

AND

The company was incorporated in Great Britain but carried on business in South Australia. Before 1930 £3,000,000 capital was paid up in English currency, which was at that time of the same value as Australian currency. This capital was all used in Australia.

H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.

ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Since 1931 the value of Australian currency had depreciated to the extent that £A1 was equal to only E16s. Accordingly the capital of £E3,000,000 was equivalent to £A3,750,000.

In 1935 125,000 bonus shares were issued as fully paid, and in 1937 and 1939 there were issues of preference shares totalling 500,000. In respect of these, a sum of £625,000 was paid in Australian money.

The *War-time (Company) Tax Assessment Act* 1940-1944 imposes a tax upon company profits in excess of five per cent of the capital employed or deemed to be employed by the company during the accounting period. By s. 24, the Act prescribes a method of calculating the "capital employed", and one element in the calculation is "the capital paid up in money or by other valuable consideration, averaged over the accounting period". An increase in the amount of the "capital paid up" involves a corresponding increase in the amount of the "capital employed" and a reduction in the taxable profit.

*Dixon J.* held that the £3,000,000 paid before 1930 should be treated as sterling and should be converted into Australian currency for the purposes of the Act, but that the £625,000 paid up in 1935, 1937 and 1939 should be treated as Australian currency.

The Commissioner of Taxation appealed to the Full Court in respect of that part of the order dealing with the £3,000,000 paid before 1930.

*D. B. Ross* K.C. (with him *C. H. Bright*), for the appellant. Nearly all the money subscribed in England had been transferred to Australia for use before any difference in the exchange rates existed. The company is connected with South Australia in that its work was done, income earned, books kept, and meetings of directors held there. Furthermore, all its directors were resident in Australia, all dividends were paid in Australian currency, and no profits, except dividends and interest, were transmitted to England. The balance-sheet of the company shows the liabilities in Australian currency and therefore the assets must also be expressed in Australian currency. The capital subscribed in England should be regarded as Australian when brought into Australia. The object of the *War-time (Company) Tax Assessment Act* 1940-1944 was to restrict profits beyond a fixed percentage just as much as to secure revenue. The company should not be excused from this penal tax because of the merely extraneous circumstances of the exchange rate. The effect would be to produce differentiation between English and Australian companies, contrary



to the views of *Latham C.J.* in *Incorporated Interests Pty. Ltd. v. Federal Commissioner of Taxation* (1). The fluctuation in the exchange rate had no effect on the amount of money actually employed in Australia. Assuming that the paid-up capital is expressed in the balance-sheet in English currency and must be converted notionally into Australian currency, then the adjustment must be made to the assets as well as the liabilities side. Alternatively the difference between the capital expressed as English currency and the capital expressed as Australian currency must be regarded as a loss and set off against accumulated profits: *Federal Commissioner of Taxation v. Miller Anderson Ltd.* (2).

[*WILLIAMS J.* referred to *Warner Bros. First National Pictures Pty. Ltd. v. Federal Commissioner of Taxation* (3).]

*G. E. Barwick K.C.* (with him *K. L. Ward K.C.* and *A. K. Sangster*), for the respondent. The respondent adopts the reasons of *Dixon J.* For the purpose of construing s. 24 of the *War-time (Company) Tax Assessment Act 1940-1944*, the actual value of the assets of the company is irrelevant. The paid-up capital of the company represents the claim of the shareholders on the company. As the company is an English company, that claim is expressed in English currency. It is not affected by the locus or manner of investment of the company's funds. Section 24 gives no right to alter the figures appearing in the company's accounts. The company has not suffered a loss by reason of the exchange rate. The company can re-value its assets only in certain special cases. The commissioner cannot do this. It is a matter for the company.

*D. B. Ross K.C.* in reply.

*Cur. adv. vult.*

The following written judgments were delivered :—

Oct. 30.

*LATHAM C.J.* This is an appeal from an order of *Dixon J.* determining a question relating to the ascertainment of the paid-up capital of the Adelaide Electric Supply Company Limited, a company incorporated in Great Britain, for the purposes of the application of the *War-time (Company) Tax Assessment Act 1940-1944*. His Honour has held that the capital of the company, so far as it was paid up before 1928 in English pounds, should, for the purposes of the Act, be converted into Australian money at the rate of

(1) (1934) 67 C.L.R. 508.

(3) (1945) 72 C.L.R. 134, at p. 138.

(2) (1946) 73 C.L.R. 341, at pp. 367, 370, 372, 376.

H. C. OF A.  
1950.  
FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.



H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Latham C.J.

£A125 for £E100. The commissioner, on the other hand, contends that inasmuch as there was no difference in value between the Australian pound and the English pound at the time when the capital in question was paid up, and inasmuch as all the capital has been used in Australia in the acquisition of assets for the purposes of the business of the company, the capital should be calculated as existing in Australian money to the amount subscribed.

The *War-time (Company) Tax Assessment Act* 1940-1944 provides for the imposition of a tax upon the taxable profit derived by a company calculated in the manner prescribed in the Act. The taxable profit is the excess over the percentage standard of profits. The percentage standard of profits is five per cent of the capital employed or deemed to be employed by the company (as defined by the Act) during the accounting period, that is (as was held in *Bankers & Traders' Insurance Co. Ltd. v. Federal Commissioner of Taxation* (1)) the capital employed or deemed to be employed in Australia. The greater the amount of such capital the greater the allowance made under the percentage standard and therefore the lower the tax: see the Act, ss. 3, 13, 19, 20, 24.

Particulars of the constitution of the company can be ascertained by reference to the case of *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.* (2). The company is a company incorporated in England and its capital, which is a liability of the company to its shareholders, must at all times be a liability in sterling. Before 1928, £3,000,000 of capital was paid up. This capital was paid up in English money, which, at the time, was of the same value as Australian money. For purposes evidently associated with the incidence of taxation the company transferred the conduct and control of its business from London to Australia, and it was held in the case mentioned that dividends which under the articles of the company as altered were to be paid in Australian money were properly so paid to persons who were registered as holders of stock in the company's registers kept in England. Another amount of £625,000 was paid up as capital in Australian money after 1931, when the English and Australian monetary systems had become different and independent and the value of the Australian pound had depreciated so that £A1 was equal only to E16s.: see *Payne v. Deputy Federal Commissioner of Taxation* (3). As the company was an English company, and as, if it were wound up, the payment of any capital to the shareholders would have

(1) (1946) 73 C.L.R. 39.

(2) (1934) A.C. 122.

(3) (1936) A.C. 497; 55 C.L.R. 158.



to be made in English money, it appears to be clear that the shares which, since 1931, have been issued as fully paid to the extent of £1 have in fact only been paid up to the extent of 16s. This question, however, is not of importance in the present case.

The "capital employed" is for the purposes of the Act to be ascertained by adding amounts specified in s. 24 (1) and making the deductions prescribed by that section. The result of such a calculation is the ascertainment of a completely artificial figure. The first element in the ascertainment of this figure is "the capital paid up in money or by other valuable consideration, averaged over the accounting period". The question is whether in relation to the accounting periods in question this capital should be calculated as £E3,000,000 or as £A3,750,000. I agree with *Dixon J.* that it should be calculated in Australian money.

The capital paid up in money or other valuable consideration means simply the capital, so paid up, whether it is still represented by assets or not : *Warner Bros. First National Pictures Pty. Ltd. v. Federal Commissioner of Taxation* (1), a case approved in *Bankers & Traders' Insurance Co. Ltd. v. Federal Commissioner of Taxation* (2); and cf. *Redbank Meatworks Pty. Ltd. v. Commissioner of Taxes (Q.)* (3). In determining the capital paid up, therefore, it is not necessary to make any estimate as to the value of any assets. The capital paid up may have been lost in whole or in part, but that fact is immaterial for the purposes of applying s. 24. In the *Bankers & Traders' Insurance Company case* (2) it was held that the capital to which s. 24 referred must be capital actually employed in Australia, and what might have been thought to be a difficulty arising from the fact that the capital need not exist anywhere in the form of assets was met by holding that as a rule the amount of capital used in Australia could be satisfactorily ascertained by deducting the value of assets which were known to be employed abroad.

Section 24 requires four other sums to be added to the capital paid up in money or by other valuable consideration. The first of these sums is accumulated profits averaged as stated; the next is reserves created out of premiums received on the issue of shares; the next is the amount by which certain assets exceed the value of the assets as appearing in the accounts of the company; and, finally, in a life-insurance company the excess, if any, of reserves

H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Latham C.J.

(1) (1945) 72 C.L.R. 134, at p. 138. (3) (1944) 69 C.L.R. 315.  
(2) (1946) 73 C.L.R. 39.



H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Latham C.J.

for liabilities over the amount ascertained as “calculated liabilities” for the purposes of the *Income Tax Assessment Act*. All these other sums obviously must be calculated in Australian money. They are to be added to “the capital paid up”. They therefore must be expressed in figures of the same significance and quality as those by combination with which they are to produce a total sum as the result of the addition prescribed by s. 24. From this total sum certain deductions are made which it is unnecessary to specify in detail. Certain of them depend upon the amount of depreciation allowed under the *Income Tax Assessment Act* in respect of certain assets. It is plain that all these moneys must be calculated in Australian pounds. Accordingly, in order to apply s. 24 it is necessary also to express the “capital paid up” in Australian pounds with reference to the relevant accounting period. Therefore the amount of £3,000,000 which was paid up in English money before 1928 must, in order to apply s. 24, be represented by its Australian equivalent of £3,750,000. As to the moneys subsequently paid up in Australia, the actual amount in Australian money paid up is that which is for the purposes of the Act the capital of the company.

The appellant contends upon a further ground of appeal that if the £E3,000,000 capital of the company is to be treated as converted into £A3,750,000, the balance sheet of the company should be reconstructed by reducing the value of the assets by £750,000 or by charging £A750,000 against reserves. I agree that the present form of the balance sheet is open to criticism, but this fact does not affect the conclusion stated above with respect to the ascertainment of the sum specified in s. 24 (1) (a)—paid-up capital.

In my opinion the decision of *Dixon J.* was right and the appeal should be dismissed.

McTIERNAN J. I agree that this appeal should be dismissed.

The tax which is levied under the *War-time (Company) Tax Assessment Act*, 1940-1944 is calculated upon the basis of the “capital employed” in the relevant “accounting period”, s. 24. The tax, the “capital employed” and its ingredients are necessarily sums of Australian money. Such capital is the money employed in Australia in gaining or producing the taxable profit; s. 3.

Section 24 provides that one of the ingredients of “the capital employed in any accounting period” is to be “the capital paid up



in money or by other valuable consideration, averaged over the accounting period ”.

The paid-up capital of the respondent company is expressed in terms of English money because the company is incorporated in England. It is necessary that the amount representing the paid-up capital which is brought into the computation of the capital employed in each of the accounting periods with which the case is concerned should be an amount of Australian money. The amount must be equivalent in value to the paid-up capital. It follows that it is right to change the amount at which the paid-up capital is stated in English money to a sum of Australian money which truly represents its value and to use that sum for the purpose of aggregating the “ capital employed ”.

The question which is really in controversy is whether, in order to arrive at the correct sum of Australian money, it is correct to apply the rate of exchange existing at the beginning of each accounting period.

It was argued for the appellant that by reason of the facts of the case, the amount at which the paid-up capital is stated in the balance sheet truly represents for economic and fiscal purposes the value of the paid-up capital in Australian money and that is the correct amount of the paid-up capital under the aspect of an amount which is included in the “ capital employed ”. Section 24 requires that the capital employed in each accounting period be ascertained. It is necessary to ascertain, as one element of that aggregate amount, the amount of the paid-up capital. The Act affords no reason for departing from the ordinary meaning of paid-up capital. This is the actual capital invested by the shareholders. It is correctly represented in the balance sheet as one of the company’s liabilities—a liability to shareholders. I think that the argument for the appellant departs from these ideas.

In order to bring paid-up capital into the computation of the capital employed in each accounting period, it is necessary to express the amount of such capital in Australian money. It follows that the computation of the capital employed in each accounting period would be done in accordance with the Act if the rate of exchange as between English and Australian money existing during each accounting period were applied.

I think that the judgment of *Dixon J.* is right.

WEBB J. I have had the advantage of reading the judgments of the Chief Justice and *Kitto J.* For the reasons given by their Honours I agree that the appeal should be dismissed.

H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

McTiernan J.



H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

FULLAGAR J. In this case I agree with the judgment of *Dixon J.*, and there is nothing that I wish to add to what he has said. In my opinion, this appeal should be dismissed.

KITTO J. These appeals relate to the assessment of war-time (company) tax payable by the Adelaide Electric Supply Company Limited in respect of the three annual accounting periods of the company ended 31st August in the years 1941, 1942 and 1943 respectively.

The assessment of the tax is governed by the *War-time (Company) Tax Assessment Act* 1940 as amended, by s. 13 of which it is provided that tax shall be payable at rates declared by the Parliament upon the amount by which the taxable profit derived during an accounting period exceeds the percentage standard. "Taxable profit" is defined in s. 3, and no question as to the amount of it arises in this case. "The percentage standard" in the case of the company is an amount equal to five per centum of the capital employed, or deemed to be employed, during the accounting period: ss. 19, 20. "The capital employed" in any accounting period is to be ascertained according to an artificial formula contained in s. 24, subject to any increase that may be allowed under s. 25. The formula requires that certain amounts be added together and that certain other amounts be deducted therefrom. Of the amounts to be added, the first is "the capital paid up in money or by other valuable consideration, averaged over the accounting period": s. 24 (1) (a). It is upon the meaning and application of this expression that the decision of this case primarily depends.

The company was incorporated in England in 1905. Its issued capital throughout the accounting periods now in question consisted of 3,625,000 shares of £1 each. Of these shares, 3,000,000 were issued before 1930, when the respective monetary systems of England and Australia began to diverge. The remaining 625,000 shares were issued in three stages; in 1935 125,000 bonus shares were issued as fully paid, and in 1937 and 1939 there were issues of preference shares totalling 500,000.

In the mutual admissions made by the company and the commissioner for the purposes of the case, it was stated (in pars. 19, 20, 36, 37, 53 and 54) that in the relevant accounting periods the paid-up capital of the company was £3,625,000, and that the whole of that paid-up capital was paid up in money or other valuable consideration. It is not stated in these paragraphs whether the £3,625,000 is expressed in sterling or Australian



currency. In fact the 3,000,000 shares issued before 1930 were paid for, as to 916,204 in sterling by persons who subscribed for them in England, and as to the remaining 2,083,796 in Australian currency by persons who subscribed for them in Australia; the 125,000 bonus shares issued in 1935 represented a capitalization of £A125,000; and in respect of shares issued in 1937 and 1939 there was paid by the holders £A500,000 only.

The company originally contended that "the capital paid up" should be regarded, in view of these facts, as amounting to £E3,625,000, the sums paid in Australian currency before 1928 being equivalent to similar sums in sterling; and accordingly it claimed that for war-time (company) tax purposes its capital paid up should be treated as £A4,531,250, by reason of the fact that throughout the relevant accounting periods £E100 was equivalent to £A125.

The commissioner, on the other hand, made his assessments on the footing that the capital paid up was £A3,625,000.

*Dixon J.*, before whom the company's appeal against the assessments came in the first instance, held that the £3,000,000 paid up on the shares issued before 1930 should be treated as sterling and should be converted into Australian currency for war-time (company) tax purposes, but that the £625,000 paid up on the shares issued in 1935, 1937 and 1939 should be treated as Australian currency.

The commissioner has appealed to the Full Court, contending that the £3,000,000 should be treated as that amount of Australian currency, and the company has not cross-appealed in respect of the £625,000.

The point at issue may be stated as being whether the relevant question to be asked in determining the amount to be added under s. 24 (1) (a) is, (1) what is the equivalent in Australian currency of the actual moneys which the members of the company paid up on their shares from time to time and which remained paid up in the relevant accounting periods; or (2) what amounts, expressed in Australian currency, should be considered, in the relevant accounting periods, as the company's paid-up capital. I cannot think that there is much room for doubt on the point. The requirement that the capital paid up shall be averaged over the accounting period necessitates the taking of an average of the amounts which during the accounting period answered the description of capital paid up. In other words, it is not what the company received in discharge of the shareholders' liability on their shares which has to be averaged; it is the amounts which in the relevant

H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.  
ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Kitto J.



H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION  
v.

ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Kitto J.

accounting period constituted the item ordinarily described on the liabilities side of a balance sheet as paid-up capital, excluding, of course, any amounts which were not paid up in money or by other valuable consideration.

Section 24 (1) (a) has nothing to do with the kind of money or other valuable consideration by means of which payment was made for the shares; its function is to include in the calculation of the artificial sum designated "capital employed" the average amount which during the accounting period stood as the company's paid-up capital. This amount, so far as the £3,000,000 is concerned, was £E3,000,000 in respect of each of the accounting periods in question. The shareholders became liable, upon taking up their shares, to contribute £E3,000,000 as "a fixed sum in British sterling" (*Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.* (1)) and this they did. It matters nothing how they contributed that amount—whether in the form of English money, or in its equivalent in the currency of another country, or in kind. The inescapable fact is that the paid-up capital of the company throughout the relevant accounting periods included £E3,000,000. This was the view taken by *Dixon J.*

Counsel for the commissioner, however, raised before the Full Court a new contention, based on the fact that the capital contributed by the members of the company before 1930 was all expended in Australia in the purchase of assets, and otherwise for the purposes of the company's business, and was so expended while the Australian pound was at par with sterling. The argument, as I understand it, amounted to this: if the £E3,000,000 so contributed and expended ought to be converted into £A3,750,000 for the purposes of s. 24 (1) (a), the difference, being £A750,000, must be regarded as lost; in the company's balance sheet there is no recognition of the difference between sterling and Australian currency and therefore no recognition of the loss of the £A750,000; and if the capital, stated in the balance sheet at £3,625,000, should be increased by £750,000 so as to state it in Australian currency, then either consequential reductions must be made in the items on the liabilities side or consequential additions must be made to items on the assets side; and this would result either in a reduction of the amount to be added for accumulated profits under par. (b) of s. 24 (1) or in an increase of the amount to be deducted under par. (i) of that section.

The second alternative may be dismissed at once. Paragraph (i) takes two figures, one to be obtained from the accounts of the



company as they stand, and the other to be ascertained in accordance with sub-ss. (2), (3) and (4) of the section. Neither figure can be altered to allow for a supposed or actual loss.

In my opinion the first alternative should also be rejected, for the reason that the supposed loss of £A750,000 was not in fact sustained. The most that can be said is that that loss would have been sustained if the company's assets had been realized (e.g., in a winding up) while the rate of exchange was £A125 to £E100 and had produced only the amount of the values attributed to them in the balance sheet. No doubt the directors might have considered it prudent to treat this contingent loss as if it were an actual loss; but if for that purpose they had adjusted the books so as to show accumulated profits as diminished by £A750,000, the result would have been to create a hidden reserve of that amount of accumulated profits to cover the loss if and when it should occur. The profits actually accumulated would remain undiminished. Paragraph (b) of s. 24 (1) is concerned with the amount of the accumulated profits, and not with the manner in which they are or might have been treated in the company's books. The amount is expressly made to include amounts standing to the credit of the profit and loss account at the commencement of the accounting period, but is not confined to amounts disclosed as accumulated profits in the balance sheet. All profits which in fact have been and remain accumulated must be brought into the calculation; and the possibility, or even the probability, that in the event of liquidation the proceeds of realization would prove insufficient to provide, after the return in full of the paid-up capital, a surplus equal to the amount of the accumulated profits affords no justification for denying that, as things stand, the full amount of accumulated profits is the amount to be brought into the calculation of "capital employed" in compliance with par. (b).

In my opinion the appeal should be dismissed.

*Appeal dismissed.*

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

Solicitors for the respondent, *Moulden & Sons*.

B. H.

H. C. OF A.  
1950.

FEDERAL  
COMMISSIONER OF  
TAXATION

v.

ADELAIDE  
ELECTRIC  
SUPPLY  
CO. LTD.

Kitto J.