[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1933.

MELBOURNE, *Feb.* 14, 15, 25.

Starke J.

Income Tax (Cth.)—Assessment—Deductions—Life assurance society—Amounts in nature of interest included in payments to policy-holders—Whether incurred in gaining or producing the assessable income—Income Tax Assessment Act 1922-1930 (*No.* 37 *of* 1922—*No.* 60 *of* 1930), *sec.* 23 (1) (*a*).

The taxpayer, a company carrying on the business of life insurance, invested sums of money received from premiums and other sources, and obtained therefrom income which was assessable to income tax. The taxpayer claimed to deduct from its assessable income, pursuant to sec. 23 of the *Income Tax Assessment Act* 1922-1930, amounts in the nature of interest which were included in the payment of death claims, maturity claims, surrenders, annuities and bonuses in cash in the year in which the payments were made.

Held, that these payments could not be deducted as they were not "incurred in gaining or producing the assessable income" within the meaning of sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1930.

APPEAL from the Board of Review.

These were appeals under sec. 51 of the *Income Tax Assessment Act* 1922-1930 by the Australian Temperance and General Mutual Life Assurance Society Ltd. from decisions of the Board of Review confirming assessments of the Society to income tax made by the Federal Commissioner of Taxation for the years 1928-1929, 1929-1930, and 1930-1931.

The grounds of the Society's objections to the assessments for the relevant years included the following:—For the year 1928-1929 (exhibit E)—That there should be deducted under sec. 23 (1) of the *Income Tax Assessment Act*: (*a*) all amounts in the nature of interest which are included in payments of death claims, maturity claims, surrenders, annuities and bonuses in cash and which relate solely to the year in which the payments are made; (*b*) all amounts in the nature of interest contained in reversionary bonuses allotted to policy-holders for the year. For the year 1929-1930 similar grounds were taken (exhibit F) and under clause (*a*) thereof for that year the sum of £24,513 was claimed as a deduction, and under clause (*b*) thereof for that year the sum of £151,504 was claimed as a deduction. Similar grounds were also taken for the year 1930-1931 (exhibit G), when the sum of £28,510 was claimed as a deduction under clause (*a*) and the sum of £165,121 was claimed as a deduction under clause (*b*).

The facts and arguments sufficiently appear in the judgment hereunder.

Herring and *A. D. Ellis*, for the appellant.

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

Cur. adv. vult.

Feb. 25.

STARKE J. delivered the following written judgment:—

These are appeals under sec. 51 of the *Income Tax Assessment Act* 1922-1930 on the part of the Australian Temperance and General Mutual Life Assurance Society Ltd. from decisions of the Board of Review confirming assessments of the Society to income tax made by the Federal Commissioner of Taxation for the years 1928-1929, 1929-1930, and 1930-1931. The Society is a mutual assurance society and grants assurances on lives, and it also grants annuities, and engages in other business for various considerations. The Act, however (sec. 20 (5)), excludes from the Society's assessment to income tax all premiums received in respect of life insurance,

H. C. OF A. 1933.

AUSTRALIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

and all considerations received in respect of annuities granted, and certain other income, and all expenditure exclusively incurred in gaining those premiums or considerations or income is likewise excluded. The Company invests large sums of money, which it receives from premiums and other sources, and obtains income therefrom, which, as to a large amount, is admittedly assessable to tax under the Federal Income Tax Acts. But it claims to deduct from this assessable income, pursuant to sec. 23, "amounts in the nature of interest which are included in payment of death claims, maturity claims, surrenders, annuities, and bonuses in cash for the year in which the payments are made." The Commissioner refused to allow these claims as deductions, and the Board of Review confirmed his decisions.

It is undoubtedly true that obligations undertaken by the Society under life assurance policies and surrender values of such policies and annuities and bonuses in cash are all calculated upon some assumed rate of interest, based upon experience of the earning power of money over long periods of time. It may be on a three per cent basis, or higher, or lower, as the Society finds expedient or safe. But the rate is not necessarily, nor indeed is it likely to be, the interest actually earned by the Society on its premium or other income. It is the interest at the assumed rate on which the Society calculates its obligations in respect of death claims, maturity claims, surrenders, annuities and bonuses in cash, which are paid in the particular period of assessment, that the Company claims to deduct. The exhibits G, H and I illustrate the calculations in various classes of cases and expound the method without further observations from me.

The Commissioner in the first place contended that the decisions of the Board of Review involved no question of law, but mere questions of fact, and consequently that the appeals were incompetent under sec. 51 (6). Unfortunately, neither the Commissioner nor the Board gave any reasons for their decisions, and I do not know whether their decisions were based upon the construction of the Act, or upon some question of mixed law and fact, or upon some inference from the facts submitted to them, which might no doubt

be a pure question of fact (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1)). When the Board of Review has reached a conclusion of fact, then its decision is not open to review by this Court, if on the material submitted to it that conclusion can properly be drawn, and if it has not misdirected itself "in law in any of the forms of legal error, which amount to misdirection" (*Inland Revenue Commissioners* v. *Lysaght* (2); *Ducker and Inland Revenue Commissioners* v. *Rees Roturbo Development Syndicate* (3)). The facts do not appear to have been disputed, and the Board, I gather from the argument before it, did not consider the interest claim as an outgoing actually incurred in gaining or producing the assessable income, that is, the income from the Society's investments (sec. 23 (1) (*a*)), or as money wholly and exclusively laid out or expended for the production of assessable income (sec. 25 (*e*); and perhaps because of the provisions of sec. 20 (5)). But, if this be so, it must have first construed the sections, and then applied that construction to the undisputed facts. In this way, in my opinion, the decisions of the Board did involve a question of law, or at least a mixed question of law and fact, which makes these appeals competent. The Society, it is true enough, could not undertake its various obligations unless it invested its premiums and other income profitably. That is part of its business, and a most essential part. But still, it is not enough that disbursements actual or notional are made in the course of or arise out of or in connection with the business. They must be incurred in gaining or producing the assessable income (*Ward & Co.* v. *Commissioner of Taxes* (4); *Strong & Co.* v. *Woodifield* (5)). There is nothing, I think, in the case of *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (6) that conflicts with this view. There, a liability to damages was said, rightly or wrongly, to have been incurred or to have been encountered in producing the assessable income, because the thing which produced the income—the newspaper—exposed the taxpayer to the expenditure claimed. In the present case, the deduction claimed is not incurred or paid in the way of interest,

(1) (1915) A.C. 433, at p. 466.
(2) (1928) A.C. 234, at p. 243.
(3) (1928) A.C. 132, at p. 140.
(4) (1923) A.C. 145.
(5) (1906) A.C. 448.
(6) (1933) 48 C.L.R. 113.

H. C. OF A. 1933.

AUSTRALIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

though it is the basis of calculations on which the Society undertakes or estimates its obligations. Further, the interest so calculated has no direct connection with the income earned by the Society on its investments, but is directly connected with the considerations given for the grant of policies of assurance, or annuities. The Society must, no doubt, invest its funds and income if it is to perform its obligations, but calculating or estimating its obligations on the basis of an interest return for the consideration given does not gain or produce the income from its investments; that arises from lending to borrowers moneys belonging to or under the control of the Society.

It was said, again, that contracts for the payment of an annual sum made by reference to a term of years were in essence loan transactions. It may be so in some cases (*Perrin* v. *Dickson* (1)), but an annuity generally means, as *Mathew* L.J. said in *Scoble* v. *Secretary of State in Council for India* (2), the purchase of an income, and usually involves a change of capital into income payable annually over a number of years. But even if the contention were right, the Society's income from investments would not be gained or produced by the interest calculated or estimated in its obligations under policies of assurance or in respect of annuities.

Another ground of appeal is taken as to commission and allowance to agents, but it was not pressed before me.

All that remains is to dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellant, *Darvall & Horsfall.*

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

H. D. W.

(1) (1930) 1 K.B. 107.

(2) (1903) 1 K.B. 494, at p. 504.