[HIGH COURT OF AUSTRALIA.]

BANKERS AND TRADERS' INSURANCE COMPANY LIMITED . . . . . } APPELLANT;

AND

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

Taxation—Company—War-time profits—Taxable profits—"Capital employed"—"Employed in Australia"—Business carried on in foreign countries—Securities deposited in those countries—Interest therefrom included in taxable income—War-time (Company) Tax Assessment Act 1940-1944 (*No.* 90 *of* 1940—*No.* 29 *of* 1944), *ss.* 3, 24 (1).

In ascertaining for the purposes of the *War-time (Company) Tax Assessment Act* 1940-1944, the capital employed by a resident company in an accounting period, the Commissioner, by the joint operation of s. 3 and s. 24 of that Act, is entitled to deduct capital of the company employed by it outside Australia notwithstanding that such capital gains or produces income in the accounting period assessable under the *Income Tax Assessment Act* 1936-1945.

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

Warner Bros. First National Pictures Pty. Ltd. v. *Federal Commissioner of Taxation*, (1945) 72 C.L.R. 134, by majority, approved.

A company carried on various classes of insurance business in Australia and elsewhere. It invested in Government securities and, apparently, when occasion required, it used them for the purpose of depositing or charging funds with governments abroad as a condition of carrying on business in the country where the deposit was so made. The interest therefrom was included in the company's income assessed to Federal income tax. Of four deposits so made one, consisting of Metropolitan Water, Sewerage and Drainage Board Dollar Bonds, was brought to Australia from America for purpose of safe custody.

Held, by *Rich, Starke, Dixon* and *McTiernan* JJ., that the capital represented by (*a*) the Metropolitan Water, Sewerage and Drainage Board Dollar Bonds was; and (*b*) the other three securities was not, "capital employed in Australia" by the company within the meaning of the *War-time (Company) Tax Assessment Act* 1940-1944.

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SYDNEY, *July* 29.

MELBOURNE, *Oct.* 18.

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

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CASE STATED.

On the hearing of an appeal to the High Court by Bankers & Traders' Insurance Co. Ltd. from an assessment for war-time company tax made by the Federal Commissioner of Taxation under the *War-time (Company) Tax Assessment Act* 1940-1944, upon the company, *Rich* J., pursuant to s. 198 of the *Income Tax Assessment Act* 1936-1945, stated for the opinion of the Full Court a case which was substantially as follows :—

1. Bankers & Traders' Insurance Co. Ltd. (hereinafter called the appellant) was incorporated on 2nd March 1921 under the provisions of the *Companies Act* 1899 (N.S.W.) for the purpose of engaging in insurance business in New South Wales and elsewhere.

2. The appellant at all material times carried on various classes of insurance business other than life insurance in the various States of the Commonwealth of Australia and in addition in the United Kingdom, Canada, India, Egypt, Jamaica, Ceylon, New Caledonia, Cook Islands, Fiji, British and American Samoa, Norfolk Islands and Tonga.

5. For the purposes of the *Income Tax Assessment Act* 1936, as amended, the appellant adopted as its accounting period the twelve months commencing on 1st April each year and ending on 31st March of the following year.

6. On 15th November 1943 the appellant furnished to the respondent its return showing the income earned by it during the period from 1st April 1942 to 31st March 1943.

7. On 22nd February 1944 the appellant forwarded to the respondent a letter which, so far as material, was as follows :—

"We set out hereunder information which will no doubt be required by you in connection with the Company's return for the year ended 31st March 1943 :—

. . . .

(3) *Investments situated outside Australia.*—Schedule 'B' enclosed gives the fullest information required under this heading."

Schedule 'B,' so far as material, was as follows :—

"Investments and other assets situated ex Australia.

Particulars.	As at 31st March 1943.	Increase since 31st March 1942.	Date of Increase or Decrease.
(*a*) British War Loan	£26,730 0 0	——	
(*b*) Great Britain Savings Bonds	10,000 0 0	——	
(*c*) Canadian Victory Bonds	1,118 11 5		

(*d*) French Colonial Govt. Bonds (Saigon — now enemy occupied Territory)		1	0	——			The sum of £331 11s. 10d. written off 31/3/42.
(*e*) Government of India Loan	26,691	8	8	——			
(*f*) Canada Permanent Mortgage Corporation, Vancouver Savings A/c.	1,946	7	3	2,223 (Decrease)	16	0	Various
Total Book Value	£66,486	8	4	£2,223	16	0	

Notes : re (*a*) and (*b*) above :

The income from these investments is exempt in the hands of the Company for the purposes of United Kingdom Income Tax, and is, therefore, taxable for Federal Income Tax purposes. Consequently we make a very strong claim for these amounts to be allowed as Capital for the purposes of the *War-time* (*Company*) *Tax Act.*

re (*c*) above :

Income from these Canadian Bonds is exempt from tax in Canada, and consequently is taxable for Federal Income Tax purposes. We therefore make a claim for the inclusion of the amount invested as capital for the purposes of *War-time* (*Company*) *Tax Act.*

re (*e*) above :

Income from these securities is taxable at the source and is not subject to Federal Income Tax.

re (*f*) above :

Income from this investment is subject to Federal Income Tax, and in this connection also we make a claim for the principal sum (averaged over the accounting period) to be allowed as capital employed in the business.

Additional notes other than items mentioned above :

We also have the following comments to make with respect to other securities of the Company situated ex Australia :

(*a*) The Company is the holder of Commonwealth of Australia Stock registered in London (book value as at 31st March 1943 £6,968 2s. 0d.), which is on deposit with the Paymaster-General in London in pursuance of the *Assurance Companies Act* 1909.

(*b*) We also hold Metropolitan Water, Sewerage and Drainage Board Dollar Bonds registered and purchased in New York (book value £3,294 2s. 4d. as at 31st March 1943). These latter securities

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are held by the Company in safe deposit in Sydney. In both cases referred to herein the loans are secured on assets in Australia and interest therefrom is included in our Federal Income Tax return in Australian currency. We, therefore, claim these amounts as capital employed in Australia.

(4) *Australian Consolidated Bonds issued in Australia and on deposit overseas* : We consider that the mere existence of these bonds abroad does not constitute a transfer of capital from Australia as the principal sum of money was actually lent in Australia in the first instance and is repayable here. Consequently we consider that the debt is secured and located within the Commonwealth, and acting on the advice of " a named accountant " we have refrained from including these items under item (3) above and maintain that the principal sum represented is actually capital employed in Australia."

8. By notice of assessment dated 13th April 1944 the respondent assessed the net War-time (Company) Tax payable by the appellant in respect of the taxable profit derived by it during the accounting period ended 31st March 1943 at the sum of £16,959 10s. 4d. The said sum was arrived at after deducting super-tax amounting to £3,922 5s. paid by the appellant.

9. As appears from the said notice of assessment and adjustment sheet, the assessment was made on the basis that the capital employed by the appellant during the said accounting period was, for the purposes of the said Act, £308,991.

10. As appears from the statement of capital employed the said sum of £308,991 does not include the sum of £118,566 which the respondent treated as " capital employed ex Australia."

11. The said sum of £118,566 is made up as follows :—

British War Loan	£26,730
Great Britain Savings Bonds	10,000
Canadian Victory Loan Bonds	1,119
Government of India Loan	26,691
Canadian Permanent Mortgage Corporation..	3,058
Commonwealth of Australia Stock registered in London	6,968
Metropolitan Water, Sewerage and Drainage Board Dollar Bonds	3,294
Australian Consolidated Bonds with—	
(i) Department of Insurance, Canada ..	27,924
(ii) Siamese Legation, London	12,782
	£118,566

12. By letter dated 9th June 1944 the appellant objected to the said assessment on the grounds therein stated.

13. The only portion of that objection material to the present appeal is that contained in par. 2 thereof which reads as follows :—

"That the following securities owned by the Company totalling £91,875 described in the Adjustment Sheet as 'Capital employed ex Australia' should not have been excluded in calculating the capital employed :

British War Loan		£26,730
Great Britain Savings Bonds		10,000
Canadian Victory Loan Bonds		1,119
Canada Permanent Mortgage Corporation ..		3,058
Commonwealth of Australia Stock registered in London		6,968
Metropolitan Water, Sewerage and Drainage Board Bonds (Dollar Bonds)		3,294
Australian Consolidated Bonds with—		
(i) Department of Insurance, Canada	£27,924	
(ii) Siamese Legation, London	£12,782	
		40,706
		£91,875

The interest derived from the securities mentioned is subject to Commonwealth Income Tax and the value of the relevant securities as set out in the Adjustment Sheet should, we contend, have been brought to account in calculating the capital employed.

We would particularly draw attention to our letter of 22nd February 1944, regarding Australian Consolidated Bonds on deposit overseas, amounting to £40,706, as shown . . . . We consider that as the debt is secured and located within the Commonwealth, the mere existence of the Bonds abroad does not constitute a transfer of capital from Australia. We, therefore, request that this particular matter be given special consideration and trust that you may see your way clear to allow these amounts to be admitted as capital for the purposes of the assessment."

14. On 11th December 1944 the respondent issued a notice of an amended assessment of War-time (Company) Tax payable by the appellant in respect of the said year but disallowed the objection contained in par. 2 of its notice of objection of 9th June 1944.

15. As appears from that notice of amended assessment the net tax assessed against the appellant was increased from £16,959 10s. 4d.

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to £17,381 12s. 2d., the capital employed by the appellant during the year under consideration being decreased from £308,991 to £304,020. No variation was made in respect of the item " capital employed ex-Australia."

16. By notice dated 7th February 1945 the appellant informed the respondent that it was dissatisfied with his decision on its said objection and requested the respondent to treat the objection as an appeal and to forward it to the High Court of Australia. Pursuant to that request the objection has been treated as an appeal and forwarded to the High Court accordingly.

17. Income was received by the appellant during the relevant year from all of the investments treated by the Commissioner as " Capital employed ex-Australia " and enumerated in par. 11 hereof. Such income, with the exception of that derived from the Government of India Loan, was properly taken into account in assessing the income of the appellant of that year under the *Income Tax Assessment Act* and accordingly properly taken into account in assessing the taxable profit of the appellant of that year under the *War-time (Company) Tax Assessment Act.*

18. The asset referred to as British War Loan (£26,730) consists of two separate amounts. The first (of the book or cost value of £13,046) represents part of a deposit effected pursuant to the provisions of the *Assurance Companies Act* 1909 (Imp.) for the purpose of enabling the appellant to carry on insurance business in the United Kingdom. The second (of the book or cost value of £13,684) was lodged as collateral security with the Comptior National d'Escompte de Paris London office for a deposit of 1,000,000 francs made by that Bank in Paris at the appellant's request to enable the latter to transact insurance business in French Indo-China. The said investments are represented in part by war stock and in part by bonds and carry interest at the rate of $3\frac{1}{2}$ per centum per annum. The interest from these investments included in the appellant's assessable income for the relevant year was £1,214.

19. The Great Britain Savings Bonds (£10,000) were deposited with the National Bank of Egypt, London branch, pursuant to the provisions of Egyptian Law No. 92 of 1939 to enable the appellant to engage in fire insurance business in Egypt. These bonds carry interest at the rate of 3 per centum per annum and the income therefrom included in the appellant's assessable income during the relevant year was £375.

20. The Canadian Victory Loan (£1,119) is represented by bonds purchased in Canada from Canadian funds. The interest payable thereon is 3 per centum per annum and the assessable income of the

appellant for the year under consideration included an amount of £41 in respect of such interest.

21. The Government of India Loan (£26,691) represents a deposit made by the appellant pursuant to the provisions of the Indian *Insurance Act* 1938 with the Reserve Bank of India to enable it to carry on insurance business in India. The interest receivable in respect of this asset is taxable in India and therefore exempt from tax in Australia under s. 23 (*q*) of the *Income Tax Assessment Act*. As appears from the appellant's notice of objection, the appellant has not disputed the action of the respondent, in deducting for the purposes of calculating capital employed, the amount invested in this asset.

22. The asset described as Canadian Permanent Mortgage Corporation (£3,058) represents the average amount during the relevant year of the appellant's credit trading balance on its account with that corporation. Interest is payable on such credit balance at the rate of 2 per centum per annum on minimum quarterly balances. An amount of £42 representing interest in respect of this account was included in the appellant's assessable income for the relevant year.

23. Commonwealth of Australia Stock registered in London (£6,968) represents part of the deposit effected by the appellant pursuant to the provisions of the *Assurance Companies Act* 1909 (Imp.) referred to in par. 18 hereof. This stock carries interest at the rate of $3\frac{1}{4}$ per centum per annum and an amount of £325 in respect of such interest was included in the appellant's assessable income for the year under eview.

24. The Metropolitan Water, Sewerage and Drainage Board Dollar Bonds (£3,294) were purchased by the appellant in December 1937 from surplus Canadian funds. The purchase was effected in Canada and the bonds were issued in New York. Since February 1938 the bonds with interest coupons attached have been held in the appellant's safe deposit box at Sydney. The interest which is at the rate of $5\frac{1}{2}$ per centum per annum is payable in New York in exchange for coupons attached to the bonds. Interest amounting to £271 was included in the appellant's assessable income for the relevant year.

25. The Australian Consolidated Bonds with the Department of Insurance Canada (£27,924) were acquired by the appellant prior to the year 1933 in the Commonwealth of Australia. These bonds were in the year 1933 transmitted to Canada and lodged pursuant to the provisions of *The Canadian and British Insurance Companies Act* 1932 (Can.) to enable the appellant to continue to carry on its insurance business in Canada. The bonds were at all material times held by the Department of Finance (Securities Deposit Division) at

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Ottawa. Interest is paid by cheque to the appellant in Sydney by the Commonwealth Bank of Australia. Portion of these bonds carries interest at the rate of $3\frac{1}{4}$ per centum per annum and portion at the rate of 4 per centum per annum. Interest amounting to £998 was included in the appellant's assessable income for the relevant year.

26. The Australian Consolidated Bonds with the Thai Legation London (£12,782) represent bonds acquired by the appellant in the Commonwealth of Australia prior to and during the year 1931. In January 1932 the appellant deposited these bonds with the Thai Legation, London. This deposit was necessary to enable the appellant to transact fire insurance business in Thailand. The appellant carried on insurance business in Thailand up to the month of December 1941 but has not since that date carried on any insurance or other business in that area. Interest (at the rate of 4 per centum per annum) is received by the London office of the appellant. Since December 1941 or early 1942 the bonds have been in the control of the Custodian of Enemy Property in England but the appellant has continued to receive the interest payable thereon. Interest amounting to £520 from these bonds was included in the assessable income of the appellant for the relevant year.

27. Of the total book value of the bonds referred to in pars. 25 and 26 hereof £24,548 represents securities to which s. 20 of the *Commonwealth Debt Conversion Act* 1931 or to which sub-s. (2) of s. 52B of the *Commonwealth Inscribed Stock Act* 1911-1945 applies. The remainder (book value £16,158) being Commonwealth of Australia Treasury Bonds $3\frac{1}{4}$ per cent, were converted from Australian Consolidated 4 per cent bonds which matured on 15th November 1941.

28. Each of the bonds referred to in pars. 25 and 26 hereof provides that the bearer thereof is entitled to payment of the amount of the bond at the offices of the Commonwealth Bank at any of the capital cities of the Commonwealth together with interest at the prescribed rate and it is expressly provided in each bond that " such sums are secured on the Consolidated Revenue of the Commonwealth of Australia."

31. On the hearing of the appeal before this Court the parties have agreed that the whole of the material facts are those referred to in preceding pars. 1 to 28 (inclusive) hereof.

Upon the facts set forth above the case was stated for the opinion of the Full Court of the High Court upon the following questions of law :—

(1) In ascertaining for the purposes of the *War-time (Company) Tax Assessment Act* the capital employed by the appellant in any accounting period is the respondent entitled to deduct capital employed outside Australia in gaining or producing income which is taken into account in assessing the income of the said period under the *Income Tax Assessment Act* ?

(2) Assuming the Commissioner is so entitled does the whole or any portion of the capital of the appellant invested in Australian Consolidated Bonds on deposit with the Department of Insurance, Canada, and in the Australian Consolidated Bonds deposited with the Thai Legation, London, and in the Metropolitan Water, Sewerage and Drainage Board Dollar Bonds and in the Commonwealth of Australia Stock registered in London constitute capital of the appellant employed in Australia within the meaning of the said Act ?

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

Barwick K.C. (with him *Hardie*), for the appellant. Section 24 of the *War-time (Company) Tax Assessment Act* 1940-1944 prescribes, prima facie, the exclusive method of determining capital employed. From the total of the amounts required to be added should be deducted the items specified and the result would be, for the purposes of the Act, but subject to s. 25 (hence prima facie), the capital employed. The competing view accepted by *Williams* J. in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) is incorrect. The general scheme of the Act is to relate the profit to the assets which produce the profit : see s. 21. There is a complete code in s. 24, subject to s. 25. The use to be made of the definition clause in s. 3 is by substituting the words of the definition for the words " capital employed " wherever occurring in s. 24. That, ordinarily, is the only use for a definition clause. It follows that there was no warrant for using the definition clause a second time. The term " capital employed " appears in s. 24 only at the commencement of sub-s. (1). What constitutes " capital employed " is ascertained from s. 24. That section is not a definition section ; it is a section which provides for ascertainment by calculation as distinct from definition. " Capital " means capital employed in Australia ; then s. 24 contains a direction or formula as to how to ascertain what capital is employed in Australia. This point was not raised in *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (2), or in *Associated Newspapers Ltd.* v. *Federal Commissioner of*

(1) (1945) 72 C.L.R. 134. (2) (1943) 67 C.L.R. 508.

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Taxation (1). The phrase "commercial capital" is traceable to *Incorporated Interests Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). One can have items such as (*a*), (*b*) and (*c*) of s. 24 (1) without referring to the assets which represent them on a particular item (*Redbank Meatworks Pty. Ltd.* v. *Commissioner of Taxes* (*Q.*) (3)). It is conceded that the Government of India Loan was rightly excluded by the respondent from the capital employed, but he wrongly excluded therefrom the other bonds and stock. Even assuming that the decision in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (4) is correct, those other bonds and stock represented capital employed in Australia in gaining the taxable profit. In the case of the Commonwealth of Australia Stock on the London register there is, of course, no indicia of title ; the debtor, the Commonwealth of Australia, is here, and the asset, the revenue of the Commonwealth of Australia, is here, and the income from it is part of the taxable profit. The question is not : Where is the company employing the capital ? The question is : Where is the capital employed in gaining the profit ? The above-mentioned stock is employed as a deposit in London for the purposes of business there, but so far as it is employed in gaining taxable profits it is employed in Australia : similarly with respect to the bonds which were lodged with the Thai legation. The appellant employed its capital initially to gain taxable profit by lending it in Australia. There supervened after that a secondary use as a measure of good faith with the Thai legation. That use has disappeared. At no point of time did the appellant cease to employ the funds to gain the taxable profit in Australia. In the case of the Metropolitan Water, Sewerage and Drainage Board Dollar Bonds the indicia of title are in Australia and are used therein. The assets under consideration should be included in the consideration.

Taylor K.C. (with him *Chambers*), for the respondent. In s. 19 of the *War-time* (*Company*) *Tax Assessment Act* 1940-1944 the expression "capital employed" must be read giving effect to the extended meaning which is attributable to that expression by reason of the definition thereof in s. 3. The capital referred to in ss. 19, 21 and 23 is capital employed in Australia and not capital employed elsewhere. Had it been otherwise there would not have been any necessity for a definition of the expression, or the inclusion therein of the words "in Australia or in a Territory of the Commonwealth." In s. 24, similarly, the capital concerned is only capital employed

(1) (1944) 69 C.L.R. 257.
(2) (1943) 67 C.L.R., at p. 526.
(3) (1944) 69 C.L.R. 315, at p. 325.
(4) (1945) 72 C.L.R. 134.

within Australia and the legislature intended that that capital should, prima facie, be ascertained in accordance with the formula laid down in that section. This interpretation finds support in sub-s. (6) of s. 24. Section 25 is operative only upon application by the taxpayer. It does not create a power which the Commissioner can exercise against a taxpayer. Upon either view of the application of the definition of " capital employed " difficulties, as between resident and non-resident companies, would arise. The decision in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) is correct. There is no provision in the Act for a reduction of the capital. The limitation " in Australia " must be read into each of the subdivisions of capital in s. 24 (1). Section 24 does not define what is to be regarded as capital employed in Australia but speaks only of capital employed in Australia. As to s. 25, if the scheme of the Act was to take into consideration the whole of the capital of a company wherever that capital might be employed one would have expected the Commissioner to have been invested with power to deal with difficulties that would arise in respect of non-resident companies with large paid-up capital and resident companies with small paid-up capital. No such power has been conferred. Moneys deposited in countries overseas in order to establish business in those countries respectively constitute capital employed abroad in the carrying on of the business so established. Those moneys were lodged as a condition precedent to carrying on business, in order to establish the business (*Employers' Mutual Indemnity Association Ltd.* v. *Federal Commissioner of Taxation* (2)). The deposits so made by the appellant were necessary for the business in the respective countries concerned, and constitute capital employed not in Australia but in those countries. That capital cannot be employed in different places at one and the same time. The fact that it is income-producing capital is immaterial. The Metropolitan Water, Sewerage and Drainage Dollar Bonds have not been employed in the appellant's business in Australia. Those bonds constitute a foreign investment made in Canada from profits earned and accumulated in Canada. The mere fact that the bonds were brought to Australia for purpose of safe custody does not make them " capital employed in Australia." The deduction of ex-Australian capital is not strictly a deduction ordered by s. 24.

Barwick K.C., in reply. The Commissioner has sought to set up a heading of deduction additional to those shown in s. 24. Specific authority for deducting the moneys invested in the Government of

(1) (1945) 72 C.L.R. 134.

(2) (1943) 68 C.L.R. 165, at p. 176.

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India Loan is to be found in s. 24 (1) (ii). It does not follow of necessity that the deduction of the other ex-Australian assets is the deduction of an amount which has already been included in pars. (*a*), (*b*), or (*c*) of s. 24 (1). The definition of "capital employed" imports a double meaning. If income is included in the taxable profits, then that which produces that income is to be considered for the purposes of the Act as capital employed in Australia in the accounting period. It is conceded that the definition does not operate very much in the Act except to create, as it were, notional capital. Its function is to show that that which is added or subtracted is to be treated as capital employed in Australia. If a company carries on business in Australia its capital is employed there, unless the income therefrom is not taxable.

Cur. adv. vult.

Oct. 18.

The following written judgments were delivered :—

LATHAM C.J. The *War-time* (*Company*) *Tax Assessment Act* 1940-1944 imposes a tax upon the amount by which the taxable profit derived by any company during the accounting period exceeds the percentage standard : s. 13. "Taxable profit" is defined as meaning the amount remaining after making certain specified deductions from the taxable income of the accounting period as assessed under the *Income Tax Assessment Act* 1936-1940. The percentage standard is an amount equal to the statutory percentage of the capital employed or deemed to be employed during the accounting period (or, in a particular case, a lesser period) : s. 19. Subject to the Act, the statutory percentage is 5 per cent : s. 20.

"Capital employed" is defined in s. 3 in the following terms : ". . . the capital of a company employed in Australia or in a Territory of the Commonwealth in gaining or producing the taxable profit."

(It is not necessary to refer to any Territories for the purpose of this case.)

This case stated is concerned with the application of the definition just quoted in the case of s. 24 of the Act, which provides that : "Subject to section twenty-five of this Act, the capital employed in any accounting period shall, for the purposes of this Act, be ascertained by adding the following amounts, namely" then follow five paragraphs, (*a*) to (*e*)—and making deductions therefrom, numbered (i) to (vi).

The Bankers and Traders' Insurance Co. Ltd. is a company incorporated in New South Wales and carrying on business in the

Commonwealth and in various other countries. The company owned securities of a total value of £91,875, made up as follows :—

" British War Loan	£26,730
Great Britain Savings Bonds	10,000
Canadian Victory Loan Bonds	1,119
Canada Permanent Mortgage Corporation ..	3,058
Commonwealth of Australia Stock registered in London	6,968
Metropolitan Water Sewerage and Drainage Board Bonds (Dollar Bonds)	3,294
Australian Consolidated Bonds with—	
(i) Department of Insurance Canada ..	27,924
(ii) Siamese Legation, London	12,782 "

The Commissioner of Taxation has treated these securities as representing capital employed outside Australia and has deducted the amount of £91,875 from the " capital employed " as calculated under s. 24. The Commissioner contends that only such portions of the amounts specified in pars. (*a*) to (*e*) of s. 24 (1) as can be shown to represent the value of assets employed in Australia are to be included in calculating the " capital employed." In fact the Commissioner has made the calculation required by s. 24 (1) (additions and deductions) and has deducted from the finally resulting sum the value of the assets of the company which, in his opinion, are employed outside Australia. It is contended for the Commissioner that this procedure is authorized by the section.

The taxpayer, on the other hand, contends that s. 24 is the means provided of ascertaining what is the " capital employed " for the purposes of the Act, and that when the calculations required by the section have been made there is no justification for making any further deduction on account of any assets of a company being employed outside Australia. The first question asked in the case stated by my brother *Rich* is as follows :—

" In ascertaining for the purposes of the *War-time (Company) Tax Assessment Act* the capital employed by the appellant company in any accounting period is the respondent entitled to deduct capital employed outside Australia in gaining or producing income which is taken into account in assessing the income of the said period under the *Income Tax Assessment Act* ? "

The second question inquires whether the capital or any portion of the capital of the company invested in the securities already mentioned constitutes capital of the company employed in Australia within the meaning of the Act. This question arises only if the first question is answered in the affirmative.

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Latham C.J.

Section 24 (1) provides as follows :—" Subject to section twenty-five of this Act, the capital employed in any accounting period shall, for the purposes of this Act, be ascertained by adding the following amounts, namely :—

(*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 has been created out of premiums received on the issue of shares;

(*d*) the amount by which the value prescribed by sub-section (2), (3) or (4) of this section as the value of any asset to which that sub-section applies exceeds 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 appears in the accounts of the company at the commencement of the accounting period, the amount prescribed by that sub-section; and

(*e*) in the case of a life assurance company, the excess (if any) of reserves for liabilities over the amount ascertained as the 'calculated liabilities' for the purposes of section one hundred and fourteen of the Income Tax Assessment Act, and deducting therefrom—" six amounts, of which I now refer only to : " (ii) any capital, averaged over the accounting period, the income (if any) from which is not or would not be taken into account in assessing the income of the accounting period under the Income Tax Assessment Act".

The *Income Tax Assessment Act*, s. 23, provides in par. (*q*) that income derived by a resident from sources out of Australia where that income is not exempt from income tax in the country in which it is derived shall be exempt from tax; and in par. (*r*) that income derived by a non-resident from sources wholly out of Australia shall be exempt from tax. These provisions produce the result that where capital which is a source of income is employed out of Australia the income derived from it is not taken into account in assessing for the purposes of income tax the income (1) of a non-resident taxpayer or (2) of a resident taxpayer when the income so derived is not exempt from income tax in the country where it is derived. As the amount of taxable profit under the *War-time (Company) Tax Assessment Act* is determined by deducting certain amounts from income as assessed under the *Income Tax Assessment Act*, the effect of s. 24 (1) (ii) of the former Act is to take out of the " capital employed " for the purposes of that Act capital outside Australia which was a source of

income but which did not contribute to the income assessable under the *Income Tax Assessment Act*, and therefore which did not contribute to the taxable profit under the *War-time (Company) Tax Assessment Act*. Thus par. (ii) excludes from " capital employed " assets outside Australia which are capital and which produce income in the two cases mentioned.

Two views have been presented of the combined effect of the definition of " capital employed " in s. 3 and the directions for the calculation of " capital employed " in s. 24.

On behalf of the Commissioner it has been argued that s. 24 requires an estimate of the value of the capital assets of the company which are found to be employed in Australia in gaining or producing the taxable profit, if those assets can be assigned to one or other of the categories (*a*), (*b*), (*c*), (*d*) and (*e*) specified in s. 24 (1) less the deductions specified in pars. (i), (ii), (iii), (iv) and (v). Upon this view when an amount is estimated, for example, under par. (*a*) of s. 24 (1) it will be necessary to inquire whether the capital paid up in money was represented by assets actually employed in Australia, and only the amount representing the value of those assets should be taken into account under that paragraph. It was also suggested, though not definitely argued, that the deductions should be limited to the value of ascertainable assets which are employed in Australia. Thus under such a deduction as (iii)—" any capital, averaged over the accounting period, invested in shareholdings in any other company "—it would be necessary to consider whether the assets (that is, presumably, shares) representing that capital were employed in Australia—though, apparently, the amount invested might be greater or less than the value of the shares. The Commissioner relies upon the decision in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (1).

The other view of these provisions is that s. 24 simply directs a calculation of amounts of money which is designed to ascertain the amount of the shareholders' money which has been put at risk for the purpose of endeavouring to make taxable profits. The definition of " capital employed " is applied by regarding s. 24 (1) as directing that, for the purposes of the Act, the capital employed by a company in Australia in gaining or producing the taxable profit is to be taken as the sum total of the items mentioned in pars. (*a*) to (*e*) in s. 24 (1), less the deductions specified in pars. (i) to (vi), and that it is wrong to make an inquiry in relation to any of the categories or in relation to the final total whether any of the assets, the values of which may

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have entered into the computation of that total, are employed in Australia.

The application of s. 24 does not result in ascertaining the existing capital of a company in the sense of assets of the company of a capital nature. It prescribes an artificial method of ascertaining an amount of money upon which, in the opinion of Parliament, the shareholder might fairly expect a fair return, such return being fixed at the percentage standard. Section 13 then imposes a tax upon the excess of taxable profits over that return.

Paragraph (*a*) requires the inclusion in "capital employed" of "the capital paid up in money or by other valuable consideration, averaged over the accounting period." The application of this provision results simply in the ascertainment of a sum of money. That sum of money is ascertained by inquiring "How much did the shareholders pay up in money or by other valuable consideration?" There is no reference in these words to the value of the assets (past or present) represented by that amount of money. The words contain no warrant for introducing by implication further words such as "so far as that capital is represented by assets still existing and employed in Australia for the purpose of gaining taxable profit." The whole paid up capital is to be taken into account, even if some or all of it has been lost.

In the case of par. (*b*), the effect of the section can be well illustrated by reference to the provision which includes "amounts standing to the credit of the Profit and Loss Account at the commencement of the accounting period." Here again the idea of the section is the ascertainment of an amount without any necessity of identifying assets as representing that amount. In a trading business a balance to the credit of profit and loss account is the result of taking into account receipts from sales of goods and other receipts, valuations of stock-in-trade at the beginning and end of the year, estimates of good debts, and deducting estimates of the value of bad debts, working expenses and other outgoings. The value of the trading assets of a company may be great and the balance to credit of profit and loss account may be small. It is only the balance which is taken into account, not the value of all or of some part of the assets by a valuation of which the balance is in part determined. No reference to assets is required in order to apply par. (*b*).

Similarly par. (*c*), referring to reserves, refers merely to the amount of reserves, whether or not those reserves can be identified with particular assets. Where a reserve is "used in the business" it would frequently be very difficult indeed to identify it with any particular asset.

In par. (*d*) a provision is included for the excess of real value of assets over the value as appearing in the accounts of the company. This is a specific provision which requires consideration of the value of an existing asset. This provision is made for the purpose of correcting figures appearing in the accounts of the company. It also is a provision directed to the ascertainment of the moneys which the shareholders have really put at risk in the business of the company. It is only by reason of the specific terms of this provision that it becomes necessary to refer to the assets represented by any particular figure in the accounts of the company, and it will be observed that it applies only where the value of an asset appears in the accounts of the company.

Paragraph (*e*) represents a calculated amount arrived at as a matter of arithmetic which could not be associated with any one asset rather than with any other asset.

The deductions for which s. 24 provides secure the result, as already stated, that assets out of Australia the income from which does not enter into taxable profit are excluded from "capital employed." It is this provision which, in my opinion, effectively works out the application of the definition of "capital employed" contained in s. 3.

Upon the view submitted for the Commissioner, either the value of assets employed out of Australia is deducted from the various sums ascertained under pars. (*a*) to (*e*), and then the value of those assets the income from which is not taken into account under the *Income Tax Assessment Act* must again be deducted under par. (ii) (which would involve a double deduction) or, alternatively, no effect can be given to par. (ii). In my opinion the words of s. 24 do not justify such an interpretation.

Paragraph (vi) provides for the deduction from the sum ascertained under pars. (*a*) to (*e*) of certain amounts allowed as deductions under s. 53A of the *Income Tax Assessment Act* (which must mean the *Income Tax Assessment Act* 1936-1944, because s. 53A was introduced by the Act No. 28 of 1944, notwithstanding the definition of "*Income Tax Assessment Act*" in s. 3). These deductions are merely amounts allowed as deductions in an assessment to income tax. They cannot possibly be regarded as representing any assets.

Thus, in my opinion, s. 24 should be read as providing a means for ascertaining the capital employed in Australia and used in gaining or producing the taxable profits and it would be a mistake to apply s. 24 by making an inquiry in respect of each of the assets to which the financial figures of the company related whether those assets were or were not employed in Australia.

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The view that s. 24 is directed to the ascertainment of an artificial figure upon which it is regarded as proper to impose a special tax rather than to the ascertainment of the capital which in the commercial sense is actually used in Australia in the business of the company is supported by consideration of s. 25. Section 25 (1) provides that: "Any company may apply to the Commissioner for an increase in the capital employed by it as ascertained under this Act, on the ground—(*a*) that the amount so ascertained does not represent the true capital employed by it in the business carried on by it".

This provision shows that the capital as ascertained under s. 24 may in some cases not represent the true capital employed by the company in the business. The words "capital employed" in the phrase "true capital employed" cannot be construed as meaning "capital employed" in the sense in which that term is defined in s. 3, because s. 25 (1) is based upon the fact that there may be a discrepancy between the "capital employed" as ascertained under the Act and "the true capital employed by the company in the business."

The first question submitted in the case stated asks whether, in ascertaining the capital employed, the Commissioner is entitled to deduct capital employed outside Australia in gaining or producing income if that income is taken into account in ascertaining income of the period under the *Income Tax Assessment Act*. In my opinion this question should be answered in the negative. Such a deduction is not warranted by pars. (i) to (vi) of s. 24 (1), and there is no other authority for making any deduction from the sum total of the amounts ascertained by the application of pars. (*a*) to (*e*) of that section.

Upon this view it is unnecessary to answer question No. 2.

RICH J. The substantial question submitted in the case stated is similar to the controversy the subject of the decision of my brother *Williams* in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). The solution of the question depends upon the construction of ss. 3 and 24 of the *War-time* (*Company*) *Tax Assessment Act* 1940-1944. In my opinion the definition of "capital employed" in s. 3 should be applied to and incorporated with ss. 19, 21, 23, 24 and 25, and I do not think that any sufficient intention to the contrary appears in the context. I therefore think that his Honour correctly construed s. 24 and accordingly I answer the first question in the affirmative. Applying this construction to the specific investments mentioned in question 2, I am of opinion that,

(1) (1945) 72 C.L.R. 134.

with the exception of the investment in the Metropolitan Water, Sewerage and Drainage Board Dollar Bonds, the other investments mentioned do not constitute capital employed in Australia. The costs should be costs in the appeal.

STARKE J. Case stated pursuant to the *War-time (Company) Tax Assessment Act* 1940-1944. By that Act it is enacted that subject to s. 25 of the Act, which is immaterial to this case, the capital employed in an accounting period shall for the purposes of the Act be ascertained by adding various amounts and deducting therefrom other amounts. But s. 3 of the Act prescribes that unless the contrary intention appears "'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."

The question is whether the following securities or assets or any of them owned by the company—the taxpayer—described by the Commissioner as capital employed ex Australia were rightly excluded by the Commissioner in calculating the capital employed by the company for the purposes of the Act.

Commonwealth of Australia Stock registered in London		6,968
Metropolitan Water, Sewerage and Drainage Board Bonds (Dollar Bonds)		3,294
Australian Consolidated Bonds with—		
(i) Department of Insurance, Canada ..	£27,924	
(ii) Siamese Legation, London	12,782	
		£40,706

These securities or assets have been deposited or lodged by the taxpayer with authorities or bodies outside Australia for the purposes of its business. The income, however, from these securities or assets is included in the assessable income of the taxpayer for the relevant year.

The company concedes that the definition of "capital employed" in s. 3 should be read into s. 24 as if it had been enacted in this form: Subject to s. 25 of this Act the capital employed in any accounting period, meaning the capital of a company employed in Australia or in a Territory of the Commonwealth in gaining or producing the taxable profit, shall, for the purposes of this Act, be ascertained by adding the following amounts . . . and deducting therefrom certain other amounts.

It then contends that this direction is imperative and exhaustive and that the direction is in no wise affected by the provisions of

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ss. 19, 21 or any other section. But it is a direction that the capital employed, as that term is defined in s. 3, shall be ascertained in the manner prescribed by s. 24. Nothing is prescribed in the section as to capital that is not so employed and no provision is made for including it in the capital, the amount of which is to be ascertained in the manner directed by s. 24.

Accordingly the first question stated in the case should be answered in the affirmative.

The second question is directed towards the particular securities or assets already mentioned. The securities are all Australian securities. According to the cases the general rule is that securities, such as bonds, promissory notes, and bills of exchange which are transferable by delivery only and the debts or moneys secured thereby are situated in the place where they happen to be and that stocks or shares, transferable only by registration, are situated, not in the place where the certificates happen to be, but in the country where registration must be effected, i.e. generally, in the country where the company is incorporated (See *Cheshire* on *Private International Law*, 2nd ed. (1938), pp. 503-504; *Dicey's Conflict of Laws*, 4th ed. (1927), pp. 345-347, note (1)).

The *War-time (Company) Tax Assessment Act* however speaks of "capital employed in Australia" but the rules governing the situation of property of the nature already mentioned are useful aids for determining where capital is employed that is invested in such securities.

1. *Commonwealth of Australia Stock registered in London.*

This stock is, I take it, subject to the provisions of the *Commonwealth Inscribed Stock Act* 1911-1945. It is registered and is transferable in London.

The stock certificate has been deposited pursuant to the provisions of the *Assurance Companies Act* 1909 (Imp.). The appellant is thus enabled to carry on insurance business in the United Kingdom. The stock carries interest which is collected by the appellant and included in the appellant's income assessed to Federal income tax for the financial year 1943-1944.

The proper conclusion on these facts is that the principal moneys secured by this stock are not employed in Australia or in a Territory of the Commonwealth in gaining or producing taxable profit.

2. *Australian Consolidated Bonds.*

These bonds were issued, I take it, pursuant to the *Commonwealth Debt Conversion Act* 1931 or the *Commonwealth Inscribed Stock Act* 1911-1945. They are transferable by delivery (See *Commonwealth*

Debt Conversion Act 1931, s. 5; *Commonwealth Inscribed Stock Act* 1911-1945, s. 51c; *Treasury Bills Act* 1914-1940, s. 5).

The bonds were acquired in Australia but were transmitted to Canada or to London and lodged in Canada and London respectively to enable the appellant to carry on its business in Canada and in Thailand. The bonds carry interest which is collected by the appellant and included in the appellant's income assessed to Federal income tax for the financial year 1943-1944.

The proper conclusion on these facts is that the principal moneys secured by these bonds are not employed in Australia or in a Territory of the Commonwealth in gaining or producing taxable profit.

3. *Metropolitan Water, Sewerage and Drainage Board Bonds (Dollar Bonds).*

These bonds were issued by the Metropolitan Water, Sewerage and Drainage Board constituted under the *Metropolitan Water, Sewerage and Drainage Act* 1924-1944, of New South Wales.

They were issued in New York, United States of America, and purchased by the appellant in Canada and are held by the appellant in Sydney, New South Wales, where it collects the interest payable on the moneys secured by the bonds. The interest so collected is included in the appellant's income assessed to Federal income tax for the financial year 1943-1944.

The proper conclusion on these facts is that the principal moneys secured by these bonds are employed in Australia in gaining or producing taxable profit.

Therefore the questions stated in the case should be answered :—

(1) Yes.

(2) Yes as to the principal moneys secured by the Metropolitan Water, Sewerage and Drainage Board Bonds (Dollar Bonds) and No as to the principal moneys secured by the other securities mentioned in the question.

DIXON J. The taxpayer is a company which falls within the definition of " resident of Australia " contained in s. 6 of the *Income Tax Assessment Act* 1936-1945. The taxable income of the company is, therefore, ascertained in accordance with s. 25 (1) (*a*) of that Act which provides that the assessable income of a resident shall include the gross income derived directly or indirectly from all sources whether in or out of Australia. If, however, income derived from sources out of Australia is not exempt from income tax in the country where it is derived, then under s. 23 (*q*) it is exempt from tax in Australia and is accordingly excluded from the assessable income.

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Section 13 of the *War-time (Company) Tax Assessment Act* 1940-1944 imposes war-time (company) tax upon the amount by which the taxable profit derived by a company during a relevant accounting period exceeds the percentage standard. "Taxable profit" means the amount remaining after deducting from the taxable income of the accounting period as assessed for income tax certain items of expenditure or of income not material to the decision of this case: s. 3. The company derives from some assets out of Australia, and from other assets which the Commissioner claims are out of Australia, amounts of assessable income which are exempt from income tax in the countries where they are derived and are, therefore, not excluded from the taxable or assessable income under s. 23 (*q*) of the *Income Tax Assessment Act*.

The company has been assessed for war-time (company) tax for the financial year beginning 1st July 1943 upon the taxable profit derived during an accounting period ended 31st March 1943, which apparently is the accounting period adopted in lieu of the twelve months immediately preceding the year of tax.

In arriving at the taxable profit the percentage standard was, of course, subtracted from the taxable income; but the taxable income from which it was subtracted was arrived at from assessable income which, as already stated, included amounts of income that are or are claimed to be from an extra-territorial source. The percentage standard was calculated upon the capital employed during the accounting period, as s. 19 directs. But, in ascertaining the capital employed during the accounting period, the Commissioner excluded the assets from which the income said to be extra-territorial was derived. He did so on the ground that the definition contained in s. 3 of "capital employed" required him to do so. The expression is defined to mean the capital of a company employed in Australia or in a Territory of the Commonwealth in gaining or producing the taxable profit. As the assets in question, although employed in producing part of the taxable profit, were not employed in Australia, they were shut out from the computation of capital upon which the percentage standard is calculated. The company complains that to exclude the asset from the capital account upon which the percentage of profit allowed is calculated and, at the same time, to include the income derived therefrom in the income account and so swell the taxable profit, is illogical and unjust. The company contends that it is not a course which the Act, properly construed, necessitates. How the capital employed in an accounting period is to be ascertained is the subject of specific statutory directions. Speaking broadly, the object of the directions is to find what are the

funds invested in the business, excepting capital the income from which is not taken into account in assessing income tax. To this end the paid up share capital, the reserves and the accumulated profits and amounts at the credit of the last profit and loss account are to be aggregated to form a base. The accumulated profits and the sum at credit of profit and loss are, however, to be adjusted so that they represent profits computed according to the conceptions of the income tax law with reference to depreciation and to the valuation of trading stock. All this is provided for in detail by s. 24. The material part of the opening words of that section are : " the capital employed in any accounting period shall, for the purposes of this Act, be ascertained by adding the following amounts, namely " ; then are set out the categories I have mentioned, paid up capital, accumulated profits including amounts at credit of profit and loss, reserves and the amounts, minus or plus, to adjust depreciation &c.

On the side of the taxpayer it is said that this is an exhaustive statement of what constitutes " the capital employed " and that there is no room for the qualification contained in the definition restricting the expression to capital in Australia and the Territories ; such a territorial restriction is incongruous with the conception of share capital and other " funds " invested in the business.

On the other side it is said for the Commissioner that the definition expresses a territorial limitation, that there is no context to displace it, and that, if the definition does not apply here, it cannot apply in the other provisions where the expression is used, viz. ss. 19, 21, 23 and 25.

In support of the taxpayer's view it is pointed out that you may substitute the definition for the expression " capital employed " in s. 24 and yet produce no greater result literally than the same exhaustive catalogue or description of what the words of the definition comprise. The suggestion is that when the words I have quoted from s. 24 (1) are replaced by the definition, the sub-section operates just as it did before the introduction of the limitation expressed by the words " employed in Australia or in a Territory " ; it operates as a direction to ascertain " capital employed in Australia or in a Territory of the Commonwealth " by taking the list of " funds " which follow and by adding them together without regard to any question whether the assets which represent the " funds " are or are not employed in Australia or indeed whether assets representing them exist.

I am unable to agree in this suggestion. I think that, once the words " in Australia or in a Territory " are imported into the leading words of s. 24 (1), they inevitably imply a qualification on what

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follows. They imply that the " funds " enumerated are to be taken into account only in so far as they are employed in Australia or a Territory. The real question is whether any sufficient contrary intention appears in the context or subject matter to exclude the application of the definition. I think that a contrary intention does not sufficiently appear. I recognize that there is something foreign to the conception of " capital " embodied in s. 24 (1) in an inquiry into the situation of tangible or intangible assets. I recognize, too, that the purpose of such an inquiry may be challenged. For par. (ii) of sub-s. (1) of s. 24 positively excludes capital which is not or would not be taken into account in assessing the income of the accounting period under the *Income Tax Assessment Act*, and that is enough to exclude, in the case of non-residents, all assets employed abroad and, in the case of residents, all assets employed abroad the income of which is taxed abroad. The exclusion is worked out under par. (ii) simply by deducting the value of the asset from the account.

But, notwithstanding these considerations, I cannot escape the conclusion that the draftsman of the definition of " capital employed " meant that the territorial limitation should operate in s. 24. To say that it would have been wiser or more just or more logical or more symmetrical if he had not imposed a territorial restriction is not enough. The fact is that a scrutiny of the Act shows that the definition can have no application if it is excluded from s. 19 and, unless its application is excluded from s. 19, there is neither point in, nor reason for, excluding it from s. 24. The material part of s. 19 provides that the percentage standard shall be an amount equal to the statutory percentage of the capital employed. It seems to me impossible to find adequate grounds for refusing to apply the definition and for refusing to read the provision as meaning that the percentage standard shall be an amount equal to the statutory percentage of the capital of the company employed in Australia or a Territory of the Commonwealth in gaining or producing the taxable profit. When it is so read the words would control territorially the capital ascertained under s. 24 (1), even if the territorial restriction were not introduced into that sub-section by applying the definition. But the fact is that the draftsman considered that a territorial restriction was necessary and, however mistaken he may have been, I think that his intention is clear enough that it should apply in ss. 19, 21, 23, 24 and 25.

The practical difficulties of applying the territorial restriction to s. 24 (1) do not appear to me to be insuperable. After all, the categories covered by pars. (*a*), (*b*) and (*c*) of s. 24 (1) cover the " funds " of a company, though indicated by descriptions usually found on the

liabilities side of a balance sheet. It ought not to be difficult to say to what extent the funds of a company have been committed to an Australian enterprise or undertaking. As a practical test there cannot often be much wrong in doing so by deducting the value of the assets which are known to be employed abroad.

In my opinion the interpretation placed upon s. 19 and s. 24 by *Williams* J. in *Warner Bros. First National Pictures Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) is correct.

My conclusion is that, in ascertaining for the purposes of the *War-time (Company) Tax Assessment Act* the capital employed by the taxpayer company in an accounting period, the Commissioner is entitled to deduct capital employed outside Australia in gaining or producing income which is taken into account in assessing the income of the accounting period under the *Income Tax Assessment Act.*

It thus becomes necessary to consider so much as the taxpayer disputes of the Commissioner's claim that certain of the company's investments do not constitute capital employed in Australia. The company carries on various classes of insurance business, other than life insurance, in Australia and elsewhere. It invests in government securities and apparently when occasion requires it uses them for the purpose of depositing or charging funds with governments abroad as a condition of carrying on business in the country where the deposit is made.

There are four contested claims made by the Commissioner that government securities represent capital employed abroad. They are submitted for our decision by the second question of the case stated. (1) The company holds Commonwealth of Australia Stock registered in London upon the register, I imagine, established pursuant to s. 14 (*b*) of the *Commonwealth Inscribed Stock Act* 1911-1945. This stock has been " deposited " with the Paymaster-General in London in pursuance of the *Assurance Companies Act* 1909 (Imp.). By what instruments or means the " deposit " was effected does not appear. In my opinion this stock forms capital employed abroad. The provisions of Part III. of the *Commonwealth Inscribed Stock Act* appear to me to bring stock on a local register within the reasoning of *Brassard* v. *Smith* (2); cf. *Erie Beach Co. Ltd.* v. *Attorney-General for Ontario* (3) and *Royal Trust Co.* v. *Attorney-General for Alberta* (4). The stock, according to the doctrine of these authorities, is situated in England. Being situated there, the fact is availed of to use it in England for a purpose of the company's business.

(1) (1945) 72 C.L.R. 134.
(2) (1925) A.C. 371.
(3) (1930) A.C. 161, at p. 168.
(4) (1930) A.C. 144, at p. 151.

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(2) The company invested some of its Canadian funds in dollar bonds issued in New York and there payable as to interest and presumably principal. But the bonds were those of the Metropolitan Water, Sewerage and Drainage Board of New South Wales. The company brought them to Australia where they lie in the safe deposit box of the company at Sydney. The situation of the securities is Australia and they are a mere investment of funds. They are not "used" otherwise in the business of the company. The investment is in the securities of a New South Wales statutory body. On the whole, I think that the conclusion should be that the capital represented by the bonds of the Metropolitan Water, Sewerage and Drainage Board is employed in Australia.

(3) Australian Consolidated Bonds bought in Australia by the company were sent to Canada and lodged pursuant to *The Canadian and British Insurance Companies Act* 1932 (Can.) with the Department of Finance at Ottawa in order to enable the company to continue its insurance business in Canada. Interest, however, is received in Australia. To say where the capital represented by these securities is employed is not easy. On the one hand, the capital earns interest in Australia, that is interest payable in Australia. On the other hand, the securities are situated in Canada, for they must be regarded in the same way as specialities which are situated where the instrument is held or found, and they are there used for purposes of the business of the company. The greater weight lies with these considerations and I think that the bonds should be regarded as capital employed in Canada.

(4) A similar case occurs in relation to Thailand. Australian Consolidated Bonds were deposited with the Thai legation in London in order to enable the company to carry on business in Thailand. In this instance the interest is received in London. As Thailand became an enemy country, the company's business there came to an end and the Custodian of Enemy Property in England took control of the bonds. I assume, however, that they remained a security for the liabilities incurred by the company in Thailand, subject of course to the suspension of those liabilities owing to the enemy character of those insured who possessed that character. In this case, too, I think that the bonds represent capital employed out of Australia.

I think that the second question should be answered that the capital represented by the Metropolitan Water, Sewerage and Drainage Board Dollar Bonds constitute capital of the taxpayer company employed in Australia, but that the other securities mentioned in the question do not.

As I have already said, in effect, I think that the first question should be answered in the affirmative.

The costs of the case stated should be costs in the appeal.

McTIERNAN J. I agree with the answers which my brother *Dixon* proposes to the questions in this case, and his Honour's reasons for those answers respectively.

Questions answered as follows :—(1) *Yes* ; (2) *The capital represented by the Metropolitan Water, Sewerage and Drainage securities is capital of the appellant company employed in Australia. The capital represented by the other securities mentioned in the question is not such capital. Costs of case to be costs in the appeal. Case remitted to Rich J.*

Solicitors for the appellant, *Stephen, Jaques & Stephen.*

Solicitor for the respondent, *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

J. B.