[HIGH COURT OF AUSTRALIA.]

ELECTROLYTIC REFINING AND SMELTING COMPANY OF AUSTRALIA PROPRIETARY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
PLAINTIFF,

H. C. OF A. 1945-1946.

MELBOURNE, 1945. *Mar.* 26, 27; *April* 11.

Latham C.J.

MELBOURNE, 1945. *Oct.* 4, 5; 1946. *Feb.* 25.

Rich, Starke, Dixon, McTiernan and Williams JJ.

Gold Tax (Cth.)—Liability—Principal and agent—Taxpayer appointed agent of Commonwealth Bank to take delivery of gold—Purchase by taxpayer of gold-bearing materials in course of its business as smelter—Gold extracted and delivered to bank—Date of possession by bank—Gold Tax Act 1939 (*No.* 52 *of* 1939)—*Gold Tax Collection Act* 1939 (*No.* 51 *of* 1939)—*Defence (Monetary Control) Regulations* (*S.R.* 1939 *No.* 77—1939 *No.* 137)—*National Security (Monetary Control) Regulations* (*S.R.* 1939 *No.* 91).

The appellant company carried on the business of smelting and refining. It purchased gold-bearing ores and other materials and treated them so as to extract and refine their gold content. From about 7th September 1939 it acted as agent for the Commonwealth Bank for the purposes, first, of the *Defence (Monetary Control) Regulations*, and subsequently of the *National Security (Monetary Control) Regulations*, which required persons in possession of gold to deliver it to the bank or an appointed agent. Before its appointment as such agent the company had in its possession gold-bearing materials which it had purchased. These materials remained in its possession until after 15th September 1939. After that date it extracted the gold and delivered it to the Commonwealth Bank. The Commonwealth sought to recover from the company tax alleged to be due in respect of the gold under the *Gold Tax Act* 1939 and the *Gold Tax Collection Act* 1939 on the basis that it was not delivered to the bank or an agent of the bank until after 15th September 1939.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Williams* J. dissenting), that the delivery of the gold was not a mere handing over to the bank of gold which the company held before 15th September in the capacity of agent for the bank but was a delivery by the company as owner which rendered it subject to tax.

Decision of *Latham* C.J. affirmed.

APPEAL from *Latham* C.J.

The Commonwealth brought an action in the High Court against the Electrolytic Refining and Smelting Co. of Australia Pty. Ltd. for the recovery of an amount alleged to be due for gold tax. The facts are stated in the judgment hereunder of *Latham* C.J., who heard the action.

Tait K.C. and *C. M. Collins*, for the plaintiff.

Fullagar K.C. and *Spicer*, for the defendant.

Cur. adv. vult.

1945, April 11.

LATHAM C.J. delivered the following written judgment :—

This is an action in which the Commonwealth seeks to recover from the defendant company a sum of £2,561 18s. 1d. claimed to be due as a balance of gold tax payable in respect of 25,585 fine ounces of gold. The defendant counterclaims for £17,478 6s. 1d., money paid under protest to the Commonwealth for gold tax claimed by the Commonwealth in respect of the same gold. The parties are agreed that if tax is payable in respect of the gold the plaintiff is entitled to judgment for the amount claimed, and that if tax is not payable the plaintiff fails upon the claim and the defendant succeeds upon the counterclaim for £17,478 6s. 1d.

It will be convenient first to state the history of the gold in question. The company refines and smelts gold bullion and other materials described as primary products containing gold, such as gold-bearing ore, concentrates, slimes, blister copper, copper matte, &c. These materials are received and treated under contracts with suppliers. Under the relevant contracts the company purchased the whole of the material and became the owner of all its contents, including the resulting valuable products. These products, so far as they are commercially valuable, were stated to be gold, silver and copper. The contracts contained detailed provisions for weighing, sampling, assaying, smelting and refining and for payment for copper, silver and gold content. In some cases the full copper and silver content was paid for in the first place, but, as to gold, 98 per cent or thereabouts was so paid for. Returning charges, or charges specifically described as refining, smelting or realization charges, were paid or allowed by the seller to the buyer. Prices were adjusted in relation to London prices or, in one case, Melbourne mint prices.

No question arises in the present case as to gold bullion, which is gold in a substantially, though not completely, refined state. The

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question arises only with respect to gold extracted from gold-bearing material delivered to the company under the contracts mentioned. The process of treating this material occupies periods varying from three weeks up to 120 days. The material delivered by different suppliers is not separately treated, but is treated together over a period constituting what is described as a campaign. The consequence is that no particular gold can be identified with the material delivered to the company by any particular supplier. The result of a campaign is, *inter alia*, so many ounces of gold, for which the company pays the suppliers of the material which produced the gold in accordance with assay values and quantity delivered, subject to returning charges &c. as already stated.

The *Gold Tax Act* 1939, to which I shall later refer more in detail, imposed tax in respect of gold delivered to the Commonwealth Bank or an agent of the bank on or after 15th September 1939. Both parties contest these proceedings upon the basis that all the material which produced the 25,585 ounces in question was delivered to the company by its suppliers before 15th September 1939. It then contained the gold which was ultimately extracted, but that gold did not exist as refined gold until various dates after 15th September. After that date, as the gold was refined, it was physically handed over to the bank by the company.

On 28th August 1939 regulations made under the *Defence Act* 1903-1939 were gazetted providing for the compulsory delivery of gold to the Commonwealth Bank or an agent of the bank and the acquisition by the bank of all gold so delivered. Negotiations took place between the bank and the defendant company and the Board of the bank appointed the company to be an agent of the bank for the purposes of these and other similar regulations. There is a dispute between the parties as to the point of time from which the company should be regarded as being such an agent.

The company rightly contends that the plaintiff must, in order to show that tax is payable, prove that the 25,585 ounces of gold were delivered to the bank or to an agent of the bank after 15th September. The question is whether the gold in question was so delivered after that date. The plaintiff contends that the company received the gold-bearing material before 15th September as owner thereof and became the owner of every part of the material including the gold which was later refined therefrom, and subsequently, that is, after 15th September 1939, delivered the gold to the bank and thereupon became liable to pay the tax. The contention for the defendant company is that the company was appointed an agent of the bank for the purposes of the regulations mentioned (and other

relevant regulations which replaced them) before 15th September; that it held the gold as such agent from the time of appointment, though the gold was, before extraction, contained in materials which had been previously purchased by the company and were awaiting treatment or undergoing treatment. On this view the gold was delivered to an agent of the bank before 15th September 1939. Alternatively, the company contends that if the materials themselves which contained the gold cannot be regarded as gold within the meaning of the Act, then, though it may be true that the delivery of the materials as such was not a delivery of gold, yet there was a delivery of the gold which was in the materials to the company and the company was in fact an agent for the bank. This contention is completed by the argument that when the company "delivered" the refined gold to the bank after 15th September it really only performed its duty as agent in respect of the gold, and should be regarded, not as delivering the gold to the bank, but as physically transferring to the bank the possession of the gold which it already held as the bank's agent.

In reply to these contentions the plaintiff argues that the gold-bearing material was not gold within the meaning of the Act and that, therefore, no delivery of the gold-bearing material before 15th September 1939 can be regarded as a delivery of gold within the meaning of the Act, whether or not the company was an agent of the bank at that time. The plaintiff further argues that when the relevant legislation refers to an agent of the bank it refers to an agent of the bank for the purpose of accepting delivery of gold on behalf of the bank, and that the gold in question, whether regarded as contained in the gold-bearing material or as consisting of the refined gold ultimately extracted, was delivered to and received and held by the company as the owner thereof and not otherwise, and that the appointment of the company as agent had no reference to gold which was already in possession of the company (whether contained in ore &c. or in process of treatment or as refined gold).

The liability of the defendant depends upon the *Gold Tax Collection Act* 1939 and the *Gold Tax Act* 1939. The application of these Acts depends, as already stated, on the delivery of gold to the Commonwealth Bank or to an agent of the bank. They do not contain any provision requiring gold to be delivered to the Commonwealth Bank, and accordingly would not have been very effective if other legislation had not imposed an obligation to deliver gold to the bank.

There was, however, other legislation in the form of regulations which created such an obligation. The first relevant regulations are

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to be found in Statutory Rules 1939 No. 77 (gazetted 28th August 1939) made under the *Defence Act* 1903-1939. They are entitled the *Defence* (*Monetary Control*) *Regulations*. I have been unable to discover any authority in the *Defence Act* for the making of these regulations. The regulations, however, were (except for one immaterial variation) re-enacted on 13th December 1939 by the *National Security* (*Monetary Control*) *Regulations*, Statutory Rules 1939 No. 91. In the meantime the *National Security Act* 1939, s. 7 (2), had validated the regulations made under the *Defence Act*. Those regulations were formally repealed on 2nd November 1939 by Statutory Rules 1939 No. 137. It will be convenient to refer to the terms of the *National Security* (*Monetary Control*) *Regulations* as representing the regulations in force at all material times.

It may be mentioned that by Statutory Rules 1939 No. 100 (23rd September 1939) an attempt was made to impose an excise duty in respect of the gold delivered to the Commonwealth Bank. These regulations were repealed by Statutory Rules 1939 No. 183, gazetted on 29th December 1939—by which time the *Gold Tax Collection Act* and the *Gold Tax Act* were in operation, both of them being made retrospective to 15th September 1939. On 12th December 1940 Statutory Rules 1940 No. 282 (*National Security* (*Exchange Control*) *Regulations*) came into operation, and by those Regulations the *National Security* (*Monetary Control*) *Regulations* as amended were repealed. They, however, repeated in regs. 14 and 15 the relevant provisions of the earlier Regulations.

The legislation which it is necessary to consider may therefore be regarded as consisting of the *National Security* (*Monetary Control*) *Regulations* (S.R. 1939 No. 91), the *Gold Tax Collection Act* 1939 and the *Gold Tax Act* 1939.

The relevant provisions which later were included in the last-mentioned Regulations were in operation from 28th August 1939. They provided (reg. 2) that "agent of the Bank" meant a person appointed by the board to be an agent of the bank for the purposes of the Regulations. Regulation 6 provided that the board might appoint any person to be agent of the bank for the purposes of the Regulations, and that any person appointed to be agent should act in accordance with instructions of the board.

Regulation 7 (1) was as follows :—

> "(1) Subject to this regulation and subject to any exemptions granted by the Treasurer by order, any person who has any gold in his possession or control shall deliver the gold to the Bank or an agent of the Bank—

(*a*) if the gold is in his possession or control at the commencement of these Regulations—within one month after such commencement; or

(*b*) if the gold has come into his possession or control after the commencement of these Regulations—within one month after it has come into his possession or control."

It was provided in reg. 7 (2) that if any person failed to comply with reg. 7 (1) the gold in respect of which the failure occurred should be forfeited to the Crown. Regulation 7 (4) was as follows:—

"All gold delivered to the Bank or an agent of the Bank in accordance with this regulation shall vest in the Bank absolutely and all the right, title and interest of the person delivering the gold shall be taken to have been converted into a right to receive payment for the gold at such price as is fixed by the Board and published in such manner as the Treasurer approves."

Under these Regulations, therefore, any person who had any gold in his possession or control was bound to deliver the gold to the bank or an agent of the bank within one month after the Regulations came into operation, or, if the gold came into his possession or control at a later date, within one month after it had come into his possession or control. Upon delivery of gold to the bank or to an agent of the bank the gold vested in the bank absolutely. The Regulations had no application to gold which was already vested in the bank.

The agency contemplated by these Regulations was plainly an agency for the purpose of accepting delivery of gold on behalf of the bank. The bank might have had agents for many purposes, but an agent for, for example, the purpose of hiring premises or of buying goods other than gold would not be an agent of the bank for the purposes of the Regulations. The purpose of the Regulations was to secure the delivery of gold to the bank or to an agent of the bank, so that the bank (not any agent of the bank) would become the owner of the gold. If, therefore, any person were appointed agent under the Regulations, and gold were delivered to that person in his capacity as such agent, the result would be that the bank would become the owner of the gold.

The Regulations have no retrospective operation. They provide for the appointment of agents to act *in futuro* in relation to delivery of gold thereafter to be made to them. A delivery of gold made to a person before the commencement of the Regulations would operate according to the ordinary law relating to the passing of property in chattels. If it was delivered by way of sale the property would vest

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in the person to whom the delivery was made. That position would not be altered by the fact that at a subsequent date that person was appointed an agent of the bank for the purpose of thereafter accepting delivery of gold on behalf of the bank.

The *Monetary Control Regulations* being in operation, the *Gold Tax Collection Act* was passed. Section 5 provides that the tax in respect of any gold (subject to certain exemptions which are immaterial—s. 6) shall be payable by the person who delivers the gold to the bank or to an agent of the bank. Section 7 provides that tax shall be a debt due by the taxpayer to the Commonwealth, and that the bank or the agent of the bank, as the case may be, shall deduct from any amount payable in respect of gold delivered to the bank, or to its agent, the amount of that tax and shall pay the amount so deducted to the Commonwealth. Section 7 (3) provides that such a deduction of any amount of tax shall operate so as to discharge the liability of the taxpayer to pay the tax ; and so as to discharge, *pro tanto*, the liability of the bank to make payment to the taxpayer for the gold in respect of which the tax was payable.

The *Gold Tax Act* provides (s. 5) that a tax is imposed upon gold delivered to the Commonwealth Bank or to an agent of the bank on or after 15th September 1939, and (s. 6) that the amount of tax so imposed shall be one half of the amount by which the amount payable by the bank in respect of gold so delivered exceeds an amount calculated at the rate of £9 for each ounce of fine gold contained in the gold so delivered.

Each Act contained a provision that it should be deemed to have come into operation on 15th September 1939.

The tax is imposed only upon gold delivered to the bank or its agent. It is calculated by reference to the amount payable by the bank in respect of the gold, and it is collected by the bank or its agent by deduction from the amount payable for the gold. Thus the system of taxation depends upon the delivery of gold to the bank in such circumstances that the bank becomes the owner of the gold and must pay for it. The *Monetary Control Regulations* supply the basis for the operation of this system of taxation, because they create the obligation to deliver gold to the bank, and provide that the bank acquires the property in the gold and becomes bound to pay for it.

The agent of the bank referred to in the statutes must be held to be a person who is an agent of the bank for the purposes of the statutes. I repeat what I have already said with reference to the same words used in the Regulations—the agent who is referred to is an agent to accept delivery of gold on behalf of the bank.

Without setting forth in detail the correspondence which passed between the Commonwealth Bank and the company, I am prepared to assume in favour of the defendant that it became an agent of the bank for the purpose of the Regulations as from 7th September 1939. At a board meeting of the bank held from 26th August to 30th August 1939 it was resolved by the board that the defendant company should be appointed an agent of the bank " for the purpose of reg. 7." The regulation referred to was plainly reg. 7 of the *Defence (Monetary Control) Regulations*, No. 77 of 1939. I agree with the argument for the plaintiff that the Regulations did not confer power upon the bank to appoint as agent a person who was unwilling to act as agent, just as a power of a municipal council to appoint a town clerk does not enable a municipal council to compel a person to accept such an appointment. But on 2nd September 1939 the bank informed the defendant that it was prepared to appoint the company as agent on certain terms which were set out, and proposed to pay a commission to be thereafter fixed. On 6th September the company replied that, subject to minor modifications, it would be pleased to accept the appointment. The parties then acted as if the company had already been appointed agent and the company from time to time informed the bank of the gold (including the gold in question) which was in its possession, whether in bullion or (as estimated) in primary products, and stated when it would be " available for delivery to the bank." The terms of the agency were under discussion until 27th November. On 9th November a sum of £231 11s. 1d., " representing commission due on gold lodged during the month of September " and described as " gold agent's commission " had been paid by the bank to the company. Thus the position is that the company in fact acted as agent from 7th September 1939, but that the terms of the agency were not completely settled until 27th November 1939. But the course of conduct of the parties shows that it was understood between them that the company should be treated as having been a duly appointed agent of the bank as from the date when the company expressed its willingness to act as agent, namely 7th September 1939. An alternative view is that the relation of agency was actually established on 7th September on the terms then proposed by the bank though those terms were subsequently varied as the result of explanations and requests by the company. The latter is the view which I prefer, but on either view the position is that the company should be treated as being an agent of the bank for the purposes of the Regulations from 7th September 1939. The *Gold Tax Collection Act* and the *Gold Tax Act* were, as already stated, passed in December 1939, but they came into operation as on 15th September 1939. The company

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should, in my opinion, be regarded as being also an agent of the bank within the meaning of the Acts as from 15th September 1939.

On 7th September 1939, however, the company already had in its possession as owner all the gold with reference to which the question of liability to taxation arises. It had bought that gold from the suppliers of the primary products. When it received the primary products it did not receive them as agent for the bank—it was not an agent of the bank in any sense when it received them. The receipt of the primary products by the company from its suppliers did not create any relation between them and the bank. When the company treated the materials it acted on its own account in accordance with the contracts which it had made, and not on behalf of the bank. When the company was appointed as agent for the bank it was so appointed only in relation to deliveries of gold thereafter to be made in such a manner that the bank acquired the gold and became liable to pay for it. The company might, after 15th September 1939, as the Regulations then stood (they were altered in this respect by Statutory Rules 1939 No. 181) have purchased gold from AB on its own account and have received gold from XY on account of the bank. As to the purchased gold, that would not become the property of the bank until the company delivered it to the bank, as it was bound to do within one month. The company (not the vendor of the gold to the company) would then be liable for the tax on that gold. In respect of gold received by the company as agent for the bank, however, the person who delivered the gold to the company would be liable for the tax and the bank would be entitled to deduct the tax from the price. Thus the fact that the gold now in question was in the possession of the company at a time when it was agent for the bank for the purpose of receiving deliveries of gold does not show that that gold had been delivered to the company as an agent of the bank so that it became the property of the bank. If the gold had been the property of the bank before 15th September 1939, no question of liability to tax could have arisen, but it had not, at that time, by delivery to the bank, become the property of the bank. After 15th September, as the gold was refined from time to time, it was delivered to the bank by the company and the bank became liable to pay the company (not the company's suppliers) for the gold. Until delivery of the gold to the Commonwealth Bank, the gold, like the copper and silver resulting from the treatment, was the property of the company. Upon delivery of the gold to the bank, but not before, it became the property of the bank. At that time the liability to tax attached and the fact that the company was an agent within the meaning of the Act, having been appointed an agent for the purposes of the Regulations, did not alter the fact that the gold in question was not delivered

by any person to the company in its capacity as agent for the bank. The gold, whether it be regarded as gold contained in the primary products, or as refined gold, came into the possession of the company as owner by right of purchase and not otherwise. There was no delivery of the gold before 15th September to the company as agent of the bank. There were deliveries of the gold by the company to the bank, such deliveries all taking place after 15th September 1939.

Upon this view the company is liable to pay the tax, even if the gold when still contained in the gold-bearing minerals is, or the materials themselves are, regarded as gold for the purpose of the Acts. Neither the Acts nor the Regulations contain any definition of gold. But I am of opinion that " gold " in the Acts and the Regulations means that which is commercially described as gold, and that the term does not cover either ores, concentrates, slimes, slag, copper blister, &c., which contain gold or the gold contained in such materials. The contracts which were put in evidence provide for the sale and delivery of hundreds of tons of gold-bearing material. In my opinion, the Regulations did not create an obligation to deliver that material to the bank or to an agent of the bank. The products of the company's operations are gold, silver, copper and residues. In my opinion, it would be as inappropriate to describe the original material as being gold as it would be to describe it as being silver or copper. If the term " gold " is understood in this manner, then the gold in question first became gold within the meaning of the Acts after the concentrates &c. had been treated so as to produce the 25,585 ounces of refined gold. That gold when produced was the property of the company, not the property of the bank. The company became liable to pay the tax when it delivered the gold to the bank.

For these reasons, I am of opinion that the plaintiff should succeed. There will be judgment for the plaintiff on the claim for £2,561 18s. 1d. and judgment for the plaintiff on the counterclaim; the defendant to pay the costs of claim and counterclaim.

From this decision, the defendant appealed to the Full Court.

Dean K.C. (with him *Spicer*), for the appellant. *Latham* C.J. was in error in holding that under the relevant regulations the defendant was nothing more than an agent " for the purpose of accepting delivery of gold on behalf of the bank." As Statutory Rules 1939 No. 77 were reproduced without any material variation by the *National Security* (*Monetary Control*) *Regulations*, the latter may be treated for purposes of reference as the only relevant Regulations. An " agent of the Bank," according to reg. 2 of those Regulations, meant a person appointed by the board of directors of the

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Commonwealth Bank to be an agent of the bank *for the purposes of the Regulations*. If, as appears to be the case, *Latham* C.J. was of opinion that the only function of the appellant as agent under the Regulations was to receive gold from third persons and hand it over to the bank, he put an unduly narrow interpretation on the Regulations. Regulation 6, which empowered the board of the bank to appoint agents, provided that any person appointed as agent should act in accordance with the instructions of the board. Under this regulation the appellant would have been bound, if directed by the board, to extract the gold from its own concentrates and to deliver that gold to the bank. There is nothing in the relevant Acts or regulations to suggest that " gold " means only fine gold, and there is no reason why it should not be regarded as including gold not yet extracted from concentrates. Accordingly, the gold in question should be regarded as having been held on behalf of the bank by the appellant as its agent, and the handing over of the gold to the bank after 15th September was not a " delivery " within the meaning of the relevant Acts.

Tait K.C. (with him *C. M. Collins*), for the respondent. There is no evidence to justify the conclusion that the appellant was an agent of the bank within the meaning of the Regulations before 15th September. The mere resolution of the board could not make the appellant such an agent until the appellant assented, and there is no evidence of any such assent before 15th September ; the negotiations which continued after that date suggest otherwise. It would not be apt in the present context to speak of " gold " as something which has not yet been extracted from concentrates ; for present purposes " gold " means fine gold, or, at least, if there is any difference, " that which is commercially described as gold " (as *Latham* C.J. expressed it). Even if it was possible to have a constructive delivery of the gold, while in the concentrates, from the appellant as owner to the appellant as agent of the bank, some overt act would be necessary, and no such act before 15th September has been proved.

Dean K.C., in reply.

Cur. adv. vult.

1946, Feb. 25.

The following written judgments were delivered :—

RICH J. This is an appeal against a judgment of the Chief Justice awarding to the Commonwealth a sum of £2,561 18s. 1d. claimed to be payable by the defendant company in respect of gold tax, and rejecting a claim by the company for a refund of gold tax already paid.

The company carries on the business of refining and smelting, and on and prior to 15th September 1939, had in its possession gold-bearing ores, concentrates, and other material, from which after 15th September 1939 it extracted the gold and delivered it to the Commonwealth Bank. The Commonwealth commenced an action against the company claiming a tax of £20,040 4s. 2d. less a sum of £17,478 6s. 1d. already paid, leaving a balance of £2,561 18s. 1d. By its defence and counterclaim, the company denied liability and claimed repayment of the £17,478 6s. 1d., this sum having been admittedly paid subject to the dispute as to liability.

According to the evidence, the company, in its business of refining and smelting, bought from customers gold bullion containing base content, and also gold-bearing ores, concentrates and other materials. It obtained refined gold from these materials by treating the bullion so as to remove the bulk of its base content, and by treating the ores, &c., so as to extract and refine their gold content. The price paid to the vendors for the bullion and other materials so bought was the value of the fine gold content less the cost of treatment to obtain the fine gold.

By provisions in force on 28th August 1939 and at all material times thereafter, and to be found in reg. 7 of the *National Security (Monetary Control) Regulations*, it was provided that, subject to any exemption granted by the Treasurer, any person who has any gold in his possession or control shall deliver it to the Commonwealth Bank or an agent for the bank, this not applying, however, to gold coins not exceeding £25 in value, wrought gold, or gold possessed for the purpose of being wrought or manufactured. All gold so delivered should vest in the bank absolutely, and the interest of the person delivering it should be taken to have been converted into a right to receive payment for it at a price based on the price of gold in London.

The *Gold Tax Collection Act* 1939, passed on 15th December 1939, but operative as on 15th September 1939, provides by s. 5 that a tax in respect of any gold shall be payable by the person who delivers it to the bank or to an agent of the bank, but imported gold, gold coin, and wrought gold are made exempt by s. 6. Wrought gold is defined to mean gold and gold alloys which on view have apparently been worked or manufactured for trade purposes, and includes the waste products arising from the working and manufacturing of gold and gold alloys for trade purposes. By the *Gold Tax Act* 1939, also passed on 15th December 1939, the tax is imposed upon gold delivered to the bank or an agent of the bank on or after 15th September 1939, and the amount of the tax is half the amount by which the amount payable by the bank in respect of gold so delivered exceeds

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an amount calculated at the rate of £9 for each ounce of fine gold contained in the gold so delivered.

I think it plain that the Regulations, and also the Acts, are concerned, not with gold-bearing material, but gold capable of being delivered as such by a person having it in his possession; and that by gold is meant, not chemically pure gold, but gold in a state of refinement in which it is dealt with by persons dealing in gold as such.

There is nothing in the regulation or in the Acts which obliges a person in possession of land containing gold-bearing ore to mine it, or in possession of gold-bearing materials to treat them and extract the gold. But, if he does get gold into his possession or control, whether by extracting it from materials belonging to him or in any other way, he must deliver it to the bank or to an agent for the bank, and upon gold so delivered he is liable to pay gold tax.

It is not disputed that the company, on and prior to 15th September, had in its possession gold-bearing material from which, after that date, it extracted the gold and delivered it to the bank, and it is not disputed that, if gold tax was payable upon this gold by the company, the amount was £20,040 4s. 2d. The company claims to be entitled to exemption from tax by virtue of certain correspondence between the bank and the company which began with a letter from the bank dated 2nd September 1939, addressed to the company, stating that it was prepared to appoint the company "as an agent of the bank for the purposes of Regulation 7," according to a general procedure, which was evidently intended to apply to all "agents" so appointed. From this "general procedure," and subsequent correspondence, it appears that the bank was appointing agents, of whom some were refiners of gold and some were not. Fine gold received by agents was to be lodged with the bank and paid for by it. "Unrefined gold received by agents other than refiners" (which appears to have been intended to mean gold-bearing material received by them) was to be forwarded by them to an agent of the bank who was a refiner. Refiner-agents were to extract the gold from material received by them from other agents or other sources, and obtain payment from the producers for the services rendered by them in this way. Agents were to pay, to the owners of the gold, prices fixed by the bank, after deducting anything which they were entitled to receive in respect of services rendered in extracting the gold. The bank was to remunerate the agents by a commission of 3s. per £100 on the value of the gold lodged by them. The defendant company, which is a refiner, intimated that it would be pleased to accept the appointment, subject to the Commonwealth Government exempting it from reg. 7, and subject to certain minor modifica-

tions. No formal agreement was ever entered into, but the parties drifted on without one, the defendant company extracting fine gold from gold-bearing materials which it had bought from customers prior to 15th September 1939, and had had on hand at that date, and delivering the gold to the bank as required by reg. 7, such delivery taking place after 15th September.

It now contends that it is not liable to pay gold tax upon this gold, on the ground that it held the gold-bearing material when it became an agent for the bank, and that therefore, from that time forward it held the gold contained in it for the bank as the bank's agent. Hence, when it extracted this gold and delivered it to the bank after 15th September, it was merely moving gold which already belonged to the bank before that date from one place to another. The contention cannot be supported. The Commonwealth Bank had no more right to carry on the business of buying quartz or tailings in order to win gold by smelting or refining or otherwise, than it had to buy land in order to quarry it for gold-bearing rock, and it had no power to appoint agents to do on its behalf what it had no power to do itself. The only relevant power conferred on it by the Regulations was that given by reg. 6 " to appoint any person to be the agent of the Bank for the purposes of these Regulations." This enabled the bank to appoint agents to receive on its behalf gold already in separate existence as such, from persons whose duty it was to deliver such gold to the bank. But the defendant company needed no authority from the bank to deal, in any way it chose, with any gold-bearing material which it might acquire, and was not required to submit to dictation from the bank as to how it should deal with it. If it chose to work material which it had bought, and extract fine gold from it, it did not do this as agent for the bank, because the bank had no power to appoint it its agent for any such purpose. It did it on its own account. But it became its legal duty to deliver any gold so won to the bank, or, if it did not do so, and could be regarded as having been duly appointed a receiving agent of fine gold for the bank, to treat itself as having taken delivery of the gold, when won, as agent for the bank. Upon actual or constructive delivery (and here there was actual delivery to the bank), gold tax became payable, and payable by the defendant company.

For the reasons which I have stated, I am of opinion that the appeal should be dismissed with costs.

STARKE J. The *Gold Tax Act* 1939 imposes a tax upon gold delivered to the Commonwealth Bank of Australia or to an agent of that bank on or after 15th September 1939 and the *Gold Tax*

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Collection Act 1939 provides that the tax is payable by the person who delivers the gold to the bank or an agent of the bank. The appellant, the Electrolytic Refining and Smelting Co. of Australia Pty. Ltd., after 15th September 1939, handed over to the bank (to use a neutral expression) 25,585 fine ounces of gold and prima facie became liable to pay the gold tax in respect of that gold. But it is contended for the appellant that, before that date, it held or was possessed of the gold as agent of the bank and so was under no liability for the gold tax.

The appellant carried on among other activities the business of refining ores, concentrates and other materials and its operations included the extraction of gold and other metals from those materials. It acquired the materials under contracts made with the suppliers and became the owners of the materials and all their metallic contents of gold, silver, copper and so forth. The 25,585 ounces of fine gold handed over to the bank was extracted from the materials acquired and held by the appellant prior to 15th September 1939 but the gold as already stated was handed over to the bank after that date.

About 2nd September 1939 the Board of Directors of the Commonwealth Bank informed the appellant that the bank was prepared to appoint it as an agent of the bank for the purposes of reg. 7 of the *Defence* (*Monetary Control*) *Regulations* which appear to have been validated by the *National Security Act* 1939-1943, s. 7. They were replaced by the *National Security* (*Monetary Control*) *Regulations*, S.R. 1939 No. 91. Under these Regulations the bank on 11th October 1939 also appointed the appellant its agent for the purposes of the Regulations and the appellant acted as the agent of the bank for the purposes of the Regulations from about 7th September 1939 until the termination of the agency on 31st December 1942.

The Regulations empowered the Bank Board to appoint a person to be the agent of the bank for the purposes of the Regulations. And they provided that any person who had gold in his possession or control should deliver the gold to the bank or an agent of the bank—

(*a*) if the gold were in his possession or control at the commencement of the Regulations—within one month after such commencement;

(*b*) if the gold had come into his possession or control after the commencement of the Regulations—within one month after it has come into his possession or control.

All gold delivered to the bank or an agent of the bank in accordance with the regulation vests in the bank absolutely, and all the right, title and interest of the person delivering the gold is converted

into a right to receive payment for the gold at such price as is fixed by the Board and duly published.

It is clear that the gold-bearing ores, concentrates and other materials acquired by the appellant were not delivered to the appellant as an agent of the bank but were purchased on its own account and for the purposes of its business. But it is said that the preliminary negotiations and correspondence between the appellant and the bank make it plain that from the date of its appointment as agent of the bank the appellant agreed or must be taken to have agreed to stand possessed as an agent of the bank of the gold content of all ores, concentrates and materials purchased by it and so held that content as such agent. The 25,585 fine ounces of gold extracted by the appellant from the ores and other materials prior to 15th September 1939 must therefore, it is contended, be regarded as delivered to the bank or at least in the hands of the appellant prior to 15th September 1939 as agent for the bank.

In my opinion, the argument cannot be sustained. In the preliminary negotiations it is true that Mr. Shain, the Melbourne manager of the bank said to Mr. Sears, the local secretary of the appellant, " On your appointment as an agent of the bank all gold in your possession, including the gold in ores, concentrates, etc., would be held by you as Agents and whilst all persons concerned must accept the conditions of Statutory Rule 77 I think that you will be able to make satisfactory arrangements with your vendors regarding the price of the gold in materials delivered to you," and Mr. Sears replied, " We will gladly co-operate with you and I am sure that the company " (the appellant) " will be pleased to act in the capacity of Agents." But the appointment contemplated by the Regulations relates to lodgments of gold by third parties with agents of the bank and not to the acquisition of gold-bearing materials by companies or persons who are in fact agents of the bank but who acquire the material on their own account. The subsequent correspondence with the bank contemplates the carrying on by the appellant of its business as formerly acquiring ores and other materials on its own account and conducting its smelting and refining operations. The ultimate delivery to the bank of the gold recovered by the appellant's operations is naturally envisaged, but there is nothing to suggest that the appellant stood possessed of the gold content of these ores and other materials for the bank. The gold recovered from the ores and other materials remained with the appellant, not as agent of the bank, but in its own right until delivery to the bank was effected and in the case before the Court that was after 15th September 1939.

The appeal should be dismissed.

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DIXON J. The question for decision is whether 25,585 fine ounces of gold were subject to the tax imposed by the *Gold Tax Act* 1939. That Act and the *Gold Tax Collection Act* 1939 are to be deemed to have come into operation on 15th September 1939. The two statutes were preceded by regulations which sought to impose the same tax, the *National Security* (*Gold Excise*) *Regulations* (S.R. 1939 No. 100). Hence the retrospectivity of the statutes. The tax is imposed upon gold delivered to the Commonwealth Bank of Australia or to an agent of that bank on or after 15th September 1939 (s. 5 of the *Gold Tax Act*). It is payable by the person who delivers the gold to the bank or an agent of the bank (s. 5 of the *Gold Tax Collection Act*). In the legislation that person is called the taxpayer. The appellant company delivered the 25,585 ounces of gold to the Commonwealth Bank after 15th September 1939. The gold was, therefore, prima facie subject to tax ; and, prima facie, the tax was payable by the appellant company.

The grounds upon which it is sought to avoid the liability which thus appears to arise depend upon the relations which, according to the case for the company, had been established between it and the bank and the interest which, according to that case, those relations gave the bank in the gold.

The business of the company is that of smelters and refiners. It refined gold bullion and bullion containing gold. It smelted gold-bearing materials such as ores, concentrates, blister copper, matte and slag.

The gold in question was smelted from materials received by the company before 15th September 1939. It was not recovered by smelting and refining until some time after that date. But, in the two weeks preceding 15th September 1939, though, doubtless, after it had received the gold-bearing material, the company, it is said, had become the agent of the bank. The contention is that, upon its true interpretation, the legislation does not mean to impose a tax upon the delivery of gold to the bank by its own agent, or of gold held for the bank, or obtained from materials held for it by its agent, and that, upon the facts, that was the position.

The word " agency," as has often been pointed out, is used to describe widely differing things and, in the present instance, it will, I think, be found that more precision is needed in applying the provisions imposing the tax. A short statement of the material facts is, however, first necessary.

The first and to my mind most important fact is that the company was the purchaser of the materials which, after 15th September

1939, it smelted and from which it thus produced the gold in question. It bought them under running contracts of a type common in the industry. The company paid a price fixed by reference to quotations of the day for the metallic content of the materials as ascertained by assay, less a returning charge or treatment charge to cover its operations. Its suppliers had no interest in the gold the company recovered and were simply vendors of gold-bearing materials. Accordingly, the company sold the refined gold produced by it as a smelter and refiner. When the war was breaking out it was, of course, necessary for the Commonwealth Government to assume the control of gold. To this end regulations were made on 25th August 1939 (S.R. 1939 No. 77, regs. 6 and 7) and, after the enactment of the *National Security Act*, these were superseded by similar regulations made on 13th September 1939 (S.R. 1939 No. 91, regs. 6 and 7). The effect of these provisions was to require a person in possession of gold to deliver it to the Commonwealth Bank or an agent of the bank and to enable the bank to appoint agents for the purpose of the Regulations bound to carry out their duties in accordance with and to comply with such instructions directions and requirements as the bank might issue or make. They provided that all gold delivered to the bank or an agent of the bank in accordance with the regulation should vest in the bank and the right title and interest of the person delivering the gold should be taken to have been converted into a right to receive payment for the gold at such price as the Bank's Board fixed and published.

The bank proceeded at once to appoint agents for the purpose of the Regulations and resolved to appoint the appellant company. It was, of course, necessary that it should be appointed if it was to continue to accept bullion. But the bank was guided, no doubt, by the wider and more general consideration that the company handled very large quantities of gold as a result of its operations. The company felt the difficulty which the Regulations, particularly reg. 7, created in the conduct of its business and at one time sought exclusion from the application of the regulation. One consequence that ensued from them was that the bank's price must from a practical point of view be substituted in the company's arrangements with its suppliers for the quotations named in the contracts. It was not found easy for the company and the bank to reach a *consensus ad idem* as to the terms of the agency, but I do not think that is material. I am prepared to accept the view that, for the purpose of the Regulations, the appellant became an agent of the bank, about 6th or 7th September 1939. As early as 2nd September the purpose was well and briefly expressed by the Melbourne manager

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of the bank, during a preliminary discussion with the local secretary of the company, in a passage as favourable to the company as anything contained in the materials before us. He said :—" Our desire is to see that your business as a whole is preserved. Your appointment as an Agent of the bank would obligate you to account for and ultimately deliver to the bank all gold received by you and the daily price fixed for gold is to be used by you in settling with your vendors. On your appointment as an Agent of the bank all gold in your possession, including the gold in ores, concentrates, etc. would be held by you as Agents and whilst all persons concerned must accept the conditions of Statutory Rule 77 I think that you will be able to make satisfactory arrangements with your vendors regarding the price of the gold contained in materials delivered to you."

Notwithstanding what was then said, I do not think that the company ever became bound to hold as agent the gold-bearing materials already in its possession. But be this as it may, it is clear that the common intention of the bank and the company was that it should continue to purchase and become owner of the ores, concentrates, blister copper, matte, slag &c., and should, as owner, deliver the refined gold to the bank, in exchange for a price fixed under the Regulations. Thus in a letter, dated 6th September 1939, the company wrote :—" Regarding the gold which is received by us in primary products as aforesaid after the 1st instant, our present understanding is that in lieu of the price which is provided for by our domestic arrangements with vendors the Commonwealth Bank price of that day (following the date of sampling or other described operation) which is stated in the said domestic arrangements shall be the price to be paid by us. We understand also that upon the production of this gold at our Refinery we are to give you the required daily written advice for the purpose of fixing the price to be paid to us by the bank for the said gold."

But, while all this was so, the company was to become the bank's agent so as to be accountable in the public interest for all gold. This anomalous fiduciary obligation in relation to gold-bearing material and gold belonging to the company beneficially forms, I think, the most plausible foundation for the company's contention that the delivery of the refined gold was not taxable.

But I think that an examination of the Acts of Parliament shows that the contention must fail. The plan of the *Gold Tax Collection Act* is that the tax, though a debt due to the Commonwealth, should be collected by the bank. The bank or the bank's agent collects it by a deduction from the amount payable by the bank to the person delivering the gold to the bank or the bank's agent. Under

the Regulations gold must be paid for whether delivered to the bank or its agents and, although it is not expressly stated, it is clear enough that it is the bank that is liable for the payment. The Act is specifically based on the liability of the bank for payment for the gold. After imposing the obligation upon the bank or its agent to deduct the tax, s. 7 proceeds to enact that the deduction shall operate so as to discharge *pro tanto* the liability of the bank to make payment to the "taxpayer" for the gold in respect of which the tax was payable. The *Gold Tax Act*, after imposing the tax upon gold delivered to the bank or an agent of the bank, goes on to define the amount of the tax in a way which again brings out the position of the bank in the acquisition of the gold as the principal. It is, therefore, quite clear that the liability for tax is imposed upon the person who delivers gold so as to become entitled as against the bank to payment by the bank for that gold. The delivery of the gold may be made to the bank or the bank's agent. But, if to the latter, he receives it as a true agent acting for the bank as a principal who becomes liable to the other party to the transaction.

Now, in the present case, it is, of course, beyond doubt that the gold-bearing materials, the ore, concentrates, &c. never were delivered to the company in any such capacity. They were delivered before the company became agent. But, even if they had been delivered afterwards, the company would not have received them otherwise than as purchaser under its running contracts. That is shown by the course of dealing with respect to ore, concentrates, and other gold-bearing materials received by the company after 15th September 1939. The company paid the contract price for them to the suppliers, who could never have supposed that they were dealing with the bank. The identity of the gold contained in them was not preserved. The company delivered to the bank the gold produced by the indiscriminate smelting and refining over a "campaign" of the materials of all suppliers and received the price as principal. From the price paid by the bank, the tax was deducted. It may be that there is a further reason against the gold-bearing materials being considered as gold in the hands of the bank's agent. The suggested reason is that gold-bearing materials are not gold within the meaning of the Regulations. The Chief Justice so decided. So far as the Acts are concerned, I should be inclined to think that, in whatever form the bank chose to receive delivery of "gold," tax would be payable upon the gold, that is, in respect of the price payable for the gold content. But that is a matter that can be passed by.

For the foregoing reasons, I am of opinion that the company has no answer to the liability prima facie arising under the very words of

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s. 5 of the *Gold Tax Act* for tax upon gold delivered to the Bank after 15th September 1939 and of s. 5 of the *Gold Tax Collection Act*, which imposes liability to pay the tax upon the person who delivers the gold to the bank (or to an agent of the bank).

I think that the appeal should be dismissed.

McTIERNAN J. The question for decision is whether the appellant incurred liability to pay tax in respect of 25,585 fine ounces of gold.

Section 5 of the *Gold Tax Act* 1939 imposes a tax upon gold delivered to the Commonwealth Bank of Australia or to an agent of the bank on or after 15th September 1939. Section 5 of the *Gold Tax Collection Act* 1939 makes the tax payable by the person who delivers the gold to the bank or to an agent of the bank. The Acts do not define " gold " or the expression " an agent of the bank," or impose any obligation upon any person to deliver any gold to the bank or an agent of the bank. But the Acts postulate, I think, the existence of regulations which had been made to mobilize gold. The provisions of these Regulations which bear on the case are, or are represented by, regs. 2, 6 and 7 of the *National Security* (*Monetary Control*) *Regulations*. Regulation 2 defines " an agent of the bank " to mean an agent of the bank for the purposes of these provisions. Regulation 6 empowers the bank to appoint any person to be an agent of the bank for the purposes of the Regulations. Regulation 7 imposes upon any person who has gold in his possession or control the obligation to deliver it to the bank or an agent of the bank within the time allowed by this regulation. The sanction for the performance of the obligation is forfeiture of the gold to the Crown. Regulation 7 further provides that all gold delivered to the bank or to an agent of the bank in accordance with this regulation shall vest absolutely in the bank, and that the right, title and interest of the person delivering the gold shall be taken to have been converted into a right to receive payment for the gold at the rate stipulated in the regulation.

The company delivered to the bank from time to time after 15th September 1939, 25,585 fine ounces of gold. This is the gold involved in the case. The contention for the Commonwealth is that this gold was the property of the company and did not vest in the bank until such delivery. The contention for the company is that the property in this gold vested in the bank before 15th September 1939. For this contention reliance is placed upon the appointment of the company as an agent of the bank for the purposes of the Regulations. It is argued that the appointment of a person as an agent of the bank for the purposes of the Regulations

affects the ownership of any gold which is in his possession or control at the time of the appointment, or which is delivered to him after the appointment and during the period of the agency. The argument is that in each case the gold vests in the bank and the agent holds it for the bank. If this argument is right the company did not incur any liability for tax in respect of the gold in question in this case. The Acts impose a tax upon gold which is delivered to the bank or an agent of the bank in accordance with the Regulations. Such gold is then the property of the bank. The Acts do not impose a tax upon gold the property of the bank delivered by an agent of the bank to the bank.

In my opinion, the appointment of a person who is in possession or control of gold at the time of his appointment does not affect his title to that gold. Regulation 7 vests in the bank gold delivered in accordance with this regulation to the bank or an agent of the bank. Gold delivered to any person before his appointment as an agent of the bank is not delivered in accordance with the regulation. The gold therefore does not vest in the bank under the regulation. The obligation imposed by the regulation could not be performed by delivering gold to a person who at the time of the delivery is not an agent of the bank. If the person to whom the gold is delivered is appointed an agent of the bank, it cannot be that the person who delivered the gold can after the appointment claim payment from the bank for the gold under reg. 7. The effect of the appointment of a person to be an agent is not that he then holds the gold which was in his possession at the time of the appointment in trust for the bank. The appointment does not automatically vest such gold in the bank. In respect of that gold, the person appointed to be an agent of the bank is subject to the obligation created by reg. 7 to deliver the gold to the bank or an agent of the bank. Upon such delivery he ceases to be the owner of the gold. It does not vest in the bank until delivered to the bank or an agent of the bank. Regulation 7 limits the period during which a person who acquires gold as owner may lawfully retain the possession and control of it. But the regulation does not destroy the capacity of any person whom the bank appoints to be an agent of the bank for the purposes of the Regulations to acquire gold or to be in possession or control of gold as its owner. So far as regards any gold delivered to an agent of the bank after his appointment, the question whether such gold was delivered to him in accordance with reg. 7 is one of intention. If the person who delivered it to the agent did so in order to perform his obligation under the regulation, the gold would have been delivered in accordance with the regulation. In that case, the gold would vest in the Bank.

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The gold in question in the present case was extracted by the company after 15th September 1939 from ore, concentrates, blister copper and other materials and, as the company refined the gold, it delivered the gold in that condition to the bank. The company purchased before 15th September 1939 all the materials from which the gold in question was extracted and got delivery of them before that date. It purchased these materials from the suppliers under contracts which transferred to the company the property in the gold which the materials contained. In the face of these contracts, even if the word " gold " is interpreted to mean the gold-bearing materials themselves or the gold while it is in such materials, it cannot be held that there was any delivery here of gold until after 15th September 1939 in accordance with reg. 7. In my opinion, the company was the owner of the gold in question in this case when it was extracted and refined, and the company continued to be the owner until it delivered the gold to the bank. The delivery was made after 15th September 1939.

Accordingly s. 5 of the *Gold Tax Act* imposed tax upon this gold and under s. 5 of the *Gold Tax Collection Act* the company incurred liability to pay the tax imposed by s. 5 of the first-named Act. In this view of the case, it is not necessary to interpret the word " gold " in the Act; but, in order to uphold the company's contention, it would be necessary to give it a meaning which includes primary products bearing gold, or gold while in such products. I do not agree that the word " gold " in the Act has such a wide meaning. On this part of the case I should agree with what the Chief Justice has said regarding the interpretation of the word " gold " if I took a view which made it necessary to decide that question.

In my opinion, the appeal should be dismissed.

WILLIAMS J. This is an appeal from a judgment of the Chief Justice which raises the question whether the appellant, the defendant in the action, was liable to pay the sum of £20,040 4s. 2d. gold tax under the provisions of s. 5 of the *Gold Tax Act* 1939, which imposes a tax on gold delivered to the Commonwealth Bank of Australia or to an agent of that bank on or after 15th September 1939. If the appellant was liable to pay the tax, it is not disputed that this sum was the proper amount. The respondent, the plaintiff in the action, collected £17,468 6s. 1d. of this sum by deductions, under protest from the appellant, from payments made by the Commonwealth Bank to the appellant for fine gold lodged by the appellant with the bank, and then sued the appellant for the balance, namely £2,651 18s. 1d. The appellant denied liability for the

balance, and counter-claimed to recover the sum of £17,468 6s. 1d. The Chief Justice held that the appellant was liable for the tax and therefore gave judgment for the appellant on the claim and counter-claim.

The appellant is a company which, *inter alia*, smelts and refines gold-bearing materials, such as gold-bearing ore, concentrates, blister copper, mattes and slag. These materials also contain copper and silver. Prior to 15th September 1939, it had in its possession a considerable quantity of these materials, which it had purchased from its suppliers, and which had to be smelted and refined or were in the process of being smelted or refined in order to extract the gold, silver, and copper content. The process of smelting and refining takes about 120 days. It was therefore not until after 15th September 1939 that the appellant lodged the gold extracted from these materials with the bank.

On 28th August 1939 regulations were gazetted (S.R. 1939 No. 77), called the *Defence (Monetary Control) Regulations*, purported to be made under the *Defence Act*, which, so far as relevant, provided: Regulation 6: that the Commonwealth Bank Board might appoint any person to be an agent of the bank for the purposes of the Regulations; reg. 7: that, subject to this regulation and to any exemptions granted by the Treasurer by order, any person who had any gold in his possession or control should deliver the gold to the bank or an agent of the bank, if it was then in his possession or control within one month after the commencement of the Regulations, or, if it came into his possession or control after the commencement of the Regulations, within one month after it came into his possession or control; reg. 7 (4): that all gold delivered to the bank or an agent of the bank in accordance with this regulation should vest in the bank absolutely, and all the right title and interest of the person delivering the gold should be taken to have been converted into a right to receive payment for the gold at such price as should be fixed by the Board and published in such manner as the Treasurer approved; reg. 7 (6): that unless and until the Treasurer otherwise directed this regulation should not apply to gold coins the total value of which did not exceed £25 or to wrought gold or to gold in the possession of any person for the purposes of being worked or being manufactured for professional or trade purposes. It would appear that there was no power to make these Regulations under the *Defence Act*, but they were validated by s. 7 (2) of the *National Security Act*, and re-enacted in all relevant respects by the *National Security (Monetary Control) Regulations*, S.R. 1939 No. 91, gazetted on 13th September 1939.

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Williams J.

At a meeting held on 26th to 30th August 1939, the Board of the Commonwealth Bank, after the *Defence (Monetary Control) Regulations* had come into force, resolved that the appellant should be appointed an agent of the bank for the purposes of reg. 7. On 2nd September 1939 an interview took place between Mr. Shain, the Melbourne manager of the bank, and Mr. Sears, the local secretary of the appellant, with a view to the appellant being so appointed. Mr. Shain, after pointing out that under reg. 7 all gold had to be delivered to the bank or an agent of the bank, said that, as the appellant smelted and refined gold, it was desirable that it should be appointed an agent of the bank so that gold for smelting and refining could be delivered to it. He also said that, upon the appointment of the appellant as an agent of the bank, all gold in its possession, including the gold in ores, concentrates, &c., would be held by it as agent. Mr. Sears said that he was sure that the appellant would be pleased to act in the capacity of agent. Pursuant to this conversation the bank wrote a letter to the appellant on 2nd September which stated that the bank was prepared to appoint the appellant as its agent for the purposes of reg. 7, that it was proposed that the general procedure to be adopted should be, *inter alia*, that the bank's agents should comprise the trading banks, the Perth and Melbourne Mints, and such others as might be appointed from time to time; that unrefined gold received from agents other than refiners should be forwarded by such agents to any refiner who was an agent of the bank; that gold received by the appellant from agents or other sources should be held on account of the bank, and delivered as fine gold to be paid for at the price fixed by the bank from time to time in terms of the Regulations; and it was proposed that in return for the appellant's services the bank should pay the appellant a commission on all gold handled by the appellant except gold which had been lodged with it by other agents of the bank. The appellant replied to this letter on 6th September and stated that, subject to minor modifications being agreed to, and subject also to the Commonwealth Government exempting it from the provisions of reg. 7, it would be pleased to accept the appointment. Reasons were then given in support of the adoption of these minor modifications.

The wording of these letters would suggest that the bank and the appellant were at that stage negotiating with a view to the appellant accepting the agency, but the parties subsequently acted on the basis that the appellant had already accepted it. Thus on 8th September the bank wrote that it had been decided to fix the appellant's commission at 3s. per £100 value of gold lodged with the bank by the appellant other than gold lodged in respect of receipts from

the bank's other agents on their own account or on customers' accounts, and that for this purpose the bank would be glad if the appellant would advise it within ten days after the close of each month of the number of ounces of fine gold lodged with the appellant by each trading bank during the month on their own account and on customers' accounts, and that payment of the commission would be made to the appellant on the difference between total lodgments during the month and the total lodgments by the trading banks as shown on these advices; and on 11th September the defendant replied that it had been noted that within ten days after the close of each month it was to advise the bank in this way and that it would be pleased to do so. At this time the appellant was accepting gold bullion for refining from the trading banks and lodging the refined gold with the bank. In a letter of 19th October to the bank the appellant stated that the total quantity of bullion gold so delivered by the trading banks to 30th September was 1,446.12 fine ounces. Such action would appear to be consistent, and consistent only, with the appellant having accepted the agency. On 27th September the bank issued a public notice relating to the price of gold under the *National Security* (*Monetary Control*) *Regulations* stating that all gold subject to the Regulations should be forwarded either through a bank or direct to an agent of the bank for assay and refining, and naming the appellant as one of its agents. On 11th October the bank wrote to the appellant referring to its letters of 2nd and 8th September in connection with the appointment of the appellant as an agent of the bank for the purposes of the *Defence* (*Monetary Control*) *Regulations*, reg. 7, to the appellant's letter of 6th September accepting the appointment, and to the supersession of these Regulations by the *National Security* (*Monetary Control*) *Regulations*, informing the appellant that it had been appointed an agent under the latter Regulations upon terms similar to those set out in the above letters, advising the appellant that it was a condition of the appointment that the safe custody of all gold received by the appellant as an agent of the bank should be at the entire responsibility of the appellant until such time as the gold was delivered to the bank, and stating that the bank would be glad if the appellant would accept the appointment on these terms. Further correspondence then ensued relating to the fresh appointment until finally on 27th November the appellant accepted the appointment. In the meantime, on 9th November, the bank had forwarded a cheque to the appellant for £231 11s. 1d. representing agent's commission at three per cent on gold lodged with the bank during the month of September.

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The proper inference to draw from all these circumstances is, I think, that the appellant had on 6th September agreed to act as the agent of the bank on the terms proposed by the bank, subject to a right to determine the agency if certain modifications were not subsequently made to these terms. This attitude may well be explained by the grave emergency created by the outbreak of war, which placed the appellant under an obligation in the national interest immediately to co-operate with the bank in the important work of mobilizing the gold, leaving less important matters for future discussion. As Mr. *Tait* pointed out some of the more important unequivocal acts showing that the appellant was acting as an agent of the bank, particularly its acquiescence in the bank notifying the public that it was an agent on 27th September, and its acceptance of the cheque for commission on 9th November, occurred after 15th September. But it was accepting gold bullion from the trading banks for refining before that date, and the acts after that date are material to throw light on the relationship of the parties from the beginning. The position was therefore that prior to 15th September the company had become an agent of the bank for the purposes of reg. 7, that prior to this date it possessed and owned the whole of the gold on which the tax in dispute has been levied, either in the condition in which it had been delivered, or in process of being converted into fine gold, that the whole of this gold when refined was subsequently lodged with the bank, and that the bank paid commission on the whole of this gold.

Upon these facts two questions arise for determination. The first is whether the gold whilst still contained in these materials was gold within s. 5 of the *Gold Tax Act*. The second is whether the gold was delivered to the appellant as an agent of the bank prior to 15th September 1939.

As to the first question : there was a clear interrelation between the *Gold Tax Act* 1939 and the *Gold Tax Collection Act* 1939 and the *Monetary Control Regulations*. It was the Regulations which compelled a person to deliver all gold, except gold coins and wrought gold (until the Treasurer otherwise directed) to the bank or an agent of the bank ; and the tax was imposed on all gold, except gold imported into Australia from any place not being a territory of the Commonwealth, and gold coins and wrought gold (until in the case of the latter exemption the Treasurer otherwise directed). The obvious purpose of the Regulations was to compel all persons in possession or control of gold in a deliverable condition to deliver the gold to the bank or an agent of the bank, and to vest the ownership of all gold so delivered in the bank. The only gold exempted from

the operation of the Regulations was gold contained in coins and wrought gold. And it was equally the purpose of the *Gold Tax Act*, apart from the exemptions, to impose a tax upon all the gold required to be delivered to the bank or an agent of the bank. Section 5 of the Act must include gold other than fine gold, otherwise it would not be necessary to exempt gold coins and wrought gold. And this is made clear by s. 6 of the Act which provides that the amount of tax shall be one half of the amount by which the amount payable by the bank in respect of gold so delivered exceeds an amount calculated at the rate of £9 for each ounce of fine gold contained in the gold so delivered. Gold in ores, concentrates, blister copper, and other gold-bearing materials which have been mined is gold in a deliverable condition. I can see no reason why the gold to which the Regulations and Acts refer should be restricted to bullion gold. The gold existed in these materials in metallic form, and it was, in my opinion, whilst still in the materials, just as much gold within the meaning of the Regulations and Acts as when it had been refined. Even if the gold, whilst still contained in gold-bearing materials, was not gold which had to be delivered to the bank or an agent of the bank within the meaning of the Regulations, it was nevertheless gold, so that if it was in fact so delivered on or after 15th September and the delivery was accepted by the bank or on its behalf, the person who delivered the gold would be liable to tax.

As to the second question: s. 5 of the *Gold Tax Collection Act* provides that tax shall be payable by a person who delivers gold to the bank or an agent of the bank. Section 5 of the *Gold Tax Act* imposes a tax upon gold delivered to the bank or to an agent of the bank on or after 15th September. Neither of these Acts therefore contemplates a tax upon the delivery of gold by an agent of the bank to the bank. In order to attract tax the gold must be delivered by a third party to the bank or agent of the bank. Authority to appoint agents for the purposes of reg. 7 of the *Defence (Monetary Control) Regulations* was conferred on the bank on 28th August. Regulation 6 (2) provided that any person appointed to be an agent of the bank should carry out his duties as agent in accordance with, and should comply with, such instructions, directions and requirements as were issued or made by the bank. It was only reasonable to expect that the bank would appoint as its agents persons whose business was of such a nature that they would be suitable appointees to receive and deal with gold in whatever form it was received. Such appointees were likely to be persons who already had gold in their possession, and it was hardly likely that the bank, after their

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appointment, would allow them to occupy the dual capacity of agents and owners.

At the interview between Mr. Shain and Mr. Sears, Mr. Shain was careful to point out that upon the appointment of the appellant as agent all the gold in the materials would be held by it as agent, and the letter of 2nd September was written on this basis. The gold in the materials was part of the gold which, to use the bank's own words in the letter, the appellant was to handle on behalf of the bank and on which the bank was to pay commission. In these circumstances the only reasonable inference is that, upon the appointment of the appellant as the agent of the bank, there was a constructive delivery of all the gold then in its possession including the gold in the materials, from itself as owner to itself as agents to hold on behalf of the bank. If I am right in holding that this was a delivery of gold within the meaning of the Regulations, the effect of this delivery would have been under reg. 7 (4) to vest the ownership of the gold in the materials in the bank as from 6th September. But, if I am wrong, and it was not a delivery within the meaning of the Regulations, the ownership would still have passed to the bank because this transfer of ownership was one of the requirements of the Board.

For these reasons, I am of the opinion that no tax was payable on the gold in question, and that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Arthur Robinson & Co.*

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

E. F. H.