[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . . . . APPELLANT;
APPELLANT,

AND

THE PREMIER AUTOMATIC TICKET ISSUERS LIMITED . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Income Tax (N.S.W.)—Assessment—Income "derived directly or indirectly from any source in the State"—Patent rights owned by taxpayer—Agreement made in State between taxpayer and licensee empowering licensee to sell patent rights—Sale of British patent rights to English company effected by licensee in England—Share of proceeds paid to taxpayer—Income Tax (Management) Act 1928 *(N.S.W.) (No. 35 of* 1928), *sec.* 4*.

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April 20, 21; *Nov.* 17.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

The taxpayer, a company incorporated in New South Wales, with its registered office and only place of business in Sydney, acquired from the inventors patent rights in respect of a ticket-issuing machine. The objects of the taxpayer included the power to turn to account, sell or dispose of any of its patents, licences and concessions. A. Ltd., a company also incorporated in New South Wales and having its registered office and principal place of business in Sydney, was the owner of patent rights in respect of a machine known as a "totalisator." S., an employee of A. Ltd., was the inventor and patentee of another ticket-issuing machine. Both types of machine for issuing tickets were suitable for use with totalisator machines. By an agreement made in Sydney in 1922 between the taxpayer, A. Ltd., and S., A. Ltd. was given the sole right to manufacture, use, sell and operate for use with totalisator machines all ticket-issuing apparatus for which rights by letters patent or otherwise had been or might be acquired by the other parties, and it was provided that should A. Ltd. dispose of its proprietary rights to the totalisator

* By sec. 4 of the *Income Tax (Management) Act* 1928 (N.S.W.) "income" is defined as meaning "income derived or deemed to be derived directly or indirectly from any source in the State."

and/or the ticket-issuing machines in any country, A. Ltd. should make payment to the taxpayer in accordance with a stipulated method of calculation. In 1928 A. Ltd. entered into an agreement in England with an English company for the sale to the latter of the British patent rights covering the totalisator and a ticket-issuing machine, and received payment of the purchase price in England. A. Ltd. thereupon, in accordance with the agreement of 1922, paid to the taxpayer out of the proceeds of the sale the sum of £10,000, which the taxpayer distributed as dividends. The taxpayer objected to the inclusion by the Commissioner of Taxation for New South Wales of this sum in its assessable income. It was admitted on behalf of the taxpayer that the sum was income, but it was contended that it was not derived from a source in New South Wales.

Held that the sum of £10,000 was derived directly and wholly from a source in New South Wales within the meaning of sec. 4 of the *Income Tax (Management) Act* 1928 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court): *Premier Automatic Ticket Issuers Ltd.* v. *Commissioner of Taxation*, (1932) 33 S.R. (N.S.W.) 107, reversed.

APPEAL from the Supreme Court of New South Wales.

The Commissioner of Taxation for New South Wales assessed the taxpayer, The Premier Automatic Ticket Issuers Ltd., to income tax in respect of the year ended 30th June 1929, and included in the assessment a sum of £10,000 received during the income year by the taxpayer from Automatic Totalisators Ltd. pursuant to an agreement made at Sydney on 16th November 1922. To that agreement there were three parties, namely, Automatic Totalisators Ltd., one Henry Roy Setright, and the taxpayer itself. At the time of the making of the agreement Automatic Totalisators Ltd., a company incorporated in New South Wales, with its registered office and principal place of business in Sydney, owned patents in Australia and other countries, including Great Britain, in respect of a totalisator machine. The taxpayer was incorporated in 1917 under the law of New South Wales, and had its only place of business in Sydney. It was formed for the purpose of acquiring, and it did acquire, patent rights in respect of a ticket-issuing machine designed for use in conjunction with totalisators, and it was empowered, *inter alia*, to sell or dispose of any of its patents, licences and concessions. In May 1928, Automatic Totalisators Ltd., in exercise of a power conferred by the agreement of November 1922, entered into an agreement in England with an English company for

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the sale to the latter of the British patent rights covering the totalisator and a ticket-issuing machine for the sum of £100,000. In accordance with a term in the 1922 agreement Automatic Totalisators Ltd. paid to the taxpayer ten per cent of the proceeds of the sale, that is, the £10,000 in dispute. The Commissioner claimed that the sum of £10,000 was derived by the taxpayer wholly from a source in New South Wales. An objection by the taxpayer was disallowed, and the matter referred to the Court of Review. At the hearing before that tribunal counsel for the taxpayer admitted that the sum of £10,000 was income, but contended that no part thereof was derived directly or indirectly from a source in New South Wales. Alternatively, he contended that it was derived only in part from a source in New South Wales. The Judge decided in favour of the taxpayer. At the request of the Commissioner, his Honor stated a case under the provisions of sec. 51 of the *Income Tax (Management) Act* 1928 (N.S.W.) for the decision of the Supreme Court.

The question submitted for the opinion of the Court was:

Whether on the facts stated the said sum of £10,000 was income of the taxpayer derived directly or indirectly from a source in New South Wales either (*a*) wholly, or (*b*) in part.

The Full Court of the Supreme Court answered the question in the negative: *Premier Automatic Ticket Issuers Ltd.* v. *Commissioner of Taxation* (1).

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

Further material facts appear in the judgment of *Evatt* J. hereunder, and in the case stated by *Dixon* J. in *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (2), the assessment under the State Act being in respect of the same sum of £10,000 as that included in the assessment made by the Federal Commissioner of Taxation.

Maughan K.C. (with him *Cohen*), for the appellant.

E. M. Mitchell K.C. (with him *Bowie Wilson*), for the respondent.

Cur. adv. vult.

(1) (1932) 33 S.R. (N.S.W.) 107.

(2) *Ante*, p. 268.

The following written judgments were delivered :—

RICH J. For reasons which appear from my judgment in *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1) I am of opinion that the judgment of the Full Court of New South Wales cannot be supported and should be reversed.

I think the order of the Supreme Court should be discharged, and, in lieu thereof, the question reserved by the case stated by the Court of Review under the provisions of sec. 51 of the *Income Tax (Management) Act* 1928 should be answered as follows :—The sum of £10,000 mentioned in the case stated was income of the taxpayer derived directly and wholly from a source in New South Wales. The appellant, the Commissioner of Taxation, should have his costs in this Court and in the Supreme Court.

STARKE J. This is an appeal from a decision of the Supreme Court of New South Wales upon a case stated by the Court of Review under the provisions of sec. 51 of the *Income Tax (Management) Act* 1928. The Supreme Court adjudged that the question submitted in the case, namely, whether on the facts stated in the case the sum of £10,000 therein referred to was income of the taxpayer derived directly or indirectly from a source in New South Wales (*a*) wholly, or (*b*) in part, " be and the same is hereby answered in the negative."

In my opinion, that decision should be reversed, and it should be adjudged in answer to the question that the sum of £10,000 therein referred to was income of the taxpayer wholly derived from a source in New South Wales, and for the reasons given by me in *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1), which I need not repeat. The facts are not so fully stated in the case submitted to the Supreme Court as in the case submitted by my brother *Dixon* to this Court under the Federal Income Tax Acts, but in substance they are indistinguishable and do not require separate treatment.

DIXON J. The reasons, which I have given for my opinion in the taxpayer company's appeal against its assessment to Federal income tax (*Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1)) necessarily result in the conclusion

(1) *Ante*, p. 268.

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in this case that the company is liable to State income tax in respect of the profit in question.

I think the appeal should be allowed, the order of the Supreme Court discharged and the question submitted by the Court of Review answered to the effect that the sum was wholly derived from sources in New South Wales.

EVATT J. The Commissioner of Taxation assessed the respondent company (hereinafter called the taxpayer) in respect of the year ending June 30th, 1929, and included in the assessment a sum of £10,000. This sum was received during the income year by the taxpayer from a company called Automatic Totalisators Ltd. pursuant to a term of an agreement made on November 16th, 1922. To that agreement there were three parties—Automatic Totalisators Ltd., one H. R. Setright, and the taxpayer itself. At the time of the making of the agreement, Automatic Totalisators Ltd. owned patents in the Commonwealth of Australia and a large number of other countries, including Great Britain, in respect of the machine for automatically recording bets, now commonly known as the "totalisator."

The taxpayer company was formed in the year 1917 for the purpose of acquiring and exploiting certain patent rights in respect of a mechanical device for issuing tickets, such device being intended for use in conjunction with the totalisator machine. After its incorporation the taxpayer agreed to acquire from Setright patent rights in respect of another mechanical device for issuing tickets which Setright had invented.

The agreement of November 1922 was made and executed at Sydney. Thereafter, in accordance with the terms of the agreement, the totalisator company paid the taxpayer various sums of money by way of royalty for the use within the Commonwealth of Setright's invention. In May, 1928, the totalisator company entered into two agreements with an English company by which the latter agreed to purchase the British patents owned by the totalisator company together with the British patent for the ticket-issuing invention of Setright. Under these two agreements, which were negotiated and executed in England, payment of the purchase price of £100,000

was made to the totalisator company during the year of income. Subsequently, in accordance with cl. 5 (2) of the Sydney agreement, the totalisator company paid to the taxpayer ten per cent of the £100,000, such sum of £10,000 being the amount in dispute in this case.

It should be mentioned that, under the agreements between the English company and the totalisator company, the purchase price consisted not only of the £100,000, but also of a percentage of the annual sums of money which would " pass through " any totalisator made under the British letters patent.

What I have called the Sydney agreement describes itself in the recital as fixing the conditions for the " use sale manufacture or operation in any part of the world of ticket-issuing machines suitable for use in conjunction with totalisators." Cl. 1 gives the totalisator company the sole and exclusive right to exploit all such ticket-issuing machines. If the totalisator company itself manufactures and sells such machines, it undertakes to pay the taxpayer a royalty of £10 for each machine manufactured and sold by it. By cl. 5 it is provided that, in the event of the totalisator company's disposing of the whole or part of its proprietary rights to the totalisator and/or ticket-issuers " in any country," the totalisator company will make payment to the taxpayer by one of two methods, the taxpayer to have the right of choosing the second method as against the first. The two specified methods of payment were as follows :—

(1) Payment by Automatic Totalisators Ltd. to the Premier Automatic Ticket Issuers Ltd. of the sum of £10 (ten pounds) for each and every ticket-issuing machine manufactured or sold by or for the said Automatic Totalisators Ltd.

(2) Payment by Automatic Totalisators Ltd. to the Premier Automatic Ticket Issuers Ltd. of a sum equal to ten per cent of any cash consideration for the sale of totalisator and issuer rights in any country and a sum equal to five per cent of the total royalties received under the terms of such sale for a period of ten years dating from the receipt of such royalties from each individual installation.

The second method of payment was chosen by the taxpayer in respect of the sale by the totalisator company of the British patents for the two inventions. But the first method of payment is important

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as indicating that, upon similar sales occurring in other countries, the taxpayer might become entitled to receive payments in the form of a royalty of £10 for each ticket-issuing machine manufactured and sold. Under the second method of payment, the taxpayer became entitled, not only to ten per cent of the cash consideration upon the sale of the combined rights in any country, but also to a percentage of five per cent of the royalties payable upon such sale during a period of ten years.

These being the relevant circumstances, the Full Court held, upon a case stated by the Court of Review under sec. 51 of the *Income Tax (Management) Act* 1928, that no part of the sum of £10,000 received by the respondent was derived directly or indirectly from a source in New South Wales (*Premier Automatic Ticket Issuers Ltd.* v. *Commissioner of Taxation* (1)).

The essence of the Court's judgment is contained in the following statement by *Street* C.J. :—

> " Well, let us examine the facts of this case. The agreement made here by Ticket Issuers Ltd. gave it a right, no doubt, to share in the benefit of sales wherever made but as a hard practical matter of fact the income which it received, and which is under consideration, arose from business transacted by Automatic Totalisators in England and wholly carried out there " (2).

The phrase " hard practical matter of fact " is obtained from the expression " practical hard matter of fact " which was used by the Court in *Studebaker Corporation of Australia Ltd.* v. *Commissioner of Taxation (N.S.W.)* (3), and from earlier cases. No doubt, in a popular sense, it can be said that the negotiation and sale by the totalisator company in England led to the receipt of £100,000 by that company and that receipt, in its turn, led to the receipt of the disputed £10,000 by the taxpayer here. But counsel for the taxpayer admitted before the Court of Review that the sum of £10,000 was income and, upon the facts of the present case, that admission necessarily carries with it the further admission that the income was " income derived from personal exertion " (*Income Tax (Management) Act*, sec. 4), comprising part of the proceeds of a business which was then being carried on by the taxpayer. Further, none of the negotiations or transactions which were conducted in England were conducted by the taxpayer itself, but constituted a " business

(1) (1932) 33 S.R. (N.S.W.) 107. (2) (1932) 33 S.R. (N.S.W.), at p. 116.
(3) (1921) 29 C.L.R. 225, at p. 233.

transacted by "Automatic Totalisators in England," to use the learned Chief Justice's own phrase. Indeed the taxpayer did not carry on business at all except within the State of New South Wales, a fact which is admitted by par. 1 of the case stated by the Court of Review.

In dealing with questions as to the "sources" of income, as we are expressly required to do by the New South Wales statute, assistance is afforded by ascertaining whether the particular taxpayer took part in transactions and operations within the territory which is said to be the source of his income. In the case of a two-locality business where what is done by a taxpayer has amounted to a carrying on of business within two territories, difficulties may arise in apportioning a taxpayer's income among such territories. But such difficulties can hardly arise where the business operations and transactions are conducted by the taxpayer exclusively within one territory. In such cases, it is not possible to affirm that its business income is derived from sources outside the territory where alone the business is conducted. Some of the leading cases dealing with this aspect of source taxation I had occasion to refer to recently in the case of *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (1) and I need not repeat the analysis I there attempted.

Because of the principle I have stated, it seems to me that in the present case the taxpayer is faced with a difficulty which is insuperable. The receipt by it of the £10,000 during the income year may be regarded as a resultant of three components, first, the taxpayer's pursuit, within New South Wales alone, of the business of turning over and exploiting patents, second, the entry by the taxpayer into the agreement of November 1922 in the course of its said business, and, third, the exercise by the totalisator company of its contractual right of disposing of the taxpayer's British patent. The first two components relate exclusively to things done within New South Wales. The third factor, though relating to things done outside New South Wales, does not relate to anything done by the taxpayer. So far as the taxpayer is concerned, therefore, the source of its income receipt of £10,000 consists entirely of business conducted by it within the State of New South Wales.

(1) (1931) 46 C.L.R. 417, at pp. 448, 453.

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The taxpayer contends that the agreement of November 1922 resulted in a pooling of assets for mutual advantage. In one sense this is a reasonably accurate description. But, under the agreement, the taxpayer retained no control over the totalisator company in respect of its exploitation of the combined patents outside Australia and New Zealand. In the nature of things, complete exploitation might cover a period of many years, and so, as and when the totalisator company decided to sell or operate the patents in other countries throughout the world, moneys would become payable to the taxpayer. So far as the taxpayer was concerned, the result of the Sydney agreement was to make the situation of the places where, and the territories in respect of which, the totalisator company might enter into arrangements to sell or exploit the patents, matters of pure accident and complete indifference. As the totalisator company carried on business partly within the State of New South Wales, it was, as a matter of mere probability, as likely that it would make its arrangements within, as without, New South Wales. Whilst the terms of all such arrangements would become a matter of great financial importance to the taxpayer, it was not concerned with them in the sense that it could control any of their terms. I do not agree with the suggestion that cl. 5 of the Sydney agreement gave the taxpayer a right to veto any proposed sale of the combined patents by the totalisator company. No doubt, the taxpayer did, under cl. 5, retain the right to choose one method of payment as against another, and for this purpose, if for no other, it was necessary for it to remain in business. After the Sydney agreement, indeed because of its terms, it might be said that, for all practical purposes, the taxpayer denuded itself of capacity to carry on any effective business outside of New South Wales.

Whilst it is possible to regard the agreement of 1922 as being itself the source of the taxpayer's income receipt of £10,000, my opinion is that the receipt should be regarded as having its source in the business carried on during the income year by the taxpayer within New South Wales, not excluding from such business the carrying out in New South Wales by the taxpayer of the agreement though it had been made many years before the income year.

For these reasons I think that the appeal should be allowed, the order of the Supreme Court discharged, and the question asked in the case stated should be answered by declaring that the said sum of £10,000 was derived wholly from sources in the State of New South Wales.

McTIERNAN J. It follows from the judgment in *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1), that the judgment of the Full Court of New South Wales should be reversed.

In my opinion, the appeal should be allowed and the question in the case stated should be answered by saying that the sum of £10,000 mentioned in the case stated was income of the taxpayer derived directly and wholly from a source in New South Wales.

Appeal allowed. Order of the Supreme Court discharged and question reserved by the case stated answered as follows: —The sum of £10,000 *mentioned in the case stated was income of the taxpayer derived directly and wholly from a source in New South Wales. The appellant, the Commissioner of Taxation, should have his costs in this Court and in the Supreme Court.*

Solicitor for the appellant, *J. E. Clark,* Crown Solicitor for New South Wales.

Solicitors for the respondent, *Braund & Watt.*

J. B.

(1) *Ante,* p. 268.