[HIGH COURT OF AUSTRALIA.]

WESTERN GOLD MINES NO LIABILITY . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER OF TAXATION (WESTERN AUSTRALIA) . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1937-1938.

MELBOURNE, 1937, *Nov.* 9.

1938, *Feb.* 24.

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

Dividend Duty (W.A.)—Company carrying on business in Western Australia—Sale of mining leases at profit—Realization of capital—Dividend Duties Act 1902-1931 (*W.A.*) (*No.* 32 *of* 1902—*No.* 47 *of* 1931), *secs.* 5, 6.

In order that mining leases which it had acquired and developed in Western Australia might be more successfully developed, the appellant company sold them to a company with a larger capital which was formed to take over the leases. The consideration received by the appellant for the sale comprised a sum of money and a number of shares in the new company. The face value of the shares and the sum of money together exceeded the expenditure of the company in the acquisition and development of the leases. The company retained the shares and did not realize them.

Held that no part of the excess constituted a profit upon which the appellant was liable to pay duty under the *Dividend Duties Act* 1902-1931 (W.A.), as the transaction amounted to a change in the form of an investment and was of a capital nature.

W. Thomas & Co. Ltd. v. *Commissioner of Taxation* (*W.A.*), (1931) 45 C.L.R. 539, applied.

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

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

APPEAL from the Supreme Court of Western Australia.

Western Gold Mines No Liability, a company formed in Victoria to acquire an option over certain gold-mining leases and a pipe track in Western Australia, was registered or entitled to be registered as the holder of those leases and the pipe track under the *Mining Acts* (W.A.). The company did certain exploratory work on the leases, and in September 1933 it had become evident to those in control of the company that the mines could be worked profitably by large-scale processes only and that the company had insufficient capital to develop the mines and undertake such operations, its nominal capital being £50,000 only. It was then decided to promote a larger company to acquire and work the properties. Accordingly, a new company, called Triton Gold Mines No Liability, with a capital of £600,000, was formed in Victoria for the purpose of acquiring the properties. The consideration for the sale to the Triton company was the issue to the appellant company by the Triton company of 200,000 shares of 10s. each in its capital, credited as fully paid, and a sum of £50,000 in cash. The Commissioner of Taxation of Western Australia treated the sale price of the properties as £150,000 and from this sum deducted £107,265, the cost of the leases, various items of expenditure and capital paid up in cash. The balance of £42,736 he treated as a profit made by the appellant in Western Australia for the year ended 30th June 1934 and accordingly assessed the company to duty amounting to £3,071 13s. under the *Dividend Duties Act* 1902-1931 (W.A.). The company appealed from the assessment to the Supreme Court of Western Australia by way of originating summons, and the Supreme Court (*Dwyer* J.) affirmed the assessment.

From that decision the company appealed to the High Court.

Wilbur Ham K.C. (with him *Coppel*), for the appellant. Secs. 5 and 6 of the *Dividend Duties Act* 1902-1931 (W.A.) impose a duty upon the profits made in every year by a company carrying on business in Western Australia. The Act is referring to profits arising from the trading or business operations of the company, and not to profits of any description, such as increments arising from the appreciation in the value or the realization of capital

assets of the company (*W. Thomas & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (1); *Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (2)). In this case the learned judge did not find that the company's business was buying and selling leases (*Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioners of Taxation* (3)). The profits were not earned in Western Australia (*Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (4); *Grainger & Son* v. *Gough* (5); *Commissioner of Taxation (W.A.)* v. *D. & W. Murray Ltd.* (6); *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (7)).

[LATHAM C.J. referred to *Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (8).]

The present case is not like that case. This company was not carrying on business in Western Australia.

Fullagar K.C. (with him *Tait*), for the respondent. There are two questions to be considered: first, was this sum profit, and, secondly, was it profit earned in Western Australia? (*W. Thomas & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (1); *Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (2)). This is not a case of accretion to or an increase in value of a capital asset, but is one in which a profit has been derived from a commercial venture (*Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (9); *California Copper Syndicate Ltd.* v. *Harris* (10); *Commissioners of Inland Revenue* v. *Livingston* (11); *Jolly* v. *Federal Commissioner of Taxation* (12)). The onus in an appeal is on the taxpayer, and there is, in this case, a finding against him (*California Copper Syndicate Ltd.* v. *Harris* (10)). Where you get a profit-making transaction such as this, it is liable to taxation (*Blockey* v. *Federal Commissioner of Taxation* (13); *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (14)). What produced the profit was what

(1) (1931) 45 C.L.R. 539.
(2) (1935) 53 C.L.R. 403.
(3) (1933) 50 C.L.R. 268, at pp. 297, 298.
(4) (1908) A.C. 46.
(5) (1896) A.C. 325, at pp. 340, 341.
(6) (1929) 42 C.L.R. 332.
(7) (1931) 46 C.L.R. 417.
(8) (1937) 57 C.L.R. 36.
(9) (1928) 41 C.L.R. 148, at p. 151.
(10) (1904) 5 Tax Cas. 159.
(11) (1926) 11 Tax Cas. 538, at pp. 542, 543.
(12) (1934) 50 C.L.R. 131, at pp. 137-139.
(13) (1923) 31 C.L.R. 503.
(14) (1933) 50 C.L.R., at p. 297.

H. C. OF A. 1937-1938. WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

was done in Western Australia, viz., the exploratory work which added to the profits. The profits were thus derived in Western Australia (*Smith* v. *Greenwood* (1)). The reason why the shares in the *California Copper Syndicate Case* (2) were held to be taxable as profits was that they could be turned into cash immediately. In the present case it is a realizable security, but that does not make any difference. Either the profit was earned in Western Australia or some part of it was earned there and the rest in Victoria.

Wilbur Ham K.C., in reply. *Livingston's Case* (3) is the strongest cited against the appellant. That case shows that changing the character of the article is carrying on a trade. But the appellant did not change the character of the land in any way and did not carry on any trade at all. The only source of profit is from the mining of gold and not from the change of ownership.

Cur. adv. vult.

1938, Feb. 24. The following written judgments were delivered :—

LATHAM C.J. A person may buy something for the purpose of keeping it with the object of earning income or deriving other advantages from it ; or, on the other hand, he may buy something to sell at a profit. When in fact it happens that an opportunity offers for selling at a profit what has been bought, questions arise as to whether the transaction of sale is a change of a form of investment or whether it is the making of a profit in a commercial transaction. In the former case the profit is not taxable as income ; in the latter case it is. The mere fact that something has been sold at a profit does not make that profit part of the income of the seller. In the case of an individual it is sometimes easy to draw the distinction. If a man buys a house for the purpose of living in it, and subsequently sells it at a profit, that sale is not a step in a profit-making transaction and it does not produce income. If, however, a person is found to be in the habit of buying and selling dwelling-houses, even though he lives in them himself, he may be held to be

(1) (1907) 2 K.B. 385. (2) (1904) 5 Tax Cas. 159.
(3) (1926) 11 Tax Cas. 538.

engaged in a business of deriving income from such sales. On the other hand, the purchase of stock-in-trade for the purpose of resale is plainly the beginning of a profit-making enterprise which is completed by the resales and the receipt of the profits. Any profit made upon such a transaction is plainly to be taken into account in estimating the income of that person. In the case of companies which carry on business for the purpose of profit the question appears to me to be more difficult than in the case of individual persons. Such a company has no private life, but the distinction between making an investment or changing the form of an investment, on the one hand, and trading in things for the purpose of making a profit, on the other hand, is necessarily recognized also in the case of companies. If a company sells its business premises at a profit, the profit would not be income. But, if it carries on a business of selling land, the profits are income. A difficulty arises in the case of both individuals and of companies with respect to isolated transactions. The fact that a transaction is isolated does not necessarily show that it is not a profit-making enterprise. Every business must begin with a single transaction, but when the question arises after only one transaction has taken place the question becomes more difficult. In what I have said I have attempted to state the principles for which certain well-known cases may be cited as authority (*Californian Copper Syndicate Ltd.* v. *Harris* (1); *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* (2); *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (3); *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (4)).

The present case arises under the *Dividend Duties Act* 1902 (as amended) of Western Australia. *Dwyer* J. has held that a profit on the sale by Western Gold Mines No Liability of certain mining leases to Triton Gold Mines No Liability is a profit assessable to duty under the Act. Western Gold Mines No Liability has appealed to this court.

The tax is payable in respect of all profits made by the company in Western Australia (sec. 6). In *W. Thomas & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (5) it was held that the Act applies only

(1) (1904) 5 Tax. Cas. 159.
(2) (1910) 5 Tax Cas. 658.
(3) (1914) A.C. 1001; 18 C.L.R. 413.
(4) (1928) 41 C.L.R. 148.
(5) (1931) 45 C.L.R. 539.

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

Latham C.J.

to trading or business profits and not to profits arising from the realization of capital assets. (See also *Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (1)).

The company actually acquired the leases in question on 22nd September 1933, admittedly with the object of reselling them at a profit to the Triton company, which was formed for the purpose of acquiring them. The agreement for sale to the Triton company was made with a trustee for that company on 28th September 1933 and was adopted by that company on 2nd October 1933. It is urged for the commissioner that these facts are conclusive—that they show that the actual acquisition of the leases at the time when they were acquired —in September 1933—was purely and simply for the purpose of resale at a profit. It is argued, on the other hand, that it is not proper to look only at these facts—that the whole dealing of the company with the leases must be considered before reaching a conclusion upon the question whether, in what the company did with respect to the leases, it was engaged in a profit-making transaction by way of trading in leases. I agree that the whole transaction must be considered (See *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (2)). The further relevant facts are that the company acquired an option to buy the leases on 23rd January 1933, and, by the agreement made on that occasion, undertook to test and explore the land. The company spent some £15,000 in doing this. The result was that it was ascertained that the development and exploitation of the property would require much more capital than that controlled by the company. There were practical difficulties in the way of increasing the capital of the company and accordingly it was decided to form a new company—the Triton company—for the purpose of acquiring the leases and working them. The consideration was taken by Western Gold Mines No Liability in the form of £50,000 cash and 200,000 10s. shares—the £50,000 cash was paid away as the purchase price of the leases under the agreement under which the company had the option of purchase. It is sought to impose tax upon the value of the 200,000 shares less certain deductions.

(1) (1935) 53 C.L.R. 403.

(2) (1928) 41 C.L.R., at pp. 151, 152.

The case is, in my opinion, by no means free from difficulty, but I have reached the conclusion that the profit in this transaction is not taxable under the Act. I base this conclusion upon the following considerations :—Western Gold Mines company is a no-liability company formed under Part II. of the *Companies Act* 1928 of Victoria. It is a company formed " for mining purposes." The rules of the company empower it to sell its property, but this fact throws no light upon the nature of any particular sale. The evidence shows, I think, that there was no intention, when the option was acquired, to sell the leases. The intention was to explore and examine and, when further information was obtained as a result of investigation, to determine how best to exploit the property, if such exploitation should appear to be probably profitable. If the investigation had shown that the property was of little or no value, the option would not have been exercised. The investigation in fact showed that the property was of considerable value, and the question which arose was that of determining how best to develop and work the property so as to obtain that value. The capital of the company was insufficient for that purpose : further capital was necessary. The sale to the Triton company, from which the profit alleged to be taxable was obtained, was a means of bringing in further capital so as to work the mining property and to obtain profits from it by way of dividends upon the 200,000 shares.

Thus, I regard the whole transaction, not as part of a business of trafficking in mining leases, but as consisting in the acquisition of and dealing with mining leases for the purpose of securing a profit from working the leases. The company acquired the leases, sold them, and took shares in the purchasing company, not for the purpose of making a profit on the sale, but for the purpose of securing to itself a share in the profits to be obtained from working the leases. Thus, in my opinion, the profit on the sale was not a trading profit gained in the carrying on of a business, and it is not taxable under the Act.

The question asked in the originating summons is : " Whether under the provisions of the *Dividend Duties Act* 1902 and the amendments thereto the said assessment by the respondent of the profits

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

of the appellant for the year ended 30th June 1934 at £42,736 was correct."

In my opinion the appeal should be allowed and the question answered in the negative.

STARKE J. The *Dividend Duties Act* 1902-1931 of Western Australia imposes a tax upon all profits made by every company carrying on business in Western Australia. This court held, in *W. Thomas & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (1), that the tax was imposed upon profits arising from trading or business operations and not upon the proceeds of a realization or an enhancement in value of its capital assets (*Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (2); and cf. *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (3) and cases there cited). The facts are not in dispute, and the only question is the proper legal conclusion from these facts. The appellant was a company formed in Victoria for mining purposes. It had very extensive powers, including powers to acquire mining properties and leases in any part of the world, and to carry on and conduct the business of mining, to promote and organize any other company for the purpose of acquiring or otherwise dealing with all or any of the property or rights of the company and to sell, exchange or otherwise deal with all or any part of its property or rights.

The appellant had acquired certain gold-mining leases and a pipe track in the State of Western Australia, and was registered or entitled to be registered as the holder of those leases and the pipe track under the *Mining Acts* of that State. The capital of the appellant company was not sufficient for the purpose of developing and working its properties to the best advantage. It was then decided to form a new company with a capital of £600,000 to take over the properties. Accordingly, a new company was formed in Victoria for mining purposes and was called Triton Gold Mines No Liability. It also had extensive powers, including the adoption of an agreement for the sale and purchase of the appellant's properties made between it and a trustee for a company to be formed under the

(1) (1931) 45 C.L.R. 539. (2) (1935) 53 C.L.R. 403.
(3) (1928) 41 C.L.R. 148.

name of Triton Gold Mines No Liability, and the power to carry on and conduct mining operations.

The consideration for this sale and purchase was the issue to the appellants by the Triton company of 200,000 shares of 10s. each in its capital, credited as fully paid, and a sum of £50,000 in cash within a certain time. The commissioner treated the sale price of the lease &c. as £150,000, and from this sum deducted £107,265 the cost of the leases, various items of expenditure and capital paid up in cash. The balance, £42,736, he treated as a profit made by the appellant in Western Australia for the year ended 30th June 1934 and assessed it to duty accordingly under the *Dividend Duties Act* 1902-1931 already mentioned. The assessment was upheld in the Supreme Court of Western Australia, and an appeal is now brought to this court.

Now, the facts make it clear that the appellant acquired the mining properties for the purpose of working and development, but it had not sufficient capital to carry out that purpose. So it promoted a new company with more capital and turned over its mining properties to it for a consideration in cash and shares. The proceeds arose from a realization of the appellant's assets and not from any mining or business operations on its part (Cf. *Evans* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (1) and *Tebrau* (*Johore*) *Rubber Syndicate Ltd.* v. *Farmer* (2); *Commissioner of Taxation* (*W.A.*) v. *Newman* (3)).

It has been said that it is often difficult in practice to draw the line between income and capital receipts, but that difficulty is seldom solved by the refinements of legal analysis. The question must ultimately resolve itself into a conclusion of fact, having regard to the circumstances of each particular case. And the present case, as it seems to me, is clearly outside the provisions of the *Dividend Duties Act* 1902-1931 of Western Australia.

The appeal should be allowed.

DIXON AND EVATT JJ. The starting point in the consideration of the present case is the decision of this court in *W. Thomas & Co. Ltd.* v. *Commissioner of Taxation* (*W.A.*) (4), which establishes

(1) (1936) 55 C.L.R. 80.
(2) (1910) 5 Tax Cas. 658.
(3) (1921) 29 C.L.R. 484.
(4) (1931) 45 C.L.R. 539.

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

Dixon J. Evatt J.

that under the *Dividend Duties Act* 1902-1924 (W.A.) the profits liable to tax are the " profits arising from the trading or business operations of a company, and not . . . profits of any description, such as increments arising from the appreciation in the value or the realization of capital assets of a company " (1). (See *Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (2).)

The profits which by the order under appeal have been adjudged taxable appear on an analysis of the assessment to consist in the face value of shares allotted to the appellant company in consideration for the transfer of the company's interest in certain mining leases. The transaction took place in September and October 1933. The interests of which the company was possessed comprised an option expiring on 8th November 1933 for the purchase of six gold-mining leases with some appurtenant and incidental rights and an absolute right to four other leases and to a mining reservation. The four mining leases and the option had been assigned to the company on its formation, which took place on 23rd January 1933. It was a working option for the acquisition of the six mining leases for a consideration of £50,000 in cash or, at the election of the purchaser, twenty-five per cent of the nominal capital of any company formed to acquire the leases. The mining reservation the company had acquired afterwards.

The nominal capital of the company was £50,000, of which the equivalent in shares of £10,000 and another £10,000 in cash had been applied in acquiring the option. It had spent also over £10,000 in exploratory work. Those who were in control of the matter decided to form another company to take over the leases and reservation in order to work them. The new company was registered on 29th September 1933 under the name of " Triton Gold Mines No Liability." Its nominal capital was fixed at £600,000, divided into shares of 10s. each.

On 26th September 1933 the appellant company entered into an agreement with a trustee for the then-intended company afterwards so registered. The appellant company agreed to sell to the new company its property comprising the mining leases and rights, the subject of the option agreement, and the mining reservation. As

(1) (1931) 45 C.L.R., at p. 547.

(2) (1935) 53 C.L.R. 403.

consideration for the sale the new company was to allot to the appellant company or its nominees 200,000 fully paid shares of 10s. and to pay it £50,000 in cash. The agreement was expressed as a sale of the mining leases and not of the option ; in other words, it proceeded on the footing that the appellant company would exercise the option and then transfer its right to the leases, as distinguished from assigning the option before its exercise to the new company. In fact notice exercising the option had been given by the appellant company on 22nd September 1933, that is, four days before the date of the agreement of sale. The election conferred by the option to pay the purchase price in cash or shares was made in favour of the cash consideration, and, accordingly, the appellant company became bound to pay the vendor of the gold-mining leases £50,000 in cash. Triton Gold Mines No Liability provided this sum in the cash consideration of £50,000 which it, as the new company, undertook to pay in addition to allotting 200,000 of its 10s. shares fully paid. It thus worked out that what the appellant company really obtained on the sale of the gold-mining leases and the mining reservation consisted in fully paid-up shares.

The account by which the commissioner has calculated the profit upon which he has levied dividend duty treats the gross receipts as £150,000 but allows the £50,000 payable on the exercise of the option as a deduction. It also allows further deductions representing expenditure and a special statutory concession. But the result is that the shares, put down as £100,000, less the expenditure and the special statutory deduction, are made the subject of the duty.

The appellant company has not converted these shares into money but has held them as an investment, and it does not appear on what basis they are brought into the account at their face value.

Dwyer J., who heard the company's appeal from the assessment of the commissioner, formed the conclusion that it had never been the company's intention to acquire the mine and work it as a going concern, but that it obtained the option for the purpose of testing the mining leases and then, if satisfied, of acquiring them, developing them and disposing of them. This view of the facts led him to hold that the profit was dutiable.

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

Dixon J. Evatt J.

In considering whether a profit arising from a transaction is of an income or capital nature, it is necessary to make both a wide survey and an exact scrutiny of the taxpayer's activities. We have become only too familiar with the standard or criterion which the law provides for distinguishing between the two descriptions of profit. (See *Jolly* v. *Federal Commissioner of Taxation* (1).) But it is a most unsatisfactory criterion, and a decision must often be made by reference to matters of degree and by reason of the weight given to particular circumstances affecting the activities of the taxpayer, and, further, by reliance upon that kind of imputed intention of which Lord *Sumner* speaks in *Inland Revenue Commissioners* v. *Blott* (2), when he says :—" The intention, which the final decision assumed, was one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact."

In the present case facts which it is unnecessary to discuss in detail appear to us to show that a number of persons connected with the financial and industrial activities of mining first obtained the option, then formed the appellant company and later Triton Gold Mines No Liability. They acted with the object of obtaining a mine which could be worked by some company in which they held a substantial interest. Their business was not that of buying and selling options or mining leases. When the appellant company was formed and the option was assigned to it, no one decided that the appellant company should not be the body to work the mine if it was decided to carry on mining operations indefinitely. The purpose was simply to explore, examine and then decide what was to be done. In September 1933, however, on a report that had been received, it was determined that capital must be raised from the public and, for this reason mainly, that a new company should be floated for the purpose of working the mine.

There is not much, if any, evidence in the materials laid before the court to show what, if any, other activities were pursued by the appellant company. Perhaps in the short period of its existence the appellant company had undertaken nothing except the investigation and exploitation of the mining leases. But, whatever the reason, the ambit of the survey of the taxpayer's operations in this case is,

(1) (1934) 50 C.L.R., at p. 139. (2) (1921) 2 A.C. 171, at p. 218.

on the facts before us, very narrow. We should, we think, adopt the assumption that the transaction under consideration does not represent an example of a general business carried on, or intended to be carried on, by the appellant company in investigating, acquiring and then disposing of mining leases and the like. We should treat it as a single transaction forming no part of any actual or intended system or organized business. So treating it, the operation appears to us to be no more than the conversion of a capital asset into a new form. The striking fact is that the appellant company did not realize the 200,000 shares it obtained as consideration for the transfer of the leases and did not enter upon the sale to Triton Gold Mines No Liability for the purpose of converting its interests in the leases and mining reservation into money. The reason for floating the latter company was not to provide money for the appellant company, but to facilitate the raising of money for the working of the venture and to give to the appellant company a new title to share in the success of the venture, namely, the 200,000 paid-up shares. It is true that the new title is a realizable asset, a marketable security. But the object was not to turn the marketable security into money. The uncertainty when the option was acquired as to what should be done and the insufficiency of the appellant company's nominal capital to work the mine on a large scale do not appear to us to show a scheme of profit-making by buying and selling. It is consistent with the intention to float a new company as was done in the event.

On the whole, we think that it was a capital transaction.

In our opinion the appeal should be allowed with costs. The order of *Dwyer* J. should be discharged, and in lieu thereof a declaration should be made that the profit of the appellant company derived from the disposal of the six leases and mining reservation under the agreement of 26th September 1933 is not liable to dividend duty, and an order should be made setting aside the assessment and remitting it to the commissioner with liberty to him to reassess the appellant company consistently with this order. The appellant company should have the costs of the proceedings in the Supreme Court.

McTIERNAN J. In my opinion the appeal should be allowed. The profits of the appellant company for the year ended 30th June 1934 were assessed by the respondent for the purposes of the

H. C. OF A. 1937-1938.

WESTERN GOLD MINES N.L. v. COMMISSIONER OF TAXATION (W.A.).

McTiernan J.

Dividend Duties Act 1902 and amendments at £42,736, and the duty payable in respect thereof at £3,071 13s. The validity of the assessment turns upon the question whether the evidence shows that the profits arose from " the trading or business operations " of the company. The Act does not impose a liability upon a company in respect of profits of every description. For example, the increase in the value of its capital assets or a profit made on the realization of capital assets are not within the scope of the Act (*W. Thomas & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (1); *Forwood Down & Co. Ltd.* v. *Commissioner of Taxation (W.A.)* (2)). The profits of the appellant which the commissioner has assessed for duty under the Act consist of the consideration in cash and the value of the shares, less deductions, which it received from Triton Gold Mines No Liability on the sale of certain gold-mining leases and other property which it had acquired on a working option. The cash that the appellant received was not more than the amount it had expended in exercising its option and thereby acquiring its interest in these leases and property. The shares which the appellant received have been retained by it. The evidence does not show that the appellant acquired the leases or the property with the intention of selling them to make a profit, or that it was any part of its business to acquire and sell mining leases and property. The appellant expended a sum of about £15,000 in developing and working the leases. The reason why the leases and the other property were sold to Triton Gold Mines No Liability was that the appellant's capital was insufficient to develop the property and it was necessary to form a new company with a nominal capital of £600,000 to take over the property. The fact as stated in the evidence is that " accordingly on the 26th day of September 1933 an agreement was entered into in Victoria between Western Gold Mines No Liability the appellant and Hugh Gerner Brain for and on behalf of a new company to be formed by which the appellant agreed to sell to such new company the said gold-mining leases and pipe track, water right and all other the premises mentioned in the option agreement dated the 8th day of November 1932 above mentioned and also portion of the mining reservations number 654H which had been acquired by the appellant

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

(2) (1935) 53 C.L.R. 403.

company as above mentioned. The consideration for the sale was that the new company should allot and issue to the appellant 200,000 shares of 10s. in its capital credited as fully paid up together with the sum of £50,000 in cash being the amount of cash which the appellant was required to pay to the Mararoa Gold Mining Co. No Liability upon the exercise of the option above mentioned. The new company was also required to take over the obligation to the Western Australian Government above mentioned."

The transaction was an exchange of capital assets. The profit arising from the exchange was an increase in the value of the appellant's assets. It was not a profit made in the course of the appellant's trading or business operations.

The question in the originating summons should be answered: No.

Appeal allowed with costs. Judgment of Supreme Court set aside. Question asked in originating summons answered: No. Appeal against assessment allowed with costs.

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

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

H. D. W.