[HIGH COURT OF AUSTRALIA.]

THE SCOTTISH AUSTRALIAN MINING COMPANY LIMITED . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, *May* 31; *June* 1, 7.

Williams J.

Income Tax (Cth.)—Assessable income—Assessment—Coal-mining company—Powers to buy and sell land—Land purchased for coal-mining operations—Coal removed—Land—Subdivided, improved and amenities provided—Sold for residential purposes—Quaere, business of selling land—Capital asset—Profits therefrom not assessable income—Material facts—Full and true disclosure—Re-assessment—Question of fact—Question of law—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *ss.* 6, 26 (*a*), 170, 196.

The memorandum of association of a company formed primarily and essentially for the purpose of carrying on the business of coal mining, contained powers to sell, improve, manage, develop, turn to account or dispose of any of the company's property. Certain land, purchased by the company in 1863 for the purpose of carrying on coal-mining operations, was, after those operations by the company had ceased in 1924, sold, from time to time in parcels, at a considerable profit, for residential and other purposes, and for which the land had been subdivided, roads and a railway station constructed, sites made available for schools and churches and areas set aside for parks.

Held that the company was not engaged in the business of selling land as from 1924 but was engaged in realizing a capital asset the profits from which should not be included in its assessable income.

The question whether a taxpayer has made a full and true disclosure of all material facts necessary for the commissioner to make an assessment raises the true construction of s. 170 of the *Income Tax Assessment Act* 1936-1943, which is a question of law and gives the High Court jurisdiction under s. 196 to entertain an appeal from a decision of the Board of Review.

NOTE: The Full Court of the High Court on 27th July 1950, by consent, dismissed an appeal from this decision, with costs.

APPEAL under *Income Tax Assessment Act.*

The Scottish Australian Mining Co. Ltd. appealed under s. 196 of the *Income Tax Assessment Act* 1936-1943 to the High Court from a majority decision of the Board of Review refusing to uphold the company's objections to its assessment by the respondent for income tax in respect of the years ended 31st December 1939, 31st December 1940, 31st December 1941 and 31st December 1942 (these being the accounting periods adopted by the appellant in lieu of the income years ended 30th June 1940, 30th June 1941, 30th June 1942, and 30th June 1943, respectively). The assessments were amended assessments under s. 170 of the Act in respect of the two earlier years and ordinary assessments in respect of the two later years.

The appeal was heard by *Williams* J. in whose judgment hereunder the material facts are set forth.

M. F. Hardie K.C. and *J. D. O'Meally,* for the appellant.

L. C. Badham K.C. and *J. M. Brennan,* for the respondent.

Cur. adv. vult.

June 27.

The following written judgment was delivered by :—

WILLIAMS J. This is an appeal by the Scottish Australian Mining Co. Ltd. under s. 196 of the *Income Tax Assessment Act* 1936-1943 from the decision of the Board of Review refusing by a majority to uphold the company's objections to its assessment by the respondent for income tax in respect of the years ended 31st December 1939, 31st December 1940, 31st December 1941 and 31st December 1942 (these being the accounting periods adopted by the company in lieu of the income years ended 30th June 1940, 30th June 1941, 30th June 1942 and 30th June 1943). The assessments are amended assessments in respect of the two earlier years and ordinary assessments in respect of the two later years.

The commissioner issued the amended assessments under s. 170 of the Act. He does not and could not charge that the avoidance of tax was due to fraud or evasion but he does charge that the appellant did not make a full and true disclosure of all the material facts necessary for its assessment and there has been an avoidance of tax and that he was therefore authorized by the section to amend the assessments within six years from the date upon which the tax became due and payable under them to prevent avoidance of tax. The amended assessments were made within this period

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of six years, and there was avoidance of tax if they were rightly made, so that the question whether the commissioner was authorized to make them depends upon whether the appellant made a full and true disclosure of all the material facts necessary for its assessment. The Board of Review held that the appellant had not made such a disclosure and that the amended assessments were authorized by s. 170.

The question at issue between the parties on all the assessments is whether profits made by the appellant from the sale of a large area of land owned by the appellant known as the Lambton Freehold Estate were part of its assessable income. The majority of the Board decided this question in favour of the commissioner and a preliminary objection was raised before me that this was a finding of fact, that no question of law was involved in the decision of the Board, and that accordingly this Court has no jurisdiction to entertain the appeal.

I am satisfied that there are at least two questions of law involved in the decision of the Board. In the first place there is the question, which is confined to the two earlier years, whether the appellant made a full and true disclosure of all the material facts necessary for the Commissioner to make the assessments. This question raises the true construction of s. 170 of the *Income Tax Assessment Act*, which is a question of law, so that a question of law is involved in the decision of the Board in respect to these two years. A similar question of law was relied upon by the respondent in proceedings under the *Estate Duty Assessment Act* 1914-1942 to give this Court jurisdiction to entertain an appeal by him from a decision of the Board of Review under s. 26 (9) of that Act to this Court in *Federal Commissioner of Taxation* v. *Westgarth* (1). On this ground alone an appeal to this Court is competent under s. 196 of the *Income Tax Assessment Act* in respect of the two earlier years. It is immaterial whether or not this Court forms the same opinion as the Board on the question of law. It is sufficient that there is a question of law involved in the decision of the Board. Such a question unlocks the door of the original jurisdiction of this Court, the proceedings are validly instituted and this Court has the same complete jurisdiction over all questions of law and issues of fact that arise in the proceedings as it has over any other matter in the original jurisdiction : *Federal Commissioner of Taxation* v. *Sagar* (2) ; *Commissioner of Taxation* v. *Miller* (3) ; *Federal Commissioner of Taxation* v. *Shaw* (4).

(1) 24 A.L.J. 129.
(2) (1946) 71 C.L.R. 421, and cases there cited.
(3) (1946) 73 C.L.R. 93, at p. 98.
(4) (1950) 80 C.L.R. 1.

In the two earlier years therefore I am free to draw such conclusions from the evidence as I think proper. That evidence consists of the evidence given before the Board which was by consent tendered as evidence before me. The two later years are in a different position for the only question of law involved in the decision of the Board is whether its conclusion was reasonably open on the facts. If it was I must dismiss the appeal with respect to these years although I might reach the opposite conclusion if I were free to do so. But this distinction between the earlier and later years may well be a mere technicality in the present case because there is no dispute as to the facts and where all the material facts are found by the tribunal of fact, and the only question is whether they are such as to fall within the provisions properly construed of some statutory enactment, the question is one of law and not of fact unless the facts show that more than one inference is reasonably open and the question is one of degree: *Farmer* v. *Cotton's Trustees* (1); *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee* (2); *Ritz Cleaners Ltd.* v. *West Middlesex Assessment Committee* (3); *Doncaster Amalgamated Collieries Ltd.* v. *Bean* (4); *British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (5); *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (6); *Commissioner of Taxation* v. *Miller* (7).

It will be convenient at this stage shortly to state the material facts. The appellant was incorporated on 6th January 1859. Clause 3 of its memorandum of association provided that its objects were to purchase from Scottish Australian Investment Co. (who have offered and are willing to sell the same at the price of £30,000 and a royalty of 3d. per ton on all marketable coals and one-fifteenth part of all other minerals to be raised and brought to grass) the properties and privileges in the colony of New South Wales, specified in the schedule thereto, and likewise of acquiring, by purchase or otherwise, from the government or any private person or public company, any other property or privileges in the Australasian colonies which might from time to time be deemed suitable for mining purposes or necessary or expedient for the better and more effectual carrying out the objects of the company and of thoroughly exploring, working and developing the mineral resources of the property so to be purchased and acquired, and the selling or otherwise realizing the coals, ores, and other produce thereof

(1) (1915) A.C. 922, at p. 932.
(2) (1932) 1 K.B. 40, at pp. 110, 111.
(3) (1937) 2 K.B. 642.
(4) (1946) 1 All E.R. 642, at p. 645.
(5) (1949) 1 K.B. 462, at p. 472.
(6) (1946) 72 C.L.R. 634.
(7) (1946) 73 C.L.R. 93.

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and the erecting wharves and doing all such other things as were incidental or conducive to the attainment of the above objects, and also for the purpose of selling or letting or otherwise disposing of, as might be deemed most advantageous, all or any portions of the property so contracted for or thereafter to be purchased and acquired, and otherwise managing the same until the sale thereof, for the benefit of the company. The memorandum of association was altered in 1929 and some additional purposes were added, but the principal and substantial object still remained, as it had been before, the carrying on of mining operations, and these additional purposes were, like the other purposes in the original memorandum of association, in the nature of incidental and ancillary powers the purposes of which were to enable the appellant to carry out its main object. This is not conclusive for one of the powers of the company is to sell, improve, manage, develop, turn to account and in any other manner deal with or dispose of the undertaking of the company or any part thereof and all or any of the property for the time being of the company, and this power is wide enough to enable the company to trade in the sale of land. In *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners* (1), Lord *Macmillan* said " the income tax code applies a more objective test: it looks at the nature of the transactions; it looks at the character of the activities." But in finding whether the company is in fact doing so, the distinction between its main object and such an incidental and ancillary power is not a matter to be left out of account: *Balgownie Land Trust Ltd.* v. *Inland Revenue Commissioners* (2); *British Launderers' Research Association* v. *Borough of Hendon Rating Authority* (3); *Royal Australasian College of Surgeons* v. *Federal Commissioner of Taxation* (4).

On the face of the memorandum of association the appellant was not in any sense a company formed for the purpose of dealing in land. The prospectus of the appellant stated that the Scottish Australian Investment Co. through their manager at Sydney, had long directed their attention to the acquisition of lands known to be rich in mineral production. They were the possessors of the various properties mentioned in this prospectus, upon some of which valuable deposits of copper and coal had already been proved to exist, but, being a company formed for the investment of capital and not to carry on mining operations, they were not in a position to develop these mineral properties on their own account. It was

(1) (1932) A.C. 650, at p. 661.
(2) (1929) 14 Tax. Cas. 684.
(3) (1949) 1 K.B. 462.
(4) (1943) 68 C.L.R. 436.

therefore proposed that a new company should be formed, to be called "The Scottish Australian Mining Company Limited," which should purchase the said several properties and work them, commencing at first on a moderate scale. The company would also take powers to acquire, by purchase or otherwise, such further mineral lands in the Australasian colonies as should be deemed desirable. The properties which the appellant purchased from the investment company included not only land suitable or believed to be suitable for mining, but also land suitable for grazing and for building sites in the City of Newcastle, but it is as plain from the prospectus as from the memorandum of association that the appellant was formed primarily and essentially for the purpose of carrying on the business of mining. If it purchased some properties from the investment company suitable for other purposes, this was presumably because the investment company desired to dispose of its properties as a whole. The appellant does not appear to have carried on mining on any of the lands purchased from the investment company. It may have done so for a short period but all these lands were sold early in its history. Its principal mining activities were carried on upon the Lambton Freehold Estate. It purchased this land between 1863 and 1865, the title being conditional purchase, and it also purchased the mining rights at the same time. The total area finally purchased appears to have been 1,771 acres. It commenced to mine this land for coal immediately it was acquired and continued to do so until 1924. The main seam was then exhausted and all that was left was some coal in pillars and in a seam near the surface and the company then commenced to sell the land in sub-division in a large way. There had been some minor sales in previous years. Forty-five acres were set aside in 1864 for the township of Lambton to provide homes for the miners. There was a small isolated sale in 1904. In 1907 twenty-four acres were sub-divided and a road known as Russell Road built in the sub-division. After 1924 the appellant commenced to push the sale of the land and incurred considerable expenditure in sub-dividing and making the land attractive to purchasers. It constructed roads. It built a railway station for £5,000. It granted land to public institutions such as schools and churches, and set aside land for parks. It sold a large area of land in the sub-division to the Newcastle hospital. The company did not part with the land entirely for it reserved the mining rights from the sale of the surface land and leased these rights to tributors who paid royalties. But it did not itself carry on any mining operations on the land after 1924. It had, however,

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acquired two other coal mines, one known as Lambton B in 1887 and the other known as Burwood in 1894 and carried on operations in these mines until they were sold at a capital loss of £116,000 to Broken Hill Pty. Ltd. in 1932. Since 1932 the only revenue derived by the company, apart from the profits on the sale of land in the Lambton Freehold Estate, has been royalties from its tributors and some interest and rents. The profits from the sales of the Lambton estate have been considerable. The purchase money on most of these sales has been payable by instalments and the method of bookkeeping adopted by the appellant has been to hold the instalments in a suspense account and only to bring the profit into the profit and loss account when the purchase money has been paid in full.

The respondent claims that these profits are part of the assessable income of the company either because they are the proceeds of a business carried on by the company within the meaning of that expression in the definition of income from personal exertion in s. 6 of the *Income Tax Assessment Act* or because they are income within the meaning of one or other or both limbs of s. 26 (*a*) which provides that the assessable income of a taxpayer shall include profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale, or the carrying on or carrying out of any profit-making undertaking or scheme. These provisions were recently considered by this Court in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1), where it was pointed out that the definition of income from personal exertion does not make all the proceeds of a business income for the purposes of the Act, and that the definition refers only to proceeds which would be held to be income in accordance with the ordinary usages and concepts of mankind except insofar as the Act states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income. It was also pointed out, as indeed s. 26 (*a*) plainly states, that the first limb of this section only operates where there is a finding that the purchase was made with the intention of selling at a profit. There is in the present case no evidence capable of supporting a finding that the Lambton Freehold Estate was so purchased. The only possible finding is that the land was purchased in order to carry on coal-mining operations. A small part of the land was sold shortly after it was purchased but coal mining cannot be carried on without coal miners and to make part of the land available for homes for them was to carry out a purpose purely incidental

(1) (1946) 73 C.L.R. 604.

and ancillary to the main purpose. The profits on the sales must therefore be taxable either because the taxpayer was carrying on the business of selling land, in which case the profits would be income on ordinary principles, or because in selling the land the appellant was carrying on or carrying out a profit-making undertaking or scheme in which case the profits would be assessable income under the second limb of s. 26 (*a*). The inquiry immediately arises when did the appellant first commence to carry on the business of selling land or, what is really the same thing, when did it first commence to carry on or carry out the profit-making undertaking or scheme. It is impossible, I think, to hold that the appellant was engaged in such a business or profit-making undertaking or scheme prior to 1924. The crucial question is therefore whether the facts justify the conclusion that the appellant embarked on such a business or undertaking or scheme in 1924. The facts would, in my opinion, have to be very strong indeed before a court could be induced to hold that a company which had not purchased or otherwise acquired land for the purpose of profit-making by sale was engaged in the business of selling land and not merely realizing it when all that the company had done was to take the necessary steps to realize the land to the best advantage, especially land which had been acquired and used for a different purpose which it was no longer businesslike to carry out. The plain facts of the present case are that the appellant purchased the Lambton lands for the purpose of carrying on the business of coal mining and carried on that business on the land until it was no longer businesslike to do so. It then had the land on its hands and it was land which because of its locality and size could only be sold to advantage in sub-division. A sale in sub-division inevitably requires the building of roads. If it is advantageous to the sale of the land as a whole to set aside part of the land for parks and other amenities, this does not convert the transaction from one of mere realization into a business. It is simply part of the process of realizing a capital asset. The facts are, in my opinion, such that the appellant is entitled to rely on the principles laid down in *Hudson's Bay Co. Ltd.* v. *Stevens* (1) and *Rand* v. *Alberni Land Co. Ltd.* (2). The facts in these cases where the court decided in favour of the taxpayer and also in *Alabama Coal, Iron, Land and Colinization Co. Ltd.* v. *Mylam* (3) where the court decided the other way were all special to those cases and unlike the present facts in many respects. But the judgments contain important

(1) (1909) 5 Tax. Cas. 424.
(2) (1920) 7 Tax Cas. 629.
(3) (1926) 11 Tax. Cas. 232.

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statements of principle. There is the statement in the judgment of the Master of the Rolls in *Hudson's Bay Co. Ltd.* v. *Stevens* (1) that he was unable to attach any weight to the circumstance that large sales were made every year. There is also the statement of *Farwell* L.J. (2) that "a land owner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as an owner not as a land speculator . . . it would be different if a land owner, an individual, entered into the business of buying and developing and selling land; but the case of the owner, whether of land, or pictures, or jewels, selling his own property, although he may have expended money on them in getting them up for sale, is entirely different; he sells as owner, not as trader." There is also the statement of *Rowlatt* J. in *Alabama Coal, Iron, Land and Colonization Co. Ltd.* v. *Mylam* (3), that "in order to see clearly that the *Hudson's Bay Case* (4), for instance, does not apply, there must be something in the nature of buying at any rate, and not merely selling, which is mere turning your property into money." His Lordship's statement (5) that "merely realizing is not trading. It is no good saying it is a trade of realizing. But I think what they (the commissioners) mean is: they have taken a process of realizing and embedded it in a trade so that in the course of carrying on a trade they have in fact done some realizing" received the approval of the Privy Council in *Commissioner of Taxes* v. *British Australian Wool Realization Association* (6). In that case the Privy Council pointed out that the mere extensiveness of the organization set up to realize an asset or assets does not of itself cause the realization to become a business. Lord *Blanesburgh* said that was "a proposition not to be entertained" (7).

The appellant used the profits it was making towards paying dividends and for that purpose brought them into the profit and loss account. But under its articles dividends are payable out of the general profits of the company and profits of any description, including the profits realized on the sale of an asset, whether in the nature of an income or a capital profit, are profits out of which a dividend is properly payable under such an article. The chairman of directors of the company at its annual meetings made the most of the profitable nature and volume of sales of the Lambton lands and the necessity of doing nothing to depreciate their value, but his statements are quite appropriate to a valuable asset and

(1) (1909) 5 Tax. Cas., at p. 436.
(2) (1909) 5 Tax. Cas., at p. 437.
(3) (1926) 11 Tax. Cas., at p. 254.
(4) (1909) 5 Tax. Cas. 424.
(5) (1926) 11 Tax. Cas., at p. 252.
(6) (1931) A.C. 224, at p. 252.
(7) (1931) A.C., at p. 252.

quite insufficient to prove that the company had entered into the business of a land company. As Lord *Macmillan* said in *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners* (1), it is the nature of the transactions and the character of the activities that count. In *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (2), it is said, in the judgment of the majority, that " the nature of the company, the character of its assets, the nature of the business carried on by it and the particular sale or realization are all relevant to the issue." The application of these tests singly and collectively to the present issue all lead to the conclusion that the appellant was merely realizing its land. I was pressed by the respondent with the decision of *Cooper* J. in *Wellington Steam Ferries Co.* v. *Commissioner of Taxes* (3), but I doubt its correctness and I am not prepared to follow it. I am not prepared to hold that the appellant commenced business as a land dealer in 1924 simply because it commenced to realize the Lambton lands. It was not a company which was formed for the purpose of dealing in land and there is to my mind no evidence that it engaged in such a business either before or after 1924. The facts are altogether different from those in such cases as *Thew* v. *South West Africa Co. Ltd.* (4); *Balgownie Land Trust Ltd.* v. *Inland Revenue Commissioners* (5) and *Hesketh Estates Ltd.* v. *Craddock* (6). They are much stronger in favour of the conclusion that the sales are a mere realization of a capital asset than those in *Inland Revenue Commissioners* v. *Hyndland Investment Co. Ltd.* (7).

With respect to the two earlier years I find that all that the appellant was engaged in was realizing a capital asset, and that the appeal should succeed.

It is therefore unnecessary finally to decide whether the appellant made a full and true disclosure of all the material facts to the commissioner within the meaning of s. 170 of the *Income Tax Assessment Act*. The appellant disclosed a great deal to the respondent and all that it disclosed was true. It disclosed the profits it was making on the sales and claimed that they were not assessable income. It supplied a number of material facts relating to the sales and could justifiably believe that it had placed the commissioner in a position to decide whether to admit the claim or not. But I doubt if the disclosure could be said to be a full disclosure. The expression " a full and true disclosure of all the material facts necessary for the

(1) (1932) A.C. 650.
(2) (1928) 41 C.L.R. 148, at p. 154.
(3) (1908) 29 N.Z.L.R. 1025.
(4) (1924) 131 L.T. 248.
(5) (1929) 14 Tax. Cas. 684.
(6) (1940) 25 Tax. Cas. 1.
(7) (1929) 14 Tax. Cas. 694.

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assessment " is a very wide one. It seems to impose on a taxpayer the duty of disclosing every fact which he knows or is capable of knowing material to a correct assessment. As at present advised I am of opinion that the appeal fails on this question but, as I have said, this would not make the appeal incompetent in respect of the earlier years, even though it were the only question of law involved in the decision of the Board.

In the case of the two later years I am also of opinion that the appeal should succeed. I am aware that in this class of case the ultimate finding is often one of degree and fact but the present evidence is, I think, consistent and consistent only with the finding that the appellant was engaged and engaged only in realizing a capital asset.

For these reasons I must order that the appeal be allowed with costs; that the amended assessments for the years ended 31st December 1939 and 31st December 1940 be set aside and that the assessments for the years ended 31st December 1941 and 31st December 1942 be amended so that the profits from the sales of the Lambton Freehold Estate are not included in the assessable income of the appellant.

Appeal allowed with costs. The amended assessments for the years ended 31*st December* 1939 *and* 31*st December* 1940 *respectively set aside and the assessments for the years ended* 31*st December* 1941 *and* 31*st December* 1942 *respectively be amended so that the profits from the sales of the Lambton Freehold Estate are not included in the assessable income of the appellant.*

Solicitors for the appellant, *Minter, Simpson & Co.*

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

J. B.