REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1930-1931.

[HIGH COURT OF AUSTRALIA.]

W. AND A. McARTHUR LTD. . . . APPELLANT;

AND

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

H. C. OF A. 1930.

MELBOURNE, *Oct.* 14-17; *Dec.* 15.

Isaacs C.J., Gavan Duffy, Rich and Starke JJ.

War-time Profits Tax—Assessment—Company carrying on business within and outside Australia—Excess profits duty levied in England on profits earned within and outside Australia—Assessment in Australia in respect of war-time profits earned within Australia—Deduction claimed in respect of sum paid as excess profits duty on Australian profits—Subsequent relief given in respect of amount paid as excess profits duty in England—Part of relief set off against subsequent excess profits duty, part set off against liability of taxpayer other than for excess profits duty, part refunded—Whether any of such relief to be included in sum assessed for war-time profits tax—Assessment—Cancellation—Subsequent amendment of original assessment—Power of Commissioner to re-assess—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 15 (4), 23—*Finance* (*No.* 2) *Act* 1915 (5 & 6 *Geo. V. c.* 89), *sec.* 38 (3)—*Finance Act* 1921 (11 & 12 *Geo. V. c.* 32), *secs.* 35, 38, *Second Schedule, Part I., r.* 1; *Part IV., rr.* 6 *and* 7.

The taxpayer, who derived profits from sources both within and without Australia, was assessed for war-time profits tax for the years ending 30th June 1917, 1918 and 1919. For the years ending 31st January 1917, 1918 and 1919 the taxpayer paid excess profits duty in England amounting to £85,865 in respect of profits arising from business from sources within and without Australia. The taxpayer thereupon claimed a deduction from war-time profits tax under

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sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918 of such part of the sum of £85,865 as was paid in respect of profits arising from sources within Australia. The taxpayer had, however, obtained relief under the Imperial *Finance Act* 1921 in respect of the excess profits duty paid in England for the years ending 31st January 1915 to 1921, which relief amounted to the sum of £68,914. Of this sum, £21,478 10s. was not actually refunded but was set off against excess profits duty payable for the years ending 31st January 1920 and 1921; a further part, amounting to £12,042 14s., was set off against liabilities of the taxpayer other than excess profits duty, and the balance of the £68,914, amounting to £35,392, was repaid to the taxpayer in cash.

Held, by *Isaacs* C.J. and *Starke* J. (*Gavan Duffy* and *Rich* JJ. dissenting), that the sum of £47,435 10s., being the sum of £68,914 less the sum of £21,478 10s., should be ratably or proportionately deducted from the excess profits duty assessed in respect of the accounting periods which ended on 31st January 1916-1919 respectively for the purposes of sub-sec. 4 of sec. 15 of the *War-time Profits Tax Assessment Act* 1917-1918.

Per Gavan Duffy and *Rich* JJ., that the taxpayer was entitled to the deductions in respect of the payments it had made on account of the British excess profits duty without regard to any part of the sum it had received by way of relief under the Imperial *Finance Act* 1921.

The assessment to war-time profits tax for the period ending 30th June 1917 was made on 10th October 1919. On 18th October 1919 the taxpayer requested the Commissioner to withdraw this assessment on account of the payment by the taxpayer of excess profits duty. On 3rd November 1919 the Commissioner wrote acceding to this request. Subsequently the Commissioner purported to amend the original assessment of 10th October 1919, by which amendment the taxpayer was rendered liable to pay tax.

Held, that the Commissioner was entitled under the provisions of sec. 23 of the *War-time Profits Tax Assessment Act* 1917-1918 to re-assess the taxpayer although he had purported to cancel the original notice of assessment.

Liverpool and London and Globe Insurance Co. v. *Federal Commissioner of Taxation*, (1927) 40 C.L.R. 108, not followed.

CASES STATED.

From the year 1908 the taxpayer, W. & A. McArthur Ltd., carried on business both in England and in Australia. Its business consisted principally of the buying of softgoods in London and the selling of such goods in Australia. The registered office of the taxpayer was situate in London and five of its six directors resided there, the sixth residing in Sydney. In 1926 the taxpayer went into liquidation. During the accounting periods of twelve months ending 31st January in the years 1917, 1918 and 1919 respectively

the taxpayer derived profits from sources within Australia and from sources outside Australia, but during the accounting period of the twelve months ending 31st January 1920 the taxpayer derived profits only from sources within Australia. Pursuant to Part III. of the Imperial *Finance* (*No.* 2) *Act* 1915, excess profits duty was levied on the excess profits arising from the business of the taxpayer in each of the accounting periods ending 31st January 1917, 1918 and 1919 respectively, and the taxpayer paid in England the amount of duty levied, being for the respective years the sums of £9,969, £38,285 and £40,611, totalling the sum of £85,865. Pursuant to the Commonwealth *War-time Profits Tax Assessment Act* 1917-1918, war-time profits tax was levied on the alleged war-time profits arising from the business of the taxpayer in the financial years ending 30th June 1917, 1918 and 1919 respectively. The taxpayer claimed a deduction under sec. 15 (4) of the *War-time Profits Tax Assessment Act* of such part of the above-mentioned sum of £85,865 as was paid in respect of profits derived from sources within Australia. The taxpayer had obtained relief to the extent of £68,914 in respect of the aggregate excess profits duty paid or assessed for the periods ending 31st January 1915 to 31st January 1921, which, allowing for a deficiency in the year 1915 of £1,570, amounted to £111,727. This relief was obtained pursuant to the Imperial *Finance Act* 1921, secs. 35 and 38, and the Second Schedule, Part I., r. 1, and Part IV., rr. 6 and 7. Of the sum of £68,914 a sum of £21,478 10s. was not actually refunded, but was set off against the excess profits duty payable for the years ending 31st January 1920 and 31st January 1921, no question arising as to the war-time profits tax payable in respect of those years. A further part of the sum of £68,914, namely, £12,042 14s., was set off against the liabilities of the taxpayer in respect of matters other than excess profits duty, and £35,392 16s., the balance of the £68,914, was repaid to the taxpayer in cash on 19th August 1922.

The assessment of £8,461 10s. 7d. for war-time profits tax in respect of the accounting period ending 30th June 1917 was dated 10th October 1919. On 18th October 1919 the taxpayer requested the Commissioner to withdraw this assessment because of the payment by the taxpayer of excess profits duty for the years ending

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31st January 1917 and 1918 respectively, aggregating £48,354. In reply to this request the Commissioner wrote on 3rd November 1919: "I have to inform you that your request has been acceded to." On 29th January 1925 the Commissioner purported to amend the original assessment and gave notice of what purported to be an amended assessment for the year ending 30th June 1917. The Commissioner purported to make amendments to this assessment upon various dates subsequently, and finally gave notice of an amended assessment on 6th February 1930.

Upon a case stated by *Rich* J. the following questions, in substance, were asked:—

As to the case stated in respect of the assessment for the financial year 1916-1917—

(1) Was it competent for the Commissioner to issue any notice of amended assessment subsequent to 3rd November 1919 for War-time Profits Tax in respect of profits of the taxpayer for the financial year ended 30th June 1917?

(2) Is there any valid assessment of the taxpayer for such tax for the said financial year now existing?

(3) Can the taxpayer in the circumstances set out in this case rely on any incompetence of the Commissioner to issue any notice of amended assessment subsequent to 3rd November 1919 for war-time profits tax in respect of profits of the taxpayer for the financial year ended 30th June 1917?

(4) In ascertaining the profits liable to be assessed for war-time profits tax under the *War-time Profits Tax Assessment Act* 1917-1918 for the financial year ended 30th June 1917, should any part of the sum of £68,914, being the amount of relief to which the taxpayer was entitled under the provisions of Part I. of the Second Schedule to the *Finance Act* 1921 of the United Kingdom, be taken into account in determining for the purposes of sub-sec. 4 of sec. 15 of the said Act the amount paid in the United Kingdom for excess profits duty in respect of the profits for the said financial year?

(5) If the answer to question 4 is Yes, what proportion of the sum of £68,914 should be deducted from the amount paid

in the United Kingdom for excess profits duty in respect of the profits of the said financial year ?

(6) Should any and (if so) which of the credit amounts (*a*), (*b*) and (*c*) set out in par. 25 of this case be taken into account in ascertaining the profits of the taxpayer liable to be assessed for war-time profits tax under the *War-time Profits Tax Assessment Act* 1917-1918 ?

From par. 25 of the special case it appeared that the credit items taken into account in the London profit and loss account in arriving at the sums of £9,467 and £6,260 consisted of (*a*) commission which the London house of the taxpayer charged the Australian house for buying goods for sale by the latter, and was calculated at $2\frac{1}{2}$ per cent upon cost and such percentage represented what would have been a fair and reasonable rate of remuneration had the work been done by an independent agent; (*b*) manufacturer's cash discounts for prompt payment which were treated by the London house as a profit made by the London house in England; (*c*) freight and insurance rebates periodically allowed to and collected by the London house, and allowed by the shipping and insurance companies because of the large amount of business which the London house controlled.

As to cases stated for the years 1917-1918, 1918-1919, questions 1, 2 and 3 for each year corresponded to questions 4, 5 and 6 for the year 1916-1917.

Ham K.C. (with him *Russell Martin*), for the taxpayer. The Commissioner was empowered to make one assessment only in respect of each year. The Commissioner having remitted the assessment, the taxpayer is in precisely the same position as if the Court had cancelled the assessment. The Commissioner should not be entitled to make a second new assessment as distinct from an amendment of the original assessment (*War-time Profits Tax Assessment Act* 1917-1918, secs. 18 (2), 21, 23, 28 (2); *Liverpool and London and Globe Insurance Co.* v. *Federal Commissioner of Taxation* (1)). The whole of the sum of £68,914 is deductible from the sum assessable to war-time profits tax as being a sum paid in respect of a similar tax in Great Britain. The word " paid " in sec. 15 (4)

(1) (1927) 40 C.L.R. 108.

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of the *War-time Profits Tax Assessment Act* has its ordinary natural meaning, and the fact that relief was granted does not prevent the payment which in fact was made being a payment within the meaning of that section. The repayment was made by virtue of the Imperial *Finance Act* 1921, and the relief granted in 1922 did not alter the character of the payment made in 1917. The contention of the Commissioner that, because relief was at some date granted, the payment made ceased to be a payment cannot be maintained. In the present case the tax was paid, not provisionally but absolutely, and the relief given by the *Finance Act* 1921 does not purport to be by way of repayment of the tax, but purports to be merely relief of a certain character, and was in the nature of a monetary relief based upon the difference between the value of the stock at the end of the accounting period and on 31st August following. The decision in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1) is distinguishable and, in view of *Inland Revenue Commissioners* v. *Dalgety & Co.* (2), must be considered as wrongly decided, as must also *Commissioner of Taxation of Western Australia* v. *D. & W. Murray Ltd.* (3). The sum of £68,914 is not apportionable and should be taken into account for the last accounting period, that is, for the year 1921; if any apportionment is to be made the relief must be apportioned in the proportions in which the profits that were Australian bear to the profits which were non-Australian. [Counsel referred to *Finance (No. 2) Act* 1915 (5 & 6 Geo. V. c. 89), secs. 36, 38; First Schedule; Second Schedule, Part I., r. 1; Part IV., rr. 6 and 7; *The King* v. *Deputy Federal Commissioner of Taxation for South Australia*; *Ex parte Hooper* (4); *Australian Knitting Mills Ltd.* v. *Federal Commissioner of Taxation* (5); *Webster* v. *Deputy Federal Commissioner of Taxation for Western Australia* (6).]

[ISAACS C.J. referred to *Commissioner of Taxation of Western Australia* v. *D. & W. Murray Ltd.* (7).]

Sir Edward Mitchell K.C. (with him *C. Gavan Duffy*), for the Federal Commissioner of Taxation. The Commissioner was within

(1) (1927) 40 C.L.R. 148.
(2) (1930) 46 T.L.R. 349, at pp. 350, 352 and 353.
(3) (1929) 42 C.L.R. 332.
(4) (1926) 37 C.L.R. 368, at pp. 372-373.
(5) (1923) 31 C.L.R. 511.
(6) (1926) 39 C.L.R. 130.
(7) (1929) 42 C.L.R., at p. 343.

his powers in making the subsequent assessment after his letter of 3rd November 1919 intimating that the assessment for the year 1917 was withdrawn. The whole amount of £68,914 cannot be regarded as having been "paid" by way of excess profits duty so as to constitute a deduction within the meaning of sec. 15 (4) of the *War-time Profits Tax Assessment Act*. The payment was not a final payment, and in fact was in part refunded and in part set off. There is no material distinction between *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1) and the present case. If there was a repayment in the one case, there must also be a repayment in the other. In *Murray's Case* the amount repaid came from a deficiency long after the Australian tax ceased.

[ISAACS C.J. Apart from this relief that the appellant has got, the tax was all paid and none of it was repaid and, therefore, properly deductible from the Australian tax demanded. It lies on the respondent to show, if he claims any of that money as being unpaid, that it was repaid within the terms of the *Finance* (*No.* 2) *Act* of 1915.

[STARKE J. The English repayment was in respect of the whole period.]

The Commissioner was not prevented from amending the appellant's assessment after 3rd November 1919. To prevent him from so doing, the position would have to come down to one of estoppel, and until something in the nature of an estoppel is created against the Commissioner he is at liberty to make such alterations to an assessment as may be necessary to correctly adjust the liability of the taxpayer. *Liverpool and London and Globe Insurance Co.* v. *Federal Commissioner of Taxation* (2) was not correctly decided. [Counsel also referred to *Finance* (*No.* 2) *Act* of 1915 (5 & 6 Geo. V. c. 89), secs. 38 (3), 44; *Finance Act* 1920 (10 & 11 Geo. V. c. 18), sec. 44; *Finance Act* 1921 (11 & 12 Geo. V. c. 32), secs. 35, 38 (3); Second Schedule, Part I.; Part II., rr. 6 and 7; Fourth Schedule, r. 4; *War-time Profits Tax Assessment Act* 1917-1918, secs. 24, 35; *Acts Interpretation Act* 1901-1930, sec. 33 (1); *Federal Commissioner of Taxation* v. *S. Hoffnung & Co.* (3);

(1) (1927) 40 C.L.R. 148. (2) (1927) 40 C.L.R. 108.
(3) (1928) 42 C.L.R. 39.

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Ham K.C., in reply.

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

ISAACS C.J. The appellant has appealed to this Court in respect of three assessments by the respondent under the Commonwealth *War-time Profits Tax Assessment Act* 1917-1918. The assessments relate to profits derived during the financial years ending respectively 30th June 1917, 1918 and 1919. In each case *Rich* J., before whom all the appeals came as Judge of first instance, stated a case for the opinion of this Court on questions of law. The questions arising under all three appeals are identical, with the exception that in the first case an additional question arises. The questions common to all three appeals are whether each of certain sums is deductible under sec. 15, sub-sec. 4, of the Act referred to as a "sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth." The additional question arising under the first appeal is as to the validity of the relevant notice of assessment dated 6th February 1930.

(1) It is well to dispose first of the additional question. It is of greater importance as affecting the daily administration of the Commonwealth Income Tax Acts, and perhaps State Acts of the same nature. The notice of assessment of 6th February 1930 purports to be a notice of the amended assessment identified as File No. 1400/135087.

(1) (1929) 42 C.L.R. 155.
(2) (1929) 42 C.L.R. 332.
(3) (1919) 2 K.B. 766; (1920) 1 K.B. 563.
(4) (1921) 2 A.C. 81, at p. 84.
(5) (1930) 46 T.L.R., at p. 350.
(6) (1921) 29 C.L.R. 424.
(7) (1926) 38 C.L.R. 219, at p. 230.

The appellant asserts it is a nullity, because, it says, first, that there can be but one assessment for any given year; and next, that, as the original assessment for the year 1916-1917 made on or before 10th October 1919, was cancelled by the Commissioner on 3rd November 1919, there could not subsequently in law be any amendment of the non-existing original assessment. These contentions are said to follow from prior decisions of this Court, namely, *Hooper's Case* (1) and the *Liverpool Insurance Co.'s Case* (2). The first contention is directly opposed to the passage in *Hooper's Case* relied on. The Commissioner cannot, in respect of any person liable to be taxed, cancel or abandon an assessment so as to leave a legal blank for that year, any more than he can disobey sec. 21 by not making the assessment. He is not only an administrative officer (sec. 6 (1)), without power to abandon revenue justly due. He is invested with very large powers in carrying out his administration, and among the powers are those in sec. 23. That gives him power "at any time" to "make all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy, notwithstanding that war-time profits tax may have been paid in respect of profits included in the assessment." The last words quoted afford an equitable escape from the common law doctrine that voluntary payment of a claim without protest, even though the claim be unenforceable by law, is not to be reopened. Without quoting the rest of sec. 23, it is sufficient to say they enable the Commissioner at all times to do justice both to the Crown and the individual. Sec. 28 makes provision for a taxpayer dissatisfied with his assessment stating his objection to it. The Commissioner is directed to consider the objection, and is empowered to "disallow it, or allow it," either wholly or in part. Disallowance may be referred by the taxpayer to the Court, as in the present instance. But "allowance," like disallowance, is a mere administrative act. The Commissioner is empowered to bind the Treasury by allowance, but there is nothing to prevent him from recalling it, should he see reason to do so. The power to recall it must stand in the same position as the power to recall a disallowance. It would be an

(1) (1926) 37 C.L.R., at pp. 372, 374. (2) (1927) 40 C.L.R. 108

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extraordinary conclusion to arrive at, that, once he disallows an objection, he cannot allow it. It would be in conflict with the quoted words of sec. 23. Suppose, for instance, a taxpayer claiming a deduction by way of objection, submits to the Commissioner's view that the law does not permit, and so pays the tax claimed. Is it possible, in view of sec. 23, to deny the power, and, indeed, the moral duty of the Commissioner, *ex mero motu*, if he either alters his view of the law, or if the Court declares it wrong in some other case, to give effect to the true law by allowing the objection formerly disallowed? But, if so, the same thing must be said of the allowance of an objection. There is every reason for giving full effect to the words of sec. 23. There must be an assessment for each year in respect of every business to which the Act applies, be it right or wrong. If right, it must be enforced; if wrong, it must be corrected or declared wrong. Its existence cannot be administratively annihilated, but it may be altered from time to time until the Court finally declares the mutual rights of the Crown and the taxpayer. When that is done, the general principles of law apply to make the contest final and the rights unchallengeable. I cannot agree with the *Liverpool Insurance Co.'s Case* (1), and hold the appellant's contention now dealt with to be wrong.

(2) The contentions covering all three cases should, in my opinion, be determined partly in favour of the taxpayer, and partly in favour of the Commissioner. The Commissioner claims the whole sum of £68,914, the benefit of which the taxpayer under the Imperial Act of 1921, sec. 38, received from the English Taxing Authority by way of relief in respect of excess profits duty, should be regarded as in repayment of duty previously paid for English excess profits duty, including Australian war-time profits. That the taxpayer obtained £68,914 by way of relief is undeniable. But the question is whether it was so received that any and what part of it can be considered as sums previously paid as excess profits duty in respect of Australian war-time profits converted into sums not so paid. In my opinion, portion can be so considered, and the remainder cannot. In the first place, the whole of the sum of £68,914 was not in fact or in law paid to the taxpayer. Pars. 26 and 27 of the case stated

(1) (1927) 40 C.L.R. 108.

disclose that for the English annual accounting periods ending respectively 31st January 1920 and 1921, the sum of £21,478 10s., portion of the £68,914, was set off against the excess profits duty payable. The set-off was a statutory requirement (sec. 38 (3) of the *Finance Act* 1921, and rule 6 of Part IV. of the Second Schedule). As to this part, the taxpayer, in my opinion, fails at the threshold. That sum was never "paid." The balance of the sum of £68,914, namely, £47,435 10s., was applied by the British Treasury as follows :—Portion, namely, £12,042 14s., was applied, and necessarily by mutual consent, to discharge liabilities of the taxpayer other than excess profits duty, and this is equally equivalent to repayment. The residue, £35,392 16s., was paid to the taxpayer in cash on 19th August 1922. Again applying rule 6 of Part IV. of the Schedule of the Act of 1921, the whole sum of £47,435 10s. was a "repayment" to the taxpayer by the Government of the United Kingdom, and necessarily a repayment of excess profit duties paid by the taxpayer.

But there still arises the main question that divides the parties here, namely, has the sum of £47,435 10s., which was unquestionably previously paid to the United Kingdom for excess profit duties, and while remaining unrepaid, unquestionably "paid" within the meaning of the Australian Act, either wholly or as to a proper proportionate part thereof, in respect of all Australian war-time profits within the meaning of sec. 15 (4) of the *War-time Profits Tax Assessment Act*, now, since repayment under the Act of 1921, lost its "paid" character for Australian purposes ? As to this, in the first place, I retain the test view I expressed in *Murray's Case* (1). Of course, the letter of the statute must be adhered to, that is to say, the true sense of the words as written must not be modified by notions of policy. But one must always read a statutory provision as a whole in order to understand every part. For instance, if under their power to make assessments and collect duty for an accounting period, notwithstanding an appeal pending, the Commissioners of Inland Revenue were to collect £100,000, which was afterwards found judicially to be reducible to £30,000, leading to a repayment of £70,000, could it be said with any show of right or reason that £100,000 had been "paid" within the meaning of the

(1) (1927) 40 C.L.R., at pp. 152, 153.

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Australian sub-sec. 4 of sec. 15 ? I am unable to think so. I held in *Murray's Case* (1) that the same sums paid for excess profit duty, though "paid," were paid under statutory terms, which entitled the payer to recall the payment under certain conditions, and that those conditions having arisen, and his payments having been consequently recalled, the payments had no longer any legal existence. I apply the same reasoning to the sums amounting to £47,435 10s., paid by the taxpayer to the British Government. They were paid on the same two conditions, entitling it to repayment of a certain proportionate amount if either condition had happened.

It was contended on behalf of the Commissioner that, applying my test stated in *Murray's Case* (1), the converse result ensued. The argument was that the moneys paid under the Act of 1915 were in the present case refunded, not by reason of any condition contained in that Act at the time of payment, but by a subsequent voluntary gift of the British Parliament, founded upon an entirely novel consideration, namely, the fall in value of stock between the last accounting period and 31st August 1921. Careful examination of the Act of 1921 satisfies me that that contention is not sustainable. Part III. of the *Finance Act* 1921, headed "Excess Profits Duty," was to end the operation of the corresponding part of the *Finance (No. 2) Act* 1915. Sec. 35 of the Act of 1921 enacts that the duty under the 1915 Act shall be charged, levied and paid, and repayment and set-off of duty shall be allowed for the final accounting period designated by that section "as if that period were an accounting period within the meaning of Part III." of the 1915 Act. The final accounting period is marked out, and in the facts of the present case extended from 1st February 1920 to 31st January 1921. Sec. 38 enabled the present taxpayer to claim relief under Part I. of the Second Schedule, and that Part IV. of that Schedule should apply to such a claim. A claim was made under Part I. of the Second Schedule, and allowed at £68,914 already mentioned. It is true that clause 1 provides only that the sum in question "shall be allowed as a deduction in computing the excess profits of the final accounting period or as an addition to any deficiency for that period, as the case may be." As acted on by the British authorities,

(1) (1927) 40 C.L.R. 148.

the excess was applied and in the manner stated, which not only wiped out the duty for that period otherwise payable, but left in addition a "deficiency" (see secs. 35 (5) and 36 (1), "deficiencies or losses") for the final accounting period of £47,435 10s. That is all the new legislation itself expressly did, so far as relevant to this case, with the following exception. In enacting sec. 35 in the terms stated, it left sec. 38 (3) of the Act of 1915 to be applied consistently with the provisions of the 1921 Act referred to. The later Act, by force of clause 1 of Part I. of Schedule 2, by law created in view of the stated facts as to this taxpayer "a loss in his trade or business" of £47,435 10s. in the last accounting period. The taxpayer was by English law entitled to assert and maintain that, and there in strict conformity with the provisional terms on which that sum had, at some time or other, been "paid" to excess profits duty, it was entitled by force of sec. 38 (3) of the 1915 Act to repayment of that sum. If, therefore, that sum represented payments in respect of Australian profits exclusively, and if it had been repaid by apportionment to specific years, which appears to me inconsistent with the English Act, the task here would have been easy. But neither of those conditions is shown to exist. Therefore, says the taxpayer, the Commissioner must fail altogether. I do not agree. Once the fact is established that the sum in question was repaid in respect of the commingled profits (and mainly Australian), I cannot think the law is unable to find a way to do justice to both parties. I would apply the principle enunciated on even more extensive lines by Viscount *Haldane* for the Judicial Committee in *Board* v. *Board* (1), where the learned Lord said: "If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode . . . is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice."

In my opinion the sum in question repaid must be proportionately allocated to the English and Australian profits, according to their respective sums, excluding the two last periods.

Next, the sum found thus attributable to the Australian profits, should be allocated to those profits proportionately to their several amounts for the various accounting periods, excluding the two

(1) (1919) A.C. 956, at p. 962.

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latest periods, to which no portion of the sum paid can possibly attach.

RICH J. The question for our decision is whether, in the assessment of the taxpayer for war-time profits derived during the years ending 30th June 1917, 1918 and 1919 a deduction should be allowed from the profits of the various accounting periods for sums which, according to the taxpayer, had been paid in respect of the profits, on account of British excess profits duty. Sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918 provides that a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth. The evident purpose of this provision was to allow as a deduction from the Australian profits of an accounting period sums paid in discharge of a liability to the Treasury of another country necessarily incurred as a result of earning the profits. This view is supported by the decision in *Hoffnung's Case* (1). Large sums were in fact paid by the taxpayer to the British Exchequer on account of excess profits duty in respect of profits which included the Australian profits of the various accounting periods. If the facts stopped there, the taxpayer's right to the deductions which it claimed would be incontestable. But the British Legislature passed the *Finance Act* 1921 (11 & 12 Geo. V. c. 32) two years after the end of the final financial year during which the Australian profits now in question were earned, namely, 30th June 1919 based on two accounting periods of twelve months each, ended 31st January 1920. Part III. of this Act brought to an end the imposition of excess profits duty. It also provided a scheme of relief for taxpayers the value of whose stock in hand taken into account as at the end of the final British accounting period which in this case was 31st January 1921 was greater than the value of similar stock-in-trade ascertained at 31st August 1921 (*Finance Act* 1921, sec. 38, and Second Schedule, Part I., clause 1). This relief was afforded by a deduction of the difference in stock values in computing the excess profits of the final accounting period. A calculation was directed of the aggregate

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

of the amount paid by way of excess profits duty less any amounts repaid. The taxpayer was given a right to repayment of the amount by which this aggregate so paid less any such amount repaid exceeded the aggregate amount of excess profits less any deficiencies or losses in respect of which the taxpayer was entitled to a repayment or set-off of duty. The appellant availed itself of these provisions, and in respect of accounting periods ending 31st January in each year from 1915 to 1921 an aggregate was calculated of excess profits duty paid or payable exceeding the aggregate amount of the excess profits of those periods and the difference was paid to it. Without the guidance of authority I should have had no doubt that this transaction was irrelevant to the deduction of the amount which had already been paid to the Inland Revenue Commissioners in respect of the Australian profits. But I am bound to follow and apply the decision of this Court in *D. & W. Murray's Case* (1) so far as it governs the matter. The question, however, is whether the *ratio decidendi* in *D. & W. Murray's Case* does govern the matter. The task of ascertaining the *ratio decidendi* is not rendered easier by the fact that three judgments were delivered assigning divers reasons for the conclusion from which I dissented. The judgment of the present Chief Justice and of *Powers* J. appears to me to rest rather upon their opinion as to the true nature and effect of sec. 38 of the British Act than upon any special construction placed upon sec. 15 (4) of the Australian Act. They considered that a payment made pursuant to sec. 38 (1) of the British Act was provisional only. This, as I understand, means that no absolute obligation to pay tax was imposed and therefore no absolute payment could be made. It followed that the repayment under sec. 38 (3) was a refund of a conditional payment which therefore never became absolute. Manifestly, if this is the correct interpretation of their Honors' judgment, it can have no application to the entirely different method of relief given by a subsequent British enactment not contemplated by sec. 38 (3) of that of 1915—relief, moreover, which is based upon considerations of policy arising out of new events, and which is measured by losses in stock values between dates long after the close of all relevant accounting

(1) (1927) 40 C.L.R. 148.

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periods. The judgment of *Higgins* J. has given me more difficulty. His Honor adopted the view that in the circumstances of *D. & W. Murray's Case* (1) a plea of payment must fail, and, therefore, in law it could not be said that excess profits duty had been paid in respect of the profits. I have come to the conclusion that his judgment must mean that the repayment which in *Murray's Case* was made under sec. 38 (3) of the British Act of 1915 was a restoration to the taxpayer of the very sum extracted from him resulting in a destruction of the liability in respect of which the payment had been made as well as of the payment itself—so that *ex post facto* it could not be said that the taxpayer by payment had discharged a liability to excess profits duty. If this be the essential ground of his decision, I cannot see that it applies to the relief obtained under the British Act of 1921. That relief consists in adding to the deficiency on the total number of British accounting periods a new loss and enabling the taxpayer to claim for that deficiency. I regard it as an independent right to relief which cannot amount to a restoration of a particular sum paid. The judgment of my brother *Starke*, which also concurred with the majority, was put upon grounds which perhaps go beyond those of the other three Judges. For the reasons I have given, I have arrived at the conclusion, not without the misgiving which is becoming to a dissentient, that I remain free to give to the provisions of the British Act of 1921 the effect in relation to sec. 15 (4) of the Australian Act, which I consider its true meaning requires.

There is not in this case a restoration of the actual payment made on account of the profits in the periods material to the Australian tax. That payment is not cancelled or reversed. At most, it is taken into account in a general calculation over a period of some seven years with a view of arriving at a credit or debit balance. The object of this account is not to repay the exact tax paid but to recompense the taxpayer for subsequent losses or losses in other periods having regard to the fact that in years of plenty the tax was levied upon the appellant. I therefore think that the appellant is entitled to the deductions in respect of the payments it has made on account of the British excess profits duty without regard to

(1) (1927) 40 C.L.R. 148.

any part of the sum it has received by way of relief under the *Finance Act* 1921. There is a special question in respect of the final accounting period, that ending 31st January 1920 (and not 1921 as the Chief Justice appears to think), because the sum levied for British excess profits duty in respect of that period was discharged by set-off.

As my opinion upon the main question in this case is not to prevail it is unnecessary for me to pursue this subsidiary question, to which little or no attention was directed in the argument. As I understand that my opinion upon the main question leaves the appellant liable to no tax in any of the three years the subject of the cases stated, it is unnecessary for me to consider the remaining grounds upon which the appellant relies.

The fourth question in the case stated in respect of the financial year 1916-1917 and the first in the cases stated for the financial years 1917-1918, 1918-1919, should be answered No.

I am authorized by my brother *Gavan Duffy* to state that he concurs in the conclusions at which I have arrived.

STARKE J. Cases have been stated in three appeals brought by the taxpayer against assessments to war-time profits tax in respect of the financial years 1916-1917, 1917-1918, 1918-1919. The taxpayer carried on business as a softgoods merchant, both in England and in Australia, and during its accounting periods of twelve months ending on 31st January in each of the years 1917, 1918 and 1919, it derived profits in that business from sources both within and without Australia. Under the English *Finance (No. 2) Act* 1915 (5 & 6 Geo. V. c. 89) and amending legislation, excess profits duty was levied on the excess profits arising from the business of the taxpayer in each of its said accounting periods, derived from sources both within and without Australia. And under the *War-time Profits Tax Assessment Act* 1917-1918 of the Commonwealth, war-time profits tax was also levied upon the war-time profits arising from the business of the taxpayer in the financial years above mentioned, derived from sources within Australia. The excess profits duty imposed by the English *Finance Act* 1915 and its amendments is a war-time profits tax, or a similar tax to that

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imposed by the War-time Profits Tax Acts of the Commonwealth, and the taxpayer paid excess profits duty under the English Act, in respect of profits from its business, as follows: Accounting period—ending 31st January 1917, £9,969; ending 31st January 1918, £35,285; ending 31st January 1919, £40,611.

The *War-time Profits Tax Assessment Act* 1917-1918, sec. 15 (4), provides: "Deductions shall not be allowed on account of the liability to pay, or the payment of, war-time profits tax, but a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth." The taxpayer claimed, as a deduction under this section, the sums paid as excess profits duty in respect of the profits from its business derived from sources within Australia. It insisted that, in the natural and literal sense of the word "paid," the sums already mentioned had been paid in respect of the profits under and in pursuance of the English *Finance* (*No.* 2) *Act* 1915, Part III.—"Excess Profits Duty." (*Inland Revenue Commissioners* v. *Dalgety & Co.* (1).) But the Commissioner relied upon the decision of this Court in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (2), which denies that the taxpayer can fasten on the formal act of payment, and say that the word "paid" is thereby once and for all necessarily satisfied, if in point of fact the money has been restored to, or "got back again" by, the taxpayer, and he can "not honestly declare that he was out of pocket by the transaction." The words in inverted commas are observations of Lord *Shaw of Dunfermline* recorded in the shorthand notes of the argument in the Privy Council on an application for special leave to appeal (unreported) in *Murray's Case*, but they were not an expression of his opinion: they were simply an exposition of the judgment of this Court. In *Murray's Case* repayment or refund of the excess profits duty tax was made pursuant to the provisions of the *Finance* (*No.* 2) *Act* 1915, sec. 38. In the present case the repayment of tax was made pursuant to the provisions of the *Finance Act* 1921 (11 & 12 Geo. V. c. 32). (See secs. 35 and 38, and the Second Schedule, Part I., r. 1; Part IV., rr. 6 and 7.) The relief granted to the taxpayer amounted to the

(1) (1930) 1 K.B. 1; 46 T.L.R. 349 (H.L.). (2) (1927) 40 C.L.R. 148.

sum of £68,914, but it was in respect of the aggregate amount of excess profits duty paid or assessed (£113,297) for the accounting periods ending on 31st January in the years 1916, 1917, 1918, 1919, 1920 and 1921. Under the *Finance Act* 1921, this relief is given by way of *repayment* except in cases where it could be set off against any duty which had been assessed on the taxpayer for any accounting period and remained unpaid. Further, any repayment under the Schedule "shall, for purposes of income tax, be treated as a repayment of duty"—a provision which makes clear the application of sec. 35 of the *Finance* (*No.* 2) *Act* 1915 to the repayment. The relief granted is a repayment or refund of duty, except in the cases mentioned. Once this is clear, then the decision of this Court in *Murray's Case* (1) governs the matter. The taxpayer cannot rely on the formal act of payment and say that he has "paid" a sum, which has been repaid, refunded and restored to him.

But some practical difficulties arise in calculating the deduction to which the taxpayer is entitled under the *War-time Profits Tax Assessment Act* 1917-1918, sec. 15 (4). The sum of £21,478 10s., part of the sum of £68,914, was set off against the excess profits duty payable for the years ended 31st January 1920 and 31st January 1921, and definitely allocated or appropriated to those years. It cannot, therefore, be treated as a repayment of any sum paid as and for excess profits duty in respect of the years in question in these cases, namely 1916-1917, 1917-1918, and 1918-1919. Again, £12,042 14s., a further part of the sum of £68,914, was set off against liabilities of the taxpayer other than excess profits duty. This was a set-off of cross-demands and the equivalent of payment. By this means, excess profits duty was got back again by or repaid to the taxpayer. This sum of £12,042 14s. must therefore be treated as part of the excess profits duty repaid to the taxpayer, pursuant to the *Finance Act* 1921. In August 1922 the balance of the sum of £68,914, namely, £35,392 16s., was paid to the taxpayer in cash. Accordingly, there is a lump sum of £47,435 10s., which has been repaid to the taxpayer pursuant to the provisions of the *Finance Act* 1921. This sum has not been allocated or appropriated to any particular year or years, and represents, therefore, repayments

(1) (1927) 40 C.L.R. 148.

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in respect of the accounting periods ending on 31st January in each of the years 1916, 1917, 1918 and 1919, for in the period ending on 31st January 1915 there were no excess profits.

In view of these facts, how is the deduction under the *War-time Profits Tax Assessment Act* 1917-1918, sec. 15 (4), to be calculated? The deduction is only of the sum paid for excess profits duty in respect of the profits arising from sources within Australia, and in respect of the profits of the year of assessment (*Federal Commissioner of Taxation* v. *S. Hoffnung & Co.* (1); *S. Hoffnung & Co.* v. *Federal Commissioner of Taxation* (2)). An apportionment is thus required by the very terms of the Act, and that allowed in *Hoffnung's Case* was the proportion of the amount of excess profits duty paid which profits from Australian sources bore to the whole of the profits assessed to excess profits duty. The lump sum of £47,435 repaid by the English authorities was, as already mentioned, in respect of accounting periods ending on 31st January in the years 1916, 1917, 1918 and 1919. The war-time profits tax was imposed in Australia in September 1917 (Act No. 34 of 1917), but the *War-time Profits Tax Assessment Act* 1917-1918, sec. 2, provides that the Act shall apply to profits of any business arising up to 30th June 1919. The present assessments are in respect of the profits of the financial years 1916-1917, 1917-1918 and 1918-1919. But the accounting periods taken under the English and under the Australian Acts appear to have been the same. The problem is how to allocate or appropriate the repayment or refund of the lump sum of £47,435 over the excess profits duty paid or assessed in respect of the accounting periods which ended on the 31st January in the years 1917, 1918 and 1919. In my opinion, the sum should be distributed ratably over those periods (cf. *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co.* (*Saxton's Case*) (3) and cases there cited). Thus can be ascertained the amount of excess profits duty paid in each accounting period. Combining this with the methods approved in *Hoffnung's Case*, the sum which has been paid in respect of the Australian profits on account of excess profits duty can then be calculated for the purposes of sec. 15 (4) of the *War-time Profits Tax Assessment*

(1) (1928) 42 C.L.R. 39.
(2) (1929) 42 C.L.R. 155.
(3) (1929) 43 C.L.R. 247, at p. 266.

Act. The Commissioner appears to have added a deficiency refund of £1,570 to his figures, but the Justice who finally disposes of this appeal will consider how (if at all) this sum should be dealt with in calculating the deduction to which the taxpayer is entitled, and what the amount of the deduction, calculated in accordance with the opinion of this Court, actually is.

The other matters raised by the cases can be disposed of more shortly. In the 1916-1917 assessment, the Commissioner on 3rd November 1919 notified the taxpayer that he withdrew his assessment dated 10th October 1919. But the withdrawal of an assessment did not discharge the taxpayer from the obligation to pay the tax imposed by the *War-time Profits Tax Acts*, and I can see nothing in the Acts prohibiting the Commissioner from altering his assessment pursuant to sec. 23, or even reassessing the taxpayer. The *Liverpool Case* (1) cannot, I think, be supported. Further, the Commissioner, in order to ascertain the profits of the taxpayer on which tax ought to be levied, added to the profits, as shown by the taxpayer's Australian books, certain commissions, manufacturers' cash discounts and freight and insurance rebates. This assessment of the Commissioner is supported by the decision of this Court in *Commissioner of Taxation of Western Australia* v. *D. & W. Murray Ltd.* (2), and I need do no more on this head than refer to the reasons there given.

The questions stated by the cases should be answered as follows:—*As to the case stated in respect of the assessment for the financial year* 1916-1917—(1) *Yes*; (2) *Yes*; (3) *No*; (4) *Yes*: *the sum of* £47,435 10*s.*; (5) *The sum of* £47,435 10*s. should be ratably or proportionately deducted from the excess profits duty assessed in respect of the accounting periods which ended on* 31*st January* 1916, 31*st January* 1917, 31*st January* 1918 *and* 31*st January* 1919; (6) *Yes*: *all of them. Case remitted to a Justice of this Court with the answers aforesaid. Costs of case reserved to Justice who disposes of appeal.*

As to each case stated in respect of the assessments for the financial years 1917-1918 *and* 1918-1919—(1) *Yes*: *the*

(1) (1927) 40 C.L.R. 108.

(2) (1929) 42 C.L.R. 332.

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sum of £47,435 10*s.*; (2) *The sum of* £47,435 10*s. should be ratably or proportionately deducted from the excess profits duty assessed in respect of the accounting periods which ended on* 31*st January* 1916, 31*st January* 1917, 31*st January* 1918 *and* 31*st January* 1919 *respectively*; (3) *Yes*: *all of them. Cases remitted to a Justice of this Court with the answers aforesaid. Costs of cases reserved for the Justice who disposes of appeal.*

Solicitors for the appellant, *Blake & Riggall*, for *Allen, Allen & Hemsley.*

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

H. D. W.

App at p 26. (1975) 1 NSWLR 491

[HIGH COURT OF AUSTRALIA.]

LESKE . . . . . APPELLANT;
PLAINTIFF,

AND

S.A. REAL ESTATE INVESTMENT COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1930. ADELAIDE, *Sept.* 23. MELBOURNE, *Oct.* 27. Rich, Starke and Dixon JJ.

Vendor and Purchaser—Contract of sale—Construction of statute—"Person"—Corporation—Name of person authorized to receive purchase-money—Authority to pay at the office of a limited company—Land Agents Acts 1925 *and* 1927 (*S.A.*) (*Nos.* 1723 *and* 1807), *sec.* 25B (I.)—*Acts Interpretation Act* 1915 (*S.A.*) (*No.* 1215), *sec.* 4.

By contracts in writing the appellant agreed to purchase subdivided land from the respondent company, a body corporate. The contracts provided that all payments falling due thereunder should be paid "at the office of S A. Real Estate Investment Co. Ltd., agents, King William Street, Adelaide."