[HIGH COURT OF AUSTRALIA.]

WARNER BROTHERS FIRST NATIONAL PICTURES PROPRIETARY LIMITED . } APPELLANT;

AND

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

H. C. OF A. 1945.

SYDNEY, *Nov.* 22; *Dec.* 19.

Williams J.

Taxation—Company—War-time profits—Taxable profits—"Capital employed"—"Employed in Australia"—"Accumulated profits"—Subsidiary company in Australia—Moneys remitted on loan to parent company in United States of America—Interest thereon paid to subsidiary company—War-time (Company) Tax Assessment Act 1940-1941 (*No.* 90 *of* 1940—*No.* 56 *of* 1941), *ss.* 3, 24 (1).

In order to ascertain the "capital employed" for the purposes of s. 24 of the *War-time (Company) Tax Assessment Act* 1940-1941, the definition of those words as appearing in s. 3 of the Act must be read into each of the additions and deductions required to be made by s. 24 (1).

From its accumulated profits a subsidiary company in Australia remitted to its parent company in the United States of America, on loan, a sum which, averaged over the accounting period, amounted to £146,676. Interest on the loan, paid to it by the parent company, was included by the subsidiary company as part of its assessable income.

Held that the said sum was not "capital employed" within the meaning of s. 24 of the *War-time (Company) Tax Assessment Act* 1940-1941.

APPEAL from the Board of Review.

Warner Brothers First National Pictures Pty. Ltd. appealed to the High Court against a decision by the Board of Review disallowing an objection by the company arising out of its assessment under the *War-time (Company) Tax Assessment Act* 1940-1941 for war-time company tax in respect of its taxable income derived during the year ended 30th June 1941.

Section 24 (1) of the *War-time (Company) Tax Assessment Act* 1940-1941 provides, so far as material, that, subject to s. 25, the capital employed in any accounting period should, for the purposes of the Act, be ascertained by adding:—(*a*) the capital paid up in money or by other valuable consideration, averaged over the accounting period; (*b*) accumulated profits, averaged over the accounting period, including amounts standing to the credit of the profit and loss account at the commencement of the accounting period but not including any profit of the accounting period; (*c*) any reserve, averaged over the accounting period, which had been created out of premiums received on the issue of shares; (*d*) the amount by which the value prescribed by sub-s. (2), (3), or (4) of s. 24 as the value of any asset to which that sub-section applied exceeded the value of that asset as appearing in the accounts of the company at the commencement of the accounting period or, if no such value appeared in the accounts of the company at the commencement of the accounting period, the amount prescribed by that sub-section; and deducting therefrom—(i) the amount by which the value of any asset to which sub-s. (2), (3), or (4) applied as appearing in the accounts of the company at the commencement of the accounting period exceeded the value of that asset prescribed by that sub-section; (ii) any capital, averaged over the accounting period, the income (if any) from which was not or would not be taken into account in assessing the income of the accounting period under the *Income Tax Assessment Act*; and (iii) any capital, averaged over the accounting period, invested in shareholdings in any other company.

The appeal was heard by *Williams* J. in whose judgment the material facts and other relevant statutory provisions are sufficiently set forth.

Kitto K.C. (with him *Leslie*), for the appellant.

Sugerman K.C. (with him *Chambers*), for the respondent.

Cur. adv. vult.

Dec. 19.

WILLIAMS J. delivered the following written judgment:—

This is an appeal from a decision of the Board of Review disallowing an objection by the appellant company arising out of its assessment for war-time company tax in respect of its taxable income derived during the year ended 30th June 1941. By the *War-time (Company) Tax Act* 1940, s. 4, a tax is imposed upon the amount by which the taxable profit of any company subject to the Act exceeds

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the percentage standard. This Act was amended in certain respects in 1941. The Act which relates to the imposition, assessment, and collection of the tax is the *War-time (Company) Tax Assessment Act* 1940. This Act was also amended in certain respects in 1941. Section 13 of the Assessment Act is to the same effect as s. 4 of the Tax Act. Section 19 of the Assessment Act provides that the percentage standard shall be an amount equal to the statutory percentage of the capital employed or deemed to be employed during the accounting period. Section 20 of the Assessment Act 1940 fixed the statutory percentage at eight per cent. The amending Act of 1941 reduced this percentage to five per cent in the case of assessments for the financial year beginning on 1st July 1941 and all subsequent years. The percentage in the present case was therefore eight per cent. Section 3 of the Assessment Act provides that unless the contrary intention appears " accounting period " and " taxable profit " have the meanings therein mentioned, and that " capital employed " means the capital of a company employed in Australia or in a Territory of the Commonwealth in gaining or producing the taxable profit.

During the accounting period, which it is agreed was the twelve months ended 30th June 1941, the appellant company had a sum, which it is agreed represented accumulated profits, and which, it is also agreed, averaged over the accounting period, amounted to £146,676 employed in the following manner. The appellant company is a subsidiary of Warner Bros. Pictures Inc., a company incorporated in the United States, and this sum represented moneys of the appellant company remitted to the United States, and lent by the appellant company to the parent company. During the year ended 30th June 1941 the parent company paid the appellant company interest at the rate of one and a half per cent on the debt and this interest was returned as part of its assessable income. It was not contended before me, as it was contended before the Board of Review, that this sum of £146,676 represented capital employed in Australia in gaining or producing the taxable profit. But it was contended before me, as it was alternatively contended before the Board of Review, that this sum, although it was in fact employed in the United States, was nevertheless accumulated profits required to be taken into account in the ascertainment under s. 24 of the Assessment Act of the capital of the appellant company employed in the accounting period. The Board of Review rejected both contentions, and with respect to the second contention, which is the only one with which I am concerned, considered that s. 24 must be read with the definition of capital employed, and that the definition must be read into each of

the additions and deductions required to be made by the section in order to ascertain the capital employed.

Upon the appeal it was agreed that the evidence before the Board of Review should be tendered and considered to be evidence given on the appeal, and no further evidence was tendered by either party. The sole question for determination on the appeal is whether this sum of £146,676 formed part of the capital employed or deemed to be employed by the appellant company during the accounting period within the meaning of s. 24. In *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) it was held that the word " capital " in the Assessment Act refers in general to commercial capital. Section 24 of the Act provides an artificial criterion by which the amount of commercial capital employed in any accounting period is to be ascertained in the first instance, but this amount can be increased in accordance with s. 25 in the circumstances therein mentioned.

In *Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2) I referred shortly to the operation of s. 24. In determining the capital employed by a company in any accounting period the respondent is bound by the provisions of this section, because it is only a company and not the respondent which can apply under s. 25 for a determination that a greater amount than that ascertained under s. 24 shall be treated as the capital employed for the purposes of the Act. The words " capital employed " occur in ss. 19, 21, 23, 24, and 25 of the Act. Wherever they occur, the definition requires that unless the contrary intention appears they shall mean capital of a company employed in Australia or in a Territory of the Commonwealth. But it is contended on behalf of the appellant company that s. 24 is itself a definition of what is meant by capital employed in Australia or in a Territory of the Commonwealth, and that this section, which is mandatory, requires that this capital shall be determined by the process of additions and deductions therein prescribed and by that process alone so that no other additions or deductions can be taken into account. As s. 24 (1) (*e*) only applies to life assurance companies it can be disregarded for the purposes of this appeal, so that the additions which must be taken into account are those enumerated in sub-s. (1) (*a*), (*b*), (*c*) and (*d*). Sub-section (1) (*b*) provides that one amount to be added is the accumulated profits of a company averaged over the accounting period, including amounts standing to the credit of the profit and loss account at the commencement of the accounting period. Admittedly the debt of £146,676 repre-

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

(2) (1944) 69 C.L.R. 257, at pp. 261, 262.

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sents accumulated profits of the appellant company which were in fact employed outside Australia and its Territories in the accounting period, but it is contended, as I have said, that s. 24 (1) (*b*) requires that all accumulated profits shall be regarded as part of the capital employed for the purposes of the section whether in fact employed within or without Australia or its Territories. I am unable to accept this contention, which fails to give any effect to the definition of capital employed in s. 3. Effect must be given to this definition in the absence of a contrary intention, and no such intention can, in my opinion, be found in s. 24. This section is intended, no doubt, to include in the capital employed by a company, to the extent allowed by the definition, the whole of the capital subscribed in money or other valuable consideration and the whole of the profits which a company has accumulated and is using in its business instead of distributing these profits by way of dividend to its shareholders, and is therefore capable of including shareholders' funds which have been lost and are no longer represented by available assets. But the section also contemplates that these funds, to the extent to which they have not been lost, and are no longer represented by available assets, will be found invested in the assets which constitute the commercial capital of the company. The section looks not merely to the liabilities side of the balance sheet of a company as counsel for the appellant company contended, but to the assets side as well. The additions provided for in s. 24 sub-s. (1) (*a*), (*b*) and (*c*) are additions of items which would appear on the liabilities side of the balance sheet of a company and would represent the whole of the shareholders' funds. But the amounts of these items, and particularly the amount of the accumulated profits, could be affected by the values placed upon the commercial assets on the credit side of the balance sheet. Sub-section (1) (*d*) and (1) (*i*) therefore provide for the addition to or subtraction from the addition already made of any increase or decrease due to substituting the values prescribed for the commercial assets by sub-ss. (2), (3) and (4) for the values placed upon these assets in the accounts. It is also necessary to trace the shareholders' funds into the commercial assets in order to make the deductions prescribed by s. 24 (1) (ii) and (iii). This tracing of the capital employed in any accounting period into the commercial assets of a company is also required by s. 21 of the Act, because it is necessary under this section for the commissioner to form an opinion whether the whole or part of the capital employed by a company is employed in carrying on the class of business for which a greater statutory percentage than that allowed by s. 20 has been prescribed.

Section 25 of the *Income Tax Assessment Act* divides companies into resident and non-resident companies. Where a company is resident its assessable income includes the gross income derived directly or indirectly from all sources whether in or out of Australia which is not exempt income; where a company is non-resident its assessable income only includes the gross income derived directly or indirectly from all sources in Australia which is not exempt income. Each class of company is liable to be assessed for war-time company tax. The construction of s. 24 contended for by the appellant company would create obvious difficulties in the case of non-resident companies, as the taxable profit of such companies would be confined to income derived from a source in Australia (in which the Territory of Papua is included). The scheme of the Act would therefore appear to require that the percentage standard should be calculated upon income derived from commercial capital employed by such companies in Australia or in a Territory of the Commonwealth. Resident companies can be divided into two classes, namely those companies which have all their commercial capital employed in Australia or in a Territory of the Commonwealth, and those companies which have part of their commercial capital so employed and the residue employed outside Australia and its Territories. In the case of a resident company in the former class there would be no difficulty in construing s. 24 so as to accord with the definition. In the case of resident companies in the latter class, income derived from capital employed outside Australia and its Territories would usually be exempt under s. 23 (*q*) of the *Income Tax Assessment Act*. In the case of companies therefore to which the *War-time (Company) Tax Assessment Act* applies the excess of taxable profit over the percentage standard on which war-time company tax is levied would almost invariably be an excess of taxable profit derived from capital employed in Australia or its Territories.

It is the duty of the Court to read the language of an Act as a whole and to give effect, if possible, to all its provisions. The words "capital employed" in s. 24 should therefore be construed if possible so as to give effect to the meaning attributed to these words in the definition. The construction of taxation Acts should be approached in a practical and not technical manner, but, for the reasons already given, there do not appear to be any practical difficulties in the way of reading the definition of "capital employed" into s. 24; on the contrary, it would appear to be necessary to construe the section in this manner, if it is to be given a fair and reasonable operation in the case of non-resident companies. It is true that the capital required to be deducted by s. 24 (1) (ii) would in terms include

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capital the income from which is exempt from income tax under s. 23 (*q*) of the *Income Tax Assessment Act*. But when the words " capital employed " in s. 24 are construed to mean capital employed in Australia or a Territory of the Commonwealth, sub-s. (1) (ii) must be read as applying to income derived from such capital which is exempt from income tax under some other provision of s. 23.

For these reasons I agree with the Board of Review that so much of the accumulated profits of the appellant company averaged over the accounting period as were employed in the loan to the parent company were not capital employed within the meaning of s. 24, so that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Ernest Cohen & Linton.*

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

J. B.