[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

WADE . . . . . RESPONDENT.

H. C. OF A. 1951.

PERTH, *Sept.* 10; MELBOURNE, *Nov.* 5.

Dixon, Fullagar and Kitto JJ.

Income Tax (Cth.)—Assessment—Assessable income—Capital receipt deemed income—Trading stock—Livestock—Compensation moneys received on compulsory destruction of cattle—"Received by way of . . . indemnity" in respect of loss of trading stock—"Disposal" of trading stock—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *ss.* 26 (*j*), 28, 32, 36 (1) (8) (*a*)

Upon the compulsory destruction under the *Milk Act* 1946-1947 (W.A.) of certain diseased dairy cattle, W., a dairy farmer, received the sum of £2,016 by way of compensation. He subsequently expended the sum of £1,886 in replacing the cattle destroyed. In making his assessment for the relevant year of income, the Commissioner of Taxation added the sum of £2,016 to the amount shown in the livestock schedule in W.'s return under sales and the sum of £1,886 to the amount shown under purchases, thus increasing the net amount received from the livestock account in respect of the excess of £2,016 over £1,886.

Held that the sum of £2,016 was properly taken into account in assessing W.'s assessable income; by *Dixon* and *Fullagar* JJ. (*Kitto* J., *contra*), on the ground that, even apart from s. 26 (*j*) of the *Income Tax Assessment Act* 1936-1947, inasmuch as by virtue of ss. 28 and 32 of the Act dairy cattle must be taken into account as trading stock, the receipt of £2,016 must be treated as receipt of an item on account of revenue; and, by *Kitto* J., on the ground that the sum of £2,016 was "received by way of . . . indemnity . . . in respect of any loss of trading stock which would have been taken into account in computing taxable income" within the meaning of s. 26 (*j*) of the Act.

Held, also, by *Dixon* and *Fullagar* JJ., that the natural meaning of the words in s. 36 (1) of the Act, "where the whole or any part of the assets of a business carried on by a taxpayer is disposed of by sale or otherwise howsoever, whether for the purpose of putting an end to the business or any part thereof or not", does not cover the intervention of governmental authority to destroy the assets.

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Per Kitto J.: The commissioner was not precluded, on appeal, from relying on s. 26 (*j*) of the Act, although he had not referred to it when making his assessment.

Observations of *Latham* C.J. and *Starke* J. in *Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation*, (1944) 7 A.T.D. 333, at pp. 344, 352, explained.

APPEAL under *Income Tax Assessment Act.*

Michael Wade, of Osborne Park, Western Australia, carried on business as a dairy farmer. During the year of income ending 30th June 1948, 110 of his dairy cows were condemned and slaughtered under Part VI. of the *Milk Act* 1946-1947 (W.A.), and he received by way of compensation the sum of £2,016. In the same year of income he purchased by way of replacement 116 dairy cows at a cost of £1,986. In his return for the year of income in question he treated the six cattle as a purchase of stock and showed the amount in his livestock account. He excluded from his revenue account the receipt of the £2,016 and also the cost of replacing the 110 cows which were destroyed, viz., £1,886.

In making his assessment for that year of income the Commissioner of Taxation added the £2,016 to the amount shown in the livestock schedule in Wade's return under sales and the £1,886 to the amount shown under purchases, thus increasing the assessable income derived from the livestock account by an amount of £584. This increase resulted from : (a) including the cost price of the 110 cattle purchased by way of replacement in the livestock account for the purpose of calculating the average cost of closing stock, resulting in an additional £454 ; and (b) adding the profit derived from the receipt of the compensation, being the difference between £2,016 and £1,886, i.e., £130.

Wade objected to this assessment, and the Board of Review upheld his objection in so far as it related to the sum of £130.

From this decision the commissioner appealed to the High Court.

The notice of appeal set forth the following as being the questions of law involved :—

1. Whether the condemnation and killing of the said cattle and the receipt of £2,016 as compensation was a disposal of trading stock within the meaning of s. 36 (1) of the *Income Tax Assessment Act* 1936-1947.

2. Whether the said sum of £2,016 was an amount received by the respondent by way of insurance or indemnity for or in respect of any loss of trading stock which would have been taken into

account in computing assessable income within the meaning of s. 26 (*j*) of the *Income Tax Assessment Act* 1936-1947.

3. Whether the Board of Review was right in holding that it was not open to it to find that the said amount of £2,016 could have been included in the respondent's assessable income under s. 26 (*j*) of the *Income Tax Assessment Act* 1936-1947.

N. P. Lappin, for the appellant. Section 36 of the *Income Tax Assessment Act* 1936-1947 applied. The dictum of *Latham* C.J. in *Farnsworth* v. *Federal Commissioner of Taxation* (1) is not exclusive. Section 26 (*j*) applied. Assessable income is defined to mean all the amounts which by the provisions of the Act are included in assessable income. The amount received by way of compensation is assessable income in the absence of any special provisions such as in s. 36 or s. 26 (*j*). The commissioner clearly indicated that the amount concerned was regarded as assessable income. The Board of Review is concerned as to whether the amount is assessable income not as to the precise nature of the receipt. *Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation* (2) was not concerned with an ordinary income tax assessment but with a special assessment.

The respondent did not appear upon the hearing of the appeal.

Cur. adv. vult.

Nov. 5.

The following written judgments were delivered:—

DIXON AND FULLAGAR JJ. This is an appeal by the Commissioner of Taxation from a decision of a Board of Review. By the decision of the Board the assessment of the taxpayer was reduced in consequence of the exclusion from the assessable income of an amount of £130. There was no appearance upon the appeal for the respondent taxpayer, who doubtless regarded the amount of the consequential reduction of tax as insubstantial.

The taxpayer is a dairy farmer. During the year of income, namely, the year ending 30th June 1948, 110 of his dairy cows were condemned under Part VI. of the *Milk Act* 1946-1947 (W.A.) (No. 27 of 1946 and No. 74 of 1947). Under s. 46, which is included in Part VI., when a test is applied and any head of dairy cattle kept by a licensed dairyman is found to be suffering with disease, an expression which includes tuberculosis, the Chief Inspector of Stock must report the fact and cause the diseased dairy cattle

(1) (1949) 78 C.L.R. 504, at p. 514.

(2) (1944) 7 A.T.D. 333, at pp. 344, 352.

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to be removed immediately from the herd of dairy cattle kept by the licensed dairyman and to be destroyed as soon thereafter as practicable. By s. 53 the dairyman whose cattle are thus destroyed may, subject to certain conditions, claim against the Milk Board constituted by the Act for payment of compensation out of the compensation fund in respect of the loss sustained by him by the destruction of the dairy cattle. The conditions require that he must make a claim for compensation and must make it within twenty-one days after the destruction of the cattle, that if the cattle were visibly suffering from disease he must have given notice thereof as required by law, that he must not have been convicted of trafficking in diseased cattle with a view to claiming compensation, and, since the enactment of the *Milk Act Amendment Act* 1948 (W.A.), that he must have contributed to the compensation fund during the year in which his cattle are tested. Until that enactment contribution by a licensed dairyman to the compensation fund was compulsory, but by an amendment of s. 60 contributions at a prescribed rate became voluntary. By a consequential amendment of s. 53, however, only those who contribute may obtain compensation. The condemnation of the taxpayer's cattle appears to have taken place before these amendments came into operation.

The compensation fund, the full name of which is the Dairy Cattle Compensation Fund, is made up of moneys paid pursuant to an appropriation by Parliament, of penalties recovered under the Act and of contributions payable to the fund by licensed dairy farmers. A person claiming compensation from the fund must make his claim in writing and serve it upon the board within the prescribed twenty-one days. The board must then admit it in whole or in part or reject it. If the board rejects the claim in whole or in part and no agreement is reached the claimant may appeal to the Minister against the refusal of the board to pay him the amount of compensation which he claims. The Minister must then appoint a competent person to act as arbitrator and hear and determine the appeal. The arbitrator may make such order in relation to the claim as he thinks just. His decision is final and conclusive. There is, however, a limit of £20 upon the amount payable in respect of the destruction of any one diseased animal.

In the present case the taxpayer received from the compensation fund £2,016 in respect of the 110 dairy cows which were destroyed. By way of replacement he bought 116 dairy cattle, for which he paid £1,986. In his return of income for the year of income in which this took place he treated the extra six dairy cattle as a

purchase of stock and showed the amount in his livestock account; but he excluded from his revenue account the receipt of £2,016 compensation for the 110 cattle condemned. Correspondingly he excluded the cost of the 110 cattle by which he replaced them, an amount of £1,886, placing a note on his return that this was a purely capital transaction. By his assessment the Commissioner of Taxation, on account of this transaction, made an increase in the net amount obtained from his livestock account. The increase amounted to £584. To this increase the taxpayer objected, although he erroneously stated the figure at £569.

The increase of £584 is composed of two parts. By s. 28 (2) of the *Income Tax Assessment Act* 1936-1947 (Cth.) it is provided that where the value of all trading stock on hand at the end of the year of income exceeds the value of all trading stock on hand at the beginning of that year the assessable income of the taxpayer shall include the amount of the excess. By the definition of "trading stock" contained in s. 6 (1) it includes all livestock. Section 32 provides that the value of livestock to be taken into account at the end of the year of income shall be, at the option of the taxpayer, its cost price or market selling value, and where a taxpayer does not exercise his option the value to be taken into account shall be the cost price. The taxpayer in the present case did not exercise his option. The combined effect of s. 28 (2) and s. 32 is that the amount of his livestock on hand at the beginning of the year of income and the amount at the end of the year of income must be compared and the excess value of the second over the first must be taken into his assessable income. The Board of Review applied these provisions and decided that the amount by which the value of the livestock at the end of the year of income, including the cost of the 110 cattle bought by way of replacement, exceeded the value of the livestock on hand at the beginning of the year must be taken into the assessable income. This amount was £454. To that extent the decision of the Board of Review was in favour of the commissioner. The residue of the sum of £584 represents the amount in question upon this appeal, namely, £130. That amount consists of the excess of the £2,016 received by the taxpayer as compensation for the destruction of his cattle over the £1,886 which he expended in purchasing the 110 dairy cattle to replace the dairy cattle destroyed. This amount the Board of Review regarded as not forming part of the taxpayer's assessable or taxable income.

In support of his appeal against this decision the commissioner relied primarily on s. 36 (1) and (8) (*a*). Section 36 (1) provides

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that " where the whole or any part of the assets of a business carried on by a taxpayer is disposed of by sale or otherwise howsoever, whether for the purpose of putting an end to the business or any part thereof or not, and the assets disposed of include any property being trading stock . . . the value of that property shall be included in his assessable income, and any person acquiring that property shall be deemed to have purchased it at the amount of that value." Sub-section (8) (*a*) provides that, for the purposes of the section, " (*a*) the value of any property or live stock shall be—(i) the market value of the property or live stock on the day of the disposal; or (ii) if, in the opinion of the Commissioner, there is insufficient evidence of the market value on that day—the value which in his opinion is fair and reasonable."

The definition of " trading stock ", as has already been mentioned, brings " live stock " within s. 36 (1). There is a definition of livestock which, by inference, makes it clear that all animals are to be included in the case of a business of primary production. Notwithstanding, therefore, the taxpayer's claim that the destruction and replacement of 110 head of his dairy herd is a capital transaction, it is clear enough that for the purposes of s. 36 (1) the cattle fall within the expression " trading stock ".

The question, however, whether s. 36 (1) applies to the destruction of the cattle depends not on that expression but on the expression " disposed of by sale or otherwise ". It is to be noticed that the provision relates to the whole or part of the assets of the business carried on by a taxpayer and that, although the expression " is disposed of by sale or otherwise howsoever " is not followed by the words " by the taxpayer ", it is nevertheless accompanied by expressions which at least include acts on his part, namely, " for the purpose of putting an end to the business or any part thereof ". The words " disposed of " are not words possessing a technical legal meaning, although they are frequently used in legal instruments. Speaking generally, they cover all forms of alienation. Section 36 (1) no doubt has a very wide application, but its operation should not be extended to cases which do not fall within the natural meaning of the words. In rejecting the application of the provision in the present case the Board of Review relied upon the passage in the judgment of the Chief Justice in *Farnsworth* v. *Federal Commissioner of Taxation* (1):—" Section 36 relates to the disposal of the assets of a business, including, *inter alia*, trading stock. The terms of the section show that it was intended to be applied to a case where there was a disposal of the

(1) (1949) 78 C.L.R. 504, at p. 514.

assets of a business as such whether in whole or in part, and whether or not the assets were disposed of because the seller was going out of business or because the business was sold to another person. The section is intended to deal with a walk-in walk-out sale, with a clearing sale, and with a transaction which represents, not an ordinary sale of goods in the course of carrying on a business, but a disposal of the assets of the business so that the business is no longer being carried on by the person who has disposed of it."

This passage has been taken to mean that the application of the section was limited to the transactions mentioned by his Honour and accordingly it has been suggested that, for example, the section cannot apply to gifts or sales for an inadequate consideration otherwise than in the ordinary course of trade. It seems probable that his Honour was doing no more than illustrating the general purpose and scope of the section and did not intend to make an exhaustive catalogue of the transactions to which the section could apply. The actual decision of the Court was that the section had no application to the regular disposal of trading stock in the ordinary course of carrying on a business. But to say that s. 36 has possibly a wider application than to the specific instances given by the Chief Justice is one thing. It is another thing to hold that it applies to the compulsory slaughter of diseased cattle forming part of trading stock. The natural meaning of the opening words of the section, namely, " where the whole or any part of the assets of a business carried on by a taxpayer is disposed of by sale or otherwise howsoever, whether for the purpose of putting an end to the business or any part thereof or not ", does not cover the intervention of governmental authority to destroy the assets. Such a thing involves no voluntary act on the part of the taxpayer, no alienation of property on his part and, except for the fact that it is authorized by law and compensation is payable, can hardly be differentiated from the destruction of the assets by external force or accident.

For these reasons s. 36 (1) ought not to be interpreted as applying to such a case.

The Commissioner of Taxation next relied on s. 26 (*j*). This is a provision that the assessable income of the taxpayer shall include " any amount received by way of insurance or indemnity for or in respect of any loss—(i) of trading stock which would have been taken into account in computing taxable income; or (ii) of profit or income which would have been assessable income, if the loss had not occurred, and any amount so received for or in respect of any loss or outgoing which is an allowable deduction."

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It is suggested that the compensation moneys constitute an indemnity in respect of a loss of trading stock which would have been taken into account in computing the taxable income. Again, the definition of " trading stock ", considered with the definition of livestock, brings the dairy cattle within the expression. The provisions of ss. 28 and 32 to which reference has already been made show that the dairy cattle would have been taken into account in computing the taxable income had they not been destroyed. The question which this contention raises is whether the amount of compensation can be considered an indemnity in respect of a loss of such trading stock. No doubt s. 26 (*j*) is primarily directed to the recovery under a policy of insurance or other contract of indemnity of the amount of any loss. But the word " indemnity " is not qualified and it expresses a notion which, it may be said, the " compensation " awarded under the *Milk Act* 1946-1947, if correctly and adequately fixed, ought to satisfy.

It is, however, unnecessary to pursue the question whether s. 26 (*j*) in itself covers such a payment as that in question in this case, although it is material to notice that the clear policy exemplified by s. 26 (*j*) is to place moneys recovered representing trading stock (as defined) in the same position as the trading stock the moneys represent. It is unnecessary to pursue the question whether s. 26 (*j*) directly applies, because the commissioner's appeal was supported upon another ground which seems well founded. This ground is that, inasmuch as dairy cattle as livestock must be taken into account under ss. 28 and 32 as trading stock, compensation must come into the account as representing the livestock in order to make up the taxable income. The principle relied upon is that moneys recovered from any source representing items of a revenue account must be regarded as received by way of revenue. A short passage may be cited from the speech of Lord *Macmillan* in *Van Den Berghs Ltd.* v. *Clark* (1) as illustrating the application of the principle involved :—" . . . a sum awarded by the War Compensation Court to a company carrying on the business of brewers and wine and spirit merchants in respect of the compulsory taking over of its stock of rum by the Admiralty was held to be a trade or income receipt : *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* (2) ; so was a sum paid to a shipbuilding company for the cancellation of a contract to build a ship : *Short Bros., Ltd.* v. *Commissioners of Inland Revenue* (3) ; so was a lump sum payment received by a quarry

(1) (1935) A.C. 431, at p. 440.
(2) (1927) 12 Tax Cas. 927.
(3) (1927) 12 Tax Cas. 955.

company in lieu of four annual payments in consideration of which the company had relieved a customer of his contract to purchase a quantity of chalk yearly for ten years and build a wharf at which it could be loaded: *Commissioners of Inland Revenue* v. *Northfleet Coal and Ballast Co.* (1); so was a sum recovered from insurers by a timber company in respect of the destruction by fire of their stock of timber: *J. Gliksten & Son* v. *Green* " (2).

In *Commissioners of Inland Revenue* v. *Executors of Williams* (3), affirmed (4), there is a passage in which Lord *Greene* provides further illustrations, illustrations covered probably in the Australian Act by s. 26 (*j*):—" Not merely are the profits derived from the sale of goods in which a person trades of a revenue character, but insurance moneys received in respect of the loss of trade goods are proper receipts to appear in a revenue account. If a company insures its stock of goods against fire and that stock is destroyed by fire, however great and valuable it may be, the receipts must be treated in exactly the same manner as receipts from a sale of the goods would have been treated. The trader, it is true, as has been said, does not trade in fires but in goods, but, if he disposes of the whole of his stock by sale or if the whole of his stock is destroyed by fire and the insurance money is received, there can be no ground for differentiating for tax purposes between the purchase money and the insurance money."

In the present case the only difficulty in the application of the principle illustrated by these passages is that a dairy herd does not consist of animals in which the dairy farmer trafficks. The taxpayer's primary source of income was the production of milk. His return for the purposes of income tax in this case shows that his substantial income is set down as the sale of milk, cream, butter and cheese. The amount shown as obtained from the sale of his dairy cattle is comparatively insubstantial. The Federal Act, however, places all animals in the category of trading stock in the case of taxpayers carrying on a business. It requires the animals on hand at the beginning and end of the period to be taken into account and inferentially the purchase and sale of such animals. Does it not follow that, apart altogether from the operation of specific provisions such as s. 36 (1) and s. 26 (*j*), sums of money which are received in respect of such animals should also be brought into account? The principle which the commissioner invokes relates to receipts which represent or replace stock the value of which must be taken into the trading account forming

(1) (1927) 12 Tax Cas. 1102.
(2) (1929) A.C. 381.
(3) (1943) 1 All E.R. 318, at p. 320.
(4) (1944) 1 All E.R. 381.

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the basis of the ascertainment of taxable income. Whether assets of a given description form stock which must be taken into that account depends on other principles or rules the application of which is determined by the income tax law. The *Income Tax Assessment Act* 1936-1947 specifically provides, by means of s. 28 and the definitions in s. 6 (1) of " trading stock " and " live stock ", that animals such as those destroyed shall be taken into account as stock for the purpose of the ascertainment of taxable income. By so providing the Act brings them under the operation of the principle which requires that a receipt representing an asset brought into the income account must be treated as income. It is not a sufficient answer to say that when s. 28 and the definitions in s. 6 (1) place a dairy herd in the position of stock in trade their operation is artificial. What should be treated as stock in trade is for the legislature to determine. As it has decided that such animals must be taken into account as trading stock, it follows that the compensation representing them must be treated as an item on account of revenue for the purpose of ascertaining the taxable income.

For these reasons the appeal should be allowed; the decision of the Board of Review should be set aside and in lieu thereof the taxpayer's appeal to the Board of Review should be dismissed. In the circumstances of the case the commissioner should abide his own costs of the appeal to this Court.

KITTO J. I agree that the appeal should be allowed.

I must confess to some difficulty in accepting the view that the fact that dairy cattle, which are not trading stock according to ordinary conceptions, are required by force of a definition to be taken into account under ss. 28 and 32 of the *Income Tax Assessment Act* 1936-1947 (Cth.) as trading stock, affords a sufficient reason for bringing compensation received in respect of their compulsory destruction into the computation of taxable income. Cases such as *J. Gliksten & Son Ltd.* v. *Green* (1) establish beyond dispute that when trading stock (in the ordinary sense) is replaced by money, the money must be acknowledged as possessing the character of a trading receipt, whether the replacement resulted from a sale or from any other event. But it is not clear to me that, where a taxing Act requires capital assets to be treated as trading stock for the purposes of provisions such as are found in ss. 28 and 32, it necessarily follows that money which replaces those capital assets is to be treated as having been received on revenue

(1) (1929) A.C. 381.

account. It may be thought that a provision producing that result would be a reasonable corollary; but I should hesitate to supply such a provision by implication.

I think it of some importance to observe that the application of ss. 28 and 32 has nothing to do with the profit and loss account of the business. That account produces its own balance, which forms an item to be taken into the computation of taxable income. Under ss. 28 and 32 a separate account is required, the balance of which forms another item in the computation of taxable income. Where trading stock (in the ordinary sense) is sold or otherwise turned into money, the proceeds must be reflected in the profit and loss account. Where assets which, though of a capital nature, are included in trading stock by definition are turned into money, the proceeds, since they are not a revenue receipt according to ordinary principles, cannot be reflected in the profit and loss account. They must be brought into the calculation of taxable income, if at all, because the relevant legislation so requires. But I find no such requirement in the *Income Tax Assessment Act*, apart from s. 26 (*j*). I should mention that by virtue of s. 51 (2) expenditure in the purchase of stock which, though by nature capital assets, are "used . . . as trading stock"—which I understand to mean, are used in a business so as to be, by virtue of the definition, trading stock of that business for the purposes of ss. 28 and 32—is deemed not to be an outgoing of capital or of a capital nature. This appears to me to tend against the view that by inference from s. 28 and its accompanying sections purchases and sales of such stock ought to be treated as revenue items.

However this may be, I am of opinion that this appeal should be allowed on the ground that the compensation money which the taxpayer received in the year of income was, within the meaning of s. 26 (*j*), "received by way of . . . indemnity for or in respect of any loss—(i) of trading stock which would have been taken into account in computing taxable income; . . . if the loss had not occurred."

The words "by way of . . . indemnity" describe the character of the receipt, and in my opinion they may be satisfied as well by a receipt pursuant to a statutory right as by a receipt under a contract. Section 25 (*c*) of the *Income Tax Assessment Act* 1922-1934 (Cth.) allowed a deduction in respect of any loss or expense recoverable under any contract of insurance or indemnity. The language of s. 26 (*j*) of the present Act is significantly wider.

The words "any loss of trading stock" are wide enough to include loss by any means, and I see no reason for denying that a

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loss by compulsory destruction is within their meaning. By compulsory destruction under the provisions of the *Milk Act* 1946-1947 (W.A.), the taxpayer lost 110 dairy cattle which, under ss. 28 and 32 of the *Income Tax Assessment Act*, would have been taken into account in computing his taxable income if the loss had not occurred. He received £2,016 under s. 53 of the *Milk Act* as "compensation in respect of the loss sustained by him by the destruction of the said dairy cattle". The only question is whether a receipt of this character is a receipt "by way of indemnity" in respect of the loss of the dairy cattle. I should have thought the description entirely apt. The purpose and effect of the receipt was, to the extent of its amount, to save the taxpayer harmless from the loss he sustained by the destruction of his cattle; in other words, to provide *pro tanto* indemnification in respect of the loss of the cattle: cf. *Stebbing* v. *Metropolitan Board of Works* (1); *Minister for Lands* v. *Ricketson* (2).

The appeal relates only to the balance of £130 remaining after subtracting from the £2,016 an amount of £1,886 which the taxpayer expended in the year of income in replacing the cattle destroyed. In making his assessment, the commissioner added the £2,016 to the amount shown in the livestock schedule in the taxpayer's return under sales, and he added the £1,886 to the amount shown under purchases. To describe the £2,016 as proceeds of sale is, of course, inaccurate. In the notice of assessment and the explanatory documents attached to it there was nothing to suggest that the commissioner had relied upon s. 26 (*j*). For that reason, the Board of Review considered that the commissioner was not entitled to rely upon s. 26 (*j*) as justifying his action in treating the £2,016 as assessable income; and they referred to certain observations made by *Latham* C.J. and *Starke* J. in *Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation* (3). I do not understand those observations to mean more than this, that where there are two provisions of an assessment Act, each giving the commissioner a power to make an assessment, and each creating a liability to tax in the event of the power it confers being exercised, an assessment made in exercise only of the power given by one of those sections cannot be supported as effective under the other. The situation in the present case is quite different. If the £2,016 formed part of the taxpayer's assessable income by reason of s. 26 (*j*), as I think it did, its inclusion in his assessable income in the course of making

(1) (1870) L.R. 6 Q.B. 37, per *Lush* J. at p. 46.
(2) (1898) 19 L.R. (N.S.W.) 281, at pp. 286, 287; 15 W.N. 189.
(3) (1944) 7 A.T.D. 333, at pp. 344, 352.

the assessment was right, whether or not the commissioner referred to s. 26 (*j*), and even though he described the amount inaccurately. No conduct on the part of the commissioner could operate as an estoppel against the operation of the Act: cf. *Commissioners of Inland Revenue* v. *Brooks* (1); *Maritime Electric Co., Ltd.* v. *General Dairies, Ltd.* (2).

Appeal allowed. Decision of the Board of Review set aside. In lieu thereof order that the assessment be confirmed.

No order as to costs.

Solicitor for the appellant: *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent: *Dwyer, Durack & Dunphy.*

F. T. P. B.

(1) (1915) A.C. 478, at pp. 491, 492. (2) (1937) A.C. 610.