[HIGH COURT OF AUSTRALIA.]

COLONIAL GAS ASSOCIATION LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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MELBOURNE, *March* 2; *May* 23.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Company—Debentures—Interest paid to absentees—Liability of company to assessment—Validity of legislation—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 55—*Income Tax Assessment Act* 1922-1932 (*No.* 37 *of* 1922—*No.* 76 *of* 1932), *sec.* 20 (2) (*b*).

The taxpayer was a company incorporated in England and carrying on its business in Australia. From time to time it raised money on debentures issued both in England and in Australia, and used that money in Australia. One register of debentures was kept at the English office of the company and another at the Australian office. The English register included all debentures issued in England, and some debentures originally issued in Australia which were later transferred to the English register. All the debentures upon that register were held by persons resident and domiciled elsewhere than in Australia. The Federal Commissioner of Taxation assessed the company to income tax under sec. 20 (2) (*b*) of the *Income Tax Assessment Act* 1922-1932 " in respect of absentee shareholders " upon the interest paid to these debenture holders during the years ending 30th June 1928, 1929 and 1931. The interest was paid out of revenue earned by the company in Australia.

Held, that sec. 20 (2) (*b*) was not invalid as having an extra-territorial application, or as contravening sec. 55 of the Constitution : It was accordingly within the powers of the Commonwealth Parliament, and the assessment was valid.

CASE STATED.

The Colonial Gas Association Ltd. having objected to assessments to income tax upon interest payable during the years ending 30th June 1928, 1929 and 1931 to debenture holders resident and domiciled elsewhere than in Australia, and such objections having

been disallowed in part by the Deputy Federal Commissioner of Taxation, and the Commissioner at the request of the company having transmitted such objections to the Supreme Court of Victoria, *Gavan Duffy* J. stated a case for the opinion of the High Court pursuant to sub-sec. 8 of sec. 51A of the *Income Tax Assessment Act* 1922-1932. The case stated was substantially as follows :—

1. The appellant is a company which was incorporated in England under the *Companies Acts* 1862-1886 on 3rd February 1888, and was registered in the State of Victoria as a foreign company on 10th May 1897, and it has continued to be so incorporated and registered.

2. A copy of the original memorandum and articles of association of the appellant and a copy of the memorandum and articles of association of the appellant including all alterations made thereto together with a copy of all special resolutions passed by the appellant are to be deemed to be incorporated in and to form part of this case.

3. Since its incorporation the appellant has established and carried on and still carries on an extensive business in Victoria and elsewhere in Australia, comprising the making and supplying of gas for lighting and other purposes, and it is also pecuniarily interested in, and carries on, other subsidiary undertakings.

4. The property of the appellant (with the exception of certain investments in England and office furniture and other assets incidental to the London office of the appellant) is situate in Victoria and other Australian States, and comprises gas works and other buildings and assets used in carrying on its business in Australia.

5. Since 1st January 1924 the whole of the business of the appellant, except such formal business as is required by statute to be transacted in England, has been transacted, controlled, managed and conducted in and from Melbourne, in the State of Victoria, or elsewhere in Australia.

6. The original nominal capital of the appellant was £250,000, but it has been increased from time to time, and now amounts to £1,000,000 divided into 1,000,000 shares of £1 each of which 920,531 shares have been issued.

7. Pursuant to resolutions passed on 7th January 1902 and 13th October 1909, the appellant created a series of debentures altogether

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for the time being not exceeding one moiety of the issued capital for the time being of the appellant, all ranking *pari passu* as a first charge on all the property of the appellant whatsoever and wheresoever both present and future without preference or priority one over another, such charge being a floating security.

8. The appellant has from time to time issued debentures of the series both in England and Australia at varying rates of interest, but all expressed to rank *pari passu* with the previous issues of the series. The debentures issued in England were so issued to persons who applied to the appellant in England for the same, and who paid to the appellant in England the amount payable in respect of the debentures applied for by such persons respectively. The debentures issued in Australia were so issued to persons who applied to the appellant in Victoria for the same, and who paid to the appellant in Victoria the amount payable in respect of the debentures applied for by such persons respectively.

9. *Pro forma* copies of a debenture in each such issue are to be deemed to be incorporated in and to form part of this case.

10. The money raised by the debentures has been used in Australia by the appellant for the purpose of financing its various undertakings.

11. At all material times the appellant has kept registers both in London and Melbourne of debentures held, and, subject to temporary restrictions from time to time, debentures were transferable from either register to the other upon the application of the holder of the relevant debentures. At all material times the debentures registered on the London register were held by persons who were not residents of nor domiciled in Australia, and with the exception of 46 £100 5 per cent debentures payable on 1st January 1930, which had been transferred from the Melbourne register to the London register, were debentures which were originally issued in England as aforesaid, and had always been registered on the London register.

12. During the year ended 30th June 1928 the appellant paid in England out of revenue earned by it in that year in Australia to the holders of the debentures on the London register the sum of £6,112 interest under and pursuant to the terms of the said debentures. Of the said sum of £6,112, £5,882 was paid to holders of debentures which had always been on the London register, and £230

to holders of debentures which had been transferred from the Melbourne to the London register.

13. During the year ended 30th June 1929 the appellant paid in England out of revenue earned by it in that year in Australia to the holders of the debentures on the London register the sum of £6,103 interest under and pursuant to the terms of the debentures. Of the sum of £6,103, £5,873 was paid to holders of debentures which had always been on the London register, and £230 to holders of debentures which had been transferred from the Melbourne to the London register.

14. During the year ended 30th June 1931 the appellant paid in England out of revenue earned by it in that year in Australia to the holders of the debentures on the London register the sum of £5,917 interest under and pursuant to the terms of the debentures. Of the sum of £5,917, £5,618 was paid to holders of debentures which had always been on the London register, and £299 to holders of debentures which had been transferred from the Melbourne to the London register, the time for payment of which had with the consent of the holders thereof been extended until 1st January 1940 pursuant to an agreement made and executed by them in England.

15. The respondent claims that the appellant is liable under sec. 20 (2) (*b*) of the *Income Tax Assessment Act* 1922-1932 to pay income tax on interest paid by it to the holders of debentures referred to in pars. 12, 13 and 14 hereof, and has caused assessments to be made of the income tax claimed to be payable by the appellant as aforesaid, and has caused to be issued to the appellant notices of asseessment.

16. By notices of objection dated 27th July 1932 the appellant objected to each of the assessments.

17. By letter dated 13th October 1932 the respondent disallowed the objections save to the extent indicated in the notices of amended assessment.

18. The appellant thereupon by notices in writing dated 10th November 1932 requested the respondent to treat each of the notices of objection as an appeal, and to forward the same to the Supreme Court of Victoria. The respondent thereupon complied with each of such requests.

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The questions for the opinion of the Court were :—

(1) Whether the appellant is liable to pay income tax for any and which of the years to which the assessments relate on interest paid by it as aforesaid to holders of the debentures whose debentures were issued in England to holders not resident or domiciled in Australia, and whose debentures have always been on the London register.

(2) Whether the appellant is liable to pay income tax for any and which of the years to which the assessments relate on interest paid by it in England as aforesaid to holders of the debentures whose debentures have been transferred from the Melbourne to the London register, but were issued in Australia to holders who at the date of issue were resident and domiciled in Australia, but who during the years to which the assessments relate were not resident or domiciled in Australia, and which debentures were originally entered upon the Melbourne register.

Wilbur Ham K.C. (with him *Spicer*), for the appellant. The debentures were raised in England and are repayable in England. Sec. 20 (2) (*b*) purports to tax the company as a representative of absentee debenture holders in respect of property outside Victoria. The provision is void in the first place because the section has an extra-territorial application ; and in the second place because it dealt with more than one subject of taxation and is, therefore, obnoxious to sec. 55 of the Constitution. The tax is upon money paid to the absentee debenture holders, and cannot, therefore, be a tax on income. In the event of the company making a loss the interest on the debentures would have to be paid out of capital. The English contract made with English debenture holders cannot be varied by Victorian law. Absentees are only taxed in respect of income from an Australian source. If the section purports to tax income from a source in Australia, then the particular debenture holders are not in that class. The appellant is objecting only as to payments to the English debenture holders. The proper interpretation of sec. 20 is that the company is the taxpayer, and is charged with something which is called income tax in respect of something that is an outgoing. No two things could be more distinct than a

tax on income and a tax on outgoings. Sec. 20 (2) (*b*) deals with more than one subject of taxation and conflicts with sec. 55 of the Constitution (*Federal Commissioner of Taxation* v. *Munro* (1); *Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (2)). In the present case the position is quite reversed because the company cannot be said to have any beneficial interest in the property of the persons from whom it has borrowed money (*Harding* v. *Federal Commissioner of Taxation* (3); *National Trustees, Executors and Agency Co. of Australasia Ltd. v. Federal Commissioner of Taxation* (4); *Osborne* v. *The Commonwealth* (5); *Waterhouse* v. *Deputy Federal Commissioner of Land Tax* (*S.A.*) (6); *Konstam* on *Income Tax*, 6th ed. (1933), p. 269). The taxpayer is taxed first on its income and then on its outgoings. The alternative to this position is that the Act purports to tax income which has nothing to do with Australia at all, and the provision is void for exterritoriality. The source of the debenture holder's right is the contract between the English lender and the English company (*Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (7)). The contract is the source of the obligation, and the place where the contract is made is the source of the income, and the fact that it is secured by property in another place does not affect the matter (*Webb* v. *Campbell* (8); *In re The Income Tax Acts* [*No.* 3] (9); *Commissioners of Taxation* v. *Jennings* (10)). The Act should be given a consistent meaning if it is possible to do so. The natural meaning of the clause is that a tax is imposed on money that is an outgoing of the company. The tax must be regarded as being put on the absentee taxpayer and not on the company, and the section is therefore an attempt to impose an exterritorial tax (*Federal Commissioner of Taxation* v. *Munro* (11); *Commissioner of Stamps* (*Q.*) v. *Wienholt* (12); *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (13); *Commissioner of*

(1) (1926) 38 C.L.R. 153, at p. 216.
(2) (1912) 15 C.L.R. 661, at p. 666.
(3) (1917) 23 C.L.R. 119, at p. 134.
(4) (1916) 22 C.L.R. 367.
(5) (1911) 12 C.L.R. 321.
(6) (1914) 17 C.L.R. 665, at pp. 671, 675, 676.
(7) (1921) 29 C.L.R. 225, at pp. 232, 233.
(8) (1900) 25 V.L.R. 506; 21 A.L.T. 227.
(9) (1901) 27 V.L.R. 304, at pp. 312, 313; 23 A.L.T. 70, at p. 72.
(10) (1898) 19 N.S.W.L.R. 193; 15 W.N. (N.S.W.) 86.
(11) (1926) 38 C.L.R., at pp. 216, 217.
(12) (1915) 20 C.L.R. 531.
(13) (1932) 48 C.L.R. 391, at p. 425.

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Stamp Duties (*N.S.W.*) v. *Millar* (1)). If this tax is to be taken as being imposed on the debenture holders who in England made a contract to be paid money there, and if that is the determining factor which entitles the Commissioner to collect tax on the money paid by the company in satisfaction of such obligation, it is in conflict with *Millar's Case* (2) (*Commissioner of Taxes* v. *Union Trustee Co. of Australia* (3)). If the Act purports to tax English income it is *ultra vires* (*Spiller* v. *Turner* (4) ; *Indian and General Investment Trust Ltd.* v. *Borax Consolidated Ltd.* (5) ; *London and South American Investment Trust* v. *British Tobacco Co.* (*Australia*) (6)).

Robert Menzies, A.-G. for Victoria, (with him *Coppel*), for the respondent. Sec. 20 (2) (*b*) of the *Income Tax Assessment Act* is valid, and on its proper interpretation authorizes the assessment. The section is capable of applying to certain cases which are within the ambit of the Federal Parliament, and is not invalid, though it may be capable of application to cases outside that ambit. As to the effect of sec. 55 of the Constitution, the section is not concerned with the particular taxpayer, but is concerned only to determine whether the money in question is to be distributed as income in the hands of somebody. If the subject matter of the taxation is income, it is susceptible to taxation. The fact that these were payments out by the taxpayer did not prevent them from being subject to income tax. The *Income Tax Acts* of 1799 (39 Geo. III. c. 13) and 1842 (5 & 6 Vict. c. 35, sec. 102) both recognize payments made by a taxpayer as being liable to income tax. Sec. 20 is capable of covering two sets of cases, one, where the amount paid or credited is paid out of earnings in Australia, and the other, where it is not paid out of earnings at all, but out of realizations of capital. In the first case, the section only makes a greater amount of the company's receipts taxable than would otherwise have been taxable ; in the second case, sec. 55 of the Constitution would appear to apply unless the payment is regarded as income in the hands of the

(1) (1932) 48 C.L.R. 618, at pp. 632, 636.
(2) (1932) 48 C.L.R. 618.
(3) (1931) A.C. 258, at p. 267.
(4) (1897) 1 Ch. 911.
(5) (1920) 1 K.B. 539.
(6) (1927) 1 Ch. 107.

debenture holder. The tax here is levied on income whoever owns that income, and if the section does not extend so far, it should be read as applying to the first case only. As to sec. 13 of the Act, looking at the matter from the debenture holder's point of view, this money is derived from sources in Australia. The source of the absentee's income is in Australia (*Nathan* v. *Federal Commissioner of Taxation* (1)). The central question is to be found in this: Does sec. 20 (2) (*b*) refer to a tax imposed on a company in respect of portion of its income, or does it impose a tax on the company in respect of the debenture holder? Sec. 20 (2) (*b*) deals with the income of the debenture holder, and the argument based on sec. 55 of the Constitution immediately falls to the ground. Sec. 14 (1) (*m*) creates the first exemption of dividends. Sec. 23 (1) (*a*) provides that in calculating taxable income the total income is taken, and certain deductions are made from it. Dividends and interest paid are excluded from income. Sec. 20 (2) (*b*) imposes an obligation on the company, not in respect of the company's own income, but in respect of the income of persons with whom the company has dealings. The sub-section operates as a limitation in respect of absentee debenture holders, who could have been brought under the provisions of the Act, and it is within the power of the Commonwealth Parliament to impose a tax on such income of absentees. This money was paid out of the revenues of a company earned in Australia, and if the section includes more than this in its operation, it should be read down to this. The money raised by the debentures had sufficient connection with Australia to enable the Commonwealth Parliament to deal with the matter.

Wilbur Ham K.C., in reply. If the company is a taxpayer, there is no question of exterritoriality, but the present assessment amounts to taxation of something which is an outgoing (*Nathan* v. *Federal Commissioner of Taxation* (2)). The assessment is not based upon income arising in Australia. The present case is quite different from *Nathan's Case* (1) and *Federal Commissioner of Taxation* v. *Munro* (3). *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (4) is more an analogy to the present case. All the material acts occur

(1) (1918) 25 C.L.R. 183.
(2) (1918) 25 C.L.R., at p. 198.
(3) (1926) 38 C.L.R. 153.
(4) (1908) A.C. 46.

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in England: there is no justification for saying that the Act is limited to persons who are already taxpayers (*Federal Commissioner of Taxation* v. *Higgins* (1)), and it is impossible to introduce the idea of representation.

Cur. adv. vult.

May 23.

The following written judgments were delivered :—

RICH J. I have nothing to add to the judgment of my brother *Dixon*, with which I agree.

STARKE J. Case stated. Shortly, the association—the appellant here—is a company which is incorporated in England and carries on business in Australia. It raised money on debentures issued both in England and in Australia, and used that money in Australia. Registers of these debentures were kept, both in London and in Melbourne. The debentures registered in London were held by persons who were not residents of nor domiciled in Australia. The association paid interest in England, under and pursuant to the terms of the debentures, to persons who were registered there as the holders of the debentures. The interest was paid out of revenue earned in Australia. The association was assessed to income tax in respect of the interest so paid by it in London, pursuant to the provisions of sec. 20 (2) (*b*) of the *Income Tax Assessment Acts* 1922-1932. That sub-section provides as follows : " In addition to any other income tax payable by it, a company shall also pay income tax on . . . the interest paid . . . by the company to any person, who is an absentee, on money raised by debentures of the company and used in Australia . . . Provided that a company shall be entitled to deduct and retain for the use of the company from the amount payable to any of the persons referred to in paragraph (*b*) of this sub-section such amount as is necessary to pay the tax which becomes due in respect of that amount."

It was not disputed that the facts stated brought the present case within the ambit of the section. But it was contended that the

(1) (1930) 44 C.L.R. 297, at p. 311.

Income Tax Assessment Acts, by reason of sec. 20 (2) (*b*), contravened the provisions of sec. 55 of the Constitution, because that sub-section dealt with more than one subject of taxation. It was insisted that the sub-section taxed outgoings of the company, and not income, and therefore dealt with a different subject of tax than an income, tax. The substance of the tax, however, is upon the interest or the income of the holders of the company's debentures. It may transcend the territorial competence of Parliament, but it is still an income tax, and the law deals with one subject of taxation only.

The Act may also, I think, be supported, even if the tax imposed by sec. 20 (2) (*b*) is really and in substance imposed upon the company itself. It ascertains what comes in to the company by reference to what it expends. "How," as was said in the Supreme Court of the United States in *Railroad Co.* v. *Collector* (1), "were these 'earnings, profits, . . . or gains' to be most certainly ascertained? In every well-conducted corporation of this character these profits were disposed of in one of four methods; namely, distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hands." The Act looks to the distribution of interest as a measure of earnings or income. It "deals with one subject of taxation, but ascertains or estimates the receipts of taxpayers by diverse methods" (*Federal Commissioner of Taxation* v. *Munro* (2)).

Another contention was that sec. 20 (2) (*b*) transcended the territorial competence of the Parliament. It is within the competence of Parliament to impose taxes upon persons, natural or artificial, resident or carrying on business within its territory, or upon property within its territory, or upon incomes made within its territory. The section clearly contemplates a company carrying on business within its territory. In the present case, the moneys raised by the debentures are "used in Australia," the interest is paid or credited by the company to a person "who is an absentee," as opposed to the company, which is treated as subject to the control of the legislative authority, and the opening words of the sub-section suggest that the company is otherwise liable as a taxpayer. In my

(1) (1879) 100 U.S. 595, at p. 598. (2) (1926) 38 C.L.R., at p. 216.

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opinion the provisions of sec. 20 (2) (*b*) are within the competence of the Parliament, whatever recognition may be given to them beyond Australia.

The questions stated should both be answered in the affirmative.

DIXON J. The taxpayer is a company incorporated in England. Its undertaking is in Australia. From time to time it has raised money upon debentures secured by way of floating charge over its undertaking. The money has been used in Australia. Some of the debentures were issued in England and some in Australia. A register is kept at the English office of the company and another at the Australian office. The English register includes all the debentures issued in England, and some debentures issued in Australia, which have since been transferred to the English register. All the debentures upon that register are held by persons resident and domiciled elsewhere than in Australia. By notices of assessment expressed to be " in respect of absentee shareholders," the Commissioner has assessed the company to income tax upon the interest payable to these debenture holders during the years ending 30th June 1928, 1929, and 1931. The assessments are made under sec. 20 (2) (*b*) of the *Income Tax Assessment Act*, which provides : " In addition to any other income tax payable by it, a company shall also pay income tax on . . . the interest paid or credited by the company to any person, who is an absentee, on money raised by debentures of the company and used in Australia or on money lodged at interest in Australia with the company." The paragraph is qualified by the following proviso : " Provided that a company shall be entitled to deduct and retain for the use of the company from the amount payable to any of the persons referred to in paragraph (*b*) of this sub-section such amount as is necessary to pay the tax which becomes due in respect of that amount."

The question for decision is whether sec. 20 (2) (*b*) operates to make the company liable to taxation upon the interest paid by it in respect of the debentures on the English register. This question involves both the meaning and the validity of the provision. In my opinion, as a matter of construction or interpretation, the provision extends to the present case. I do not think that its

application is limited to debenture interest which forms part of the assessable income of the absentee derived from sources within Australia. The source of the interest paid by the company in respect of the debentures in question may be said to be a transaction or security outside Australia. How far in view of the provisions of sec. 16 (*b*) (iii.) such a conclusion would exclude the debenture holders themselves from liability to Commonwealth income tax in respect of the interest need not be considered. For, in my opinion, the operation of sec. 20 (2) (*b*) was not meant to depend upon the existence of a separate or primary liability of the absentee to income tax in respect of the interest. Its purpose is to impose upon the company an original or independent liability to assessment in respect of the interest paid to absentees, and it does so for the very reason that the absentee, or the interest paid to him, may be outside the operation of the provisions of the enactment taxing the recipients of income derived from an Australian source. The absentee and not the company is intended to bear the incidence of the tax, although the liability to the Crown is imposed upon the company. Thus the deduction by the company of the amount of the tax from the interest paid to the debenture holder is authorized by the proviso. This authority may in many cases prove ineffectual, and companies may, notwithstanding its express statement, find themselves unable to make or retain the deduction. The reason is that many of the contracts of loan, which the proviso seeks to affect, will be governed by the law of some country outside Australia, and, therefore, except in Australia, the payment to the debenture holder of the full amount of the interest will remain an enforceable obligation of the company. This consideration, however, cannot control the meaning of the enactment, which is, in my opinion, to levy the tax upon the company, and give it a right to deduct the amount as a remedy over against the debenture holder. Nor can the main provision be construed as contingent upon the effective operation of the proviso. Notwithstanding that the company may be required, by the law of another country, to pay the interest without deduction, it is intended to remain liable to the Crown.

Most of the debentures with which these proceedings are concerned were issued in England in respect of moneys raised in England.

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Sec. 20 (2) (*b*) is expressly limited to interest paid " on money raised by debentures of the company and used in Australia." The question arises whether the words " in Australia " should be read as governing the expression " raised by debentures," or as attached only to the word " used." I think that the latter is the proper interpretation. It appears the more natural construction, and accords better with what may be supposed to be the intention of the legislation.

A further question of interpretation arises, which is of importance in relation to the attack upon the validity of the provision. Sub-sec. 2 commences: " In addition to any other income tax payable by it, a company shall also pay income tax on." To what companies does this statement refer? Is it to be understood as impliedly confined to companies which have some, and if so what, connection with Australia? Or is it a universal statement applying to all companies without regard to any Australian connection, and restricted in that respect only by such qualifications as appear in the paragraphs which follow? My answer to these questions is that upon its proper interpretation the application of the sub-section is confined to companies deriving assessable income from Australia. In construing the provision we should, I think, consider it as it stood in the *Income Tax Assessment Act* 1922. But this is of little importance, because, in relation to the first two years now in question, at any rate, the enactment had undergone no change obscuring the considerations upon which the interpretation I have adopted depends. The leading provision of the *Income Tax Assessment Act* is sec. 13 (1), which provides that income tax shall be levied for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the preceding twelve months. In the subsequent provisions, which describe the mode in which taxable income shall be ascertained, and provide what shall, and what shall not, be taken into account, general words are for the most part used in describing persons and companies, and no expressions occur indicating the connection with Australia which must exist. The territorial limitation contained in sec. 13 (1) which, no doubt, is a governing provision, is treated as sufficient. That sub-section is prefaced by the words: " Subject to the provisions of this Act," and some of the provisions which follow contain

modifications or enlargements of the general rule enacted by the sub-section. Sec. 16 (*b*) contains a modification of the requirement that the source of the income shall be Australia. In the case of a member, shareholder, depositor or debenture holder of a company, this paragraph, before its amendment in 1930, substituted the requirement that the company should derive income from a source in Australia, or be a shareholder in a company which derives income from a source in Australia. In that event, the member, shareholder, depositor or debenture holder is made liable to include in his assessable income dividends, bonuses or profits, and interest distributed, credited or paid to him. If the company derives income from a source outside Australia, as well as a source within Australia, a dividend must be proportioned, but no similar requirement is expressly made in the case of interest. Before the amendments made in 1923, the policy of the *Income Tax Assessment Act* was to tax the shareholder upon profits distributed within the year of earning, and to tax the company only upon the profits not distributed within the year of earning. Upon a subsequent distribution of such profits the shareholder became liable to include them in his assessment, but obtained a rebate in respect of the tax paid by the company. In giving effect to this general plan, some special treatment became necessary of the questions which arise in respect to the distribution of the company's funds among absentees and persons holding bearer securities, whose identity could not readily be ascertained. The purpose of sec. 20, as a whole, was to deal with the matters specially affecting the liability of companies. Sub-sec. 1 provided for the ascertainment of the taxable income by deducting, in addition to other deductions, from the assessable income so much as was distributed to the members. In terms this provision is not limited territorially, unless the definition of " assessable income " contained in sec. 4, viz., " gross income which is not exempt from taxation," is to be understood as containing a reference to territorial exemption. But it is clear that the provision is governed by the general statement contained in sec. 13 (1), and is, therefore, limited to companies deriving assessable income from sources in Australia. Again, in par. (*a*) of sub-sec. 2, when the company was made liable to tax upon so much of the assessable income distributed to shareholders

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who are absentees, the same limitation was involved. In par. (*b*) the payments brought under tax are interest, not profits, and par. (*c*) includes interest. But, when direct liability is imposed upon the recipient of such interest by sec. 16 (*b*), the condition required is that the company shall derive income from Australia, or be a shareholder in a company which does so. Par. (*c*) of sub-sec. 2, relating to bearer securities, discloses upon its face a design of ensuring the collection from the company of what might, because of the nature of the security, escape the tax directly imposed upon the recipient of the interest or dividend. This is supported by the proviso authorizing a refund to any holder of a security who is not liable to furnish a return. These considerations all point to the fact that the subject dealt with by sec. 20 was companies deriving income from an Australian source. It was primarily directed to an ascertainment of the liability of such companies to income tax. Necessarily, the ascertainment must proceed from the assessable income. Every company, therefore, comes within its ambit which derives assessable income from Australia, but I think no other does. In the case of pars. (*b*) and (*c*) of sec. 20, the payment dealt with, namely interest, forms prima facie a deduction from assessable income, and may have been so regarded by the framer of the provision. It does not follow, however, that when the amount of interest paid exceeds the assessable income, or when for some reason the interest does not constitute an allowable deduction, these paragraphs do not apply. The interpretation which I have adopted of sec. 20 (2) (*b*) of the Act of 1922-1929 should, in my opinion, continue, notwithstanding the amendments made by the Act of 1930. These amendments make important alterations in secs. 13 and 16 (*b*), but they do not directly affect sec. 20. For these reasons I am of opinion that the operation of sec. 20 (2) (*b*) is to impose upon companies, deriving assessable income from sources in Australia, a direct liability to the Crown in respect of interest upon debentures paid to absentees, without regard to the liability of the absentees to include that interest in their returns, or to make a return, but to authorize the company to recoup itself by way of deduction, and thus throw the incidence of the tax upon the recipient of the interest. In this last respect, the provision resembles secs. 19 and 21 of the All Schedules Rules of the English *Income Tax Act* 1918.

This interpretation of the provision goes a long way to dispose of the attack on the validity of sec. 20 (2) (*b*). That attack was based upon the objections (1) that the section had an extra-territorial application, and (2) that it dealt with more than one subject of taxation, and was, therefore, obnoxious to sec. 55 of the Constitution.

(1) The fact that it is confined to companies deriving assessable income from Australia, in my opinion, removes the first objection. It may be true that the tax is imposed upon what may not form part of that assessable income. It may be conceded further that the payment of interest is not connected in the enactment with the receipts constituting assessable income. Thus, although the tax is laid upon companies deriving assessable income from Australia, it is not imposed in respect of that income or of any part of it. But when income, whether gross or net, is derived from Australia, the legislative power of the Parliament in respect of taxation, which is exercisable in relation to that circumstance, is not restricted to levying a tax upon the income so derived. To derive income from a country involves the person deriving it in a territorial connection with the country sufficient to support the validity of an exercise of the power in respect of the person as distinguished from the income. The case is not one, as was the *Commissioner of Stamp Duties* (*N.S.W.*) v. *Millar* (1), in which the only connection between the taxpayer sought to be made liable and the territory was a thing amounting to no more than a possible subject of taxation, which the Legislature had not selected as the subject of the tax. The derivation in Australia of assessable income involves the conduct of operations or the possession of property or proprietary rights in Australia, exposing a company to the imposition of such relevant conditions by way of liability as the Legislature chooses.

The condition which, under the enactment in question, must be complied with by a company if it derives assessable income from Australia is that it shall pay in the first instance tax imposed in respect of the income of persons residing elsewhere, consisting of interest paid by the company upon loan money which it has applied to some purpose in Australia. I think such a provision is within the territorial competence of the Commonwealth.

(1) (1932) 48 C.L.R. 618.

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(2) The subject matter of the *Income Tax Assessment Act* and *Income Tax Acts* has been defined or described in this Court in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1), and in *Cornell* v. *Deputy Federal Commissioner of Taxation (S.A.)* (2). Some variation between these definitions or descriptions may be found, but at least it is clearly established by these decisions that the subject dealt with includes income, whether net or gross, derived by persons natural or artificial. If a primary liability to income tax upon interest paid by companies to absentees were imposed directly upon the payees, it would be undeniable that the subject of taxation was an item of the taxpayers' revenue which did not fall outside the description of the subject with which otherwise the assessment and taxing Acts deal. For no distinction could be drawn unless upon the ground that there would be a departure from the general nature of the taxation in restricting the tax neither to cases in which the income has an Australian source nor to those in which the taxpayer has an Australian residence. Such a ground would be untenable, because the existence and extent of a territorial limitation do not enter into the description or definition of the subject of taxation, but relate only to the effect of locality upon liability to tax. The validity of such an enactment might be denied on territorial grounds, but not because of inconsistency with sec. 55. The real question is whether in imposing the primary liability to the Crown directly on the payer with a right of deduction from the payment, and so, as I think, avoiding invalidity on territorial grounds, the Legislature has changed the subject of taxation and infringed upon sec. 55. In my opinion, it has not done so. For the very restricted purpose of that constitutional provision, it appears to me unimportant that the tax levied in respect of the income should, in one case, be laid directly on the recipient and, in another, indirectly, by imposing immediate liability to the Crown upon the person who pays him, and giving that person a right of deduction or recoupment. In my opinion the subject of the tax remains the same. In each case the receipts or revenue of the person intended to bear the tax is the subject selected. The difference lies, not in the subject of the tax, but in the mode of collecting it and the diverse personal liabilities

(1) (1925) 35 C.L.R. 422; (1926) 38 C.L.R. 153. (2) (1920) 29 C.L.R. 39.

which result. Neither these considerations, nor the consideration that other countries may not recognize the company's right to deduct tax, appear to me to be relevant to the narrow question set by sec. 55 of the Constitution.

For these reasons I think both questions in the special case should be answered in the affirmative.

EVATT J. I have read the judgment of my brother *Dixon*. I agree with his interpretation of sec. 20 (2) (*b*) of the *Income Tax Assessment Act*, and with the reasons advanced by him for such an interpretation. I also agree with his opinion that sec. 55 of the Constitution does not apply to the present case.

In my opinion, the argument that the sub-section is *ultra vires* because of its extra-territorial application is unsound. I expressed my opinion fully upon this question in the recent case of *Trustees Executors & Agency Co.* v. *Federal Commissioner of Taxation* (1), where I held that the principle indicated in the judgment of Lord *Macmillan* in *Croft* v. *Dunphy* (2) must be applicable to such a case as the present.

If a company pays debenture interest to persons outside Australia, it is within the competence of the Commonwealth Parliament to tax the recipient of the debenture interest in respect of its receipt, or to tax the company which is here in respect of the debenture holder's receipt of the interest. Whether the Legislature does so by making the company the agent for the debenture holder is nothing to the point. In all such cases the law passed is obviously one in relation to the peace, order and good government of the Commonwealth with respect to taxation (sec. 51 (II.) of the Constitution).

MCTIERNAN J. I agree, for the reasons assigned by my brother *Dixon*, that both questions in the special case should be answered in the affirmative.

Questions answered in the affirmative.

Solicitors for the appellant, *Arthur Robinson & Co.*

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

H. D. W.

(1) (1933) 49 C.L.R. 220.

(2) (1933) A.C. 156.