Appr Commissioner of Taxation v Jax Tyres Pty Ltd 5 FCR 257
Cons Korczynski v Wes Lofts (Aust) Pty Ltd 10 FCR 348
Appl Kodak (A'asia) Pty Ltd v Commonwealth 21 ATR 1096
Appl WEA Records Pty Ltd v FCT 21 ATR 799
Appl A A T Case 7762 (1992) 23 ATR 1077
Cons Commonwealth v Genex Corporation Pty Ltd (1992) 67 ALJR 115
Appl Jax Tyres Pty Ltd v Federal Commissioner of Taxation (1984) 55 ALR 723
Appl Aust Competition & Consumer Commission v Lovelock Luke (1997) 39 IPR 439
Appl Regal Holdings Ltd & CEO of Customs, Re (1997) 46 ALD 373
Appl AC&CC v Unilever Australia Ltd (1997) 40 IPR 354
Foll A A T Case 11/98; Case 12,970 (1998) 39 ATR 1067
Cited New Style Furniture Sales Ltd v Deputy Commissioner of Taxation (1998) 39 ATR 453

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . PLAINTIFF;

AND

JACK ZINADER PROPRIETARY LIMITED DEFENDANT.

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SYDNEY, *Aug.* 5, 8; *Sept.* 27.

Dixon, Williams and Webb JJ.

Sales Tax—"*Goods*"—"*Manufacture*"—*Fur garments*—*Worn garments left by customers altered or remodelled into garments of another form*—*Materials in worn garments used therefor*—*Processes involved*—*Liability to tax*—*Sales Tax Assessment Act* (*No.* 1) 1930-1942 (*No.* 25 *of* 1930—*No.* 54 *of* 1942), *ss.* 3 (1), 17, 17A, 18 (1) (*c*).

A furrier company received from customers fur garments which had become too badly worn and damaged to be repaired, and, after removing the defective parts, remodelled, for those customers respectively, by various processes, what was left into modern styles of coats, fur capes, fur collars, fur coats and stoles having regard to the extent, shape and nature of the available materials. The materials used by the company in remodelling were, except about five per cent of the linings, confined to those available from the customer's garment. If new linings were required the customer supplied them.

Held, by *Dixon* and *Williams* JJ. (*Webb* J. dissenting) that the articles which resulted from the remodelling were goods manufactured and sold within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942, and were liable to tax under that Act.

CASE STATED.

An action was commenced in the original jurisdiction of the High Court by the Federal Commissioner of Taxation in which he claimed from the defendant, Jack Zinader Pty. Ltd., the sum of £311 2s. 1d. alleged to be payable by the defendant to the plaintiff as and for sales tax under the *Sales Tax Assessment Act* (*No.* 1) 1930-1942.

Upon the action coming on to be tried *Williams* J., at the request of both parties and pursuant to s. 18 of the *Judiciary Act*

1903-1948, stated for the consideration of the Full Court of the High Court, a case which was substantially as follows :—

1. On 19th November 1946 the plaintiff caused to be issued out of this Honourable Court a writ of summons in this cause claiming the sum of £311 2s. 1d. which the plaintiff alleged is payable by the defendant to the plaintiff as and for sales tax under the provisions of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 in the circumstances hereinafter mentioned.

2. On 22nd November 1946 the defendant duly appeared to the writ.

3. At all material times the defendant carried on business and still carries on business at 287 Elizabeth Street, Sydney, in the State of New South Wales as a furrier and repairing and remodelling fur garments.

Upon the action coming on to be tried the plaintiff and the defendant made the following admission of facts and they are all the material facts :—

(i) Where a fur garment becomes badly worn or badly damaged in any part or parts it is not possible to repair the garment by patch-work. The only work that can be done successfully is to cut out the defective parts and remodel what is left into the type of garment which is most suitable or useful having regard to the extent, shape or nature of the available material.

(ii) The following are the methods processes and procedure employed by the defendant in carrying on its said business of remodelling furs :—

(*a*) remodelling customers' second-hand coats into modern styles of coats known as swaggers, saunters, coatees or jackets : (i) remove collar, sleeves and linings from the coat handed in by the customer ; (ii) lay out the remainder of the coat on a paper pattern made from the customer's measurements ; (iii) cut to the pattern ; (iv) cut out any worn skins and replace with skins from other parts of the coat not required, or if none available, replace with new or second-hand skins of the same blend in stock ; (v) dampen and nail out on the pattern board to the shape and measurements of the paper pattern (this stretches the remodelled garment and so removes any irregularities in the shape especially where skins have been added) ; (vi) sleeves (usually remodelled to suit the garment) are attached, also collar, if necessary, and the garment is then relined and finished. (Sometimes the old lining is used after washing or cleaning and sometimes new lining is used).

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(*b*) remodelling customers' second-hand fur necklets into stoles: (i) remove lining and open up the necklet to a flat piece; (ii) cut out, to the dimensions of a paper pattern, the article required; (iii) dampen and nail to shape; (iv) line and finish.

(*c*) remodelling customers' second-hand necklets or stoles into fur capes: (i) remove lining and open up second-hand article to a flat piece or pieces. Cut off head or heads and tails (if any); (ii) cut into strips and lay on a paper pattern of the cape required; (iii) sew the strips together in the shape of the pattern; (iv) dampen and nail out to the required shape; (v) line and finish.

(*d*) remodelling customers' second-hand fur capes into stoles: (i) remove lining of cape and cut into strips which are laid out on a paper pattern of the stole required; (ii) sew strips together in the shape of the pattern; (iii) dampen and nail out to shape; (iv) line and finish.

(*e*) remodelling customers' second-hand necklets or stoles into fur collars: (i) remove lining of the second-hand article and cut into shape in accordance with paper pattern; (ii) dampen and nail out to the shape of the collar required; (iii) line and finish.

(*f*) remodelling customers' second-hand fur coats known as coats, jackets, saunters, swaggers or coatees into fur capes: (i) remove lining, sleeves and collar (if any) from the garment handed in by the customer; (ii) lay out the remainder of the garment on a paper pattern made from the customer's measurements; (iii) cut to the paper pattern; (iv) cut out any worn skins and replace with skins from other portions of the coat or new skins; (v) dampen and nail out to the shape of the cape required; (vi) line and finish.

4. Except to a small extent in the case of linings, the materials used by the defendant in remodelling are confined to those available from the customer's garment. About ninety-five per cent of the linings of the remodelled garment are the old linings. The defendant does not provide individual linings and where new linings are necessary the company requires the customer to supply them.

5. At all material times the defendant has been registered and still is registered as a manufacturer under the Act.

6. The plaintiff claims that for the purpose of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942 the several methods, processes and procedure hereinbefore mentioned constitute the manufacture and sale by the defendant of goods, viz.: fur coats, stoles, fur capes and

fur collars, and that the defendant is manufacturing and selling these goods within the meaning of the provisions of the Act. The plaintiff claims that the said fur coats, stoles, fur capes and fur collars are prescribed goods manufactured to the order of individual clients within the meaning of the Act.

7. The defendant has refused and still refuses to pay sales tax in respect of such goods supplied to clients in and for the period of three years ended 30th September 1945, and alleges that it is not liable under the Act for the payment of sales tax in respect of such goods. The plaintiff does not charge the defendant with intention to evade or make default in payment of the said tax and the defendant has refused to pay the tax with the intention only of testing the applicability of such Act to the production of goods in the manner stated herein.

The following question was stated for the opinion of the Full Court of the High Court:—

> Are the garments referred to in par. 6 hereof, viz.: fur coats, stoles, fur capes, and fur collars "goods manufactured" in and sold in Australia within the meaning of the *Sales Tax Assessment Act* 1930-1942?

The parties agreed that if the question was answered in the affirmative judgment was to be entered for the plaintiff for the sum of £311 2s. 1d. and that if the question was answered in the negative judgment was to be entered for the defendant.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

J. P. Hannan, for the plaintiff. This matter is within the scope of s. 17A of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942. The articles as remodelled and completed by the defendant are not goods which have gone into use or consumption in Australia. They are not sold as second-hand goods. They have not retained their character as goods or part of goods which have gone into use or consumption. The definitions of "manufacture" and "manufacturer" respectively, in the Act, are inclusive. A commercial article is manufactured when it is brought into existence as such (*Gamble* v. *Jordan* (1); *McNicol* v. *Pinch* (2); *Shorter Oxford Dictionary*). The paramount element in *Adams* v. *Rau* (3) and *Federal Commissioner of Taxation* v. *Riley* (4) was the rendering of skilled service but there is not any such element in this case. The

(1) (1913) 3 K.B. 149, at p. 153.
(2) (1906) 2 K.B. 352.
(3) (1931) 46 C.L.R. 572.
(4) (1935) 53 C.L.R. 69, at pp. 79, 80.

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goods in *Deputy Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) were clearly second-hand. The definition limits the extent to which goods can be classified as second-hand goods. The subject goods are goods manufactured in Australia. The processes involved were not a mere re-assembling of parts as in *Irving* v. *Munro & Sons Ltd.* (2) but were a working-up or fabricating of materials supplied by the customer into forms suitable for use. The defendant gives a new shape, if not a new quality, and certainly a new combination to an article which had already gone through an artificial process (*Irving* v. *Munro & Sons Ltd.* (3); *City of New Orleans* v. *Le Blanc* (4); *The People* v. *Morgan* (5)), *Judicial and Statutory Definitions of Words and Phrases*, vol. v., pp. 4349-4351). When the defendant has gone through the various processes preliminary to the making or remodelling of articles, the garments brought in by the customers have lost their original identity, and when, by reason of those operations and processes, they emerge, as, for example, stoles or coatees or jackets, the results are goods manufactured within the meaning of the Act. The articles thus produced are entirely different from the garments brought to the defendant by his customers. If there be a combination of parts, then in the process of combining them the defendant is engaged in manufacture. The goods so manufactured are not sold in the ordinary sense, but under s. 17A there is deemed to be a sale. They do not come within the classification of " second-hand goods " for the purposes of par. (*b*) of the definition of " goods." The defendant is a manufacturer within the meaning of the relevant part of the definition of " manufacturer " in s. 3 (1) of the Act. That meaning is exhaustive. The materials of which the newly-finished articles are made have not, as such parts, gone into use or consumption in Australia. The defendant is liable to sales tax whenever there is a complete taking apart, whether by the customer or the defendant, and refashioning or refabricating takes place.

Barwick K.C. (with him *Macfarlan*), for the defendant. The finished articles, that is to say, the remodelled, reformed fur garments, are not goods within the purview or the meaning of the Act. They are not sold, either actually or notionally. The said articles are not manufactured, but if they are " manufactured " then they are not manufactured from " materials " supplied by the customers. The various processes carried out by the defendant on an old fur

(1) (1934) 52 C.L.R. 85.
(2) (1931) 46 C.L.R. 279.
(3) (1931) 46 C.L.R., at p. 282.
(4) 34 La. Ann. 596.
(5) 63 New York Supp. 76.

garment do not result in a new fur garment. After the alteration has been made to the old fur garment it still remains a fur garment of the same skins and, in most cases, with the same linings. After the remodelling it remains still an aggregation of skins in some form, but they are the same skins. They are second-hand skins and the garment, unquestionably, is a second-hand garment. Second-hand goods are outside the scope of the Act (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1)). There is nothing in par. (*b*) of the definition of "goods" which departs generally from the policy which the Court in that case found to exist in the Act. Section 17A was in the Act prior to the decision in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (2). That section does not impose a totally inconsistent policy of rendering liable to tax goods made to the order of a customer from second-hand materials, and, of course, not made for sale. The only function of s. 17A is to get a notional sale where there is none in respect of goods which are otherwise within the purview of the Act. Paragraph (*b*) does not impinge upon that provision because there is the requisite that the goods must be sold. The subject articles are not sold, nor are they "new" goods. They are not "goods" because the garments, as fur garments, irrespective of what sort of fur garments they were, had already gone into use for consumption and were, therefore, second-hand for that reason and excluded under par. (*a*) of the definition and hence not goods within s. 17A. Paragraph (*b*) does not apply to this case. The garments were second-hand garments because they were entirely fabricated from second-hand skins which had gone into use or consumption before, and therefore were not goods, thus excluding s. 17A. If, however, the fact that it is the same class of fur garment, or the fact that it is made out of second-hand materials, does not put it outside the definition so that literally it would come within s. 17A, then, to make it consistent with the policy of the Act, that section must be read as limited to the manufacture of new goods, that is to say, goods which are made out of new materials and emerge into the community as not a different article, but as a new article (*Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (2)). As a matter of the real construction of the Act goods must be limited to new goods, and the manufacture of new goods, and it follows that if s. 17A be not applicable, there is not any sale. The defendant, as a furrier, really performs a service of a skilled order in reforming the garments,

(1) (1934) 52 C.L.R., at pp. 87, 88, 93, 94, 99.

(2) (1934) 52 C.L.R. 85.

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on which tax has already been paid, into something slightly different but still of the same general class of goods, and is, therefore, not a manufacturer (*Adams* v. *Rau* (1)). There is a distinction between goods and materials. In the circumstances of these transactions, the old garments are not " materials " brought for the purpose of manufacture. The word " materials " as used means " new " materials. Unless goods are sold as second-hand goods they cannot be deemed to be sold as second-hand goods, and for that reason par. (*b*) of the definition of goods is inapplicable to s. 17A.

Hannan, in reply. The plaintiff's case rests on s. 17A. That section does not provide that goods must be manufactured wholly or in part out of new materials. The meaning attached to the word " manufacture " in *Gamble* v. *Jordan* (2) should be applied. The simple operations of alteration are covered by par. (*b*) of the definition of manufacture. " Manufacture " includes " production " and assuming that the new garments are not things in the way of production, they come within par. (*b*) as a combination of parts forming an article which is commercially distinct from those parts. The antecedent process of taking the old garment to pieces is a subordinate or ancillary matter. A second-hand article is one which, after some passage of time, or some usage, still retains the character it had when first manufactured. The processes involved are processes of manufacture. The whole purpose of s. 17A is to strike at a case where materials are supplied by a customer for transformation into goods, and a notional sale is deemed to take place in order to bring the operation within the range of the Act. The remodelled garments are goods as defined and although they are not sold in the actual sense of the term, they are notionally sold within the meaning of s. 17A, and not as second-hand.

Cur. adv. vult.

Sept. 27.

The following written judgments were delivered :—

DIXON J. The question for our decision is whether fur coats, stoles, capes and collars formed by remodelling fur garments are, for the purposes of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942, goods manufactured and sold.

Section 17 of that Act provides that sales tax shall be levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him. Section 17A imposes upon a transaction by which one person manufactures goods for another out of

(1) (1931) 46 C.L.R. 572.

(2) (1913) 3 K.B., at p. 153.

that other's material the artificial character of a sale. The section provides that where goods are manufactured for a person wholly or in part out of materials supplied by him the manufacturer of the goods . . . shall for the purposes of the Act be deemed to have sold the goods to the first-mentioned person, at the time of their delivery to him for the amount charged to him by the manufacturer in respect of those goods. Section 18 (1) (*c*) makes the amount so charged the sale value of the goods for the purposes of the Act. That, however, is subject to s. 18 (5A) and Part IIIA. of the regulations which together operate to reduce the sale value. The word " manufacture " is defined by s. 3 (1) (*b*) to include the combination of parts or ingredients whereby an article or substance is formed which is commercially distinct from those parts, subject to a qualification that is not in point.

The taxpayer in the present case, a company which is the defendant in the action, carries on business in Sydney as a furrier and repairs and remodels fur garments. The company is registered under the Act as a manufacturer.

The commissioner claims sales tax in respect of fur coats, stoles, capes and collars which the defendant company has remodelled on the ground that the remodelling of fur garments for customers is hit by s. 17A. An inspection of s. 17A will show that the claim depends on the remodelling amounting to a manufacture of goods and upon its being done for the customer " wholly or in part out of materials supplied by him."

" The essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made " (per *Darling* J., *McNicol* v. *Pinch* (1)). The first and, it may be thought, the decisive question in the case, is therefore whether the garments which result from the process of remodelling are different things, that is are different " goods," from the garments that the customer hands over. This perhaps is rather a question of fact than of law, but, although the form of the proceeding before us is a case stated, it is stated under s. 18 of the *Judiciary Act* 1903-1948, which authorizes a reference of both fact and law and no objection has been raised to our drawing inferences of fact. The commissioner distinguishes between repair and remodelling and does not claim sales tax in respect of repair even although it may mean some change in, for example, the length of the garment. We are told that an old or worn fur coat is remodelled into a modern style of coat, that a fur necklet is remodelled into a stole and a fur necklet or fur stole is remodelled into a cape. A full length fur coat may

(1) (1906) 2 K.B. 352, at p. 361.

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be converted into a " saunter " or the somewhat similar " swagger " coats which are considerably shorter but full and often flared at the bottom. But the conversion may be to a jacket, which is waist length and secured in front by a clasp or a belt, or into a coatee, which is less than waist length and fits more closely and usually is not fastened in front. To effect these changes the collar, sleeves and linings of the coat handed in by the customer are removed, and the remainder of the coat is laid out upon a proper pattern prepared to the customer's measurement and is cut to the pattern. Worn skins are replaced by skins from what is cut off or by new skins. The body of the garment is then dampened and is nailed out on a pattern board to the shape and measurements of the paper pattern. By this means it is stretched and irregularities are removed. Usually the sleeves are remodelled. They and the collar, if one is necessary, are attached and the remodelled garment is lined and finished. Sometimes the lining is new ; sometimes the old lining is washed and used.

The same or an analogous practice is followed when a necklet is converted into a stole or a necklet or stole into a cape. In a necklet the skin is sewn together so as to form a cylinder of fur and an animal's head is attached at one end and a tail at the other. In a stole, which is often of considerable length, the skin is flat and is lined.

On the side of the taxpayer it is contended that these procedures do not change the identity of the garment but only some of its characteristics. The customer hands in a fur garment and takes away a fur garment. It is altered and renovated but it is still a fur garment ; it is her fur garment ; it is the fur garment she brought to the furriers. On the side of the commissioner it is said that a different fur garment has been brought into existence. The old fur garment has been used only to provide the materials or some of them from which the new fur garment has been made. It is a thing of a different description both commercially and from the point of view of the wearer. It is a different entity and has a new identity. " Goods " have therefore been produced.

On the whole the commissioner's view appears to be the more correct. The work of the furrier is to use skins to form garments. In skins he works with materials often of great value and usually of some permanence. His skill lies in the use he can make of them and the descriptions of garment he produces. Fashion, commercial usage and his customer's tastes combine to distinguish the various descriptions of garment he makes and to compel the recognization of them as separate categories of " goods." When

he takes skins made up into one description of fur garment and produces another, he cannot be treated as having altered an existing thing without producing a new one. He has made a different article.

But on behalf of the taxpayer answers to this position are put forward by way of confession and avoidance. Let it be so, it is said. Nevertheless there is no " manufacture." The process does not amount to manufacture. It is not manufacture within the ordinary meaning of the word nor within the statutory definition. It is a reshaping or reforming of an existing second-hand article. Taking a thing to pieces and putting it together again is not manufacture and putting it together in a different shape is not enough to make applicable the word " manufacture." So runs the argument. The argument is answered by the consideration that, according to the conclusion already stated, the process produces a different article. When that consideration is added to the fact that the actual work done and the procedure employed in producing the new, that is the distinct, article is characteristically a manufacturing process, it must follow that the " goods " are " manufactured " within the ordinary meaning of that term.

But then it is said that the goods are not " manufactured for a person wholly or in part out of materials supplied by him " within the true intention of the expression as it occurs in s. 17A.

To hand in a garment for the purpose of its being altered into another garment cannot, it is claimed, be described as supplying materials to be manufactured into goods. One reason given is that second-hand materials are not within the purview of the provision. But apart from that reason, which really arises from a more general contention calling for separate consideration, it is hard to see why, once it is found that a new or different article is produced, the old garment should not be treated as containing the materials supplied for the purpose of manufacturing the different article.

That leads to the final contention upon which reliance was placed for the taxpayer. The contention is that because the fur coat or other garment handed in is second-hand and because by consequence the resulting " new " or distinct garment is second-hand in the sense that it is made of used or worn skins, therefore the transaction or the goods must fall outside the scope of the tax. It is put in two ways. One is that upon the reasoning adopted in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) the Act does not intend to tax a notional sale of such goods.

(1) (1934) 52 C.L.R. 85.

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The other invokes the exception in favour of second-hand goods placed, after the decision, in the definition of "goods" in s. 3 (1).

The first ground depends upon the conclusion of the Court in the case of *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) that the clear intention of the sales-tax legislation is to take the course of commerce between the first appearance in Australia of goods, whether as a result of importation or of manufacture, and the retail disposal of them and to impose the tax once only upon them, so that the retail price of the goods would be increased by the incorporation in it of one, but not more than one, amount of the tax.

One answer to this ground is that the application which the commissioner gives to s. 17A in the present case does not offend against the principle. It is no doubt true that the garment handed in has borne sales tax. The skins and other materials of which it consists have borne their due proportion of the sales tax paid originally in respect of the finished garment. On the assumption that, in the course of trade by which the furs and materials were supplied to the manufacturer of the original garment, certificates were properly quoted, the elements of which the garment was made up would have borne sales-tax once only and that as constituent parts of the finished article. For, to repeat what was said in *Davies Coop & Co. Ltd.* v. *Federal Commissioner of Taxation* (2): "What goes into a manufactured article and forms part of its substance is sold as part of it so to speak, and then bears sales tax in its manufactured form and for the first time."

But the use that the commissioner makes of s. 17A does not mean that any part of the materials will bear sales tax a second time. What is taxed is the cost of the service performed by the furrier for his customer in remodelling the garment, or more correctly a portion of that cost. For that is the notional sale value under s. 18 (1) (*c*) and (5A) and Part IIIA. of the regulations. As that service *ex hypothesi* produces a distinct article, it is quite consistent with the policy of the sales-tax legislation and with the principle of the decision in *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) to impose a sales tax on a notional price consisting in part of the charge for the service.

Another answer is that, since that decision, the Parliament has reduced the principle judicially discovered in the legislation to statutory expression. That statutory expression should therefore afford the measure of the application of the principle. It is to be found in the exception in the definition of "goods" in s. 3 (1).

(1) (1934) 52 C.L.R. 85.

(2) (1948) 77 C.L.R. 299, at p. 317.

Upon this exception the taxpayer relies as the second ground for the contention that the transactions in question must fall outside the scope of the tax because the garment providing the materials is second-hand. The exception is stated in two alternative paragraphs. The first, par. (*a*), says that the word " goods " does not include goods which have, either through a process of retailing or otherwise, gone into use or consumption in Australia.

There is a very short answer to the taxpayer's reliance upon this paragraph. It is that the " new " or different garment produced from the old garment, the fur coats, stoles, capes or collars, have not as such gone into use or consumption. The skins of which they are made up have done so, but not the garments produced by remodelling. The skins have borne tax and they will not do so again. The cost of the work done in turning the skins to new account will provide the measure of the sale value taxed. Paragraph (*b*) of the exception could not be availed of by the taxpayer. For it depends (1) on the goods being sold as second-hand goods, and (2) on the existence of an opinion on the part of the commissioner that parts of the goods (the remodelled garments) retain their character as goods or parts of goods which have gone into use or consumption in Australia. As to (1), the notional sale under s. 17A can hardly be treated as a sale to the customer of her " new " or remodelled garment as a second-hand fur coat or the like. As to (2) the commissioner seems to have held no such opinion.

The taxpayer's contentions therefore fail.

The question in the case stated should be answered in the affirmative, and, in accordance with the agreement of the parties, judgment should be entered for the plaintiff for £311 2s. 1d. and with costs.

WILLIAMS J. The question asked in the case stated is whether the garments referred to in par. 6 of the case, viz. :—fur coats, stoles, fur capes and fur collars are " goods manufactured in and sold in Australia within the meaning of the *Sales Tax Assessment Act* (*No.* 1) 1930-1942." The garments referred to in par. 6 are fur garments made by the defendant for customers who supply the materials consisting of existing fur garments which have become so badly worn or damaged that it is impossible to repair them by patch work and they are only usable as material from which the defective parts can be cut out and what is left remodelled into a fur garment which is most suitable or useful having regard to the extent, shape and nature of the available material. Customers' second-hand fur coats are remodelled into modern stoles and coats known as swaggers, saunters, coatees or jackets ; their second-hand

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fur necklets are remodelled into stoles; their second-hand necklets or stoles are remodelled into fur capes; their second-hand fur capes are remodelled into stoles; their second-hand necklets or stoles are remodelled into fur collars; and their second-hand fur coats known as coats, jackets, saunters, swaggers or coatees are remodelled into fur capes by the processes described in the paragraph. Except to a small extent in the case of linings the materials used by the defendant in these processes are confined to those available from the customers' garments. About ninety-five per cent of the linings of the remodelled garments are the old linings. The defendant does not provide individual linings and where linings are necessary requires the customer to supply them.

It is clear that there is no actual sale of the remodelled garments by the defendant to its customers. But the plaintiff relies upon s. 17A of the Act which provides that where goods are manufactured for a person wholly or in part out of materials supplied by him, the manufacturer of the goods, whether he manufactures those goods himself or procures their manufacture by another person, shall, for the purposes of this Act, be deemed to have sold the goods to the first-mentioned person, at the time of their delivery to him, for the amount charged to him by the manufacturer in respect of those goods. This section was first introduced into the principal Act by Act No. 29 of 1934. At the time of its introduction the section contained the words " makes up those goods himself or procures their making up " but Act No. 78 of 1936 omitted these words and inserted in their stead the present words " manufactures those goods himself or procures their manufacture." The section was introduced before the case of *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) had come on for hearing in this Court. Section 3 of the Act of 1930 simply defined goods as including commodities and manufacture as including production. In *Deputy Federal Commissioner of Taxation (S.A.)* v. *Ellis & Clark Ltd.* (1) it was held that a person who purchased second-hand and other electrical goods (principally electrical motors) and resold them either with or without first repairing them was not liable to sales tax. It was pointed out that the general policy of the sales tax legislation, which must be considered as a whole, is to levy sales tax once and for all upon the last sale of the goods by wholesale, that is upon the sale to the retailer by the last wholesaler, and that to avoid double taxation goods which have gone through the process of retailing into use and consumption in Australia, and in this sense are second-hand, are outside the scope of the legislation.

(1) (1934) 52 C.L.R. 85.

The definitions of goods, manufacture and manufacturer were amended by Act No. 78 of 1936 to adopt and possibly to enlarge the effect of this decision. Section 3 now provides that goods includes commodities, but does not include (*a*) goods which have, either through a process of retailing or otherwise, gone into use or consumption in Australia; (*b*) goods which are sold as second-hand goods and are manufactured exclusively or principally from goods which—(i) have, whether alone or as parts of other goods, gone into use or consumption in Australia; and (ii) in the opinion of the commissioner, in their condition as parts of the goods so manufactured, retain their character as goods or parts of goods which have gone into use or consumption in Australia. Section 3 also provides, so far as material, that manufacture includes (*a*) production (*b*) the combination of parts or ingredients whereby an article is formed which is commercially distinct from those parts or ingredients, except such combination . . . as, in the opinion of the commissioner, it is customary or reasonably practicable for users or consumers of those articles or substances to undertake. Section 3 also provides, so far as material, that manufacturer means a person who engages, whether exclusively or not, in the manufacture of goods . . . and a person (not being an employee) who manufactures goods, whether or not the materials out of which the goods are manufactured are owned by him. The Act therefore applies in terms to all goods which are goods or commodities in the ordinary meaning of those words except those goods which are excluded by pars. (*a*) and (*b*) of the definition. The Act also applies in terms to all goods which are manufactured according to the ordinary meaning of that word or which are manufactured within the meaning given to that word by the definition.

In order that s. 17A may apply there must be a notional sale of manufactured goods within the meaning of the Act, and it was contended for the defendant that the remodelled garments, as they had been made entirely or substantially from second-hand materials, were really second-hand goods and that the policy of the legislation expounded in *Deputy Federal Commissioner of Taxation*, (*S.A.*) v. *Ellis & Clark Ltd.* (1) could only be carried into effect and double taxation avoided if such goods were held not to be goods within the meaning of the Act. There is in my opinion nothing in the judgments in *Deputy Federal Commissioner of Taxation* (*S.A.*) v. *Ellis & Clark* (1) to show that the policy of the Act has this result. Further, the Act has now been amended and the defendant must rely on the exceptions contained in pars. (*a*) or (*b*). A similar

(1) (1934) 52 C.L.R. 85.

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problem to the present problem was discussed in *Adams* v. *Federal Commissioner of Taxation* (1) and I see no reason to alter the view there expressed that the question at issue is one of fact and degree. The exception of goods which have, either through a process of retailing or otherwise, gone into use in Australia can only apply to particular goods whilst they remain such goods and not to what remains of such goods after they have been manufactured into goods which are different goods from their second-hand components. Work which could be fairly described as a mere repair or modification of the goods would not affect their original character. But once the work done causes the goods to lose this character, they become goods within the meaning of the Act. The amended definition of manufacture includes the combination of parts whereby an article is formed which is commercially distinct from those parts. There is nothing in this provision to suggest that the combination must consist exclusively or substantially of a combination of new parts. It includes in its ordinary signification a combination of parts all of which have gone into use in Australia. Paragraph (*b*) of the definition of goods would appear to have been inserted in the Act to authorize the commissioner to exclude from tax goods sold as second-hand goods which are not goods excluded by par. (*a*), and therefore to enlarge the exception in par. (*a*). This paragraph would seem to be confined to cases where the goods sold as second-hand goods are exclusively or principally a mere combination of second-hand articles or parts of such articles.

But it is unnecessary to discover its exact meaning because the defendant does not rely on it, and as at present advised I do not see how it could be applied to s. 17A. The sale value of the goods under the section is the value of the services of the manufacturer of the goods, and these services would have the same value whether the goods were manufactured from new or second-hand materials. The ordinary meaning of the verb manufacture is to work up materials into forms suitable for use. Where new materials are supplied there would plainly be a notional manufacture of goods within the meaning of the Act. Where old materials are supplied there would only be such a manufacture if the work done was more than a mere repair or modification of the old materials and was such as to change the old goods into goods of a different character. The purpose of the customer in leaving an old fur garment with the defendant is not to have that garment repaired or made to fit the wearer but to provide the material required for the making and

(1) (1948) 8 A.T.D. 332.

fashioning of the remodelled garment. It is immaterial whether the customer leaves the old garment complete as a garment or first unpicks the old garment and leaves the pieces of fur and linings with the defendant. The defendant is not concerned to repair or alter the old garment, it is concerned to fashion a different garment out of the serviceable pieces of the old garment or, in other words, to work up this material into a new form suitable for use. This is manufacture within the ordinary meaning of the word. The manufacture goes further than merely combining the parts of the old garments into an article which is commercially distinct from those parts, although this would be manufacture within the meaning of the definition of manufacture in the Act.

For these reasons I would answer the question asked in the affirmative and enter judgment for the plaintiff for £311 2s. 1d. and costs.

WEBB J. I have found this a difficult question of fact. However, I think it more likely than not that the remodelled garment in each case remains a second-hand garment. If the taxpayer bought used fur garments and sold them after remodelling he could not, I think, sell them as new goods without being guilty of misrepresentation. Persons intending to buy new fur garments would expect to be told that these were in fact used garments remodelled, and would, I suggest, be likely to refuse to buy them or to insist on their sale as second-hand goods. If these garments could properly be sold as new goods then so could any used but remodelled wearing apparel, however old, including hats and footwear. I do not suggest that new wearing apparel could never be made out of old materials. That would depend on the nature and extent of the processing of the old materials which themselves might be changed into new materials better and more durable than the old materials. Dr. *Hannan* submitted that new furniture might be made out of old packing cases. That is so, and the furniture might be better for being made out of seasoned timber. At all events the timber would be planed and polished or varnished. But, apart from any distinction based on permanence or durability, things made of wood or metal belong to a different category from used garments subjected to little or nothing more than re-shaping, repair and, to a minor extent, to laundering, and then continued in use for the same purposes by the same wearer, without any special treatment of the fur skins e.g. by tanning where the skins have not already been subjected to that process. In my opinion

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such garments remain second-hand goods: they are not commercially distinct from the used garments and so do not attract sales tax on an actual or notional sale.

I would answer the question submitted in the case in the negative and enter judgment for the defendant.

Question answered in the affirmative. Judgment for the plaintiff for £311 2s. 1d. *with costs.*

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

Solicitors for the defendant, *Manning, Riddle & Co.*

J. B.