[HIGH COURT OF AUSTRALIA.]

FARNSWORTH . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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MELBOURNE, *May* 10, 11; SYDNEY, *Aug.* 4.

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

Income Tax (Cth.)—Assessment—"Trading stock on hand at . . . end of . . . year"—Marketing pool of fruit—Fruit delivered by grower to packing company and mixed with fruit of other growers so as to become unidentifiable—Progress payments in relevant income year—Estimate of balance likely to be received by grower in subsequent year—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *ss.* 6, 28, 31, 36.

The taxpayer, a fruitgrower, delivered dried fruits grown by her to a packing company to be dealt with in accordance with the rules of a marketing association of which she was a member. The fruit was graded, processed and packed by the company, and the processing involved the mixing of the taxpayer's fruit with that of other growers so that it became impossible to identify the fruit of any particular grower. The fruit was sold by a selling agent, some of it prior to 30th June 1943 and the remainder thereafter. The rules of the association provided for the distribution of the proceeds of the fruit when sold—less the expenses of marketing—among the suppliers ratably according to parity in respect of the grade, description and quantity of the fruit supplied. Progress payments were made to the growers from time to time, and in the financial year which ended on 30th June 1943 the taxpayer received such payments to the extent of £340 in respect of fruit supplied by her in that year. The packing company made an estimate as at 30th June 1943 of the net proceeds which it anticipated would become available for distribution on the completion of the sale of the fruit supplied during the year ending on that date, and it issued to each grower a statement of the net balance of his estimated share. A statement was accordingly issued to the taxpayer in which her prospective share—after deduction of the progress payments—was estimated at £648. In assessing the taxpayer's income derived during the year ending on 30th June 1943 the Federal Commissioner of Taxation included this sum of £648, as well as the £340 actually received by her in that year, in her assessable income.

Held that the sum of £648 was wrongly so included. The interest of the taxpayer as at 30th June 1943 in the fruit in the pool was not, within the meaning of s. 28 of the *Income Tax Assessment Act* 1936-1943, " trading stock on hand " of the taxpayer as at that date. The sum of £648 was not the value of " trading stock " within s. 36 of the Act, and it was not on any other ground part of the taxpayer's assessable income of the year in question.

CASE STATED.

On an appeal by Delina Wilhelmina Farnsworth to the High Court from a decision of a Board of Review confirming an assessment to Federal income tax *Dixon* J. stated for the opinion of the Full Court a case which was substantially as follows :—

1. The appellant is a horticulturist carrying on business at Cardross in the State of Victoria. She commenced to carry on such business in the year ending on 30th June 1943.

2. She is and at all material times was a member of the Redcliffs Branch of the Australian Dried Fruits Association. [The rules of the association, which were annexed to the case, are sufficiently described in the judgments hereunder.]

3. In the year ending on 30th June 1943 the appellant produced certain dried fruits on her property at Cardross aforesaid. The fruits so produced by her were " dried fruits " within the meaning of that term in the *Dried Fruits Act* 1938 (Vict.). The fruits were at all times material dealt with, handled, processed, packed and sold and the proceeds accounted for in accordance with the rules of the above-mentioned association.

4. In or about the month of April 1943 the dried fruits so produced by the appellant and the dried fruits produced in the same year by other growers members of the association were delivered to Irymple Packing Pty. Ltd., a company carrying on business at Irymple in the State of Victoria, which company was at all times material a " packer " or " packing house " registered under the said rules. Upon such delivery the appellant and other growers who delivered their fruit to the company received from the company for the fruit so delivered delivery dockets which contained the following note : " For packing and re-classification (if necessary) under Commonwealth and State Government Regulations and for sale subject to all A.D.F.A. terms and conditions in conjunction with the fruit of Sarnia Packing Pty. Ltd., Media Irrigation Pty. Ltd., Loxton, South Aust., J. Thwaites, Nyah, and J. and K. McAlpine Pty. Ltd., Nyah. Under no circumstances is the grower entitled to withdraw such fruit from A.D.F.A. control. The Company is hereby instructed as Agent for the grower to insure the

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above fruit against loss by fire, and to debit cost to the relative pool account."

5. The dried fruit so delivered by the appellant and such other growers to Irymple Packing Pty. Ltd. was processed and packed by the company in accordance with the said rules and the said Act at its packing house, which was registered under the Act. The processing involved the mixing of the dried fruit of the appellant with that of such other growers, and after such processing it became impossible to identify the dried fruit so delivered by any particular grower. Such processing took place shortly after the delivery of fruit to the company. The fruit delivered by the appellant was processed with that of other growers before 30th June 1943.

6. The dried fruit so processed and packed by the company was sold in accordance with the said rules by Co-operative Dried Fruits Sales Pty. Ltd., a company carrying on business at West Melbourne, which company was at all times material a " selling agent " within the meaning of the said rules. Some of such dried fruit was so sold prior to 30th June 1943 and the remainder thereafter. Some was so sold for consumption within the Commonwealth of Australia and the remainder for export to the United Kingdom and other countries.

7. Between the date of the delivery of her dried fruit to Irymple Packing Pty. Ltd. and 30th June 1943 the appellant received through that company the sum of £340 on account of her interest in the dried fruit delivered by her and other growers to the company.

8. It was the practice of Irymple Packing Pty. Ltd. to make an estimate as at 30th June in each year of the net proceeds which it anticipated would be received by it from the sale of the dried fruit so produced and delivered by all such growers in that year and to give to each of the growers who had delivered dried fruit to it as aforesaid a statement showing the total amount which it was anticipated such grower ultimately would receive out of such proceeds in respect of his interest therein after deducting the amount of any payments made to such grower to that date on account. The company informed the appellant that the amount it was estimated as at 30th June 1943 she would so receive in respect of that year after deducting the sum of £340 referred to in par. 7 was £648.

9. The appellant duly lodged with the respondent a return of income derived by her from all sources during the twelve months from 1st July 1942 to 30th June 1943, in which she included the sum of £340, but not that of £648.

10. The respondent assessed the income tax payable by the appellant with respect to the income derived by her during the said

twelve months upon the basis that her income included the said sum of £648.

11. The appellant being dissatisfied with such assessment lodged with the respondent an objection in writing against the same.

12. The respondent considered and wholly disallowed the objection.

13. The appellant, being dissatisfied with such decision, requested the respondent in writing to refer the same to the Board of Review for review and the same was so referred.

14. The Board of Review reviewed such decision and duly gave its decision in writing by which a majority of the members of the Board confirmed the assessment. [A copy of the reasons for the decision of the Board was annexed to the case; these reasons are sufficiently described in the judgments hereunder.]

15. The appellant duly appealed to the High Court from the decision of the board.

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

(*a*) Whether the share or interest of the appellant as at the thirtieth June 1943 in the dried fruits so delivered by the appellant and other growers to the Irymple Packing Pty. Ltd. as aforesaid was trading stock on hand at the end of that year within the meaning of s. 28 of the *Income Tax Assessment Act* 1936-1943.

(*b*) Whether the sum of six hundred and forty-eight pounds was the value ascertained under Subdivision B of Division 2 of the said Act of trading stock on hand at the end of the year of income.

(*c*) Whether the said sum of £648 or any other and what sum should have been included as part of the assessable income of the taxpayer for the said year.

Spicer K.C., for the appellant. So far as the fruit in question here is concerned, the appellant had no " trading stock on hand," within the meaning of s. 28 of the Act, on 30th June 1943. To come within that description, goods would have to be within the disposition of the taxpayer. The appellant ceased to have any power of disposition over the fruit when she delivered it to the packing company and it was mixed with the fruit of other growers. The position is either that the property in the fruit passed to the packing company or that the various growers became co-owners of the intermixed mass of fruit, of which they had not possession or control. The fruit became a different commodity after it passed into the hands of the packing company, and the growers had only

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contractual or equitable rights against the company. This case is not within s. 36 of the Act, which does not apply to a disposal of goods in the ordinary course of business. It does not apply to a disposal of trading stock where such stock is the only thing disposed of. The fruit here was not " assets of a business " within the meaning of s. 36. In any event, there is no evidence that £648 was the value of anything owned by the appellant at 30th June 1943. It was merely an estimate of what she might expect to receive in the future ; it was not a debt owed to her by the packing company, and whatever she received could only be assessed as income when she received it.

Tait K.C. (with him *Winneke*), for the respondent. The nature of the interest of the appellant in the fruit unsold on 30th June was that she remained the owner of an undivided share in it—a share by way of ownership in the fruit itself. This ownership was subject to certain contractual rights and obligations, but it was itself a right of property. The property did not pass to the packing company, which was merely in the position of an agent ; likewise, the selling agent. The Australian Dried Fruits Association, itself, was merely an agent—a means of control by the growers. The property in the fruit remained in the growers until it was sold, but, instead of each grower having the property in the actual fruit delivered by him, each grower had an undivided share in the ownership of the mass (*Sandeman & Sons* v. *Tysack and Branfoot Steamship Co., Ltd.* (1)). No new or different commodity was produced by the mixing of the fruit. The appellant's undivided share in the unsold fruit was " stock on hand," within the meaning of s. 28, at 30th June 1943. The fruit was necessarily trading stock of the appellant's business before it was delivered to the packing company (see Act, s. 6, definition of " trading stock "), and whether it was stock on hand at the relevant date depends on whether the appellant still had a right of property. The words " on hand " do not refer to physical possession ; the test is the ownership of the property rights : cf. *Edward Collins & Sons* v. *The Commissioners of Inland Revenue* (2), where that test was applied and it was held on the facts that the goods in question were not stock on hand. The question of value is a separate one. It is true that the sum of £648 is an estimate, but in the absence of further facts which the taxpayer could have supplied, it is a reasonable basis of assessment. The assessment is prima-facie correct (Act, s. 177). If s. 28 does not apply, it follows that the fruit was trading stock " disposed of "

(1) (1913) A.C. 680, at pp. 694, 695. (2) (1924) 12 Tax Cas. 773, at p. 780.

within the meaning of s. 36. Even if not so, it represented earnings of the appellant's business, which must be taxed on an earnings basis (*Commissioner of Taxation (S.A.)* v. *Executor Trustee Co. of South Australia* (1)). Its value should be brought into account as income, as being analogous to trading stock. Here, again, the amount assessed is a reasonable estimate of the value.

Spicer K.C., in reply.

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered:—

LATHAM C.J. This is a case stated in an appeal by Delina Wilhelmina Farnsworth under s. 196 of the *Income Tax Assessment Act* 1936-1943 from a decision of a Board of Review confirming an assessment of the appellant to income tax in respect of the income year ending on 30th June 1943. Mrs. Farnsworth was a member of the Australian Dried Fruits Association and, in accordance with the rules of the association, in 1943 before the month of June delivered fruit to be processed together with other fruit by a packing company and to be sold by one of the selling agents appointed by the association. Before 30th June 1943 she received cash payments for her fruit amounting to £340. In her income-tax return she claimed allowable deductions amounting to £350. The packing company informed the commissioner that in respect of Mrs. Farnsworth sales of fruit from 1st July 1942 to 30th June 1943 produced a sum of £340, and that "the value of fruit unsold at 30th June 1943" was £648. The commissioner included the sum of £648 in the assessable income of the appellant for the year.

The appellant became a fruit-grower in the course of the income year ending on 30th June 1943. She had no fruit on hand for sale on 1st July 1942. The commissioner applied s. 28 of the Act, which is in the following terms:—"(1) Where a taxpayer carries on any business, the value, ascertained under this subdivision, of all trading stock on hand at the beginning of the year of income, and of all trading stock on hand at the end of that year shall be taken into account in ascertaining whether or not the taxpayer has a taxable income. (2) Where the value of all trading stock on hand at the end of the year of income exceeds the value of all trading stock on hand at the beginning of that year, the assessable income of the taxpayer shall include the amount of the excess. (3) Where the value of all trading stock on hand at the beginning of the year of income exceeds the value of all trading stock on hand at the end

(1) (1940) 63 C.L.R. 108, at pp. 123, 155.

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of that year, the amount of the excess shall be an allowable deduction."

Section 31 is as follows :—" The value of each article of trading stock (not being live stock) to be taken into account at the end of the year of income shall be, at the option of the taxpayer, its cost price or market selling value or the price at which it can be replaced." The commissioner treated the amount of £648 as representing the " market selling value " of the appellant's fruit on hand on 30th June 1943.

It is provided in s. 6 that " ' trading stock ' includes anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange, and also includes live stock." The appellant's fruit was produced for the purpose of sale. The contention of the commissioner, which was upheld by the majority of the Board, was that the appellant had trading stock on hand at the end of the year of income of the value of £648, that she had no trading stock on hand at the beginning of that year, and that therefore the sum of £648 should be taken into account as part of her assessable income. The majority of the Board based their decision upon the fact that the appellant's fruit was with her consent mixed with fruit belonging to other persons so that it became incapable of identification. The rule of law is as stated in *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 746—" Where the chattels of two persons are intermixed by consent or agreement so that the several portions can be no longer distinguished, the proprietors have an interest in common in proportion to their respective shares." It was held that the several growers, including Mrs. Farnsworth, who sent their fruit to the packing company for processing and subsequent sale became co-owners of the mass of fruit. The majority of the Board held that they did not sell the fruit to the packing company and that the fruit which was unsold was trading stock on hand on 30th June 1943. It was therefore decided that the commissioner had rightly included the sum of £648 in the assessable income of the taxpayer as representing the value of that fruit.

The Chairman of the Board dissented. He pointed out that the fruit was sold gradually during the year up to December 1943 and that it was impossible to say whether or not any or any particular quantity of the appellant's fruit had been sold or had not been sold by 30th June 1943. He was therefore of opinion that as none of the appellant's fruit could be shown to be in her hands (or even to be in the hands of the packing company or the selling agent on the date mentioned) it could not be said that the appellant was the

owner of any part of the unsold fruit. He held, therefore, that the sum of £648 had no relation to and did not represent the value of any fruit of the appellant shown to be on hand on that date. He was inclined to the opinion that the property in the fruit passed to the packing company upon delivery. Thus he was of opinion that s. 28 did not apply, and that therefore the assessable income of the appellant was truly stated at £340, which was the sum actually received in the income year.

The Australian Dried Fruits Association consists of fruit-growers who have joined the association and have therefore become bound by the rules of the association. The rules provide for the appointment of packing houses (including the Irymple Packing Co. Ltd.) and of selling agents (including the Co-operative Dried Fruits Sales Pty. Ltd.). The packing houses are bound not to purchase fruit from growers without the permission of a board constituted under the rules. No such permission was shown to have been given in the present case, and it is therefore difficult to hold that the packing house bought the fruit and became the owner of it as a purchaser. The growers agree that they will sell their dried fruits through one or more of the selling agents appointed under the rules. The rules provide that the control of fruit until it reaches retailers shall be held by growers. They also provide that progress payments are to be made from time to time, that differential payments according to grade shall be made not later than 30th June each year, and that final account sales shall be rendered to growers showing the grower's share of the pool proceeds. The total price to be paid to each grower is determined by a rule which is in the following terms :— " The pool proceeds shall be loaded by the variations fixed by the Board of Management, and the net result, after loading, divided by the total tonnage which will give the price for the basic grade, to which shall be added or subtracted the variation fixed and the price for each grade or sub-grade thus be ascertained."

The terms upon which the plaintiff delivered her fruit to the Irymple Packing Co. were stated in a delivery docket which showed the number of sweat boxes, fruit received, the type and grade of each kind of fruit, and the net weight. The delivery docket contained the following memorandum :—" For packing and re-classification (if necessary) under Commonwealth and State Government Regulations and for sale subject to all A.D.F.A. terms and conditions in conjunction with the fruit of Sarnia Packing Pty. Ltd., Media Irrigation Pty. Ltd., Loxton, South Aust., J. Thwaites, Nyah, and J. and K. McAlphine Pty. Ltd., Nyah. Under no circumstances is the grower entitled to withdraw such fruit from A.D.F.A.

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control. The Company is hereby instructed as Agent for the grower to insure the above fruit against loss by fire, and to debit cost to the relative pool account."

The fruit processed by the Irymple Packing Co. in 1943 was sold by Co-operative Dried Fruits Sales Pty. Ltd. as agent for the growers. Until sold it was owned by those who had contributed fruit to the pool and it should be held, I think, that it was owned by them in proportion to the quantities respectively supplied. The growers did not, in my opinion, lose their property in the fruit because it was mixed together and disposed of in instalments. Where goods of different owners are mixed and later sold by instalments on behalf of all of them, an unsold balance is owned by the original owners in the proportion in which they contributed to the mass, whether or not any of their goods are identifiable in the unsold balance. In the present case the agents for sale are bound by the terms of their contract with the growers to distribute the proceeds of sale in accordance with the quality as well as the quantity of fruit contributed. The contractual arrangement evidenced by the delivery docket prevents any grower from withdrawing his contribution to the pool, but in my opinion it does not prevent him from continuing to be a co-owner of the unsold fruit.

If it were known how much of the contributed fruit was unsold at the end of a year, and if it could be shown that a particular quantity of that fruit was contributed by a particular grower, it could perhaps be argued that the grower had that quantity of fruit on hand at the end of the year for the purposes of s. 28. But there is no evidence in the present case even of the total amount of fruit on hand at the end of the relevant income year and no evidence showing that any of the appellant's fruit was then unsold. Therefore the assessment cannot be supported on the basis that the appellant had £648 worth of fruit on hand on 30th June 1943.

But the majority of the Board held that the amount of £648 was an estimate of the market-selling value of the fruit of the appellant as at 30th June 1943 because the packing company, with the authority of the appellant, so informed the commissioner. On this point I agree with the opinion of the Chairman of the Board. The amount of £648 was not an estimate of the value of any fruit owned by the taxpayer which was then on hand. It was an estimate of what she would probably receive after 30th June 1943 so as to pay her on a pooling basis the total amount which she would be entitled to receive for all her fruit from the total proceeds of all pooled fruit. The amount of £648 was an estimate of probable future income.

Each grower had on 30th June 1943 a right to receive further progress payments and a final payment, but that right was not stock in trade. It was not something produced for the purpose of being sold. Nor was the separate interest of each grower in the mass of pooled fruit something produced for the purpose of being sold. These separate interests did not become the subject of sale. Such interests are not "articles" within s. 31. What was sold by the Co-operative Dried Fruits Sales Pty. Ltd. was the fruit—the owners of the fruit all having authorized the sale.

The commissioner, relying upon the decision of this Court in *Perpetual Executors & Trustees Association of Australia Ltd.* v. *The Commissioner of Taxation* (1), submitted further alternative contentions. In the first place, it was argued that the taxpayer is a trader, and therefore must necessarily be taxed on an earnings basis, and not on receipts, and that upon any view the amount of £648 had been earned by the taxpayer and should be treated as income apart altogether from the provisions of s. 28. Reference was made to the case of *The Commissioner of Taxes (S.A.)* v. *The Executor Trustee and Agency Co. of S.A. Ltd.* (2) where *Dixon* J. (3) quoted with approval the following statement:—"'There is an important distinction between debts due to a trading company and unpaid in a particular year or period and other income which is not a trade receipt. Trading debts due but not yet paid must be included in arriving at the balance of profits or gains.' (*Houldsworth Shaw* and *Baker* in *Law of Income Tax*, p.111)." In the report of the same case I said (p. 123):—"In the case of traders, where tax is imposed upon the profits of a trade, profits are calculated both in Australia and in England on an earnings basis; that is to say, the trade debts which fall due to the taxpayer during the year are credited and allowance is made for bad debts." These statements refer to debts owed to a taxpayer continuously carrying on a trading business which upon any system of accounting would be regarded as book debts. The amount of such debts would naturally be taken into account in determining his profits or gains for the year to which the accounts related. But the amount of £648 in the present case was not a debt owed by any person to the taxpayer. It represented only an estimate of what the taxpayer would probably be paid if the mass of fruit were all sold and paid for. Accordingly, in my opinion, this amount should not be included as if it were a debt owed to the taxpayer.

(1) (1948) 77 C.L.R. 1.
(2) (1940) 63 C.L.R. 108.
(3) (1940) 63 C.L.R., at p. 155.

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Finally, it was argued for the commissioner that s. 36 of the *Income Tax Assessment Act* 1936-1943 should be applied to this case. Section 36 provides for the case of the disposal of " the assets of a business." It provides that :—" (1) Subject to this section, where the whole or any part of the assets of a business carried on by a taxpayer is disposed of by sale or otherwise howsoever, whether for the purpose of putting an end to the business or any part thereof or not, and the assets disposed of include any property being trading stock, standing or growing crops or crop-stools, or trees which have been planted and tended for the purpose of sale the value of that property shall be included in his assessable income, and any person acquiring that property shall be deemed to have purchased it at the amount of that value."

It is contended that the taxpayer's fruit was an asset of her business and that she disposed of it. It consisted of trading stock and therefore (it is said) the value of the fruit should be included in the assessable income, the value being fixed under s. 36 (3) at market value on the day of disposal or, if in the opinion of the commissioner there is insufficient evidence of the market value of that day, at the value which in his opinion is fair and reasonable. The commissioner should then (it is argued) be regarded as having determined that the fair and reasonable value of assets which she disposed of and for which she had not been paid was £648. Section 36 relates to the disposal of the assets of a business, including, *inter alia*, trading stock. The terms of the section show that it was intended to be applied to a case where there was a disposal of the assets of a business as such whether in whole or in part, and whether or not the assets were disposed of because the seller was going out of business or because the business was sold to another person. The section is intended to deal with a walk-in walk-out sale, with a clearing sale, and with a transaction which represents, not an ordinary sale of goods in the course of carrying on a business, but a disposal of the assets of the business so that the business is no longer being carried on by the person who has disposed of it. What the fruit-growers did in delivering their fruit to the packing house cannot fairly be described as a disposal of the assets of their respective businesses. Accordingly, in my opinion, s. 36 has no application to this case.

The questions asked in the case stated are as follow :—" (*a*) Whether the share or interest of the Appellant as at the Thirtieth June 1943 in the dried fruits so delivered by the Appellant and other growers to the Irymple Packing Pty. Ltd. as aforesaid was trading stock on hand at the end of that year within the meaning of Section

28 of the Income Tax Assessment Act 1936-43 ? (*b*) Whether the sum of Six hundred and forty-eight pounds was the value ascertained under Subdivision B of Division 2 of the said Act of trading stock on hand at the end of the year of income ? (*c*) Whether the said sum of £648, or any other and what sum should have been included as part of the assessable income of the taxpayer for the said year."

The questions should all be answered " No."

RICH J. The facts in this interesting case are somewhat complicated but the *lacunae* in the case stated have been filled by the clear and detailed opinions of the Board of Review who had the advantage of hearing evidence. A review of the facts leads me to the conclusion that after a fruit grower has delivered his fruit to the packing company and it has been processed he has lost all control and power of disposition of it and his fruit has become so inextricably mixed with the fruit of other growers as to be incapable of identification. The property in the fruit passed to the packing company and became converted into a claim for an account. The grower's interest is not an equitable interest but an equity to an account enforceable by action. In the instant case the appellant received " door " and " progress payments " from the " pool," that is " the proceeds of the sale of the fruit delivered to, processed and packed by the several packers concerned." The object of these payments is to support the grower—keep the wolf from the door—while the fruit in the pool is being realized. In the year ending the 30th day of June 1943 the appellant received from the packing company the sum of £340 on account of her interest in the dried fruit in the " pool." And on this date in each year the packing company was accustomed to make an estimate as of that date of the net proceeds received by it of fruit in " the pool " and to give to each grower a statement showing the net balance which it was estimated he would receive after deducting the " door and progress payments " already mentioned. In the case of the appellant the assessed or estimated amount she was likely to receive after deducting the sum of £340 referred to was, the company stated, £648 in respect of the relevant year ending 30th June 1943. The commissioner amended the appellant's return by including this sum as " the value of produce on hand at the 30th June 1943 " considering it to be " stock on hand " at that date. This assessment is, I think, incorrect.

In my opinion, when the appellant handed over her fruit and it was processed she ceased to be the owner of it and it was not part of her stock in trade. If and when stock is sold and the proceeds

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of sale are received by the owner, such proceeds become assessable income from the date of sale. The sum in question was merely a prophetic estimate of the share of the net proceeds of sale she might receive after the sale.

For these reasons I would answer the questions propounded in the negative.

DIXON J. This is a case stated pursuant to s. 18 of the *Judiciary Act* 1903-1948 in an appeal under s. 196 (1) of the *Income Tax Assessment Act* 1936-1948 by a taxpayer against a decision of a Board of Review.

During the year ending 30th June 1943 the taxpayer became a horticulturist. She grew berry fruit. She was or became a member of the local branch of the Australian Dried Fruits Association. She sent the dried fruits the products of her horticulture to a packing house registered with that association. Dried fruits sent by growers to the packing house were graded, processed and packed and sold through agents registered with the association and the proceeds, after the deduction of packing and other charges, distributed among the suppliers ratably according to parity in respect of the grade, description and quantity of the dried fruit sent into the pool. The packing house does not await the disposal of the dried fruit in the pool before making any payments to the grower. Monthly progress payments of so much a ton are made to the suppliers, beginning with an immediate payment called a "door payment." By 30th June 1943, the end of the fiscal year, the taxpayer had received in this way sums amounting to £340. But the packing house made an estimate as at 30th June of the net proceeds which it anticipated it would receive from the sale of the dried fruit in the pool and become available for distribution, and it furnished each grower with a statement of the net balance of his estimated share after allowing, of course, for payments the grower had received. The amount that it was estimated the taxpayer would receive was estimated at £648. In assessing the taxpayer's income derived during the year ending 30th June 1943 the commissioner included the sum of £648 as part of her assessable income as well as the sum of £340 and the majority of the Board of Review upheld the assessment. The ground for including the sum of £648 was that it represented the value of the taxpayer's stock in trade on hand at 30th June 1943.

The case, which I stated at the request of the parties, seems to me now to be somewhat defective in failing to give a more precise account of the dried fruits pool into which the taxpayer sent the

products of her horticulture. A document called a consolidation of the Rules Regulations and Practices of the Australian Dried Fruits Association is annexed. The information obtained from this document about the pooling of dried fruit is meagre. Moreover it contains not a few provisions likely to be the source of confusion until upon closer examination it is seen that they cannot be applicable to such a pool as concerns us. But the reasons of the members of the Board of Review are also annexed and fortunately they contain sufficient information to enable us to decide the questions before us. As s. 18 of the *Judiciary Act* authorizes a reference upon which the court can decide fact and law, it does not seem to matter that we are drawing inferences of fact. As I understand the arrangement, the packing house, either by itself or in combination with other named packing houses, accepted dried fruits from the growers on the terms that, without discriminating between one grower's fruit and another, the fruit should be graded, processed and packed and sold and that a "pool" of the total proceeds of each variety of fruit should be formed. The packing house provided the growers with cases, called sweat boxes, in which they placed their dried fruits, and delivered them to the packing shed. There the fruit was weighed in the sweat boxes and delivery dockets were given showing weight, grade and variety. The dried fruit was tipped from the sweat boxes into a hopper, where of course it lost its identity as the fruit of the particular supplier. Growers doubtless delivered fruit day after day and the work of the shed proceeded in grading, processing and packing the fruit that flowed into the hoppers. The sale of the packed fruit and its dispatch for delivery apparently continued over some months. The earlier progress payments did not depend upon the flow of receipts into the pool, though probably later payments did so, and certainly the final payment. An account was kept for each variety of fruit pooled. The account was credited with the amounts arising from the sale of packed fruit of that variety. It was debited with the packing and marketing charges. At the end, when the net proceeds of all the fruit in a pool was ascertained, complete account sales were rendered to the growers who had sent fruit into that pool. It is of course evident that in estimating as at 30th June the amounts that the pool, into which the taxpayer's fruit went, would return to the respective growers in excess of what they had already received the packing house was not stating what fruit remained in its hands at that date unsold. It was estimating the final result of the pool after deducting progress payments which had been made independently of sales by the packing house. The estimate was consistent

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with sales having been made of almost all the fruit packed or of very little of it. But unfortunately, in a list furnished by the packing house to the commissioner, the estimated further returns were shown in a column headed "Value of fruit unsold at 30th June 1943." Perhaps the heading led to the commissioner's treating the amount of £648 opposite the taxpayer's name as the value of her stock in trade on hand at 30th June 1943.

In my opinion it is not possible to treat the sum as the value of the taxpayer's stock in trade on hand at the end of the accounting period. The taxpayer's dried fruit had ceased to be "on hand" within the meaning of s. 28 of the *Income Tax Assessment Act* 1936-1943 when she delivered it to the packing shed. The packing house cannot be treated as a mere agent of the taxpayer holding her stock in trade for sale. The taxpayer's dried fruit had been delivered irrevocably to the packing house upon terms, complicated no doubt, which entitled her to a money sum and left her with no dispositive power over the fruit and no power to direct or control the disposal by the packing house of the fruit either alone or in combination with other suppliers. Of course the packing house was contractually bound to process, pack and sell the fruit in the appointed manner. The obligations it incurred have, I imagine, a fiduciary character. For the packing house is bound to account for the proceeds of the fruit pooled and to make a proper distribution. But, if it matters, I should have thought the property in each parcel of fruit delivered into the pool passed to the packing house. Whatever contractual and equitable rights each grower or all growers possessed to enforce the obligations of the packing house they could not be considered "stock in trade on hand" of each individual taxpayer. It does not appear to me to be right to treat all the dried fruit of a variety which at a particular time is in the hands of the packing house as the property in co-ownership of all or some number of the suppliers of fruit of that variety to the season's pool. It was delivered on terms which do not contemplate co-ownership at law; and, as for trust, I should have thought that the equitable rights of a supplier in relation to the pool were of a very special nature. However, I do not think that it matters much. For in any case it appears to me to be out of the question to treat an interest of the kind suggested as stock in trade of the taxpayer on hand. If further confirmation of this conclusion is sought, it can be found by attempting to apply s. 31.

For the commissioner, as an alternative ground for the assessment, it was contended that the delivery of the dried fruit to the packing shed so that it went into the pool was a transaction falling within

s. 36 (1). That provision deals with the case of a taxpayer's disposing of the whole or any part of the assets of a business. If the whole or any part of such assets are disposed of by sale or otherwise howsoever, whether for the purpose of putting an end to the business or any part thereof or not, and the assets include any property being, among other things, trading stock, then the value of the property must be included in the taxpayer's assessable income.

This provision is generally considered to have no application to the regular disposal of trading stock in the ordinary course of carrying on a business. In my opinion that is the correct view of s. 36 (1). The ordinary course of carrying on the taxpayer's business or pursuit of horticulture involved the sending of her products to a dried fruits pool. I think that s. 36 (1) does not apply to her case.

A third ground was taken for the commissioner in support of the assessment. It is said that the taxpayer carried on a business in which she produced a commodity and turned it into money. The proceeds of such a business should be assessed, it is urged, on an earnings basis, that is by a comparison of the position of the business at the beginning and end of an accounting period, taking into account all accruals and outstandings. Trading stock is defined in the Act, s. 6, to include anything produced. From this it may be seen, it was said, that the Act contemplates such a basis of assessment for primary production. Therefore, so it was contended, the sum of £648 should be taken into the accounts of the business as an outstanding for the year of income ending 30th June 1943. The argument has, I think, weight; but it involves difficulties. The sum expected to arise from the pool cannot be described as a debt. If the sum was not realized in the ensuing accounting period, the deficiency could not be brought within s. 63. If the deficiency could be brought in as a loss or debit it must be on general principles of accounting. To bring it in somehow would be essential to a fair assessment. Yet the structure of the Act is hardly consistent with a debit which will not fall within any category of authorized deduction. It could not readily be brought within s. 51. These are some of the difficulties.

I hesitate in the present case to lay down any proposition of universal application about anticipated dividends from pools of primary products. But it does seem to me that the natural solution of a case like the present, which is a simple case, is to ascertain the taxable income of the taxpayer on the basis of receipts and outgoings. After all, as was remarked by Mr. Gibson, who dissented in the Board of Review, the payments were not " got or obtained "

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by the taxpayer before she received them. He said that the payments were undoubtedly assessable income derived by the taxpayer at, but not before, the respective times when the payments were received; they were required to be made to her under the rules adopted by the contract but the amounts and the times of the payments were at the discretion of the packers concerned. I agree in this view.

In my opinion the questions in the case stated should all three be answered "No."

McTIERNAN J. In this case I am of the opinion that the questions in the case should be answered in the negative. I agree with the reasons of my brother *Dixon*.

WEBB J. For the reasons given by the Chief Justice I think the questions in the case should be answered in the negative.

Questions in case answered "No." Costs of case to be costs in the appeal. Case remitted to Dixon J.

Solicitors for the appellant: *Percy T. Park and Hillard*, Mildura, by *Rodda, Ballard & Vroland*.

Solicitor for the respondent: *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

E. F. H.