

# REPORTS OF CASES

DETERMINED IN THE

## HIGH COURT OF AUSTRALIA

1932-1933.

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[HIGH COURT OF AUSTRALIA.]

DOHERTY . . . . . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

*Income Tax (Cth.)—Assessment—Deduction—Pastoral property—Trust estate—  
Business carried on at a loss—Loss not allowable as a deduction from other income  
of beneficiary—Income Tax Assessment Act 1922-1930 (No. 37 of 1922—No. 60  
of 1930), sec. 26.*

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April 3, 12.

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The taxpayer, who was entitled to an interest in certain pastoral properties under the will of her brother, claimed to deduct, under sec. 26 of the *Income Tax Assessment Act 1922-1930*, from her assessable income derived otherwise than from the trust estate her proportion of a loss incurred by the testator's representatives in carrying on the pastoral properties for the financial period in question.

*Held*, that the taxpayer's share of the loss incurred in carrying on the pastoral properties could not be deducted from income derived by her otherwise than from the trust estate.

APPEAL from the Board of Review.

The taxpayer, Grace Doherty, claimed to deduct from the income for which she was assessed for the financial year 1931-1932 a sum

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of £6,515, her share of a loss made in carrying on a pastoral business in Australia. The Commissioner disallowed the deduction, and the Board of Review confirmed his decision.

From that decision the taxpayer now appealed to the High Court. The facts and arguments sufficiently appear in the judgment hereunder.

*Wilbur Ham K.C.* and *Russell Martin*, for the appellant.

*Robert Menzies*, A.-G. for Victoria, and *C. Gavan Duffy*, for the respondent.

*Cur. adv. vult.*

April 12.

STARKE J. delivered the following written judgment:—

The taxpayer, Grace Doherty, claimed to deduct from the income for which she was assessed for the financial year 1931-1932, a sum of £6,515, her share of a loss made in carrying on a business in Australia. The Commissioner disallowed the deduction; the Board of Review confirmed his decision, and an appeal is now brought to this Court.

James Patrick Doherty, brother of the taxpayer, was a grazier who carried on a pastoral business on several properties. He died in March 1930, and appointed a company and the taxpayer executor and executrix respectively of his will and codicil. It is unnecessary to set out the will and codicil in detail: it is enough to say that he gave a vested interest in the residue of his estate (which included his pastoral properties) to his wife and three sisters, that they were presently entitled to the income thereof, and that they were under no disability. The executor and executrix carried on the pastoral business, in accordance with the terms of the will, but practically under the supervision and direction of the beneficiaries, until they had performed their executorial duties, and were in a position to hand over possession of the properties to the beneficiaries, which they did soon after March of 1932. But between the death of the testator and 30th June 1931 the executor and executrix made a loss in carrying on the testator's pastoral business, amounting, as was admitted before me, to £26,061, of which loss the sum of £6,515



represents the taxpayer's share. It was stated at the Bar—though I am not sure whether it was admitted—that the loss between the date of death, 30th March 1930, and 30th June 1930 amounted to £10,375, and that between 1st July 1930 and 30th June 1931 to £16,461. These figures give a result greater than the sum of £26,061, the admitted loss, but the division of the loss is only important for the purposes of sec. 26 (1), and not for the purposes of sec. 26 (2). It is, however, the sum of £6,515 which the taxpayer claims to deduct from her assessable income for the year 1931-1932, derived otherwise than from the trust estate.

Under sec. 31 of the *Income Tax Assessment Act* 1922-1930 the executor and executrix were not as such liable to pay tax in respect of income arising from the carrying on of the pastoral properties, but each beneficiary to whom those properties were given was assessable in her individual capacity in respect of her individual income from the trust properties remaining after allowing all the deductions under the Act, except the deduction under sec. 24, and, where the beneficiary had no beneficial interest in the corpus of the estate, except the deduction under sec. 26 in respect of any loss required to be met out of corpus. But the loss exceeded the income; and the question is whether the taxpayer's share of the loss can, under sec. 26, be carried over and deducted from any other income derived by her separately (sec. 31 (1) (b) ), that is, otherwise than from the trust estate.

The first limb of sec. 26 provides that where a loss is made in any year by any person in carrying on a business in Australia, that person shall be entitled to a deduction of that loss from the net assessable income (if any) derived by him in that year. In the present case the taxpayer did not carry on the business in her individual capacity. It is contended, however, that she and her fellow executor carried on the business and were bare trustees for the beneficiaries of that business. But that position does not, I think, meet the express words of the sub-section. The beneficiaries were no doubt the owners in equity of the pastoral properties, but it cannot be said that the executors were the agents or representatives of the beneficiaries. They derived their authority and their powers from the will of the testator, and were his representatives. They

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were personally liable to creditors in respect of any obligations they incurred in carrying on the business. They had, no doubt, a right of indemnity out of the estate, and the creditors had a right to be put in their place by subrogation. But I cannot agree that the beneficiaries carried on the business either at law or in equity, or can be treated under the Acts as if they had carried it on. Moreover, it appears to me that sec. 31 indicates, in sub-secs. 1 (a), 1 (b) and 1 (c), that the trust income must be ascertained separately from the "other income." It was said that the last clause of sec. 31 (1) (a) recognizes that deductions under sec. 26 can be made. So it does, if there be any trust income from which the deductions can be made and provided that no deduction is allowed for a loss that falls upon corpus. But the trust income is kept in a separate compartment, so to speak, and it is from the trust income (if any) and not from other income that the deduction is allowed. The provisions of sec. 26 (2) are, I think, on the same footing. The deductions there allowed are similar losses, that is, losses incurred by the taxpayer in carrying on a business in any of the four years next preceding the year in which the income was derived.

The history of the legislation (at which I have looked) throws, I think, no light upon the proper construction of the present sec. 26. It may be found in the Acts of 1915, secs. 21, 26; 1918, sec. 21; 1922, secs. 26, 31; 1927, sec. 16; 1928, sec. 15; 1930, sec. 14.

The appeal is dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Keane & Prendergast*.

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

H. D. W.