[HIGH COURT OF AUSTRALIA.]

INCORPORATED INTERESTS PROPRIETARY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1943.

MELBOURNE, *March* 19.

SYDNEY, *April* 5.

Latham C.J., Rich, Starke and Williams JJ.

War-time (Company) Tax—Assessment—"Capital"—Company "in which little or no capital is required"—Exemption of profit which "arises from commissions, fees or charges for services rendered"—War-time (Company) Tax Assessment Act 1940 (*No.* 90 *of* 1940), *s.* 14 (*d*).

In s. 14 (*d*) of the *War-time (Company) Tax Assessment Act* 1940 the word "capital" is used in the commercial sense, not in the sense of paid-up, issued or nominal capital.

So *held* by the whole Court.

In s. 14 (*d*) of the *War-time (Company) Tax Assessment Act* 1940 the expression "company . . . in which little or no capital is required" means a company which requires little or no capital to carry on its business as a whole. A company cannot gain the exemption provided by s. 14 (*d*) by showing merely that a part of its business consists in the earning of commissions and that little or no capital is required therefor.

So held by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. dissenting).

CASE STATED.

On an appeal by Incorporated Interests Pty. Ltd. to the High Court against an assessment to war-time company tax, *Latham* C.J. stated for the Full Court a case which was substantially as follows:—

1. The appellant company was incorporated in Victoria in the year 1934, and its issued share capital has at all times consisted of one hundred fully paid shares of one pound and no more.

2. The profits of the appellant arise principally from commissions received from the following companies which carry on the business of insurance brokers, namely, Bennie S. Cohen & Son (N.S.W.) Ltd., Bennie S. Cohen & Son (S.A.) Ltd., Bennie S. Cohen & Son (Vic.) Pty. Ltd., Bennie S. Cohen & Son (W.A.) Ltd., Bennie S. Cohen & Son (Q'land) Pty. Ltd. and Bennie S. Cohen & Son (N.Z.) Ltd.

3. The commissions are paid to the appellant pursuant to agreements in writing between it and the aforesaid companies.

Annexed to and forming part of the case was a copy of the agreement between the appellant (therein called the "co-ordinating company") and Bennie S. Cohen & Son (N.S.W.) Ltd. (therein called the "Sydney company"), and the case stated that the other agreements were in similar terms. The agreement was as follows: —"Whereas: 1. The Sydney company carries on and has for some time past been carrying on the business of insurance brokers in the State of New South Wales in the Commonwealth of Australia as agents for Bennie S. Cohen & Sons Limited a company incorporated in England (hereinafter called 'the London company') upon the terms of an agreement dated the ninth day of January one thousand nine hundred and twenty-four and made between the Sydney company of the one part and the London company of the other part. 2. A number of other companies incorporated in various States of the said Commonwealth and the Dominion of New Zealand carry on and have for some time past been carrying on therein a like business of insurance brokers as agents for the London company under agreements similar in character to that mentioned in the last recital. 3. In view of the great distance separating the London company and the various companies incorporated in the said Commonwealth and Dominion co-ordination of business and financial arrangements have been in the past difficult and it has been thought desirable to facilitate the co-ordination of the said business and finance as hereinafter appears Now it is hereby agreed as follows:—1. The co-ordinating company shall give to the Sydney company such advice and assistance as may be in the interests of the Sydney company whether it shall be in a position to do so by reason of its knowledge of the experience and working of the various companies in the said other States or the said Dominion or for any other reason and shall from time to time make such financial arrangements as may be useful and convenient as between the Sydney company and the said other companies and generally having regard to its position shall do all in its power to advance the interests of the Sydney company. 2. The co-ordinating company shall be at liberty with a view to the advancement of the business of the London company and all the said companies to make such use as it may think fit of all information and experience of the Sydney company which shall come to its knowledge but subject thereto shall not divulge the same to any other person firm or corporation whatsoever. 3. As remuneration for its services the co-ordinating company shall be entitled to receive from the Sydney company in respect of every month commencing with the month of February

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

one thousand nine hundred and thirty-four a sum equal to thirty-three and one-third per cent on so much of all commission or brokerage in respect of all business introduced by the Sydney company and effected by the London company (including any special allowances which may be made by underwriters but excluding profits arising from profit-sharing agreements with underwriters) as remains after deducting any proportion thereof to which the London company may from time to time be entitled. The said remuneration to be payable within twenty-one days after the end of each month."

4. Out of the accumulated profits of its business the appellant has from time to time purchased freehold lands, shares in other companies and government securities. In the year ended 30th June 1940 it received income from these investments as follows:—

Dividends on shares—		
Australian investments ..	£3,434	
Ex-Australian ,, ..	£204	£3,638
Interest—		
Australian	£196	
Ex-Australian	£366	£562
Rent—Australian	£140	£140
		£4,340

In addition the appellant received bonus shares to the value of £448, which sum is to be treated for purposes of income taxation as being received by way of dividends. Neither dividends nor interest derived from sources outside Australia were included in the taxable income of the appellant, and the amount included in its taxable income in respect of dividends upon shares in other companies was (after allowing the appropriate deductions) £3,028.

5. In that year the appellant's profit from the whole of its activities was £38,064. This amount was received from the following sources:

	Gross	Expenses	Net	Earned in Australia
Commissions earned in New Zealand	£7,599	£182	£7,417	——
Commissions earned in Australia	26,996	642	26,354	£26,354
Dividends on shares	3,638	40	3,598	3,028
Interest on Government securities	562	6	556	194
Rent	140	1	139	139
	£38,935	£871	£38,064	£29,715

The sum of £5,048 represents taxes paid by the appellant which it is entitled to deduct for the purpose of ascertaining its taxable income.

6. The capital employed in earning the taxable profit of the appellant for the year ended 30th June 1940 calculated in accordance with the provisions of the *War-time (Company) Tax Assessment Act* 1940 amounted to £13,011, of which £5,061 was invested in Commonwealth loans and £2,804 in freehold property.

7. The taxable income of the appellant for the financial year 1940-1941 as assessed under the *Income Tax Assessment Act* 1936-1941 amounted to £24,667.

8. The Commonwealth income tax payable by the appellant for the financial year 1940-1941 upon income derived by it during the year ended 30th June 1940 amounted to £2,162, exclusive of super-tax and any tax assessed under Part IIIA. of the *Income Tax Assessment Act.*

9. The assets of the appellant and the value thereof as at 30th June 1939 were as follows :—

(i)	Shares in other companies at cost	£83,556	7	8
(ii)	Australian consolidated bonds at cost ..	5,061	6	8
(iii)	Other government loans at cost	17,577	5	0
(iv)	Freehold property in Perth, W.A.	2,804	9	1
(v)	Sundry debtors—			
	Bennie S. Cohen companies in Australia for commission due but not paid	3,523	9	4
	Bennie S. Cohen (N.Z.) Ltd.—commission due but not paid	1,962	5	9
	Sundry advances	7,117	14	4
	Rent due	11	13	4
(vi)	Cash at banks	12,180	9	9

10. Of the assets referred to in par. 9 no part thereof is used in or required for the earning of the commissions referred to in par. 2 hereof save and except some trifling sums for petty cash included in item vi thereof. As at 30th June 1939 the total amount due by the appellant company to creditors was £229 16s. 3d.

11. By an assessment and an amended assessment, notice whereof was given on 1st September and 24th November 1941 respectively, the respondent assessed the appellant for war-time (company) tax in the sum of £9,579 17s.

12. By notice in writing dated 27th October 1941 the appellant objected to the said assessment on the grounds :—" 1. That no tax is payable by the company. 2. Little or no capital is required by the company and its profit arises mainly from commissions, fees or

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

charges for services rendered and such profit is accordingly exempt from tax under s. 14 (*d*) of the . . . Act. 3. So much of the profit of the company as is not exempt from tax under s. 14 (*d*) represents less than eight per cent of the capital employed in earning that profit and is therefore not subject to tax."

13. On 24th November 1941 the respondent disallowed the objection and by letter dated 23rd January 1942 the appellant requested the respondent to treat its objection as an appeal and forward the same to the High Court of Australia.

14. In assessing the appellant to war-time (company) tax the respondent has included in the taxable profit of the appellant an amount in respect of commissions received by the appellant during the year ended 30th June 1940 pursuant to the agreements referred to in par. 3. The said amount is properly calculated if the said commissions are subject to war-time (company) tax.

15. If the amounts received by the appellant pursuant to the agreements are exempt from war-time (company) tax the appellant is not liable to pay any such tax for the financial year 1940-1941.

16. The parties have appeared before me and agreed that all the facts material to the hearing of this appeal are contained in the preceding paragraphs and annexures, and upon these facts I state the following questions for the opinion and consideration of the Full Court of the High Court of Australia :—

(1) Is the appellant a company in which little or no capital is required within the meaning of s. 14 (*d*) of the *War-time (Company) Tax Assessment Act* 1940 ?

(2) Are the commissions referred to in par. 2 of this case subject to war-time (company) tax ?

The relevant statutory provisions appear in the judgments hereunder.

Dr. *Coppel*, for the appellant. (1) Section 14 (*d*) applies to a company whose profit arises wholly or partly from commissions and which, for the acquisition of those commissions, requires little or no capital. The section then applies so as to exempt the company from the operation of the Act so far as that part of its business is concerned. The capital which is required is that which has relation to the commissions, that is, which is required to earn the commissions. Capital which has no relation to the earning of the commissions is outside the purview of the section. Therefore it is immaterial that the company carries on some other business in respect of which it cannot be said that little or no capital is required. If that is not so, the section may operate very harshly : some companies will have to pay tax

on commissions although little or no capital is required to earn them, while others will escape. It should not be assumed that that was the intention of the legislature unless no other construction of the section is reasonably open. (2) Alternatively, " capital " in the section means paid-up capital. Prima facie, the words of a statute should be given their technical meaning (*Deputy Federal Commissioner of Land Tax, Sydney* v. *Hindmarsh* (1)). [He referred to ss. 3 (" taxable profit "), 13, 19, 20 and 24 of the Act.]

Dean, for the respondent. " Capital " in s. 14 (*d*) means the total sum of the assets used by the company for the purpose of earning the income which it in fact receives. If it uses the assets, it cannot contend that it does not require them. Section 14 (*d*) relates to the business as a whole, not to a part only. That is the natural meaning of the words used, and the section should be so construed. " Capital " here cannot mean the paid-up capital of the company : that would be inconsistent with s. 25 of the Act.

Dr. *Coppel*, in reply.

Cur. adv. vult.

April 5.

The following written judgments were delivered :—

LATHAM C.J. Case stated. The *War-time (Company) Tax Assessment Act* 1940, s. 14 (*d*), provides that the Act shall not apply to a company (with certain exceptions) " in which little or no capital is required, to the extent to which the Commissioner is satisfied that its profit arises from commissions, fees or charges for services rendered." The question which arises upon this case is whether the appellant company comes within this provision to the extent that its profit arises from commissions.

Section 13 of the Act provides that war-time (company) tax shall be levied and paid upon the amount by which the " taxable profit " derived by any company during the accounting period exceeds the " percentage standard." The percentage standard is, in the case of this company, the statutory percentage, that is, eight per cent (s. 20), of " the capital employed, or deemed to be employed " during the accounting period (s. 19). Section 24 provides for the ascertainment of " capital employed " in an accounting period. This section directs that such capital shall be ascertained by adding together certain amounts, namely : (*a*) capital paid up in money ; (*b*) certain accumulated profits ; (*c*) reserve funds created out of premiums received on issue of shares ; (*d*) the amount by which the value of

(1) (1912) 14 C.L.R. 334, at pp. 337, 340.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

certain assets has been written down. Other provisions in the section relate to life assurance companies, and to the method of ascertaining the value of assets for the purpose of the section.

In the year ending 30th June 1940, the company received £26,354 as commissions which were earned in Australia. These commissions were paid by various companies carrying on the business of insurance brokers and were paid under agreements between the appellant and those companies. In addition the assessable income of the company under the *Income Tax Assessment Act* 1936-1940 included net dividends on shares £3,028, net interest on Government securities £194, and net rent from real property owned by the company £139, a total of £29,715. When proper deductions were made the amount of taxable income was assessed by the Commissioner at £24,667.

The *War-time* (*Company*) *Tax Assessment Act*, s. 3, defines "taxable profit" as meaning the amount remaining after taking from the taxable income of the accounting period as assessed under the *Income Tax Assessment Act* (*a*) income tax, (*b*) dividends, and certain other amounts which are not material for the purpose of this case. When these deductions were made from the taxable income the amount remaining was £19,527, which the Commissioner claims is the taxable profit for the purpose of the Act. The company contends that commissions should be excluded in making the assessment under the Act.

The "capital employed" in the company (s. 19) is agreed to be £13,011, so that the statutory percentage (eight per cent) is £1,041. The Commissioner therefore claims that the excess of taxable profit over the percentage standard is £18,437, the tax upon which is £9,579.

The assets of the company consist of shares in other companies (£83,566), which are excluded by s. 24 from the definition of "capital employed," of Australian consolidated bonds (£5,061), other government loans (£17,557), freehold property (£2,804), and moneys due from debtors and cash at banks, making in all a total value of assets of over £133,000.

Of these assets no part is used in or required for the earning of the commissions mentioned, with the exception of trifling sums for petty cash.

The profit made by the company arises from commissions to a very large extent, to the extent of £26,354 out of the profit (not "taxable profit" within the meaning of the Act) of £29,715. If commissions are excluded in applying the Act, the taxable profit of the company would not exceed the statutory percentage and no tax would be chargeable. The question for determination is whether

the company falls within the provisions of s. 14 (*d*), which in its full terms is as follows :—" This Act shall not apply to—(*d*) a company (not being a company carrying on the business of financing time payments, instalments or hire purchase sales, or of providing cash orders) in which little or no capital is required, to the extent to which the Commissioner is satisfied that its profit arises from commissions, fees or charges for services rendered." There is no doubt that the profit of the company arises to a large extent from commissions. The question therefore is whether the company is one in which " little or no capital is required " in the sense in which that phrase is used in the Act. It has been argued for the company that " capital " should be interpreted in this provision as meaning paid-up capital. It is difficult, however, to justify this contention. It is impossible to say that " capital " has a single technical meaning which prima facie should be attributed to the word in any statutory provision. The *Companies Act* distinguishes between nominal, issued, and paid-up capital, and the significance of the word in a particular case depends upon the context in which it is used. In the case of the *War-time (Company) Tax Assessment Act*, it is important to observe that " company " is defined in s. 3 so as to include all bodies or associations, corporate or unincorporate, but not partnerships. Thus an unincorporated association is a company for the purposes of the Act. In the case of such an association, however, there is no paid-up capital in the ordinary sense. Thus it is impossible to attach to the word " capital " in s. 14 (*d*) in all cases the meaning of paid-up capital. Having regard to the nature of the statute, by which it is evidently intended to impose a tax upon profits which are regarded as being properly specially taxable because out of proportion to the capital of the " company " which makes them, and to the definition of the word " company," I am of opinion that the word " capital " cannot be understood as referring to paid-up capital.

The Commissioner contends, therefore, that the capital of a company for the purposes of the section means the assets which it actually uses in the process of producing profit. All the assets of this company are so used and the value of the assets is over £133,000. Alternatively, it is said, the capital of the company as ascertained under s. 24 is £13,011. In either case (whether assets used or " capital employed " is taken as the measure for the purpose of s. 14 (*d*)) it cannot be said that little or no capital was required in the case of this company to produce the profit which it actually made in the relevant year.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

The appellant contends that the relevant capital for the purpose of applying the section is the capital required for the production of profit from commissions, and that capital required for other purposes is irrelevant. It is pointed out that the adoption of the contention for the Commissioner would bring about most arbitrary and capricious results. Company A using only assets worth £100, and deriving its income solely from commissions, would pay no tax under the Act. Company B, with the same income from commissions, and with the same amount of capital (£100) used for the purpose of earning the commissions, but having substantial sums invested which bring in income, or carrying on some other business which involves the use of substantial assets, would not only pay tax on the commissions, but would also pay tax on its total excess taxable profit at a higher rate than if the commissions were excluded: See *War-time (Company) Tax Act* 1940. It is argued for the appellant that the object of the special provision contained in s. 14 (*d*) is to exempt commissions from liability to tax because they are in the nature of income depending upon personal qualifications and skill, and are not derived from the use of capital in any sense: compare s. 25 and see *Lindley* on *Partnership*, 9th ed. (1924), p. 710, where the learned author says: "Profits, and very large profits, may be made by skill, and an extensive connection, with little or no capital."

In deciding between these opposing contentions, it is proper, if the words are not unambiguous, to choose a construction which is fairly open on the words themselves and which avoids differentiation as between taxpayers who in relevant particulars are in an identical position.

It is important to observe that the words used in s. 14 (*d*) are "little or no capital is *required*." Section 19 fixes the statutory percentage upon the capital *employed*, and s. 24 provides for the ascertainment of the capital *employed*.

The word "required" in s. 14 (*d*) is elliptical. The meaning of the word in any context can be determined only by specifying some purpose in relation to which the subject matter is required; that is, by answering the question, "Required for what?". The whole Act depends upon a relation between capital and profit. Dividends from shares are excluded from "taxable profit" under the Act (s. 3). The value of shares in other companies is excluded by s. 24 from the capital which is taken to be "employed" for the purpose of the Act. These provisions show that, in a case where the application of the Act is excluded in relation to certain income, there is a correlative exclusion of the corresponding capital—i.e., of the capital assets which produce that income.

It is therefore reasonable to consider the commissions referred to in s. 14 (*d*) in relation to the capital required for earning them, and not in relation to capital with which they have no connection whatever. The section regards the profit of a company as severable in the cases to which the section applies; the profits can be divided into profits arising from commissions, &c., and profits arising from other sources. The Act is not to apply to a company to the extent to which the profit arises from the former sources if little or no capital is required. The question, "Required for what?", may fairly be answered, "For the purpose of producing the commissions." This answer supplies the appropriate description of the capital to which the section refers.

Support is given to this view by decisions upon the words "any profession . . . in which comparatively little or no capital expenditure is required," which appear in the *War-time Profits Tax Assessment Act* 1917-1918, s. 8. Similar words in English legislation were construed in the case of *Inland Revenue Commissioners* v. *North and Ingram* (1). In that case it was held that the expression "no capital expenditure is required or only capital expenditure of a comparatively small amount" did not refer to the capital actually used by a particular person in a profession, but generally to the capital expenditure required for a profession of the kind mentioned in the Act. Schoolmasters claimed an exemption from tax on the ground that they were engaged in a profession in which little or no capital expenditure was required. They had expended £18,000 in purchasing a school, but the court held that the fact that the school was used in their profession did not exclude their calling from the category of a profession in which comparatively little or no capital was required. The matter must, it was held, be considered generally, and, as the profession of teaching could have been carried on without purchasing and owning a school, it was not proper to regard the £18,000 spent in acquiring premises as capital required in the relevant sense. The principle of this decision was applied by *Starke* J. in *Robbins Herbal Institute* v. *Federal Commissioner of Taxation* (2).

These decisions are, in my opinion, opposed to the contention of the Commissioner that "capital . . . required" in s. 14 (*d*) means the whole of the capital actually used in the whole business of a company.

"Capital required" cannot be identified with the expression "capital employed" to which a special artificial meaning is given by s. 24. The difference in terminology indicates, almost necessarily in this case, a difference in meaning. If Parliament had

(1) (1918) 2 K.B. 705.

(2) (1923) 32 C.L.R. 457.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

intended that the artificial meaning of " capital employed " should be the basis of the application of s. 14 (*d*), the term " capital employed " would have been used, as in other sections of the Act.

If the words " capital required " do not mean the capital in fact used for the production of the whole of the profit of the company, and if they do not mean the " capital employed " in the special sense of the Act, then, in my opinion, they must be interpreted as meaning the capital required for the earning of the commissions, &c., with which the section deals.

For these reasons in my opinion the contention of the appellant is correct and the questions in the case should be answered as follows :—

Question 1. Is the appellant a company in which little or no capital is required within the meaning of s. 14 (*d*) of the *War-time* (*Company*) *Tax Assessment Act* 1940 ? *Answer.* Yes.

Question 2. Are the commissions referred to in par. 2 of this case subject to war-time (company) tax ? *Answer.* No.

It was suggested in the argument before the Full Court that the assets of the company represented by investments might not be capital required by the company within the meaning of s. 14 (*d*) of the *War-time* (*Company*) *Tax Assessment Act* 1940 because the investments might not have been made as part of the business of the company. When the matter was before me no such contention was raised on behalf of the appellant and there is accordingly no express finding of fact upon this matter. Upon the construction of s. 14 (*d*) which commends itself to my colleagues, this fact must be ascertained before the questions in the case can be answered. I agree therefore that the case should be remitted to me for this purpose.

RICH J. The relevant part of the *War-time* (*Company*) *Tax Assessment Act* 1940, s. 14 (*d*), which calls for consideration reads : " a company . . . in which little or no capital is required, to the extent to which the Commissioner is satisfied that its profit arises from commissions, fees or charges for services rendered." The word " capital " both in the Acts relating to companies and in common parlance is often used in quite different senses (*Attorney-General* v. *Anglo-Argentine Tramways Co. Ltd.* (1)). In the sub-section in question the word does not, for instance, mean nominal capital, issued capital or paid-up capital. The definition of " company " in s. 3, which includes unincorporated bodies or associations, sufficiently excludes those senses. Moreover, when paid-up capital is intended it is expressly so stated (s. 24 (1) (*a*)). The sub-section was, I think, inserted in

(1) (1909) 1 K.B. 677, at p. 685.

the Act for the purpose of exempting such callings as those of auctioneers whose business requires little or no capital and to which the tag *vox et praeterea nihil* aptly applies. And in my opinion the phrase "capital required" means the stock, money or wealth in any form necessary for the operations of the particular company during the accounting period. The question involved is one of degree and therefore one of fact (*Currie* v. *Inland Revenue Commissioners* (1); *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee* (2)). The facts as stated suggest to my mind that the company may be carrying on an investment business in addition to the commission business from which it is alleged that the company's profits are mostly derived. But there is no finding on this point, as it was not raised before the Chief Justice. I agree, therefore, that the case should be remitted to his Honour for the ultimate facts to be found, admitted or proved so that the certainty of the point of law raised may be applied to those facts to determine the case (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3)).

STARKE J. Case stated under the *War-time (Company) Tax Assessment Act* 1940 and the *Judiciary Act*. The facts are stated in the case.

Two questions are submitted for the opinion of the Court:—

(1) Is the appellant a company in which little or no capital is required within the meaning of s. 14 (*d*) of the *War-time (Company) Tax Assessment Act* 1940?

(2) Are certain commissions referred to in the case subject to war-time (company) tax?

The *War-time (Company) Tax Assessment Act* 1940, s. 14 (*d*), provides that the Act shall not apply to a company (not being a company carrying on certain businesses) in which little or no capital is required, to the extent to which the Commissioner is satisfied that its profit arises from commissions, fees or charges for services rendered.

The appellant contended that a company is entitled to this exemption if little or no capital is required for the production of profits arising from commissions, fees or charges for services rendered. But the court must adhere to the ordinary meaning of the words used and the grammatical construction, unless that is "at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such

(1) (1921) 2 K.B. 332, at pp. 336, 338, 339, 341.
(2) (1932) 1 K.B. 40, at p. 111.
(3) (1925) 36 C.L.R. 442, at p. 450.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

inconvenience, but no further" (*Christophersen* v. *Lotinga* (1)). The construction suggested by the appellant finds no support in the words used: the condition of exemption is that the company is one in which little or no capital is required, which in this context I take to mean required in the conduct of its business: Cf. s. 25 (1) (*b*). That is the ordinary meaning of the words used and their grammatical construction. It is not sufficient for the taxpayer to show that its profit arises from commissions, fees or charges for services rendered: it must also show that it is a company in which little or no capital is required for the conduct of its business (*Bradfield* v. *Federal Commissioner of Taxation* (2)). The words do not, I think, refer to the capital actually being used, but refer generally to the capital expenditure required for the conduct of a business such as the company carries on: See *Inland Revenue Commissioners* v. *North and Ingram* (3). But decisions under Acts which except "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount," or "in which comparatively little or no capital expenditure is required", do not aid the proper construction of the section now under discussion, for the words in those cases are attached and relate only to professions the profits of which depend mainly on the personal qualifications of the persons by whom they are carried on: See *Inland Revenue Commissioners* v. *North and Ingram* (4); *Robbins Herbal Institute* v. *Federal Commissioner of Taxation* (5).

Another contention, though but faintly urged, was that the capital of the company required for the purpose of a business such as it conducts would be represented by its paid-up capital, namely, £100. But that is obviously untenable, for a company may raise capital for the purpose of its business by means of borrowed moneys or the use of accumulated profits, and, no doubt, in other ways.

Capital is not in truth a technical term. For the purpose of economics capital has been defined as produced wealth as distinguished from land and other natural resources used productively for gain. But in a business or mercantile sense, and therefore in the sense used in the *War-time (Company) Tax Assessment Act*, it is simply the means with which business is carried on, and it may consist of money or property convertible into money. The final determination of the capital of a company or the capital required,

(1) (1864) 33 L.J. C.P. 121, at p. 123.
(2) (1924) 34 C.L.R. 1.
(3) (1918) 2 K.B. 705.
(4) (1918) 2 K.B. 705.
(5) (1923) 32 C.L.R. 457, at p. 464.

which I take to mean in its context in the *War-time (Company) Tax Assessment Act* the capital required for the conduct of the business of a company, thus becomes one of fact having regard to all the circumstances of the case.

The company in this case was incorporated in the State of Victoria with extensive objects, which covered the co-ordination of business and financial arrangements of various insurance brokers and also the investment of moneys. Its profits arose mainly from commissions received from companies which carried on the business of insurance brokers, and for the year which ended on 30th June 1940 this income appears in the profit and loss account at £34,594, of which about £26,354 net was earned in Australia. Out of its accumulated profits the company had purchased land and other investments which stood in its balance-sheet of 30th June 1939 at £2,804 and £106,194 respectively, and from these investments an income of nearly £3,400 was earned in Australia for the year which ended on 30th June 1940. The capital employed or deemed to be employed for the year ended 30th June 1940 calculated in accordance with the provisions of the *War-time (Company) Tax Assessment Act* (see ss. 19 and 24) amounted to the sum of £13,011. But in ascertaining this sum the Commissioner took into account pursuant to s. 24 (1) (*b*) accumulated profits standing in the books of the company on 30th June 1939 at the sum of £123,164. But it is clear from the balance-sheet of the company as at 30th June 1939 that these profits were substantially represented by the land and investments of the company. Thus on the asset side of the balance-sheet investments at cost are set down at £106,194, freehold property at £2,804, and, on the liabilities side, profit and loss £123,164. But the capital so ascertained, whether employed in the company's business or not, is the capital employed or deemed to be employed for the purpose of ascertaining the percentage standard prescribed by the Act. It does not solve the question under s. 14 (*d*) whether a company is one in which little or no capital is required, that is, required for the conduct of its business. It is, as I have said, a question of fact, though possibly an inference from a wide area of facts: See *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1), per Lord *Sumner*. The objects and powers of the company contained in its memorandum and articles of association are not decisive of the question: it is an element which must be considered (*Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (2)).

The fact that a company carries the income from its investments into its profit and loss account is also an element which must be

(1) (1915) A.C. 433, at p. 466. (2) (1928) 41 C.L.R. 148, at pp. 151, 152.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

considered, but again is not decisive. And the capital actually employed by a company in the conduct of its business is also an element which must be considered.

The case stated does not find the ultimate fact necessary for the decision of this case, as I think it should, but what have been called evidentiary facts: See *Day* v. *Standard Waygood Ltd.* (1). There is a good deal behind the formation of the appellant company which requires investigation before any finding of fact should be made. The real purpose of the company is unknown, and its shareholding is likewise unknown. The profits of the company arise principally from co-ordinating the business of insurance brokers (whatever that may mean) who earn the commissions and pay the company 33⅓ per cent on so much of all commissions or brokerage the insurance brokers received from business introduced by them to a London company. The profits so made are accumulated and apparently not distributed. Part of the business of the company may well be holding and investing moneys for the insurance brokers or the London company, which the insurance brokers may locally represent. But I have said enough to make it proper that the case should be remitted to the Chief Justice for a further elucidation of the facts.

WILLIAMS J. The questions asked in the case relate to the liability of the appellant company to be assessed for war-time (company) tax during the financial year ended 30th June 1941, in respect of the profits which it earned in the year ended 30th June 1940. The tax is imposed by the *War-time (Company) Tax Act* 1940, but the extent of the liability to the tax is determined by the *War-time (Company) Tax Assessment Act* 1940, which is incorporated in and is to be read as one with the *Tax Act*. By s. 4 of the *Tax Act*, a tax is imposed at the rates specified on the amount by which the taxable profit of any company exceeds the percentage standard. By ss. 19 and 20 of the *Assessment Act*, the statutory percentage is fixed at eight per cent upon the "capital employed." The "capital employed" is calculated in accordance with s. 24 of the *Assessment Act*. The *Assessment Act* contains provisions by which a Board of Referees may allow an increase on the statutory percentage where some unavoidable condition associated with a particular class of business makes it just that a greater percentage should be allowed (ss. 21-23), or may allow the "capital employed" as determined by s. 24 to be notionally increased where the amount so ascertained does not represent the true capital employed by a company in the business carried on by it (s. 25 (1) (*a*)), or where the company requires

(1) (1941) 65 C.L.R. 204, at p. 214.

little or no capital in the conduct of its business and its profits are mainly due to the personal skill, ability or enterprise of its shareholders (s. 25 (1) (*b*)). Section 3 defines the " capital employed " to mean the capital employed in Australia or in a Territory of the Commonwealth in gaining or producing the taxable profit. The taxable profit is the amount remaining after deducting from the taxable income as assessed under the *Income Tax Assessment Act* the income tax payable in respect of that taxable income and any dividends included in the taxable income received as a shareholder in another company (s. 3). Dividends received by a company from its shareholdings in other companies are excluded from the calculation of its taxable profit, so that the capital invested in such shareholdings is excluded from the ascertainment of the " capital employed " (s. 24 (1) (iii)).

Section 14 (*d*) of the Act provides that the Act shall not apply to a company (not being a company carrying on the business of financing time payments, instalments or hire purchase sales, or of providing cash orders) in which little or no capital is required, to the extent to which the Commissioner is satisfied that its profit arises from commissions, fees or charges for services rendered.

The appellant company was incorporated on 16th January 1934. The objects clause in its memorandum of association, after providing that each of the specified objects is to be construed independently of the other, proceeds to enumerate a large number of objects, which enable the company to carry on a wide range of business. The first object (*a*) enables the company to purchase and sell, dispose of and deal in every kind of real and personal property, including land, mortgages, shares, stocks and debentures. Object *w* enables the company to act as agent, representative, adviser, or broker to any company or person in respect of its or his business, moneys, remittances, investments or other interests upon such terms and conditions as to remuneration or reward as may be arranged. The nominal capital is £2,000, divided into 2,000 shares of one pound each, of which one hundred shares have been issued, all of which have been fully paid.

Pursuant to the powers conferred upon it by object *w*, the appellant, by six separate contracts made in February 1934 with six companies carrying on the business of insurance brokers, five of the companies operating in Australia and one in New Zealand, agreed to advise and assist these companies, to make such financial arrangements between them as might be useful and convenient, and to perform certain other acts on their behalf. In consideration of these services, the six companies each agreed to pay to the appellant

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

a sum of 33⅓ per cent of the commissions and brokerage which they earned on business introduced by them and effected by an insurance company in London. In the year ended 30th June 1940, the five companies operating in Australia paid to the appellant sums totalling over £26,000.

At 30th June 1939 the assets of the appellant consisted of shares in other companies at cost £83,556; Australian consolidated bonds at cost £5,061; other government loans at cost £17,577; freehold property in Perth (W.A.) £2,804; sundry debtors £12,615; and cash in banks £12,180. None of these assets were used in or required for the earning of the moneys payable to the appellant under the contracts except trifling sums for petty cash included in the item "cash in banks," so that little or no capital was required to earn these profits. Under s. 24 of the Act the capital employed does not include among the accumulated profits any profit of an accounting period (in this case the year ended 30th June 1940), so that the respondent Commissioner (after omitting the shareholdings in other companies) ascertained the capital employed at 30th June 1939 to be £13,011. After excluding the dividends from shares but including the payments made by the five Australian companies, he assessed the appellant for tax in the sum of £9,579 17s.

The appellant objected to the assessment on the grounds, *inter alia*, that little or no capital was required by the appellant in the accounting period and its profit arose mainly from commissions, fees or charges for services rendered and such profit was accordingly exempt from tax under s. 14 (*d*) of the Act, and that so much of the profit as was not exempt from tax under s. 14 (*d*) represented less than eight per cent of the capital employed in earning that profit and was therefore not subject to tax.

It has been agreed that if the amounts received by the appellant pursuant to the contracts are exempt from tax, the income from the investments other than the shares was less than eight per cent on the capital employed, so that the appellant would not be liable to pay any tax on this income. It has also been agreed that the £26,000 represents commissions, fees or charges for services rendered.

The question for decision is, therefore, whether the appellant is a company "in which little or no capital is required," and this involves a determination whether this phrase refers to the capital required for the whole of the business carried on by a company or only to that part of the business from which the commissions, fees and charges are derived. The phrase is elliptical, so that words must be supplied, but some assistance in deciding what these words should be is obtained from s. 25 (1) (*b*), in which a similar phrase

occurs with the addition of the words "in the conduct of its business." As the Chief Justice has pointed out in his judgment, the phrase appears to be an adaptation of the expression "in which comparatively little or no capital expenditure is required" contained in s. 8 (1) (*d*) of the Commonwealth *War-time Profits Tax Assessment Act* 1917-1918. This sub-section, which was discussed by my brother *Starke* in *Robbins Herbal Institute* v. *Federal Commissioner of Taxation* (1), was the same as s. 39 (*c*) of the Imperial *Finance* (*No.* 2) *Act* 1915. But these Acts exempted the income of any profession the profits of which depended mainly on the personal qualifications of the person by whom it was carried on and in which comparatively little or no capital expenditure was required, so that the profits of a particular class of business were excluded and these profits could be severed from the profits of some other class of business carried on by a taxpayer (*Inland Revenue Commissioners* v. *Maxse* (2)). On the other hand it was held that a company could not carry on a profession within the meaning of the exemption, because, being inanimate, it could not have the necessary personal qualifications (*Inland Revenue Commissioners* v. *Peter McIntyre Ltd.* (3)).

"Business" in the present *Assessment Act* is defined by s. 3 to include any profession or trade carried on or carried out by a company and any transaction in the course of carrying on or carrying out any profit-making undertaking or scheme by a company and the making of or dealing in investments. The Act recognizes, therefore, that a company can be engaged through its agents in carrying on a business which if carried on by individuals would be considered to be carrying on a profession. The word "company" in the Act includes all bodies or associations corporate or unincorporate, but does not include partnerships. But s. 14 does not exclude certain businesses from the operation of the Act. It excludes certain companies. The companies which are excluded by s. 14 (*d*) are companies "in which little or no capital is required," which means, in my opinion, upon the structure of the Act as a whole and in the light of s. 25 (1) (*b*), companies "in which little or no capital is required" for the conduct of their business.

It was submitted on behalf of the appellant that the word "capital" in s. 14 (*d*) is used in a technical sense and refers to either the nominal, issued or paid-up capital of a company. But nominal capital would not provide any assets with which a business

(1) (1923) 32 C.L.R. 457. (2) (1919) 1 K.B. 647.
(3) (1926) 12 Tax. Cas. 1006.

H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

could be carried on; the only business value of unpaid capital is that it can be mortgaged; and the amount of paid-up capital often has no relation to the value of the assets employed in producing the profits. It depends upon whether a company, which has accumulated profits and used them in its business, has increased its paid-up capital to a value equivalent to that of its assets by capitalizing these profits by the issue of bonus shares. Capital in a technical sense has more relation to questions relating to the rights of shareholders *inter se* than to questions relating to the ratio which profits bear to the value of the assets with which a company is carrying on business. Besides, the Act applies to bodies incorporated in any manner for the purpose of making profits either under a Companies Act, by Royal charter, or by some private Act, and some of these bodies might not have any capital in the technical sense contended for. The Act is dealing throughout with commercial capital, and, in my opinion, it is in this sense that the word is used in s. 14 (*d*).

Sections 21-23 provide for cases in which one class of business carried on by a company can be separated from the rest of its business. Otherwise, apart from income which is expressly exempted from the ascertainment of taxable profits and assets used to earn this income which are expressly excluded from "capital employed," the Act treats the whole of a company's operations as one business and aggregates all the profits in order to ascertain whether the aggregate exceeds eight per cent per annum upon the value of the assets employed in all its operations. If the sub-section means that the capital required to carry on the business from which the commissions, fees or charges are derived can be severed from the capital required to carry on the rest of a company's business, it would not be necessary to exempt the commissions, fees and charges out of the profits derived from the severed part of the business, because the whole of such profits would necessarily be earned in the shape of commissions, fees or charges.

Section 25 (1) (*b*) refers to the conduct of a company's business as a whole, and this sub-section, as I have already said, must be considered in conjunction with s. 14 (*d*). Both sub-sections recognize that a company may earn profits which are more in the nature of income derived from personal exertion than profits derived from a sound commercial use of business assets; but, whereas s. 14 (*d*) recognizes that commissions, fees and charges for services rendered are in the nature of income from personal exertion, s. 25 (1) (*b*), which deals with profits generally, casts upon a company the onus of establishing that the profits in question are of this nature. If

they are, then the value of the personal exertions can be capitalized and the " capital employed " notionally increased to this extent. But neither sub-section provides for the particular class of business in question being severed from the rest of a company's business. The purpose of s. 14 is to place certain types of companies outside the operation of the Act either wholly or to a specified extent. Section 14 (*d*) does not describe a particular class of business which any company might carry on. It does not impose upon the Commissioner the duty of determining how much capital is required for one class of business carried on by a company and how much for another. It is describing a particular class of company. That is to say, a company which requires little or no capital to carry on the whole of the business which it is in fact carrying on in the accounting period. In such a company the profits from the whole of the business are exempt to the extent to which they arise from commissions, fees or charges for services rendered.

While the bulk of the appellant company's profits are derived from commissions it is not directly carrying on an insurance business. It is the six companies which are carrying on the insurance business and earning the commissions. The duties to be performed by the appellant company for these six companies are of a nebulous character, and the trifling expenditure which it incurs in discharging them does not indicate that their fulfilment is onerous. The case does not give the names of the shareholders in the appellant company, but it would seem that the investment of the commissions received from the six operating companies forms an important part of its business. It is certainly significant, but not decisive, that the first of the stated objects authorizes the appellant company to carry on an investment business (*Commissioner of Taxes* v. *British Australian Wool Realization Association* (1)). At 30th June 1939 it owned investments which had cost nearly £120,000 and had £12,000 cash in banks available for investment. It would appear from the facts that the appellant is probably engaged as a part of its business in making investments within the meaning of the definition of " business " in s. 3 of the Act, and if this is so then it cannot be said that little or no capital is required for its business.

But the question whether the appellant is carrying on this business is one of fact, the importance of which had not emerged when the case was stated. The case does not therefore contain an ultimate finding of fact on this issue, so that I agree that the proper course is to remit the case so that the fact may be determined.

(1) (1931) A.C. 224, at p. 251.

[H. C. OF A. 1943.

INCORPORATED INTERESTS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

LATHAM C.J. The members of the Court have expressed their opinion upon the proper construction of the *War-time (Company) Tax Assessment Act* 1940, s. 14 (*d*), but the majority of the Court consider that the questions stated cannot be answered until it is found whether the appellant carried on as part of its business the investment of its funds. The case is accordingly remitted to the Chief Justice for further consideration.

[On 19th May the matter again came before *Latham* C.J. and, by consent, the appeal was dismissed.]

Solicitors for the appellant, *Pavey, Wilson & Cohen.*

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

E. F. H.