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[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES EXECUTORS & AGENCY COMPANY OF AUSTRALASIA LIMITED AND ANOTHER . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

(CHISHOLM'S CASE)

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MELBOURNE, *Sept.* 14, 15;

SYDNEY, *Dec.* 12,

Dixon C.J., Webb, Kitto and Taylor JJ.

Estate Duty (Cth.)—Estate situate partly within and partly outside Australia—Deduction—Duty payable in respect of part of estate outside Australia—Method of determining quantum—Asset situate outside Australia—Exempt from duty under law of situs—Whether part of estate on which duty lawfully paid in situs—Estate Duty Assessment Act 1914-1950 (*No.* 22 *of* 1914—*No.* 80 *of* 1950), *s.* 8 (7).

Sub-section (7) of s. 8 of the *Estate Duty Assessment Act* 1914-1950 provides: "When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate".

Held, by *Dixon* C.J., *Webb* and *Taylor* JJ. (*Kitto* J. dissenting), that the quantum of the deduction under sub-s. (7) is ascertained by comparing the aggregate of the duties so paid in the places outside Australia and the duty payable under the Act in respect of the appropriate parts of the estate.

A testator domiciled in Australia left estate in England, including investments to the value of £stg.5,026 8s. 2d. which, under the English *Finance Acts*, were exempt from duty. Duty was assessed in England and paid on the remainder of the English estate.

Held, by the whole Court, that the investments did not constitute any part of the deceased's estate upon which duty was lawfully paid in England and, accordingly, no deduction was allowable under s. 8 (7) of the *Estate Duty Assessment Act* 1914-1950 in respect of them.

CASE STATED.

The National Trustees Executors and Agency Company of Australasia Limited and Abigail Chisholm were the administrators of Colin Joseph Chisholm, deceased, who died on 10th August 1949 at Camberwell, Victoria, leaving an estate having a gross value of £135,121.

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The Commissioner of Taxation, by notice of assessment dated 16th March 1951, assessed the estate duty payable in respect of the said estate at the sum of £12,546 10s. 9d.

The administrators objected to the assessment and by notice in writing the commissioner informed the administrators that their objection had been disallowed. The administrators thereupon requested the commissioner to treat the objection as an appeal and to forward it to the High Court of Australia.

The appeal was heard before *Fullagar* J. who, on 28th July 1953, with the concurrence of the parties and pursuant to s. 28 of the *Estate Duty Assessment Act* 1914-1950, stated a case for the opinion of a Full Court. The relevant portions of the case were as follows :—

2. The assets of the deceased situated outside Australia were situated in Singapore, Malaya, England, Canada and the United States of America. Some of the Canadian assets were situated in the Province of Quebec and some in the Province of Ontario. The assets situated according to relevant United States fiscal laws in the United States of America were as to part situate in the State of California and as to part in other States.

5. Estate duty amounting to £stg.19,561 6s. 11d. (£A24,451 13s. 8d.) was duly paid by the appellants pursuant to the laws of the United Kingdom in respect of the assets of the deceased situate in England which assets were valued at the date of death at £stg.60,659 2s. 2d. (£A75,823 17s. 8d.). The said duty was calculated on £stg.55,632 14s. 0d., the sum of £stg.5,026 8s. 2d. having been deducted in respect of investments exempt from duty under s. 47 of the *Finance (No. 2) Act* 1915 (Imp.) (5 & 6 Geo. 5, c. 89), s. 22 (1) of the *Finance (No. 2) Act* 1931 (Imp.) (21 & 22 Geo. 5, c. 49) and s. 60 (1) of the *Finance Act* 1940 (Imp.) (3 & 4 Geo. 6, c. 29).

6. (a) Estate tax amounting to $8,844.22 (United States dollars) was duly paid by the appellants pursuant to the laws of the United States of America in respect of the assets of the deceased situated in the United States of America according to the *Internal Revenue Code* of the United States, which assets were valued at the date of death at $61,781.75 of which $596 was not taxable under s. 863 (b) of the *Internal Revenue Code*. Estate tax as aforesaid was paid on the net amount of $57,376.87.

(b) The said tax was duly paid by the appellants on 23rd May 1950 and was due and payable fifteen months after the deceased's death. At the date of such payment the rate of exchange between United States dollars and Australian currency was 2.2275 United States dollars equals one (1) Australian pound and the Australian

currency equivalent of the tax so paid was £A3,970 9s. 5d. At the date of the deceased's death the rate of exchange between United States dollars and Australian currency was 3.2055 United States dollars equals one (1) Australian pound and converted at that rate of exchange the Australian currency equivalent of the duty so paid was £A2,759 1s. 6d.

(c) Included in the assets of the deceased at the date of his death were shares in certain companies incorporated in Canada the share certificates in respect of which were then held in the United States. The said shares are listed hereunder, together with the respective places of incorporation of the said companies and the respective situations of the share registers upon which the deceased's shareholdings therein were registered :—

Shareholding	*Company*	*Place of Incorporation*	*Situation of Register*
102 shares common stock of no par value	International Nickel Co. of Canada Ltd.	Canada (Federally incorporated)	New York
100 shares capital stock of no par value	Hudson Bay Mining & Smelting	Canada (Federally incorporated)	Montreal
200 shares common stock	Fraser Companies Ltd.	Canada (Federally incorporated)	Toronto
400 shares capital stock of no par value	Chromium Mining & Smelting Corpn. Ltd.	Ontario	Toronto
300 shares capital stock	Canadian General Investments Ltd.	Ontario	Toronto
100 shares common stock of no par value	Price Bros. & Co. Ltd.	Quebec	Montreal

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The value of the abovementioned shares at the date of deceased's death as returned and assessed for United States estate tax purposes was $19,174.50. Under the relevant fiscal laws of the United States such shares were considered as part of the deceased's assets situated in the United States and estate tax was payable thereon. The amount of $61,185.75 (i.e., $61,781.75 less $596) referred to in par. 6 (a) above includes $19,174.50 in respect of such shares and estate tax was paid upon them as aforesaid.

(d) Further "inheritance" tax was payable by the appellants in the United States of America in respect of the assets of the deceased there situate, namely inheritance tax in the State of California payable under the laws of that State but at the date of the assessment of estate duty the subject of this appeal such tax had not been assessed or paid and the commissioner did not know that the estate of the deceased was liable for such inheritance tax. Pursuant to the abovementioned *Internal Revenue Code* the appellants will upon payment of the said inheritance tax be able to obtain a refund of some portion of the estate tax referred to in sub-par. (a) of this paragraph.

7. (a) Succession duty and interest amounting to $3,188.87 (Canadian dollars) being $3,156.71 succession duty and $32.16 interest was duly paid by the appellants pursuant to the laws of the Dominion of Canada in respect of the assets of the deceased situate according to the relevant fiscal laws of Canada in that Dominion (being the shares listed in par. 6 (c) hereof) which assets were valued at the date of death at $22,487.50 (Canadian dollars).

(b) The said duty was duly paid by the appellants on 13th June 1950 and was due and payable within six months after the death of the deceased. At the date of such payment the rate of exchange between the Canadian dollar and Australian currency was 2.4495 Canadian dollars equals one (1) Australian pound and the Australian currency equivalents of the duty and interest so paid were respectively £A1,288 14s. 4d. and £A13 2s. 7d. At the date of the deceased's death the rate of exchange between Canadian dollars and Australian currency was 3.2055 Canadian dollars equals one (1) Australian pound and converted at the rate of exchange the Australian currency equivalents of the duty and interest so paid were £A984 15s. 7d. and £A10 0s. 8d.

(c) The assets of the deceased so situated in Canada and on which duty was paid as aforesaid were the shares referred to in par. 6 (c) above and at the date of assessment of estate duty the subject matter of this appeal the commissioner did not know the respective situation of the share registers upon which the deceased's

shares were registered and accepted that the said shares were all situate in Canada.

(d) Further tax was payable by the appellants in the Dominion of Canada in respect of the assets of the deceased there situate, viz., tax in the Provinces of Quebec and Ontario on the assets of the deceased situate in those provinces but at the date of the assessment of estate duty the subject of this appeal such tax had not been assessed or paid and the commissioner did not know that the estate of the deceased was liable for such further tax. Pursuant to the relevant laws of the Dominion of Canada, the appellants are entitled to a refund of some portion of the Canadian succession duty above referred to by reason of the payment of the said provincial taxes but the amount of such refund has not yet been ascertained and it has not yet been paid.

8. The changes in the exchange rates between the United States and Canadian dollars on the one hand and the Australian pound on the other referred to above took place on 18th September 1949.

10. In calculating the deductions to which the appellants are entitled under s. 8 (7) of the Act, the commissioner—

(a) accepted that the assets of the deceased specified in the estate duty return were respectively situated in the places outside Australia there specified and on this basis and on the basis of the information then in his possession as to the liability of the deceased's estate for duty in places outside Australia he made a series of separate calculations by each of which he ascertained with respect to that part of the estate of the deceased which was situate in each separate place outside Australia and in respect of which duty was lawfully paid in any place outside Australia whether in each instance the amount of duty lawfully payable in all places outside Australia in respect of that part was greater or lesser than the duty payable under the said Act in respect of that part;

(b) in accordance with (a) in the case of United States duty deducted from the duty paid in that country so much thereof as was referable to the shares referred to in par. 6 (c) and in the case of Canadian duty aggregated the duty paid in the United States on the said shares with the duty paid in Canada;

(c) converted the amount of the duties paid in Canada and the United States into Australian currency at the rates of exchange prevailing at the death of the deceased;

(d) in calculating the duty payable under the said Act in respect of that part of the estate situate in England in respect of which duty was lawfully paid in England excluded the investments to

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the value of £stg.5,026 8s. 2d. referred to in par. 5 of this case from that part of the estate.

12. The following questions of law arise on this appeal and are stated for the opinion of a Full Court of the High Court—

(1) Whether on the proper construction of s. 8 (7) of the *Estate Duty Assessment Act* 1914-1950 the commissioner should for the purpose of calculating the amount to be deducted thereunder—

(a) ascertain whether the aggregate of the whole of the duty lawfully paid outside Australia in respect of that part of the estate which was situate outside Australia was greater or lesser than the duty payable under the said Act in respect of such part of the estate, or

(b) make a series of separate calculations by each of which he would ascertain with respect to that part of the estate of the deceased which was situate in each separate place outside Australia and in respect of which duty was lawfully paid in any place outside Australia, whether in each instance the amount of the duty lawfully paid in all places outside Australia in respect of that part was greater or lesser than the duty payable under the said Act in respect of that part or,

(c) make a series of separate calculations by each of which he would ascertain with respect to each place outside Australia in which duty was lawfully paid in respect of any part of the estate of the deceased situate outside Australia, whether in each instance the amount of duty lawfully paid in that place in respect of any part of the deceased's estate situate outside Australia was greater or lesser than the duty payable under the said Act in respect of the part of the estate in respect of which such duty was so paid.

(2) If question 1 (a) is answered No, whether the commissioner should for the purposes of applying s. 8 (7) (*a*) of the said Act in relation to the deceased's estate which was situate in the United States and Canada—

(a) in the case of the United States duty, deduct from the duty paid in that country so much thereof as was referable to the shares referred to in par. 6 (c) of this case, and, in the case of Canadian duty, aggregate the duty paid in the United States on the said shares with the duty paid in Canada, or

(b) allow deductions of the amounts of duty lawfully paid in the United States and Canada respectively, or

(c) make the calculation in some other and what manner ?

(3) Whether in making the calculation required by the answer to question 1 the commissioner should treat that part of the deceased's estate which is situate in England in respect of which

duty was lawfully paid as being of the value of £stg.60,659 2s. 2d. or £stg.55,632 14s. 0d.

(4) Whether under the grounds stated in the appellants' objection it is open to the appellants in this appeal to challenge the rate of exchange at which the commissioner in applying s. 8 (7) of the said Act converted the amount of duty paid—(a) in the United States, or (b) in Canada, into Australian currency, namely, at the rate of exchange at the date of the deceased's death.

(5) If question (4) is answered Yes, whether on the proper construction of s. 8 (7) of the said Act the commissioner should, in order to ascertain the amount of duty paid outside Australia, convert such duty into Australian currency at the rate of exchange prevailing—(a) on the date of the deceased's death; (b) on the date on which such duty became due and payable; (c) on the date on which such duty was paid; (d) on some other and what date?

A. D. G. Adam Q.C. (with him *K. A. Aickin*), for the appellants. The appellants contend that the proper construction of s. 8 (7) of the *Estate Duty Assessment Act* 1914-1950 requires the adoption of method (a) in Question 1 (par. 12 of case stated). This does no violence to the language of the section and fits its real policy of relief against double taxation. Method (c) gives rise to anomalies where two countries impose duty on the same assets. [He referred to *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation*, per *Latham* C.J. (1).] The intention of the section is clearly to put an upper limit on the deduction allowable in respect of ex-Australian duties, viz., the amount of Australian estate duty referable to ex-Australian assets lawfully dutiable out of Australia. Method (b), adopted by the commissioner, is quite arbitrary. There is nothing in the section which requires or permits assets situated in separate overseas countries to be separately aggregated on the basis of locality. A contrast may be drawn with the express provisions in certain other Acts which would give some warrant for the commissioner's method: see *Stamp Duties Act* 1920-1952 (N.S.W.), s. 103A, *Finance Act* 1894 (Imp.) (57 & 58 Vict., c. 30), s. 20. To justify the commissioner's method, s. 8 (7) (*b*) would need to be redrafted to refer to "that part of the estate situated in that country". The method of separate calculations in respect of separate localities creates other difficulties. For example, where overseas assets are situated in a country with a federal system the commissioner could select either the overall federal location or separate provincial locations. No solution to

(1) (1938) 59 C.L.R. 611, at p. 623.

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the question of such selection is furnished by the commissioner's method. Again in this instance, the commissioner's method fails to give the appellants the deduction for United States duty to which they are entitled. Full credit is not given either for United States duty or for Canadian duty. Such full credit should be given. Finally, the commissioner's method requires a division of a single United States duty which is not made by the country imposing the duty. It is contended that the method of calculation suggested in question (1) (a) allows, by simple application of s. 23 of the *Acts Interpretation Act* 1901-1950, s. 8 (7) to import the plural words " duty or duties is or are paid " &c. This method requires no straining of the language of s. 8 (7) and works in every case irrespective of the varying foreign modes of assessment to death duty. It accords with the general nature of an estate duty as outlined in *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (1), and with the policy of giving full relief for overseas duty to the extent of and no more than the amount of Australian duty referable to overseas assets. By contrast, the commissioner's method gives a deduction authorized neither by s. 8 (7) (*a*) nor by s. 8 (7) (*b*), taking ex-Australian assets as a whole. The English estate (question (3)) should be treated as the " conglomerate mass " of assets situated in England since the estate as a whole situate in England is subject to English duty, notwithstanding certain exemptions.

C. I. Menhennitt, for the respondent. A notional apportionment is clearly indicated in the opening words of s. 8 (7) of the *Estate Duty Assessment Act* 1914-1950, " When any duty is lawfully paid in any place outside Australia in respect of any part of the estate ". Such an apportionment is obviously necessary in the application of s. 8 (7) (*b*), as was accepted in *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (2). The commissioner's method is quite straightforward. It is first necessary to decide where an asset is situated according, it is submitted, to the ordinary rules of private international law. By contrast, the method supported by the appellants requires the treatment of " any part " as the total conglomeration of ex-Australian assets, i.e., as equivalent to " that portion, if any, situate outside Australia ". The commissioner then reads " any part " distributively and having found the situation of an asset considers the duty paid thereon in " any place or places ". Thus a " *toties quoties* " application is given, even if the *Acts Interpretation Act* 1901-1950, s. 23, applies. A series

(1) (1932) 47 C.L.R. 402. (2) (1938) 59 C.L.R. 611.

of separate parts is contemplated. Application of this method in the case of a federal system raises no difficulty. " Any country " was the only subdivision before the commissioner on the facts put to him, but, " any place " could have been applied to a province and " any part " could have been the assets situated in any taxing area. " Any part " is the key expression falling for interpretation. Instead of taking the estate asset by asset, it is sufficient, as a matter of arithmetical convenience, to group assets with the same location, to obtain, e.g., the Canadian part of the estate. " Part " could have reference to group location in relation to a taxing unit. The respondent's interpretation of " any " gains support from a like interpretation of the word in *Charente Steamship Co. Ltd.* v. *Wilmot* (1): see also *In re Yates*; *Batcheldor* v. *Yates* (2), per *Cotton* L.J., for an interpretation of " part " as a separable part. By application of s. 23 of the *Acts Interpretation Act* 1901-1950 s. 8 (7) is re-written " place or places . . . part or parts " and read distributively. But this is fatal to the appellants' argument, to sustain which " part " must be read in the singular as equivalent to " that portion if any situate outside Australia ", while " place " must, on the facts, be read in the plural. The first operation of s. 8 (7) is upon part of an estate. Emphasis is on the phrase " in respect of any part of the estate ". It may be necessary, in certain circumstances, e.g., where assets are treated differentially in a single place, to treat particular assets separately as " parts ". But the reduction to singular " part " and singular " place " does not embarrass the respondent's case. On the other hand, it is fatal to the appellants' argument. The decision in *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (3) is completely consistent with the commissioner's method. It supports the interpretation of " part " as a group aggregation of assets in each place in which duty is imposed. Support for this " distributive view ", as against the appellants' " total view ", is found (4). Section 34 (2) of the *Estate Duty Assessment Act* 1914-1950 employs the phrase " any part " with a distributive meaning similar to the usage in s. 8 (7). " Place " can be used in a collective sense, covering " places " where " any part " is dutiable. Question (3) is resolved by examination of the basis of imposition of English death duty. See s. 47 of the *Finance (No. 2) Act* 1915 (Imp.) (5 & 6 Geo. 5, c. 89), s. 22 (1) of the *Finance (No. 2) Act* 1931 (Imp.) (21 & 22 Geo. 5., c. 49) and s. 60 (1) of the *Finance Act* 1940 (Imp.) (3 & 4 Geo. 6, c. 29).

(1) (1942) 1 K.B. 210.
(2) (1888) 38 Ch. D. 112, at pp. 121, 122.
(3) (1938) 59 C.L.R. 611.
(4) (1938) 59 C.L.R., at pp. 630, 631.

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K. A. Aickin, in reply. *Charente Steamship Co. Ltd.* v. *Wilmot* (1) is distinguishable on the facts. The history of the legislation shows that the only distinction as to locality contemplated by s. 8 (7) is between estate situated in Australia and ex-Australian estate. The *Estate Duty Assessment Act* 1928 merely imposed an upper limit to the deduction allowable in respect of all foreign duties, which were wholly allowable under the *Estate Duty Assessment Act* 1914. A simple solution is not found by equating "part" with "asset" because that commits the commissioner to a detailed investigation of foreign laws as to incidence of foreign duties on each individual foreign asset. The respondent's interpretation involves not merely a "distributive" meaning of the word "part" but also the importation of some additional phrase, such as "in each instance (of such an asset)". If some subdivision of foreign assets is required, then the indivisible unit is the group of assets in respect of which duty is lawfully paid in any place—method (1) (c). If s. 8 (7) (*a*) and s. 8 (7) (*b*) deal with the same block of assets, then the commissioner is committed for the purposes of the s. 8 (7) (*b*) calculation to inclusion more than once of the same assets. If method (1) (c) is rejected, then method (1) (a) is inescapable. The respondent's case involves a departure from the true nature of an estate duty which is a levy on an aggregate of assets and not on each asset separately. It is, however, admitted that s. 8 (7) (*b*) requires an apportionment. If s. 8 (7) (*b*) is accepted as a means of imposition of a maximum upon the deduction allowable, then, by the appellants' proposed calculation it is impossible to reach a resultant deduction in excess of that maximum.

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered :—

DIXON C.J. AND TAYLOR J. The first series of questions raised by the case stated in this matter is concerned with the construction of sub-s. (7) of s. 8 of the *Estate Duty Assessment Act* 1914-1950. That sub-section is in the following terms :—"When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate".

Some of the difficulties involved in the application of this provision were solved by the decision in *Perpetual Trustee Co.*

(1) (1942) 1 K.B. 210.

(*Ltd.*) v. *Federal Commissioner of Taxation* (1), where it was held that the duty which was payable under the Act in respect of that part of the deceased's estate which was situate outside Australia should be determined by ascertaining the proportion of the total duty which that part of the deceased's estate, less a ratable part of the estate debts, bore to the net value of the whole estate. But in that case the only part of the estate situate outside Australia was a part situate in England and the further difficulties which arise where assets of an estate are situate in different countries outside Australia and where some of such assets attract duty in more than one of such countries do not present themselves.

Three possible views of the effect of the sub-section are presented by the first series of questions. Firstly, it may be that the sub-section is not concerned with differentiating between duties paid on different parts of the estate outside Australia. On this view the requirements of the section would be satisfied by aggregating the various amounts of foreign duty and, having compared the resulting sum with the duty payable under the Act in respect of the parts of the estate outside Australia, deducting the lesser amount from the total duty payable under the Act. But this method, for which the appellant contends, is criticised not only on the ground that the words of the sub-section are not appropriate to produce such a result, but also because in some cases its application would, in respect of some of the assets situate abroad, result in an allowance in the aggregate deduction decided upon of a sum in excess of the duty payable under the Act in respect thereof.

If the method suggested by this view of the sub-section is wrong then it is necessary to make a series of calculations and comparisons for the purpose of applying the section. But such a course involves difficulties of its own, for competing views are advanced which seize upon, on the one hand, the duty paid *in any place* outside Australia and, on the other, the duty paid *in respect of any part of the estate* situate outside Australia, for the purpose of making a comparison with the duty payable under the Act in respect of the appropriate parts of the estate. Each method would, of course, lead to the same result except in cases such as the present where shares which form part of the estate and which, according to Australian law, are situate in Canada have attracted duty not only in that country but also in the United States of America where the relevant share certificates were held at the date of the death of the deceased. The application of the former of these methods is a matter of some difficulty and is calculated to produce anomalous

(1) (1938) 59 C.L.R. 611.

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results. In the present case, for instance, the duty paid in Canada was less than the duty payable under the Act in respect of that part of the estate upon which Canadian duty was paid. Accordingly the appropriate deduction on this view was the amount of the duty paid in that place. Likewise the duty payable in the United States of America on these shares was less than the duty payable under the Act in respect thereof. But the aggregate of the Canadian duty and the United States duty was greater than the duty payable under the Act. Assuming that a deduction of the Canadian duty has been made, the question immediately arises whether a full deduction of the United States duty on the shares should be allowed. Perhaps the question would have arisen in a more acute form if the duty payable under the Act in respect of these shares had been less than the duty paid either in Canada or in the United States, for the question which would then have arisen would have been whether this particular method, involving, as it does, a series of comparisons between the duty paid in each place and the appropriate proportion of duty payable under the Act, would have been satisfied only by the making of two deductions each of the amount of the latter duty. It may, of course, be said that the deduction which the sub-section authorizes in such a case is the *duty payable under the Act* in respect of the relevant part of the estate and that this can be deducted only once. But even if this be so, it does not dispose of the difficulties which arise, and which were adverted to in argument, where the duty paid in one place is less, and in another place, greater than the duty payable under the Act in respect of that part of the estate which has attracted the foreign duties. Nor does it dispose of the difficulties which arise where assets situate in one foreign country attract duty not only in that country but also in another country as portion only of that part of the estate of the testator subject to duty in the latter country. This is the case here for the Canadian shares formed portion only of that part of the deceased's estate which attracted duty in the United States.

The second of the methods which require a series of calculations to be made avoids these difficulties by selecting as the basis for each calculation the various parts of the estate which have attracted duty outside Australia. In our view, however, this method is not justified by the terms of the sub-section. It was sought to be supported by giving to the expression "any part of the estate" a distributive meaning but we see no reason why a distributive meaning should be given to this expression and yet denied to the controlling words of the section—"Where any duty is lawfully

paid in any place outside Australia". Moreover, the method is, in our opinion, clearly in conflict with the comparison directed by the sub-section between duty paid at *the* place outside Australia and that payable under the Act in respect of the appropriate part of the estate. The result of the adoption of this method by the commissioner in the present case was to make a comparison between the duty payable under the Act in respect of the Canadian shares and the aggregate of duties paid in respect thereof in Canada and the United States, and thereafter to compare part of the amount of the duty paid in the latter country, i.e. the duty payable on the assets situate in the United States exclusive, of course, of the Canadian shares, and the duty payable under the Act in respect of those assets. In our opinion in neither case was a comparison of the nature specified in the sub-section made.

If, in giving effect to the sub-section, it were necessary to choose between the methods which require a series of calculations and comparisons to be made in cases such as the present we would, for the reasons briefly indicated, prefer the former method, but upon consideration of the language of the sub-section and its history, it is unnecessary to make such a choice. In its original form s. 8 (7) read as follows:—"All duties lawfully paid in any place outside Australia, in respect of any part of the estate situate outside Australia may be deducted from the duty to which the estate is liable under this Act".

This sub-section was replaced by the existing provision in 1928 (Act No. 47 of 1928, s. 5 (*c*)). Under the earlier provision all foreign duties payable on any part of the estate situate outside Australia were deductible and it was quite immaterial whether any such part of the estate or any assets comprised therein attracted duty in more than one place. Equally, it was quite immaterial whether the aggregate of such duties equalled or exceeded the duty payable under the Act in respect of that part or those parts of the estate situate outside Australia, or indeed in respect of the whole estate. Accordingly, it was possible for deductions on account of foreign duties to absorb entirely the liability for duty under the Act and it was this obviously possible result, we should think, with which the provision introduced in 1928 was intended to deal. It is not without significance that, so far as was possible having regard to the prescription of a maximum limit on the deduction given by the sub-section, the language of the former sub-section was adopted. That sub-section made reference to "all duties paid *in any place* outside Australia, in respect of *any part* of the estate situate outside Australia" and the application of the sub-section did not require

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either the expression "any place" or "any part" to be read distributively; the deduction permitted was of *all duties* paid, in effect, anywhere out of Australia in respect of any portion of the estate situate outside Australia. In these circumstances we do not see why the form of the present sub-section should be regarded as requiring either expression to be read distributively and thereby ascribe to the legislature an intention that a series of comparisons should, in a case such as the present, be made. The first of the suggested methods which involve a series of comparisons is practically unworkable whilst the second focuses attention on the expression "any part of the estate situate outside Australia" to the entire exclusion of the opening words of the sub-section. Indeed if the expressions "in any place" and "in the place" are to be ignored the sub-section would quite clearly not require a series of comparisons to be made but would be satisfied by a comparison between the aggregate of the duties paid outside Australia on any part of the estate situate outside Australia and the duty payable under the Act on such parts of the estate.

We think the problem in this case is best solved by regarding the present sub-section as an expression in the singular of the basis upon which a deduction therein is permitted and that in its application to a case such as the present it should be read in the plural form. On this basis the section permits a deduction when any duties are lawfully paid in any places outside Australia in respect of any parts of the estate situate outside Australia and the quantum of the deduction should be ascertained by comparing the amount of the duties so paid in the places outside Australia and the duty which is payable under the Act in respect of the appropriate parts of the estate. Having regard to the history of the section we do not think, as was suggested in argument, that it is a valid objection to this construction that, where the aggregate of the foreign duties is less than the duty payable under the Act in respect of the ex-Australian estate, such aggregate may contain an amount of foreign duty payable in a particular place in respect of particular ex-Australian assets which is greater than the duty payable under the Act in respect of such assets.

For the reasons given we are of the opinion that question (1) (a) should be answered in the affirmative and questions (1) (b) and (c) in the negative. On this view it is unnecessary to answer question (2) nor, in the circumstances of this case, questions (4) and (5).

The final question is concerned with the basis upon which the respondent should ascertain "that part of the estate" situate

in England upon which duty was lawfully paid. Included in the English estate were investments to the value of £5,026 8s. 2d. which, pursuant to s. 47 of the *Finance* (*No.* 2) *Act* 1915 (Imp.) (5 & 6 Geo. 5, c. 89), s. 22 (1) of the *Finance* (*No.* 2) *Act* 1931 (Imp.) (21 & 22 Geo. 5, c. 49), and s. 60 (1) of the *Finance Act* 1940 (Imp.) (3 & 4 Geo. 6, c. 29), were exempt from duty. The statutory provisions under which the investments were exempt were not merely assessing provisions which affected only the manner in which duty was assessed on the whole of the English estate. On the contrary, the duty was assessed and paid only on the other assets. In these circumstances the appellant claims that the investments formed part of the estate upon which duty was paid and, accordingly, that the total value of the whole of the English assets should be taken into account in making the calculation required by par. (*b*) of the sub-section. With this view we disagree, for the investments did not constitute any part of the deceased's estate upon which duty was lawfully paid in England. Accordingly their value should be disregarded for the purposes of par. (*b*) and question (3) should be answered by saying that the commissioner should treat that part of the deceased's estate which is situate in England in respect of which duty was lawfully paid as being of the value of £55,632 14s. 0d.

WEBB J. Case stated by *Fullagar* J. under s. 28 of the *Estate Duty Assessment Act* 1914-1950. Questions including exchange questions, arise as to the calculation of deductions under s. 8 (7) where duties are paid in two or more foreign countries on a part or parts of the estate of a person who died domiciled in Australia leaving property within and beyond Australia.

Section 8 (7) provides: "When any duty is lawfully paid in any place outside Australia in respect of any part of the estate situate outside Australia there shall be deducted from the total duty to which the estate is liable under this Act the lesser of the following sums—(*a*) the amount of duty so paid in the place outside Australia; or (*b*) the duty which is payable under this Act in respect of that part of the estate".

If the phrase "in any place outside Australia" were to be held to be controlling, then a distributive application of s. 8 (7) would be required. But that would give in every case a pointless result, as the particular duty would then always be deducted from the total duty to which the estate is liable apart from deductions on account of the payment of foreign duties. This would be so, because

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there is no express provision in the Act fixing the order of such deductions and providing that after the first deduction is made the total duty for the purposes of each further deduction should be the original total less the deduction or deductions already made on account of the payment of foreign duty. Without such a provision the meaning of "total duty" is, I think, constant: it means the total duty without any deductions on account of the payment of foreign duties. If, as counsel for the commissioner submitted, the phrase "in respect of any part of the estate outside Australia" were to be held to be controlling, then, if, as counsel for the commissioner also submitted, s. 8 (7) is to be given a distributive application, again the same pointless result is reached. This suggests that what is intended by s. 8 (7) is not a number of completely independent assessments and separate deductions but only one deduction, i.e., the aggregate of the payments on account of foreign duties. I think the proper course is simply to apply s. 23 (*b*) of the *Acts Interpretation Act* 1901-1950, and to take the word "duty" in s. 8 (7) to include "duties" where foreign duty is referred to; the word "place" to include "places"; and the word "part" to include "parts": with the appropriate verbs and adjectives. So read s. 8 (7) has the same effect as the provision for which it was substituted by s. 5 of the Act of 1928; but subject to the limitation as to the amount that may be deducted from the total duty. Apart from the obvious need to avoid the sacrifice of Australian duty to foreign duties no reason for this amendment was suggested or can be inferred.

I think then that question (1) (a) should be answered "Yes".

It becomes unnecessary to answer questions (1) (b) or (c), or question (2).

As to question (3) if, as par. 5 of the case states, the duty paid in the United Kingdom was paid "in respect of the assets . . . valued at . . . £stg.60,659 2s. 2d.", then question (3) should be answered "£stg.60,659 2s. 2d.", as counsel for the appellant submitted. But I do not understand it to be contended that the Court should adhere to the exact wording of the case in complete disregard of the provisions of the English statutes under which the exemptions amounting to £stg.5,026 8s. 2d. were granted. As the latter sum represented the values of the assets specifically exempted by those English statutes because of their particular nature, and not, say a mere proportion of the total value of the estate situate in the United Kingdom, I think that the commissioner should treat the part of the estate situate in the United Kingdom in respect of which duty was paid in the United Kingdom

as of the value of £stg.55,632 14s. 0d.; and question (3) should be answered accordingly.

It becomes unnecessary to answer questions (4) and (5).

KITTO J. By virtue of sub-s. (3) of s. 8 of the *Estate Duty Assessment Act* 1914-1950 for the purposes of the Act the estate of a deceased person comprises his real and personal property in Australia, and, in addition, his personal property situate out of Australia if he was domiciled in Australia at the time of his death. Moreover, by virtue of sub-s. (4), property which was not his at his death is deemed, for the purposes of the Act, to be part of his estate if it falls within certain descriptions; and this applies to personal property within any of those descriptions which was situate out of Australia at the date of death, provided that the deceased was then domiciled in Australia: *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1).

It is, clearly enough, by way of corollary to the inclusion of ex-Australian property to this extent in the dutiable estate, that sub-s. (7) of the same section is enacted. This provision allows a deduction from the total duty to which the estate is liable under the Act, that is to say from the duty which s. 8 (1) requires shall be levied and paid upon the value, as assessed under the Act, of the estate of the deceased person, when any duty is lawfully paid in any place outside Australia. The deduction is to be the lesser of two sums. One is the amount of duty paid in the place outside Australia in respect of any part of the estate situate outside Australia and the other is the duty which is payable under the Act in respect of that part of the estate. The two sums have one characteristic in common; the payment in each case must be "in respect of" a part of the estate situate outside Australia.

It is in this that the key to the construction of the section appears to me to lie. The meaning of "in respect of" in this context has already been decided. It was considered by this Court in *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (2), in relation to estate duty under the Act, and the decision was that the description of duty payable "in respect of" the ex-Australian assets applies to that proportion of the total duty to which the estate is liable which the value of the assets outside Australia, after the deduction of a ratable part of all the debts, bears to the net value of the whole estate. By an analogous apportionment one may ascertain what part of the duty paid in another country upon such property as is treated in that other country

(1) (1933) 49 C.L.R. 220. (2) (1938) 59 C.L.R. 611.

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as the estate of the deceased person dutiable there, satisfies the description in sub-s. (7) of duty paid in that other country "in respect of" any of that property which is a part of the estate dutiable in Australia.

Now, when sub-s. (7) speaks of "any part of the estate situate outside Australia", it cannot mean the whole of the personalty situate outside Australia which is included in the dutiable estate by sub-ss. (3) and (4), considered as one mass; for, if duty were paid in one foreign country upon some such personalty and in another foreign country upon other such personalty, it would simply be a misuse of language to describe the combined total of these foreign duties as duty paid "in respect of" all the foreign personalty. The truth would be that no duty would have been paid "in respect of" the foreign personalty as a whole, but each amount of foreign duty would be paid "in respect of" the particular lot of foreign personalty upon which it had been charged.

Sub-section (7) thus appears to me, according to the natural meaning of its terms, to be intended to apply whenever "any part of the estate situate outside Australia" has attracted ex-Australian duty so that that duty may be said to have been paid in respect of that part. So understood, the sub-section operates to prevent the double taxation which sub-ss. (3) and (4) would otherwise produce in some cases; for as often as either of those sub-sections brings into the dutiable estate an asset situate abroad, and thereby causes Australian estate duty to become payable in respect of that asset, so often sub-s. (7) allows a deduction of that duty or of any foreign duty paid in respect of the same asset, whichever is the less.

If this is the operation of the sub-section, there is no difficulty in applying s. 23 (*b*) of the *Acts Interpretation Act* 1901-1950 so as to read the words "where any duty is lawfully paid in any place outside Australia" as including the case where any duties are lawfully paid in any places outside Australia. If, for example, shares forming part of the estate under the Act are situate in Canada, and duty is charged in respect of them in Canada and again in the United States, the aggregate of these two duties is the amount of duty paid in places outside Australia in respect of those shares; and, as I understand the sub-section, either that amount or the duty payable under the Act in respect of the same shares, whichever is the lesser, is to be deducted from the total duty payable under the Act. Likewise if in an estate there are government bonds situate in England and brought to duty both in England and in New Zealand, sub-s. (7) gives a right to deduct the duty paid in the

two places in respect of the bonds, or the duty payable here in respect of them, whichever is the less. I cannot see any justification for so construing the sub-section as to produce the curious result (as I would venture to regard it) that, if the shares in Canada and the government bonds in England happen to form parts of the same deceased person's estate, there are not these two rights of deduction, but, for no particular reason that I can perceive, one right of deduction, to be worked out by lumping the shares and the bonds together and treating the Canadian and the United States duties paid in respect of the shares, and the English and New Zealand duties paid in respect of the bonds, as if the combined total had been paid in respect of both the shares and the bonds.

I would answer Question 1: (a) No, (b) Yes, (c) No. And I would answer Yes to Question 2 (a).

I agree that Question 3 should be answered in the manner proposed in the judgment which my brethren have delivered.

Questions answered as follows:—

(1) (*a*) *Yes;* (1) (*b*) *and* (*c*) *No.*

(3) £*stg*.55,632 14*s*. 0*d*.

(2), (4) *and* (5). *These questions do not arise having regard to the answer to question* (1).

Costs of the case stated reserved for the judge disposing of the appeal.

Solicitors for the appellants, *Leach & Thomson.*

Solicitor for the defendant, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.