Expl/Dist FCT v Equitable Life & General Insurance Co Ltd 93 ALR 609

Appl Prestige Motors Pty Ltd v Federal Commissioner of Taxation (1993) 118 ALR 497

[HIGH COURT OF AUSTRALIA.]

HICKMAN . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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BRISBANE, *June* 21-23.

SYDNEY, *Sept.* 8.

Knox C.J., Higgins and Starke JJ.

MELBOURNE, *Oct.* 31; *Nov.* 1.

Higgins J.

War-time Profits Tax—"Profits arising from any business"—Business of grazier—Sale of grazing property with all improvements and live-stock—Assessment as to live-stock—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 4, 7, 10, 14, 15, 16.

Appeal—War-time profits tax assessment—Interest on amount overpaid—Jurisdiction—Notice of assessment—Form—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 22, 26, 29, 30.

Sec. 7 of the *War-time Profits Tax Assessment Act* 1917-1918 provides that there shall be levied and paid on all war-time profits from any business to which the Act applies arising after the 30th June 1915 a war-time profits tax at a rate declared by Parliament. By sec. 10 the profits arising from any business shall be determined separately, and on the same principles as the profits and gains of the business would be determined for the purpose of Commonwealth income tax, subject to certain modifications. By sub-sec. 2 of sec. 14 the tax may be assessed on any person for the time being owning or carrying on the business, and where there has been a change of ownership the accounting period may be taken to be the period ending on the date on which the ownership changed; and by sub-sec. 5 the person to whom the business was transferred is personally liable to pay the tax which may be subsequently assessed as payable by the former owner. Sec. 15 provides that subject to the Act the profits are to be taken as the "actual profits arising in the accounting period" from sources within Australia, and prescribes rules for computation of profits. Sec. 16 defines the "pre-war standard of profits," refers to profits "arising from the business on the average" of certain years, and indicates that profits liable to tax must arise from a business which is carried on during the relevant accounting period.

Held, that the expression "profits arising from any business" as used in the Act means profits arising from the carrying on or carrying out of a business, or, in other words, the trading profits of a business; and that the proceeds of the sale of a business as a whole were not in any part, upon the facts stated, profits arising from a business.

A person who carried on the pastoral business of breeding, buying and selling cattle, sold substantially the whole of the assets of his business, consisting of his pastoral property with all improvements and cattle, specified portions of the purchase price being allocated to the land and to the cattle respectively.

Held, that no portion of the purchasing price paid for the cattle was profit liable to war-time profits tax under the statute.

Sec. 4 of the Act provides: "'Business' includes any profession or trade and any transaction not in the course of a person's business for the sale and purchase of any commodity."

Per Knox C.J.: The extension of meaning given to the word "business" by sec. 4 operates to the extent of attaching to a business carried on by a taxpayer the profits made by him on transactions of sale and purchase of a commodity which are outside the ordinary course of carrying on that business.

Per Starke J.: The words do not make liable to taxation transactions for the sale and purchase of any commodity apart from a profession or trade carried on by a taxpayer, but include only the transactions which are carried on or carried out within or as part of the business, whether covered by the ordinary course or scope of the business or not.

Per Higgins J.: In the absence of any prescribed form of notice of assessment, the notice should show on its face the amount upon which, in the judgment of the Commissioner, tax ought to be levied (secs. 22 and 26 of the Act).

Suggestion of *Higgins* J. for an amendment of the Act so as to allow the Court to order the Commissioner to pay interest on sums which he has wrongfully received and retained.

APPEAL from the Federal Commissioner of Taxation.

On the hearing of an appeal by George Hickman from an assessment of him for war-time profits tax, *Higgins* J. stated for the opinion of the Full Court a case which was (so far as material to this report) substantially as follows:—

1. The appellant is a grazier, his business including the business of purchasing and fattening cattle for resale, and resides at Bororen, near Gladstone, in the State of Queensland.

2. In or about the year 1902 the appellant purchased a grazing property known as "Uplands," near Bororen, consisting partly of

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freehold land and partly of agricultural farms under the Land Acts of Queensland, together with about 300 head of cattle, and commenced to carry on the business of a grazier as aforesaid; and he continued to carry on such business thereon until 1st January 1918, acquiring from time to time additional areas of land which he worked in conjunction under the said name of "Uplands," comprising a total area of about 6,300 acres in 1918.

3. From the year 1902 until 1st January 1918 the appellant carried on such business, and maintained and increased his herd upon the said property by breeding therefrom and by the natural increase thereof and by purchasing from time to time certain cattle. (Full particulars were here set out of the cattle purchased, calves reared and cattle sold by the appellant for each of the years from 1904 to 1917, both inclusive, and the manner in which they were disposed of or otherwise dealt with by the appellant, together with the number of cattle upon the said property at the end of each such year.)

7. On 1st January 1918 the appellant sold to his brother, Frederick Pope Hickman, the said property, together with all improvements and stock thereon (with the exception of certain horses), for the total price of £22,843; of which sum the sum of £11,967 was in respect of the land and improvements (being at the rate of £2 per acre less certain expenses to convert certain agricultural farms into freehold) and the sum of £10,876 was in respect of the cattle. Thereupon the ownership of the said business carried on at Uplands by the appellant was changed, and vested in the said Frederick Pope Hickman. Of the said sum of £10,876, the sum of £8,500 was paid in the month of February 1918 and the balance in the month of June 1918. The said horses remained depasturing on the said holding until the subsequent purchase by the appellant of an unstocked cattle property at Iveragh in the month of December 1918 as to part thereof and in the year 1919 as to the balance thereof. The said property, known as "Eaglestone," comprises about 3,700 acres; and the appellant has been and is carrying on the business of a grazier as aforesaid in a manner similar to that which he carried on at Uplands, but on a smaller scale. On the purchase of the said property Eaglestone the said horses were moved from Uplands thereto.

8. At the time of the said sale there were upon the said property 1,298 head of cattle, of which about 300 head were bullocks purchased as aforesaid and the balance cattle bred by the appellant on the said property as aforesaid. (Then followed particulars of the said 1,298 cattle and the prices fixed for the same by the purchaser and the appellant—the total of such prices amounting to £10,876.)

9. The respondent has assessed the appellant to war-time profits tax under the *War-time Profits Tax Assessment Act* 1917-1918 for the accounting period from 1st July 1917 to 1st January 1918.

10. In assessing the appellant to war-time profits tax as aforesaid the respondent assessed the appellant's profits from the said business, firstly, at the sum of £6,236 ; secondly, by an amended assessment, at the sum of £4,134 ; and, thirdly, by a further amended assessment at the sum of £3,992. In the original assessment the respondent treated the sum of £10,876, in par. 7 hereof mentioned, as a receipt for the purpose of assessing war-time profits tax in respect of the said business. In the first amended assessment the respondent treated the sum of £7,276 part of the sum of £10,876 as a receipt for the purpose of assessing war-time profits tax. In the second amended assessment the respondent treated the sum of £7,116 part of the sum of £10,876 as a receipt for the purpose of assessing war-time profits tax.

11. Notices of the different assessments were given by the Commissioner, and such assessments were objected to by the appellant.

12. The respondent, in making the final assessment against the appellant in respect of war-time profits tax, has allowed to the appellant certain deductions. Upon the basis of profits arising from the said business of £3,992 assessed as aforesaid the respondent claims from the appellant for the accounting period before mentioned £1,280 9s. 3d. as war-time profits tax.

One of the questions for the opinion of the Court was as follows :

(1.) Whether any, and if so what, portion of the said sum of £10,876 is profits liable to war-time profits tax within the meaning of the *War-time Profits Tax Assessment Act* 1917-1918.

E. A. Douglas and *McGill*, for the appellant. The Act applies

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to profits of a business as enhanced by war conditions, and not to the profits received on a realization sale of a business: it applies to profits on trading operations; a sale which ends the trading operations so far as the taxpayer is concerned is not a trading operation by him. There is no distinction in principle between this case and *Commissioner of Taxation (W.A.)* v. *Newman* (1). [Counsel also referred to *John Smith & Son* v. *Moore* (2); *McKellar* v. *Federal Commissioner of Taxation* (3); *Gittus* v. *Commissioners of Inland Revenue* (4), and *Wankie Colliery Co.* v. *Commissioners of Inland Revenue* (5).]

Macrossan, for the respondent. The appellant, as a breeder of and dealer in cattle, would be liable to taxation on profits made on sales of portions of his cattle, and he cannot escape tax because he makes his profit on one sale of the whole of his cattle. The definition of "business" in sec. 4 includes the present transaction (*Dalgety* v. *Commissioner of Taxes* (6)). [Counsel also referred to *Anson* v. *Commissioner of Taxes* (7); *Melbourne Trust Ltd.* v. *Commissioner of Taxes (Vict.)* (8); *O'Kane & Co.* v. *Commissioners of Inland Revenue* (9).]

Cur. adv. vult.

Sept. 8.

The following written judgments were delivered:—

KNOX C.J. From the year 1902 until 1st January 1918 the appellant was the owner of a grazing property on which he carried on the business of a grazier, breeding, buying and selling cattle. His course of business is described in detail in the special case. On 1st January 1918 the appellant sold the property, together with all improvements and stock thereon (except some horses). The contract of sale is in the following words:—"Memorandum of agreement whereby George Hickman undertakes to sell to Frederick Pope Hickman the whole of the land at Uplands, Bororen, in the State of

(1) (1921) 29 C.L.R., 484.
(2) (1921) 2 A.C., 13.
(3) (1922) 30 C.L.R., 198.
(4) (1921) 2 A.C., 81.
(5) (1921) 3 K.B., 344; (1922) W.N., 99.
(6) (1912) 31 N.Z.L.R., 260.
(7) (1922) N.Z.L.R., 330.
(8) (1912) 15 C.L.R., 274; (1914) 18 C.L.R., 413.
(9) Now reported, (1922) 126 L.T., 707.

Queensland, including all improvements thereon, being 6,320 acres 1 rood 8 perches more or less together with all cattle being not less than 1,298 head depastured thereon. The price to be paid for the land is £11,967 and the price to be paid for the cattle £10,876. It is agreed that the whole of the purchase-money shall be paid within ten years from the 1st day of January 1918 and that payments on account thereof shall be made of not less than £500 per annum. In addition, interest shall be paid on any outstanding amount at the rate of 4½ per cent. per annum, such interest to be paid yearly on or before the 31st day of December. A mortgage shall be executed over the whole of the land in favour of George Hickman for the sum of £11,967 bearing interest as aforesaid. All payments are to be on account of cattle until amount at which they are valued above shall have been paid." On the sale of the property the appellant ceased to carry on business as a grazier until the month of December 1918, when he purchased another grazing property. Of the cattle, 1,298 in number, sold by the appellant with the property, 300 were bullocks purchased by him in the course of carrying on the business and the balance were bred by him on the property.

The respondent has made three assessments—one original and two amended—of the appellant to war-time profits tax in respect of the accounting period commencing on 1st July 1917 and ending on 31st December 1917. In the first the amount of tax was assessed at £2,029 1s. 6d.; in the second it was reduced to £1,334 17s. 2d., and in the final assessment it was further reduced to £1,280 9s. 3d., the taxable excess profits being stated as £2,094. This last amount was arrived at by treating £7,116, part of the sum of £10,876 allocated by the contract to the cattle included in the sale, as a receipt of the business for the purpose of assessing the appellant to the war-time profits tax, for the accounting period in question. On the appeal against this assessment coming on to be heard before my brother *Higgins*, he stated a special case submitting for the opinion of the Court certain questions of which, in the view I take of the case, it is necessary to refer to the first only, viz., "Whether any, and if so what, portion of the said sum of £10,876 is profits liable to war-time profits tax within the meaning of the *War-time Profits Tax Assessment Act* 1917-1918.

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In this case it is clear from the words of the contract of 1st January 1918 that it was an indivisible contract for the sale of the land and stock—substantially the whole of the assets of the business theretofore carried on by the appellant—and that the allocation of portion of the purchase-money to the live-stock and the balance to the land, presumably made for the convenience of the parties, does not convert the single contract into two—one for the sale of the land and the other for the sale of the live-stock for independent considerations. The single transaction must be treated as effecting a complete change of ownership of a continuing business and of the assets employed in carrying it on.

The substantial question is whether any part of the purchase-money payable on such a transaction is to be brought into account as a receipt in the assessment of the vendor to war-time profits tax in respect of the profits of the business sold.

Mr. *Douglas* for the appellant admitted that he was liable to be assessed to this tax in respect of so much of the trading profits of the business made during the accounting period as was properly attributable to the six months during which he carried on the business; but contended that no portion of the sum of £10,876 could be treated as taxable profits, because the Act was directed to the taxation of trading profits and did not assume to tax the proceeds of realization of a business sold as a whole in one transaction. In my opinion this contention is correct. The subject matter of taxation is shown by sec. 7 (1) to be war-time profits *arising from a business*, and the directions contained in the Act for calculating the amount of war-time profits arising in a financial year make it clear that the taxable amount of war-time profits is to be ascertained by comparing the profits arising from the business in each accounting period during the War with the profits which arose from the business in a specified period before the War. In these respects the provisions of this Act are in substance indistinguishable from those of the Imperial Act, *Finance (No. 2) Act* 1915. By sec. 10 of the Act, which corresponds to sec. 40 of the Imperial Act, the profits of the business are to be determined on the same principles as the profits and gains of the business are or would be determined for purposes of income tax, subject to certain modifications not relevant to this

case. By sec. 14 (2) of the Act, corresponding with sec. 45 (2) of the Imperial Act, the tax may be assessed on any person for the time being owning or carrying on the business, and where there has been a change of ownership of the business the accounting period may be taken to be the period ending on the date on which the ownership changed, and the tax may be assessed on the person carrying on the business at that date. By sec. 14 (5) the transferee of any business is made personally liable to pay any war-time profits tax which may subsequently be assessed as payable by the former owner. By sec. 15 (1), dealing with computation of profits, the profits are to be taken to be the actual profits arising in the accounting period from sources within Australia—this corresponds with clause 1 of Part I. of Sched. IV. of the Imperial Act. The provisions of sec. 16 dealing with the pre-war standard of profits indicate clearly that the profits were to be profits of a business which was carried on during the relevant period (see sub-sec. 3 and sub-sec. 4, corresponding with sec. 40 (2) and clause 3 of Part II. of Sched. IV. of the Imperial Act). A comparison in detail of the provisions of the Commonwealth Act with those of the Imperial Act has satisfied me that for the purpose of deciding the question raised in this case the two Acts may be regarded as substantially identical; the main object of each being to tax the profit made during war time in carrying on a business in excess of that made before the War in carrying on the same business, and the method of ascertaining the amount of the excess profit prescribed by each Act being in principle the same. The differences in matters of detail between the provisions of the two Acts may be regarded as immaterial in the present case. Consequently decisions on the Imperial Act which are relevant to the question before us may properly be referred to.

In *John Smith & Son* v. *Moore* (1) Viscount *Cave* says: "In . . . the case of a continuing business which has changed hands during the War, the comparison to be made . . . is a comparison between the *trading profits* earned in carrying on that business during the accounting period and those produced by the same business in the pre-war period, without regard to the change of ownership." And his Lordship, speaking of a transfer of a

(1) (1921) 2 A.C., at p. 33.

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business with its goodwill and assets, says (1) :—"The business is to be treated as a going and continuing concern, and the comparison to be made . . . is a comparison between the trading profits produced by carrying on that concern in the war and pre-war periods respectively. The whole purpose of the Act is to tax the profits of a business so far as enhanced by war conditions; and in this connection a change of . . . owners is irrelevant, so long as the real continuity of the business is maintained. The business is the tree of which the produce in different periods is to be compared."

In the present case it is clear beyond doubt that there was a mere change of ownership of the continuing business carried on by the appellant until 31st December 1917, and thereafter carried on by the purchaser. In par. 7 of the special case it is stated that "Thereupon" (*i.e.*, on 1st January 1918) "the ownership of the said business carried on at Uplands by the appellant was changed, and vested in the said Frederick Pope Hickman" (the purchaser). It is equally clear that no portion of the purchase-money received on the sale out-and-out of the business and its assets as a going concern can properly be regarded as *trading profits*, an expression which imports the continuance and not the extinction of the trade or business from which the profits arise.

In the case of *O'Kane & Co.* v. *Commissioners of Inland Revenue* (2), decided by the House of Lords in January 1922—a full report of which has been supplied to the Court by counsel for the respondent,—the decision was that the question whether profits on sales of certain stock-in-trade were profits arising from the trade or business of the appellants was a question of fact, and that there was evidence to support the finding of the Commissioners that such profits did arise from the trade or business. The only matter strictly relevant to the present case is to be found in the speech of Lord *Parmoor*. His Lordship quotes the following passage from the judgment of *Samuels* J. in the Irish Court (3):—"The facts as found seem to me to admit of only one conclusion, that the sales in question were realization sales; that they were capital transactions incident to the winding

(1) (1921) 2 A.C., at p. 34.
(2) Now reported, (1922) 126 L.T., 707.
(3) (1922) 126 L.T., at p. 711.

up of the business, and that the amount realized was not income within the Income Tax Code, which, in the words of Lord *Halsbury* in *Secretary of State for India* v. *Scoble* (1), 'never was intended to tax capital—as income at all events' " ; and then his Lordship proceeds : " Now if that contention of fact had been warranted, . . . that the sales in question were realization sales and were capital transactions incidental to the winding up of the business, personally I should have come to the conclusion that the excess profits duty could not have been charged in respect of a transaction of that character." The opinion expressed by Lord *Parmoor* strongly supports the contention of the appellant in this case. Mr. *Macrossan* sought to distinguish these cases on the ground that the definition of " business " in the Commonwealth Act (sec. 4) includes " any transaction not in the course of a person's business for the sale and purchase of any commodity." In my opinion the object of inserting this extension of the meaning of the word " business " is that suggested by Mr. *Douglas*, viz., in order to attach to a business carried on by the taxpayer profits made by him on transactions of sale and purchase which are outside the ordinary course of carrying on that business. The Commonwealth Act contains no provision corresponding to sec. 35 (1) of the *Finance Act* 1918, whereby profits arising from the sale otherwise than in the ordinary course of trade of the trading stock or part of the trading stock of a business are to be deemed to be profits arising from a trade or business.

In my opinion the expression " profits arising from any business " as used in the *War-time Profits Tax Assessment Act* means " profits arising from the carrying on of any business," or, in other words, " trading profits " ; and this view is supported by the observations of Viscount *Cave* in *John Smith & Son* v. *Moore* (2).

The provision in sec. 10 of the Act for ascertaining profits for the purpose of this Act on the same principles as for income tax brings into play the principle laid down in *Californian Copper Syndicate* v. *Harris* (3), referred to in the opinion of the Judicial Committee in *Commissioner of Taxes* (*Vict.*) v. *Melbourne Trust Ltd.* (4), and by this Court in *Commissioner of Taxation* (*W.A.*) v. *Newman* (5).

(1) (1903) A.C., 229 ; 89 L.T., 1.
(2) (1921) 2 A.C., 13.
(3) (1904) 6 F. (Ct. of Sess.), 894 ; 5 Tax Cas., 159.
(4) (1914) 18 C.L.R., at pp. 420-421.
(5) (1921) 29 C.L.R., 484.

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Higgins J.

In my opinion the answer to question 1 should be: "No portion of the said sum is liable."

HIGGINS J. I concur in the opinion that no portion of the sum of £10,876 is profit liable to tax under the *War-time Profits Tax Assessment Act* 1917-1918. The proceeds of the sale of a business are not, in any part profits "arising from any business," within the meaning of sec. 7. In the case of *Commissioner of Taxation (W.A.)* v. *Newman* (1), under a similar Act of Western Australia, I had the opportunity of stating my views on the subject; and I need not repeat them. But although for the purpose of this case the differences between the British Act and the Commonwealth Act may be regarded as immaterial, I should like to guard myself against the inference that for other purposes the two Acts are to be treated as if they were the same (see *McKellar* v. *Federal Commissioner of Taxation* (2)).

STARKE J. The facts are set forth in the judgment of the Chief Justice. But I desire to draw the attention of the Commissioner to the apparent want of care in making assessments in this case, and the consequent hardship upon the taxpayer.

In January 1921 the taxable excess profits of the taxpayer were assessed at £3,695, and the war-time profits tax payable in respect thereof at £2,029. In April 1922 the assessment of excess profits was reduced to £2,197, and the tax to £1,334; and in May 1922 they were again reduced to £2,094 and £1,280 respectively. The taxpayer was called upon to pay £2,029 before the end of March 1921, and in fact paid the amount. But when the reduced assessments were notified, the overcharge was not, so far as I can follow the facts, returned to the taxpayer, but a credit was given in April for £694 and increased in May to £749. Now it appears from the opinions of the Chief Justice and my brother *Higgins* that the exaction was wholly unwarranted in point of law; and in this conclusion I agree.

A tax called the "war-time profits tax" is levied upon all war-time profits calculated, in accordance with the provisions of the Act, *from any business* (*War-time Profits Tax Assessment Act* 1917, sec. 7). "Business" includes any profession or trade, and

(1) (1921) 29 C.L.R., 484. (2) (1922) 30 C.L.R., 198.

any transaction, not in the course of a person's business, for the sale and purchase of any commodity (sec. 4). "The profits *arising from any business* shall be separately determined for the purposes of this Act, but shall be so determined on the same principles as the profits and gains of the business are or would be determined for the purpose of Commonwealth income tax, subject to the modifications set forth in Part IV. and to any other provisions of this Act" (sec. 10). As a matter of interpretation, these provisions point, as in the income tax cases, to profits made in carrying on or out a business (see *Commissioner of Taxes* (*Vict.*) v. *Melbourne Trust Ltd.* (1); *Commissioner of Taxation* (*W.A.*) v. *Newman* (2)). The method of calculating the profits prescribed by sec. 7, sub-sec. 2, also aids this interpretation. But the words in the interpretation clause (sec. 4), already referred to, require consideration. In my opinion, these words do not tax transactions for the sale and purchase of any commodity apart from a profession or trade exercised or carried on by the taxpayer, but only so far as the transaction is carried on or carried out within, or as part of, the business, whether covered by the ordinary course or scope of the business or not. The question whether in the present circumstances the amount allotted to cattle (£10,867) in the memorandum of sale referred to in the case, arose from the taxpayer's business or in carrying on or carrying out that business, is, to my mind, one of fact, which falls for decision by the Justice who hears the appeal. I doubt whether the High Court ought to determine the matter on a case stated pursuant to sec. 29 of the Act. But as the Chief Justice and my brother *Higgins* have treated the question as one of law, I think I may properly state my conclusion upon it.

The taxpayer had carried on the business of a grazier on his property, buying, fattening, breeding and selling cattle. The sale from which the sum of £10,867 arose was not in the ordinary course of trade. It was not made for the purpose of realizing the profits of the business, but in order to end it so far as the taxpayer was concerned, and, in truth, to change the form in which his assets then existed into that of money. Such a transaction was not, as it appears

(1) (1914) A.C., 1001; 18 C.L.R., 413.
(2) (1921) 29 C.L.R., 484.

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to me, carrying on or carrying out his business. Consequently profits accruing from such a transaction do not arise from the business of the taxpayer within the meaning of the *War-time Profits Tax Assessment Act*.

Question 1 *answered*: *No portion of the* £10,876 *is profit liable to tax. Costs of special case to be costs in the appeal.*

J. L. W.

The appeal from the assessment subsequently came on again for hearing before Higgins J.

Herring, for the appellant.

Dean, for the respondent.

Cur. adv. vult.

Nov. 1.

HIGGINS J. delivered the following written judgment:—

This is an appeal from a decision of the Commissioner, given under sec. 28 of the *War-time Profits Tax Assessment Act* 1917-1918, and disallowing the objection of the appellant. By notice of assessment dated 28th January 1921 the Commissioner assessed the amount upon which, in his judgment, war-time profits tax ought to be levied at £3,695, and the tax at £2,771 5s. The appellant paid (as he had to pay under sec. 25) £2,029 1s. 6d. (being the amount of the tax less a refund which is immaterial) on or before 28th March 1921; but he lodged his objection. On 12th April 1922 the Commissioner gave notice of amended assessment reducing the assessment to £2,197 and the amount of the tax to £1,334 17s. 2d.; but he did not, as required by sec. 23 (2), refund the overpayment. On 5th May 1922 the Commissioner gave notice of a further amended assessment, reducing the amount of the assessment to £2,094 and the amount of the tax to £1,280 9s. 3d.; but he did not, as required by the Act, refund the overpayment. Under sec. 28 (7) the reduced assessment is to be treated as the assessment appealed from. When the appeal

came before me in Brisbane, I stated a case for the Full Court under sec. 29; and on 8th September 1922 the Full Court determined the case, deciding that no tax was payable and advising that the costs of and incidental to the case be costs in the appeal. The opinion of the Full Court has been remitted to me; and I now have to give judgment on the appeal.

My order is, under sec. 29, that the appeal be allowed, the decision of the Commissioner set aside, and the assessment reduced by £2,094 (being the whole amount of the assessment as finally amended); and that the Commissioner pay to the appellant the costs of the appeal, including the costs of and incidental to the case stated.

But one cannot fail to recognize that the order does not do full justice. The Commissioner—or rather the Treasury—has had the use of the £2,029 1s. 6d. since March 1921, and the appellant has lost the use of the money during all that time. There is no provision in the Act allowing the Court to grant interest in such a case. Under sec. 30 (2) "if the assessment is altered on appeal a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded"; that is all. The Act, as it stands, offers a distinct inducement to the Commissioner to claim payment of taxation in many cases where his right is doubtful, to say the least. Many taxpayers do not appeal, trusting in the departmental officers to do what is right; and if any taxpayer appeal successfully the Commissioner has not to pay him any interest. Mr. *Herring* has referred me to the English *Taxes Management Act* 1880, under which the amount found to be wrongly received "shall be repaid with such interest (if any) as the High Court may allow." I venture to commend to those who frame our laws the propriety of such a provision. The present position is unjust and even baneful.

I am informed by counsel that there is no form of notice of assessment prescribed by any regulations. If so, there is every reason for the Commissioner to comply strictly with the words of the Act (secs. 22 and 26) and to show on the face of his notice his "assessment of the amount upon which, in his judgment, war-time profits tax ought to be levied." The notice before me is only a notice of the amount of tax claimed, and the taxpayer is left to delve in

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complicated figures in order to find the amount on which the tax is to be levied.

Order accordingly.

Solicitor for the appellant, *W. H. Conwell.*

Solicitors for the respondent, *Chambers, McNab & McNab,* for *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

BECKETT . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1922.

SYDNEY, *Dec.* 11.

Criminal Law—Murder—Conviction of child under seventeen years of age—Sentence—Abolition of capital punishment—Statute—Interpretation—Criminal Code (Qd.) (63 *Vict. No.* 9, *Sched. I.*), *sec.* 305*—*State Children Act* 1911 *(Qd.)* (2 *Geo. V. No.* 11), *secs.* 4, 24 *—*Criminal Code Amendment Act* 1922 *(Qd.)* (13 *Geo. V. No.* 2), *secs.* 2, 3.*

KNOX C.J., ISAACS, HIGGINS, GAVAN DUFFY AND STARKE JJ.

* Sec. 305 of the *Criminal Code* (Qd.) provides that any person who commits the crime of wilful murder is liable to the punishment of death.

Sec. 4 of the *State Children Act of* 1911 (Qd.) defines the word "child" as meaning "a boy or girl under the age or apparent age of seventeen years," and the word "convicted" as meaning "found guilty or convicted of any crime or offence punishable by imprisonment." Sec. 24 provides that "If any child is convicted, the Court having cognizance of the case shall not sentence such child to imprisonment, but shall—(*a*) Commit such child to the care of the" State Children "Department; or (*b*) Order such child to be sent to a reformatory or industrial school, and to be there detained or to be otherwise dealt with under this Act"; &c.

Sec. 2 of the *Criminal Code Amendment Act of* 1922 (Qd.), which came into operation on 31st July 1922, provided that "The sentence of punishment by death shall no longer be pronounced or recorded, and the punishment of death shall no longer be inflicted." Sec. 3 amends the *Criminal Code* (*inter alia*) by repealing the words "the punishment of death" in sec. 305 and inserting in lieu thereof the words "imprisonment with hard labour for life, which cannot be mitigated or varied under section nineteen of this Code."