[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;
RESPONDENT,

AND

HENDERSON . . . . . RESPONDENT.
APPELLANT,

H. C. OF A. 1943.

MELBOURNE, *Mar.* 24; SYDNEY, *April* 5.

Williams J.

MELBOURNE, *May* 20, 21; *June* 4.

Latham C.J., Rich and Starke JJ.

Income Tax (Cth.)—Assessment—Capital or income—Income from personal exertion—Profit arising from sale of property acquired for purpose of profit-making by sale—"Prospector"—Sale of right to mine for gold—Mining company carrying on mining operations in Australia for gold—Income Tax Assessment Act 1936-1938 (*No.* 27 *of* 1936—*No.* 46 *of* 1938), *ss.* 6, 23 (*p*), 78 (1) (*d*).

H., a taxpayer, was an assayer and metallurgist who had discovered an improved process for recovering gold from "slum dumps" (material excavated from mines and lying on the surface of the ground, from which the residual gold could be extracted only by chemical processes). H. sampled and assayed certain dumps, and a syndicate of which H. was a member acquired the right "to enter upon and treat" the slum for the recovery of gold. The interests of the members of the syndicate in the dumps were assigned to the C. Co. in return for a cash consideration, which was paid, and royalties. The C. Co. and H. assigned all their interests to the G. Co., of which H. was a director and general manager, the consideration, so far as H. was concerned, being the allotment of fully-paid shares in the G. Co. The G. Co. treated the dumps by H.'s process and recovered gold therefrom. The Federal Commissioner assessed H. to income tax on the value of the fully-paid shares allotted to him, and disallowed a claim by H. to a deduction of the amount of calls paid by him on contributing shares which had been acquired by him in the G. Co.

Held, by *Latham* C.J., *Rich* and *Starke* JJ.:—

(1) (Reversing the decision of *Williams* J. on this point), that the value of the fully-paid shares was a capital receipt of H.: It was not a profit arising from a sale by H. of property acquired by him for the purpose of profit-making by sale, and was not brought within the operation of the *Income Tax Assessment Act* 1936-1938 by the definition in s. 6 of that Act of "income from personal exertion."

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(2) (Affirming the decision of *Williams* J. on this point), that the G. Co., in treating the dumps, was "a mining company . . . carrying on mining operations . . . for gold" within the meaning of s. 78 (1) (*d*) of the *Income Tax Assessment Act* 1936-1938, and that H. was therefore entitled to a deduction in respect of the calls paid by him on his contributing shares in the company.

APPEAL from *Williams* J.

Anketell Matthew Henderson, an assayer and metallurgist, who had discovered an improved method for treating "slum dumps" (soil which had been raised from the beds of gold mines and from which the visible gold had been removed, so that such gold as was left could be extracted only by special processes), became one of four members of a syndicate which obtained and exercised options "to enter upon and treat for the recovery of gold and other metals" for specified periods the untreated slum lying in certain slum dumps. In July 1936 the syndicate granted to Clutha Development Ltd. the option of acquiring from the syndicate its interests. The Full Court, differing on this point from the trial judge, held that Clutha Development Ltd. exercised the option; the consideration payable to the syndicate was £100 to Henderson, £500 to each of the other members of the syndicate and also a royalty to the syndicate of $7\frac{1}{2}\%$ of the gross value of the gold won from the dumps from time to time. Clutha Development Ltd. was empowered to assign its rights and obligations under the option at any time to any company, and the syndicate was to accept the liability of the new company instead of that of Clutha Development Ltd. About the same time Henderson (declaring that he acted for and on behalf of Clutha Development Ltd.) acquired from the other members of the syndicate an option to purchase their interests in the options to treat the slum dumps and in the agreement with Clutha Development Ltd. This option was exercised, the consideration for the assignment being £3,500. Further, in 1937 Henderson, as trustee for Clutha Development Ltd., had assigned to him by the other members of the syndicate, their interests in the option agreements and in the agreement with Clutha Development Ltd., that is, the one-fourth share of each of them other than Henderson in the royalty provided for in the agreement with the last-mentioned company.

On 11th October 1937, Gold Dumps Pty. Ltd., of which Henderson was a director and general manager, entered into an agreement whereby it bought from Clutha Development Ltd. and Henderson all their interests in the option agreements in respect of the slum dumps, in an option agreement in respect to a tailings licence,

a licence to treat tailings, the registration of a dam site and a protective registration in respect of a stack of sand and slum. The consideration, so far as Henderson was concerned, was the allotment to him or his nominees, within one month after the date of the agreement, of 6,000 fully-paid shares in the company. Pursuant to the agreement 2,100 shares were allotted to Henderson and 3,900 to his nominees; he subsequently purchased 2,000 contributing shares, and all these shares were so held on 25th February 1941, when Henderson died. He had been assessed to income tax by the Federal Commissioner of Taxation for the year which ended on 30th June 1939 in respect of £2,100, the par value of the 2,100 shares which had been allotted to him, and had paid the tax. By an amended assessment the Commissioner assessed him in respect of £3,900 as the value of the 3,900 shares allotted by him to his nominees, and by a further amended assessment the Commissioner disallowed Henderson's claim to deduct a sum of £1,000 paid by him in April 1938 for calls on the 2,000 contributing shares purchased by him. Henderson objected to these amended assessments on the grounds :—

(1) Subject to ground 4 that the whole of the said sum of £6,000 or alternately the said sum of £3,900 received by me from Gold Dumps Pty. Ltd. under and by virtue of an agreement dated 11th October 1937 between Clutha Developments Ltd. of the first part myself of the second part and Gold Dumps Pty. Ltd. of the third part was income derived by me as a bona fide prospector from the sale transfer or assignment by me of my rights to mine for gold in the areas referred to in the said agreement in Australia.

(2) Without prejudice to the foregoing ground that the whole of the said sum of £6,000 or alternately the sum of £3,900 is not income in that the property disposed of by me under the agreement hereinbefore referred to was not acquired by me for the purpose of profit-making by sale or for the carrying on or carrying out of any profit-making undertaking or scheme but the whole of the said amount of £6,000 or alternatively the said sum of £3,900 was a capital receipt.

(3) That the sum of £1,000 paid by me as calls on shares held by me in the said Gold Dumps Pty. Ltd. is an allowable deduction from my income in that the said Gold Dumps Pty. Ltd. is a mining company carrying on mining operations for gold and that the said sum of £1,000 is in respect of calls on shares in a mining company carrying on mining operations in Australia for gold.

(4) That without prejudice to ground 2 the sum of £6,000 is not the money value of the 6,000 shares in the said Gold Dumps Pty. Ltd. to which I became entitled under and by virtue of the said

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agreement but that the money value of the said shares is five shillings per share.

The objections, being disallowed, were treated as an appeal to the High Court. Henderson having died, his executrix proceeded with the appeal, which was heard by *Williams* J.

Ham K.C. and *Mulvany*, for the appellant.

Fullagar K.C. and *H. Walker*, for the respondent.

April 5.

WILLIAMS J. delivered the following written judgment:—This is an appeal by the executrix of A. M. Henderson who died on 25th February 1941 against two amended assessments dated respectively 7th September and 27th September 1939, made by the respondent Commissioner under the provisions of the *Income Tax Assessment Act* 1936-1938 in respect of the financial year ended 30th June 1939 based upon his income earned during the financial year ended 30th June 1938.

By the first of these amended assessments the Commissioner included in his assessable income the sum of £3,900 received from a company incorporated in the State of New South Wales on 11th October 1937 named Gold Dumps Pty. Ltd., and by the second of these amended assessments he disallowed a sum of £1,000 paid in April 1938 for calls on 2,000 shares of £1 each in that company.

The £3,900 represented the par value of 3,900 out of 6,000 fully paid shares of £1 each which the company agreed to allot to him or his nominees under the circumstances hereinafter mentioned, while the £1,000 was paid for calls upon 2,000 additional contributing shares which were subsequently allotted to him by the company.

The deceased had been assessed in the original assessment for £2,100, representing the value of the balance of the 6,000 shares, and had paid the tax without objection, so that his executrix has no right of appeal in respect of this sum. It is common ground that, if he is not liable to be taxed in respect of the £3,900, he ought not to have been taxed in respect of the £2,100; but, if the appeal succeeds, it is a question for the Commissioner and not for this Court whether a refund can and ought to be made in respect of the £2,100.

Of the objections raised by the appellant to the amended assessments she has insisted upon the following at the hearing:—(1) that the whole of the sum of £6,000 or alternatively the sum of £3,900 received by the deceased from Gold Dumps Pty. Ltd. by virtue of an agreement dated 11th October 1937 between Clutha Development Ltd. of the first part, the deceased of the second part and Gold

Dumps Pty. Ltd. of the third part was income derived by the deceased as a bona fide prospector from the sale, transfer or assignment by him of his rights to mine for gold in the areas referred to in the agreement in Australia; (2) that the whole of the sum of £6,000 or alternatively the sum of £3,900 is not income in that the property disposed of by the deceased under the agreement was not acquired by him for the purpose of profit-making by sale or for the carrying on or carrying out of any profit-making undertaking or scheme but the whole of the sum of £6,000 or alternatively the sum of £3,900 was a capital receipt; and (3) that the sum of £1,000 paid by the deceased as calls on shares held by him in Gold Dumps Pty. Ltd. is an allowable deduction in that Gold Dumps Pty. Ltd. is a mining company carrying on mining operations for gold and the sum of £1,000 is in respect of calls on shares in a mining company carrying on mining operations in Australia for gold.

The evidence tendered on behalf of the appellant consisted of certain documents, certain admissions, and the oral testimony of Victor Thomas Edquist, an experienced mining engineer and metallurgist, the whole of whose evidence I accept. Mr. *Fullagar* agreed that the recitals in the documents so far as relevant can be treated as evidence of the facts which they narrate. From this evidence it appears that the deceased was a metallurgist who was interested in improving existing methods of extracting gold from the soil. Until recently, when a process known as the cyanide process was discovered, it was impossible to separate more than the visible gold from the soil, so that the slum dumps scattered about Australia, representing the soil which has been raised from the beds of gold mines and from which the visible gold has been removed, still contain a proportion of gold that is too fine to be seen. Gold had been discovered at Rutherglen in Victoria in what are called deep lead mines. Prior to 1906 these mines had been worked, the soil brought to the surface, and the visible gold extracted. Of the slum dumps that remained, four near Carisbrook were known as "The Napier," "Kong Meng No. 2," "Chalk's No. 1" and "Chalk's Freehold" respectively. These dumps were about three to four acres in extent. The deeper portions were about twenty feet deep and the shallower portions about four feet deep. After the cyanide process was discovered attempts were made to treat these dumps, but they were unsuccessful.

By an agreement made on 12th October 1935, a syndicate, in which the deceased owned a quarter share, secured options over the four dumps, exercisable within six months. These options were duly exercised on 13th December 1935. In July 1936 Clutha Development Ltd., a company incorporated in New South Wales,

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became the owner of the shares of the members of the syndicate other than that of the deceased. By an agreement made on 11th October 1937 between Clutha Development Ltd., the deceased and Gold Dumps Pty. Ltd. (therein called the purchaser) Clutha Development Ltd. sold to the purchaser for £35,130 its three-quarter share and interest in the four dumps, and its interests in certain other dumps in which the deceased was not interested, and the deceased sold to the purchaser his share and interest in the four dumps for 6,000 shares to be allotted to him or his nominees within one month after the date of the agreement.

Mr. *Fullagar* admitted that the deceased received the 6,000 shares provided for by the agreement which were allotted as follows:— 2,100 to himself and 3,900 to his nominees, that the deceased subsequently purchased 2,000 contributing shares in the capital of the company, and that all these shares were still retained by the deceased or his nominees at the date of his death, the 2,100 and 2,000 shares still standing in his own name and the 3,900 in the names of his nominees in the register of members of the company.

Mr. Edquist described the preliminary work which was done at the four dumps by the deceased or under his direction. The witness said that there are plenty of these dumps in Australia, that there is only one way to find out if they are payable, and that is to bore them and take samples. The boring has to be done in a systematic manner, the lines of the bore holes being laid out so that each hole will represent an even amount of tonnage for the purpose of average values, so that the contents of the bore holes will give a section of the dump from top to bottom for the purpose of assay. He said that many hundreds of samples have to be taken and assayed, and that from the weighed average of the samples the average value of the gold in the dump can be estimated. Following the assay the question is then considered whether there is sufficient gold present to warrant further examination. If there is, the samples are then put through an experimental process which is practically a replica of the method with which it is intended to treat the dump.

Mr. Edquist also described the method by which the gold in the four dumps was treated under the managership of Mr. Henderson. Although the witness did not state specifically that this work was done by Gold Dumps Pty. Ltd., the argument proceeded upon this basis. He said that the deceased used what is called the vacuum filtered process. The slum was first mixed with water into a pulp, and alkaline cyanide with lime of soda or potassium added, which dissolved the gold. The pulp containing the dissolved gold was then filtered to separate the solution from the solids. The solution was

then clarified and passed through a precipitating plant which consisted of a small filter charged with finely divided zinc. By bringing the cyanide of gold solution in contact with the finely divided zinc, a chemical reaction took place whereby some of the zinc went into the solution and the gold was deposited in solid form. This was then treated with further chemicals to get rid of the excess zinc, and the residue was washed, roasted and smelted for the recovery of the bullion. He said that the plant for these operations, which had a working capacity of 500 to 600 tons a day, must have cost from £25,000 to £30,000. It was placed in a central position so as to serve all four dumps. The slum was propelled to the treatment plant by subjecting the dumps to a sluicing process. For this purpose the deceased put in pumps which gave water under very high pressure in pipes, the dumps were subjected to a high pressure jet of water from these pipes, and this caused the slum to disintegrate and flow along a main gutter with side gutters to the treatment plant, where the sand and any worthless material was separated by screening, leaving a smooth slimy pulp to subject to the treatment already mentioned.

The burden of proving that an assessment, or an amended assessment, is excessive lies upon the taxpayer: ss. 173 and 190. It is therefore necessary for the appellant to prove, in the language of the objection numbered " 2 ", which is based upon the definition of " income from personal exertion " contained in s. 6 of the Act, that the profit which the deceased made when he sold his one-fourth share and interest in the dumps to Gold Dumps Pty. Ltd. for 6,000 fully paid shares (and it is not now contested that the value of these shares was £1 each) was not income from personal exertion, because it was a profit arising from the sale by the deceased of a quarter share in property not acquired by him for the purpose of profit-making by sale. Mr. *Ham* referred to the decision of this Court in *Evans* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (1), but the facts in that case were entirely different from the facts in the present case. Applying the principles of construction laid down in the joint judgment of *Rich* J., *Dixon* J. and *Evatt* J. (2), I am unable to hold that the dominant purpose actuating the syndicate in acquiring the options over the dumps was to work the dumps itself. The evidence of Mr. Edquist is directly to the contrary. He said that the work which the deceased was doing prior to the sale to Gold Dumps Pty. Ltd. was in the nature of preliminary investigation, that he had a small experimental plant of which he was very proud, that he had often seen him working with his plant, and that he was very keen on

(1) (1935) 55 C.L.R. 80.

(2) (1935) 55 C.L.R., at p. 99.

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experimental work. Of the four members of the syndicate, the deceased appears to have been the only one with any practical knowledge of gold mining and the only one to carry out any experiments on the dumps. The shares of the other three members of the syndicate were first acquired by Clutha Development Ltd. There is no evidence that this company has ever worked a mine. Its name suggests that it is a development company only. When the operations to extract the gold from these dumps (to use a neutral term) were about to commence, the three-fourth share and interest of this company in the dumps was sold for cash to Gold Dumps Pty. Ltd. The latter company was incorporated on the same day as the agreement of purchase was entered into. The appellant has entirely failed to satisfy me affirmatively on the facts with respect to this objection. On the contrary, I am satisfied that the proper inference to be drawn from the facts is that the deceased like the other members of the syndicate acquired his share and interest in these dumps with a view to testing them to ascertain their gold content, and, if the test proved satisfactory, to selling this share and interest at a profit.

The questions that arise on the two remaining objections are (*a*) whether the sale by the deceased of his share and interest in the dumps was the sale of a right to mine for gold in a particular area within the meaning of s. 23 (*p*) of the Act; (*b*) if it was, whether the deceased was a bona fide prospector within the meaning of this sub-section; and (*c*) (which is largely wrapped with *a*) whether Gold Dumps Pty. Ltd., which made the calls, was a mining company carrying on mining operations for gold within the meaning of s. 78 (1) (*d*). Sections 23 and 78 of the Act, so far as material, are in the following terms:—

"23. The following income shall be exempt from income tax:—

. . .

(*p*) income derived by a bona fide prospector from the sale transfer or assignment by him of his rights to mine for gold in a particular area in Australia or in the Territory of New Guinea. For the purpose of this paragraph, 'bona fide prospector' means a person, other than a company, who has personally carried out the whole or major part of the field work of prospecting for gold in the particular area, or who has contributed to the expenditure incurred in the work of prospecting and development in that area, and includes a company which has itself carried out the whole or major part of such work."

"78. The following shall . . . be allowable deductions:—

(1) . . . (*d*) Calls paid by the taxpayer in the year of income on shares owned by him in a mining company or syndicate carrying

on mining operations in Australia for gold, silver, base metals, rare minerals or oil, or in any company carrying on afforestation in Australia as its principal business."

Attention must also be called to s. 23 (*o*), which exempts "the income derived by a person from the working of a mining property in Australia or in the Territory of New Guinea principally for the purpose of obtaining gold, or gold and copper, provided that in this case the value of the output of gold is not less than forty per centum of the total value of the output of the mine."

The *Shorter Oxford English Dictionary*, 2nd ed. (1936), and other standard dictionaries describe prospecting as exploring a region for gold and also as working a mine or lode experimentally so as to test its richness. There is a possibility that gold may be found in many localities in Australia, which is the only country with which this appeal is concerned. The prospects of finding gold are of course brighter in some localities than in others. But gold is not worth discovering at all unless it is discovered in payable quantities. It is reasonably certain that disused slum dumps contain fine invisible gold, but it is quite uncertain whether they contain gold which can be recovered in payable quantities, so that in order to ascertain the amount of gold which they contain it is necessary to make the exhaustive preliminary test which Mr. Edquist has described.

Emphasis is laid in s. 23 (*p*) upon a person who claims the benefit of the sub-section carrying out the whole or a major part of the field work of prospecting for gold in the particular area and upon the contributions which he has made to the expenditure incurred in the work of prospecting and developing the area. The sub-section therefore plainly seeks to encourage qualified persons to go out into the field and to expend their time, energy and money in making the necessary preliminary investigations, and in doing the necessary preliminary development work required to establish the reasonable probability of the presence of gold in a particular area in quantities sufficient to warrant that area being worked as a mine.

The Act, in exempting income from the working of a mining property for the purpose of obtaining gold, and the profits on the sale of rights to mine for gold in a particular area, and in allowing as a deduction calls paid on shares in companies carrying on mining operations for gold, evinces, to my mind, a plain intention to offer a strong incentive to increase the production of gold in Australia. This purpose will only be achieved if the gold is actually won from the earth in which it is contained. In order to effect this purpose, it is just as expedient to encourage persons to carry out the preliminary exploratory tests required to establish the presence of gold in

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payable quantities in the slum dumps and to encourage companies to establish the necessary expensive plants to recover the gold from such dumps, as it is expedient to induce persons to search for and find gold in payable quantities where it has never been discovered before and to induce companies to establish such plants to work these discoveries.

In each case the preliminary work in the field could be described as prospecting for gold in a particular area, whether that area was a river bed, an old slum dump, or any other likely area. The evidence in the present case proves that the deceased carried out the major part of the field work of testing the four dumps, and that he contributed to the expenditure incurred in the work of prospecting and developing them.

The answers to the questions whether the deceased sold a right to mine for gold in the dumps, and whether Gold Dumps Pty. Ltd. in working the dumps was carrying on mining operations for gold, depend upon the same substantial considerations. Mr. *Fullagar* contended that the treatment of minerals already won lying on the surface and capable of separate ownership did not constitute mining operations, that the sale of a right to work such minerals and extract gold therefrom was not the sale of a right to mine for gold, and that the work itself was not gold mining. He relied upon the decision of the Court of Appeal in *Golden Horse Shoe (New) Ltd.* v. *Thurgood* (1). In that case the appellant company had purchased dumps similar to the four dumps in the present case with a view to extracting the invisible gold by a new process, presumably similar to the process used by the deceased. The question for determination was whether, in ascertaining the profits for the purpose of the Imperial *Income Tax Act* 1918, the price paid for the dumps could be taken into account. It was held that, as the tailings were raw material already won and gotten, the amount expended in acquiring them was in the nature of an expenditure on the raw material of the company's trade; and that for the purpose of assessing the company's profits or gains, the cost of the tailings treated during the period of assessment was a proper deduction from the proceeds realized by the sale of the gold extracted. In my opinion the decision has little bearing upon the present appeal, in which the problem is of a different character arising under a different Act. It was not relevant in *Golden Horse Shoe (New) Ltd.* v. *Thurgood* (1) to adduce evidence to prove in what generic industrial description the operations of re-treating dumps would fall and no such evidence was given. The expressions "rights . . . to mine for gold" and "mining operations . . . for gold" used in the Assessment Act are ordinary

(1) (1934) 1 K.B. 548.

English expressions, and the determination of their meaning is a question of fact, the duty of the court being to determine what they meant in the vernacular of mining men at the time the Act was passed in 1936. But there is no suggestion that the meaning then was not the same as it is to-day (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1)). In the *Shorter Oxford English Dictionary*, 2nd ed. (1936), it is stated that the word " mine " includes, not only the place which yields the minerals, but also the minerals themselves. Mr. Edquist said that in mining parlance the process of extracting the gold from the dumps is called re-treatment, and that re-treatment is one amongst a number of operations which can be described generically as mining operations. He mentioned crushing, sliming, filtering, ground sluicing and bucket dredging as being other instances of mining operations. He said that he was most familiar with lode mining in which the ore is mined underground, brought to the surface, and, after several stages, crushed down until it is fine enough to liberate the gold. He said that portion of the gold is then recovered in metallic form and that any further portion which escaped (presumably he was referring to the tailings) would be either stacked for treatment afterwards if there was not a plant for doing this work, or if there was a plant, it would be run straight into the plant and treated. He said that the whole of this work would be described as mining operations. The only distinction between the operations described by Mr. Edquist and those which took place at Carisbrook was that the re-treatment of the four dumps did not take place until after an interval of thirty years, but the re-treatment was in each case part of the same total process resulting in the complete recovery of the whole of the gold.

I find that the sale of the share and interest of the deceased in the dumps to Gold Dumps Pty. Ltd. was a sale of a right to mine in a particular area, and that the company at the time the calls were made was carrying on mining operations for gold.

The appeal must, therefore, be allowed. The amended assessment of 7th September 1939 must be set aside, so far as it includes the sum of £3,900 received from Gold Dumps Pty. Ltd. The amended assessment of 27th September 1939 must be set aside completely. There must be liberty to apply. The respondent must pay the appellant's costs of the appeal, including any reserved costs.

From this judgment the respondent appealed to the Full Court of the High Court.

Fullagar K.C. and *Walker*, for the appellant.

(1) (1941) 65 C.L.R. 150, at pp. 160, 161.

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Fullagar K.C. Henderson did not sell any "rights to mine for gold" within the meaning of s. 23 (*p*) of the *Income Tax Assessment Act* 1936-1938: he had no such rights. What was sold was a right to enter land and treat "tailings" for the gold not already extracted. [He referred to *Northam* v. *Bowden* (1).] The tailings were chattels (*Sydenham Quartz Gold Mining Co. Ltd.* v. *Ah Cheong* (2)). The re-treatment of the tailings to extract the residual gold was not "mining" at all. The word "mining" is not ordinarily capable of being applied to a case of the treatment of matter which has been severed from the earth. The characteristic of mining is excavation from the earth (*Australian Slate Quarries Ltd.* v. *Federal Commissioner of Taxation* (3); *Deputy Federal Commissioner of Taxation* (*Q.*) v. *Stronach* (4)). The taxpayer's claim to exemption of income under s. 23 (*p*) and the claim to a deduction in respect of calls under s. 78 (1) (*d*) of the Act should both fail. For the purposes of this case there is no material distinction between the words of the two sections: there was no mine or right to mine within the meaning of s. 23 (*p*), and, accordingly, there were no "mining operations" within s. 78. Sections 115 and 116 of the *Mines Act* 1928 (Vict.) regard the treatment of tailings as something different from mining. [He referred to *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (5); *Golden Horseshoe* (*New*) *Ltd.* v. *Thurgood* (6).] Henderson was not a "prospector" within s. 23 (*p*): he did not, in any normal sense of the word, prospect any territory to discover whether it could be mined for gold.

Walker. Henderson had no "right to mine," under Victorian law, in the sense of going below the surface. He had no right to deal with land. Only the Crown can grant the right to mine. A licence over Crown land gives the right to deal with tailings. Even if Henderson had had a miner's right, he could not have worked the tailings without a licence from the Crown. [He referred to the *Mines Act* 1928 (Vict.), ss. 15, 356; Mining By-laws, *Victoria Government Gazette*, 19th Feb. 1931, pp. 617-640.]

Ham K.C. and *Mulvany*, for the respondent.

Ham K.C. Mining operations are any operations which are part of the winning of gold or other mineral from the earth; it does not matter whether the operation is hewing earth from a pit or treating

(1) (1855) 11 Ex. 70 [156 E.R. 749].
(2) (1897) 23 V.L.R. 441.
(3) (1923) 33 C.L.R. 416, at pp. 420, 421, 424.
(4) (1936) 55 C.L.R. 305.
(5) (1941) 65 C.L.R. 150.
(6) (1934) 1 K.B. 548, at pp. 557, 560, 561, 563, 565.

it chemically. Operations such as those conducted at the Newcastle steel works—where iron ore is converted into pig iron—are different; in such a case the mineral has already been won from the earth and the subsequent treatment of the mineral is an industrial process whereby the mineral is put to the uses of which it is capable. A "prospector" is a person who explores or investigates a possible source of gold, and, if it is necessary for the respondent to rely on s. 23 (*p*), Henderson was a prospector within the meaning of that provision, and the sum assessed in respect of the value of the shares acquired by him—if it is income—is exempt. However, the sum in question represents a capital receipt. It is not brought within the category of income for the purposes of the Act by the definition of "income from personal exertion" in s. 6 (*Evans* v. *Deputy Federal Commissioner of Taxation* (1)). The transactions in this case show that Henderson did not acquire his interests in the slum dumps with the intention of selling them, and the material agreements and assignments do not show any sale outright of his interests in or arising from the dumps. On the contrary, Henderson in effect continued his interests by taking shares in Gold Dumps Pty. Ltd. and by becoming a director and general manager of that company. He retained his own interests but brought it about that other people put in more capital, thus helping to work the dumps. On this point the decision of *Williams* J. was wrong and the respondent should succeed.

Mulvany referred to *Thomson* v. *Federal Commissioner of Taxation* (2) and to the *Oxford English Dictionary*, *s.v.* "prospecting."

Fullagar K.C., in reply. As to the question of capital or income, the burden of proof is on the taxpayer (Act, s. 190). The acquisition of the original rights in respect of the dumps was the commencement of a profit-making scheme, and that scheme culminated in a sale. There is nothing in the facts of the case to displace the presumption that the assessment is correct and nothing to justify a reversal of the finding and decision of *Williams* J. on this point.

Cur. adv. vult.

June 4.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of *Williams* J. setting aside two amended assessments to income tax made upon A. M. Henderson (since deceased) under the *Income Tax Assessment Act* 1936-1938.

(1) (1935) 55 C.L.R. 80, at pp. 81, 98, 99.

(2) (1923) 33 C.L.R. 73.

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Section 6 of the Act includes in the definition of "income from personal exertion" "any profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale." The taxpayer received certain shares in a company, Gold Dumps Pty. Ltd., as the consideration for the transfer by him to the company of his rights under certain agreements. The Commissioner contended that these rights were acquired by him for the purpose of profit-making by sale, so that the shares constituted part of his income. This question was decided in favour of the Commissioner.

Section 23 of the Act provides that certain income shall be exempt from income tax, including—

"(*p*) income derived by a *bona fide* prospector from the sale, transfer or assignment by him of his rights to mine for gold in a particular area in Australia or in the Territory of New Guinea." "*Bona fide* prospector" is defined for the purposes of this provision. My brother *Williams* accepted the contention of the taxpayer that he was entitled to the benefit of this exemption in respect of the shares already mentioned. But if it is held that the shares were not income within the meaning of the Act, it will not be necessary to consider the meaning and applicability of s. 23 (*p*).

Section 78 of the Act provides that an allowable deduction from assessable income shall be :—

"(*d*) (1) Calls paid by the taxpayer in the year of income on shares owned by him in a mining company or syndicate carrying on mining operations in Australia for gold, silver, base metals, rare minerals or oil."

The taxpayer paid calls on 2,000 shares in the company Gold Dumps Pty. Ltd., which treated certain tailings. The question is whether this company was a mining company which, in treating the tailings, was "carrying on mining operations." This question was decided in favour of the taxpayer.

The evidence showed that Henderson was a metallurgist and assayer who had invented an improved process for treating slum dumps which were the residue of previously treated material. His process made it possible to extract gold in payable quantities from material which previously could not have been profitably treated. The evidence is that Henderson sampled four dumps at Carisbrook in Victoria, and assayed the samples. The result of this investigation was evidently satisfactory, for a syndicate was formed in which he had a fourth interest. The syndicate obtained and exercised options whereby it became entitled "to enter upon and treat for the recovery of gold and other metals" for stated periods the

untreated slum lying in certain specified slum dumps. The interests of the members of the syndicate in the dumps were assigned to a company called Clutha Development Ltd., which undertook to pay royalties to the vendors. The interest of the taxpayer after this assignment consisted in a right to receive royalties from the Clutha company. That company assigned all its interests to Gold Dumps Pty. Ltd. for £35,130, which was paid in cash. The taxpayer assigned to Gold Dumps Pty. Ltd. his interest under the agreement with the Clutha company. The consideration to the taxpayer for his interest was the allotment to him or his nominees of 6,000 shares in the capital of Gold Dumps Pty. Ltd. The taxpayer became a director and the general manager of Gold Dumps Pty. Ltd., which treated the tailings. The Commissioner claims that the 6,000 shares are part of the assessable income of the taxpayer. The taxpayer for some reason paid tax on 2,100 of the shares and the present assessment relates to tax upon the other 3,900 shares.

The first question is whether the shares which the taxpayer received from Gold Dumps Pty. Ltd. constituted a profit arising from the sale by the taxpayer of property acquired by him for the purpose of profit-making by sale. The principles of law which are relevant for the decision of this question are to be found in *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (1) and *Evans* v. *Deputy Federal Commissioner of Taxation (S.A.)* (2): See also *Western Gold Mines N.L.* v. *Commissioner of Taxation (W.A.)* (3). It is unnecessary to re-state the principles which these cases illustrate. I agree with the finding of the learned Judge that the taxpayer originally acquired the rights in the dumps for the purpose of making a profit. What he transferred in consideration of the 6,000 shares were rights to royalties. The evidence does not show, in my opinion, that he acquired these rights for the purpose of re-selling them at a profit. In my opinion the evidence shows that the taxpayer looked for his profit to the use of the rights which he had obtained as distinct from the disposition of those rights. He did not sell his rights for cash. Instead of selling out of the enterprise of working the dumps, he stayed in that enterprise and, instead of realizing his rights in order to make a profit, dealt with the property by assisting the formation of a company in order to obtain the capital necessary to make the royalty rights profitable and to enable him to derive income therefrom: Cf. *Western Gold Mines N.L.* v. *Commissioner of Taxation (W.A.)* (3). In my opinion the contention for the taxpayer upon this question is

(1) (1928) 41 C.L.R. 148. (2) (1935) 55 C.L.R. 80.
(3) (1937) 59 C.L.R. 729.

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right and the assessment, in so far as it includes the sum of £3,900, representing the 3,900 shares received from Gold Dumps Pty. Ltd., should be set aside.

Upon this view (that the shares were not "income") it is not necessary to consider whether the taxpayer was entitled to any exemption of income from tax as a bona fide prospector. I reserve my opinion upon this question.

The other question which arises is whether calls amounting to £1,000 paid in respect of the 2,000 contributing shares taken by the taxpayer in Gold Dumps Pty. Ltd. should be allowed as a deduction from the assessable income of the taxpayer. The question is whether Gold Dumps Pty. Ltd. was a mining company which carried on mining operations in treating the dumps.

It was argued that the dumps, consisting as they did of already treated material which lay upon the surface of the ground, were chattels, and that mining operations are necessarily limited to operations in what is land as distinct from chattels. To support the proposition that the dumps were chattels and not land, reference was made to *Northam* v. *Bowden* (1) and *Golden Horse Shoe (New) Ltd.* v. *Thurgood* (2). It may be conceded that soil or minerals severed from the freehold are chattels and that the primary meaning of the word "mine" is a subterranean excavation for the purpose of getting minerals (*Lord Provost and Magistrates of Glasgow* v. *Farie* (3)). But, as this case shows, "mine" is not a definite term and it is used in other than its primary sense. The *Mines Act* 1928 of Victoria, to which appellant's counsel referred, may be used to show that the word "mine," and the word "mining" used adjectivally, are not limited either to excavation or to subterranean excavation: See *Mines Act*, s. 3 :—definition of "mine" to include a place wherein "any operation for or in connexion" with mining purposes is carried on upon Crown land; definition of "mining purposes" as the purpose of obtaining gold or minerals by any mode or method &c.; and of "to mine" so as to include to "carry wash sift smelt refine crush or otherwise to deal with any earth by any mode or method whatsoever for the purpose of obtaining gold or minerals." Definitions enacted for the purpose of a State statute cannot control the interpretation of a Federal statute, but these definitions show that it would not be inconsistent with the use of those terms in State legislation to hold that the sluicing and treatment of tailings were mining operations.

The evidence is that the company sluiced the dumps and reduced them to floating material, which was then screened, filtered and

(1) (1855) 11 Ex. 70 [156 E.R. 749].
(2) (1934) 1 K.B. 548.
(3) (1888) 13 App. Cas. 657, at pp. 670, 675, 687.

treated chemically by the process developed by the taxpayer. It was then washed, roasted and smelted, so that ultimately gold was produced. The evidence of a mining expert, Mr. V. T. Edquist, showed that, according to the ordinary use of the term, gold mining includes not only excavation of material by digging, or mechanical methods, or hydraulic methods, but also treatment by a battery or otherwise, and by a chemical process, when carried out at the place where the gold-bearing material was obtained. The witness agreed that if material such as concentrates or tailings had been removed from the place where it was produced and treated at some other place (for example, if it were removed from Broken Hill to Port Pirie) the treatment at the latter place would not be described as a mining operation, though the same process at the place of origin would be described as part of the mining operations. His Honour accepted this evidence, and I agree that the work done by Gold Dumps Pty. Ltd. constituted a mining operation.

The memorandum of association of Gold Dumps Pty. Ltd. authorizes the company to purchase and to work mines and mineral properties and to carry on and conduct the business of sluicing, crushing, washing, smelting, &c., ores, metals and minerals. In fact the company did conduct this business. Such operations were mining operations and the company was therefore a mining company.

The calls paid by the taxpayer to the company should therefore have been allowed as deductions, and the assessment which disallowed them was rightly set aside.

In my opinion the appeal should be dismissed.

RICH J. The questions arising in this case which are sufficient to dispose of it are largely questions of fact and as I am in substantial agreement with the judgment of the Chief Justice I do not propose to add anything on my part.

STARKE J. Appeal from a judgment of my brother *Dudley Williams* which set aside an assessment to income tax for the financial year which ended on 30th June 1939 in so far as it included a sum of £3,900 representing the value of 3,900 shares in Gold Dumps Pty. Ltd. and a sum of £1,000 which had been paid in calls on shares held by the taxpayer in Gold Dumps Pty. Ltd.

The facts are somewhat involved but can be summarized. In 1935 one Elford acquired options, which were exercised, " to enter upon and treat for the recovery of gold and other metals for a period up to eight years from the date of the exercise of the " options " the untreated slum lying in the slum dumps " standing upon the lands of the vendors. Elford acquired these rights on behalf of

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himself and certain other persons including the taxpayer. It "was proposed to form a company to treat the said dumps." In July of 1936 Elford and his party, including the taxpayer, granted to Clutha Development Ltd. the sole and exclusive option of acquiring from Elford and of taking over the benefit, advantage, liabilities and obligations of Elford under the option agreements already mentioned and all the right, title and interest of Elford and his party, including the taxpayer, in and to the same respectively. This option was exercised by Clutha Development Ltd. The consideration payable in respect thereof was £1,600 in cash, as to the sum of £100 for the taxpayer Henderson, and £500 each for the other members of the party, and also the payment of a royalty of $7\frac{1}{2}$ per cent of the gross value of the gold won from the dumps from time to time. Clutha Development Ltd., it was provided, might assign its rights and obligations under the option at any time during the currency of the option to any company and in the event of such assignment the liabilities and obligations of Clutha Development Ltd. were forthwith thereupon to be assigned and taken over by such company and Elford and his party were to accept the liability of such company in the place of Clutha Development Ltd. and release and discharge it therefrom. Also in July 1936 the taxpayer Henderson acquired from Elford and the other two members of his party an option to purchase all those their respective interests of, in and to the full benefit and advantage of the option agreements to treat the slum dumps already mentioned and also the agreement with Clutha Development Ltd. This option was also exercised. The consideration for the assignment of these rights was £3,500. The taxpayer Henderson declared that he acquired these rights as trustee for and on behalf of Clutha Development Ltd. and assigned and confirmed to the company such rights. And in 1937 three of the Elford party set over to the taxpayer, who was a trustee for Clutha Development Ltd., all their shares and interests in the option agreements and in the Clutha agreement, which represented one-fourth share each of the royalty already mentioned. The taxpayer, however, retained his right to one-fourth share of the royalty.

On 11th October 1937 a company called Gold Dumps Pty. Ltd. was incorporated in New South Wales, of which the taxpayer Henderson was a director and the general manager. Clutha Development Ltd., was, I gather, a promoter of this company. On the same day Clutha Development Ltd. and the taxpayer Henderson sold to Gold Dumps Pty. Ltd. all that and those the full benefit and advantage of and in the option agreements to treat the slum dumps already mentioned, the full benefit and advantage of and in an option agreement in respect to a tailings licence, also a licence to

treat tailings, the registration of a dam site and a protective registration in respect of certain sand and slum stacked in a certain district called the Smythesdale district. The consideration payable by Gold Dumps Pty. Ltd. to Clutha Development Ltd. was the sum of £35,130 and to the taxpayer Henderson for his share and interest in the said licences, mining rights or titles was 6,000 shares fully paid up in the capital of Gold Dumps Pty. Ltd. to be allotted and issued to the taxpayer or his nominees. This agreement recited that the taxpayer was entitled to a certain share and interest in the rights " in respect of the said slum dumps option licences mining rights and titles."

During the lifetime of the taxpayer the Commissioner had assessed him to tax in respect of the value of 2,100 of these 6,000 shares, and he had paid tax in respect thereof. And since his death the Commissioner has amended the assessment and brought to charge the value of the balance of the 6,000 shares. The capital of Gold Dumps Pty. Ltd. is divided into shares of £1 each, and the Commissioner has assessed the shares received by the taxpayer at their face value as income of the taxpayer assessable to income tax for the financial year which ended on 30th June 1939.

My learned brother held that the value of these shares constituted income from personal exertion in that they were a profit arising from the sale by the taxpayer of property acquired by him, that is, the right to treat the slum dumps, for the purpose of profit-making by sale or from the carrying on or carrying out of a profit-making undertaking or scheme—See *Income Tax Assessment Act* 1936-1938, s. 6 : " income from personal exertion ". But he further held that the value of these shares was exempt from income tax under the provisions of the Act, s. 23 (*p*). This section exempts from income tax " income derived by a *bona fide* prospector from the sale, transfer or assignment by him of his rights to mine for gold in a particular area in Australia. . . . For the purpose of this paragraph, '*bona fide* prospector' means a person . . . who has personally carried out the whole or major part of the field work of prospecting for gold in the particular area, or who has contributed to the expenditure incurred in the work of prospecting and development in that area."

In my opinion, neither conclusion can be sustained. It is true enough that the Elford party did not intend to work the option agreements to treat the slum dumps themselves : they proposed, as the Clutha agreement recites, to float a company to treat the dumps : they set over or assigned the right to treat the dumps for a cash consideration of £1,600 and a royalty of 7½ per cent on the gross value of the gold from time to time won from the dumps. The

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Clutha agreement is better described as a working arrangement than a sale which involves a money consideration called the price. No profit arising from any sale arises under this agreement. Further, the recital in the agreement and the agreement itself are cogent evidence that the rights under the option agreements were not acquired by the Elford party, including the taxpayer, for the purpose of profit-making by sale. Moreover, the 6,000 shares in Gold Dumps Pty. Ltd. were not allotted to the taxpayer or his nominees in consideration of the setting over the rights under the option agreements to treat the slum dumps. The rights of the Elford party, including the taxpayer, in these option agreements had been set over to Clutha Development Ltd., and all they were entitled to was the £1,600, which, I gather, was paid, and the royalty rights. Clutha Development Ltd. and the taxpayer Henderson sold to Gold Dumps Pty. Ltd. the full benefit of the option agreements to treat the slum dumps and some other interests mentioned in that agreement for sale. But all that the taxpayer had and all that he sold to Gold Dumps Pty. Ltd. was his one-fourth share in the royalty and perhaps the other interests mentioned in that agreement. It was for these rights that the taxpayer had allotted him and his nominees 6,000 shares in Gold Dumps Pty. Ltd. The taxpayer's share in the royalty appears to have been commuted for shares. Instead of royalties the taxpayer was now to receive dividends if and when declared. Profits from a sale of the slum-dumps option rights do not arise from this transaction. And, if it be suggested that the profits arise from the sale of the royalty rights and that these were acquired by the taxpayer for the purpose of sale, the answer is that, though the taxpayer in form sold those rights, still he sold them for shares for the purpose of making profits in the working of the slum dumps and not by sale of the royalty rights. As already mentioned, the taxpayer became a director and the general manager of Gold Dumps Pty. Ltd., which is cogent evidence of his purpose in disposing of his royalty rights. No doubt the acquisition of the slum dumps was for a profit-making purpose—not by way of sale—but by way of royalties or dividends on shares. Consequently the value of the 6,000 shares was not assessable to income tax. The value of 2,100 of the taxpayer's shares was assessed to tax in his lifetime and tax paid thereon, but the Court is powerless to correct that assessment in these proceedings ; but I should think that the Commissioner will himself make the necessary correction when he learns that the assessment was contrary to law.

It is not necessary in this view to determine whether the taxpayer was entitled to the exemption from income tax in respect of the value of the 6,000 shares already mentioned pursuant to s. 23 (*p*)

of the *Income Tax Assessment Act* 1936-1938. But, as my brother *Williams* held that the taxpayer was exempt from assessment under this section, and the matter is of no little public importance, and the parties argued it at length, it is perhaps desirable that this Court should deal with that decision.

Income derived by a bona fide prospector from the sale, transfer or assignment by him of his rights to mine for gold in a particular area in Australia is exempted from tax. The Elford party, including the taxpayer, had no rights to mine. All they ever had was a right to enter upon and treat for the recovery of gold and other metals the untreated slum in the slum dumps. The material of the slum dumps had long before been excavated from the earth, or mined, and lay stacked on the surface as waste material. Further, the Elford party, including the taxpayer, were not prospectors within the meaning of the section. A prospector for the purposes of the section is one, I take it, who bona fide explores a region or an area for gold. The section contemplates field work, development of the area explored for the purpose of recovering gold. The Elford party, and the taxpayer in particular, did not explore any region or area for gold or anything else. All they or any one of them did was to assay and estimate the gold contents of slum dumps. The sites of these dumps were well known, and it was common knowledge that they contained gold too fine to be seen which had not been recovered by the methods used when the material in the dumps was originally treated. But to call a person who assays these dumps for the purpose of determining whether they are worth re-treating by improved methods a prospector is a novel use of the word and one, I am persuaded, quite contrary to the accepted meaning of the word in English and amongst mining men.

"A prospector," I observed in *Thomson* v. *Federal Commissioner of Taxation* (1), "in the ordinary use of the word, is one who explores a region for minerals and endeavours to establish their existence." Of course that is a description and not an exhaustive definition, but it represents fairly well, I think, the general characteristics of a prospector; but it does not fit the Elford party or the taxpayer in the present case.

There remains for consideration the deduction of £1,000 from the taxpayer's income allowed by my brother *Dudley Williams* in respect of calls on shares in Gold Dumps Pty. Ltd. A deduction is allowed by the *Income Tax Assessment Act* 1936-1938, s. 78 (1) (*d*), subject to certain provisions immaterial to this case, in respect of "calls paid by the taxpayer in the year of income on shares owned

(1) (1923) 33 C.L.R. 73, at p. 75.

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by him in a mining company . . . carrying on mining operations in Australia for gold." The deduction is claimed in respect of calls on shares held by the taxpayer in Gold Dumps Pty. Ltd., which worked the slum dumps already mentioned but carried on, as I understand, no other operations. They were worked by hydraulic power and the material conveyed to a plant, where it was treated by the well-known cyanide process (See *Cassel Gold Extracting Co., Ltd.* v. *Cyanide Gold Recovery Syndicate Ltd.* (1)) as modified or improved by the taxpayer, and the gold in the slum thus recovered. The operation carried on by Gold Dumps Pty. Ltd. was, I agree with my brother *Dudley Williams*, a mining operation. The company had no right to mine the slum dumps, but still I think that its operations were mining operations and that it is consequently rightly described as a mining company, as also appears from its memorandum of association. Large dumps of mined material were stacked on the surface of the ground, and this material was conveyed by means of hydraulic power to a plant where it was treated by a cyanide process and the gold contained in it recovered. Had this operation been carried out in series when the gold-bearing material was mined and brought to the surface, there can be little doubt, though not conceded in argument, that the operation would have been properly described as a mining operation. And there is no reason why such an operation should not fall within the indefinite description " mining operations " because it is carried out at a later date and by another operator. The dumps were worked by methods in common use amongst mining men for the recovery of gold, and the gold was recovered by an ordinary mining method or process.

In the main the question is one of fact, and I agree, as I have said, with the finding of my brother *Dudley Williams*. But I wish to reserve my opinion whether smelting and treatment companies who acquire and treat concentrates, tailings or slum for the recovery of gold or other metals are carrying on mining operations. Nothing I have said, I feel it right to say, leads to or supports that conclusion; the question, so far as I am concerned, remains undetermined. Although I am not in agreement with all the reasons and conclusions given by my brother *Dudley Williams*, still his formal judgment was right and this appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for the respondent, *Arthur Phillips & Just.*

E. F. H.

(1) (1894) 11 R.P.C. 638; (1895) 12 R.P.C. 232.