[HIGH COURT OF AUSTRALIA.]

S. HOFFNUNG & COMPANY LIMITED . APPELLANT;

AND

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

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MELBOURNE, *Mar.* 11, 21.

Knox C.J., Isaacs and Starke JJ.

War-time Profits—Taxpayer deriving profits from sources within and without Australia—Deductions—Excess profits duty paid in England in respect of Australian profits—Deduction in respect of war-time profits tax of sum paid in England in respect of Australian profits—Method of computing such sum—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *sec.* 15 (4)—*Finance* (*No.* 2) *Act* 1915 (5 *&* 6 *Geo. V. c.* 89).

The appellant was a company deriving profits from its trading operations in Australia and also in England, and was liable to assessment for duty both under the Imperial *Finance* (*No.* 2) *Act* 1915 (5 & 6 Geo. V. c. 89) and also under the *War-time Profits Tax Assessment Act* 1917-1918 in respect of the financial years 1917-1918 and 1918-1919.

Held, that, in computing the profits of a business, the Commissioner must take into account as well the deduction allowed by sec. 15 (4) of the *War-time Profits Tax Assessment Act* as the other deductions allowed by the Act, and that he was not entitled to assess the profits on the basis of deducting the allowances authorized by the Act and before making the deduction authorized by sec. 15 (4).

APPEAL from the Federal Commissioner of Taxation.

The appellant, S. Hoffnung & Co. Ltd., being dissatisfied with a decision of the Deputy Commissioner of Taxation on an objection lodged by it in connection with the notice of amended assessment in respect of the financial year 1917-1918, sent by the Deputy Commissioner of Taxation to the appellant pursuant to the *War-time Profits Tax Assessment Act* 1917-1918 on 10th July 1925, asked the Commissioner to treat the objection as an appeal and to

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forward it to the High Court, which the Commissioner accordingly did. By an order of the Chief Justice of the High Court it was ordered that this appeal be consolidated with an appeal by the Company against an assessment under the same Act for the financial year 1918-1919 and that the appeals should be argued before the Full Court.

The following admissions of fact relating to the tax payable in respect of the financial year ending 30th June 1918, and made for the purpose of this appeal only, were made by the appellant and the respondent :—

1. The appellant has paid the respondent as and for war-time profits tax in respect of the financial year ending 30th June 1918 the sum of £6,709 10s.

2. The appellant has paid to the Inland Revenue Authorities the sum of £31,333 12s. as and for excess profits duty in respect of the financial year ending 31st March 1918. The respondent is not to be taken as admitting that this sum is a sum which has been paid within the meaning of sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918.

3. The Inland Revenue Authorities, in arriving at the sum of £31,333 12s. for excess profits duty in respect of the financial year ending 31st March 1918, adopted the following method :—(Particulars were then set out of amended excess profits duty assessment for the year ended 31st March 1918, which showed (*inter alia*): Income derived in Australia and also assessed for war-time profits tax £115,303, other income £10,735—total £126,038 ; increased capital allowance £14,201, pre-war standard of profit £72,670—making a total of £86,871 ; and by deducting the last sum from £126,038 there was left a taxable excess profit of £39,167. The excess profits duty at 80 per cent was therefore £31,333 12s.).

4. The respondent in arriving at the amount of profit arising in the accounting period ending 31st March 1918 adopted the following method :—(Then followed details of a computation of profits and taxable excess profits for purposes of war-time profits tax assessment in respect of profits of accounting period ended 31st March 1918, showing a total of Australian profits brought into account in the assessment before the deduction of excess profits

duty under sec. 15 (4) as £116,633 ; less the following deductions : Excess profits duty deduction as calculated by Commissioner £5,171, extra allowance in respect of borrowed money £6,280, allowance for increased capital employed £24,649—making a total of £36,100, which, deducted from £116,633, left a balance of £80,533.

5. In respect of the financial years ending 31st March 1915, 1919 and 1921 respectively the Inland Revenue Authorities have refunded to the appellants the sum of £13,048, of which £6,154 is attributable to the financial year ending 31st March 1918.

6. The Inland Revenue Authorities did not make any allowance for the payment of war-time profits tax in Australia.

7. The appellant has not paid any sum to the Inland Revenue Authorities for excess profits duty in respect of the accounting period ending 31st March 1919 as there were no excess profits in that period.

The following admissions of fact relating to the tax payable in respect of the financial year ending 30th June 1919 and made for the purpose of this appeal only were made by the appellant and the respondent :—

1. The appellant has paid to the respondent as and for war-time profits tax in respect of the financial year ending 30th June 1919 the sum of £2,041 10s. 10d.

2. The appellant has paid to the Inland Revenue Authorities the sum of £16,254 as and for excess profits duty in respect of the financial year ending 31st March 1920. The respondent is not to be taken as admitting that this sum is a sum which has been paid within the meaning of sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918.

3. The Inland Revenue Authorities, in arriving at the sum of £16,254 for excess profits duty in respect of the financial year ending 31st March 1920, adopted the following method :—(Here followed particulars of amended excess profits duty assessment for the year ended 31st March 1920, which showed (*inter alia*) : Income derived in Australia and also assessed for war-time profits tax £127,887, other income £8,955—total, £136,842 ; increased capital allowance £28,052, and pre-war standard of profit £72,670, the last two sums making a total of £100,722, which, deducted from £136,842, left taxable

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excess profits £36,120, and tax on that sum at 45 per cent being £16,254.

4. The respondent in arriving at the amount of profit arising in the accounting period ending 31st March 1920, adopted the following method:—(Here followed details of a computation of profits and taxable excess profits for purposes of war-time profits tax assessment in respect of profits of accounting period ended 31st March 1920, showing a total of £98,139 less pre-war standard of profits £62,971, leaving a balance, being excess profits included in notice of amended assessment dated 10th July 1925, of £35,168.)

5. In respect of the financial years ending 31st March 1915, 1919 and 1921 respectively the Inland Revenue Authorities have refunded to the appellants the sum of £13,048, of which £3,192 is attributable to the financial year ending 31st March 1920.

6. The Inland Revenue Authorities did not make any allowance for the payment of war-time profits tax in Australia, but such authorities made an allowance of £7,259 which appeared in the profit and loss account as a provision of war-time profits tax.

7. The appellant has not paid any sum to the Inland Revenue Authorities for excess profits duty in respect of the accounting period ending 31st March 1919 as there were no excess profits in that period.

Robert Menzies K.C. (with him *Herring*), for the appellant. The amount of the deduction allowable under sec. 15 (4) of the *War-time Profits Tax Assessment Act* as a sum paid in respect of the profits under the *Finance* (*No.* 2) *Act* 1915 (English Excess Profits Tax Act) is to be determined by a consideration of the figures adopted by the English taxation authorities without reference to the figures found by the Australian Commissioner of Taxation. For the year ending 31st March 1918 the English figures showed as "income derived in Australia and also assessed for war-time profits tax" the sum of £115,303, "other income" as £10,735—"total," £126,038. The amount of the deduction should, therefore, be the proportion of the amount of excess profits duty paid which £115,303 bears to £126,038, and not the proportion which the Australian Commissioner of Taxation says the Australian profits, namely, £80,533, bears to £126,038.

Sir Edward Mitchell K.C. (with him *C. Gavan Duffy*), for the respondent. Sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918 is directory only and not mandatory. The amount to be deducted under sec. 15 (4) was only the amount actually paid, and no amount could be said to be paid until a sum was settled or agreed to as a final tax between the taxpayer and the English taxation authorities. "The profits" in sec. 15 (4) mean "the profits after all necessary deductions have been made under sec. 15 except perhaps those under sub-sec. 4 itself." The Australian Commissioner of Taxation has assessed the profits for the purpose of war-time profits tax at £80,533 for the accounting period ending 31st March 1918, and this is the sum which should be regarded as the Australian profits, and not the larger sum allowed by the English taxation authorities as income derived from Australia.

Robert Menzies K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

Mar. 21.

KNOX C.J. These are appeals against assessments of war-time profits tax for the financial years 1917-1918 and 1918-1919. The question at issue between the parties relates to the deduction to be allowed under sec. 15 (4) of the *War-time Profits Tax Assessment Act* in respect of payment of excess profits duty under the provisions of the Imperial *Finance (No. 2) Act* (5 & 6 Geo. V. c. 89). In a previous case between the same parties relating to the assessment for the year 1916-1917, it was argued on behalf of the Commissioner that the expression "paid in respect of the profits" in sec. 15 (4) should be construed as meaning "paid in respect of the war-time profits of the business." I decided against this contention and on appeal my decision was affirmed by a Full Court. The appellant relies on the reasons given in that case in support of its contention that the amount to be allowed under sec. 15 (4) is so much of the excess profits duty actually paid in England as is attributable to profits derived from its Australian business irrespective of any difference between the method adopted by the British revenue authorities and that prescribed by the *War-time Profits Tax Assessment Act* for

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calculating the amount of taxable profits. If, for instance, in assessing the amount of excess profits duty payable, the British revenue authorities take the profits derived from the Australian business for a given accounting period as equal to the profits derived from all other sources the appellant says that one-half of the amount paid for excess profits duty is paid "in respect of the profits" within the meaning of sec. 15 (4) and is therefore to be deducted from the gross profits of the business in determining the amount of the taxable profits of the business for the purposes of the *War-time Profits Tax Assessment Act*. The Commissioner, on the other hand, contends that the expression "the profits" in sec. 15 (4) means the profits of the Australian business which remain after making all deductions allowed by the *War-time Profits Tax Assessment Act* and before making the deduction allowed by sec. 15 (4). The result of this construction would be that if, as in these cases, the amount of the profits of the Australian business after making such deductions was less than the amount of the Australian profits as determined by the British revenue authorities, the taxpayer would be entitled to a deduction of part and not of the whole of the amount of excess profits duty paid by him in respect of Australian profits. In my opinion this construction of the sub-section is inconsistent with the opinion expressed by the learned Judges who decided the earlier case of *Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.* (1) and the contention of the respondent on this point cannot be sustained. Sir *Edward Mitchell*, for the respondent, put forward two other contentions, namely, (a) that the provisions of sec. 15 (4) were directory not mandatory, and (b) that the payment by way of excess profits duty was subject to review in certain cases and therefore the amount of such payment could not be treated as a sum paid within the meaning of sec. 15 (4). In my opinion both these points are concluded by the decision in the former case to which I have referred, and that in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (2), and, indeed, they were not seriously pressed.

For these reasons I am of opinion that in each case the appeal should be allowed.

(1) (1928) 42 C.L.R. 39.

(2) (1927) 40 C.L.R. 148.

The Court has been informed that the parties have agreed that the result of its decision is that the appellant is entitled to a refund of £6,709 10s. in respect of the assessment for the financial year 1917-1918 and £1,855 4s. in respect of the assessment for the year 1918-1919.

The order will be that the appeal be allowed, that the assessments for the financial year 1917-1918 be reduced to nil and the assessment for the financial year 1918-1919 reduced to £186 6s. 10d., and that the respondent do repay to the appellant the sum of £8,564 14s. The respondent is to pay the costs of both appeals.

ISAACS J. I agree.

STARKE J. The decision of this Court in *Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.* (1) disposes of the main contentions presented by Sir *Edward Mitchell*, namely, that the profits mentioned in sec. 15 (4) of the *War-time Profits Tax Assessment Act* are the profits of a business after deducting the allowances authorized by the Act, and before making the deduction allowed by sec. 15 (4), and that the provisions of that section are merely directory and confer no right upon the taxpayer.

Another contention, that no sum had been paid in respect of the profits, on account of any war-time profits tax or similar tax imposed in England, because the English excess profits duty was open to review, is untenable, and could not in any case be sustained, having regard to the decision in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (2).

I agree with the order proposed.

Appeal allowed. Assessments reduced. Respondent to repay to appellant £8,564 14*s. Respondent to pay costs of both appeals.*

Solicitors for the appellant, *Blake & Riggall.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1928) 42 C.L.R. 39.

(2) (1927) 40 C.L.R. 148.