[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

HIGGINS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1930.

SYDNEY, Dec. 1, 2, 3.

Isaacs C.J., Rich and Starke JJ.

Income Tax (Cth.)—Assessment—Money held by trustee in trust for A if found entitled thereto—If A not entitled then in trust for B—A found not entitled—Money held for further three years then paid to B under authority of Court—Accrued interest during such period—Trustee liable to pay tax thereon—"Presently entitled"—"In actual receipt"—Rate of tax—Beneficiary a company—Company rate applicable—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 13, 16 (*c*), 19, 31 (1), (2), (3), 32, 33, 89—*Income Tax Act* 1925 (*No.* 29 *of* 1925), *secs.* 3, 4.

In order to meet the contingency of claims to certain moneys being established in legal proceedings then instituted, a sum of money sufficient to satisfy such claims was placed in the hands of the respondent as trustee, who executed a declaration of trust in connection therewith. In the trust deed he declared that such money was "held by me in trust to abide the final result of such proceedings for such persons (if any) as may by the final result of such proceedings be declared to be entitled thereto and failing such persons in trust for British Australian Wool Realization Association Limited." The trust money was immediately invested by the respondent; and interest thereon, which accrued from time to time, was also invested. The legal proceedings were finally concluded in March 1924, the result being a declaration that no such persons were entitled to the money in question. In 1927 the respondent applied to the Court for authority to pay the money to the Association, which was granted, and the money together with interest additions was so paid in April 1927. The Federal Commissioner of Taxation claimed income tax from the respondent at the "individual" rate in respect of the interest which accrued on such money during the financial years 1925-1926, 1926-1927 and 1927-1928 Some of the assessment notices bore date

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

19th July 1927 and others 7th November 1927. The respondent objected, *inter alia*, that he was not liable to pay the tax as the moneys in question were not his moneys and that before assessment the moneys had been paid over to the Association entitled thereto, also that, if he were liable, then the "company" rate should be applied

Held, that, assuming the respondent to be assessable after the decision in March 1924, he was assessable only in his representative capacity, which made his liability that of the person or persons he represented, and, therefore, as after the decision referred to he represented the above-named Association, his liability was on the company flat rate.

Decision of the Supreme Court of Victoria (*McArthur* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

In 1916 the Imperial Government entered into an arrangement with the Commonwealth Government for the acquisition by the Imperial Government of the whole of the wool clip of Australia for the wool-clip season 1916-1917 for military purposes, which arrangement was subsequently extended so as to cover the period of the War and one full wool year after the termination of hostilities, such period being later treated as ending on 30th June 1920. A term of the arrangement, which was made by a series of cablegrams between the two Governments, was that "in the event of profit being realized from the sale of any surplus which might remain over after military requirements of the British and Allied Armies had been satisfied His Majesty's Government would propose, after payment of all expenses, to share such profits with the Government of Australia." To carry into effect such arrangement certain regulations were promulgated by the Commonwealth Government by virtue of which a Central Wool Committee and in each State a State Wool Committee subordinate to the Central Wool Committee were constituted; the control of the administration of the regulations, subject to the directions of the Prime Minister, being given to the Central Wool Committee. Under the direction of such Committee a system of appraisement in accordance with the provisions of the said regulations was substituted for the ordinary method of marketing wool for sale by auction and appraisers were appointed by the Committee to whom wool might be submitted for appraisement. No wool of the various clips coming within the arrangement was compulsorily acquired, but, as the sale of wool was prohibited except

through or to, or with the consent of, the Central Wool Committee, substantially the whole of such clips was appraised in accordance with the provisions of the regulations. From time to time between November 1916 and August 1919 statements were made in the Commonwealth Parliament by different Ministers to the effect that the Australian share of any profits referred to above would not be retained by the Commonwealth Government, but would be distributed by it amongst the suppliers of wool in Australia. On 27th June 1918 the Central Wool Committee passed the following resolution: —"That all skin wools shall be paid on the flat-rate price basis of 15½ pence per pound and shall not participate in any profits from any source over and above that flat-rate price. This decision shall operate from 1st July 1918." The resolution having been confirmed by the Acting Prime Minister, the suppliers of skin wool were informed accordingly. They contended, however, that on the appraisement of their skin wool they acquired rights in respect of the profits in question which the Central Wool Committee could not in any way affect, but under protest they submitted their wool for appraisement. In September 1920 the sum of £6,486,992 was paid by the Imperial Government as its first payment on account of the Commonwealth Government's share of the profits from the resale of surplus wool, and this sum, together with a further sum of £1,166,300 held by it from other sources, was, less the sum of £351,905 7s. 9d., distributed by the Central Wool Committee amongst all persons interested at the rate of 5 per cent on the appraised value of the wool, but no part of the money was distributed among the persons who had supplied skin wool for appraisement during the 1918-1919 and 1919-1920 wool seasons. Before such distribution was made proceedings had been commenced in the High Court by John Cooke & Co. Pty. Ltd. and Peter McWilliam Ltd., on behalf of themselves and all suppliers of skin wool during the 1918-1919 and 1919-1920 wool seasons, for a declaration that they were entitled to share in the moneys received and to be received from the Imperial Government and in all profits made by the Commonwealth Government or the Central Wool Committee in the course of administering the wool regulations or otherwise, and the said sum of £351,905 7s. 9d. was retained by the Central Wool Committee to provide for the

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

contingency of such claims being established. A sum of money sufficient to meet such contingency was also retained from moneys allocated for payment to certain wool-selling brokers as commission and to suppliers of skin wool supplied prior to 1st July 1918. At the time of the distribution referred to above, large quantities of the surplus wool remained unsold, and, as the result of negotiations between the Imperial Government and the Commonwealth Government, the British Australian Wool Realization Association Ltd. was formed for the purpose of controlling and disposing of such surplus wool and the distribution of the proceeds therefrom. Sir John Michael Higgins, chairman of the Association, was appointed trustee of the moneys so retained; and on 13th September 1921 he executed separate declarations of trust in respect of the "skin wool" money, and the "wool-selling brokers' commission," a declaration of trust in respect of the said sum of £351,905 7s. 9d., known as the "First 5 per cent Profits Dividend Trust," being executed by him on 14th July 1922. The deeds of trust in respect of the "Skin Wool Trust" and the "First 5 per cent Profits Dividend Trust," after referring to the proceedings instituted by John Cooke & Co. Ltd. and Peter McWilliam Ltd., stated that the moneys respectively referred to in such deeds were "held by me in trust to abide the final result of such proceedings for such persons (if any) as may by the final result of such proceedings be declared to be entitled thereto, and failing such persons in trust for British Australian Wool Realization Association Limited." The deed of trust in respect of the Wool-Selling Brokers' Commission stated that the moneys therein referred to were "held in trust by me for the wool-brokers" whose names were set out upon an annexure "if such commission is found to be properly payable to them and, if not, for the British Australian Wool Realization Association Limited." The moneys so held by Sir John Michael Higgins were, upon the execution of the respective deeds of trust, invested and interest moneys arising from such investments were laid out in further investments from time to time. On 24th March 1924 the proceedings instituted by John Cooke & Co. Ltd. and Peter McWilliam Ltd. were finally concluded by the Privy Council on appeal from the High Court (*John Cooke*

& Co. Pty. Ltd. and Field v. *The Commonwealth and the Central Wool Committee* (1)), the result being a finding that no persons were entitled to the moneys in question (*John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (2)).

In June 1924 Sir John Michael Higgins applied to the Supreme Court of Victoria by originating summons for an order authorizing him (*inter alia*) to hand over the moneys in question together with interest accrued thereon to the Association. On that originating summons *Cussen* J. on 1st April 1927 made an order that the trustee " do forthwith transfer assure surrender and release " to the Association " all moneys and assets held by him as trustee under the relevant deeds of trust," which order was complied with on 14th April 1927. In 1928 certain wool-selling brokers applied to the Supreme Court of Victoria by originating summons for an order as to the disposal of the moneys referred to in the " Wool-Selling Brokers' Trust " deed, and on 5th June 1928 *McArthur* J. declared that upon the true construction of the trust deed, dated 13th September 1921, the brokers whose names appeared upon the annexure became entitled to the fund therein referred to in proportionate parts conditionally upon its being ascertained that it was competent to the Central Wool Committee to pay or distribute such fund to them by way of commission in respect of wool submitted through them for appraisement. *McArthur* J. further declared that it was competent for the Committee to do so, and authorized Sir John Michael Higgins to distribute such fund to the brokers in question, which was accordingly done. On 19th July 1927 the Deputy Federal Commissioner of Taxation forwarded notices of assessment of Federal income tax payable by Sir John Michael Higgins, described in such notices as " Trustee First 5 per cent Profits Dividend Trust," for the financial years 1926-1927 and 1927-1928 on the interest accrued on the said sum of £351,905 7s. 9d. during such years, and on 7th November 1927 sent a similar notice of assessment to him in respect of the financial year 1925-1926. Separate notices of assessment of Federal income tax were also forwarded on 19th July 1927 by the Deputy Commissioner to Sir John Michael Higgins, as trustee thereof, in respect

(1) (1922) 31 C.L.R. 394.

(2) (1924) 34 C.L.R. 269.

H. C. OF A. 1930. FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

of interest earned by the "Skin Wool Trust" fund during each of the financial years 1922-1923 (which was subsequently abandoned before *McArthur* J.), 1925-1926, and 1926-1927; and in respect of interest accrued during each of the financial years 1922-1923, 1925-1926 and 1926-1927 on the "Wool-Selling Brokers' Commission Trust" fund, a similar notice being sent on 7th November 1927 in respect of interest earned by the "Skin Wool Trust" fund during the financial year 1927-1928. The rate of tax in all assessments was the rate applicable to individuals. Sir John Michael Higgins objected to the assessments in respect of the "First 5 per cent Profits Dividend Trust" and the "Skin Wool Trust" on the grounds, *inter alia*, (1) that the moneys taxed were, at all times material, assets of British Australian Wool Realization Association Ltd. and were held by him on behalf of that Association subject to a claim since declared to be unfounded; (2) that before assessment British Australian Wool Realization Association Ltd. was ascertained to be the true owner of the assets in question, and he was ordered by the Court to hand over such assets to the said Association. He objected to the assessments in respect of the "Wool-Selling Brokers' Commission Trust" on the ground, *inter alia*, that in so far as the money was vested in him it was so vested to be held for and on behalf of British Australian Wool Realization Association Ltd. and/or for certain wool-brokers, and such moneys were not taxable in his hands or at all. He objected in respect of all the assessments on the grounds, *inter alia*, that the rate payable was that applicable to companies; that he was not a trustee within the meaning of the *Income Tax Assessment Act* 1922-1926; that no part of the moneys or assets in question was derived by him in the capacity of trustee of the respective trust funds or at all, and as against him were not taxable or assessable income; that in so far as the "company" rate was not applicable the rate actually applied had not been calculated as provided by sec. 13 of the Act. The Commissioner of Taxation disallowed the objections, which at the request of Sir John Michael Higgins were treated as appeals and forwarded to the Supreme Court of Victoria for hearing.

The appeals, having in each respective trust been consolidated by order of the Court, were heard by *McArthur* J., who, in his

judgment delivered on 28th June 1929 in respect of the "First 5 per cent Profits Dividend Trust" and the "Skin Wool Trust," stated that he gave sec. 31 of the *Income Tax Assessment Act* 1922-1925 its literal meaning, and held that, though the British Australian Wool Realization Association Ltd. was, in his opinion, "presently entitled" to the income as from 24th March 1924, and though it was in "actual receipt thereof" as from 14th April 1927, and though the assessments in question were not made until July and November 1927, still, inasmuch as the incomes in respect of which the assessments were made were derived by the trustee prior to 14th April 1927, the trustee was rightly assessed in respect of the income so derived by him, and was liable to pay tax in respect of the financial years for which he had been assessed. And the Commissioner, having assessed the trustee, could not afterwards assess the Association in respect of the same income. His Honor further held that the trustee should be assessed at the rate applicable to the beneficiary as, in his opinion, the intention of the Legislature was that in respect of his liability to pay tax the trustee should stand in the beneficiary's shoes, and that he should pay neither more nor less than the beneficiary would be obliged to pay if he were the taxpayer. Similar decisions were made by his Honor in respect of the "Wool Selling Brokers' Commission Trust" appeals.

From these decisions the Commissioner of Taxation now appealed to the High Court.

Sir Edward Mitchell K.C. (with him *Fullagar*), for the appellant. The principal question at issue is: What in the circumstances was the proper rate that should have been charged—that is, the rate applicable to a company or the rate applicable to an individual? The matter will eventually turn upon the construction of sec. 31 of the *Income Tax Assessment Act* 1922-1925, particularly sub-secs. 1 and 2. The term "presently entitled" in sub-sec. 1 means the person who either has the actual receipt or has actual control over the money and can say what is to be done with it, coming within sec. 19 of the Act. The purpose of that sub-section is, on the face of it, to make beneficiaries who are individuals subject to progressive income tax. It is for the purpose of getting actual assessment

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

against the beneficiary. Such assessment cannot be got unless the term "presently entitled" denotes derived in the sense that he can be assessed. Sir John Higgins could have immediately put an end to his liability simply by transferring the money; but, until he did that, clearly he remained within the provisions of sub-sec. 2; and on the facts those provisions apply. Until the order by *Cussen* J. on 1st April 1927 the Commissioner was not in a position to look to B.A.W.R.A. for payment of income tax on the money here in question.

[STARKE J. The decision of the Privy Council in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (1) shows that, as a matter of law, no one was entitled, and therefore the Association was entitled to it under the deed of trust.]

The question is: Was the Association "presently entitled"?

[STARKE J. If no one else was entitled the Association must have been "presently entitled."]

"Presently entitled" means that the person or corporate body is in a position to be assessed; that the moneys are held under such conditions that they are in a position to be assessed. Reference to the taxing Act shows that if the trustee be a company the company rate applies, and that the rate applicable to an individual is applicable if the trustee be an individual (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Kuhnel & Co.* (2)). The main object of sec. 31 of the *Income Tax Assessment Act* 1922-1925 is to make the beneficiary liable to the progressive taxation (sub-sec. 3). A trustee is not to be liable to pay tax as a trustee at all. If he does what he can do at once, if the beneficiary is presently entitled—that is, hand it over to the beneficiary, who is then presently in receipt of it—the trustee cannot be taxed. If he does not so hand over, the trustee is to be taxed in accordance with the relevant *Income Tax Act* which prescribes what the tax is to be when the taxpayer is a company and what the rate will be in respect of personal exertion.

[ISAACS C.J. referred to sec. 89 of the *Income Tax Assessment Act* 1922-1925.]

That section is a general section which deals with the position generally, and sec. 31 is the specific section which rules. A

(1) (1924) 34 C.L.R. 269. (2) (1925) 37 C.L.R. 141.

comparison of sub-sec. 1 of sec. 31 with sub-sec. 2 of that section shows that a distinction is made in the rate payable. Under sec. 31 (1) it is clear that when the words used are "shall be assessed," the beneficiary cannot be assessed unless he makes returns, and those returns, under sec. 32, must be of income derived by him. If the money is not actually put into his possession there will always be some difficulty in showing whether he derived it or not—whether he comes within the terms of sec. 19. To meet such a difficulty the Legislature provided, in effect, that if a beneficiary were "presently entitled," a trustee could avoid liability for taxation by simply handing the money over. There is nothing in the Act, read in conjunction with the taxing Act, to show that an individual is to be entitled to pay taxation at the company rate if he is a beneficiary. It is exactly the converse position to that in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Kuhnel & Co.* (1), where the Court held that reference must be had to the taxing Act and that the rate payable depended upon whether the taxpayer was a company or an individual.

[RICH J. Sub-secs. 1 and 2 of sec. 31 should be exclusive, and one complementary of the other. Your argument would make them overlap, and bring about double taxation, and, except as provided in sub-sec. 3, there is no provision in the Act for deduction.]

That relates to par. (*a*) of sub-sec. 2, and the language is wide enough to cover both; it relates only to legal disability. The Legislature intended that when income is received from investment someone must pay tax thereon in respect of each financial year, and, if the Commissioner is not in a position to assess the beneficiary, then he can assess the trustee.

[RICH J. The reference in sec. 31 (2) (*b*) to a person "presently entitled and in actual receipt" suggests that "presently entitled" means entitled in right as distinct from entitled in possession. There is a great deal to be said in favour of "and" being read as "or."]

Sir John Higgins comes within sub-sec. 2 on the facts of the case. Sec. 31 deals with certain specific matters. A person who is merely an agent is made directly liable to pay tax by sec. 27. It is a proper

(1) (1925) 37 C.L.R. 141.

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

interpretation of the taxing Act that the question of rate depends upon the taxpayer who has to pay (sec. 89). The words "shall be assessed" as appearing in sec. 31 bring in by necessary implication a condition that money shall have been received—that the income of the beneficiary shall have been received. There is no inconsistency between sub-secs. 1 and 2 of sec. 31: double assessment does not necessarily mean double taxation. Bringing in sec. 16 (*c*) and accepting the view that "derived" means actually received, the word "income" is as important as the word "derived." "Income" means something actually coming in. It was not intended that sec. 31 should create a new kind of assessment distinct from other assessments under the Act. A beneficiary cannot be assessed unless he is a person who is able to comply with the requirements of secs. 32 and 33, or unable to comply with the requirements of sec. 16 (*c*). As regards the liability of a beneficiary, "income derived" means actual receipts under the Act except where sec. 19 comes into operation.

[STARKE J. referred to *Commissioners of Taxation* v. *Kirk* (1).]

Whatever the interpretation might be of sub-sec. 1 of sec. 31, whether or not the words are similar, the expression "in actual receipt thereof" is either interpolated, or is to be treated as, by the necessary implication of those words, by virtue of what follows, "shall be assessed in his individual capacity" and by reference to sec. 16 (*c*). Whatever that might be, it is clear that under such sub-secs. 1 and 2 Sir John Higgins is brought within it, under sec. 31 (2) (*b*). The provisions of sec. 31 (3) emphasize the view that under sub-sec. 2 it is the trustee who becomes the taxpayer; it is the trustee who has to pay the money, and, if the beneficiary is also assessed, whatever he pays will be allowed. The rate he should pay depends upon the relevant taxing Act.

[STARKE J. referred to sec. 89 (*d*).]

That section does not apply to the position which is already provided for under sec. 31 (2): it is unnecessary. At no stage of these proceedings was it possible for the Commissioner to tax the Association; that is, until the money was handed over in pursuance of the order of *Cussen* J. of April 1927. The Association was

(1) (1900) A.C. 588.

neither "presently entitled" to nor "in actual receipt" of the money. The *Income Tax Act* 1925 by sec. 3 (5) provides that the rate of income tax payable by a company shall be as set out in the Fourth Schedule to the Act. "Payable by a company" means payable by a company as taxpayer. If a trustee is made a taxpayer under sec. 31 (2) of the *Income Tax Assessment Act*, he is the person to whom the provisions of sec. 4 (1), (2) and (3) of the *Income Tax Act* 1925 apply. The latter Act must be referred to (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Kuhnel & Co.* (1)), and also for the purpose of determining when the Association became "presently entitled" the circumstances under which the trust deed was created should be looked at. The originating summons to determine who was entitled to the money was before the Court from February 1925 until 1st April 1927. Whilst that matter was pending the Commissioner could not purport to tax the Association: it was not in possession of the money. When *Cussen* J. made the order, it relieved Sir John Higgins from any further liability or responsibility after he handed the money over in April 1927 without prejudice to the claims of any party. Until that was done, Sir John Higgins was the obvious person to tax. He was properly taxable as the taxpayer under sec. 31 (2), and, that being so, upon the proper construction of the taxing Acts, even admitting that all the provisions of the assessment Acts can be incorporated, he should be taxed at the individual rate, and not at the rate of the person who was afterwards determined, or was stated to be the beneficiary.

Ham K.C. (with him *Piggott*, *Martin* and *Herring*), for the respondent. *McArthur* J. was in error in deciding that the trustee was taxable at all under the circumstances, and the true alternative position he should have adopted was that the Association or the wool-selling broker companies were the proper taxpayers. It having been determined in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (2) that no persons were entitled, it then became clear that without any contingency at all the trust was in favour of the Association. The income all arose after that period. Not only

(1) (1925) 37 C.L.R., at p. 143. (2) (1924) 34 C.L.R. 269.

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

was the taxpayer ascertained at the time the assessment was made, but the Association was "presently entitled" to the whole income at all relevant times. The proper interpretation of the Act is that where there is a beneficiary who is presently entitled, that is, who has a legal right to demand payment, there is no intervening interest between his interest and the time it would be proper for the trustee to pay it over. Then the Act taxes the beneficiary himself, and the provisions of sec. 31 (1) come in that the trustee is not liable. The word "and" in the phrase "presently entitled and in actual receipt thereof" in sec. 31 (2) (*b*) should be read as "or." If that sub-section were read conjunctively and it were held that the trustee should be assessed where the beneficiary, although not presently entitled, is not in actual possession, the result would be that two persons would be made taxable for the same item of income. The Act should be construed so as to avoid double taxation.

[ISAACS C.J. That position can be avoided by the trustee seeing that the beneficiary gets actual receipt of the money to which he is presently entitled.]

Although a beneficiary may be "presently entitled" to money, it does not necessarily follow that the trustee can give him actual receipt thereof, and at least the trustee should not be taxable if he distributes the trust money within the same financial year. Double taxation can be avoided by construing sub-sec. 2 so that the trustee shall be separately assessed and liable to pay tax in respect of that part of the tax (*a*) which is proportionate to the interest of any beneficiary, (*b*) where no other person is entitled, and (*c*) where no other person is in actual receipt thereof and liable as a taxpayer in respect thereof. The word "and" has been construed as "or" in much stronger cases than the present in order to avoid unreasonable or improbable interpretation of a statute (*Golden Horseshoe Estates Co.* v. *The Crown* (1); *Fowler* v. *Padget* (2); *Waterhouse* v. *Keen* (3); *Townsend* v. *Read* (4)). It is too wide a statement to say that a taxing statute should be strictly construed and that nothing should be implied except what the actual words express, because where it

(1) (1911) A.C. 480, at pp. 487, 488.
(2) (1798) 7 T.R. 509, at p. 514; 101 E.R. 1103, at p. 1106.
(3) (1825) 4 B. & C. 200, at p. 209; 107 E.R. 1033, at p. 1037.
(4) (1861) 10 C.B. (N.S.) 308, at p. 322; 142 E.R. 471, at p. 476.

can be seen from the actual words of a taxing Act that one construction leads to inconvenience or to a palpable absurdity, or to a great improbability, the Courts prefer the reasonable construction (*Colquhoun* v. *Brooks* (1)). The general basis of the decision in *Kuhnel & Co.* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (2) supports the proposition that if you get the position under the *Income Tax Act* that the beneficiary in those circumstances is liable to pay the tax, then it follows that the trustee is not. If, however, "and" is to be read conjunctively, then in the circumstances of this case both conditions were fulfilled at the relevant time; that is, the Association was both presently entitled and in actual receipt at the relevant time. Should "and" be read distributively, it is sufficient if the Association was presently entitled and liable as a taxpayer. Any moneys derived after the decision in *John Cooke & Co. Pty. Ltd.* v. *The Commonwealth* (3) were derived at a time when it was ascertained the Association was presently entitled and liable as a taxpayer; as a result of that decision the trust in favour of the Association became unconditional and absolute. The Association was taxable under sec. 31 (1) because it is quite clear that the income in question was accumulated by the trustee and dealt with on behalf of the Association and is, therefore, within the terms of sec. 19, and the Association is deemed to have derived it. In construing taxing Acts the Court will accept the construction which is open and which avoids double taxation (*Gilbertson* v. *Fergusson* (4); *Commissioners of Inland Revenue* v. *Roberts* (5); *Carr* v. *Fowle* (6)). If Sir John Higgins is properly taxable, he is, by sec. 89 (*d*), authorized to recover from the person on whose behalf he paid it, namely, the British Australian Wool Realization Association Ltd.: this is the only possible case to which sec. 89 could apply. Upon the true construction of sec. 31 the relevant time to consider the question of assessments and whom to assess is not the time when the income was received by the trustee or beneficiary, nor the financial year in which it was received, but the time at which the assessment was made.

(1) (1889) 14 App. Cas. 493, at p. 506.
(2) (1923) 33 C.L.R. 349.
(3) (1924) 34 C.L.R. 269.
(4) (1881) 7 Q.B.D. 562, at pp. 570, 572.
(5) (1925) 41 T.L.R. 623, at p. 624.
(6) (1893) 1 Q.B. 251, at p. 254.

H. C. OF A. 1930.

FEDERAL COMMISSIONER OF TAXATION v. HIGGINS.

[STARKE J. referred to *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1).]

By the express words of sec. 89, and, if not by the express words, then by the necessary implication, the trustee under this Act pays in a representative capacity only, and pays only what the beneficiary would have had to pay if the trustee were not there to pay for him.

[STARKE J. referred to *Syme* v. *Commissioner of Taxes* (2).]

As regards the absurd result which would happen if the rate were to vary according to whether the trustee happened to be a company or an individual, or possibly joint trustees, see *Hill* v. *East and West India Dock Co.* (3) and *Railton* v. *Wood* (4). The word "answerable" in sec. 89 (*a*) is in contradistinction to "liability." No liability to pay is imposed upon the trustee, but he is answerable.

Sir Edward Mitchell K.C., in reply. Having regard to the facts and matters which came for determination before the Court in *Deputy Federal Commissioner of Taxation* (*S.A.*) v. *Kuhnel & Co.* (5), the principle in that case applies here. The reasons given for the judgment show that the Court took into account the construction of the taxing Acts as well as the taxation assessment Act. Until April 1927 Sir John Higgins came within the specific language of sec. 31 (2) and, therefore, under that he had to be separately assessed and was liable to pay tax. There is no case of hardship, or possible hardship, which would cause the Court to read the word "and" as "or," or to strain the language in some way to say there are two constructions open: the language is quite clear. The only class of case where the company rate can be paid is where the company is the taxpayer. On the proper construction of sec. 4 (5) of the *Income Tax Act* 1925 coupled with the provisions of sec. 13 (2) of the *Income Tax Assessment Act* 1922-1925, can it be said that a trustee who, under sec. 31 (7) of the latter Act, has been separately assessed and liable to pay tax has to pay that tax, being an individual, not at the individual rate

(1) (1927) 40 C.L.R. 148.
(2) (1914) A.C. 1013, at pp. 1018, 1019.
(3) (1884) 9 App. Cas. 448, at p. 456.
(4) (1890) 15 App. Cas. 363.
(5) (1925) 37 C.L.R. 141.

but at the company rate. The wool-brokers never were regarded as "presently entitled" until the order of *McArthur* J. in 1928.

THE COURT delivered the following judgment:—

This case has been very fully and closely reasoned out, and the arguments have enabled us to state our conclusions without the necessity of further consideration. Assuming the trustee to be assessable after the Privy Council decision in March 1924, we are all clearly of opinion that in view of the terms of the provisions as to trustees that the trustee was assessable only in his representative capacity which makes his liability that of the person or persons he represents. After the Privy Council decision in 1924 the trustee represented B.A.W.R.A. in respect of the First 5 per cent Profits Dividend Trust and the Skin Wool Trust, and, consequently, the trustee's liability was on the company flat rate. The same principle applies to the Wool-brokers Trust, and the judgment of *McArthur* J. in June 1928 properly disposes of the matter.

The three appeals dismissed with costs.

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

Solicitors for the respondent, *Blake & Riggall.*

J. B.