[HIGH COURT OF AUSTRALIA.]

PERPETUAL TRUSTEE COMPANY (LIMITED) AND ANOTHER . . . . . } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1937-1938.

SYDNEY, 1937, *Dec.* 9, 10. 1938, *April* 11.

Latham C.J. Rich, Starke, Dixon and McTiernan JJ.

Estate Duty (Cth.)—Estate situate partly within and partly without Australia—Deduction—Duty payable in respect of part of estate without Australia—Method of determining quantum—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 8 (7).

Sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928 provides: "When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate."

Held, by *Latham* C.J., *Starke*, *Dixon* and *McTiernan* JJ. (*Rich* J. dissenting), that the method of determining the amount of Federal estate duty payable in respect of that part of an estate situate outside Australia is to take that proportion of the total duty to which the estate is liable which the value of the assets outside Australia, after the deduction of a ratable part of all the debts, bears to the net value of the whole estate.

CASE STATED.

On an appeal to the High Court by Perpetual Trustee Co. (Ltd.) and Irene Rita Paul, the executor and executrix respectively of the will and codicils of Michael Stephen Foley deceased, against an assessment of Federal estate duty, a case was stated for the opinion of the Full Court. The facts were agreed between the parties as follows:—

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

1. Michael Stephen Foley, of Drummoyne, near Sydney, in the State of New South Wales (hereinafter called the deceased) died on 5th June 1934.

2. At the time of his death the deceased was resident and domiciled in Australia. His estate comprised both real and personal property in Australia and personal property in England, and there were debts owing in Australia and in England.

3. The deceased made a will and two codicils, probate whereof was duly granted to the appellants Perpetual Trustee Co. (Ltd.) and Irene Rita Paul, the executor and executrix named therein, by the Supreme Court of New South Wales in its probate jurisdiction, and the probate was duly resealed by the High Court of Justice in England in its Probate, Divorce and Admiralty Division.

4. The Federal Commissioner of Taxation assessed the value of the estate of the deceased for the purpose of estate duty under the *Estate Duty Assessment Act* 1914-1928 at the sum of £80,471, made up as follows :—

Gross value of estate—		
Assets situated in Australia	£72,134	
Assets situated in England		
£29,508 13s. 11d. (English currency)		
Australian currency	36,886	
	£109,020	£109,020
Allowable deductions—		
Debts owing in Australia	£27,818	
Debts owing in England		
£584 14s. 9d. (English currency)		
Australian currency	731	
	£28,549	£28,549
		£80,471

5. The assets in England were valued for the purpose of English estate duty at the sum of £29,432 2s. 11d., English currency (£36,790 Australian currency), and there were debts owing by the deceased

in England amounting to the sum of £584 14s. 9d., English currency (£731, Australian currency). The difference between the sum of £29,432 2s. 11d. and the sum of £29,508 13s. 11d. referred to in par. 4 hereof represents an addition to the assets in England resulting from a refund of income tax.

6. English estate duty was assessed upon the net value of the assets in England after deduction of the debts owing in England, namely, £28,847 8s. 2d., English currency (£36,059, Australian currency), being at the rate of ten per cent. Such English estate duty, amounting to £2,884 14s. 10d., English currency (£3,605 18s. 6d., Australian currency) was lawfully paid by the appellants.

7. The Commissioner of Taxation assessed estate duty under the *Estate Duty Assessment Act* 1914-1928 upon the estate of the deceased at the sum of £5,407 1s. 6d., made up as follows :—

Duty at the rate of 15 per cent upon £80,471 ..	£12,070 13 0
Less rebate to comply with sec. 8 (6) of the Act in respect of so much of the estate as passed to the widow or children or grandchildren of the deceased	3,898 13 0
	£8,172 0 0
Less deduction under sec. 8 (7) of the Act ..	2,764 18 6
	£5,407 1 6

8. The sum of £2,764 18s. 6d. referred to in par. 7 hereof is the sum assessed by the respondent Commissioner of Taxation as being within the meaning of sec. 8 (7) (*b*) of the *Estate Duty Assessment Act* 1914-1928 the duty which is payable under the Act in respect of the part of the estate of the deceased situate in England.

9. The sum of £2,764 18s. 6d. represents :—

$$\frac{36886 - \frac{36886}{109020}\ (28549)}{80471} \text{ of } £8,172\ 0\ 0$$

that is to say, that proportion of the total duty to which the estate is liable which the value of the assets in England, after deduction

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

of a proportion of all the debts, bears to the net value of the whole estate. The proportion may be otherwise expressed as the proportion which the gross value of the assets in England bears to the gross value of the whole estate, that is to say—

$$\frac{36886}{109020} \text{ of } £8,172\ 0\ 0.$$

10. The appellants lodged notice of objection against such assessment and upon the objection being disallowed appealed to the court.

11. A question has arisen in the said appeal as to the proper mode of determining what is, within the meaning of sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928, the duty which is payable under the Act in respect of the part of the estate of the deceased situate in England.

12. The appellants contend that for the purpose of determining the duty no deduction should be made from the gross value of the assets in England or alternatively that if any deduction is to be made such deduction should not exceed the amount of the English debts.

13. The respondent contends that such duty is properly determined in the manner stated in par. 9 hereof.

The questions stated for the opinion of the Full Court were :—

1. Has the respondent Commissioner of Taxation adopted the correct method of determining what is, within the meaning of sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928, the duty which is payable under the Act upon the part of the estate of the deceased situate in England ?
2. If the answer to question 1 is in the negative, how otherwise should the duty be determined ?

Street, for the appellants. The extra amount of duty payable under sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928 by reason of the presence of foreign assets is the difference between (*a*) the duty on the estate inclusive of the foreign assets, and (*b*) the duty on the estate exclusive of the foreign assets. Sec. 8 (7) was enacted for the purpose of avoiding double taxation ; the intention was that allowance should be given for duty properly paid in respect

of the foreign assets (*Douglass* v. *Federal Commissioner of Taxation* (1)). The expression " that part of the estate " means the amount of the foreign assets without the deduction of any debts, or, alternatively, at most, with the deduction of foreign debts (*Permanent Trustee Co. of New South Wales Ltd.* v. *Commissioner of Stamp Duties* (2)); otherwise, indirectly, double payment would result. If the commissioner's determination renders the estate liable to a larger duty by reason of having foreign assets that is, in effect, a retaxing of the foreign assets (*The Commonwealth* v. *Queensland* (3)). The answer to question 1 in the case stated should be in the negative, and to question 2, that the duty payable should be the difference between the duty on the estate inclusive of the gross foreign assets and the duty on the estate minus the gross foreign assets, or, alternatively, there should be taken into account, if not the gross foreign assets, the foreign assets less only the foreign debts.

Sugerman, for the respondent. The estate should not be regarded as consisting of Australian and foreign assets, it should be regarded as an aggregate. The correct method of determining the duty payable upon that part of the deceased's estate situate outside the Commonwealth is the method set forth in par. 9 of the stated case. This is the method adopted by the respondent. The " duty payable . . . in respect of that part of the estate " is a part of the " total duty to which the estate is liable " which must first be ascertained. Both are duties " under this Act." In computing the part, regard must be had to the statutory method of computing the duty of the whole estate. This involves the assessment of the value of the estate by deducting " all debts " (sec. 17) from the real property situate within the Commonwealth and the personal property " wherever situate " (sec. 8 (3) (*b*), (*c*)), and the application thereto of duty " at the rates declared by the Parliament " (sec. 8 (2)). Under the *Estate Duty Act* 1914, the rate declared is a rate varying with " the total value of the estate after deducting all debts." As to this method, see *Wallace* v. *Attorney-General*, *Jeves* v. *Shadwell* (4)

(1) (1931) 45 C.L.R. 95, at pp. 102, 107.
(2) (1930) 30 S.R. (N.S.W.) 350, at pp. 353, 354; 47 W.N. (N.S.W.) 124, at pp. 125, 126.
(3) (1920) 29 C.L.R. 1, at pp. 20, 25.
(4) (1865) 1 Ch. App. 1, at pp. 7, 8.

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

and *In the Will of Harding* (1). *Douglass* v. *Federal Commissioner of Taxation* (2) is distinguishable. The real question which arose in that case was different from the question in this case; there it was a question of what was meant when reference was made to one sum as being included in another sum. The following four methods are other possible ways of determining what is the amount of duty in respect of part of the estate, but all four are incorrect:—(*a*) Ascertain the amount by which the duty was increased by the inclusion of the foreign assets, that is, find the difference between (i) the duty on the estate inclusive of the foreign assets, and (ii) the duty on the estate minus the foreign assets. This method involves taking into account the increase in the rate flowing from the increase in quantum of the estate. There is not any more justification for attributing the increase in the rate to the addition of the foreign assets to the Australian assets than there is for the reverse process of attributing it to the addition of the Australian assets to the foreign assets. (*b*) Treat the foreign assets (or those assets less the foreign debts) as an independent estate and apply to it the rate of duty appropriate to an estate of that value. This method ignores the requirements of the Act by treating the estate as two separate estates rather than as one aggregate. (*c*) Apply the rate per centum, at which the duty is calculated upon the estate, to the gross foreign assets. This method applies to a gross amount forming part of the estate a rate of duty which is intended to be applied to the net estate and which varies with the amount of the net estate. (*d*) Apply the rate per centum, at which the duty is calculated upon the estate, to the foreign assets less the foreign debts. This method is incorrect in attributing to the phrase "foreign debts" any other significance than as a mere convenient mode of referring to the debts due in the foreign country. Those debts do not form a class attributable to the foreign assets by contrast with Australian debts attributable to Australian assets; all debts are provable *pari passu* in the administration of either part of the estate (*In re Kloebe* (3)). Further, this method applies to part of the estate, after a deduction of an amount of debts which bears no relation to the whole amount, a rate of duty

(1) (1896) 7 Q.L.J. 126, at p. 131.
(2) (1931) 45 C.L.R. 95.
(3) (1884) 28 Ch. D. 175.

intended to be applied to the total net estate, after deducting "all debts" (sec. 17), and varying with a net estate after deducting "all debts" (*Estate Duty Act* 1914).

Street, in reply. If, as is suggested, the debts in the estate have no locality, then the method *a* or *c*, as referred to on behalf of the respondent, should be followed. Method *a* is the method followed in *Douglass* v. *Federal Commissioner of Taxation* (1).

Cur. adv. vult.

1938, April 11.

The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this case stated is as to the principle according to which a deduction should be allowed from the amount of Commonwealth estate duty payable in respect of an estate when the estate includes property outside Australia.

The *Estate Duty Assessment Act* 1914-1928 provides in sec. 8 (7) that estate duty shall be levied and paid upon the value as assessed under the Act of the estates of persons dying after the commencement of the Act. Sec. 8 (3) provides that the estate of a deceased person who is domiciled in Australia shall comprise his real property in Australia and his personal property wherever situate.

Sec. 8 (7) is as follows: "When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate."

Part IV. of the Act provides for returns to be made setting out the values of all items comprised in the estate. Sec. 17 provides that in the case of the estate of a deceased person who was at the time of his death domiciled in Australia all debts due and owing by the deceased at the time of his death shall be deducted from the gross value of the assessable estate.

The deceased, Michael Stephen Foley, who was at the time of his death domiciled in Australia, owned both real and personal

(1) (1931) 45 C.L.R. 95.

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

property in Australia and personal property in England, and he owed debts to persons in Australia and to persons in England. The value of the estate in Australia and England respectively and the amount of the debts so owing are set out in the case stated. An amount equivalent to £3,605, Australian currency, was paid in England as English estate duty. The duty assessed upon the value of the estate under the Commonwealth *Estate Duty Assessment Act* was £8,172. The question which arises is as to the proper deduction to be made under sec. 8 (7), and, more particularly, as to the amount which can properly be described as " the duty payable under this Act in respect of that (that is, the English) part of the estate."

The appellants contend that the principle to be applied is that a calculation should be made of the amount by which the Commonwealth duty was increased by reason of the inclusion of the English estate—this amount to be ascertained by calculating the difference between—(*a*) the duty on the estate inclusive of the English assets (gross or, alternatively, net); and (*b*) the duty on the estate exclusive of those assets (gross or, alternatively, net); and that this amount is the amount to be compared with the amount of duty paid in England for the purpose of ascertaining what sum should be deducted under sec. 8 (7).

Another suggestion on behalf of the appellants is that the amount of duty payable in respect of the English part of the estate should be ascertained by simply applying the rate per centum at which duty in Australia is calculated upon the whole to the gross English assets or, alternatively, to the net English assets.

The commissioner, on the other hand, contends that a proportion of the total debts should be attributed to each and every one of the assets according to its value, so that the total amount of the duty should be distributed in proportion to the value of the assets in Australia and in England respectively.

In order to decide between these opposing contentions it is necessary to consider carefully the exact provisions of the relevant section. For the purpose of applying sec. 8 (7) it is necessary in the first place to ascertain whether duty is paid in any place outside Australia in respect of any part of the estate situate outside Australia.

The amount of that duty must be ascertained. Then that amount must be compared with the duty payable under the Commonwealth Act in respect of that part of the estate. The lesser of these two sums is to be deducted from the total duty otherwise payable. The section assumes that it is possible to ascertain the amount of the total Commonwealth duty which is payable in respect of any part of the estate in respect of the whole of which that duty is imposed. The actual calculation to be made is a calculation of the part of the total amount of duty which is payable in respect of the part of the estate which is outside Australia. The rest of the duty must then be regarded as payable in respect of that part of the estate which is inside Australia. This second part of the duty must be calculable in precisely the same way and by the same method as in the case of the duty payable in respect of the part of the estate which is outside Australia ; that is, the total of the two amounts of duty calculated as paid upon the part of the estate inside Australia and as paid upon the part of the estate outside Australia must, when added together, be equivalent to the single total amount of duty which, apart from sec. 8 (7), is the amount of duty actually payable. Any method of calculation which does not bring about this result cannot be justified under the terms of the Act. I therefore proceed to examine in the light of this principle the methods suggested by the appellant and the commissioner respectively.

The Act provides only for a single assessment of the duty to be paid. There are not two separate assessments and charges of duty, one on property inside Australia and another on property outside Australia. Duty is calculated on the value of the whole estate, ascertained by deducting from the value of the assets the amount of all the debts of the deceased. The whole of any particular asset may in fact be absorbed, in the course of administering the estate, in payment of a debt or debts. It would, however, in my opinion, be wrong to say that therefore that asset bears no part of the estate duty. A proportion of the duty paid must be regarded as having been paid as in respect of that asset. So also the burden of duty, charged as it is upon the net value of the whole estate, cannot be regarded as being imposed only upon the assets out of which, perhaps quite fortuitously, it happens to be paid. Thus each £1

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

of the assets should be regarded as providing its ratable contribution to payment of duty. If the debts amount to one-fifth of the assets, then 4s. out of each £1 of the value of each asset should be regarded as expended in paying the duty.

All debts owed by the deceased must be paid out of his estate in a due course of administration. In relation to the Australian Act there appears to me to be no warrant for describing some debts as English debts and others as Australian debts. The amount of taxation imposed by the Act depends upon ascertaining the value of the estate by deducting the value of all debts from the value of all assets of a deceased person which are taxable.

These principles lead me to the conclusion that the method proposed by the commissioner is correct. This method ascertains the amount of the Commonwealth duty payable in respect of the part of the estate outside Australia by taking a proportion of the duty which is the same as the proportion of the value of the assets outside Australia to the value of the total assets. (The result is necessarily the same if all the debts are ratably deducted from the two sets of assets, that is, if each £1 in each set of assets is charged with the same amount of debts, and the proportion of the reduced outside assets is then taken to the reduced total assets.) If this method is adopted it will be found that the condition to which I have referred in the first part of this judgment is satisfied in all cases, namely, the amount of duty payable in respect of the assets outside Australia, ascertained by this method, together with the amount of duty payable in respect of the assets inside Australia, ascertained by this method, when added together, produce an amount which is the actual duty payable (apart from sec. 8 (7)). The other methods suggested do not bring about this result.

For the purposes of illustration I take an estate valued at £10,000 and for the purpose of simplicity I assume that there are no debts. Let £8,000 worth of assets be in Australia and £2,000 worth of assets outside Australia. The rates of duty according to the schedule of the *Estate Duty Act* 1914 are as follows :—On an estate of the value of £2,000—£1 per cent; on an estate of the value of £8,000—£2 2s. per cent; on an estate of the value of £10,000—£2 6s. per cent. The duty payable upon an estate of £2,000 would be

£20; the duty payable upon an estate of £8,000 would be £176; the duty payable upon an estate of £10,000 would be £260.

It is clear that the amount to be deducted cannot be the amount of tax which would be payable in respect of the part of the estate which is outside Australia if it were itself an estate taxable under the Act. The *Estate Duty Act* imposes a graduated rate of taxation, not a flat rate. Thus it is obvious that if an estate of £10,000, instead of being taxed at the higher rate applicable to £10,000, is divided into two parts, and the two parts are taxed separately at the rate applicable to each part, then the sum of the taxes on the two parts will not amount to the amount of taxation which would be payable if all the assets were taxed together in one estate. In the above example it will be seen that if the £2,000 and the £8,000 are taxed separately, the total amount paid is £196, while, if the £10,000 is taxed as a single estate, the amount paid is £260. The appellants did not argue that such a method as this should be adopted.

It was contended for the appellants that the proper question to ask is: "By what amount is the duty increased by reason of the inclusion of the English assets in the estate for the purpose of assessment of Commonwealth duty?" If this method is applied the position would be as follows:—The duty chargeable on an estate of £8,000 would be £176. With the English assets included, however, the duty chargeable would be £260. The difference between these two amounts thus results in an increase of £84 in the amount of duty paid. This sum is said to represent "the duty which is payable under this Act in respect of that "(English)" part of the estate" (sec. 8 (7)). When, however, the same principle is applied for the purpose of calculating the part of the £260 which is payable in respect of the part of the estate which is inside Australia, the position is that an amount of £20 would be payable on the estate in England of £2,000, if the Australian estate were excluded. The actual amount payable on the whole estate of £10,000 is £260. Therefore the amount of duty payable is increased by reason of the inclusion of the Australian estate from £20 to £260, that is, by £240. Thus the suggested method brings about this result—when we seek to ascertain what proportion of a sum of £260 is paid in respect of the English and Australian assets respectively we find that £84 is paid in respect

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

of the English assets and £240 in respect of the Australian assets—in all a sum of £324. It is, in my opinion, plainly impossible to hold that the sum of the parts of the duty is greater than the whole duty, and therefore a method which brings about such a result should be rejected.

The other contention submitted for the appellants is that the amount of duty payable in respect of the English part of the estate is an amount to be ascertained by applying the actual rate of duty upon the whole (net) estate to the gross (or net) value of the English assets. When there are no debts this method is identical in result with that of the commissioner. When there are debts, however, the result is very different. If, for example, the net value of all assets were £10,000, but the gross value of English assets were £20,000, then, according to this contention, the amount of duty payable in respect of the English part of the estate would obviously be greater than the whole amount of the duty payable in respect of the whole of the estate—the part would be greater than the whole. This is an impossible result.

A similar criticism is applicable if a comparison of the net value of English assets with the net value of all assets is taken as the method of ascertaining the amount of the Australian duty which is payable in respect of the part of the estate situate outside Australia. The net value of English assets (that is, gross value of such assets less English debts) might be £100,000. There might be heavy debts in Australia so that the net value of the whole estate would be a much smaller sum, say £5,000. Australian duty would be charged only on £5,000 but the proportion of the net value of the English estate to the net value of the whole estate would be twenty to one. According to this method the amount of Australian duty payable under the Act in respect of the English part of the estate would be twenty times the amount of the whole Australian duty payable in respect of the whole estate. Such a result, in my opinion, condemns the method which brings it about.

It is not an effective reply to the argument which I have just stated to point out that in such a case the section deals with the matter by prescribing the deduction of the lesser of the two amounts mentioned in sec. 8 (7) and that the lesser of these amounts would,

in the cases which I have mentioned, be the amount specified in par. *a* of sec. 8 (7), namely, the amount of duty paid in the place outside Australia. (It may be observed that obviously this amount itself might be greater than the whole amount of the Australian duty.) The point is that the section requires a calculation of the amount of Australian duty which is payable under the Act in respect of the part of the estate which is situated outside Australia. That amount cannot possibly be greater than the whole amount of the Australian duty payable. It may be added that it is quite possible that a deceased person dying domiciled in Australia should leave only assets in one or more countries, only debts in one or more countries, and both assets and debts in one or more countries. The taxation laws of these countries may vary in relation to the assets chargeable with tax, the deduction of debts, rates of tax, and other matters. No construction of sec. 8 (7) should be adopted which would make it impossible to apply the section in all the varying circumstances indicated. It happens, in the present particular case, that the English revenue law does not allow the deduction of debts owed to persons resident out of Great Britain, though in other cases some such debts may be deducted for the purpose of ascertaining the assets chargeable with duty (*Finance Act* 1894 (57 & 58 Vict. c. 30) sec. 7 (2)). Thus in the present case what may be called the net English personal estate (in the sense of English assets less debts payable to persons resident in England) happens to represent the assets in respect of which English estate duty has been calculated. But duty might be calculated upon a different basis upon assets in England or some other country. Sec. 8 (7) should be construed in such a manner as to be capable of application in all these cases.

No difficulties arise if the debts (wherever owing) are regarded as attributable to all the assets (wherever situated) in proportion to the gross value of the assets. Thus, if one-fifth of the assets is in England, one-fifth of the Australian duty is to be regarded as paid in respect of that part of the estate: the remaining four-fifths of the duty is paid in respect of the other part of the estate. The duty payable on the whole of the estate is therefore equal to the sum of the amounts of duty payable in respect of all the parts of the estate. Thus this method satisfies the general principle which, I have

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

suggested, is necessarily involved in the application of the section, and it satisfies it in all cases, whatever the relative value of assets or amounts of debts may be, and whatever the local situation of the assets or debts may be.

The method which the commissioner has adopted therefore appears to me to be sound in principle. All the other methods suggested produce in some cases results which appear to me to be inconsistent with the assumption made under the section that the whole of the duty can be divided into parts which can be attributed to the assets situated in different countries.

Question 1 in the case stated is as follows : " Has the respondent Commissioner of Taxation adopted the correct method of determining what is, within the meaning of sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928, the duty which is payable under the said Act upon the part of the estate of the deceased situate in England ? "

In my opinion this question should be answered in the affirmative.

RICH J. This is a case stated raising a question as to the mode of calculating the deduction from estate duty allowed by sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928. The sub-section allows a deduction from what would otherwise be the duty calculated under the general sections of the Act, that is to say, it is not a deduction made from the value of the assets in assessing the net value of the duty, but from the preliminary computation of the tax payable on that value. The object of the deduction is to afford relief against double taxation in the case of an estate of a person domiciled in Australia. The estate of such a person includes for the purpose of assessment of estate duty all property real and personal situated in Australia and personal property situated elsewhere. It contemplates the payment of death duty under the law of some other country or countries upon the property situated out of Australia and provides for a deduction of tax by way of relief against double taxation which otherwise would follow from the inclusion of the personalty in the estate liable for Australian duty. Sec. 8 (7) is as follows : " When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so

paid in the place outside Australia ; or (*b*) the duty which is payable under this Act in respect of that part of the estate." The special case is based upon the assumption that the smaller of the two amounts of duty will be the duty payable under the Commonwealth Act in respect of the estate outside Australia. The place where it is situated is Great Britain and the tax in question is British estate duty. What we are asked to decide is how to find how much of the Australian duty is payable in respect of that part of the estate included in the value for Australian duty which is situated in Great Britain and upon which duty is lawfully paid. There are debts payable in England as well as debts payable in Australia. Of course, the whole of the debts irrespective of the place of payment were deducted in assessing the value of the estate for purposes of Australian duty. The English debts were a very small proportion of the whole, and the difficulty is to know how debts ought to be treated in arriving at the part of the estate to which the alternative limb of sec. 8 (7) marked *b* refers. The Commissioner of Taxation has treated every pound (£) in the total gross value of the value of the estate as calculated for Australian duty as bearing a proportionate amount of all the debts wherever payable. Then he has subtracted that amount or proportion in the pound (£) from the amount of the English personalty and treated the residue as the part on which the deduction is to be calculated. The problem is a difficult one but I do not think this solution does justice to the purpose of the sub-section as disclosed on its face. The question is one of construction. The limb or par. *b* of the sub-section uses a relative expression when it speaks of that part of the estate. The antecedent is expressed in the first part of the sub-section, viz. : " When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia." This portion of the sub-section states in full the description which must be applied in finding the amount of the deduction. The view which appears to me most plausible is that it describes the very part of the estate upon which the overseas tax, i.e., the British tax, has been calculated. In fact the British tax is calculated on the English assets, which, in this case, are all personalty, after deducting the debts payable in England. If this net amount is taken it gives a portion of the estate upon

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

which Australian duty is calculated and it is that portion to which par. *a* of sub-sec. 7 would apply. It seems reasonable to think that in the alternative between par. *b* and par. *a* the legislature was concerned only with the rate of tax and not with the part of the estate to be taxed. It is easy to understand why the Australian legislature should not allow a deduction of a higher rate of tax than its own tax. Also the words with which sub-sec. 7 begins read in their natural sense describe the very thing taxed abroad.

In my opinion the questions in the case stated should be answered : —(1) No. (2) The duty should be determined by deducting from the amount of duty which otherwise would be payable upon the value for duty of the estate wherever situate such a proportion of that amount as bears to the whole the same proportion as the value in Australian currency of the net balance of the personal estate upon which British duty was paid, that is to say, the net balance of the personal estate in Great Britain after deducting the debts owing in Great Britain, bears to the value for duty of the assets wherever situate ; unless the amount of such British duty be lower than the product.

STARKE J. Case stated for the opinion of this court. The facts are fully stated in the case and I shall not repeat them.

The question for our consideration is the application of the provision of sec. 8 (7) of the *Estate Duty Assessment Act* 1914-1928 to the facts so stated. So far as is material to this case the sub-section is as follows : " When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act . . . (*b*) the duty which is payable under this Act in respect of that part of the estate."

Estate duty is imposed upon the value of a conglomerate mass of property which is called the estate of the deceased after making the deductions allowed by the Act and not upon the value of each asset forming part of that mass (*National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1)). Moreover, the rate of tax is graduated according to the total

(1) (1916) 22 C.L.R. 367.

value of the estate after deducting all debts (*Estate Duty Act* 1914).

The difficulty is in ascertaining in these circumstances the duty that is payable under the Act in respect of that part of the estate situate outside Australia. The section first states the case in which a deduction is allowable and that is the only function of that part of the section. By sub-sec. 7 (*a*) the amount of duty so paid may be deducted but that is not this case and may create some difficulties of its own in apportionment. But sub-sec. 7 (*b*) has nothing to do with the duty paid outside Australia. It is concerned with the duty payable under the Commonwealth Act in respect of that part of the estate of the deceased situate outside Australia.

The commissioner contends that the debts of the testator should be marshalled, or perhaps it would be more correct to say apportioned ; that is to say, that a proportionate part of the debts should be set against the assets situate outside Australia. The duty payable under the Act is thus the proportion of the total duty to which the estate is liable which the value of the assets situate outside Australia after deduction of a proportion of all the debts bears to the net value of the whole estate.

On consideration I think this is the most accurate solution of the difficulty that has been propounded.

The main contention for the appellant was that the duty payable under the Act in respect of the assets outside Australia is the amount by which the duty was increased by the inclusion of the outside assets, that is, the difference between the duty on the estate inclusive of the outside assets and the duty on the estate less the outside assets. But that method is fallacious on its face in the case of a tax at a graduated rate. All the other methods suggested in aid of the appellants during the argument are equally fallacious.

Consequently, in my opinion, the first question stated in the case should be answered in the affirmative.

Dixon J. The question for decision turns upon the interpretation of the provision in the Commonwealth *Estate Duty Assessment Act* 1914-1928 which authorizes a deduction from the estate duty otherwise payable, when some form of death duty is levied in respect of foreign assets by the country in which they are situate. The

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

provision, which is sub-sec. 7 of sec. 8, is in the following terms: "When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate."

A serious difficulty in the application of par. *b* of this sub-section is occasioned by the consideration that situation in or out of Australia is an attribute of the deceased's assets, that is, his gross estate, whereas estate duty is paid in respect of the value of his net estate, that is, the balance remaining after deducting debts and other charges from the value of his assets. When a person domiciled in Australia dies his real and personal property in Australia and his personal property elsewhere are comprised in his estate, the value of which for duty is obtained by deducting debts and charges wherever payable.

In the present case the deceased, whose place of domicil was Australia, left real and personal property here and personal property in England. He left debts amounting to about twenty-seven per cent. of his assets. Of these debts less than three per cent. were payable outside Australia. His English assets, however, constituted a full third of the total value of the gross estate. The substantial position giving rise to the difficulty can be shown by taking hypothetical figures based on these percentages or proportions. Thus, take the following values, all expressed in Australian money:—

Real and personal property in Australia ..	£8,000
Personal property outside Australia	£4,000
Gross value of assets everywhere	£12,000
Debts payable in Australia	£3,150
Debts payable outside Australia	£100
Total debts	£3,250
Value of estate for duty	£8,750

This last figure of £8,750 is that upon which Commonwealth duty is to be calculated in the first instance. From the amount so calculated there is to be deducted the smaller of the two sums

described in pars. *a* and *b* respectively of sub-sec. 7. The first of these is the amount of duty paid in the place outside Australia in respect of any part of the estate there situate. The amount of duty, English estate duty, so paid was calculated on the balance remaining after deducting from the value of the personal property situate outside Australia, the amount of the debts payable outside Australia, that is, in the figures supposed, on £4,000 less £100 or £3,900. The second of the two sums the lower of which is allowed as a deduction is the duty which is (otherwise) payable under the Commonwealth Act in respect of " that part of the estate," that is to say, the part before mentioned. It is the mode of computing this sum that we are called upon to determine. The full " duty which is payable under this Act," to use the phraseology of par. *b*, is " payable in respect of " the value of the estate for duty, viz., £8,750. How do you find the " duty which is payable under this Act in respect of that part of the estate " which fills the description given earlier in the sub-section ?

The answer which the commissioner gives to the question is based upon the view or assumption that the description is filled by the gross assets situate outside Australia, that is, in the example above, by the £4,000. If you take that figure and ask, how much of the duty calculated upon or " payable in respect of " the £8,750 is " payable in respect of " the £4,000, the nature of the problem is seen as one of apportionment. The problem, if so stated, is how to apportion between two parts of a gross sum, namely, between the £4,000 representing assets outside Australia and the £8,000 representing assets in Australia which are the two parts of the £12,000 representing the total gross value of the estate, an amount, namely, the total duty, calculated as a percentage of a net sum arrived at by making a deduction from the gross sum. You have a sum, the Commonwealth duty, which is calculated on £8,750, being £12,000 less £3,250. How much of it, you ask, is " attributable to," " referable to " or " paid in respect of " each of the two parts of the £12,000, namely, the £4,000 and the £8,000 ? If the £3,250 is deducted ratably from each and every part of the £12,000, if, that is to say, the £100, representing debts payable abroad, is not to be thrown exclusively against the £4,000 and the £3,150, representing

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

debts payable in Australia, is not to be thrown against the £8,000 but, on the contrary, every pound of the £12,000 bears its equal proportion of £3,250, then the question scarcely would admit of any other answer than that which the commissioner's mode of calculation imports. For, taking the amount of Federal estate duty which would be payable on the value for duty of the entire net estate, he attributes to the £4,000 that proportion of the total duty which the value of the assets abroad, after deducting a ratable proportion of all the debts, bears to the value for duty of the entire net estate. Or what is the same thing, he attributes to the £4,000 that proportion of the total duty which the value of the gross assets abroad bears to the value of the entire gross estate. Thus, upon the figures taken above as an illustration, the commissioner says that

$$\frac{4{,}000}{12{,}000}$$

of the estate duty was the proper deduction.

But the basal assumption of all this is that when par. *b* uses the words " in respect of that part of the estate " it refers to a description which is filled by the gross assets situate out of Australia, in the example given, the £4,000. It appears to me that the first question for consideration is whether this assumption is well founded or is erroneous. If the words and the sense of sub-sec. 7 are closely considered, it will be seen that the whole provision hinges on the introductory clause : " When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia." It is to this clause that par. *a* goes back when it speaks of " the amount of duty so paid." It is to this clause that par. *b* refers when it employs the phrase " that part of the estate." " That part " is the part " in respect of which duty is lawfully paid in " the " place outside Australia." " That part " is not simply the assets there situate. The description involves more than locality. It involves the ascertainment of what part of the estate was made liable for duty in the other country. It must be part of the estate dutiable in Australia, it must be situate out of Australia, but then it is to be the very part upon which, to take this case, English estate duty was lawfully paid. Does this mean " that part " consisting of gross assets ? Or does it mean the net value considered as a " part " ?

English estate duty was not levied upon the value of the assets in England less a ratable proportion of the total debts of the deceased. It was levied upon the English assets less only the debts payable in England. To take again the figures supposed above, it was not levied on: £ $(4{,}000 - \frac{4{,}000}{12{,}000} \times 3{,}250)$ or £ $(\frac{4{,}000}{12{,}000} \times 8{,}750)$ but on £4,000 — £100 or £3,900.

If the part of the estate made liable for duty in England, the part "in respect of which duty is lawfully paid in the place outside Australia," can be considered the net value of the part, it would be arrived at in this manner. In other words, it would be the revenue law of England that would ascertain the proportion of debts to be thrown against the gross assets there situated. It would do so because the Commonwealth provision, in speaking of the part of the estate situate outside Australia in respect of which duty is lawfully paid in a place outside Australia, would be taken to refer to that value forming part of the total estate which the legislation of the other country selected for taxation.

But, on the whole, I do not think that sub-sec. 7 of sec. 8 will bear a construction by which the expression "that part of the estate" is made to refer to the net value in respect of which duty is lawfully paid in any place outside Australia. For, in the first place, that net value might exceed the net value of the total estate. It might do so if, to take as an example the case of a man dying domiciled in Australia leaving personalty in England, the difference between the English assets and the English debts exceeded the difference between total personalty and total debts. In such a case the net value of the English estate could not be a "part" of the net value of the whole. In the second place, the words "part situate" naturally refer to assets or property and not to a net value consisting in the balance of an account expressed in money values. The tax or duty, whether English or Australian, is payable "in respect of" the property or assets although it is calculated by a process which allows a deduction of debts.

The assumption made by the commissioner, the correctness of which I have described as the first question, appears to me for these reasons, to be well founded. Upon this view the question which remains must, I think, be regarded as arising on the words "duty payable . . . in respect of." Do these words admit of any

H. C. OF A. 1937-1938.

PERPETUAL TRUSTEE CO. (LTD.) v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

other method of defining the relationship between the "duty payable" and the assets "in respect of" which it is paid than a ratable apportionment? It has been contended that they may be interpreted as referring to the amount by which the Australian duty is increased by the inclusion of the assets outside Australia. Perhaps the legislature intended this result. Certainly the consequence of adopting a ratable proportion is in many cases to leave a greater amount of double taxation payable than it may be supposed the legislature contemplated. But I think the words "payable in respect of" cannot be construed as equivalent to "payable by reason of the inclusion of" that part. Unless they were so construed the increase of duty arising from the inclusion of the English assets could not be taken as the deduction authorized by sec. 8 (7) (*b*).

The suggestion that the English debts might be thrown against the English assets and that the rate of duty payable on the net estate from all sources might be applied to the balance appears to me to have no warrant in the words of the sub-section, unless upon the construction which I have already rejected, namely, that the "part of the estate situate outside Australia" means the net value upon which duty was levied in the country where the part was situated.

I have not dealt directly with the arguments advanced by counsel for the taxpayer. The interpretation and application of sec. 8 (7) (*b*) has caused me much difficulty, and I have thought it better to state the reasons depending upon the construction of the words of the provision which strike my mind as determining the character of the problem and the conclusion.

In my opinion the first question in the case stated should be answered: Yes.

The second question is contingent upon a negative answer being given to the first.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Question 1 *in the case stated answered in the affirmative.*

Solicitors for the appellants, *McMaster, Holland & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.