

[HIGH COURT OF AUSTRALIA.]

DOUGLASS APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

Income Tax (Cth.)—Assessment—Assessable income from property—Deductions—Dividends from companies included in taxable income—Tax paid on profits by companies concerned—Shareholder entitled to rebate on whole of dividends—Company rate—“That part of the said dividends which is included in taxable income”—Income Tax Assessment Act 1922-1927 (No. 37 of 1922—No. 32 of 1927), secs. 16 (b) (i.), (iii.), 23.*

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SYDNEY,
April 16.

MELBOURNE,
May 11.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

Appl'd
49 C.L.R. 34

Included in the taxpayer's assessable income from property was an amount in respect of dividends received by him during the financial year ended 30th June 1927 from certain companies which had paid tax thereon. Amongst the deductions allowed by the *Income Tax Assessment Act 1922-1927* in ascertaining his taxable income were two items, aggregating £92, in respect of insurance and audit fees. The taxable income exceeded the amount of the dividends so received. A claim by the taxpayer under the provisoes to sec. 16 (b) (iii.) of the Act, to a rebate at the company rate on the whole amount of the dividends in question was rejected by the Commissioner, who contended that under the provisoes referred to the rebate allowable should

Sec. 16 of the *Income Tax Assessment Act 1922-1927* provides that "The assessable income of any person shall include . . . (b) in the case of a . . . shareholder . . . of a company which derives income from a source in Australia . . . (i.) dividends . . . credited, paid or distributed to the . . . shareholder from any profit derived from any source by the company: . . . (iii.) interest credited or paid to any depositor or debenture-holder of a company: Provided where the dividends . . . referred to in" sub-par. (i.) "of this paragraph have been distributed out of profits upon which any company has paid or is liable to pay tax under the provisions of any

Income Tax Act which comes into operation after the thirtieth day of June one thousand nine hundred and twenty-three the amount of those dividends . . . shall . . . be excluded from the assessment of the income of the taxpayer unless the rate of tax payable by him on income from property, if the dividends . . . are included, exceeds the rate of tax paid or payable by the company: Provided further that if the rate of tax is not less than the rate of tax paid or payable by the company, the taxpayer shall be entitled to a rebate in his assessment of the amount of tax paid by the company on that part of the said dividends . . . which is included in his taxable income."

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be calculated on the quantum of dividends remaining after the deduction from the amount of the dividends received a proportionate part of the said sum of £92 in the proportion that the amount of the dividends received bore to the total assessable income. On appeal by the taxpayer,

Held, that the Commissioner's contention was wrong, and that the whole of the dividends were "included in his taxable income" within the meaning of the proviso.

CASE STATED.

The appellant, William Douglass, lodged with the Federal Commissioner of Taxation an objection on three specific grounds against his assessment for income tax payable for the financial year ended 30th June 1928, and, being dissatisfied with the Commissioner's decision on the objection, requested him to treat the objection as an appeal and to forward it to the Supreme Court of New South Wales for hearing. Subsequently the appellant was informed by the Commissioner that his objection had been allowed to the extent of two of the grounds, and that his assessment had been amended accordingly. The appeal proceeded on the remaining specific ground of objection that the amount of the income subject to rebate under sec. 16 (b) (iii.) of the *Income Tax Assessment Act 1922-1927* should not be reduced by a proportion of deductions paid and claimed by the appellant which constituted valid deductions from his income and had no relation whatsoever to income derived by him from certain companies in the form of dividends or distributed income upon which the companies had paid tax.

The appeal came on for hearing before *James J.*, who, under the provisions of sec. 51A of the *Income Tax Assessment Act 1922-1930*, stated a case, which was substantially as follows, for the opinion of the High Court :—

1. On 24th November 1927 the appellant duly made a return under the *Income Tax Assessment Act 1922-1927* of income derived by him during the period 1st July 1926 to 30th June 1927, and such return should have included as assessable income from property (among other sums) a sum of £11,911 representing company dividends received by the appellant in that year.

2. Part of the said sum of £11,911, namely £11,830, represented dividends distributed by certain companies out of profits upon

which such companies had paid tax under Income Tax Acts of the Commonwealth coming into operation after 30th June 1923 at the rate of 1s. in the £1.

3. Under date 20th April 1928 the respondent duly served notice of assessment upon the appellant for income tax for the financial year 1927-1928.

4. On or about 23rd May 1928 the appellant duly lodged with the respondent notice of objections against the said assessment on the following grounds: (1) that the full amount of rebate to which he was entitled in respect of income distributed to him by certain companies had not been allowed; (2) that income distributed by a company out of its profits a portion or all of which may have been derived from exempted sources, and therefore not taxable in the hands of the distributing company, did not make such portion of the distribution taxable in his hands; and (3) that the amount of income subject to rebate under sec. 16 (*b*) (iii.) should not be reduced by a proportion of deductions paid and claimed by him which constituted a valid deduction from his income and had no relation whatsoever to income derived by him in the form of dividends or distributed income upon which companies had paid tax.

5. The respondent disallowed the said objections and duly notified the appellant of such disallowance by letter dated 16th June 1928.

6. By letter dated 12th July 1928 the appellant duly requested the respondent to treat his said notice of objections to the said assessment as a notice of appeal and to forward the same to the Supreme Court of New South Wales.

7. The said assessment was subsequently amended by the respondent, and on or about 20th February 1929 the appellant received a letter from the respondent in which the appellant was informed that the objections to the assessment on grounds 1 and 2 shown in par. 4 hereof had been allowed.

8. On or about 6th March 1930 the appellant notified the respondent that he intended to proceed with his appeal only upon ground 3 shown in par. 4 hereof.

9. The amount of taxable income from property derived by the appellant during the income year 1926-1927 was £13,574, being total

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assessable income from property £15,592 less the sum of £2,018, representing deductions allowable therefrom under sec. 23 of the said Act.

10. Included in the said sum of £15,592 (assessable income from property) was the said sum of £11,830, representing dividends and mentioned in par. 2 hereof.

11. Included in the said amount of £2,018 of allowable deductions were the sum of £50, being the amount of premiums paid by the appellant during the said income year for the insurance of his own life, and the sum of £42, being the amount of audit fees and bank charges incurred and paid by the appellant during the said income year.

12. The said sum of £50, life insurance premiums, was not incurred or paid by the appellant for the purpose of producing or in respect of the producing of any of his income and was duly allowed as a deduction from his total assessable income from property in accordance with sec. 23, sub-secs. 1 (c) and 2 (a), of the above-mentioned Act.

13. The said sum of £42 represented audit fees and bank charges incurred by the appellant in gaining or producing his said total assessable income from property generally, and was duly allowed as a deduction from such total assessable income in accordance with sec. 23, sub-secs. 1 (a) and 2 (b), of the above-mentioned Act.

14. The rate of tax payable by the appellant on his income from property derived during the income year 1926-1927 being not less than 1s. in the £1, the appellant contends that by virtue of sec. 16 (b) of the *Income Tax Assessment Act* 1922-1927 and its provisoes, he was entitled to a rebate of tax of 1s. in the £1 on the whole of the said sum of £11,830.

15. The respondent contends that the rebate to be allowed in assessment by virtue of the said provisoes is to be calculated on the amount of £11,830 after deducting therefrom a proportionate part of the said sum, of £50 and £42 allowed as deductions as aforesaid; that is to say, after deducting therefrom the sum of £70, being approximately $\frac{11830}{15592}$ of £92, and that accordingly such rebate of tax as aforesaid should be allowed the appellant only upon the sum of £11,760.

The question stated for the opinion of the High Court was as follows:—

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Is the appellant in the circumstances aforesaid entitled to a rebate of tax of 1s. in the £1 on the sum of £11,830, or upon the balance of the sum of £11,830 remaining after deducting therefrom $\frac{11830}{15592}$ of £92, or upon any other and if so what other sum?

Weston, for the appellant. The system adopted by the Commissioner is not sanctioned by the Act: it could only be justified by very clear and express words in the statute. The more natural meaning of the language contained in the provisoes to sec. 16 (b) (iii.) of the *Income Tax Assessment Act* 1922-1927 is that Parliament wished to prevent double taxation. The word "taxable" was introduced to prevent a taxpayer from getting a rebate in respect of tax he had not paid.

Hooton, for the respondent. The two sums deducted by the appellant were not attributable to any income in respect of property. The taxable income is the amount of income after all allowable deductions are made. If there are items of general deduction from income from property and such income includes dividends, then it cannot be said that the whole of the dividends are included in the taxable income. It is necessary to ascertain the meaning of the words "said dividends" appearing in the second proviso to sec. 16 (b) (iii.). Such words obviously mean the dividends referred to in the centre of the preceding proviso as being the nearest antecedent. The dividends referred to are dividends which are part of the assessable income of the particular taxpayer. By using the words "on that part of the said dividends" in the second proviso, Parliament has expressed its intention, and there is no need to draw any inference.

[DIXON J. referred to *W. & A. McArthur Ltd. v. Federal Commissioner of Taxation* (1) and *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co.* (2).]

The words in the proviso make it clear that it must be ascertained how much of the dividends remain in the taxable income after the

(1) *Ante*, at pp. 19 *et seqq.*

(2) (1929) 43 C.L.R. 247, at p. 267.

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deductions allowed by the Act have been made. It is important here to bear in mind that the definition of "taxable income" specifically refers to deductions allowed by the Act. If the appellant is entitled to a rebate on the whole sum of £11,830, he would be obtaining a rebate on income on which he was not required to pay tax. The proviso deals with the amount of dividends which a particular taxpayer or a particular shareholder receives; it deals with the individual taxpayer whose case is being considered.

Weston, in reply. The second proviso to sec. 16 (b) (iii.) is not a proviso to the first proviso. It deals with a group of dividends not touched by the first proviso.

Cur. adv. vult.

May 11.

The following written judgments were delivered :—

RICH J. The question raised by this case stated is whether, upon the true construction of the second proviso standing at the foot of sec. 16 (b) (iii.) of the *Income Tax Assessment Act* 1922-1927, the rebate of tax paid by a company to which a shareholder is entitled when the profits are distributed should be calculated only on so much of the taxpayer's dividends remaining after a proportionate part has been subtracted of the deductions allowable from the gross or assessable income of the taxpayer in arriving at his net or taxable income. Sec. 16 (b) (i.) provides that the assessable income of any person shall include "in the case of a . . . shareholder . . . of a company which derives income from a source in Australia . . . dividends . . . or profits . . . distributed to the . . . shareholder from any profit derived . . . by the company." Inasmuch as profits distributed by the company will in most cases have been assessed to tax as part of the income of the company before distribution, in order to avoid double taxation some provision is required in relief of liability of the shareholder; accordingly two provisos at the foot of par. (b) were enacted. They are as follows :—"Provided where the dividends, bonuses, profits or shares referred to in sub-paragraphs (i.) or (ii.) of this paragraph have been distributed out of profits upon which any

company has paid or is liable to pay tax under the provisions of any Income Tax Act which comes into operation after the thirtieth day of June One thousand nine hundred and twenty-three the amount of those dividends, bonuses, profits or shares shall, where the shareholder is not a company, be excluded from the assessment of the income of the taxpayer unless the rate of tax payable by him on income from property, if the dividends, bonuses, profits or shares are included, exceeds the rate of tax paid or payable by the company: Provided further that if the rate of tax is not less than the rate of tax paid or payable by the company, the taxpayer shall be entitled to a rebate in his assessment of the amount of tax paid by the company on that part of the said dividends, bonuses and profits, and of the face value of the said shares, which is included in his taxable income." In the present case the rate of tax payable by the appellant, who is the shareholder, is not less than the rate of tax paid by the company, and we are, therefore, concerned with the second proviso. The language of that proviso is elliptical because it refers to a matter already dealt with by the first proviso. For instance, the words "the rate of tax" refer back to the expression in the first proviso "the rate of tax payable by him on income from property, if the dividends, bonuses, profits or shares are included." The expression "the said dividends, bonuses and profits" refers back to the words in the first proviso "where the dividends, bonuses, profits or shares referred to in sub-paragraphs (i.) or (ii.) of this paragraph have been distributed out of profits upon which any company has paid or is liable to pay tax under the provisions of any Income Tax Act which comes into operation after the thirtieth day of June one thousand nine hundred and twenty-three." Indeed, the second proviso is based upon the hypothesis or condition expressed in the clause in the first proviso introduced by the word "where," and unless this is remembered the meaning of the second proviso may not be readily understood. Finally, the words "in his taxable income" with which the second proviso ends refer to a money sum; by the definition contained in sec. 4 "taxable income" means "the amount of income remaining after all deductions allowed by this Act have been made." It follows that, when the proviso

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directs that a rebate shall be allowed "of the amount of tax paid by the company on that part of the said dividends," &c., "which is included in his" (the taxpayer's) "taxable income," it means that so much of the dividends included in the shareholder's assessable income pursuant to sub-par. (i.) of par. (b) of sec. 16 which have been distributed by the company out of profits upon which it has paid or is liable to pay tax as is included in his taxable income must be ascertained, and the tax paid by the company upon that amount of such dividends must be allowed as a rebate. This necessitates an ascertainment of that amount of the dividends which remains in the taxable income. The taxable income is the net balance of the assessable income which is left after all the deductions are made therefrom. The dividends may, and usually will, be only one of many items of revenue which together compose the assessable income. The apparently simple statement of the provision, therefore, conceals the difficult problem of how, in the net sum obtained by subtracting a number of items from a gross sum itself composed of many items, it is possible to find portion of one of the items of the gross sum. The Commissioner has attacked the problem by distributing the deductions from the gross sum ratably over the items which compose the gross sum after throwing out such deductions as are so associated with particular items of the revenue that the deductions ought to be attributed to such items. While I sympathize with him in his attempt to solve a problem which he did not shirk, but courageously faced, in spite of the fact that its nature and difficulty seem to have escaped the attention of the draftsman who otherwise must surely have expounded and expanded his meaning, I cannot think that he has supplied the key. The object of the Legislature was to avoid double taxation, and to make some just allowance of the tax already paid or payable when profits which had borne or were liable to bear tax fell again to be taxed. When the provision speaks compendiously of "that part of the . . . dividends . . . and profits . . . included in" the shareholder's "taxable income," it appears to me more consistent with the general intention to treat it as referring to the sum by which the taxable income is increased by reason of the inclusion of the dividends among the items which compose the assessable income.

Upon the facts of this case the result of this view is that the taxpayer is entitled to a deduction of tax at the rate of 1s. in the £1 paid by the company calculated on the whole amount of dividends which have been included in his assessment.

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STARKE J. The facts are fully set out in the special case stated pursuant to the powers contained in the *Income Tax Assessment Act 1922-1927*, and it is unnecessary to recapitulate them.

The question of law turns upon the proper construction of a proviso to sec. 16 (b), which is in these words: "Provided further that if the rate of tax is not less than the rate of tax paid or payable by the company, the taxpayer shall be entitled to a rebate in his assessment of the amount of tax paid by the company on that part of the said dividends, bonuses and profits . . . which is included in his taxable income." Taxable income is the amount of income remaining after all deductions allowed by the Act have been made (sec. 4). In the present case the whole amount of the dividends has been included in account in ascertaining the taxable income. They are "included in his taxable income," or else the amount of that income would be less. The Commissioner contends that the rebate under the proviso must be calculated upon the balance of dividends remaining after allowing a proportionate part of various deductions from income, which are permitted by the *Income Tax Acts*, but which have no relation whatever to the earning or receipt of the dividends in question. The reason assigned is that if deductions be allowed from assessable income, then part only of the dividends can be included in the taxable income. A more sensible reason, however, for the use of the words "that part" may be found in the proviso to sec. 16 (b) dealing with dividends arising from sources within and without Australia, and possibly also in that dealing with dividends arising from the sale of assets. (See sec. 16 (b), first and third provisoes.) But it is in truth unnecessary to suggest a reason for the use of those words, because they cover all dividends on which tax has been paid by a company, and the only real question is: have such dividends been included in the taxable income of the taxpayer? In the present case they have been so included in account, and if that satisfies the proviso

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to sec. 16 (b), as I think it does, then the question is solved and the taxpayer is entitled to the deduction he claims. This result has the merit of simplicity, and avoids the fractional calculations set up by the Commissioner.

The question stated should be answered as follows : The appellant is entitled to a rebate of 1s. in the £1 on the sum of £11,830.

DIXON J. The question in this case arises upon the second of the two provisos which were added by sec. 5 of Act No. 27 of 1923 to par. (b) of sec. 16 of the *Income Tax Assessment Act 1922*. The provisos relate to the allowance of a rebate or exemption to a taxpayer whose assessable income includes dividends distributed to him out of the profits of a company of which he is a member if the profits have already been taxed in the hands of the company. The first proviso deals with the case of a taxpayer liable for a rate of tax which is lower than that at which the profits have already been taxed in the company's assessment. The amount of the dividends must be excluded from the assessment of the income of such a taxpayer "unless the rate of tax payable by him on income from property, if the dividends . . . are included, exceeds the rate of tax paid or payable by the company." The second proviso enacts : "that if the rate of tax is not less than the rate of tax paid or payable by the company, the taxpayer shall be entitled to a rebate in his assessment of the amount of tax paid by the company on that part of the said dividends . . . which is included in his taxable income."

The taxable income is the amount of income remaining after all deductions allowed by the Act have been made from the assessable or gross income. The dividends are included in the assessable income, which, of course, may be composed of many items besides the dividends. Many of the deductions allowed by the Act are not directed to the earning of assessable income, and are permitted irrespective of the nature of the items included in the assessable income. Provision is made by sec. 23 (2) for distinguishing between income from personal exertion and income from property in making deductions. When the gross income from property and the deductions allowable from such income have been ascertained, then,

speaking generally, the sum of the deductions allowed from income from property is to be deducted from the sum of the items of assessable income from property. Upon the interpretation of the second proviso which the Commissioner has adopted, the provision requires the ascertainment of what amount of one of the items which compose the total assessable income, namely, dividends, is contained in the residue of the assessable income remaining after the total sum of the deductions has been subtracted. Thus, if a case be supposed in which a taxpayer has a greater income from property than from personal exertion and his income from property consists of £300 derived from interest, £300 from rent and £400 from dividends, making in all an assessable income of £1,000, from which he is entitled to deduct £50 paid as premium for life insurance and £50 in respect of each of four children under the age of 16 years, making a total of deductions of £250, the question would be how much of the £400 derived from dividends is included in the residue of the taxable income from property, namely, £750. The Commissioner construes the word "said" in the phrase "that part of the said dividends . . . which is included in his taxable income" as referring to the dividends included in his assessable income, so that the phrase means "that part which is included in his taxable income of the dividends which have been distributed to him as a shareholder out of the profits upon which the company has paid tax and which are included in his assessable income." Further, he construes the words "which is included in his taxable income" as referring, not to the inclusion of the dividends in the account from which the taxable income results as a balance, but as referring to the inclusion in the figure which constitutes that balance of a less figure which consists of part of the dividends. If this be the correct construction of the second proviso, it does require the ascertainment of so much of the amount of dividend taken in as assessable income as remains in the net residue after the deductions, that is, in the taxable income. There appear to be two methods only in which the problem may be solved of ascertaining what part of the dividends forming one of the items composing the assessable income is included in the figure which constitutes the taxable income. One method is to treat each and every part of the deduction as deductible from

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each and every part of the assessable income, at any rate unless some deduction is included which is allowed by reason of the corresponding inclusion in the assessable income of some particular item of revenue, and so should be thrown against that item. This is the method adopted by the Commissioner. He treats the deductions, which are allowable irrespective of the nature of the items in the assessable income as deductible ratably from the whole of the assessable income from property. Thus he ascertains that part of the dividend which is included in the taxable income by deducting from the amount of the dividends included in the assessable income a ratable part of the deductions. The residue of the dividend is included in the taxable income. In the example already given he would treat the sum of the deductions, namely, £250, as deductible from each and every part of the sum of the items of the assessable income, £1,000. So each of the three items of assessable income would be diminished ratably by 5s. in the £1, and the taxable income would include £300 of dividends, £225 of rents and £225 of interest. The other method is to treat the word "included" as referring to the amount by which the taxable income is increased by reason of the presence of the dividends in the assessable income. This means that to the extent that the taxable income is greater because of the inclusion of the dividends in the assessable income, the dividends are included in the taxable income. Thus, in the instance already given, as the taxable income would have been £600 if no dividends had been included in the assessable income, the amount of the dividends included in the taxable income upon this view would be £400. If the deductions exceeded £600 instead of amounting to £250 there would be no taxable income if the dividends were omitted from the assessable income. For example, if the deductions amounted to £700, then, by including the sum of £400 derived from dividends, the taxable income would be brought from nil to £300. That part of the dividends included in the taxable income would therefore be £300. These alternatives arise if in other respects the construction be accepted which the Commissioner places upon the second proviso and, notwithstanding the opinion of my brother *Starke*, I am not at present prepared to say that it is wrong. But I find it unnecessary to give a definite opinion whether

that construction be correct because, assuming it to be so, I think that the second of the two alternatives affords the right solution of the problem which that construction raises. The choice between the alternatives really depends upon the force attributed to the word "included." Probably those who framed the provision did not appreciate the problem which was inherent in what they were prescribing, but whether they did so or not, it is upon this word that the difficulty arises. When the question is asked how much of an item contained in a gross sum is included in a net residue of that sum, it is not unreasonable to understand it as inquiring by how much the net residue is increased by reason of the presence of the item in the gross sum. The object of the provision was to secure to the taxpayer an allowance in respect of tax already paid upon the profits out of which the dividends were paid. Justice seems to require that he should receive an allowance in respect of so much of his taxable income as would not exist but for the inclusion of the dividends in the assessable income. It therefore seems proper to give to the word "included" a force which is in accordance with the meaning which ought fairly to be attributed to the legislation and which it may reasonably bear. In a case in which the dividends exceed the taxable income, it may be necessary to determine whether the construction of the second proviso from which this problem arises is the true one, or whether it should receive a construction by which its operation would be the same as if in terms a rebate were allowed of the amount of tax paid by the company on so much of the dividends as are included in the assessable income. In the present case, however, it is enough to say that accepting the construction of the proviso assigned to it on behalf of the Commissioner the method is erroneous which he has adopted in the application of the proviso so construed.

The question in the stated case should be answered:—The appellant is entitled to a rebate of 1s. in the £1 on the sum of £11,830.

EVATT J. Events have happened which entitle the taxpayer to the rebate mentioned in the last proviso to sec. 16 (b) of the *Income Tax Assessment Act 1922-1927*. And the question in dispute is the ascertainment of "the amount of tax paid by the company on

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that part of the said dividends . . . which is included in his taxable income." Most of sec. 16 (b) is directed to the question—what is the assessable income of a company shareholder to include; as a rule, dividends credited, paid, or distributed are to be brought into account in such assessable income, but there are certain exceptions and qualifications.

Now the "taxable income" is the "assessable" or gross income minus all deductions allowed by the Act (sec. 4). When dividends help to make up the total represented by "assessable income," what part of such dividends is included in the remainder left after deducting the allowed sums from the assessable income? For that remainder is the "taxable income."

The precise problem in figures or amounts is what "part" of £11,830 (the dividends) is "included in" £13,574 (the taxable income from property). The Commissioner answers the problem by working out a proportion sum based on the assumption that certain deductions, which bear no relation to the earning or production of any particular item of the taxpayer's assessable income, should be allocated ratably to each part of the taxpayer's total assessable income; and the amount of dividends should then be debited with and diminished by the amount representing their proportionate part of the selected deductions.

This answer of the Commissioner may be stated in the formula:—

$$\text{Rebate varies as Dividends} \left\{ 1 - \frac{\text{Selected Deductions}}{\text{Assessable Income}} \right\}.$$

It will be seen that, on this basis, in proportion as the selected deductions diminish, the taxpayer's rebate will increase; and as the selected deductions increase, so will the rebate diminish. In the present case, the result of the formula is to fix the rebate on the sum of £11,760 (to the nearest £1), which is £70 less than the amount of the dividends.

In my opinion there is no justification in the language of the section for the adoption of the official formula. In the first proviso to the same section of the Act, the Legislature used appropriate words where a rule of three calculation was intended. And I do not see how it can be said that "that part" of £11,830 included in £13,574 is "about £11,760."

What "part" of (say) £50 is "included in" (say) £1,000? I think that, arithmetically, the answer is : the whole of the £50. And if the question is, what part of £1,000 (dividends) is included in £1,000 (taxable income)—the answer still is : the whole of the £1,000.

There may occur a case where the dividends making up part of the assessable income are themselves greater in amount than the taxable income. The problem then in figures is (say) what "part" of £1,100 is included in £1,000 a lesser sum?

There seem to be three possible answers :—

(1) The £1,100 (the greater sum) may, in a sense, be included in the £1,000 (the lesser sum) because the latter figure represents a remainder from a figure which exceeded £1,100, but also included it. The £1,100 is thus included in account in the £1,000.

(2) Ascertain by how much the taxable income is increased by reason of the inclusion of the dividends in the assessable income. This calculation cannot be made without other calculations, and depends to a great extent upon the quantum of deductions.

(3) A third method is to have regard solely to the two figures £1,000 and £1,100. How much of the greater sum is included in the lesser. The whole is greater than its part, but the question is : what "part" of the whole is "included in" the part? The answer might well be that the proportion of the whole included in its part, is measured by the part itself. How much of £1,100—what part of it—is included in £1,000? The answer would be : £1,000 of the £1,100. This view would secure a rebate to the taxpayer based upon the whole amount of dividends included in the assessable income, but so that such amount of dividends could never exceed the amount of taxable income itself.

Criticism of any one of the alternative views is possible because of the vagueness of the language employed in the section. But it is unnecessary to express a preference for any view. For in any event the taxpayer succeeds in this appeal.

I am of opinion that that "part" of £11,830 (dividends) which was included in £13,574 (taxable income) is the whole of the £11,830, and the appellant is entitled to a rebate upon such sum.

H. C. OF A.
1931.

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Evatt J.

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TAXATION.

McTiernan J.

McTIERNAN J. I agree that the appellant is entitled to a rebate of 1s. in the £1 on the sum of £11,830. The *Income Tax Assessment Act 1922-1927* does not, in my opinion, expressly or impliedly authorize that the rebate mentioned in the last proviso to sec. 16 (b) should be calculated in the manner which has been adopted by the respondent, and I do not think that this method of calculation has been made implicit in the section by the use of the words "that part." The only clear intention of the Legislature, which the proviso exhibits, is that a taxpayer who comes within its provisions should be entitled to have a deduction made from the amount of taxation for which he is liable to be assessed. The reason for the rebate appears to be that the income of such a taxpayer has been retrenched by the payment of income tax by the company in which he is a shareholder, and his own "assessable income" has been made to include a sum of dividends, bonuses and profits, which have been taken into account in computing the "assessable income" of the company. (Sec. 16 (a), (b).) However, while the intention of the Legislature to grant a rebate is clearly expressed, it does not appear to have provided that the two deductions in question in the present case, should be apportioned in any manner between the appellant's income consisting of dividends and his other income, for the purpose of arriving at the rebate. In the absence of clearer legislative provision governing the calculation of the rebate in the present case, I agree with my brother *Starke*, that the words of the proviso to sec. 16 (b) will be satisfied by allowing a rebate at the rate of 1s. in the £1 on the sum of £11,830. That amount is the whole amount of the dividends included in his assessment upon which tax has been paid at the rate of 1s. in the £1 by certain companies in which the appellant was a shareholder.

Question answered: The appellant is entitled to a rebate of 1s. in the £1 on the sum of £11,830.
Costs, costs in the appeal.

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

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

J. B.