Dist *Cliffs International Inc v Comr of Taxation* 80 FLR 12
Appl *Commr of Taxn v Kowal* (1983) 79 FLR 75
Appl *Telecasters North Qld Ltd v FCT* 20 ATR 637
Foll *Raymor (NSW) Pty Ltd v FCT* 20 ATR 1363
Appl *Comr of Taxation v Creer* 11 FCR 52
Appl *Comr of Taxation v Janmor Nominees Pty Ltd* 15 FCR 348
Appl *Swinford v Federal Commissioner of Taxation* (1984) 3 NSWLR 118
Discd *Fletcher v Comr of Taxation (No2)* 23 FCR 134
Cons *FCT v Riverside Road Lodge Pty Ltd* 23 FCR 305

Appl *Kalgoorlie Goldmines Ltd v FCT* (1991) 22 ATR 168
Expl *Fletcher v Federal Commissioner of Taxation* (1991) 103 ALR 97
Cons *Fletcher v Federal Commissioner of Taxation* (1991) 66 ALJR 11
Expl *Fletcher v Federal Commissioner of Taxation* (1991) 22 ATR 613
Appl *FCT v Cooper* (1991) 21 ATR 1616
Foll *Martin v FCT* (1984) 2 FCR 260
Appl *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1
Discd *John Fairfax & Sons Pty Ltd v FCT* (1959) 101 CLR 30
Appl *Taxation, Federal Commissioner of v Edwards* (1993) 119 ALR 375
Appl *Taxation, Federal Commissioner of v Edwards* (1993) 27 ATR 293
Appl *Propend Finance Pty Ltd v Aust Federal Police Commissioner* (1994) 27 ATR 584
Appl *Kemp v Federal Commissioner of Taxation* (1992) 24 ATR 75
Appl *A A T Case 8229* (1992) 24 ATR 1014
Appl *Kemp v FCT* (1992) 110 ALR 375
Appl *A A T Case 7889* (1992) 23 ATR 1122
Appl *A A T Case 7723* (1992) 23 ATR 1043
Appl *FCT v Manchester Unity IOOF* (1994) 28 ATR 251
Foll *Taxation, Federal Commissioner of v Edwards* (1994) 49 FCR 318
Foll *Creer v Federal Commissioner of Taxation* (1994) 28 ATR 442
Appl *Whitaker v Federal Commissioner of Taxation* (1996) 33 ATR 394
Cons *W D & H O Wills (Australia) Pty Ltd v Comr of Taxation* (1996) 65 FCR 298
Appl *Esso Australia Resources Ltd v Commissioner of Taxation* (1997) 144 ALR 458
Cons *Hayden v Federal Commissioner of Taxation* (1996) 68 FCR 19
Appl *Steele v Federal Commissioner of Taxation* (1997) 73 FCR 330
Appl *FCT v Payne* (2001) 177 ALR 270
Discd *A A T Case 14/98* (1998) 39 ATR 1105
Appl *Esso Aust Resources Ltd v FCT* (1998) 84 FCR 541
Foll *Case [1999] AATA 161; Re Bradshaw & DCT* (1999) 41 ATR 1195
Appl *Riha & FCT, Re* (2003) 53 ATR 1108
Cons *Case [1999] AATA 406; Re the Taxpayer & FCT* (1999) 42 ATR 1090
Refd to *Estate Mortgage Fighting Fund Trust v FCT* (2000) 175 ALR 482

[HIGH COURT OF AUSTRALIA.]

RONPIBON TIN NO LIABILITY . . . APPELLANT:

AND

DERAL COMMISSIONER OF TAXATION . RESPONDENT.

ONGKAH COMPOUND NO LIABILITY . . APPELLANT:

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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MELBOURNE, *May* 11, 12; *June* 6.

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

Income Tax (Cth.)—Assessment—Deductions—"Losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income"—Apportionment—Tin-mining company registered in Victoria—Mining operations in Siam prior to war—Income therefrom exempt from Federal income tax—Suspension of operations in Siam during war—No income thereafter derived by company except small amount from investments—Maintenance of office and central administration in Melbourne—Expenses incidental thereto—Income Tax Assessment Act 1936-1944 (*No.* 27 *of* 1936—*No.* 28 *of* 1944), *ss.* 23 (*q*), 51 (1).

The taxpayer company was registered in Victoria as a no-liability mining company. Before the outbreak of war with Japan it carried on in Siam tin-mining operations from which it derived a substantial income. This income was treated as exempt from tax under s. 23 (*q*) of the *Income Tax Assessment Act* of 1936 and ensuing years. In the relevant income year it had no income except an amount of £1,833 derived from investments. Notwithstanding that, owing to the occupation of Siam by the Japanese, it derived no income from mining, it maintained its administrative structure in Australia with a view (*inter alia*) to the resumption of its operations in Siam. In Melbourne, where it had its registered office, it incurred expenditure, such as directors' fees and expenses of management, in the central administration of its affairs.

Appl *FCT v Payne* (2001) 202 CLR 93
Appl *FCT v Payne* (2001) 75 ALJR 442
Appl *FCT v Payne* (2001) 46 ATR 228
Foll *Morris v FCT* (2002) 50 ATR 104
Appl *Elcham v Comr of Police* (2001) 53 NSWLR 7
Appl *FCT v La Rosa* (2003) 129 FCR 49
Foll *Spassked Pty Ltd v Comr of Taxation* (2003) 54 ATR 546
Dist *Lopez v DFCT* (2005) 60 ATR 387

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It claimed a deduction of the whole of this expenditure under s. 51 (1) of the *Income Tax Assessment Act* 1936-1944. On the basis that only a small part of the total expenditure was referable to the gaining of assessable income from investments, the commissioner allowed as a deduction only a small percentage of the gross income.

Held that, on an appeal against the assessment to the High Court, the judge who heard the appeal should decide as a matter of fact what part or proportion of the expenditure was fairly and properly attributable to gaining the assessable income.

The meaning and effect of s. 51 (1) of the Act considered.

CASES STATED.

Prior to the outbreak of war with Japan, Ronpibon Tin No Liability carried on tin-mining operations in Siam and Tongkah Compound No Liability carried on similar operations in Malaya. Each company was registered in Victoria as a no-liability mining company. It was admitted in each case that the income derived by the company from these operations had been exempt from income tax under s. 23 (*q*) of the *Income Tax Assessment Act*. After the mines had been occupied by the Japanese neither company derived any income except a comparatively small return from investments. Each company, however, retained its registered office in Melbourne and its administrative structure generally and incurred expenditure in the central administration of its affairs. The accounting period relevant to this report was, in the case of Ronpibon Tin No Liability, the year ending 30th June 1944 and, in the case of Tongkah Compound No Liability, that ending 30th September 1943. In such accounting period the former company derived a gross income of £1,833 from its investments. In the same period the expenses of central administration and certain other expenses which are described in detail in the judgment hereunder amounted in all to £1,206. The company claimed the whole of this amount as a deduction from its assessable income for the purposes of Federal income tax. Tongkah Compound No Liability made a similar claim. In accordance with a departmental practice the commissioner allowed a deduction equal to two and one-half per cent of the gross income. Otherwise he disallowed the claim in each case.

Each company appealed against the assessment to the High Court. The two appeals came before *Latham* C.J., who referred them to the Full Court. The appeals coming on for hearing together before the Full Court, it was agreed by the parties (and ordered accordingly) in each case that the materials before the

court together with a question submitted by *Latham* C.J. should be treated as a case stated for the opinion of the Full Court under s. 198 of the *Income Tax Assessment Act* 1936-1944.

The question submitted by his Honour was, in each case, whether in point of law he was at liberty to find that in assessing the company to income tax in respect of income derived during the accounting period the commissioner acted rightly in disallowing in whole or in any and what part the deduction claimed.

Ashkanasy K.C. (with him *Spicer* K.C.), for the appellants. During the relevant year each of the appellant companies was carrying on one entire business, which consisted of carrying out the activities required by law, holding itself ready to resume the operation of its mines in Malaya or Siam (as the case might be) if and when that became practicable, doing what it could to protect its assets in respect of such mines, looking out for opportunities to carry on mining activities elsewhere and investing its available funds. The whole of the amount claimed as a deduction in each case represents moneys expended for the purpose of gaining the income which the company in fact derived from that entire business in the relevant year. It is therefore an outgoing which is deductible under the first branch of s. 51 (1) of the Act of 1936-1944 as having been wholly incurred in gaining the assessable income of the relevant year. Alternatively, it is deductible under the second branch of s. 51 (1) as having been necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Under this branch a relationship need not be shown between the expenditure and the assessable income of the year of the expenditure; it is sufficient that the purpose is to produce assessable income in future years. That is so, at all events, in the case of a continuous business. There was a continuity of business here, notwithstanding that the mining operations were suspended—a continuity with a view to resuming operations when practicable. It is not relevant here that the income derived from past mining operations was exempt income. Section 23 (*q*) cannot be applied to future income, because it will not be possible to say, until such income is earned, whether the conditions of s. 23 (*q*) have been fulfilled in relation to it. [He referred to the *Income Tax Assessment Act* 1936-1944, ss. 6 (definitions of " exempt income " and of " business "), 25, 77; *Amalgamated Zinc (de Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1); *W. Nevill and Co. Ltd.* v. *Federal Commissioner of Taxation* (2)].

(1) (1935) 54 C.L.R. 295.

(2) (1937) 56 C.L.R. 290.

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Tait K.C. (with him *M. McInerney*), for the respondent. It is submitted that the appellant companies cannot rely on the second branch of s. 51 (1). Neither of them was carrying on a business during the relevant year; they were merely looking for an opportunity to go into business again in the future. Moreover, the words " such income " in the second branch refer back to the words " the assessable income " in the first branch of s. 51 (1), so that there is the same relation in each branch between the income gained and the year of the expenditure. The words of the first branch, " incurred in gaining " mean " incurred in the course of gaining." The second branch of s. 51 (1) first appeared in the 1936 Act; accordingly, cases decided on the prior Acts, (e.g., the *Amalgamated Zinc Case* (1)) do not assist in the determination of the question arising here: cf. *W. Nevill and Co. Ltd.'s Case* (2).

[DIXON J. referred to *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (3).]

Under the first branch of s. 51 (1) the matter is one of apportionment. What is deductible is such part of the expenditure in question as is reasonably referable to the gaining by the company of the income from investments which was its only income of the relevant year. It cannot be said, in the case of Ronpibon Tin No Liability, that the whole Melbourne expenditure of £1,206 was reasonably incurred to gain the income of £1,833. The commissioner's apportionment was reasonable in the circumstances of these two cases. [He referred to *Sennitt & Son Pty. Ltd.* v. *Federal Commissioner of Taxation* (4); *Aspro Ltd.* v. *Commissioner of Taxes* (5); *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (6).]

Spicer K.C., in reply. If " such income " in the second branch of s. 51 (1) merely means the same thing as " the assessable income " in the first branch, then the second branch adds nothing to the first. Unless the appellants' construction is correct, there is no provision in the Act whereby a loss suffered by a taxpayer in one business can be deducted from the income of another business carried on by him. Once the stage is reached that losses or outgoings may be deducted although not related to the earning of income in the same year, there is some scope for the second branch of s. 51 (1). This view is supported by s. 77 in that it recognizes and provides for the deduction of a loss in the case of a business which would otherwise

(1) (1935) 54 C.L.R. 295.
(2) (1937) 56 C.L.R., at pp. 299-301, 303, 305, 308.
(3) (1946) 72 C.L.R. 634, at p. 643.
(4) (1932) 1 A.T.D. 387.
(5) (1932) A.C. 683, at pp. 688, 689.
(6) (1932) 48 C.L.R. 113, at pp. 118, 121-123, 125, 127.

earn exempt income. The commissioner is not concerned with the quantum of the expenditure, there being no question as to bona fides.

Tait K.C., by leave. Section 77 applies only where the taxpayer is carrying on a business in Australia. " Carrying on " means something more than merely having a head office in Australia : cf. s. 76 (*a*).

Cur. adv. vult.

THE COURT delivered the following written judgment :—

These are two appeals from assessments to income tax which were brought on to be heard before the Chief Justice as associated matters.

His Honour at the joint request of the parties took steps to have the question which the appeals raise submitted for the decision of the Full Court. The matters are now before us as upon cases stated under s. 198 of the *Income Tax Assessment Act* 1936-1944.

In each case the appellant is a no-liability mining company registered in Victoria. Up to the outbreak of war with Japan the chief business of the companies was tin mining. Ronpibon Tin No Liability owned and worked a tin mine in Siam under leases from the Siamese Government. Tongkah Compound No Liability owned and worked a tin mine at Seremban in Malaya and it held shares in other companies which owned and worked tin mines at the same place. Each of the appellant companies had derived substantial revenues from the tin mining so carried on. But these revenues formed no part of the assessable income of the companies. It was admitted by the parties in each case that the income from tin mining had been exempt from income tax under the provisions of s. 23 (*q*) of the *Income Tax Assessment Act*. It does not appear why this was so in the case of Malaya, that is to say whether the income from tin mining was not exempt from income tax in that country or the tin won was subject to a royalty or an export duty. But it is to be gathered from the material before the Court that in Siam an income tax was imposed and, further, that the company was required to pay a royalty in respect of the tin. After the Japanese obtained control of Siam and of Malaya the companies were of course cut off from all access to their workings, which fell into enemy hands. The mining manager and the assistant mining manager of Ronpibon Tin No Liability were interned, but the wife of one and the wife and children of the other had been sent to Australia. There the company continued to pay them an allotment

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or allowance for their support. The last accounting period in which either company received income from tin mining carried on during the period was the accounting period which included the last months of the calendar year 1941. That accounting period for Ronpibon Tin No Liability was the year ending 30th June 1942 and for Tongkah Compound No Liability the year ending 30th September 1942. In assessing the respective companies to income tax upon the income derived during the successive accounting periods up to that time, the commissioner had necessarily to deal with the question to what extent the outgoings incurred by the companies in Australia were referable to the mining operations in Malaya or Siam and to what extent they were referable to the derivation of income from other sources. The other sources of income consisted only in interest upon money invested either in Treasury Bonds or upon fixed deposit.

The dividends of Tongkah Compound No Liability from the shares of other tin-mining companies were treated as exempt, like the profits of the company's own operations. In Melbourne, where each company had its registered office, expenditure was incurred in the central administration of the affairs of the respective companies. There were the directors' fees, the expenses of management and the cost of cables, postages, stationery, audit fees and some minor incidental expenditure. Each company followed the practice common among mining companies of employing a legal manager at an over-all annual fee in return for which he allowed the company to use his premises as its registered office and did, or caused to be done by his staff, the clerical and other work of management, charging other out-of-pocket expenses to the company. It was evident that the principal work both of the legal manager and of the directors was concerned with mining and not investment. For example, for the twelve months ending 30th June 1941 the receipts of Ronpibon Tin No Liability from the proceeds of tin fell not much short of £100,000 while the interest from money invested did not quite reach £1,000. In dealing with the question what amount of the expenses incurred in Melbourne should be considered referable to the income from investments and allowed accordingly as a deduction from that income, forming as it did the only non-exempt or assessable income, the commissioner took a short cut. He fixed two and one-half per cent of the income from investments as an adequate charge against that form of income and allowed as a deduction an amount so calculated. In doing so he followed a method which apparently he has found it convenient to employ in cases where it becomes necessary to apportion to income from

investments part of the general expenses incurred by a company which has some other main purpose. Neither of the appellant companies objected to this method of distributing their Melbourne expenses between their exempt income and their assessable income. But in the accounting periods following those on foot at the time of the entry of Japan into the war, the commissioner applied the same method of ascertaining how much of the expenditure incurred in administering the affairs of the companies was referable to the assessable income. He did this notwithstanding that in these accounting periods the companies were conducting no mining operations in Malaya and Siam. No doubt the commissioner considered that, for whatever purpose the administrative structure of each company was maintained, no greater part of the expenditure it entailed could be treated as incurred in the course of holding and superintending the investments and receiving the interest thereon. It could not matter whether the administrative structure established for the main purpose of winning tin in Malaya or Siam was maintained for that purpose, as it was in prior accounting periods, or for the purpose of awaiting in a state of preparedness the ultimate restoration of the companies' undertakings and in the meantime dealing with questions growing out of the past or present situation or for any other purpose. It would still remain true, so the commissioner appears to have considered, that only a small part of the total expenditure could be referred to the gaining of assessable income from investments.

The companies, however, challenged this view. They carried in objections to the assessments of the taxable income for the accounting periods ending respectively 30th June 1944 and 30th September 1943 and claimed that the whole of what they called the Melbourne office expenses should be allowed as a deduction from the assessable income from investments because they were outgoings incurred in gaining the assessable income or in carrying on a business for the purpose of gaining such income. It is as well to state in more detail the material facts. In the accounting period ending 30th June 1944 Ronpibon Tin No Liability derived £1,374 as interest from government loans and £459 as interest from fixed deposits, making in all £1,833. It had no other income. On the expenditure side, the company paid £450 as the fee or salary for management. The legal manager had been paid £500 and then £600 per annum but a reduction in the rate had been made in view of the changed situation. It paid in directors' fees £200. This again was a reduced amount. Formerly the directors' fees had been £600, but they had fallen to £450 in a previous accounting period. The

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expenditure on cables, postages, stationery, audit fees and travelling and general expenses amounted to £136. The expenditure on cables related to matters arising out of the production of tin in Siam. About 1938 the International Tin Committee formed a pool of tin stocks as a cushion or buffer to control the effects of an under or over supply of tin. The pool was called the " Buffer Stock Scheme," and it was this scheme and the disposal of tin in the pool which occasioned the cables. The expenditure in travelling arose from the fact that one of the directors journeyed to meetings from another State. The last item on the expenditure side consisted in allotments to the dependants of the mine manager and the assistant mine manager who had been interned in Siam. This amount was £420. The total of these items of expenditure is £1,206, which forms the deduction claimed by Ronpibon Tin No Liability.

It is perhaps desirable to add that the work done in the management of the company covered the registration of transfers of shares, in which there was some movement, and the interviewing of the many shareholders about the prospects of the company, particularly with reference to its Siamese assets. The directors had caused some investigation to be made of possible mining enterprises in Australia. During the accounting period in question, however, only one such prospective venture was looked into and that was done by or through one of the directors who had formerly been the company's consulting engineer. He acted in his capacity of director.

The case of Tongkah Compound No Liability is of the same nature but there are differences in the precise facts. In that company there was no attempt to look for other ventures. The expenditure included no items for allotments or sustenance of the mining staff or any of their dependants. On the other hand the receipts of the company for the accounting period ending 30th September 1943 included a sum of £4,999 paid from " The Buffer Stock Scheme " as the company's share of the proceeds of realizing the stock held. The realization had taken place in the previous accounting period. The interest of the company in the Pool had stood in the balance sheet at £1,081 and the difference was taken into the profit and loss account at £3,913 (*sic*). In assessing the company the commissioner appears to have treated this item as exempt income. The company derived £2,809 from government loans and fixed deposits. It expended £300 in directors' fees and £590 in meeting the manager's salary, audit fees, postages, printing, stationery and advertising. It seeks to deduct from the assessable income consisting of the interest the total of these two amounts, namely £890.

Upon the foregoing facts the Chief Justice has submitted for the opinion of the Full Court the question, in each case, whether in point of law he is at liberty to find that in assessing the taxpayer to income tax in respect of income derived during the accounting period the commissioner acted rightly in disallowing in whole or in any and what part the deduction claimed.

The answer to this question depends primarily on s. 51 (1) of the *Income Tax Assessment Act* 1936-1944. That provision is in great part made up of expressions taken from ss. 23 (1) (*a*) and 25 (*b*) of the *Income Tax Assessment Act* 1922-1934, expressions that have been elucidated by many decided cases. But there are very important differences between the operation which the present s. 51 (1) is framed to produce and the manner in which the former s. 23 (1) (*a*) and s. 25 worked. Some of these differences it is desirable to mention. In the first place the principle expressed by the former s. 25 (*e*) has been abandoned. The principle was, in the words of that provision, that a deduction should not in any case be made in respect of money not wholly and exclusively laid out or expended for the production of assessable income. Instead of imposing a condition that the expenditure shall wholly and exclusively be for the production of assessable income the present s. 51 (1) adopts a principle that will allow of the dissection and even apportionment of losses and outgoings. It does this by providing for the deduction of losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income. In the second place it introduces an alternative ground or head of deduction; it allows the deduction of all losses and outgoings to the extent to which they are necessarily incurred in carrying on a business for the purpose of gaining or producing such income.

It had been repeatedly contended on the part of the commissioner under the former provisions that an expenditure directed not to obtain or increase revenue but to avoid or reduce expenditure in a business was not incurred in gaining or producing the assessable income or at all events was not wholly and exclusively laid out or expended for the production of assessable income: see *Federal Commissioner of Taxation* v. *Gordon* (1) and *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (2). No such contention could be sustained in a case falling under the alternative head of deduction of s. 51 (1) and that may be one reason why the alternative was introduced. It must, however, be conceded that no actual decision of this Court had given positive effect to the particular contention

(1) (1930) 43 C.L.R. 456, at pp. 465, 469.

(2) (1937) 56 C.L.R. 290, at pp. 296, 301, 304, 306-307, 308-309.

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so often made by the commissioner. The word " necessarily " no doubt limits the operation of the alternative, but probably it is intended to mean no more than " clearly appropriate or adapted for " : cf. per *Higgins* J. in *Commonwealth* v. *Progress Advertising & Press Agency Co. Pty. Ltd.* (1).

The word " business " is defined by s. 6 (1) to include profession, trade, employment, vocation or calling, but not occupation as an employee. The alternative in s. 51 (1) therefore covers a wide description of activities. But in actual working it can add but little to the operation of the leading words, " losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income." No doubt the expression " in carrying on a business for the purpose of gaining or producing " lays down a test that is different from that implied by the words " in gaining or producing." But these latter words have a very wide operation and will cover almost all the ground occupied by the alternative. The words " such income " mean " income of that description or kind " and perhaps they should be understood to refer not to the assessable income of the accounting period but to assessable income generally. If they were so interpreted, they would cover a case where the business had not yet produced or had failed to produce assessable income and the alternative would then itself suffice to authorize the deduction of a loss made in a distinct business.

The third matter to be mentioned is the express exception with which s. 51 (1) concludes. To except losses and outgoings of capital is both necessary and logical. But to except losses and outgoings to the extent to which they are incurred in relation to the gaining or production of exempt income seems to except something from the primary description which could not fall within it. For exempt income can never be assessable income. They are mutually exclusive categories. The explanation doubtless is the desire to declare expressly that so much of the losses and outgoings as might be referable to exempt income should not be deductible from the assessable income. Although it may not be strictly logical to express the declaration in the form of an exception, the declaration serves the not unimportant purpose of making an express contrast.

The present case, however, can be decided by reference to the earlier or positive part of the sub-section, that which makes the deduction of losses and outgoings allowable.

For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end. The words " incurred in

(1) (1910) 10 C.L.R. 457, at p. 469.

gaining or producing the assessable income " mean in the course of gaining or producing such income. Their operation has been explained in cases decided under the provisions of the previous enactments: see particularly *Amalgamated Zinc (de Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1) and *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (2).

Notwithstanding the differences in other respects in the present provision, the expression " incurred in gaining or producing the assessable income " has been left unchanged and bears the same meaning. In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income. It is by this standard that the question raised by the present cases must be determined. It is true that for the appellant companies it is claimed that if they fail by this standard there is an alternative standard by which they should succeed expressed in the reference contained in s. 51 (1) to losses and outgoings necessarily incurred in carrying on a business for the purpose of gaining or producing such income. The claim is that the course pursued by each company in the relevant accounting period in the conduct of its affairs amounted to the carrying on of a business, one entire business having for its purpose the gaining of assessable income. All the expenditure was incurred, so it was said, in carrying on the business: " necessarily " should receive a qualified meaning. If much that the companies did was attributable to a hope or expectation that eventually they would be able to resume mining operations in Malaya or Siam, that, it was contended, would not amount to a present purpose of gaining exempt income. There were too many contingencies under s. 23 (*q*), ranging from the future state of foreign tax laws to the satisfaction of the commissioner that future taxes would be paid. So many contingencies made it impossible to say that it was a purpose of gaining assessable income that would be exempt. With much of all this it is unnecessary to deal. Let it be assumed that neither company did more or less than carry on one single business when after the loss of its tin workings it pursued its way fulfilling the duties imposed by company law, concerning itself with the fate of its tin workings in South East Asia, holding itself in readiness to resume operations if and when fortune allowed, examining any prospective local venture that might be proposed and looking after the investment of its funds. Yet,

(1) (1935) 54 C.L.R. 295, at pp. 303-304, 307, 309, 310.

(2) (1937) 56 C.L.R., at pp. 300, 301, 305-306, 308.

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excepting the income from investments, the subject of nearly all these activities was a concern of capital. When the companies were cut off from their undertakings in Siam and Malaya what they lost was the possession of capital assets. The re-establishment of the foreign mining businesses of which they had been deprived must be considered to be largely an affair of capital. So would the taking up of a fresh venture in Australia. Communications and business transacted with reference to the "Buffer Stock Scheme" may be put aside as a matter concerning exempt income. So far as anything else done by either company in the course of its inactive existence related to revenue, the only assessable *income* (as distinguished from capital) in view was interest upon investments. Accordingly, the reliance placed by the companies upon the second alternative in the positive part of s. 51 (1) will not advance their claim to deduct the full expenditure incurred in the respective accounting periods. It is therefore necessary to return to the opening words of s. 51 (1) and inquire to what extent the expenditure of the respective companies was incurred in gaining or producing the assessable income. The question is how far was it incurred in the course of, how far was it incidental and relevant to, gaining or producing the assessable income. Here again it is necessary to bear in mind that communications made and things done with reference to the buffer stock scheme relate to exempt income and that a consideration of a prospective new venture, like anything done with a view to the possibility of resuming the Siamese or Malayan operations, must largely be an affair of capital. Of course we are not here concerned with any very specific expenditure or any very definite operations. The whole matter relates to a few items the greatest of which are fees to directors and for *management*, but if their allowability is to depend on the nature of what was done, then principle requires that it should be borne in mind that the chief reasons for keeping up the structure of the companies on such a scale related to capital and not revenue.

In applying the foregoing test or standard separate and distinct items of expenditure should be dealt with specifically. To begin with there are the payments by Ronpibon Tin No Liability to the dependants of members of that company's Eastern staff. These payments amount to £420. Clearly this item is not allowable. The company could in the circumstances hardly do otherwise than make the payments but from the point of view of the income-tax law they could not be regarded as business expenditure, unless with reference to the past tin-mining operations which the company had carried on in Siam or to future operations there which it hoped to resume.

In the next place the cost incurred by the same company in cables and other communications with reference to the buffer stock scheme cannot be deducted. That is also true of any expenses incurred by Tongkah Compound No Liability in connection with the scheme and the receipt therefrom of the share of the proceeds of realization of stocks of tin in the pool. Sufficient details do not appear to say what other distinct and severable items are wholly incapable of reference to the gaining of assessable income.

The charges for management and the directors' fees are entire sums which probably cannot be dissected. But the provision contained in s. 51 (1), as has been already said, contemplates apportionment. The question what expenditure is incurred in gaining or producing assessable income is reduced to a question of fact when once the legal standard or criterion is ascertained and understood. This is particularly true when the problem is to apportion outgoings which have a double aspect, outgoings that are in part attributable to the gaining of assessable income and in part to some other end or activity. It is perhaps desirable to remark that there are at least two kinds of items of expenditure that require apportionment. One kind consists in undivided items of expenditure in respect of things or services of which distinct and severable parts are devoted to gaining or producing assessable income and distinct and severable parts to some other cause. In such cases it may be possible to divide the expenditure in accordance with the applications which have been made of the things or services. The other kind of apportionable items consists in those involving a single outlay or charge which serves both objects indifferently. Of this directors' fees may be an example. With the latter kind there must be some fair and reasonable assessment of the extent of the relation of the outlay to assessable income. It is an indiscriminate sum apportionable, but hardly capable of arithmetical or ratable division because it is common to both objects.

In such a case the result must depend in an even greater degree upon a finding by the tribunal of fact.

The reason why the commissioner has adopted the practice of allowing two and one-half per cent on income from investments as a deduction is no doubt because generally speaking it has been found to produce an adequate allowance and because he is forced by the exigencies of administration to provide his assessors with some fixed rule.

But it is a more or less arbitrary expedient to which it is scarcely possible to resort judicially when the Court is called upon to decide

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an appeal from an assessment. The Court must make an apportionment which the facts of the particular case may seem to make just, and the facts of the present cases are rather special. In making the apportionment the peculiarities of the cases cannot be disregarded. The taxpayers are companies. A directorate is necessary. The circumstances were such as to call for some consideration from time to time on the part of the directors of the investment of the money. Thus although the assessable income is only interest on government loans and fixed deposits, it is by no means a mere question of fixing a fair commission rate for handling the business. It is important not to confuse the question how much of the actual expenditure of the taxpayer is attributable to the gaining of assessable income with the question how much would a prudent investor have expended in gaining the assessable income. The actual expenditure in gaining the assessable income, if and when ascertained, must be accepted. The problem is to ascertain it by an apportionment. It is not for the Court or the commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent: see per *Ferguson* J. in *Tooheys Ltd.* v. *Commissioner of Taxation* (1); per *Williams* J. in *Tweddle* v. *Federal Commissioner of Taxation* (2). The question of fact is therefore to make a fair appointment to each object of the companies' actual expenditure where items are not in themselves referable to one object or the other. But this must be done as a matter of fact and therefore not by this Full Court. It will be enough for this Court in answer to the question submitted in each case to make a declaration in accordance with the principles stated. But before formulating the answers to the questions it is desirable to refer to two other provisions of the Act, in order to avoid misunderstanding.

In each of the cases before the Court a ground of objection under s. 103 (1) (*b*) was taken in the notice of objection. The ground was not argued and clearly is untenable. But though no ground of objection under s. 77 was taken in the notice, that section was relied upon during the argument. It is sufficient to say that, even if it were open, the appellant companies could not succeed under s. 77 because neither taxpayer incurred in the year of income a loss in carrying on in Australia a business. Neither company had two distinct businesses in Australia for the purpose of the section. Though mining abroad and investment at home formed distinguishable sources of income, what was done in Australia with reference

(1) (1922) 22 S.R. (N.S.W.) 432, at p. 440.

(2) (1942) 7 A.T.D. 186, at p. 190.

to these activities fell within operations of the company incapable of amounting to more than the business in Australia.

Ronpibon Tin No Liability v. *The Commissioner of Taxation of the Commonwealth of Australia.—Question answered as follows:—"As a matter of law no part of the expenditure upon allotments to dependants of the Eastern staff of the company or upon cables is allowable as a deduction and the commissioner rightly disallowed that part of the expenditure as a deduction; subject to the foregoing declaration the learned judge should decide as a matter of fact what part or proportion of the remaining expenses was fairly and properly attributable to gaining the assessable income." Costs of case to be costs in the appeal.*

Tongkah Compound No Liability v. *The Commissioner of Taxation of the Commonwealth of Australia.—Question answered as follows:—"The learned judge should decide what part or proportion of the expenditure in respect of which the deduction is claimed was fairly and properly attributable to gaining the assessable income." Costs of case to be costs in the appeal.*

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E. F. H.