Foll. 8 ALR. 258.
Ref to 30 ALJR 412
A.P. 133 CLR. 526.
Ref to 20 ALR 77.
Ref to 33 FLR 348.

[HIGH COURT OF AUSTRALIA.]

CLOWES AND ANOTHER . . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1953-1954.

1953, MELBOURNE, *Sept.* 16;

1954, SYDNEY, *April* 7.

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

Income Tax (Cth.)—Assessable income—Purchases under agreement of beneficial interest in produce of "lots" in pine plantation—Vendor to plant, maintain and harvest timber—Proportion of proceeds of sale of produce from whole plantation divisible among lot-holders according to respective lot-holdings—Distribution to lot-holder to be in full settlement of claims under agreement—Sum paid to lot-holder in excess of sum paid by him—Whether difference a "profit arising . . . from the carrying on or carrying out of any profit-making undertaking or scheme" by or on behalf of taxpayer—Scheme—Necessity for system—Income Tax Assessment Act 1936-1945 (*No.* 27 *of* 1936—*No.* 4 *of* 1945), *s.* 26 (*a*).

Section 26 of the *Income Tax Assessment Act* 1936-1945 provides that the assessable income of a taxpayer shall include "profit arising from the sale by the taxpayer of any property . . . or from the carrying on or carrying out of any profit-making undertaking or scheme".

Held by *Dixon* C.J. and *Kitto* J. (*Webb* and *Taylor* JJ. expressing no opinion) that, on the proper construction of the section, the undertaking or scheme must be carried on or carried out by the taxpayer or on his behalf.

A., a draper, entered into two agreements in similar form dated respectively 19th February 1926 and 17th July 1929 with a company, Pine Plantations Pty. Ltd. Each agreement, after reciting that A. was desirous of becoming possessed of a beneficial interest in the produce of a certain acreage of timber land, called a lot, provided for the payment by A. to the company of certain moneys, under both agreements totalling £75, and for the transfer by the company, as soon as all the lots in the plantation had been sold and the purchase moneys paid, of the title to the land into the name of a trustee company to be held upon two trusts. The first trust was to compel the company to carry out certain obligations with respect to planting and maintaining the land with pine trees, to be set out in a trust deed. The second trust was to hold the land as security for the performance by the company of its obligations under the trust deed and under cl. 8 of each agreement, and afterwards in

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

trust for the company, and to hold the produce of the land and the net proceeds thereof in trust for the company and the lot-holders, as to one-tenth thereof for the company and as to nine-tenths thereof for the lot-holders according to their respective lot-holdings. The company was obliged under cl. 5 of each agreement to plant the land with pine trees in a proper and husband-like manner and under cl. 8 thereof, as soon as the forest or growing timber on the land or any part of it reached maturity, or otherwise became marketable, to make arrangements for marketing the produce thereof, either standing or cut, and, after deducting all costs and expenses and its own one-tenth of the net proceeds, to distribute the remaining nine-tenths among the lot-holders in proportion to their lot-holdings in full and final settlement of their claims under the agreement. A. paid to the company the sum of £75 and the land was planted with timber which was eventually marketed. During the year ending 30th June 1945 the company distributed to A. in pursuance of cl. 8 of the agreements sums totalling £105. The Commissioner of Taxation contended that £30 being the difference between £105 and £75 was assessable income.

Held, by *Dixon* C.J. and *Kitto* J. (*Webb* and *Taylor* JJ. dissenting), that the sum of £30 was a mere enlargement of capital, and was not to be deemed assessable income by reason of the provisions of s. 26 (a) of the *Income Tax Assessment Act* 1936-1945 because the investments, not forming part of any system or practice, were not themselves a profit-making scheme, while the operations which produced the profit were not carried on by or on behalf of the taxpayer as a lot-holder, but by the company on its own behalf.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1945.

Joseph Reginald Clowes (hereinafter called the taxpayer) entered into two agreements, dated 17th February 1926 and 17th July 1929, with Pine Plantations Pty. Ltd., a company.

There were no material differences between the two agreements, but one related to land known as "South Australian Plantation Number One" while the other related to land known as "South Australian Plantation Number Three". The agreement dated 17th February 1926 was, so far as relevant substantially as follows :—

This agreement made the 17th February 1926 between Pine Plantations Pty. Ltd. (hereinafter called "the company") of the one part and Joseph Reginald Clowes (hereinafter called "the lot-holder") of the other part :—Whereas the lot-holder is desirous of becoming possessed of a beneficial interest in the produce of one acre of timber lands (hereinafter referred to as a lot or lots) forming portion of four hundred and fifty acres of land or thereabouts situated in South Australia and known in the company's register as South Australian Plantation Number One. Now this agreement witnesseth as follows :—

1. The lot-holder shall pay to the company or its authorized agent the sum of two pounds per lot on the signing hereof on account of the purchase money which is £25 per lot.

2. The lot-holder shall pay to the company the balance of purchase money being £23 per lot by twenty-three equal consecutive calendar monthly payments of £1 per lot. If default be made by the lot-holder in paying any calendar monthly payment on its due date the whole amount then unpaid by the lot-holder shall immediately become due payable and recoverable. Any lot-holder may pay the balance of his purchase money at any time before the same becomes payable hereunder and if a lot-holder shall pay the whole sum of £25 per lot within thirty days from the date hereof he shall be entitled to receive a discount of five per cent thereon.

3. The company may at any time and it shall as soon as the whole of the lots in the said South Australian Plantation Number One have been sold and the purchase money paid by the lot-holders transfer the title to the said land into the name of a trustee company to be found or formed by the company for the purpose and such trustee company shall hold the said land upon (*inter alia*) the following trusts :—

(a) To compel the company to fairly and faithfully carry out all the obligations entered into by it with respect to planting and maintaining the said land with pine trees, such obligations to be more specifically set out in the document under seal constituting the trust a copy whereof may be inspected at the company's registered office.

(b) To hold the whole of the said land as security for the performance by the company of its obligations under the trust deed and under cl. 8 hereof and afterwards in trust for the company and to hold the produce of the said land and net proceeds thereof in trust for the company and the lot-holders as to nine-tenths thereof for the lot-holders who have made all the payments in respect of their lots according to their respective lot-holdings and as to one-tenth thereof in trust for the company.

Provided always and it is hereby agreed :—

4. That the company shall pay and continue to pay all rates and taxes payable in respect of the said land for a period of twenty years from the date hereof.

5. That the company shall within one year from the date hereof or at the first available and usual planting season after the expiration of one year from the date hereof plant all the said land in respect of which lots have been taken up with pine trees in a proper and husband-like manner saving and excepting such portions thereof as

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

may be required as clear ways for the purpose of fire breaks. And the company shall continue to plant the remainder of the said land as the remaining lots are taken up and paid for from time to time in the same way and with the said exceptions. The company may at its option plant any portion of the said land in manner aforesaid before it is either sold or paid for.

6. As soon as the whole of the purchase money for lots in respect of the said South Australian Plantation Number One has been paid by the lot-holders the company will deposit with the said trustee company the sum of £2,250 either in cash or in approved Government securities being one-fifth of the said purchase money as security for the performance by the company of its obligations to lot-holders as prescribed in the trust document hereinbefore referred to.

7. That in the event of the lot-holder making default in payment of any of the moneys payable by the lot-holder hereunder and such default continuing for a period of fourteen days the company may (without prejudice and in addition to any other rights and/or remedies it may have) without notice rescind this contract and retain for its own use and benefit all moneys paid by the lot-holder and all benefits and profits (if any) accruing to the lot-holder shall thereupon revert to the company under this contract.

8. The company will as soon as the forest or growing timber on the said land or any part of it has reached maturity or otherwise become marketable make such arrangements as it considers necessary or advisable for marketing the produce thereof either standing or cut and after deducting all costs and expenses and the company's one-tenth share of the net proceeds as provided for in cl. (3) (b) hereof will distribute the remaining nine-tenths amongst the lot-holders in the proportion of one-four hundred and fiftieth part for every fully paid up lot in full and final settlement of the claims of such lot-holders under this contract.

Pursuant to the agreements the taxpayer paid to the company the sum of £75.

During the year ended 30th June 1945 the company paid to the taxpayer, pursuant to the above agreements, sums totalling £105 out of the proceeds of the marketing of the timber produced upon the lands described in the agreements.

The Commissioner of Taxation took the view that the sum of £30, being the difference between the sum of £105 received from the company and the sum of £75 paid to it, as income and included it, by amended assessment, in the taxpayer's assessable income for the year ended 30th June 1945.

The taxpayer objected to the amended assessment on the following grounds :—

1. That the sum of £30 included in the assessment was not income within the meaning of the *Income Tax Assessment Act* 1936-1945, or at all, and that the assessment was, therefore, excessive and contrary to law.

2. That he did not acquire the bonds in Pine Plantations Pty. Ltd. for the purpose of profit-making by sale or in the course of carrying out any profit-making undertaking or scheme.

The Commissioner of Taxation having disallowed the objection, the taxpayer, by notice dated 22nd July 1949, requested that the decision of the commissioner might be referred to a board of review, and it was so referred. On 1st August 1952, the Commonwealth Board of Review No. 2 confirmed the assessment. From this decision the taxpayer brought the present appeal to the High Court of Australia. On 13th March 1953 the appeal came before *Kitto* J. who directed, by consent of the parties, that it be argued before a Full Court of the High Court of Australia upon the material before the board of review.

On 26th August 1953, the taxpayer having in the meantime died, *Kitto* J. ordered that the appeal be carried on by his executor, Robert Norman Clowes, and executrix, Sarah Hilda Trewhella.

D. I. Menzies Q.C. (with him *K. A. Aickin*), for the appellant. It is submitted that the sum of £30 is not income but payment in extinguishment or part extinguishment of a liability created when the lot-holders purchased their lots. At that time they acquired no interest in land, but simply a chose in action. The board of review was in error in relying on s. 26 (a) of the *Income Tax Assessment Act* 1936-1945. When that section refers to a profit-making undertaking or scheme, it means such a scheme carried on by the taxpayer or on his behalf. Since the taxpayer acquired only a chose in action, the scheme here was not carried on by him or on his behalf. Nor could it be said that the taxpayer by investing his money was carrying on a scheme, since the element of repetition is lacking. The distribution by the company to the lot-holders is analagous to the distribution by the liquidator in the winding-up of a company under the *Companies Acts*. [He referred to *Webb* v. *Federal Commissioner of Taxation*, per *Higgins* J. (1); *Inland Revenue Commissioners* v. *Burrell*, per *Sargant* L.J. (2); *Commissioner of Taxation (N.S.W.)* v. *Stevenson*, per

(1) (1922) 30 C.L.R. 450, at pp. 483, 484.

(2) (1924) 2 K.B. 52, at p. 73.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Rich, *Dixon* and *McTiernan* JJ. (1); *Federal Commissioner of Taxation* v. *Blakely*, per *Fullagar* J. (2); *Whyte* v. *Clancy* (*H.M. Inspector of Taxes*) (3).]

J. B. Tait Q.C. (with him *Peter Murphy*), for the respondent. The sum of £30 is assessable income by virtue of s. 26 (a) of the *Income Tax Assessment Act* 1936-1945. Prior to the introduction of that section if the transaction was an isolated one, the profit resulting therefrom was not income. [He referred to *Jones* v. *Leeming*, per Viscount *Dunedin* (4); *Inland Revenue* v. *Fraser* (5).] Section 26 (a) has two limbs. The first requires the element of sale but, under the second, a profit is taxable if a taxpayer enters into a profit-making scheme. That is the position here. It does not matter how the scheme is carried on. The undertaking must be an undertaking of the taxpayer, but it is none the less such because other lot-holders are interested. The carrying out of a profit-making scheme does not necessarily involve repetition of acts. [He referred to *Blockey* v. *Federal Commissioner of Taxation*, per *Isaacs* J. (6); per *Rich* J. (7); *Coglan* v. *Federal Commissioner of Taxation* (8); *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation*, per *Dixon* J. (9); *New Zealand Flax Investments Ltd.* v. *Federal Commissioner of Taxation* (10).]

K. A. Aickin in reply. [He referred to *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation*, per *Dixon* J. (11); *Shaw* v. *Federal Commissioner of Taxation* (12).]

Cur. adv. vult.

April 7, 1954.

The following written judgments were delivered :—

DIXON C.J. This is an appeal by a taxpayer from a decision of the board of review by which an amended assessment of the Commissioner of Taxation was confirmed. The amount of tax involved is small but the decision of the case will govern the liability of a number of taxpayers.

The amended assessment included in the assessable income of the taxpayer an additional £30. The year of income is the twelve months ended 30th June 1945. During that year the taxpayer

(1) (1937) 59 C.L.R. 80, at pp. 97, 99.
(2) (1951) 82 C.L.R. 388, at pp. 406-407.
(3) (1936) 20 Tax. Cas. 679, at pp. 694, 697-698; (1936) 2 All E.R. 735, at pp. 738, 741-742.
(4) (1930) A.C. 415, at p. 422.
(5) (1942) S.C. 493.
(6) (1923) 31 C.L.R. 503, at p. 507.
(7) (1923) 31 C.L.R., at p. 509.
(8) (1932) 47 C.L.R. 109, at p. 111.
(9) (1933) 50 C.L.R. 268, at p. 298.
(10) (1938) 61 C.L.R. 179.
(11) (1933) 50 C.L.R. 268, at p. 297.
(12) (1920) 27 C.L.R. 340.

received the sum of £105 which must be taken to have been paid to him by Pine Plantations Pty. Ltd. in pursuance of two contracts he had made with that company dated respectively 19th February 1926 and 17th July 1929. At the time of making these contracts he had paid the company £25 in pursuance of the first of them and £50 in pursuance of the second of them. The sum of £30 included in his taxable income is the difference between these two sums and £105. The question for decision is whether the commissioner correctly included the amount in the assessable income of the taxpayer.

The taxpayer himself is described as a draper and it is obvious that he paid the sum of £75 to Pine Plantations Pty. Ltd. by way of investment. He passively awaited whatever return he might receive from that company. Pine Plantations Pty. Ltd. appears to have been incorporated in Victoria and to have held land near Mt. Gambier, South Australia, where it carried out a project of planting and cultivating pine trees which upon maturity it would cut and market. There were separate areas of land which the company dealt with as distinct enterprises. The first of the two contracts made by the taxpayer with the company is concerned with an area of 450 acres called South Australian Plantation Number One ; the second with an area of 500 acres called South Australian Plantation Number Three. The agreements with the company into which the taxpayer entered are in common form and are numbered serially. The form begins by giving the name and occupation of the taxpayer and describing him as the lot-holder. There is then a recital that the lot-holder is desirous of becoming possessed of a beneficial interest in the produce in the first case of one acre and in the second case of two acres of timber land afterwards referred to as a lot or lots forming portion of 450 and 500 acres respectively of the company's land, described in the company's register as South Australian Plantation Number One or Number Three. The agreement which is under seal contains a number of provisions of which the following are material to the present question. An obligation is imposed on the lot-holder to pay to the company £3 per lot on the signing of the contract on account of the purchase money which amounted to £50 in the one case and £25 in the other. The balance of the purchase money is to be paid in instalments. The lot-holder was to pay every month in the one case an amount of £1 a lot and in the other of 10s. a lot, that is to say until the balance of the purchase money was paid off. The company engaged, as soon as the whole of the lots in the plantation had been sold and the purchase money paid by the lot-holders, to

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

DIXON C.J.

transfer the title to the land into the name of a trustee company to be held upon trust to compel the company fairly and faithfully to carry out all the obligations entered into by it with respect to planting and maintaining the land with pine trees and upon trust to hold the whole of the land as security for the performance by the company of its obligations under the trust deed and afterwards in trust for the company and to hold the produce of the land and the net proceeds thereof as to nine-tenths for the lot-holders and as to one-tenth for the company. The company agreed that within two years or at the next planting season thereafter it would plant all the land in respect of which lots had been taken up with pine trees and would continue to plant the remainder of the land as the remaining lots were taken up and paid for. Although this clause might seem to refer to the lots taken up as if each was a separate and specific acre of land it is obvious that the reference is rather numerical than specific; the plantation is dealt with as a whole and the lot-holders take only a distributable share of the total net proceeds. The duty of the company to sell the timber and distribute among the lot-holders their share of the proceeds is the subject of another clause of the agreement. This clause provides that as soon as the forest or growing timber on the land or any part of it has reached maturity or has otherwise become marketable the company will make such arrangement as it considers necessary or advisable for marketing the produce thereof either standing or cut and, after deducting all costs and expenses and the company's one-tenth of a share of the net proceeds, will distribute the remaining nine-tenths amongst the lot-holders in proportion (in the case of the first contract) of one-four hundred and fiftieth part and (in the case of the second contract) of one-five hundredth part for every fully paid up lot, in full and final settlement of the claims of such lot-holders under the contract.

The two areas of land were planted with pine trees and apparently cultivated successfully. The plantations must have come to maturity at about the same time and the timber must have been then cut and sold. But the parties, rightly enough no doubt, treated the facts concerning the company's operations as immaterial and contented themselves with an agreed statement that during the year ended 30th June 1945 the company paid to the taxpayer pursuant to the contracts sums totalling £105 out of the proceeds of the marketing of the timber produced upon the lands described.

From the taxpayer's point of view he laid out a sum of money entitling him at the end of a protracted period of time to an uncertain return in a lump sum which he hoped might prove larger than

his outlay though it might well prove smaller. In the event, when a period of fifteen to eighteen years had elapsed, he received back a sum equal to his outlay and an additional forty per cent. But the taxpayer did nothing but lay out his money on the faith of the contract and await the result. The company was in no sense his agent. The money which he paid in pursuance of the contracts became part of the general funds of the company. Its obligations to him were simply contractual. It made the contract for its own advantage and in performing it acted independently of the direction or control of any lot-holders, whose relationship to the company was simply that of persons providing it with money on special terms. Further, every lot-holder made a separate contract. They were not bound together by any contract *inter socios*. It would be impossible to regard them collectively as an unincorporate body or association of persons that would fall within the definition of " company " contained in s. 6 of the *Income Tax Assessment Act* 1936-1945. The decision of the board of review, however, was based upon s. 26 (a). That provision enacts that the assessable income of a taxpayer shall include profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme.

The part of this clause upon which the board relied is of course that referring to a profit-making undertaking or scheme. It is not a case of " profit arising from the sale by the taxpayer of any property acquired by him ". The board took the view that there was " one profit-making undertaking or scheme, to which those who entered into contracts with the company were parties. They adventured their money in the scheme in the hope and expectation that the ultimate proceeds of the timber, to be shared between themselves and the company, would return to them a profit on their outlay ". After some consideration I have come to the conclusion that this view of the matter, simple and attractive as it may at first seem, is fallacious. When s. 26 (a) speaks of the carrying on or carrying out of a profit-making undertaking or scheme it means the carrying on or out by the taxpayer or on his behalf. The words " by the taxpayer " occur only after the word " sale " but they give the sense of the whole clause. It was aimed at bringing what might otherwise have been thought possibly to be capital profits within the conception of income. It was not concerned with the somewhat different matter of treating as the assessable income of a given taxpayer a receipt by him derived from someone else because that someone else had obtained it by

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

DIXON C.J.

a scheme of profit-making or by some other means that would justly give it in the latter's hands the character of income. It is therefore necessary to find an undertaking or scheme carried on or carried out by or on behalf of the taxpayer. No doubt, so much is inferentially conceded when it is said that the lot-holders were parties to the one profit-making scheme. But the operation giving rise to the profit so described was the planting of pine trees, the cultivation of the plantation and the logging and disposal of timber. These appear to me to have been both in fact and in law the operations of the company conducted on its own behalf and not on behalf of the lot-holders. True it is that the company had contracted with the lot-holders to plant the trees, market the timber and pay over the stipulated portion of the proceeds. But these were contractual terms on which the money was raised by the company. From the taxpayer's standpoint the only profit in contemplation was an increase in the amount he invested with the company when the money became repayable as a result of the operations of the company, operations which as part of the terms of the investment the company became bound to carry out. To enter into a contract to provide a specified sum on such terms, to pay it and then to await results cannot in my opinion be properly described as " carrying on or carrying out a scheme or undertaking ". If the case is considered apart from s. 26 (a), then I think the taxpayer's gain should be held to be a mere enlargement of capital. In the case of each of the two contracts, a single sum was paid in the expectation or hope of the return of a single sum, an increased sum. From the taxpayer's point of view it was nothing but a casual investment of capital in hope of enlargement at the end of many years. It was not done in the course of the taxpayer's business. There is no suggestion that it formed part of any system or practice. It is likely enough that it was nothing but the result of yielding to a canvasser.

I think that the assessment was erroneous in including in the assessable income the amount of £30 in question. It follows that in my opinion the appeal should be allowed and net tax shown in the amended assessment reduced by £12 13s.

WEBB J. I would dismiss this appeal for the reasons among others given by *Taylor* J.

In addition to the parts of the agreements referred to by his Honour, I rely on the following provision :—" . . . And the company shall continue to plant the remainder of the said land as the remaining lots are taken up and paid for from time to time ".

But for this provision it might be arguable that there is not sufficient on the face of the agreements or elsewhere to connect the appellant taxpayer with the source of the income, i.e., with the profit-making undertaking or scheme. "The difference between capital and income depends upon the relation of the recipient to the source of the receipt": *Commissioner of Taxation (N.S.W.)* v. *Stevenson*, per *Rich*, *Dixon* and *McTiernan* JJ. (1). It may be that with the assistance of the records of the company the particular portions of the land planted with pine trees as the result of the taxpayer's purchase of lots can be identified. But in any event I think there is enough on the face of the agreements to indicate that the taxpayer acquired not choses in action but interests in particular timber in respect of which he was paid, on the basis of his lot-holding, his due proportion of the profits from the timber grown on his lots and other lots, and thus to establish the necessary relationship between the taxpayer and the source of the income and to prevent the latter from being held to be a capital receipt. In my opinion the single harvest of all lots and the distribution of the proceeds on the basis of lots held did not prevent the taxpayer's lots from being the source of his income.

If several farmers agreed upon a joint harvesting and marketing of crops and shared the proceeds on an acreage basis, the share of each would, I think, have its source in his land and not in the agreement; although the agreement might render that share greater or less than the proceeds of individual operations. Here the source of the income in question is in the cultivation of the lots, i.e., in the profit-making undertaking or scheme, and not in shareholding in the company.

So regarded the taxpayer was as much a party to this profit-making undertaking or scheme as was the company which operated on his lots. As a lot-holder in the land he received his share of the profit. He was not a shareholder in receipt of assets of the company. As to nine-tenths, the profits from his lots were made for him and not for the company. The company received the remaining one-tenth as its share of the proceeds of the joint venture.

KITTO J. This appeal relates to the income tax and social services contribution payable by the appellant in respect of income derived by him in the year ended 30th June 1945. By an amendment of an assessment, the Commissioner of Taxation brought into charge a sum of £30 which the appellant derived in the relevant year but which he contends formed no part of his assessable income. His

(1) (1937) 59 C.L.R. 80, at p. 97.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

objection raising this contention was unsuccessful before the board of review, and from the board's decision this appeal is brought.

The amount in question is the difference between £75 which the appellant paid to a company called Pine Plantations Pty. Ltd. and £105 which the company paid to him. The appellant paid the £75 to the company in two sums, £25 in 1926 and £50 in 1929, pursuant to the provisions of written agreements made between the company and himself; and the £105, being the full amount which became payable to him under those agreements, he received, as is agreed for the purposes of the case, in the year ended 30th June 1945. The commissioner contends that the difference is assessable income for the purposes of the *Income Tax and Social Services Contribution Assessment Act* 1936-1945 (Cth.), either by virtue of s. 25 (a) of the Act as being income according to ordinary conceptions, or by virtue of s. 26 (a) as being profit arising from the carrying on or carrying out of a profit-making undertaking or scheme. The first step in the consideration of the matter must be to examine the terms of the two agreements.

The agreement of 1926 recited that the appellant (who was called the lot-holder) was desirous of becoming possessed of a beneficial interest in the produce of one acre of timber lands (referred to as a lot or lots) forming portion of a specifically described area of land known in the company's register as South Australian Plantation Number One. The agreement of 1929 contained a similar recital with respect to a beneficial interest in the produce of two acres of timber lands forming portion of an area known in the company's register as South Australian Plantation Number Three. The operative portions of the two agreements were substantially identical. The first two clauses obliged the lot-holder to pay the appropriate sum (£25 or £50) by instalments, the whole being described as the purchase money. Of the remaining clauses, those which have any present materiality prescribed the obligations of the company, which were as follows. As soon as all the lots in the plantation had been sold and the purchase money paid by the lot-holders, the company was to transfer the title to the land into the name of a trustee company, to be held upon two trusts. The first trust was to compel the company to carry out certain obligations, with respect to planting and maintaining the land with pine trees, to be set out in a trust deed. The second trust was to hold the land as security for the performance by the company of its obligations under the trust deed and under cl. 8 of the agreement (which will be mentioned in a moment), and afterwards in trust for the company, and to hold the produce of the land and the net

proceeds thereof in trust for the company and the lot-holders, as to nine-tenths thereof for the lot-holders according to their respective lot-holdings, and as to one-tenth thereof for the company. The company also promised to deposit £2,500 with the trustee company as security for the performance of the company's obligations to the lot-holders as prescribed in the trust deed.

The active duties to be performed by the company were laid down in cll. 5 and 8. Without troubling to set out the detail of these provisions it may be said that, first, cl. 5 bound the company to plant the land with pine trees in a proper and husband-like manner; and cl. 8 obliged it, as soon as the forest or growing timber on the land or any part of it should have reached maturity or otherwise become marketable, to make arrangements for marketing the produce thereof, either standing or cut, and, after deducting all costs and expenses and its own one-tenth of the net proceeds, to distribute the remaining nine-tenths amongst the lot-holders in proportion to their lot-holdings, in full and final settlement of their claims under the agreement. It will be observed that what each lot-holder was to become entitled to ultimately was an aliquot share in nine-tenths of the net proceeds of marketing; and it is in this sense that the recital must be understood when it refers to a beneficial interest in "the produce" of an acre, or two acres, forming portion, but an undivided portion, of the specified parcel of land.

The company, having planted and grown the trees on the land referred to, eventually marketed the timber. From the gross proceeds it deducted its costs and expenses, and from the net proceeds thus obtained it deducted one-tenth as its own share and distributed the remaining nine-tenths amongst the lot-holders. It was in this distribution that the appellant received the £105 above mentioned.

These being the relevant facts, the case, considered from the appellant's point of view, is one of a purchase of a right to receive a fixed proportion of a future fund as to which everything was uncertain. Whether the fund would ever come into existence; when it would come into existence if it ever should; and in that event how much it would be; all these things were uncertain; and consequently the purchaser, when he laid out his purchase money, accepted the risk that it might be lost wholly or in part, and by the same token gave himself the chance that it might return to him augmented after a period of years. The risks were quite serious: the trees might be inexpertly planted or unwisely tended; the land or climate might prove unsuitable for them; fire might

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

destroy them; and, even if everything else should go well, the timber might have to be sold on a depressed market and the lot-holders might for that reason get back less than they had put in or nothing at all. Nevertheless, to the appellant and the other lot-holders it must have seemed that the chance of a profit was sufficiently bright to justify the risk of loss. In the event, it was a profit and not a loss that was realized. If there had been a loss, it would have been a loss of capital, beyond all question. Is not the profit likewise to be conceded a capital nature?

Counsel for the appellant, looking for an analogy, suggested that the distribution made by the company amongst the lot-holders resembled a distribution by a liquidator in the winding-up of a company under the *Companies Acts*. In order to clear away irrelevancies in the case of a company, one should no doubt suppose a company whose articles of association forbid the distribution of profits while the company is a going concern, and provide that after a defined period the company shall go into liquidation and the assets shall be distributed amongst the members. Clearly enough, in such a case what the members would receive in the winding-up would be wholly capital in their hands, even though it was more than they had put into the company, and even though the excess arose from the making of profits of an income nature by the company. The reason would be that the case would not be one of the detachment from each member's capital asset of the profits it had produced, so that the profit came to the member as the fruit of his asset while the asset itself remained intact; there would simply be a receipt by the member of "his proper proportion of a total net fund without distinction in respect of the source of its components", and he would receive it "in replacement of his share": *Commissioner of Taxation (N.S.W.)* v. *Stevenson* (1). Equally in the present case it may be said that the appellant did not receive any sum as the detached profit of his £75; he received nothing but his proper proportion of a total net fund which had become distributable without distinction in respect of its components, and that proportion he received in replacement of his £75.

But this can hardly be decisive of the matter, for it is a commonplace that, where a sum of money is laid out on the terms of a contract which eventually produces a single but greater amount in replacement of that sum, the excess may be either capital or income, or partly capital and partly income, and its quality must be decided in the light of the provisions of the contract and any

(1) (1937) 59 C.L.R. 80, at p. 99.

relevant extrinsic circumstances. In *Lomax* v. *Peter Dixon & Son* (1), Lord *Greene* M.R. discussed this general topic with particular reference to contracts of loan. If £10 is paid today in consideration of a promise to repay £15 in a year's time, with no stipulation for interest *eo nomine*, the difference may really be interest, or it may be compensation for the capital risk undertaken, or it may be partly the one and partly the other. In so far as it is interest it is, of course, income; in so far as it is not interest, not a payment for the use of the capital sum, but an inseverable part of an amount received under a promise which, had events turned out differently, might have yielded less instead of more than the capital sum, it is capital—unless, of course, as in the case of a moneylender, the transaction is entered into in the course of a business of making money by means of such transactions. It is along this line that the solution of the present problem must be sought.

It was not in the course of any business of his that the appellant entered into his transactions with the company. So far as appears, he was making isolated investments of capital. Moreover, it was foreign to the whole idea of the transactions that the money paid to the company by the lot-holders should produce any periodical profit, or even a single profit as a separately identifiable amount. Upon payment to the company, the lot-holders' money was gone, and it was not repayable in any circumstances. That a larger amount would some day be received was assuredly hoped, perhaps believed, but not promised. The chance of getting more was the recompense for the risk of getting less; and the inherent uncertainty as to the time of receipt and the amount of the more, if more there should prove to be, necessarily made all calculations based on interest rates irrelevant. The essence of the matter simply was that the company bound itself to follow, over an indefinite period of years, a course of action which it expected would yield substantial net proceeds, and, in consideration of an immediate payment by the appellant, it promised to pay him a proportion of those net proceeds if and when they should come in. In the event, that for which he had paid £75 turned out to be an amount of £105. The £75 was capital, and there is no reason for denying the same character to the larger sum which ultimately replaced it.

There remains the question whether the profit which the £105 contained, though of a capital nature, should be treated as included in the appellant's assessable income by virtue of s. 26 (a) of the Act, as being profit arising from the carrying on or carrying out of any profit-making undertaking or scheme. The board of review

(1) (1943) K.B. 671.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Kitto J.

thought that s. 26 (a) applied to the facts of the case, and decided against the appellant for that reason. In effect, the answer has been given already. There was, undoubtedly, a profit-making scheme, and it produced a profit. But the scheme was the company's scheme, and the profit it produced arose to the company and not to the lot-holders. Omitting to observe the significance of this, the board of review treated passages in the judgments delivered in this Court in *New Zealand Flax Investments Ltd.* v. *Federal Commissioner of Taxation* (1) as applicable by analogy to the present case. In truth there is nothing in that case which throws any light upon the problem here. Moreover, it cannot be said that the company and the lot-holders were co-adventurers, each putting capital into a joint enterprise and deriving together the profit arising from the carrying of that enterprise to fruition. If the case were one of that description, not the £30 alone, but the whole £105 would be assessable income of the appellant. This result, however, is not contended for by the commissioner; and indeed it could not be supported, for the expression "profit arising" in s. 26 (a) must necessarily mean profit arising to the taxpayer, and the £105 was not profit arising to the appellant. But it is insisted that the £30 was profit arising to the appellant, and that it arose from the carrying out of a profit-making scheme. The scheme is said, according to one form of the argument, to have consisted of the investment of £75, upon the terms of the agreements of 1926 and 1929, for the purpose of deriving a profit from the carrying out by the company of the profit-making scheme which it had evolved. This contention must be rejected because a profit to which s. 26 (a) applies, since it must be a profit arising to the taxpayer, must be a profit arising from the carrying on or carrying out by him or on his behalf of an undertaking or scheme, that is to say by him or on his behalf either alone or with others. The appellant's profit cannot be said to have arisen to him from the carrying out by the company of its scheme. The entire net proceeds of marketing the timber constituted a profit which arose therefrom, but it arose to the company; and the payment of the £105 by the company to the appellant was simply the agreed application by the company of a proportionate part of that profit, so that the £30 profit arose to the appellant from his investment and not from the carrying out of the company's scheme. If it be said, as the alternative form of the argument asserted, that this investment was itself a profit-making scheme, the answer must be given that paying a sum of money in consideration of a promise of a

(1) (1938) 61 C.L.R. 179.

possibly larger payment upon the happening of a future event cannot be described as carrying out a scheme, according to any ordinary use of language. If it could, every bet would be a profit-making scheme, as would every contract of life assurance. The word " scheme " is not satisfied unless there is some programme, or plan of action; and clearly there was nothing of that sort which the appellant can be said to have carried out.

For these reasons, I am of opinion that the appeal should be allowed, the decision of the board of review set aside, and the amended assessment appropriately reduced.

TAYLOR J. This is an appeal from a decision of a board of review constituted under the *Income Tax Assessment Act* 1936-1945 disallowing objections to an amended assessment to income tax based on the appellant's income for the year ended 30th June 1945. The amendment had the effect of increasing the appellant's assessable income by the sum of £30 and his income tax by the sum of £12 13s. 0d.

The amount of £30 represented portion of three amounts received by the appellant from Pine Plantations Pty. Ltd., a company which entered into contractual engagements with the appellant first of all in 1926 and again in 1929. The first of these contracts recited that the appellant (thereinafter called the " lot-holder ") was desirous of becoming possessed of a beneficial interest in the produce of one acre of timber lands forming portion of 450 acres of certain specified land situated in the State of South Australia known as South Australian Plantation Number One, and witnessed that the lot-holder should pay to the company or its authorized agent, in all, the sum of £25 for his lot. By cl. 3 of the contract the company bound itself, as soon as the whole of the lots in the said plantation had been sold and the purchase money paid by the lot-holders, to transfer the title to the said land into the name of a trustee company to be formed for the purpose. It was further agreed that such trustee company should hold the land upon trust " to compel the company to fairly and faithfully carry out all the obligations entered into by it with respect to planting and maintaining the said land with pine trees " and " to hold the whole of the said lands as security for the performance by the company " of its obligations under a certain trust deed and " to hold the produce of the said land and net proceeds thereof in trust for the company and the lot-holders as to nine-tenths thereof, for the lot-holders who have made all payments in respect of their lots according to their respective lot-holdings and, as to one-tenth, thereof in

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Taylor J.

trust for the said company ". The company further agreed (cl. 5) that it should within two years from the date of the contract, or at the first available and usual planting season after the expiration of two years from the date thereof " plant all the said land in respect of which lots have been taken up with pine trees in a proper and husband-like manner " and (cl. 8) that it would as soon as the forest or growing timber on the land or any part of it should reach maturity or otherwise become marketable make such arrangements as it should consider necessary or advisable for marketing the produce thereof either standing or cut and after deducting all costs and expenses and the company's one-tenth share of the net proceeds that it would distribute the remaining nine-tenths among the shareholders in the proportion of one-four hundred and fiftieth part for every fully paid up lot in full and final settlement of the claims of " such lot-holders under this contract ".

In 1929 the appellant and Pine Plantations Pty. Ltd. entered into another agreement in similar terms with respect to two lots in " South Australian Plantation Number Three ".

These two agreements obliged the appellant to pay, in all, to Pine Plantations Pty. Ltd. the sum of £75 and this obligation he duly discharged. Subsequently, the company became liable, according to the terms of these agreements, to pay to the appellant the sum of £105 as and for the sum of his share of the distributions of the net proceeds of the marketing of the produce of the plantations specified in the agreements. For the purposes of this appeal it is agreed that this sum was received by the appellant in the relevant income year.

The difference between the appellant's outlay of £75 and the amount of £105 received by him was the basis of the amended assessment under appeal and against this assessment the appellant objected on the following grounds:

" (1) That the sum of £30 included in the assessment is not income within the meaning of the Income Tax Assessment Act 1936/1945 or at all, and that the assessment is, therefore, excessive and contrary to law.

(2) I did not acquire the bonds in Pine Plantation Pty. Ltd. for the purpose of profit-making by sale or in the course of carrying out any profit-making undertaking or scheme ".

For the appellant it was contended that the payment of £105, made as it was for the purpose of extinguishing, or perhaps partly extinguishing, a contractual right could not be regarded either in whole or in part as a receipt of income character. For the purpose of reinforcing this contention counsel for the appellant argued

that the payment was analogous to a payment to the holder of shares in a company upon a distribution of the company's assets in a winding-up. If the analogy exists then, as was contended, the principles applied in *Inland Revenue Commissioners* v. *Burrell* (1) govern this case and the amended assessment should be set aside. But in my view no such analogy exists and the basis of that decision has no application whatever to the present case.

Burrell's Case (1) is classic authority for the proposition that upon a distribution to shareholders by a liquidator in the winding-up of a company the amounts received by the shareholders are, apart from any statutory transformation of their nature for a particular purpose, receipts of a capital nature, and this conclusion is not affected by the circumstance that some portion of the company's assets at the commencement of the winding up represents undistributed or accumulated income. The alternate argument advanced by the appellant in that case was that portion of the fund in the hands of the liquidator represented profits, that that portion of the fund did not, in his hands, cease to have that character and that its distribution constituted a distribution of profits to the shareholders. The contention was unanimously rejected. *Pollock* M.R. pointed out that the liquidation had deprived the directors of the power of declaring a dividend and that the rights of the parties must be governed by " what is and not what might have been ". Thereupon he proceeded: " Further it is a misapprehension, after the liquidator has assumed his duties, to continue the distinction between surplus profits and capital. Lord Macnaghten in *Birch* v. *Cropper* (2), the case which finally determined the rights inter se of the preference and ordinary shareholders in the Bridgewater Canal, said: ' I think it rather leads to confusion to speak of the assets which are the subject of this application as " surplus assets " as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company —part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company '. As *Lindley* L.J. said in *In re Armitage* (3) ' The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares '. . . . It is not right to split up the sums received by the share-

(1) (1924) 2 K.B. 52.
(2) (1889) 14 App. Cas. 525, at p. 546.
(3) (1893) 3 Ch. 337, at p. 346.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Taylor J.

holders into capital and income, by examining the accounts of the company when it carried on business, and disintegrating the sum received by the shareholders subsequently into component parts, based on an estimate of what might possibly have been done, but was not done . . . The quota returned to the shareholder is returned to him as that part of the property of the company to which he is entitled, by the officer whose duty it is to distribute the 'property of the company' in accordance with s. 186 of the Companies (Consolidation) Act, 1908. That officer does not carry on the company as the directors did; and he has no longer the power that they had, to divide the profits as dividend upon the shares—profits, to which, in that character, the shareholder had no right to lay a demand" (1).

The reasons of *Atkin* and *Sargant* L.JJ. proceeded on the same lines the former remarking that neither branch of the appellant's argument took into account sufficiently the legal results of the winding-up. After referring to the statutory duties of the liquidator he said: "The liquidator's duty is to realize it", (the property of the company) "to pay off the liabilities and distribute the remaining assets amongst the shareholders subject to the rights given under the articles. The liquidator cannot declare a dividend or distribute a dividend. He deals with assets. He need not trouble himself with the question whether the assets in the company's books represent capital or uncapitalized profits. He can realize the assets in the most beneficial way and can pay capital liabilities out of the assets that represented profits, or liabilities on revenue account of the assets that represented capital. Having paid the liabilities and having a lump sum in his hand there appears to me to be no liability in him to reconstruct his capital account or other accounts; and no power in the shareholders either to insist on the liquidator doing so, or themselves so to adventure. Of course, the property that comes to his hands, as it always remains the property of the company, is bound by the engagements of the company whether created by the articles or otherwise. Thus if the profits in the hands of the company are charged to a third person, the charge is operative against the liquidator. This, I think, is the case *In re Spanish Prospecting Co.* (2). If the articles have given any particular body of shareholders the right to profits whether distributed or not, this (subject to the claims of the creditors) must be recognized in distribution by the liquidator, *In re Bridgewater Navigation Co.* (3) which turned upon a special article. But

(1) (1924) 2 K.B., at pp. 63 et seq.
(2) (1911) 1 Ch. 92.
(3) (1891) 2 Ch. 317.

though the liquidator must honour such obligations he himself has no power to capitalize or decapitalize, to distinguish in his distribution between capital or income: his duty is simply to distribute assets. He may, while carrying on the business of a company, with a view to a beneficial realization, earn profits. In such a case the company will be assessable to income tax on such profits. But the shareholder will not receive them as profits; for him they are but an accretion to the assets; and if they become surplus assets, it is in that form that the shareholder will receive them" (1).

Sargant L.J. said: "The character in which any distribution by the company amongst its shareholders reaches their hands depends entirely on the circumstances in which the distribution is made. In the liquidation of a limited company the distribution of the surplus assets of the company is almost necessarily of a final and non-recurrent character, and reaches the hands of the shareholders quite irrespective of the sources from which the assets have accrued to the company. It is true that so far as the assets can be identified, as here, as having arisen from profits, they might while the company was a going concern have been distributed by way of declaration of dividend; but though this power, if exercised, would have removed the assets from the ownership of the company and divided them amongst the shareholders by way of income, the mere existence of the power while unexercised cannot, in my judgment, have any effect of the kind. These assets, though capable of distribution as income, remain, while not so distributed, part of the general mass of property of the company and are subject to the debts and all the accruing liabilities and possible losses of the company, and the expenses of any liquidation; and I cannot see enough in the mere history of the accruer of the assets to the company to enable a distinction to be made for the present purpose between that part of a final distribution of assets of the company which arises from profits of the company capable of distribution as income, and the other parts of that distribution" (2).

Observations of a similar nature were made in *Commissioner of Taxation (N.S.W.)* v. *Stevenson* (3). In the joint judgment of *Rich*, *Dixon* and *McTiernan* JJ. it was said: "But an entirely different set of considerations arises when accumulated profits exist in a company which winds up. In the liquidation the excess of its assets over its external liabilities is distributed among the share-

(1) (1924) 2 K.B., at pp. 67 et seq.
(2) (1924) 2 K.B., at pp. 73 et seq.
(3) (1937) 59 C.L.R. 80.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Taylor J.

holders in extinguishment of their shares. The shareholders, in other words, as contributories receive nothing but the ultimate capital value of the intangible property constituted by the shares. The *res* itself ceases to exist. The profits are not detached, released or liberated, leaving the share intact as a piece of property. There is no dividend upon the share. There is no distribution of profits because they are profits. The shareholder simply receives his proper proportion of a total net fund without distinction in respect of the source of its components and he receives it in replacement for his share " (1).

I have cited these passages, and others might be cited, to show that the character of the fund out of which a liquidator makes such a distribution has always been regarded as of prime importance. In *Burrell's Case* (2) it was of vital significance that the liquidator did not and could not make a distribution of the company's income as such and accordingly it was clear that there was no basis upon which any amount received by the shareholder could be regarded as income in his hands. Perhaps it may be said that it is not quite as clear that if some part of the distribution should properly have been regarded as a distribution of the company's income the court of appeal would, *pro tanto*, have regarded the receipt by the shareholder of his share of the distribution as a receipt of income. I should have thought, however, that such a conclusion must inevitably have followed, but whatever course the decision would have taken on that hypothesis it is clear that there is no analogy between the receipt by a shareholder of a share of a distribution on winding-up and the receipt by the appellant of the amount under consideration in this case.

In the present case it is not altogether clear whether the appellant has received his full share of the distributions of the net proceeds of the marketing of the relevant produce but it is clear that upon receipt of a final payment the contractual obligations of the company will be discharged. It was this circumstance, in part at least, which has led the appellant to suggest the analogy above referred to, but in my view the retirement or extinction of the contractual right is not a feature which assists in the solution of the problem. The substantial question, I think, is whether the sum of £30 represents profit arising from the carrying on or carrying out of any profit-making undertaking or scheme whilst an alternate question may also arise whether, according to the common understanding of that term, the profit made by the appellant should be regarded as income.

(1) (1937) 59 C.L.R., at p. 99.

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

On the facts it is clear that the appellant did not *carry on* any profit-making undertaking. What he did was merely to pay his money on the terms of the contracts referred to in expectation that at some future and more or less remote point of time he would receive a return exceeding the amount outlaid by him. To " carry on business " has been said to " import a series or repetition of acts " (*Kirkwood* v. *Gadd* (1) and *Blockey* v. *Federal Commissioner of Taxation* (2)) and I have no doubt that the expression in s. 26 (a), whatever it may mean in other contexts, must be understood in this sense in its application to profit-making undertakings. But the sub-section is not limited to profits arising from activities from this nature ; it extends expressly to profits arising from the carrying out of a profit-making scheme. This conception, standing alone, would, I think, be quite wide enough to cover the activities embraced by the first limb of the sub-section and also to embrace activities which constitute the carrying on of a profit-making undertaking. But it extends further and is, in my opinion, wide enough to cover the circumstances of this case. The only difficulty which I have felt in the matter is occasioned by the fact that the expression, if understood without restriction of any kind might, on occasions, tend to impress with the character of assessable income profits which, on general principles ought fairly to be regarded as capital profits. An attempt to restrict the meaning of the expression—" the carrying out of any profit-making scheme "—is to be found in the appellant's contentions that the *carrying out* of a scheme also implies a series or repetition of acts and that the scheme must be one which the taxpayer himself carries out. I should have thought however, that whether the second contention be sound or not there is no valid ground for accepting the first for I can see no warrant for concluding that every profit-making scheme or plan which may be decided upon by a taxpayer must require for carrying it into effect a series or repetition of acts. In my view such a conclusion would be erroneous and I respectfully adopt the observations of *Dixon* J. in *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (3) where, referring to the second limb of the predecessor of s. 26 (a) he said : " It is not easy to say whether the expression ' profit-making by sale ' refers to a sole purpose, or a dominant or main purpose, or includes any one of a number of purposes. The alternative ' carrying on or carrying out ' appears to cover, on the one hand, the habitual pursuit of a course of conduct, and, on the other, the carrying into execution of a plan or venture which does not involve repetition or system " (4).

(1) (1910) A.C. 422, at p. 423.
(2) (1923) 31 C.L.R. 503.
(3) (1933) 50 C.L.R. 268.
(4) (1933) 50 C.L.R., at p. 298.

H. C. OF A. 1953-1954.

CLOWES v. FEDERAL COMMISSIONER OF TAXATION.

Taylor J.

The appellant nevertheless maintained that even if this be so the only profit-making scheme disclosed by the evidence was that which the company operated and further that this scheme was not carried out by the company as agent or otherwise on behalf of the appellant. But once it be accepted that the carrying out of a profit-making scheme does not necessarily involve a series or repetition of acts I fail to see why the investment of a sum of money for the purpose of securing to the investor an aliquot share of the net profits of a business undertaking should not itself, be regarded as a profit-making scheme or plan. On the facts of the present case the appellant paid the sum of £75 in order to obtain the right to specified proportions of nine-tenths of the net proceeds of the produce of specified areas of land and under the terms of the agreement he became entitled to an aliquot share of the company's income. In these circumstances I am of the opinion that the proposal designed to produce that result falls fairly within the expression " profit-making scheme " and that the taking of the steps necessary to give legal effect to the proposal constituted the carrying out of such a scheme. Accordingly I am of the opinion that the appellant was rightly assessed and that the appeal should be dismissed.

Appeal from the decision of the Board of Review allowed. Decision of the Board of Review set aside. In lieu thereof order that the assessment be reduced by £12 13s. 0*d*. *Commissioner to pay the costs of the appeal.*

Solicitors for the appellants, *Oswald Burt & Co.*

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

R. D. B.