[HIGH COURT OF AUSTRALIA.]

FORWOOD DOWN AND COMPANY LIMITED APPELLANT;

AND

THE COMMISSIONER OF TAXATION (WESTERN AUSTRALIA) . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1935.

PERTH, *Aug.* 26.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Dividend Duties—Assessment—Company dealing in machinery—Mining lease acquired with machinery—Sale of lease and machinery—Profit from sale taken into profit and loss account—Profit from trading or business operations—Dividend Duties Act 1902-1931 (*W.A.*) (*No.* 32 *of* 1902—*No.* 47 *of* 1931), *secs.* 5, 6.

A company manufacturing and dealing in machinery sometimes bought mining machinery *in situ* upon mines which had closed down. To avoid removing the machinery at once it in some cases acquired the leases of the mines. Usually it treated such leases as of no value and abandoned them after the removal of the machinery. But in the case of one such lease, it let the mine on tribute and subsequently sold the lease together with machinery. It took the profit on the sale into its profit and loss account, and was assessed to duty thereon under the *Dividend Duties Act* 1902-1931 (W.A.).

Held that the profit was not an increment arising from an appreciation in the value or the realization of capital assets, but was a profit arising from the trading or business operations of the company within the interpretation placed by *W. Thomas & Co.* v. *Commissioner of Taxation* (*W.A.*), (1931) 45 C.L.R. 539, upon the *Dividend Duties Act*.

Decision of the Supreme Court of Western Australia (*Dwyer* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

Forwood Down & Co. Ltd. carried on the business of general and structural engineers and manufacturers and dealers in machinery.

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In the course of its business it purchased machinery which had been in use at mines. On occasions, where the mine had been closed down, it purchased the lease of the mine so that it could leave the machinery at the site pending resale. Usually the lease so purchased was surrendered or allowed to lapse as soon as the machinery was disposed of. In 1923 the company and George Ridway purchased mining leases of the Lancefield Gold Mining Co. (in liquidation) together with plant and machinery. From time to time portions of the machinery were sold and removed from the mine. The mine was let on tribute, and in 1933 the leases, together with the remaining machinery, were sold for a consideration consisting of shares in the purchasing company. The vendor company estimated its profit on the transaction at £8,500 and took that amount into its profit and loss account as "profit on sale of leases." It was assessed to duty on that amount under the *Dividend Duties Act* 1902-1931 (W.A.), and it appealed against the assessment to the Supreme Court of Western Australia. *Dwyer* J. dismissed the appeal.

From that decision the company now appealed to the High Court.

Ward and *O'Reilly*, for the appellant. The *Dividend Duties Act* does not tax all profits, but only profits derived from the carrying on of a business. The acquisition of leases for resale was not a business operation of the company. The company did not carry on the business of buying and selling mining leases, and therefore was wrongly assessed. *W. Thomas & Co.* v. *Commissioner of Taxation (W.A.)* (1) is authority for the proposition that only the ordinary trading profits of a company are taxable. The expression "carrying on," in relation to business, connotes "a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated" (per *Brett* L.J. in *Smith* v. *Anderson* (2); see also *Coglan* v. *Federal Commissioner of Taxation* (3)). As to the meaning of profits, see *In re Spanish Prospecting Co.* (4). If the acquisition of the leases is regarded as a business operation, then the disposal of them was a termination

(1) (1931) 45 C.L.R. 539.
(2) (1880) 15 Ch. D. 247 at pp. 277, 278.
(3) (1932) 47 C.L.R. 109, at p. 111.
(4) (1911) 1 Ch. 92.

of that operation. The surplus is, therefore, not taxable (*Federal Commissioner of Taxation* v. *Ryan* (1); *Commissioner of Taxation (W.A.)* v. *Newman* (2); *Hickman* v. *Federal Commissioner of Taxation* (3)). All that happened in this case was the appellant changed one form of investment (i.e., the mining lease) for another (viz., shares in a company) (see *Doughty* v. *Commissioner of Taxes* (4)). The judgment appealed from is wrong in that it attributes to the appellant company an intention to acquire the leases for resale. The intention is attributed because the company could have converted the mining leases to a machinery area. Actually, under the Western Australian Mining Regulations the appellant company could not have held these leases as machinery areas. *Blockey* v. *Federal Commissioner of Taxation* (5) has no application. Profits from a joint venture are not necessarily taxable and that case is no authority to the contrary. Properly understood, it supports the conclusion that profits from an isolated joint venture are not profits from the carrying on of a business and therefore are not taxable.

Wolff, for the respondent, was not called upon.

The following judgments were delivered:—

RICH J. I think that the conclusion arrived at by *Dwyer* J. is entirely supported by the facts. His Honor did not, I think, accept the evidence that the property was not intended to be resold but that it was acquired and intended to be retained as a capital asset. In the course of his judgment his Honor said:—"But in view of the company's letter of 28th June 1923 I think the company's present statement of its intention is mistaken and that there was throughout a purpose to resell the mine if that could be effected. Some of the machinery was disposed of during succeeding years, but a substantial quantity was retained. I gather from the company's communication that the portion disposed of was regarded as surplus plant and the residue kept was sufficient to work the mine." I would add that the company did not intend to work the mine itself. I consider

(1) (1926) 38 C.L.R. 472.
(2) (1921) 29 C.L.R. 484.
(3) (1922) 31 C.L.R. 232.
(4) (1927) A.C. 327.
(5) (1923) 31 C.L.R. 503.

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that the facts warrant the conclusion that the sale in question resulted in a profit arising from carrying on the business of the company.

The appeal should be dismissed with costs.

STARKE J. I agree that the appeal should be dismissed.

It appears to me that the mining lease and machinery on it were acquired by the appellant in the ordinary course of business as machinery merchants; it was disposed of at a date distant from the time of purchase but it was disposed of in the ordinary way of business. The realization of the mining lease and machinery was not a mere change of investment but acts done in carrying on or carrying out the business operations of the appellant. Some little difficulty might have occurred as to the profit made on the transaction but for the fact that the parties in the Court below treated the sum assessed as a profit made on the sale of the mining lease. I see no reason why we should doubt the accuracy of the parties' assessment of the profit.

DIXON J. I agree that the appeal should be dismissed.

The decision in *W. Thomas & Co.* v. *Commissioner of Taxation (W.A.)* (1) restricts the application of the expression occurring in sec. 6 of the *Dividend Duties Act* 1902-1931, "all profits made by such company," to profits arising from the trading or business operations of the company and excludes profits such as increments arising from the appreciation in the value or the realization of capital assets of the company.

The question in the present case is whether the value of shares in a mining company acquired by the taxpayer company in consideration of the transfer of some mining leases and plant answers the description profits arising from the trading or business operations of the company. The taxpayer company conducts a business of general and structural steel engineers and manufacturers and dealers in machinery. In the course of this business, the company bought mining machinery as it stood on the mines, where it had been in use. In the case of mines that had closed down, it found it con-

(1) (1931) 45 C.L.R. 539.

venient to purchase at the same time the mining lease. It could then leave the machinery *in situ* until a favourable opportunity occurred of disposing of it. After the removal of the machinery, the taxpayer company would ordinarily surrender or abandon the lease. But, in 1923, in conjunction with one Ridgway, it acquired a mining lease which in the event was disposed of in a different manner. Probably the purpose which the taxpayer company had in view was substantially the same. But it began by attempting to resell the whole undertaking as an entirety. Then it let a tribute in respect of the sands. Some machinery was removed, but the inference is open, or, at least, not negatived, that the balance sufficed for the proper working of the mine. *Dwyer* J. has found that throughout there was a purpose of reselling the mine.

On an appeal under sec. 30 of the *Dividend Duties Act* 1902-1931 I think the burden of proof is on the taxpayer, and this view of the company's purpose cannot, in my opinion, be considered disproved by the evidence. But, in any case, on the view of the company it acquired the lease in the ordinary course of its business as a necessary accompaniment of the machinery. It did not acquire it as premises it intended to occupy indefinitely. The lease was paid for by expenditure chargeable against revenue. It was, on the company's contention, a valueless concomitant of the machinery it bought, to be held only until the machinery was disposed of and removed. On removal it would be abandoned, if it was not resold ; not worked as a fixed asset in the undertaking. There never was any use on the part of the taxpayer company of the mine or the plant thereon, and, I think, never any intention to use it. It did not represent fixed capital devoted to the production of profit by means of operation or use. The transaction by which it was disposed of was not, it is true, ordinarily within the scope of the company's trading operations. It is suggested that the shares received as consideration for the sale cannot be regarded as more than a change in the form of the company's legal and commercial title to the property ; that the transaction by which the lease and machinery was transferred for shares was not part of the conduct of the trade or business of the taxpayer (see *Doughty* v. *Commissioner of Taxes* (1)). But, both

(1) (1927) A.C., at p. 336.

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Dixon J.

in the statement of facts and in the profit and loss account, a definite value is assigned to them. No proof was led upon the manner in which this value was arrived at. For all that appears, the shares may have possessed a value on the market which made them the equivalent of so much money. They may have been immediately convertible.

On the whole of the somewhat meagre facts, I do not think the taxpayer company has shown that the profit appearing in its accounts is not an actual profit from the trading and business operations of the company.

The appeal should be dismissed with costs.

EVATT J. When analyzed, the case for the company rests mainly upon the supposed antithesis, in describing its purpose in acquiring the mining lease, between the purpose of storing machinery on the lease and the purpose of reselling the lease. The antithesis is a false one because, in point of fact, the company acquired the lease for *both* purposes, not only that of storing machinery pending the sale of the latter, but also that of reselling the lease when a place of storage was no longer required. In all the circumstances, the transaction of buying and selling the lease was sufficiently related to the company's business to bring the profit into tax in accordance with the principles enunciated in *W. Thomas & Co.* v. *Commissioner of Taxation (W.A.)* (1).

The appeal should be dismissed.

MCTIERNAN J. I agree that *Dwyer* J. arrived at a correct conclusion in finding that the appellant joined with Ridgway in an ordinary profit-making venture in the way of its business, and that the venture was to buy the Lancefield mine and machinery and to resell at a profit and that these objects were carried out.

It follows that the learned Judge was correct in holding that the amount in question should be regarded as profits taxable under the *Dividend Duties Act* (see *Thomas's Case* (1)).

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dwyer & Thomas.*

Solicitor for the respondent, *J. L. Walker* K.C., Crown Solicitor for Western Australia.

(1) (1931) 45 C.L.R. 539.