[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;
RESPONDENT,

AND

THE TRUSTEES OF THE WHEAT POOL OF WESTERN AUSTRALIA . . } RESPONDENTS.
APPELLANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *March* 2, 3.

SYDNEY, *May* 12.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Wheat pool—Reserve fund—Surplus in hands of trustees paid into reserve fund—Whether amounts paid in are taxable—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *sec.* 31.

Under the terms upon which the Wheat Pool of Western Australia was constituted the trustees of the Pool distributed the proceeds of the sale of the wheat as provided by the conditions of the Pool, and in accordance with such conditions paid the surplus remaining in their hands in each year into a reserve fund. The Federal Commissioner of Taxation sought to tax the surplus so paid in under sec. 31 (2) (*b*) of the *Income Tax Assessment Act* 1922-1928, as income derived from personal exertion.

Held, by *Gavan Duffy* C.J., *Starke* and *Evatt* JJ. (*Rich*, *Dixon* and *McTiernan* JJ. dissenting), (1) that the trustees of the Wheat Pool were not trustees within the meaning of the *Income Tax Assessment Act*, and, inasmuch as the growers were not, under the conditions of the Pool, nor were any other persons, presently or contingently entitled to the moneys placed to the credit of the reserve fund, the trustees were not liable to tax under sec. 31 of that Act; (2) that the trustees were mandataries or agents of the growers and were assessable only to the extent that the growers were liable; that in the amounts received by the trustees no account was taken of the cost of production of

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the wheat, and that the reserve fund which formed part of the proceeds of the wheat could not be treated apart from and independently of those proceeds and as a separate income in the hands of the trustees.

Decision of the Supreme Court of Western Australia (*Draper* J.): *Trustees of the Wheat Pool of Western Australia* v. *Deputy Federal Commissioner of Taxation*, (1931) 34 W.A.L.R. 53, affirmed on different grounds.

APPEAL from the Supreme Court of Western Australia.

This was an appeal from the Supreme Court of Western Australia (*Draper* J.), which held that the respondents, the trustees of the Wheat Pool of Western Australia, were not liable to pay income tax under the *Income Tax Assessment Act* 1922-1928 on sums of money placed by them in the reserve fund, constituted under the Wheat Pool conditions.

The statement of facts agreed upon between the parties was in substance as follows :—

1. The Co-operative Wheat Pool of Western Australia (now known as The Wheat Pool of Western Australia) was established in 1922 (after the termination of the compulsory State Pool which had existed up to that time) to enable farmers to continue pooling their wheat under a voluntary system.

2. The objects of the Pool were (*inter alia*) :—(*a*) To enable the growers to dispose of their wheat crops in co-operation to the best advantage through a central selling organization controlled by four trustees acting as agents for such growers. (*b*) To provide more economical storage, handling, transport and marketing facilities than the individual grower would have at his command. (*c*) To arrange finance and make advances to the growers from time to time on account of the proceeds of wheat delivered by them. (*d*) To distribute the ultimate proceeds of the sale of the pooled wheat (subject to certain deductions authorized by the conditions of the Pool) among the members of the Pool according to the quantities of wheat delivered by them in such a manner that so far as possible no member of the Pool would be deprived of any of the proceeds obtained from the marketing of his wheat. (*e*) To promote the interest of co-operative wheat-pooling in Western Australia and to supply information concerning wheat and wheat-marketing to members of the Pool.

3. Since the year 1925 the trustees of the Pool have been Alexander Joseph Monger, Charles Walter Harper, John Smith Teesdale and Thomas Henry Bath.

4. The conditions under which the Pool operated during the selling period or season from November 1927 to November 1928 were embodied in a form of wheat receipt. These conditions were signed by each farmer who placed his wheat with the Pool for disposal.

5. Under the conditions the trustees were given certain defined powers for the purpose of enabling them to carry out the objects of the Pool.

6. The remuneration of the trustees was fixed by condition No. 13 of the wheat receipt. Such remuneration was as follows: the Chairman, £600; the other trustees, £400 each. Apart from this remuneration the trustees made no personal profits or gains from the operations of the Pool.

7. The trustees received considerable quantities of wheat in the season 1927-1928 and disposed of such wheat in accordance with the conditions of the Pool.

[Pars. 8 and 9 referred to conditions of the wheat receipt which are set out hereunder.]

10. At the conclusion of the operations of the Pool in the season 1927-1928, the surplus over the next lower one-eighth of a penny per bushel of wheat placed in the Pool amounted to £7,234, representing ·101 of 1d. per bushel. In pursuance of the authority given by the conditions the trustees placed the sum of £4,500 in the reserve fund during the year of assessment ending on 30th June 1929 and placed the sum of £2,784 in the reserve fund during a subsequent year of assessment not involved in this appeal.

11. Portions of the reserve fund were invested from time to time and the trustees commenced to receive considerable income from such investments. The income was applied to the same purposes as the capital of the fund.

12. In December 1929 the trustees through their solicitors inquired from the Commissioner of Taxation as to their liability for taxation in respect of the income derived from the reserve fund.

13. In his letter of 10th March 1930 the Commissioner claimed that tax was payable on the amount of undistributed proceeds

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received yearly by the trustees and on the income derived from the investments thereof, and asked that returns showing these amounts should be immediately furnished to him. This was done and the Commissioner issued, together with other assessments of tax not material in this appeal, the following assessment for the year ending 30th June 1929 :—Income from personal exertion : Gross £6,585 ; Net £4,926. Income from property : £5,902. Tax payable : £1,505 5s. 9d. In preparing the assessment under appeal the Commissioner treated the amount placed by the trustees in the reserve fund as income from personal exertion and the income derived from the investment thereof as income from property. The net income from personal exertion was ascertained by deducting from the gross amounts paid yearly into the reserve fund the various items of expenditure during that year. Further, in the year of assessment now under appeal, the Commissioner included as an item of income from personal exertion the sum of £200 recovered by the trustees as a result of legal proceedings against a ship-owner for damages caused to the Pool by the late arrival of his vessel at Western Australian ports for loading.

14. On receipt of these assessments the trustees objected to them on the ground that part of the tax had been assessed on the reserve fund which the trustees contended was not taxable for the reasons stated in their notice of objection dated 8th May 1930. The objection was disallowed, and the trustees thereupon requested the Commissioner to treat the objection as an appeal and to forward it to the Supreme Court for hearing.

The question for the consideration of the Court is :

Is the whole or any part, and if so what part, of the sum placed by the trustees in the reserve fund to be considered as income and subject to tax under the said Act ?

The notice of objection dated 8th May 1930 objected to the assessment on the reserve fund accumulated in each of the years of assessment under clauses 2 and 10 of the Pool conditions, on the grounds that :—(*a*) As far as the trustees were concerned it consisted of numerous loans or contributions of capital made by various growers to enable the Pool to be financed and to carry out the

purposes mentioned in clause 10 of the Pool conditions and was not income or subject to income tax. It might be that the respective growers would be liable to pay income tax on the amounts retained by the trustees but since there was no obligation on the trustees to return the loans or contributions to the respective contributories such contributories were not cestuis que trust and the trustees were not taxable as representative taxpayers. (*b*) The trustees were not carrying on business for profit or gain to themselves.

The relevant conditions of the Pool set out on the form of wheat receipt were as follows :—" 2. The grower doth hereby irrevocably appoint the trustees his agents to sell such wheat at the best price obtainable under market conditions and to pay to the grower the sum received after deducting therefrom the whole of the expenses (whether preliminary or otherwise) incurred in and about the receiving handling sale and disposal of the wheat including all salaries wages and other payments made in connection therewith or otherwise in connection with the operations of the trustees, it being expressly agreed that the whole of the net proceeds up to the next lower one-eighth of one penny per bushel shall be distributed amongst the growers as hereinafter provided. 3. Wheat on delivery shall lose its identity and the grower shall be entitled only to such proportionate share of the total moneys distributed to the growers as the result of the operations of the Pool as the total wheat delivered by him to the trustees bears to the total pooled wheat but subject nevertheless to any deduction as hereinafter provided. 4. The trustees shall issue or cause to be issued to the grower a certificate from time to time in respect of the wheat or any portion of the wheat delivered by the grower to the trustees and the relative certificates shall be produced at all times as required by the trustees to enable the grower to obtain payment of the said advance or any dividend. Provided, however, that before the issue of any such certificate the grower shall satisfy the trustees by declaration or otherwise at the trustees' option that he has not made given or executed any charge over the wheat delivered to the trustees and that no person other than the grower has any interest therein. 5. The trustees shall arrange for an advance to be made to the grower upon all wheat

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handed over to the Pool of 3s. 4d. per bushel of f.a.q. in good sound new bags less any deductions on account of wheat being below f.a.q. standard. As moneys are from time to time received or realized from the sale of wheat and become available for distribution the trustees shall declare a dividend or dividends. The trustees may deduct from the first or subsequent dividends payable to each grower the cost of railage on the customary bushel basis from the siding from which the wheat was railed to the nearest port. 6. The trustees may if they think fit enter into arrangements with millers to secure to any grower of special strong milling wheat a special allowance and in such case any such amount received and representing such special allowance shall not form any portion of the Pool funds but shall belong to the grower of such wheat." Condition 7 provided for additional expenses being charged against certain growers in special circumstances. "8. Excepting as hereinbefore otherwise provided or as authorized by the grower no deductions or charges shall be made against any individual grower." Condition 9 conferred special powers on the trustees. The material powers were:— "(*c*) To sell the said wheat by public auction or private contract for cash or on terms in one or more lots to corporations public or other bodies and authorities millers brokers merchants importers or other persons at any place in Western Australia or abroad at such time or times and upon such terms and conditions as the trustees shall think fit. . . . (*e*) To enter into any contracts with millers and others for the gristing and/or storage of the said wheat or any portion thereof and to enter into contracts and make arrangements for the sale of the gristed products. (*f*) To enter into contracts in their own names as trustees of the Co-operative Wheat Pool of Western Australia. (*g*) To borrow or raise money for the purpose of marketing the said wheat and of carrying out the powers hereby given and of making interim payments to growers on account of wheat actually delivered and for that purpose to mortgage charge hypothecate or pledge the said wheat and to negotiate any contracts drafts bills of exchange bills of lading notes acceptances orders or other documents relating thereto. (*h*) To enter into and carry out any transactions usually entered into and carried out by dealers in

wheat and which the trustees may consider in their absolute discretion advisable in the interests of the Pool and particularly to buy wheat and if thought necessary by them for the protection of the Pool and by way of insurances against decline in prices to buy and sell futures provided such futures sold shall at all times be earmarked against a specified quantity of wheat held for sale by the trustees. (*j*) To take such steps as the trustees in their discretion shall deem necessary to ensure the successful marketing of the wheat and as will protect the interests of the growers." " 10. Any fractional part of the net proceeds of the Pool undistributed under clause 2 hereof may be placed by the trustees to the credit of a reserve fund in the name of the trustees for the time being of the Pool and the amount so placed to such reserve fund may be applied by the trustees in such manner as they may in their absolute discretion consider conducive to the interests of co-operative wheat-pooling and particularly it may be made applicable for:—(*a*) Propaganda purposes. (*b*) Purchase of shares in any company whose activities relate to the handling shipping delivering or treating of grain or in any way connected therewith and whether in Australia or elsewhere. (*c*) Purchase or acquirement of plant and machinery for handling and reconditioning storing or treating grain or purchase of shares in any company being engaged in work of that nature. The moneys and investments to the credit of such reserve funds may be utilized from time to time at the trustees' absolute discretion and any surplus reserve fund may be carried over to each successive pool and shall be deemed to vest in the trustees from time to time of each successive pool. Should the trustees at any time decide to finalize such reserve fund or reduce the amount thereof they shall be entitled to do so and they may at their option (*a*) distribute the same or any portion thereof among Pool members of the period during which such finalization or reduction takes place and/or (*b*) issue to such Pool members a certificate or certificates setting out the respective interests of such Pool members in the said fund or any investments thereof or in any portion thereof. Excepting as hereinbefore provided the funds or investments to the credit of the said reserve fund at any time shall not be distributable amongst members

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of any Pool. The trustees may appoint any nominee to hold shares in any company in which an interest is being acquired in pursuance of the powers by this clause given." Conditions 11 and 12 provided for the appointment of new trustees. "13. The trustees may appoint any one of their number to be chairman and his remuneration shall be £600 per annum. Each of the other trustees shall be entitled to remuneration of £400 per annum. These sums shall be exclusive of any payments to which they may be respectively entitled for actual expenses incurred by them in discharge of their trust. 14. The obligations and liabilities which the trustees may enter into under these conditions being so entered into on behalf of the growers the trustees shall not be personally liable therefor and they and each of them shall be indemnified by the grower in respect thereof. 15. The grower hereby empowers the trustees to bring and defend actions in their own names on his behalf in relation to these conditions." Condition 16 provided for meetings of the growers when convened by the trustees. "17. These conditions shall be binding upon the grower his executors administrators transferees and assigns and every person claiming under or through him or them." In the declaration made by the grower as provided by condition 4 he agrees that the trustees may hold the said wheat and any certificate to be issued in respect thereof without making any advance to him until the amount due under such charge as is referred to in the condition is fully paid and such charge is discharged.

Draper J. allowed the appeal, holding that sec. 31 (2) of the *Income Tax Assessment Act* applied only if a trustee was liable to pay income tax in respect of the income of the trust, and that this liability arose only when the trustee was a partnership created by a person in respect of the income or income-producing assets under which the relatives by blood, marriage or adoption were entitled to part of the income of the estate and which partnership in the opinion of the Commissioner was created to avoid liability to income tax; and that the Act as amended in 1925 so far as it was relevant to the present facts did not extend the liability of a trustee to payment for income tax further than as stated, and that the trustees of the Wheat Pool were exempt from liability to income

tax under sec. 31 (1) and were not liable to taxation on the assessment under appeal: *Trustees of the Wheat Pool of Western Australia* v. *Deputy Federal Commissioner of Taxation* (1).

From this decision the Commissioner of Taxation now appealed to the High Court.

Wilbur Ham K.C. (with him *Hassett*), for the appellant.

Robert Menzies K.C. (with him *Negus*), for the respondents.

Counsel cited the following cases: *New York Life Insurance Co.* v. *Styles* (2); *Jones* v. *South-West Lancashire Coal Owners' Association Ltd.* (3); *Thomas* v. *Richard Evans & Co.* (4); *Williams* v. *Singer* (5); *Federal Commissioner of Taxation* v. *Higgins* (6); *Minister of National Revenue* v. *Saskatchewan Wheat Producers Ltd.* (7).

Cur. adv. vult.

May 12.

The following written judgments were delivered:—

GAVAN DUFFY C.J., STARKE AND EVATT JJ. The growers of wheat in Western Australia have established a wheat pool on a voluntary basis. The object of the Pool is to enable the growers to dispose of their wheat crops, in co-operation, to the best advantage through a central selling organization controlled by trustees acting as agents for the growers. Trustees of the Pool have been constituted and the Pool is fed by the growers delivering wheat to the trustees. Upon delivery the wheat loses its identity and the grower is only entitled to a proportionate share in the proceeds after deductions for expenses, and a reserve fund. The trustees are irrevocably appointed as the agents of the growers for the sale of the wheat and for the distribution of the proceeds after the deductions above mentioned. "The whole of the net proceeds up to the next lower one-eighth of a penny per bushel," it is stipulated, shall be distributed amongst the growers. It is the undistributed sum retained under this clause that is placed to the credit of a reserve fund in the name of the trustees, for the time being, of the Pool. Moneys at the

(1) (1931) 34 W.A.L.R. 53.
(2) (1889) 14 App. Cas. 381.
(3) (1927) A.C. 827.
(4) (1927) 1 K.B. 33.
(5) (1921) 1 A.C. 65, at p. 72.
(6) (1930) 44 C.L.R. 297.
(7) (1930) Can. S.C.R. 402.

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credit of the reserve fund or any investments thereof may be utilized from time to time at the trustees' absolute discretion, and particularly to (*a*) propaganda purposes; (*b*) purchase of shares in companies connected with the grain trade; (*c*) purchase of plant for handling or treating grain. Should the trustees decide to wind up or reduce the amount of the reserve fund they are entitled to do so and may distribute the same among the Pool members or issue a certificate to them setting out their interest in the fund or any investments thereof. But otherwise the reserve fund is not distributable amongst the members of any pool.

During the financial year ending on 30th June 1929 the trustees placed a considerable sum of money to the credit of the reserve fund established pursuant to the Pool agreement. The appellant, the Commissioner of Taxation, assessed the trustees to income tax under the *Income Tax Assessment Act* 1922-1928 in respect of the moneys so placed, during the year in question, to the credit of the reserve fund, but upon appeal to the Supreme Court of Western Australia the inclusion of these moneys in the assessment was disallowed. The Commissioner has now brought an appeal to this Court on the grounds that the moneys so placed to the credit of the reserve fund were income from personal exertion in the hands of the trustees, and that they were liable to be assessed and to pay income tax thereon pursuant to the provisions of the Act, sec. 31 (2) (*b*). It is contended that the moneys credited to the reserve fund are the result of a business or undertaking carried on by the trustees and therefore their income assessable to income tax. The argument founded upon sec. 31 is based upon the assumption that the trustees of the Wheat Pool are trustees within the meaning of the Acts. The Wheat Pool and the trustees set up to manage it are but machinery for the purpose of realizing the wheat of the growers. The trustees are really the mandataries or agents of the growers and the provisions, as to the reserve fund, are part of the mandate. (See *Welden* v. *Smith* (1); *Robinson* v. *South Australia* (2).) But sec. 31 contemplates a trust estate, income from that trust estate and beneficiaries, presently or contingently, entitled to that income. The suggestion that the wheat or its

(1) (1924) A.C. 484. (2) (1929) A.C. 469.

proceeds or the business or undertaking is the trust estate is far-fetched, even bearing in mind the definition of trustee in sec. 4, but the growers are not, nor is any other person, presently or contingently, entitled to the supposed income from that fund, namely, the moneys placed to the credit of the reserve fund. The whole basis of the assessment under sec. 31 therefore breaks down. Still that leaves open the question whether the trustees of the Wheat Pool may not be chargeable under other sections such as 13 and 89. But if the trustees are mandataries or agents of the growers, as, in our opinion, they are, then they are only assessable in that capacity, and to the extent that their mandataries, the growers, are liable. The proceeds of the wheat are, of course, income derived by the trustees by virtue of their mandate or agency ; but it is not true that it is net profit or assessable income of the mandataries or growers, for no account is taken of the costs incurred by the growers in sowing and harvesting their crops, and delivering the grain to the trustees. The reserve fund which is part of the proceeds of the wheat cannot be treated apart from, and independently, of those proceeds, and as a separate income in the hands of the mandataries or agents, the trustees. Consequently, in our opinion, the basis upon which the moneys placed to the credit of the reserve fund have been included in the assessment of the trustees of the Pool, is wrong. An assessment of the trustees upon a proper basis would not, we understand, result in any taxable income. The reasons given by *Draper* J. in the Court below cannot be supported but the result he reached is right and this appeal should be dismissed.

RICH J. The trustees of the Wheat Pool of Western Australia complain of an assessment made upon them in respect of the year of income ending 30th June 1928 under sec. 31 (2) (*b*) of the *Income Tax Assessment Act* 1922-1928. The trustees have conducted a voluntary pool in each year since 1921, when the compulsory Wheat Pool in Western Australia was discontinued. The conditions governing the operations of the trustees are stated upon wheat receipts which they issue to those who deliver wheat into the Pool. The general plan of the arrangement is that the trustees shall market

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the wheat supplied to them and distribute the net proceeds among the suppliers ratably according to the number of bushels delivered by each supplier subject to reduction or "dockage" in respect of condition and the like. Clause 3 of the conditions provides: "Wheat on delivery shall lose its identity and the grower shall be entitled only to such proportionate share of the total moneys distributed to the growers as a result of the operations of the Pool as the total wheat delivered by him to the trustees bears to the total pooled wheat, but subject nevertheless to any deduction as hereinafter provided." The deduction referred to is that provided for in clause 10, which enables the trustees to place to the credit of a reserve fund in the name of the trustees any fractional part of the net proceeds of the wheat which exceeds the nearest lower one-eighth of a penny per bushel obtained by dividing the number of bushels delivered to the Pool into the total net proceeds of the Pool. The reserve fund is to stand in the name of the trustees of the Pool and the funds may be applied by the trustees in such manner as they may in their absolute discretion consider conducive to the interests of co-operative wheat-pooling and particularly it may be made applicable for (*a*) propaganda purposes; (*b*) purchase of shares in any company whose activities relate to the handling, shipping, delivering or treating of grain or in any way connected therewith and whether in Australia or elsewhere; (*c*) purchase or acquirement of plant and machinery for handling and reconditioning, storing, or treating grain or purchase of shares in any company being engaged in work of that nature. The moneys and investments to the credit of such reserve funds may be utilized from time to time at the trustees' absolute discretion, and any surplus reserve fund may be carried over to each successive pool, and shall be deemed to vest in the trustees from time to time of each successive pool. The trustees are also empowered "to finalize such reserve funds or reduce the amount thereof." If they do so, they may at their option distribute the sum liberated "among pool members of the period during which such finalization or reduction takes place" or they may issue a certificate to the members setting out their respective interests in the fund. The trustees have throughout successive years built up a reserve fund which remains in their possession.

The Commissioner of Taxation has adopted the view that the sums detached from the proceeds of the operations of the Pool in collecting and marketing the wheat and credited to the reserve fund constitute profits. But as no person is according to the conditions of the Pool presently entitled beneficially or in actual receipt beneficially of the amount credited in any year to the reserve the Commissioner has assessed the trustees in respect of such profits. The trustees objected to this assessment upon grounds which, although inartistically expressed, sufficiently contain the points that they were not liable to be assessed in respect of the sums detached if such sums were profits or income and that such sums were not in truth profits or income. On appeal to the Supreme Court of Western Australia *Draper* J. held that sec. 31 (2) (*b*) had a very restricted application and was confined to liabilities which only arose when the trust is a partnership created by a person for the purpose of avoiding tax. I am unable to agree with this construction of the statute. I think the provisions of the statute referred to by *Draper* J. do not influence the interpretation or application of sec. 31 (2). The construction which I give to sec. 31 (2) sufficiently appears in the judgment which I have prepared in the case of the *Executor Trustee and Agency Co. of South Australia* v. *Federal Commissioner of Taxation* (1). The first objection of the taxpayer cannot be supported on any other ground. It appears undeniable that the taxpayers are trustees. The sum paid to reserve fund is in point of law the property of the trustees but they have no beneficial interest in it. Upon the terms of the conditions of pool under which they hold the reserve fund and the proceeds of wheat from which the subventions to reserve are detached require them to devote the money to purposes in which the suppliers of wheat in a given year have in that capacity no further interest after the close of that year. Upon the terms of the instrument no other person is presently entitled or in actual receipt thereof or liable as a taxpayer in respect thereof. It is true that difficulties at once occur to the mind as to the validity of the trust which has no objects save the general well-being of those who may hereafter market wheat. But the Tax Commissioner is not bound to concern himself with such matters and the trustees do not and should not

(1) *Post*, 26.

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rely upon any doubts as to the efficacy of the conditions upon which they hold the reserve fund. If, therefore, the sum contributed to reserve is profit or income the trustees are the persons to be assessed in respect thereof. The real question is whether it is profit or income. In considering this question the manner in which the fund is used, the purposes for which it is created and its ultimate fate are alike irrelevant. Nor is it material that the purpose for which the sum is detached from the total net proceeds and withheld from distribution is that it may be contributed to the fund. What is material is the means by which it is brought into existence, the continuing nature of the undertaking which brought it into existence, the character of the arrangement which enables the trustees to detach it and the annual recurrence of the detachment of such a sum. That the trustees carry on a continued undertaking can admit of no doubt. The agreed statement of facts sets out that the objects of the Pool included the purpose of enabling growers to dispose of wheat in co-operation "through a central selling organization controlled by four trustees acting as agents for such growers." In each year this organization performed for the growers who supplied wheat to it the services of collecting the wheat into a pool, realizing it and distributing the net proceeds subject to the deduction in question. All these services were commercial in character and the undertaking was a business. It was none the less a business because it was conducted without any desire of personal profit to the trustees. The grower who desired to avail himself of the undertaking, and enjoy the advantages of its services, was required to submit to the deduction of the amount put to reserve—this was part of the return exacted from him as portion of the consideration for the services and advantages he obtained. It was exacted because it was conceived to be for the welfare of the undertaking considered as a continuing institution or enterprise. These facts stamp it with the character of profit or income. If they do not, it is difficult to know what it is. Is it capital?

In my opinion the appeal should be allowed.

DIXON J. The compulsory Wheat Pool set up by the State of Western Australia during the War was continued until the season of 1922 when the compulsory system was brought to an end. (See *Wheat Marketing Acts* (W.A.), Nos. 18 of 1916; 33 of 1917; 26 of 1918; 32 of 1919; 39 of 1920 and 18 of 1921.) Thereupon an

organization was established without statutory authority to enable farmers to continue pooling their wheat under a voluntary system. It was called "The Co-operative Wheat Pool of Western Australia," but after the enactment of Act No. 28 of 1929 (W.A.) the word "Co-operative" was dropped from its title. The objects with which the organization was established include the following:— (*a*) To enable the growers to dispose of their wheat crops in co-operation to the best advantage through a central selling organization controlled by four trustees acting as agents for such growers. (*b*) To provide more economical storage handling transport and marketing facilities than the individual grower would have at his command. (*c*) To arrange finance and to make advances to the growers from time to time on account of the proceeds of wheat delivered by them. (*d*) To distribute the ultimate proceeds of the sale of the pooled wheat (subject to certain deductions authorized by the conditions of the Pool) among the members of the Pool according to the quantities of wheat delivered by them in such a manner that so far as possible no member of the Pool would be deprived of any of the proceeds obtained from the marketing of his wheat. (*e*) To promote the interest of co-operative wheat-pooling in Western Australia and to supply information concerning wheat and wheat marketing to members of the Pool. No corporation was brought into existence for the purpose of carrying out these objects and, so far as appears, no voluntary association of a continuing character was formed. The undertaking was carried on by trustees and the conditions governing the Pool were fixed by the terms upon which they received the wheat from those who delivered it into the Pool. These terms under the title "Conditions of Pool" were set out upon a wheat receipt which was issued on behalf of the trustees to the suppliers of wheat. It does not appear whether the "Conditions of Pool" varied from season to season, but the conditions upon which wheat was received from all suppliers of one season must have been uniform. The conditions governing the season presently material provided for a pool of a kind now familiar in Australia. Wheat delivered into the Pool lost its identity and the supplier obtained only a right to share in a distribution of the amount produced by the operations of the Pool. Wide powers were conferred upon the trustees, who were

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enabled to deal with the wheat according to their discretion. The second of the conditions appointed the trustees agents of the suppliers to sell the wheat and, after deducting all expenses, to distribute among the suppliers " the net proceeds up to the next lower one-eighth of a penny per bushel." The plan was that distributions should be made of the net proceeds of the wheat by dividends calculated upon the bushels delivered until the sum per bushel should reach the last eighth of a penny which could be paid without exhausting the fund. The remaining sum was retained. The tenth condition, which calls the sum the " fractional part of the net proceeds of the Pool undistributed under clause two," provides how such a sum is to be used and applied. It may be placed to the credit of a reserve fund in the name of the trustees for the time being of the Pool, and it may be applied by the trustees in such manner as they may in their absolute discretion consider conducive to the interests of co-operative wheat-pooling and in particular for purposes of propaganda, for the purchase of shares in any company handling, shipping, delivering or treating grain and for the purchase of plant and machinery for handling, reconditioning, storing or treating grain. The reserve funds may be utilized from time to time at the trustees' absolute discretion, and any surplus reserve fund may be carried over to each successive pool and is vested in the trustees from time to time of each successive pool. The trustees may at any time " decide to finalize such reserve fund or reduce the amount thereof," and may at their option distribute the moneys among the members of the pool then in operation or issue to them certificates of their interests in the fund or in any portion thereof. Otherwise the funds or investments to the credit of the reserve fund may not be distributed among members of any pool.

Year by year a surplus over the nearest lower one-eighth of a penny per bushel has been retained and appropriated to the reserve fund. The reserve fund has been invested and earns interest. The Deputy Commissioner of Taxation has now assessed the trustees to Federal income tax upon the sum in each year appropriated to reserve and upon the annual earnings of the reserve fund itself. The trustees do not dispute the liability of the revenue derived from the investment of the fund, but they contend that the sums

appropriated to reserve representing the surplus over the nearest lower one-eighth of a penny per bushel are not income and that they are not liable as trustees to be taxed thereon. The assessments are not based upon the view that the suppliers of wheat to the Pool enter into such a relation with one another as to constitute an association taxable as a " company " under the artificial definition of that word in sec. 4 of the *Income Tax Assessment Act* 1922-1928, and, in any case, there is little in the facts in evidence to support such a view of the matter. (Compare *Hecht* v. *Malley* (1).) Indeed, the trustees appear to act as a board of management of an undertaking or concern conceived as possessing continuity and existence entirely independent of the suppliers, who may be considered to resort to it rather as clients or customers than as co-operators. The terms upon which a supplier's wheat is received entitled him to payment of no more than the sum calculated to the one-eighth of a penny per bushel which is nearest below the exact ratable proportion of the whole surplus, and, so far as the contract goes, it is for that sum that he has parted with his wheat. In his assessment it would be difficult to include in his assessable income any greater amount than the sum he receives from the Pool by way of distribution of the price or proceeds of his wheat. According to the text of the conditions upon which he has disposed of his wheat, the difference between the sum he receives and the full ratable proportion of the total surplus goes to a fund in which he takes no beneficial interest. If in a later season the trustees " decide to finalize the reserve or reduce the amount thereof " he may share in the consequent dividend. But, if he does so, it will be because in that season he is a supplier of wheat to the Pool, and not by reason of or in respect of his supplies of wheat in the season now in question. In other words, like any other person, he may qualify as a member of a class whose fortune it is to participate in the reserve, but the delivery of his existing wheat into the existing Pool forms no element in the qualification. Further, a distribution is a remote contingency arising only because the funds in reserve become superfluous or the purpose of the fund fails. It is true that proprietary rights in the fund may depend on other considerations

(1) (1924) 265 U.S. 144, at pp. 158 *et seqq.*; 68 L. Ed. 949, at pp. 958 *et seq.*

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than the mere tenor of the contract. The purposes of the reserve fund may be advantageous to wheat farmers generally, but it is not apparent either that the objects of the trust are charitable or that any beneficial interest is given to ascertained or ascertainable persons or, at any rate, to persons necessarily ascertainable within the period allowed by law. But neither the Commissioner of Taxation nor the trustees have suggested that the supplier of wheat is presently entitled by way of resulting trust to the amount retained and placed to the credit of reserve, and in any case their obligations *ex contractu*, whether to the trustees or *inter se*, as well as the terms of the agreement, may operate to prevent a resulting interest (see *Cunnack* v. *Edwards* (1); *Braithwaite* v. *Attorney-General* (2)). The Commissioner is, I think, right in ignoring such questions and in making his assessment upon the assumption that the reserve fund will continue to be administered and applied according to the terms of the "Conditions of Pool."

The reserve fund, so considered, is primarily devoted to the purpose of a continuing undertaking. So far as it may be expended upon plant and machinery and in acquiring shares in companies that provide services in connection with grain, it represents fixed capital of the undertaking. The nice question whether "propaganda" is an operation the expenditure for which should be set down to capital or revenue need not be discussed, for it is plain in any case that the reserve fund may be employed in meeting charges of a recurrent or "income" character as well as of a capital nature. But the fact remains that the fund is needed for the conduct of an enterprise. It is true that the enterprise consists in carrying out in respect of each successive season a single operation, but as the existence of the fund itself shows, this does not mean a discontinuity. A continued undertaking or organization is maintained to conduct an indefinite succession of pools. It is true that the advantage of the wheat growers or perhaps the desire to confer an even wider benefit provides the motive of the enterprise and that it is not actuated by anyone's desire for personal profit. But this, while it explains why so little revenue is derived from the conduct of the enterprise, does not make the earnings of the enterprise anything

(1) (1896) 2 Ch. 679. (2) (1909) 1 Ch. 510.

but income. The real question appears to me to be whether the surplus of each season's pool, when it is ascertained and before it is applied to reserve, consists of earnings of the undertaking. If the surplus possesses this character, it is income however it may be applied. The destination or application of income is immaterial. The surplus over the nearest one-eighth of a penny is necessarily uncertain in amount, not only in its total, but in its amount per bushel, but, if the conditions do not vary from year to year, some amount may be retained every year. It is recurrent. In the next place, it is stipulated for as part of the terms upon which the wheat will be received into the Pool. It is an advantage to the undertaking contracted for as a part of the consideration afforded in exchange for the benefits arising to the supplier of wheat to the Pool. It is obtained by carrying on a purely business operation, the receipt, or perhaps acquisition of wheat and its sale and shipment, the collection of the proceeds and the ascertainment and distribution of the surplus over costs, charges and expenses up to the nearest lower one-eighth of a penny. These economically are services performed, and the amount retained by the trustees is obtained as a result of their performance. It appears to me that it is an earning of the undertaking derived from carrying on its business. I am, therefore, of opinion that it is assessable income.

The trustees have, it seems, been assessed under sec. 31 (2) (*b*) of the *Income Tax Assessment Act* 1922-1928, and the question remains whether sec. 31 exposes them to assessment in respect of this assessable income derived from the undertaking. Sec. 31 (2) (*b*) provides that "a trustee shall be separately assessed and liable to pay tax in respect of that part of the income of the trust estate which if the trustee were liable to pay tax in respect of the income of the trust estate would have been the income of the trust estate remaining after allowing all the deductions . . . and to which no other person is presently entitled and in actual receipt thereof and liable as a taxpayer in respect thereof."

According to the text of the "Conditions of Pool" there is no other person presently entitled to the amount representing the surplus over the nearest lower one-eighth of a penny, and no other

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person in actual receipt thereof and liable as a taxpayer in respect thereof. But the provision applies only when the assessable income answers the description " income of the trust estate." This expression appears to restrict the operation of the section to income which arises in the administration of trusts affecting property under the control of the trustee. The wide definition of trustee in sec. 4 applies only unless the contrary appears and cannot displace the effect of this phrase. The income must arise or be derived by the trustee in virtue of some property or right in the nature of property which is vested in him or under his control or of which he is a fiduciary. (See *Howey* v. *Federal Commissioner of Taxation* (1).) Is this requirement satisfied in the case of the income of " The Wheat Pool of Western Australia " ? In my opinion this question must be answered : Yes. The material assets vested in the trustees are not particularized or described in the admissions or documents put in evidence. But it is clear enough that the trustees are the proprietors of an organized undertaking. The ingredients which make it up include, no doubt, some tangible things ; it certainly comprises assets, whether material or immaterial, acquired with the moneys placed in reserve. It is not, however, necessary to inquire into the character of the ingredients into which the undertaking may be disintegrated. For an organized undertaking carrying on business operations has always been considered as of the nature of property which may be held upon a trust. It is in virtue of their trusteeship of this undertaking that the trustees derive the assessable income.

For these reasons I am of opinion that the order of the Supreme Court of Western Australia allowing the appeal from the assessment for the financial year ended 30th June 1929 based on income derived during the year ended 30th June 1928 was wrong, and this appeal from that order should be allowed and the order discharged. In lieu thereof, it should be ordered that the taxpayer's appeal to the Supreme Court should be dismissed with costs.

McTIERNAN J. I have read the judgment of my brother *Dixon* and agree with it.

(1) (1930) 44 C.L.R. 289, at p. 293.

Discharge order of Supreme Court of Western Australia dated 14th September 1931. *Adjudge that the trustees of the Wheat Pool of Western Australia are not liable to income tax under the Income Tax Assessment Act* 1922-1930 *in respect of moneys placed by them to the credit of the reserve fund constituted under the Wheat Pool conditions in statement of facts mentioned in and for the income year which ended on 30th June* 1929 *and so far allow the appeal of the said trustees to the Supreme Court of Western Australia. Order that the Deputy Commissioner do pay the costs of the trustees of their said appeal to the Supreme Court and of this appeal.*

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

Solicitors for the respondent, *Parker & Parker*, Perth, by *Moule, Hamilton & Derham*.

H. D. W.