

[HIGH COURT OF AUSTRALIA.]

NICHOLAS . . . . . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXATION } RESPONDENT.

*Income Tax—Income—Trust in respect of any income or income-producing assets—  
Income for benefit of unmarried infant children—Settlement—Beneficiaries con-  
sisting of adults and minors—Income Tax Assessment Act 1936-1943 (No. 27  
of 1936—No. 10 of 1943), s. 102 (1) (b).*

H. C. OF A.  
1947.

SYDNEY,

Dec. 1, 12.

Williams J.

The appellant was the sole trustee of a deed whereby her husband settled 4,000 shares in a company, as to one-fourth upon trust for her absolutely, and as to the other three-fourths upon trust until his death to divide the income equally amongst such of his children as should be living at the time of the said income being received and upon his death upon trust to divide the capital amongst his children and their issue as therein mentioned. The settlor was still alive and had three sons, one of whom was over twenty-one years of age and the other two under that age and unmarried during the income-year ended 30th June 1943. The dividends received during that year by the appellant from the trust fund were divisible equally between herself and the three children. She was assessed as trustee of the settlement under s. 102 (1) (b) of the *Income Tax Assessment Act 1936-1943*, upon £350, being portion of the net income to which the two infant sons were entitled. The amount of tax assessed, £325 10s., was stated in the assessment to be the amount of tax by which the tax actually payable by the settlor on his own taxable income was less than the tax which would have been payable by him if he had received the £350.

*Held*, that the assessment as made by the Commissioner was correct.

APPEAL from the Commissioner of Taxation.

Grace Marie Nicholas was the sole trustee of a deed, dated 12th March 1941, whereby her husband, David Thomas Nicholas, settled 4,000 shares in F. W. Williams & Co. Pty. Ltd., as to one-fourth upon trust for her absolutely, and as to the other three-fourths



H. C. OF A.  
1947.  
NICHOLAS  
v.  
FEDERAL  
COMMISSIONER OF  
TAXATION.

upon trust until his death to divide the income equally amongst such of his children as should be living at the time the said income was received and at his death upon trust to divide the capital amongst his children and their issue as therein mentioned.

The settlor was still alive and had three sons one of whom had attained the age of twenty-one years and the other two were under that age and unmarried in 1943. The dividends received by the appellant from the trust fund during the income-year ended 30th June 1943 were divisible under the deed in the sums of £175 to herself, £175 to the adult son and £175 to each of the infant sons. As trustee of the deed the appellant was assessed under s. 102 (1) (b) of the *Income Tax Assessment Act* 1936-1943 for £325 10s. being the amount of tax payable upon £350 representing the infants' share of the dividends. The sum of £325 10s. was stated in the assessment to be the amount by which the tax actually payable by the settlor on his own taxable income was less than the tax which would have been payable by him if he had received the income of that portion of the trust which was in favour of the two infant sons.

An objection on various grounds made by her in respect of the assessment having been disallowed the appellant appealed to the High Court.

Further facts and the relevant statutory provisions are set forth in the judgment hereunder.

*E. J. Hooke and O'Meally*, for the appellant.

*Leslie*, for the respondent.

*Cur. adv. vult.*

Dec. 12.

WILLIAMS J. delivered the following written judgment:—The appellant Grace Marie Nicholas is the sole trustee of a deed dated 12th March 1941, whereby her husband David Thomas Nicholas settled 4,000 shares in F. W. Williams & Co. Pty. Ltd., as to one-fourth upon trust for her absolutely, and as to the other three-fourths upon trust until his death to divide the income equally amongst such of his children as should be living at the time of the said income being received and on his death upon trust to divide the capital amongst his children and their issue as therein mentioned.

The settlor is still alive and has three sons one of whom was over twenty-one and the other two were under twenty-one and unmarried in 1943. During the year of income ended 30th June 1943 the appellant received £750 in dividends from the trust fund which was divisible under the deed £175 to herself, £175 to the adult son,



and £175 to each of the infant sons. She was assessed as the trustee of the deed under s. 102 (1) (b) of the *Income Tax Assessment Act* 1936-1943 for £325 10s. being the amount of tax payable upon £350 representing the infants' proportions of the dividends.

The sum of £325 10s. was stated in the assessment to be the amount by which the tax actually payable by David Thomas Nicholas on his own taxable income was less than the tax which would have been payable by him if he had received the income of the portion of the trust which was in favour of the two infant children. The assessment was objected to on a number of grounds, but the objection was disallowed and the taxpayer has appealed to this Court. Grounds four, six, eight, and nine in the notice of objection were not pressed on the appeal.

It was submitted that the appeal should succeed on the grounds that—(1) A trustee cannot be assessed under s. 102 because the legislature has failed to declare a rate of tax in respect thereof. (2) Section 102 (1) (b) does not apply to the income of a trust where the beneficiaries comprise adults as well as children of the creator of the trust who are under the age of twenty-one and unmarried. (3) If s. 102 (1) (b) was intended to apply to such a trust it cannot operate because there is no machinery for calculating the share of the net income of the trust on which tax is to be paid in the absence of any provision for the apportionment of that net income. (4) If there is to be an apportionment of the net income of such trust between beneficiaries who are adults and beneficiaries who are such children, there must also be an apportionment of the income between each of such children and the trustee must be assessed separately in respect of the income of each such child.

(1) Section 6 of the *Income Tax Assessment Act* 1936-1943 defines income tax to mean the income tax imposed as such by any Act as assessed under this Act. Section 17 provides that income tax at the rates declared by the Parliament shall be levied and paid for the financial year . . . upon the taxable income derived during the year of income by any person. The *Income Tax Act* 1943 provides that income tax is imposed at the rates declared by this Act. Section 5 (8) provides that the rate or rates of tax payable by a trustee shall be as set out in the sixth schedule to this Act. The sixth schedule prescribes the rates of tax payable by a trustee where a trustee is liable to be assessed and to pay tax pursuant to either s. 98 or s. 99 of the *Income Tax Assessment Act*.

It was submitted that the assessment under appeal must fail because the tax on the £350 was payable by the appellant as a trustee, and no rates were declared upon the taxable income of

H. C. OF A.  
1947.

NICHOLAS  
v.  
FEDERAL  
COMMISSIONER OF  
TAXATION.

Williams J.



H. C. OF A.  
1947.

NICHOLAS  
v.  
FEDERAL  
COMMISSIONER OF  
TAXATION.

Williams J.

trustees by the *Income Tax Act* except where trustees were liable to pay tax pursuant to ss. 98 or 99. The *Income Tax Assessment Act* is not an Act which imposes a tax or declares the rates of tax. The tax is imposed and the rates are declared by the *Income Tax Act*. But s. 3 of the *Income Tax Act* provides that the *Income Tax Assessment Act* shall be incorporated and read as one with this Act.

Section 102 of the *Income Tax Assessment Act* is in the following terms :—

“ 102—(1) Where a person has created a trust in respect of any income or income-producing assets, and—

- (a) he has power, whenever exercisable, to revoke or alter the trusts so as to acquire a beneficial interest in the income derived during the year of income, or the assets producing that income or any part of that income or of those assets ; or
- (b) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of twenty-one years and unmarried,

the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed.

(2) The amount of such tax shall be the amount by which the tax actually payable on his own taxable income by the person who created the trust is less than the tax which would have been payable by him if he had received the net income of the trust estate, or so much thereof as is attributable to the beneficial interest, as the case may be, in addition to any other income derived by him.

(3) Where this section is applied to the assessment of the income of a trust estate or part thereof derived in the year of income, no beneficiary shall be assessed in his individual capacity in respect of his individual interest in the income or part to which this section has been so applied, and the trustee shall not be assessed in respect of that income or part otherwise than under this section.”

This section forms part of the *Income Tax Assessment Act* as a separate Act and also forms part of the *Income Tax Act* because the *Income Tax Assessment Act* is incorporated in the *Income Tax Act*. The second schedule to the *Income Tax Act* prescribes the rate of tax in respect of taxable income derived from property and the third schedule the rates of tax in respect of taxable income derived partly from personal exertion and partly from property. These two schedules contain all the rates of tax required to calculate the amount of tax payable by a trustee under s. 102 whether the income of the creator of the trust is derived from property only or partly from personal exertion and partly from property. Section 102



imposes a tax because that section is incorporated in the *Income Tax Act*, and the rates in accordance with which the amount of tax is to be calculated are declared by the Parliament because they are contained in the second and third schedules to the *Income Tax Act*.

The tax is imposed on the trustee by s. 102 in an analogous manner to that in which the tax on undistributed profits provided for by ss. 104 and 105 of the *Income Tax Assessment Act* is imposed on private companies. This tax is imposed by the incorporation of these sections in the *Income Tax Act*. Section 5 (9) of the *Income Tax Act* provides that the rates of income tax payable by a company shall be as set out in the seventh schedule. This schedule does not contain the rates at which a private company is to be taxed under ss. 104 and 105. But the rates for the purposes of these sections are, like the rates for the purposes of s. 102, to be found in the second and third schedules: *Cadbury-Fry-Pascall Pty. Ltd. v. Federal Commissioner of Taxation* (1).

(2) and (3). Prior to the amendment of the principal Act by the *Income Tax Assessment Act* 1941, s. 102 (1) only applied to the income of revocable trusts. Section 102 (2) then provided that the amount of tax should be the amount by which the tax actually payable on his own taxable income by the person who created the trust was less than the tax which would have been payable by him if he had received so much of the net income of the trust estate as was attributable to the beneficial interest which he had power so to acquire, in addition to any other income derived by him. The Act of 1941 added the second class of trusts now defined by s. 102 (1) (b). At the same time s. 102 (2) was amended by omitting the words "so much of" before the words "the net income of the trust estate" and by omitting the words "which he had power so to acquire." It is clear that Parliament intended to amend s. 102 (2) so that the section would apply where the whole net income of the trust estate or only part thereof is subject to the power of revocation, and where the whole net income of the trust estate or only part thereof is payable to a child or children of the creator of the trust who is or are under twenty-one and unmarried. It was not disputed that the words "the net income of the trust estate" apply not only where the whole of such income is subject to the power of revocation but also where the whole of such income is payable to this class of children. But it was submitted that the words "so much thereof as is attributable to the beneficial interest" refer exclusively to the beneficial interest mentioned in s. 102 (1) (a), and do not include the case where only part of

H. C. OF A.  
1947.

NICHOLAS  
v.  
FEDERAL  
COMMISSIONER OF  
TAXATION.  
Williams J.



H. C. OF A.  
1947.  
NICHOLAS  
v.  
FEDERAL  
COMMISSIONER OF  
TAXATION.  
Williams J.

the income of an irrevocable trust is payable to children under twenty-one and unmarried. It was therefore submitted that s. 102 (2) can only operate in relation to the trusts defined by s. 102 (1) (b) where all the beneficiaries are under twenty-one and unmarried, and the whole net income of the trust estate can be added to the income of the creator of the trust. If s. 102 (2) had not been amended by the Act of 1941, there might have been no answer to this submission. But when the sub-section was amended in 1941, care was taken to omit the words limiting the beneficial interest to an interest which the settlor had power to acquire by the exercise of a power of revocation. Before the amendment the words referred to existing beneficial interests in a trust fund, namely interests subject to revocation. By the amendment the words were enlarged so as to cover these interests and also other existing beneficial interests in a trust fund, namely the interests of children of the creator of the trust who are under twenty-one and unmarried. Section 102 (3) clearly intends that the section is to be applied to the assessment of either the whole or part of the income of a trust estate whether such income is income defined by s. 102 (1) (a) or (b), and that there can be beneficiaries having individual interests in the whole or in that part of the trust estate to which the section applies.

(4) Section 102 treats the income to which it applies, whether it be the whole net income of the trust estate because it is subject to the power of revocation or all the beneficiaries are children of the creator of the trust under the age of twenty-one and unmarried, or part only of that income because only part of the income is subject to the power of revocation or only some of the beneficiaries are in this category, as a single taxable fund, and taxes this fund in the hands of the trustee at an amount by which the tax actually payable by the person who created the trust is less than the tax which would have been payable by him if he had received this fund in addition to any other income derived by him less all allowable deductions.

For these reasons I am of opinion that the appellant fails on all grounds, and I order that the appeal be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Pigott, Stinson, Macgregor & Palmer*.  
Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.