

Full Appl  
Henderson &  
sons v Federal  
Commissioner  
of Taxation  
(1924) 34  
CLR 294

[HIGH COURT OF AUSTRALIA.]

WALKER AND COMPANY . . . . . APPELLANTS ;

AND

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

*War-time Profits Tax—Assessment—Calculation of war-time profits—Accounting period—Pre-war standard—“ Last pre-war trade year ”—War-time Profits Tax Assessment Act 1917-1918 (No. 33 of 1917—No. 40 of 1918), secs. 7 (4), 16 (12).* H. C. OF A. 1923.

BRISBANE,  
June 14, 22.

Knox C.J.,  
Isaacs and  
Gavan Duffy JJ.

By sec. 7 (4) of the *War-time Profits Tax Assessment Act 1917-1918* it is provided that “ For the purposes of this Act the accounting period shall be taken to be the period of twelve months for which the accounts of the business have been made up for the purposes of the *Income Tax Assessment Act 1915-1916*, and where the accounts of any business have not been made up for any definite period, or for the period for which they have been usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year as the Commissioner determines ending on such a date as the Commissioner determines.”

*Held*, by Knox C.J. and Gavan Duffy J. (Isaacs J. dissenting), that sec. 7 (4) impliedly provides that, where the accounts of a business have not been made up for the purposes of income tax but have been made up as usual for the purposes of the business, “ the accounting period ” shall be the period for which the accounts of the business have been so made up.

By sec. 16 (12) of the *War-time Profits Tax Assessment Act 1917-1918* it is provided that “ ‘ The last pre-war trade year ’ means the year ending at the end of the last accounting period before the fifth day of August one thousand nine hundred and fourteen, and ‘ the last three pre-war trade years ’ means the three years ending at the three corresponding times.”

The accounts of a business being carried on under an indenture of partnership as from 1st September 1900 were regularly made up for half-yearly periods ending on 28th February and 31st August in each year prior to 5th August



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1914; and no accounts of the business had been made up for the purposes of the *Income Tax Assessment Act* 1915-1916 prior to the year ending 31st August 1915.

*Held*, by Knox C.J. and Gavan Duffy J. (*Isaacs* J. dissenting), that under sec. 16 (12) the last pre-war trade year of the business for the purposes of assessment under the *War-time Profits Tax Assessment Act* 1917-1918 ended on 28th February 1914; not on 31st August 1913, as determined by the Commissioner.

*Per Isaacs* J.: By virtue of sec. 7 (4) "the accounting period" for the purpose of calculating the total war-time profits arising in the respective financial years is in each case "the period of twelve months" which begins on 1st July in one calendar year and ends on 30th June in the next calendar year.

#### CASE STATED.

On the hearing of an appeal to the Supreme Court of Queensland by Walker & Co. from an assessment of war-time profits tax for the financial years ending in 1917, 1918 and 1919, respectively, *Shand* J. stated a case, which was substantially as follows, for the opinion of the High Court:—

2. Walker & Co., the appellants, were a partnership firm carrying on business at Bundamba in the State of Queensland as colliery proprietors as from 1st September 1900 under indentures of partnership dated 6th June 1901 and 16th July 1906; and such business was continuously carried on by them from the inception of the partnership up to and including the periods covered by the returns hereinafter referred to. The following clauses were embodied in the terms of the said partnership agreement:—“(15) On the first days of March and September in every year during the continuance of the said partnership a general account and valuation shall be taken made up to the first day of March and September as the case may be of the stock-in-trade credit property and effects debts and liabilities of the said partnership and of all matters and things usually comprehended in general accounts of a like nature and in taking such account a proper allowance and deduction shall be made for or in respect of bad or doubtful debts owing to the said partnership. (16) Immediately after the taking and settling of each such half-yearly account as aforesaid each partner shall be entitled to receive his shares of the net profits of the said partnership business for the then past half year on bringing into accounts all sums previously drawn out by him under the provision in that behalf hereinbefore contained.”



3. Accounts of the partnership were made up as prescribed by the said articles up to 1st March and 1st September in each year until 1st March 1917. Thereafter the accounts of the partnership were made up for a period of ten months from 1st March 1917 to 31st December 1917. And from and after 31st December 1917 such accounts were made up half-yearly from 1st January to 30th June and from 1st July to 31st December in the years 1918 and 1919 respectively.

4. The periods of twelve months for which the appellants' accounts were made up, for the purposes of the returns made by them under the provisions of the *Income Tax Assessment Act* 1915-1916 and the Acts amending the same, are the following: In 1914-1915, from 1st September 1914 to 31st August 1915; in 1915-1916, from 1st July 1915 to 30th June 1916; in 1916-1917, from 1st July 1916 to 30th June 1917; in 1917-1918, from 1st July 1917 to 30th June 1918; in 1918-1919, from 1st July 1918 to 30th June 1919.

5. For the purposes of the *War-time Profits Tax Assessment Act* 1917, and in particular for the determination of the pre-war standard of profits, the appellants on 31st January 1918 made a return to the respondent; and in such return the appellants claimed as the last three pre-war trade years the years ending respectively on 29th February 1912, 28th February 1913 and 28th February 1914.

6. On 25th January 1922 the respondent assessed the appellants for war-time profits tax for four years ending 30th June 1919 in the total sum of £13,358 6s. 8d. as hereunder stated: Year ended on 30th June—1916, £614 13s. 11d.; 1917, £3,635 17s. 9d.; 1918, £5,492 13s. 4d.; 1919, £3,615 1s. 8d. For the purpose of the above assessments, and in order to determine the pre-war standard of profits, the respondent adopted as the last pre-war trade year the year ending on 28th February 1914 in accordance with the claim of the appellants in the returns mentioned in par. 5 hereof.

7. The appellants duly gave to the respondent notice of objection (with particulars) to the said assessments, and, so far as is material to the present case, claimed in substance that for the purpose of determining the pre-war standard of profits the last pre-war trade year was the year ending on 28th February 1914, and that, inasmuch as the last three pre-war trade years on that basis covered a period of

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abnormal depression within the meaning of the *War-time Profits Tax Assessment Act* 1917-1918, the appellants were under the provisions of sec. 16 (4) thereof entitled to adopt for the purpose of the determination of the pre-war standard the average of any two of the three pre-war trade years preceding the last three pre-war trade years.

8. On 27th February 1923 the respondent issued to the appellants amended assessments in respect of the financial years ending 30th June 1917, 1918, 1919. For the purposes of this case no question arises with reference to the assessment in respect of the financial year ending 30th June 1916.

9. The said amended assessments and adjustment sheets attached thereto showed that the respondent for the purpose of determining the pre-war standard of profits adopted the average of two pre-war trade years ended respectively on 31st August 1911 and 31st August 1912 as being the best two of the last three pre-war trade years.

10. The appellants contend that the last pre-war trade year of the appellants' business ended at the end of the last accounting period of such business being 28th February 1914, and, if such period be taken as correct, that owing to abnormal depression in the last three pre-war trade years of their business they are entitled under sec. 16 (4) to substitute for the purpose of the pre-war standard of profits any two of the three pre-war trade years preceding the last three pre-war trade years.

11. The respondent contends that the last pre-war trade year of the appellants ended on 31st August 1913; but, if the period claimed by the appellants be taken as correct, does not dispute the balance of the appellants' contention.

12. The appellants having been notified of such amended assessments and having duly required their notice of objection to be treated as a notice of appeal to the Supreme Court of Queensland at Brisbane, the said appeal came on for hearing before me on 1st June 1923.

On the hearing of the appeal before me, the following questions, which in my opinion are questions of law, having arisen, at the request of the parties I state this case for the opinion of the High Court :—

Upon the facts herein appearing, did the last pre-war trade year of the appellants' business for the purposes of any and which



of the said amended assessments end (a) on 28th February 1914, or (b) on 31st August 1913, or (c) on some and what other date ?

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*McGill* (*Douglas* and *Gore* with him), for the appellants. If the words of sec. 16 (12) of the *War-time Profits Tax Assessment Act* 1917-1918 be given their ordinary meaning, the end of the last accounting period was in this case 28th February 1914; and the words of the sub-section are particularly apt for indicating the period that ended on that date.

[ISAACS J. referred to *McKellar v. Federal Commissioner of Taxation* (1).]

Alternatively, if the directions given in sec. 7 (4) apply in ascertaining the accounting period referred to in sec. 16 (12), the end of the last accounting period was 30th June 1914.

*Feez* K.C. (with him *Real*), for the respondent. The partnership commenced on 1st September 1900, and the usual accounting period in all pre-war years ended on 31st August, and 31st August 1913 is in this case the date referred to in sec. 16 (12).

*Cur. adv. vult.*

The following written judgments were delivered :—

June 22.

KNOX C.J. AND GAVAN DUFFY J. The question raised in this appeal turns on the meaning of the expression “the last accounting period” contained in sec. 16 (12) of the *War-time Profits Tax Assessment Act* 1917-1918. The appellants contend that the “end of the last accounting period before the fifth day of August one thousand nine hundred and fourteen” was, in the case of this business, 28th February 1914 or, alternatively, 30th June 1914. The respondent contends that it was 31st August 1913.

The relevant facts as stated in the special case are as follows :—The appellants carried on business in partnership from 1st September 1900 up to and including 30th June 1919. The articles of partnership provided that the accounts of the partnership should be made

(1) (1922) 30 C.L.R., 198.



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1923. were made up in conformity with this provision until 1st March  
1917. The next account was made up for ten months ending on  
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The relevant portion of sec. 16 (12) of the Act is in the following words: " 'The last pre-war trade year' means the year ending at the end of the last accounting period before the fifth day of August one thousand nine hundred and fourteen." If these words are to be given their ordinary meaning, we feel no doubt that the appellants' first contention is correct. The accounting periods of the business ended on 28th or 29th February and on 31st August in each year, and the last of such periods before 5th August 1914 ended on 28th February in that year. The words of the sub-section are apt to designate that period; and it seems to us impossible to say that a formula evidently prescribed by Parliament to suit varying circumstances is merely a circumlocution for the words "thirtieth day of June one thousand nine hundred and fourteen." But it is said that the accounting period referred to in sec. 16 (12) must be ascertained in accordance with the directions given in sec. 7 (4) of the Act, and not according to the ordinary meaning of the words used. That sub-section is in the following words: "For the purposes of this Act the accounting period shall be taken to be the period of twelve months for which the accounts of the business have been made up for the purposes of the *Income Tax Assessment Act* 1915-1916, and where the accounts of any business have not been made up for any definite period, or for the period for which they have been usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year as the Commissioner determines ending on such a date as the Commissioner determines."

The *Income Tax Assessment Act* 1915-1916 provided for the assessment and collection of income tax which was for the first time imposed in respect of income derived during the year beginning on 1st July 1914 and ending on 30th June 1915, and no accounts of any business for any period before 1st July 1914 were made up



“for the purposes of the *Income Tax Assessment Act 1915-1916.*” This fact is said to create a difficulty in applying the provisions of sec. 7 (4) to the determination of the accounting period referred to in sec. 16 (12), which must have ended before 5th August 1914. But as sec. 7 (4) requires that “for the purposes of this Act” the accounting period shall be determined in accordance with its provisions, it is necessary to apply these provisions to the ascertainment of the accounting period mentioned in sec. 16 (12) if it is possible to do so. We think they can be so applied.

Sec. 7 (4) contemplates or assumes that in the case of any given business the accounts (a) may have been made up for the purposes of the *Income Tax Assessment Act 1915-1916*, or (b) may not have been made up for those purposes, or (c) may not have been made up for any definite period, or (d) may have been usually made up for a particular period but may not in fact have been made up for that period in the year under consideration, or (e) that a year or more may have elapsed without the accounts being made up. It expressly provides that in case (a)—(i.e., if accounts have been made up for the purposes of income tax)—the accounting period shall be the period covered by these accounts. It also expressly provides that in cases (b), (c), (d) and (e) the accounting period shall be such period as shall be determined by the Commissioner within the limits prescribed by the section. It does not *expressly* provide that, where the accounts have not been made up for purposes of income tax but have been made up as usual for the purposes of the business, the accounting period shall be the period for which the accounts of the business have in fact been so made up; but we think this provision must be implied, because sub-sec. 4 provides that if the accounts have been usually made up for a period the power of the Commissioner to determine the accounting period only arises if the accounts have not been made up for that period in the year under consideration, and because sub-sec. 2 assumes the normal accounting period to be one different from the period constituting the financial year. We think sub-secs. 2 and 4 provide in effect that in determining what is the accounting period in any given case the following method shall be adopted:—If the accounts of the business have been made up for purposes of income tax in

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respect of the relevant period, the period covered by the accounts so made up shall be the accounting period. If the accounts have not been so made up but have been made up in the usual course of the business over a period included in the relevant financial year, that period shall be an accounting period. If accounts have not been made up (a) for purposes of income tax, or (b) for a period for which they have been usually made up, or (c) for a period not exceeding a year, or (d) for any definite period, the accounting period shall be determined by the Commissioner.

In this case it is necessary to ascertain the profits of certain pre-war trade years for the purpose of arriving at the pre-war standard of profits. No accounts of the business in respect of any of these years having been made up for the purposes of the *Income Tax Assessment Act* 1915-1916, it is impossible to adopt the first method prescribed by sec. 7 (4) for determining the accounting period in respect of any of these years. But during these years the accounts of the business were regularly made up for half-yearly periods ending on 28th February and 31st August in each year. It follows, if our construction of sec. 7 (4) be correct, that the power of determination conferred on the Commissioner by that section has not arisen, and that the only method provided by it for determining the accounting period is by adopting the period for which the accounts of the business were made up. The last usual accounting before 5th August 1914 was up to 28th February 1914; and in our opinion that date is the end of the last accounting period before 5th August 1914 within the meaning of sec. 16 (12) of the Act.

The questions should be answered (a) Yes; (b) No; (c) It is not necessary to answer.

ISAACS J. The case turns on the effect to be attributed to the phrase "the last accounting period before the fifth day of August one thousand nine hundred and fourteen" in sec. 16 (12) of the *War-time Profits Tax Assessment Act* 1917-1918. The Commissioner contends that on the facts of this case that phrase means the year ending 31st August 1913. The appellants contend that the phrase as applied to this case means the year ending 28th February 1914. A third period is in this case a possible period, namely, the year



ending 30th June 1914. These are the three possibilities (if any is possible); and the question is which of these should be adopted.

In *McKellar v. Federal Commissioner of Taxation* (1) I said:—  
 “The Act, on its true construction, treats a business as a single profit-making machine; and, in order to see how far the profits made by it during the war period are attributable to war conditions, the profit-making capacity of the same machine during the pre-war period is to be ascertained irrespective of the earlier ownership of the machine, and then the two capacities are compared, adjustments being made, where necessary, for increase or diminution of capital employed at the respective periods. . . . But, *ex natura rerum*, capital must be calculated for the same period as the profits. Consequently the capital in relation to the accounting period profits must be taken as at the accounting period according to the method prescribed by the Act. And the capital in relation to the pre-war percentage standard profits must be taken as at the appropriate pre-war period, which by the Act, sec. 16 (9), is fixed, apart from special cases, as at the end of the last pre-war trade year, and this, by sub-sec. 12, is defined as the year ending at the end of the last accounting period before 5th August 1914, and to fully understand this we have further to turn to sec. 7 (4), which defines ‘accounting period’ by reference to the *Income Tax Assessment Act 1915-1916*.” That indicates the dominant purpose of the Act, and also to some extent refers to the meaning of the expression “the last accounting period before the fifth day of August one thousand nine hundred and fourteen”; but the precise points in issue in this case were not then involved, and have to be determined now.

Having regard to what those points are, the only material facts are: (1) The taxpayers in the ordinary course of business made up business accounts for the respective periods of six months ending 28th February 1914 and 31st August 1914; (2) the taxpayers made up their business accounts for the purpose of income tax returns for the years 1917, 1918 and 1919 for “the period of twelve months” beginning 1st July and ending 30th June; (3) the Commissioner adopted as “the last pre-war trade year” the year ending 31st August 1913, thus determining as “the accounting period” for the purposes

(1) (1922) 30 C.L.R., at pp. 205-206.

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H. C. OF A. 1923. of sec. 16 (12) the period comprised between 1st September and 31st August. The problem is which of these (if any) is proper to be taken for the purposes of sec. 16 (12).

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As I have said in *McKellar's Case* (1), the words "accounting period" cannot in that sub-section be interpreted without reference to sec. 7 (4). The expression "accounting period" has been coined for the purposes of the Act, and has received an arbitrary interpretation, which, however it may be construed, cannot be added to or altered. This leads me, before proceeding to construe the statutory definition, to make one observation in advance. During the argument reference was made to the English *Finance (No. 2) Act* 1915, in order to point to the difference of language between the two statutes. The difference is very marked. The English Act in sec. 38 defines "the accounting period," for the purposes of the excess profit duty part, as "the period for which the accounts of the trade or business have been made up," with additional provisions for unusual or exceptional circumstances. That, of course, means the period for which the taxpayer actually made up his business accounts and has no reference to twelve months or any other fixed period. Nor has it any reference to income tax assessment. The Commonwealth Parliament, however, deliberately and expressly rejected that definition, and framed an entirely different one. The position is, I should think, plain that what the Parliament has so clearly and deliberately rejected, and refused to adopt, and has replaced by other affirmative directions of its own, cannot for any purpose or under any process of interpretation be introduced by a Court whether by way of implication, analogy or otherwise. That would be directly overriding Parliament. I therefore have no hesitation, whatever other result may arise, in rejecting the appellants' contention that because of the first material fact above stated, the period ending 28th February must be adopted.

Sec. 7 (4) provides that for the purposes of the Act—and that includes sec. 16 (12)—"the accounting period" (a) shall be taken to be "the period of twelve months" for which the accounts of the business have been made up for the purposes of the *Income Tax Assessment Act* 1915-1916; and (b) where the accounts of any



business have not been made up for any definite period, or for the period for which they are usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year as the Commissioner determines ending on such a date as the Commissioner determines. The last portion was necessary because not every taxpayer is under any legal obligation to keep accounts in any particular form or even to keep accounts at all (see per Lord *Sumner* in *John Smith & Son v. Moore* (1) ).

The period adopted by the taxpayer in respect of the years 1917, 1918 and 1919, answered the criterion first stated in sub-sec. 4 of sec. 7. It also answered the second criterion in the later portion of the sub-section, namely, "not . . . for the period for which they have been usually made up." But the Commissioner raises no question about the latter: it is common ground that the first criterion is correct. "The accounting period," for the purpose of calculating the total war-time profits arising in the respective financial years, is incontrovertibly in each case "the period of twelve months" which begins on 1st July in one calendar year and ends on 30th June in the next calendar year. "Accounting period" is an artificial time basis created by Parliament for the purposes of revenue—that is, as a fiscal basis—on which the taxpayer is to "account" to the Commonwealth; and unless for that purpose the actual period for which the taxpayer privately makes up his accounts (for his own information and not to "account" to himself, and still less to the Commonwealth) is adopted, that period is irrelevant. But I take it that once "the accounting period" has been marked out by terminal dates, that is preserved wherever it is used by the Act. It may be applied to different years, but "the accounting period" as a basis of comparison or measurement or identification remains. Years may not always be comparable, and therefore sec. 16 (3) provides for an average, as a standard; and, similarly, by sec. 16 (4) even years may be substituted; and even then a percentage standard is available (sec. 16, sub-secs. 8, 9 and 10).

When we come to sec. 16 (12), "the last pre-war trade year" is declared to mean "the year ending at the end of the last accounting

(1) (1921) 2 A.C., 13, at p. 39.

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*period* " before 5th August 1914, and " " the last three pre-war trade years ' means the three years ending at the three corresponding times." The Legislature means, in my opinion, to recognize in that paragraph " the period already marked out by terminal dates for the computation of profits " just as it did in sub-sec. 1 of sec. 16, where it is directed that the profits of any pre-war trade year shall be computed on the same principles and subject to the same provisions as the profits of " the accounting period." Once the actual pre-war profits are ascertained, then the " standard " is calculated from them.

But the dominant principle is comparison of the " war " profits with " pre-war " profits, with reference to a period called " the accounting period " and created as a basis. I, therefore, am of opinion that the proper " accounting period " relevant to sec. 16 (12) is, on the facts of this case, the period 1st July to 30th June.

If sec. 16 (12) is governed by sec. 7 (4), there is, for reasons already stated, no room for any definition which could introduce 28th February. That would be legislation, not interpretation. If sec. 16 (12) is not governed by sec. 7 (4), then it always must mean the same thing; and if it means the actual period adopted by the taxpayer before 5th August 1914 in this case, it means that in every case, even though (to apply the words of sec. 7 (4) ) the accounts had not been made up for any definite period, or for the period for which they were usually made up, or a year or more had elapsed without accounts being made up. All of these contingencies were expressly within the contemplation of the Legislature; and so cannot be ignored in interpreting their words.

*Questions answered: (a) Yes; (b) No; (c) Not necessary to answer.*

Solicitors for the appellants, *Nicol Robinson, Fox & Edwards*.

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

J. L. W.