H. C. OF A. is entitled, as the effect of the judgment of the majority of this 1917. Court is that the judgment appealed against will stand.

BUTLER v. FAIRCLOUGH.

Appeal dismissed with costs.

Solicitors for the appellant, Backhouse, Skinner & Hamilton. Solicitors for the respondent Fairclough, Upton & Upton.

B. L.

## [HIGH COURT OF AUSTRALIA.]

## THE COMMERCIAL BANKING OF SYDNEY LIMITED

AND

THE FEDERAL COMMISSIONER OF TAXA-TION

RESPONDENT.

THE BANK OF NEW SOUTH WALES

APPELLANT:

AND

THE FEDERAL COMMISSIONER OF TAXA-TION .

1917.

SYDNEY, April 5, 26.

Barton A.C.J., Isaacs, Gavan Duffy and Rich JJ.

H. C. OF A. Income Tax—Assessment—Company—Income—Deductions—Amount distributed to shareholders—Dividend—Income for period—Accumulated profits—Apportionment-Income exempt from taxation-Income Tax Assessment Acts 1915 (Nos. 34 and 47 of 1915), sec. 16 (1).

> Where a company which has accumulated profits distributes a dividend to its shareholders it is always a question of fact whether the distribution is, for the purposes of sec. 16 (1) of the Income Tax Assessment Act 1915, made out of the profits for that period or partly out of those profits and partly out of the accumulated profits.

Where a company which had accumulated profits distributed as dividend H. C. of A. a sum less in amount than the profits for the period in respect of which the dividend was paid,

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Held, on the whole evidence, that, notwithstanding the fact that the BANKING Co. directors in their report to the shareholders, which was adopted by them, had recommended the payment of the dividend out of a sum made up of the accumulated profits and the profits for the period, the distribution was made NEW SOUTH solely out of the profits for the period.

COMMERCIAL OF SYDNEY BANK OF WALES

Federal Commissioner of Taxation v. Foster Brewing Co. Ltd., 22 C.L.R., 545, discussed.

v. FEDERAL COMMIS-SIONER OF TAXATION.

Per Isaacs J.—Where a dividend is not shown to have been paid wholly out of the profits for the period, but is only shown to have been paid out of a sum composed of all profits current and accumulated, the Commissioner of Taxation has no authority under sec. 16 (1) of the Income Tax Assessment Act 1915 to apportion the dividend between the profits for the period and the accumulated profits, and the company cannot claim the deduction provided for by the section.

Income which is exempt from taxation is not part of the "total income" referred to in sec. 16 (1) of the Income Tax Assessment Act 1915.

Where the income of a company for the period of assessment was made up of income derived from sources within Australia and income derived from sources without Australia, and the income derived from sources within Australia included income which was exempt from taxation, and a sum was distributed as dividend which was less than the income derived from sources in Australia and not exempt from taxation,

Held, that the amount to be deducted under sec. 16 (1) was so much of the sum distributed as dividend as was attributable to the amount of income derived from sources in Australia and not exempt from taxation.

## CASES STATED.

On an appeal by the Commercial Banking Co. of Sydney Ltd. to the High Court from an assessment of them by the Federal Commissioner of Taxation for income tax in respect of the financial year 1915-1916, Rich J. stated a case for the opinion of the Full Court which was substantially as follows:-

- 1. This is an appeal from assessment of income tax for the financial year 1915-1916.
- 2. The appellant is an incorporated company carrying on business in the Commonwealth of Australia and elsewhere,
- 3. The said assessment herein is based upon the income of the appellant during the period from 1st July 1914 to 30th June 1915.

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H. C. of A. 4. At the commencement of the said period the appellant had 1917. £57,854 undistributed profits in hand and carried this amount COMMERCIAL forward to the credit of profit and loss account for the said period.

- 5. During the said period the appellant derived income from sources within Australia and also from sources without Australia.
- 6. The appellant distributed to its shareholders the sum of £200,000 as follows:—19th January 1915, £100,000—dividend for half-year ending 31st December 1914; 20th July 1915, £100,000—dividend for half-year ending 30th June 1915. For the purposes of this case it is agreed that the above-mentioned amounts are to be taken to have been distributed during the said period.
- 7. During the said period part of the total income derived by the appellant from sources within Australia consisted of interest to the amount of £63,377 derived from money invested by the appellant in Government securities of various States of the Commonwealth, and for the purposes of this case it is agreed that the amount of such interest is to be regarded as being income not subject to taxation under the *Income Tax Assessment Acts* 1915.
- 8. Apart from the said amount carried forward and the said amount of interest derived from Government securities the income derived by the appellant during the said period from sources within Australia was more than sufficient to provide the amount distributed to shareholders in dividends.
- 9. The reports and balance-sheets of the appellant presented at the meetings of shareholders held on 19th January 1915 and 20th July 1915 and adopted by resolution at those meetings are attached hereto, and form part of this case.
- 10. By sec. 16 of the said Act it is (inter alia) enacted that for the purpose of ascertaining the taxable income of a company there shall be deducted from the total income, in addition to any other deductions allowed by the Act, so much of the income as is distributed to the members, shareholders or debenture-holders of the company.
- 11. The appellant contends:—(a) That the amount carried forward is not income derived during the said period and not liable to income tax for the said period either directly or indirectly, and it is not to be assumed that the dividends were partly paid out of

this amount. (b) That the amount to be deducted from the total H. C. OF A. income in respect of the income distributed is so much of the amount distributed as is attributable to the amount of income derived COMMERCIAL from sources within Australia. (c) That in any event the appellant Banking Co. is entitled to appropriate now towards the payment of dividends any funds available for that purpose.

12. The respondent on the other hand, contends:—(a) That the said sum of £57,854 together with the income referred to in par. 5 hereof formed a common fund available for distribution to the shareholders of the appellant. (b) That the amounts so distributed as aforesaid during the said period were paid out of such common fund. (c) That for the purposes of determining how much of the income of the appellant was distributed to the shareholders of the appellant within the meaning of sec. 16 (1) of the said Act the said common fund should be treated as consisting of the following component parts, viz.—amount carried forward from the previous year; amount of profits derived from sources in Australia (less income from Government securities); amount of interest derived from Government securities; amount of profits derived from sources outside Australia: and that the amount so distributed as aforesaid should be treated as having been paid pro rata out of each of such component parts. (d) That the amount to be deducted from the total income of the appellant under sec. 16 (1) of the said Act in respect of the income distributed to shareholders should be limited to so much of the amount distributed to shareholders as is attributable to the amount of income derived from sources within Australia less income from Government securities. (e) That with regard to the contention of the appellant set out in par. 11 (c) hereof the appellant is not now entitled to appropriate towards the payment of dividends any funds available for that purpose, and that in any event the appellant is not now entitled to raise this point inasmuch as it was not raised by the objection of the appellant herein (which was annexed and was to be taken as part of this case).

- 13. The questions for the determination of the Court are:
  - (1) Whether the contention of the respondent is correct;
  - (2) If not, what under the circumstances hereinbefore set forth is the proper mode of arriving at the amount to be deducted

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from the total income of the appellant under sec. 16 (1) of the said Act in respect of the income distributed to shareholders?

The first of the reports referred to in par. 9 above was as follows:— The balance at the credit of profit and loss account, after deduct-NEW SOUTH ing rebate on current bills and accrued interest on fixed deposits, reducing premises account, paying note and other taxes, and providing for bad and doubtful debts, as well as granting to the officers a bonus on their salaries, amounts to £195,960 13 8, out of which the directors recommend the following appropriations:

payment of a dividend for the half-y	rear			
at the rate of 10 per cent. per annum		£100,000	0	0
transfer to reserve fund		25,000	0	0
balance being undivided profit		70,960	13	8
		£195 960	13	8
	at the rate of 10 per cent. per annum	at the rate of 10 per cent. per annum transfer to reserve fund	at the rate of 10 per cent. per annum £100,000 transfer to reserve fund 25,000 balance being undivided profit 70,960	transfer to reserve fund 25,000 0

The profit and loss account, which was the only material part of the balance-sheet for that period, was as follows:—

				DI					
To di	vidend	accou	nt for	payment	of a div	ridend			
f	or past	half-y	ear at	the rate	of 10 per	cent.			
1	er annu	m					£100,000	0	0
,, r	eserve fu	ind					25,000	0	0
,, b	alance	of uno	divided	profit c	arried to	next			
1	nalf-year					ALC: N	70,960	13	8
							2707.000	10	-
							£195,960	13	8
				CR.					
By ar	nount u	ndivid	ed fron	n last half	-year		£57,854	6	3
,, pr	ofit for l	half-ye	ear end	ed 31st I	ecember	1914	138,106	7	5
							2107.000	10	-
							£195,960	13	8

The other report and profit and loss account were in similar terms.

On a similar appeal by the Bank of New South Wales Rich J. stated another case, which, except as to the figures, was in the same terms as those in the case already set out; and the same questions

were asked. The report of the directors for 27th November 19 which was one of three therein referred to, contained the following		H. C. of A. 1917.
statement:— The net profits for the half-year after deducting rebate on current bills, interest on deposits, paying note and other taxes, reducing valuation of bank premises, providing for bad and doubtful debts, and fluctuations in the value of investment securities, and including recoveries from debts previously written off as bad, amount to £246,323 18 11		COMMERCIAL BANKING CO. OF SYDNEY AND BANK OF NEW SOUTH WALES v. FEDERAL COMMISSIONER OF TAXATION.
To which is added—		
Undivided balance from		
last half-year 69,405 1 10 315,729 0	9	
Out of this an interim dividend at the rate		
of 10 per cent. per annum for the quarter		
ending 30th June last, was paid on 27th		
August, in terms of clause cv. of Deed of Settlement 87,500 0	0	
Settlement		
Leaving for distribution £228,229 0	9	
which the directors recommend to be dealt with as follows:—		
To payment of a quarter's dividend to 30th		
September 1914, at the rate of 10 per		
cent. per annum £87,500 0	0	
" augmentation of the reserve fund 50,000 0	0	
" balance carried forward 90,729 0	9	
£228,229 O	9	
The profit and loss accounts were in the same form as those in	the	

The profit and loss accounts were in the same form as those in the first case.

The two cases were heard together.

Knox K.C. (with him H. M. Stephen), for the appellant the Commercial Banking Co. of Sydney. In determining whether dividends

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H. C. OF A. have, for the purposes of sec. 16 (1) of the Income Tax Assessment Act 1915, been paid out of the profits for the period of assessment COMMERCIAL or out of accumulated profits brought forward from the previous period, the Court should be guided by the common understanding that a dividend is a distribution paid out of the profits of the year if NEW SOUTH they are sufficient (Federal Commissioner of Taxation v. Foster Brewing Co. Ltd. (1)). Nothing can be inferred from the directors' reports and the balance-sheets which can interfere with the ordinary presumption that that was done here. As to the contention in reference to the Australian profits which are exempt from taxation, the words "total income" mean the total Australian income and not the total assessable income. That is shown by the amendment of sec. 16 (1) made by sec. 7 of the Income Tax Assessment Act (No. 2) 1916. The appellant's contention as to the deduction is therefore correct, and follows the language of the section.

> Knox K.C. (with him Alec Thomson), for the appellant the Bank of New South Wales.

Leverrier K.C. (with him Bavin), for the respondent. The only evidence as to the source from which the dividends were paid is that of the appellants themselves, namely, that it was paid out of the composite fund made up of the accumulated profits and the profits for the period. The only meaning which can be attributed to the words "total income" in sec. 16 (1) is "total assessable income." From the deduction which is allowed must be excluded the proportion · of the dividend attributable to the income which is exempt from taxation.

Cur. adv. vult.

The following judgments were read:— April 26.

> Barton A.C.J. These two special cases were argued as one, for though the figures differ the considerations applicable are identical. The facts are set out in the special cases, so that there is no need to repeat them. The question arises under sec. 16 (1) of the Income

Tax Assessment Act 1915, which is as follows, omitting two provisoes H. C. of A. which do not affect the present questions: "For the purpose of ascertaining the taxable income of a company there shall be deducted COMMERCIAL from the total income, in addition to any other deductions allowed BANKING Co. by this Act, so much of the income as is distributed to the members. shareholders, or debenture-holders of the company."

The "other deductions" allowed by the Act to taxpayers generally are specified in sec. 18 (1). They are not in question in this case.

The sums distributed to the shareholders as dividends during a period of twelve months constitute together the special deduction from the income of companies. This deduction is prescribed by sec. 16 (1) because the dividends form part of the income of the shareholders. They are taxable in respect thereof (see sec. 14 (b)). and therefore tax is not levied on the dividends as against the company.

It is well to consider first the effect of the deduction of the dividend. When the deduction or subtraction of dividend is applied to the taxable profits of the past year and to those alone, the remaining taxable sum is, of course, smallest. When, rightly or wrongly, the deduction is applied proportionately to non-taxable funds, the taxable sum, being to that extent less burdened, is larger. Consequently the aim of the Commissioner is to spread the deduction proportionately over all non-taxable funds to which it can fairly be applied. Thus in the case of Federal Commissioner of Taxation v. Foster Brewing Co. Ltd. (1) heard at the last sittings in Melbourne, the Commissioner, relying on the fact that in their profit and loss accounts the company debited the dividends against the gross sum made up of (1) the net profits for the preceding period and (2) the balance brought forward undistributed into that period, sought to apply the deduction proportionately to the gross sum in both of its constituent parts, namely, the "carry-over" in addition to the profits, so that the proportion of the deduction charged against the profits would necessarily be smaller and the resultant taxable income, after the "other" deductions allowed by the Act, larger. In the present case he first seeks to apply the deduction proportionately in that way, setting it against the "carry-over" plus the profits of the period.

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H. C. OF A. Secondly, he also claims that the deduction from the total income in respect of the dividend should be limited to so much of the dividend COMMERCIAL as is attributable to the Australian profits less the interest on State Banking Co. Government securities. In other words, he claims that this interest, being exempted income, should be eliminated from the Australian NEW SOUTH profits to be divided; that it should be ascertained how much of the dividend is attributable to the profits then remaining, and that this part of the dividend should be deducted from the sum so remaining in the process of ascertaining the income taxable. This would make the deduction against the income smaller, and the taxable income greater.

> The Banks contend that the intention of the Act is that the whole deduction in respect of dividend should apply to that part of the Australian profits which is subject to taxation. The result of this contention, if accepted, would be that the taxable income of the Bank after the deduction would be at its minimum.

> The first question argued is whether the deduction can be applied proportionately to the total sum consisting of what has been called the "carry-over" and the annual profits.

> In the case of the Foster Brewing Co. (1), already mentioned, it was held by the Full Court, in dismissing an appeal from the learned Chief Justice of this Court, that the Commissioner was not entitled to make an apportionment of the deduction by attributing part to the net profit and part to the anterior accumulations, but that the deduction could be made only from the total income of the year. But the facts in that case were not identical with the facts now before There, the taxpayer showed that the whole of the sum distributed as dividend was paid to the shareholders by cheques on the banking account of the company, which then stood in credit, the credit consisting wholly of moneys paid in as income received in the year and admitted to be for the year. The Commissioner rested his case in effect on the profit and loss accounts, which appeared to show each half-year an undistributed sum carried forward from the previous half-year, together with the profit for the half-year, from which two sums, added together as one aggregate, the halfyear's dividend appeared by the account, so he contended, as having

been deducted. That process was, however, held not to be con- H. C. of A. clusive that the dividend was paid out of the aggregate sum, and taking all the facts together it appeared to my learned brethren, COMMERCIAL and indeed to myself, that the proper conclusion in that case was BANKING Co. that the sums distributed were paid out of the income for the taxable period. My own judgment rested on a ground which seems to me to be applicable to the present case, in which, as Mr. Knox admits, there is no specific evidence, outside the profit and loss accounts, of the payment of the dividends out of a separate sum received as profit in the period immediately preceding the dividend. I considered that according to the generally accepted meaning of a dividend as periodically declared by a company upon its operations was, normally, the profit distributed to the members and shareholders of the concern, and paid out of its total income, and that this dividend, when less than the profit seen to have been made for the period under review, was, according to common understanding, referable to that profit. So also, when the sum was equal to the profit. But, if it appeared that the sum distributed was larger than the profit, it was the general understanding, and I think it was the only possible one, that resort had been had to other existing funds of the company to make up the excess. (One would think that only in such a case could the dividend be taken primâ facie as even in part paid otherwise than out of profits.) I thought that, unless the facts showed the contrary, the profit and loss accounts of companies were made up in accordance with this understanding, and as there was nothing in the Act inconsistent with it, the Statute should be read in accordance with it. On such a subject as this, as well as on the subject in controversy in the case of Bank of Toronto v. Lambe (1), it is eminently true, as the judgment of the Privy Council put it at p. 582, that the common understanding of men is "one main clue to the meaning of the Legislature." The sum declared as dividend being, as it is here, less than the profit made in the taxable period. I thought it was within the terms of the section deductible from the income received in that period.

As the exact source of the dividend in the present cases is not proved by evidence similar to that which existed in the Foster Brewing

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H. C. of A. Co. Case (1), the question is whether, upon the facts now before us. the true presumption is that the company had itself treated the COMMERCIAL dividends as apportioned between the previous undistributed balance Banking Co. and the income of the period. I do not think that the mere fact of the addition together on the face of the profit and loss account of NEW SOUTH the undistributed sum carried over and the profit of the period just ended, making in this instance the total of the credit side of the profit and loss account, is material evidence that the sum debited in that account for payment of dividend has been paid out of the aggregate sum credited, and not solely out of the profits shown, which largely exceed the amount of the dividend. It does not warrant the inference that the company has itself apportioned the dividends in the manner asserted: for the purpose of a profit and loss account is obviously not the making of any such apportionment. The profit and loss account in each case clearly distinguishes the "carry-over" from the profits of the period, and therefore from income of the year, to which alone sec. 16 (1) applies. The account cannot by any means be said to be evidence of a departure from the general understanding to which I have referred. The general practice of companies in these matters is notorious. It is a fact known to every shareholder in any business corporation. It would be too much to conclude that because that well-established practice has been adhered to since the Act, just as it prevailed previously, dividends, both before and since the Act, have not been paid wholly out of the profits where the profits have been larger in amount than the dividends, unless indeed there has been evidence to the contrary. It may be that in some future case there will be what there is not in this case: proof that resort was had to funds external to the profits of the period notwithstanding that the profits exceeded the sum necessary; a thing most unlikely to happen unless some strong and unusual occasion for it appeared. My opinion is adverse to the Commissioner on the first point.

The second question is, I think, solvable by the terms of the Act. The Australian profits in the case of each Bank consisted in part of interest derived from money invested by the Bank in Government securities of various States of Australia. This interest was part of the profits by which dividend was furnished, but the Bank's H. C. of A. income earned in the period from sources within Australia was more than sufficient to provide for the dividends distributed apart from COMMERCIAL the interest on State securities. As it is agreed for the purposes of BANKING Co. this case that this interest is not the subject of taxation, the question arises whether the deduction for dividends from the year's Aus- New South tralian profits is to include so much of the dividends as was paid out of the interest on State Government securities.

Sec. 16 (1), which, of course, does not apply to exempted incomes (sec. 11), is explicit in requiring the dividend to be deducted from the total income, in addition to any other deductions allowed by the Act. Those deductions, as I have pointed out, are specified in sec. 18 (1). There is no provision in the Act for the deduction from the company's total income of any sum in respect of interest on investments in State Government securities. The fact of exemption does not involve deduction. We are not informed of the reason for which this interest is agreed not to be subject to taxation, but I think we must take the effect of the agreement to be to place this interest on the same footing of exemption as that which is the subject of sec. 11 (e). It is therefore not part of the total income, which is the subject of the distribution in terms of the section, for it stands as exempted income. When one looks at the remainder of the Act one fails to find anything which takes this matter outside the letter of the provisions of sec. 16 (1).

I understand we are complying with the desire of all parties in expressing our opinions upon the first question, though it is not really a question of law, and further that such a course does not meet with any objection on the part of the learned Justice who will decide the appeal.

I therefore answer the questions as follows:—(1) As to the undistributed sum carried over—No. As to the interest on Government securities of States—Yes, having regard to the admission contained in the special case. (2) It is unnecessary to answer this question specifically in view of the answer to question 1.

Isaacs J. This comes before us as a case stated under the Income Tax Assessment Act; but by general consent it is considered VOL. XXIII.

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H. C. of A. convenient that we should express our views on the facts as well as 1917. the law. Both the matters we have to consider arise under sub-sec. -COMMERCIAL 1 of sec. 16 as it stood before 21st December 1916.

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Isaacs J.

The first question in each case is as to whether any part and, if so, how much of the dividends paid to shareholders is to be NEW SOUTH regarded as paid out of amounts carried forward to the credit of the profit and loss account.

> In the recent case of Foster Brewing Co. Ltd. v. Federal Commissioner of Taxation (1) the same question was raised in relation to the then appellant company. This Court unanimously held on a case stated by the learned Chief Justice that the fact of debiting in the balance-sheet and books of the company dividends to the gross sums made up of current profits and balances of profits brought forward was not conclusive that the dividends were not paid solely out of current income. The Court added as a guiding principle (2): "Whether the dividends have been so paid is a question of fact which will be determined by the Justice who will hear the appeal." Then the learned Chief Justice proceeded to hear the appeal (2). He dealt with it in accordance with the Full Court decision as I understand it and as he apparently understood it, purely as a question of fact to be determined according to the evidence appearing in the particular case. The evidence showed in his Honor's view that the dividends were in fact paid out of the moneys proved to have been received as current income. That was plainly the controlling feature of the case in the opinion of the learned Judge, and as he saw no evidence to alter that fact he held accordingly. There was an appeal from that decision to the Full Court, and it was dismissed (Federal Commissioner of Taxation v. Foster Brewing Co. Ltd. (3)). The primary factor there, in my opinion, was that which was taken by the Chief Justice. And the reason underlying my opinion was stated in my judgment. I adhere to it, and think it was not only in consonance with the Full Court decision but it was legally the only possible method of approach in that case.

For the present purpose we have to assume the "total income"

<sup>(2) 22</sup> C.L.R., at p. 293. (1) 22 C.L.R., 288. (3) 22 C.L.R., 545.

for the given period—which means the total amount of income of a taxable character—has been ascertained. Then certain permitted deductions if claimed are to be considered in order to ascertain the COMMERCIAL company's "taxable income," that is, the amount upon which BANKING Co. in fact for the given year the company is to pay tax. Apart from deductions, otherwise allowed, sec. 16 (1) itself allows a distinct New South deduction, namely, whatever part of the "total income" already ascertained has been in fact distributed among shareholders or debenture-holders. That being a deduction, and in respect of a transaction entirely within the control and knowledge of the company, is to be sustained by the company, and its allowance or disallowance depends entirely on what the particular company in the particular instance has done. It is a pure question of fact. In my view, the fact is to be ascertained just in the same way as any other fact is to be established where it is not notorious, or where the law does not alter the onus of proof or create any special presumption. Any evidence which, by direct assertion or legitimate inference, convinces the tribunal of the ultimate fact in controversy is sufficient, and, in my opinion, nothing short of that is.

Now, in the present case, we have not the starting point that presented itself in the Foster Brewing Co. Case (1), of the actual fund out of which the dividends were in the first instance paid. The only evidence consists of reports and balance-sheets, and whatever is incorporated in them. They do not directly show the portion of the profits out of which the dividends came. Taking the Bank of New South Wales Case, the first document relates to the first half-year of taxation. It does not say in so many words that the interim dividend of £87,500 was in fact paid out of current profits. It says the dividend was paid "out of this," that is, out of the total profits of £315,729 0s. 9d., which are shown to consist of both current and past profits. So far, that is consistent with the dividend being paid out of the conglomerate fund. Of course £28,000 of the dividend must have come out of current profits, but on the other hand the whole of the rest might have been paid out of the £69,000 odd carried over from the previous year. If the evidence stopped there, I should think the appellant as to the £69,000 failed altogether,

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Isaacs J.

H. C. OF A. because it had not proved the fact required by the Statute. The Commissioner in that state of affairs applies a proportionate calcula-COMMERCIAL tion, and detailed criticism has been applied to it. I do not stop to BANKING Co. consider that criticism, because I can find no justification for any such process. No doubt it is one which is very favourable to the NEW SOUTH taxpayer where he fails to prove his absolute right to the deduction. It may be a very just method where there is no evidence to satisfy a tribunal one way or the other. But, nevertheless, it is equivalent to legislation, and it is not what the law permits in relation to the public revenue. The law asks the one question: "Does the company show that the distribution came out of its total income or not?" If it does show that, it can deduct the sum; otherwise not. The proportion is only a compromise in the absence of evidence, and as I have said the law so far makes no provision for it, whatever the Legislature may think fit to do in the future.

The evidence here adds to the bare statement referred to, that the August dividend was paid in terms of clause cv. of the Deed of Settlement. After carefully considering that clause I am not prepared to say it advances the matter one way or the other. regard it as helping the Bank in the present instance, by limiting its power to pay interim dividends out of current profits only, might seriously affect its action on some future occasion. I treat that clause as neutral. The Articles of the Commercial Banking Company I treat in the same way. I look further at the document of November 1914. There it is stated that the balance for distribution after payment of the interim dividend, viz., £228,229 0s. 9d., the directors recommend shall be distributed as follows:-

(1)	September dividend	 	£87,500	0	0
(2)	Augmentation of reserve fund	 	£50,000	0	0
(3)	Balance carried forward	 	£90,729	0	9
			£228,229	0	9

I am entitled as a Judge to have regard to probabilities that arise from public or social facts, or in some cases from matters proved in Courts to have occurred so often as to constitute a general practice, but not to act on my own knowledge, if I had any, of particular facts or the practice of some or even many companies as to the particular

part of their profits they usually apply to payment of dividends. H. C. of A. Since every company is free to choose, it ought to be able to point to some evidence as to its choice.

I must, however, take into account as part of common knowledge the ordinary instincts of mankind in dealing with their business affairs.

In so doing, I give weight to the consideration that business men. when they can do a thing simply and directly, are likely to do it so. rather than indirectly and so as to embarrass themselves with complications, unless there be some motive shown to impel them to the contrary. No such motive is here shown. Therefore, though the evidence is by no means strong, yet, in the absence of opposing motive and of any evidence to the contrary, I consider, if I am to act as a tribunal of fact, that it is more logical and more likely that the Bank determined to pay the interim dividend out of current profit, and left the balance of current profit so diminished to stand for future consideration along with the past profits untouched, rather than that it first deliberately mixed up the former profits with the new and then out of the combined mass paid an interim dividend. To use a homely illustration, the course adopted seems to have been to leave the £69,405 ls. 10d. in the money-box. The Bank could have taken it out, but apparently did not. Then as to the next dividend, the same considerations satisfy my mind that the higher probability is that the balance of current profit was first dealt with by declaring a dividend, then a sum to the reserve, and finally the resultant balance of £21,323 18s. 11d. was added to the untouched sum of £69,405 ls. 10d. old profit, making a total £90,729 0s. 9d. of non-distributed and non-applied profit. The rest follows in the same way.

The facts in the Commercial Banking Co. Case are for all practical purposes identical, and lead to the same conclusion.

Then comes the second point, namely, as to whether the dividend so far as it includes income from non-taxable Government stock, should be included in the deduction. I think it very clear that the language of sec. 16 (1) is much more precise than is found in some other sections. It requires the deduction to be "so much of the. income as is distributed "&c. What is the income? Clearly that

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H. C. of A. expression is referable to the words "the total income"; and that, 1917. BANKING Co. OF SYDNEY AND BANK OF WALES v. FEDERAL COMMIS-SIONER OF

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as I have said, means the total income of a taxable character. I COMMERCIAL avoid the expression "taxable income," because that has been given an arbitrary statutory signification which in this connection would be incorrect, and has apparently led to the more recent adoption of NEW SOUTH the phrase "assessable income." But as sec. 16 (1) stood before the recent amendment, no deduction could under that subsection be made in respect of any dividend of any other income. The income from State stock has been conveniently treated as not taxable, in other words, as outside the area of taxation, which means "exempt." It follows, in my opinion, that whatever was so paid cannot be deducted from the income otherwise taxable.

The cases should be remitted to the learned Justice with the opinion that (1) the dividends paid were paid out of current income of the year, and (2) the taxpayers are not entitled to deduct dividends paid out of income from State stock.

GAVAN DUFFY AND RICH JJ. We agree that the proper inference of fact in each case is that the dividend was paid out of the profits for the half-year.

We also agree that so much of the income of the appellant Banks as consists of interest derived from money invested in Government securities of the States of the Commonwealth is no part of the total income mentioned in sec. 16 (1) of the Income Tax Assessment Act 1915, and should not be deducted under that section as part of the income distributed to the members or shareholders.

> Questions answered accordingly. Costs to be costs in the appeal in each case.

Solicitors for the appellants, Cape & Kent; Allen, Allen & Hemsley. Solicitor for the respondent, Gordon H. Castle, Crown Solicitor for the Commonwealth.