

[HIGH COURT OF AUSTRALIA.]

JONES APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXA-
TION } RESPONDENT.

Income Tax (Cth.)—Assessment—Live stock—Natural increase—Value—Not previously taken into account—Cost price—Selection by taxpayer—Taxpayer's right of further selection during income year—Income Tax Assessment Act 1936 (No. 27 of 1936), secs. 34 (1), 35.

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SYDNEY,
April 26, 27.
MELBOURNE,
May 22.
Latham C.J.,
Rich, Starke
Evatt and
McTiernan JJ.

In purported exercise of rights conferred by secs. 34 (1) and 35 of the *Income Tax Assessment Act 1936*, a taxpayer who had elected under the *Income Tax Assessment Act 1922-1934* to omit from his account the value of the natural increase of his live stock selected, in the case of sheep, a "cost price" of ten shillings per head as the value of the natural increase at the beginning of the income year 1935-1936, and four shillings as the value thereof at the end of that year.

Held that the exercise of the option by the taxpayer under sec. 35 (2) (b) of the *Income Tax Assessment Act 1936* fixed, for the purposes of the Act, the value of such of the sheep as were natural increase previously omitted from his account at ten shillings not only at the beginning but also at the end of the income year. Sec. 34 (1) (b) of that Act did not give to him another option in relation to that stock.

CASE STATED.

On the hearing of an appeal to the High Court by Alfred Jones from an assessment made upon him by the Federal Commissioner of Taxation under the *Income Tax Assessment Act 1936-1937*, in respect of income derived by him during the year ended 30th June 1936, at the request of the parties, *Rich J.*, pursuant to sec. 198 of the Act, stated, for the opinion of the Full Court, a case which was substantially as follows :—

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1. The appellant at all material times was a grazier and carried on his business at Moree in the State of New South Wales.

2. On or about 21st October 1936 the appellant made a return of his income of the twelve months ended 30th June 1936 to the respondent as required by the *Income Tax Assessment Act* 1936.

3. In the course of his business the appellant from time to time acquired the natural increase of certain live stock comprising sheep, cattle and horses owned by him in connection with and for the purposes of his business.

4. Prior to the commencement of the *Income Tax Assessment Act* 1936 the appellant duly elected under sec. 16 of the previous Act (the previous Act wherever herein mentioned meaning the previous Act as defined in sec. 6 of the *Income Tax Assessment Act* 1936) to value his live stock at cost price and also to omit from the account required by par. *a* of sec. 16 the value of all natural increase of his live stock born during the respective income years, and accordingly the appellant made returns and was assessed for income tax under the previous Act on the basis prescribed by sec. 16, the value of the natural increase of his live stock being brought into account for the purposes of such returns and assessments only in so far as such natural increase was sold or otherwise disposed of by him and only in the respective income years in which it was so sold or otherwise disposed of.

5. Shortly before making the return mentioned in par. 2 hereof the appellant in the manner and within the time prescribed exercised his option under sec. 32 of the *Income Tax Assessment Act* 1936 by a separate notification signed by him requiring that the value of live stock to be taken into account should be the cost price thereof.

6. Together with the notification and within the time prescribed the appellant for the purposes of and in pursuance of sec. 35 of the *Income Tax Assessment Act* 1936 forwarded to the respondent a further notification in the form prescribed that in pursuance of sec. 35 the appellant selected as the cost price of natural increase of each class of live stock to be taken into account certain values per head, that is to say :—sheep, 10s. per head ; cattle, £5 per head ; horses, £3 per head. The values so selected by the appellant were within the limits prescribed (under the previous Act) referred to in par. *b*

of sub-sec. 2 of sec. 35 and were in each case not less than the lower of the limits prescribed under the *Income Tax Assessment Act* 1936 in respect of the value to be selected as the cost price of natural increase.

7. The cost price of the natural increase of the live stock of the appellant had not been previously taken into account under the *Income Tax Assessment Act* 1936 by the appellant.

8. Together with the notifications mentioned in pars. 5 and 6 hereof the appellant, within the time and in the manner prescribed for selection of cost prices of natural increase under sec. 34 (1) (b) of the *Income Tax Assessment Act* 1936, forwarded to the respondent a third notification, namely, a notification that in pursuance of sec. 34 of that Act he selected as the cost price of natural increase of each class of live stock to be taken into account, certain values per head, that is to say : sheep, 4s. per head ; cattle, £1 per head ; horses, £1 per head.

9. For the purposes of and in his return the appellant adopted as the values of the natural increase of each class of live stock still on hand at the end of the said income year, other than the natural increase of the said income year itself, the respective values selected by him as mentioned in par. 8 hereof.

10. The respondent assessed the appellant for income tax in respect of the income derived by him during the said income year and caused to be issued to the appellant a notification of such assessment under date 19th July 1937 together with an adjustment sheet explanatory of the assessment.

11. As appears from the adjustment sheet, the respondent in making the assessment brought into account as at the end of the said income year the natural increase of live stock of each class, which natural increase were on hand at the beginning and were still on hand at the end of the said income year, at the respective values per head selected by the appellant as mentioned in par. 6 hereof, that is to say, sheep, 10s. per head ; cattle, £5 per head ; horses, £3 per head.

12. By notice dated 3rd August 1937 and within the period specified in sec. 185 of the *Income Tax Assessment Act* 1936 the appellant lodged with the Deputy Commissioner of Taxation,

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Sydney, his objection to the assessment. The grounds of objection, so far as material, and as amended as a result of the correspondence referred to in par. 13 hereof, were: (a) that the assessment had been made contrary to the provisions of the *Income Tax Assessment Act* 1936, and was therefore illegal; and (b) that the commissioner had illegally altered the values selected by the appellant in terms of sec. 34 (1) (b) of the Act for the valuation of his live stock on hand at 30th June 1936.

13. Correspondence with reference to the grounds of objection passed between Messrs. Ross Sampson & Co., agents for the appellant, the appellant and the Commissioner of Taxation, Sydney, the Commissioner of Taxation, so far as concerned the assessment and notice of objection, being addressed and writing in his capacity of Commonwealth Deputy Commissioner of Taxation.

14. By letter dated 15th November 1937 the Deputy Commissioner of Taxation, Sydney, notified the appellant of the decision upon the objection, that is, that he had partly allowed ground (a) referred to in par. 12 hereof, and had disallowed ground (b), and on that date caused to be issued to the appellant a notice of amended assessment giving effect to that decision together with an adjustment sheet explanatory of the alteration made in the assessment and wherein it was stated that the assessment in regard to live stock trading figures was in order.

15. By letter dated 7th December 1937 and within the period specified in sec. 187 of the *Income Tax Assessment Act* 1936 the appellant informed the Deputy Commissioner of Taxation, Sydney, that he was dissatisfied with the decision on the objection and requested that his objection be treated as an appeal and forwarded to the High Court, and this appeal has been duly instituted.

The following questions were reserved for the opinion of the Full Court:—

- (i) Whether the appellant was entitled to adopt as the cost prices of the natural increase (of his live stock) still on hand at the end of the income year ending 30th June 1936, other than natural increase of the said income year itself, the respective values selected by him as mentioned in par. 8 of the case stated.

- (ii) Whether the respondent was correct in assessing the appellant on the basis that the cost prices selected by the appellant as the values of the natural increase (of his live stock) on hand at the commencement of the said income year should be taken as the respective values of so much of the same natural increase of each class as still remained on hand at the end of the said income year.
- (iii) Whether the appeal should be allowed or should be dismissed.

The relevant statutory provisions are set forth in the judgment of *Latham C.J.* hereunder.

Weston K.C. (with him *A. R. Taylor*), for the appellant. Sec. 28 of the *Income Tax Assessment Act* 1936 merely provides that all trading stock at the beginning and end of the income year shall be taken into account as ascertained under the subdivision in which that section appears, namely, subdivision B of division 2 of the Act. It is left to other sections to fix the basis of calculation and to provide for the selection of the value per head. Secs. 29 and 33 are irrelevant to the question raised in this appeal, for the value of the stock, which is the subject of the appeal, was not ascertained in the year preceding the year of income. Sec. 34 (1) (b) admittedly operates during the income year under consideration. The appellant duly selected the cost price, e.g., 4s. in the case of sheep, under sec. 34 (1) (b), and that value should apply at the commencement and end of the relevant year unless there is any provision in sec. 35 to the contrary. Sec. 35 only provides as regards the “carry-over” stock for the value of 10s. as the value to be taken into account in ascertaining the value of the trading stock on hand at the beginning of the income year. The section is silent as to the value to be taken into account for the same stock at the end of the year and, therefore, the value selected under sec. 34, e.g., 4s. in respect of sheep, is applicable.

Hooton, for the respondent. Pursuant to sec. 28 (1) of the *Income Tax Assessment Act* 1936, the value ascertained under subdivision B of division 2 of the Act of all trading stock on hand at the beginning

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of the income year and of all trading stock on hand at the end of that year shall be taken into account. With respect to the natural increase omitted from the account under the previous Act and still on hand at the beginning of the first year of income to which the 1936 Act applies there was not any value which had been ascertained at the end of the immediately preceding year. Natural increase previously omitted is not provided for by sec. 29 but is specially provided for by sec. 35. Under sec. 35, if market selling price had been chosen as the basis for valuing live stock under the previous Act, the market selling price is to be taken for the purpose of valuing the previously omitted natural increase as at the beginning of the first year of income to which the 1936 Act applies (sec. 35 (2) (a)). Sec. 35 does not provide in terms, as regards the case falling within sub-sec. 2 (a), that the market selling price is also to be taken as at the end of the year for such of the natural increase in question as is still on hand at the end of the year. Having brought the natural increase in question in at market selling price as at the beginning of the year—for the opening figures of the account—it must be assumed, in the absence of a special direction in the Act, that the same stock, so far as still on hand, should be brought in at the end of the year—for the closing figures—on the same basis, that is to say, of market selling price. The Act, however, contains a direction for the ascertainment of the basis of value at the end of the year. This is to be found in sec. 32, which must be read in conjunction with sec. 33. Therefore, in a case falling within sec. 35 (2) (a) market selling basis of value must be taken as at the end of the year unless the commissioner gives leave to do otherwise. A similar position obtains as regards cost price under sec. 35 (2) (b). Where cost price is actual it does not change. It is submitted that the same applies to the artificial cost price once it has been ascertained in respect of particular natural increase. Sec. 35 (3), and particularly the words “ascertained as the cost price of natural increase,” shows that the value per head arrived at under sub-sec. 2 (b) of that section is, for the purposes of the Act, to be the cost price of the previously omitted natural increase in question. It is by ascertaining the cost price of previously omitted natural increase according to the method prescribed by sec. 35 (2) (b) that as regards

such natural increase the value at the beginning and at the end of the year is ascertained for the purposes of sec. 28. Sec. 34 does not apply to the special case dealt with by sec. 35. Sec. 34 deals only with the cost price of natural increase of the first and subsequent years of the 1936 Act. The following considerations show that sec. 34 does not apply to cases falling under sec. 35 :—(i) Sec. 35 (1) gives a distinct advantage to the taxpayer in that it gives him a free debit for the natural increase on hand at the beginning of the first year of income although he had not previously brought such natural increase into account as income. If the appellant's contention is correct, then taxpayers such as the appellant are given a further advantage, namely, by bringing the natural increase in question into account at a high figure for the beginning of the year and at a low figure for the end of the year they are able to reduce or extinguish the amount of assessable income in question or to show a loss for the year. The court will not conclude that this was the intention of the legislature unless the words it has used are so clear as to compel the court to adopt such conclusion. (ii) Sec. 34 (1) (b) clearly deals with the natural increase of the first year of income to which the 1936 Act applies. The cost price selected under that provision becomes the cost price of natural increase of subsequent years by virtue of sec. 34 (1) (a). Sec. 35 (3) also deals with the natural increase of the first year of income to which the 1936 Act applies and sec. 35 (2) (b) allows the taxpayer to select a cost price for the natural increase of such first year of income ; but here the limits within which the selection may be made are limits prescribed under the previous Act, that is to say, they are different limits from the limits available under sec. 34 (1) (b), which are restricted to the 1936 Act. Again, the cost price selected under sec. 35 (2) (b) becomes the cost price of natural increase of subsequent years (sec. 35 (3)). Thus, sec. 34 and sec. 35 deal with the same matter in different ways. (iii) The appellant contends for two cost prices, but there cannot be two cost prices and at the same time an application of sec. 34 (1) (a), because there is only one taking into account, namely, when the account is made up at the end of the year for income tax purposes. "Previously taken into account" in sec. 34 (1) (a) means taken into account in the making up of the

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account at the end of the preceding year. "Last taken into account" in sec. 34 (1) (a) means taken into account in respect of the preceding year. If in the last taking into account there are two cost prices the question arises : Which cost price is to be taken for the purposes of sec. 34 (1) (a) ? (iv) If—as the respondent contends is not the case—there are two takings into account in the one year, one at the beginning and the other at the end of the year, then, looking at the matter as at 30th June 1936, there had been a previous taking into account of the natural increase in question under the 1936 Act, namely, the taking into account at 1st July 1935, and such previous taking into account was the last taking into account under sec. 34 (1) (a), and, the case thus coming under sec. 34 (1) (a), the result would be that the cost price to be adopted as at 30th June 1936 would be the cost price as at 1st July 1935, namely, in respect of the appellant's sheep in question, a price of ten shillings.

Weston K.C., in reply.

Cur. adv. vult.

May 22.

The following written judgments were delivered :—

LATHAM C.J. By the *Income Tax Assessment Act* 1922-1934, sec. 16 (a), it was provided that the assessable income of any person should include, *inter alia*, profits derived from any trade or business and converted into stock-in-trade. It was directed that for the purpose of computing such profits the value of live stock (subject to an exception) not disposed of at the beginning and end of the period in which the income was derived should be taken into account, except when the taxpayer otherwise elected pursuant to par. *aa* of the section. Sub-par. ii of par. *a* required live stock to be valued, for the purpose of the account, at either cost price or market selling price at the option of the taxpayer. For the purposes of this provision the "cost price," in relation to natural increase, was a value per head selected by the taxpayer within prescribed limits. These provisions were applicable both to purchased live stock and to the natural increase of live stock owned by the taxpayer. The section, however, contained in par. *aa* a special provision which, if the taxpayer so elected, could be applied to the natural increase of stock. Instead of taking

such increase into account at cost price or market selling price, the taxpayer could elect to omit from the account of his income the value of all natural increase of live stock owned by him and born during the year in which the income was derived. Where the taxpayer made such an election it was provided that he should not be assessed for income tax in respect of that natural increase except to the extent to which he had disposed of it, and that the value of the natural increase should not be brought to account until the year in which it was sold or otherwise disposed of by the taxpayer (sec. 16 (a) and (aa)).

The *Income Tax Assessment Act* 1936 does not reproduce these provisions allowing the taxpayer to elect not to take the value of natural increase into account. That Act provides that the value, as ascertained under the Act, of trading stock on hand at the beginning of the year of income and at the end of that year shall be taken into account in ascertaining whether or not the taxpayer has a taxable income (sec. 28). "Trading stock" is defined in sec. 6 to include live stock. Where a taxpayer had not taken advantage of the provision enabling him to elect to omit the value of natural increase from his account, the position at the time when the 1936 Act came into operation was that a value, either cost price or market selling price, would have been attributed to all the live stock, including natural increase. Sec. 29 of the 1936 Act provides that that value shall be the value to be taken into account at the beginning of the year of income. Thus values under the previous Act are carried forward into the application of the 1936 Act. But this provision plainly would not deal with a case where no value had been attributed under the previous Act to stock which was on hand at the beginning of the first year (1935-1936) in respect of which the new Act applied. This would be the case where a taxpayer had elected to omit the value of natural increase from his previous returns. Accordingly it was necessary to make provision for the determination of the value of such stock at the beginning of that year in order to apply the provisions of sec. 28 in making a comparison between the value of the live stock at the beginning of the year and the value of the live stock at the end of the year.

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The appellant in the present case had elected under the previous Act to omit from his account the value of natural increase. Purporting to exercise rights given to him by the 1936 Act, he selected (to take the case of sheep) ten shillings per head as the value of the natural increase of sheep at the beginning of the income year 1935-1936 and four shillings as the value at the end of that year. The result was that, in the case of natural increase, he showed a loss of six shillings per head, the loss arising not from any alteration in market selling prices or from any depreciation in values, however measured, but simply and entirely from the election of the taxpayer to take a high cost price as at the beginning of the year and a low cost price as at the end of the year. The commissioner contends that the taxpayer was not entitled to select two cost prices in respect of the same year and that, having selected ten shillings as the cost price as at the beginning of the year, he was bound to the same figure at the end of the year. The decision between the two contentions depends upon the terms of secs. 32, 33, 34 and 35 of the 1936 Act.

As to stock other than natural increase the taxpayer had under the previous Act (sec. 16 (a) (ii)) elected to take cost price as the measure of value. In the case of such stock sec. 29 fixed the cost price so selected as the value at the beginning of the income year 1935-1936.

Sec. 32 deals with the value of live stock to be taken into account at the end of the year. It is a provision which is general in its terms. It is as follows:—"The value of live stock to be taken into account at the end of the year of income shall be, at the option of the taxpayer, its cost price or market selling value, and where a taxpayer does not exercise his option within the time and in the manner prescribed, the value so to be taken into account shall be the cost price," with a proviso enabling a taxpayer to adopt some other value with the leave of the commissioner. This section must, in the case of purchased stock, refer to actual cost price, not to a cost price selected under such a provision as sec. 16 (a) (ii) of the previous Act when applied to natural increase. There is no such provision in the 1936 Act which is applicable to purchased stock. That stock must be valued under sec. 32 at what it cost or at what is its market selling value, just as trading stock, other than

live stock, had to be so valued under sec. 16 (a) (i) of the previous Act. There is no actual cost price of natural increase, and therefore sec. 32 cannot by its own force operate to give an option between cost price and market selling price with respect to natural increase.

Sec. 33 provides that "a taxpayer shall not, except with the leave of the commissioner, adopt a basis of valuation of his live stock taken into account at the end of the year of income different from the basis on which the valuation of his live stock was made when it was last taken into account at the end of a previous year, whether under this or the previous Act." This provision is applicable only where there existed a previous basis of valuation. It cannot be applied to natural increase which had not previously been taken into account and which had therefore never been valued on any basis. Thus two further provisions were necessary. In the first place, it was necessary to get some value as a possible starting point for all natural increase. This provision had to be general in character, applying throughout the currency of the Act. But, secondly, it was necessary to deal with the transition problem created by the necessity of fixing a value (to allow sec. 28 to operate) in the case of existing live stock, representing past natural increases, which had never been valued under the previous Act because the taxpayer had elected to omit it from his account. This provision would necessarily be special in character, applying only to the first income year under the 1936 Act. Sec. 34 deals with the first matter. Sec. 35 deals with the transition problem.

Sec. 34 provides means for ascertaining a cost price for natural increase. This cost price so ascertained is, in the case of natural increase, the cost price between which and market selling value a taxpayer may elect under sec. 32, unless he is precluded from election under sec. 33 or tied to a value in respect of particular stock under sec. 29.

Sec. 34 is as follows: "(1) The cost price per head of natural increase of any class of live stock of a taxpayer shall be—(a) where the cost price of natural increase of that class has been previously taken into account under this Act by the taxpayer—the cost price per head at which natural increase of that class was last taken into account unless, with the leave of the commissioner, the taxpayer

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selects another cost price; and (b) where the cost price of natural increase of that class has not been previously taken into account under this Act by the taxpayer—the cost price selected by him within the limits prescribed in respect of live stock of that class. (2) Where a taxpayer does not so select within the time and in the manner prescribed he shall be deemed to have selected, as the cost price, the lower of the prescribed limits.”

Thus sec. 34 deals with two cases—(a) where the cost price of natural increase has previously been taken into account under the 1936 Act, and (b) where the cost price of natural increase has not been previously taken into account under the 1936 Act. Par. *a* cannot apply in relation to the income year 1935-1936, because no cost price of any of the stock can have been previously taken into account under the 1936 Act. But after the first year of operation par. *a* will apply to all stock on hand at the beginning and the end of each year. Par. *b* deals with the case of stock born during an income year. It allows a taxpayer to select, within prescribed limits, a cost price for stock of the relevant class—sheep, cattle, horses or pigs, as the case may be. Thus there can be, within limits, an original arbitrary selection of a cost price for stock born during an income year. Then that cost price applies also at the end of the year by virtue of sec. 34 (1) (a), which continues into each subsequent year the cost price at which the natural increase was last taken into account under the Act. Thus, when the Act is in full operation there is complete provision for valuing both stock acquired by sale or otherwise and natural increase accruing year by year. There will be an applicable cost price or market selling price for all stock.

It was suggested in argument that this paragraph also applied to new taxpayers when they came under the provisions of the Act as owners of live stock for the first time. But in such cases the live stock with which the taxpayer commenced his enterprise would be purchased live stock or live stock otherwise acquired by him and would be valued under secs. 28, 29 and 32 without any aid from sec. 34 (1) (b), which is limited to natural increase. Subsequent natural increase in such a case would be valued under sec. 34 (1) (b), not because the taxpayer was a new taxpayer, but because

the stock was born during the income year. The value selected for live stock of the same class would be applied to it. Thus a value would be provided for all the live stock of a new taxpayer.

But the provisions to which I have referred do not fully deal with the transition problem. They do carry end values under the previous Act into the new Act as beginning values. The whole or nearly the whole flock of a taxpayer may consist of accumulated natural increase of years prior to the first income year (1935-1936) to which the 1936 Act applies. If he has taken it into account under the previous Act, sec. 29 provides that the beginning value under the new Act shall be what was the end value under the previous Act. But it is still necessary to deal with the case where the taxpayer had elected to omit the value of natural increase from his account. In such a case there is no previous end value to serve as a beginning value for the first account under the 1936 Act. Sec. 35 deals with this case. Sec. 35 (1) provides that the value of the natural increase omitted and on hand at the beginning of the first income year to which the new Act applies shall be taken into account in ascertaining the value of trading stock at the beginning of that year. It follows, by virtue of sec. 28, that, if still on hand, it must be taken into account at the end of the year. Sub-sec. 2 of sec. 35 provides means for fixing the value at the beginning of the year: "The value at which natural increase shall be so taken into account shall be—(a) where the taxpayer had exercised under the previous Act an option to value live stock at market selling price—the market selling price as at the beginning of the year; (b) where the taxpayer had exercised under the previous Act an option to value live stock at cost price—a value per head selected by the taxpayer, within the limits prescribed, as cost price for natural increase under the previous Act, by regulations in force immediately preceding the commencement of this Act, or where he does not so select within the time and in the manner prescribed—the lower of those prescribed limits."

Under sec. 16 of the previous Act every taxpayer, whatever he might have done as to omitting or not omitting natural increase, had valued his other live stock at either market selling price or cost price. Sec. 35 (2) deals with the transition problem which

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still remains by applying to omitted natural increase the basis of valuation for the taxpayer's other live stock. If for that other live stock he had chosen market selling price, then his omitted natural increase is to be taken into account at the market selling price as at the beginning of the income year 1935-1936 (sec. 35 (2) (a)). If, as in the present case, the taxpayer had exercised under the previous Act an option to value his other live stock at cost price, then sec. 35 (2) (b) allows him to select, for the omitted natural increase, a cost price within the limits mentioned in the section. The taxpayer selected ten shillings for sheep under this provision. This value of ten shillings is the beginning value for the income year 1935-1936. Sec. 35 (3) provides that that value so ascertained shall, unless altered with the leave of the commissioner, apply to natural increase of the first year of income to which the Act applies and of all subsequent years. Thus the cost price of ten shillings is fixed as the value not only of the carry-over previously omitted natural increase but also of the natural increase of the year 1935-1936 and of all subsequent years. There is no provision in the Act which allows the taxpayer to alter this value at his option as at the end of the first year. Market selling price is an actual price. It represents a fact which cannot be altered. Cost price is either actual cost price or is a price arbitrarily selected within the prescribed limits, but once ascertained it also is not alterable except with the consent of the commissioner.

Thus, in my opinion, the exercise of the option by the taxpayer under sec. 35 fixed the value of such of his sheep as were natural increase previously omitted from his account at ten shillings not only at the beginning but also at the end of the income year 1935-1936. Sec. 34 (1) (b) does not give to him another option in relation to that stock. He was not entitled to select four shillings as another cost price to be applied as at the end of the year, while leaving ten shillings standing as at the beginning of the year. His cost price for sheep remains fixed at ten shillings. The cost price of his cattle, horses and pigs is similarly fixed at the prices selected under sec. 35 (2) (b). Accordingly the assessment of the commissioner was correct.

The questions in the case should be answered as follows :—(1) No. (2) Yes.

The case should be remitted with these answers to *Rich J.* and the costs of the case should be costs in the appeal.

RICH J. I agree with the conclusion arrived at by the Chief Justice and the answers to the questions proposed by him.

STARKE J. Case stated under the provisions of the *Income Tax Assessment Act* 1936-1938, sec. 198.

The appellant was a grazier who carried on his business in the State of New South Wales. He was assessed to income tax for the financial year 1936-1937 in respect of his income for the preceding year. The Act requires that the value of live stock on hand at the beginning of the year of income and at the end of that year shall be taken into account in ascertaining whether a taxpayer has any taxable income (sec. 28). But the question in this case is how the value of natural increase of the appellant's live stock for the income year should be ascertained.

This depends mainly upon the meaning of sec. 35 of the Act. So far as material this section provides :—“(1) Where under the previous Act, a taxpayer elected to omit from the account of his stock-in-trade the value of natural increase of his live stock, the value of the natural increase omitted in pursuance of that election and on hand at the beginning of the first year to the income of which this Act applies, shall be taken into account in ascertaining the value of trading stock on hand at the beginning of that year. (2) The value at which natural increase shall be so taken into account shall be . . . (b) where the taxpayer had exercised under the previous Act an option to value live stock at cost price—a value per head selected by the taxpayer, within the limits prescribed, as cost price for natural increase under the previous Act, by regulations in force immediately preceding the commencement of this Act.”

The facts bring the case within the terms of this section and the case states that the taxpayer selected as allowed by the section the cost price of natural increase on hand at the beginning of the year of income at ten shillings per head. The taxpayer, however,

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claims to select for natural increase on hand at the end of the year of income a cost price of four shillings per head pursuant to sec. 34 (1) (b) of the Act:—"Where the cost price of natural increase of that class has not been previously taken into account under this Act by the taxpayer—the cost price selected by him within the limits prescribed in respect of live stock of that class."

But the Act does not, I think, contemplate two prices as "cost price," one at the beginning of the income year and another at the end of the year. The words "cost price" in themselves suggest only one price. Once "cost price" of natural increase has been selected under sec. 35 it stands in the same position as actual cost price, which cannot alter or change. Indeed, I think secs. 33 and 35 (3) support this view. The provisions of sec. 34 do provide the general rule for ascertaining under the Act the cost price of natural increase, but they do not interfere with a selection or determination of "cost price" made under the special provisions of sec. 35 nor authorize any change in it.

The questions in the case should be answered:—(1) No. (2) Yes.

EVATT J. The question on this appeal is whether, in bringing into account for the first time certain natural increase of live stock, the appellant, who carries on the business of a grazier, is entitled to select as the value per head of the stock at the end of an income year a figure which is considerably lower than the value per head which he has selected, and by which he is bound, in respect of the self-same stock as at the commencement of the year.

The answer to the question depends upon the interpretation of the trading stock subdivision of the *Income Tax Assessment Act* 1936, and especially upon secs. 34 and 35 thereof. Under the provisions of the previous *Income Tax Assessment Act* (Cf. *Income Tax Assessment Act* 1922-1934, sec. 16 (a) and (aa)) the general principle that in computing the assessable income of the year, the value of all live stock not disposed of at the beginning and end of the income year should be taken into account was made subject to a specific exception embodied in sec. 16 (aa). This gave the owner of live stock an election to omit from the yearly account the value of all natural increase of live stock owned by him and born during the

year, the scheme being that the natural increase so omitted should not be brought into account until the year in which it was sold or otherwise disposed of. Under the terms of such previous Act, the present appellant duly elected to omit from the yearly account the value of all natural increase of his live stock born during the respective income years; and under the same Act he also exercised the general option to have his live stock valued at "cost price" rather than at "market selling price" (*Income Tax Assessment Act 1922-1934*, sec. 16 (1) (ii)).

Sec. 35 of the present Act made a considerable alteration in the law applicable to cases where under the previous Act the taxpayer had elected to omit from the account of his stock-in-trade the value of the natural increase of live stock born during the several income years. The new plan required that the value of the natural increase previously omitted and in hand on July 1st, 1935, should be "taken into account in ascertaining the value of trading stock on hand" at that date. Sec. 35 (2) then deals with the method of determining the value at which the omitted natural increase should be taken into account. If, under the previous Act, the taxpayer had exercised the option to value at "market selling price," the stock were to be taken into account at that price on July 1st, 1935. But where (as here) the taxpayer had under the previous Act opted to value live stock at cost price, the natural increase was to be taken into account by a special method of valuation which gave the taxpayer a right to select a value within certain limits. In pursuance of the right of selection so conferred by sec. 35 (2) (b), the appellant duly selected certain values per head. To take sheep by way of example, he selected the value of 10s. per head.

By sec. 35 (3) it was provided that the value per head ascertained as the cost price of natural increase under sec. 35 (2) (b) would, unless altered with the leave of the commissioner, apply also to the natural increase of the income year 1935-1936 and all subsequent years. Subject to one suggested qualification, sec. 35 provides a complete scheme for dealing with the difficulties of bringing into account trading stock previously omitted. By giving the taxpayer who had previously chosen the "cost price" method of valuation a further right of selection of value, what accountants term a "free

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debit" is created as at the commencing point of the first year of accounting. Thenceforward, natural increase born during the income year had to be brought into account year by year and, except by leave of the commissioner, the value selected by the taxpayer in respect of the omitted stock applied also to the new natural increase.

The suggested qualification to the scheme contained in sec. 35 is embodied in the taxpayer's contention that although sec. 35 has operated to determine finally the figure at which the omitted stock must come into account on July 1st, 1935, it is silent as to the figure at which the same stock are to be valued on June 30th, 1936. He says that in respect of this date he is entitled to fix another cost price, and purporting to act under sec. 34 (1) (b) he has selected (to take sheep by way of example) the figure of 4s. per head. If this method of procedure is correct, then the taxpayer has succeeded in creating, in respect of sheep alone, a loss of 6s. per head for the first year of income under the new Act. This "loss" then becomes available as an allowable deduction under sec. 28 (3), and, by reason of the averaging provisions, has an important effect upon the tax payable in subsequent years.

In my opinion the taxpayer's contention is erroneous. Sec. 34 must be considered in relation to the other provisions of subdivision B. Sec. 28 lays down the general rule as to taking into account trading stock on hand at the beginning and the end of the year of income. Sec. 29 lays down the further general principle that the value of trading stock (including live stock) at the beginning of each year of income (July 1st) shall be its value as at the day before (June 30th), being the end of the previous income year. Sec. 32 provides that the value of live stock to be taken into account at the end of the year of income shall be, at the option of the taxpayer, its cost price or market selling value. In relation to the live stock, sec. 33 reinforces the general principle laid down in sec. 29 by providing that, without the leave of the commissioner, the taxpayer shall not adopt a basis of valuation of live stock taken into account at the end of the income year which differs from the

basis on which the valuation was made when last taken into account at the end of the previous year.

Then comes sec. 34. It deals with the method of ascertaining the cost price per head of natural increase “of any class” of live stock. It provides that (i) where the cost price “of that class” has been previously “taken into account under this Act,” the figure shall be continued in the accounting except by leave of the commissioner, and (ii) where the cost price of natural increase “of that class” has not been previously taken into account “under this Act” the figure shall, subject to prescribed limits, be the cost price selected by the taxpayer in respect of live stock “of that class.”

In my opinion there is not a word in sec. 34 (1) (b) which suggests that in respect of the omitted natural increase which is here in question the taxpayer is given a new right of selecting a value which is applicable to such omitted stock as at June 30th, 1936, although a different value has already been definitely fixed for the same omitted stock as at July 1st, 1935. So flagrant a departure from the general principle of bringing trading stock into account would require very clear statutory warrant. Sec. 34 is addressed to an entirely different question, that of securing continuity and system in bringing into account the cost price per head of natural increase belonging to any particular class of live stock. Sec. 34 (1) (b) says nothing to indicate that it can apply to the first taking into account of the omitted natural increase. It has its natural operation *after*, not *before*, the first taking into account under the new Act of some particular class of live-stock natural increase. “Taking into account” denotes that the account has been made up by reference to the end as well as to the beginning of the income period. If in the year 1935-1936 the cost price of sheep has been “taken into account” at a certain figure, then that figure binds the taxpayer in future accountings in respect of natural increase of sheep (sec. 34 (1) (b)). If, on the other hand, in relation to natural increase, a question is raised as to the cost price of pigs or (in the case of a new taxpayer) of sheep or cattle, and no guide is to be found by reference to the accounts of 1935-1936 or any subsequent year, the taxpayer is given a right to select the cost price of the

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class within the prescribed limits. In this way, sec. 34 (1) (b) may apply even to taxpayers who have previously elected to omit natural increase if they extend their business to live stock of a different class. But in all other cases, the general rule contained in sec. 35 (3) applies, viz., that where a taxpayer who has previously elected to omit natural increase stock brings such stock into account as at July 1st, 1935, at a value selected by him pursuant to sec. 35 (2) (b), that value binds him not only with respect to such omitted stock, but also, except with the commissioner's leave, with respect to natural increase of the income year 1935-1936 and all subsequent years.

The question asked in the case stated should, therefore, be answered :—(1) No. (2) Yes.

McTIERNAN J. I agree with the judgment of *Evatt J.*

Questions in the case answered as follows:—

(1) No. (2) Yes. *Costs of case to be costs in the appeal. Case remitted to Rich J.*

Solicitor for the appellant, *Mervyn Finlay.*

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

J. B.