[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

LEWIS BERGER & SONS (AUSTRALIA) LIMITED . . . . . } RESPONDENT.

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SYDNEY, *March* 29; *April* 11.

Starke J.

Income Tax—Assessment—Board of Review—Appeal to High Court—Evidence—Company—Profits of business—Profits earned partly outside Australia—Ascertainment of profits derived from Australia—Grounds of appeal—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 39 (1), 51 (2), (6).

An appeal from the Board of Appeal constituted under the *Income Tax Assessment Act* 1922-1925 being a proceeding in the original jurisdiction of the High Court, the parties to the appeal are not limited to the material which was before the Board, but are entitled to adduce such evidence in support of, or in answer to, the appeal as is relevant.

The appellant on such an appeal is limited to the grounds of appeal stated in his notice of appeal, unless he obtain leave to amend the notice.

Where the profits of a taxpayer's business include profits which are attributable to sales to customers outside the Commonwealth, the question of what portion of the profits attributable to such sales is derived directly or indirectly from sources in Australia is a question of fact, and the Commissioner of Taxation is not entitled to apply to all such cases the same rigid formula.

APPEAL from the Board of Review.

Lewis Berger & Sons (Australia) Ltd. having been assessed for Federal income tax for the year 1919-1920 and the Commissioner

having disallowed an objection to the assessment, the decision of the Commissioner was referred to the Board of Review, which varied the assessment. From the decision of the Board of Review the Commissioner of Taxation appealed to the High Court, and the appeal was heard by *Starke* J., in whose judgment hereunder the material facts appear.

Alroy Cohen, for the appellant.

H. E. Manning, for the respondent.

Cur. adv. vult.

April 11.

STARKE J. delivered the following written judgment:—

This is an appeal by the Commissioner of Taxation from the decision of a Board of Review constituted under the *Income Tax Assessment Act* 1922-1925. Under sec. 51 (6) of that Act the appeal may be brought from any decision of the Board which, in the opinion of this Court, involves a question of law. The Board, in its proceedings, did not exercise the judicial power of the Commonwealth, but an administrative function, namely, that of reviewing the Commissioner's assessments for the purpose of ascertaining the taxable income upon which tax should be levied. The appeal to this Court submits the ascertainment of the taxpayer's liability to judicial review and ascertainment, but the so-called appeal is a proceeding in the original, and not within the appellate, jurisdiction of the Court. It follows, I think, that the parties on this appeal are not limited to the material that was before the Board of Review, but are entitled to adduce before this Court such evidence in support of, or in answer to, the appeal as is relevant to the matter. The material before the Board and its decision and reasons should be brought before this Court, and the parties may use this material if they so desire, but further or additional evidence may be adduced, or the appeal may be conducted as an original cause brought in this Court. A taxpayer, however, is limited by the Act, sec. 51 (2), in such proceedings, to the grounds stated in

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his objection to the assessment, and an appellant should be limited to the grounds of appeal stated in his initiating process in this Court, that is, his notice of appeal, unless he obtain leave to amend it.

On this appeal the parties prepared a transcript of the proceedings before the Board and used it before me. It thus appeared that the respondent was assessed to Federal income tax for the year 1919-1920, based on income derived during the year ending on 30th June 1919. The respondent carried on the business of manufacturing and dealing in paints, varnishes and the like. Its total sales for the year amounted to £303,569, of which £51,443 was attributable to sales made to customers in New Zealand. Its expenditure for the year amounted to £42,069, of which £934 was expended in New Zealand. The net profits of the business for the year from all sources amounted to £34,963 after excluding items that were not allowable as deductions under the Income Tax Acts, but it included the profits attributable to sales made to customers in New Zealand.

The Commissioner calculated or estimated the profits on these as follows :—

New Zealand sales $\frac{51,443}{303,569}$ of £34,963 (net profit of year) equals Total sales

£5,925, profit on sales in New Zealand. He considered, however, that part of this profit (£5,925) was derived directly or indirectly from sources within Australia. This amount he calculated or estimated as follows :—

Expenditure in New Zealand $\frac{934}{42,069}$ of £5,925 (profit on sales in New Total expenditure

Zealand) equals £132, profits not derived from sources in Australia. Deducting this sum of £132 from the total net profit of £34,963, the Commissioner arrived at the figure £34,831 as the taxable income of the respondent derived directly or indirectly from sources within Australia, less a sum of £684 for certain losses and mortgages which are immaterial for present purposes.

The Board of Review was of opinion that the Commissioner's apportionment of this profit between Australia and New Zealand

was unreasonable and inadequate, and halved the total sum of £5,925 as between Australia and New Zealand.

There is no point of law that I can see in this decision of the Board. It depends upon business judgment and experience, applied to the facts of the particular case, the nature of the business, and the mode in which it was actually carried on.

The Commissioner insisted that there was no evidence upon which the Board could found its decision, or displace his assessment (*Income Tax Assessment Act* 1922-1925, sec. 39 (1) (*b*)), but the Board had as much and probably more information than the Commissioner, and was, in fact, in just as good a position as he was, to apportion profits as between Australia and New Zealand.

The Commissioner's real aim is to elevate his formula into a fixed and rigid rule. It is not a rule of law however, and is at best a rule of convenience. It cannot be applied to all cases in all circumstances, and I am not surprised that the Board regarded it as unreasonable in the circumstances of this particular case.

In argument the learned counsel who appeared for the Commissioner insisted that the Board of Review had proceeded upon the view that only income directly derived from sources within Australia was subject of income tax, whereas the Act provided that income derived directly or indirectly from sources within Australia was assessable to tax. But the transcript of the proceedings before the Board shows, I think, that the parties agreed, or did not dispute, that the receipts from New Zealand sales—£51,443—represented sales actually made in New Zealand f.o.b. Sydney. The Commissioner's representative distinguished *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1), and claimed that the only point involved was to ascertain some reasonable basis of apportionment.

During his argument in reply, learned counsel applied to me for leave to call evidence for the purpose of showing that the sales to New Zealand customers were sales made in Sydney f.o.b. upon orders obtained in New Zealand (*Grainger & Son* v. *Gough* (2)). In my opinion, however, the notice of appeal did not, and was not intended to raise any such case, and I refused to amend it. The assessment

(1) (1908) A.C. 46.

(2) (1896) A.C. 325.

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did not proceed on this basis, nor was the case made to the Board or to this Court until the last moment. Consequently I refused to receive the evidence.

The result is that the appeal is dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent, *Norton, Smith & Co.*

B. L.