H. C. OF A. 1927. FLETCHER v. A. H. McDONALD & CO. PTY. LTD.

only to "employees"; and under the definitions in clause 15, the word "employee" means "an *adult* employee who is a member of the Amalgamated Engineering Union, but this does not apply to apprentices."

*Appeal dismissed with costs.*

Solicitors for the appellant, *Maurice Blackburn & Co.*

Solicitors for the respondent, *Haden Smith & Fitchett.*

B. L.

---

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . APPELLANT;
RESPONDENT,

AND

WEATHERLY . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1927. MELBOURNE, *Mar.* 8. SYDNEY, *April* 13. Knox C.J., Isaacs, Higgins Rich and Starke JJ.

*Income Tax—Assessment—Income—Sale of trading stock—Live-stock used for breeding purposes—Income Tax Assessment Act* 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *sec.* 17*.

The respondent, a pastoralist, sold about one-half of his station and that sale made it necessary for him to sell a large number of his stock. He therefore held a special sale of stock. The stock sold included sheep and cattle which the respondent alleged would not have been sold except for the necessity of reducing the numbers brought about by the sale of land, and of these some

* Sec. 17 of the *Income Tax Assessment Act* 1922-1925 provides that "(1) The proceeds derived from the sale of the whole or part of the trading stock of any business after the thirtieth day of June one thousand nine hundred and twenty-one (whether on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business) shall be assessable income. . . . (4) In this section—(*a*) the expression 'trading stock' does not include live-stock which in the opinion of the Commissioner . . . were ordinarily used by the vendor . . . for breeding purposes."

were alleged to be ordinarily used for breeding purposes. The respondent claimed that for the purposes of his assessment for Federal income tax he was entitled to deduct from the total proceeds of the sale the proceeds of such stock as would not have been sold except for the necessity of reducing the numbers, or, alternatively, the proceeds of so many of such stock as were ordinarily used for breeding purposes.

*Held*, by *Knox* C.J., *Higgins*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that the generality of sub-sec. 1 of sec. 17 of the *Income Tax Assessment Act* 1922-1925 was not limited by the parenthesis, that the sale therefore fell within the section and that the respondent was entitled to the benefit of sub-sec. 4 (*a*) thereof.

Decision of the Supreme Court of Victoria (*McArthur* J.): *Weatherly* v. *Federal Commissioner of Taxation*, (1927) V.L.R. 73; 48 A.L.T. 146, affirmed.

APPEAL from the Supreme Court of Victoria.

Lionel James Weatherly was the owner of a station property called Woolongool, in the Western District of Victoria, on which for a number of years he had carried on the business of a pastoralist. On 1st July 1923 the area of the property was 27,142 acres and the approximate number of stock carried was 20,000 sheep and 700 cattle. In March 1923 Weatherly sold to the Closer Settlement Board 14,344 acres of the property, possession of which was to be given on 31st January 1924. This made it necessary for Weatherly to get rid of a large number of his stock so that the remainder might be carried on so much of the property as he retained. He accordingly held a special sale of sheep and cattle, at which he sold 14,446 sheep and 700 cattle. Of this stock 9,633 sheep and 364 cattle were sold solely on account of the necessity for reducing numbers consequent upon the sale of the land to the Closer Settlement Board. Of the 9,633 sheep and 364 cattle sold by Weatherly some were used by Weatherly for breeding purposes. In his return for the purpose of Federal income tax for the year 1924-1925 Weatherly deducted from the total proceeds of the special sale the proceeds of the sale of the 9,633 sheep and 364 cattle. The Commissioner of Taxation refused to allow such deduction. On 14th May 1925 Weatherly gave notice of objection to the assessment on the grounds (1) that the assessment issued was unfair and excessive, and (2) that the Commissioner had improperly treated as income the proceeds of the sale of certain live-stock. The Commissioner

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

disallowed the objection, and Weatherly appealed from that refusal to the Supreme Court of Victoria. The appeal was heard by *McArthur* J., who made an order declaring that the proceeds of the special sale were assessable income save and except the proceeds derived from the sale of such of the stock as in the opinion of the Commissioner were ordinarily used by Weatherly for breeding purposes: *Weatherly* v. *Federal Commissioner of Taxation* (1).

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

*Sir Edward Mitchell* K.C. (with him *Keating*), for the appellant. Sec. 17 of the *Income Tax Assessment Act* 1922-1925 does not apply to this case. That section only applies to a case where the sale is " on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business "—that is, the whole of the business. Sec. 17 as it stood in the Act of 1922 was enacted to remove the doubt, raised by the decision in *Commissioner of Taxation* (*W.A.*) v. *Newman* (2), whether under the provisions of sec. 16 the proceeds of sale of trading stock sold, not in the ordinary course of business, but to put an end to the business, would be taxable income within the meaning of sec. 16. As the section then stood, sub-sec. 1 covered every case of a sale of trading stock. Sub-sec. 1 of the present sec. 17 was intended to limit the operation of the section to sales of trading stock made either on a sale of a business as a going concern or for the purpose of putting an end to the business. Sec. 17 is a qualification upon sec. 16 and, if this case does not fall within sec. 17, it falls within sec. 16 and is taxable. There is no case and no provision, other than sec. 17, which entitles a person who realizes portion of his trading stock by reason of some unusual happening to say that the proceeds of such realization are not assessable income. The decision in *Commissioner of Taxation* (*W.A.*) v. *Newman* only applies to a sale of trading stock for the purpose of wholly putting an end to a particular business. [Counsel also referred to *Inland Revenue Commissioners* v. *Newcastle Breweries Ltd.* (3); *In re Spanish Prospecting Co.* (4).]

(1) (1927) V.L.R. 73; 48 A.L.T. 146.
(2) (1921) 29 C.L.R. 484.
(3) (1926) 42 T.L.R. 609, at p. 610.
(4) (1911) 1 Ch. 92.

*Owen Dixon* K.C. (with him *Clayton Davis*), for the respondent. This case falls within sec. 17, and the respondent is entitled to the benefit of sub-sec. 4 in respect of the stock used for breeding. As a matter of construction the parenthesis in sub-sec. 1 does not limit the generality of the sub-section. The words "whether" and "or" are not appropriate to indicate a contingency or condition, and their use merely indicates a description of events which fall within the scope of the provision (*Re Pickup's Trusts* (1)). The other sub-sections of sec. 17 show that sub-sec. 1 was not intended to be limited by the words in the parenthesis. If this case does not fall within sec. 17 the proceeds of the sale are not taxable income. The facts as found show that the sale was for the purpose, not of making profits, but of relinquishing part of respondent's business. It was a withdrawal of capital from the business. The reasoning in *Commissioner of Taxation (W.A.)* v. *Newman* (2) and *Hickman* v. *Federal Commissioner of Taxation* (3) support that view. The provision in sub-sec. 4 of sec. 17 shows that but for it a disposal of trading stock by way of testamentary disposition would have fallen within sub-sec. 1, and to such a disposal the words in the parenthesis could not apply. [Counsel also referred to *De Grey River Pastoral Co.* v. *Deputy Federal Commissioner of Taxation* (4); *Doughty* v. *Commissioner of Taxes* (5).]

*Sir Edward Mitchell* K.C., in reply, referred to *Gloucester Railway Carriage and Waggon Co.* v. *Inland Revenue Commissioners* (6); *Anson* v. *Commissioner of Taxes* (7).

[ISAACS J. referred to *Melbourne Trust Ltd.* v. *Commissioner of Taxes (Vict.)* (8).]

*Cur. adv. vult.*

April 13.

The following written judgments were delivered :—

KNOX C.J. I agree with *McArthur* J. in thinking that on its true construction sec. 17 (1) of the *Income Tax Assessment Act* 1922-1925 prescribes that the proceeds derived from the sale of trading stock whether sold in the course of carrying on business or

(1) (1861) 1 J. & H. 389.
(2) (1921) 29 C.L.R. 484.
(3) (1922) 31 C.L.R. 232.
(4) (1923) 35 C.L.R. 181.
(5) (1927) 163 L.T. Jo. 114.
(6) (1925) A.C. 469.
(7) (1922) N.Z.L.R. 330.
(8) (1912) 15 C.L.R. 274, at p. 302.

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

KNOX C.J.

not shall be assessable income. I agree also that sec. 17 (4) of the Act applies to the sale of breeding stock, however sold—whether sold in the course of carrying on the business or not. I have nothing to add to the reasons given by the learned Judge in support of these conclusions.

In my opinion the order made was right, and this appeal should be dismissed.

ISAACS J. The question raised by this appeal is whether, on the sale of breeding stock in the course of carrying on a business, and not either "on the sale of the business as a going concern or in any other manner for the purpose of discontinuing the business," the proceeds of the sale are assessable income under the Commonwealth *Income Tax Assessment Act* 1922-1924. The Supreme Court of Victoria decided that question in the negative, holding that the sale fell within sec. 17 of the Act. I have the misfortune, contrary to the majority opinion, to think that the question should be answered in the affirmative.

I should *in limine* refer to one contention made on behalf of the respondent taxpayer. Mr. *Dixon* quite frankly admitted that sec. 17 could not reasonably apply to ordinary sales in business—sales over the counter, so to speak. But he sought to steer a middle course by attributing to the opening words of sub-sec. 1, if I understood his argument aright, the notion of a bulk sale, something conveying the idea of a block of goods. I am unable to find that distinction in the section. "Part" means any part—from a wether to a flock, from a pound of sugar to a ton. Such a distinction applied to the section would introduce one more element of confusion in addition to those which will be presently pointed out. There are only two possible categories: the first, that which would exist if sec. 17 had not been passed, namely, all sales in the course of carrying on the business, on the one hand; and all sales for the purpose of relinquishing the business, on the other. The first is the ordinary case of business transactions; and so the question we have really to answer in the present case is whether all sales in the ordinary course of business are included in sec. 17, so that "breeding" stock are entirely eliminated for income tax purposes. One consideration

alone would, in my opinion, suffice to show that such was not the meaning of sec. 17. Sub-sec. 4 (*a*) declares that the expression "trading stock" in sec. 17 does not include live-stock which, in the opinion of the Commissioner, were ordinarily used by the vendor as (1) beasts of burden or (2) working beasts or (3) for breeding purposes. That is to say, three classes of exceptions. Therefore, under sec. 17 the proceeds of "breeding stock"—their identification being left to the Commissioner—are not "assessable income." But under the general provisions of the Act, including sec. 16, which applies to ordinary trading operations, because it is of *general application* to all assessable income, their proceeds are treated as assessable income. Sec. 16 definitely includes "all live-stock" except only "beasts of burden" and "working beasts." This express and sole exception for ordinary business operations is carried throughout the relevant sections of the Act. It is found in several places in sec. 16 and again in sec. 23, where the omission of "breeding stock" is most significant. Sub-sec. 1 of sec. 23 in par. (*e*) (i.) treats "beasts of burden and working beasts" as fixed assets for the purpose of producing income and subject to a deduction for diminution in value by what is called "wear and tear." The same thing occurs later on in the sub-section, and in sub-sec. 2. But "breeding stock" are conspicuous by their absence.

Now, secs. 16 and 23 are, of course, applicable to the general course of business operations in the grazing business, or any other business, where "beasts of burden" and "working beasts" and "breeding stock" are used, and the provisions apply to the whole year's transactions and not merely to a particular transaction. And, in computing the profits of the year under sec. 16 (*a*), the value of beasts of burden and working beasts is deducted because not taken into account, while the value of breeding stock is not deducted. The deductions in sec. 23 include, as stated, amounts in respect of beasts of burden and working beasts but not of breeding stock. And, as to beasts of burden and working beasts, it is as they are *in fact*, and not as determined by the Commissioner. Now, in sec. 17 in the proviso to sub-sec. 4, where live-stock are excluded under that sub-section as answering *in the Commissioner's opinion* any of the three classes mentioned, the relevant deductions allowed by

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

Isaacs J.

sec. 16 and sec. 23, which would otherwise apply because they are general, are not to be allowed. That is to say, the deductions for "beasts of burden" and "working beasts" are not to be allowed. But "breeding stock" are wholly untouched.

If there were nothing more to point to than the conflict between secs. 16 and 23 on one side and sec. 17 on the other, if the respondent's view be maintained I should consider it sufficient to show that sub-sec. 1 must, if reasonably open to that construction, be read as controlled by the two alternatives therein expressed. That is to say, that in order to bring sec. 17 into operation the sale must be either (a) on the sale of a business as a going concern, or (b) in any "other manner for the purpose of discontinuing the business." But there is very much more to show that the Legislature did not enact anything so unnecessary, so unjust, oppressive and stupid a piece of legislation, as sec. 17 would be if it had the effect necessary to sustain the respondent's contention. To say the least of it, no one could assert that sec. 17 is unambiguously in favour of the respondent's contention. And if ambiguous, then, as it puts a drastic, a novel, an artificial and a most unjust impost on thousands of traders, if the respondent's view be accepted—traders of all classes—the recognized canon of interpretation is to read it in favour of the taxpayer. That does not mean to read sub-sec. 4 in favour of this taxpayer, but to read sub-sec. 1 in favour of all taxpayers. If that is done, there is no need to trouble about sub-sec. 4.

Sec. 16 in its present form was, so far as relevant here, substantially framed when sec. 17 was framed. They are to that extent simultaneous enactments operating in diverse circumstances. But, while sec. 16 enacts what statutory profits shall be "assessable income," it does not make, nor does any other section make, a fictitious selling price for ordinary transactions, or create a fictitious sale in order to provide fictitious assessable income. For general trading operations such provisions would, I apprehend, deserve the epithets I have employed. The Commissioner in ordinary circumstances must, if justice is to prevail, accept business transactions as they actually exist. But, for special cases where the general law may be defeated or an unfair burden be otherwise cast on the general body

of taxpayers, special regulations are not only just but highly desirable. And so in the two special alternative cases which, by decisions of this Court (notably that in *Hickman's Case* (1), delivered in September 1922), were found unprovided for, the special regulations found in sec. 17 may with good sense and fairness be applied.

Sub-sec. 2 declares that wherever "trading stock," that is, as per sub-sec. 1, "the whole or part of the trading stock," is sold, either together with or separately from other assets of the business, the consideration for the sale is to be determined by the Commissioner, and the amount so determined "shall be deemed to be the price paid by the purchaser for the trading stock." I have stated that the expression "any trading stock" does not imply the whole of the trading stock. To the reason I have already given, I would add, lest any room should be given for misapprehension, that certainly the Legislature would not defeat its own provision by intending that, if seven-eighths of the trading stock were so dealt with, it might escape, and then the remaining one-eighth escape afterwards, whereas, if both were sold together, the whole would be subject to the sub-section. Therefore sub-sec. 2 applies to all sales of trading stock, large or small, whether it is the furnishing by a warehouse of a retailer's complete stock, or his subsequent replenishments, and whether it is the sale by a retailer of furnishings for an hotel, or the sale of a yard of calico, as well as the complete disposal of the vendor's entire stock on his relinquishing business. Now I would seriously ask what sense, or justice, or what fragment of the most elementary business principles is there in disregarding the actual prices obtained by vendors of trading stock, and taxing them on prices to be determined by the Commissioner, determined, that is, without appeal? Read as the respondent reads it, sub-sec. 2 is simply revolutionary.

Then take the next sub-section, and apply it to the ordinary case of carrying on business. It says: "For the purposes of this section" —that is, the whole sec. 17, and including sub-sec. 1—"any trading stock which has been disposed of otherwise than by sale shall be deemed to have been sold." That is to say, on the respondent's basis, if, for instance, a newspaper proprietor destroys newspapers

(1) (1922) 31 C.L.R. 232.

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

Isaacs J.

returned unsold, or if a benevolent merchant donates goods for some charitable purpose, or if a grazier retaining his general business makes to a child on marriage an *inter vivos* gift of cattle (and in innumerable other instances of disposals of trading stock, not sales, that will readily suggest themselves), then the trading stock "shall be deemed to have been sold." And the consequence is thus stated: "Any trading stock so disposed of . . . shall be deemed to have realized the market price of the day on which it was so disposed of . . . but, where there is no market price, . . . shall be deemed to have realized such price as the Commissioner determines." What is there to compel the Court to adopt an interpretation which, without escape, leads to such ridiculous consequences? In my opinion neither the words nor the history of the provision will support it. The words read, not as if sec. 17 were the only section in the Act, but as one part of a very large and composite document, do not, as I think, leave the matter in serious doubt.

Reading the Act as a whole, the first relevant thing we observe is that ordinary business income is provided for in sec. 4. "Income from personal exertion" means (*inter alia*) "the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person." Up to October 1922 the law as declared by *Hickman's Case* (1) was that business assessable income was confined to income the proceeds of a business carried on. In that case *Knox* C.J. said (2): "The Act was directed to the taxation of trading profits and did not assume to tax the proceeds of realization of a business sold as a whole in one transaction." My brother *Higgins*, in the same case, said (3): "The proceeds of the sale of a business are not, in any part, profits 'arising from any business,' within the meaning of sec. 7," that is, of the *War-time Profits Tax Assessment Act* 1917-1918. My brother *Starke* was of the same opinion (4). That judgment was given on 8th September 1922. The decision disclosed a gap. A trader selling his stock, even the whole of it, in a year, without intending to give up business, was taxable; but if he sold his stock and made the same amount of profit, but on an occasion

(1) (1922) 31 C.L.R. 232.
(2) (1922) 31 C.L.R., at p. 238.
(3) (1922) 31 C.L.R., at p. 242.
(4) (1922) 31 C.L.R., at p. 243.

when he either parted with his business or intended to abandon it, he was free from taxation. Walk-in-and-walk-out contracts were typical of the latter class. This gap it was necessary to fill, and the Legislature filled it by sec. 17 in October 1922. At the same time the Legislature made some further provision for ordinary transactions, as I have pointed out, but not as to "breeding stock." What was then enacted is important, both for the way it met the existing law and for the very eloquent way in which the then enactment was subsequently altered. Sec. 17 of the Act of 1922, by sub-sec. 1, said: "The proceeds derived from the sale, after the thirtieth day of June one thousand nine hundred and twenty-one, whether on the sale of the business as a going concern, or in any other manner whatsoever, of the trading stock or part of the trading stock of any business, shall be assessable income derived from carrying on a business." As that sub-section stood in 1922, very much could be said for its words comprehending more than the Legislature really intended. The two alternative conditions of the application were: (1) "on the sale of the business as a going concern," and "(2) or in any other manner whatsoever." No doubt, there would have been an overlapping by reason of the definition section already bringing in ordinary trading operations, and there would also have been the extraordinary conflict between sub-secs. 2 and 3, on the one hand, and the ordinary and just principles of computation, on the other, as well as the contradiction respecting breeding stock already mentioned. Obviously the words "or in any other manner whatsoever" went altogether beyond the necessity and propriety of the case.

By Act No. 51 of 1924 the error was corrected, and, as I venture to think, so thoroughly as to leave but little room for misapprehension. Sub-secs. 1 and 2 were omitted and were reframed so as to assume their present form. The phrase "or in any other manner *whatsoever*" was altered to read "or in any other manner for the purpose of discontinuing the business." The two alternative conditions of the section henceforth were: (a) "on the sale of a business as a going concern," and (b) "or in any other manner for the purpose of discontinuing the business." Further, the words "shall be assessable income derived from carrying on a business" were altered to

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

Isaacs J.

"shall be assessable income." And lastly, the proviso to sub-sec. 4, to which I have adverted, was added.

The obvious significance of these changes was this: The two alternative conditions possessed the one characteristic, namely, the taxpayer no longer carried on the business; and the elimination of the final words indicated that the Legislature, by sub-sec. 1, regarded sec. 17 as not directed to transactions having the nature of carrying on the business. To extend the subject to ordinary business transactions, that is, to give it an unlimited operation, is to give no meaning or effect to the amendments of 1924 and also to treat the alternatives as immaterial. The word "whether" followed by the word "or" indicates the prescribed alternatives for the operation of the section. The latest edition of *Webster's Dictionary* under the word "whether" says it is "a particle used to indicate that what follows is an alternative. Its correlative, indicating a second or contrasting alternative, is *or*, or *or whether*." Thus the words referred to mean: "whether on the sale of a business as a going concern, *or whether* in any other manner for the purpose of discontinuing the business," but they do not mean further, "or whether the sale takes place in any other conceivable manner." If they did, it would include the proceeds of a sheriff's sale, for there are no words to limit the effect once they go beyond the two alternatives mentioned. The word "whether" followed by the word "or" indicates the prescribed alternatives for the operation of the section.

The extension of sub-sec. 1 beyond those alternatives implies also that the amendment of 1924, striking out "whatsoever" and inserting "for the purpose of discontinuing the business," must be disregarded; that words of limitation mean nothing.

The whole case for the respondent rests on one conjecture, namely, that when the Legislature said "whether on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business" it should be read as if it were "whether or not" &c. That it does not mean that is conclusively shown by the amendment of 1924. I should have thought it plain even before, but with that amendment it appears to me unarguable. Except by means of the aphorism that language was made for the purpose of concealing thoughts, I know no way to support the respondent's position.

In my opinion the appeal should be allowed.

HIGGINS J. In my opinion, the effect of the Act as stated by the learned Judge of first instance (*McArthur* J.) was right. I confess that I cannot see any difficulty in coming to the conclusion that sec. 17 applies to this case. The proceeds derived from the special sale of live-stock held on 24th January 1924 are "assessable income" so far as they were derived from trading stock; but trading stock does not include live-stock which in the opinion of the Commissioner was ordinarily used by the vendor for breeding purposes. I take the bracketed words "(whether on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business)" as not exhaustive of this provision in sec. 17 as to the proceeds of sale, but as applying the provisions to extreme cases; such as that of *Commissioner of Taxation* (*W.A.*) v *Newman* (1) and that of *Hickman* v. *Federal Commissioner of Taxation* (2). The provisions of the Acts of 1924 and 1925 apply to all financial years subsequent to 1st July 1922 (Act of 1922-1925, sec. 2); and the financial year with which this case is concerned is the year 1924-1925.

Owing to the patchwork character of successive amendments of the Act, framed to meet particular difficulties as they arise, it is very difficult, if not impossible, to discover one consistent, harmonious scheme throughout the Act. The practice seems to be to stuff up every hole in the Act as it appears. Our safest course, under the circumstances, is to apply to each contingency the provisions clearly relating thereto. I do not think, however, that we need be puzzled by the contrasts to be found between the provisions of sec. 16 and sec. 23 on the one side, and the provisions of sec. 17 on the other side. For secs. 16 (*a*) and 23 (1) (*e*) relate to changes in *values*; whereas sec. 17 relates to *sales*. Change in values of trading stock has to be regarded for the purpose of ascertaining *profits*; whereas, in dealing with sales, the proceeds of sales of breeding stock are excepted, for the reason that breeding stock are assumed to be used by the taxpayer, not for the purpose of trading, but for the purpose of producing income (see sec. 23 (1) (*e*)).

But this appeal is only as to the objection of the taxpayer as stated in his second notice (14th May 1925); and as this second objection does not go to the full extent of the taxpayer's right,

(1) (1921) 29 C.L.R. 484. (2) (1922) 31 C.L.R. 232.

H. C. OF A. 1927.

FEDERAL COMMISSIONER OF TAXATION v. WEATHERLY.

Higgins J.

I should think that the order should be varied so as to limit the right of the taxpayer on the appeal to that which he has claimed in his objection (sec. 51A (3) ). Subject to such a variation the appeal should, in my opinion, be dismissed.

I may add that no objection has been raised to the effect that the Act deals with more than one subject of taxation (see sec. 55 of the Constitution).

RICH J. I agree with the construction placed by the learned primary Judge upon sec. 17 of the *Income Tax Assessment Act* 1922-1925 and that it governs the present case. The words in brackets in sub-sec. 1 of that section, "whether on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business," do not affect the generality of the preceding words of the sub-section. They are not exclusive. They are intended to be and are, in my opinion, words of enlargement and not of restriction.

For this reason I agree that the appeal should be dismissed.

STARKE J. *McArthur* J. held that sec. 17 (1) of the *Income Tax Assessment Act* 1922-1925 applies to and governs this case, and in my opinion the learned Judge was right, and for the reasons stated by him. The provisions of sub-secs. 3 and 4 (*b*) lend support, if any were needed, to this view.

The appeal ought to be dismissed.

*Appeal dismissed with costs.*

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

Solicitors for the respondent, *Aitken, Walker & Strachan.*

B. L.