[HIGH COURT OF AUSTRALIA.]

BLOCKEY . . . . . APPELLANT;

AND

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

H. C. OF A. 1923.

MELBOURNE, *Feb.* 27, 28; *Mar.* 12.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Income Tax—Assessment—Income—Profits on speculation in wheat scrip—Income from personal exertion—Proceeds of business carried on by taxpayer—Income Tax Assessment Act 1915-1921 (*No.* 34 *of* 1915—*No.* 32 *of* 1921), *sec.* 3.

Three persons entered into an agreement to buy from time to time wheat scrip to the value of about £5,000, to sell the scrip as opportunity offered at a profit, and to divide any profits between them in certain proportions. The buying of the scrip extended over a period of about two months and the selling over a subsequent period of about one month, and the result was that a profit was realized.

Held, that the share of the profits of each of the persons was the proceeds of a business carried on by him within the definition of "income from personal exertion" in sec. 3 of the *Income Tax Assessment Act* 1915-1921, and was therefore part of his assessable income.

CASE STATED.

On an appeal by Edward John Steriker Blockey from an assessment for Federal income tax for the year ending 30th June 1918, *Knox* C.J. stated, for the opinion of the Full Court, a case which was substantially as follows:—

1. During the whole of the year ended 30th June 1918 the appellant (Edward John Steriker Blockey), one Francis Oswin Bailey Stone and one Stanley Harold Felton were hardware merchants carrying on business in Melbourne.

2. In March 1918 the appellant and the said Stone and the said

H. C. OF A. 1923.

BLOCKEY v. FEDERAL COMMISSIONER OF TAXATION.

Felton agreed that they would buy on a joint account Victorian and/or New South Wales wheat scrip to the value of about £5,000; that they would, after purchasing same, endeavour to sell it at a profit and would divide any profits or share any losses in the following proportions: Blockey, one-half; Stone, three-eighths; Felton, one-eighth.

3. In pursuance of the said agreement the appellant, early in March 1918, caused Messrs. Lindley Walker & Co., brokers, to be instructed to buy Victorian and/or New South Wales 1917-1918 wheat scrip to a value not exceeding £5,000 at prices according to instructions given from time to time until the said amount of £5,000 was expended.

4. Subsequently, when being informed by the said brokers that they were unable to obtain the whole quantity of wheat scrip desired, the appellant on or immediately prior to 13th April 1918, by agreement with the said Stone and Felton, caused Messrs. Byron Moore & Day, brokers, and Mr. K. H. Johnston, broker, of Melbourne, to be instructed to buy about £1,000 worth of Victorian and/or New South Wales wheat scrip at prices according to instructions.

5. In pursuance of the said instructions the said brokers on various dates between 16th March 1918 and 14th May 1918 bought, on behalf of the appellant and the said Stone and Felton, Victorian 1917-1918 wheat scrip and New South Wales 1917-1918 wheat scrip for a total sum of £5,238 14s. 2d., which was provided on account of the appellant and the said Stone and Felton in the proportions mentioned in par. 2 hereof.

6. On or about May 1918 the appellant, by agreement with the said Stone and Felton, caused instructions to be given to Messrs. Lindley Walker & Co. and K. H. Johnston, the said brokers, to sell the whole of the wheat scrip so purchased. The same was accordingly all sold on various dates during the period 27th May to 30th June 1918 for a net sum of £8,657 2s. 4d.

7. In his return of income made pursuant to the *Income Tax Assessment Act* 1915-1918 for the year ended 30th June 1918, the appellant did not include any item representing his share of the profit on the said transaction in wheat scrip, but by a memorandum

attached to the said return informed the Commissioner that a profit of £1,850 had been made by him as a result of transactions in wheat scrip.

8. The appellant was duly assessed and paid income tax upon the income shown as such in such return.

9. On 21st May 1920 the Commissioner caused to be served upon the appellant a notice of amended assessment in respect of income derived during the year ended 30th June 1918. The amendment notified by the said assessment consisted in the addition to the assessable income of the appellant of his share (as stated in a memorandum attached to his return, namely £1,850) of the whole of "the profit from transaction in wheat scrip," being the transaction or transactions above set out as being income derived from personal exertion.

10. The appellant, being dissatisfied with such amended assessment, lodged notice of objection thereto in writing upon the ground that the profit made by the appellant on the sale of the said wheat scrip was not "income" within the meaning of the *Income Tax Assessment Act* 1915-1918.

11. The Commissioner on 21st August 1920 decided the said objection against the appellant, who, being dissatisfied with such decision, gave notice asking the Commissioner to treat such objection as an appeal and to forward it to the High Court of Australia for hearing.

12. Upon the hearing of this appeal before me the parties hereto agreed upon the facts hereinbefore stated; and I state this case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law:—

(1) Whether the said sum of £1,850, being the taxpayer's share of the profits of the above transactions, was the proceeds of a business carried on by the taxpayer within the meaning of sec. 3 of the *Income Tax Assessment Act* 1915-1921;

(2) Whether the said sum of £1,850 is otherwise taxable income within the meaning of the said Act.

Latham K.C. (with him *Spicer*), for the appellant. The purchase and sale of the wheat scrip was one isolated transaction, and that is not sufficient to constitute a carrying on of a business so as to bring

H. C. OF A. 1923.

BLOCKEY v. FEDERAL COMMISSIONER OF TAXATION.

the profit on the transaction within the definition of "income from personal exertion" in sec. 3 of the *Income Tax Assessment Act* (see *Grainger & Son* v. *Gough* (1); *In re Income Tax Acts* [*No.* 2] (2); *Smith* v. *Anderson* (3); *Schroder* v. *Hebbard* (4)). The realization of profit does not in itself make that profit income. [Counsel also referred to *Mooney* v. *Commissioners of Taxation* (*N.S.W.*) (5); *Commissioners of Taxation* (*N.S.W.*) v. *Mooney* (6); *Webb* v. *Australian Deposit and Mortgage Bank* (7); *In re Income Tax Acts* [*No.* 4] (8).]

Gregory (with him *Normand*), for the respondent. The profit on the transaction was income. The test is: Was the sum of gain from the transaction the result of carrying out a scheme of profit making? (See *Californian Copper Syndicate Ltd.* v. *Harris* (9).)

[ISAACS J. referred to *Melbourne Trust Ltd.* v. *Commissioner of Taxes* (*Vict.*) (10); *Commissioner of Taxes* (*Vict.*) v. *Melbourne Trust Ltd.* (11); *Kirkwood* v. *Gadd* (12).]

In the case of an association of persons initiated solely for the purpose of making gain, the gain when made is income. [Counsel also referred to *T. Beynon & Co.* v. *Ogg* (13); *In re Income Tax Acts —Quat Quatta Co.'s Case* (14).] [Counsel was stopped.]

Cur. adv. vult.

Mar. 12.

The following written judgments were delivered:—

KNOX C.J. On the facts stated in the special case I am of opinion that question 1 should be answered in the affirmative. The profits in question were the result of a joint venture undertaken by the appellant and two other persons. The agreement between them was that they should buy from time to time wheat scrip for the sole purpose of reselling such scrip as opportunity offered at a profit.

(1) (1896) A.C., 325, at p. 343.
(2) (1901) 27 V.L.R., 39; 22 A.L.T., 187.
(3) (1879-80) 15 Ch. D., 247, at pp. 261, 277.
(4) (1907) V.L.R., 107, at p. 110; 29 A.L.T., 1.
(5) (1905) 3 C.L.R., 221, at pp. 229, 245.
(6) (1907) 4 C.L.R., 1439.
(7) (1910) 11 C.L.R., 223, at p. 227.
(8) (1899) 25 V.L.R., 679; 22 A.L.T., 39.
(9) (1904) 5 Tax Cas., 159.
(10) (1912) 15 C.L.R., 274, at p. 303.
(11) (1914) 18 C.L.R., 413.
(12) (1910) A.C., 422, at p. 431.
(13) (1918) 7 Tax Cas., 125.
(14) (1907) V.L.R., 54; 28 A.L.T., 100.

The transactions of purchase and sale extended over a considerable period, and the intention of the appellant and his co-adventurers clearly was not to hold the scrip as an investment but if possible to realize a profit by selling it at a higher price than they gave for it.

The observations in the *Californian Copper Syndicate Ltd.* v. *Harris* (1) and in *T. Beynon & Co.* v. *Ogg* (2), referred to by Mr. *Gregory*, cover this case in principle.

ISAACS J. I agree that the question should be answered in the affirmative. The relevant principle is that stated in the Scottish case, *Californian Copper Syndicate Ltd.* v. *Harris* (3), affirmed by the Privy Council in the *Melbourne Trust Case* (4). The proper test here, based on the Scottish cases, is, I think, this: Is the gain made an enlargement of capital arising from the mere realization of property, or is it a gain made in business operations in the course of carrying on a scheme for profit making? I cannot entertain any doubt it was the latter. The facts as stated disclose a definite and interconnected scheme for profit making by buying and selling through brokers Victorian and/or New South Wales 1917-1918 wheat scrip. The buying portion of the scheme was to continue until a considerable amount of capital was employed, namely, £5,000, at various times on instructions given from time to time. No time limit was fixed; that fell to be determined by final instructions. In fact the purchasing portion of the scheme lasted for two months and reached £5,238 14s. 2d. Then instructions were given to brokers to pursue the selling portion of the scheme, which lasted a little over a month and resulted in a net receipt of £8,657 2s. 4d. The net result of the whole scheme was a profit of £3,418 8s. 2d. That profit is, therefore, not the product of a single instance or of two or more unconnected instances. It is not the case of a man buying land or goods to keep or use, and then finding it desirable or advantageous to sell. It is the case predicated by Lord *Loreburn* L.C. and by Lord *Atkinson* in *Kirkwood* v. *Gadd* (5). The Lord Chancellor said:—"What is carrying on business? It imports a series or repetition of acts."

(1) (1904) 5 Tax Cas., 159 (cited in 29 C.L.R., at p. 488).
(2) (1918) 7 Tax Cas., 125
(3) (1904) 5 Tax Cas., 159.
(4) (1914) 18 C.L.R., 413.
(5) (1910) A.C., at pp. 423, 431.

H. C. OF A. 1923.

BLOCKEY v. FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

Lord *Atkinson*, referring to the judgment of *Brett* L.J. in *Smith* v. *Anderson* (1), said that "the words 'carries on' must be held to imply a repetition of acts, the sum of which constitutes the 'business.'" That case and another, *In re Griffin*; *Ex parte Board of Trade* (2), quoted in the *Melbourne Trust Case* (3), show clearly to my mind that the present case must be regarded as one in which the taxpayer was, with his co-adventurers, carrying on a business. It is true the business was in a measure limited in point of capital, and was not intended to endure indefinitely; but neither of those circumstances is inconsistent with carrying on a business. The all-important fact is that there were a series of transactions connected by a common purpose, that of dealing in wheat scrip, and consisting of all the characteristic operations found in a business of that nature, buying and selling; the scrip itself being treated, not as an investment, but as stock-in-trade, a mere medium for successfully carrying through the profit-making scheme. The capital invested was risked, and was returned, with the profit it had earned. I have no doubt the Commissioner is right and the question should be answered accordingly.

I will add a word to prevent possible misconception:—What I have said has reference to the facts of this particular case, in which the only claim made by the Commissioner is on the basis of income derived from personal exertion. The appellant resisted on the ground that the adventure was not a "business" within the meaning of that term as found in the definition of "income from personal exertion." I have expressed the opinion that it was. But nothing I have said must be taken as indicating that, if the adventure had not been a "business" and the Commissioner had assessed the profits as income from property, he would have failed. Whatever is "income" is income from property, unless it falls within the statutory definition of "income from personal exertion." A mere realization of property though producing profit does not, as I have said, produce income. It is a mere enlargement of capital. But if a man, even in a single instance, risks capital in a commercial venture—say, in the purchase of a cargo of sugar or a flock of sheep—

(1) (1879-80) 15 Ch. D., at pp. 277-278.
(2) (1890) 60 L.J. Q.B., 235.
(3) (1912) 15 C.L.R., at pp. 302-303.

for the purpose of profit making by resale and makes profit accordingly, I do not for a moment mean to say he has not received "income" which is taxable. I intimated during the argument that this was possible; and I leave it open.

HIGGINS J. The position is that the appellant and two others bought through brokers, between 16th March and 14th May 1918, wheat scrip for a sum of £5,238 14s. 2d. as a speculation to resell at a profit, and they sold it between 27th May and 30th June for £8,657 2s. 4d. The appellant's share of the profit was £1,850. In my opinion, this profit is "income from personal exertion" within the meaning of the definition in sec. 3. It comes within the words "the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person." The transaction was "business" (sec. 3), and the business was carried on from purchase to sale. The fact that there was but one sale of wheat scrip bought and sold does not affect the liability to income tax; just as the fact that a ship charterer makes only one voyage would not affect his liability to pay income tax on the profits of that voyage (sec. 22). If a retired architect took up one job and earned one fee in the year for his services, he would have to bring that fee into his income account. The business of the speculation was carried on "as a partner" with the others, within the definition of "partnership" in sec. 3. The fact admitted in this case, that the purchase was made with a view to profit on resale, distinguishes the case clearly from such cases as *Commissioners of Taxation (N.S.W.)* v. *Mooney* (1).

RICH J. I agree that question 1 of the case should be answered in the affirmative. The enterprise upon which the appellant and his associates entered was limited to a particular adventure, but involved, as the facts show, a series of transactions extending over some months, with the object from time to time not of making an investment in the sense of a retention of property, but of carrying out a profit-making scheme in which the disposal of the purchased property was an inseparable ingredient. The resulting profit is, in

(1) (1905) 3 C.L.R., 221; (1907) A.C., 342, at p. 350; 4 C.L.R., at p. 1445.

H. C. OF A. 1923.

BLOCKEY v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

my opinion, taxable income within the meaning of the *Income Tax Assessment Act*.

STARKE J. The *Income Tax Assessment Act* 1915-1921 imposes a tax upon income derived from sources within Australia and remaining after all deductions allowed by the Act have been made. Income, as was said by Lord *Selborne* in *Jones* v. *Ogle* (1), signifies what comes in. But it is not everything that comes in that is income within the meaning of the Income Tax Acts. Proceeds from a mere realization or a mere change of investment, or from an enhancement of capital, are not income for the purposes of these Acts (*cf. Stevens* v. *Hudson's Bay Co.* (2); *Commissioner of Taxation* (*W.A.*) v. *Newman* (3); *Tebrau* (*Johore*) *Rubber Syndicate Ltd.* v. *Farmer* (4)). On the other hand, receipts which result from a scheme of profit making by trading or dealing in some commodity are income for the purposes of the Acts (*Californian Copper Syndicate* v. *Harris* (5); *Commissioner of Taxes* (*Vict.*) v. *Melbourne Trust Ltd.* (6); *T. Beynon & Co.* v. *Ogg* (7)). Now, the facts stated in the present case make it clear that the taxpayers entered upon a joint venture to purchase a considerable amount of wheat scrip for the purpose of selling it at a profit. The venture was a scheme for profit making by buying and selling wheat scrip. Any profits so made were clearly, in my opinion, taxable income within the meaning of the *Income Tax Assessment Act* 1915-1921. The Commissioner has assessed these profits as "income from personal exertion," that is to say, income "the proceeds of a business carried on by the taxpayers." The learned counsel for the appellant insisted that profits from the sale of the wheat scrip were not "the proceeds of a business carried on by the taxpayer"; but, even if the argument were sound, the result must, in my opinion, be that the proceeds should be assessed as "income from property." The carrying on of a business, said the learned counsel, involved a series of acts or transactions of a similar kind, and not an isolated act or transaction; a man who buys a horse and sells it at a profit does not carry on a business.

(1) (1872) 42 L.J. Ch., 334, at p. 336.
(2) (1909) 101 L.T., 96.
(3) (1921) 29 C.L.R., 484.
(4) (1910) 5 Tax Cas., 658.
(5) (1904) 5 Tax Cas., 159.
(6) (1914) 18 C.L.R., 413; (1914) A.C., 1001.
(7) (1918) 7 Tax Cas., 125.

This may be admitted; but, as was said by *Fry* L.J. in *Werle & Co.* v. *Colquhoun* (1), the question is one of fact, not of law, depending upon a variety of circumstances. In my opinion, the Commissioner was right in his assessment of the profits of the venture in this case as income from personal exertion. The taxpayers contributed a fund of about £5,000 for the purchase of wheat scrip which might be bought and sold in lots as opportunity offered, and as a matter of fact the scrip was sold in several lots at different times. The venture was intended to, and did in fact, involve a series of acts or transactions.

Question 1 *answered*: *Yes.*

Solicitors for the appellant, *F. G. Smith & McEacharn.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) (1888) 20 Q.B.D., 753, at p. 761.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN KNITTING MILLS LIMITED (IN LIQUIDATION) . . } APPELLANT;

AND

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

War-time Profits Tax—Assessment—Profits of business—Deduction—Calls paid on shares in company—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 10 (1), 15 (2)—*Income Tax Assessment Act* 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 18 (1) (*i*).

Sec. 10 (1) of the *War-time Profits Tax Assessment Act* 1917-1918 provides that "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