

[HIGH COURT OF AUSTRALIA.]

TINDAL APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXA- }
TION } RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Assessable income—Deceased estate—Income from residue payable to widow—Estate’s share in partnership business—Decretal order—Widow declared entitled to interest at fixed amount on value of share as representing income—Amounts credited to trust fund—Payment thereof to widow in any one year less than or greater than fixed amount—Inclusion in assessable income—Derived—“Presently entitled”—Quantum—Income—Deficiency—Recourse to capital—Income in hands of widow—Derivation from personal exertion or property—Income Tax Assessment Act 1936-1940 (No. 27 of 1936—No. 17 of 1940), ss. 17, 19, 97 (1).*

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SYDNEY,
Aug. 9, 23.
Latham C.J.,
Rich, Starke,
Dixon and
Williams JJ.

Under a will and a decretal order made in respect thereof, a life tenant was entitled to receive the annual sum of £1,844 charged upon both income and capital. Up to 30th June 1939, she was entitled to receive £27,189, but had actually received only £24,395. During the year ended 30th June 1940 she became entitled to a further £1,844 and was paid £2,858. It was not clear whether the difference between these two amounts represented arrears from previous years, or whether it was paid from capital or income. The beneficiary claimed that she was “presently entitled” (within the meaning of s. 97 (1) of the *Income Tax Assessment Act 1936-1940*) to £1,844 only, and that the amount received in excess of that sum should not be included in her assessable income for the year ended 30th June 1940 on the ground that it represented arrears of amounts to which she had become entitled in previous years.

Held, by Rich, Starke, Dixon and Williams JJ. (Latham C.J. dissenting), that in the circumstances the whole of the sum of £2,858 should be included in the beneficiary’s assessable income for the year in question.

Held, further, by the whole Court, that income derived from a trust estate by a beneficiary thereof is not “income from personal exertion” as defined in s. 6 of the *Income Tax Assessment Act 1936-1940*, and, therefore, is, for the purposes of that Act, “income derived from property.”

Syme v. Commissioner of Taxes (Vic.) (1914) A.C. 1013, distinguished.

REFERENCE from the Board of Review.

Objections to an assessment of Gladys Clare Tindal to tax under the *Income Tax Assessment Act* 1936-1940 having been disallowed, were, at her request, referred to the Board of Review. Upon the matter coming on to be heard before it, the Board of Review, at the request of the Federal Commissioner of Taxation, referred the matter to the High Court and set forth the facts substantially as follows :—

1. The taxpayer is the widow of Charles Henry Tindal deceased.
2. The deceased died on 3rd May 1926 having duly made and executed his last will and testament dated 14th September 1916, probate whereof was granted to Perpetual Trustee Co. (Ltd.) the executor and trustee therein named (hereinafter referred to as the trustee). The deceased by his will, so far as material, gave devised and bequeathed the whole of his real and personal estate to his trustee upon trust to pay all his just debts, funeral and testamentary expenses and to stand possessed of the residue of his estate to pay the income thereof to his wife during her life subject to her maintaining and educating the children of the marriage.

3. At the date of his death the assets of the deceased comprised, *inter alia*, a pastoral property known as "Caramana" and one share in a grazing business carried on in partnership with one W. M. L. Hughes under the name of Tindal and Hughes.

4. Prior to his death but after the date of his will the deceased entered into a partnership agreement with Hughes which agreement was expressed to be for a term of ten years dating from 1st January 1926 and provided, *inter alia*, that if either of the partners should die during the continuance of the partnership the partnership business should be carried on by the surviving partner and the executor of the deceased partner for and during the term of the agreement and upon the terms and conditions therein contained.

5. By an order of the Supreme Court of New South Wales in its Probate Jurisdiction made on 20th May 1927 the trustee was authorized to carry on the partnership business with Hughes for the balance of the term of the partnership agreement, namely until 1st January 1936, or for such shorter period as the trustee in its discretion should consider to be in the interest of the estate of the deceased.

6. The trustee has made further applications to the Supreme Court of New South Wales in its Probate Jurisdiction and orders have been made by that court authorizing the trustee to carry on the partnership business with Hughes until 1st January 1946.

7. Since the death of the deceased the trustee and Hughes have continuously carried on the partnership business. The pastoral

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property "Caramana" was worked by a share farmer or share farmers from the death of the testator until 6th July 1931, when it was sold by the trustee.

8. In or about the month of August 1933 the trustee caused to be issued out of the Supreme Court of New South Wales in its equitable jurisdiction an originating summons for the determination of the following questions :—

- (1) Whether upon the true construction of the will and in the events that have happened Gladys Clare Tindal the widow of the testator is entitled to : (A) the income derived from the partnership business of Hughes and Tindal ; (B) the income derived from the carrying on of the share-farming operations upon the property known as "Caramana," or (C) interest upon the capital value of the assets employed in (a) the said partnership business ; (b) the said share-farming operations ; and if so at what rate of interest and at what date should such assets be valued.
- (2) Whether for the purpose of determining the income to which the widow is entitled the income derived from such share-farming operations must be apportioned between the real and personal estate employed therein and if so in what manner should such apportionment be made.
- (3) In the event of the widow being entitled to receive interest as aforesaid out of what portion of the estate should any deficiency in income be made up and should such deficiency carry interest and if so at what rate and as from what date ?

9. By a decretal order made upon that originating summons on 16th March 1934 the Court declared (1) :—

- (1) That upon the true construction of the will of the above-named testator Charles Henry Tindal deceased and in the events that have happened the defendant Gladys Clare Tindal the widow of the testator Charles Henry Tindal was entitled to interest at the rate of £4 10s. per centum per annum from the date of the death of the testator on the capital value of the share of the testator in the partnership business of Hughes and Tindal ascertained as at 3rd May 1927 whilst such share remained unconverted as representing the income to which she was entitled under the will in respect of the share pending the conversion thereof.
- (2) That, in respect of the share-farming operations carried on since the death of the testator on his dairy farm property

known as "Caramana" which at his death consisted of realty and personalty valued for probate purposes at £11,000 and at £2,491 6s. 6d. respectively, the income actually received therefrom since his death up to the date of the conversion thereof should be apportioned between the realty and personalty in proportion to their respective probate values and that in respect of the realty Gladys Clare Tindal was entitled to so much of the income actually received as bore to the total income the same proportion as the value of the realty bore to the aggregate of the values of the realty and personalty and that in respect of the personalty Gladys Clare Tindal was entitled to interest at the rate of five per cent per annum from the date of the death on the probate value of the personalty as representing the income to which she was entitled under the will in respect of the personalty up to the date of the conversion thereof.

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- (3) That in the event of the income actually received from the carrying on of the partnership and from or in respect of the personalty employed in the share-farming operations respectively being insufficient to pay the aforesaid interest to Gladys Clare Tindal any deficiency of such interest should be made up when funds were available out of the income of the residuary estate of the testator and in so far as such income was insufficient out of the capital of the residuary estate.

- (4) That such deficiency (if any) did not carry interest.

10. Under the decretal order the sum of £1,844 10s. 6d. was the annual amount to which the taxpayer was entitled in respect of the assets employed in the partnership. The total amount due to the taxpayer under the decretal order up to and including 30th June 1935 in respect of the assets was £16,894. The total amount to which the taxpayer was entitled in accordance with the decretal order in respect of "Caramana" up to the time of its sale was £2,917.

11. A schedule marked "C" showed:—

- (1) the amount to which the taxpayer was entitled under the decretal order in respect to the partnership business and "Caramana";
- (2) remittance made to the taxpayer being sums paid by the trustee to her or paid at her request in respect of income tax for which she was liable;

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- (3) the actual receipts of the trustee from the partnership business and “Caramana,” and from other sources in the estate ;
- (4) the total amounts derived by the trustee from the partnership and “Caramana ” and other sources ; and
- (5) progressive totals of items numbered 1, 2, 3, and 4 hereof ; and was as follows :—

	Amount to which taxpayer entitled under the decretal order			Remittances to taxpayer	Trustee's actual receipts			
	From				From			Total.
	Partnership	“Caramana”	Total		Partnership	“Caramana”	Other sources	
	£	£	£	£	£	£	£	£
30/5/1926 to 30/6/1935	16,894	2,917	19,811	13,963	10,909	2,787	773	14,469
Year ended 30/6/1936	1,844	—	1,844	6,606	1,500	—	330	1,830
30/6/1937	1,845	—	1,845	1,201	500	—	156	656
30/6/1938	1,844	—	1,844	1,200	1,000	—	137	1,137
30/6/1939	1,845	—	1,845	1,425	500	—	227	727
30/6/1940	1,844	—	1,844	2,858	2,500	—	9	2,509

Progressive totals of the above	Amount payable to taxpayer	Amount remitted to taxpayer	Amount received by trustee
30/6/1935	£19,811	£13,963	£14,469
Year ended 30/6/1936	21,655	20,569	16,299
30/6/1937	23,500	21,770	16,955
30/6/1938	25,344	22,970	17,092
30/6/1939	27,189	24,395	18,819
30/6/1940	29,033	27,253	21,328

12. In respect of the period from the death of the deceased to 30th June 1935, the trustee credited to an account styled “Income Account ” (which was an account showing the amounts of income to which the trustee considered the taxpayer to be entitled) the actual receipts of the trustee from the partnership business and from “Caramana ” and the net income derived by it from other sources in the estate.
13. Shortly after 30th June 1935 the trustee adjusted its accounts so as to conform to the decretal order by : (a) debiting to the capital account of the estate and crediting income account the sum of £130, being the difference between the amount to which the taxpayer had become entitled in accordance with the decretal order in respect of

"Caramana" (£2,917) and the total receipts derived therefrom (£2,787); and (b) debiting to an account in the estate styled "Tindal and Hughes Partnership Adjustment Account" (hereinafter called the adjustment account) and crediting to the income account the sum of £5,985 being the difference between the amount to which the taxpayer had become entitled up to 30th June 1935 in accordance with the decretal order in respect of the partnership business (£16,894) and the receipts derived from that business (£10,909).

14. The adjustment account was opened in the trustee's books for the purpose of recording the effect of the decretal order, namely, to show the amount of the adjustment due to the taxpayer in respect of past payments to her and to show the amounts thereafter received by the trustee from the profits of the partnership and to show the continuing effect of the order in favour of the taxpayer and the expenses and charges attributable to the amounts received by the trustee as aforesaid. Since 30th June 1935, the practice of the trustee has been to credit the adjustment account with all moneys received by it from the partnership, and to debit that account in respect of each half year with the sum of £922 5s. 3d. (being one half of the said sum of £1,844 10s. 6d.) and to credit income account in respect of each half year, with the sum of £922 5s. 3d. In addition, such income as the taxpayer was entitled to from other sources in the estate has been credited during each year to the said income account. No other amounts since 30th June 1935 were credited to the income account and the taxpayer, under the will or decretal order, was the only person entitled to moneys credited to the income account. From year to year the sums so credited to income account or payable to the taxpayer under the order could have been paid to the taxpayer at any time if she had desired payment thereof from the capital of the estate and/or from the share of the estate in the partnership profits retained by the partnership but there was not at all material times cash available in the estate for that purpose. At all relevant times any amount required by the taxpayer to be paid to her by the trustee or disbursed by it on her behalf was so paid or disbursed. By an arrangement between the taxpayer and the trustee the sums set out under the heading "Remittances to taxpayer" in the fifth column of schedule "C" were out of income account, in the respective years paid to the taxpayer or disbursed at her request in payment of her taxes and debited to income account accordingly. The balances at 30th June for each of the years 1935 and 1940 inclusive standing in the income account, adjustment account and capital account, and also the cash of the estate in the trustee's hands, were as follows:—

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	Income account	Tindal and Hughes adjustment account	Capital	Cash in trustee's hands
As at 30/6/1935	£435 5 11		£5,750 6 7	£6,194 12 6
		Debit		
„ „ 30/6/1936	2,118 12 6	£6,368 1 4	5,966 10 9	1,716 11 11
„ „ 30/6/1937	2,912 13 2	7,725 11 10	5,950 15 9	1,137 17 1
„ „ 30/6/1938	3,694 7 6	8,611 17 4	5,950 15 9	1,033 5 11
„ „ 30/6/1939	4,341 11 3	9,969 7 10	5,934 3 3	306 6 8
„ „ 30/6/1940	3,226 19 2	9,378 17 10	5,917 15 9	Dr. 234 2 11

15. As appears from schedule “C”, as at 30th June 1939 the taxpayer had become entitled in accordance with the decretal order since the death of the deceased to sums totalling £27,189 and had been paid or had had paid on her behalf sums totalling £24,395. During the year ended 30th June 1940 she became entitled to a further sum of £1,844 in respect of the assets employed in the partnership and £9 from other sources making the total amount to which she had become entitled since the death of the deceased £29,033; and during the same year there was paid to her or on her behalf £2,858 making the total amount paid to her or on her behalf since the death of the deceased £27,253. Of this sum of £2,858, the sum of £1,200 was paid to the taxpayer and £1,658 paid on her behalf, in respect of income tax for the years.

15. (a) During the year ended 30th June 1940, the trustee's share of the partnership profits determined in accordance with the *Income Tax Assessment Act* was the sum of £4,935 and during that year the trustee received from the partnership the sum of £2,500. The trustee made its return as trustee for the purposes of the *Income Tax Assessment Act* and included the £4,935 in its return of which amount the sum of £4,819 was treated by the Commissioner of Taxation as income from personal exertion in the hands of the trustee of the estate.

16. In respect of the year ended 30th June 1940, the taxpayer made a return of her income which showed under “income derived from property” the sum of £2,840 as having been received from the estate of the deceased. Upon adjustment this sum was increased to £2,858, and the Commissioner of Taxation issued to her a notice of assessment accompanied by an adjustment sheet.

17. The taxpayer duly lodged a notice of objection against the assessment on the grounds:—(i) That her share of income from the estate of the deceased should be reduced so that the actual income

assessed against her in respect of that share was the actual income to which she was entitled during the year ended 30th June 1940. That was in respect of income receivable by her through the said estate's interest in the Tindal and Hughes partnership, the amount to be assessed at £1,844 10s. 6d., being the actual amount to which she was entitled during the year ended 30th June 1940, and which had in actual fact been credited to her income account in the estate of the deceased plus the balance of the estate income, excluding partnership income. (ii) That her share of income from the said estate's interest in the said partnership should be taxed in relation to the estate's share of profits from the partnership. That was, the proportion of such share representing personal exertion income must be taxed as personal exertion income and the balance representing property income must be taxed as property income.

18. The Commissioner considered and disallowed the objection and the taxpayer requested him to refer his decision to the Board of Review.

19. The Commissioner accordingly referred his decision to the Board of Review, and, the reference coming on to be heard, the Commissioner requested the Board to refer to the High Court certain questions, and this was accordingly done under s. 196 (2) of the *Income Tax Assessment Act 1936-1940*.

Upon the matter coming on to be heard in the original jurisdiction of the High Court both parties requested *Williams J.* to refer the questions of law to the Full Court, the taxpayer on the ground that their determination would affect her liability to income tax under the *Income Tax Assessment Act 1936-1940* in other years as well as for the year ended 30th June 1940 and the Commissioner on the further ground that similar questions had arisen in the assessment of beneficiaries in other trust estates.

The parties agreed that all the material facts were included in the reference from the Board of Review. On these facts *Williams J.* stated for the consideration of the Full Court the following questions :—

1. Whether (a) the whole, or (b) only £1,844 of the sum of £2,858, paid to or on behalf of the taxpayer by the trustee of the will of Charles Henry Tindal deceased in the year ended 30th June 1940, was included in the assessable income of the taxpayer derived during that year ?

2. In the event of question 1 (a) being answered in the affirmative, whether this sum was income derived from personal exertion or from property ?

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3. In the event of question 1 (b) being answered in the affirmative, whether this sum was income derived from personal exertion or from property ?

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Weston K.C. (with him *Kerrigan*), for the appellant.

Kitto K.C. (with him *E. J. Hooke*), for the respondent.

Cur. adv. vult.

Aug. 23.

The following written judgments were delivered :—

LATHAM C.J. Case stated under the *Judiciary Act* 1903-1940, s. 18, in a reference of questions of law to the Court under the *Income Tax Assessment Act* 1936-1940, s. 196 (2).

Section 97 of the *Income Tax Assessment Act* 1936-1940 contains the following provision: "Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate."

Charles Henry Tindal died on 3rd May 1926, leaving a will under which he gave to his trustee the whole of his estate upon trust to pay debts &c. and to stand possessed of the residue upon trust to pay the income thereof to his wife during her life. The deceased was a partner in a pastoral enterprise and the trustee obtained the leave of the Court to carry on the business in partnership with the surviving partner. The business has been carried on under this authority up to the present time. On 16th March 1934 the Supreme Court in Equity, applying the rule in *Howe v. Lord Dartmouth* (1), declared that the widow was entitled to interest at four and a half per centum per annum from the date of the death of the testator on the capital value of the share of the testator in the partnership business ascertained as at 3rd May 1927 while the share remained unconverted as representing the income to which she was entitled under the will in respect of that share pending conversion. The annual amount which the widow is entitled to receive under this part of the order is £1,844 10s. 6d. The trustee had not paid her this amount in respect of each of the preceding years and, after the order was made, the estate accounts were adjusted to show the amount to which she had been declared to be entitled. The trustee thereafter kept an income account to which £1,844 (or £1,845) per annum was

(1) (1802) 7 Ves. Jun. 137 [32 E.R. 56].

credited as on account of income from the partnership, together with other income which the widow was entitled to receive from the estate. In each year from 30th June 1935 to 30th June 1939 these amounts were credited, but the amounts actually received by the trustee in those years from the partnership were only £1,500, £500, £1,000, £500. In 1940 (i.e. the year ended 30th June 1940) the payment made to the widow was £2,858, made up of £1,844 and £1,014 on account of arrears, some arrears being still outstanding.

The widow was entitled to the whole of the moneys credited to the income account, so far as they existed, but there is no evidence of any dealing with any moneys actually under the trustee's control which would bring into operation the provision of s. 19 of the *Income Tax Assessment Act* that income shall be deemed to have been derived by a person although not actually paid over to him but re-invested, accumulated &c. or otherwise dealt with on his behalf or as he directs. Over the whole period from the death of the testator to 30th June 1940 the amount payable to the taxpayer under the order of the court on account of her interest in partnership income was £29,033: the amount actually paid to her was £27,253, but the amount which the trustee received was only £21,323. The Commissioner did not rely upon s. 19 in the argument.

In each year the widow was entitled to receive £1,844 from income or, if income was deficient, from the capital of the estate. In fact actual payments were made to the widow in respect of moneys derived from the partnership as follows:—

Year ended 30th June 1936	£6,606
" " " " 1937	1,201
" " " " 1938	1,200
" " " " 1939	1,425
" " " " 1940	2,858

All of these amounts were treated by the Commissioner as assessable income in respect of the years in which they were received. It is now contended for the taxpayer that the Commissioner should, by reason of s. 97 of the Act, have included the sum of £1,844 in assessable income in each of the years 1937, 1938 and 1939 though the sums received by the taxpayer were in fact the smaller sums above stated. The result would be that in respect of the year ended 30th June 1940 the sum of £1,844 derived from the partnership should be regarded as part of the assessable income of the widow, but the balance derived from the partnership, namely £1,014 (i.e. the rest of the sum of £2,858) should have been included in her assessable income and taxed in the preceding year or years when it (or part of it) became a sum to which the beneficiary was then presently entitled. The result of

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accepting this contention would be that the taxpayer ought to have paid tax in each year 1937 to 1939 upon an income which included the sum of £1,844, i.e. upon larger amounts in past years, and upon a smaller amount in 1940. The taxpayer presents this argument by reason of the increase in rates of taxation made in recent years.

The first question submitted to the Court is: "Whether (a) the whole, or (b) only one thousand eight hundred and forty four pounds (£1,844) of the sum of two thousand eight hundred and fifty eight pounds (£2,858) paid to or on behalf of the taxpayer by the trustee of the Will of Charles Henry Tindal deceased in the year ending 30th June 1940 is included in the assessable income of the taxpayer derived during the said year."

The case stated assumes that receipts by the taxpayer under the order of the court are her income, even though the order provides that if there is a deficiency in income recourse may be had to capital. This assumption is, in my opinion, rightly made. The fact that an annuity is paid out of capital does not affect the character of the payment in the hands of the annuitant (*Brodie's Trustees v. Inland Revenue Commissioners* (1); *Ewing v. Commissioner of Taxation* (2)).

In order to answer the question submitted it is necessary to decide (1) whether, upon the true construction of s. 97 of the Act, the assessable income of a beneficiary includes a share of the net income of a trust estate independently of actual receipt of that income by the beneficiary; (2) if so, whether the facts stated in the case show that the sum of £1,014 actually received on account of arrears by the beneficiary in 1940 was a share in the net income of the trust estate to which the beneficiary had become presently entitled in a year or years preceding the year 1940.

As to the first question I am of opinion that, when s. 97 applies, the result is that the assessable income of a beneficiary does include his share of the net income of the trust estate, whether or not that income is paid to him. Otherwise the section would produce no effect in relation to assessment or payment of tax. Sections 95-99 are designed, in my opinion, to secure payment of tax upon the whole of the net income of a trust estate, either from a beneficiary or the trustee, whether or not that income is paid over to or on account of the beneficiary.

Section 95 defines "net income" as meaning the total assessable income of the trust estate calculated under the Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions, with certain exceptions. Subsequent sections, in my opinion,

(1) (1933) 17 Tax Cas. 432.

(2) Noted (1928) 2 A.L.J. 246.

provide for the exaction of tax in respect of that net income where beneficiaries are presently entitled to it and where they are not so entitled—i.e., in all cases.

Section 96 provides that, except as provided in the Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate. Accordingly, in any case where it is not provided that a trustee is “liable to pay” tax on the income of a trust estate, the position is either that the beneficiary (the only other possible person concerned) pays tax (at some time) or that no tax is payable. In the present case the ordinary roles of revenue officer and taxpayer are reversed, the former contending that tax is not assessable and payable except upon moneys received, and the latter contending that tax is payable upon income even though not actually received.

An analysis of ss. 97-99 shows that three cases are dealt with.

(1) A beneficiary presently entitled to a share in the income of a trust estate—s. 97. In this case the beneficiary’s share of the net income is included in his assessable income. It therefore enters into the calculation of his “taxable income”: See definition of the latter phrase in s. 6. The trustee is not liable to pay tax in a case falling within s. 97—see s. 96, already quoted.

(2) A beneficiary presently so entitled but under a legal disability—s. 98. In this case the trustee is “assessed and liable to pay tax” in respect of that share of the net income as if it were the income of an individual.

(3) No beneficiary presently so entitled or there is a part of the income to which no beneficiary is presently entitled—s. 99. In this case also the trustee is “assessed and liable to pay tax” on the net income or the part of the income as the case may be.

The express provisions in ss. 98 and 99 that the trustee shall be “liable to pay tax” are rendered necessary by the provision of s. 96 that, except as provided in the Act, a trustee shall not be “liable as trustee to pay income tax upon the income of the trust estate.”

In cases (2) and (3) tax is paid quite independently of any receipt of income by a beneficiary. It would be strange if tax were payable independently of receipt in the cases specified in ss. 98 and 99 and not in the case specified in s. 97. The position is, in my opinion, the same in each case. The inclusion of the income in the assessable income of the beneficiary is stated by s. 97 to depend merely upon the *right* of the beneficiary to receive it—the fact that he is “presently entitled.” The result of such inclusion is necessarily that the beneficiary is assessed to tax and pays tax accordingly. If it were held that, though the income of a beneficiary presently entitled must be included in his assessable income, he could not be taxed in respect

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of it unless it were also shown that he had actually chosen to draw the income, the result would be that s. 97 would have no effect. The section does not relieve the trustee of any liability, because the trustee is not liable unless he is declared to be liable—s. 96. If the section does not impose some liability upon the beneficiary which would otherwise not exist, it does nothing. The other provisions of the Act secure the assessment and payment of tax upon income which is received by the beneficiary. It is the function of s. 97 to make a special provision for assessment and consequent taxation in the case of a beneficiary presently entitled, even though the income is not received by him.

Thus, in my opinion, if the taxpayer in the present case was presently entitled to £1,844 as income of the trust estate in the years preceding 1940 (in which she was actually paid smaller sums by the trustee) the sum of £1,844 should have been included in her assessable income in each of those years, although that sum was not paid to her. The result of this view is that the excess of £2,858 over £1,844, namely £1,014, which she received in 1940, should (if it existed so that she could have a present right to it as income) have been returned by her as income in some one or more of the previous years, but not in 1940.

The next question is whether the facts stated bring this case within s. 97; e.g. in the year 1937, when she should have received £1,844, but actually received only £1,201, and the trustee received from the partnership only £500—what was the share of income of the trust estate to which she was presently entitled? The condition of the operation of s. 97 is that the beneficiary should be presently entitled to a share of the income of the trust estate and not be under any legal disability. If this condition is satisfied, the result is that there is to be included in the assessable income “that share of the net income of the trust estate”, a phrase which must mean the share of the “net income” to which the beneficiary is presently entitled, although the opening words of the section are “a share of the income”, not of “the net income.” It is therefore necessary to ascertain the net income of the trust estate in relation to any year in respect of which the question arises.

Under s. 95 in order to ascertain “the net income of a trust estate” it is necessary to ascertain the total assessable income of the trust estate calculated under the Act as if the trustee were a taxpayer. In the present case the trustee is carrying on business in partnership, and therefore s. 92 of the Act is applicable to the trustee (not to the widow, who is not a partner). Section 92 (1) provides that the assessable income of a partner shall include “his individual interest in the

net income of the partnership of the year of income." This individual interest is assessable income, whether or not the partner draws it out of the partnership funds. He cannot avoid assessment and taxation by abstaining from drawing his share of profits from the partnership. Thus in the present case the net income of the trust estate in any year, so far as it is derived from the partnership business, includes the interest of the trustee in that year in the net income of the partnership.

But the assessable income of the trustee does not include any capital moneys, though, as in this case, such moneys may be paid over by the trustee to satisfy the right of a beneficiary to income. Moneys provided by a realization of capital in order to satisfy a right of a beneficiary to income would (as already stated) be received by the beneficiary as income, but nevertheless could not be part of the net income of a trust estate to which he was presently entitled within the meaning of s. 97, because they would not be included in the income of the trust estate calculated under the Act in accordance with s. 95 as if the trustee were a taxpayer. Payments made out of the capital of the estate can be disregarded for the purposes of s. 97. The trustee could never be a taxpayer in respect of proceeds of realizations of capital even though those proceeds were applied to satisfy a claim of a beneficiary to income.

There is no definite statement in the case stated that no moneys paid to the taxpayer as income were paid out of capital. In par. 14 of the case it is stated that the sums payable to the taxpayer under the order of the court "could have been paid to the taxpayer at any time if she had desired payment thereof from the capital of the said estate and/or from the share of the said estate in the partnership profits retained by the said partnership but there was not at all material times cash available in the estate for that purpose." The inference is that neither capital nor profits retained by the partnership were drawn upon in order to make payments to the taxpayer.

But the statement quoted from par. 14 of the case suggests that there were from time to time some "retained profits" of the partnership which could have been drawn (but were not in fact drawn) by the trustee at any time if desired. If this is the case the trustee had an "individual interest" in income of the partnership which would be its income as a partner and therefore would be part of the net income of the trust estate as defined in s. 95. But the facts stated do not show that the sum of £1,014 does represent, in whole or in part, any of the income of the partnership in any year prior to 1940. The statement in par. 14 of the case is only that the payments of £1,844 per annum could have been made at any time from capital

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“and/or” retained profits. At a particular time there may have been no retained profits, though arrangements were made to make payments to the beneficiary. Thus the facts as stated do not show that the payment of £1,014 made in 1940 on account of arrears was income of the trust estate to which the beneficiary was presently entitled in any prior year. The facts stated do not go back into the income of the partnership, and therefore upon the facts as stated it cannot be decided whether or not the sum of £1,014 should be included in the assessment of a year or years prior to 1940 and therefore not in the assessment of 1940.

Accordingly, in my opinion, the first question in the case should be answered by stating that £1,844 of the sum of £2,858 is included in the assessable income of the taxpayer during the specific year, but that the facts stated in the case do not show whether or not any further part of the said sum of £2,858 is so included.

The other questions in the case inquire whether either the sum of £2,858 or the sum of £1,844, if included in assessable income, is income derived from personal exertion or from property. The income is income derived by a beneficiary of a trust estate. It does not fall within the definition of income from personal exertion contained in s. 6 of the Act, and it is therefore income derived from property, which is defined as meaning “all income not being income from personal exertion.”

RICH J. By this reference of the Board of Review which comes before us on a case stated by *Williams J.* we are asked to decide two questions concerning an item included in the taxpayer's assessable income which has been derived during the accounting period ended 30th June 1940. The item of income is a sum of £2,858 received by the taxpayer within that period from the trustee of her late husband's estate. Under a decretal order giving effect to the second part of the rule in *Howe v. Lord Dartmouth* (1) the taxpayer as life tenant is entitled to interest at four and a half per cent per annum on the capital value of the share of the testator in a certain partnership business which is still being carried on. The sum of £2,858 consists of an amount of £1,844 representing the interest of the current year payable under the order, the balance being part of arrears from previous years which up to that time had not been paid to the taxpayer. The first question is whether this balance is to be considered as derived during the accounting period in question. I cannot see in the facts contained in the reference anything which would justify us in holding that the amount of this balance was

(1) (1802) 7 Ves. Jun. 137 [32 E.R. 56].

actually derived in any previous year within the meaning of s. 17 of the *Income Tax Assessment Act*. It represents just a figure of an amount due under the decretal order but never paid. It does not appear that in a previous year any actual moneys were appropriated by the trustee and held separately in its hands on account of the taxpayer. This shows too, I think, that s. 19, which was mentioned from the Bench during argument, does not apply so as to require us to deem the balance in question to have been derived by the taxpayer in a previous year. Counsel, however, for the taxpayer relied upon s. 97 (1) as showing that at some time earlier than the accounting period with which we are concerned the taxpayer as beneficiary had become assessable in respect of the total amount due to her from time to time under the decretal order. I cannot think that in s. 97 (1) the words "a share of the income of a trust estate" include the fictional income given to a tenant for life under a decree like that in the present case. Section 95 defines the expression, which relates to the assessable income of the estate as distinguished from the beneficiary. There is nothing to show that in previous years the assessable income of the estate was the source from which the undrawn arrears under the order could and would have been paid had they been drawn. The decretal order contemplates a deficiency as possible and directs that it shall be made up out of capital. I think the reliance on s. 97 is ill-founded. The first question in the reference and in the case stated should therefore be answered: "on the facts appearing the whole of the sum of £2,858." The second question is whether this amount is income from property or personal exertion. It cannot be brought within what, in *The Bohemians Club v. Acting Federal Commissioner of Taxation* (1), I called the artificial definition of s. 6 as income from personal exertion, and therefore is income from property.

The second question should be answered: Income derived from property.

STARKE J. Case stated pursuant to the *Judiciary Act* 1903-1940, s. 18, upon a reference to this Court by a Board of Review of certain questions of law pursuant to s. 196 (2) of the *Income Tax Assessment Act* 1936-1940.

Charles Henry Tindal by his will devised and bequeathed unto his trustee the whole of his real and personal estate upon trust to pay the income thereof to his wife, the taxpayer, for her life and after her decease for her children. The main asset of the trust estate was a share in a pastoral business carried on in co-partnership. The trustee was authorized to carry on this business with the surviving partner.

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By a decretal order of the Supreme Court of New South Wales it was declared that the taxpayer was entitled to interest at the rate of four and a half per centum per annum from the death of the testator on the capital value of the share of the testator in the partnership business whilst such share remained unconverted as representing the income to which she was entitled under the will in respect of the share pending conversion thereof. The order further declared that in the event of the income actually received from the carrying on of the partnership being insufficient to pay the aforesaid interest any deficiency should be made up when funds were available out of the residuary estate of the testator and in so far as such income was insufficient out of the capital of the residuary estate.

The decretal order also contained declarations as to another property which are immaterial for present purposes.

The testator's share in the pastoral business has not yet been converted.

Under the decretal order the sum of £1,844, in round figures, is the annual amount representing income to which the taxpayer is entitled under the will. The total amount to which she became entitled to 30th June 1939 was £27,189 and the amount she had been paid was £24,395.

In the year which ended on 30th June 1940 she was entitled to a further sum of £1,844 and she was paid the sum of £2,858. The Commissioner included in the assessable income of the taxpayer for the year which ended on 30th June 1940 the sum of £2,858 whereas she contends that only the sum of £1,844 should be so included.

The *Income Tax Acts* levy income tax for each financial year upon the taxable income derived by any person during the year of income. The taxable income is the amount remaining after deducting from the assessable income all allowable deductions and the assessable income is the gross income of a resident taxpayer from all sources which is not exempt income. "Derived" is not a technical word. It means arising or accruing or coming in by way of income, not necessarily actually received "but ordinarily that is the mode of derivation" (*Federal Commissioner of Taxation v. Clarke* (1); *Federal Commissioner of Taxation v. Thorogood* (2); *Commissioners of Taxation v. Kirk* (3); *St. Lucia Usines and Estates Co. Ltd. v. St. Lucia (Colonial Treasurer)* (4); *Leigh v. Inland Revenue Commissioners* (5)).

The taxpayer was no doubt entitled to annual payments of income from the testator's estate in accordance with the will of the testator

(1) (1927) 40 C.L.R. 246, at p. 260.

(2) (1927) 40 C.L.R. 454, at p. 458.

(3) (1900) A.C. 588, at p. 592.

(4) (1924) A.C. 508, at p. 512.

(5) (1928) 1 K.B. 73.

and the decretal order, but the sum of £2,858 did not come in by way of income to the taxpayer until the year in respect of which she was assessed. Prima facie, therefore, the Commissioner was right in his assessment.

But the taxpayer relies upon s. 97 (1) of the *Income Tax Assessment Act* 1936-1940: "Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate." That section is the complement of s. 96: "Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate."

The assessable income of the beneficiary is to include the beneficiary's share of the net income of the trust estate. Is that share to be included in the year that it comes to the beneficiary or in the year that it comes into the trust estate? It is unnecessary to resolve that question in the present case.

In the year which ended on 30th June 1940 the trustee's share of the partnership profits was £4,935 and that sum was included in that year in the trustee's income tax returns. The Commissioner treated £4,819 of that sum as income from personal exertion in the hands of the trustee. In the year which ended on 30th June 1940 the trustee however actually received from the partnership only £2,500. But this is all consistent with the view that the sum of £2,858 paid to the taxpayer was part of the net income which came into the trust estate for the year which ended on 30th June 1940.

Accordingly there is nothing in s. 97 (1) which displaces the Commissioner's assessment.

Another question is whether the income of the taxpayer from the trust estate was income derived from personal exertion or from property. The definition of these terms in the Act requires that the question be answered that the sum of £2,858 is income derived from property. *Syme v. Commissioner of Taxes (Vic.)* (1) is distinguishable on the words of the Act.

The questions stated should be answered as follows:—

- (1) (a) The whole.
- (2) The whole of the said sum of £2,858 is income derived from property.

DIXON J. The question upon this reference by the Board of Review concerns the assessable income derived during the year of income ended 30th June 1940 by the tenant for life under the trusts of a will which came into operation in 1926. The chief income-

(1) (1914) A.C. 1013.

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producing asset of the trust estate is the share in a partnership conducting a pastoral business. As the will contained no directions displacing the application of the second part of the rule in *Howe v. Lord Dartmouth* (1), the life tenant, who is the taxpayer, was not entitled to the actual net income of the estate; and, in 1930, the Supreme Court in Equity made a decretal order declaring that she is entitled to interest at the rate of four and a half per centum per annum from the death of the testator on the capital value of the share of the testator in the partnership business, pending conversion. Conversion has not yet taken place. The adjustment which the decretal order necessitated resulted in the crediting to the taxpayer, as life tenant, of a large amount representing underpayment of notional income. This amount she did not immediately draw and each year since then the trustee of the estate has withdrawn a certain amount of the ascertained annual profits of the firm and each year the trustee has credited the taxpayer with the annual amount of notional income or interest to which she is entitled under the terms of the decretal order. At the beginning of the accounting period in question the position was as follows:—The trustee had paid to or on account of the taxpayer a total of £2,794 less than the total to which she had become entitled under the decretal order and which had been credited in the income account accordingly. The trustee, however, had drawn from the profits of the partnership a total amount less by £8,370 than the total sum credited to the income account pursuant to the decretal order. The facts stated in the reference show that there were profits of the partnership which were not drawn, but it does not appear whether the trustee's share of the undrawn profits earned since the death of the testator was or was not sufficient to cover the deficiency of £8,370. It is not clear how this deficiency was dealt with in the accounts of the trustee, but it would seem that it was debited to capital. During the accounting period upon which the assessment is based, the trustee received from the partnership a sum of £2,500 on account of the estate's share of the year's profits, which share amounted to £4,935; it credited the income account with the notional income or interest to which the taxpayer was entitled under the decretal order, being an amount of £1,844; and it paid to or on account of the taxpayer sums amounting to £2,858.

The questions submitted for our consideration are, in substance, first, whether the whole £2,858 so drawn, or only the £1,844 so credited, should be included in the assessable income of the taxpayer derived during the year in question, and, secondly, whether the sum

(1) (1802) 7 Ves. Jun. 137 [32 E.R. 56].

so included should be regarded as income from property or from personal exertion. H. C. OF A.

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The first question is understood to assume for the purposes of the day that independently of the source, that is capital or income, whence the amount is made up, whatever sums are "derived" by the taxpayer pursuant to the decretal order form part of her assessable income: Cf. *Ewing v. Commissioner of Taxation* (1). The point to which the question is directed is whether the payment by the trustee to or on account of the taxpayer of £2,858 constitutes a derivation by her at the time of such payment of the whole sum, or, on the contrary, is no more than the withdrawal by her of part of an accrued amount lying at her credit with the trustee, made up of the balance of amounts credited in past years in the income accounts pursuant to the decretal order. It is contended that in each year in which she became entitled to notional income or interest credited to the income account pursuant to the decretal order, the whole amount, and not her actual drawings, became part of her assessable income and should be, or should have been, included in her assessments accordingly for the then current year. On this footing, the £1,844 to which she became entitled in the accounting period ended 30th June 1940 is, of course, assessable income, and that is not disputed. It is, therefore, the difference between the two sums that is in question, namely £1,014.

In determining whether the amounts of notional income or interest to which she became entitled under the decretal order, independently of any actual payment to her, constituted assessable income of the year current when those amounts accrued due to the taxpayer, it is, I think, necessary to consider three possible positions.

(1) The first requires a little explanation. It must be borne in mind that, although the decretal order gives the life tenant a right to the prescribed rate of notional income both as against the corpus and income of the estate, the primary fund to answer the payments is income. So far as current "income" of the estate would extend, it would be applicable to that purpose and the ultimate fund to make up any deficiency would be the estate's share of undrawn profits of the partnership if they sufficed. In the final accounting, capital would not be called upon to bear the deficiency until the estate's share of all forms of income from the partnership had been exhausted. The gross or net income of the estate for the purpose of this adjustment of the rights of life tenant and remainderman is not necessarily the same in all respects as the assessable or the taxable income for the purposes of liability under the *Income Tax Assessment Act*. But

(1) Noted (1928) 2 A.L.J. 246.

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while these conceptions are not co-extensive, the greater part of the revenue fund is common to both.

If the facts had shown that the excess over £1,844 of the amount of £2,858 paid to or on account of the taxpayer was attributable to undrawn profits of the partnership for a previous year or years, I should have thought that a serious question would have arisen whether ss. 92, 95 and 97 of the *Income Tax Assessment Act* did not combine to show that it was in that year, or those years, that the amount should have been included in the assessable income. Section 97 (1) provides that : " Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate." Section 95 defines " the net income of a trust estate " so that it corresponds with the total assessable income of the trust estate calculated as if the trustee were the taxpayer in respect of that income. Now the trustee in the present case represents a deceased partner and is a partner in the firm. Section 92 (1) provides that the assessable income of a partner shall include his individual interest in the net income of the partnership of the year of income.

In the present case, therefore, there is not a little to be said for the view that, if, in any given year, the actual profits of the partnership earned in that year, drawn and undrawn, sufficed to cover the amount of £1,844 to be credited to the taxpayer pursuant to the decretal order, then she might be assessable for that year of income in respect of the whole amount, and it would not matter that so much of those profits as were actually withdrawn by the trustee in that year would not suffice to cover the amount of £1,844, and it would not matter that the taxpayer in that year drew nothing on account of the amount of £1,844 credited to her under the decretal order.

It would follow that, if the difference between the £1,844 for the year ended 30th June 1940 and the £2,858 paid by the trustee to or for the taxpayer (viz. the £1,014) could be shown to represent accrued credits made in a year or years in which the actual income of the partnership sufficed to cover them, then it might be a consequence that they should have been included in the assessable income of the taxpayer for that year or those years. It would be a corresponding consequence that they were not assessable as income of the accounting period in question upon this reference. Further than this, I do not think that s. 97 (1) affects the question before us, notwithstanding the more extensive reliance placed upon its provisions on the part of the taxpayer.

But the facts stated in the reference do not establish that the money drawn in the accounting period can be properly attributed to such a source as I have described. For, as I said, the facts do not show that the undrawn profits of the partnership in the respective years that may be material would cover the credits made pursuant to the decretal order.

(2) Section 19 of the *Assessment Act* provides that "income shall be deemed to have been derived by a person although it is not actually paid over to him but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on his behalf or as he directs." Can it be said that when credits were made in each year to the income account, pursuant to the decretal order and no disbursements therefrom were made for or to the taxpayer, they formed income dealt with on her account or as she directed in those respective years? I think not. There is nothing to show that there was any real sum raised from capital and made available by actual appropriation or otherwise, so that, as a distinct money sum, it was held on her account subject to her immediate directions. It is consistent with the facts that there was a real deficiency and no more than an acknowledgment in the books of the true accounting position and of the taxpayer's right to have it found and made up.

(3) Finally, can it be said that independently of s. 19, amounts credited pursuant to the decretal order in each respective year immediately became income "derived" by the taxpayer within the meaning of s. 17? The answer is, I think, *a fortiori*. There is nothing to show that anything occurred in any given year to realize the right which the decretal order conferred.

For these reasons I think that the taxpayer has not established that the first question should be answered in her favour. The actual question in the reference should, in my opinion, be answered that the facts do not show that the whole sum of £2,858 mentioned therein should not be included in the assessable income derived during the year of income ended 30th June 1940.

The second question presents no difficulty. What is income from personal exertion is defined in s. 6. All other income is income from property. The income derived by the taxpayer, as stated in the reference, does not fall within the definition of income from personal exertion. *Syme v. Commissioner of Taxes (Vic.)* (1) is inapplicable because, no doubt with that decision in mind, the draftsman of the definition introduced the words "carried on by the taxpayer" after the words "proceeds of any business." The taxpayer did not carry

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on the business. She was a beneficiary, not a partner. Her trustee did carry on the business, that is as a partner.

The second question should, therefore, be answered that it is all income from property.

WILLIAMS J. This is a reference by the Board of Review of two questions of law under s. 196 (2) of the *Income Tax Assessment Act* 1936-1940. They arise out of an objection by the appellant to her assessment by the respondent in respect of her taxable income derived during the year ended 30th June 1940. Upon the disallowance of her objection the appellant requested the respondent to refer his decision upon the objection to the Board of Review. When the reference came on for hearing the respondent requested the Board of Review to refer these questions to this Court. The reference came on for hearing in the original jurisdiction and a case was stated under s. 18 of the *Judiciary Act* 1903-1940 for the opinion of the Full Court.

The appellant is the tenant for life under the will of C. H. Tindal who died on 3rd May 1926. At the date of his death the testator was carrying on a grazing business in partnership with W. M. L. Hughes under an agreement expressed to be for a term of ten years from 1st January 1926. By two orders made by the Supreme Court in its Probate Jurisdiction the trustee of the will was authorized to carry on this business, firstly until 1st January 1936 and secondly until 1st January 1946. The assets of the testator also comprised a dairy farm known as "Caramana" which was sold on 6th July 1931.

For some time after the death of the testator the trustee paid the appellant the actual net income received by it from the partnership business and "Caramana."

On 16th March 1934 the Supreme Court of New South Wales in its equitable jurisdiction, made a decretal order declaring that, upon the true construction of the will of the testator and in the events which had happened, the appellant was entitled to interest at the rate of four and a half per centum per annum from the date of the testator's death upon the capital value of his share in the partnership business ascertained at the date of death while such share remained unconverted. It was also declared that the income received from the share-farming operations carried on at "Caramana" between the date of death and the date of conversion should be apportioned between the realty and personalty according to their probate values and that the appellant was entitled to the actual income of the realty and to interest at the rate of five per centum per annum upon the probate value of the personalty from the date of death until conversion. It was also declared that in the event of the income

actually received from the carrying on of the partnership and from the personalty being insufficient to pay the interest, any deficiency should be made up when funds were available out of the income of the residue and, insofar as such income was insufficient, out of the capital of residue; such insufficiency if any, not to carry interest. The case is reported (*Re Tindal; Perpetual Trustee Co. Ltd. v. Tindal* (1)).

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£1,844 is the annual sum to which the appellant is entitled under the order in respect of the assets employed in the partnership business. She was entitled under the order to £2,917 in respect of "Caramana" up to the time of its sale. Up to 30th June 1935 the total amount paid to the appellant in respect of the partnership business and "Caramana" was £13,963 whereas she was entitled to £19,811. During the year ended 30th June 1936 the trustee paid the appellant £6,606 which reduced the deficiency to £1,086. As at 30th June 1939 the deficiency had increased to £2,794. The trustee could have paid the appellant the whole of the deficiency at any time if she had desired payment thereof from the capital of the estate or from the share of the estate in the partnership profits retained by the partnership, but there was not cash available in the estate for this purpose. During the year ended 30th June 1940 the trustee paid to or on behalf of the appellant the sum of £2,858 representing the £1,844 to which she was entitled under the order, and arrears £1,014.

The first question is whether (a) the whole or (b) only £1,844 of the sum of £2,858 should be included in the assessable income of the appellant derived during the year ended 30th June 1940. The appellant relied on s. 97 (1) of the *Income Tax Assessment Act* which is in the following terms: "Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate."

The section is one of a number of sections discussed in *Federal Commissioner of Taxation v. Whiting* (2). Section 95 defines the net income of a trust estate as the total assessable income of the trust estate calculated under the Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions except certain deductions. Section 17 provides that income tax shall be levied and paid for each financial year upon the taxable income derived during the year by any person. Section 19 provides that income shall be deemed to have been derived by a person although it is not actually paid over to him but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated,

(1) (1933) 34 S.R. (N.S.W.) 8.

(2) (1943) 68 C.L.R. 199.

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or otherwise dealt with on his behalf or as he directs. Section 6 defines taxable income to mean the amount remaining after deducting from the assessable income all allowable deductions. Section 25 provides that the assessable income of a resident taxpayer shall include the gross income derived directly or indirectly from all sources whether in or out of Australia which is not exempt income. Assessable income under the Act is therefore income which is actually derived or deemed to be derived by a taxpayer during a financial year. The taxable income is the assessable income less such sums as are allowed as deductions in that year. The share of the net income of a trust estate referred to in s. 97 is therefore a share of income derived by the trustees of the estate during a financial year. The section would require a life tenant presently entitled to income of a trust estate *in specie* to include in his assessable income the whole of the net income of the trust estate as defined by s. 95 less any sums which the trustees were entitled to retain out of this income under the trust instrument.

The present appellant is not entitled to receive any part of the share of the trustee in the profits of the partnership *in specie*. Her right is to receive a sum measured by the amount which it is estimated she would have received if the testator's interest in the partnership business had been sold one year after his death and the proceeds of sale had been invested in authorized investments. It is a right in the nature of a terminable annuity to be paid a fixed annual sum out of the income actually received by the trustee from the carrying on of the partnership and available for the purpose, and in so far as this income is deficient to be paid when funds are available out of the income of residue and, in so far as such income is insufficient, out of the capital of residue. Section 97 can only apply to so much of the profits of the partnership and income of residue as are derived in any financial year and applied in that year towards payment of the sum of £1,844. Any other payments to make up the deficiency, although made out of capital, would be assessable income of the appellant (*Brodie's Trustees v. Inland Revenue Commissioners* (1); *Lindus and Hortin v. Inland Revenue Commissioners* (2); *Cunard's Trustees v. Inland Revenue Commissioners* (3); *Ewing v. Commissioner of Taxation* (4)). But these payments would be part of her assessable income, not by virtue of s. 97, but by virtue of the general operation of the Act and in particular s. 25.

The appellant did not contend that any part of the £2,858 was assessable income of any previous year because it was deemed to be

(1) (1933) 17 Tax Cas. 432.

(2) (1933) 17 Tax Cas. 442.

(3) (1945) 173 L.T. 258.

(4) Noted (1928) 2 A.L.J. 246.

derived by her within the meaning of s. 19. She rested her whole case upon s. 97, and that case has failed.

In my opinion the first question should be answered that the whole of the sum of £2,858 is included in the assessable income of the appellant derived during the year ended 30th June 1940.

The next question is whether this sum is income derived from personal exertion or from property. The definitions in s. 6 divide assessable income into income from personal exertion and income from property. Income from personal exertion includes the proceeds of any business carried on by the taxpayer either alone or as a partner with any other person. Income from property is defined to mean all income not being income from personal exertion.

The income derived by the trustees from the carrying on of the partnership business was income derived from personal exertion. But the appellant and not the trustee is the taxpayer and she is not a partner. When she receives her share of the net income under s. 97, it is not income which falls within the definition of income from personal exertion and is therefore income from property.

In my opinion, this question should be answered that the sum of £2,858 is income from property.

Questions in case answered as follows :—(1) The whole. The whole is income derived from property. Case remitted to Williams J. Costs of case to be costs in the reference.

Solicitors for the appellant, *Priddle, Gosling, Dalrymple & Sillar*.
Solicitor for the respondent, *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

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