[HIGH COURT OF AUSTRALIA.]

BERRI CO-OPERATIVE PACKING UNION LIMITED . . . . . } APPELLANT;

AND

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

H. C. OF A. 1930.

ADELAIDE, *Sept.* 24.

MELBOURNE, *Sept.* 29.

Dixon J.

Income Tax (Cth.)—"*Co-operative company*"—*Taxable income*—*Income distributed among shareholders — Distribution by book entry — Entry of corresponding levy on shareholders*—*Income Tax Assessment Act* 1922-1929 (*No.* 37 *of* 1922 —*No.* 11 *of* 1929), *secs.* 4, 20 (1), 20 (1A), 23 (1) (*a*), 51 (6).

Sec. 20 (1) of the *Income Tax Assessment Act* 1922-1929 provides that in calculating the taxable income of a co-operative company there shall be deducted so much of its assessable income as is distributed among its shareholders as interest or dividends on shares or as rebates based on purchases by shareholders from the company. Sec. 23 (1) (*a*) provides that in calculating taxable income there shall be deducted from the taxpayer's assessable income losses and outgoings actually incurred in producing that assessable income.

A "co-operative company" in the course of its operations received fruit from its members which it packed and sold. The net proceeds of the sale of all fruit of a given class of each season were distributed ratably among the members supplying such fruit. The company deducted 5 per cent from the weight of fruit delivered, because there was a loss of weight when it was stemmed and treated. If it were subsequently found that the quantity of fruit sold by the company exceeded 95 per cent of the weight of fruit delivered to it, the proceeds of sale from the excess in weight over the 95 per cent were dealt with as revenue which the company might carry to its profit and loss account. The company, in an annual list, credited shareholders with aliquot proportions of such revenue, but the amounts placed opposite shareholders' names were followed by sums contained in a column headed "levies," which totalled the exact amount of the credit balance of the profit and loss account of the year.

Held, that the proceeds of fruit sold were assessable income of the company, and that the sums received in respect of the sale of fruit representing the excess over 95 per cent of the weight of fruit delivered were taxable.

APPEALS from decisions of the Board of Review confirming assessments of the appellant's income for the financial years ending 30th June 1928 and 30th June 1929.

The facts and the argument sufficiently appear from the judgment hereunder.

K. L. Ward, for the appellant.

Cleland K.C. (with him *Powers*), for the respondent.

Cur. adv. vult.

Sept. 29.

DIXON J. delivered the following written judgment:—

These are two appeals, pursuant to sec. 51 (6) of the *Income Tax Assessment Act* 1922-1929, from decisions of the Board of Review, which confirm respectively assessments of the appellant's income made by the Commissioner for the financial years ending 30th June 1928 and 1929 based upon income years ending 30th September 1927 and 1928.

The appellant is a society registered under the *Industrial and Provident Societies Act* 1923 of South Australia, and, as the Commissioner admits, it is a "co-operative company" which answers the requirements of sec. 20 (1A) of the *Income Tax Assessment Act*, as amended, presumably, by sec. 8 (C) and sec. 26 (3) of the Act of 1930 (No. 50).

The appellant claims, first, that the sums in which it has been assessed do not form part of its assessable income, and, if they do, second, that the whole of such assessable income was distributed among the appellant's shareholders and should be deducted pursuant to sec. 20 (1) in calculating taxable income, which thus amounts to nothing.

The appellant society, in the course of its operations, receives fruit from its members, which it packs and sells. It does not preserve the separate identity of the fruit of each particular supplier and account to him for the proceeds of his particular fruit, but it distributes the net proceeds of the sale of all the fruit of a given class of each season among the members who supply such fruit ratably according to the quantity and quality of what each supplies. In order to fix the quantity supplied, it deducts 5 per cent from the

H. C. OF A. 1930. BERRI CO-OPERATIVE PACKING UNION LTD. v. FEDERAL COMMISSIONER OF TAXATION. Dixon J.

actual weight of the fruit when it is delivered, because there is a loss of weight when the fruit is stemmed and treated. In order to provide for the cost of packing, an amount calculated upon quantity is fixed as a packing charge, and this is debited against the supplier. If, at the end of a season, it is found that the total of the packing charges exceeds the cost of the services for which the charges are made, the difference is dealt with as a sum available for distribution among supplying members. Sums so distributed are called in the society's accounts rebates upon packing charges. If, at the end of a season, it is found that the quantity of the fruit sold by the society actually exceeds 95 per cent of the weight of fruit delivered to it by the suppliers, so much of the money arising from the sale of fruit as represents the excess in weight over 95 per cent is dealt with as revenue, which the appellant may carry to its profit and loss account. The appellant's activities include the sale to its members of goods which they require for consumption or for use in fruit-growing. If, at the end of a year, it is found that the amount of the net proceeds of this trade exceeds the cost, the excess is distributed among the purchasing members in proportion to the amounts of their purchases. In the society's accounts the sums so distributed are called rebates on purchases.

In assessing the society, the Commissioner in each year adopted the credit balance of the profit and loss account as his base, and obtained the taxable income by deducting therefrom depreciation pursuant to sec. 23 (1), and, pursuant to sec. 20 (1), so much thereof as had been distributed among the shareholders as interest on shares. The credit balance of the profit and loss account, in each year, was produced by including among the receipts so much of the proceeds of the sale of fruit as represented the excess over 95 per cent of the weight of fruit delivered, as well as stocks on hand at the end of the year.

The first question which arises is whether any part of the proceeds of fruit sold, or the value of fruit held for sale, should be included in the assessable income, or, failing that, in the taxable income, inasmuch as the fruit is delivered to the appellant as a co-operative society by its members for sale for their benefit, and not for its own profit. It is suggested that the principles acted upon in *New York*

Life Insurance Co. v. *Styles* (1) and *Jones* v. *South-West Lancashire Coal Owners' Association Ltd.* (2) apply, and prevent the inclusion of such items in the appellant's assessable income. But sec. 4 defines "income" specifically to include all sums received by a co-operative company or society in respect of commodities sold by the company or society, whether on its own account or on account of its members. There can be no doubt that this interpretation applies to the word "income" in the definition in the same section of the term "assessable income." But although so much of the sums received in respect of the sale of fruit as represents 95 per cent of the weight of fruit delivered comes within this definition, these sums have been excluded, no doubt rightly, in calculating the taxable income; and the society maintains that so much as represents the excess over 95 per cent should likewise be excluded. But it is to be assumed that the conditions upon which the fruit is delivered to the society impose upon it an absolute obligation to account to the supplying member for the proceeds of 95 per cent of the actual weight of fruit at the time of delivery. Upon this footing, the deduction from the assessable income of such an amount is authorized and required by sec. 23 (1) (*a*). But no other inference can be drawn from the inclusion in the society's profit and loss account of so much of the proceeds of the sale of fruit as represents the excess over 95 per cent of its weight, than that the conditions of delivery entitle the society to dispose of these sums as part of its revenue. The rules of the appellant contain nothing inconsistent with this conclusion, and there is no other evidence to displace it. It follows that the appellant society must succeed, if at all, upon the ground that it is entitled to a further deduction under the provisions of sub-sec. 1 of sec. 20. This sub-section enacts that, in calculating the taxable income of a co-operative company, there shall be deducted, in addition to any other deductions allowed under the Act, so much of the assessable income of the company as is distributed among its shareholders as interest or dividends on shares, or as rebates based on purchases by shareholders from the company. In respect of each of the two years to which these appeals relate, the society credited members who supplied fruit,

(1) (1889) 14 App. Cas. 381. (2) (1927) A.C. 827.

H. C. OF A. 1930.

BERRI CO-OPERATIVE PACKING UNION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

with rebates upon packing charges, and members who bought goods, with rebates on purchases, but the amounts of these rebates were deducted from the receipts for purchases and for packing charges before they were carried to the credit of the profit and loss account. These rebates, therefore, are not included in the amounts upon which the Commissioner based his assessments. The society maintains, however, that the whole amounts upon which the assessments are based, namely, the credit balances appearing in the profit and loss accounts, were distributed among its shareholders as rebates based on purchases by shareholders from the company (*sc.*, the appellant society), because it credited to the respective shareholders lump sums consisting of (i.) these rebates and (ii.) aliquot proportions of such credit balances. These lump sums were credited in two lists in each year. In the first list the lump sums were simply placed opposite the shareholder's name; for the year ending 30th September 1928 as an undivided sum, for the year ending 30th September 1927 divided into two sums, one described as rebates (i.e., on packing charges and on purchases) declared for the year ended 30/9/27, and the other as "1926 credits declared year ended 30/9/27." In the second list, the lump sums so made up were placed opposite the shareholders' names, but were followed by sums contained in a column headed "Levies," which totalled the exact amount of the credit balance of the profit and loss account of the relevant year. The excess of the lump sums over the amounts in the column headed "Levies," was shown in a column headed "Surplus," which totalled the exact amount of the rebates upon packing charges and purchases, and these surplus sums were then shown as divided under two columns, one headed "Bonus Shares" and the other "Transferred to Bonus Ledger." The balance, thus described as transferred to Bonus Ledger, was credited to the shareholders' accounts, which recorded the state of liability between the society and its individual members. The distributions upon which the society relies are said either to be effected by these entries or to be constituted by the transactions which they narrate or describe.

The object of each of these annual transactions is clear enough. The committee of management of the society were prepared to diminish its funds to the extent required for a distribution of the

rebates on packing charges and purchases, but did not desire to diminish them to the further extent required for a distribution of the credit balances of the profit and loss accounts. They intended to credit to some reserve funds and to interest on capital amounts which were equivalent to these credit balances. But, in consequence of a communication from the Commissioner, they believed that if in each year they levied the amount which they required for these purposes upon the shareholders, debited the levy upon each shareholder against him, and credited him with a lump sum which contained his distributable proportion of the credit balance of the profit and loss account, then the Commissioner would consider that there had been a distribution within sec. 20 (1). In fact the journal entries and the distribution accounts show that these surpluses, after an allocation between the year in which each was derived and the previous year, were treated as absorbed by the levy upon shareholders, and the levy, in its turn, was treated as absorbed by the amounts carried to reserve and appropriated to answer interest on capital.

The society's contention rests upon the view that there was an unconditional appropriation of the assessable income to the individual shareholders which, in the absence of a cross-liability, would have given each a right to payment of his share, and that this right was only defeated by the independent creation of a cross-demand in the same amount by means of a levy.

This contention is embarrassed by a number of difficulties, some of which arise from the condition of the rules of the society, some from the neglect of formal steps needed to carry out the plan and some from the late date at which an attempt was made to put it into effect. It is enough, however, to deal with two answers which appear to go to the substance of the society's case. First, if it be assumed that what the appellant society did amounted to a distribution of its assessable income, this in itself would not be enough to entitle the society to a deduction of the amount distributed. It would remain necessary to show that a basis of distribution had been adopted which complied with the requirements of sec. 20 (1). In the circumstances of this case, in order to satisfy this condition, it would be necessary to establish that the assessable income was

H. C. OF A. 1930.

BERRI CO-OPERATIVE PACKING UNION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

distributed among the shareholders, as rebates based on purchases by shareholders from the society. But in fact the amounts credited to the members, so far as they were derived from the balance of the profit and loss account, were calculated upon the relative quantities of fruit which members supplied. To meet this difficulty, it was contended that the word "purchases" must be given a wide meaning, and that it included the employment for reward of the services of the co-operative company by its members. It is quite impossible to give such an interpretation to the expression. Second, what the appellant society did does not amount to a distribution of its assessable income. Neither the committee of management nor the general meeting meant to, or did, appropriate to the use of shareholders any sum beyond the surplus arrived at by subtracting the so-called levy, that is any sum beyond the rebates on packing charges and purchases.

The shareholders did not acquire any new right in respect of the profits, nor was any existing obligation of the shareholders discharged. The so-called levy, and the inclusion of "assessable income" in the amount of the shareholder's credit against which the "levy" was debited, did not affect the shareholder's position in relation to the society. He incurred no new obligation, and it conferred upon him no new right or interest. The society did no more than state in one breath its intention to distribute and its intention to retain the same sum of money. It was a mere book-keeping device adopted because it was supposed that it would entitle the society to a reduction under sec. 20 (1) in its income tax assessment.

Upon these grounds the appeals fail. In each case the order will be : Appeal dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant, *Edmunds, Jessop & Ward.*

Solicitors for the respondent, *Fisher, Powers & Jeffries*, for *W. H. Sharwood*, Commonwealth Crown Solicitor.

C. C. B.