

[HIGH COURT OF AUSTRALIA.]

AUGUSTUS DOWNS PASTORAL COMPANY }
 LIMITED } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

War-time Profits Tax—Assessment—No pre-war trade year—Pre-war standard of profits—Assets purchased with taxpayer's money—Capital paid up in money—Capital of business—Method of ascertaining—“Selected values” of live-stock—Applicable to determine profits only, not capital—War-time Profits Tax Assessment Act 1917-1918 (No. 33 of 1917—No. 40 of 1918), secs. 15 (5), 16 (6), (13), 17 (1)—War-time Profits Tax Assessment Act 1924-1926 (No. 53 of 1924—No. 27 of 1926), sec. 2 (1), (1A), (1B), (2), (3B).**

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July 31;
Aug 5.Rich, Starke
and Dixon JJ.

Held, that the “selected” values of live-stock referred to in sec. 2 of the *War-time Profits Tax Assessment Act 1924-1926* apply only in determining the profits of the accounting period, and they are not applicable when ascertaining the capital of a business.

Held, further, that, for the purposes of assessment of war-time profits tax, the capital employed in the business of a company during the year ended 30th June 1917 should be ascertained by applying the provisions of sec. 17 of the *War-time Profits Tax Assessment Act 1917-1918* without recourse to the provisions of sec. 2 of the *War-time Profits Tax Assessment Act 1924-1926*.

* The *War-time Profits Tax Assessment Act 1917-1918*, by sec. 17, provides as follows:—“(1) 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. (2) Any capital the income on which is not taken into account for the purposes of this Act shall be excluded in computing the

amount of capital for the purposes of this Act. (3) Where any money paid into or credited to a business is not being drawn upon for the purposes of that business it shall be excluded from the capital of the business for the purposes of this Act. (4) Where any asset has been paid for otherwise than in cash or created or acquired without purchase its value for the purposes of this section shall be taken to be its value at the time the asset was created or acquired,” &c.

The *War-time Profits Tax Assessment Act 1924-1926*, by sec. 2, provides (*inter alia*) as follows:—“(1) Where the

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The appellant company carried on the business of a pastoralist on a sheep station which it purchased on 8th May 1914 and began to operate on 13th June 1914. It paid £80,000 for the station and live-stock thereon, the price of the latter being £63,800. The purchase-money was found from a paid-up capital of £42,000 and a loan from a bank of £40,000.

Held, that so far as such assets were acquired by the company with the company's money, capital was paid up, by the owner, in money within the meaning of sec. 17 (1) of the *War-time Profits Tax Assessment Act 1917-1918*.

CASE STATED.

The appellant, Augustus Downs Pastoral Co. Ltd., was assessed by the Federal Commissioner of Taxation, under the authority of the *War-time Profits Tax Assessment Act 1924-1926*, for war-time profits tax for the financial year ended 30th June 1917. The Company lodged an objection against the assessment and, being dissatisfied with the Commissioner's decision thereon, requested him to treat the objection as an appeal and to forward it to the High Court. The objection to the assessment was substantially that the tax as assessed was excessive and that upon a proper adjustment of the capital the Company was not liable for any war-time profits tax for the period under review. The Company stated that in the Commissioner's adjustment sheet the calculation of capital had been made upon an entirely incorrect basis, no account having been taken of the increased values of live-stock arising out of the application of selected values, although the effect of such application was reflected in the adjustment of profits for the relevant period.

value of live-stock has been taken into account in assessments made under the *War-time Profits Tax Assessment Act 1917*, or under that Act as subsequently amended, the person whose profits were assessed may, within seven months after the commencement of this Act, elect to have the assessments so made altered, so that, in determining the liability of that person to pay tax under that Act, the value of the live-stock shall be taken into account at a value selected by the taxpayer within the limits prescribed by regulation fifty contained in Statutory Rules 1923, No. 177, made under the *Income Tax Assessment Act 1922-1923* for the purposes of the selection under section sixteen of that Act of the value of live-stock. (1A) Where, prior to the commencement of this sub-section, the

value of live-stock has been taken into account in assessments made under the *War-time Profits Tax Assessment Act 1917*, or under that Act as subsequently amended, the person whose profits were assessed may, if he has not made an election under the last preceding sub-section, elect at his option within three months after the commencement of this sub-section, either to accept, in respect of the value of live-stock, the assessments so made, or to have the assessments so made altered so that, in determining his liability to pay tax under that Act, live-stock shall be taken into account at the value selected by him within the limits specified in the last preceding sub-section. (1B) Where, after the commencement of this sub-section, it appears to the Commissioner . . . that an assessment, under the

The appeal came on for hearing before *Rich J.*, who stated, for the opinion of the Full Court, under the provisions of sec. 29 of the *War-time Profits Tax Assessment Act 1917-1918*, a case which was, so far as material, as follows:—

1. The appellant is a company duly incorporated under the *Companies Act 1899* of the State of New South Wales as a company limited by shares, and at all material times carried on business as pastoralists on a certain station property situate in the State of Queensland.

2. The Company was incorporated on 6th May 1914 with a nominal capital of £100,000 divided into 100,000 shares of £1 each, and of such shares 42,000 shares were issued shortly after incorporation and the sum of £42,000 was paid up thereon in cash. No further shares have been issued.

3. The Company on 8th May 1914 purchased the said station property for the sum of £80,000, and of such sum the sum of £63,800 was paid for certain live-stock upon the said station property, and by the contract of sale such last-mentioned sum was calculated as follows:—27,000 cattle at approximately £2 6s. per head, £62,000; 360 horses at £5 per head, £1,800: Total £63,800. The balance of the said purchase price represented certain real and other personal property.

4. To enable the Company to pay the said sum of £80,000 it borrowed the sum of £40,000, and gave as security therefor a mortgage over the said real property and a mortgage over the said

War-time Profits Tax Assessment Act 1917-1918, should be made of the profits derived in any financial year by any person (not being a person who has made an election under either of the last two preceding sub-sections) and that the value of live-stock should be taken into account in that assessment, he shall give notice to that person of his intention so to make that assessment, and that person may, within sixty days after service of that notice, make one (and only one) election to have all assessments, in respect of his profits, under the *War-time Profits Tax Assessment Act 1917*, or under that Act as subsequently amended, altered or made so that, in determining his liability to pay tax under that Act, live-stock

shall be taken into account at a value selected by him within the limits specified in sub-section 1 of this section.

(2) For the purposes of this section 'live-stock' means live-stock not disposed of at the beginning or end of the respective accounting periods which are required to be taken into consideration for the purposes of assessments. . . .

(3B) The value selected by any person in pursuance of his right of election under sub-section 1 or 1A of this section shall be the value at which live-stock shall be taken into account in any assessment of the profits of that person, under the *War-time Profits Tax Assessment Act 1917-1918*, made after the commencement of that sub-section."

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live-stock; and the sum so borrowed, together with £40,000 out of the said sum of £42,000, was expended in purchasing the said station property as aforesaid. The balance of £2,000 was utilized for the purpose of carrying on the Company's business.

5. The business of the Company was commenced on 13th June 1914, and on 10th May 1920 the Company was assessed for war-time profits tax for the financial year ended 30th June 1918 at the sum of £910 5s., and (as this assessment appeared to be in order) the Company paid the tax so assessed. As, owing to the recent commencement of the business of the Company, there had not been one pre-war trade year the pre-war standard of profits taken into account in the assessment was 15 per cent on the average amount of capital computed by the Commissioner as having been employed in the business during the accounting period. The said assessment was the only assessment for the purpose of the *War-time Profits Tax Assessment Act* 1917-1918 made by the Commissioner on the Company prior to the passing of the said *War-time Profits Tax Assessment Act* 1924-1926.

6. As the value of the live-stock of the Company not disposed of at the beginning and end of the relevant accounting period had been taken into account in the said assessment at the values then prescribed by the *War-time Profits Tax Assessment Act* 1917 as amended and the Regulations then in force, the Company, upon the passing of the *War-time Profits Tax Assessment Act* 1926, duly elected to have the assessment so made altered so that in determining its liability to pay tax under the *War-time Profits Tax Assessment Act* 1917 or under that Act as subsequently amended the Company's live-stock should be taken into account at the following values: Cattle at £3 10s. per head; horses at £3 per head.

7. Following upon the election referred to in par. 6 hereof the Commissioner has purported to alter the said assessment. The Commissioner has also purported to make an assessment in respect of the financial year ended 30th June 1917, and claims that the Company is liable to pay the sum of £2,871 by virtue of such last-mentioned assessment.

8. For the purpose of calculating the amount of war-time profits upon which tax, if any, is payable by the Company for the financial

year ended 30th June 1917, the Commissioner has (*inter alia*) taken as the capital of the Company's business the sum of £30,496, being the sum of £42,000 (the original capital paid up as aforesaid) as reduced by debit balances brought forward from profit and loss account, such balances being calculated by taking into account live-stock owned by the Company at the values set out in par. 6 hereof.

9. The Company duly objected to the said last-mentioned assessment on the ground (*inter alia*) that the Commissioner had calculated the capital of the Company for the purposes of the said Acts upon an erroneous basis; and the Commissioner has disallowed such objection.

10. At the beginning of the said financial year ended on 30th June 1917 the live-stock of the Company upon the said station property and constituting part of the assets of the Company used in its business consisted of the following: 21,420 head of cattle; 394 head of horses. And at the end of the said year the said live-stock consisted of the following: 21,660 head of cattle; 400 head of horses.

11. Of the cattle originally purchased as aforesaid approximately 13,383 thereof had been sold or had died or been destroyed or otherwise ceased to exist, and at the beginning of the said year there remained on hand approximately only 13,617 of the cattle so purchased. The balance of cattle then on hand consisted of approximately 7,803 head, being natural increase. Of the horses originally purchased as aforesaid, approximately 37 thereof had died or been destroyed or otherwise ceased to exist, and at the beginning of the said year there remained on hand approximately 322 of the horses so purchased. The balance of the horses then on hand consisted of approximately 30 head, being natural increase, and 42 head, being horses purchased by the Company subsequent to the said original purchase and prior to the beginning of the said year.

12. The Company contends that in view of the facts hereinbefore set forth and of the provisions of the said *War-time Profits Tax Assessment Act 1924-1926* the capital of the business should be calculated for the purpose of determining its liability to pay tax for the relevant year by taking into account its live-stock at the beginning of each year at the sums mentioned in par. 6 hereof, with

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13. The Commissioner contends that the capital of the business for the financial year commencing on 1st July 1916 is the sum of £30,496, arrived at as follows:—Capital paid up, £42,000; Deduct debit balance of profit and loss account carried forward from previous year (£11,211) and capital invested outside the business (£500), £11,711 : £30,289. Add depreciation written off in excess of departmental rates, £207 :—Average capital of year ended 30th June 1917, £30,496.

15. The Company, being dissatisfied with the decision of the Commissioner upon the said objection, duly asked him to treat such objection as an appeal.

16. On the hearing of the appeal before me the following question, which in my opinion is a question of law, has arisen, and I state this case for the opinion of the High Court thereon.

The questions stated by *Rich J.* for the opinion of the Full Court were as follows:—

- (1) Is the amount of £31,780—being the excess of selected values over the cost price of live-stock purchased on 8th May 1914—capital within the meaning of sec. 17 of the *War-time Profits Tax Assessment Act 1917-1918* ?
- (2) By what method and at what amount should the capital employed in the business of the Company during the year ended 30th June 1917 be computed ?

Maughan K.C. (with him *Harper*), for the appellant. Following upon the passing of the *War-time Profits Tax Assessment Act 1924-1926* live-stock must be taken into account at selected values when determining the liability of the taxpayer. No matter what calculations the Commissioner finds necessary for the computation of capital or income the values of the live-stock as selected by the taxpayer must be adopted. The value is not determined by what was paid for the live-stock. The scheme of the Act is that artificial values must give way to selected values. When the Legislature said selected values had to be taken into account in determining

the liability of the taxpayer, that refers to every item of his calculation in which he had to bring in live-stock. The amount of capital paid up here means the amount put into the business, not merely into the Company. Where there was no pre-war trading the capital in the business must be ascertained in order to determine the liability of the taxpayer to pay tax. In order to make the process uniform, consistent and fair, it is necessary to follow out the instruction to ignore market value, estimated cost, purchase price, &c., and substitute in lieu thereof such value as may be selected by the taxpayer.

E. M. Mitchell K.C. (with him *A. M. Cohen*), for the respondent. The question of law is as to the computation of capital only. It would seem that the contention of the appellant is that the capital should be increased by the sum of £31,780, the excess of selected values over cost price of live-stock purchased in May 1914. There is no justification for disturbing the accounts as at 30th June 1914, because the period ending 30th June 1914 is not an accounting period required to be taken into consideration for the assessments in question which is for the accounting period 1st July 1916 to 30th June 1917. As to this period the *War-time Profits Tax Assessment Act* 1924-1926, by sec. 2 (1), 2 (2) and 3B, provides that the live-stock at 1st July 1916 and 30th June 1917 shall be taken into account at selected values in the assessments of the profits of that accounting period. There is no other accounting period required to be taken into consideration for the purposes of the assessments, and there is not any other accounting period to which the selected values are to be applied. In point of fact the periods ended 30th June 1914 and 30th June 1915 could not be accounting periods because the Act had no application to either of them. The first accounting period for the purpose of the Act is the period 1st July 1915 to 30th June 1916. The appellant's claim is to add to the capital the excess of selected values over cost price at a date before the Act came into force. This claim is based on the assumption that the appellant is entitled to apply the selected values to the stock on hand at the end of the period ending 30th June 1914, and so show some hypothetical profit without applying selected values to the

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stock on hand at the beginning of that period. If the selected values were to be applied at the beginning and end of that period, then there would be no figure of £31,780, for the value at the beginning would be the same as at the end and there would be no profit, the difference being nil, and therefore there would be nothing to carry forward to the credit of the profit and loss account. The Act of 1924-1926 merely provides that live-stock at the beginning and end of an accounting period shall be taken into account at selected values for the purposes of assessment of profits. The Act does not purport in any way to affect the computation of capital. The capital which has to be considered is not the capital at the beginning or the capital at the end of an accounting period, but it is the average capital employed during the accounting period. There is no warrant in the 1924-1926 Act for applying selected values to the determination of capital at some period intermediate between the beginning and end of the accounting period. The fact that the provisions of the 1924-1926 Act are applicable only to numbers of live-stock on hand at the beginning and end of the accounting periods shows how inapplicable these provisions are to the computation of capital which is a computation of the average capital employed over the whole accounting period, and further illustrates that the provisions refer only to profits and not to capital: see sec. 3B of the 1926 Act and sec. 10.(1) of the 1917-1918 Act, which says that profits shall be determined as for income tax; and compare this with sec. 16A of the *Income Tax Assessment Act* 1922-1929, which explains clearly that live-stock values are taken into consideration for the purposes of income tax only and have nothing to do with capital. The *War-time Profits Tax Assessment Act* is divided into Parts, of which Part IV. is headed "Computation of Profits," Part V. "Pre-war Standard," Part VI. "Capital." These are three different matters. Sec. 16 of the Act especially provides that the provisions of Part VI. are to apply with respect to the ascertainment of capital. The Court is not here concerned with the ascertainment of the profits of any pre-war trade year, because there was not any pre-war trade year and the question is what is the statutory percentage of the average capital employed. Sec. 15 (15) shows that borrowed money is not

to be treated as capital. Applying sec. 17, which must be applied, (a) the sum of £31,780 is not capital paid up, (b) it is not accumulated trading profits invested, (c) it is not a credit balance brought forward. It is, therefore, not capital in any of the senses of sec. 17. It is purely a fictitious figure and represents, as stated in the reconstructed balance-sheets, the excess of selected values over cost prices as at the inception of the business, and has no relevance at all to the matters before the Court. [Counsel referred to *McKellar v. Federal Commissioner of Taxation* (1).]

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Maughan K.C., in reply. The Commissioner has introduced selected values into periods that are not accounting periods, which is not consistent with the contention now put forward on his behalf. The qualification in sec. 2 (2) of the 1926 Act includes all periods necessary to be taken into consideration for the purpose of determining capital.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

Aug. 5.

The appellant has been assessed, somewhat tardily, to war-time profits tax in respect of the year ending 30th June 1917. Its business is that of a pastoralist. This business is conducted upon a sheep station which the appellant purchased on 8th May 1914, and which it began to operate on 13th June 1914. By virtue of sec. 16 (13) of the *War-time Profits Tax Assessment Act* 1917-1918, the appellant has been assessed as if a new business had been commenced on 13th June 1914, with the result that its pre-war standard of profits has, pursuant to sec. 16 (6), been taken to be the statutory percentage on the average amount of capital employed in the business during the accounting period, namely, the year ending 30th June 1917.

In determining the average amount of capital it is necessary to apply the provisions of sec. 17 (1) of the Act which 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

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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." As Lord *Buckmaster* pointed out in *Merlimau Rubber Estates Ltd. v. Commissioners of Inland Revenue* (1), "capital for the purpose required is not the capital sunk in the business unless it can be brought within the words of the definition," which are "complete, and exclude all that is without their compass." In the present case, the Company paid £80,000 for its station and the live-stock thereon, and of this sum, £63,800 represented the price of the live-stock. It found the money to do this from a paid-up capital of £42,000 and a loan from the bank of £40,000. £2,000 of its capital appears to have been applied in working expenses. In our opinion, so far as these assets were acquired with the Company's money, capital was paid up, by the owner, in money within the meaning of sec. 17 (1). The Commissioner acted on this view and, in doing so, he treated the whole paid-up capital of the Company, namely, £42,000, as having been expended in the acquisition of the assets. In respect of the borrowed money, in calculating the profits of the accounting period, he made the allowance prescribed by sec. 15 (15). But in calculating the profits, he applied the provisions of the *War-time Profits Tax Assessment Act* 1924-1926, sec. 2 (1A) and (3B), under which the taxpayer had elected to have his assessment made, so that in determining his liability to pay tax, live-stock should be taken into account at the value selected by him within the limits specified in sub-sec. 1. In so doing the Commissioner acted rightly. But the appellant contends that these provisions not only should be applied in determining the profits of the accounting period, but that they should also be given an operation in ascertaining the capital; an operation which would result in the selected values being assigned, in lieu of the actual price paid, to so much of the assets acquired as consisted of live-stock. This contention the Commissioner disallowed, and from his disallowance the appellant now appeals. In our opinion, the Commissioner's view is clearly right. In the first place sec. 2 of the *War-time Profits*

(1) (1923) A.C. 283, at p. 286.

Tax Assessment Act 1924-1926 requires the use of selected values (when the taxpayer elects to resort to them) for the purpose of taking into account live-stock not disposed of at the beginning or end of the respective periods which are required to be taken into consideration for the purpose of assessment. The expression "live-stock" is defined to this effect by sub-sec. 2. This definition confines the application of the provisions to the ascertainment of the profit and loss of an accounting period when it is necessary to take into account at a value the live-stock on hand at the beginning and at the end of the period. Such a process is quite irrelevant to the ascertainment of the capital of the business, at least in so far as it consists of the amount of its capital paid up, by the owner, in money or in kind within the meaning of sec. 17. Nor does it become any more relevant because in this case the average amount must be found of the capital employed in the business during the accounting period. In the next place, the provisions of sec. 17 are specific, and require that the capital of the business be taken to be, as the first item, the amount of its capital paid up by the owner in money or in kind. In this case, as we have already said, we think the capital was paid up in money and that there is no room for taking in assets at a value. Further, if it were otherwise, sub-sec. 4 of sec. 17 would be the appropriate provision for the purpose of valuation. When, however, the Commissioner turned to the next items prescribed by sec. 17 (1) as the measure of capital, he took the step of resorting to the provisions of sec. 2 of the *War-time Profits Tax Assessment Act 1924-1926*, and to this the taxpayer objects. Instead of taking the actual balances brought forward from previous years to the credit or debit of profit and loss account, he reconstructed that account by taking the selected values of live-stock in lieu of the values adopted in the appellant's commercial account. His counsel concedes, and in our opinion rightly, that in doing this the Commissioner is mistaken and departed from the true application of sec. 17 (1). As the result appears to be unfavourable to the taxpayer, and the error is covered by his objection, the assessment must be altered in this respect.

The formal order upon this special case will be: Answer to question 1—No; to question 2—By applying sec. 17 of the *War-Time*

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Questions answered accordingly.

Solicitors for the appellant, *Minter, Simpson & Co.*

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

Crown Solicitor.

J. B.

Cons Cash Resources Aust Pty Ltd v BT Securities Ltd [1990] VR 576	Discd Wu v Glaros (1991) 55 SASR 408	Cons Avco Financial Services Ltd v Fishman [1993] 1 VR 90	Cons J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) 125 CLR 546	Rev Abigail v Lapin (1934) 51 CLR 58	Appl Platzer v Commonwealth Bank of Australia [1997] 1 QdR 266	Cons Thorpe v Bristle Ltd (1997) 80 FCR 330
Appl Moffett v Dillon [1999] 2 VR 480						

[HIGH COURT OF AUSTRALIA.]

LAPIN AND ANOTHER APPELLANTS;
PLAINTIFFS,

AND

ABIGAIL RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
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H. C. OF A. *Land—Priorities—Conflicting equitable titles—Transfer absolute in form—Intended as security only—Registration—No caveat lodged by transferor—Subsequent unregistered mortgage from registered proprietor of land to third party—No evidence as to search by third party for caveats—Priority of equities—Negligence—Estoppel—Notice—Onus of proof—Real Property Act 1900 (N.S.W.) (No. 25 of 1900), sec. 43.**

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*Money-lender—Solicitor—Loan transactions—Nature of transactions and surrounding circumstances—Question of fact as to whether “money-lender”—Onus of proof—Money-lenders and Infants Loans Act 1905 (N.S.W.) (No. 24 of 1905), sec. 8.**

Knox C.J.
 Isaacs,
 Gavan Duffy,
 Starke and
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The registered proprietors of land under the *Real Property Act 1900* (N.S.W.), by transfers absolute in form and expressed to be made in consideration of a money payment, transferred the land to the nominee of a creditor as security

* The *Real Property Act 1900* (N.S.W.) provides, by sec. 43, as follows: “Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the

registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered