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

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the profits and gains of the business are or would be determined for the purpose of Commonwealth income tax, subject to " certain provisions. Sec. 15 (2) provides that " Deductions for wear and tear or for any expenditure of a capital nature for renewals, or for the development of the business or otherwise in respect of the business, shall not be allowed except such as may be allowed for the purposes of the Commonwealth income tax." Sec. 18 (1) of the *Income Tax Assessment Act* 1915-1918 provides that " In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted . . . (*i*) five per centum of the total amount paid in the year in which the income is derived in respect of calls on the shares of a company carrying on operations in Australia : " &c.

Held, that in determining, for the purposes of the *War-time Profits Tax Assessment Act*, the profits of a business carried on by a company, neither sec. 10 (1) nor sec. 15 (2) of that Act entitled that company to deduct from the profits of the business five per centum of the total amount paid in the year in which the profits were derived in respect of calls on the shares of another company carrying on business in Australia, although the acquisition of those shares was within the objects for which the former company was established.

CASE STATED.

On the hearing of an appeal by the Australian Knitting Mills Ltd. (in Liquidation) from an assessment of it for war-time profits tax by the Federal Commissioner of Taxation, *Starke* J. stated, for the opinion of the High Court, a case which was substantially as follows :—

1. The appellant at all times material was a company incorporated under the provisions of the Companies Acts of the State of Victoria and carried on business throughout the Commonwealth of Australia.

2. The appellant established knitting mills in the State of Victoria, and there manufactured woollen and worsted goods of all descriptions.

3. The appellant in 1918 applied and subscribed for and was allotted 88,334 shares of £1 each in the Yarra Falls Spinning Co. Proprietary Ltd.

4. During the period from 1st July 1918 to 30th June 1919 the appellant paid in respect of calls on the said shares the sum of £79,500 12s.

5. The said Yarra Falls Spinning Co. is and at all times material was a company carrying on operations in Australia.

6. The appellant duly furnished to the respondent the return

required in pursuance of the *War-time Profits Tax Assessment Act* 1917, setting forth a full and complete statement of the net profits of its business for the financial year commencing on 1st July 1918.

7. The respondent caused an assessment to be made from the said return for the purpose of ascertaining the profits upon which war-time profits tax should be levied, and caused notice in writing of the assessment to be given to the appellant.

8. In determining the profits arising from the business of the appellant, the respondent disallowed a deduction of the sum of £3,975 0s. 7d., representing 5 per cent. of the said sum of £79,500 12s. paid in calls as aforesaid.

9. The appellant lodged an objection in writing with the respondent against the said assessment, stating fully the reason for the objection pursuant to sec. 28 (1) of the *War-time Profits Tax Assessment Act* 1917-1918.

10. The respondent considered and wholly disallowed the said objection, and gave written notice of his decision to the appellant.

11. The appellant asked the respondent pursuant to sec. 28 (4) of the said Act to treat its objection as an appeal and forward it to this Court; and such objection was so treated and forwarded to this Court.

12. The appellant has abandoned its said objection and appeal, except so far as the same relate to its claim to have 5 per cent. of the total amount paid by it in the year the subject of assessment in respect of calls on the said shares allowed as a deduction.

13. On the hearing of the appeal before me the following question, which in my opinion is a question of law, has arisen, which I state for the opinion of the High Court :—

> Ought the said sum of £3,975 0s. 7d. to be allowed as a deduction in determining the profits arising from the business of the appellant in the financial year commencing on 1st July 1918 for the purposes of the *War-time Profits Tax Assessment Act* 1917-1918 ?

The memorandum of association of the Australian Knitting Mills Ltd. contained the following provisions (*inter alia*) :—" II. The objects for which the company is established are all or any of the following :—The company having power to do any of the matters

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herein mentioned (whether in one or different paragraphs), apart from any other of the said matters, and none of the general or other descriptions given in this clause being subject to be limited or restrained by reference to the name of the company, or by reference to matters of the same or some similar kind to those elsewhere in this clause mentioned or referred to, or to be otherwise limited or restrained by any other part of this clause not containing an express limitation or restriction, nor by any inference to be drawn from such other part, and so that the objects specified in this memorandum may be carried out in as full and ample a manner, and construed in as wide a sense, as if each of the paragraphs hereof defined the objects of a separate and independent company. (1) To carry on all or any of the businesses of woollen spinners, yarn merchants, worsted spinners, wool combers, worsted stuff manufacturers, hosiers, manufacturers of sweaters, jerseys, underwear and kindred articles; merchants and dealers in wool, silk, cotton, flax, hemp, jute, and other fibrous substances, and in goods manufactured therefrom; spinners, weavers and manufacturers of such goods; bleachers, dyers, and makers of vitriol and bleaching and dyeing materials, or any other business similar thereto." " (9) To invest any moneys of the company not immediately required for the purposes of its business in such manner as may be thought fit, and to lend money to such parties and on such terms, with or without security, as may be thought to be for the interests of the company, and in particular to customers of, and persons having dealings with, the company, or to companies, firms, or persons carrying on any business which may be useful and beneficial to the company." " (14) To promote, form, organize, and register, and to aid in the promotion, formation, organization and registration of any other company for the purpose of acquiring, working, or otherwise dealing with all or any of the property, rights, or liabilities of this company, or any property in which this company is interested, or for any other purpose which may be deemed advantageous to this company, with power to assist such company or companies by paying or contributing towards the preliminary expenses or providing the whole or part of the capital thereof, or by taking, subscribing for, or underwriting shares therein or debentures or other securities thereof, or by lending money

thereto." "(16) To enter into partnership or into any arrangement for sharing profits, union of interests, co-operation, joint adventure, reciprocal concession, or otherwise with any person or company carrying on or engaged in, or about to carry on or engage in, any business or transaction which this company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to lend money to, guarantee the contracts of or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same."

Among the objects stated in the memorandum of association of the Yarra Falls Spinning Co. Proprietary Ltd. were the following: "(a) To carry on the trades or businesses of wool scourers and washers wool combers and weavers topmakers wool spinners yarn merchants worsted spinners and of merchants manufacturers and dealers in all or any products of wool silk cotton flax hemp and other like substances and of fellmongers tanners provision packers extract manufacturers tallow melters artificial manure manufacturers and any other business whether similar to those enumerated or not capable of being carried on in conjunction therewith."

Latham K.C. (with him *Spicer*), for the appellant. Under its memorandum of association the appellant company had power to subscribe for shares in such a company as the Yarra Falls Spinning Co., and the exercise of that power is as much a carrying on business as is the exercise of any other of the powers stated in the memorandum (*Cotman* v. *Brougham* (1)). The payment of the calls in respect of the shares subscribed for was therefore an expenditure of a capital nature for the development of the business of the appellant or otherwise in respect of its business within the meaning of sec. 15 (2) of the *War-time Profits Tax Assessment Act* 1917-1918. (See *Smith* v. *Anderson* (2); *Inland Revenue Commissioners* v. *Korean Syndicate Ltd.* (3); *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co.* (4).)

(1) (1918) A.C., 514.
(2) (1879-80) 15 Ch. D., 247.
(3) (1921) 3 K.B., 258, at p. 273.
(4) (1922) 2 K.B., 381, at p. 389.

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[KNOX C.J. referred to *John Smith & Son* v. *Moore* (1).]

If the payment of the calls is such an expenditure, sec. 15 (2) implies that a deduction may be made in respect of such payment, for it would be permitted under sec. 18 (1) (*i*) of the *Income Tax Assessment Act* 1915-1918. The provision in sec. 18 (1) (*i*) is one of the principles upon which the profits and gains of the business would be determined for the purposes of Commonwealth income tax, and by virtue of sec. 10 (1) of the *War-time Profits Tax Assessment Act* that principle is to be applied in determining the profits arising from the business for the purposes of war-time profits tax. If the transaction in respect of the shares of the Yarra Falls Spinning Co. is a separate business from the other business of the appellant, there has been no assessment on that basis.

Ham (with him *J. H. Moore*), for the respondent. The deductions permitted by sec. 18 of the *Income Tax Assessment Act* are deductions from the assessable income, and are not deductions made in arriving at the profits from a business. It cannot be said that the provisions of sec. 18 are "principles" upon which the profits and gains of a business are to be ascertained. [Counsel was stopped.]

Latham K.C., in reply.

Cur. adv. vult.

Mar. 20.

The following written judgments were delivered :—

KNOX C.J. During the year 1st July 1918 to 30th June 1919 the appellant paid in respect of calls on shares in the Yarra Falls Spinning Co., which had been allotted to it in 1918, the sum of £79,500 12s. The Spinning Co. was a company carrying on operations in Australia. In its return of profits for the year in question for the purpose of the *War-time Profits Tax Assessment Act* 1917 the appellant claimed a deduction of £3,975, being 5 per cent. of the said sum of £79,500 so paid in calls. The respondent disallowed the deduction claimed. The question for decision is whether such deduction should have been allowed in determining the profits arising from the business of the appellant in the financial year commencing on 1st July 1918 for the purposes of the said Act. The

(1) (1921) 2 A.C., 13.

appellant relies on the provisions of secs. 10 and 15 of the Act and sec. 18 (1) (*i*) of the *Income Tax Assessment Act* 1915-1918. The contention of the appellant may be summarized as follows:—The payment of £79,500 was an expenditure of a capital nature in respect of the business; sec. 15 (2) of the *War-time Profits Tax Assessment Act* by implication provides that a deduction may be allowed in respect of such expenditure if such a deduction would be allowed for the purposes of the income tax; sec. 10 of the *War-time Profits Tax Assessment Act* imports into the computation of profits for the purposes of that Act the provisions for computing taxable income contained in the *Income Tax Assessment Act*; sec. 18 (1) (*i*) of the *Income Tax Assessment Act* allows a deduction in ascertaining taxable income of 5 per cent. of the amount paid in the year in respect of calls on shares in a company carrying on operations in Australia; the amount of £79,500 paid by the appellant was paid in respect of calls on shares in such a company, and therefore 5 per cent. of that amount should be deducted in ascertaining the profits of the appellant for the purpose of assessment of war-time profits tax. This argument ignores the essential distinction between income of the taxpayer which is taxable under the *Income Tax Assessment Act* and profits of a business which are the subject of taxation under the *War-time Profits Tax Assessment Act*. Sec. 10 of the last mentioned Act provides that the profits arising from any business shall for the purposes of the Act be 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 certain modifications. The provision contained in sec. 18 (1) (*i*) of the *Income Tax Assessment Act* is applied, not in determining the profits of a business, but in ascertaining the taxable income of a taxpayer who may or may not derive income from a business. If a taxpayer carries on a business, then for the purpose of assessing him to income tax the profits of his business are included in his income, but these profits are ascertained by deducting from the gross receipts of the business amounts expended or allowed in respect of the matters specified in pars. (*a*), (*d*), (*e*), (*f*) and (*j*) of sub-sec. 1 of sec. 18 of the *Income Tax Assessment Act*. To the profits of the business so ascertained is added the amount of his income from other sources, *e.g.*,

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from investments or property, and it is from the total so found that the deduction authorized by par. (*i*) is made. In no sense can the deduction authorized by par. (*i*) be said to be a principle, or even a provision, applying to the determination of the profits of a business for the purpose of Commonwealth income tax. Consequently I am of opinion that neither sec. 10 nor sec. 15 (2) of the *War-time Profits Tax Assessment Act* operates to authorize the deduction made by the appellant.

For these reasons I am of opinion that the question submitted should be answered in the negative.

ISAACS J. In my opinion the question should be answered in the negative.

The appellant rests its claim to have the sum of £3,975 0s. 7d. allowed as a deduction, in determining the taxable war-time profits of its business, on the provision in par. (*i*) of sec. 18 (1) of the *Income Tax Assessment Act*. That provision, it is said, is attracted by force of secs. 10 (1) and 15 (2) of the *War-time Profits Tax Assessment Act*, either separately or conjointly. We have, therefore, to see what those sections provide. Before reading the words relied on, it is necessary to bear in mind that, whereas the income tax is a tax on a totality of income from various sources in Australia (divided in the case of individuals for the purpose of rating into two classes), the war-time profits tax, on the other hand, is a tax on business profits only; and as to the latter tax it is essential to remember that, as I expressed it in *McKellar* v. *Federal Commissioner of Taxation* (1), "The Act, on its true construction, treats a business as a *single profit-making machine*." Now, when we come to the specific provisions of sec. 10 (1), we find it enacted that "the profits arising from any business shall be separately determined for the purposes of this Act." That is to say, each taxable "profit-making machine" is to be valued *separately* from every other. Then says the sub-section: "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 out in Part IV. and to any other

(1) (1922) 30 C.L.R., 198, at p. 205.

provisions of this Act." That is, while preserving the segregation of the given " business " its results are to be ascertained just as they would be under the *Income Tax Assessment Act*, subject to any special provisions of the *War-time Profits Tax Assessment Act*. Does that attract par. (*i*) of sec. 18 (1) of the *Income Tax Assessment Act* ? Clearly not, because that sub-section, in its governing introductory words, deals with " calculating the taxable income of a taxpayer," and, in order to arrive at that, " the total assessable income derived by the taxpayer *from all sources* in Australia " is taken as a basis. It then provides that among permissible deductions there shall be a deduction as claimed by the appellant here. But that is not described as a deduction from business receipts, or in any way connected with a business. It is not dependent on the taxpayer sustaining a loss by the expenditure ; nor is it avoided if he makes a profit on the shares. It is a concession to the taxpayer on grounds of public policy, and not as a recognition of commercial justification in arriving at profits of a business. It has nothing to do with such a process. It cannot, therefore, come within the words of sec. 10 (1) of the *War-time Profits Tax Assessment Act*, " profits and gains of the business." If not, how is it helped by sec. 15 (2) ? The appellant says, first, that in sec. 10 (1) the words " subject to the modifications set out in Part IV." bring in sec. 15 (2). So they do, but, for the purpose of " modification," that is, of modifying the principles as to " profits and gains of the business "—and, so far, sec. 15 (2) is irrelevant. But further, it is argued that sec. 15 (2) operates *ex proprio vigore*. It says : " Deductions for wear and tear or for any expenditure of a capital nature for renewals, or for the development of the business or otherwise in respect of the business, shall not be allowed except such as may be allowed for the purposes of the Commonwealth income tax." That, of course, is not an independent section. It is a sub-section of sec. 15, which is headed " Computation of Profits." The first sub-section shows that " actual profits " is the object sought after. But since the words " actual profits " were affirmatively enacted in sub-sec. 1, not only was a special proviso to that sub-section found necessary, but a distinct provision as to deductions was obviously required to prevent any misapprehension. Sub-sec. 2 was therefore inserted, but only in connection

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with the " profits " of the specific business : and other sub-sections were added with reference to the same subject. Sub-sec. 2, therefore, does not extend to anything that is not allowed for the purposes of the income tax as a deduction from the gross income from a business in order to arrive at the taxable amount of its profits. Par. (*i*) of sec. 18 (1) of the *Income Tax Assessment Act* is not of that character. It does not connote a business at all ; it does not connote expenditure for a business; still less does it connote a loss in a business. It is, therefore, outside the words and scope of sec. 15 (2) of the *War-time Profits Tax Assessment Act*. It is for the same reason equally outside the purview of the first proviso to sec. 10 (1) of the same Act, and, of course, entirely outside the mercantile notion of a legitimate factor in arriving at the actual profits of a business. For these reasons my opinion is as I have stated.

HIGGINS J. I have come to the conclusion that the question should be answered in the negative. But there is much in Mr. *Latham's* argument with which I concur ; and I am not at all surprised that such a question has arisen under this difficult Act. The draftsman has taken, without the usual marginal acknowledgment, sec. 15 (2) from the fourth schedule to the British *Finance (No. 2) Act* 1915 ; and the words are not quite appropriate to the provisions of the Australian Act. I agree with the argument that the acquisition of the shares in the Yarra Falls Co. was part of the business of the appellant company, under its memorandum of association ; and that it is not for the Court to treat one object stated in the memorandum as being on a different level from the other objects. But, in my opinion, sec. 10 of the *War-time Profits Tax Assessment Act* 1917-1918 does not import into that Act the provision in question (sec. 18 (1) (*i*) of the *Income Tax Assessment Act* 1915-1918). The provision is that " in calculating the taxable income of a taxpayer the total assessable income . . . shall be taken as a basis, and from it there shall be deducted . . . (*i*) five per centum of the total amount paid in the year in which the income is derived in respect of calls on the shares of a company carrying on operations in Australia." Sec. 10 of the *War-time Profits Tax Assessment Act* provides that the profits arising from any business

shall be determined on the same principles as the profits and gains of the business would be determined for the purpose of the Commonwealth income tax. But the provision in question does not enter into the determination of the profits and gains of the business at all; it enters into the calculation of the "taxable income" *after the profits of any business have been determined*, and the exemptions (sec. 11), and only as part of the subsequent "deductions" (sec. 3—definition of "income from personal exertion," "assessable income," "taxable income"). As for the other section on which stress has been laid—sec. 15 (2) of the *War-time Profits Tax Assessment Act*—the words are merely negative, that there shall not be deductions for wear and tear, for expenditure of a capital nature for renewals, or for the development of the business or otherwise in respect of the business, unless such as may be allowed for the purposes of the Commonwealth income tax. Whatever is to be deemed the precise meaning of the words "for the development of the business or otherwise in respect of the business" as applied to the *War-time Profits Tax Assessment Act*, or to the *Income Tax Assessment Act*, they do not, in my opinion, apply to the curious provision contained in sec. 18 (1) (*i*) of the latter Act.

RICH J. I have had the advantage of reading the judgment of my brother *Isaacs*, and agree with it. I answer the question asked in the negative.

STARKE J. The *War-time Profits Tax Assessment Act* 1917-1918 imposes a tax upon all war-time profits from any business, calculated and computed according to the provisions of the Act. The important section for the purposes of this case is sec. 10, which provides that the profits arising from any business shall be separately determined for the purposes of the 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 the Commonwealth income tax subject to the modifications set out in any other provisions of the Act. Profits and gains in a commercial account are estimated "by setting against the income earned the cost of earning it" (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1)). The problem is to determine the extent

(1) (1915) A.C., 433, at pp. 444, 458.

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to which the *War-time Profits Tax Assessment Act*, coupled with the *Income Tax Assessment Act*, has modified or limited this method.

Part IV. of the *War-time Profits Tax Assessment Act* allows various deductions and restricts others. Thus sec. 15, sub-sec. 2, contains both a restriction and an allowance. The allowance, as I understood the argument, was such expenditure as might be permitted, for the purposes of the Commonwealth *Income Tax Assessment Act*, for the development of the business or otherwise in respect of the business. With this exception, it was not suggested that the provisions of Part IV. touched this case. We are therefore driven to a consideration of the *Income Tax Assessment Act* 1915-1918.

Strangely enough, we do not find in the *Income Tax Assessment Act* any express provisions for determining the profits and gains of a business but only for determining taxable income, which may or may not include the profits or gains of a business. Apparently the provisions of sec. 10 of the *War-time Profits Tax Assessment Act* were taken from the *Finance (No. 2) Act* 1915 (5 & 6 Geo. V. c. 89), sec. 40. But there the provision that the profits of the trade or business should be determined on the same principles as the profits and gains of the trade or business would be determined for the purpose of income tax, is intelligible; for the English income tax is imposed upon (*inter alia*) the annual profits or gains arising or accruing from any trade exercised within the United Kingdom. Now, the *Federal Income Tax Assessment Act* provides that in calculating the taxable income of a taxpayer there shall be deducted (*inter alia*) five per centum of the total amount paid in the year in which the income is derived in respect of calls on the shares of a company carrying on operations in Australia. The taxpayer had established knitting mills in Victoria and manufactured woollen and worsted goods of all descriptions. In 1918 it subscribed for shares in another company—a spinning company—as it was empowered to do under its memorandum of association, and paid in respect of calls on the shares a sum of £79,500. It claimed to deduct five per centum of this sum. The amount was an expenditure, as I understood the argument, in the development or otherwise in respect of the business of the company. But it was not an outgoing incurred in gaining or earning the profits of the company,

and I fail to understand, apart from express statutory authority, how such expenditure could be taken into account in computing the profits of the company. Consequently the taxpayer is forced to assert that the *Income Tax Assessment Act*, sec. 18, sub-sec. 1 (*i*), coupled with the *War-time Profits Tax Assessment Act*, does allow this expenditure as a deduction from profits whether it was or was not an outgoing incurred in or in connection with the gaining of the profits of the company.

The object of the *War-time Profits Tax Assessment Act* is to ascertain the profits of a business, and the true intent of sec. 10 of the Act is to utilize for that purpose any principles set forth in the *Income Tax Assessment Act* for determining the profits of a business, subject to such modifications as may be found in the *War-time Profits Tax Assessment Act*. But the section does not enable all the deductions set forth in sec. 18 of the *Income Tax Assessment Act* to be deducted from profits whether they have or have not any connection with the earnings of a business. The calls paid in the present case have no connection with the earnings of the company in its business, and therefore, in my opinion, the question must be answered in the negative.

Question answered: *No.*

Solicitors for the appellant, *Arthur Robinson & Co.*

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

B. L.