[HIGH COURT OF AUSTRALIA.]

SYMON . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932.

SYDNEY, *May* 3; *Aug.* 4.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessable income—Deduction—Monetary gift to university—Fund established during course of two years—Payments thereout during one of such years—Income Tax Assessment Act 1922-1929 (*No.* 37 *of* 1922—*No.* 11 *of* 1929), *sec.* 23 (1) (*h*) (ii.)*.

Having resolved to make a gift of £10,000 to the University of Adelaide for certain specified works, the taxpayer deposited the sum of £7,500 during 1926, and the sum of £2,500 during the months of February and March 1927, in the hands of a company and arranged that the money should be repayable with interest on demand. The money deposited in 1927 formed part of the taxpayer's assessable income for that income year. The whole amount of £10,000 was repaid to him and placed to his credit at his bankers, but in May 1927 was deposited by him with the State Treasurer at interest and was finally transferred to a trust fund. The Treasurer was authorized to make payments thereout from time to time in respect of the above-mentioned works, and the balance remained to the credit of the taxpayer at interest. The amount so paid by the Treasurer during 1927 was £2,200. The taxpayer claimed that this amount was a gift made in 1927 out of assessable income derived by him during that year, and therefore deductible under sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929. The Commissioner allowed a deduction

* The *Income Tax Assessment Act* 1922-1929 provides, by sec. 23, as follows:—"(1) In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted . . . (*h*) . . . (ii.) gifts of one pound and upwards made out of the assessable income derived during the year in which the gifts are made . . . to public universities in Australia or to colleges affiliated therewith. . . . For the purposes of this sub-paragraph . . . 'Gift' means a gift in the form of money or a gift in kind when the Commissioner is satisfied that the donor has used part of his assessable income of the year for the acquisition of the gift."

of £550 only, as representing that part of the £2,200 paid out as the proportion of the sum of £2,500 deposited during 1927 bore to the total deposit of £10,000.

Held, by *Starke*, *Evatt* and *McTiernan* JJ. (*Rich* and *Dixon* JJ. dissenting), that the taxpayer had the right to attribute the whole of the payment of £2,200 to his assessable income for 1927, and was accordingly entitled to the deduction claimed by him.

REFERENCE by the Board of Review.

The taxpayer, Sir Josiah Henry Symon, claimed that a sum of £2,200 given by him as a gift to the University of Adelaide during the year ended 31st December 1927 was a gift, within the meaning of sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929, made out of the assessable income derived by him during that year and therefore deductible by virtue of that section. The claim, having been disallowed by the Deputy Commissioner, it was, at the request of the taxpayer, treated as an objection and forwarded to the Board of Review. At the hearing before the Board of Review a question of law arose, which, at the request of the Commissioner was, under the powers conferred by sec. 51 (6) of the Act, referred to the High Court, and was by *Rich* J. referred to the Full Court. The facts as stated by the Board of Review were substantially as follows :—

1. On 14th August 1926 Sir Josiah Henry Symon (hereinafter called " the taxpayer "), desiring to make a gift to the University of Adelaide of £10,000 to cover the cost of erecting a Women's Union Building estimated at £9,000 and of equipping the Women's Union Library with books, wrote to the Chancellor of the University offering to make such a gift.

2. On 28th August 1926 the Chancellor of the University of Adelaide wrote to the taxpayer stating that his letter of 14th August had been laid before the Council of the said University and that the offer was unanimously accepted.

3. In order to have readily available a sum of money to meet the total outlay involved the taxpayer from time to time drew from his banking account, into which the assessable income received by him during the years ended 31st December 1926 and 31st December 1927 was from time to time paid, various sums totalling in all £10,000, and paid such sums to Harris Scarfe Ltd. on deposits repayable on demand with interest.

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

4. The sums so paid to Harris Scarfe Ltd. and the dates of payment were as follows :—6th October 1926, £5,000 ; 23rd November 1926, £1,000 ; 10th December 1926, £1,500 ; 2nd February 1927, £1,000 ; 2nd March 1927, £1,500. Total, £10,000. Of the moneys so deposited the sums deposited in the year 1927 were withdrawn from the taxpayer's banking account on the dates above mentioned.

5. To facilitate the execution and completion of his desire, on or about 15th October 1926 the taxpayer arranged with the Treasurer of the State of South Australia that a trust fund should be opened with the Treasury to be called " Sir Josiah Symon Trust Account University Women's Union," and that the amount of £10,000 to be paid by the taxpayer should be credited to such trust account and that the Treasury should make payments out of such trust account from time to time to the contractors for the University Women's Union Building upon the certificate of the architects for the building, and that the balance at credit of the account should remain at all times the property of the taxpayer and carry interest at 4½ per cent per annum payable from time to time to the taxpayer.

6. On or about 30th May 1927 the taxpayer caused the sum of £10,000 which had been paid to Harris Scarfe Ltd. to be transferred to the Treasury of South Australia, to be treated as an ordinary deposit in the name of the taxpayer repayable on demand and bearing interest at the rate of 4½ per cent per annum.

7. The said sum of £10,000 was retained by the Treasury on behalf of the taxpayer until 19th July 1927, on which date a cheque for the amount of £10,000 together with accrued interest thereon to that date was forwarded by the Under-Treasurer of the State of South Australia to the taxpayer. Such cheque was paid into the taxpayer's banking account.

8. On 19th July 1927 the taxpayer handed to the said Under-Treasurer a cheque for £10,000 drawn upon his banking account to open the trust account referred to in par. 5 of this reference and to be dealt with pursuant to the arrangement referred to in par. 5.

9. In accordance with the Audit Regulations of the State of South Australia it was necessary for the Treasury to arrange for the exchange of cheques as set out in pars. 7 and 8 hereof in order to

effect the transfer of the said sum of £10,000 from the deposit repayable on demand to the trust account.

10. The Treasury, South Australia, in pursuance of the arrangement referred to in par. 5 hereof made payments to the contractors for the Women's Union Building out of the trust account as follows: —27th September 1927, £700; 31st October 1927, £750; 25th November 1927, £750. Total, £2,200.

11. On 31st August 1928 the taxpayer furnished to the Deputy Federal Commissioner of Taxation for the State of South Australia (hereinafter called " the Deputy Commissioner ") a return of income derived by him from all sources in South Australia from 1st January 1927 to 31st December 1927.

12. The taxpayer's assessable income for the year ended 31st December 1927 exceeded the amount of £9,400.

13. In the return a deduction was claimed of the amount of £10,000 as a gift by the taxpayer to the " University—For Women's Union—Lady Symon Building."

14. On 13th November 1929 the Deputy Commissioner assessed the taxpayer in respect of the financial year 1928-1929, such assessment being based upon the income derived by him during the year commencing on 1st January 1927 and ending on 31st December 1927, and duly gave the taxpayer notice thereof dated 13th November 1929.

15. Under the assessment the Deputy Commissioner disallowed the deduction of £10,000 claimed by the taxpayer as a gift, pending a demonstration that such gift complied with the requirements of sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929.

16. The taxpayer objected to the assessment by notice of objection dated 24th December 1929, and claimed in such objection that during the year ended 31st December 1927 a gift was made by him to the University of Adelaide of the sum of £2,200 and that such gift was a " gift " within the meaning of sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929.

17. The Deputy Commissioner having considered the taxpayer's objection disallowed the claim referred to in par. 16 hereof, and on 20th June 1930 gave written notice of his decision to the taxpayer.

H. C. OF A. 1932. SYMON v. FEDERAL COMMISSIONER OF TAXATION.

18. The taxpayer, being dissatisfied with the decision of the Deputy Commissioner, requested the Deputy Commissioner on 21st July 1930 in writing to refer the decision to a board of review for review and on 4th August 1930 the decision was so referred.

19. On 15th August 1930 the Deputy Commissioner amended the assessment and delivered to the taxpayer notice of the amended assessment dated 15th August 1930. By the amendment the Deputy Commissioner allowed as a deduction the amount of £550, being portion of the amount of £2,200 claimed as a deduction by the taxpayer. The sum of £550 was so allowed by the Commissioner on the ground that that sum represented that part of the gift of £2,200 paid within the calendar year 1927 as the proportion of the £2,500 placed on deposit during that year bore to the total gift of £10,000 placed on deposit during the term from 6th October 1926 to 2nd March 1927.

20. The reference came on for hearing before the Board of Review on 20th and 22nd May 1931.

21. At the hearing the Commissioner of Taxation requested the Board in accordance with the provisions of sec. 51 (6) of the Act to refer to the High Court a question of law arising before the Board. The Board accordingly referred the following question :—

> Was the gift of £2,200 by the taxpayer to the University of Adelaide or any portion thereof made out of the assessable income derived by the taxpayer during the year ended 31st December 1927 within the meaning of sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929 ?

Flannery K.C. (with him *Harper*), for the appellant. The whole of the facts must be considered. Such facts, as shown in pars. 8 and 5 of the reference by the Board of Review, establish that the gift was initially made on 19th July 1927 and that such gift was perfected by the payment of the sum of £2,200 in the manner appearing in par. 10. The money was paid out of a mixed fund, that is, partly assessable and partly non-assessable, and the taxpayer is entitled to be taken to have paid the money in the manner most beneficent to him, and, in doing so, to have acted reasonably in taking advantage of an exemption allowed by the law (*Sterling*

Trust Ltd. v. *Commissioners of Inland Revenue* (1); see also *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2)).

Hooton, for the respondent. The taxpayer has failed to show that the gift was made out of assessable income and is, therefore, not entitled under sec. 23 (1) (*h*) (ii.) of the Act to deduct the amount in question. Under the sub-section as originally framed a deduction could be made irrespective of the source from which the gift was made, and, as so framed, *Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (1) and *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2) would be applicable, but those cases became inapplicable upon the present sub-section being substituted for the original sub-section by sec. 14 of Act No. 32 of 1927. Under the sub-section as now framed it is not correct to assume that the gift was made out of the assessable income of 1927 merely because in the circumstances the latter exceeded the former. The words "out of assessable income," as now appearing in the sub-section, must be given a particular force. On the facts before the Court the Court cannot come to the conclusion that any part of the £2,200 was assessable income. At the most the only deduction to which the taxpayer is entitled is the proportionate part allowed by the Commissioner. Circumstances which are applicable in the case of a trading company making payments in the nature of annual outgoings do not apply to the case of a private individual who is making a gift, even if he is doing so by a series of payments, and therefore *Edinburgh Life Assurance Co.* v. *Lord Advocate* and *Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* are distinguishable. The matter of payment of annual charges is not involved here, and therefore *London County Council* v. *Attorney-General* (3) also is distinguishable.

Cur. adv. vult.

The following written judgments were delivered:— Aug. 4.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it and with the answer to the question referred to this Court.

(1) (1925) 12 Tax Cas. 868.
(2) (1910) A.C. 143.
(3) (1901) A.C. 26.

H. C. OF A. 1932. SYMON v. FEDERAL COMMISSIONER OF TAXATION. Starke J.

STARKE J. The *Income Tax Assessment Act* 1922-1929 provides that in calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted (*inter alia*) gifts of one pound and upwards made out of the assessable income derived during the year in which the gifts were made to public universities in Australia, if the gifts are verified to the satisfaction of the Commissioner (see sec. 23 (1) (*h*) (ii.)).

In 1926 the taxpayer, Sir Josiah Symon, generously resolved to make a gift of £10,000 to the University of Adelaide to cover the cost of erecting a " Women's Union Building " and equipping the Women's Union Library. He deposited this sum in the hands of a company and arranged that it should be repayable on demand by him with interest. The moneys were deposited from time to time in various sums as follows: 6th October 1926, £5,000; 23rd November 1926, £1,000; 10th December 1926, £1,500; 2nd February 1927, £1,000; and 2nd March 1927, £1,500. It was admitted before us that the deposits of £1,000 and £1,500 in the year 1927 were made out of the taxpayer's assessable income for that income year. These sums were repaid to him and placed to his credit at his bankers. But in May of 1927 he deposited the total sum of £10,000 with the Treasurer of South Australia at interest, and it was finally transferred to a trust fund styled " Sir Josiah Symon Trust Account University Women's Union." An arrangement was made whereby the Treasurer should make payments from time to time out of the fund to contractors for the Women's Union Building, and the balance should remain at credit of the taxpayer carrying interest at 4½ per cent payable to him. In pursuance of this arrangement the Treasury in 1927 made payments to contractors for the Women's Union Building as follows:—September, £700; October, £750; November, £750. Total, £2,200.

The Commissioner, in his assessment of the taxpayer to income tax allowed him a deduction of £550, part of the sum of £2,200 paid to the contractors as already mentioned. It was calculated on the proportion that the sum deposited in 1927 (£2,500) bore to the total gift of £10,000 namely, one-fourth. The taxpayer claimed that he was entitled to a deduction of the whole sum of £10,000,

but ultimately he reduced his claim to £2,200—the amount paid out in 1927 to the contractors. The Commissioner refused to allow that amount, and the taxpayer appealed to a board of review under the *Income Tax Acts*. The Board has stated for the opinion of this Court the following question: Was the gift of £2,200 by the taxpayer to the University of Adelaide or any portion thereof made out of the assessable income derived by the taxpayer during the year ended 31st December 1927 within the meaning of sec. 23 (1) (*h*) (ii.) of the *Income Tax Assessment Act* 1922-1929? Under sec. 51 (*b*) a board of review is authorized to refer to this Court any question of law arising before the board. The question of law here seems to be: What upon the given state of facts is the conclusion of law which follows? The real point is whether or not the taxpayer is entitled to say he made payments amounting to £2,200 out of his assessable income during the year in which the payments were made. Or are the payments to be treated as paid proportionately out of a mixed fund of assessable income and moneys which were not assessable to income tax for that year? (Cf. *Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (1).)

Cases which have been decided afford no little assistance to a right determination of the matter. *Scottish Oils Ltd.* v. *Commissioners of Inland Revenue* (2) favours the *pro rata* division which the Commissioner adopted. But in England a line of decisions has been given as to the "right of the debtor to retain for his own benefit the amount of tax deducted against his creditors," under a section which provided: "Upon payment of any interest of money or annuities charged with income tax . . . and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly." The cases are

(1) (1925) 12 Tax Cas. 868.

(2) (1925) S.C. 132.

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

collected in *Konstam, The Law of Income Tax*, 4th ed., p. 195. In *Sugden* v. *Leeds Corporation* (1) Lord *Atkinson* said :—" When the interest and annuities so charged may with equal legality be paid out of either the 'taxed' or 'untaxed' fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the 'taxed fund.' It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where in the ordinary course of business, it should be applied for that purpose." This "right of attribution," as it has been called by Viscount *Sumner* in *Birmingham Corporation* v. *Inland Revenue Commissioners* (2), has also been applied by the Court of Appeal in England to the corporation profits tax. The English *Finance Act* 1920, sec. 52 (1) (*b*), provides : " The amount of tax payable in respect of the profits of a British company for any accounting period shall in no case exceed the amount represented by ten per cent of the balance of the profits of that period estimated in accordance with the provisions of this Part of this Act, after deducting from the amount of those profits any interest or dividends actually paid out of those profits at a fixed rate on any debentures, debenture stock, preference shares (so far as the dividend paid thereon is at a fixed rate), or permanent loan issued before the commencement of this Act, or on any debentures, debenture stock, or permanent loan issued after that date for the purpose of replacing an equal amount of any debentures, debenture stock, or permanent loan issued before that date." A question arose under this Act, whether debenture interest paid out of the whole of the income received by a company, that is, profits some of which were assessable and some of which were not assessable to corporation profits tax, could be attributed by the company to moneys which were assessable

(1) (1914) A.C. 483, at p. 499.

(2) (1930) A.C. 307, at p. 318.

in its hands to such tax (*Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (1)). *Pollock*, now Lord *Hanworth* M.R., said (2) the question was whether the payment was to be treated as one which had been proportionately paid out of the company's free or taxable income: "Where you are considering the business of a company which has two sources of income, the one subjected to tax and the other not, you are entitled to assume and deem that it has paid the money that it ought to pay according to the most business-like way of appropriating the revenue to the expenses; further, that even though that has not been done in fact by any separate allocation of the money . . . still you are entitled to treat the money as having been paid out of the fund which is most favourable to the company, which is, in this case, the taxpayer." *Warrington* L.J. (now Lord *Warrington of Clyffe*) held (3) that it was open to a company to pay as it pleased; that it was more advantageous to it to pay out of assessable income; and that therefore it must be taken to have so paid it. *Atkin* L.J. (now Lord *Atkin*) said (4) it was not a question of any rights a creditor had against a debtor, but a question of the right of a person paying the money to pay out of his own fund, and that there was nothing in law to prevent him paying from any fund he pleased that was a lawful fund. And their Lordships dissented from the decision in *Scottish Oils Ltd.* v. *Commissioners of Inland Revenue* (5).

In the case before us, the sum of £2,500 paid by the taxpayer out of his assessable income for the year 1927 can be traced into the mixed fund or deposit of £10,000 in the Treasury. And there is no doubt that the taxpayer ultimately claimed before the Commissioner and the Board of Review a right to attribute the actual payment in 1927 of £2,200 to the contractors to his assessable income for that year. In my opinion, the reasoning of the English cases, though upon statutes which are not identical in objects or in terms with the *Income Tax Assessment Act* 1922-1929, is nevertheless applicable to the deduction here claimed and establishes the right claimed by the taxpayer.

(1) (1925) 12 Tax Cas. 868.
(2) (1925) 12 Tax Cas., at pp. 881, 882.
(3) (1925) 12 Tax Cas., at p. 886.
(4) (1925) 12 Tax Cas., at p. 887.
(5) (1925) S. C. 132.

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

Consequently the question referred to this Court should be answered: Yes.

DIXON J. Sec. 23 (1) of the *Income Tax Assessment Act* 1922-1928 provides that, in calculating the taxable income of a taxpayer, the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis and from it there shall be deducted various allowances. The list of allowable deductions includes gifts to public universities made out of the assessable income derived during the year in which the gifts are made (see sec. 23 (1) (*h*) (ii.)).

The taxpayer claims to deduct from the assessable income derived by him during the year ended 30th June 1927 the sum of £2,200, which, during that year, he gave to the University of Adelaide.

The Commissioner has refused to allow a greater reduction than £550 upon the ground that, except for this amount, the gift was not made out of the assessable income derived during the year 1927. This decision was referred to the Board of Review, which, upon the request of the Commissioner, referred it as a question of law to this Court pursuant to sec. 51 (6).

The facts upon which the question arises are simple. The taxpayer, having decided to make a gift of £10,000 to the University of Adelaide, arranged with the South Australian Treasury that he should deposit that sum as a loan from him to the Treasury at interest and that out of the deposit the Treasury should make payments as and when required for the purposes of the gift. The deposit was no more than an investment to which the taxpayer remained entitled until such payments should be made. Thus the payments actually made by the Treasury would form the gift to the University. In 1927 in pursuance of the arrangement the taxpayer made a deposit with the Treasury of £10,000. This sum was admittedly composed of £2,500 paid by the taxpayer out of moneys which formed part of his assessable income derived during the year 1927 and of £7,500 paid by the taxpayer out of moneys which formed part of his assessable income derived, not during the year 1927, but during the year 1926. During 1927 the Treasury made payments out of the deposit of £2,200 for the purposes of the gift. The taxpayer contends that

the whole of this sum should be considered to be paid out of the sum of £2,500 derived during 1927 which was contained in the total sum of £10,000. The Commissioner has adopted the view that the payments made by the Treasury are necessarily made without discrimination out of the entire deposit which came into its hands as a single sum, and, accordingly, that each and every part of the disbursement of £2,200 has been paid uniformly out of each and every part of the total sum of £10,000 so that of the sum of £2,500 derived in 1927 which entered into the composition of the £10,000 only a ratable part, namely £550, entered into the composition of the sum of £2,200 expended.

The contention for the taxpayer denies that any such attempt to ascertain the real or the notional composition of the sum paid out of the total deposit is permissible but, on the contrary, seeks to attribute the payment made in 1927 to so much of the deposit as represents income of that year, upon the ground that such an attribution is required or presumed in law. The supposed principle or presumption which is invoked appears to be that if a payment by a taxpayer out of a specified fund or source would operate in relief of his liability to taxation, whether by conferring a right to deduction or otherwise, and the taxpayer makes the payment indifferently out of funds or sources consisting only in part of the specified fund or source, then, in the ascertainment of his liability to tax, the payment must be attributed to the specified fund or source, to the end that he may obtain the relief. I am unable to believe that any such general principle exists. The justification in reason for the supposed doctrine, as I understand it, is sought in the considerations which may be said to arise from the situation in which a taxpayer is placed. These considerations are : that the taxpayer might have qualified for the deduction by separating his funds and resorting to the specified fund or source when he made the payments ; that the liability to taxation cannot, or ought not, to depend upon the way in which the accounts are kept or upon the way in which moneys are physically dealt with or upon the way in which payments are ascribed to funds ; that the taxpayer in making a payment out of his general resources has done nothing in fact incompatible with the use of the specified fund or source for the purpose contemplated

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

by the enactment providing for the deduction or other relief; that if an intention to appropriate or allocate expenditure is material, an intention to attribute it in the most beneficial and therefore most business-like way should be presumed; that, in any case, when the taxpayer came to deal with the taxation authorities, it was not too late to make the appropriation; and finally that there is no more reason in distributing the payment over the whole than in attributing it to part of the larger funds or sources.

But the contention of the taxpayer is not based simply on general reasoning. Whatever justification may be found in reason for the principle invoked, it is said to be firmly established by authority. In my opinion the cases relied upon do not establish any such general principle and do not proceed upon reasoning which is applicable to sec. 23 (1) (*h*) (ii.) of the Commonwealth *Income Tax Assessment Act* 1922-1928. They are decisions of high authority which deal with problems possessing some resemblance to the present question. It is therefore necessary to examine them somewhat fully in stating my reasons for the view that they do not govern the matter. The cases arise out of the somewhat difficult differentiation required by the English Income Tax Acts between annual payments by a taxpayer when they are made out of untaxed profits and when they are made out of taxed profits. The rule which they establish for attributing such a payment as between a taxed fund and an untaxed fund has also been applied to a provision imposing corporation profits tax which authorizes in the computation of the profits a deduction of "any interest or dividends actually paid out of those profits." This extension of its application is relied upon as giving to what otherwise might have been thought no more than a judicial elucidation of particular statutory provisions the authority of a general principle of attribution or appropriation of payments in respect of source.

By the joint operation of sec. 102 of the *Income Tax Act* of 1842, of sec. 40 of the *Income Tax Act* of 1853 and of sec. 24 (3) of the *Customs and Inland Revenue Act* 1888 (now rules 19-21 of the All Schedules Rules of the *Income Tax Act* 1918) any person who makes a payment of any interest, annuity or other annual payment is authorized or required to deduct therefrom the amount of the tax

at the rate in force at the time. If, and in so far as, the payment is made by the taxpayer " out of the profits or gains brought into charge," that is out of a fund taxed so that the burden of the income tax in respect of the fund has already fallen upon him, the taxpayer is entitled to retain the deduction, but, if, and in as far as, the payment is not made out of the profits or gains brought into charge, the taxpayer becomes accountable to the Crown for the amount of the deduction. In *London County Council* v. *Attorney-General* (1) a claim was made unsuccessfully by the Crown that so much of the interest payable upon the metropolitan stock as was equal to the London County Council's taxed income ought not to be considered as paid thereout, but ought to be apportioned ratably over the subjects upon which the interest was secured: lands, rents, property, rates and other income. Lord *Macnaghten* (2) dismissed the argument with the observation that it was an ingenious but not very business-like suggestion: " It is enough to say that it is the plain duty of the council, not being beneficial owners of the funds which they administer, to keep down annual charges out of annual income as far as it will extend." Lord *Davey* (3) said that the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. He added " One of the learned Judges in the Court of Appeal seems to have thought the case might be different if the County Council had made some appropriation of their funds, though it is difficult to see how any account-keeping by the debtor could alter the rights of the Crown."

In *Edinburgh Life Assurance Co.* v. *Lord Advocate* (4) a life insurance company deducted and retained from the annual payments made by it in respect of annuities the amount of the income tax thereon. It refused to account to the Crown for the sum so deducted on the ground that the annuity payments were made out of its taxed profits, " out of the profits or gains brought into charge." The company had a large income from interest, dividends and rents which bore tax and a large income from premiums which did not. The company combined its income from all sources in a common fund from which it discharged all outgoings without differentiation.

(1) (1901) A.C. 26.
(2) (1901) A.C., at p. 33.
(3) (1901) A.C., at p. 46.
(4) (1910) A.C. 143.

H. C. OF A. 1932. SYMON v. FEDERAL COMMISSIONER OF TAXATION. Dixon J.

In the House of Lords the Crown contended that, as the annuities were not made a special charge on any particular fund belonging to the company, and were in fact paid out of a mixed fund, the payments must be ascribed to all the sources of income in the proportions which each source of income bore to the whole of the income (1). This contention failed. Lord *Atkinson* referred to the observations of Lord *Macnaghten* and of Lord *Davey* in the *London County Council's Case* (2), and explained the resemblance and points of difference between the two cases including the fact that the London County Council had, while the Edinburgh Life Assurance Co. had not, set apart its taxed income as a separate fund from which interest had been paid. He then said (3):—"In my opinion, where annuities such as these are charged upon a tax-bearing fund amply sufficient to pay them in full, though not set apart for that purpose, they cannot be held to be 'not payable' or 'not wholly payable' out of the gains and profits brought into charge within the meaning of the 24th section. For the purposes of that section I think that the interest on the annuities charged upon the tax-bearing fund must under such circumstances be treated as payable out of that fund, so far as it will reach. If the taxed fund be insufficient to pay all the interest and annuities, then the income tax deducted on the interest or annuities not satisfied out of it must be accounted for. In short, I attach no special virtue to the manipulation of the funds of a corporation, in the manner above mentioned, as a means of escape from liability to income tax. To do so would in effect be, I think, to lose sight of what appears to be one of the main objects, if not the main object, of the section, namely, to avoid obliging a subject to pay income tax twice over on the same sum. That object would, in the result, be defeated if the subject were obliged first to pay income tax on a given fund, then to pay income tax on sums properly payable out of it simply because he had omitted formally to dedicate the funds specially to that use, and formally to pay those sums out of it." Lord *Gorell* too, relied upon the case of the London County Council. He said (4): "The point there decided, upon which these remarks were made, no doubt was affected

(1) (1910) A.C., at p. 155.
(2) (1901) A.C., at pp. 33, 46.
(3) (1910) A.C., at pp. 157-158.
(4) (1910) A.C., at p. 162.

by the difference between capital and income, in due course of administration, but when the terms of the Acts and the object to be effected are considered in relation to such a case as the present, it would seem that the principles indicated in that judgment should also apply where money, out of which annual payments are payable, is derived from two sources, that coming from one being charged with income tax, while that coming from the other is not so charged." With respect to the contention that the annuities had not been paid in fact out of taxed income, he said (1):—"This argument would seem to make the rights of the Crown depend upon the book-keeping of the company; but this cannot be, nor do I think the liabilities of the company can be made to depend upon their system of accounts. This argument could hardly be open if the company had, in fact, kept the interest, dividends, and rents from their investments apart from their other moneys and paid the annuities out of the former. Can it then make any difference to their rights and liabilities if they choose to mix the funds for the purpose of their accounts and pay thereout whatever sum is necessary to discharge their liabilities to the annuitants?" After saying that it might be that a person who, in fact, paid out of the taxed profits interest not in law payable thereout could deduct the tax from the payments and retain it for his own benefit, Lord *Gorell* proceeded (2):—"But it does not appear to me to follow that where the annuities are payable out of profits or gains brought into charge it is necessary to use in paying the annuities the actual moneys received in respect of the profits or gains in order to obtain the benefit of the deduction and retention. In the case of a business like the appellants' and taking into account the language and object of the three Acts, it seems to me that if the annuities are made payable out of the interest, dividends, and rents charged with the tax it is immaterial whether the money to pay them is taken out of the general till of the company or not, provided that it does not exceed the amount of income on which tax is charged." Lord *Ashbourne* concurred.

In *Sugden* v. *Leeds Corporation* (3) deductions were made from interest payments which the Leeds Corporation claimed were made

(1) (1910) A.C., at p. 163.
(2) (1910) A.C., at pp. 163, 164.
(3) (1914) A.C. 483; 6 Tax Cas. 211.

H. C. OF A. 1932. SYMON v. FEDERAL COMMISSIONER OF TAXATION. Dixon J.

out of its taxed income. A division was made by law in the financial operations of the corporation and it was held that interest upon loans borrowed for one purpose could not be properly defrayed out of earnings derived from other purposes or undertakings of the corporation. The Crown recovered from the corporation so much of the amount deducted by the corporation from its interest payments on account of tax as represented deductions from interest which could only have been answered out of earnings derived from the other undertaking, and not out of the funds belonging to the purpose for which the money had been borrowed. The ground of the decision was that the interest could not with equal legality be paid out of the taxed fund resorted to. Lord *Haldane* L.C. said (1) :—" If the annual payments would properly have been payable out of profits, but the person bound to make them has chosen to defray them out of some other source of income, this does not affect his right to retain the amount of tax he has deducted. On the other hand it is not enough to entitle him to retain it that he has a merely contingent or ineffective right to pay out of the profits. His right must be of a kind that actually enables payment to be properly made out of the profits, and does not leave them practically unaffected because of the existence of some other source of income primarily and effectively applicable in discharge of the burden. In each case the question is whether the annual payments taxed are actually and properly payable out of the profits. If they are, these profits are treated by the Acts as diminished *pro tanto* in the hands of the owner, and he, having paid once for all on the whole, is thus entitled to retain for his own benefit the amount of tax he deducts from the annual payments before making them, as being tax that he has already paid."

Lord *Atkinson* said (2) :—" When the interest and annuities so charged may with equal legality be paid out of either the ' taxed ' or ' untaxed ' fund of the debtor, and the taxed fund is adequate in amount to pay them, it will not be necessary for the debtor, in order to entitle him to retain for his own benefit the entire sum deducted, that he should have in his books or otherwise specifically appropriated

(1) (1914) A.C., at p. 491 ; 6 Tax Cas., at p. 253.

(2) (1914) A.C., at p. 499 ; 6 Tax Cas., at p. 259.

or set apart the taxed fund to discharge this interest or these annuities, or to prove that he had in fact paid them out of the 'taxed fund.' It will suffice, should the two funds be blended and formed into a mixed fund, that the interest and annuities charged should be paid out of this mixed fund. They will, if so paid, be treated as having been paid out of the taxed fund, especially where in the ordinary course of business it should be applied for that purpose."

In *Birmingham Corporation* v. *Inland Revenue Commissioners* (1) the corporation was held accountable to the Crown for sums deducted for tax from payments for interest on money borrowed for a housing scheme, notwithstanding that the payments were made out of a blended fund in which sufficient taxed income was included to answer the interest payments. The payments were held to be made, not out of the taxed income, but out of a subsidy from the Exchequer to make up the loss on the housing scheme. The reason for this conclusion was expressed by Viscount *Sumner* thus (2): "This express contribution out of public moneys by an actual subsidy must be exclusive of any implied right to lay hands on other public moneys by way of further contribution, in the form of a notional attribution of a particular part of their own undivided fund to the payment of this particular interest charge." The general rule he described in two passages:—"A series of decisions in your Lordships' House has laid down, not it is true in any case precisely the same as this, the conditions under which payments, neutrally made in fact, may be deemed to have been so made for income tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done" (3). "My Lords, it is true that under the All Schedules Rules in question the tax must be paid as well as payable, but I hesitate in this case to say that it has not been paid within the meaning of the rule, if the right of attribution referred to in your Lordships' decisions is applicable to the case. Neither as a matter

(1) (1930) A.C. 307.
(2) (1930) A.C., at p. 316.
(3) (1930) A.C., at pp. 314, 315.

H. C. OF A. 1932. SYMON v. FEDERAL COMMISSIONER OF TAXATION. Dixon J.

of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution *ex post facto*, as part of a contention as to their rights, will serve the corporation's turn without even an ultimate attribution in their books. . . . The question, I think, turns upon a claim of right" (1).

These cases do not appear to establish any general rule for ascertaining to what source a particular payment is to be ascribed in a question between the Revenue and a taxpayer. They depend upon considerations arising from the purpose or scope of the provisions of the Income Tax Acts authorizing and prescribing deductions from annual payments. As appears from the examination of the decisions already made, the governing consideration was that the provision is directed at avoiding double taxation and at the relief of the taxpayer who had borne the tax levied at the source of income which he did not in the event enjoy. A further consideration, which almost follows from the first, is that the Legislature could not have intended the taxpayer's right to relief to depend on any system of accounting or upon any physical utilization of funds. The attribution of the payment as between one possible source and another, therefore, became a matter depending rather upon the limitations set by the law to the use of the funds available to the taxpayer and to the allocation of his expenditure, and, within those limits, upon the inherent connection between the income and the expenditure according to notions of finance and business. These considerations may have weight in relation to problems of attribution arising upon other enactments dealing with taxation and they may lead to similar conclusions, but the decisions establish no independent principle.

In *Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (2) the Court of Appeal applied them directly to sec. 52 (1) (*b*) of the *Finance Act* 1920. The effect, so far as material, of this provision, is to impose a tax upon the profits of corporations not exceeding ten per cent of the balance of profits estimated in accordance with the provisions of the Act after deducting from the amount of those

(1) (1930) A.C., at p. 318.

(2) (1925) 12 Tax Cas. 868.

profits any interest or dividends actually paid out of those profits on any securities issued before the Act. The corporation in question paid its interest out of a mixed account consisting partly of revenue which constituted the taxable profits and partly of revenue which was exempt. The Court of Appeal held that the interest must be considered as paid out of the taxable profits. Lord *Hanworth* relied upon the cases of the *London County Council* v. *Attorney-General* (1) and of the *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2). He was of opinion that where there were two sources of income, the one subject to tax and the other not, that it should be assumed that payments were made according to the most business-like way of appropriating revenue to expenses, and further that, even though that has not been done in fact by any separate allocation of money, still the payment should be treated as made out of the fund most favourable to the taxpayer (3). *Warrington* L.J. said (4): "What we have to determine is not whether the interest or dividend is payable out of what I might call the assessable profits—there is no question about that—but what we have to determine is whether, under the circumstances, it has been paid out of those funds. I think on the authority of Lord *Atkinson's* speech, and that of Lord *Gorell's*, we ought to hold that there is no principle of law by which apportionment can be introduced, and that it was open to the company to pay as they pleased; that it was more advantageous to them to pay it out of assessable income, therefore they must be taken to have so paid it." *Atkin* L.J. (5) applied the judgments in the *Edinburgh Life Assurance Co.'s Case* and the *Leeds Corporation Case* (6). This decision of the Court of Appeal simply applies the decision upon the Income Tax Acts to the provisions of the *Finance Act* 1920 imposing corporation profits tax which is treated as *in pari materia*. At bottom it rests upon the object and general scope of the enactment under which the question arose. Except that par. (*h*) (ii.) of sec. 23 (1) of the *Income Tax Assessment Act* 1922-1928 of the Commonwealth requires as a condition of deduction that a payment, the gift, shall be made out of the assessable income, there is small resemblance between the English and

(1) (1901) A.C. 26.
(2) (1910) A.C. 143.
(3) (1925) 12 Tax Cas., at pp. 880 *et seqq.*
(4) (1925) 12 Tax Cas., at pp. 885, 886.
(5) (1925) 12 Tax Cas., at p. 889.
(6) (1914) A.C. 483; 6 Tax Cas. 211.

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J.

Australian provisions. Neither the freedom from double taxation nor the immunity of the old securities from old burdens enters into the purpose of the Commonwealth provision. There is no connection in law, reason, business, or the nature of things between assessable income and a gift. The motives actuating a donor may be generated or developed under the influence of increasing annual gains, but they may as well arise from considerations which disregard the state of the donor's accounts. The Legislature, by an amendment, confined the deduction to gifts made out of assessable income, and its purpose in so doing must have been to disallow a deduction if the gift was referable to capital account, to exempt income, such as that derived from non-taxable securities or ex-Australian sources, or to accumulations of the income of prior years. The choice between these various sources, assuming an intending donor to possess them, must lie wholly with him. There is no rule of law, of finance, of accountancy or even of prudence which controls or identifies the source to which the bounty is to be referred. The real difficulty in the provision is to know what exact practical operation the Legislature has in mind when it speaks of making a gift "out of assessable income." Assessable income is an aggregate composed at best of receipts; sometimes it is made up largely of values attributed to items in account such as stock-in-trade and book debts. The aggregate is the result of an addition sum rather than a fund, a calculation rather than available "money." The items which compose it are rarely identifiable sums of money "out of" which, in a physical sense, payments are made. Further in the practical use of "money" payments are not made "out of" funds which originate as a matter of actual fact in one class of receipt rather than in another. They are made by cheque on a bank account which as often as not is overdrawn, and, in any case, the credit which allows the withdrawal usually arises from banking operations which ignore such distinctions as those upon which the ascertainment of assessable income proceeds. It may well be that an historical investigation of the composition of the actual monetary source from which the amount of the gift was immediately obtained by the taxpayer is not intended. But an appropriation by him of current income to answer the expenditure in some way seems essential for the purpose of sec. 23 (1) (*h*) (ii.).

Further, that appropriation, in my opinion, must be independent of his dealings with the Commissioner of Taxation. The provision assumes that payment is made out of assessable income before, not in virtue of, the return of his income for assessment. Perhaps an *ex post facto* appropriation can never suffice.

In the present case, what the taxpayer did in drawing from his resources is quite clear. The difficulty is confined to differentiation between parts of a fund which the taxpayer blended and so dealt with that it did not admit of separation out into parts from which it was originally composed. No allocation of payments thereout to any particular elements which had gone into it remained possible.

In these circumstances, the taxpayer cannot be said to have paid out of the assessable income of 1927 more than a proportion of the deposit ratable with the amount of such income which went into it. The question should be answered: Not to any greater extent than £550.

EVATT J. During the income year 1927 the taxpayer made a gift of £2,200 to the University of Adelaide. The question which now arises is whether this was a gift made "out of the assessable income derived during the year" in which the gift was made (*Income Tax Assessment Act* 1922-1928, sec. 23 (1) (*h*) (ii.)).

The deposit in the Treasury of South Australia from which the payment of £2,200 was made to the University, consisted of a sum of £10,000, £2,500 of which was part of the taxpayer's 1927 assessable income and £7,500 of which was part of his 1926 assessable income.

The Commissioner says that no part of the taxpayer's Treasury deposit was more capable of identification as part of his 1927 assessable income, than as part of his 1926 income. His conclusion is that the gift of £2,200 should be regarded as having been made indifferently out of each and every penny of the £10,000 deposit. His result is to attribute one-fourth of the £2,200 to the 1927 income, because one-fourth of the total deposit represented assessable income of that year.

Presumably the same proportional method would have to be applied by the Commissioner if, during the income year, a taxpayer made a gift by payment of a cheque drawn on his banking account.

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

Evatt J.

The account might include not only balances and deposits produced by the assessable income of many years, but also receipts in the nature of capital. Is the rule of three to be applied, the numerator of the fraction being the amount of the relevant assessable income in the account (*quære*, as at the moment of payment of the cheque or as at the end of the income year ?), and the denominator being the total receipts of the account (as at some moment of time or other) ? Such a method of allocation would be productive of curious results. What is the relevant moment of calculation ? The precise assessable income of the year is not ascertainable until its close. And what regard is to be had to payments out of the account other than the charitable gift itself ? Are payments representing capital outlay to be regarded as partially attributable to moneys in the account derived from income sources ? If not, it is difficult to see why any payment out of the account should be regarded as an "indifferent" payment in the sense that it is referable to *every* source from which the account was fed. Immediate allocation to source of cheques paid to charities from such an account, would seldom be possible.

I can see no justification for applying the artificial method of proportion adopted by the Commissioner in the present case. The truth is that the only satisfactory method of working out the statutory provision is that of dissection of the taxpayer's transactions of the income year into the form of an account. It is true that gifts to charitable institutions have no real place in such an account because not productive of assessable income. But the statute can fairly be regarded as postulating the making up of an account of assessable income for the purpose of determining the permissibility of the described deduction.

Other courses may be open, but they all seem to be productive of absurd conclusions. Let me take another instance. A taxpayer may be having a successful year, and be in receipt of a large increase of income during it. Because of that fact he may be enabled, and resolve, to contribute generously to a charitable institution. It may be more convenient at that moment to dispose of part of a capital asset in order to make the actual donation. Is the taxpayer in such a case to be denied the benefit of the statutory deduction,

despite the direct relation between his income and his gift, and the reasonable probability of his recouping his capital asset out of income, so as to make the gift really fall on income ?

Assuming that the gift can be charged against income, I see no effective middle course between allowing the whole of the deduction in such an instance, and allowing none of it. If the former, the immediate source of the actual gift is not the material factor, for the gift may be by cash and not even pass through the taxpayer's bank account.

And is the deduction to be available only in case of the taxpayer's resolving to earmark part of his " assessable income " for the purpose ? The Legislature may reasonably be supposed to consider that, although actions usually spring from mixed motives, a gift to charity is not usually decided upon, at any rate by persons as distinct from corporations, and by professional men as distinct from those engaged in the production or disposition of vendible commodities, with any immediate reference to the question whether income or capital funds are to be employed in constituting the actual gift to charity. And in such cases, the fund employed in making the gift is not usually indicative of any intention to make income or savings or capital bear the burden of the gift.

Now I cannot think that the Legislature intended to advantage the person who, from the first, infused into his philanthropic act the motive of benefiting himself by obtaining a deduction, and intended to disadvantage—relatively at all events—the man to whose mind the question of deduction did not occur until after the gift was made.

In my opinion the requirement that the gift is to be made " out of the assessable income " derived during the income year, should not be read as meaning that the deduction is excluded merely because the immediate source of the payment is the money obtained by realizing a capital asset, or that the taxpayer must " appropriate " the gift to his assessable income at the moment of his deciding to make it or of making it. The words " out of " are of ambiguous import, but I think that they are employed merely to express such a relation between the gift made and the assessable income, as will ordinarily arise if, after the ascertainment of the assessable income

H. C. OF A. 1932.

SYMON v. FEDERAL COMMISSIONER OF TAXATION.

Evatt J.

at the end of the income year, the gift made is of such an amount that it can be presented as having been charged—in account—against the true assessable income of the taxpayer.

In many cases, of course, no such account will ever be made up until the time comes for returning the income to the Commissioner of Taxation. But I do not think that it was supposed that failure to make up the account before then, would deprive the taxpayer of the benefit of the deduction. There is no reason why the philanthropist, when changed into the role of taxpayer, should not be considered as possessing the ordinary "business" acumen, the enlightened self-interest, usually associated with the presentation of an income account by a company or a person carrying on a profit-making concern.

The facts admitted in the present case show that the whole of the gift of £2,200 to the University could have been assigned by the taxpayer to an account of the assessable income of the year 1927. In the circumstances I think that he is entitled to attribute his gift to that assessable income. If so, a deduction of the whole sum of £2,200 should be allowed.

McTIERNAN J. I think the question should be answered: Yes. I have read the judgment of my brother *Starke*, and agree with it.

Question answered: *Yes, as to the whole amount, namely,* £2,200. *Costs to be paid by the respondent.*

Solicitors for the appellant, *Stephen, Jaques & Stephen.*

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

J. B.