[HIGH COURT OF AUSTRALIA.]

ARCHER BROTHERS PROPRIETARY LIMITED (IN VOLUNTARY LIQUIDATION) APPELLANT ;
APPELLANT,

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.
RESPONDENT,

H. C. OF A. 1952-1953.

1952.
BRISBANE, *June* 20 ;

1953,
SYDNEY, *May* 1 ;

McTIERNAN J.

BRISBANE, *July*, 31, *Aug.* 1, 3 ;

SYDNEY, *Aug.* 28.

Williams A.C.J., Kitto and Taylor JJ.

Income Tax (Cth.)—Assessable income—Additional tax—Private company—Distributions to shareholders—Dividends—Liquidation during year of income—Income Tax Assessment Act 1936-1948 (*No.* 27 *of* 1936—*No.* 44 *of* 1948), *ss.* 6, 47, 104.*

Section 47 of the *Income Tax Assessment Act* 1936-1948 applies to the winding up of all companies, including private companies within the meaning of Pt. III, Div. 7 of the Act.

Distributions to shareholders made by the liquidator of a private company, to the extent to which they are deemed by s. 47 of the Act to be dividends, are to be regarded as dividends for the purpose of Pt. III, Div. 7 of the Act.

* Section 47 of the *Income Tax Assessment Act* 1936-1948 provides: "(1) Distributions to shareholders of a company by a liquidator in the course of winding up the company, to the extent to which they represent income derived by the company (whether before or during liquidation) other than income which has been properly applied to replace a loss of paid-up capital, shall, for the purposes of this Act, be deemed to be dividends paid to the shareholders by the company out of profits derived by it. (2) Those distributions shall, to the extent to which they are made out of any profits or income, be deemed to have been paid wholly and exclusively out of those profits or that income. (3) For the purposes of this section, 'paid-up capital' does not include the paid-up value of shares which have been issued by the company in satisfaction of dividends which have been paid out of profits arising from the revaluation of assets not acquired for the purposes of re-sale at a profit but includes capital which has been paid up in money or by other valuable consideration and which has been cancelled and has not been repaid by the company to the shareholders".

Section 104 is contained in Div. 7 of Pt. III of the Act and provides: "Where a private company has not, before the expiration of the prescribed period, made a sufficient distribution of its income of the year of income, the Commissioner may, subject to section one hundred and five B of this Act, assess the aggregate additional amount of tax which would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it, and the company shall be liable to pay the tax so assessed".

A private company, which went into liquidation during the year of income, is liable to be assessed to additional tax under s. 104 of the Act, where it has not made a sufficient distribution of income.

Decision of *McTiernan* J. affirmed.

APPEAL from *McTiernan* J.

This was an appeal from an order of *McTiernan* J. dismissing an appeal by Archer Brothers Pty. Ltd. (in voluntary liquidation) from an assessment of the appellant company to additional tax under s. 104 of Pt. III, Div. 7 of the *Income Tax Assessment Act* 1936-1948 on the ground that the company, a private company within the meaning of the said Act, had not made a sufficient distribution of its income during the year ended 30th June 1949.

The appellant objected to the assessment upon the grounds :— (1) That at 30th June 1949 (the last day of the relevant year of income) the said company could not lawfully declare or pay any dividend to its shareholders, because it went into voluntary liquidation in accordance with a resolution made on 10th December 1948. (2) That as full control of the company's affairs undertaking and assets passed into the hands of the liquidator (duly appointed on 6th January 1949) the company could not lawfully distribute any portion of its income of the year ended 30th June 1949. (3) That it was not legally permissible for the liquidator to make any such distribution. (4) That the shareholders of the company were not, at 30th June 1949 or subsequently, entitled to any dividend out of its income of the said year. (5) That s. 104 is not applicable in the circumstances of this case ; and neither that section nor any other provision of the Act gives authority for the assessment.

The objection was disallowed by the respondent and the appellant being dissatisfied with the respondent's decision on the objection requested the respondent to treat the objection as an appeal and to forward it to the High Court of Australia. This was duly done and the matter came on for hearing before *McTiernan* J. upon an agreed statement of facts, which was substantially as follows :—

1. Archer Brothers Pty. Ltd. (in voluntary liquidation) (hereinafter called the appellant) was registered as a private company under *The Companies Acts* 1931 *to* 1942 (Q.).

2. Subject to the effect at law of the appointment of a liquidator of the appellant on 10th December 1948 the appellant was at all material times (i) a private company within the meaning of s. 103 of the *Income Tax Assessment Act* 1936-1948 and (ii) a resident within the meaning of the said Act.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

3. On 10th December 1948, on which date the paid-up capital of the appellant was £74,756 divided into 74,756 shares of £1 each, the shareholders of the appellant passed a resolution for its voluntary winding up.

4. After 10th December 1948 the liquidator for the purpose only of winding up the affairs of the appellant carried on the business formerly carried on by the appellant.

5. Between 30th June 1948 and 10th December 1948 the appellant made a net profit on profit and loss account of £1,705 14s. 9d., and during the same period derived a taxable income of £3,110.

6. Between 10th December 1948 and 30th June 1949 the liquidator sold and converted into money almost the whole of the appellant's assets.

7. The appellant during the last mentioned period derived a taxable income of £42,593.

8. By assessment dated 8th May 1950 the appellant was assessed to income tax and social service contribution in the sum of £13,448 5s. 0d. in respect of a total taxable income for the year ended 30th June 1949 of £45,703, being the total of the two several sums of £3,110 and £42,593 aforesaid.

9. The appellant duly paid the amount of such assessment and there is no appeal with reference thereto.

10. Between 10th December 1948 and 30th June 1949 the appellant made a net profit on profit and loss account of £26,974 18s. 11d.

11. Subsequent to his appointment on 10th December 1948 and before the expiration of the prescribed period within the meaning of s. 104 of the *Income Tax Assessment Act* 1936-1948, the liquidator made the following distributions, out of funds constituted in part of profits or income for the year ended 30th June 1949 and in part of the proceeds of sale and conversion of the appellant's assets, to the shareholders :—

12th January 1949; distribution of 1s. 0d. per share totalling	£3,737 16 0
30th May 1949; distribution of 10s. 0d. per share totalling	37,378 0 0
20th December 1949; distribution of 3s. 0d. per share totalling	11,071 16 0
	£52,187 12 0

12. Before the expiration of the said prescribed period and before the distribution on 20th December 1949, namely on 1st December

1949, the Deputy Commissioner of Taxation, Brisbane, pursuant to s. 215 of the *Income Tax Assessment Act* 1936-1948 advised the liquidator to hold an amount of £28,000 in respect of taxes which might become payable.

13. Of the said sum of £28,000 the sum of £13,448 5s. was paid to the respondent in respect of the assessment dated 8th May 1950, leaving a balance of £14,551 15s. 0d.

14. On 26th July 1950 the Deputy Commissioner of Taxation, Brisbane, assessed the appellant to additional income tax and social service contribution under the provisions of Div. 7 of the *Income Tax Assessment Act* 1936-1948.

15. Under the said assessment the Deputy Commissioner of Taxation arrived at the appellant's " distributable income " for the year ended 30th June 1949 by deducting from the appellant's taxable income for such year, £45,703, the amount of income tax and social service contribution paid, namely £13,448, thereby reaching the figure of £32,255. From the sum of £32,255 the deputy commissioner deducted an allowance of £4,225 pursuant to s. 103 (2) (*e*) of the *Income Tax Assessment Act* 1936-1948. A " sufficient distribution " of £28,030 was thus arrived at. From the said sum of £28,030 a " deemed " distribution of £138 was deducted under s. 106 of the *Income Tax Assessment Act* 1936-1948 giving an " undistributed amount " of £27,892.

16. On the said " undistributed amount " of £27,892 the appellant was assessed to additional income tax and social service contribution in the sum of £14,095 7s. 0d.

The appellant's objection to such assessment of £14,095 7s. 0d. forms the subject of this appeal.

M. Hanger Q.C. (with him *A. Bradford*), for the appellant.

C. G. Wanstall, for the respondent.

Cur. adv. vult.

May 1, 1953.

The following written judgment was delivered by :—

McTIERNAN J. The appellant, a grazing company incorporated in Queensland, was assessed by the respondent to " additional tax " as a " private company " on the basis that it had not made a sufficient distribution of its income of the year ended 30th June 1949. The assessment purported to be made in accordance with the *Income Tax Assessment Act* 1936-1948, Pt. III., Div. 7.

The parties agreed upon a statement of facts which was put in evidence. The statement is Exhibit A.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J.

It is sufficient to mention at this stage, that on 10th December 1948, the appellant went into voluntary liquidation and the assessment is based upon income derived during the periods of the year of income before and after the liquidation commenced. The appellant admitted that at all material times before 10th December 1948, it was a private company for the purposes of the *Income Tax Assessment Act* 1936-1948.

The liquidation proceeded subject to *The Companies Acts* 1931 *to* 1942 (Q.) Pt. VII.

The appellant relies upon the liquidation to deprive the respondent of authority to assess it to tax under Div. 7 of the Act. It does not claim that upon liquidation it fell out of the terms of the definition of a private company in s. 103. What the appellant claims by its grounds of objection is in effect that by reason of the liquidation it no longer had power to make such a distribution of its income of the year of income as is contemplated by s. 104, and, therefore, the respondent had no power under the section to make the assessment.

Section 47 of the Act, in my opinion, is an answer to the appellant's objection. This section deals with distributions made to the shareholders of a company by a liquidator in the course of winding up the company. It deals with such distributions to the extent to which they represent income derived by the company, whether before or during liquidation, other than income which has been properly applied to replace a loss of paid-up capital. The section declares that such distributions shall, " for the purposes of this Act ", be deemed to be dividends paid to shareholders by the company out of profits derived by it. The words " the purposes of this Act " bring in Pt. III Div. 7. It follows that the word " dividends " in this division includes distributions to shareholders of a company by a liquidator, in the course of winding up the company, which s. 47 assimilates, for the purposes of the Act, to dividends paid to shareholders by a company out of profits. It follows from the provisions of s. 47, that it would be contrary to the clearly expressed intention of the Act to exclude a private company from Div. 7 merely because at the material time it was in voluntary liquidation. In my opinion the appellant was liable to be assessed under this division even though it went into voluntary liquidation during the year of income.

The appellant tendered evidence to show that the commissioner was in error in proceeding upon the basis that the appellant had not made a sufficient distribution of its income for the relevant year. Objection was made on the commissioner's behalf to the

admission of the evidence for the reason that it was not relevant to the appeal. I admitted this evidence subject to the objection. In my opinion the objection is a valid one because the appellant's objection to the assessment failed properly to raise the issue as to which the evidence was tendered. The fifth is the only ground of the appellant's objection to the assessment which could possibly raise the issue. This ground could raise the issue only because it is loosely and generally expressed. Section 185 of the Act provides that the taxpayer must state fully and in detail the grounds on which he relies. The evidence is not relevant to any ground which is stated fully and in detail in the company's objection. Section 190 provides that upon every appeal the taxpayer shall be limited to the grounds stated in his objection. In my opinion the objection does not fairly cover the point that the appellant made a sufficient distribution of its income of the relevant year and the assessment under appeal is bad for that reason. The terms of the objection, in my opinion, would not convey to the commissioner that the appellant would rely upon that point. It would be contrary to a substantial line of cases to allow the appellant to do so. The most recent of these cases are *A. L. Campbell & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* per *Dixon* C.J. (1), and *Federal Commissioner of Taxation* v. *Western Suburbs Cinemas Ltd.* (2).

I should dismiss the appeal with costs.

From the way in which the case was presented I gathered that the parties expected that it might be referred to the Full Court. The appellant may still have the matter considered by the Full Court by appealing if it is so advised.

From that decision the appellant appealed to the Full Court of the High Court.

A. Bradford (with him *H. T. Gibbs*), for the appellant, cited *R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (3); *Federal Commissioner of Taxation* v. *Western Suburbs Cinemas Ltd.* (4); *A. L. Campbell & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1); *Inland Revenue Commissioners* v. *Burrell* (5); *Re Crichton's Oil Co.* (6); *Commissioner of Taxation (N.S.W.)* v. *Stevenson* (7); *Webb* v. *Federal Commissioner of*

(1) (1951) 82 C.L.R. 452, at p. 461.
(2) (1952) 86 C.L.R. 102.
(3) (1926) 37 C.L.R. 368, at p. 373.
(4) (1952) 86 C.L.R. 102, at p. 106.
(5) (1924) 2 K.B. 52, at pp. 62-64, 66, 70, 72.
(6) (1902) 2 Ch. 86, at pp. 93, 95.
(7) (1937) 59 C.L.R. 80, at pp. 99-101, 108.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Taxation (1); *Re Armstrong Whitworth Securities Co. Ltd.* (2); *James Smith & Sons (Norwood) Ltd.* v. *Goodman* (3); *Pulsford* v. *Devenish* (4); *Argylls Ltd.* v. *Coxeter* (5).

C. G. Wanstall, for the respondent, cited *Molloy* v. *Federal Commissioner of Land Tax* (6); *R.* v. *Deputy Commissioner of Taxation (W.A.)*; *Ex parte Copley* (7); *Federal Commissioner of Taxation* v. *Western Suburbs Cinemas Ltd.* (8); *A. L. Campbell & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (9); *H. R. Lancey Shipping Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (10); *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (11); *Commercial Banking Co. of Sydney Ltd.* v. *Commissioner of Taxation* (12); *Lever Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (13); *Ardmona Fruit Products Co-operative Co. Ltd.* v. *Federal Commissioner of Taxation* (14); *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (15); *Webb* v. *Federal Commissioner of Taxation* (16).

Cur. adv. vult.

Aug. 28.

THE COURT delivered the following written judgment:—

This is an appeal from an order of *McTiernan* J. dismissing an appeal by the appellant Archer Bros. Pty. Ltd. (in voluntary liquidation) from an assessment of that company, which is a private company within the meaning of Pt. III, Div. 7 of the *Income Tax Assessment Act* 1936-1948, to additional tax under that Division in respect of its taxable income derived during the year ending 30th June 1949. The appellant went into voluntary liquidation on 10th December 1948. Its taxable income for the year in question was £45,703 comprising £3,110 derived prior to the date of liquidation and £42,593 derived subsequent to that date. By an assessment dated 8th May 1950, from which there is no appeal, the appellant was assessed for income tax and social service tax in the sum of £13,448 5s. in respect of this taxable income. On 26th July 1950, the appellant was assessed (and this is the assessment under appeal) for additional tax under the provisions of Pt. III, Div. 7 of the

(1) (1922) 30 C.L.R. 450, at pp. 484, 485.
(2) (1947) Ch. 673, at p. 689.
(3) (1936) Ch. 216.
(4) (1903) 2 Ch. 625.
(5) (1913) 29 T.L.R. 355.
(6) (1938) 59 C.L.R. 608, at p. 610.
(7) (1923) 30 A.L.R. 86.
(8) (1952) 86 C.L.R. 102, at p. 106.
(9) (1951) 82 C.L.R. 452, at p. 461.
(10) (1951) A.L.R. 507, at p. 512; (1951) 9 A.T.D. 267, at pp. 272-273.
(11) (1923) 31 C.L.R. 490, at pp. 495-497, 498.
(12) (1950) 9 A.T.D. 112.
(13) (1948) 77 C.L.R. 78.
(14) (1952) 86 C.L.R. 530.
(15) (1940) 63 C.L.R. 278.
(16) (1922) 30 C.L.R. 450, at pp. 474, 485.

Income Tax Assessment Act 1936-1948. For the purposes of this assessment the respondent deducted the above amount of £13,448 5s. from this taxable income of £45,703 and thus arrived at a "distributable income" of £32,255. From this sum of £32,255 the respondent deducted an allowance under s. 103 (2) (*e*) of the *Income Tax Assessment Act* 1936-1948 of £4,225. He thus arrived at a "sufficient distribution" of £28,030. From this sum of £28,030 he deducted a "deemed" distribution of £138 under s. 106 of the Act giving an "undistributed amount" of £27,892. On this "undistributed amount" the respondent assessed the appellant to additional tax in the sum of £14,095 7s. 0d. This assessment was objected to by the appellant but the objection was disallowed by the respondent and the appellant thereupon requested the respondent to treat the objection as an appeal and to forward it to this Court. In its objection the appellant stated the following grounds :— (1) That at 30th June 1949 (the last day of the relevant year of income) the company could not lawfully declare or pay any dividend to its shareholders, because it went into voluntary liquidation in accordance with a resolution made on 10th December 1948. (2) That as full control of the company's affairs, undertaking and assets passed into the hands of the liquidator (duly appointed on 6th January 1949) the company could not lawfully distribute any portion of its income of the year ended 30th June 1949. (3) That it was not legally permissible for the liquidator to make any such distribution. (4) That the shareholders of the company were not, at 30th June 1949, or subsequently, entitled to any dividend out of its income of the said year. (5) That s. 104 is not applicable in the circumstances of this case ; and neither that section nor any other provision of the Act gives authority for the assessment.

The main contention of the appellant before *McTiernan* J. and before us was that Div. 7 does not apply to a company after it has gone into liquidation. This contention was rejected by *McTiernan* J. His Honour said : "Section 47 of the Act, in my opinion, is an answer to the appellant's objection. This section deals with distributions made to the shareholders of a company by a liquidator in the course of winding up the company. It deals with such distributions to the extent to which they represent income derived by the company, whether before or during liquidation, other than income which has been properly applied to replace a loss of paid up capital. The section declares that such distributions shall, 'for the purposes of this Act', be deemed to be dividends paid to shareholders by the company out of profits derived by it. The words 'the purposes of this Act', bring in Pt. III,

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

Div. 7. It follows that the word 'dividends' in this Division includes distributions to shareholders of a company by a liquidator in the course of winding up the company which s. 47 assimilates, for the purposes of the Act, to dividends paid to shareholders by a company out of profits. It follows from the provisions of s. 47, that it would be contrary to the clearly expressed intention of the Act to exclude a private company from Div. 7 merely because at the material time it was in voluntary liquidation. In my opinion the appellant was liable to be assessed under this Division even though it went into voluntary liquidation during the year of income" (1). Counsel for the appellant contested this reasoning of his Honour. He submitted that the words "for the purposes of this Act" in s. 47 do not make the section apply to Pt. III, Div. 7 of the Act. He submitted that the word "dividends" in Div. 7 does not include distributions to shareholders of a company by a liquidator in the course of winding up the company. He also submitted that the appellant had properly applied its income of the year ending 30th June 1949, to replace a loss of paid up capital. Otherwise the grounds argued in support of this contention were those raised in the notice of objection.

A further contention which the appellant sought to raise before *McTiernan* J. and before us was that, if Div. 7 applies to a company in liquidation, the appellant had made a sufficient distribution of its taxable income. It was submitted that the appellant had done so because prior to the end of the prescribed period, that is, 31st December 1949, it had made the three distributions hereinafter referred to, and it could not be said that the appellant had not made a sufficient distribution of its income of the year of income where the liquidator had distributed amongst the shareholders within the prescribed period the whole of the assets of the company other than the sum of £28,000 which the liquidator was directed by the respondent under s. 215 of the Act to set aside to provide for taxation and the sum of approximately £3,600 which the liquidator was bound by law to retain to cover contingent or foreseeable liabilities of the company. *McTiernan* J. held that this contention was not open on the grounds stated in the notice of objection. Section 185 of the Act provides that a taxpayer who is dissatisfied with any assessment shall post to or lodge with the commissioner an objection in writing against the assessment stating fully and in detail the grounds on which he relies. Section 190 (*a*) provides that upon a reference to a board of review or upon an appeal the taxpayer shall be limited to the grounds stated in his objection.

(1) Ante, at p. 144.

The effect of these and similar provisions has been referred to in this Court on several occasions. It was pointed out in *Molloy* v. *Federal Commissioner of Land Tax* (1), that these provisions are made to protect the public revenue and the Court is bound to give effect to them. In *H. R. Lancey Shipping Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (2) *Williams* J. said: "The grounds of objection need not be stated in legal form, they can be expressed in ordinary language, but they should be sufficiently explicit to direct the attention of the respondent to the particular respects in which the taxpayer contends that the assessment is erroneous and his reasons for this contention" (3). In *A. L. Campbell & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (4) the present Chief Justice said: "I think that courts should not interpret grounds of objection technically, narrowly or with rigidity, but at the same time I cannot escape the conviction that the grounds were not intended to cover the point that has been made and that they would not convey it to the commissioner" (5). In *Federal Commissioner of Taxation* v. *Western Suburbs Cinemas Ltd.* (6), *Kitto* J. said: "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" (7).

Applying these principles, it is clear, we think, that the present grounds of objection are apt and apt only to raise the first contention. Adapting the words of the Chief Justice, they were never intended to cover the points sought to be raised by the second contention and they would not convey it to the commissioner. We think that *McTiernan* J. was right in not allowing the appellant to raise the second contention before him and, like him, we shall confine ourselves to a consideration of the first contention.

(1) (1938) 59 C.L.R. 608, at p. 610.
(2) (1951) A.L.R. 507; (1951) 9 A.T.D. 267.
(3) (1951) A.L.R., at p. 512; (1951) 9 A.T.D., at p. 273.
(4) (1951) 82 C.L.R. 452.
(5) (1951) 82 C.L.R., at p. 461.
(6) (1952) 86 C.L.R. 102.
(7) (1952) 86 C.L.R., at p. 106.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

Part III, Div. 7 of the *Income Tax Assessment Act* 1936-1948, which is headed " Private companies ", comprises ss. 103 to 109A of the Act. Section 103 (1) contains a number of definitions and provides *inter alia* that, unless the contrary intention appears, " distributable income " means the amount obtained by deducting from the taxable income of a company the sums referred to in pars. (*a*) to (*d*) inclusive. The sub-section also provides that " undistributed amount " means: (*a*) the amount by which the dividends paid and the dividends deemed to have been paid, within the prescribed period, by a private company out of its taxable income of the year of income fall short of a sufficient distribution; or (*b*) where no dividends have been so paid or deemed to have been so paid, the amount which would have been a sufficient distribution. The sub-section also provides that " the prescribed period " means: (*a*) in relation to a company which is a resident—the period commencing on the first day of the year of income and ending six months after the close of that year. Section 103 (2) provides that for the purposes of this division (*e*) a private company shall be deemed to have made a sufficient distribution of its income of the year of income if, within the prescribed period, it has paid in dividends out of the taxable income of that year an amount not less than the aggregate of the percentages of the distributable income referred to in pars. (i) to (vi) inclusive. The purpose of this provision is to enable a private company to set aside as a reserve some part of its distributable income without incurring additional tax.

Section 104 is in the following terms: " Where a private company has not, before the expiration of the prescribed period, made a sufficient distribution of its income of the year of income, the Commissioner may, subject to section one hundred and five B of this Act, assess the aggregate additional amount of tax which would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it, and the company shall be liable to pay the tax so assessed ". Sections 108 and 109 provide that where loans, &c., are made or remuneration, &c., for services is paid by a private company to its shareholders so much of such loans, &c., as in the opinion of the commissioner represents distributions of income or so much of such remuneration &c. as exceeds a reasonable amount, &c., shall for the purposes of the Act be deemed to be dividends paid by the company to its shareholders out of profits derived by it.

Section 107 relates to rebates. Sub-section (1) provides that a person shall be entitled to a rebate of the amount by which his income tax is increased by the inclusion in his assessable income of—(*a*) dividends paid to him by a company where the dividends are paid wholly and exclusively out of one or more of the following amounts:—" (*c*) an amount in respect of which, under section twenty-one of the previous Act or under Division 2 of Part III of that Act, the company paying the dividend has paid or is liable to pay tax; (*d*) the undistributed amount of any year of income prior to the year of income which commenced on the first day of July, One thousand nine hundred and forty-seven; and (*e*) the amount remaining after deducting from the undistributed amount of any year of income subsequent to the year of income which ended on the thirtieth day of June, One thousand nine hundred and forty-seven, the aggregate of the amount of tax payable under this Division and the amount of contribution payable under the *Social Services Contribution Assessment Act* 1945, or that Act as amended, in respect of that undistributed amount". Sub-section (2) provides that—" Where a dividend is paid either wholly or in part out of an amount specified in paragraph (*e*) of sub-section (1) of this section, a person in whose assessable income that dividend, or an amount in respect of that dividend, is included shall not be entitled to the rebate provided by that sub-section unless—(*a*) the shares in respect of which the dividend is paid . . . are shares in respect of which a distribution was supposed to be made for purposes of the assessment of the tax or contribution referred to in that paragraph ".

This short analysis of some of the sections of Div. 7 is sufficient to indicate the artificial conception that lies behind the imposition of additional tax on private companies . The policy underlying the imposition is plain enough. The tax is imposed so that the revenue will derive the same benefit from the taxable income of the company in each year of income as it would derive if the company first paid ordinary income tax on that taxable income and the shareholders also paid the income tax they would have to pay if the balance of that taxable income less the allowable deductions was distributed to them by the company as dividends, including the amounts deemed to be dividends under ss. 108 and 109. The language of the division is no doubt primarily adapted to apply to private companies which are going concerns. It is in several respects, as counsel for the appellant submitted, ill-adapted to apply to companies which are in liquidation. When a company goes into liquida-

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

tion the whole of its property, whether that property is of a capital nature or consists of undivided profits, becomes assets in the hands of the liquidator out of the mass of which he is under a statutory duty to pay the costs, charges and expenses of the winding up, to discharge the debts and liabilities of the company, and to distribute the surplus amongst the shareholders according to their rights and interests in the company. Such distributions are distributions of capital. They are therefore not liable to be assessed for income tax unless some statute makes them part of the assessable income of the shareholders: *Inland Revenue Commissioners* v. *Burrell* (1). It is true that when a company goes into liquidation the liquidator cannot safely make any distributions to shareholders until he has paid or provided for the costs, charges and expenses of the liquidation and for the debts and liabilities of the company. In the ordinary course of liquidation, therefore, it would often be difficult for the liquidator of a private company to comply with s. 104 by making a sufficient distribution of its income of the year of income within the prescribed period. In the present case the liquidator of the appellant, which is a pastoral company, sold and converted almost the whole of the assets of the company into money between 10th December 1948, and 30th June 1949. He made the following distributions out of the proceeds of sale to the shareholders and no others, that is to say, on 12th January 1949, a distribution of one shilling per share amounting to £3,737 16s. on 30th May 1949, a distribution of ten shillings per share amounting to £37,378; on 20th December 1949, a distribution of three shillings per share amounting to £11,071 16s. After making the last of these distributions, which in all amounted to a return of fourteen shillings in the pound of the shareholders' capital, there remained in the hands of the liquidator the sum of approximately £31,500. Of this sum the liquidator had been required by the respondent on 1st December 1949, pursuant to s. 215 of the *Income Tax Assessment Act* 1936-1948 to set aside the sum of £28,000 in respect of taxes which might become payable. Out of this sum the sum of £13,448 5s. was paid to the respondent in respect of the assessment of 8th May 1950, leaving a balance of £14,551 15s. The balance of the sum of £31,500, after setting aside the £28,000, that is, £3,600, was retained by the liquidator to meet the contingent liabilities of the company. It was contended by Mr. *Bradford* that what had happened in the present liquidation illustrated the incompatibility of the language of s. 104 with the ordinary course of a liquidation.

(1) (1924) 2 K.B. 52.

The liquidator could not distribute "the distributable income" as dividends because all the distributions he made were necessarily distributions of capital. He could not distribute the £28,000 because he was bound by s. 215 of the Act to set aside this sum. He could not distribute the £3,600 because he was bound by law to retain this sum to meet contingent liabilities.

But it is clear that a company which is in liquidation can continue to carry on its business with a view to a beneficial realization and that the profits it makes in doing so are assessable income : *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). In the present case the appellant admittedly derived a taxable income of £45,703 in the relevant year. Even in the case of a private company which is a going concern it may be impossible for the company to make a sufficient distribution of its income of the year of income within the prescribed period. The company might require the undistributed income to meet urgent debts and liabilities. The fund might be entirely lost. The constitution of the company might prevent it making the distribution. The fact that it is the company and not the shareholders who pay the additional tax must not be lost sight of. The shareholders are only taxed on the dividends they receive either by actual distributions or by the dividends being credited to them. The right of a shareholder to a rebate under s. 107 only arises if the company subsequently declares a dividend wholly and exclusively out of the fund which has borne additional tax. Unless Div. 7 continues to apply to private companies after they have gone into liquidation, such companies could avoid the payment of additional tax by going into liquidation at any time prior to the end of the year of income or indeed at any time prior to the end of the "prescribed period". It would also follow that, where a company had been assessed for additional tax whilst it was a going concern, the shareholders could not obtain a rebate of tax under s. 107 after the company had gone into liquidation.

Section 6 of the *Income Tax Assessment Act* provides that "dividend" includes any distribution made by a company to its shareholders, whether in money or other property, and any amount credited to them as shareholders but does not include a return of paid-up capital. So the statutory meaning of "dividend" is wider than its ordinary meaning. It is wide enough to include distributions made by the liquidator of a company to its shareholders which are not a return of paid-up capital. But no reliance

(1) (1923) 31 C.L.R. 490.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams A.C.J. Kitto J. Taylor J.

need be placed on the definition for this purpose because the whole position is clarified by s. 47. This section, which relates to distributions by liquidators, is in the following terms: "47—(1) Distributions to shareholders of a company by a liquidator in the course of winding up the company, to the extent to which they represent income derived by the company (whether before or during liquidation) other than income which has been properly applied to replace a loss of paid-up capital, shall, for the purposes of this Act, be deemed to be dividends paid to the shareholders by the company out of profits derived by it. (2) Those distributions shall, to the extent to which they are made out of any profits or income, be deemed to have been paid wholly and exclusively out of those profits or that income. (3) For the purposes of this section, 'paid-up capital' does not include the paid-up value of shares which have been issued by the company in satisfaction of dividends which have been paid out of profits arising from the revaluation of assets not acquired for the purposes of re-sale at a profit but includes capital which has been paid up in money or by other valuable consideration and which has been cancelled and has not been repaid by the company to the shareholders".

We can find no reason for not giving the words in the section "for the purposes of this Act" their natural meaning. In our opinion the section applies to the winding up of all companies and therefore to the winding up of companies which are private companies within the meaning of Div. 7. In the present case the respondent wrote the following letter to the appellant on 3rd May 1950: "With reference to your income tax affairs for the year ended 30th June 1949, please be good enough to advise:—(1) The amount of distribution made to shareholders during the above-mentioned year and the extent to which this distribution represents a return of capital. (2) The amount of dividend, if any, paid from the profits of the year ended 30th June, 1949, before the 31st December, 1949".

On 19th May 1950, the liquidator replied:—"In reply to your letter of 3rd May we set out below details of distributions made to shareholders during the year ended 30th June, 1949:—12th January, 1949, One shilling (1/-d.) per share. 30th May, 1949: Ten shillings (10/-d.) per share. The total distribution of 11/- per share set out above represents a return of capital. No dividends have been paid out of profits for the year ended 30th June, 1949. A distribution of three shillings (3/-d.) per share, being a further return of capital, was made on 20th December, 1949".

These distributions were in fact made out of funds in the hands of the liquidator constituted in part by profits or income of the year of income ending on 30th June 1949, and in part by the proceeds arising from the sale and conversion of the appellant's assets in that year. When the liquidator said that no dividends had been paid out of profits for the year ended 30th June 1949, he meant presumably that they should not be regarded as dividends paid out of profits because the distributions were all replacements of paid-up capital. As these distributions were all applied to replace a loss of paid-up capital, although they included some profits forming part of the taxable income of the appellant for the year of income ending 30th June 1949, they would not, by virtue of s. 47, form part of the assessable income of the shareholders. If there had been sufficient surplus assets, other than the income included in this taxable income, to distribute as a replacement of paid-up capital, the liquidator could have made a sufficient distribution of this taxable income to the shareholders to satisfy s. 104. On the other hand he could have paid additional tax and then distributed the balance of the fund to the shareholders. These distributions would it seems be dividends within the meaning of the definition of dividend in s. 6 of the Act and would certainly be deemed to be dividends paid to the shareholders out of profits or income derived by the company within the meaning of s. 47. By a proper system of book-keeping the liquidator, in the same way as the accountant of a private company which is a going concern, could so keep his accounts that these distributions could be made wholly and exclusively out of those particular profits or income, and the shareholders would become entitled to a rebate under s. 107. Mr. *Bradford* endeavoured to establish that the provisions of s. 47 were merely ancillary to s. 44 and that a comparison of the terms of the second sub-section of each of those sections showed that this was so. But s. 47 is couched in the widest terms, and we cannot see any reason why distributions by a liquidator should not, to the extent to which they may be deemed by this section to be dividends, be regarded as dividends for the purpose of Div. 7. We reach this conclusion on what we conceive to be the proper construction of the *Income Tax Assessment Act* 1936-1948 but we should mention that we were referred by Mr. *Wanstall* to the provisions of the previous Income Tax Assessment Acts which imposed additional tax on private companies and provided relief for shareholders to whom the fund that was taxed was subsequently distributed and this history confirms this construction.

H. C. OF A. 1952-1953.

ARCHER BROTHERS PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

For these reasons we are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Rees R. & Sydney Jones*, Rockhampton by *Cannan & Peterson*, Brisbane.

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

B. J. J.