[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR SOUTH AUSTRALIA } APPELLANT;

AND

WM. KUHNEL & COMPANY LIMITED . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1925.

ADELAIDE, *Sept.* 29, 30.

MELBOURNE, *Nov.* 4.

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

War-time Profits Tax—Assessment—Profits of company—Deduction—Commonwealth income tax—Shareholder a company—Trustee—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *sec.* 15 (4), (5)—*Income Tax Assessment Act* 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *secs.* 26, 27 (2).

In determining the deduction, from the profits for the accounting periods 1916-1917 and 1917-1918 of a company, provided for by sub-secs. 4 and 5 of sec. 15 of the *War-time Profits Tax Assessment Act* 1917-1918, of Commonwealth income tax paid in respect of those profits, according to the method laid down in *Kuhnel & Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*S.A.*), (1923) 33 C.L.R. 349: the amount of the income tax which, in pursuance of sec. 15 (5) (*c*) of that Act, would have been payable by a company, which is a shareholder in the taxpayer company and holds its shares in trust for beneficiaries, if the share of the profits credited or paid to it had been its only income, must be estimated on the basis (i.) that the rate at which income tax was payable by a company was that fixed by the relevant *Income Tax Act* and (ii.) that under sec. 27 (2) of the *Income Tax Assessment Act* 1915-1916 a certain deduction was to be made from the income tax payable by a trustee; but the deduction allowed for income distributed to beneficiaries pursuant to sec. 27 (2) must be confined to the distributions made in the respective accounting periods.

Kuhnel & Co. Ltd. v. *Deputy Federal Commissioner of Taxation* (*S.A.*), (1923) 33 C.L.R. 349, explained.

Decision of Supreme Court of South Australia (*Murray* C.J.): *Kuhnel & Co. Ltd.* v. *Deputy Commissioner of Taxation* (*S.A.*), (1924) S.A.S.R. 442, reversed.

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DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.) v. KUHNEL & CO. LTD.

APPEAL from the Supreme Court of South Australia.

On the hearing of appeals by Wm. Kuhnel & Co. Ltd. to the Supreme Court of South Australia from assessments for war-time profits tax for the several periods 1916-1917, 1917-1918 and 1918-1919, *Murray* C.J. stated a case for the opinion of the High Court upon certain questions, and the High Court answered those questions. The case stated and the answers are set out in *Kuhnel & Co. Ltd.* v. *Deputy Federal Commissioner of Taxation (S.A.)* (1). The only material question was substantially: What was the proper method of determining the deduction in respect of Commonwealth income tax in accordance with sec. 15 (5) (*c*) of the *War-time Profits Tax Assessment Act* 1917-1918? The material portion of the answer to that question was as follows: "The true method for determining the deduction to be made (a) as to the profits of each of the accounting periods 1916-1917 and 1917-1918 is to find the amounts of income tax that would have been payable by each shareholder in the Kuhnel Company if the share of the said profits credited or paid to him had been the only income derived by him from sources within Australia whether the shareholder is a trustee or not."

The appeals subsequently came again before *Murray* C.J., who held that the effect of the words "whether the shareholder is a trustee or not" in the answer of the High Court was that the income tax of a shareholder was to be calculated according to the same method whether he was a trustee or not, and that the rate of tax to be applied in calculating the deduction in respect of the amount of income tax which would have been payable by Elder's Trustee and Executor Co. Ltd., which was a shareholder in the appellant Company, should be that applicable to an individual and not that applicable to a company. The learned Chief Justice thereupon made an order reducing the assessments of the war-time profits tax for the year 1916-1917 from £764 0s. 7d. to £302 12s. 6d., and that for the year 1917-1918 from £1,441 17s. 6d. to £969 5s.: *Kuhnel & Co. Ltd.* v. *Deputy Commissioner of Taxation (S.A.)* (2).

From that decision the respondent now appealed to the High Court.

Piper K.C. (with him *Ward*), for the appellant.

(1) (1923) 33 C.L.R. 349.

(2) (1924) S.A.S.R. 442.

Skipper (with him *Burton Hardy*), for the respondent.

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This appeal depends upon the meaning to be attributed to the words " whether the shareholder is a trustee or not " in the order made by this Court in *Kuhnel & Co. Ltd.* v. *Deputy Federal Commissioner of Taxation (S.A.)* (1). *Murray* C.J. says, in effect, that the order requires the income tax of each shareholder in the Kuhnel Company to be calculated regardless of the fact that the shareholder, in any particular case, fills the position of a trustee and is entitled as trustee to the benefit of certain deductions under the *Income Tax Assessment Act* 1915-1916, e.g., sec. 27 (2). But a reference to the point in issue in *Kuhnel's Case*, in our opinion, negatives that view. The question submitted to the Court was whether " the aggregate of the amounts of tax that would have been payable by each shareholder should be ascertained by reference to the profits credited or paid *to each shareholder* in the Kuhnel Company or by reference to the *shares or interests in those profits of the beneficiaries* under the will of William Kuhnel " (2). Now, the Court held the tax must be ascertained by reference to the profits credited to the *shareholder*, whether he was or was not a trustee, and not by reference to what the beneficiaries received. Hence the words " whether the shareholder is a trustee or not." But this does not determine the amount of tax that would have been payable by the shareholder. That amount depends upon the application of the relevant tax Acts to the given case, including, of course, the provisions as to the rates of tax upon the income of a company, and of sec. 27 (2) of the *Income Tax Assessment Act* 1915-1916. But the deduction allowed for income distributed to beneficiaries pursuant to that section must be confined to the distributions in each accounting period.

The appeal should be allowed, and the case remitted to the Supreme Court, unless the parties, in view of the decision upon this appeal, can now agree, as was suggested by them, upon the proper

(1) (1923) 33 C.L.R. 349. (2) (1923) 33 C.L.R., see pp. 363, 367.

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amount of war-time profits assessable to war-time profits tax and the amount of tax payable.

ISAACS J. There are three questions to be answered :—(1) The interpretation of certain words in the former order of this Court, namely, " whether the shareholder is a trustee or not." (2) If a trustee is a company, is the tax which is chargeable a tax on the company flat rate or on the individual progressive rate ? (3) Is sec. 27 (2) of the Assessment Act of 1915 applicable, and, if so, can distributions to beneficiaries after the close of the accounting period be taken into the account for that period ?

The answers are :—(1) The words are rightly interpreted by *Murray* C.J., namely, " that the income tax of a shareholder is to be calculated according to the same method whether he is a trustee or not." In other words, you ignore his trusteeship for that purpose, that is, for the purpose of *assessment* apart from the application of sec. 27 (2). The words referred to had reference to sec. 26 (1) of the Act as it then stood. As to liability to *pay* the full amount of tax so assessed, sec. 27 (2) might have to be applied. (2) The taxing Act —as distinguished from the assessment Act—places a flat rate only on companies. It makes no exception in the case of the company being a trustee. The assessment Act cannot alter that, and it does not purport to do so. (3) Sec. 27 (2) is applicable. The difficulty in applying it presenting itself to the mind of *Murray* C.J. may be disposed of by remembering that the observations in *Kuhnel & Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (1) which occasioned the difficulty were directed to method only and not to working out the details of accounts. As to the rest of the third question the distribution referred to is confined to the accounting period. Otherwise, in some cases, and quite apart from legal requirements, sub-sec. 2A of sec. 27 might operate unfavourably to the trustee, as if the minor in the accounting period attained majority in the next year.

The appeal should be allowed. But as the materials for completing the assessment are not before us, the matter should be remitted to the Supreme Court of South Australia to proceed in conformity with the judgment of this Court, unless the parties can agree as to the amount of tax.

(1) (1923) 33 C.L.R., at pp. 360-361.

HIGGINS J. All difficulty in this case vanishes when it is once grasped that the question which the Court answered was merely as to the proper deduction from the *profits*—the gross profits—taxable under the *War-time Profits Tax Assessment Act*; and that the question did not relate to the proper deduction from the *tax* assessable to a trustee, under the *Income Tax Assessment Act* 1915 (secs. 26, 27 (2) and (2A)).

The question which the Court answered related expressly, and related only, to the mode of calculating " the deduction in respect of Commonwealth income tax to which the " Kuhnel " Company is entitled under sub-sec. 4 and par. (*c*) of sub-sec. 5 of sec. 15 " of the *War-time Profits Tax Assessment Act*. The Court had no duty or right to go beyond the question asked.

As stated by the learned Chief Justice of South Australia in par. 21 of the case, the Commissioner, in calculating the deduction in respect of Commonwealth income tax under sec. 15 (5) (*c*), regarded the words " the aggregate of the amounts of tax that would have been payable by each *shareholder* " as meaning (so far as the profits credited or paid to the trustees of the estate of the testator are concerned) the aggregate of the amounts that would have been payable by the beneficiaries in the estate. This view we thought to be wrong; and as to the two accounting periods 1916-1917 and 1917-1918, we said that the true method for determining this deduction from the profits was to find the amounts of income tax that would have been payable by each *shareholder* (Elder's Trustee Co. and four nominees were the shareholders). We added " whether the shareholder is a trustee or not," for the obvious reason that under the *Income Tax Assessment Act* 1915, before it was amended by the Act No. 18 of 1918, it was provided that " any person who derives income as a trustee shall be assessed and liable in respect of income tax as if he were beneficially entitled to the income " (sec. 26 (1)). We were not asked any question as to the deduction from the income *tax* assessable to him of so much of the tax as was due to the income distributed to beneficiaries, or deemed to be distributed (sec. 27 (2), (2A)).

The scheme of the Income Tax Acts was drastically altered, however, by the Act No. 18 of 1918, which by its sec. 21 provided

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that a trustee shall *not* be liable to pay tax as trustee (ordinarily), and by sec. 22 repealed sec. 27 of the Act of 1915. There is no need now (ordinarily) for any deduction from a trustee's tax.

I concur in the view of the Chief Justice of the Supreme Court that under our order on the case stated the method applicable to the accounting period 1917-1918 is to be the same as that which applies to the accounting period 1916-1917.

I am also of opinion that the rate of income tax to be applied, for these two accounting periods, in calculating the deduction from profits for the purpose of the war-time profits tax, so far as regards the shares held by Elder's Trustee Co., is the rate of tax applicable to companies. The result is anomalous, as *Murray* C.J. points out; but it is in accordance with the Act. It is not at all surprising that there should be some confusion arising from these Acts.

The appeal must be allowed, the order of the Supreme Court set aside and the case remitted to the Supreme Court for adjustment of the figures on the lines indicated. We have not the materials for adjusting the figures.

RICH J. The meaning of the formal order in *Kuhnel's Case* (1) has been discussed on this appeal. For my part I intended the words "whether the shareholder is a trustee or not" to mean regardless of the fact that the shareholder is a trustee. That case was concerned with method only. The relevant facts necessary to raise the present questions were not before us; argument was not directed to them, and the formal judgment expressed no opinion on them. For the first time we are asked to express an opinion as to the rate of tax applicable in calculating the deduction in respect of the Company's share of income. In my opinion the flat rate is to be applied and regard must be had to the provisions of sec. 27 of the *Income Tax Assessment Act* 1915-1916.

Appeal allowed. Case remitted to the Supreme Court unless the parties can agree to the amount of the war-time profits tax.

(1) (1923) 33 C.L.R. 349.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Powers & Jeffries.*

Solicitors for the respondent, *Scammell & Skipper.*

B. L.

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DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.) *v.* KUHNEL & CO. LTD.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

ELLIS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1925.

SYDNEY, *Dec.* 11, 18.

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

Criminal Law—Trial—Accused persons tried together—Comment made by one on fact that another has refrained from giving evidence—Substantial miscarriage of justice—New trial—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *secs.* 402, 405, 407—*Criminal Appeal Act* 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 6.

A comment made by one of two accused persons being tried together upon the fact that the other has refrained from giving evidence on oath on his own behalf is within the prohibition of sec. 407 (2) of the *Crimes Act* 1900 (N.S.W.), which provides that "it shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf."

That comment having been made and the accused in respect of whom it was made having been convicted, there is a miscarriage of justice, but that miscarriage of justice is not necessarily substantial within the meaning of sec. 6 of the *Criminal Appeal Act of* 1912 (N.S.W.).

Special leave to appeal from the order of the Supreme Court of New South Wales (Full Court): *R.* v. *Ellis*, (1925) 25 S.R. (N.S.W.) 575, rescinded.

APPEAL from the Supreme Court of New South Wales.

John Matthew Ellis and James Beresford Harvey were on 30th September 1925 tried together before the Supreme Court in its