[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

YORK MOTORS PROPRIETARY LIMITED . RESPONDENT.

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SYDNEY, *Sept.* 19, 27.

Williams J.

SYDNEY, *Nov.* 27, 29; *Dec.* 17.

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

Sales Tax—Goods manufactured in Australia—Motor vehicles—"Goods . . . treated by" manufacturer "as stock for sale by retail"—"Treated"—Evidence—Question of law—Sales Tax Assessment Act (*No.* 1) 1930-1940 (*No.* 25 *of* 1930—*No.* 64 *of* 1940), *s.* 17.

A company carried on the business of importing, assembling and manufacturing motor vehicles which it sold principally by retail. Prior to April 1940 all its vehicles were kept in a common stock in the sense that they were not separated into stock for sale by retail or by wholesale in the company's books, nor were they physically separated in its buildings. The vehicles were appropriated to a wholesale or retail sale as and when the sale was made and sales tax was paid in respect of the vehicles actually sold. Full particulars of all the vehicles, including their engine numbers, were recorded on consecutive folios in the company's stock-book. In April 1940, on receipt of information that a rise in the rate of sales tax was impending, the chairman of directors, to whom the direction of the policy of the company was entrusted by the board, decided to treat certain vehicles in stock as stock for sale by retail. The manner of giving effect to this decision was left to the company's accountant who made memoranda in the company's stock-book stating that, with exceptions which were specified, the stock was transferred to stock for sale by retail. On 3rd May the rate of tax was increased. In June 1940 the company made an appropriate return to the Commissioner of the vehicles so treated and paid sales tax thereon at the rate existing prior to 3rd May 1940. On 25th June 1940 the accountant informed the company's sales staff in writing that on 30th April 1940 most of the completed vehicles had been transferred to stock for sale by retail and that before they sold any vehicle wholesale it would be necessary to ascertain whether the required vehicle was available in the stock which had not been transferred to "stock for sale by retail." However the stock so transferred was not exclusively sold by retail, certain of such vehicles being in fact sold subsequently by wholesale.

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Held, by *Latham* C.J., *Rich*, *Starke* and *Dixon* JJ. (*McTiernan* J. dissenting), that the taxpayer had "treated" the vehicles so transferred as "stock for sale by retail" within the meaning of s. 17 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940.

Decision of *Williams* J. affirmed.

APPEAL from *Williams* J.

An objection was lodged by York Motors Pty. Ltd. against an assessment made under the *Sales Tax Assessment Act* (*No.* 1) 1930-1940, of which notice was issued on 29th January 1942, of the sale value of certain goods manufactured by that company and sold by it during the period 1st May 1940 to 31st August 1941.

The objection having been disallowed by the Commissioner of Taxation the matter was, at the request of the company, referred to a Board of Review.

The question for decision was whether certain motor vehicles manufactured by the company were, within the meaning of the Act, "treated by it as stock for sale by retail" during the period mentioned above. By s. 17 of the Act sales tax is required to "be levied and paid upon the sale value of goods manufactured . . . by a taxpayer and . . . sold by him or treated by him as stock for sale by retail or applied to his own use." The sale value of goods sold without having been treated as stock for sale by retail as is prescribed by s. 18 (1), and of goods sold after having been so treated is as prescribed by s. 18 (2), and, by s. 24 (1) the tax is required to be paid within twenty-one days after the close of the month in which the goods were sold or treated.

The rate of tax on the sale value of the goods is, by s. 3 of the *Sales Tax Act* (*No.* 1) 1930-1941, the rate applicable at the time when the goods were sold or treated, as the case may be. That section provides, *inter alia*, that sales tax is imposed at rates specified hereunder:—"Where the goods have been so sold, treated or applied . . . during the period commencing on the 9th September, 1939, and terminating on the 2nd May, 1940, six per cent; during the period commencing on the 3rd May, 1940, and terminating on the 21st November, 1940, eight and one-third per cent; during the period commencing on the 22nd November, 1940, and terminating on the 29th October, 1941"—certain rates, the rate relevant to this report being ten per cent.

The motor vehicles which the company claims to have treated as stock for sale by retail during the sixteen months' period mentioned comprise most of those which were (*a*) manufactured and unsold at the beginning of the period and (*b*) manufactured during the period.

In respect of the vehicles claimed to have been so treated in each month of the period the company furnished returns and paid tax in the ensuing month—the tax in respect of each vehicle being at the rate applicable at the time of the alleged treatment. Taking the view that none of these vehicles was so treated the Commissioner has assessed the sale-values (s. 18 (1)) of such of them as were sold during the period and has accordingly required the company to pay tax on those sale values at the rates applicable at the respective times of the sales. . . .

The company was incorporated in Victoria in 1932 but its place of business is in Sydney. It manufactures motor cars and motor trucks and sells them by wholesale and by retail, but principally by retail. It has other associated activities which need not be considered. It has franchises for the manufacture and sale in Australia of what may be sufficiently described as Chrysler and Morris vehicles. For that purpose it imports the chassis frames and engines from America and England, respectively.

The company's showrooms for cars are in William Street, Sydney. They are large but relatively few cars are kept there. Usually there is only one car to represent each of the various types and models within the company's franchises. The displayed cars are not put there primarily as stock for sale but they are, of course, eventually sold and customers who actually want them at any time are not refused. The truck showrooms are in Parramatta Road, Camperdown. Here there is a greater number and variety of vehicles for both display and sale. The great bulk of the company's stock of completed cars and trucks is housed in a very large wharf store in Walsh Street, Sydney. All assembling is done at the company's factory in Barker Street, Sydney. Near the factory the company has a building to which the completely assembled vehicles are taken for any finishing touches they may require.

The transactions of the company which are unquestionably wholesale sales of cars (and recognized by the company as such) are relatively small in number and value, though actually they are somewhat substantial. In the average their value appears to amount to about five per cent of that of the total sales. They are made principally, if not exclusively, to Capper's Motors Pty. Ltd. of Newcastle and some inter-State distributors. Sales which are made direct to users of the cars, and are therefore definitely retail, comprise more than half of the total sales. The remainder of the company's sales are made to or through dealers and finance companies. They are very considerable in number but it is impossible on the evidence available to determine whether or the extent to which they are made by whole-

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sale or by retail. All cars sold to or through dealers are invoiced to and fully paid for by the dealers, whose commissions are deducted from the sale prices. What is established is that the company's stock on hand has never been physically separated into cars for sale by wholesale and cars for sale by retail, and that cars have never been labelled or otherwise physically dealt with for the purpose of making that differentiation.

The first information the company had of the arrival of new chassis was the receipt of the shipping documents which contained an import number and the number of the frames, engines and models shipped. One set of stock books was kept for Chrysler and another set for Morris vehicles. Each set was kept on the same basis and it will be sufficient to refer, as counsel did, to the Chrysler books.

Each embryo vehicle was immediately given a separate stock number and entered in the books. As the imported and locally manufactured parts were assembled into a complete vehicle in the case of cars, or a complete vehicle or chassis in the case of trucks the numbers of the chassis, engines, and bodies were entered against each stock number. As the vehicles were completed and sold, further entries were made of the cost, invoice, sale price and whether the sale was made by wholesale or by retail. In this way each vehicle could be identified at any stage of its history either before or after completion.

In April 1940 the company received information that the rate of tax was likely to be increased in the near future. The question was raised whether it would be advisable for the company to anticipate the increase by treating the greater part of the vehicles which were complete and ready for sale as stock for sale by retail. It was realized that if this was done the company, which was at the time indebted to the bank on overdraft, would have to pay a large amount of tax, estimated at £10,000, with the result that the overdraft and interest on the overdraft would be considerably increased. Consultations took place between the chairman of directors, to whom the direction of the policy of the company was entrusted by the board, and the general manager, and general manager and the taxation expert and the accountant of the company, and it was decided that it would nevertheless be to the ultimate advantage of the company immediately to transfer such portion of the stock as was estimated would be required for sale by retail to stock for sale by retail. The manner of giving effect to the transfer was left to the general manager by the chairman of directors and the general manager left the matter to the accountant.

Shortly stated the method adopted was to open new folios under the heading, at first written in pencil, " All the foregoing unsold

stock as at 30/4/40 has been transferred to stock for sale by retail with the exception of the following." This was subsequently inked over and the following words added, " Units reserved for wholesale sale and incomplete units. The particular stock number coming under the heading of Stock for Sale by Retail can be identified with the stock list as at 30/4/40." Under this heading whilst still in its original form in pencil, a member of the staff entered the completed vehicles which the accountant considered should be reserved for wholesale, and the vehicles still incomplete on 30th April 1940. The effect of the entries was to leave the residue of completed vehicles in the stock book still unsold on 30th April 1940, 471 in number, as the stock transferred to stock for sale by retail.

In June 1940 the company made two returns for the purpose of tax. On Form No. 1 it returned as usual the sales of spare parts and accessories, new cars and chassis, trucks and bodies actually sold to 2nd May at six per cent accompanied by the net amount of tax £77 12s. 6d., and those sold from 3rd May at eight and one-third per cent accompanied by the net amount of tax £1,057 8s. 11d. On Form No. 2 headed " Return of Goods Manufactured By the Taxpayer and Treated As Stock for Sale By Retail " on 1st May 1940 it returned 471 vehicles which had been so transferred accompanied by the net amount of tax at six per cent £8,536 2s. 1d. Between June and October, 122 further vehicles were similarly transferred to retail stock in the books and returned as stock treated for sale by retail in the following month on Form No. 2 accompanied by the net amount of tax. Between 1st and 21st November, that is, just before the second increase in the rate of tax, 262 further vehicles were similarly transferred and returned on Form No. 2 in the following month accompanied by the net amount of tax at the rate of eight and one-third per cent.

During the period 1st May 1940 to 31st August 1941, 1,201 vehicles were transferred in the books as stock for sale by retail and 967 were sold. Thirty-three of these vehicles were sold by wholesale. Of the cars not transferred in the books as stock for sale by retail, 18 were sold by wholesale and 85 by retail. The company made further returns of the 33 vehicles sold by wholesale stating that they were vehicles " incorrectly treated as stock for sale by retail " and claimed a refund of the tax already paid and paid tax at the rate in force at the date of sale.

The Board of Review rejected the claim by the company that during the period mentioned above it had " treated " certain vehicles as " stock for sale by retail."

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An appeal by the company from that decision came on for hearing before *Williams* J.

At this hearing the accountant (who subsequent to the hearing before the Board of Review had left the company's employ) gave additional evidence that having read the reasons for the decision of the Board of Review his mind was directed to the fact that on 25th June 1940 he advised the members of the company's sales staff by memorandum in the following terms :—" From the point of view of Sales Tax we sell : (*a*) By wholesale (to Capper's and Interstate distributors), (*b*) By retail (to all other customers). At the close of business on the 30th April, we have transferred most of our completed units less a few that we have reserved for Capper's to ' stock for sale by retail.' We cannot, however, sell by wholesale from this stock for sale by retail and that means that before we can accept an order from Capper's or from an Interstate Distributor, we must ascertain if we have the required vehicle available in our stock which has not been transferred to ' stock for sale by retail.' Either Mr. Chignell or myself will be able to advise you of this, on application."

Barwick K.C. and *Bruxner*, for the appellant.

Maughan K.C. and *Hooke*, for the respondent.

Cur. adv. vult.

Sept. 28.

WILLIAMS J. delivered the following written judgment :—

This is an appeal under s. 42 (6) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940 from a decision of the Board of Review that the appellant company was rightly assessed by the respondent for £4,618 6s. 1d. on 29th January 1942. The company does not dispute that it was rightly assessed for £356 2s. and claims that the assessment should be reduced to this amount.

The company is a manufacturer and wholesaler of motor vehicles within the meaning of the Act. There were two increases in the rates of tax, the first from six per cent to eight and one-third per cent from 3rd May 1940 and the second from eight and one-third per cent to ten per cent from 22nd November 1940, and the liability of the company to pay the tax in dispute depends upon whether it treated the vehicles included in the assessment, the manufacture of which was completed prior to 3rd May, as part of its stock for sale by retail before the date of the first increase, and the balance of the vehicles, the manufacture of which was completed prior to 22nd November, as part of its stock for sale by retail before the date of the second increase.

The parties agreed that the oral and documentary evidence given before the Board should be tendered and accepted as evidence on the appeal, and Mr. *Barwick* on behalf of the company tendered some additional evidence by R. L. Smith, the accountant of the company, who also gave evidence before the Board. The chairman of the Board has already given in his reasons a full and accurate statement of the evidence given before the Board, and I shall therefore content myself with a summary of what appear to be the most material facts.

In April 1940 the company was carrying on in Sydney the business of importing from the United States the frames and engines of the chassis for Chrysler motor vehicles, and from England the frames and engines of the chassis for Morris motor vehicles, and of adding to these members springs, wheels, tyres, batteries and other accessories locally produced, and assembling the component parts into complete chassis. In the case of cars it also attached bodies made locally, and in the case of trucks it sometimes attached cabs and bodies made locally and sometimes sold the chassis with cabs to purchasers who attached bodies manufactured for them. The company then sold the complete cars and trucks and truck chassis by retail and wholesale but its business was predominantly a retail business, not more than five per cent of the sales being made wholesale. It sold the vehicles direct to the public through its own salesmen by retail and it also sold vehicles at retail prices, which I think should be classified as sales by retail, to the public through dealers who received a commission on the sale, and to finance companies from whom members of the public were acquiring vehicles on hire purchase. It sold vehicles by wholesale to one main wholesaler, Capper's Motors Pty. Ltd., and sometimes to Interstate Distributors Ltd.

The first information the company had of the arrival of new chassis was the receipt of the shipping documents which contained an import number and the number of frames, engines and models shipped. One set of stock books was kept for Chrysler and another set for Morris vehicles. Each set was kept on the same basis and it will be sufficient to refer, as counsel did, to the Chrysler books.

Each embryo vehicle was immediately given a separate stock number and entered in the books. As the imported and locally manufactured parts were assembled into a complete vehicle in the case of cars, or a complete vehicle or chassis in the case of trucks, the numbers of the chassis, engines, and bodies were entered against each stock number. As the vehicles were completed and sold, further entries were made of the cost, invoice, sale price and whether the sale was made by wholesale or by retail. In this way each vehicle

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could be identified at any stage of its history either before or after completion.

Prior to April 1940 the company kept all the vehicles in a common stock in the sense that they were not separated into stock for sale by retail or by wholesale in its books, nor were they physically separated in its buildings. The vehicles were appropriated to a wholesale or a retail sale as and when the sale was made.

Section 17 of the *Sales Tax Assessment Act* provides that sales tax shall be levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use. While the company kept its books, and housed and sold its vehicles in this manner, sales tax did not become payable until the moment of sale whether the vehicles were sold by wholesale or by retail, and in each month the company made a return of sales and of sales tax for the previous month. This return was made on Form No. 1, which is in the form for sales and was accompanied by the net amount of tax calculated at the rate in force at the date of sale.

In April 1940 the company received information that the rate of tax was likely to be increased in the near future. The question was raised whether it would be advisable for the company to anticipate the increase by treating the greater part of the vehicles which were complete and ready for sale as stock for sale by retail. It was realized that if this was done the company, which was at the time indebted to the bank on overdraft, would have to pay a large amount of tax, estimated at £10,000, with the result that the overdraft and interest on the overdraft would be considerably increased. Consultations took place between the chairman of directors, to whom the direction of the policy of the company was entrusted by the board, and the general manager, and the general manager and the taxation expert and the accountant of the company, and it was decided that it would nevertheless be to the ultimate advantage of the company immediately to transfer such portion of the stock as was estimated would be required for sale by retail to stock for sale by retail. The manner of giving effect to the transfer was left to the general manager by the chairman of directors and the general manager left the matter to the accountant. The chairman of directors, the general manager, the accountant, and the bookkeeper and keeper of stock books, Miss Matear (as she then was), all gave evidence. A full explanation of the entries which were made by Miss Matear under the direction of the accountant, as she said, "in a hurry" to implement the decision appears in the reasons of the chairman of the Board of Review.

Shortly stated the method adopted was to open new folios under the heading, at first written in pencil, " All the foregoing unsold stock as at 30/4/40 has been transferred to stock for sale by retail with the exception of the following." This was subsequently inked over and the following words added, " Units reserved for wholesale sale and incomplete units. The particular stock number coming under the heading of Stock for Sale by Retail can be identified with the stock list as at 30/4/40." Under this heading, whilst still in its original form in pencil, Miss Matear entered the completed vehicles which the accountant considered should be reserved for wholesale, and the vehicles still incomplete on 30th April 1940. The effect of the entries was to leave the residue of completed vehicles in the stock books still unsold on 30th April 1940, 471 in number, as the stock transferred to stock for sale by retail.

In June 1940 the company made two returns for the purposes of tax. On Form No. 1 it returned as usual the sales of spare parts and accessories, new cars and chassis, trucks and bodies actually sold to 2nd May at six per cent accompanied by the net amount of tax £77 12s. 6d., and those sold from 3rd May at eight and one-third per cent accompanied by the net amount of tax £1,057 8s. 11d. On Form No. 2 headed " Return of Goods Manufactured By The Taxpayer and Treated As Stock For Sale By Retail " on 1st May 1940 it returned the 471 vehicles which had been so transferred accompanied by the net amount of tax at six per cent £8,536 2s. 1d. Between June and October, 122 further vehicles were similarly transferred to retail stock in the books and returned as stock treated for sale by retail in the following month on Form No. 2 accompanied by the net amount of tax. Between 1st and 21st November, that is, just before the second increase in the rate of tax, 262 further vehicles were similarly transferred and returned on Form No. 2 in the following month accompanied by the net amount of tax at the rate of eight and one-third per cent.

During the period 1st May 1940 to 31st August 1941, 1,201 vehicles were transferred in the books as stock for sale by retail and 967 were sold. Thirty-three of these vehicles were sold by wholesale. Of the cars not transferred in the books as stock for sale by retail, 18 were sold by wholesale and 85 by retail. The company made further returns of the 33 vehicles sold by wholesale stating that they were vehicles " incorrectly treated as stock for sale by retail " and claimed a refund of the tax already paid and paid tax at the rate in force at the date of sale.

I agree with Mr. *Barwick* that the scheme of the Act is to impose tax upon the last wholesale sale. A manufacturer may sell his

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manufactured goods wholesale to a retailer or he may be a retailer himself or he may, as in the present case, sell some of his goods by wholesale and sell the rest by retail himself. The tax becomes payable once and for all upon the occurrence of any one of the three events described in the section, namely: sale of the goods by the manufacturer, their treatment by him as stock for sale by retail, or their application by him to his own use. The third event is irrelevant on this appeal. The second event could occur either previously to or simultaneously with the first event. The crucial question on the appeal is whether the vehicles sold between 1st May 1940 and 31st August 1941 had already been treated by the company as stock for sale by retail.

In the English *Finance* (*No.* 2) *Act* 1940 by which a purchase tax was imposed the corresponding words are "where a wholesale merchant or manufacturer . . . appropriates or applies any chargeable goods . . . to the purposes of any business carried on by him of selling chargeable goods by retail." In *B. Morris Ltd.* v. *Lunzer* (1) the Court of Appeal said that the tax becomes payable at the end of what may be called the wholesale stage and not before, and that the scheme of the section is to fix a point of time comparable or analogous to that at which, in the normal case of the sale to a retailer, the goods are to be regarded as passing out of this stage. "In the typical case of a wholesaler who has a retail business, the point of time selected is that at which he does some act in relation to his goods which indicates that he has ceased to be a wholesaler and has become a retailer in regard to them" (2). There is no difference in substance that I can see between the meaning of the word "appropriates" in the English Act and the word "treated" in our own Act. They are both words "of quite general import chosen as suitable to describe a variety of transactions. In the case of any particular transaction the problem is to find the particular stage in the transaction to which they most sensibly apply having regard to the facts of the case." Treat "is a wide word": *In re Masters and Duveen* (3). A number of meanings are given to it in the dictionaries. The most suitable, in the collocation in which it is used in s. 17, would appear to be that given in the *Shorter Oxford English Dictionary*, "To consider or regard in a particular aspect and deal with accordingly."

In my opinion a manufacturer treats his manufactured stock as stock for sale by retail when he reaches a definite decision not to sell it wholesale to another retailer but to sell it himself by retail,

(1) (1942) 1 K.B. 356, at p. 360.
(2) (1942) 1 K.B., at p. 362.
(3) (1923) 2 K.B. 729, at p. 734.

and he does some final and unconditional act which, in the words of the Court of Appeal, " indicates that he has ceased to be a wholesaler and has become a retailer in regard thereto."

It was not suggested on behalf of the respondent that the witnesses for the company were not honest witnesses or that the entries in the stock books were not honest entries. It is clear from the uncontradicted oral evidence that a definite decision was reached in April immediately to transfer to stock for sale by retail all complete vehicles which it was estimated would not be required to fulfil wholesale orders, and subsequently to make similar transfers whenever there was reason to believe that there would be a further increase in the rate of tax. The alteration made in the stock books was a final and unconditional act giving effect to this decision. The pencil writing at the head of the new folios was an unequivocal statement that all the unsold vehicles in the book, other than those reserved for wholesale and incomplete units, had been transferred to stock for sale by retail from a particular date.

It is true that the vehicles were not physically separated in the company's buildings or severally labelled. It is also true that there was no evidence before the Board of Review that the sales staff were informed of the change of policy. But, as Mr. Smith said in his evidence before me, he was not questioned on this point before the Board of Review by either side. He then supplemented his previous evidence by giving evidence, which I accept, that on 25th June 1940 he circulated a memorandum in writing to the heads of the sales departments stating that " at the close of business on 30th April, we have transferred most of our completed units less a few that we have reserved for Capper's to ' stock for retail.' We cannot . . . sell by wholesale from this stock . . and that means that before we can accept an order from Capper's or from an Interstate Distributor, we must ascertain if we have the required vehicle available in our stock which has not been transferred to ' stock for sale by retail.' Either Mr. Chignell or myself will be able to advise you of this, on application."

It must not be overlooked that subsequent acts are only evidence of whether the crucial decision and consequential appropriations in the books were genuine or merely colourable. The chairman of the Board of Review said that both the chairman of directors (not the managing director as he called him) and the accountant admitted that it was not known for certain whether a vehicle transferred to stock for sale by retail would ultimately be sold by retail, and that 33 of the vehicles so transferred were sold by wholesale. But there is nothing in the section which prevents a manufacturer, who has

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genuinely treated goods as stock for sale by retail, from later selling them by wholesale if for some subsequent reason it becomes desirable to do so. The fact that the company thought that the 33 vehicles would have first to be re-transferred to the wholesale list is evidence of the final and unconditional nature of the previous transfer to the retail list. If the business of the company had been predominantly a wholesale business, a decision to treat the bulk of the stock as stock for sale by retail would have been colourable. But the decision was to apportion the stock in accordance with the realities of the business. Then there is the return in June on Form No. 2 of the stock treated as stock for sale by retail on 1st May and payment of tax on this basis. This could only be an honest return if there was as Mr. *Maughan* put it, an irrevocable decision on 1st May as between the company and the Commissioner so to treat this stock for the purposes of s. 17.

All the members of the Board of Review were of opinion that a physical separation of the stock was not required by s. 17. But the chairman appears to have thought that all that the company had done was to treat the stock in its books, and that this had no effect upon the actual treatment of the vehicles as part of a common stock. He said that it was a necessary inference from the evidence that no differentiation between the wholesale and retail stock was ever made by way of written or other direction given to the sales staff, and that there was no room for doubt that, until the matter became an issue with the Commissioner, the only employees of the company who had any information as to the vehicles which had been selected were the accountant and his subordinates so that as between the company, its sales staff, and customers the vehicles continued to be treated as part of a common stock for wholesale or retail. As I have said the question of the knowledge of the sales staff was not investigated before the Board by either side, and Mr. Smith's subsequent evidence shows that it was erroneous to draw such inferences. The other members of the Board appear to have based their joint decision upon the view " that the treatment implied by the section is something clearly provable or necessary to be inferred from the company's conduct irrespective of any expression of intention on the part of the company's directors or officers." This places too high a burden of proof on the company. Section 39 (1) makes the assessment prima-facie evidence of the correctness of any calculations upon which the liability is ascertained. The onus of proof is therefore on the taxpayer, but he need only give sufficient evidence to weigh down the scales in his favour. These members thought that if the company had at once notified the Commissioner before

the increased tax operated its position would have been unassailable. But s. 21 only requires a manufacturer who during any month treats any goods as stock for sale by him by retail to furnish a return within twenty-one days after the close of that month. I cannot agree with them that the company was in an equivocal position immediately prior to the commencement of the higher rate. It had already reached and given effect to a definite decision and it had bound itself to return the stock as stock treated for sale by retail whether the rates were increased or not.

For these reasons I am of opinion that the company did treat the vehicles included in the assessment as stock for sale by retail upon the dates the entries to this effect were made in the stock books.

I am also of opinion that the decision of the Board of Review involves a question of law within the meaning of s. 42 (6). I think that the Board erred in law in that it misconstrued the section and in that the uncontradicted facts reasonably lead only to the conclusion that the vehicles were treated as stock for sale by retail. I recently discussed the same objection and cited authorities in *Federal Commissioner of Taxation* v. *Sagar* (1) and I shall not repeat what I there said. Recent decisions on the point include, in the House of Lords, *Bomford* v. *Osborne* (2); *Doncaster Amalgamated Collieries Ltd.* v. *Bean* (3); and in this Court *Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (4), *Maughan* v. *Federal Commissioner of Taxation* (5), *Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (6), and *Federal Commissioner Taxation* v. *West Australian Tanners and Fellmongers Ltd.* (7).

For these reasons I must allow the appeal, and order that the assessment be reduced to £356 2s. The respondent must pay the appellant's costs of the appeal.

From this decision the Federal Commissioner of Taxation appealed to the Full Court.

Maughan K.C. (with him *E. J. Hooke*), for the appellant. The decision of the Board of Review was correct and should be restored. The vehicles in question were not " treated " by the respondent as " stock for sale by retail " within the meaning of s. 17 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940. The entries made by the accountant were not decisive or final and were not binding on the respondent who, at any time, could have cancelled or repudiated such entries. The accountant's memorandum shows that so far as

(1) (1946) 71 C.L.R. 421.
(2) (1942) A.C. 14.
(3) (1946) 175 L.T. 10.
(4) (1941) 65 C.L.R. 150.
(5) (1942) 66 C.L.R. 388.
(6) (1944) 69 C.L.R. 389.
(7) (1945) 70 C.L.R. 623.

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the respondent's sales staff was concerned the vehicles were not "treated" as retail stock until 25th June 1940, that is to say subsequent to the increasing of the rate of sales tax on 3rd May 1940. It would have been a simple matter for the respondent to have informed the Commissioner of the action contemplated and the reason therefor, but the Commissioner was not so informed. The relevant meaning of the word "treat" as shown in *Webster's Dictionary* is "to regard and act toward or deal with accordingly." The mental attitude implied must be followed in every instance by some act or acts evidencing that attitude. Passages in the judgment appealed from do not correctly state the law or the inferences to be drawn from the facts. Because of certain inaccuracies made by the accountant and his assistant the effect of the entries was not, as stated in the judgment, to leave the residue of completed vehicles in the stock books still unsold on 30th April 1940 as the stock transferred to stock for sale by retail. There is nothing in the nature of these entries which fits them into the category of being final and unconditional (*B. Morris Ltd.* v. *Lunzer* (1)). "Final" means unchangeable in all circumstances. The memorandum of 25th June 1940, being a subsequent act, was not evidence that the entries made on or before 2nd May were final and unconditional. From the fact that some of the vehicles were later re-transferred to the wholesale list the inference can be drawn that the entries were not final and unconditional. The evidence does not show that effect had been given to the decision to treat the vehicles "as stock for sale by retail" (*B. Morris Ltd.* v. *Lunzer* (2)).

Barwick K.C. (with him *Bruxner*), for the respondent. In dealing with the question of whether the stock was treated by the respondent as stock for sale by retail, it must be remembered that being predominantly a retailer the respondent had not theretofore troubled to record or treat its stock either as wholesale stock or retail stock. It is not necessary in order to determine that certain stock is retail stock that it can be predicated of every item of it that it will necessarily be sold by retail. The vehicles were "treated" during the period terminating on 2nd May 1940 within the meaning of the Act, as amended by the Act of 1940, and thereupon tax became payable by the respondent at the then prevailing rate, namely six per cent. In so treating them all that was necessary to be done, and all that could have been done, was done in order to indicate that they were stock set aside for sale by retail. So long as the "treating" was, at the time, definite and bona fide it need not necessarily have been

(1) (1942) 1 K.B. 356.

(2) (1942) 1 K.B., at p. 362.

irrevocable. All the vehicles in question were sold by retail except such as were re-transferred to the wholesale list. The higher rate was paid in connection with the vehicles so re-transferred. The point now for discussion is whether the respondent is liable for six or eight per cent on the 471 cars " treated " on or before 2nd May 1940. Even if some cars were erroneously " treated " or regarded as treated such error must be limited to those vehicles and did not vitiate the effect of the treatment of any of the other cars. The advising of the staff was evidentiary of the reality of the treatment. It was not a requisite in order that there should be a treatment that the staff should have been informed of what had been done, but it was very strong evidence of what had been done on or before 2nd May 1940. After that date two returns were made each month, one in respect of sales and the other in respect of treatments, instead of only one per month as theretofore.

Maughan K.C., in reply. The accountant's memorandum of 25th June 1940 is limited to vehicles in stock as at 30th April 1940, and does not apply to vehicles subsequently brought into stock for sale by retail. There is no record of any subsequent similar memorandum. A mere entry in the stock books by the accountant, never referred to the principals or to the persons in the organization most concerned, and not communicated to the Commissioner, is not a treating of the vehicles within the meaning of s. 17. There should have been some more general communication to the respondent's staff and which should have been repeated to its sales staff. Reference to the *Shorter Oxford Dictionary* and *Webster's Dictionary* shows that the word " treat " involves two steps, firstly the formation of an intention to do a particular thing, and, secondly, some act giving effect to that intention or decision. The fact that the entry was " pencilled " until after the crucial date might be construed as indicating that it was of a temporary or provisional nature only. At that stage there was not that measure of finality that amounted to " treating " such as the Act contemplates. Something more than a notional process was required. There is no appeal from the Board of Review on a question of fact.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of *Williams* J. reducing an assessment to sales tax from £4,681 6s. to £356 2s.

The respondent company imported chassis of motor cars and trucks, obtained tyres and various accessories and assembled the cars and trucks and sold them. In April 1940 the officers of the company

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had reason to believe that the rate of sales tax was to be increased. It was observed that sales tax became payable by a manufacturer under the *Sales Tax Assessment Act* (*No.* 1) 1930 as amended when goods were "treated by him as stock for sale by retail." This provision was doubtless intended to bring about the result that when goods were so treated sales tax should become payable and that a manufacturer when he had moved goods, as it were, from the wholesale to the retail sphere, should be required to pay tax as if he had disposed of them to a retailer. The officers of the company, expecting an increase in the rate of tax, determined to take advantage of this provision by treating a large number of cars as stock for sale by retail, so that tax became payable at six per cent on sale value under the law as it then existed. This meant a large immediate payment instead of a series of future payments at the expected increased rate which would otherwise be made from time to time as the cars were actually sold. Certain entries were made in the company's stock book and the making of these entries is relied upon as "treatment" of the cars to which they refer as stock for sale by retail.

The rate of sales tax was increased from six per cent to eight and one-third per cent from 3rd May 1940. The company made its return in accordance with the Act within twenty-one days after the close of the month of May (see s. 21) and paid tax at the six per cent rate. The Commissioner now claims tax at the eight and one-third per cent rate in respect of the cars which the company claims had been transferred to stock for sale by retail on about 2nd May. A similar claim is made by the Commissioner in respect of cars transferred by book entries before 22nd November, when sales tax was further increased to rates higher than eight and one-third per cent. The question is whether the company had, before the rates were increased (that is before 3rd May in one case and 22nd November in the other case), treated the cars as stock for sale by retail.

The business of the company was importing chassis for engines of cars and trucks from the United States of America and Great Britain and adding wheels, tyres, batteries, &c. which were made in Australia, and assembling the constituents into complete cars and trucks which were then sold. Only five per cent of the vehicles were sold wholesale; ninety-five per cent were sold retail. The imported part of each vehicle was entered in the books of the company under a number and the books of the company recorded the history of the vehicle up to the time of its sale. The chairman of directors and the general manager of the company consulted with the taxation expert and the accountant of the company and resolved to try to take

advantage of the provision which imposed tax at the statutory rate as and when goods were treated as stock for sale by retail. The accountant and the book-keeper then made entries in the books. Certain cars were selected and full particulars of the cars were written on several folios in the stock book. At the head of the first of these folios the following was written in pencil: "All the foregoing unsold stock as at 30/4/40 has been transferred to stock for sale by retail with the exception of the following." Then followed the list of cars which were, by reason of the words written in the stock book, reserved from the otherwise general transference of unsold stock to stock for sale by retail. The result of these entries was that certain vehicles which were ready for sale were reserved for sale by wholesale and uncompleted vehicles which were not ready for sale were withheld from the transfer to stock for sale by retail. Thus all the other vehicles were recorded in the stock book as transferred to stock for sale by retail. These things were done before 3rd May, which was the date upon which the rate of sales tax was increased from six per cent to eight and one-third per cent. At a later date the pencil notation was written over in ink and words were added to it so that in its final form it read as follows:—"All the foregoing unsold stock as at 30/4/40 has been transferred to stock for sale by retail with the exception of the following units reserved for wholesale sale and incomplete units. The particular stock number coming under the heading of stock for sale by retail can be identified with the stock list as at 30/4/40." On 21st June 1940 the company made a return under the Act for May and paid tax on sales up to and including 2nd May at six per cent and on later sales at eight and one-third per cent. But with respect to the vehicles, four hundred and seventy-one in number, which had been transferred in the books, it made a return describing them as goods manufactured by the taxpayer and treated as stock for sale by retail on 1st May 1940 and paid the amount of £8,536 2s. 1d. as tax at the rate of six per cent.

On 25th June the employees of the company who constituted its sales branch were informed in writing by the accountant that most of the completed units, less a few reserved for wholesale sale, had been transferred to stock for retail sale, and that before they sold any vehicle wholesale it would be necessary to ascertain whether the required vehicle was available in the stock which had not been transferred to "stock for sale by retail." It is pointed out by counsel for the Commissioner that this instruction was given on 25th June and therefore cannot be relied upon as an act constituting treatment "as stock for sale by retail" before 2nd May. The evidence

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as to the vehicles alleged to be transferred to stock for sale by retail in November does not differ in any material respect from that relating to the vehicles so transferred in May.

The Commissioner assessed the company to sales tax at eight and one-third per cent on vehicles sold after 2nd May though it was claimed by the company that they had been treated as stock for sale by retail before 2nd May. The company appealed from the assessment of the Commissioner to a Board of Review, which upheld the assessment. The members of the Board of Review agreed that, in order to treat goods as stock for sale by retail, it was not necessary to make a physical separation of the goods, but that "treatment" involved something more than reaching a decision or forming an intention so to treat goods. A decision to treat did not amount to actual treatment. It was pointed out in the reasons for the decision of the Board of Review that some of the cars (a small number) which in the books had been assigned to the class of cars to be treated as stock for sale by retail were in fact sold wholesale, and the Board of Review accordingly reached the conclusion that there was really no difference in the practice of the company after 2nd May from that which had obtained before that date. The position was that the whole stock of cars was regarded as available for sale by wholesale or retail as occasion required. The Board of Review referred to and adopted dictionary definitions of the word "treat"—"To regard and act toward or deal with accordingly" (*Webster*) and "To consider or regard in a particular aspect and deal with accordingly" (*Oxford English Dictionary*). The ground of the decision was that an intention had been formed to treat the cars as being stock for sale by retail, but that there was no actual treatment of them as such stock.

Liability for sales tax in the case of goods manufactured in Australia depends upon one of three events taking place: (1) sale; (2) treatment of goods as stock for sale by retail; (3) application to the manufacturer's own use: See *Sales Tax Assessment Act* (*No.* 1), s. 17. When any of these events takes place and as soon as it takes place the liability to tax attaches at the rate which is applicable at that time. Thus if a manufacturer sells goods he becomes liable to pay the tax. It would be immaterial that he re-purchased the goods from the purchaser. So also, if he treats the goods as stock for sale by retail, he must pay tax, and it is immaterial that he may subsequently sell the stock or apply it to his own use. If tax is paid upon any of the three events happening, then the Act has operated fully in relation to the sale value of the goods which have been sold or "treated" or applied to a manufacturer's own use.

The Act distinguishes between actual sale of goods and treatment as stock for sale by retail. Such "treatment" is something which is short of actual sale. It is a "treatment" of stock as stock *to be sold by retail* at some time thereafter; that is, the stock in some way enters the class of being regarded as stock for retail sale. If it is so regarded, then it is immaterial that in fact it may be sold wholesale or may be used by the manufacturer himself. The "treatment" creates a liability to pay tax and the manufacturer becomes bound to include the stock in his monthly return under s. 21 and to pay tax accordingly.

Treatment as stock for sale by retail, if distinguishable from actual sale, must include any proved decision to regard the stock as stock for retail sale, that is, any decision to allocate or assign the stock to the category of goods intended to be sold by retail. Until sale, the goods remain in the possession or control of the owner. Treatment as stock for sale by retail does not involve any change in possession or control. It means that the stock is regarded in a particular way, namely as available for disposal by retail sale; that is, the treatment of stock to which the Act refers is a mental determination which, however, must be proved to exist if the question of whether or not it did exist is called in question.

It is difficult to see what more could be done in the way of treating goods such as motor cars as stock for sale by retail. It is not suggested that some physical separation is required, as by putting the goods in a separate room or on particular shelves, although evidence that that was done might, in a particular case, show that such treatment had occurred, as, for example, if a manufacturer who had a factory and a shop moved goods from his factory to his shop, unpacked them and put them upon shelves in his shop, where he sold them by retail. It was suggested that, in order to bring about an effective "treatment" before 2nd May, there should have been a communication of the decision to treat the cars as stock for sale by retail to the sales staff before 2nd May or a communication to the Commissioner of Taxation that the company intended to treat the cars in question as stock for sale by retail. But it may be pointed out that neither of these acts would have prevented a change of mind. It was argued that a decision to "treat" within the meaning of the Act must be something final and irrevocable. But it must be conceded that no such decisions can be final and irrevocable in the sense that they cannot be altered; e.g. a manufacturer might apply to his own use goods which he had previously decided to sell by retail. As already stated, when certain events happen, tax becomes payable upon sales value as ascertained at the time when

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the events happen and at the rates of tax applicable when those events happen. If one of those events, as in the case of treatment of goods as stock for sale by retail, happens, tax becomes payable in due course and nothing that happens subsequently can affect that liability. If the manufacturer subsequently sold the goods or applied them to his own use that would not matter. The fact that he had treated them as goods for sale by retail would be enough to make him liable for tax.

In the present case the bona fides of the company was not challenged and the decision of the Board of Review was that there was a real intention to treat the cars specified in the new entries made in the books before 3rd May as stock for sale by retail. This intention was manifested and proved by acts done in pursuance of the intention. Thus the vehicles were, in the relevant sense, treated as stock for sale by the company by retail and accordingly the decision of *Williams* J. was right and the appeal should be dismissed.

RICH J. The *Sales Tax Act* (*No.* 1) 1930-1941 imposes a tax upon the sale value of goods manufactured in Australia and (1) sold by the manufacturer or (2) treated by him as stock for sale by retail or (3) applied to his own use. The rate of tax is that applicable at the time when the event happens which attracts the tax. In the present case this appeal is concerned with the treatment of the goods as stock for sale by retail. This treatment and the application to the manufacturer's use are in effect deemed by the Act and the *Sales Tax Assessment Act* (*No.* 1) 1930-1940 to be sales for the purposes of the Acts. The facts of the case have been so fully and clearly set out by the members of the Board of Review as to need no repetition. I shall only refer to such facts as are necessary for the purposes of my judgment. The respondent company is a manufacturer within the meaning of the relevant Acts whose business consists, *inter alia*, of the manufacture and sale of motor cars and trucks chiefly by retail. The rate of tax varied from time to time and in the present case there were two increases in the rates—that from 3rd May 1940 and the other from 22nd November 1940. The respondent made a return as prescribed by s. 21 of the *Sales Tax Assessment Act* and paid tax at the rate in force before 3rd May 1940 and 22nd November 1940. The Commissioner, however, assessed the goods at the increased rates from those dates. On objection by the respondent the matter was referred to the Board of Review who gave a decision in favour of the Commissioner. On appeal my brother *Williams* reversed this decision. Hence this appeal to us. And the question for our determination is whether the respondent

company " treated " the goods assessed as part of its stock for sale by retail before those respective dates. It appears that towards the end of April the trade heard a rumour of the proposed increase and Mr. R. L. Smith, the accountant of the respondent, reported the information to its management. After consultation it was determined to transfer part of the respondent's stock to stock for sale by retail. It was not contended by the Board of Review that this determination and the acts which followed in furtherance of this decision were not bona fide but the Board considered that the decision should have been translated into action in a more open and manifest manner short of physical segregation. For the purpose of the returns prescribed by s. 21 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940 an option is given to the manufacturer as to the manner in which he shall proceed. When he chooses the event the tax attaches however he may afterwards deal with the goods. In this sense only is the decision, if duly evidenced, final *vis-a-vis* the Commissioner. The event chosen may be " treatment " followed by actual sale but the tax attaches the rate applicable to the former event and not that applicable to the sale. Dual liability is not imposed. I shall not attempt to give an exhaustive definition of the word " treat " because its meaning depends upon the collocation in which it is set and the facts of the particular case. An artificial meaning is given by the Act to the word in the phrase " goods . . . treated . . . as stock for sale by retail " and one must not give to the interpretation of the Act any wider meaning than the purpose of the artificial meaning requires : Cf. *Leitch* v. *Emmott* (1) ; *International Hotel Ltd.* v. *McNally* (2). I do not think that the decision and policy of the respondent were aoristic or impermanent and I agree that the entries and records made in the books by the respondent are sufficiently definitive of the treatment of the goods for the purposes of the Act. On the facts found by my brother *Williams* I think that the conclusion arrived at by him is right and that the appeal should be dismissed.

STARKE J. Sales tax is imposed upon the sale value of goods manufactured in Australia and sold by a taxpayer or treated by him as stock for sale by retail or applied to his own use (*Sales Tax Assessment Act* (*No.* 1) 1930-1940, s. 17).

The rate of tax imposed during the period commencing on 9th September 1939 and terminating on 2nd May 1940 was six per cent and during the period commencing on 3rd May 1940 and terminating on 21st November 1940 was eight and one-third per cent (*Sales Tax Act* (*No.* 1) 1930-1941 (reprint)).

(1) (1929) 2 K.B. 236, at p. 248. (2) (1940) 64 C.L.R. 24, at p. 28.

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The taxpayer in this case was manufacturing, importing and assembling motor vehicles. Prior to April 1940 it kept all its vehicles in a common stock in the sense that they were not separated into stock for sale by retail or by wholesale in its books nor were they physically separated in its buildings. The vehicles were appropriated to a wholesale or a retail sale as and when the sale was made and sales tax was paid in respect of the cars actually sold. But in April 1940 the taxpayer decided that it would be to its advantage to transfer such portion of its stock as was estimated would be required for sale by retail to stock for sale by retail. It was considered that so treating the stock would attach the rate of tax (six per cent) applicable to the period terminating on 2nd May 1940 even though the stock were sold during the period commencing on 3rd May 1940 when a higher rate of tax was imposed, namely eight and one-third per cent. And this view accords, I think, with the provisions of the *Sales Tax* and *Assessment Acts* already mentioned, and no argument to the contrary was heard on the part of the Commissioner. Accordingly, entries were made in the books of account of the taxpayer for the purpose of carrying out this decision.

On or before 2nd May 1940 a memorandum was made in pencil in the stock ledgers that " all the foregoing unsold stock as at 30/4/40 has been transferred to stock for sale by retail with the exception of the following " and underneath this entry was re-written all incompleted cars on hand on 30th April and completed cars reserved for wholesale sale. Some days or weeks later, the pencil words were re-written in ink and the following words added " units reserved for wholesale sale and incomplete units. The particular stock numbers coming under the heading of stock for sale by retail can be identified by the stock list as at 30/4/40." And, with some exceptions, the stock so transferred for sale by retail was so sold. There are other stock entries at later periods but it is unnecessary to detail them for the purpose of determining this appeal.

" A manufacturer," said the learned judge from whom this appeal is brought " treats his manufactured stock for sale by retail when he reaches a definite decision not to sell it wholesale to another retailer but to sell it himself by retail, and he does some final and unconditional act which, . . . indicates that he has ceased to be a wholesaler and has become a retailer in regard thereto." Doubtless a taxpayer who so decides and acts treats his goods as stock for sale by retail but I should not think that his act must be final and unconditional, so that he can never change his method of dealing with such goods or sell them wholesale or apply them to his own use. It is enough if he decides to sell his stock by retail and evidences in

some manner his decision. It may be evidenced in many ways, e.g. his method of conducting business, advertisements, entries in his books of account and so forth. But it is not necessary that he should notify the Commissioner of Taxation, though perhaps not inadvisable, nor is it necessary that he should never change his method of dealing with the stock.

Now, it has been found in this case that the taxpayer reached a definite decision in April 1940 to transfer to stock for sale by retail all complete vehicles not then required to fulfil wholesale orders and subsequently to make similar transfers whenever there was reason to believe that there would be a further increase of tax and that the alteration made in the stock books was a final and unconditional act giving effect to this decision. Substantially, I agree with this, though I would not call the entries in the stock books a final and unconditional act but they are acts evidencing the fact that the stock was treated by the taxpayer as stock for sale by retail.

An appeal is only given to this Court from a decision of the Board of Review, as is this appeal, which in the opinion of the Court involves a question of law. This case, I think, is near the line (*Federal Commissioner of Taxation* v. *Broken Hill South Ltd.* (1); *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (2)). But I shall not dissent from the view that the appeal involves a question of law. The only question of law, to my mind, that arises is, whether there was any evidence that the taxpayer treated its stock as stock for sale by retail.

It is not disputed, I understand, that the reduction made by the trial judge in the taxpayer's assessment is right if the learned judge's conclusions of fact were correct.

The appeal should be dismissed.

DIXON J. The issue in this case arises from the fact that under the *Sales Tax Act* (*No.* 1) 1930-1941 the rates of sales tax vary with the period of time within which the taxable transaction took place. The material part of s. 3 provides that sales tax is imposed at the rates specified thereunder upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use. Thereunder appears the following:—"Where the goods have been so sold, treated or applied . . . during the period commencing on the 9th September, 1939, and terminating on the 2nd May, 1940, 6 per centum; during the period commencing on the 3rd May, 1940, and terminating on the 21st November, 1940, eight and one-third per cent; during

(1) (1941) 65 C.L.R. 150.

(2) (1915) A.C. 433, at p. 466.

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the period commencing on the 22nd November, 1940, and terminating on the 29th October, 1941 "—certain rates, the relevant one being ten per cent.

It will be seen that three events are named in the alternative as transactions in respect of which sales tax becomes payable upon the goods, viz. (1) the taxpayer's selling the goods; (2) his treating them as stock for sale by retail; and (3) his applying them to his own use. It is plain that in respect of the same goods he might on one date treat them as stock for sale by retail and at a later date sell them or to apply them to his own use. In respect of the same goods two of the events would then occur which are chosen by the Legislature as occasions for the imposition of sales tax.

The first might occur before 3rd May 1940 or 22nd November 1940, as the case might be, and the second upon a later date. There would then be two rates which might, on a literal interpretation of the Act, be chargeable on the sale value of the goods. I think, however, that the Crown would be entitled only to the earlier rate. Probably this is the fair implication of the taxing Act itself. But the provisions of sub-s. (1) and sub-s. (2) of s. 18 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940 amply confirm it. For sub-s. (1) prescribes what shall be the sale value of goods sold by a manufacturer if they are not goods to which sub-s. (2) applies and sub-s. (2) applies to goods treated by the manufacturer as stock for sale by retail and prescribes another value for goods so treated. The mutually exclusive discrimination between the two classes of transaction is in a form that shows that if the goods once become taxable as goods treated as stock for sale by retail they cannot be taxable as goods sold, when afterwards they come to be sold, because in that case there is no sale value prescribed for them, falling as they do within the exception to sub-s. (1).

It is not, I think, disputed by the Commissioner that in accordance with the foregoing interpretation of the Acts, a sale of goods does not expose them to sales tax at the higher rate, if at an earlier date to which a lower rate applies the same goods have already become liable to sales tax as goods treated by the manufacturer as stock for sale by retail.

The issue in the case is whether the taxpayer, who is the respondent on this appeal, did, by treating the goods as stock for sale by retail, incur sales tax at the lower rate so that sales tax was not incurred at the higher rate when the goods were afterwards sold in the later period to which a higher rate applied. In respect of some of the goods the question is whether they were treated before 3rd May 1940 as stock for sale by retail; in respect of other of the goods it

is whether they were so treated before 22nd November 1940. The taxpayer learned shortly before 3rd May 1940 of the impending rise in the sales tax and took measures at once to incur the tax at the lower rate. The goods with which the taxpayer dealt were motor cars, and it is not easy to take any physical steps with respect to a large number of motor cars which will show that they are treated as stock for sale by retail. The taxpayer therefore contented itself with making entries in its ledger designed to take into its retail stock all the complete cars on hand except certain specified cars needed for its much more limited wholesale trade. The entries affecting the first period were made hastily upon 30th April and 1st and 2nd May 1940 under the direction of the chairman of directors, the general manager and the accountant of the taxpayer company. That the entries were made before 3rd May 1940 and made pursuant to a resolve of the management of the company has been found as a fact by *Williams* J. and the honesty of the testimony describing the steps taken to incur liability for sales tax is not impugned. I have had some misgiving whether before 3rd May the entries made were definitive or only provisional because the most material of them at that date were still in pencil writing. But notwithstanding some uneasiness on this score, I think that we should act upon the finding that the entries were complete and perfected before that date, a finding in all other respects amply supported by the evidence.

In the second period cars were entered in the ledger as stock for sale by retail, and there is no doubt that as a matter of book-keeping these entries were not tentative but final.

From the point of view of the ultimate dealing with the cars, the appropriation in the books of cars for retail sale was not always treated as conclusive and irrevocable. For some cars so appropriated were in the end sold by wholesale. Moreover, in the work done at the end of April and in the first two days of May there were errors, the erroneous inclusion of cars. But that does not seem important. The question upon which the case turns in substance is whether by entries in the ledger goods like cars can be treated as stock for sale by retail so as to attract sales tax. For that reason I have not thought it necessary to state the detailed facts. They are set out in the judgment of *Williams* J. and were examined in the argument before us with care by the Commissioner's counsel. It is what was not done that is important. Before 3rd May the sales organization of the taxpayer company was not instructed concerning the decision. Nothing was done in reference to the stores where the stock was held. Needless to say, the returns to the Commissioner had not then been made. No physical measure was taken with reference to the cars.

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The contention of the Commissioner is that before a manufacturer can be liable for sales tax on the ground that he has treated goods as stock for sale by retail he must do something overt in relation to the goods indicating that they are retail stock and that entries in books of account amounting only to matter of record are not enough. It was suggested, further, that what is done should be final as well as unconditional as the manifestation of an intention that the goods should be retail stock.

Finality of decision is, I think, something foreign to the conception upon which s. 17 of the *Sales Tax Assessment Act* and s. 3 of the *Sales Tax Act* proceed in imposing sales tax on goods treated as stock for sale by retail. The legislation is looking to an act on the part of the taxpayer which when done will expose him to a liability to tax in respect of the goods. There is no fiscal reason why, if the tax so incurred is paid, the goods should ultimately be dealt with by retail. It is open to the taxpayer to do what he likes with his goods. What he does afterwards with the goods will not affect his liability for tax once he has incurred it by treating them as retail stock.

No doubt the Commissioner is on stronger ground when he says that more is necessary than book-keeping entries. It must be remembered, however, that in this case we are looking at the matter from the opposite point of view to that which the draftsman of the legislation contemplated. He was concerned in imposing a liability which it might be assumed that the taxpayer would desire to avoid. He therefore used a vague and ample word like "treat." The legislation evidently means that if the taxpayer devoted goods to his retail stock, he shall then and there be taxable. Acts indicative of an intention to appropriate or devote goods to retail sale would amount to overt admissions of the requisite purpose, and if they were unequivocal would naturally be regarded as sufficient to justify the imposition of liability. But here conduct which, if the taxpayer were seeking to avoid liability for sales tax imposed on the footing that he had treated goods as stock by retail, would be seized on as an admission comes to wear rather the appearance of an allegation. The impending rise in the sales tax reversed for the time being the interests and therefore the purposes of the parties. "Treat" in the statutes covers, I think, any measure taken in the conduct of business with reference to the goods unequivocally referable to a present intention or decision that the goods shall then and there be retail stock. I cannot but think that the entries in the books would be considered to respond to this test, if the taxpayer were resisting liability for tax imposed by reason of the goods being treated as stock for sale by retail.

I see no reason for thinking that the reversal of the interests and motives of the taxpayer and the revenue authorities respectively should make any difference in the legal significance and consequences of the act done.

Appropriation in accounts is a recognized method of devoting money or goods to a purpose and in my opinion we should hold that by definitive entries in a book a manufacturer may treat his goods as stock for sale by retail.

I think that the appeal should be dismissed.

McTIERNAN J. I should allow this appeal.

In my opinion the Board of Review correctly stated the meaning and effect of the phrase " treated by him " (the taxpayer) " as stock for sale by retail " which is in s. 17 (1) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1940 ; the Board was not bound to hold upon the evidence that the company did treat the motor vehicles which are in question as stock for sale by retail ; there was evidence both ways upon this issue. I think that the Court ought not to reverse the finding of the Board on that issue.

In order to make it plain that the Board did not misapprehend what is the legislative intention expressed by the above-mentioned phrase in the context where it is to be found, I quote some passages from the reasons of the Chairman of the Board with whom the other members were in agreement—" Of the meanings given to the verb ' treat ' in the *Oxford English Dictionary* only one is possibly relevant in this case and that is ' to consider or regard in a particular aspect and deal with accordingly.' " " The two elements are necessary to constitute a treating but it would seem that the really important thing is that the action taken for that is the only evidence of the mental attitude or intention. The company must show that it regarded and actually dealt with the cars in question as ' stock for sale by retail.' The quoted words place the matter upon a solid basis of fact. ' Stock,' of course, means ' stock-in-trade ' or ' the goods kept on sale by a dealer, &c.' (*Oxford English Dictionary*) ; ' for ' denotes purpose and, for the purposes of the Act, ' sale by retail ' cannot extend beyond sale to a user or consumer. Hence, it must be shown that the cars themselves were so regarded and dealt with (whatever the manner of dealing with them might be) that they in fact became goods *kept for sale by retail*—that they were stock *to be* sold by retail. It is obvious that there is an infinite variety of ways (depending on the nature of the goods or the business or the particular circumstances at the relevant time) in which goods may be so dealt with, and I do not think the Board should attempt

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to bring the matter within the scope of a definition. One thing which is certain, however, is that goods cannot become stock actually held for sale by retail by virtue of a notion or intention which has not been consummated by action; some act must be done which, if or when disclosed, is sufficient to establish that the goods are in fact held as stock for sale by retail." "There appear to be no reasonable grounds for holding that an oral or written direction by a responsible executive of a taxpayer that specified goods in stock are to be sold by retail, is not an effective treatment of those goods as stock for sale by retail. The difference between doing that and physically segregating or otherwise handling goods as stock for sale by retail is a matter which concerns, not the effectiveness of the treatment, but the nature of the proof of the treatment."

These references make it plain that the Board applied the right principle in deciding the issue before it. The issue was whether the company had within the meaning of s. 17 treated certain motor vehicles as stock for sale by retail. It should be added that in giving the decision the Board expressly rejected the contention put forward on behalf of the Commissioner that in order to treat goods as stock for sale by retail for the purposes of s. 17 it is necessary physically to segregate or set aside the goods. I agree that the contention was rightly rejected.

The onus was on the company to sustain the affirmative of the issue. If the case were one in which the company was challenging an assessment based upon the acts which the company in the present case alleges were acts constituting the treating of goods for sale by retail the onus would rest upon the company to sustain the negative. The evidence relied upon by the company is correctly summarized in the following passage quoted from the reasons of the Chairman. After recapitulating the evidence the Chairman said "It is clear from the foregoing statement of the facts that the claim that the segregated were described in the book as 'stock for sale by retail'" depends entirely on the effect of the making of certain entries and notations in the stock books. These, of course, are to be coupled with the managing director's decision but as they must be taken to express that decision they virtually constitute the whole of the evidence for the company. The effect of the entries and notations may be briefly stated as follows:—Certain unsold completed cars in respect of which entries appeared in what might be described as the 'common stock' list in each stock book were from time to time segregated from the other cars in the list either by re-writing the entries in another part of the book or by referring to the selected cars

in such a way as to enable them to be identified, and the cars so segregated were described in the book as 'stock for sale by retail.'"

The Board of Review did not decide that the entries and notations in the stock book and the evidence of the policy laid down by the management when it got wind of the impending increase of the rate of tax, in pursuance of which the entries and notations were made, could not support the affirmative of the issue. The description "stock for sale by retail" in the stock book is evidence of an intention to treat the motor vehicles to which it refers as stock for sale by retail and the making of the entries and notations in the book manifests that intention. But, as the Chairman said, it was not "unassailable" evidence of such an intention. The Chairman referred in detail to the evidence which throws doubt on the inference which the company claims to draw from the entries and notations in the stock book. I adopt the Chairman's digest of that evidence. "There was no direction that the cars dealt with in the books as stock for sale by retail were to be sold by retail. The selection of the cars to be so dealt with—and evidently the extent to which cars were to be selected for that purpose—was left entirely to the accountant, and there is hardly any room for doubt that, until the matter became an issue with the Commissioner, the only employees of the company who had information as to the cars which had been selected were the accountant and his subordinates. At the times when they were dealt with in the books as retail stock the selected cars, being completed but unsold, had already been actually treated as stock for sale by wholesale or by retail as occasion might require, and, as between the company and its sales staff and customers they continued to be so treated until sold. In fact they were treated for the purposes of sale in precisely the same way as all cars had been treated by the company from its inception." However, before *Williams* J. a document dated 25th June 1940 was put in evidence which to some extent is such a direction as that mentioned at the beginning of the last citation. The company's claim was that it treated the stock in question as stock for sale by retail before 3rd May 1940.

The strength of the evidence contrary to the company's hypothesis, that it was its intention to treat the vehicles in question as stock for sale by retail, is revealed by the following citation from the chairman's reasons which accurately summarizes admissions made by the managing director and accountant of the company. "Both the managing director and the accountant admitted that at the time of the book transfer of any car to the list of stock for sale by retail it could not be said definitely that it was to be sold by retail or that it

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was to be sold by wholesale. When pressed on this point in cross-examination, the managing director said that the company would know, within certain limits, how many of the cars so transferred at a particular time would be sold by wholesale and how many by retail because the company's experience showed that, on the whole, not more than five per cent of its cars were sold by wholesale." There is ample evidence to support the following inferences which were drawn by the Chairman from these inferences. "This (the reference is to the managing director's statement in cross-examination), of course, means that the managing director contemplated that the cars so transferred would be sold by wholesale or by retail, as occasion required, in just the same way as cars had always been sold by the company. In my opinion this discloses the true intention of the company in regard to the book transfers to retail stock. The cars described in the stock book as stock for sale by retail were already in fact in a common stock (in the company's wharf store and showrooms) for sale either by wholesale or by retail and they were actually sold accordingly (as occasion required) without any regard to what was done in the stock books. It follows that the so-called transfers to retail stock were merely a treatment of the stock books and had no effect whatever upon the company's actual treatment of the cars in question as part of a common stock."

There are two other matters proved in evidence before the Board which detract from the conclusiveness of the entries and notations in the stock book as proof of the company's intention to treat the motor vehicles to which they referred as stock for sale by retail. Between 3rd May and 31st October 1940 there were book transfers of one hundred and twelve vehicles to retail stock. These transfers were not in conformity with the managerial policy in pursuance of which certain stock on hand on 30th April was treated as stock for sale by retail. The second matter is that the company passed on to the purchasers of cars amounts equal to the tax at the rate applicable at the time of the sales respectively, not at the lower rate at which it paid tax prior to the assessment in respect of those cars.

It is not the case upon the evidence here that the company is conclusively shown to have had the intention to treat the motor vehicles in question as stock for sale by retail and did so. The evidence is open to the inference that at the time the company alleges that it had such an intention, its intention was to sell those vehicles by wholesale or retail as the occasion might require. It is a justifiable inference from the evidence that when it sold any vehicle included in the entries relied upon in the stock book wholesale it did not reverse an intention which it had formed to sell the vehicle by

retail, but it was carrying out the only real intention which the evidence proved that it ever formed and that was to sell the vehicle by wholesale or retail as the occasion required.

There is no error of law in the Board's decision. I think that its finding of fact is correct, but in any case it is not within the province of the Court in these proceedings to reverse the finding, even if the Court disagreed with it; there is substantial evidence to support the Board's finding and it is the tribunal to judge the weight of that evidence.

Appeal dismissed with costs.

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

Solicitor for the respondent, *Morton Brewster*.

J. B.