16th Australian Field Regiment and later of the 2/1st Australian Field Regiment, as a seconded officer.

Section 23 (*s*) (ii) (1) of the *Income Tax Assessment Act* 1936-1945 exempts from income tax the pay and allowances earned by a person as a member of the Defence Force (i) out of Australia; and (ii) in Australia if, within a period comprising the year of income and twelve months thereafter he leaves Australia for service out of Australia, and during the period of twelve months immediately following the date on which he leaves Australia, or commences so to serve, is on service out of Australia for a continuous period of not less than ninety days: provided that this shall not apply to exempt such pay and allowances of a person who does not serve as "a member of a body, contingent or detachment of that Force engaged on service out of Australia".

It was conceded by the commissioner that the taxpayer was entitled to the exemption if his service in London was as a member of an Australian Defence Force body, contingent or detachment engaged in service out of Australia. He had complied with the other conditions prescribed.

The taxpayer was not serving in London with any other member of the Australian Defence Force; so he does not claim that while there he was a member of a body or contingent engaged in service out of Australia. But he does contend that he was himself a detachment of the Australian Defence Force. A detachment can consist of one person. I understand the commissioner does not dispute that. But he contended that in the proviso to s. 23 (*s*) (ii) (1) "detachment" involves a plurality of persons, in view of its association with the words "body" and "contingent". Whilst there may be something to be said for the application of the *ejusdem generis* rule, still I hesitate to apply it if it is correct to speak of "a member of a detachment" where the detachment consists of only one person. Now I think the expression "A member of a detachment, in fact the only member," would be unobjectionable, and so I see no reason why plurality should necessarily be attributed to "detachment" in s. 23 (*s*) merely because of its association with "body" and "contingent"; more particularly as that construction could work injustice in some cases. A detachment of one might perform military service of greater merit and value than a detachment of several called upon to perform the same kind of service, and it would be absurd and unjust that the individual constituting the detachment of one should be held disentitled because he acted alone.

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But the commissioner contended here—although he appears not to have done so before the Board of Review—that "service" as used in s. 23 (*s*) meant service in the face of the enemy, and for this he relied on s. 23 (*s*) (ii) (2), which extended the exemption in question to the pay and allowances of a member of an air crew of a squadron in Australia, if the role of the squadron was operational and involved flights out of Australia. Under this provision a member of an air crew would have been entitled to the exemption even if he made no flight out of Australia; and in any case a flight might have been operational, although made far from enemy activity. Moreover, service anywhere outside Australia in a sea-going ship was also sufficient to secure the exemption. But accepting these provisions for members of air crews as indicating the kind of service that Parliament contemplated when enacting s. 23 (*s*) (ii), still it was not contended by the commissioner, and could not, I think, properly be contended, that the exemption was confined to those engaged in actual combat. So to confine the exemption would have been to exclude from it army medical personnel as well as those engaged in necessary administrative work in the face of the enemy. Such administrative work might have included the compilation of instructions as to the control of fire-power against that enemy, and still would have been military service, and if rendered in the Pacific outside Australia during the war would, I think, have been of an operational character. But if so it would not have ceased to possess that character because it was rendered in London, which, when the taxpayer was there, was still under attacks by the common enemy, or threats of attacks, although dwindling, and, although the gun-fire instructions which the taxpayer was helping to compile might have been on a comprehensive scale and for the most extensive use in the war then being waged on a world-wide scale.

In those circumstances the magnitude of the instructions and the extent of their proposed use could not have deprived this military duty of its operational character.

It is not, I think, material that the sub-committee in London was not on the Australian War Establishment. A detachment of the Australian Defence Force could co-operate with the forces of another Power without losing its identity as a portion of the Australian Defence Force on the special service involved. Here the special service was of a representative nature and necessarily precluded loss of identity. The taxpayer was not on the sub-committee simply as Major Rickard; he was there as the representative of the Australian Defence Force and as a part of it. The

sub-committee's task, comprehensive as it was, still bore directly on operations against the common enemy and was discharged under his attacks, or threat of attacks.

So far I have assumed that operational service was required to secure the exemption. But I do not think there is a sufficient indication of that in the provision for members of air crews, or elsewhere in the Act. There is at all events no necessary implication that operational service was required and so I think that military service of any kind sufficed.

I think then the taxpayer's service in London was as a detachment of the Australian Defence Force within the meaning of s. 23 (*s*) (ii) (1), and that he was entitled to the exemption claimed by him.

As the sum of £379 was not assessable and the balance of taxpayer's income was under £250, no tax was payable in respect of the year in question. See s. 81 (1) (*a*).

The appeal is dismissed, the decision of the Board of Review affirmed, and the assessment set aside.

The appellant commissioner will pay the respondent taxpayer his costs of this appeal.

*Appeal dismissed. Decision of the Board of Review affirmed. Assessment set aside. Appellant to pay the respondent's costs of appeal.*

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

Solicitor for the respondent, *J. D. L. Gaden*.

J. B.

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION APPELLANT;

AND

WESTERN SUBURBS CINEMAS LIMITED. RESPONDENT.

H. C. OF A. 1952.

SYDNEY, *May* 5.

MELBOURNE, *June* 11.

KITTO J.

*Taxation—Assessable income—Deduction—Theatre—Ceiling—Portion—Repairs—Dangerous condition of ceiling—Entire new ceiling installed—Cost—Deductibility of estimated cost of repairs—Expenditure—Nature—Capital or income—Question of law—Income Tax Assessment Act* 1936-1947 (*No.* 27 *of* 1936—*No.* 11 *of* 1947), *ss.* 53, 196 (1).

Section 53 of the *Income Tax Assessment Act* 1936-1947 in effect provides that expenditure (not being expenditure of a capital nature) incurred for repairs to income-producing property shall be an allowable deduction.

*Held*, that where an expenditure incurred in consequence of a state of disrepair is of a capital nature, it is not permissible to treat part of that expenditure as an allowable deduction under s. 53 on the ground that the state of disrepair could have been dealt with by incurring non-capital expenditure equal to that part, or on the ground that some items which entered into the expenditure incurred would have entered into a non-capital expenditure by means of which the state of disrepair could have been dealt with.

*Highland Railway Co.* v. *Balderston*, (1889) 2 Tax. Cas. 485, and *Rhodesia Railways Ltd.* v. *Income Tax Collector, Bechuanaland*, (1933) A.C. 368, distinguished.

Expenditure incurred in the provision of a new ceiling for a cinema theatre *held*, in the circumstances, to be of a capital nature.

APPEAL under *Income Tax Assessment Act.*

The Commissioner of Taxation appealed under s. 196 of the *Income Tax Assessment Act* 1936-1949 to the High Court from a decision of the Board of Review allowing an objection by Western Suburbs Cinemas Ltd. to its assessment by the commissioner for income tax in respect of the year ended 30th September 1947 (1).

(1) (1950) 1 T.B.R.D. 165.

The appeal was heard by *Kitto* J., in whose judgment hereunder the material facts and relevant statutory provisions are set forth.

*K. W. Asprey*, for the appellant.

*R. Else-Mitchell*, for the respondent.

*Cur. adv. vult.*

KITTO J. delivered the following written judgment:—

In this case the Commissioner of Taxation appeals against a decision of a Board of Review upholding an objection lodged by the respondent company against an assessment of the income tax payable by it in respect of income derived during the year ended 30th September 1947.

The company carries on business as a motion picture exhibitor in six suburban theatres, including the Melba Theatre, Strathfield. The company's return of income of that year included a profit and loss account in which there was a debit of £4,463 3s. 4d., described as "Major repairs written off: Repairs as per Architect's Certificates vide Schedule 'B'". Schedule B was a document headed "Dissection of Architects Certificates Herewith", and it showed a total sum of £4,463 3s. 4d. in respect of repairs as distinguished from improvements, that total sum including £1,509 9s. 0d. in respect of the Melba Theatre, Strathfield. With Schedule B was an architect's certificate dated 1st December 1947 which certified that of a total sum of £15,066 10s. 11d. expended on account of work carried out at the Melba Theatre, Strathfield, a number of items which in fact total £1,509 9s. 0d. were expended on repairs and replacements, the balance being attributed to certain "other works". Amongst the items totalling £1,509 9s. 0d. was an item of £603 0s. 0d., which appeared thus:—"The existing Celotex ceiling was in a bad state of repair, and it was found that the cost was not warranted as the work would be unsatisfactory in the way of repairs so a new fibro ceiling was installed. To have carried out repairs including scaffold to the old ceiling we estimate the cost would have been £603 0s. 0d."

This item the commissioner disallowed, his disallowance of it being reflected in the adjustment sheet accompanying the notice of assessment, which stated: "Add . . . Replacement of Celotex ceiling with Fibro Ceiling—Melba Theatre £603."

The company by its public officer lodged an objection in writing against the assessment. Under s. 185 of the *Income Tax Assessment Act* 1936-1947 it was necessary for the objection to state

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"fully and in detail the grounds" relied upon. The objection contained only the following statement of grounds :—"The grounds on which I rely are :—1. That the sum of £603 being that proportion of cost of new fibro ceiling estimated as being cost of repairing the old Celotex ceiling at the Melba Theatre, Strathfield, should have been allowed by the Commissioner as an allowable repair. 2. The ceiling was in a dangerous condition and the purpose of the company was to restore the ceiling to its original condition. Celotex was not and still is not available and as fibro was procurable, it was decided to use this material. The cost of repairing the existing Celotex ceiling with fibro would have been costly and the job would still not have been completely satisfactory, consequently it was decided to replace the whole ceiling with fibro. The amount of £603 claimed as repairs represents the estimated cost of repairing that portion of the ceiling which was considered dangerous by Cowper, Murphy and Associates, the Company's Architects."

The objection was disallowed and the company requested that it be referred to a Board of Review. The board by a majority upheld the objection and ordered that the assessment be amended accordingly. From that decision the commissioner appeals to this Court. The appeal is competent only if the decision of the board involved a question of law : s. 196 (1). In my opinion the decision involved a question of law, the question being whether, on the facts alleged in the objection, the estimated sum of £603 was in law an allowable deduction under the Act. The relevant provision of the Act is contained in s. 53 (1) in these terms :—"(1) Expenditure incurred by the taxpayer in the year of income for repairs, not being expenditure of a capital nature, to any premises, or part of premises, plant, machinery, implements, utensils, rolling stock, or articles held, occupied or used by him for the purpose of producing assessable income, or in carrying on a business for that purpose, shall be an allowable deduction."

Now, what the objection alleged plainly enough was that a portion of the ceiling of the Melba Theatre was considered by the company's architects to be, and in fact it was, in a dangerous condition ; that it could have been repaired with celotex if that material had been available, or with fibro ; but, because celotex was not available and to effect repairs with fibro would have been costly and not completely satisfactory, the company decided to replace the whole ceiling with a new fibro ceiling ; this replacement cost an unspecified amount which is not claimed to be an allowable deduction ; but the company claims that a lesser amount of £603 is an allowable deduction, that amount being the estimated

cost which would have been incurred in repairing the ceiling if it had in fact been repaired instead of being replaced.

The evidence before me gave a picture rather different from that suggested by the company's grounds of objection. The principal witness was the company's architect Mr. Roberts, who was corroborated by the builder who installed the new ceiling. It appears that the old ceiling was mainly of an American material called Ten Test. The ceiling was not flat but consisted of a flat centre portion, and side portions sloping to the walls. The side portions were of Ten Test, and the flat centre portion consisted of lattice panels surrounded by Ten Test. The Ten Test was found by the architect, on inspection in 1946, to have become dry, buckled and of a biscuit-like brittleness. It was affixed to the ceiling joists with panel pins, many of which had drawn through the sheets of Ten Test. The lattice had become badly bent and buckled, and in many places it had left the ceiling joists.

The architect came to the conclusion that it was really impossible to repair the ceiling at all. Ten Test was not available, but it does not appear that celotex, which was the Australian rival to Ten Test, or another material of a similar kind, caneite, was unobtainable. However, the architect would not use any material of this type for the ceiling, because experience had satisfied him that it was unsatisfactory for that kind of work. He employed, not fibro, but fibrous plaster, and with that he covered the whole area formerly covered by Ten Test and lattice. The fibrous plaster was affixed to new battens, which in turn were fixed to new ceiling joists : and the result was an entirely new ceiling. Fibrous plaster has a much longer life than the celotex type of material ; it is harder, and it also lends itself better to decorative treatment and can be moulded. The new ceiling cost more than £3,000.

The architect gave evidence in support of the estimate of £603. Having made it clear, as I have said, that repair of the ceiling was not practicable, he said that in his opinion an expenditure of £603 would have been necessary in order to prevent the ceiling being dangerous " if it had been possible to repair it ".

Even if, on this evidence, the provision of a new ceiling for the theatre should be regarded as a repair within the meaning of s. 53, I should have thought that the expenditure involved was expenditure of a capital nature and therefore not allowable as a deduction by virtue of that section. To decide whether a particular item of expenditure on business premises ought to be charged to capital or revenue account is apt to be a matter of difficulty, though the difference between the two accounts is clear enough

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as a matter of general statement (*Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (1) ). In this case the work done consisted of the replacement of the entire ceiling, a major and important part of the structure of the theatre, with a new and better ceiling. The operation seems to me different, not only in degree, but in kind, from the type of repairs which are properly allowed for in the working expenses of a theatre business. It did much more than meet a need for restoration; it provided a ceiling having considerable advantages over the old one, including the advantage that it reduced the likelihood of repair bills in the future. The case resembles one of the illustrations given by *Rowlatt* J. in *Mitchell* v. *B. W. Noble Ltd.* (2). As his Lordship there observed, if you say, " I will not have a railing which perpetually falls down or wants repainting; I will abolish it and I will build a brick wall which will not fall down or will not want painting ", that is a capital expenditure. The truth is, I think, that the new ceiling was an improvement to a fixed capital asset and that its cost was a capital charge.

It is clear that this was the view taken by the draftsman of the company's grounds of objection. He did not assert that the whole cost of the new ceiling was an expenditure incurred for repairs of a non-capital nature. On the contrary, he referred to two courses which were open to the company, namely repairing that portion of the old ceiling which was considered dangerous, and replacing the whole ceiling; and he made it clear that the company had chosen the latter course in preference to the former, and accepted the view that the cost incurred was not an allowable deduction. The ground of objection which he stated was that £603 was an allowable deduction because that was the amount which would have been expended if the company had decided to repair the dangerous portion of the ceiling instead of deciding to replace the entirety. To this ground the company was limited before the Board of Review by force of s. 190 (*a*), and as a necessary consequence it is similarly limited on this appeal. I should therefore reject as incompetent, even if I did not think it erroneous, the contention advanced before me that £603 should be treated as an allowable deduction on the ground that it is part of a larger sum to the whole of which s. 53 applies. The commissioner, when considering whether the objection should be allowed, could not reasonably be expected to gather from the written objection that he was being asked to apply his mind to any such contention.

(1) (1938) 61 C.L.R. 337, at p. 360. (2) (1927) 1 K.B. 719, at p. 729.