Cons *McLennan* v *Federal Commissioner of Taxation* 91 ALR 52

Cons *Robe River Mining Co Pty Ltd* v *FCT* 88 ALR 50

Dist *Robe River Mining Co Pty Ltd* v *FCT* 19 FCR 294

Cons *Avco Financial Services Ltd* v *FCT* 150 CLR 510

Cons *Australian National Hotels Ltd* v *FCT* 19 ATR 1575

Cons *Australian National Hotels Ltd* v *FCT* 81 ALR 667

Cons *Avco Financial Services* v *FCT* 56 ALJR 668

Dist *Robe River Mining Co Pty Ltd* v *FCT* 21 FCR 1

Cons *FCT* v *Riverside Road Lodge Pty Ltd* 23 FCR 305

Appl *International Nickel Aust Ltd* v *FCT* (1977) 137 CLR 347

Dist *Caltex Ltd* v *Federal Commissioner of Taxation* (1960) 106 CLR 205

Appl *Logwon Pty Ltd* v *Council of the Shire of Warringah* (1993) 33 NSWLR 13

Appl *FCT* v *Mercantile Mutual Insurance* (1999) 87 FCR 536

Refd to *Estate Mortgage Fighting Fund Trust* v *FCT* (2000) 175 ALR 482

Dist *Steele* v *Federal Commissioner of Taxation* (1997) 73 FCR 330

Foll *Steele* v *DCT* (1999) 161 ALR 201

[HIGH COURT OF AUSTRALIA.]

THE TEXAS COMPANY (AUSTRALASIA) LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . RESPONDENT.

THE FEDERAL COMMISSIONER OF TAXATION . . . . APPELLANT;

AND

THE TEXAS COMPANY (AUSTRALASIA) LIMITED . . . . RESPONDENT.

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SYDNEY, 1939, *Dec.* 5-8, 11-14.

MELBOURNE, 1940, *Mar.* 18.

SYDNEY, *April* 8.

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

Income Tax (Cth.)—Assessable income—Deductions—Purchase abroad for sale in Australasia—Price payable in foreign currency—Delayed payments—Exchange—Variation of rate—Increased amount paid—Business carried on in New Zealand—Expenditure and outgoings incurred thereby—Income "chargeable" with tax abroad—Exempt income—Control of business abroad—Loss—Percentage of total receipts—Distribution of petrol—Petrol pumps—Costs of installation and maintenance—Ordinary income tax and "property" tax—Concurrent liability—Amount of taxable income—Method of ascertainment—Distribution of petrol—Petrol pumps—Costs of installation and maintenance—Board of review—Powers—Variation of own decisions—Making of assessments—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *secs.* 4, 13, 14 (1) (*q*), 23 (1) (*a*), 25 (*e*), 26 (2), 28, 44, 51—*Income Tax Act* 1930 (*Nos.* 51 *and* 61 *of* 1930), *sec.* 7A—*Income Tax Act* 1933 (*No.* 41 *of* 1933), *sec.* 5.

Petroleum products were purchased by the taxpayer company in the United States of America from a group of companies incorporated there which owned all the shares in the taxpayer company, supplied it with plant, equipment and other capital items and also made advances to it. All the indebtedness so incurred by the taxpayer was on a dollar basis. The taxpayer's share capital was insufficient to meet its requirements for working capital, so, in order to provide it with funds large enough for its needs, the taxpayer was allowed to delay payments in respect of its indebtedness for an average period of two years. During the period intervening between the incurring of the indebtedness and the date of payment the rate of exchange had so moved against Australia that a considerably larger number of Australian pounds than the number originally calculated was required to discharge the American debt in dollars. The taxpayer had also to provide the cost of remittance to its supplier.

Held that so much of the exchange as was found to be referable to expenditure incurred in or for the purpose of discharging or providing for liabilities on income or revenue account was allowable as a deduction in ascertaining the taxable income of the taxpayer in the year in which the payments were made.

The taxpayer, a company incorporated in Australia, carried on business in Australia and New Zealand. In New Zealand the net income of the taxpayer derived from that country would be liable to tax. In the year 1930 the income of the taxpayer derived from its business carried on in New Zealand was less than the amount of deductions and exemptions from the income allowed by the New-Zealand income-tax law, so that no tax was charged.

Held that the New-Zealand income was "chargeable" with income tax in New Zealand within the meaning of sec. 14 (1) (*q*) of the *Income Tax Assessment Act* 1922 and was exempt from tax in Australia; accordingly, the gross income derived in New Zealand should not be included in its assessable income in Australia and no deductions referable to that income were allowable deductions.

Sec. 28 of the *Income Tax Assessment Act* 1922-1934 provided: "When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the commissioner in his judgment thinks proper."

Held that the mere fact that a business controlled abroad incurs a loss is not sufficient to warrant an assessment under sec. 28 independently of the question whether the business might have been expected to produce an ordinary taxable income of appreciable amount; and that even if all the conditions prescribed by sec. 28 are present the commissioner is not under an imperative duty to assess a taxpayer under that section.

Sec. 7A of the *Income Tax Act* 1930 (sec. 5 of subsequent *Income Tax Acts*) provided: "In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived

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by any person—(*a*) from property; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, when the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of " a certain percentage "of that taxable income."

Held:—

(1) That in assessing the taxable income for the purposes of this section the total assessable income from the sources mentioned in the section should be taken as the basis and from it there should be deducted all deductions which are allowed under the Act in respect of that class of income.

(2) That a taxpayer is liable to further income tax under this section notwithstanding that sec. 28 of the *Income Tax Assessment Act* 1922-1934 has been applied for the purpose of ascertaining the taxable income for ordinary income tax.

(3) That when the provisions of sec. 28 of the *Income Tax Assessment Act* 1922-1934 have been applied to a particular year the amount of income on which the further tax imposed by sec. 7A of the *Income Tax Act* 1930 (sec. 5 of subsequent Acts) is levied should be ascertained and assessed independently of sec. 28 and in the same manner as if sec. 28 had not been applied in that year for the purpose of assessing the taxpayer to ordinary income tax.

At great loss to itself the taxpayer installed and maintained petrol pumps to enable retailers to sell the taxpayer's products to the public. For some of such pumps the taxpayer received a nominal annual rent, but nothing was received in respect of the other pumps. The amount received was very small compared with the cost of maintaining the pumps. The taxpayer also received large sums by way of interest on Commonwealth loans.

Held, by *Rich*, *Dixon* and *McTiernan* JJ., that rent from the pumps was not income within the meaning of sec. 7A of the *Income Tax Act* 1930 (sec. 5 of subsequent *Income Tax Acts*); therefore the cost of maintaining the pumps was not allowable as a deduction against the interest on the loans which was liable to tax under sec. 5 (1) (*b*) of that Act.

Held, by *Latham* C.J. and *Starke* J., that rent from the pumps was income, but whether the costs of maintenance were allowable as deductions under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* and not prohibited by sec. 25 (*e*) of that Act was a question of fact for determination on appeal.

The taxpayer company was assessed to income tax by the Commissioner of Taxation for the years 1929, 1930, 1931 and 1932 under sec. 28 of the *Income Tax Assessment Act* 1922-1934, but it was dissatisfied with the assessments, and lodged objections, which were disallowed by the commissioner. The objections were referred to the board of review. Subject to a reopening of the case in connection with the assessing of the taxpayer to further tax on income from property, in respect of the years 1929, 1930 and 1931, the board upheld the objections and directed "an assessment under the ordinary provisions of the" (*Income Tax Assessment*) "*Act* to issue for each of these years." The board also set aside an assessment made for the year 1932 as being excessive and directed an amended assessment to issue under sec. 28. Upon the reopening of the case about three months later the board made assessments for each of the above years.

Held that the board had power to make the assessments and was not precluded by its earlier decision from making them.

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APPEALS from the board of review.

The Texas Co. (Australasia) Ltd. carried on business from the year 1918 by importing from the United States of America and selling in Australia various petroleum products. All the shares in the Australian company were held by the Texas Corporation of New York. That corporation held ninety-nine per cent of the shares in another company—the Texas Co., incorporated in Delaware. The Texas Co., Delaware, supplied the petroleum products to the Australian company either from its own stocks or from those of the Texas company incorporated in California.

Questions arose as to the assessments of the Australian company under the *Income Tax Assessment Act* 1922, as amended from time to time, in respect of income received by that company during the calendar years 1929, 1930, 1931, 1932 and 1933, which were accepted by the Commissioner of Taxation as accounting periods in lieu of periods ended on 30th June in each year.

The commissioner assessed the company under sec. 28 of the Act, and objections by it were referred to the board of review.

From the decisions of the board of review in relation to the several years both the company and the commissioner appealed to the High Court and, for the purposes of the appeals, made mutual admissions which were substantially as follows :—

1. The appellant, the Texas Co. (Australasia) Ltd. (hereinafter called "the company") is a company incorporated in accordance with the law of the State of New South Wales on 6th August 1918.

4. The company furnished to the commissioner income tax returns for the financial years 1930-1931, 1931-1932, 1932-1933, 1933-1934, and 1934-1935 under the *Income Tax Assessment Acts* of its income for the calendar years 1929, 1930, 1931, 1932 and 1933 respectively.

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The profit and loss accounts of the company's Australian business disclosed the under-mentioned results :—

Calendar year.	Profit.	Loss.
1929	£4,322 10 3	——
1930	——	£53,500 11 8
1931	——	7,900 17 11
1932	——	72,894 8 9
1933	——	660,384 4 8

Adjustments made by the company for Federal income-tax purposes were as under :—

	Taxable income.	Loss.
1929	£13,650 0 4	——
1930	2,418 0 0	——
1931	23,865 0 0	——
1932	——	55,789 2 3
1933	——	638,512 16 5

On 18th October 1935 a notice of assessment by the commissioner for each of the said five years was received by the company, each of such assessments being made under sec. 28 of the *Income Tax Assessment Act* 1922 as amended. In making each of these assessments, the commissioner, after reciting that the company was carrying on a business in Australia which was at all material times controlled principally by persons resident outside Australia ; that it appeared to the commissioner that the business produced less than the ordinary taxable income which might be expected to arise from that business ; and that pursuant to sec. 28 of the *Income Tax Assessment Act* the company was assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business as he in his judgment thought proper, notified the company in the following terms :—" Now therefore take notice that I in my judgment think that twenty per centum of the said total receipts (whether cash or credit) of the said business during the said year ended . . . is the proper percentage of such receipts on which the said company is assessable and chargeable with income tax for the said financial year . . . and that I have assessed the said company for income tax for the said financial year accordingly." The total receipts on which the assessments were based were :—

				Amount of tax.		
Year ended 31st December 1929	£1,500,562	..	£20,007	9	4
,, ,, ,, ,, 1930	1,854,262	..	25,959	12	9
,, ,, ,, ,, 1931	2,108,987	..	29,525	15	9
,, ,, ,, ,, 1932	2,458,583	..	24,585	16	0
,, ,, ,, ,, 1933	2,358,898	..	23,588	19	0

And, in addition thereto, the commissioner notified the company that twenty per cent of certain total receipts as shown hereunder, were subject to further tax under sec. 5 of the *Income Tax Act* :—

Year ended	Total receipts.	Amount of further tax.		
31st December 1929	£875	£13	2	6
,, ,, 1930	2,889	288	18	0
,, ,, 1931	5,218	521	16	0
,, ,, 1932	5,146	308	15	2
,, ,, 1933	1,318	79	1	7

5. On 28th November 1935 the company lodged with the commissioner a notice of objection to each of the said five assessments on the grounds, *inter alia*, (5) that sec. 28 of the relevant *Income Tax Assessment Act* is not applicable ; (7) that no part of the total receipts is subject to further tax under sec. 5 either at the rate fixed by the commissioner or at any other rate and further tax on income from property is not applicable when the commissioner assesses under sec. 28.

6. On 24th June 1936 the commissioner disallowed each of the objections and notice of such disallowances was given to the company.

7. On 6th July 1936 the company requested the commissioner in writing to refer his decisions disallowing each of the objections to the board of review for review and on 8th September 1936 the commissioner in pursuance of that request referred the decisions to the board of review.

8. On 28th July 1937 the board gave a decision on the said reference and gave written reasons therefor. The decision, so far as material, was as follows : Subject to a reopening of the case, as set out hereunder, in regard to the claim made in ground 7 of each of

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the objections, the board after consideration of the evidence and the arguments submitted, decides as under :—Years 1929, 1930 and 1931 (financial years 1930-1931, 1931-1932 and 1932-1933) :—The claim made in ground 5 of the objection for each of these three years is upheld. An assessment under the ordinary provisions of the Act to issue for each of these years in lieu of the assessment under sec. 28. Year 1932 (financial year 1933-1934) :—Amended assessment to be issued under sec. 28, the total receipts (cash and credit) of the business being taken at £2,446,671 and the percentage on which the company shall be assessable and chargeable being 9.5 per cent. Year 1933 (financial year 1934-1935) :—The claim made in ground 5 of the objection is upheld. Neither evidence nor argument was heard upon the claim made in ground 7 of each of the objections, and the case will be re-opened for the purpose of hearing evidence and argument on this ground only. The reasons, so far as material, contained the following :—As a result of further checks made after the assessments were issued, it now appears that the total receipts (cash and credit) of the taxpayer's business were as follows :—1929—£1,501,960 ; 1930—£1,823,287 ; 1931—£2,057,684 ; 1932—£2,446,671 ; 1933—£2,299,056. On 7th September 1937 the parties again appeared before the board of review, and evidence was given on matters relating to special property tax on that and the next succeeding day and the parties through their counsel addressed the board. A further decision of the board on the reference was given on 18th October 1937 and the board gave written reasons therefor. The decision, so far as material, was substantially as follows :—The board's decision of 28th July 1937 was subject to a reopening as mentioned therein. The case was re-opened on 7th September, and after consideration of the further evidence and argument submitted the board decides as follows :—Year 1929 (financial year 1930-1931) :—The taxable income is assessed at £66,592, and the amount liable to the further tax under sec. 7A (1) of the *Income Tax Act* 1930 is assessed at £1,103. Notice to be issued accordingly. Year 1930 (financial year 1931-1932) :—The taxable income is assessed at £64,970, and the amount liable to the further tax under sec. 5 (1) of the *Income Tax Act* 1931 is assessed at £13,577. Notice to be issued accordingly. Year 1931 (financial year 1932-1933) :—The taxable income is assessed at £139,313, and the amount liable to the further tax under sec. 5 (1) of the *Income Tax Act* 1932 is assessed at £23,640. Notice to be issued accordingly. Year 1932 (financial year 1933-1934) :—The company is assessed under sec. 28 on £232,434, being 9.5 per centum of its total receipts (£2,446,671). The amount liable to the further tax under sec. 5 (1) of the *Income Tax Act* 1933 is assessed at £19,906. Notice to be issued accordingly. Year 1933 (financial year 1934-1935) :—As to this year, the board in its decision of 28th July 1937 said that "The claim made in ground 5 of the objection is upheld." In lieu of the terms in which the decision was expressed, the board considers it desirable to restate the decision in the following terms :—Notwithstanding that the business produced no taxable income, the board, in its judgment, does not think it proper to assess and charge tax on any percentage of the total receipts of the business (sec. 28). Deposits to be refunded.

9. The paid-up capital of the company from 1918 to 1929 was £50,000, all of which was subscribed by the Texas Co. incorporated in New York or its nominees. Upon the dissolution of the said Texas Co. the whole of the said shares were transferred to the Texas Corporation or its nominees on 30th January 1928 and have since then been at all material times beneficially owned by it.

10. The business carried on by the company in Australia is and was at all material times controlled by persons resident outside Australia.

11. The trading stock of the company consists and has always consisted of Texaco petroleum products. Until the dissolution of the Texas Co. incorporated in New York in or about 1928 as aforesaid the company obtained these products from such Texas Co., by whom the products were invoiced to the company. Since the dissolution of the Texas Co. as aforesaid the company has obtained these products from the Texas Co., incorporated in Delaware, U.S.A., the products being refined or manufactured either by such company or the Texas Co. incorporated in California, U.S.A., and invoiced to the company by the Texas Co. incorporated in Delaware (hereinafter called the supplier). The Texas Corporation, which after 1928 beneficially owned as aforesaid the whole of the issued

shares in the company, also owned ninety-nine per cent of the capital stock or shares of the supplier, and also ninety-nine per cent of the capital stock or shares of the Californian Petroleum Corporation, which owned ninety-nine per cent of the capital stock or shares of the Texas Co. incorporated in California.

12. Since 1928 the petroleum products were shipped to the company in Australia by the supplier, which paid the freight and insurance thereon, and the purchase price f.o.b. as shown on the invoices, together with the cost of the freight and insurance, was payable by the company to the supplier in American dollars.

13. The company also from time to time obtained from America certain plant, equipment, and other capital items which were purchased by the supplier for the company as its agent at its request and which were shipped by the supplier and invoiced by it to the company at a price in American dollars which was payable by the company to the supplier together with the cost of freight and insurance which was paid by the supplier. The supplier also made cash advances to the company in Australia because the latter was short of cash.

14. Before the dissolution in 1928 of the Texas Co. incorporated in New York as aforesaid in the books of the company the invoice price (which included f.o.b. value, freight and insurance) of all the trading stock obtained as aforesaid was credited to an account called the " Texas Co. New York Account " (hereinafter called the said account). The name of the said account was not changed upon the dissolution, and since such dissolution the invoice price, including the cost of freight and insurance of the petroleum products and of the plant, equipment, and other capital items has been credited to the said account. The debit entries in the said account have been principally for remittances which the company made to or on account of the Texas Co., New York, and there were during the relevant years also some debit entries for other items, disbursements of a casual nature made to the use of the New-York house, not exceeding in the whole four and one-half per cent of the total debits. There were also debit entries for financial assistance granted by the supplier to the company at the end of each of the relevant years.

15. The said account was kept both in American dollars and Australian pounds. The credit entries for stock received and freight and insurance thereon and also for the plant, equipment,

and other capital items all showed the number of dollars owed therefor and the equivalent in Australian pounds at the date of the invoice for the same, which was approximately the date of shipment. The credit entries for cash advances showed the number of dollars remitted from America and the equivalent in Australian pounds at the date of remittance. Other credit entries, such as for advertising material, which did not exceed in the whole three per cent of the total entries, showed the conversion into Australian pounds at the date as at which such entries were made.

16. After 1st January 1932 in the books of the company any variation between the Australian pounds equivalent of the f.o.b. dollar cost at the date of invoice and the date of sale was entered both in the company's trading account for income tax purposes and in the said account. This was accomplished through a merchandising account, dealing with stocks on hand. To this account the aforesaid f.o.b. value as shown on the invoice in dollars and in Australian pounds equivalent at date of invoice was debited, and the f.o.b. dollar cost of stock sold during a month converted into Australian pounds at the average rate of exchange New York-Sydney telegraphic transfer ruling during that month was credited, the corresponding debit for the latter being carried through sales cost account into the trading account of the company for the period covering such sales. An adjustment was then made of the f.o.b. balance of stock unsold at the end of the month in merchandising account expressed in Australian pounds by entering the difference between the Australian pounds equivalent to the number of f.o.b. dollars in the account at the end of the month at the rate of exchange then ruling and the Australian pounds in which such balance (before adjustment) appeared in the account. This difference in Australian pounds for exchange adjustment was debited or credited as the case may be, and after it was entered the balance of the merchandising account at the end of every month showed the stock on hand in f.o.b. dollar cost and in Australian pounds equivalent at rate of exchange ruling at the end of such month, and these figures were brought into account as part of the cost of stock-in-trade for the purpose of the company's trading account for income tax purposes. The corresponding entry for the difference for exchange adjustment

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was made to the said account, so that the balance to the credit of such account at any time in so far as it represented amounts owing for stock received included such stock at the f.o.b. dollar cost and the Australian pound equivalent, not at date of invoice, but at date of sale or, if still on hand, at the date of such balance.

17. At all material times the debit entries to the said account, being remittances and other items as aforesaid, were brought into account in Australian pounds at the American dollar equivalent of the Australian pounds remitted or otherwise debited at the date of such remittance or debit. But at the end of every month an adjustment of the Australian pounds so debited for remittance was made by ascertaining the difference between the total debits in Australian pounds for remittances for the month converted as aforesaid and the total of such debits in Australian pounds converted at the rate ascertained by dividing the number of dollars standing to the credit of the said account at the beginning of the month by the number of Australian pounds standing to the credit of the said account at the beginning of such month and debiting or crediting as the case might be this difference in Australian pounds to the said account. If in applying the above procedure there was for any year an excess of credits over debits for these differences then such excess of credits was claimed by the company in its income tax returns as deductions, but if there was an excess of debits then such excess of debits was returned as assessable income. These differences are hereinafter referred to as " exchange."

18. Save in so far as inferences can be drawn from the facts that the said account was a running account, that the balance was made up each month, and that the remittances made as aforesaid were entered in such account as at the date of remittance, the remittances, which were generally for lump sums in Australian currency, were not appropriated against any particular items that had been entered on the credit side of the said account nor were any of them allocated so as to satisfy particular items for cash advances, capital items, or stock.

21. Until the end of 1930 the amount standing to the credit of the said account in the company's Australian books represented the

amount outstanding in respect of the business of the company conducted in Australia and New Zealand.

On or about 17th February 1931 the company made entries in its books debiting the said account with £756,475 7s. 2d. and \$3,674,503.41, rate of exchange \$4.8574, the corresponding credit being to the account of The Texas Co. (Australasia) Ltd., New Zealand. Thereafter no further New-Zealand items either debit or credit were entered in the said account.

22. Until after the end of 1930 there was comparatively little fluctuation in the rate of exchange between Australia and America, but in the years 1931 and 1932 the rate dropped heavily. The bank rates—telegraphic transfer Australia on New York, at the last working day of each month giving the American equivalent of the Australian pound from the beginning of 1930 to the end of 1935, were as follows :—

Month.	1930	1931	1932	1933	1934	1935
	\$	\$	\$	\$	\$	\$
January ..	4.741	3.722	2.759	2.700	3.969	3.868
February ..	4.712	3.723	2.777	2.719	4.037	3.864
March ..	4.572	3.723	3.010	2.725	4.045	3.829
April ..	4.568	3.726	2.918	3.025	4.076	3.845
May ..	4.564	3.727	2.939	3.184	4.028	3.918
June ..	4.563	3.727	2.873	3.503	4.004	3.929
July ..	4.572	3.720	2.817	3.683	3.993	3.944
August ..	4.572	3.725	2.766	3.610	3.973	3.949
September ..	4.562	2.981	2.751	3.766	3.941	3.907
October ..	4.458	3.108	2.611	3.797	3.955	3.910
November ..	4.454	2.685	2.547	4.131	3.953	3.919
December ..	4.455	2.704	2.653	4.064	3.914	3.919

31st December		1929	\$ 4.783
,,	,,	1930	\$ 4.456
,,	,,	1931	\$ 2.704
,,	,,	1932	\$ 2.653
,,	,,	1933	\$ 4.064
,,	,,	1934	\$ 3.914

23. Owing to the drop in rates of exchange referred to in the last paragraph the company in Australia, following the receipt of a letter from its New-York office in August 1932, deferred as from

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that date and for the time being remitting against the amount outstanding at 1st October 1931, and debited remittances after 1st January 1932 against credits after 1st October 1931 and for this purpose commenced in August 1932 to keep instead of the said account two accounts called "account A" and "account B" respectively, the former containing the items credited after 1st October 1931 and debited after 1st January 1932 and the latter containing the amount outstanding on 1st October 1931. In August 1932 the credit balance outstanding at 1st October 1931 was carried to an account B and a new account A opened to deal with the amounts after such date, and thereafter during all relevant periods the said two accounts were kept. On 30th October 1933 a further letter about the same matter was received in Australia from New York which, so far as material, is as follows :—"In accordance with the above" (that is, as outlined in the former letter), "all current transactions since 25th September 1931 were booked in account A. As of September 1931, our company had funds on special and fixed deposit in Australia and also held Commonwealth bonds, all of which at that time totalled £665,150 8s. 10d., as follows :—

Special deposit	£190,000 0 0	
Fixed deposit	350,000 0 0	
Total cash		£540,000 0 0
Commonwealth bonds ..		125,150 8 10
Total		£665,150 8 10

"The funds in special bank accounts as set forth above, together with funds realized from sale of the bonds, have since been remitted to the Texas Co. and entries were made on your books charging the remittances to account A. However, we are now of the opinion that it would have been more proper had such remittances been charged to account B in view of the fact that the funds were accumulated prior to September 1931 and inasmuch as the same were realized from sales of products shipped prior to September 1931, the value of which is included in the balance of account B. Further, the amount of £665,150 8s. 10d. was not needed for working capital at that time, and we now suggest that necessary entries be made on your books to revise the accounts in order to charge the Texas Co. account B with funds remitted subsequent to September 1931 out of special and fixed deposit accounts, as well as funds realized on disposition of Commonwealth bonds and that exchange adjustment entries on such remittances be revised and charged to deficit adjustment account." The further instructions contained in such letter were carried out in the books of the company. Before the receipt of the letter dated 30th October 1933 the remittances affected by the instruction contained in such letter had already been dealt with in account A by debiting the same in manner aforesaid and making adjustments for " exchange " as aforesaid.

24. The amount to the credit of the said account in the books of the company at—

31st December 1928 was			£1,229,398 1s. 11d.
31st December 1929 was			£3,167,047 10s. 7d.
31st December 1930 was			£3,304,781 18s. 6d.
31st December 1931 was			£2,734,945 7s. 2d.
31st December 1932 was	B Account		£2,678,837 11s. 1d.
	A Account	Cr.	£205,761 0s. 7d.
31st December 1933 was	B Account	Dr.	£1,866,605 2s. 1d.
	A Account	Dr.	£198,469 15s. 2d.

Up to 31st December 1930 these figures included the amount outstanding in respect of the business in New Zealand of the company, but thereafter such New-Zealand figures are not included, as mentioned in par. 21 hereof.

25. If in the said account the earliest debit item is regarded as satisfying wholly or in part the earliest credit item, then during the relevant periods, except as regards remittances debited to account A as aforesaid, there was a " lag " of about two years in paying for items credited to the account and as regards credit items for stock received the same was not paid for until after such stock had been sold or disposed of by the company.

27. At the hearing before the board of review the company produced a statement headed as follows : " Details of Property Income." The details of this statement sufficiently appear in the judgments hereunder.

29. The item " Other income (pump rents) " in the statement shows the amount received by the company by way of rent or hire of kerbside petrol pumps owned by the company and let to the reseller under a hiring agreement (of which the agreement mentioned in par. 38 hereof is a sample) and used by him for the purpose of

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distributing petrol to consumers in the circumstances and manner hereinafter mentioned.

30. The company claimed as a deduction from the gross income which would otherwise be liable to tax under secs. 7A (1930) and 5 (1931-1934) as aforesaid the whole of the items shown in the statement under the heading of "deductions." (These included items for depreciation on petrol pumps, repairs to petrol pumps, municipal taxes and licences on petrol pumps, loss on sale and retirement petrol pumps, additional depreciation on amounts applicable to petrol pumps capitalized, and administration expenses—two and one-half per cent on taxable interest and five per cent on pump rents.) The board of review allowed as deductions for such purpose only the items administration expenses (two and one-half per centum on taxable interest and five per centum on pump rents) and disallowed the deductions of the other items claimed.

31. Until the year 1928 or thereabouts the company sold and distributed most of its petrol in drums, tins, and cases, but in or about 1928 the company commenced and thereafter during 1929 and 1930 continued to change the ordinary method of distribution from drums, tins, and cases to bulk handling. The change was made for the purpose of economy and saving in distribution cost, and most of the other oil companies distributing petroleum products in Australia made a similar change at or about the same time, some of them having changed before this company commenced to do so. By means of bulk handling the company's costs of distribution would be reduced and the company would have been at a disadvantage as compared with other companies unless it had changed to bulk distribution and installed petrol pumps as hereinafter set out. Petrol pumps were found to be the most convenient and economical method of distributing petrol to the consumers.

32. Most of the company's petrol is sold to retailers who in turn sell it to motorists and other consumers, and the method of handling adopted, so far as ninety per cent of the company's petrol was concerned, was for an underground tank to be installed on or near the retailer's premises to contain a supply of the company's petrol. A petrol pump connected with such tank was installed usually at the kerb-side outside the retailer's premises and the petrol was pumped from the tank through the pump, where it was measured direct into the motor car of the consumer. The pump was painted and carried distinctive markings and the name of the company's

petrol, to distinguish it from pumps from which other petrol could be obtained.

33. Petrol pumps were installed by the company in order that the company might more conveniently and economically sell its petrol and in the cities and larger towns distribution through petrol pumps became the ordinary method of distributing petrol to consumers and a very large proportion of the company's product after its sale to the reseller came to be sold by the reseller through such pumps. In the smaller country centres the old method of distribution in drums, tins, and cases was continued, but pumps were installed wherever the volume of turnover was sufficient to warrant the installation of a pump.

35. Before a pump was installed it was the practice of the company to obtain particulars of the volume of business that was done by the retailer on whose premises the pump was proposed to be installed and a pump was not installed unless the company considered a sufficient volume of petrol would be sold through the pump to warrant its installation. If, after the pump had been installed, it was found that the hirer was unsatisfactory, including isolated cases where the volume was considered insufficient by the company, then the company would terminate the hiring agreement hereinafter referred to in connection with that pump, and remove the pump.

37. The general policy was for the company to provide and own the petrol pumps at the retailers' premises and most of the petrol pumps which were installed as aforesaid and used for the distribution by the reseller of the company's product after sale of it to the reseller were owned by the company (referred to as company-owned pumps) but some were owned by the retailer (referred to as customer-owned pumps).

38. In the case of the company-owned pumps, the company had the pumps manufactured in Australia, and the company installed them at the retailer's premises. The cost of single pumps was about £50 or £60, and the cost of installation, including the tank, was about £25, being an outlay by the company of from £75 to £85 in respect of each single pump installed. The pump remained the property of the company, and the retailer who used the pump entered into an agreement with the company for the hire of the pump upon terms including the payment of ten shillings a year in the case of a single pump and one pound a year for a double pump for hire or rent and upon condition that the pump should be used

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exclusively for petrol dealt in by the company. In some cases the retailer paid a sum of £10 for a single pump or £20 for a double pump towards the cost of installation and in other cases no charge for installation was made.

39. In the case of customer-owned pumps the company and the owner of the pump entered into an agreement under which the owner agreed to use the pump exclusively for distributing the company's product after its purchase by him and the company agreed to pay the owner one half-penny a gallon on all petrol distributed by him through the pump.

41. In the case of company-owned pumps the company did not always collect the rent of 10s. a pump (single—£1 double) provided for in the hiring agreement. Rent was received for approximately eighty per cent of the pumps under hire as aforesaid and not received for the remaining twenty per cent.

42. Although under the agreements the hirer is required to keep the pump in good order and condition, the company during the relevant years in fact expended considerable sums in repairs to the company-owned pumps to which such agreements relate. The usual practice was for the company to do all repairs and not to ask the hirer to pay for them. The company, owing to the competition of other oil companies, did such repairs at its own expense and did not recover the cost from the retailer. The amount spent by the company on repairs to petrol pumps is stated in the item "repairs to petrol pumps" in the statement under the heading of "deductions." The amount includes a relatively small expenditure for painting and repairs on customer-owned pumps. The average amount spent per pump for repairs in the year 1932 was approximately £4 8s. 4d.

43. The company also paid in connection with the company-owned pumps municipal taxes and licence fees, notwithstanding that under the terms of the agreements between the company and the hirers the same were required to be paid by the hirer. The amount expended by the company for such municipal taxes and licences is set out in the statement under the heading of "deductions," and amounted in 1932 to an average of about 8s. per pump.

44. The item in the statement "depreciation on petrol pumps" represents an annual charge for depreciation on the company-owned pumps at the rate of five per cent on the cost of the tank and pump, which is the rate of depreciation allowed on petrol pumps by

the Commissioner of Taxation for income tax purposes. The depreciation is calculated on all company-owned pumps, whether rent was received for them or not.

45. The item in the statement " loss on sale and retirements—petrol pumps " represents the difference between the original cost of petrol pumps owned by the company on the one hand and the amount of depreciation as above mentioned written off such pumps up to the time they were taken out of service and disposed of by the company or broken up as scrap after being withdrawn from use as being worn out, obsolete, or otherwise no longer required together with the amount (if any) realized for them upon such disposal on the other hand.

46. The item " additional depreciation on amounts applicable to petrol pumps now capitalized " represents depreciation on charges for installation of pumps and also on charges for removal of pumps from one location to another, which charges were not allowed as a deduction from assessable income for income tax purposes in the year in which incurred and were accordingly capitalized and were being written off over a period over the heading of depreciation.

47. Approximately twenty-five per cent of the total amount claimed as deductions in the statement is in respect of pumps for which no rent was collected.

48. The whole of the amount claimed as deductions in the statement, other than the item " administration expenses ", have been allowed as deductions from assessable income for the purpose of the assessments purporting to have been made by the board under the ordinary provisions of the Act.

49. The business carried on by the company at all material times was that of importing from America and of selling and distributing in Australia and in New Zealand all petroleum products.

50. The activities of the company in Australia substantially consisted of taking delivery in Australia of petroleum products, landing and storing the same in Australia pending sale, and selling and distributing the same in Australia. Its activities in New Zealand were the same as regards New Zealand.

51. The company was registered in New Zealand as a foreign company prior to the year 1929. From the date of incorporation of the company in Australia there was a managing director in Australia who managed the business of the company in Australia and at all material times until 1st January 1933 directed the policy of

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the company in New Zealand. There was at all material times a managing director in New Zealand who managed the business carried on in New Zealand but as to matters of policy until 1st January 1933 was subject to instructions from the managing director resident in Australia.

The board of directors of the company consisted of a managing director for Australia and one other director resident in Australia, several directors resident in America and the managing director for New Zealand. The board controlled the business both in Australia and New Zealand. There was a staff of officers in New Zealand under the managing director for New Zealand and a separate staff for Australia under the managing director for Australia. After 1st January 1933 the policy of the company in New Zealand was not directed in any respect from Australia.

52. In New Zealand separate books of account were kept for the New-Zealand transactions and a separate trading and profit and loss account was made up from such books. In such books until the end of 1930 the amount owing in respect of New-Zealand transactions for merchandise and other matters, including cash advances to finance the New-Zealand operations, was stated to be owed to the company in Australia, but after 1931 the same was stated to be owing to the Texas Co.

The company, up to the end of 1930, carried in its books in Australia an account styled "The Texas Co. (Australasia) Ltd. New Zealand account"; in this account were entered all transactions between the Australian office and New Zealand, which included all merchandise imported into New Zealand and all cash advances to and remittances made by New Zealand.

From the end of 1930 the company still carried in its books in Australia an account styled "The Texas Co. (Australasia) Ltd. New Zealand account," but from that time onwards this account only disclosed the accumulated profit and loss of New Zealand from year to year. In order that this account might be correctly entered up figures were forwarded from New Zealand every year to the head office in Sydney; the figures shown in this account were incorporated in the company's profit and loss account and balance sheet.

53. The turnover in Australia of the company's business was approximately four times that in New Zealand.

54. For 1930 the company's operations in New Zealand resulted in a loss.

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55. Under the *Land and Income Tax Act* 1923 of New Zealand, the company was liable subject to the provisions of such Act to pay income tax in New Zealand upon all income derived by it from New Zealand in 1930. For the purpose of ascertaining the income liable to tax as aforesaid that Act provides that certain deductions shall be allowed for expenses and other matters from the gross income derived in New Zealand.

57. In 1930 the company in carrying on its business in New Zealand derived gross income from New Zealand but the total amount which would be allowable under the said Act or under the Federal *Income Tax Assessment Act* 1922, as amended, as deductions and exemptions from gross income, was greater than the total amount of such gross income and the company was not taxed under the New-Zealand Act in respect of its income for that year.

58. On or about 15th April 1937 the managing director of the company in New Zealand received a letter from the Commissioner of Taxes for New Zealand. Omitting formal parts, the letter was as follows :—" I certify that the Texas Co. (Australasia) Ltd. paid the sum of £124 0s. 1d. as income tax on income derived for the year ended 31st December 1929. No income tax was paid in respect of the income years ended 31st December 1930 and 1931 by reason of the fact that a loss was incurred during the year ended 31st December 1930 and under the provisions of sec. 81 of the *Land and Income Tax Act* 1923 such loss was carried forward to the following year and wholly absorbed the income derived for that year."

59. Upon the reference to the board of review of the decisions of the respondent commissioner disallowing the objections the board of review heard the evidence given and the submissions made on behalf of the company and the commissioner respectively.

60. During that hearing a statement was put in evidence before the board which purported to show the amount of the taxable income of the company for the income years 1929, 1930 and 1931 respectively calculated on the figures returned by the company after making adjustments for items allowed or disallowed under the provisions of the Federal *Income Tax Assessment Acts*. The said statement was as follows :—

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SYDNEY—AUSTRALIA.

Statement of Taxable Income.

Financial Year Accounting Year ended 31st December	1930-1931 1929.	1931-1932 1930.	1932-1933 1931.	Total tax.	Amount previously paid.	Difference.
Taxable income as returned	£13,650	£2,418	£23,865			
Add :						
Oil and grease dispensers and barrel trucks	£13,919	£8,464	£1,304			
Installation and removal expenses ..	24,769	23,721	8,575			
Tools and Supplies—Estimated value of additions ..	5,000	7,500	—			
Legal Expenses—Estimated disallowable portion ..	300	1,000	1,000			
Equipment transfer expenses	546	1,413	1,991			

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Alterations to leased property	239		797		145				
Estimated amount of expenditure on alterations, additions, etc., charged as repairs	250		250		250				
Erecting and painting signs	3,395		6,617		2,730				
Petrol pump globes	1,777		2,100		965				
Electrical wiring on petrol pumps ..	1,642		1,949		922				
Exchange on remittances	—		—		104,703				
		51,837		53,811		122 585			
Total ..		65,487		56,229		146,450			
Less :									
Additional depreciation allowable as per attached statement		—		5,899		11,876			
Taxable income ..		65,487		50,330		134,574			
Tax		£4,365 16 0		£3,523 2 0		£9,420 3 7	£17,309 1 7	£3,153 8 8	£14,155 12 11

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61. At the hearing before the board of review in May 1937 counsel for the commissioner submitted that the board had figures before it of what the taxable income would be under the ordinary provisions of the Federal Acts for the income years 1929, 1930 and 1931 and that those figures should be taken.

On the same occasion counsel for the company stated that his contention would be that the company should not be assessed under sec. 28 of the said Act in respect of these three years and that he took it the board would assess the company on the basis set out in the statement which appears in par. 60 hereof, subject to any amount which the board might see fit to allow in respect of the claim for exchange for 1931 and the claim for the New-Zealand loss for 1930 and that subject to those two claims he submitted that the company should be assessed for those years on the figures shown in that statement.

62. At the further hearing of the reference to the board of review of the decisions of the commissioner, the board heard evidence relating to the objection to the special property tax assessed by the commissioner for each of the years and also the submissions of the counsel for the respective parties thereon. Counsel for the commissioner also submitted, *inter alia*, that the board, having decided that the assessments made by the commissioner for the years 1929, 1930 and 1931 under sec. 28 were wrong and that sec. 28 did not apply, should itself assess the taxable income of the company for those years, and submitted that such assessments should be according to the figures in the statement set forth in par. 60 hereof with certain adjustments. Counsel for the company objected to any alteration being made to the decision rendered by the board on 28th July 1937, and adduced no further evidence.

63. Before the board of review the company put forward a formula as being a suitable formula for the board of review once it came to the conclusion that sec. 28 did apply to use in determining on what percentage of the total receipts of the company's business the company should be assessed and charged with income tax under sec. 28 of the *Income Tax Assessment Act* 1922 as amended, for that year, and that the commissioner before the board, whilst he did not admit that the formula was the correct or only method

of determining such percentage under sec. 28, did not dispute that it was a proper method and did not argue that the figures worked out on the formula would not give a percentage that could be used for the purposes of sec. 28. The commissioner submitted, however, that at most the formula was a guide and that the board was not bound to fix the percentage ascertained by it. The formula was as follows:—(1.) Ascertain in Australian currency the total receipts (whether cash or credit) of the taxpayer's business in Australia for the income year. (2.) Ascertain—in Australian currency—for the income year—(*a*) the total cost of duty, wharfage, landing charges and marketing and overhead expenses of the said business; (*b*) the total f.o.b. cost of the products sold by the said business in the said year calculated at the lowest price at which comparable products could have been purchased f.o.b. at the date of shipment by the taxpayer in the quantities required by it in any available world market and having regard to its necessity to have a continuous supply; (*c*) the total cost of freight for such products from the port of actual shipment to the port of discharge in Australia calculated at the lowest freight rates for comparable distances which could be obtained at the date of shipment for like products in similar quantities; (*d*) total cost of insurance of such products during the voyage from such port of shipment to such port of discharge calculated at the lowest rate which could be obtained for comparable risks. (3.) Deduct from the total receipts in 1. the aggregate of the total costs in 2. and calculate the percentage which the resultant figure bears to the total receipts in 1.

64. Other than that formula no basis, formula or method of approach for determining whether sec. 28 should apply for any particular year or not was referred to in evidence or argument before the board of review nor did counsel advert in discussing the applicability of sec. 28 to any matter other than the result obtained by applying the said formula.

65. The board of review did have regard to the formula set forth in par. 63 hereof for the purpose of determining the percentage of the total receipts of the company's business on which income tax should be assessed and charged to the company for the calendar year 1932 in accordance with the provisions of sec. 28. The board,

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however, did not fix as the said percentage the exact figure found by the formula, but the percentage fixed by it was based upon and closely approximated the result given by the formula.

66. The board of review decided that for the calendar year 1932 the company came under the provisions of sec. 28 and the percentage of the total receipts of the business on which the company should be assessed and chargeable with income tax for that year should be nine and one-half per cent and that accordingly for that year the company should be assessed and chargeable with income tax on the sum of £232,434.

67. In applying the said formula for the calendar year 1932 the board of review did not include under clause 2 of the formula or take into account—(i) the amount or any part of the amount claimed by the company under the heading "exchange account"; (ii) any amount claimed by the company for losses carried forward.

68. That the amount of taxable income (other than the amount determined to be liable for special property tax) assessed by the board of review for each of the income years 1929, 1930 and 1931 is correct—(A) If and provided that—(i) the board of review, having given the decision it did on 28th July 1937, as to each of such years, had power and authority to give the further decision it pronounced on 18th October 1937; (ii) the board of review having power and authority to give such further decisions it was proper in the circumstances for it to exercise such power; (B) Whether the said further decision is valid and proper or not except so far as the appellant establishes—(*a*) that some "exchange" as claimed by the company should have been allowed as a deduction; (*b*) that, as regards the income year 1930, some New-Zealand loss as claimed by the company should have been allowed as a deduction; (*c*) that in respect of income years 1930 and 1931 the amount claimed by the company as depreciation and disallowed or some portion thereof should have been allowed; (C) If the said further decision is not valid and proper except so far as and to the extent that the appellant establishes (*d*) that in respect of the income year 1931 the taxable income was excessive.

Rich J., under sec. 18 of the *Judiciary Act* 1903-1939, by consent of the parties, ordered and directed that the questions appearing hereunder arising in the appeals be argued before the Full Court of the High Court on the mutual admissions which appear above.

The questions were as follows :—

Question 1 :—Should the amount of any "exchange" referred to in par. 17 of the mutual admissions be allowed as a deduction in ascertaining the taxable income of the company under the provisions of the *Income Tax Assessment Act* 1922 as amended in the year in which payments were made as set forth in these mutual admissions ?

Question 2 :—In ascertaining the taxable income of the company for the income year 1930 should the gross income derived by the company from carrying on its business in New Zealand be included in its assessable income and should the expenditure and other deductions referable to that income be allowed as deductions to the extent that the same are allowable deductions under the *Income Tax Act* 1932 (*sic*) as amended ?

Question 3 :—Had the board of review power to do more than to uphold the objections to the assessments for the years 1929, 1930 and 1931 ?

Question 4 :—Having given the decision it did in July 1937, as to the years 1929, 1930, 1931 and 1933, had the board of review any power to give the decision it did in October 1937 except as to special property tax ?

Question 5 :—The board of review having determined that the percentage under sec. 28 of the *Income Tax Assessment Act* 1922 as amended fixed by the commissioner for the year 1932 was excessive did the board of review have power to do other than set aside the assessment for that year ?

Question 6 :—Were the assessments of the board of review dated 18th October 1937 of taxable income for the income years 1929, 1930, 1931 and 1932 valid assessments ?

Question 7 :—Should the board of review when considering whether to apply sec. 28 to the company in respect of the income year 1932 or in ascertaining for that year the percentage of gross receipts mentioned in sec. 28 have taken into account losses made by the company in any,

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and if so what, previous year or years, and if so are such losses to be arrived at by applying the ordinary provisions of the Act or by applying the formula set forth in par. 63 of the mutual admissions or partly by one means and partly by the other ?

Question 8 :—Was any business carried on by the company in Australia during the relevant period within the meaning of sec. 28 of the Act ?

Question 9 :—Was the company assessable or chargeable with tax on a percentage of the total receipts of the business in respect to the year 1932 ?

Question 9A :—Upon the facts admitted and upon the proper construction of sec. 28 had the board of review authority to refuse to fix any percentage of the total receipts of the business ?

[This question was added during the argument before the Full Court.]

Question 10 :—Was the board of review wrong in not allowing the claim of the company to deduct the amounts claimed by it as deductions from gross income of the property or any and if so which of such amounts for the purpose of ascertaining the taxable income of the company liable to special property tax ?

Question 11 :—The board of review having determined that the company was liable to be assessed under the provisions of sec. 28 of the Act for the financial year 1933-1934 and having determined the percentage of the total receipts of the company's business on which it is assessable and chargeable with income tax under that section and the company if such determination was correct accordingly being liable for income tax on such percentage at the rate fixed by the *Income Tax Act* 1933 was the company also liable for any further tax on its income from property under sec. 5 of that Act ?

Question 12 :—If yes to question 11, should the amount of taxable income of the company referred to in sec. 5 have

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been ascertained for the said year by applying the percentage determined as aforesaid to the gross amount of the income so referred to or should the amount of such taxable income have been ascertained under the general provisions of the *Income Tax Assessment Act* 1922 as amended ?

Weston K.C. (with him *Kitto*), for the taxpayer. *Question* 1.—The taxpayer's obligation was a dollar obligation which was required to be paid in dollars whenever a payment was made. The matter was crystallized in *Moreau* v. *Federal Commissioner of Taxation* (1). That case is this case in reverse. The deduction claimed was not a mere book entry; it was an actual dollar payment, that is, dollar payment expressed in Australian pounds at the rate at which it was paid. It was an inevitable and unavoidable expense of carrying on the business ; it was a means of paying for the goods which the taxpayer had to buy in order to carry on, therefore it was a deductible outgoing. The taxpayer could only pay for the goods by buying dollars, therefore it was a necessary expense, in Australian money, of the business.

[LATHAM C.J. referred to *Madeleine Vionnet et Cie* v. *Wills* (2).]

The commissioner's attitude is based upon the fact that the taxpayer did not pay promptly for its goods, that is to say, that it paid at a date later than the date upon which it sold the goods. As a matter of ordinary business the fund out of which a trader hopes to, and does, pay his supplier is from the proceeds of the goods. The commissioner is not entitled to run the business of a taxpayer, and is not at liberty to dictate to a taxpayer how his business should be conducted. The commissioner must take things as he finds them, and if it is a bona-fide payment actually made in the course of the business and in relation to the income the matter is concluded. This is an attempt to control actuality by a merely notional and purely artificial standard nowhere adverted to in the Act. Exchange, whatever the amount may be at the time of payment, is an ingredient of, or item in, the cost of goods. Having regard to the dicta or *ratio decidendi* in *Amalgamated Zinc* (*De Bavay's*) *Ltd.*

(1) (1926) 39 C.L.R. 65, at pp. 69, 70. (2) (1939) 56 T.L.R. 15.

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v. *Federal Commissioner of Taxation* (1), and in *Herald & Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (2) and *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3), the position is that if there be the nexus of a continuing business in the year of expenditure, expenditure may be deducted although that expenditure was the result of liabilities incurred in an antecedent accounting period, or although that expenditure might not have had its beneficial effect exhausted in the period of expenditure but some of that effect might be held to exist in later years.

[McTIERNAN J. referred to *Commissioner of Taxation* (*N.S.W.*) v. *Ash* (4).]

The decision in *In re the Income Tax Acts* [*No.* 2] (5) is opposed to the respondent's contention. In *Radio Pictures Ltd.* v. *Inland Revenue Commissioners* (6), where the facts bear a striking resemblance to the facts in this case, the court decided in favour of the contention now submitted on behalf of the taxpayer. That case also indicates that when the facts are undisputed the conclusion is a matter open to review in circumstances such as these. It shows further that considerations applicable in respect of a judgment are not applicable in respect of income-tax law, and is relevant to the decision in *Madeleine Vionnet et Cie* v. *Wills* (7) which was a case of a judgment and was based upon pecularities. *Question* 2.—This question should be answered in the affirmative. The income derived from that part of the business carried on in New Zealand was not chargeable under the taxation legislation of that country; therefore it, that is, the gross income, was not exempt under sec. 14 (1) (*q*) of the *Income Tax Assessment Act.* Not being exempt it was chargeable under that Act, therefore the expenditure and other deductions referable to that gross income should be allowed to the extent permitted by the *Income Tax Assessment Act.* The taxpayer's income from whatever source should be considered as a whole. The word "chargeable" means payable; it does not mean assessable. Sec. 28, in providing that the business in Australia shall be assessable and chargeable with income tax, draws a distinction

(1) (1935) 54 C.L.R., at pp. 303, 307.
(2) (1932) 48 C.L.R. 113.
(3) (1937) 56 C.L.R. 290.
(4) (1938) 61 C.L.R. 263.
(5) (1907) V.L.R. 327; 28 A.L.T. 196.
(6) (1938) 22 Tax Cas. 106.
(7) (1939) 56 T.L.R. 15.

between assessable and chargeable and treats them as not synonymous.

[Rich J. referred to *R.* v. *St. Clement Danes* (1).]

"Chargeable" in the sense there referred to means that a person requiring relief may get it at the charge of the parish: See also *Spanish Telegraph Co. Ltd.* v. *Shepherd* (2). The taxpayer here concerned is both assessable and chargeable. Construed as above sec. 14 (1) (*q*) does not, on the facts of this case, conflict with sec. 26. The difficulties of sec. 26 were referred to in *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (3). The right of a person to avail himself of that section depends upon his income from sources outside Australia being partly liable to tax. Here, the income relevant to the year under consideration was not liable in New Zealand. The mode of approach for the ascertainment of taxable income and deductions is as shown in *Federal Commissioner of Taxation* v. *Gordon* (4), which was, in effect, approved in *Commissioner of Taxation (N.S.W.)* v. *Hillsdon Watts Ltd.* (5).

[Dixon J. referred to *Webster* v. *Deputy Federal Commissioner of Taxation (W.A.)* (6) and *New Zealand Flax Investments Ltd.* v. *Federal Commissioner of Taxation* (7).]

Questions 3, 4, 5 and 6.—These may be dealt with together and should be answered as follows: 3, Yes; 4, No; 5, As the question is stated, Yes; and 6, The assessments referred to are invalid. The effect of the board's decision in July 1937, upholding ground 5 of the objection, was that the assessments were set aside as nullities or invalid under the law, and as intimating that the way was open for other assessments to issue. That was a binding and final decision. Upon the making of the decision the board became *functus officio*. The board exceeded its power by arriving at a decision on the next occasion quite inconsistent with what it did on that occasion. Having made a decision in July 1937 it was not competent for the board to make the decision it purported to make in October 1937, nor had it power to make any assessments. As regards the years 1929, 1930 and 1931, the board had a discretion

(1) (1862) 3 B. & S. 143 [122 E.R. 55].
(2) (1884) 13 Q.B.D. 202.
(3) (1935) 54 C.L.R. 295.
(4) (1930) 43 C.L.R. 456, at p. 461.
(5) (1937) 57 C.L.R. 36.
(6) (1926) 39 C.L.R. 130.
(7) (1938) 61 C.L.R. 179.

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to assess or not to assess and likewise jurisdiction to do one or the other; but it was jurisdiction as to the exercise of a discretionary power. The board obviously determined in July 1937 not to assess itself and to submit the matter to the commissioner. That was an exercise of a discretionary power on the part of the board, which, although competent so to do, the court will not override nor, in the circumstances, will it itself assess. Even though the board's decision is not an exercise of a judicial power of the Commonwealth, it is, probably, an exercise of a semi-judicial power. *Question* 7.—The answer to this question should be that upon the board finding the normal net profits in the particular year it should then have said that if the taxpayer had traded in a normal way that was the profit it would have had, that was the taxable income, but it would have the benefit of losses carried forward from previous years, in relation to its liability. A taxpayer should get the benefit of past losses on one basis or another. The fixing of a percentage upon gross receipts without taking into account past losses goes far beyond the obvious intention of sec. 28 and works a real and grave injustice. In such a case sec. 28 would be used not to correct an anomaly but to inflict a penalty. Notwithstanding that the power exercised is a discretionary one this court has jurisdiction to consider whether such a decision is good or bad. This court will interfere when it is affirmatively established (*a*) that there is not any material at all upon which the decision could be properly reached; (*b*) that the decision is so irrational as not to deserve to be called a decision; and (*c*) that there has been a misdirection in law (*Moreau* v. *Federal Commissioner of Taxation* (1); *Robertson* v. *Federal Commissioner of Taxation* (2)). A decision which ignores losses is, in an administrative sense, irrational. *Question* 8.—The words "business carried on in Australia" in sec. 28 mean a business carried on in Australia and not elsewhere, or in Australia only. The taxpayer's business during some of the years under consideration was not such a business, and, therefore, did not come within the scope of the section. *Question* 9.—The taxpayer does not ask for any answer to question 9 as framed, when read relevantly to the year 1933 which is proposed to be introduced into it; but does ask for an order as to what is the

(1) (1926) 39 C.L.R. 65. (2) (1937) 57 C.L.R. 147.

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proper legal result of what the board indicated. *Question* 9A.—The board had power to decide that no percentage should be fixed. What the board did in fact in July 1937 as regards the year 1933 was to set aside the existing assessment and to determine that the taxpayer, for that year, did not come within the operation of sec. 28. That decision was correct and should not be interfered with. Whether the commissioner decides rightly or wrongly it is between the commissioner and the board to settle what are the powers and what are the percentages. Properly construed, sec. 28 does not mean that where a foreign-controlled business does not produce any taxable income it must be assessed on a percentage of the total receipts. The section, having regard to its obvious purport, lends itself to being read down. The prima-facie meaning of words used in a taxing Act may always be modified (*Astor* v. *Perry*; *Duncan* v. *Adamson* (1)). If the phrase "taxable income" in sec. 28 be not capable of being controlled either by extending the qualifying clause to it or the introduction of some such word as "such," the court should imply after the words "such percentage" the words "if any." *Questions* 10 and 11.—Question 11 should be answered, No. It is important to note that the further tax is imposed upon a portion of a whole, the whole being described as the taxable income derived by any person. The definition of assessable income in sec. 4 of the Act means the amount of income remaining after all deductions allowed by the Act have been made. When one operates under sec. 28 the ordinary provisions of the Act are superseded entirely; it is put into a special category in a particular case which, as here, might work what is perhaps an extremely unfair result. An arbitrary assessment, if made under sec. 28, is a special assessment. It is not meant, when one speaks of taxable income derived from property, that a company can be assessed for what is primarily business income and be re-assessed on another basis altogether which might be quite different from and more prejudicial to a taxpayer than the first method of property tax. The validity or otherwise of sec. 28 was dealt with in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2). A company liable under sec. 28 of the *Income Tax Assessment Act* is not liable under sec. 7A of the *Income Tax*

(1) (1935) A.C. 398. (2) (1925) 35 C.L.R. 422.

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Act 1930 (sec. 5 of the *Income Tax Acts* 1931, 1932 and 1933). The power to fix a percentage gives a power to take account of every relevant circumstance ; this power should be exhausted. If the answer to question 11 is in the negative then question 10 should be answered in the affirmative. Sec. 7A (sec. 5) of the *Income Tax Act* subjects three specified classes of property to a special imposition, loosely termed property tax, although the third class need not be income from property in the usual meaning of that word. The finding was that the rents referred to constituted an item of business income not from property. This item was part of personal exertion income although subjected to the special tax on the face of it and it was subject to all the business expenditure. The pumps were used as an incident of running the business. Rent from the pumps was income of the taxpayer's business incurred wholly and solely in the course of gaining or producing the assessable income. Unless the expenditure in connection with the pumps was incurred those pumps might not exist as they do, and income would not be derived from them. The view expressed in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Federal Commissioner of Taxation* (1) covers this matter. The taxpayer does not own the land upon which the pumps are erected, but is merely a licensee, thus rents therefrom are not rents in the ordinary sense and do not come within pars *a* or *b* of sec. 7A (1) (sec. 5 (1)) of the *Income Tax Act*. *Question* 12.—If the answer to question 11 be in the affirmative and the ordinary method of assessment indicated in question 10 be applicable to the case, the only remaining thing to be done as regards question 12 is to carry forward the arbitrary taxable income determined under sec. 28, ascertain the appropriate percentage of the receipts from money included in the total receipts ascertained under sec. 28 ; and charge the special tax upon property upon that sum. The board misdirected itself in two respects : (*a*) that pump rent was income from property, and (*b*) that the expenditure was incurred with a view to expanding the sales of the business.

Tait, for the Commissioner of Taxation. *Question* 1.—This question should be answered in the negative. The moneys referred to in par.

(1) (1934) 52 C.L.R. 9, at p. 19.

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17 of the mutual admissions were retained in Australia in order to provide working capital, therefore the excess exchange ultimately paid, although admittedly a payment made in the course of the business, was an outgoing in the nature of capital, the deduction of which is precluded by sec. 23 (1) (*a*) of the *Income Tax Assessment Act*. The payment made was not, and no part of it was, a payment for goods. It was not a loss or outgoing actually incurred in gaining or producing the assessable income within the meaning of sec. 23 (1) (*a*), nor was it wholly and exclusively laid out or expended for the production of such income within the meaning of sec. 25 (*e*). The mere delay in payment is not, but the reason for that delay is, relied upon.

[DIXON J. referred to *O'Shea* v. *Commissioner of Taxes* (*Vict.*) (1).]

The lag of two years was for the purpose of providing capital assets, that is, the purchase of plant, which, when the remittance was made, resulted in the additional amount being paid in Australian pounds by way of exchange. On the question whether a matter is capital or income there seems to be some doubt as to whether it is a question of fact or of law (*Sun Newspapers Ltd. and Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2)). The real contention here is one of fact as to what is the proper inference to be drawn in the circumstances of this case. The board of review decided as a fact, on the evidence before it, that the retained moneys were of a capital nature. This finding of fact should not be disturbed unless it can be shown that the members of the board were wrong in the way they directed their minds to the matter, or in the application of general principles or of law. Cases in which this matter has been dealt with one way or the other are *J. P. Sennitt & Son Pty. Ltd.* v. *Federal Commissioner of Taxation* (3) ; *Australian Temperance and General Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (4) ; *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (5) ; *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (6) ; *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (7) ;

(1) (1927) 39 C.L.R. 313.
(2) (1938) 61 C.L.R. 337, at p. 354.
(3) (1932) 1 A.T.D. 387.
(4) (1933) 48 C.L.R. 452, at p. 455.
(5) (1933) 49 C.L.R. 171.
(6) (1928) 41 C.L.R. 148, at p. 154.
(7) (1914) 3 K.B. 674, at p. 682.

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British Imperial Oil Co. Ltd. v. *Federal Commissioner of Taxation* (1); *Federal Commissioner of Taxation* v. *Munro*; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2).

[Starke J. referred to *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3).

[Dixon J. referred to *Wali Mohammad* v. *Mohammad Bakhsh* (4) and *Secretary of State for India* v. *Rameswaram Devasthanam* (5).]

Assuming that the court will, as to the exchange losses, itself consider the matter as a question of fact whether it is capital or income, the facts upon which the commissioner relies are (*a*) the relationship between the taxpayer and the parent company incorporated in the United States of America; (*b*) the balance-sheets, which show that the money was retained and used in order to supply capital for the taxpayer; (*c*) the non-payment for two years; and (*d*) the contents of the letter dated 30th October 1933, set forth, so far as material, in par. 23 of the mutual admissions. Unless the rule in *Clayton's Case* (6) be applied the taxpayer is unable to claim that the additional amount when the remittance was made was referable to particular goods. There was, at least, an element in that of a capital nature; it therefore cannot be said to be wholly and exclusively expended in the production of the assessable income. The retention of moneys for capital purposes is a factor which was not present in *Moreau* v. *Federal Commissioner of Taxation* (7), nor was it present in *Radio Pictures Ltd.* v. *Inland Revenue Commissioners* (8). Such cases as *Herald & Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (9); *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (10) and *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (11), go to a question under sec. 23 whether a deduction can be allowed in a year in which no income was necessarily produced from that expenditure. That is a principle which the commissioner does not contest; it, however, is not really relevant to this case. The test or criterion whether a deduction was incurred in gaining or producing assessable income is

(1) (1925) 35 C.L.R., at p. 432.
(2) (1926) 38 C.L.R. 153.
(3) (1915) A.C. 433.
(4) (1929) L.R. 57 Ind. App. 86, at pp. 91, 92.
(5) (1934) L.R. 61 Ind. App. 163.
(6) (1816) 1 Mer. 572 [35 E.R. 781].
(7) (1926) 39 C.L.R. 65.
(8) (1938) 22 Tax Cas. 106.
(9) (1932) 48 C.L.R. 113.
(10) (1935) 54 C.L.R. 295.
(11) (1937) 56 C.L.R. 290.

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the purpose of the expenditure (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (1); *Henderson* v. *Meade-King Robinson & Co. Ltd.* (2)). Expenditure of interest in circumstances somewhat similar to those present in this case was disallowed in *European Investment Trust Co. Ltd.* v. *Jackson* (3), and in *Ward* v. *Anglo-American Oil Co. Ltd.* (4). In the latter case exchange also was disallowed. The courts there considered the very question now before this court, namely, whether it was an expenditure which was not used to gain profits. This court, in *Federal Commissioner of Taxation* v. *Munro* (5), disallowed a deduction in respect of interest paid on borrowed money used for a purpose whereby no income was produced.

[DIXON J. referred to *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (6).]

The difference in Australian pounds that was paid was not an outgoing incurred in gaining income but was in the nature of capital. The additional Australian pounds were part of the cost of financing the business and of purchasing and supplying the further plant, equipment and other items that the taxpayer required. The funding of the debt, the fact that it was not wholly and exclusively an income item or wholly and exclusively a payment for the goods, the method of the taxpayer in the keeping of its accounts, and the basis of credit in the trading account in the past years, all go further to show that that was a capital item and precludes the allowing of the deduction (*Ward & Co. Ltd.* v. *Commissioner of Taxes* (7)).

[STARKE J. referred to *Farmer* v. *Scottish North American Trust Ltd.* (8).]

Submissions as to the deduction of exchange in respect to 1932, as distinct from other years, are that the matter is left to the board of review and is not for this court to review, that is, the question whether this should be taken into account. Assuming that this court considers that the board should have looked at this in considering the question of exchange, in fixing a percentage, then the board, in fixing a percentage for that year, was correct in not

(1) (1926) A.C. 205, at pp. 212-214.
(2) (1938) 22 Tax Cas. 97, at p. 105.
(3) (1932) 18 Tax Cas. 1, at pp. 11, 12.
(4) (1934) 19 Tax Cas. 94.
(5) (1926) 38 C.L.R. 153.
(6) (1934) 51 C.L.R. 568.
(7) (1923) A.C. 145.
(8) (1912) A.C. 118.

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taking into consideration or allowing anything for exchange losses, and for this reason, that under sec. 28 what the commissioner, and later the board, was required to do was to consider what would have been the position of the taxpayer if it had not been controlled abroad and what would be the ordinary income expected to arise. If the taxpayer had not been controlled abroad it, doubtless, would have had its capital needs supplied in some other way, e.g., by share capital, or by loans. The matter of percentage under sec. 28 is left to the opinion of the commissioner, so where the board of review, under the provisions of the Act, has taken the place of the commissioner and bona fide exercised its judgment that judgment is not open to review in this court (*R.* v. *Arndel* (1) ; *Moreau* v. *Federal Commissioner of Taxation* (2) ; *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (3) ; *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (4) ; *Robertson* v. *Federal Commissioner of Taxation* (5)). There is not any interference in any way on the part of the commissioner in the conduct of the taxpayer's business. He accepts what has been done by the taxpayer, but contends that what was done creates a capital outlay. *Question* 2.—This question depends upon the meaning of the word " chargeable " in sec. 14 (1) (*q*) of the *Income Tax Assessment Act.* As there used it means brought into account. The meaning of the word " chargeable " was dealt with in *R.* v. *St. Clement Danes* (6). Sec. 14 (1) (*q*), using the word chargeable in that sense, refers to a gross amount being brought in and that prevents the reasoning advanced on behalf of the taxpayer from applying. Sec. 14 deals with classes of income ; income in the abstract. The principle stated in *Webster* v. *Deputy Federal Commissioner of Taxation (W.A.)* (7) that the gross income is taken and then everything allowed by the Act and nothing else is deducted therefrom cannot be applied throughout the Act in all places, e.g., it does not apply in sec. 26, or in sec. 14. Deduction of business losses is provided for in sec. 26 of the Act, and as it is clear that the business losses incurred in New Zealand do not come within the provisions of that section it follows that such losses are not deductible at all.

(1) (1906) 3 C.L.R. 557.
(2) (1926) 39 C.L.R. 65.
(3) (1932) 47 C.L.R. 621.
(4) (1935) 53 C.L.R. 534.
(5) (1937) 57 C.L.R. 147.
(6) (1862) 3 B. & S. 143 [122 E.R. 55].
(7) (1926) 39 C.L.R. 130.

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That section is exhaustive. Those provisions support the view that income in sec. 14 (1) (*q*) means gross income. Sec. 26 does apply to companies. *Question* 3.—This should, upon the proper contruction of the provisions of sec. 44 and sec. 51 (4) of the Act, be answered in the affirmative. *Question* 4.—This also should be answered in the affirmative. The power of the board of review to assess is to be found in sec. 51 (4) and in sec. 44. There was only one assessment for the taxpayer for the year. The board could not assess until it had determined the matter as to special property tax. On the question whether the assessment is one or more than one, see *R.* v. *Deputy Commissioner of Taxation* (*S.A.*) ; *Ex parte Hooper* (1) and *Federal Commissioner of Taxation* v. *Hoffnung & Co. Ltd.* (2). It was impossible for the board to make an assessment on the occasion of its first decision because all the materials necessary therefor were not then before it. When the board gave the first decision it had a power to assess which it had not yet exercised and which it subsequently exercised. The first decision was an interim decision necessary for the purpose of appeal by the parties and, thereafter, to issue the assessment on the basis of the resultant figures. *Question* 5.—An affirmative answer should be made. The board had power not only to set aside the assessment, but also to determine what the percentage should be : See secs. 28, 37 and 44. *Question* 6.—The assessments referred to were valid assessments. The board of review did not upon the giving of its decision in July 1937 become *functus officio*. On that occasion the board did not perform its function under sec. 51 : it merely made an interim assessment of its opinion and upheld a ground of objection. It did not make the decision that was required to be made, that is, as to what should be done about the objection to the whole assessment as such, until October 1937. The board considered the matter and took the view that the matter had been left open to it to make the assessment. It is agreed that if it be decided that exchange or losses should be brought in then to that extent in respect to the early years the assessments would not be correct assessments. *Question* 7.—There were not any losses assessed ; therefore the answer should be : No, the board was not

(1) (1926) 37 C.L.R. 368.

(2) (1928) 42 C.L.R. 39.

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bound to take into account the losses referred to therein. *Question* 8.—This should be answered in the affirmative. The fact that the taxpayer was carrying on a business elsewhere than in Australia does not mean that that company was not carrying on a business in Australia. The admitted facts show that the taxpayer carried on a business in Australia. *Question* 9.—Although argument ought, perhaps, to be postponed and the question referred to the judge of first instance, there does seem to be a question of law which this court should answer. The answer to the question should be, Yes, on the basis that there are three conditions precedent to sec. 28, namely, (*a*) that the business is carried on in Australia; (*b*) that it is controlled principally by persons outside Australia; and (*c*) that it appears to the commissioner there is less than the ordinary taxable income that might be expected to arise. Those conditions precedent are present in this case; therefore it follows that the taxpayer was assessable and chargeable on the total receipts in respect of the year 1932. *Question* 9A.—Upon the admitted facts and the proper construction of sec. 28 the board was bound to fix some percentage however small. Sec. 28 is clearly intended to apply in cases where there is not any standard possible. The primary meaning of the words "shall be assessable" and "shall be assessable and chargeable" in that section is that it is necessary to make the charge; they are mandatory, not discretionary. *Question* 10.—Upon a consideration of all the facts stated in the mutual admissions the board was right in not allowing the taxpayer to deduct the amounts referred to in that question. The object of the expenditure must be considered. On the facts those items of expenditure were not incurred in producing the assessable income, e.g., the pumps were not installed for the purpose of obtaining rent therefrom. This is not a case for apportionment. The whole of the expenses were incurred in order to gain the general profits of the business. Under sec. 7A of the *Income Tax Act* 1930—sec. 5 in the subsequent annual *Income Tax Acts*—the taxable income from the classes *a*, *b* and *c* must be ascertained. Although the Act does not itself lay down any particular method of ascertaining that taxable income, the proper method, as indeed the taxpayer itself adopted before the board of review and this court, is to take the gross income from these classes of property and deduct only such outgoings as are incurred thereby. By analogy one adopts the method shown in sec. 23 for the purpose of finding the total taxable income, and, by that method, ascertains the required section or class of the taxable income. On that basis the deductions which the taxpayer has claimed were not incurred in connection with pump rents but in earning profits from petrol sales. *Question* 11.—The taxpayer was liable for the further tax. The subject matter or income taxable under sec. 28 of the *Income Tax Assessment Act* is different from that taxable under sec. 7A (sec. 5) of the *Income Tax Act.* The levy of a tax on the receipts of a business under sec. 28 of the *Income Tax Assessment Act* does not prevent the levying also of a tax upon the taxable income derived from the three classes of assets specified in sec. 7A (sec. 5) of the *Income Tax Act.* A distinction should be drawn between taxable income as meaning the amount of income on which the tax is levied and the tax on that income. If it be, as has been suggested by the taxpayer, that the word "shall" in sec. 28 (1) means "may," and that the commissioner is not bound to find any amount is assessable or chargeable, it may be that there is no amount found under sec. 28 because of the commissioner's discretion, but that fact would not prevent a tax being imposed upon sec. 7A (sec. 5) upon those classes of income specified therein.

Weston K.C., in reply. *Question* 1.—The answer to this question could be expressed in the following form: Yes, so far as it is exchange on remittances for items not being capital items. The commissioner wrongly assumes that capital in sec. 23 (1) (*a*) includes circulating capital. Another incorrect assumption is as to the question whether capital in sec. 23 (1) (*a*) is limited to fixed capital or extends to circulating capital. On either assumption, if there be an expenditure relating to capital that capital *ex hypothesi* is not deductible. The contention that these deductions were prohibited by sec. 25 (*e*) goes entirely on quantum and if this court determines the matter on principle in favour of the taxpayer the deductions are matters for the judge of first instance. He may take the view that a particular deduction

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or deductions is a matter of pro rata apportionment of a particular remittance or on some other basis, and, also, that *Clayton's Case* (1) applies. The delay in payment did not, and could not, alter the fact that the money ultimately paid was money due for goods supplied. Even if the debt had lost its character of a debt for goods supplied and had been changed into a debt for money lent the consequences suggested on behalf of the commissioner would not flow. The exchange, or the appropriate portion thereof, was a permissible deduction, as it was an expenditure necessarily made in the course of the business, in discharging dollar indebtedness for stock-in-trade (*Radio Pictures Ltd.* v. *Inland Revenue Commissioners* (2)). " Capital " was held in *Roberts* v. *Deputy Commissioner of Taxation* (3) to mean " fixed " capital as distinguished from " circulating " capital. Assuming the contrary, proceeds of stock sold, which proceeds were returned in Australia, performed the office of circulating capital. It is incorrect to suggest that every item of expenditure incurred in relation to that working capital is not deductible. The obligation to discharge the dollar debt in dollars never altered. The money paid by the taxpayer in America represented two ingredients, namely, (*a*) the cost of the goods to the taxpayer, and (*b*) the cost of discharging the debt in America (*Farmer* v. *Scottish North American Trust Ltd.* (4)). The decisions in *European Investment Trust Co. Ltd.* v. *Jackson* (5) ; and *Ward* v. *Anglo-American Oil Co. Ltd.* (6) go entirely upon three rules in the English statute and, therefore, are distinguishable. Liabilities should be estimated as far as possible in the current year and adjusted as far as possible in the subsequent year (*Commissioner of Taxation* v. *Manufacturers' Mutual Insurance Ltd.* (7)). The court is absolutely bound to apply its mind afresh to decide every question of fact necessary to determine the matter. Upon an appeal the court has no option but to deal *de novo* with the facts so far as the parties are not in agreement. The relevant amendments made by the 1932 Act were prospective and not retrospective in their operation, which emphasizes the fact that when the legislature wished to make

(1) (1816) 1 Mer. 572 [35 E.R. 781].
(2) (1938) 22 Tax Cas. 106.
(3) (1919) S.A.L.R. 143.
(4) (1912) A.C., at pp. 124, 126.
(5) (1932) 18 Tax Cas. 1.
(6) (1934) 19 Tax Cas. 94.
(7) (1931) 31 S.R. (N.S.W.) 575 ; 45 W.N. (N.S.W.) 215.

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the test of exemption here non-exemption in New Zealand it knew how to do so. The principle to be applied is shown in *Smith* v. *Motor Discounts Ltd.* (1). This court should not assess for the years 1929, 1930 and 1931; it is not a matter which arises under any of the questions asked, and, also, by par. 68 of the mutual admissions the right to deal with the year 1931 on the admitted facts was expressly reserved to the parties. The decision of the board upon ground 5 of the objections in respect of the several years went to the whole of each of the various assessments. The main function of sec. 25 (*e*) is to prevent capital items or matters which would appear in capital account being deducted from gross revenue. Here no question in that acute form arises.

Cur. adv. vult.

1940, Mar. 18.

The following written judgments were delivered :—

LATHAM C.J. The Texas Co. (Australasia) Ltd. carried on business from the year 1918 by importing from the United States of America and selling in Australia gasolene, kerosene and other petroleum products. All the shares in the Australian company were held by the Texas Corporation of New York. The Texas Corporation held ninety-nine per cent of the shares in another company—the Texas Co., incorporated in Delaware. The Texas Co., Delaware, supplied the petroleum products to the Australian company either from its own stocks or from those of the Texas company incorporated in California. Questions arise as to the assessment of the Australian company under the Commonwealth *Income Tax Assessment Act* 1922, as amended from time to time, in respect of income received by the Australian company during the calendar years 1929, 1930, 1931, 1932 and 1933, which were accepted by the Commissioner of Taxation as accounting periods in lieu of periods ending on 30th June in each year—See *Income Tax Assessment Act*, sec. 32 (3).

The commissioner assessed the company under sec. 28 of the Act and the company appealed to a board of review. Sec. 28 is as follows :—" When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the commissioner that the business produces either no

(1) (1935) 54 C.L.R. 107.

taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the commissioner in his judgment thinks proper." From the decisions of the board of review in relation to the several years both the company and the commissioner have appealed to this court. *Rich* J., acting under the *Judiciary Act* 1903-1939, sec. 18, directed that certain questions arising in the appeals be argued before the Full Court on admissions made by the parties.

Question 1.—This question asks whether it is proper to allow deductions claimed by the company in respect of payments of Australian money made in remitting money to New York in order to satisfy debts owed in the United States of America in dollars. In the years in question rates of exchange moved against Australia and they varied from time to time, as is shown by the following table of variations in the dollar-equivalent to the Australian pound :

31st December,		1929	$4.783
,,	,,	1930	$4.456
,,	,,	1931	$2.704
,,	,,	1932	$2.653
,,	,,	1933	$4.064
,,	,,	1934	$3.914.

The company incurred debts for oil, &c., supplied at times when the exchange was near to what was regarded as normal, so that the number of Australian pounds required for the purchase of American dollars was close to par rate of exchange. The company subsequently discharged these liabilities when the rate of exchange had moved against Australia, so that a considerably larger number of Australian pounds was required to settle the American debt in dollars. The commissioner is prepared to allow as a deduction the increased amount in Australian pounds required to discharge the dollar debts if that increase is calculated by a comparison of the amount required at the time when the debt became due with the amount required when the goods in respect of which the debt was due were sold—the latter time being the time when in the ordinary course the purchase price should have been remitted to America. The company, however, did not make regular remittances as it sold the goods, but withheld payment, with the consent of the supplier company, for a period which on the average produced a two years lag between the invoicing of the oil, etc., and the payment therefor. The company claims as a deduction the whole amount of the differences so involved.

For the calendar years 1929, 1930, and 1931 the company kept its accounts in Australian pounds and in American dollars, but without any special adjustment on account of variations in exchange. The company valued its stocks in both pounds and dollars and credited itself and debited the supplier company with remittances in both pounds and dollars. After Great Britain went off the gold standard in September 1931 the company altered its system of accounting, and from 1st January 1932 a new and somewhat complicated system was introduced. The result was that balances to the credit of the trading account, so far as they represented debts due for stock-in-trade consisting of oil, etc., took into account so much of that stock as had been sold at the original f.o.b. dollar cost of that stock, but at an Australian pounds figure, not at the date of the invoice but at the date of the sale in Australia. If the stock was still unsold, the Australian pounds figure was calculated for the purpose of the trading account as at the date of the balance. The dollar debts in respect of particular consignments remained unchanged in dollar figures throughout. Remittances to America were taken into account at the actual amount of Australian pounds expended and in dollars at the dollar equivalent of the Australian pounds remitted at the date of the remittance. But (admission no. 17) " at the end of every month an adjustment of the Australian pounds so debited for remittance was made by ascertaining the difference between the total debits in Australian pounds for remittances for the month converted as aforesaid and the total of such debits in Australian pounds converted at the rate ascertained by dividing the number of dollars standing to the credit of the said account at the beginning of the month by the number of Australian pounds standing to the credit of the said account at the beginning of such month and debiting or crediting as the case might be this difference in Australian pounds to the said account. If in applying the above procedure there was for any year an excess of credits over debits for these differences

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then such excess of credits was claimed by the company in its income tax returns as deductions, but if there was an excess of debits then such excess of debits was returned as assessable income. These differences are hereinafter referred to as 'exchange'." The result of the system adopted was that the accounts of the company showed over the period of years involved the actual payments made in Australian pounds from time to time for the purpose of discharging the dollar indebtedness of the company.

The commissioner assessed the company under sec. 28 of the *Income Tax Assessment Act* 1922 for all the years in question upon a percentage of the cash and credit receipts of the company. He therefore did not make assessments under the ordinary provisions of the Act. But now, in consequence of the decisions of the board of review, assessments are to be made under those provisions for at least the years 1929, 1930 and 1931. If assessments for each year in which there is net income are made under the ordinary provisions of the Act, it may be supposed that the return upon which the assessments will be based will show stocks at the beginning of the year, stocks purchased during the year at cost whether paid for or not, on the one hand, and, on the other hand, sales made during the year, and value of stock on hand at the end of the year, the difference between the two sides of the account being the net income on trading account for the year. If an assessment for each year is made upon this basis, namely, a credit basis as distinct from a cash account of actual receipts and actual disbursements in the year, there are difficulties in finding room for a deduction in a subsequent year of an unexpectedly increased amount which was paid in cash in that year in respect of the price of goods received in a prior year, the price for which, though not paid, had been deducted in the accounts for that prior year. If, owing to the movement of exchange, goods which in earlier years could have been paid for in dollars by an expenditure of say £1,000 Australian were in fact paid for in a subsequent year by a necessarily increased amount of £1,100 Australian, it is urged that it would be difficult to regard the additional sum of £100 as deductible in the later year if it is regarded as the price of the goods bought in the earlier year because, *ex hypothesi*, the full deduction of what was in the earlier year taken to be the price, namely, £1,000, had already been made. It has been suggested that a claim for the deduction of increased expenditure resulting from adverse exchange movements where the payment is made in respect of goods acquired in an earlier year cannot be deducted in a later year, because such a deduction would involve a substitution of a cash basis for a credit basis in assessing the company. In my opinion, however, the suggested difficulty disappears if the increased outlay required in a subsequent year to discharge the constant (in this case, dollar) debt is regarded not necessarily as payment of the price of the goods, but as a necessary outgoing made in the normal course of the continuance and maintenance of the business as an enterprise conducted for the purpose of profit. The *Income Tax Assessment Act*, sec. 23 (1) (*a*), permits the deduction of outgoings (subject to exceptions) actually incurred in gaining or producing the assessable income. Although assessments to income tax are made for separate years, it is established that an expenditure made in one year which does not produce its income-gaining effect till a subsequent year may nevertheless be deducted in the year in which it is made, and so also an outgoing which arises out of income-gaining activities of a prior year may be deducted in a subsequent year when it is actually made (*Ward & Co. Ltd.* v. *Commissioner of Taxes* (1) ; *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (2) ; *Amalgamated Zinc* (*De Bavay's*) *Ltd.* v. *Federal Commissioner of Taxation* (3)). Thus the mere fact that the deductions claimed relate to the discharge of liabilities incurred in previous years does not in itself prevent a deduction. The cases to which I have referred show that in relation to this matter the law does not insist that when a credit system of accounts has been adopted so that an expenditure is deducted when it is incurred (whether or not the liability which it represents has actually been discharged by payment) it is thereafter impossible to make a further deduction on the same account in a subsequent year when it turns out that a larger expenditure than that anticipated must actually be made in order to discharge the liability.

Income is assessed under the *Income Tax Assessment Act* in terms of Australian pounds, and taxpayers are taxed in terms of Australian

(1) (1923) A.C., at p. 148.
(2) (1932) 48 C.L.R., at p. 118.
(3) (1935) 54 C.L.R. 295.

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pounds. If a taxpayer carrying on business in Australia is to discharge a debt incurred in dollars in the United States of America he must spend a number of Australian pounds dependent upon the current rate of exchange in order to obtain control of the necessary amount of dollars in America. Such expenditure of Australian pounds is an ordinary business expenditure, and the taxpayer is entitled to claim as a deduction the actual outgoing which he makes in order to discharge his normal business debts for stock-in-trade and the like: Cf. *Moreau* v. *Federal Commissioner of Taxation* (1). As I have already said, the fact that he has made a preliminary estimate of the amount required to discharge his foreign debts does not, in my opinion, preclude him from claiming later a deduction of any increased amount which in fact he has to pay. This deduction is claimable simply as an outgoing incurred in gaining or producing assessable income. In one sense it is true that it is not incurred in gaining or producing the assessable income of the later year in which the money is actually paid, but a business is properly regarded as a continuing enterprise, and if a business man in one year were to decline to pay his debts incurred in previous years it is obvious that his business would soon come to an end. Accordingly, the payment made in subsequent years has a real relation to the assessable income of the later year, although it is also related to, for example, the price of goods purchased in an earlier year, an estimate of which price has already appeared in his accounts and been allowed in the assessment for that year.

What has been said applies, however, only to outgoings in Australian pounds which are not outgoings of capital (sec. 23 (1) (*a*)). Accordingly, remittances sent by the company to America in repayment of moneys lent or in payment for plant which became part of the capital assets of the company fall outside the principles stated and no exchange in respect of such remittances should be allowed as a deduction.

Remittances were not appropriated to particular items, except that from August 1932 remittances forwarded after 1st January 1932 were appropriated for a period to liabilities accruing after 1st October

(1) (1926) 39 C.L.R., at p. 70.

1931. This arrangement was varied in October 1933. The particulars are set out in admission no. 23 and the letters therein mentioned. Subject to these facts, the ordinary rule should be applied and payments should be appropriated towards the discharge of the debts in the order in which the latter became payable.

In the present case remittances to satisfy debts owed for stock-in-trade supplied were delayed beyond a normal period because the company was short of capital in Australia. The commissioner is prepared to allow exchange costs calculated as at the date when, it is said, apart from the necessity of the company for more capital, the remittances would have been made, that is, the commissioner says, at the time when the goods were sold. It is argued that any increased cost due to any further delay in payment must be regarded as an outgoing of capital, and therefore not allowable as a deduction, because it was really incurred by reason of the necessity of obtaining more capital for the company.

The principle involved in the proposition submitted for the commissioner is very far-reaching. If it were adopted it would mean that whenever a trader postponed the payment of ordinary trade debts and therefore lost a discount and so was called upon to pay a larger amount than would otherwise have been the case, he would be allowed as a deduction in his assessment only the smaller amount which he would have paid if he had paid more promptly. Similarly, if a trader in the same position obtained credit and became liable to pay interest, the interest would not be allowed as a deduction. In each case the trader would have the benefit during the period of postponement of the use of a sum of money equivalent to the amount of the debt. The application of the principle in such cases would involve an inquiry as to whether the postponement of payment of debts was really due to a desire to have the use of a larger amount of money or was to be explained by some other reason. In nearly every case it would be possible to take the view that postponement was due to the former reason. Such a principle has not, so far as I am aware, ever yet been applied.

I construe the admissions of the parties as showing that payment of debts in the present case was postponed in order to provide the company with more capital in Australia and that the consequence

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of such postponement was that when the American dollar debts were ultimately paid more Australian pounds were required to pay them than would otherwise have been the case. But in my opinion these facts do not prevent the deduction of the exchange costs so incurred. The *Income Tax Assessment Act* does not include any provision which prevents the deduction of amounts paid in order to obtain the use of capital. Sec. 23 (1) (*a*) expressly permits the deduction of interest if an outgoing of interest is actually incurred in gaining or producing assessable income. If a liability for interest is incurred in order to introduce capital into an income-gaining business enterprise the amount of interest paid is allowable as a deduction : See *Federal Commissioner of Taxation* v. *Munro* (1).

It was further objected on behalf of the commissioner that the exchange in question was not an allowable deduction because it did not constitute a payment or any part of a payment for goods. I have already incidentally dealt with this objection. In my opinion, the payment may be described as a payment of the price of goods, but it may also be described as an ordinary outgoing not in the nature of capital, because it was an outgoing for the purpose of carrying on a business as a going concern and a necessary outgoing for that purpose. Accordingly, the amount can be deducted under sec. 23 (1) (*a*). Therefore, even if the view be taken that the expenditure of the moneys paid to obtain the American dollars cannot be regarded as being simply and only a payment of the price of goods, still the payment can be deducted as an outgoing under sec. 23 (1) (*a*).

Finally, it was objected that sec. 25 (*e*) of the *Income Tax Assessment Act* prevented the exchange in question being allowed as a deduction because the money was not wholly and exclusively laid out or expended for the production of assessable income. In so far as the money was expended in the repayment of loans and in payment for plant it was money not expended for the production of assessable income—it was simply a capital expenditure. But in so far as the money was expended to pay the dollar debts for stock-in-trade (oil, &c.) it was money wholly and exclusively expended for the production of assessable income in the ordinary trading activities of the company. Accordingly, in my opinion, question 1 should be

(1) (1926) 38 C.L.R., at pp. 171, 197, 217, 218.

answered. "Yes, so far as the amount was expended on remittances in payment of debts not being capital liabilities—except in the case of any year to the income of which sec. 28 of the Act is applied."

Question 2.—Question 2 is as follows :—"In ascertaining the taxable income of the company for the income year 1930 should the gross income derived by the company from carrying on its business in New Zealand be included in its assessable income and should the expenditure and other deductions referable to that income be allowed as deductions to the extent that the same are allowable deductions under the *Income Tax Act* 1932 as amended ?" (The reference to *Income Tax Act* 1932 should be a reference to the *Income Tax Assessment Act* 1922 and I so read the question.)

In each of the years in question the company carried on business in New Zealand as well as in Australia. The company was resident in Australia and, accordingly, was bound to pay tax upon any non-exempt income derived from New Zealand as well as upon income derived from Australia (sec. 4—definition of assessable income—and sec. 13). In the year 1930 the company made a loss upon the New-Zealand business and was not charged with income tax in New Zealand. The company claims that it should be allowed to deduct that loss in its Australian assessment. If the New-Zealand income was chargeable with income tax in New Zealand it was exempt in Australia (sec. 14 (1) (*q*)). If it was so exempt it was not assessable in Australia and no New-Zealand outgoings or losses were deductible in Australia. Thus, in the present case, the customary attitudes of commissioner and taxpayer are reversed. The commissioner seeks to show that the New-Zealand income is exempt in Australia by showing that it is chargeable in New Zealand. If he succeeds, the New-Zealand losses cannot be deducted in Australia. The taxpayer, on the other hand, strives to show that the New-Zealand income is assessable in Australia in order to get the benefit of including New-Zealand outgoings (which exceeded New-Zealand revenue for 1930) in its Australian return.

The answer to this question depends upon the interpretation of sec. 14 (1) (*q*) of the Act. This section provides, so far as relevant, that : "The following incomes, revenues and funds shall be exempt from income tax :—(*q*) income derived from sources outside Australia

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—(i) by a resident of Australia to the extent to which that income is proved to the satisfaction of the commissioner—(1) to be chargeable with income tax in any country outside Australia."

In the year 1930 no income tax was in fact charged upon the New-Zealand income. The company contends that therefore such income was not "chargeable with income tax" in New Zealand and accordingly, was not exempt from Australian taxation. If this be so, the gross income would have to be brought into account and the appropriate deductions would be allowable, and as such deductions exceeded the gross income in the year in question the result would be that the company would gain an advantage in its Australian assessment.

In my opinion the contention of the company is not well founded. If it had been intended to exempt only income which was actually charged with income tax, so that some amount of tax became due and payable, it would have been very easy to say so. It may be that in a particular year no charge is actually made because the income is insufficient in amount to reach the taxing limit or because losses exceed receipts. But if the income is of such a nature that it is liable to be taxed then, in my opinion, it is income which is chargeable with income tax though not actually so charged.

The result of this view of the section is that if income is exempt from tax in a country outside Australia (under, for example, a provision such as sec. 14 in the Australian Act) then it is taxed in Australia. If, on the other hand, it is not so exempt from tax but, if sufficient in amount, is taxed, then the income is not subject to tax in Australia. The result in the present case is that as the income is ordinary business income and is liable to tax in New Zealand it is exempt in Australia and should therefore not be brought into account. Therefore, the losses connected with it should not be brought into account.

The second question should therefore be answered in the negative.

Question 3.—This question inquires whether the board of review had power to do more than uphold the objections to the assessment for the years 1929, 1930 and 1931. For these years the commissioner had assessed the company under sec. 28. The company objected that sec. 28 was not applicable. The board not only upheld this objection, but also made its own assessments.

The board gave two decisions, or, at least, made two statements on this matter. In July 1937 the board upheld the objection to the application of sec. 28 to the years mentioned and reserved for future consideration a question as to what has been called special property tax. In October, however, after hearing further argument, the board assessed the company in respect of ordinary income tax and also in respect of special property tax in respect of these years.

Sec. 44 of the Act provides that a board of review shall for the purpose of reviewing decisions of the commissioner have all the powers and functions of the commissioner in making assessments under the Act and that such assessments shall for all purposes (except for the purpose of objection and appeal to the High Court) be deemed to be assessments of the commissioner. Sec. 51 (4) provides that the board, on review, shall give a decision, and may either confirm the assessment or reduce, increase, or vary the assessment.

It is therefore plain that the general question asked must be answered in the affirmative. The board had power, *inter alia*, to make assessments as well as to uphold objections.

Question 4.—This question asks whether the board, having given the decision which it gave in July 1937 as to the years 1929, 1930, 1931 and 1933, had power to give the decision which it gave in October 1937 except as to special property tax, the latter being the only question specifically reserved in July for future consideration.

The objection is based upon the facts just mentioned in relation to question 3 except that in respect of the year 1933 (when there was a heavy loss) what happened was that in July the board in its decision stated that " the claim made in ground 5 of the objection is upheld." Ground 5 was an objection that sec. 28 of the Act was not applicable. In October the board " re-stated " its decision in the following terms :—" Notwithstanding that the business produced no taxable income, the board, in its judgment, does not think it proper to assess and charge tax on any percentage of the total receipts of the business—sec. 28."

As to the first three years mentioned the board, as already stated, had power to make assessments in respect of these three years. In

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July it did not exercise that power but said—" An assessment under the ordinary provisions of the Act to issue for each of these years in lieu of the assessment under sec. 28." It is said that this was a decision that the commissioner should issue an assessment. In my opinion it does not necessarily bear this meaning and it was still open to the board to make an assessment. There is only one assessment in respect of one year and it was impossible to make an assessment until the matter of special property tax had been dealt with. This was not done until October, and then the board gave its decision in relation to these years by actually making assessments. In my opinion these assessments were not rendered invalid by reason of the fact that the board did not make them in July, when it was really impossible to make them.

As to the year 1933, the July decision was that the claim made in ground 5 of the objection was upheld, that is, the application of sec. 28 was excluded. In October " the decision " was " re-stated " in the terms already set out. The October decision was therefore to the effect that sec. 28 was applicable to the year 1933 because the business produced no taxable income, but that the board exercised a discretion and refused to apply the section by fixing an infinitesmal percentage of cash and credit receipts under the section.

The first matter for inquiry is whether the board, having given the July decision, was entitled to do anything further in October. The July decision only upheld the objection, namely, that sec. 28 was not applicable. The board was still able to exercise any of its powers in relation to that year provided that the exercise of such powers was consistent with its decision that sec. 28 did not apply. In October the board really reversed its July decision as to the applicability of sec. 28, holding that sec. 28 was applicable, but that the board had a discretion whether or not to apply the section and decided not to apply the section by fixing a percentage of receipts as the taxable income of the company.

The importance of this question depends upon the fact that in 1933 the company made a very large loss (it is said amounting to £600,000). It is the view of the company that if the company were liable to be assessed in respect of 1933 only under the ordinary provisions of the Act, that loss could be carried forward in the four succeeding years (sec. 26 (2)) until it was exhausted. If, on the other hand, the assessment is technically made under sec. 28 by fixing a very small percentage of the cash and credit receipts of the company, then the company had an income of say £1 for that year and therefore had no losses to be carried forward. The matter is therefore of importance to the parties.

The board dealt with the appeals in respect of the five years together, but strictly each appeal should have been separately heard. The parties were entitled to a separate decision in the case of each appeal. When the board has given—see sec. 51 (4)—a decision it cannot, in my opinion, alter that decision at a later date. The decision of the board determines the rights of the parties under secs. 44 and 51. There can then be an appeal to the High Court from a decision of the board which in the opinion of the High Court involves a question of law (sec. 51 (6)). These provisions assume that a definite ascertainable decision is given at a particular time from which an appeal can be brought within the time which is allowed by the *Rules of Court* : See Order LIA, rule 11. In the present case the board gave a clear decision in July that sec. 28 did not apply. In my opinion the board was not at liberty upon the same material, or even upon further material, and independently of consent, to give a different decision upon the same matter in October and to determine that sec. 28 did apply and either to fix a percentage under that section or to " apply " the section but to abstain from fixing a percentage thereunder.

In my opinion, therefore, question 4 should be answered as to the years 1929, 1930 and 1931—" Yes," and as to the year 1933—" No."

In connection with this question it was argued for the commissioner that whenever the following conditions were satisfied sec. 28 necessarily applied :—(*a*) a business carried on in Australia, (*b*) controlled principally by persons resident outside Australia, and (*c*) it appeared to the commissioner that the business produced no taxable income or that it produced less than the ordinary taxable income which might be expected to arise from the business. The result would be that the person carrying on the business in Australia would necessarily be assessed for income tax upon a percentage of total receipts.

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It is not disputed that the object of sec. 28 was to reach and to make amenable to taxation businesses which on account of foreign control had not produced income where normally such income would reasonably be expected to arise. Upon the contention of the commissioner the section would apply to every foreign-controlled business in Australia in every year in which a loss was made, because in such a year there would be " no taxable income." In my opinion, this is not the true view of the section. The section provides that when the specified conditions are satisfied, a person carrying on business in Australia shall be " assessable and chargeable " on a percentage of total receipts. These words, I think, mean that he may be so assessed and that he may be so charged. They do not compel the commissioner so to assess and so to charge. For these reasons, if it were necessary to decide the point, I should be of opinion that the board took a wrong view in holding that the section was necessarily applicable and in going on to hold also that, though the section was necessarily applicable, the fixing of a percentage was optional.

Question 5.—Question 5 is as follows :—" The board of review having determined that the percentage under sec. 28 of the *Income Tax Assessment Act* 1922 as amended fixed by the commissioner for the year 1932 was excessive did the board of review have power to do other than set aside the assessment for the said year ? "

The board of review agreed with the commissioner that in respect of the year 1932 an assessment should be made under sec. 28. But, after consideration of the evidence, the board fixed the percentage of receipts upon which the company should be assessed and charged with income tax at 9.5 per cent and substituted that percentage for the percentage of 20 per cent fixed by the commissioner. In July the board fixed the total receipts of the business at £2,446,671 and said that the percentage on which the company should be taxed should be 9.5 per cent. In October the board made a calculation of the 9.5 percentage and declared that the company was assessed under sec. 28 on £232,434, being 9.5 per cent of the said total receipts. At the same time the board declared that the company should be assessed to further tax (special property tax) upon an amount of £19,906.

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The reasons which I have given in relation to question 3 lead me to reply to question 5 in the affirmative, that is, the board of review did have power to do more than set aside the assessment of the commissioner for that year. The board had power to make an assessment itself and that assessment could only be made in October when an assessment to further tax as well as to ordinary income tax or to tax under sec. 28 could be made.

Question 6.—Question 6 is as follows :—" Were the assessments of the board of review dated 18th October 1937 of taxable income for the income years 1929, 1930, 1931 and 1932 valid assessments ? "

The objection to these assessments is that they were made in October after the July decision. As to the years 1929, 1930 and 1931 I have really answered this question under question 4, and as to 1932, under question 5.

In my opinion, the answer should be in the affirmative in the case of each year. This answer does not mean more than that they were valid as assessments under the Act. It does not mean that they were justifiable in all respects. They may be altered upon appeal.

Question 7.—This question relates to the year 1932 in respect of which sec. 28 was applied by the board as well as by the commissioner. It inquires whether the board when considering whether to apply sec. 28 for that year or in ascertaining a percentage of gross receipts, should have taken into account losses in previous years.

Sec. 28 contains no guidance as to the principles which are to be applied in determining a percentage in a case where a taxpayer is taxed upon an assumed income for the reason that a business has not produced such an income as would normally be expected. In considering whether the section should be applied the commissioner (or the board upon review) is, in my opinion, at liberty to take into account losses in previous years, though not bound to do so. It is, in my opinion, quite impossible to lay down any rule as to the weight to be given to the circumstance that such losses have been incurred. But the fact that losses have actually and bona fide occurred in previous years may lead to the view that sec. 28 should not be applied in relation to a subsequent year. Similarly, real losses in previous

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years might help the commissioner in fixing a percentage of receipts as a fair assessed income of the company.

In question 7 the court is also asked to declare whether, if such losses are to be taken into account, they are to be arrived at by applying the ordinary provisions of the Act or by applying some formula which the commissioner may have used for the purpose of fixing a percentage under sec. 28. No question can actually arise as to this matter unless the result of allowing deductions for exchange losses before 1932 brings about the result that there are losses in those years. As the question is therefore entirely hypothetical it should strictly not be answered. If it were answered I should express my opinion that there can be no ground whatever for utilizing any such formula in relation to any estimate of either income or losses in relation to any year in respect of which sec. 28 has not been applied.

Question 8.—Question 8 is as follows :—" Was any business carried on by the company in Australia during the relevant period within the meaning of sec. 28 of the said Act ? "

The point sought to be raised by this question depends upon the fact that the company carried on business both in Australia and New Zealand during the relevant period. It is urged that sec. 28 applies only to a case where a business is carried on solely in Australia and not where one and the same business, that is, a business under the same control, is carried on in Australia and in another country. Sec. 28 is introduced by the words—" When any business which is carried on in Australia is controlled principally by persons outside Australia . . ." It is contended that these words relate only to a business the whole of which is carried on in Australia. In my opinion the section should not be so construed. If a business is carried on in Australia then it is none the less carried on in Australia because it is also carried on outside Australia or because the persons who control the business have another business outside Australia.

In my opinion question 8 should be answered in the affirmative.

Question 9.—Question 9 is as follows :—" Was the company assessable or chargeable with tax on a percentage of the total receipts of the business in respect to the year 1932 ? "

It is suggested that, for some reason not very clearly stated, sec. 28 cannot be applied after a series of years to which the ordinary provisions of the Act have been applied. In my opinion there is no substance in this contention.

The company carried on a business in Australia. That business was controlled principally by persons resident outside Australia. It appeared first to the commissioner and then to the board that the business in respect of the year 1932 produced less income than the ordinary taxable income which might be expected to arise from that business. Accordingly, the company was assessable and chargeable with tax under sec. 28 on the percentage of the total receipts of the business. The question should therefore be answered in the affirmative.

Question 9A.—This question was added upon the argument before the Full Court. It is as follows :—" Upon the facts admitted and upon the proper construction of sec. 28, had the board of review authority to refuse to fix any percentage of the total receipts of the business ? " This question is limited to the year 1933.

In my opinion, for reasons which I have stated in dealing with question 4, the board of review was entitled to decline to apply sec. 28, that is, the board was not bound to apply sec. 28. It followed that the board was not bound to fix under sec. 28 any percentage of the total receipts of the business as the taxable income of the company. Further, for reasons which I have already stated, I am of opinion that, in view of the decision given in July that sec. 28 was not applicable at all, the board had no authority to reverse its decision in October so as to hold that the section was applicable but then to elect to refuse to fix the percentage. Accordingly, in my opinion, the question should be answered by declaring that as the board decided in July that sec. 28 was not applicable to the company in respect of the year 1932 the question of fixing the percentage of the total receipts of the business did not arise for any purposes of the Act in relation to that year.

Questions 10, 11 *and* 12 relate to what is referred to in the proceedings as special property tax. This is a further income tax imposed first under sec. 7A of the *Income Tax Act* 1930 and subsequently under sec. 5 of subsequent relevant *Income Tax Acts*.

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All the sections are in the same terms, which are as follows :— "7A (1) In addition to any tax (including additional tax, super-tax and further tax) payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(*a*) from property ; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further tax of seven and one-half per centum of the amount of that taxable income."

It will be observed that the further tax imposed under these provisions is payable upon what is described as "the taxable income" derived by a person from certain sources mentioned. One question which arises is whether the taxable income is to be ascertained by taking the taxable income assessed under the ordinary provisions of the Act and imposing the further tax upon such part of that total income as, upon some proportional basis, can be attributed to the sources mentioned in the section, or whether, on the other hand, the taxable income is to be ascertained by taking the income actually derived from the three sources *a*, *b* and *c* and making appropriate deductions therefrom.

A further question which arises is whether if the second method is adopted the deductions appropriate to items in *a* are to be made from the income of *a* and so in the case of *b* and *c*, or whether, on the other hand, the income is to be aggregated and all the deductions are then to be aggregated and are then to be made from the total aggregated income, thus reaching the total net taxable income derived from the three sources mentioned.

Question 11 deals with another question which arises in relation to the further tax, namely, the possibility of applying in one and the same year the provisions of sec. 28 (which depend upon a disregard of the real income and an attribution to the company of an income on a basis of percentage of total receipts) together with the provisions of sec. 7A and sec. 5, which depend upon ascertaining the actual sources of income of the taxpayer. It is urged that where a percentage basis is taken it is simply impossible to allocate any proportion of the income so estimated to any one or more of the sources *a*, *b* and *c* specified in sec. 7A.

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Before considering these questions it is desirable to set out the facts in relation to which they arise. The income of the company in relation to which the question of the application of sec. 7A arises was derived from three sources—rent, interest and pump rents. Rent varied from £13 to £35 in the five years in question. Interest varied from £528 to over £24,000, and pump rents varied from £543 to £2,226. Except for administration expenses, which were allowed by the commissioner to the extent of two and one-half per cent on taxable interest, and five per cent on pump and other rents, all the deductions claimed related to petrol pumps. The deductions reached as high a figure as £37,000. When the deductions were made from the total income in question, there was a debit balance in each year, that is, the deductions exceeded the total revenue. The company therefore claims that no income was taxable in any of the years in question under the provisions of sec. 7A (or sec. 5 in later years).

Before 1928 most petrol was sold in tins or drums, but from that time onwards it became customary and, indeed, necessary from a business point of view, to sell petrol through pumps placed at garages. Accordingly, the company in the years which are in question in this appeal sold most of its petrol through pumps. Some of these pumps were leased at an annual rental of ten shillings per year. Others were owned by customers of the company. The installation of a pump costs from £75 to £80 and the company maintained all the pumps from time to time and painted them in a manner designed to attract trade. The moneys received from persons who utilize pumps owned by the company were called pump rents, although the company did not own the ground upon which the pump stood —many, indeed, being placed upon the public highways. It is not pretended that the object of installing and maintaining the pumps was to earn ten shillings per annum in respect of each pump. One year may be taken as an example. In the year 1930 the income from pump rents was £867. The deductions claimed in respect of that year were : depreciation on petrol pumps £6,070, repairs to petrol pumps £8,207, licence fees paid in respect of petrol pumps

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£991, and further depreciation £1,436, and some relatively small administration expenses. Only the administration expenses were allowed as a deduction by the commissioner and by the board.

As to the first question which I have mentioned, I am of opinion that sec. 7A (and sec. 5 of the later Acts) contemplates actual assessment of taxable income derived by the company from the three sources mentioned. It involves calculations quite separate from those which are made in the ordinary assessment. It does not involve a calculation of some proportion of taxable income as ascertained under an ordinary assessment. There is no reason why the latter construction should be given to the section and there is a very sound reason why it should not be given, namely, that the section is plainly intended to tax moneys which are in fact derived from the sources mentioned. In my opinion the object is not to impose tax upon a sum of money which is reached by taking into account considerations which have no relevance whatever to the provisions of the section, such as volume of income from all sources including sources other than those mentioned in the section together with and subject to deductions attributable to the whole of that income and allowing such deductions to produce an effect upon the amount taxable under the section. If a contrary view to that which I suggest were adopted, then it would be possible for a taxpayer to have a very large net income from the sources *a*, *b* and *c* mentioned in the section and yet to escape tax thereunder. He might be entitled to so many deductions applicable to income derived from other sources that his total taxable income under the general provisions of the Act would be very small. For example, his net income from the sources *a*, *b* and *c* might be £10,000, and yet his taxable income from all sources, including *a*, *b* and *c*, might be only £10. Upon the view contrary to that which I have suggested he would be taxed under sec. 7A only upon some proportion of the £10. In my opinion there is no reason for reading the words of the section so as to bring about this result.

In order to apply the section it is necessary first to ascertain all the income of the taxpayer derived from *a*, *b* and *c*. It is then necessary to ascertain how much of that gross income is taxable. (The section expressly applies only to "taxable income.") This can be done only by making appropriate deductions. These deductions can be ascertained by applying the ordinary provisions of the Act so far as they are applicable to income derived from the sources specified in the section. There is nothing to exclude, for example, the application of sec. 23 when an assessment is being made which includes the application of sec. 7A. Sec. 23 provides that in calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis and that from it certain deductions shall be made. The provisions of sec. 23, so far as applicable, should be applied in ascertaining taxable income for the purpose of sec. 7A. Thus, for example, there should be deducted all losses and outgoings (excluding capital losses and outgoings) which are actually incurred in gaining or producing the income which is being assessed (sec. 23 (1) (*a*)). In determining what deductions should be allowed under the general provisions of the Act, the provisions of sec. 23 (2) are applied and deductions are accordingly made from the class of income to which in the opinion of the commissioner the deduction relates. So in applying sec. 7A the gross income under *a*, *b* and *c* should be ascertained and then deductions should be allowed if in the opinion of the commissioner (or the board upon appeal) they represent outgoings actually wholly and exclusively incurred in gaining or producing that gross income.

The next question is whether the income from *a*, *b* and *c* should be added together and all the deductions applicable to *a*, *b* and *c* deducted from the total or whether the deductions appropriate to *a* should be deducted from the gross income under *a* and so also severally for *b* and *c*.

In my opinion the former is the correct procedure. Sec. 7A treats the sum to be ascertained for the purpose of levying the further tax of seven and one-half per cent as "the amount of that taxable income" (see the concluding words of sub-sec. (1)). The tax, in other words, is imposed upon one amount and not upon three amounts. I am therefore of opinion that all the deductions relevant to *a*, *b* and *c* should be deducted from the total of the gross income derived under heads *a*, *b* and *c*.

The next question is whether the expenses associated with the pumps, which the company claims as deductions, were properly so

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allowable. The amount of pump rents received was relatively small and it is contended for the commissioner that the real object of the expenditure was not to obtain the pump rents but to promote the general business of the company.

I am of opinion that the receipts from pump rents were income of the company. They represent moneys which were in fact received by the company from other persons. They were not capital receipts. They must, in my opinion, be regarded as income.

But, in order to bring the income within par. *c* of the section, it must be of such a class that if derived otherwise than in the course of carrying on a business it would be income from property. Pump rents might be derived by a person who owned and let out pumps without selling petrol and without being engaged in a business of letting out pumps. In such a case the receipts would be income from property. Thus, in my opinion, the pump rents do come within par. *c* of the section.

But any deductions claimed must be outgoings, etc., actually incurred in gaining or producing the assessable income (*Income Tax Assessment Act*, sec. 23 (*a*)). Whether they were so incurred is a question of fact for determination upon the appeals. Further, sec. 25 (*e*) prohibits the deduction of any amounts which were not wholly and exclusively laid out or expended for the production of assessable income, that is, in this connection, the income assessable under sec. 7A (or sec. 5). Whether the amounts claimed as deductions were or were not so laid out or expended is also a question of fact to be determined upon the appeals. The question should, in my opinion, be answered accordingly.

Question 11.—This question asks whether, the board of review having decided to tax the company under sec. 28 for the year 1932 and having accordingly fixed a percentage of total business receipts as the income of the company for the purpose of applying that section, the company was liable for any further tax under sec. 5 of the *Income Tax Act* 1933. In other words, can sec. 28 of the principal Act and sec. 5 imposing further tax be applied in the case of the same taxpayer in the same year ? The contention for the company is that the assessment under sec. 28 fixes the income of the company for all income tax purposes and that, the income being a percentage of business receipts, it is quite impossible to identify within that income any income that possesses the characteristics mentioned in pars. *a*, *b* and *c* of sec. 5. In my opinion this contention cannot be sustained. Sec. 28 results in the company being taxed at ordinary rates of ordinary income tax on a percentage of its total business receipts. Sec. 5 simply adds a further tax upon a different basis. If in any year the company in fact has income which falls within sec. 5, then sec. 5 operates by force of its own terms without being subject to any impediments created by sec. 28. Therefore, in my opinion, question 11 should be answered in the affirmative.

Question 12 is as follows :—" If yes to question 11, should the amount of taxable income of the company referred to in the said sec. 5 have been ascertained for the said year by applying the percentage determined as aforesaid to the gross amount of the income so referred to or should the amount of such taxable income have been ascertained under the general provisions of the *Income Tax Assessment Act* 1922 as amended ? "

This question is based upon the suggestion that a percentage ascertained and applied under sec. 28 should be applied to income taxable under the " further tax " provisions. In my opinion there is no basis for this suggestion. Sec. 28 takes a percentage of business receipts as the taxable income of the company for ordinary purposes and, as already stated, sec. 5 simply imposes another tax upon certain income of the company which is described as taxable income and which, as I have already stated, is to be ascertained by identifying the gross income derived from sources *a*, *b* and *c* and then making the appropriate deductions.

I am therefore of opinion that question 12 should be answered by saying that the amount of the taxable income should be ascertained under the general provisions of the *Income Tax Assessment Act* 1922 as amended.

Rich J. These appeals from the board of review were brought before the Full Court in April 1938 upon material which had been laid before the board of review and without any evidence taken before this court. This procedure might not have been open to any objection of a substantial nature if, as soon as the argument had been

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fairly opened, it had not appeared that the parties were in hopeless disagreement upon all the crucial facts. In the circumstances the Full Court took the only possible course of remitting the appeals to a single justice. The appeals were accordingly brought before me in that capacity. The discussion before the Full Court had made it plain that, unless a commission were issued to take evidence abroad, the appellant could not proceed very far in the strict proof of the facts, the burden of proving which fell upon it, at all events by admissible evidence. Such a commission would not have been returned, if at all, except after the lapse of some years, and the parties seemed to have been sufficiently chastened by the unfortunate course their proceedings had so far followed to listen to the voice of reason and endeavour to agree upon the facts, which, after all, there was not much reason to doubt. The not unnatural reluctance of the commissioner to admit facts which were outside his knowledge, and the great difficulty of reducing the details of complicated transactions to a compendious yet accurate statement, proved the source of much delay and many embarrassments in arriving at an agreement. The parties, however, brought before me a lengthy statement of facts and a catechism of questions upon both of which they agreed. Although I was not myself perfectly satisfied with the form of the questions or the sufficiency and clarity of the facts I was loath to take any steps to disturb a harmony achieved at the expense of surmounting so many obstacles and of so much labour, and I accordingly adopted what the parties had agreed upon and referred the matter to the Full Court. In dealing as a member of the Full Court with the reference I have to remember that the matter must again come before me to be disposed of finally. I think I shall cause myself and the parties less embarrassment by refraining from entering upon a disquisition concerning the matters of law and questions of mixed fact and law which arise under the questions. I have had the advantage already of reading the judgments prepared by the Chief Justice and by *Dixon* J., which cover the ground of all thirteen questions put to the Full Court and adopt substantially the same view of the greater number of those questions. As to the first five questions those judgments agree except in the form of the answer, and it is unnecessary for me to do more than say that I am substantially of the same opinion. As to the seventh question I agree on the whole that it would be safer and better to leave it unanswered. Questions 8 and 9 and 9A are answered by the two judgments to which I have referred substantially to the same effect and I concur in the result. The tenth question causes more difficulty. From the taxpayer's point of view its importance lies in the taxpayer's contention that the pump rents are to come into the account for the purpose of special property tax as an item of gross income so that on the other side of the account—the expenditure side—the very great cost connected with the maintenance of the pumps shall be brought in and thereby reduce or extinguish the large revenue items of interest, etc. I cannot think this is right. The pump rents are at best insignificant items of receipts arising in the course of a business activity concerned only with the sale of petrol, i.e., the establishment and maintenance of petrol pumps for the retail sale of the petrol from which the company derives its business income. To include the pump rents in the account of property income and under colour of doing so to bring in this large business expenditure on the other side is, to use a homely phrase, to make the tail wag the dog. The answer may be that rents of this description cannot be conceived of as income arising independently of the business activity of supplying petrol. In the practical world rents from petrol pumps are unknown except to the distributor of petrol. But *quacunque via* I think that the company's contention should fail. The purpose of the expenditure is not to obtain pump rents but to advertise the company and its wares and sell petrol. For these reasons I think the board of review was not wrong but was right in refusing to allow the company to deduct the amounts in question. As to question 11 I agree with the view which both judgments I have mentioned adopt that the company is liable to the further income tax or special property tax imposed by the taxing Act notwithstanding that sec. 28 of the *Income Tax Assessment Act* is applied for the purpose of ascertaining the company's taxable income for ordinary income tax. I agree also in the view those judgments take of the twelfth question, viz., that in ascertaining the further income tax or special property tax sec. 28 has no application and an account is to be made up to ascertain the taxable income subject to the tax entirely independently of sec. 28.

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Starke J. A series of questions have arisen in appeals to this court in connection with the assessment of the Texas Co. (Australasia) Ltd. to income tax in respect of the income years 1929, 1930, 1931, 1932 and 1933. My brother *Rich* has directed that they be argued before the Full Court upon facts admitted between the parties.

The main topics raised by the questions may be examined without a minute statement of the facts, and a foundation laid for categorical answers to the questions.

1. *Exchange.*—The taxpayer was a company incorporated in the State of New South Wales. Its main business was the purchase and sale of petroleum products in Australia and New Zealand. It purchased those products from a company or a group of companies in America, which may be referred to as "the supplier." The goods were shipped in America to the taxpayer and invoices delivered covering the price f.o.b. and also freight and insurance which was payable by the taxpayer in American dollars. The supplier also provided the taxpayer with plant, equipment, and other capital items and also made advances to it, all on a dollar basis. The products were sold in Australia and New Zealand.

Until the end of 1930, there was comparatively little fluctuation in the rate of exchange between America and Australia, but then it moved against Australia, especially so in the years 1931, 1932 and 1933. It was quite obvious, as the taxpayer's American office stated, that with the Australian pound depreciated so heavily the taxpayer could not pay its current liabilities in United-States dollars without suffering tremendous exchange losses. The American creditors deferred some payments, but still considerable adjustments had to be made for exchange differences which the taxpayer claimed as deductions in its return for the purpose of assessment to income tax. Nothing, I think, really turns upon the method of accountancy whereby these adjustments were made. The commissioner does not challenge the accuracy of the method. But it is desirable that the question which is set this court should be clearly understood and disentangled from the complicated method of accountancy which was necessarily adopted to make adjustments in the accounts of the taxpayer. It incurred an obligation in American dollars for goods supplied and during the periods material to these appeals entered

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the amount of that obligation in its books in dollars and also the corresponding liability in Australian currency at the rate of exchange then current. But when the taxpayer came to pay for the goods, intervening exchange movements required it to provide more in Australian currency to pay or provide for the goods and discharge the dollar obligation than the sum originally calculated as the equivalent in Australian currency of the dollar obligation. The taxpayer had also to provide the cost of remittances to its supplier.

The taxpayer claims these additional sums, paid or provided in any of the years in question here, as deductions from its income assessable to income tax. It claims them as losses or outgoings actually incurred in gaining or producing its assessable income (*Income Tax Assessment Act* 1922-1934, sec. 23 (1) (*a*)). The commissioner did not, as I understand the argument, dispute the general proposition that such losses or outgoings might, in circumstances other than exist in the present case, be legitimately claimed as deductions under and by virtue of the *Income Tax Assessment Act* 1922-1934.

But the commissioner contends that the deductions claimed in these appeals should not be allowed for several reasons.

A. Because they were losses or outgoings of a capital nature (Act, sec. 23 (1) (*a*)). It appears that the supplier allowed payment of the sums due to it to stand over for considerable periods of time. And moneys realized from the sale of goods were used, during those periods, in the business of the taxpayer or, as the commissioner suggests, in providing working capital for the business. Certainly the share capital of the company was insufficient to cover the capital expenditure of the taxpayer in Australia. But the delay in payment of the moneys owing to the supplier was not wholly because working capital was required in the taxpayer's business, for about August 1932 the supplier apparently permitted the taxpayer to defer payments of the indebtedness incurred prior to September 1931 until business conditions improved, which it was considered would be accompanied by a rise in the exchange rate and relieve the difficulties of the situation.

If, however, the main purpose of the delay in the payments was to provide working capital for the taxpayer, how does that delay

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make the payments outgoings of a capital nature ? They were, nevertheless, though deferred, outgoings incurred in connection with the trading operations of the taxpayer : the purchase of the stock in which it traded. They may be placed, I think, in much the same category as the interest payments in respect of borrowed money, which were allowed in *Farmer* v. *Scottish North American Trust Ltd.* (1). The amounts fluctuated from time to time and payments were delayed temporarily and for uncertain periods (2). They were outgoings by means of which the taxpayer procured funds by which it made a profit " and, like any similar outgoing, should be deducted from the receipts to ascertain " the taxable income of the taxpayer (2).

B. Because the payments were not losses or outgoings actually incurred in gaining or producing the assessable income (Act, sec. 23 (1) (*a*)). The Act in sec. 25 (*e*) also provides that a deduction shall not be made in respect of money not wholly and exclusively laid out or expended for the production of assessable income. The supplier, as already stated, provided the taxpayer not only with petroleum products but also with plant and other capital items and also made advances to it. The account of the supplier with the taxpayer was a running account and a balance was struck monthly. Remittances, when made, were entered in such account as at the date of remittance and were generally for lump sums in Australian currency. But they were not appropriated against any particular item that had been entered on the credit side of the account nor were any of them allocated so as to satisfy particular items for goods or stock, capital items, or advances. The question whether these remittances were losses or outgoings incurred in gaining or producing the assessable income and were wholly or exclusively so laid out or expended is mainly a question of fact (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3) ; *New Zealand Flax Investments Ltd.* v. *Federal Commissioner of Taxation* (4)). It has been recognized, however, almost as a business necessity, that taxpayers with continuing businesses must be allowed to deduct expenditure in the year of assessment (which is not a capital outlay) incidental to or connected with the operations or

(1) (1912) A.C. 118.
(2) (1912) A.C., at p. 127.
(3) (1915) A.C., at p. 466.
(4) (1938) 61 C.L.R., at p. 198.

activities regularly carried on for the production of income. It is not necessary that each item of expenditure should be traced to definite items of income (*Ward & Co. Ltd.* v. *Commissioner of Taxes* (1); *Amalgamated Zinc* (*De Bavay's*) *Ltd.* v. *Federal Commissioner of Taxation* (2); *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3)). The commissioner, whilst accepting these decisions, submits: (*a*) That it does not appear on the admitted facts that remittances were made to the supplier and that it is consistent with the facts stated that the remittances were to the taxpayer's own office in New York; (*b*) That it does not appear on the admitted facts that the deductions claimed were appropriate to the years in which they were claimed; (*c*) That the remittances were not wholly or exclusively laid out or expended for the production of the assessable income. In my opinion the submissions numbered *a* and *b* are questions of fact for the justice who hears these appeals. They involve a detailed examination of the facts and the taxpayer's accounts and cannot be satisfactorily dealt with on the materials before this court. Submission *c* is based on the undoubted fact that the remittances covered expenditure both of a revenue and a capital nature. The remittances were not only for goods or stock supplied but also for plant and other capital items and advances. But whether these outgoings can be disentangled and treated in part as of a revenue nature and in part as of a capital nature is essentially a question of fact for the justice who hears these appeals. It may be that the application of the rule in *Clayton's Case* (4) will solve the problem, though I should doubt it on the form of such of the accounts as have been submitted to this court; or some percentage allowance or some other method or evidence. But if it be true, as the taxpayer asserts, that it can demonstrate beyond all doubt that the deductions claimed by it were wholly and exclusively laid out or expended in the sense already indicated, for the production of the assessable income for the years in question in these appeals, then it would be entitled to the deductions claimed.

2. *New Zealand losses.*—In 1930 the taxpayer derived income from its business carried on in New Zealand, but the deductions and

(1) (1923) A.C., at p. 148.
(2) (1935) 54 C.L.R., at p. 307.
(3) (1932) 56 C.L.R., at p. 305.
(4) (1816) 1 Mer., at p. 608 [35 E.R. at pp. 792, 793].

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exemptions from that income allowed by the New-Zealand law were greater than the amount of the income, so that no income tax was payable in New Zealand in respect of the income of that year. The taxpayer nevertheless claims to deduct this loss in assessing its taxable income under the *Income Tax Assessment Act* 1922-1934. Income tax is payable under the Acts for each financial year upon the taxable income derived directly or indirectly by every resident, which includes the taxpayer, from all sources whether in Australia or elsewhere, and in calculating the taxable income the total assessable income derived by the taxpayer is taken as a basis and from it various deductions are allowed : See Act, secs. 13, 4, and 23. But the commissioner points out that assessable income means the gross income which is not exempt from income tax under the provisions of the Act. And sec. 14 (1) (*q*) of the Act 1922-1934 (Act 1930 No. 50, sec. 5) exempts from income tax income derived from sources outside Australia by a resident of Australia to the extent to which that income is proved to the satisfaction of the commissioner to be chargeable with income tax in any country outside Australia.

The taxpayer argues however that its income in New Zealand was not chargeable with income tax in New Zealand because the deductions and exemptions there allowed exceeded the amount of the income. This contention cannot be sustained. The commissioner must be satisfied that the income is chargeable ; that is that the income is of such a nature that it is liable to and may be brought to charge under the New-Zealand law, whether it is actually charged or not. If it be so chargeable, then it is exempt from income tax under the Commonwealth Acts and both that income and deductions from it disappear from assessments under the *Income Tax Assessment Act* 1922-1934. The commissioner was satisfied, and indeed it is clear, that the New-Zealand law brought to charge income derived by the taxpayer from sources in New Zealand.

3. *Assessments under sec.* 28 *of the Act.*—The commissioner assessed the taxpayer to income tax under sec. 28 of the *Income Tax Assessment Act* 1922-1934 for the income years 1929, 1930, 1931, 1932 and 1933, but the board of review disallowed this assessment as to the years 1929, 1930 and 1931 and directed assessments under the ordinary provisions of the Act.

The provisions of sec. 28 were adopted by the board as to the year 1932 and it purported to adopt these provisions as to the year 1933 and thus expressed its decision :—" Notwithstanding that the business produced no taxable income, the board in its judgment does not think it proper to assess and charge tax on any percentage of the total receipts of the business."

Sec. 28 enacts, so far as material: " When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the commissioner in his judgment thinks proper."

The board of review, for the purpose of reviewing the decisions of the commissioner, has under sec. 44 all the powers and functions of the commissioner in making assessments. The taxpayer contends that the section applies only to the case of a business carried on wholly within Australia. The contention is untenable : a business is carried on in Australia although it is also carried on elsewhere. All the Act requires is that business is carried on in Australia : it is explicit in its terms and effect must be given to it. It is not disputed that the taxpayer's business was controlled principally by persons resident outside Australia.

But both parties complained of the decision that the board of review gave as to the year 1933. The power conferred by sec. 28 is discretionary in its nature : that is to say that neither the commissioner nor the board is bound to exercise it though the conditions mentioned in the section actually exist. But the form of the board's decision suggests that though the business produced no taxable income of any sort still the powers conferred by sec. 28 must be exercised. Such an application of the section would not accord with its language. It must, as I think, appear to the commissioner or the board that there is no taxable income, measured by the ordinary standards of the Act, or less than the ordinary taxable income which might be expected to arise from that business (*British*

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Imperial Oil Co. Ltd. v. *Federal Commissioner of Taxation* (1)). But in my opinion the decision of these matters of fact is entirely within the authority of the commissioner or the board if they are approached from a right understanding of the meaning of the Act.

4. *Further tax on income from property or special property tax, as it is commonly called.* The tax was originally imposed in 1930 by the Act 1930, No. 61, sec. 7A, and may be found substantially re-enacted in the Act 1934 No. 31, sec. 5—" In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(*a*) from property; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of " a certain percentage " of that taxable income."

The taxpayer contended that in respect of the income years in which the powers given by sec. 28 of the Act were exercised then the further tax on income from property was superseded. This contention cannot be sustained in the face of the explicit terms of the tax Act. It is a tax additional to any other income tax and upon a special class of income. The provisions of sec. 28 relate to taxation of a business carried on in Australia but controlled abroad and are wholly inapplicable to the further tax.

Other questions also arise in connection with this further tax. One the manner of its assessment. The main consideration is that the tax is a further tax on income derived from particular sources. Prima facie, therefore, the general method of assessment under the *Income Tax Assessment Act* 1922-1934 should be followed. The total assessable income derived from the sources mentioned in the section should be taken as the basis and from it should be deducted all deductions that are allowed under the Act for that class of income. The taxable income mentioned in the section will then be ascertained.

Another, the deductions that may be allowed to the taxpayer in respect of income assessable to tax under the section. The taxpayer received " pump rents," as they are called, or in other words amounts

(1) (1926) 38 C.L.R., at p. 214.

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received by way of rent or hire for petrol pumps owned by the taxpayer and let to retailers under hiring agreements and used by the retailers for distributing petrol to consumers. Such rents are comparatively small in amount, but the taxpayer claimed very considerable deductions in respect of repairs to and depreciation of such petrol pumps, municipal taxes and licences on such petrol pumps, losses on sale or retirement of such petrol pumps and administration expenses in connection with such petrol pumps. In my opinion the " pump rents " are income derived by the taxpayer in the course of carrying on its business and are of a nature that if derived otherwise than in the course of carrying on a business would be income from property. They are received by the taxpayer in the course of its business. But if the rents had been derived otherwise than in the course of carrying on the business they could not have been described as income from personal exertion and must have fallen within the definitions of income from property which means all income not derived from personal exertion (*Income Tax Assessment Act* 1922-1934, sec. 4). The assertion that the " pump rents " are not income within the meaning of the Act appears to me untenable. They come in and increase the revenue of the taxpayer, though in a small degree. But the deductions claimed by the taxpayer in respect of this income must, I apprehend, be a loss or outgoing actually incurred in gaining or producing the income in the sense already indicated—Cf. Act, sec. 23 (1) (*a*)—and I would go further and apply the prohibition of sec. 25 (*e*) and say that no deduction should be allowed in respect of any money not wholly and exclusively laid out or expended for the production of that income.

In my opinion, the question whether the deductions claimed were so incurred and expended is mainly a question of fact. The board of review allowed a deduction in respect of administration expenses but otherwise rejected the deductions. The company admittedly did not instal the pumps for the purpose of earning the pump rent of ten shillings per pump per year. They were installed and maintained to enable retailers to sell the taxpayer's products to the public. As the board said, the " pump rents " constitute only a small fraction of the total receipts of the taxpayer and even if the taxpayer found it impossible to obtain pump rents still the nature

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of its business requires that it should instal and maintain petrol pumps. These reasons impress me, but the final determination of the question and how far it is open in these appeals is for the justice who hears these appeals.

5. *The functions and powers of the board of review.*—The board of review is an administrative and not a judicial body, though it must of course exercise its powers and authorities according to the provisions of the law and not arbitrarily and capriciously (*Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1))—and cf. *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (2). A taxpayer who is dissatisfied with an assessment made by the commissioner under the Act may lodge an objection in writing against the assessment stating the grounds upon which he relies. The commissioner must consider the objection and may either disallow or allow it wholly or in part and give notice of his decision to the taxpayer. A taxpayer who is dissatisfied with the decision of the commissioner may in writing request the commissioner to refer the decision to a board of review for review or to treat his objection as appeal and forward it either to this court or to the Supreme Court of a State (Act, sec. 50). The board of review, if a decision be referred to it, is required to give a decision in writing and it may either confirm the assessment or reduce, increase, or vary the assessment (sec. 51). And for the purpose of reviewing a decision of the commissioner, the board of review has all the powers or functions of the commissioner in making assessments, determinations and decisions under the Act and such assessments, determinations and decisions are deemed to be assessments, determinations, or decisions of the commissioner (Act, sec. 44).

The taxpayer had been assessed by the commissioner to income tax for the years already mentioned, but it was dissatisfied with the assessments and lodged objections which were disallowed by the commissioner. The taxpayer then requested the commissioner to refer his decision in each of the years mentioned to the board of review, which he did. And the board thus became seised of each of those decisions for the purpose of review.

(1) (1931) A.C. 275; 44 C.L.R. 530; (1926) 38 C.L.R. 153.
(2) (1925) 35 C.L.R. 422.

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The commissioner had assessed the taxpayer to income tax for each of the years 1929, 1930 and 1931 under and in pursuance of the provisions of sec. 28 of the Act, but the board upheld an objection to these assessments and determined that assessments should be made under the ordinary provisions of the Act and that such assessments should issue in respect of each of those years in lieu of an assessment under the provisions of sec. 28. But this was subject to a reopening of the case in connection with the assessment of the taxpayer to further tax on income from property. The board re-opened the case and in October 1937 assessed the taxable income of the taxpayer in each of the years mentioned and also the further tax on income from property.

The board did not exceed its powers, authorities and functions in so doing. The board was seised of decisions of the commissioner for the purpose of review and until its functions were completely discharged the decision remained within its power and jurisdiction for the purpose of review. The board did not, as a matter of fact, alter its decision, but carried it to completion. Even if the board had reached the conclusion that its former pronouncement was wrong, I see no reason why it should not have corrected any mistake that it had made and promulgated a proper decision so long as it was seised of the matter for the purpose of review. A superior court of justice, it may be remarked, has full power to rehear or review a case until judgment is drawn up, passed, and entered: See *In re Suffield & Watts*; *Ex parte Brown* (1); *In re the Lyric Syndicate* (*Ltd.*) (2); *The Turret Court* (3). The authority of administrative bodies is not so confined and must necessarily be more flexible.

In July 1937 the board, as to the year 1932, directed that an amended assessment be issued under sec. 28 of the *Income Tax Assessment Act* 1922-1930 and determined the total receipts and the percentage on which the taxpayer should be assessable and as to the year 1933 held that sec. 28 was inapplicable. But these decisions were also subject to reopening of the case in connection with the assessment of the taxpayer to further tax on income from property.

(1) (1888) 20 Q.B.D. 693.
(2) (1900) 17 T.L.R. 162.
(3) (1901) 84 L.T. 331; 69 L.J.P. 117.

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In October of 1937 the board, as to the year 1932, assessed the taxpayer to income tax under and in pursuance of the provisions of sec. 28 of the Act and also to further tax on income from property and as to the year 1933 the board restated its decision in these terms :—" Notwithstanding that the business produced no taxable income, the board in its judgment does not think it proper to assess and charge tax on any percentage of the total receipts of the business —sec. 28."

These determinations of the board may be erroneous either wholly or in part and subject to review by this court but they were not in my opinion beyond its authority and jurisdiction. The board was still seised of the decisions of the commissioner for the purpose of review. The question of the further tax was still open and so indeed was the question whether the taxpayer should be assessed for 1933 and how it should be assessed. The board had determined that the provisions of sec. 28 were inapplicable but that did not completely discharge its function. Even if the determination of the board of October 1937 as to the year 1933 reverses or departs from that of July 1937, the board in my opinion nevertheless acted within its authority and jurisdiction in the determination of October 1937 for it was still seised of the decision of the commissioner for the purpose of review and had not exhausted its function. So long as the board retained seisin of the decision of the commissioner for the purpose of review it had authority to review its determinations and give effect to its conclusions reached upon such review. Moreover, it must not be assumed that I assent to the proposition that sec. 44 of the Act, coupled with sec. 37, would not justify the board's determination of October 1937, but it is not necessary to express any concluded opinion on the effect of these sections.

All that remains is to answer the specific questions directed to be argued before this court under the order of my brother *Rich.*

Question 1. So much of the amount of the exchange referred to in par. 17 of the mutual admissions of fact as is found to be referable to expenditure incurred in and for the purpose of discharging liabilities on revenue or income account is allowable as a deduction in ascertaining (otherwise than under sec. 28 of the *Income Tax Assessment Act* 1922-1934) the taxable income of the company in the year in which the payments were made as set forth in the mutual admissions.

Question 2. No.

Question 3. Yes.

Question 4. Yes.

Question 5. Yes.

Question 6. Yes, subject to any appeal duly brought to this court.

Question 7. The question should not be answered in its present form.

Question 8. Yes.

Question 9. Yes.

Question 9A. Yes, but subject to any appeal duly brought to this court.

Question 10. So much of the deductions as are found to be actually incurred in gaining or producing the income assessed to the further tax upon income from property is allowable as a deduction in ascertaining the taxable income of the taxpayer from that source. The question is substantially a question of fact for determination by the justice who hears the appeals.

Question 11. Yes.

Question 12. The amount of the taxable income should be ascertained according to the method prescribed for ascertaining taxable income under the general provisions of the *Income Tax Assessment Act* 1922-1934 having regard however to the limited class of income assessable pursuant to sec. 5 or its corresponding provision in other Acts.

Dixon J. The taxpayer is a company incorporated in New South Wales and throughout Australia it carries on a business of supplying petrol and petroleum products. It was formed in 1918 by a body or bodies incorporated in the United States of America, whose business it is to produce and distribute gasolene and other products of petroleum. The taxpayer remains under the control of this group of corporations or one of them and its business is therefore " controlled principally by persons resident outside Australia " within the meaning of sec. 28 of the *Income Tax Assessment Act* 1922-1934.

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That section provides that when a business carried on in Australia is so controlled and it appears to the Commissioner of Taxation that the business produces no taxable income or less than the ordinary taxable income which might be expected to arise from the business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business, as the commissioner in his judgment thinks proper.

For the five financial years beginning 1st July 1930 and ending 30th June 1935 the commissioner assessed the taxpayer company under this provision. The accounting period of the taxpayer is the calendar year and the assessments therefore took a percentage of the gross receipts for each of the years of income 1929, 1930, 1931, 1932 and 1933. The taxpayer carried in objections to the application of sec. 28 to its business and requested the commissioner to refer his decisions to the board of review. That tribunal reached the conclusion that in one year only should the taxpayer company be assessed under sec. 28, viz., the income year 1932. The board, having announced this conclusion, proceeded at a later date to ascertain upon ordinary principles the company's taxable income for the three preceding years. In the fifth year, 1933, it was not disputed that the company's trading had resulted in a heavy loss.

In all five years both the commissioner and the taxpayer appealed to this court from the decisions of the board of review on one ground or another. The appeals are of course to the original jurisdiction of this court. They came before *Rich* J., who at the request of the parties made an order which, as amended at the hearing, directed that some thirteen questions, formulated by them as arising in the appeals, should be argued before the Full Court. It is these questions that we are now called upon to decide.

The appeals themselves involve many complications and difficulties which our answers to the questions will not necessarily remove. The attempt on the part of the parties to isolate specific questions and extract them from the matters in general controversy is to be commended as an effort to lighten the burden of a heavy case, but it means that the Full Court cannot determine the appeals finally and must confine itself to giving in general terms answers to questions,

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some of which are of rather an abstract nature, leaving the application of the answers to the agreement of the parties or, failing their agreement, to a justice. The nature of the questions makes it unnecessary to discuss the facts of the case. Each question depends upon a particular set of facts or phase of the case and it is better to deal with the questions in order, stating under each of them such of the facts as are material to the answer.

1. Question 1 relates to deductions which the taxpayer claims to make because remittances to the United States of dollars cost more in Australian pounds than the amount in Australian currency at which its dollar liabilities were expressed in its books of accounts. The claim assumes, of course, that the income of the taxpayer will be assessed, as in the three earliest years the board has assessed it, upon ordinary principles, and has no direct concern with the company's assessment in any year to which sec. 28 is ultimately applied.

From 1929 the Australian pound fell heavily in terms of dollars. At the end of that year it stood at $4.78 and by a fall steadily gaining in acceleration it reached by November 1932 a level of about $2.50. From that it rose in a fluctuating manner but at the end of the period with which we are concerned it was under four dollars. During this time the taxpayer carried a very large dollar liability to the New-York house, notwithstanding the remittances which are the foundation of its present claim to deductions on account of increased expenditure for exchange. The reason for carrying so large a dollar indebtedness lies in the company's relationship with the group of corporations in the United States which included alike the source of its finances and the source of its supplies of trading stock and plant.

The share capital with which the taxpayer was constituted proved by no means sufficient to meet its requirements for working capital. In order therefore to provide it with funds large enough for its needs, the company was allowed to delay payments for the trading stock and plant supplied from the United States. Thus a dollar liability grew while a working capital accumulated. Further large amounts were written off the liability in each successive year to represent a reduction in the price of gasolene and petroleum products allowed by the supplier. As from the end of September 1931, the time

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approximately when Britain left the gold standard, the company's account with the American Texas Co. or group whence it obtained its supplies was divided into two. The debt up to that date was, so to speak, funded for the time being and all remittances going forward after a period fixed somewhat arbitrarily as three months from that time, that is after 31st December 1931, were to be regarded as payments for new supplies. But the taxpayer company had by this time accumulated a fund much in excess of its requirements because, owing to the adverse exchange, it had accumulated and invested moneys which otherwise it would have remitted. When this fact was understood in New York, fresh directions were given and in the end remittances were made out of such surplus accumulations. They were appropriated in the Australian books as payments on account of the old indebtedness.

Subject to the two special matters to which I have referred, viz., the reductions in price and the directions as to the division of the accounts as from 30th September 1931, the taxpayer company kept the account of its dealings with the New-York house responsible for its supplies without appropriating payments or other debits to the account against any items on the credit side.

On the credit side of the account were entered the invoice price, including freight and insurance, of supplies of stock-in-trade and of items of plant and of certain cash advances made in 1929 and the early part of 1930. On the debit side were entered disbursements of a casual nature made to the use of the American house and the remittances. The price of the goods was expressed in dollars and the liability was one to be discharged in United States currency by payments in New York. Accordingly, the remittances were made by purchasing American exchange. The account was kept in dual currency, but until 1932 it seems to have been regarded as unnecessary to keep the merchandise and trading accounts of the taxpayer company in dollars as well as in Australian currency. In 1929 and in 1930 the changes in the value of the Australian pound in terms of dollars were not such as to bring into the company's return for taxation any important item under the head of exchange. Indeed, it appears that the expenditure took its place in the trading account and represented cost of transfer as much as increase in the cost of procuring dollars. But in 1931 it is a different story and large amounts are claimed as deductions on account of the very much greater cost of remittances in dollars. The movement of exchange against Australia was reflected in the company's accounts in more ways than one, at all events after the adoption of bi-monetary accounting for its internal accounts as well as for the purpose of its account with the New-York house.

In the merchandise account the invoice cost of goods was debited in dollars and converted into Australian pounds at the rate of exchange prevailing at the date of the invoice. But this rate of conversion was adjusted every month. The adjustment or revaluation was effected by a process which it is unnecessary to describe in detail; it is enough to say that it had the effect of converting the dollar value of the goods on hand at the end of the month into pounds at the rate prevailing on that day and of providing for the variation in the exchange when applied to the dollar value of goods sold during the month. Thus the Australian currency equivalent of the dollar value of goods on hand was brought up to date month by month and in the case of goods sold the difference between the Australian equivalent at the old and at the new rate of conversion was brought into the merchandise account. The adjusted values in pounds were reflected in the trading account, whence they found a place in the income tax returns. So far the commissioner, apart from his resort to sec. 28, does not challenge the company's method of taking into account, in relation to its assessment of its income, the effect upon its trading of the variation in the rate of exchange. Nor does he contest the company's next step, which indeed operates, during a movement against Australia, to reduce, not to increase, the claim of the taxpayer which he does contest. That step concerns the difference between the Australian currency equivalent of the dollar value of the goods on hand at the end of the month as appearing from the balance of pounds and dollars shown in the account and the equivalent of those dollars at the rate of exchange prevailing at the end of the month. This difference, being for the period in question an excess of the latter over the former, is carried to the credit of the account with the New-York supplying house, an account which, generally speaking, does not affect the income-tax return. This

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account also is balanced monthly. Goods received during the month are credited at the invoice dollar value converted into pounds at the rate prevailing at the date of the invoice. Remittances are debited in dollars and in pounds converted at the rate at the date of the remittance, that is to say, the pounds equivalent of the company's actual outlay in effecting the remittance. At the end of the month the balance in dollars represents the balance due to the American house, but the balance in pounds is, during a decline of the pound, less by the increase in the cost of purchasing the exchange for the remittances than the Australian currency equivalent of the same goods as contained in the opening figure for the month, that is, the balance from the previous month. This deficiency is made up to some extent by the credit from the merchandise account of the exchange adjustment therein, already mentioned. But the rest of it forms a balancing figure representing what is described variously as a loss on exchange or an increase in the outlay to remit dollars. It is this item that the taxpayer company claims to bring into its assessment as a deduction, a claim which the commissioner has successfully resisted before the board of review.

It is important to see what such an item represents. It forms in the first instance portion of the excess in pounds required to remit a given number of dollars at the time of the remittance over the number of pounds standing in the account as equivalent to the same number of dollars at the credit side of the account, that is, on the side of the account which stated the dollar liability of the taxpayer to the New-York house and its equivalent in Australian currency as at the end of the previous month. The remaining portion, having gone into the trading account, cannot be taken into consideration a second time. The total excess pounds required for actual remittances over the previous equivalent in pounds of the same sum in dollars as was remitted on each occasion during a year of income represents a cash outlay during that year, unexpectedly found necessary to discharge liabilities which, for the purpose of profit and loss and of assessment of taxable income, have been taken into account at lower amounts in pounds. In the present case the liabilities which the taxpayer says are discharged by the remittances are found always to be more than a year old and therefore they

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must have been taken into account in a previous accounting period or year of income. Commercial accounts are not kept on a receipts and disbursements basis but on a valuation and credit basis. Purchases of stock-in-trade go into the account quite independently of actual payment. The cost of the purchase is taken in as at the time when the purchases are made, not when the cost is paid, and the disbursement involved in payment does not form an item of the account of the year when the purchase is made, still less of the subsequent year. We are therefore concerned with the difference between, on the one hand, the pounds in which a dollar liability taken into a prior accounting period is expressed or valued for the purpose of accounting or assessment, and, on the other, the actual amount in pounds found in the subsequent accounting period to be required to discharge it.

In considering the validity of a claim to deduct such an item from assessable income in the year of actual expenditure, the first question to be answered is whether any part of the actual expenditure made in discharging liabilities which have already gone into account as and when incurred should find any place in the estimate of income. The fact that to discharge the liability more is required than the sum at which it was expressed or valued might perhaps be regarded as no more than a falsification of a prior estimate, justifying a revision of the estimate, if that course be still open, but not warranting a deduction from current profit.

But this, I think, is not the true way to look at the matter. During any given accounting period the profit or loss made by the taxpayer's operations must be ascertained by a comparison between its position at the beginning and at the end, based upon estimates of value and upon the accrual of debits and credits. But discrepancies between the liabilities carried into the period and the cost of defraying them must come into the comparison as an actual reduction or increase of the profit or loss otherwise produced by the comparison, provided always that the liability is one belonging to an income account and that the loss ought not for other reasons to be referred to capital. For where liabilities are not fixed in their monetary expression, whether because of contingencies or because they are payable in foreign currency, a difference between the estimate and the

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actual payment must be borne as a business expense, and where the continuous course of a business is divided for accounting purposes into closed periods it is a reduction of the net profit, which otherwise would be calculated for the period.

But in the present case the commissioner denies that any liability of an income nature is discharged by the remittances in making which the excess expenditure was incurred. The remittances were made without specific appropriation and in respect of a running account which included items for plant and other things of a capital nature. Reliance is placed upon sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1934, which forbids the deduction of money not wholly and exclusively laid out or expended for the production of assessable income. It is, however, a mistake, I think, to treat this provision as concerned with the distinction between expenditure of a capital and of a revenue nature. Expenditure on plant looks to the production of assessable income, whether the expenditure be upon recurrent repairs and therefore of an income nature or upon new plant and therefore of a capital nature.

The operation of sec. 25 (*e*) is to disallow claims to deduct expenditure made in order to effect some purpose other than the production of assessable income, and to do so even if the latter purpose was also to some extent present as a secondary object. It is not this provision but the excepting words in sec. 23 (1) (*a*), "not being in the nature of losses and outgoings of capital," that exclude the deduction of items referable to capital. They are excluded though, as the form of the section recognizes, they may be actually incurred in gaining or producing the assessable income. No less may they be money wholly and exclusively expended for the production of assessable income. There is I think nothing which prevents the division or apportionment between capital and income of an outgoing which is in part of a capital nature and in part of a revenue nature. But the outgoing must be of such a kind that it is capable of distribution. The point arises in reference to the nature of the liabilities which the remittances discharged. As I have stated, they were made without specific appropriation, and debited to a running account which included items for the supply of plant, some comparatively small items for advances, and some other items of a capital nature. Is it

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possible to trace the liabilities which the remittances during a year have operated to discharge, and, by apportionment or otherwise, to attribute a proper part to liabilities incurred on account of revenue, that is, of an income nature ? The question is I think almost entirely one of fact. Before the board of review an attempt was made by the taxpayer to show that it could be done, indeed actually to do it. But in the view taken by the board it was not necessary for that tribunal to express any opinion as to the success of the attempt. The mode in which the accounts have been kept makes the task difficult, but it does not appear to me to be impossible. I see no reason why the remittances to the debit of the account should not be taken as discharging the items on the credit side of the account in the order in which they are entered, that is to say, why the rule or presumption should not be applied that payments satisfy the earlier liabilities. Further than this I do not think we are in a position to go upon this reference to the Full Court.

But it is not enough that liabilities of an income nature may have been discharged by the remittances involving the increased outlay of pounds in purchasing dollars. Consistently with that fact, the increased outlay may still be of a capital nature. And the commissioner maintains that it is of a capital nature because it was brought about by the company's using as its working capital the moneys out of which the liabilities should have been discharged before the fall of the pound. His contention fastens upon the cause of the delay in remitting moneys to discharge the earlier liabilities of the taxpayer company for stock-in-trade and supplies. Because remittances were withheld in order to provide the company with the equivalent of a working capital the commissioner says that the increase in the cost of the dollar ultimately purchased to discharge the earlier liabilities should be borne by the capital account. In other words, the need for capital accounts for the additional expenditure incurred in purchasing the dollars at the higher cost prevailing at the later date. It might at first sight appear that as remitting in dollars is a regular part of the taxpayer company's outlay in the ordinary routine of its business, it could not be of any importance how the expenditure for that purpose in any given year was appropriated to satisfy liabilities. That is to say, it is a recurrent expenditure, and why should it not be charged against current receipts ?

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But it must be remembered that the accounting is not upon a cash but upon a credit basis, not upon a basis of actual receipts or disbursements, but by valuation and taking and giving credit: See *Executor, Trustee and Agency Co. of S.A. Ltd.* v. *Deputy Federal Commissioner of Taxes (S.A.)* (1). Current purchases, in other words, are taken into the account against current sales independently of payment by or to the taxpayer. Thus the true nature of the deduction claimed is for the increase in the cost of discharging a past liability for which provision in the accounts was made at a lower figure.

But notwithstanding that so much must be conceded to the contention of the commissioner, I think that the outgoing is not wholly of a capital nature and to the extent to which it is attributable to the discharge of liabilities incurred on revenue account ought to be allowed. From the fact that the increase in the expenditure arose from a delay in payment designed to create a fund for working capital, it by no means follows that it is a capital outgoing. The variations in the cost of exchange for discharging liabilities in foreign currency are continual sources of credits and debits in accounts into which the liabilities have already been taken. It is true that the credits and debits do not, or at all events may not, record actual losses and gains incurred or obtained independently of the previous expression of the liability in the accounts. But they are continually recurring variations in the position of the business in its course of profit earning. Whether the variations are on account of capital or revenue cannot depend on the purpose of the business policy or measures to which as a matter of causation the size or direction of the variation may be traceable. Some kinds of recurrent expenditure made to secure capital or working capital are clearly deductible. Under the Australian system interest on money borrowed for the purpose forms a deduction. So does the rent of premises and the hire of plant. No doubt the difficulty of assigning an outgoing to capital or income is often very great. This court has dealt with aspects of the problem in *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (2), *Ash* v. *Federal Commissioner of Taxation* (3) and *Sun Newspapers Ltd. and Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (4). Here I think that there are

(1) (1939) 62 C.L.R. 545.
(2) (1934) 51 C.L.R.: Cf. at pp. 575, 576.
(3) (1938) 61 C.L.R. 263.
(4) (1938) 61 C.L.R. 337.

factors which place the expenditure in the category of an outgoing on account of revenue, so far as it is not referable to capital liabilities. First among these factors is that the circumstances that the liability discharged is *ex hypothesi* of an income nature. Next the chance of loss or gain in the expenditure required to discharge it, owing to variations in exchange, is a matter attendant upon the use of funds transferable from one country to another, which is continual, recurrent and not independent of judgment and policy on the part of those managing a business of which such funds form a part. It is a loss or gain ordinarily regarded in business as detachable from the fund, and susceptible of treatment as a trading profit or loss.

The delay increased the chances of a loss expressed in pounds, but the fact that the reason for the delay related to capital does not make the outgoing a capital loss. It is rather a standing contingency representing the recurrent expenditure which must be incurred to obtain the use of the money and is much more like annual outgoings to obtain the use of capital assets, such as rent, hire or interest.

There remains a further point. The commissioner challenged the reality of the expenditure claimed as a deduction. He challenged it on two independent grounds. He said in the first place that it represented a mere book-keeping expense, the reality of which could never be determined until the account was closed off ; that exchange continually varied, that the fact that in a given period the amount at which the liabilities stood was found to be exceeded by the outlay in discharging them told you nothing of the true result of the whole account. This contention, I think, leaves out of view the fact that it is necessary to find profit and loss over yearly accounting periods and that to do so comparisons must be instituted between credits, debits and values over the period. To arrive at a conclusion as to the profits of a period, casual recurrent expenditure on account of outgoings allowed for in anticipation must in appropriate cases be compared with the provision made. Otherwise the true result of the trading would not appear.

The second ground of the challenge depends on the facts of the case as appearing from the admissions between the parties. The identity of the corporation or group to which I have so far referred

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as the New-York house is not stated or at all events clearly established. The commissioner says that it may be that it is only a branch of the taxpayer company itself and therefore that a remittance at a particular date throws no light on the actual discharge of the liability. There is I think good ground for excluding the hypothesis suggested. For the form and contents of the documents as well as the account of the organization of the corporations raises a presumption that the remittances went to the supplier. But as will appear from a consideration of what I have said above I do not attach so much importance to the date at which the liability was actually discharged as to the fact that the remittance was for the purpose of providing for the liabilities, and of the latter I think there can be no doubt.

For the reasons given I think that it cannot be said that the deductions claimed for "exchange" should be disallowed.

The first question should in my opinion be answered as follows :— So much of the amount of the exchange referred to in par. 17 of the mutual admissions as is found to be referable to expenditure incurred in or for the purpose of discharging or providing for liabilities on revenue or income account is allowable as a deduction in ascertaining (otherwise than under sec. 28 of the *Income Tax Assessment Act*) the taxable income of the company in the year in which payments were made as set forth in the mutual admissions.

2. The second question relates to a loss sustained by the taxpayer company in the year 1930 in its trading operations in New Zealand. It claims to deduct this New-Zealand loss in the ascertainment of its taxable income. As the taxpayer is incorporated in Australia it falls within the statutory definition of "resident" (sec. 4 of the *Income Tax Assessment Act* 1922-1930). A resident is liable to taxation upon his income derived from all sources whether in Australia or elsewhere. The claim for deduction is based alternatively upon the provisions of sec. 23 (1) (*a*) and upon those of sec. 26. The material part of sec. 23 (1) (*a*) provides that in calculating the taxable income the total assessable income derived by the taxpayer shall be taken as a basis and from it there shall be deducted all losses and outgoings actually incurred in gaining or producing the assessable income.

The contention on the part of the taxpayer is that its assessable income from all sources including New Zealand should be aggregated and from it there should be deducted the outgoings everywhere that were incurred in its production. Thus the New-Zealand outgoings, which exceeded the New-Zealand assessable income, would be thrown against the mass, so that the New-Zealand deficiency would operate to reduce the Australian income.

To qualify for this inclusion among the deductions, the New-Zealand expenditure or outgoings must have been incurred in the gaining or producing the assessable income and sec. 25 (*e*) goes further and forbids deductions in respect of money not wholly and exclusively laid out or expended for the production of assessable income. If it were true that New-Zealand revenue formed part of the taxpayer's assessable income, it would be hard to deny that the New-Zealand expenditure fulfilled the required condition. But " assessable income " is defined to mean, in the case of a resident, the gross income derived from all sources which is not exempt from income tax under the provisions of the *Income Tax Assessment Act* 1922-1930 : See sec. 4. And the commissioner contends that the New-Zealand income is exempt from taxation. The exemption, it is said, is given by sec. 14 (1) (*q*) (i) (1), which provides that there shall be exempt from income tax income derived from sources outside Australia by a resident of Australia to the extent to which that income is proved to the satisfaction of the commissioner to be chargeable with income tax in any country outside Australia.

In New Zealand the net income of the taxpayer company derived from that country would be liable to income tax. In 1930 there was of course no net income ; outgoings overtopped revenue. But if the balance had been the other way and there had been an excess of receipts in New Zealand over expenditure and outgoings, the excess would have been taxable income liable to New-Zealand income tax. In these circumstances the question is whether it can be said that the New-Zealand outgoings were incurred in gaining assessable income, inasmuch as if any net income had arisen in New Zealand it would have been exempt from Australian tax under sec. 14 (1) (*q*) (i) (1). In my opinion it cannot properly be said that the New-Zealand outgoings were incurred in producing assessable income as

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defined. The reason is that the New-Zealand receipts are exempt under sec. 14 (1) (*q*) (i) (l) and therefore fall outside the definition in sec. 4 of assessable income. They are exempt from tax in Australia, that is from inclusion in an assessment, because they are liable to be charged with tax in New Zealand, if there is a balance remaining after the deductions allowed by New Zealand law have been made.

I think that sec. 14 (1) (*q*) (i) exempts gross receipts or what would otherwise form an item or items of assessable income. The word " chargeable " is a wide one and I think it includes the case of New-Zealand or foreign assessable income which is liable to taxation only after deductions of outgoings and other allowances and includes that case whether the deductions exceed the assessable income so that no New Zealand or foreign tax is in fact payable. It does not mean to bring into the Australian assessment foreign gross income where there is a foreign tax payable on the net amount, simply because the deductions wipe out the whole and leave no net figure. Accordingly I am of opinion that the taxpayer is not entitled under sec. 23 (1) (*a*) to deduct New-Zealand losses in his Australian assessment.

The taxpayer's reliance upon sec. 26 is also answered by the interpretation I have placed upon sec. 14 (1) (*q*) (i) (1). The material part of sec. 26 is sub-sec. (1) (*b*), which provides that where a loss is made in any year by any person, if he is a resident, in carrying on a business the proceeds of which (if any) derived from sources outside Australia would not be wholly exempt from income tax under the provisions of sec. 14 (1) (*q*) (i), that person shall be entitled to a deduction of that loss from the net assessable income (if any) derived by him in that year.

Sec. 26 contains many difficulties but it is sufficient to say in the present case that it cannot apply because according to the construction I have put upon sec. 14 (1) (*q*) (i) (1), the proceeds of the New-Zealand business would under those provisions be wholly exempt from Australian income tax.

3, 4, 5 and 6. Questions 3, 4, 5 and 6 relate to the mode in which the board of review exercised or purported to exercise its powers.

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Sec. 50 (4) of the *Income Tax Assessment Act* 1922-1935 enables a taxpayer to require the commissioner to refer his decision upon an objection to the board of review. Under sec. 51 the taxpayer is limited on the review to the grounds stated in his objection and the board on review must give a decision in writing and may either confirm the assessments or reduce, increase or vary the assessment. Under sec. 44 the board for the purpose of reviewing decisions so referred to it has the powers and functions of the commissioner in making assessments, determinations and revisions under the Act.

By reg. 45 (1) of the *Income Tax Regulations* (S.R. No. 64 of 1927) the board is to give a written decision on each review and shall forward copies of the decision to the commissioner and to the taxpayer and the commissioner is required, unless the decision has been appealed from, to give effect to the decision within thirty days after the receipt thereof. Within thirty days the commissioner or the taxpayer may appeal to this court from any decision of the board of review which in the opinion of the court involves a question of law (sec. 51 (6) and *Rules of the High Court of Australia*, Order LIA., rule 11).

The five assessments which were the subject of the reference to the board made at the taxpayer's request were each made under the provisions of sec. 28 and not under the ordinary provisions of the Act. The objections covered not only income tax but also the further income tax imposed by sec. 7A (1) of the *Income Tax Act* 1930 (sec. 5 (1) of the later taxing Acts), a tax sometimes referred to by the not very accurate description, special property tax. The board dealt first with so much of the assessments as related to income tax, deferring the consideration of the further income tax. It stated its conclusions in writing in the form of a decision. As to the first three years, 1929, 1930 and 1931, the board upheld the taxpayer's objection that sec. 28 was not applicable and added—" an assessment under the ordinary provisions of the Act to issue for each of these years in lieu of the assessments under sec. 28." As to the fourth year, 1932, the board stated that an amended assessment was to be issued under sec. 28 on the basis of a specified amount of receipts and of a named percentage fixed by the board. As to the fifth year, 1933, the board simply upheld the objection that sec. 28 was not

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applicable. In that year the taxpayer company's accounts disclosed a very large loss. These determinations were expressed in the form of a written decision duly signed by its members, such as would comply with the requirements of the Act and the rules that a decision should be given in writing. The document concluded by saying that the case would be re-opened for the purpose of hearing evidence and argument on the ground only relating to the special or further income tax.

But when for this purpose the case came again before the board it made some addition to or perhaps variation of its prior decision upon the other matters. For the first three years the board assessed the amount of the taxable income, that is, under the ordinary provisions. For 1932 the board expressed an actual assessment under sec. 28, at the percentage it had fixed upon the sum for gross receipts that it had specified. As to 1933 the board said that in lieu of the terms in which its decision was expressed upholding the ground that sec. 28 was not applicable, the board considered it desirable to restate the decision in the following terms, viz., notwithstanding that the business produced no taxable income the board in its judgment does not think it proper to assess and charge tax on any percentage of the total receipts of the business. The purpose of this declaration was to enable the commissioner to argue in subsequent years that the loss incurred in 1933 could not be carried into later assessments because sec. 28 had been put into operation for the year 1933.

The taxpayer considered that, if, as the first decision of the board appeared to require, the commissioner proceeded to assess it upon ordinary principles for the first three years, it would be open to the taxpayer company to object to the assessment on any grounds it thought fit and either appeal to the court or request another reference to the board of review. With this possibility in view the taxpayer objects that when the board gave its second decision it was beyond its authority to go back and vary or add to the board's first decision by itself assessing the taxable income for the three earliest years. The taxpayer applies the objection to the fourth year also. These are other matters to which the third, fourth, fifth and sixth questions are directed. The declaration, as it may be called, made in the fifth year, 1933, that the board had proceeded under sec. 28 to its conclusion, is made the subject of separate questions.

When in its first decision in relation to 1929, 1930, and 1931 the board of review said that an assessment under the ordinary provisions of the Act was to issue I take it to mean that the commissioner would make and issue such assessments. It appears that the board itself has not in the past made assessments as sec. 44 (1) authorizes it to do, and during the discussion before the board the chairman made it clear that assessment by the commissioner was what was in contemplation. But the statement cannot I think, amount to an order or a direction given to the commissioner operating to impose an independent duty upon him. The board is an administrative tribunal with authority to review the commissioner's assessments and decisions, but I do not think that it is authorized to direct him what he shall do. What the statement amounts to is, I think, a declaration that the objection to the former assessments under sec. 28 having been upheld it will devolve upon the commissioner to make assessments upon ordinary principles. In the same way, for the year 1932, the board, having fixed a new percentage under sec. 28 and determined the amount of the total receipts, says that the work of assessing upon that basis falls to the commissioner. The board might have proceeded, I think, to make all four assessments under sec. 44 (1), or it might have gone on, not to make complete assessments, but, nevertheless, to ascertain the taxable income. It is to be noticed that the board's power to assess is limited to the purpose of reviewing the decisions of the commissioner: See sec. 44 (1). That means that in so far as it is incidental to giving effect to the decisions of the board, which must be confined to the grounds of objection, the board may assess.

In the circumstances of the present case it had in the first instance authority to go as far as it afterwards did on the occasion of its second decision. The only question therefore is whether by its first decision it was precluded from taking up the matter where it had left it and going on to assess the taxable income.

Clearly enough the board at the time of giving its first decision regarded it as final except for further income or special property tax. I should doubt very much whether the board could vary a

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decision once given or give a further decision inconsistent with it. I do not think that sec. 37 which enables the commissioner to alter his assessments is incorporated by sec. 44 among the powers the board is to have.

But upon the view I have expressed as to the nature and legal effect of the statement appended to the first decision, that assessments were to issue, it was not incompatible with the legal operation of the board's first decision for it afterwards to go on and assess the taxable income. To do so was not to depart from but to fufil or complete its decision or order. No doubt its intention to stop short of assessing and to leave the task to the commissioner was changed. But I do not think that the change of intention meant that any operative part of the board's decision was either set at nought or rescinded.

The question arises however whether the board, having elected to stop short of carrying its decision further into effect than a mere declaration, can afterwards change its mind and complete or carry nearer to completion the consequences of its decision. On the whole I think it is at liberty to do so at any time before the closing of the process of review. It is exercising an administrative authority and I do not think that until it has completed the exercise of the function of reviewing the assessments referred to it, its administrative authority is exhausted. I see no reason to doubt that it may give definitive decisions, which it cannot afterwards set aside, upon separate decisions of the commissioner referred for review although those decisions do not clear up the whole assessment. But while the assessment remains before it, I think that it may go on to exercise a power so as to carry out what it has already decided, though at an early stage it chose to refrain from doing so.

In answer to question 3 I think it should be declared that the power of the board of review was not limited to upholding the objection to the assessments for the years 1929, 1930 and 1931.

To question 4 I think the answer should be that notwithstanding its decision in July 1937 as to the years 1929, 1930 and 1931 the board of review did have power to give the decision of October 1937 with respect to those years. The question inquires also about the year 1933, but as that year is dealt with by other questions and it depends on somewhat different considerations I think the answer to question 4 as asked should not include it.

In answer to question 5 I think it should be declared that the board's power in respect of the year 1932 to which sec. 28 has been applied was not limited to setting aside the assessments.

In answer to question 6 it should be declared that the assessments by the board of the taxpayer's taxable income for the years 1929, 1930, 1931 and 1932 made on 18th October 1937 are not void, but, subject to any order made upon the appeals therefrom to this court, are binding upon the taxpayer.

7. Question 7 is concerned with the bearing upon the application of sec. 28 to the year 1932 of losses by the taxpayer in previous years. The board of review adopted figures for its taxable income in the years 1929, 1930 and 1931 quite inconsistent with the hypothesis that the company incurred any loss. But it is said that if the increased expenditure on purchasing exchange is deductible it will or may be found that, in 1931 at all events, a loss was sustained. Under sec. 26 the taxpayer might be entitled in 1932 to deduct an unexhausted loss incurred in 1931 if the assessment were made not under sec. 28 but upon ordinary principles.

I find some difficulty in understanding exactly what is the application of question 7 to the matters in controversy. It seems to be directed to some contention on the part of the taxpayer that, in exercising its discretions to apply sec. 28 to the year 1932 and to fix the particular percentage which the board in fact adopted, the board ought to have treated the existence of such a loss as a relevant consideration. Presumably if it turns out that there was in truth a loss in 1931 and that the board's assessment of the taxpayer company's taxable income for that year cannot be sustained, then it will be contended that the exercise of their discretion for the year 1932 is vitiated. The question proceeds to inquire upon what principles the existence and amount of such a loss should be ascertained.

The discretions given by sec. 28 are not controlled by any express direction as to what matters must be taken into account or what must be excluded from consideration. It would be hard to say that the fact of a loss in a prior year, still unexhausted and capable of

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deduction under sec. 26 in a subsequent year, is a matter foreign to the exercise of the discretion to apply sec. 28 in assessing the income of the subsequent year.

But it is another thing to say that neglect to consider or give weight to the fact that such a loss was incurred would invalidate the exercise of the discretion by the board or commissioner, still less a mistake as to the existence of such a loss.

The question is stated in very abstract terms. The facts do not appear which would show the application and the legal consequence of the answer. In my opinion it is both unsafe and unwise to attempt to formulate an answer. An abstract answer is likely to give rise to more difficulties than it will remove. The matter of the question forms only a step in a contention which, though no doubt it seeks a concrete result, cannot be advanced except upon a solid basis of fact. I think that we should not answer the question at all. We should wait until the basis of fact is established and then insist that the concrete question should be considered as an entirety.

8. Question 8 is said to be pointed at a contention that inasmuch as part of the business of the company is carried on outside Australia, viz., in New Zealand, the business was not of a description to which sec. 28 applied. This contention appears to me to be entirely misconceived. So much of the business of the company as is carried on in Australia is, within the meaning of sec. 28, a business which is carried on in Australia.

In answer to question 8 in my opinion it should be declared that the fact that part of the business of the company is carried on outside Australia is no objection to the application of sec. 28 to so much of the company's business as is carried on in Australia.

9. Question 9 is included in order that the taxpayer might contend that it is not open to the commissioner to assess a taxpayer under sec. 28 for a given year of income which is preceded and followed by years the income of which is assessed upon ordinary principles. There is no foundation for such a contention.

The question should be answered that it is no objection to the application of sec. 28 to the year 1932 that in the years immediately preceding and following the taxable income of the taxpayer has been ascertained on ordinary principles and not by the application of sec. 28.

9A. Question 9A, which was added by amendment, relates to the last year, 1933. In the second decision of the board of review it is made quite clear that the board regarded the conditions expressed in sec. 28 as fulfilled so that it was called upon to consider whether any and what percentage should be fixed of total receipts as the income upon which the company should be taxable. The decision stated that the board did not think proper to assess and charge tax on any percentage of the total receipts. The question asks whether the board had authority to refuse to fix any percentage of the total receipts of the business. The commissioner is responsible for raising the matter. His purpose is not to obtain a substantial percentage of the receipts as taxable income, but something however small or even illusory which will establish an assessment for 1933 under sec. 28. His reason for seeking this is that in 1933 the company in fact made a very large loss upon its trading operations and it is expected that it will claim under sec. 26 to carry this loss into 1934 and perhaps subsequent years as a deduction, until it is exhausted The commissioner hopes to establish as a proposition of law that sec. 26 does not enable a taxpayer who in a year of loss has been assessed under sec. 28, even at an illusory figure, to carry the loss into any subsequent year, whether his income for that year is assessed upon ordinary principles or under sec. 28.

The conditions expressed in sec. 28 which the board regarded as fulfilled are the following :—(*a*) a business which is carried on in Australia, (*b*) is controlled principally by persons resident outside Australia, and (*c*) it appeared to the board that the business produced no taxable income or less than the ordinary taxable income which might be expected to arise from that business.

As to the conditions mentioned in (*a*) and (*b*) no difficulty exists. They were fulfilled. The third condition is expressed in the section as something which need only appear to the commissioner or board, as distinguished from something which must be true in fact. But there is I think a question as to what it is that must so appear. The company in 1933 incurred a real loss of considerable dimensions. It did so from causes which those principally in control of the business could neither prevent nor affect. No one suggests that the failure of the business to produce in that year taxable income is a thing which might not be expected in the circumstances. Now sec. 28 in stating the condition under discussion says : " when . . . it

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appears to the commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business." The board of review interpreted the provision as meaning that whenever a business in Australia controlled from abroad makes a loss, then the commissioner's discretion arises to fix a percentage of gross receipts as the taxable income of the business. This appears to me to be a too literal construction of the words. The alternative expression means, I think, to require a comparison between the ordinary taxable income which the business controlled from abroad might be expected to produce and what it does produce whether nothing or something. It is expressed elliptically, not to say illogically, but I do not think that the mere fact that the business produces no taxable income in a given year is enough to fulfil the condition independently of the question whether the business might have been expected to produce an ordinary taxable income of appreciable amount. The purpose of sec. 28 was stated in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1), by *Higgins* J. :—" It is not correct to say that sec. 28 purports to allow income tax where there is no income ; in effect, it says merely that the commissioner may assess for income tax a percentage of the total receipts from the business in Australia where the evidence before him is insufficient to show the true income or any income of that business—where '*it appears* to the commissioner that the business produces either no taxable income or less than the ordinary taxable income'. A firm that carries on business in London as well as in Australia can easily hide the profits of its Australian business by increasing the invoiced prices of the goods sent to Australia." *Starke* J. said :—" The object of sec. 28 is to prescribe a standard for fixing or estimating income in a particular case. It takes the total receipts as the source of income and then prescribe a percentage on those receipts as the standard for assessing income ; but it is said that the case in which that standard is prescribed is one in which there is no taxable income. That is true ; but it means no taxable income in reference to other standards set up by the Act, and therefore requiring a standard of its own. It is no secret that income tax has been avoided by companies and

(1) (1926) 38 C.L.R., at p. 209.

traders resident outside Australia setting up local companies to trade in Australia, and supplying them with commodities at prices that cannot return a profit here, but returning handsome profits to the company or trader so setting up the local companies " (1).

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It would I think be opposed to the general conception of the provision to construe it as if the mere fact that no taxable income was earned by a foreign-controlled company was enough, without any consideration of the question whether it might in the given year have been expected to earn taxable income, to justify the commissioner in assessing upon a percentage of total receipts. It does not mean that every time such a company makes a loss it is to be so assessed, but if it makes the smallest profit or taxable income then it must be considered whether it is less than the ordinary income that might be expected. The question what might have been expected is present, I think, in both cases, according to the true meaning of the provision. I am therefore of the opinion that what appeared to the board was not enough to fulfil the condition in question. For it did not appear to the board that any taxable income might have been expected in 1933.

But in any case I think that sec. 28 by the words " shall be assessable and chargeable " does not mean to impose upon the commissioner an imperative duty to assess upon a percentage of total receipts whenever the three preliminary conditions prescribed by the section are fufilled. I construe those words as conferring a power and a discretion, not as imposing upon the commissioner an inexorable duty to fix some percentage, however small, and to proceed to assess thereon.

I am therefore of the opinion that the board was mistaken in the form in which, in its second decision, it expressed its conclusion that the taxpayer ought not to be assessed for the year 1933 under sec. 28.

Question 9A covers, as will be seen, the ground to which, in relation to the year 1933, question 4 was partly directed, and it was for that reason that I preferred to deal with the whole question of the year 1933 under question 9A.

In my opinion in answer to the question it should be declared that the board of review rightly refused to fix any percentage under

(1) (1926) 38 C.L.R., at pp. 214, 215.

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sec. 28 and the facts did not warrant any assessment under that section.

The remaining questions relate to the further tax, i.e., further income tax, imposed by sec. 7A (1) of the *Income Tax Act* 1930 and by sec. 5 (1) of the *Income Tax Acts* 1931, 1932 and 1933.

10. Question 10 is concerned with the refusal of the board of review to allow certain deductions in ascertaining the net income subject to the tax. The provision, which was considered by the court in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Federal Commissioner of Taxation* (1) is as follows :—In addition to any income tax payable under the preceding provisions of this (taxing) Act, there shall be payable upon the taxable income derived by any person (*a*) from property ; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property ; and (*c*) in the course of carrying on a business where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further tax of ten per centum of the amount of that taxable income.

The effect of the last paragraph of the provision, par. *c*, is, I think, to include income derived by any person in the course of carrying on a business, if the income is of such a class that, when it is derived otherwise than in the course of carrying on a business, it is income from property : Cf. *Victoria Park Racing and Recreation Ground Co. Ltd.* v. *Federal Commissioner of Taxation* (2).

During the years in question the taxpayer received interest on Commonwealth loans liable to income tax, and in three of the years, viz., 1930, 1931 and 1932, the amounts were large. The interest was liable to the special or further income tax under par. *b* of the provision.

The taxpayer company also received some items of revenue which have been brought under par. *c* without objection on its part. For the purpose of selling its petrol it establishes kerbside pumps. The cost of doing so is very large indeed. The cost of maintaining the pumps also is very heavy. There are outgoings for repairs, for municipal taxes and licence fees, losses on reselling pumps regularly withdrawn from use and an annual provision for depreciation. But

(1) (1934) 52 C.L.R. 9.

(2) (1934) 52 C.L.R., at p. 26

many petrol pumps are hired to the proprietors of garages who pay hire, or, as it is called, rent for the pumps. The hire from the company's point of view is not considerable and in fact is but a small saving on the very large expenditure in connection with petrol pumps which the exigencies of the business of distributing petrol throw upon the taxpayer company. But the payments for hire form the items of revenue which have been brought under par. *c* as liable to the further income tax. The company is by no means opposed to the inclusion of the hire from petrol pumps in the income to be taxed ; for it forms the first step in an argument for the allowance against all the items brought under the further tax, including interest, of deductions which would overtop the items in amount and leave no net balance to be taxed. The deductions claimed are for the expenditure in maintaining the pumps, i.e., for the items to which I have referred. The theory of the company is that all the gross income from the classes of property falling under the three pars. of sec. 7A (1) is to be lumped together for the purpose of ascertaining the taxable income and all the expenditure incurred in producing any of the items is also to be lumped together for the purpose of deducting the total from the total of gross income. It contends that all the items of expenditure incurred in maintaining the pumps were incurred in producing the hire or pump rents. The board met the contention by disallowing the items, with the exception of one called administration expenses. It did so on the ground that the expense was referable to the business of selling petrol rather than to the obtaining of pump rents.

I think that this ground is not altogether sound. The truth, in my opinion, is that there was no net or taxable income from the hire of petrol pumps and the item never should come into the computation at all. The fact is that the hire obtained represents no independent source of revenue. It is nothing but a recoupment of a very small part of a large expenditure upon the establishment and maintenance of a means of selling petrol. The circumstances are singular and in my opinion they do not admit of the method of treatment which the taxpayer seeks to apply. To treat the receipts from hire as an item of gross revenue and the expenses of maintaining the pumps, because incurred in producing the hire, as items of a

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total expenditure to be thrown against the total receipts from all sources liable to the special or further tax is to overlook the fact that the pump rents are mere incidents of the expenditure; the expenditure is not an incident of the pump rents. Sec. 7A (1) (or see sec. 5) of the taxing Acts does not make it clear how the net income to be further taxed is to be ascertained. The expression "taxable income" cannot have its full defined sense, that is, the full meaning given it by sec. 4 of the *Income Tax Assessment Act*, viz., "the amount of income remaining after all deductions allowed by this Act have been made." For instance, it can scarcely be supposed that any part of a premium paid by a taxpayer upon his wife's life insurance is allowable in ascertaining the net amount liable to further tax: Cf. sec. 23 (1) (*c*). A conceivable interpretation of the provision is that it requires an apportionment of the net taxable income ascertained for the purpose of ordinary income tax, an apportionment with a view to finding so much of the net sum thus ascertained as is attributable to the inclusion in the assessable income of the items described in pars. *a*, *b* and *c*. But I do not think this is its meaning. It may be that what the provision intends is that a further assessment of taxable income shall be made on the assumption that no other assessable income was derived by the taxpayer but only assessable income filling the descriptions contained in pars. *a*, *b* and *c*.

But before it can be found that a receipt constitutes income falling within par. *c* something more must be asked than whether, if the receipt had been obtained otherwise than in carrying on a business, it would have been income from property. The peculiarity that the thing which incidentally produces the receipt is maintained at a great cost for business purposes and that the receipt arises merely incidentally and accidentally makes it necessary to inquire whether the receipt can be at all regarded as income of a class which, if it is obtained otherwise than in carrying on a business, is income from property. The establishment and maintenance of petrol pumps has no relation to anything but the carrying on of the business of selling petrol. The receipt is impossible except as a saving or recoupment in connection with selling petrol. It is a complete distortion of the transaction to regard the receipt as capable of an independent existence as revenue. It is obtainable only from the retail seller of the company's petrol who is provided with a pump for the purpose of selling it. In truth there is no " income " from the petrol pumps considered as property ; there is only a reduction or recoupment in part of the expenditure in establishing and maintaining an implement of trade. Before you can arrive at the conclusion that there is taxable income derived in the manner described by par. *c* it must appear possible that taxable income might arise from the source in question otherwise than in the course of carrying on the business. No taxable income does or could arise from maintaining the pumps apart from selling petrol.

I think that question 10 should be answered that the deductions claimed are not allowable against interest, but, having regard to the expenditure they represent and the purpose of the pumps, there is no taxable income from pump rents.

11. Question 11 asks whether a taxpayer who is assessed for his ordinary tax under sec. 28 is also liable to assessment, in addition, for the further income tax or so-called special property tax.

It is suggested that to apply sec. 28 to a given year is to exclude for that year the special property tax. This suggestion does not appear to me to be well founded.

There are two taxes, income tax and further income tax. For the first an assessment must be made of income generally whether under the ordinary provisions of the *Income Tax Assessment Act* or under sec. 28. For the second, another ascertainment of a particular class of income or of classes of income must be made. It is an independent ascertainment of a different taxable income. For this sec. 28 is not available. The two taxes are independent; the subject matters taxed, although of the same general nature, viz., income, are of different classifications ; and the subjects of tax must be separately ascertained. There is nothing in the use of sec. 28 for the ordinary income at all inconsistent with the imposition of the special property tax.

In my opinion question 11 should be answered that notwithstanding the application of sec. 28 to the assessment of the taxpayer company for ordinary income tax in respect of the year of income 1932, it remained liable to the further income tax under sec. 5 of the *Income Tax Act* 1933 (No. 41 of 1933).

12. Question twelve enquires how, for the purpose of the further income tax or special property tax, the taxable income is to be

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ascertained in a year to which sec. 28 has been applied for the purpose of ordinary income tax.

In my opinion, sec. 28 has no application to the ascertainment of the "taxable income" described in sec. 7A (1) or sec. 5, as the case may be of the taxing statutes relevant to the various years. It is essentially concerned with the income from a business and cannot be employed for such a purpose as the special property tax. There is nothing in sec. 28 to require that when it is applied to ordinary income it shall also supersede the general operation of the provision contained in sec. 7A (1) or sec. 5, as the case may be. That provision operates just as if sec. 28 had not been used for ordinary income tax.

In answer to question twelve it should be declared that for the year 1933 the amount of the income upon which the further income tax imposed by sec. 5 of the *Income Tax Act* 1933 is levied should be ascertained or assessed independently of sec. 28 and in the same manner as if sec. 28 had not been applied in that year for the purpose of assessing the taxpayer company to ordinary income tax.

The costs of this reference should be reserved to be dealt with at the hearing of the appeals.

McTIERNAN J. I concur in the answers which my brother *Dixon* proposes should be given to the questions and in the reasons given by him for those answers.

The order of the court was, as amended on 8*th April* 1940, *as follows :—With respect to the questions set out in the order of Rich J. of* 3*rd November* 1939 *as amended order and declare as follows :—*

As to Question 1. *Declare that so much of the amount of the exchange referred to in the said question as is found to be referable to expenditure incurred in or for the purpose of discharging or providing for liabilities on revenue or income account ought to be allowed as a deduction in ascertaining* (*except under sec.* 28 *of the Income Tax Assessment Act*) *the taxable income of the company in the year in which payments as set forth in the mutual admissions were made.*

As to Question 2. *Declare that no part of the expenditure or outgoings incurred by the appellant company for the purpose of carrying on its business in New Zealand ought to be allowed in ascertaining the company's taxable income under the Income Tax Assessment Act and that in ascertaining the taxable income of the company for the income year* 1930 *none of the gross income derived by the company from carrying on its business in New Zealand should be included in its assessable income.*

As to Question 3. *Declare that the power of the board of review was not confined to upholding the objection of the appellant company to the assessments for the years of income* 1929, 1930 *and* 1931.

As to Question 4. *Declare that notwithstanding the decision of the board of review of* 28*th July* 1937 *the said board had power to give with respect to the years of income* 1929, 1930 *and* 1931 *its decision of* 18*th October* 1937 *and that with respect to the year of income* 1933 *the said board rightly refused to fix any percentage under sec.* 28 *and no assessment under the said section was warranted by the facts.*

As to Question 5. *Declare that the power of the board of review with respect to the year of income* 1932 *was not confined to setting aside the assessment.*

As to Question 6. *Declare that the assessments by the board of review for the years of income* 1929, 1930, 1931 *and* 1932 *are not void, but, subject to any order made by this court in these appeals, are binding upon the appellant company.*

As to Question 7. *Declare that no order should be made upon this reference to the Full Court.*

As to Question 8. *Declare that the fact that part of the business of the appellant company is carried on outside Australia is not a valid ground of objection to the application of sec.* 28 *of the Income Tax Assessment Act in assessing the company in respect of income tax.*

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As to Question 9. *Declare that it is not a valid ground of objection to the application of sec.* 28 *of the Income Tax Assessment Act to year of income* 1932 *that in the years immediately preceding and following that year the taxable income of the appellant company has been ascertained on ordinary principles and not by the application of sec.* 28.

As to Question 9A. *Declare that the board of review rightly refused to fix any percentage under sec.* 28 *of the Income Tax Assessment Act for the year of income* 1933 *and the facts did not warrant the making of any assessment under that section.*

As to Question 10. *Declare that in ascertaining the taxable income of the appellant company upon which the tax imposed by sec.* 5 *of the Income Tax Act* 1934 *and by the corresponding previous taxing provisions is payable the deductions claimed by the appellant company for outgoings and expenditure in connection with petrol pumps are not allowable against interest derived by the appellant company but the receipts from pump rents ought not to be included in the gross income for the purpose of such ascertainment.*

As to Question 11. *Declare that notwithstanding the application of sec.* 28 *of the Income Tax Assessment Act to the assessment of the appellant company for ordinary income in respect of the year of income* 1932 *the appellant company remained liable to the further income tax payable under sec.* 5 *of the Income Tax Act* 1933.

As to Question 12. *Declare that for the year of income* 1932 *the amount of the taxable income upon which the further income tax payable under sec.* 5 *of the Income Tax Act* 1933 *is levied should be ascertained independently of sec.* 28 *and in the same manner as if sec.* 28 *had not been applied in respect of that year for the purpose of assessing the appellant company to ordinary income tax.*

The costs of this reference to the Full Court, costs in the appeals.

Solicitors for the taxpayer, *Minter, Simpson & Co.*

Solicitor for the Federal Commissioner of Taxation, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J.B.