What we have said makes it unnecessary to determine whether sec. 64 is not also within the legislative power conferred by sec. 78 of the Constitution; and we express no opinion on that point.

The provisions of sec. 64 do not, therefore, transcend the power of the Parliament, and the question reserved must be answered in the affirmative.

Question answered in the affirmative both as to discovery of documents and interrogatories. Case remitted to the Supreme Court of South Australia. Costs of the special case to be costs in the application.

Solicitors for the plaintiff, *Wadey, Norman & Waterhouse.*

Solicitors for the defendant, *Baker, Glynn, McEwin & Ligertwood.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . } APPELLANT;

AND

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

Income Tax—Assessment—Foreign shipping company—Taxable income—Deductions—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918) *secs.* 3, 16 (1), 22—*Income Tax Act* 1918 (*No.* 41 *of* 1918), *secs.* 2, 4 (5), *Fourth Schedule.*

In the assessment of the income of a shipping company, of which the principal place of business is out of Australia and which carries passengers, &c., shipped in Australia, from the sum which represents 10 per cent of the amount payable to it in respect of the carriage of passengers, &c., and upon which sec. 22 (2)

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of the *Income Tax Assessment Act* 1915-1918 provides that the agent of the company is liable to pay income tax, neither by virtue of that Act nor of sec. 4 (5) and the Fourth Schedule (*a*) of the *Income Tax Act* 1918 can a deduction be made under sec. 16 (1) of so much of the assessable income as is available for distribution and is distributed to the members or shareholders of the company.

CASE STATED.

On the hearing of an appeal by the Union Steamship Co. of New Zealand Ltd. (by its public officer, William Harding) against an assessment of it by the Federal Commissioner of Taxation for income tax for the year 1918-1919 to the Supreme Court of New South Wales, *Ferguson* J. stated a case, which was substantially as follows, for the opinion of the High Court :—

1. The appellant is a foreign company incorporated in the Dominion of New Zealand and having its board of directors and principal place of business and head office there, and is registered in several States of the Commonwealth as a foreign company.

2. The business of the appellant is that of a shipping company, and it owns and charters ships which trade between ports in various parts of the world, including trading between ports outside Australia and ports within Australia.

3. For the purposes of conducting its said business the appellant owns certain lands and is lessee of certain other lands within the Commonwealth, and in connection therewith receives in Australia certain rents. It also receives in Australia dividends upon shares held by it in Australian companies and interest upon investments made by it in Australia.

4. The appellant, in conducting its said business, carries passengers, live-stock, mails and goods shipped in Australia, and books passengers and cargo and makes all usual contracts in connection therewith in Australia and receives in Australia moneys payable to it for passage moneys, freights, the carriage of mails and subsidies.

5. This is an appeal from assessment of income tax for the financial year commencing on 1st July 1918, and, with the approval of the respondent, is based upon income derived during the year of income commencing on 1st April 1917 and ending on 31st March 1918, the date upon which the annual balance of the accounts of the appellant was ascertained.

6. The total profits of the appellant from all sources in the world for the twelve months ending on 30th September 1917 available for distribution amongst its members was the sum of £157,403, and its total profits from such sources for the twelve months ending on 30th September 1918 available for distribution amongst its members was the sum of £174,682. The appellant distributed amongst its members, out of the said sum of £157,403, a dividend amounting to the sum of £155,000, and out of the said sum of £174,682 a dividend amounting to the sum of £155,000. Out of its income for the relevant year of income the appellant paid to members of the Company resident in Australia dividends amounting to the sum of £20,216.

7. During the said year of income the sum of £981,991 became payable to the appellant in respect of the carriage of passengers, live-stock, mails and goods shipped in Australia, and during the said year of income the appellant received in Australia rents derived in Australia amounting to the sum of £2,412 and dividends and interest derived in Australia amounting to the sum of £15,448, and paid in Australia rates, taxes, repairs and contributions amounting to the sum of £4,512.

8. Pursuant to the *Income Tax Assessment Act* 1915-1918 the appellant duly made a return of its income for the said year of income, and as appears thereby the appellant's total assessable income from the sources hereinbefore mentioned was £116,059, being made up of 10 per cent of the above-mentioned sum of £981,991—£98,199; rents—£2,412; and dividends and interest—£15,448.

9. The appellant claimed in the said return to deduct from such assessable income the following sums:—Rates, taxes, repairs and contributions—£4,512; dividends paid to members of the Company resident in Australia—£20,216; the total deductions being £24,728: and further claimed that its total taxable income for the said year of income was therefore the sum of £91,331, being the said sum of £116,059 less the said sum of £24,728.

10. The respondent duly received the said return, and by notice of assessment dated 26th April 1919 assessed the taxable income of the appellant at the said sum of £91,331; and the appellant duly paid tax upon the income so assessed.

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11. On 10th September 1921 the respondent, by a notice of amended assessment, reduced the said deduction of £20,216 in respect of dividends paid to members resident in Australia to the sum of £12,494, thus making the taxable income of the appellant amount to the sum of £99,053, and claimed tax on the difference between that sum and the said sum of £91,331.

12. The appellant duly paid the additional sum so claimed and duly objected to the said amended assessment.

13. The respondent assessed the appellant upon the basis that the proper deduction to be allowed under sec. 16 (1) of the said *Income Tax Assessment Act* 1915-1918 in respect of dividends paid out of the income for the said year of income is to be calculated in the following manner :—

Australian profits available for distribution :		
Rents (as aforesaid)	£2,412	
Dividends and interest ..	£15,448	
	£17,860	
Less deductions as aforesaid ..	£4,512	
		£13,348
Appellant's total profits from all sources in the world for year ending 30th September 1917 available for distribution		£157,403
The same for year ending 30th September 1918 ..		£174,682
Dividends paid out of the said sum of £157,403 = £155,000.		
Proportion of same to be allowed $\frac{6674}{157403}$ of £155,000		£6,572
Dividends paid out of the said sum of £174,682 = £155,000.		
Proportion of same to be allowed $\frac{6674}{174682}$ of £155,000		5,922
Total distribution allowable		£12,494

14. The figure 6,674 referred to in the last preceding paragraph hereof is arrived at by dividing the said sum of £13,348 mentioned in such paragraph by two.

15. It is agreed between the parties that if the contentions of the respondent as expressed in pars. 17 and 18 are otherwise correct,

then the sum of £12,494 is to be taken to represent the proper proportion of the said sum of £13,348.

16. The appellant contends that the said sum of £98,199 must be deemed to be assessable income of the appellant derived in Australia within the meaning of sec. 16 (1) of such Act, and that the total income of the appellant derived in Australia therefore exceeds the said sum of £20,216 distributed to members of the appellant in Australia, and that the whole of the said sum of £20,216 constitutes a proper deduction under sec. 16 (1) of such Act.

17. The respondent contends that the said sum of £98,199, being the amount assessable against the appellant under sec. 22 of the said *Income Tax Assessment Act* 1915-1918, is pursuant to the provisions of the said section a hard and fast sum upon which the appellant is liable to pay tax without any deduction from the said sum, and that, therefore, the only income available for distribution within the meaning of sec. 16 (1) of such Act was the said sum of £13,348 and the appellant is not entitled under the said sec. 16 (1) to any deduction in excess of the said sum of £12,494.

18. The respondent further contends that the sum of £7,722, being the difference between £20,216 and £12,494 is not, within the meaning of sec. 16 (1) of the *Income Tax Assessment Act* 1915-1918, assessable income available for distribution and distributed to members or shareholders.

The questions stated for the determination of the High Court were as follows :—

1. (a) Is the appellant's contention as set out in par. 16 hereof correct; or (b) are the respondent's contentions as set out in pars. 17 and 18 hereof correct ?
2. Upon the facts set forth in this case what deduction is the appellant entitled to make under sec. 16 (1) of the *Income Tax Assessment Act* 1915-1918 ?

Leverrier K.C. (with him *Harper*), for the appellant. From the 10 per cent in respect of which under sec. 22 (2) of the *Income Tax Assessment Act* 1915-1918 the agent is to be assessed, the appellant is entitled under sec. 16 (1) to deduct so much of that sum as was

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available for distribution and was distributed to shareholders in Australia. That view is borne out by sec. 4 (5) and the Fourth Schedule of the *Income Tax Act* 1918. Unless the contention for the appellant is correct no rate is fixed, and no tax is imposed upon the appellant.

Flannery K.C. (with him *Alroy Cohen*), for the respondent. No deductions can be allowed from the 10 per cent. The sum in respect of which the 10 per cent is the taxable income under sec. 22 (2) has no relation to the profits of the Company, but is an artificial sum. What is deducted under the Fourth Schedule to the *Income Tax Act* 1918 is something which is paid out of the profits. The words " which has not been distributed to the members or shareholders of the company " are introduced into the Schedule in order to make it clear that the Legislature does not intend to tax income of a company which has been distributed among shareholders.

Cur. adv. vult.

NOV. 28.

The following written judgments were delivered :—

KNOX C.J. The appellant, whose principal place of business is out of Australia, as owner of ships carries passengers, live-stock, mails and goods shipped in Australia and receives payment of passage money and freight in respect of such carriage. In the relevant year the amount so received by the appellant was £981,991. The respondent, in assessing the appellant to income tax under the *Income Tax Assessment Act* 1915-1918, included in the assessment the sum of £98,199, being 10 per cent of the amount so received by the appellant, and refused to allow any deduction from the amount so included in respect of income to the amount of £20,216 distributed by the appellant to its shareholders in Australia. The question for decision is whether the appellant is entitled to such deduction. The respective contentions of the appellant and the respondent are stated in the special case as follows :—" 16. The appellant contends that the said sum of £98,199 must be deemed to be assessable income of the appellant derived in Australia within the meaning of sec. 16 (1) of such Act, and that the total income of the appellant derived

in Australia therefore exceeds the said sum of £20,216 distributed to members of the appellant in Australia, and that the whole of the said sum of £20,216 constitutes a proper deduction under sec. 16 (1) of such Act. 17. The respondent contends that the said sum of £98,199, being the amount assessable against the appellant under sec. 22 of the said *Income Tax Assessment Act* 1915-1918, is pursuant to the provisions of the said section a hard and fast sum upon which the appellant is liable to pay tax without any deduction from the said sum, and that, therefore, the only income available for distribution within the meaning of sec. 16 (1) of such Act was the said sum of £13,348 and the appellant is not entitled under the said sec. 16 (1) to any deduction in excess of the said sum of £12,494."

The sum of £13,348 mentioned in par. 17 represents income derived by the appellant in Australia from sources outside its shipping business and available for distribution to shareholders, and the sum of £12,494 is admittedly the proper proportion of the sum of £13,348 to be allowed as a deduction if the respondent's contention be correct.

By sec. 22 of the *Income Tax Assessment Act* 1915-1918 it is provided as follows :—"(1) Every person whose principal place of business is out of Australia and who either as owner or charterer of any ship carries passengers, live-stock, mails or goods shipped in Australia shall by his agent or other representative in Australia, when called upon by the Commissioner by notice published in the *Gazette* or by any other notice, make a return of the full amount payable to him (whether such amount be payable in or beyond Australia) in respect of the carriage of the passengers, live-stock, mails and goods. (2) The agent shall be assessed thereon and liable to pay tax on ten pounds per centum of the amount so payable." It is clear that the proportion of the gross receipts of the taxpayer on which tax is made payable by this section is an arbitrary amount which bears no necessary relation to the profits made by the taxpayer on the transactions from which the gross receipts are derived, and may be either greater or less than the amount of such profits. The amount is the same whether such transactions result in profits available for distribution to shareholders or in a loss.

By sec. 16 (1) of the Act it is enacted as follows: "For the

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KNOX C.J.

purpose of ascertaining the taxable income of a company there shall be deducted from the total assessable income, in addition to any other deductions allowed by this Act, so much of the assessable income as is available for distribution and is distributed to the members or shareholders of the company." The deduction allowed by this section is of " so much of the assessable income as is available for distribution and is distributed " to the shareholders. It is true that the assessable income of a company which is within the provisions of sec. 22 is the total amount of the gross receipts of the company in respect of the matters therein specified, but the deduction to be allowed is only of so much of that amount as is available for distribution and is distributed to shareholders. If the gross receipts be not greater than the amount expended in earning them, it is clear that no portion of the gross receipts is available for distribution to shareholders. In the present case there is nothing to show whether any portion of the sum of £981,991 was available for distribution to shareholders, and it is consistent with all the facts stated in the case that the transactions which resulted in the receipt by the Company of that amount were carried on at a loss. If that state of things existed, there would have been no income from this source available for distribution to shareholders although the Company might have derived from its other operations or from investments income out of which a distribution might properly have been made. It follows, in my opinion, that the appellant has failed to establish that the deduction claimed is authorized by sec. 16 (1) of the *Income Tax Assessment Act*.

But Mr. *Leverrier* relied on the provisions of the *Income Tax Act* 1918 as entitling the appellant to the deduction claimed. By sec. 4 (5) of that Act it is provided that the rates of income tax in respect of the income of a company should be as set out in the Fourth Schedule to the Act, which is in the words following :—" Rates of tax upon the income of a company.—(*a*) For every pound sterling of the taxable income of a company which has not been distributed to the members or shareholders of the company the rate of tax shall be two shillings and sixpence. (*b*) For every pound sterling of the income of a company distributed to the members shareholders or stockholders of the company who are absentees and of interest

paid or credited by the company to any person who is an absentee in respect of debentures of the company or on money lodged at interest with the company by such person the rate of tax shall be eightpence." It was argued that clause (*a*) of this schedule authorized the appellant to deduct any amount distributed to its members from its "*taxable*" income, and conferred a right of deduction independent of that given by sec. 16 (1) of the Assessment Act. I do not think the Schedule can be so construed. The method of ascertaining the taxable income of every taxpayer is prescribed by the *Income Tax Assessment Act*. That is, in fact, the main object of that Act. The *Income Tax Act* imposes the tax and declares the rates at which it is payable, but the amount of income on which tax is to be paid by each taxpayer is determined and the collection of the tax provided for by the Assessment Act, which by sec. 2 of the Tax Act is to be incorporated and read as one with the Tax Act. It is not the function of the Tax Act to prescribe the method of ascertaining taxable income, and, in my opinion, the words in the Fourth Schedule on which Mr. *Leverrier* relies do not confer any right on the taxpayer to make a deduction not authorized by the Assessment Act. It is clear that by sec. 16 (1) of the Assessment Act the deductions which a company is entitled to make in respect of profits distributed to shareholders must be made from assessable income in order to arrive at taxable income. The amount remaining represents the taxable income of the company. The company has no concern with so much of the amount deducted as has been distributed to shareholders who are not absentees. But the company is made liable, by sec. 16 (1A) (*a*), to pay income tax "in addition to any other income tax payable by it" on so much of the amount deducted from its assessable income under sec. 16 (1) as is distributed to shareholders who are absentees. The words in the Fourth Schedule of the Tax Act which are said to confer a right to make a deduction from the taxable income of the Company may well have been and probably were inserted in order to exclude from the income on which the rate of tax was 2s. 6d. in the £, so much of the assessable income of the Company as was distributed to absentee shareholders on which, by clause (*b*) of the Schedule, the company was liable to pay income tax at the rate of 8d. in the £.

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Isaacs J.

In my opinion the questions should be answered as follows:— 1 (a). No; 1 (b). Yes. 2. £12,494.

ISAACS J. The appellant is one of the "persons" described in sec. 22 of the *Income Tax Assessment Act* 1915-1918. During the relevant year of income there was payable to the appellant, as the full amount payable within the meaning of sub-sec.1 of that section, £981,991. The agent, therefore, became under sub-sec. 2 assessable on that amount and liable to pay tax on £98,199. That is to say, the full amount is the "assessable income" and the smaller amount is the "taxable income" of the appellant for the relevant period.

The appellant, however, is a company, and its liability in respect of the "taxable income" depends on the tax imposed on companies by the Taxing Act No. 41 of 1918. Sec. 3 of that Act enacts that "income tax is imposed at the rates and amounts declared in this Act." Sec. 4 (5) declares: "The rates of the income tax in respect of the income of a company shall be as set out in the Fourth Schedule to this Act." The Fourth Schedule, by par (*a*), says: "For every pound sterling of the taxable income of a company which has not been distributed to the members or shareholders of the company the rate of tax shall be two shillings and sixpence."

The contest arises in this way:— The appellant contends that par. (*a*) of the Fourth Schedule enables it to deduct from the "taxable income" of £98,199, such portion as it has distributed to members. There are formidable difficulties in the way. First, the contention assumes that "taxable income" there means a sum arrived at *before* the deduction of dividend. But by reason of sec. 3 of the Assessment Act (incorporated in the Taxing Act by sec. 2) "taxable income" means the amount of income remaining *after* all deductions allowed by the Assessment Act, and by sec. 16 (1) dividends distributed is one of these. No one would, of course, contend that in the case of an ordinary company two deductions of the same sum are intended, but, unless the impossible is assumed and the same words "taxable income" are given two inconsistent meanings, that result must follow with regard to this Company.

There is, as it seems to me, but one solution of the rather unguarded form of par. (*a*), namely, that it means that, for every pound sterling

of the taxable income of a company—not including therein any distributable portion of the company's income which has been in fact distributed to its members or shareholders—the rate of 2s. 6d. shall be paid. The negative words are thus merely a precautionary repetition of the provision of sec. 16 (1) of the Assessment Act. Applying that interpretation to the sum of £98,199, we have to ask whether any portion of the dividends paid by the Company is included in that sum. Clearly not. In the first place, the sum in question is not a specific identifiable portion of the receipts. It is merely a conceptual sum arrived at by an arbitrary arithmetical process adopted for the very purpose of avoiding actual operations. To introduce the actual distribution of dividends would, in addition to the objections already stated, be both incongruous and impossible —incongruous, because it would frustrate the manifest object of sec. 22, and impossible, because no part of the dividend distributed can be identified with the conceptual sum adopted as the "taxable income." The sum proper to be deducted is equally unidentifiable either in amount or service. The dividends are the result of general world trading, and are by no means to be attributed, at all events solely, to Australian trading.

The appellant's position finds no foothold either in law or finance. The result is that the "taxable income" is the net one-tenth arrived at under sub-sec. 2 of sec. 22, without any further deduction.

STARKE J. The appellant, the agent and public officer of the Union Steamship Co., is assessable to income tax, pursuant to sec. 22 of the *Income Tax Assessment Act* 1915-1918. The full amount payable to the Company for the carriage of the passengers, live-stock, mails and goods, within the provision of that section in respect of the financial year 1918-1919, amounted to £981,991. The agent was assessed thereon, and sec. 22, sub-sec. 2, enacts that the agent shall be liable to pay tax on ten pounds per centum of the amount so payable—that is, in this case, on £98,199.

"*Assessable income*" is defined as the gross income which is not exempt from taxation, and "*taxable income*" as the amount of income remaining after all deductions allowed by this Act have been made (see sec. 3). The sum of £981,991 is the assessable income of

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Starke J.

the Company and £98,199 the taxable income of the Company for the purposes of sec. 22. It is an arbitrary method of determining taxable income in certain cases, and renders inapplicable the provisions of secs. 14, 16 and 18 of the Act. So much was conceded, I think, in the argument before us. But reliance was placed upon the Act imposing the tax—the *Income Tax Act* 1918, No. 41. By sec. 4, sub-sec. 5, of that Act, it is provided that the rate of income tax in respect of the income of a company shall be as set out in the Fourth Schedule. This Schedule, so far as material, is in these words :—" Rates of tax upon the income of a company. —(*a*) For every pound sterling of the taxable income of a company which has not been distributed to the members or shareholders of the company the rate of tax shall be two shillings and sixpence." The taxable income of a company means, as already noticed, the amount of income remaining after all deductions allowed by the Act have been made. What, then, do the words of the Schedule " which has not been distributed to the members or shareholders of the company " mean ? They clearly refer to the provisions contained in sec. 16 of the Assessment Act. But that section provides that, for the purpose of ascertaining the taxable income of a company, there shall be deducted from the total assessable income, in addition to any other deductions allowed by the Act, so much of the assessable income as is available for distribution and is distributed to members or shareholders of the company. Under this section, therefore, the amount distributed to members or shareholders is or ought to be deducted before the taxable income is ascertained. Even if the amount was not deducted, owing to some mistake or inadvertence, still notice of assessment is conclusive evidence that the amount and all the particulars of the assessment are correct, except in proceedings on appeal against the assessment, when it shall be prima facie evidence only (see sec. 35).

Consequently it seems that the words in the Fourth Schedule can never come into practical operation if the method of ascertaining the taxable income of a company pursuant to sec. 16 is followed. Still, their operation in connection with sec. 22 must be considered. Here the full amount payable in respect of the carriage of the passengers, &c., *shall* be assessed. And the taxpayer is liable to

pay tax on ten pounds per centum of the amount so payable. No deduction is provided for or allowed. And it is enacted that the Assessment Act 1915-1918 shall be incorporated and read as one with the Tax Act (Tax Act 1918, No. 41, sec. 2). The words in the Schedule must in these circumstances be related to the provisions of the Assessment Act. They cannot be so construed as to cut across and render nugatory the basis and method of computation adopted in sec. 22. On the contrary, the words should be related to some exemption or deduction or allowance contained in the Assessment Act. True it is that the words will never come into practical operation in this view and are superfluous, but that seems a lesser evil than nullifying the basis and method of computation provided in secs. 16 and 22 of the Assessment Act.

This case might, I think, have been disposed of on the ground that the facts stated in the case do not establish the distribution of the sum of £98,199, or any part of it, among members or shareholders of the Company; but I prefer to rest my opinion upon the true construction of the Acts.

The questions should be answered:—1 (a). No; 1 (b). Yes. 2. The sum of £12,494.

Questions answered:—1 (*a*). *No*; 1 (*b*). *Yes*.
2. £12,494.

Solicitors for the appellant, *Minter, Simpson & Co.*

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

B. L.