[HIGH COURT OF AUSTRALIA.]

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LIMITED . . . . } APPELLANT;

AND

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

H. C. OF A. 1943.

SYDNEY, *Nov.* 10, 11; *Dec.* 1.

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

War-time (Company) Tax—Mutual indemnity association—Company—Limited by guarantee—Insurance business—Reserve fund—Statutory deposit—"Co-operative company"—"Rendering of services to its shareholders"—"Company in which little or no capital is required"—War-time (Company) Tax Assessment Act 1940 (*No.* 90 *of* 1940), *s.* 14 (*b*), (*d*)—*Income Tax Assessment Act* 1936-1940 (*No.* 27 *of* 1936—*No.* 65 *of* 1940), *s.* 117.

A company limited by guarantee, and having no share capital nor any shareholders in the ordinary sense, was empowered by its memorandum of association to carry on all kinds of insurance business. The memorandum did not limit the company to doing such business with its members, although from certain of the articles it could be assumed or suggested that all policies issued would be issued only to members. In fact the company had issued policies only to members.

Held, by *Latham* C.J., *Starke* and *Williams* JJ. (*Rich* and *McTiernan* JJ. dissenting), that when it investigated and adjusted and either resisted or paid claims made under policies issued by it the company did so on its own account in the course of its business and did not thereby render services to its members; therefore the company was not a "co-operative company" within the meaning of s. 117 of the *Income Tax Assessment Act* 1936-1940, and was not entitled to the benefit of the exemption provided by s. 14 (*b*) of the *War-time (Company) Tax Assessment Act* 1940.

After all claims made under policies issued by a company without any share capital, and certain dividends, had been paid, the surpluses which remained in the hands of the company from time to time were placed in a reserve fund. This reserve fund was from time to time drawn upon whenever the amount of the claims made it necessary to do so. The amount of the reserve fund

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

at the beginning of the subject income year was £27,145. Of this amount £10,000 was deposited with the Colonial Treasurer under s. 19 of the *Workers' Compensation Act* 1926-1938 (N.S.W.) as a condition of the company carrying on the business of insurance against workers' compensation risks.

Held, by *Latham* C.J., *Rich*, *Starke* and *Williams* JJ. (*McTiernan* J. not deciding), that the company was not "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.

APPEAL from the Board of Review.

An appeal by Employers' Mutual Indemnity Association Ltd. from the decision of a Board of Review upholding an assessment of the appellant association to war-time (company) tax in respect of taxable profit derived during the year ended 30th June 1940 was referred by *McTiernan* J. to the Full Court of the High Court.

The assessment was made under the *War-time (Company) Tax Assessment Act* 1940. The association claimed that it was exempt under sub-ss. *b* and *d* of s. 14 of that Act, which provide:—"This Act shall not apply to . . . (*b*) a co-operative company as defined in section one hundred and seventeen of the *Income Tax Assessment Act*; . . . (*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." Section 117 of the *Income Tax Assessment Act* 1936-1940 defines the expression "co-operative company," so far as it is material for this report, as including "a company which has no share capital, and which . . . is established for the purpose of carrying on any business having as its primary object or objects one or more of the following:— . . . (*d*) the rendering of services to its shareholders." "Shareholder" in the Act includes member.

The association was incorporated on 6th August 1914, under the name of the Master Carriers' Mutual Indemnity Association Ltd. It is, and always has been, a company limited by guarantee. It has no share capital and no shareholders in the ordinary sense. Under clause 4 of the objects set forth in its memorandum of association every member undertakes that if the association be wound up while he is a member, or within one year after his membership ceases, he will contribute an amount not exceeding one pound to meet the debts and liabilities contracted by the association during his membership and the costs, &c., of the winding up. For the purpose of registration the association was declared to consist of one thousand

members and, by art. 2 of the articles of association, that number may be increased whenever the directors so decide.

In 1926 the association adopted its present name after having, in that year, taken over the assets and liabilities of two similar companies, namely, the Master Bakers' Mutual Indemnity Association Ltd. and the Master Plumbers' Mutual Indemnity Association Ltd. Since then the membership has been divided into three sections (A., B. and C.), and in accordance with the articles separate accounts are kept for each section. The B. section comprises only those who are also members of the New South Wales Master Bakers' Association, and the C. section comprises only those who are also members of the Master Carriers' Association of New South Wales. Other members belong to the A. section, which includes, for example, housewives who employ domestic servants. There is a committee for each section, and any committee may, *inter alia*, make a call upon the members of its section. The articles provide that the chairmen of the three committees shall be the directors of the association.

The business of the association until 1932 consisted entirely of issuing policies of insurance to persons compelled to insure their employees under the *Workers' Compensation Act* 1926-1938 (N.S.W.). In 1933 the business was extended to include motor car insurance, but this part of the business, although substantial, is comparatively small. By its memorandum of association the association is empowered to carry on all kinds of insurance business. The terms of the memorandum do not limit the association to doing such business with its members. Neither do the articles in express terms impose any such limitation, though certain of the articles are so expressed as to assume or suggest that all policies issued will be issued to members. In fact the association has issued policies only to members.

A person becomes a member of the association by applying for and being granted a policy of insurance (workers' compensation or motor car) which in all, or nearly all, cases covers a period of twelve months. The rates are fixed according to the tariff of the Underwriters' Association, which provides for varying rates according to the nature of the risks. The association reinsures some of its risks with other companies, including " non-resident " companies.

The premiums for workers' compensation insurance are determined by the amount of wages paid by the insurer. For that reason the amount expressed in a policy is necessarily an estimate, and there is provision for adjustment at the end of the insurance period when the exact amount of the wages paid is known. If it is found that the wages actually paid in any period exceeded the amount estimated,

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

the employer pays an additional sum by way of premium for that period. If, on the other hand, the estimate was too high, the employer receives a refund.

The management of the association is in the hands of a chartered accountant who provides, at his own expense, the office premises and the staff necessary to carry on the work. In return he receives a proportion of the total premium income. On his staff is an engineer, whose principal duty is to report on motor car accidents. The accountant has also made arrangements with a medical practitioner to render services in connection with injuries sustained by workers who are protected by the *Workers' Compensation Act*, or by persons involved in motor car accidents.

It appeared from the accountant's evidence that he and his staff were competent to handle almost every claim made under the policies issued by the association, but each committee took the responsibility of deciding whether or not any claim coming within its own particular province should be resisted.

The association has accumulated funds representing the surpluses of yearly receipts over yearly outgoings, together with interest on the investment of those funds. When the results of each year's operations are known, that is, when all claims arising in the year have been settled or provided for, and when all expenses have been met, a bonus refund is made to the policy holders and the balance, if any, is transferred to a reserve fund. The reserve fund is available for use in special circumstances and was drawn upon in each of the five years ended 30th June 1933 to 1937 inclusive, in order to enable the association to make bonus refunds to the policy holders. In every other year since the association was incorporated the reserve fund has been increased.

The surpluses of receipts over outgoings are profits. The ascertainment and distribution of profits are governed by art. 113, which provides: "The profits of each section of the company shall from time to time be investigated as the committee shall determine. Such proportion of such profits as the respective committees may determine shall be divided between the persons who were members of the section to which such profits belong during any portion of the period covered by the investigation in question *pro rata* in accordance with the moneys paid by such persons respectively to the company for premiums and calls during the period covered by such investigation in question."

No member shall, except with the consent of the committee, resign his membership until the expiration of three calendar months next after he shall have given notice in writing to the committee

to that effect and until all moneys due by him to the association have been paid. The committee may, if it thinks fit, refund to any member ceasing to be a member by resignation such proportion of the premiums paid by him for the current year as the committee may in its absolute discretion think fit. A proportion of any reserve funds exceeding £2,000 may be paid to a former member, or his representatives, when his membership ceases by death or resignation.

The association's revenue account for the year ended 30th June 1940 showed :—income : net premium income received (£82,987), less bonuses to policy holders (£15,593), plus interest earned on deposits, &c., (£2,789), £70,183 ; expenditure : compensation claims (£52,604), plus administration expenses, &c., (£12,374), £64,978 ; net surplus revenue for year £5,205 ; taxation paid and provided for, £1,403 ; balance transferred to reserve fund, £3,802.

In the previous year, when the income was slightly greater and the expenditure slightly less, the amount transferred to the reserve fund was £7,414.

The assets at 30th June 1939 totalled £67,914. Twelve months later they were £72,064, of which £23,585 was represented by funds at short call and £28,176 by investments in government bonds. Included in the last-mentioned amount was a sum of £10,000, being the deposit which the association—like every other insurance company—was required under the provisions of s. 19 of the *Workers' Compensation Act* 1926-1938 (N.S.W.) to lodge with the Colonial Treasurer in order to carry on its business. The liabilities at 30th June 1940, were :—provision for unpaid claims, premiums paid in advance and sundry creditors, £24,135 ; bonus funds granted and premium adjustments due to policy holders, but actually not paid to them till after balance day, £17,209, total £41,344. The difference between £72,064 and £41,344 represented the reserve fund, £30,720, at that date, as compared with £26,917 at 30th June 1939.

The Commissioner, for the purpose of the disputed assessment, treated the sum of £26,917, the reserve fund at 30th June 1939, as accumulated profits, and to that sum he had added the sum of £288, being the amount deemed to be applicable to "non-resident" reinsurances. The resultant total of £27,145 was treated by the Commissioner as the amount of capital employed by the association in the yearly accounting period ended 30th June 1940. It was not disputed that, if the association was a "company" to which the Act applied, these and other figures in the assessment were correct.

Leaver, for the appellant. The appellant is a co-operative company within the meaning of s. 117 of the *Income Tax Assessment*

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Act 1936-1940, as applied by s. 14 of the *War-time (Company) Tax Assessment Act* 1940. The members or shareholders of the appellant association became such members or shareholders on the basis that they are entitled to a share of the assets and are liable for all losses and expenses incurred by it. This is a parallel case with *New York Life Insurance Co.* v. *Styles* (1). The surpluses of receipts over outgoings, referred to as "profits," belong entirely to the members of the association and not to the association itself. The surpluses were simply unexpended balances of members' moneys and were not profits of the association. "Profits" is not defined in the statute, as was the case in *Cornish Mutual Assurance Co. Ltd.* v. *Inland Revenue Commissioners* (2). Members are liable to be called upon to make good any deficits sustained by the association. In the various matters the association acts only on behalf of its members. Par. *d* of the definition of the words "co-operative company" in s. 117 should not be read as a limitation of, or *ejusdem generis* with, par. *c* of that definition. Par. *d* was inserted into the definition after par. *c*. As empowered by its articles, the association renders to its members the service of keeping them insured, that is, the issuing of policies and the adjustment of claims. It is academic to suggest that the association is not compelled by its objects or articles to render the services it claims to render to its members. It is beside the point that whatever is done by the association in and about the matter of insurance is only similar to what is done by other companies for members of the general public. Section 121 of the *Income Tax Assessment Act* is not in conflict with s. 117. It is not limited to co-operative societies, and supports the view now put in respect of s. 117. The reserve funds are not moneys of the association. That being so, there is not any share capital. Having regard to the circumstances, particularly the articles and the manner in which it renders the services to its members, the association is "a company in which little or no capital is required."

A. R. Taylor K.C. (with him *Dignam*), for the respondent. The decision of the Board of Review involves findings of fact (i) that the work of investigating, adjusting and paying claims is not performed for the members of the association but is performed for the association itself in pursuance of its business; (ii) that the association is not a company in which little or no capital is required; and (iii) that no part of the association's income arises from charges for services rendered. In order to be within the provisions of ss. 117, 118, and 119 of the *Income Tax Assessment Act* it must be

(1) (1889) 14 App. Cas. 381; 2 Tax Cas. 460. (2) (1926) A.C. 281.

shown (*a*) that the association was established for a particular primary purpose or purposes and not merely that the association has engaged in certain business activities; and (*b*) under s. 118, that having been established for a particular primary purpose or purposes the association proceeded to do at least ninety per cent of its business with its own members. It was also found as a fact that even if the work of investigating, adjusting and paying claims constitutes services, they are not intended to be and are not in fact services rendered to members. On the facts the only question for this Court is whether on the evidence before it the Board reasonably could have arrived at its conclusions (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1)). The respondent is prepared to concede that the meaning of the expression "rendering a service" does raise a question of law. The word "service" is not a technical word. As used in s. 117 it refers to those functions which, in the absence of a co-operative association, would be performed by the persons themselves in the ordinary course of their respective businesses. A person does not, ordinarily, in the course of his business provide his own insurance cover, or investigate, adjust or pay insurance claims made upon him. An illustration of what services may be performed by co-operative societies for their members is to be found in the *Co-operation, Community Settlement, and Credit Act* 1923 (N.S.W.). That Act does not include insurance as a service. Sections 119 and 121 of the *Income Tax Assessment Act* are special provisions and were inserted as a matter of precaution by reason of the decisions in *New York Life Insurance Co.* v. *Styles* (2), *Cornish Mutual Assurance Co. Ltd.* v. *Inland Revenue Commissioners* (3) and *Jones* v. *South-West Lancashire Coal Owners' Association Ltd.* (4). Section 121 deals with matters not dealt with in s. 119. So far as subject matter is concerned s. 119 is co-extensive with s. 117. Unless there is some limit to be placed on the meaning of the expression "the rendering of services," there was no purpose in the amendment made to the section by the legislature specifying particular matters. The services are performed for the purposes of the association's own business. By reason of the reference to s. 117 thereof, the whole of the *Income Tax Assessment Act* may be looked at in order to ascertain the meaning of the expression "a co-operative company." There is nothing in its memorandum or articles of association which restricts the association's operations to its members or to any form of insurance business. The test is not what the association has done and is doing, but what it is empowered to do.

(1) (1941) 65 C.L.R. 150.
(2) (1889) 14 App. Cas. 381.
(3) (1926) A.C. 281.
(4) (1927) A.C. 827.

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

For the purpose of carrying on its business the association does require a considerable amount of capital, e.g., the depositing of the sum of £10,000 in accordance with the provisions of the *Workers' Compensation Act* 1926-1938 (N.S.W.). This was so decided by the Board of Review as a question of fact. The meaning of the words "capital required" was considered in *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). The questions of reserve fund, income, profits and taxability were considered in *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2).

Leaver, in reply. The effect of the association's articles of association as a whole limits the rendering of services, including insurance, to members only. Although under its control, the reserve funds are not the property of the association, but are the property of its members.

Cur. adv. vult.

Dec. 1.

The following written judgments were delivered :—

LATHAM C.J. Appeal from a decision of a Board of Review upholding an assessment of the appellant company to war-time (company) tax in respect of taxable profit derived during the year ended 30th June 1940. The assessment was made under the *War-time (Company) Tax Assessment Act* 1940. The company claims that it is exempt under s. 14 of that Act. Section 14 provides, *inter alia* : "This Act shall not apply to— . . . (*b*) a co-operative company as defined in section one hundred and seventeen of the *Income Tax Assessment Act*; . . . (*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". The company claims that it falls within both of these provisions for exemption.

The *Income Tax Assessment Act* 1936-1940, s. 117, provides that in Div. 9 of Part III. of the Act: "'co-operative company' means a company the rules of which limit the number of shares which may be held by, or by and on behalf of, any one shareholder, and prohibit the quotation of the shares for sale or purchase at any stock exchange or in any other public manner whatever, and includes a company which has no share capital, and which in either case is established for the purpose of carrying on any business having as its primary object or objects one or more of the following :—(*a*) the

(1) (1943) 67 C.L.R. 508. (2) (1913) A.C. 610.

acquisition of commodities or animals for disposal or distribution among its shareholders; (*b*) the acquisition of commodities or animals from its shareholders for disposal or distribution; (*c*) the storage, marketing, packing or processing of commodities of its shareholders; (*d*) the rendering of services to its shareholders; (*e*) the obtaining of funds from its shareholders for the purpose of making loans to its shareholders to enable them to acquire land or buildings to be used for the purpose of residence or of residence and business."

The company is a company limited by guarantee and it has no share capital, and no shareholders in the ordinary sense: but "shareholder" in the Act includes member (s. 6). It claims that it was established for the purpose of carrying on a business having as its primary object the rendering of services to its shareholders. The "services" which, it is claimed, the company renders to its shareholders consist in the issuing of insurance policies against workers' compensation and motor car risks and the investigation, adjustment and payment of claims made under those policies.

By its memorandum of association, the company is empowered to carry on all kinds of insurance business. The terms of the memorandum do not limit the company to doing such business with its members. Neither do the articles in express terms impose any such limitation, though certain of the articles are so expressed as to assume or suggest that all policies issued will be issued to members. In fact the company has issued policies only to members. It would be necessary to examine the articles more closely if it were necessary to determine whether the business of the company in issuing policies was limited by the articles to issuing such policies to shareholders, as distinct from the general public. Upon the view which I take of the nature of the business of the company it is not necessary to determine this question.

It is contended for the company that when the company investigates and adjusts a claim made against it and either resists payment, or ultimately pays under the policy, the company is rendering services to its shareholders. In my opinion this is not the case. The company is bound by the terms of the policies which it issues to indemnify policy holders according to the terms of the policies, and in the case of workers' compensation policies it is also by statute liable directly to insured workers (*Workers' Compensation Act* 1926-1938 (N.S.W.), s. 18 (3)). In making the investigations which are necessary before the company decides whether to pay or to resist a claim the company is not engaged in rendering a service to the

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

particular shareholder who has taken out the policy, or to its shareholders generally. It is acting on its own account. It is either discharging a liability which it has undertaken, or is resisting a liability alleged by the shareholder or some other person to exist but disputed by the company. Accordingly, in my opinion, the business of the company in investigating, adjusting and paying claims under policies cannot be brought within the category of rendering services to any other persons.

But it is claimed that the business of issuing insurance policies is itself a business which has as its primary object the rendering of services to the persons to whom policies are issued. The issuing of an insurance policy is the making of a contract of indemnity. An insurance company carries on a business in the same way as any other company or person carries on a business. In a very general sense it might be said that a company formed for the purpose of manufacturing and selling goods renders services to the persons who buy its goods ; that a company which lends money on mortgage renders services to the mortgagors with whom it deals ; that a company which produces wool renders services to the persons to whom the wool is sold ; and that in each of the cases mentioned the company renders services to its shareholders, first, when it deals with any of them, and, secondly, when it seeks to make profits for them. But the rendering of services, in the ordinary sense of that expression, does not cover any and every kind of dealing between persons. It would not be in accordance with the ordinary use of language to say that every company which deals with another person in some way or other upon terms acceptable to that person, and therefore regarded by him as being beneficial to him, was engaged in rendering services to him. The object of the companies in the cases mentioned is to carry on business profitably and it cannot be said, even if in a very general sense they are rendering services to, among others, their shareholders, that the primary object of the company is to render such services.

In my opinion the words " rendering of services to " persons mean doing work of some kind for those persons. When it is the primary object of a company to do work for other persons, then it may be said that the primary object of the company is the rendering of services to such persons. But the issuing of an insurance policy to a person cannot be described as doing work for that person. It is making a contract with him. Work may be done for a person in pursuance of a contract with him, but the making of a contract with him does not amount to doing work for him.

I am therefore of opinion that the company is not a co-operative company within the meaning of s. 117 of the *Income Tax Assessment*

Act 1936-1940 and is therefore not entitled to the benefit of the exemption provided by s. 14 (*b*) of the *War-time* (*Company*) *Tax Assessment Act* 1940.

The next question is whether the company falls within the provisions of s. 14 (*d*) of the *War-time* (*Company*) *Tax Assessment Act* 1940, as being a company in which little or no capital is required. If this question should be answered in favour of the company, it will then be necessary for the Commissioner to determine the extent to which he is satisfied that its profit arises from charges for services rendered, as the company is exempt from tax only to the extent to which the Commissioner is so satisfied. Both questions must be answered in favour of the company before exemption can be established. Thus if none of the profits of the company can be said to arise from charges for services rendered it would be immaterial that the company was one in which little or no capital is required. I have already stated my opinion that the company is not a company established for the purpose of carrying on a business one of the primary objects of which is the rendering of services to its shareholders. In giving my reasons for this opinion I have already given reasons to support the proposition that the company does not render services at all—the issuing of insurance policies cannot be described as rendering a service at all and the adjustment, &c., of claims is not a service to any person other than the company, and is therefore not a " service rendered " (see s. 14 (*d*)), which I understand as meaning a service rendered to some other person.

Apart, however, from this answer to the claim for exemption under s. 14 (*d*), I am of opinion that it is shown that the company is not one in which little or no capital is required.

The company started without any capital at all. It was fortunate in its early years in that the claims made were less than the premiums received and the company accordingly saved money out of premiums paid on policies. The articles provide for the division of policy holders into three sections, and for a degree of control by committees representing the sections over the moneys received by way of premiums from members of those sections. Article 113 provides for investigation of the profits of each section of the company from time to time as the committees shall determine, and also provides that such proportion of such profits as the respective committees may determine " shall be divided between the persons who were members of the section to which such profits belong during any portion of the period covered by the investigation in question *pro rata* in accordance with the moneys paid by such persons respectively to the company." After the company had paid all claims and dividends had been paid

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

in pursuance of article 113, surpluses remained in the hands of the company from time to time. These surpluses were placed in a reserve fund and the amount of the reserve fund at the beginning of the income year in question was (after an adjustment which is not in question) £27,145. Of this amount £10,000 represented by government securities is deposited with the Colonial Treasurer under the provisions of the *Workers' Compensation Act* 1926-1938, s. 19, as a condition of the company carrying on the business of insurance against workers' compensation risks. Other part of the reserve fund is represented by other income-producing investments. The reserve fund was from time to time drawn upon when the amount of the claims made it necessary to do so.

Accordingly, first, the sum of £10,000 was a sum which it was necessary for the company to provide in order to carry on the business which it in fact conducted, and which any company conducting such a business must provide. That sum was a sum which had to be held to provide against possible future contingencies. It was not available for ordinary use by the company. It could be withdrawn only if the company ceased business and provided for all its insurance liabilities (*Workers' Compensation Act*, s. 25). It was, in my opinion, plainly part of the commercial capital of the company. Secondly, the reserve fund was necessary to enable the company to carry on business from year to year. It consisted of moneys saved for the purpose of meeting obligations for which the current income of the company in a particular year might not be sufficient. This sum also is capital in the ordinary commercial sense of that term. It has been held in the case of *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) that the word "capital" in s. 14 (*d*) of the *War-time (Company) Tax Assessment Act* means, not share capital, but the assets actually used by the company for capital purposes. Accordingly, in my opinion, it cannot be said that this company is one in which little or no capital is required, and for this reason also the company does not fall within the provisions of s. 14 (*d*) of the Act.

It was contended that, because under art. 26 a member of the company upon resignation or death had certain rights of withdrawal of what was regarded as his interest in the reserve fund, therefore the reserve fund could not be regarded as capital of, i.e., owned by, the company. In my opinion this proposition is quite untenable. The rights of the members of the company under the articles do not affect the ownership by the company of the reserve fund.

In my opinion the appeal should be dismissed.

(1) (1943) 67 C.L.R. 508.

RICH J. The question which arises for determination in the present appeal is whether the appellant company is exempt from the provisions of the *War-time (Company) Tax Assessment Act* 1940 by reason of s. 14 (*b*) or 14 (*d*) of that Act. Section 14 (*b*) exempts a co-operative company as defined in s. 117 of the *Income Tax Assessment Act*. Section 14 (*d*) exempts 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 company in fact carries on the business of insuring employers against liability to pay workers' compensation and of motor car insurance, the former being its principal activity.

By s. 117 of the *Income Tax Assessment Act* 1936-1940 " co-operative company " is defined to mean a company the rules of which limit the number of shares which may be held by, or by and on behalf of, any one shareholder, and prohibit the quotation of the shares for sale or purchase at any stock exchange or in any other public manner whatever, and includes a company which has no share capital, and which in either case is established for the purpose of carrying on any business having as its primary object or objects (one or more of certain stated objects of which the only one suggested to be relevant is) the rendering of services to its shareholders.

The first question which arises under s. 14 (*b*) is whether, assuming the company to possess all other qualifications for exemption under the clause, it can be regarded as carrying on a business having as its primary object or objects the rendering of services to its shareholders. I am unable to see anything in the fact that it is insurance business which it carries on which prevents it from being so regarded. The phrase " rendering of services " is as wide as could well be devised. The definition does not say rendering of services under contracts of service in the technical sense. It says " rendering of services " generally, without any limitation either expressly stated or involved in the context. A person who insures another against risk of loss is rendering him service in a very real and perfectly natural sense of the term. The restriction which the clause associates with the phrase is directed not to the nature of the services but to the persons to whom they are rendered. So long as it is to its members that the company is to render services as its primary object, it is, in my opinion, immaterial what those services are. If any doubt could be felt on the point, it is, in my opinion dispelled by the provisions of s. 14 (*d*). The express exclusion from that

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

clause of companies carrying on the business of financing time payments, instalments or hire-purchase sales, or of providing cash orders, shows plainly that the legislature was in this context using the phrase " render services " in a sense wide enough to include the operations of these companies if they were not excluded, and therefore not in a sense referable to " contracts of service." There is no reason to suppose that the legislature intended the phrase to be understood in any narrower sense in s. 117 of the *Income Tax Assessment Act* when it is incorporated by s. 14 (*b*). There is nothing inconsistent with this view in s. 121 of the *Income Tax Assessment Act*, which refers specifically to " every association of persons formed for the purpose of insuring those persons against loss, damage or risk of any kind in respect of property." On the contrary, it is obvious that co-operative associations rendering services of this type were in that Act singled out for separate treatment, not because they are not co-operative companies within the meaning of s. 117, but because (notwithstanding that they are insurance companies) they are, and, it being thought desirable to make special provision as to the basis of their assessment for income tax, it was necessary to deal with them separately and specially and not leave them to be covered by the general provisions of s. 119, which would otherwise have been applicable. Indeed, s. 121 provides strong confirmation for the view that s. 117 (*d*) in the context in which it is found in the Act from which it is borrowed, as well as in the context into which it is introduced, is to be read in its ordinary natural sense, and is wide enough to include insurance services.

Since the company has no share capital and is in fact established for the purpose of carrying on a business which has as its primary object the rendering of indemnity services, the only remaining title to exemption which it must establish in order to come within s. 14 (*b*) is that it should be to its " shareholders," in the sense of members, that it is to render those services. On this point the evidence and findings of the Board are all one way. Evidence was given by Mr. White, the secretary of the company, that " the whole 100 per cent of the business is done with members, in that we do not have anything to do with anyone who does not become a member. That is the only way they can get any benefit or have any service rendered for them, that is, by becoming members." The articles of association contemplate that a person desiring to obtain indemnification by the company must, in the course of doing so, become a member. This evidence was obviously accepted by the Board of Review, which has made a finding that " a person becomes a member of the Association by applying for and being granted a policy of insurance (workers' compensation or motor car)."

In these circumstances I am of opinion that, on the evidence and findings, the appellant company is a company established for the purpose of carrying on a business having as its primary object the rendering of services to its shareholders. It is quite true that the company could be so reorganized as to admit of its being carried on as a non-co-operative company (although clause 3 (E) of the memorandum of association is perhaps significant as indicating the sense in which it appears to have been taken for granted that the general language of the rest of the clause was to be understood), but for the purpose of ascertaining the objects for which the company was in fact established, whatever may be the scope of its general powers, it is legitimate, and may be necessary, to examine the provisions of the contemporaneous articles of association (*Anderson's Case* (1)). When these are adverted to, there can, I think, be no doubt that the company was at any rate established as a co-operative company, and that it could not be carried on upon any other footing without a complete remodelling of its articles. The contract *inter socios* constituted by the articles of association (which are its original articles) makes it a co-operative company, and, according to the evidence, it has always been carried on as such. Hence there is nothing in the observations of *Dixon* J. in *Shelley* v. *Federal Commissioner of Taxation* (2), which is inconsistent with the conclusion at which I have arrived. It follows, in my opinion, that the appellant company has, upon the Board's findings of fact, brought itself as a matter of law within the provisions of s. 14 (*b*), and that the appeal should be allowed.

In these circumstances it is not, in my view of the case, necessary to pass upon the question whether the company is entitled to exemption under s. 14 (*d*), as being one in which little or no capital is required, to the extent to which its profit arises from commissions, fees or charges for services rendered. I may say, however, that upon this question I am in agreement with the conclusion arrived at by my brethren.

I adhere to the view which I ventured to express in *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (3), that the phrase " capital required " means the stock, money or wealth in any form necessary for the operations of the particular company during its accounting period, that is, *de facto* required by a company carrying on such a business as the company in question is in fact carrying on. Quite apart from the substantial deposit of money which such a company is by law required to make as a condition of

(1) (1877) 7 Ch. D. 75, at p. 79. (2) (1929) 43 C.L.R. 208, at p. 231.
(3) (1943) 67 C.L.R., at p. 519.

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

carrying on such a business, it is obvious that no company could carry on an insurance business without possessing or being in command of substantial capital. Even the Anglo-Bengalee Disinterested Loan & Life Assurance Co., the paid-up capital of which, according to its chairman of directors, was to be "a figure of two, and as many oughts after it as the printer can get into the same line", needed for its activities the capital provided by its dupes.

It follows that, in my opinion, the appeal should be allowed on the ground that, upon the Board's findings, the appellant company is within the provisions of s. 14 (*b*), although not within those of s. 14 (*d*).

STARKE J. Appeal by the taxpayer from the decision of a Board of Review rejecting objections to an assessment to war-time (company) tax for the financial year 1940-1941 referred by order to this Court. The Board acquired jurisdiction under the provisions of the *War-time (Company) Tax Assessment Act* 1940, which incorporated various sections of the *Income Tax Assessment Act* 1936-1940.

The appeal was made to this Court pursuant to the provisions contained in the latter Act, which provides that the Commissioner or the taxpayer may appeal to the High Court from any decision of the Board which involves a question of law. The taxpayer claims that it is a company in which little or no capital is required and therefore entitled to the exemption provided by the *War-time (Company) Tax Assessment Act* 1940, s. 14 (*d*). Capital in its context in this section is not the share capital of a company, but the capital in the business sense required for the conduct of a business such as the company carries on (*Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)). The question therefore was one of fact for the Board. It has found that the company was incorporated under the *Companies Act* 1899 (N.S.W.) and is a company limited by guarantee issuing policies covering workers' compensation and motor vehicle, including third party, risks. It issues such policies to its members, but its memorandum of association does not so restrict it. Obviously such a company could not, as a matter of business, rely wholly upon the annual premium income for the purpose of meeting claims: it would require reserves or accumulated funds in the ordinary course of business. And the company has in fact accumulated a reserve fund of £27,000 or thereabouts out of income for any of the purposes of its business. The only question for this Court is whether, in these circumstances, there is any evidence which affords a reasonable basis for the finding of the Board that the

(1) (1943) 67 C.L.R. 508.

taxpayer is not a company in which little or no capital is required. Clearly there is.

The taxpayer also claims it was a co-operative company as defined by the *Income Tax Assessment Act* and entitled to the benefit of the provision of s. 14 (*b*) of the *War-time (Company) Tax Assessment Act* 1940. A co-operative company for the purposes of this provision includes "a company which has no share capital, and which . . . is established for the purpose of carrying on any business having as its primary object or objects . . . (*d*) the rendering of services to its shareholders." The taxpayer has no share capital: it is a company limited by guarantee. It issues policies of insurance to its members as already mentioned and settles claims under those policies. The Board has found that the company was not established for, and does not carry on, any business having as its primary object or objects the rendering of services to its shareholders.

In a general sense insurance companies do give or render service to the public or their members. Mutual insurance companies, associations and clubs are quite common in connection with marine insurance. And so are co-operative societies in connection with the purchase and sale of commodities and loans of money. And all in a general sense give or render service to their members. But the question is what is the meaning of the expression "the rendering of services to its shareholders" in the context in which it is found in the *Income Tax Assessment Act* 1936-1940. It is used in connection with what is called a co-operative company and the doing of acts for shareholders. And it is in this sense, I think, that the expression is used in the Assessment Act: the doing of acts for shareholders, including the rendering of services to its shareholders such, for instance, as shearing sheep for shareholders, as was suggested during the argument.

The Board was right in rejecting the general sense in which the expression "giving or rendering services" is sometimes used. And beyond this the question is, as it seems to me, one of fact. The only question for the Court is whether there is any evidence which affords a reasonable basis for the finding of the Board that the issue of policies and settling claims by the taxpayer is not "the rendering of services to its shareholders." Again clearly there is.

The appeal should be dismissed.

McTIERNAN J. The Employers' Mutual Indemnity Association is an incorporated company limited by guarantee. It has no share capital. The memorandum of association shows that the objects of

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J.

the company include various classes of insurance. But registration as a company is necessary to entitle the association to carry on its business (*Companies Act* 1936 (N.S.W.), s. 8; *In re Padstow Total Loss and Collision Assurance Association* (1)). The company was served with a notice of assessment showing that it was assessed to tax pursuant to the *War-time (Company) Tax Assessment Act* 1940, the assessment being based on taxable profit derived during the year ended 30th June 1940. Section 34 of this Act made applicable to this assessment the provisions of Div. 2 of Part V. of the *Income Tax Assessment Act* 1936-1940, relating to reviews and appeals. The company objected to the assessment on grounds depending on s. 14 (*b*) and s. 14 (*d*) respectively of the *War-time (Company) Tax Assessment Act* 1940. The Commissioner of Taxation having wholly disallowed the objection, at the company's request he referred his decision to the Board of Review, which confirmed the decision, and the company appealed to the High Court from the decision of the Board. This appeal is based on s. 196 (1), which is contained in Div. 2 of Part V. of the *Income Tax Assessment Act* 1936-1940, and provides that the Commissioner or taxpayer may appeal to the High Court from any decision of the Board which involves a question of law.

This appeal is a proceeding in the original jurisdiction of the Court. Rule 13 of the Rules of this Court governing the appeal provides that the appeal shall (subject to s. 18 of the *Judiciary Act* 1903-1940) be heard before a single Justice and shall be by way of an original hearing. The " materials " (as they are described in rule 14) which were prepared for the use of the Court pursuant to rule 15 of the above-mentioned Rules contained the evidence given by the only witness called in the case (he was called on behalf of the company), the memorandum and articles of association, certain of the company's accounts, the Board's decision, and its reasons for the decision. The admissions of fact are contained in the oral evidence. The company and the Commissioner were content to rely upon those materials, and neither party wished to adduce any further evidence or add to those materials. It was agreed that the questions raised by the appeal were of general importance, and with the concurrence of both parties a direction was given pursuant to s. 18 of the *Judiciary Act* 1903-1940 that the whole case be argued before the Full Court. This course was taken in *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (2)—See also *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3), *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (4). Some instances of cases in which a direction

(1) (1882) 20 Ch. D. 137.
(2) (1941) 65 C.L.R. 150.
(3) (1941) 65 C.L.R. 134.
(4) (1932) 48 C.L.R. 48.

was given that a case consisting of evidence be argued before the Full Court are *Riverina Transport Pty. Ltd.* v. *Victoria* (1), *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (2).

The appeal is not competent unless the decision of the Board involves a question of law. In so far as its objection to the assessment depends upon s. 14 (*b*) of the *War-time* (*Company*) *Tax Assessment Act* 1940, the company claimed that it is a co-operative company as defined in s. 117 of the *Income Tax Assessment Act* 1936-1940. This claim was based on the ground that it has no share capital and is solely engaged in rendering services to its members. The nature of these services was stated to be adjusting and paying claims against its members under the *Workers' Compensation Act* (N.S.W.) and other similar Acts and at common law. And in so far as its objection depends on s. 14 (*d*) of the *War-time* (*Company*) *Tax Assessment Act* 1940, the company claimed that no capital is required for carrying on its business and that none has ever been employed throughout the period of its existence, and that any profits which it has derived have arisen from charges for services rendered to its members.

Section 14 (*b*) of the *War-time* (*Company*) *Tax Assessment Act* provides that the Act " shall not apply to a co-operative company as defined in section one hundred and seventeen of the *Income Tax Assessment Act*." This means the *Income Tax Assessment Act* 1936-1940. The company comes within that definition in so far as it has no share capital.

The question is whether it comes within the other part of the definition. Its claim is based on the ground that it is established for the purpose of carrying on a business having as its primary object or objects the rendering of services to its shareholders. The company's memorandum does not limit its objects to the insurance only of its own members and their property. The memorandum may be contrasted with that, for example, in the case of *Lion Mutual Marine Insurance Association Ltd.* v. *Tucker* (3). There the memorandum said that the association was a company limited by guarantee and not having a capital divided into shares and that the objects for which the association was established were : " The mutual insurance by the association (*a*) of the ship of the members . . ." : and with Form B in the Third Schedule of the *Companies* (*Consolidation*) *Act* 1908 (Imp.), which contains a memorandum for a company limited by guarantee and not having a share capital. The third paragraph of this memorandum is : " The objects for which the Company is

(1) (1937) 57 C.L.R. 327. (2) (1939) 61 C.L.R. 735, at p. 767.
(3) (1883) 12 Q.B.D. 176.

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J.

established are the mutual insurance of ships belonging to members of the Company . . ."

In *Shelley* v. *Federal Commissioner of Taxation* (1), the question arose whether the company of which the taxpayer was a member, was a co-operative company within the meaning of s. 20 (1A) of the *Income Tax Assessment Act* 1922-1928. This section set out the attributes which a company should have to be a co-operative company for the purposes of s. 20 (1) of that Act, which dealt with the calculation of the taxable income of a co-operative company. Section 117 is wider than s. 20 (1A) to the extent that it includes a company which has no share capital and adds " the rendering of services to its shareholders " to the objects mentioned in s. 20 (1A). In that case *Dixon* J. said : " But whatever characteristics may be required in order to bring a company within that expression " (" co-operative company "), " it seems reasonably clear that the company must possess them by virtue of its constitution. It is not enough that a company may in fact conduct a series of transactions upon principles which justify the title of ' co-operative ' " (2). Although the memorandum does not limit the objects for which the company is established to the insurance of the members of the company or their property, yet the articles of association make it reasonably plain that the company is established for the purpose of carrying on a business having as its primary object the insuring of the members or of their property.

The members of the Board said : " In a broad sense all purely mutual insurance companies are formed with the primary object of rendering services to their members." But the members rejected this " broad construction " for the reason that the context of s. 117 shows that the word " services " is used in a sense which is not wide enough to include insurance and that this view is necessary to make s. 117 (*d*) consistent with ss. 119 and 121 and also with Div. 8 of Part III. of the *Income Tax Assessment Act* 1936-1940.

The effect of s. 14 (*b*) is to bring into the *War-time* (*Company*) *Tax Assessment Act* by reference, the definition of co-operative company in s. 117 of the *Income Tax Assessment Act.* In the case of *Mayor &c. of Portsmouth* v. *Smith* (3) Lord *Blackburn* said : " Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are

(1) (1929) 43 C.L.R. 208.
(2) (1929) 43 C.L.R., at p. 231.
(3) (1885) 10 App. Cas. 364, at p. 371.

not incorporated in the new Act." In my opinion it is not the intention of s. 14 (*b*) to incorporate s. 117 in the *War-time* (*Company*) *Tax Assessment Act*. The intention is, as I have stated, to bring in by reference the definition of co-operative company and to provide that the *War-time* (*Company*) *Tax Assessment Act* is not to apply to a company which is within that definition. The rule of interpretation which applies is that which was stated by Lord *Esher* in the case of *In re Wood's Estate* (1): "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all." The present case is an instance of legislation by reference to a section of a former Act, not an instance of a section of a subsequent Act incorporating a section of a former Act. It follows that the words used in s. 117 to express the definition of a co-operative company should be construed as if they appeared as a definition clause or an interpretation clause in the *War-time* (*Company*) *Tax Assessment Act* 1940.

It is evident from the words of the definition that par. *d* has in contemplation objects which are not properly described by pars. *a*, *b*, *c* or *e*. The words "the rendering of services to its shareholders" have the ordinary general meaning of the words as applied to the subject matter with regard to which they are used. They are used to apply to a service which would be the primary object or one of the primary objects which a company governed by the rules mentioned in the definition or having no share capital might be established to carry on. The word "services" does not mean services rendered pursuant to a contract of employment between master and servant. The word refers to services which are of the same nature as those rendered by a business enterprise in satisfying the business needs of persons having recourse to it. It is within this ordinary general meaning of the expression "the rendering of services" to say that an insurance company renders services to its policy holders by covering them against loss or damage to their property or claims by workmen in their employment, and by performing the promises in the policies upon the happening of the loss, damage or claim insured against.

In my opinion upon the true construction of the definition of a co-operative company which s. 14 (*b*) enacts by reference to s. 117 of the former Act, the subsequent Act, the *War-time* (*Company*) *Tax*

(1) (1886) 31 Ch. D. 607, at p. 615.

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J.

Assessment Act, does not apply to this company. According to this opinion the company is not liable to taxation under this last-mentioned Act.

It is unnecessary to deal with the question whether the company is exempted by s. 14 (*d*) of the *War-time (Company) Tax Assessment Act*. I do not pass upon the contentions that were made to support the claim that the company is one in which little or no capital is required.

In my opinion the appeal should be allowed and the assessment set aside.

WILLIAMS J. The respondent Commissioner assessed the appellant company for war-time (company) tax for the year which ended on 30th June 1940. The company did not dispute the correctness of the amount for which it was assessed if it was liable to pay the tax, but it objected to the assessment on the grounds that it was exempt under the provisions of s. 14 (*b*) or (*d*) of the *War-time (Company) Tax Assessment Act* 1940.

The Commissioner disallowed the objection and the company appealed to the Board of Review.

Section 14 of the *War-time (Company) Tax Assessment Act* provides, so far as material, that the Act shall not apply to : (*b*) a co-operative company as defined in section one hundred and seventeen of the *Income Tax Assessment Act* ; or 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.

Section 117 of the *Income Tax Assessment Act* 1936-1940, which is the Act referred to in s. 14 of the *War-time (Company) Tax Assessment Act*, provides, so far as material, that — " ' co-operative company ' means a company the rules of which limit the number of shares which may be held by, or by and on behalf of, any one shareholder, and prohibit the quotation of the shares for sale or purchase at any stock exchange or in any other public manner whatever, and includes a company which has no share capital, and which in either case is established for the purpose of carrying on any business having as its primary object or objects one or more of the following :— . . . (*d*) the rendering of services to its shareholders."

The Board of Review decided that the company was not exempt under either sub-s. *b* or *d* of s. 14 of the *War-time (Company) Tax Assessment Act* and confirmed the assessment.

The company has now appealed to this Court.

The appeal in the original jurisdiction of this Court came before my brother *McTiernan*, who referred it to the Full Court under the provisions of s. 18 of the *Judiciary Act* 1903-1940. Under s. 196 of the *Income Tax Assessment Act* the company can only appeal from a decision of the Board of Review on a question of law, so that the appeal can only succeed if the company can satisfy the Court that on the evidence the Board could not have reasonably come to the above decision. As the assessment is prima facie evidence of its validity the company must then satisfy the Court that on the facts it has brought itself within sub-s. *b* or *d* of s. 14 (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1); *Maughan* v. *Federal Commissioner of Taxation* (2)).

As to the objection that the company is a co-operative company within the meaning of s. 117 of the *Income Tax Assessment Act* 1936-1940:—Mr. *Taylor* for the respondent submitted several contentions why the appellant does not come within this section. In order to succeed the appellant must prove that it was established for the carrying on of a business having for its primary object or objects one or more of the activities referred to in pars. *a* to *e* inclusive. The only activity relied on by the appellant is that it has as a primary object the rendering of services to its shareholders.

The appellant is a company which was established in order to carry on the business of insurance in all its branches, but since its incorporation it has been carrying on in the main the business of insuring employers against liability under the *Workers' Compensation Act* 1926-1938 (N.S.W.), and in a subsidiary but substantial manner the business of motor car insurance. But an insurance business is not, in my opinion, a business the object of which is to render services to any persons, whether shareholders or not. Contracts of insurance, other than life insurance, are contracts of indemnity and of indemnity only (*Castellain* v. *Preston* (3)), whereas the rendering of services must result from contracts of service or for services. Contracts of service or for services are not specifically enforceable in equity because they contain an element of personal and confidential relationship, and it is not in the interests of society that persons who are not desirous of maintaining continuous personal relations should be compelled to do so. There is nothing personal or confidential in a contract of indemnity. It is simply a contract by one person to indemnify another person against liability on the occurrence of some uncertain event. When that liability crystallizes into an actual

(1) (1941) 65 C.L.R. 150. (2) (1942) 66 C.L.R. 388.
(3) (1883) 11 Q.B.D. 380, at p. 386.

H. C. OF A. 1943.

EMPLOYERS' MUTUAL INDEMNITY ASSOCIATION LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

liability by the occurrence of the event, equity will specifically enforce the contract by ordering the indemnifier to pay the amount for which he has become liable either to the person indemnified or to the creditor of the person indemnified. In the case of an insurance it is a contract *uberrimae fidei*. The indemnity may be against a fund and not against a person. It is a contract which may be express or implied and which may take many forms: See *Halsbury's Laws of England*, 2nd ed., vol. 16, pp. 9 et seq. It would be difficult, for instance, to classify as a contract of service or for services the implied indemnity which arises in favour of a vendor in the case of the purchase of an equity of redemption. The indemnifier does not render any services to the person indemnified except to pay the amount which he has become liable to pay on the occurrence of the uncertain event. Apart from statute, the person indemnified is not bound on receipt of the money to apply it in discharge of the liability against which he has been indemnified. The amount received becomes part of his general assets (*In re Harrington Motor Co. Ltd.*; *Ex parte Chaplin* (1)). The words in s. 117 are of course used in a popular and not in a technical sense, so that it may be urged that these considerations are more relevant to the determination of the technical meaning of a contract of indemnity than to the elucidation of the popular meaning of the rendering of services. But a glance at several standard dictionaries shows that in common parlance the expression refers to services of a personal nature.

The same expression occurs in s. 14 (*d*) of the Act, and the circumstances that in this sub-section the profit that is exempted is profit which arises from commissions, fees or charges for services rendered assists the conclusion that the services to which s. 117 refers are services which would be remunerated by commissions, fees or charges and therefore services and earnings of a personal nature. Contracts of insurance (and the policies issued by the appellant are no exception) usually authorize the insurance company to investigate, settle and litigate claims, but these provisions are inserted in the policy for the protection of the insurance company, and acts which an insurance company does in pursuance of these provisions are done by the company on its own behalf and for its own protection and not as a service to its policy holders. For these reasons, and without expressing any opinion upon the other objections raised by Mr. *Taylor*, I am of opinion that the Board came to a right conclusion that the appellant is not a co-operative company within the meaning of the *War-time (Company) Tax Assessment Act*, s. 14 (*b*).

(1) (1928) 1 Ch. 105.

As to the objection founded on the *War-time (Company) Tax Assessment Act*, s. 14 (*d*) :—The reserve fund of the company consists of profits accumulated by the company in the course of its business. Mr. *Leaver* contended that this fund is the property of the shareholders and not of the company. The articles of association give to shareholders and ex-shareholders certain rights against this fund, but these rights are not such as to make the company an agent or trustee of the fund for the shareholders. They are rights against the fund on the basis that the fund forms part of the property of the company. Mr. *Leaver* also contended that the appellant is a company which requires little or no capital for the conduct of its business. This Court has decided in *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) that the Act refers to commercial capital ; and I adhere to the opinion which I expressed in that case that s. 14 (*d*) refers to the class of business which a company is conducting and not to the circumstances of each particular company. Apart from statutory requirements, a company which carries on an insurance business could not be aptly described as a company in which little or no capital is required for the conduct of its business. In addition, the main activity of the appellant, as I have already said, is to carry on workers' compensation insurance, and the *Workers' Compensation Act* 1926-1938 (N.S.W.), s. 19, requires the appellant to deposit £10,000 with the Colonial Treasurer, so that the appellant plainly requires considerable capital in order to carry on this class of insurance business.

For these reasons I am of opinion that the Board also came to a right conclusion that the appellant is not exempt under the provisions of s. 14 (*d*).

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *C. T. Poole & Son.*

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

J. B.

(1) (1943) 67 C.L.R. 508.