[HIGH COURT OF AUSTRALIA.]

SHARP, STEVENSON & HARE PROPRIETARY LIMITED . . . . APPELLANT;

AND

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

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MELBOURNE, *Feb.* 28; *Mar.* 1.

SYDNEY, *April* 11.

Isaacs, Higgins, Powers, Rich and Starke JJ.

War-time Profits Tax—Assessment—Capital of business—"Trading profits invested in the business"—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *sec.* 17 (1).

Agreements had been entered into between the appellant, which was a trading company, and four persons, who held substantially the whole of the shares in the appellant, by which each of the four persons was employed by the appellant in its business and by which each was to be paid a weekly salary and a further sum representing as to two of them one-third each, and as to the other two one-sixth each, of the net profits of the appellant. It was also provided that the shares of the profits were to be payable in such manner and at such times as the directors might direct. From time to time resolutions were passed at the annual meetings of shareholders that the net profits should be placed to the credit of the various shareholders' deposit accounts in terms of the agreements entered into, and that the amounts on deposit should be payable in such manner and at such times as the directors should direct, and until paid or satisfied should carry interest at a certain rate on the daily balance. Deposit accounts in the names of the four persons were kept in the books of the appellant in which from time to time were credited their respective shares of the profits and from time to time payments were made out of the accounts by the authority of the directors, but considerable sums always remained to the credit of those accounts. In respect of its war-time profits tax assessment for the year 1918-1919 the appellant claimed that for the purpose of calculating the pre-war standard of profits of its business a sum representing the total of the amounts standing to the credit of these deposit accounts on 31st December 1917 should be treated as part of the capital of its business.

Held, by *Isaacs*, *Higgins* and *Powers* JJ. (*Rich* and *Starke* JJ. dissenting), that no part of the sum was accumulated trading profits invested in the business, within the meaning of sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918, and that therefore the sum should not be treated as part of the capital of the business.

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APPEAL from the Federal Commissioner of Taxation.

The appellant, Sharp, Stevenson & Hare Pty. Ltd., was a proprietary company which carried on the business of costume and mantle maker. Its issued capital was £7,002 in 7,002 shares of £1 each, and at the relevant times the shareholders were Samuel Francis Sharp, who held 4,074 shares; Ernest Alan Stevenson, who held 1,463 shares; James Gordon Hare, who held 732 shares; Annie Jane Hare, who held 732 shares; and E. G. C. Steele, who held 1 share. The first four shareholders above mentioned were employed by the appellant in its business under written agreements. The agreement with Sharp contained a clause which provided that in consideration of his services "the said company agrees to pay the said Samuel Francis Sharp during the continuance of this agreement a salary of £8 per week and a further sum of money equivalent to one-third of the net profits for each year so long as he or his legal personal representatives shall be the holder or holders of the number of shares in the company now held by him. . . . The net profits to be determined yearly as at 31st December payable in such manner and at such time as a majority of directors in meeting shall direct." Each of the other agreements contained a similar clause, except that in each case the amount of the salary was different and that in the cases of James Gordon Hare and Annie Jane Hare the share of the net profits was one-sixth instead of one-third. At a general meeting of the shareholders in each year from 1916 to 1918 a resolution was passed to the effect that the net profits be placed to the credit of the various shareholders deposit accounts in the proportions set out in the respective agreements and that such deposits should be payable in such manner and at such time as the majority of directors in meeting should direct and that such deposits until paid or satisfied should carry interest on the daily balance at the rate of 6 per cent per annum. In the books of the appellant, deposit accounts were kept in the names of the four

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persons above mentioned, in which were credited from time to time the respective shares of the net profits and interest thereon, and out of these accounts payments were made from time to time to those persons in pursuance of resolutions of the directors. At the material times a large sum of money remained to the credit of each of the four persons in the deposit accounts, and on 31st December 1917 the total amount to the credit of the four deposit accounts was £8,973 8s. 8d. In respect of its war-time profits tax for the year 1918-1919 the appellant claimed, in substance, that for the purpose of calculating the capital of the business the net yearly profits of the appellant during the preceding years, that is, the above sum of £8,973 8s. 8d., should be taken into account as being accumulated trading profits invested in the business within the meaning of sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918. The Federal Commissioner of Taxation refused to allow this claim, and from his decision the appellant appealed to the High Court.

The appeal coming on for hearing before *Knox* C.J. was referred by him to the Full Court.

Other material facts are stated in the judgments hereunder.

Owen Dixon K.C. (with him *Herring*), for the appellant. The net profits of the appellant were accumulated trading profits invested in its business, within the meaning of sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918. The sums which were credited to the deposit accounts of the four persons were never distributed to them and never belonged to them. No cause of action in respect of those sums was ever created, and the amounts which appear to the credit of those accounts cannot be treated as loans by those persons to the appellant (*Inland Revenue Commissioners* v. *Port of London Authority* (1)). If profits are kept in the business and are represented in a concrete form as stock-in-trade they are accumulated profits invested in the business. [Counsel also referred to *Merlimau Rubber Estates Ltd.* v. *Inland Revenue Commissioners* (2); *McKellar* v. *Federal Commissioner of Taxation* (3).]

(1) (1923) A.C. 507, at p. 514.
(2) (1923) A.C. 283.
(3) (1922) 30 C.L.R. 198.

C. Gavan Duffy, for the respondent. In order to constitute accumulated trading profits invested in the business, there must be shown a definite intention to permanently use those profits for the purpose of the business, and the mere use of the profits in the business is not sufficient (*Hooper & Harrison Ltd.* v. *Federal Commissioner of Taxation* (1)). There must be some definite act by the company, such as the placing of the profits in a particular fund which can only be used for capital purposes. There must first be an accumulation and then an investment.

Owen Dixon K.C., in reply.

Cur. adv. vult.

April 11.

The following written judgments were delivered :—

ISAACS J. This is an appeal under sec. 28 of the *War-time Profits Tax Assessment Act* 1917-1918, the relevant profit-making periods being the calendar years 1917 and 1918, the latter half of the former and the first half of the latter year being included in the assessment year. The question is whether, in respect of the financial year ending 30th June 1919, the appellant company is entitled to have computed as capital certain sums of money amounting in all to £8,973 8s. 8d., which have been disallowed by the Commissioner. An alternative contention was put forward by the Commissioner that at all events some portion of the sum should be deducted for expenses in the shape of salaries. This alternative contention it is not necessary to consider. The sum of £8,973 8s. 8d. consists partly of the sum of £2,705 10s. credited to Samuel Francis Sharp in his deposit account, and is made up partly of interest at 6 per cent, which was allowed to him as on a deposit, and partly of three other sums of £3,113 4s. 2d., £1,348 18s. 6d. and £1,805 16s., which are made up of principal and interest similarly credited and allowed to Ernest Alan Stevenson, Annie Jane Hare and James Gordon Hare. Those sums were so credited and allowed in the following circumstances :—The appellant company was incorporated on 10th March 1914, for the purpose (*inter alia*) of acquiring and taking over

(1) (1923) 33 C.L.R. 458, at pp. 469, 490.

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the clothing business of Samuel Francis Sharp. Samuel Francis Sharp, Ernest Alan Stevenson, James Gordon Hare and Annie Jane Hare were directors of the company. On 16th December 1915 the company agreed with Sharp to employ him as managing director for fifteen months from January 1916, at a salary of £8 per week and a further sum equivalent to one-third of the net profits for each year, with some qualifying provisions not material. On the same date the company agreed with Stevenson to employ him for fifteen months from 1st January 1916—determinable—as cutter and designer, at £6 per week and one-third of the net profits for each year. On the same date James Gordon Hare and Annie Jane Hare were engaged as assistant manager and salesman and as cutter and designer respectively for fifteen months at the respective salaries of £6 and £4 10s. per week, with (*inter alia*) one-sixth of the net profits of each year. There were further agreements for three years with each of a similar nature, with increased salaries, but the same proportion of net profits. The company's balance-sheet as at 31st December 1915 showed a net profit of £1,202 8s. 9d. On 24th February 1916 it was resolved by the general meeting of shareholders that the net profits of £1,200 for the year be placed to the credit of the various shareholders' *deposit* accounts in the proportion set out in the agreements of 1915; that the *deposits* should be payable in such manner and at such times as the majority of directors direct, and until paid or satisfied should carry interest on the *daily balance* at 6 per cent per annum. The appropriation account shows that of the net £1,200 there was appropriated to Samuel Francis Sharp's deposit account £400, to Stevenson's deposit account £400, to James Gordon Hare's deposit account £200, and to Annie Jane Hare's deposit account £200. The balance-sheet for 31st December 1916 showed a net profit of £4,038 10s. 10d., and on 23rd February 1917 a similar appropriation of all the net profits of the year took place; and corresponding credits entered in the respective deposit accounts of the persons mentioned. Interest is also shown as credited. The balance-sheet for 31st December 1917 showed a net profit of £5,224 2s. 3d., and on 8th February 1918 a similar appropriation was resolved upon in respect of that sum less

£360 1s. 2d. for war loan and income tax. That deduction made, the balance appears in proper proportions in the respective deposit accounts. The balance-sheet for 31st December 1918 shows a net profit of £3,687 16s., which, after income tax reductions stands at £3,002 7s. 10d. No profits are ever brought forward from one year to another to the credit of profit and loss account.

It seems to me impossible to support the taxpayer's contention that the net profits made in 1917 were in 1918 "accumulated trading profits invested in the business" within the meaning of sec. 17, sub-sec. 1, of the *War-time Profits Tax Assessment Act* 1917-1918. By agreement the company was bound to divide its net profits as they appeared at the end of each year. The company did divide them, and converted them from undistributed profits of the company distributable at its will (apart from the agreements) into "deposits" belonging to the individual shareholders, and payable —that is, payable *as deposits*, not as a share of profits—whenever the directors deemed advisable. The resolutions distinctly say either "such *deposits* to be payable" (as in 1916), or "payable" (as in 1917), or "repayable" (as in 1918).

No doubt exists in my mind—treating the records of the company as honestly representing real transactions—that the agreements were carried out and intended to be carried out, the legal rights of the shareholders to specific amounts of the moneys represented by appropriated net profits were made clear and reduced to the character of *moneys deposited* with the company, and on which, until those deposits were paid—that is, *repaid*—interest ran.

The net profits of each year were thus absorbed by a transaction which combined in itself the double process of passing the right in the sum represented by the profits owned by the company to the individuals as their own money and then returning the same money in separate rights as loans to the company at 6 per cent interest, repayable when the directors thought convenient. But the moneys thereby lost their character of profits, whether previously accumulated or not. They consequently lost their capability of future accumulation as profits, and they necessarily ceased to exist as profits, the property of the company.

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It is not unimportant to observe that the accounts of the company, if looked at, say by the Commissioner of income tax, as they inevitably would be each year, would show that the profits of the company had been distributed year by year. That is important as showing a very strong reason for attributing reality to the accounts if honesty is assumed. By sec. 14 of the *Income Tax Assessment Act* 1915-1918 then in force, it was enacted that the income of any person should include (*inter alia*) "dividends . . . credited . . . to any . . . shareholder," &c. And by sec. 16 it was enacted that "for the purpose of ascertaining the taxable income of a company there shall be deducted from the total assessable income . . . so much of the assessable income as is available for distribution and is distributed to the members or shareholders of the company." The rates on the amounts purporting to be distributed to the individuals were lower than the flat rate of 2s. 6d. in the pound then payable on the undistributed income of the company. It would be strange if by means of this system of accountancy opposite results, both operating to the disadvantage of the Treasury, could be reached.

I therefore do not feel constrained to pursue the question of "accumulation" or "investment." But I must add that the "investment" required to bring the case within sub-sec. 1 of sec. 17, is investment of profits belonging to the company, profits which the company could, if it chose, at its own absolute will devote to any other purpose of the company. For instance, it means profits which at the company's will—unless its articles interpose—could be used, for instance, for dividends or reserves. Profits of that nature, if accumulated so as to be identifiable as capital would be, and if used in the business as capital, whereby the owner of the business otherwise loses the use of his own money so treated as capital, are by sec. 17 regarded for this purpose as capital. But where, as here, the owner expressly appropriates his profits to satisfy his existing contractual obligations, although he stipulates for the right contractually to use the moneys as a loan at interest, it is not statutorily treated as capital, but by sec. 15 (15) its use is arranged for in the way of interest.

Needless to say, my conclusions negative accumulation. Whether, in view of the majority view in *Hooper and Harrison's Case* (1), I should be justified in negativing also investment, I think it unnecessary to say.

In my opinion the appeal fails.

HIGGINS J. The only objection to the assessment left for our decision is objection 3—substantially, that moneys deposited with the company and bearing interest should be treated as capital under sec. 17 of the Act. The appeal as to the assessment is as to the financial year 1918-1919—1st July 1918 to 30th June 1919. According to the company's balance-sheet as at 31st December 1917 four shareholders had then deposits amounting, with accrued interest, to £8,973 8s. 8d.

Sec. 17 (1) provides: "The amount of the capital of a business shall be taken to be the amount of its capital paid up by the owner in money or in kind, together with all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit respectively of profit and loss account." It is not contended that these deposits constitute part of the amount of the capital of the business paid up in money or in kind; or that they form part of the balances brought forward from previous years to the credit (or debit) of profit and loss account: but it is urged that they are comprehended under the words "accumulated trading profits invested in the business." I confess that from first to last I have been unable to understand how deposits in the company—loans to the company—can rationally be treated as "invested in the business," or even as "accumulated trading profits." The words used in the section would seem to apply fully to the case of bonus shares in a company. A prosperous company declares a dividend from accumulated trading profits, and the shareholders consent to the dividends being applied in payment for new shares which they take up in the company. This is a clear addition to the capital of the company; and the additional capital is "invested in the business." If the section applied to companies only, an apt expression would be "accumulated trading profits applied

(1) (1923) 33 C.L.R. 458.

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in payment for new shares"; but as the section applies also to businesses owned by individual persons, the more general expression "invested in the business" is used. But the amount must be "invested," not lent. When A lends money on a mortgage to the owner of a business, he does not "invest" in the business, but he invests in a mortgage. If he "invest in the business" he would ordinarily expect a share in the profits of the business. To "invest" means "to lay out (money or capital) in the purchase of property, especially for permanent use as opposed to speculation; put (money or capital) into other forms of property" (*Standard Dictionary*). A shareholder who lends on deposit is in no different position as to the deposit from an outsider who lends on deposit. The argument of the appellant here is inconsistent with the views of all the members of this Court who took part in the decision in *Hooper & Harrison Ltd.* v. *Federal Commissioner of Taxation* (1). Personally, I am still of the opinion that "the mere use of the reserve profits in the business is not enough; there must be a definitive appropriation of the reserve to capital, so that it is no longer available for dividends, or for purposes other than the purposes of capital" (2).

Under the memorandum of association (clauses II. (15) and III. (c)) the company is empowered to receive money on deposit or loan from its shareholders for fixed periods or *payable at call* whether bearing or not bearing interest; and from no others. At a general meeting of shareholders held on 24th February 1916, a resolution was carried "that the net profits of £1,200 (the result of the year's trading) be placed to the credit of the various shareholder's deposit accounts in the proportion set out in the agreements entered into and duly executed on 16th December 1915. Such deposits to be payable in such manner and at such time as the majority of directors in meeting shall direct and until paid or satisfied shall carry interest on the daily balance at the rate of 6 per cent per annum." A similar resolution was carried at the general meeting of 23rd February 1917, and at the general meeting of 27th February 1918. From time to time the directors passed resolutions purporting to allow withdrawals. No attempt has been made to show that deposits withdrawable *at the will of the directors* instead of "for

(1) (1923) 33 C.L.R. 458.

(2) (1923) 33 C.L.R., at p. 490.

fixed periods or payable at call" were within the powers of the company; but even if they were within the powers, it does not follow that the loan was "an investment in the business of the company."

The agreements referred to in the resolutions of the shareholders were agreements made by the individual shareholders with the company as to the proportions in which net profits were to be divided among the shareholders. These proportions were different from the proportions in which the shareholders held shares. There has been no argument as to the validity of these agreements, in face of the articles of association.

In my opinion, the appeal should be dismissed.

POWERS J. This is an appeal from an assessment made by the Commissioner of Taxation of the Commonwealth of Australia. The appellant in December 1917, pursuant to sec. 17 of the *War-time Profits Tax Assessment Act* 1917, furnished to the Commissioner a return for the purpose of calculating the pre-war standard of profits of its business. The Commissioner, pursuant to sec. 21 of the above Act, caused an assessment to be made for the purpose of ascertaining the profits of the company upon which war-time profits tax should be levied for the period beginning on 1st July 1918 and ending on 30th June 1919. The present appeal is against that assessment. The appellant objected to the assessment on six grounds, but has withdrawn all objections except No. 3: "that 18 per cent decrease on 'capital' is incorrect, for the capital has materially increased from year to year as will be observed from the balance-sheets furnished each year by the company." In objection 3 the reasons were given why the decision of the Commissioner was wrong.

The only questions for the Court to decide are whether what are alleged in the objections to be "accumulated trading profits" are such profits within the meaning of sub-sec. 1 of sec. 17 of the *War-time Profits Tax Assessment Act* 1917, and whether, if they were, they were "invested in the business" within the meaning of the same sub-section. Sec. 17 (1) enacts: "The amount of the capital of a business shall be taken to be the amount of its capital

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paid up by the owner in money or in kind, together with all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit respectively of profit and loss account." In the objection to the assessment it is alleged that *the "capital" has materially increased.* It is admitted that the capital of the company has not increased, but it is claimed that the "capital of the business" referred to in sec. 17 has increased by accumulated trading profits. That is all it is necessary for the appellant to show. The appellant claims that the sums in question are "accumulated trading profits" because they consist of profits which have not been drawn out of the business by the members entitled to them and are profits which cannot be drawn out of the company's funds without the consent of the company; and that they have been used in the business for purchasing stock which has not been divided or sold. It is true that the profits in question have not been drawn out of the business, but under agreements between the company and the working members of the company these profits are ascertained each year and credited to the working members for *services performed,* not in proportion to their holdings in the capital of the company, but in proportion to the value of the services performed by them for the company. No dividends can be paid to ordinary members of the company, because the four working members are entitled in varying proportions to all the profits of the company for services performed. 7,000 shares out of 7,002 shares in the company are held by the working members. Not only are the shares of so-called accumulated profits (moneys due for services rendered) allotted each year to the working members in the proportions agreed, but they are recognized by the company as creditors of the company by being paid 6 per cent interest per annum on the amounts so credited as deposits in the company until they are withdrawn from the company by the consent of the directors. Not only are the so-called accumulated profits allotted to the members by name at each balance and interest paid by the company to them on the amounts, but the sums appear in the balance-sheets of the company for the years in question under the head of *Liabilities* in the same way as the following: "Bank overdraft," "bills payable," "sundry creditors." The balance-sheet

(so far as liabilities are concerned) as at 31st December 1917 was as follows :—*Liabilities.*—Nominal capital (20,000 shares of £1 each), £20,000, less unallotted capital (12,998 shares of £1 each), £12,998, £7,002 ; bank overdraft (including interest to date), £4,610 15s. ; bills payable, £1,039 13s. 4d. ; sundry creditors, £3,657 6s. 3d. ; S. F. Sharp deposit account (including interest accrued), £2,705 10s. ; E. A. Stevenson deposit account (including interest accrued), £3,113 4s. 2d. ; A. J. Hare deposit account (including interest accrued), £1,348 18s. 6d. ; J. G. Hare deposit account (including interest accrued), £1,805 16s. ; reserve fund (invested in war bonds as per contra), £200 : £25,483 3s. 3d. The sums in question are not shown in any balance-sheet as accumulated trading profits.

In the circumstances mentioned I hold that the sums in question shown in the balance-sheet are not " accumulated trading profits " within the meaning of sec. 17, but are sums allotted *each year* to the working members as debts due by the company for services performed, and, if they are invested in the business, they are not invested within the meaning of sec. 17, but only invested in the same way as moneys received from the bank overdraft are invested in the business. I cannot see that the fact that the amounts due to the working members may have been used to buy stock converts them into " accumulated trading profits " invested in the business within the meaning of sec. 17 (1) of the *War-time Profits Tax Assessment Act.*

I hold that the Commissioner was right, in the circumstances of this case, in not regarding the debts credited to the members for services rendered as accumulated trading profits invested in the business within the meaning of sec. 17, and therefore that the appeal should be dismissed.

RICH J. It has been pointed out more than once that the pivot on which the solution of any question relating to sec. 17 of the *War-time Profits Tax Assessment Act* 1917-1918 turns is that the business only is the subject of the tax. Owners may change but the business continues. A business may be owned by one or more individuals or by an incorporated company so that where the word " capital " occurs it is not used in the technical sense attributed to such

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companies. "External consideration of what capital may ordinarily mean is really irrelevant and may lead to confusion and mistake" (*Merlimau Rubber Estates Ltd.* v. *Inland Revenue Commissioners* (1)). What, then, is the meaning of capital as defined by the section? Does the sum in question fall within the words of the definition? This case, if at all, falls within the second part of the definition—"together with all accumulated trading profits invested in the business." I cannot find in *Hooper & Harrison Ltd.* v. *Federal Commissioner of Taxation* (2) that a majority of the Judges concerned agree upon the construction of the section; and in the absence of a binding decision the matter is still open. The sum at issue represented at one time accumulated trading profits of the business of the company, and they were put or laid out, used or employed in the business. But Mr. *Gavan Duffy* in his very able argument suggests that, assuming this, the accumulation had been put an end to as the result of the resolutions passed on 23rd February 1917 and 27th February 1918.

In considering these transactions one must have regard to the substance and not the form. By these resolutions the parties varied the agreements previously entered into. They intended (and that, I think, is the true effect of the resolutions) that the profits should remain in the business pending ultimate detachment and that in the meantime interest should be paid. The parties arrived at an agreement in advance as to the future disposition of the profits, but maintained them as they were in the business with the object of the business deriving income or profit therefrom. The profits thus remained those of the owner—the company—undivided although credited in certain proportions to the respective parties without any right on their part to call for them. No debt against the company or claim against the assets was thereby created. If no action would lie against the company either for debt or to establish a claim or charge against the assets of the company, it appears to follow that the profits retain their original characteristics.

In my opinion, the profits did not cease to be the profits of the company or lose their cumulative form or become detached from the

(1) (1923) A.C., at p. 284.

(2) (1923) 33 C.L.R. 458.

profit earning of the business of the company and the words of the section are fulfilled.

I conclude, therefore, that the appeal should be allowed.

STARKE J. This is an appeal from an assessment to war-time profits tax for the year beginning on 1st July 1918 and ending on 30th June 1919. The appellant, for the purpose of calculating the pre-war standard of profits of its business, claims that a sum of £8,973 8s. 8d. should be treated as part of the capital of its business. It represents certain sums standing in the appellant's books of account as at 31st December 1917 to the credit of certain deposit accounts in the names of Samuel Francis Sharp, Ernest Alan Stevenson and James Gordon and Annie Jane Hare, who substantially held the whole of the shares in the appellant company. The greater part of these sums were appropriations of the profits of the business of the appellant, in circumstances and in manner presently to be stated, and the balance represented credits for salaries and interest on balances of profits placed to the credit of the several deposit accounts. Under agreements made with the aforesaid shareholders the appellant agreed to pay each of them certain salaries, and a further sum of money equivalent to one-third of the net profits to Samuel Francis Sharp and Ernest Alan Stevenson respectively and one-sixth of the net profits to James Gordon and Annie Jane Hare respectively, so long as they retained the shares held by them at the date of the agreement. The net profits, according to the agreement, were to be payable on 31st December of each year, but payable in such manner and at such time as the majority of directors in meeting should direct. Meetings of the shareholders were held from time to time and resolutions were passed that the net profits of the year be placed to the credit of the various shareholders' deposit accounts in terms of agreement entered into, and that the amounts on deposit be payable in such manner and at such time as the majority of directors in meeting should direct, and until paid or satisfied should carry interest on the daily balance at the rate of 6 per cent per annum. The directors have authorized payment of various sums standing to the credit of the several deposit accounts from time to time but considerable sums have always been retained at the credit of these accounts. The appellant claims that

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the profits of its business credited to these various deposit accounts were, during the period of assessment relevant to this case, capital of the business carried on by it within the meaning of sec. 16 (11) and sec. 17 of the *War-time Profits Tax Assessment Act* 1917-1918.

Now, sec. 17 enacts that "the amount of the capital of a business shall be taken to be the amount of its capital paid up by the owner in money or in kind, together with all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit respectively of profit and loss account." In *Hooper & Harrison's Case* (1) this section was considered by this Court and the reasons for the decision establish, I think, two propositions relevant to this case: one that the phrase "accumulated trading profits" imports, for the purposes of the section, some segregation of profits of a business from the floating balances of profit and loss in that business (*Knox* C.J. and *Gavan Duffy* J. (2), and *Isaacs* and *Rich* JJ. (3)); the other that the phrase "invested in the business" imports the use of the trading profits in the business in a manner indicating some fixedness in that use (*Knox* C.J. and *Gavan Duffy* J. (2); *Higgins* J. (4)). The Chief Justice and my learned brothers do not, I think, mean that the trading profits used in the business can never be withdrawn, but rather that the use should be of a more or less durable or lasting character. It therefore becomes in all cases a question of fact whether trading profits are or are not invested in the business, and that depends upon the acts and conduct of those conducting the business. In this case, trading profits which had been made in the business were carried to various deposit accounts. They were never released or liberated to the shareholders. Under the agreements already mentioned the net profits of the company were only payable in such manner and at such time as the majority of directors in meeting should direct. No enforceable rights accrued to the shareholders under these agreements unless the directors should so direct. Until a direction was given the profits remained in the hands of the appellant and were its profits. The resolutions at the shareholders' meetings, which have been so much relied upon, do not, in my opinion,

(1) (1923) 33 C.L.R. 458.
(2) (1923) 33 C.L.R., at p. 469.
(3) (1923) 33 C.L.R., at p. 481.
(4) (1923) 33 C.L.R., at p. 490.

carry the matter further. It was resolved that the profits be carried to the credit of various deposit accounts, but, following the agreements, payable only in such manner and at such time as the majority of directors in meeting should direct. The credit of the profits to the shareholders in deposit accounts did not alter their agreements. They were still unable to claim payment of the profits unless the directors so directed. The book entries were, no doubt, convenient for accounting purposes, but it seems plain that they did not release to the shareholders, or entitle them to, a penny-piece until the directors acted. The profits remained in the hands of the appellant and were its profits. It is a negation of the plain words of the agreements and of the resolutions of the shareholders to treat these credits as appropriations or payments of profits to the shareholders, and it puzzles me how the amounts at the credit of the deposit accounts can be treated as lent by the shareholders to the appellant either actually or notionally, when those amounts are only payable to the shareholders in such manner and at such time as a majority of the directors in meeting shall direct. I have not overlooked that part of the resolution of the shareholders which directs that the amounts until paid or satisfied shall carry interest on the daily balances at the rate of 6 per cent per annum; but that again seems to me an accounting provision for preserving the proportionate interests of the shareholders in the profits of the appellant. Consequently, in my opinion, the profits remaining at the credit of the deposit accounts of the shareholders are accumulated trading profits of the appellant which have been segregated in the accounts of the appellant from every other fund or account; and further, I think that these profits have been invested in the business of the appellant. They have been used in its business for the purchase of trading stock, which is clearly a capital purpose, and the fixedness in character of that use is apparent from the conduct of the appellant. It continued the use of the profits for the purchase of trading stock over a considerable period of time and the last balance-sheet of the appellant, which is in evidence, shows that they are still largely so used.

The appeal should, therefore, in my opinion, be allowed, although some inquiry seems necessary to ascertain the exact amount of the

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accumulated profits that were actually used in the business of the appellant during the relevant period of assessment.

Appeal dismissed with costs.

Solicitors for the appellant, *J. M. Smith & Emmerton.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

FLETCHER . . . . . APPELLANT;
COMPLAINANT,

AND

A. H. McDONALD & COMPANY PROPRIETARY LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 10.

SYDNEY, *April* 12.

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

Industrial Arbitration — Award — Interpretation — Apprentices — Wages — Whether award applies to those apprenticed before award.

By an award of the Commonwealth Court of Conciliation and Arbitration, which came into operation on 1st January 1925, it was provided that apprentices might be allowed in certain trades, that only a limited number of apprentices might be taken by any respondent to the award and that the term of apprenticeship should be five years. It was also provided that "the minimum rate of wages to be paid by any respondent to apprentices shall be" during each of the five years of apprenticeship a certain sum per week.

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the provision as to the minimum rate of wages applied only to apprenticeships entered into after the award came into operation.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) affirmed.