[HIGH COURT OF AUSTRALIA.]

REID . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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MELBOURNE, *March* 19.

Latham C.J., Starke and Dixon JJ.

Income Tax (Cth.)—Exempt income—Income from a foreign source "not exempt from income tax in the country where it is derived"—Dividends from foreign companies—Income Tax Assessment Act 1936-1944 (*No.* 27 *of* 1936—*No.* 3 *of* 1944), *ss.* 23 (*q*), 25, 44, 72A.

A taxpayer resident in Australia was a shareholder in a Canadian company. The company, having declared a dividend, dealt with the amount payable to the taxpayer as it was required to do by Canadian legislation which imposed an income tax of fifteen per cent "on all persons who are non-residents of Canada in respect of . . . all dividends received from Canadian debtors" and required the company to withhold the amount of the tax and remit it to the prescribed authority; after deducting the amount of the tax, the company remitted the balance to the taxpayer in Australia.

Held that the amount received by the taxpayer was income which, within the meaning of s. 23 (*q*) of the *Income Tax Assessment Act* 1936-1944, was "not exempt from income tax in the country where it is derived"; accordingly, it was exempt from income tax pursuant to s. 23, and as "exempt income" it was excluded by s. 25 from the taxpayer's assessable income: Section 44 of the Act did not operate to exclude the dividend from the exemption provided by s. 23 (*q*).

CASE STATED.

On an appeal by Donald Reid to the High Court against an assessment to Federal income tax *Latham* C.J. stated for the opinion of the Full Court a case which was substantially as follows:—

1. At all times material the appellant was and still is a resident in the Commonwealth of Australia.

2. At all times material the appellant was a shareholder in Placer Development Ltd. and in Pato Consolidated Gold Dredging Ltd.

3. The companies named are and at all times material were each of them companies incorporated in British Columbia in the Dominion of Canada where they each carry on their respective businesses.

4. The *Income War Tax Act* of the Dominion of Canada contained the following provisions :—" In addition to any other tax imposed by this Act an income tax of fifteen per centum is hereby imposed on all persons who are non-residents of Canada in respect of (*a*) All dividends received from Canadian debtors irrespective of the currency in which the payment is made . . . In the case of . . . dividends in respect of fully registered shares . . . the taxes imposed by this section shall be collected by the debtor who shall . . . withhold fifteen per centum of the obligation and remit the same to the Receiver General of Canada . . . Dividends or shareholders' bonuses shall be taxable income of the taxpayer in the year in which they are paid or distributed. . . . 'Taxpayer' includes any 'person' whether or not liable to pay tax . . . No action shall lie against any person for withholding or deducting any sum of money as required by this Act . . . The receipt of the Minister for any sum of money collected, withheld or deducted by any person as required by this Act . . . shall constitute a good and sufficient discharge of the liability of any debtor to his creditor with respect thereto to the extent of the amount referred to in the receipt."

5. At all material times the appellant was a non-resident of Canada within the meaning of the above quoted provisions and was not otherwise chargeable to income tax in Canada upon the dividends hereinafter referred to.

6. During the year ended 30th June 1944 Placer Development Ltd. declared dividends, expressed to be appropriated by it wholly and exclusively out of profits derived from ex-Australian sources, payable in respect of the shares held by the appellant in the company to the total amount of 1,575 Canadian dollars, being a dividend of 25 cents per share on 3,000 shares declared payable on 15th December 1943, and a dividend of 25 cents per share on 3,300 shares declared payable on 15th June 1944, such shares being held, at the respective dates of the dividends declared, by the appellant in Placer Development Ltd.

7. Pursuant to the Canadian Act Placer Development Ltd. deducted from the amount of 1,575 dollars fifteen per centum thereof as and for the tax payable in the Dominion of Canada under the Act and remitted the same to the Receiver General of Canada ; and remitted from Canada to the appellant in Australia the balance then remaining of the 1,575 dollars, converted into Australian currency

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at the then prevailing rates of exchange, namely, £373 0s. 5d., which amount was duly received by the appellant in Australia during the income year ended 30th June 1944.

8. During the year ended 30th June 1944, Pato Consolidated Gold Dredging Ltd. declared dividends payable in respect of the shares held by the appellant in the company to the total amount of 3,600 Canadian dollars, being two dividends of 15 cents per share respectively on 12,000 shares declared payable in December 1943 and June 1944, such shares being held, at the respective dates of the said dividends declared, by the appellant in Pato Consolidated Gold Dredging Ltd.

9. Pursuant to the Canadian Act Pato Consolidated Gold Dredging Ltd. deducted from the amount of 3,600 dollars fifteen per centum thereof as and for the tax payable in the Dominion of Canada under the provisions of the Act and remitted the same to the Receiver General of Canada ; and remitted from Canada to the appellant in Australia the balance then remaining of the 3,600 dollars, converted into Australian currency at the then prevailing rates of exchange, namely, £850 18s. 10d., which amount was duly received by the appellant in Australia during the income year ended 30th June 1944.

10. By a return of income derived during the year ending 30th June 1944, made and dated October 1944, the appellant disclosed the receipt as dividends of the several sums of £373 0s. 5d. and £850 18s. 10d., but claimed that those sums were not assessable to income tax.

11. By a notice of assessment issued 14th June 1945 the respondent assessed the appellant for income tax in respect of a taxable income derived during the year ended 30th June 1944 which included the several sums aforesaid at the figure of £1,224.

12. The appellant objected to the assessment, and the objection, having been disallowed by the respondent, was treated as an appeal to the High Court.

The questions for the opinion of the Full Court were as follows :—

1. Is the said sum of £1,224 (being the total amount of dividends received by the appellant during the year of income ended 30th June 1944 from shares in the said Canadian companies) exempt from income tax pursuant to s. 23 (*q*) of the *Income Tax Assessment Act* 1936-1944 ?
2. Is the said sum of £1,224 exempt income within the meaning of s. 25 (1) of the said Act ?

Tait K.C. (with him *H. Walker*), for the appellant. The dividends here in question, being subject to a tax of fifteen per cent in Canada,

the country where they are derived, are, within the meaning of s. 23 (*q*) of the *Income Tax Assessment Act*, income which " is not exempt from income tax in " that country ; by virtue of s. 23 the amount of the dividends is, therefore, " exempt from income tax " and, as " exempt income," it is excluded by s. 25 (1) from the assessable income of the taxpayer. Section 23 is in Div. 1 of Part III. of the Act, under the headings (as to the Part) " Liability to Taxation " and (as to the Division) " General." The arrangement generally of Part III. shows that the provisions of Div. 1 are the dominant provisions, that they are to apply to the whole of what follows in Part III. unless the context shows otherwise. Neither s. 23 (*q*) nor s. 25 draws any distinction between dividends from shares in companies and other income, and it would be a curious distinction that excluded such dividends from the exemption. Section 44 does not derogate from s. 23 (*q*) or s. 25 ; on the contrary, it is ancillary to s. 25. Its main object appears to be to make clear, in respect of dividends, the distinction as between resident and non-resident taxpayers expressed in s. 25. It certainly does not show any clear intention to cut down the effect of the plain words of ss. 23 (*q*) and 25.

Coppel K.C. (with him *Gilbert*), for the respondent. It is not contended that, if it were not for s. 44, the provisions of ss. 23 (*q*) and 25 would not be sufficient to give the appellant the exemption claimed. Section 44, however, it is submitted, is a special provision which, in accordance with the rule of construction whereby special provisions prevail over general ones (See *Churchill* v. *Crease* (1) ; *Dryden* v. *Overseers of Putney* (2)), takes dividends out of the generality of ss. 23 (*q*) and 25. That s. 23 (*q*) is a general provision which must yield to special provisions is clear from the heading to Div. 1 of Part III., in which it appears. Section 25 is under a similar heading in Div. 2, Sub-div. *A*, " *Assessable Income Generally.*" Section 44 is in Sub-div. *D* of the same Division, which is devoted entirely to dividends, and it deals with them in terms to which it would be difficult to attribute a purpose unless it is regarded as cutting down the earlier general provisions. It is significant that s. 44 (1) refers to the assessable income of a " shareholder in a company " (not the more usual word, " taxpayer "). Moreover, s. 44 (2) (*b*) (See, particularly, par. (iii)) contains provisions which are inconsistent with the application of s. 23 (*q*) to dividends, or, at all

(1) (1828) 5 Bing. 177, at p. 180 [130 E.R. 1028, at p. 1030].

(2) (1876) 1 Ex. D. 223, at p. 232.

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events, do not fit easily into a scheme which includes such an application. The amendments made to s. 44 in 1942 do not seem consistent with the conception of s. 23 (*q*) as applying to dividends. In 1942 also the Act was amended by the introduction of s. 72A, which assumes that dividends on which income tax is paid abroad are assessable income. It cannot be said that a distinction between income from dividends and other income is not to be found elsewhere in the Act; it appears in express words in s. 50.

Tait K.C., in reply. Section 72A is not inconsistent with, nor is it rendered ineffectual by, the appellant's reading of ss. 23 (*q*), 25 and 44; it will operate to give relief not otherwise provided for to a non-resident taxpayer who is taxed abroad on dividends which are within s. 25 (1) (*b*) and s. 44 (1) (*b*).

The following judgments were delivered:—

LATHAM C.J. The questions raised by this case depend principally upon the interpretation of ss. 23 (*q*), 25 and 44 of the *Income Tax Assessment Act* 1936-1944. The taxpayer (who is resident in Australia) has received dividends from Canadian companies which did not carry on any operations in Australia. The dividends payable to him by the Canadian companies are taxed to the extent of fifteen per cent under Canadian legislation. The amount of tax is retained by the companies and paid by them to the Canadian revenue authorities. Accordingly this income of the taxpayer is not exempt from income tax in the country where it is derived. Section 23 (*q*) provides that:—

"The following income shall be exempt from income tax:—

. . . . . .

(*q*) income derived by a resident from sources out of Australia, where that income is not exempt from income tax in the country where it is derived."

Upon the natural construction of those words there is no doubt that the income in question falls within them. It is derived entirely from a Canadian source. It is not exempt from income tax in the country where it is derived. Prima facie, therefore, it is not subject to tax.

Section 25 provides:—

"The assessable income of a taxpayer shall include—

(*a*) where the taxpayer is a resident—the gross income derived directly or indirectly from all sources whether in or out of Australia; and

(*b*) where the taxpayer is a non-resident—the gross income derived directly or indirectly from all sources in Australia, which is not exempt income."

Accordingly, in order to discover the assessable income of a taxpayer, you ascertain his gross income and then ask whether it is exempt or not. The application of these sections by themselves would appear to produce the result that this income is non-taxable. But the Commissioner relies upon s. 44, which provides :—

"(1) The assessable income of a shareholder in a company (whether the company is a resident or a non-resident) shall, subject to this section—

(*a*) if he is a resident—include dividends paid to him by the company out of profits derived by it from any source ; and

(*b*) if he is non-resident—include dividends paid to him by the company to the extent to which they are paid out of profits derived by it from sources in Australia."

Sub-section (2) of s. 44 provides for exceptions from sub-s. (1). The contention for the Commissioner is that s. 23 (*q*) is a general provision but that s. 44 consists of special provisions dealing with dividends which should be held to prevail over the general provisions. It is pointed out that in s. 44 (1) (*a*), which applies to a resident taxpayer, there is a specific provision that his assessable income shall include dividends paid to him by a company whether the company is resident or non-resident and whatever the source of the profits of the company may be. If that provision is to be regarded as a provision specifically applicable to dividends, to the exclusion of other provisions, then these dividends should be included in the assessable income of the taxpayer.

I can see no reason for describing s. 44 as a specific provision excluding or overcoming other provisions which reason would not be as applicable to s. 23 (*q*). The provisions in s. 23 are very specific, applying to particular specified cases, and I am unable to see any reason for regarding s. 44 as more specific than s. 23 (*q*). The provision in s. 23 that "the following income shall be exempt from income tax" is a provision which presumes that, apart from the provisions contained in s. 23, the income in question would fall within the other provisions of the Act making income taxable. The very object of s. 23 is to exclude from taxable income income which otherwise would have been taxable. Accordingly I see no reason for failing to give s. 23 (*q*) its full meaning according to the natural sense of the words.

An argument has been submitted upon s. 72A, which, it was contended by Dr. *Coppel*, would be quite unnecessary if the view of

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the taxpayer submitted in this appeal were accepted. In my opinion, Mr. *Tait* has provided an answer to that suggestion by reference to the case of a non-resident taxpayer paying tax in a foreign country. In that case a deduction is allowed and there is scope for the operation of the section upon the interpretation of s. 23 (*q*) and s. 44 which I have stated. In my opinion, the questions in the case should be answered in the affirmative, that is, that the amounts are exempt.

STARKE J. I agree.

DIXON J. I agree.

Questions answered in the affirmative and case remitted to Chief Justice.

Solicitor for the appellant, *Bernard Nolan.*

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

E. F. H.