[HIGH COURT OF AUSTRALIA.]

CHARLES . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, 1953, *Sept.* 7-9;

1954, *April* 23.

Dixon C.J., Kitto and Taylor JJ.

Income Tax—Assessable income—Trust—Realization of capital investments of trust—Profits—Shares—Issue of new shares—Sale of "rights"—Proceeds—"Profits of a business"—"Profit-making undertaking or scheme"—Profits arising—Income or capital—Income Tax Assessment Act 1936-1948 (*No.* 27 *of* 1936—*No.* 44 *of* 1948), *s.* 26 (*a*).

In the relevant income tax year C. received the sum of £830 as a certificate holder in the Second Provident Unit Trust. The trust was governed by a declaration of trust which, *inter alia*, contained elaborate provisions which limited investments of the trust to the shares or debentures of specified companies and securities authorized for the investment of trust funds. £440 of that sum consisted of C.'s share of dividends and interest received on capital investment of the trust, and it was treated both by C. and by the commissioner as retaining in the hands of C. its original character of income from property. The balance of £390 came partly from profits which had been made on realizations of capital investments of the trust, and partly from the proceeds of sale of "rights" in respect of new share issues which had arisen in respect of shares held as capital investments of the trust. The commissioner contended that that sum was profits of a business, or, alternatively, profits arising from the carrying out of a profit-making undertaking or scheme within the meaning of s. 26 (*a*) of the *Income Tax Assessment Act* 1936, as amended, and accordingly possessed from the beginning, and continued to have when it reached the hands of C., the character of income from personal exertion. Upon an appeal before a board of review the evidence was that during the relevant period the managers of the trust kept themselves closely informed of market trends and whenever they were of opinion that securities were likely to fall in market value, parcels of shares were sold to avoid a reduction in value of each unit in the trust which would be consequent upon a decline in market value of the shares held.

Held that accepting the evidence, the case could not be treated as one in which beneficiaries received from trustees profits made by the sale of property acquired for the purpose of profit-making by sale, and that therefore the said sum should not be included in C.'s assessable income.

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Appeal.

During the year of income ended 30th June 1949 the taxpayer, Alexander Richard Charles, was one of a number of certificate holders in what is known as a unit trust. The trustee of the trust was one of the recognized trustee companies and the trust fund consisted of moneys and selected stock exchange securities held by the trustee on behalf of the certificate holders in terms of a trust deed. By virtue of his contribution as a certificate holder, the taxpayer became entitled to, *inter alia*, a proportionate share of the moneys annually distributed by the trustee to the certificate holders. In the relevant year of income the moneys paid by the trustee to the taxpayer represented his share of moneys which the trustee had derived from: (i) dividends on securities held; (ii) profits on the sale of certain securities; (iii) profits on distributions in the winding-up of a company in which the trustee held shares; and (iv) profits on the sale of " rights " in respect of the shares held by the trustee.

In dealing with the taxpayer's return of income for the relevant year the Commissioner of Taxation took the view that the whole of the above moneys were assessable income derived from personal exertion and, after some adjustments, issued an amended assessment accordingly. The taxpayer objected, claiming that the three last-mentioned classes of profits were not assessable income.

The commissioner gave as his reasons for disallowing the taxpayer's objection that " amounts received by the taxpayer during the year of income ended 30th June 1949, as distributions by the Second Provident Unit Trust out of profits arising from the sale of securities and rights on behalf of that Trust, are assessable income pursuant to the provisions of s. 25 (1) and/or s. 26 (*a*) of the *Income Tax Assessment Act* 1936-1948 ".

At the request of the taxpayer the matter was forwarded to a board of review for review. The board of review, by a majority, upheld the commissioner's decision as to the objection.

From that decision the taxpayer appealed to the High Court.

The appeal came on for hearing before *Webb* J. and after some further evidence relating to, *inter alia*, the nature of the operations of the unit trust and also the nature of the transactions involved in relation to the sale of rights had been given, his Honour, by consent, referred the appeal to the Full Court.

The relevant provisions of the trust deed are stated in the judgment of the Court hereunder.

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H. T. Gibbs (with him *F. T. Cross*), for the appellant. The principle of law involved is stated in *Californian Copper Syndicate Ltd.* v. *Harris* (1). The effect of that deed is that certain securities, including money, were vested in a trustee company on certain trusts in favour of the managing company and in favour of the unit holders. The trustees were bound to distribute what is defined in cl. 13 (B) as " cash produce ". The effect of cl. 13 (B) is to include two sorts of cash produce : (i) income, and (ii) profits realized on a sale of securities which in the discretion of the managers are treated as cash produce. The only powers of sale given by the trust instrument are to be found in cll. 3 (*a*), 4 (*c*) and 13 (C), and no power is expressly given to the trustees to sell for purposes of speculation or to make a profit, but the effect of cl. 13 (B) is that although they must re-invest, all of the proceeds do not include profit. They must retain it and treat it as cash produce, in which case they are bound to make a distribution of it. The evidence given was that the securities referred to in the deed and in the schedule to the instrument are securities of a conservative kind and not the sort which speculators would normally buy. The unit holders are beneficiaries and the profits which arise from the sale of securities and rights are of a purely capital nature. There was not any profit-making scheme. Neither the taxpayer nor the trustee nor the managers were carrying on any business in the course of which securities also were sold. The question is : Are these payments taxable income ? That question is a question of law (*Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (2) ; *Hudsons Bay Co. Ltd.* v. *Stevens* (3) ; *Alabama Coal, Iron, Land & Colonization Co. Ltd.* v. *Mylam* (4) ; *Dunn Trust Ltd.* v. *Williams* (5)). Search has failed to reveal a contrary decision but a statement was made in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (6) to the effect that the question the court has to decide is one of fact. The only activity that is intended is the variation of securities. That is incidental to the operation of any trust. If that is a business then any trustee who holds securities conducts a business, because in every trust there is implied by law power to vary securities, which implies power to buy and sell them. The trustees are empowered to hold a block of securities until the determination of the trust, with power to sell those securities only in three cases : (i) for the

(1) (1904) 5 Tax. Cas. 159, at pp. 165, 166.
(2) (1928) 41 C.L.R. 148, at pp. 151, 153, 154, 157, 158, 161.
(3) (1909) 5 Tax. Cas. 424, at p. 437.
(4) (1926) 11 Tax. Cas. 232, at p. 252.
(5) (1950) 31 Tax. Cas. 477.
(6) (1946) 73 C.L.R. 604, at p. 608.

purpose of paying calls, (ii) for the purpose of varying the investment, and (iii) to sell rights. But if in the course of making a sale for reinvestment the trustees make a profit—as they have in fact done—the deed gives power, with the concurrence of the managers, to distribute that profit. The intention of the deed is to expressly prohibit the sale of those securities except in the cases mentioned, and the only relevant case is for the purpose of reinvestment.

[Dixon C.J. referred to *Brodies' Trustees* v. *Inland Revenue Commissioners* (1).]

The trustees were distributing capital. There is nothing in the circumstances of this case to make it income in the hands of the taxpayer. The cases concerned with investment companies are concerned with the taxibility of the company. The whole basis of the relationship between the appellant and the trustees is radically different from the relationship between a shareholder and a company ; in the case of the investment company it cannot be denied that the company is carrying on a business for profit. The question to be asked—not in relation to beneficiaries but in relation to the trustees—is : Did the trustees receive these moneys as fruits of a profit-making scheme ? The beneficiaries stand in the relationship of a *cestui que trust* to the trustees. It is not material whether the profit on the sale of shares was distributed in one half-year rather than another. The distributions resulting from the proceeds of sales of rights and profits on sale of shares were always substantial, but they could not be described as regular or consistent in amount. The reason for selling was to avoid loss rather than to make profits. In no case were shares sold to make a profit, and in no case was the total amount of any particular holding sold. Even if the trustees made distributions of capital sums, they were not thereby treating them as income, but were simply treating them as distributable. On the proper construction of the Act applied to these circumstances, there could not be any change in the character of these moneys between the time they were held by the trustees and the time they were held by the beneficiaries. According to ordinary usages and concepts, those sums received by the trustees in respect of the sale of securities would not be treated as income but would be treated as being of a capital nature : *Lewin* on *Trusts*, 15th ed. (1950), p. 240 ; *In re Armitage* ; *Armitage* v. *Garnett* (2). Ordinarily, the profits arising from the sale of rights would be treated, as between the tenant for life and the remainderman, as capital and not as income.

(1) (1933) 17 Tax. Cas. 432. (2) (1893) 3 Ch. 337, at p. 34

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[DIXON C.J. referred to *Deputy Federal Commissioner of Taxation* v. *Trustees of the Wheat Pool of Western Australia* (1) and *Hecht* v. *Malley* (2).]

The question is simply whether these moneys were income in the hands of the trustees. There is not any question that the arrangement could be a partnership because the unit holders do not take any part in controlling the activities of the trustees so far as the purchase or the sale of shares is concerned. In the following cases the court has had to consider whether moneys which have been received have been received as profits arising out of the conduct of a profit-making scheme: *Californian Copper Syndicate Ltd.* v. *Harris* (3); *Hudsons Bay Co. Ltd.* v. *Stevens* (4); *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (5); *Inland Revenue Commissioners* v. *Westleigh Estates Co. Ltd.* (6) and *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (7). Although there was not any intention of making a profit it is clear that the company concerned in the last mentioned case was doing something it had to do for the purpose of carrying on a business. That case turns upon the fact that it is part of the business of an insurance company to vary its investments. The same position applies in the case of a bank (*Punjab Co-operative Bank Ltd. Amritsar* v. *Commissioner of Income Tax, Lahore* (8)).

A. L. Bennett Q.C. (with him *C. G. Wanstall*), for the respondent. The first questions are: Is this a trust, and does it involve the problem that arises in relation to taxation in respect of trust estates. There are certain indications in the trust deed that it is in the form of a trust. The position of the manager is one of partnership with the trustee carrying on this business or this scheme of profit-making; he is in the position of a contracting party to an arrangement under which there is a certain declaration of trust, but the manager is conducting the business as well as the trustee; his powers and authorities in the matter are of a more active nature than those of the trustee and together they are carrying this partnership. So far as the appellant is concerned a trust is being dealt with. The manager is acting for himself. He is conducting the business and his powers are very great. In *Ewing* v. *Commissioner of Taxation* (9) it was held that an annuity was income though it

(1) (1932) 48 C.L.R. 5.
(2) (1924) 265 U.S. 144 [68 Law. Ed. 949].
(3) (1904) 5 Tax. Cas. 159.
(4) (1909) 5 Tax. Cas. 424.
(5) (1928) 41 C.L.R., at pp. 151, 152, 154, 163.
(6) (1924) 1 K.B. 390, at pp. 418, 422, 423; (1923) 12 Tax. Cas. 657.
(7) (1946) 73 C.L.R., at pp. 606, 608, 613, 615.
(8) (1940) A.C. 1055, at p. 1072.
(9) Noted (1928) 2 A.L.J. 246.

was paid by the trustees out of capital. Capital in the hands of the trustees becomes income in the hands of the beneficiaries. [He referred to *Tindal* v. *Federal Commissioner of Taxation* (1).] The profits from the sale of shares and from the sale of rights are income derived by the trustee and therefore income of a unit holder from the carrying out of a profit-making undertaking or scheme. If this is income in the hands of the trustees, it is also income in the hands of the unit holder. The definition of " assessable income " is to be found in s. 26 (*a*). Section 95 requires, in arriving at the income of the trust estate, the adoption of the idea that the trustee is a taxpayer. On the assumption that the trustee is a taxpayer and that the words " assessable income " are defined in s. 26 (*a*) the net income includes profit arising from such carrying on. In arriving at the income of this estate it is permissible to ascertain whether it is the carrying on of a business ; whether it is something that arises from the carrying on of a profit-making undertaking or scheme. That can be done by having regard to the definition of assessable income and also by treating the trustee completely as a taxpayer. Section 97 contemplates a liability on the part of the beneficiary where he is presently entitled. No time is incorporated expressly into s. 97. In this case moneys have been paid to the beneficiary, the appellant. Having been paid he is not any longer presently entitled. At some point of time he must have been so entitled. Under the deed he is presently entitled until the moneys are carried to the " cash produce account ", which is done immediately before distribution. Until so carried it is the final account from which the moneys go out to the unit holders. By that time the unit holders only rights may be to sue for an administration. So that immediately before distribution the appellant was presently entitled for a period and that period would fall within the income year. That being so he is assessable. Alternatively, recourse could be had to s. 26 (*b*) which seems expressly to deal with the case. Another key to the problem may be found in s. 19. Section 26 (*b*) refers to beneficial interests derived, that is derived by the beneficiary, and s. 19 provides that " income shall be deemed to have been derived ". These are only " machinery " difficulties which are capable of solution. The whole Act contemplates that there is a liability on the beneficiary. The alternative is that the liability is completely on the trustee as at some stage he receives payment. Unless one is bound to a particular point of time, namely 30th June, then he was presently entitled in the year of income. This

(1) (1946) 72 C.L.R. 608, at pp. 620, 623, 624, 629, 632.

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trust is carrying on a business, not necessarily the business of stock jobbing, but the business of making profits for unit holders.

[Dixon C.J. Do the words "profit-making scheme" include a plan the purpose of which is to organize the assessable income of the property ?]

Yes. Profit arising from the continual change of investments, consisting of, for example, house properties and industrial properties, would be profits arising from the carrying out of the business, which is primarily the business of holding property and making money from rentals : see *Punjab Co-operative Bank Ltd., Amritsar* v. *Commissioner of Income Tax, Lahore* (1) ; *Federal Commissioner of Taxation* v. *Green* (2) and *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (3). The propositions stated in the last-mentioned case were referred to and discussed in *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (4) ; *H. R. Lancey Shipping Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (5) and *Hobart Bridge Co. Ltd.* v. *Federal Commissioner of Taxation* (6).

H. F. Gibbs, in reply, referred to *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* (7) ; *Inland Revenue Commissioners* v. *Hyndland Investment Co. Ltd.* (8) and *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (9).

Cur. adv. vult.

April 23, 1954.

The Court delivered the following written judgment :—

The appellant was assessed to income tax and social services contribution under the *Income Tax Assessment Act* 1936-1948 (Cth.) in respect of his income derived during the year ended 30th June 1949. An objection to the assessment was disallowed by a deputy commissioner and subsequently by a Board of Review. From the Board's decision an appeal was brought to this Court and was referred by *Webb* J. to the Full Court. It is that appeal which is now before us.

The appeal concerns an amount of £390, portion of a sum of £830 which the appellant received in the relevant year as a certificate holder in what is known as the Second Provident Unit Trust. £440

(1) (1940) A.C., at pp. 1071, 1073.
(2) (1950) 81 C.L.R. 313.
(3) (1946) 73 C.L.R., at pp. 606, 613, 615, 617, 619.
(4) (1950) 81 C.L.R. 188, at p. 194.
(5) (1951) 58 A.L.R. 507, at pp. 510-511, 25 A.L.J. 145.
(6) (1951) 82 C.L.R. 372, at pp. 382, 383.
(7) (1910) 5 Tax. Cas. 658.
(8) (1928) 14 Tax. Cas. 694.
(9) (1946) 73 C.L.R. 604.

of that sum consisted of the appellant's share of dividends and interest received on capital investments of the Trust, and it was treated both by the appellant and by the commissioner as retaining in the hands of the appellant its original character of income from property. The balance, the £390 now in question, came partly from profits which had been made on realizations of capital investments of the Trust, and partly from the proceeds of sale of " rights " in respect of new share issues which had arisen in respect of shares held as capital investments of the Trust. Both parties to the appeal attached significance to the distinction between the two amounts in respect of source, the appellant contending that the £390 was in his hands a receipt of a capital nature and not liable to be included in the computation of his assessable income, and the commissioner contending that the £390 was profits of a business, or (alternatively) profits arising from the carrying on or carrying out of a profit-making undertaking or scheme within the meaning of s. 26 (*a*) of the *Income Tax Assessment Act*, and accordingly possessed from the beginning, and continued to have when it reached the hands of the appellant, the character of income from personal exertion.

The Trust was governed by a declaration of trust executed on 13th November 1939 between a company named Unit Trusts Ltd. (therein called the managers) of the one part and Queensland Trustees Ltd. (therein called the trustees) of the other part. It was expressed to apply to a trust fund consisting of 1,350 shares in thirteen companies which the managers had caused or were to cause to be transferred to the trustees, and such further securities as the managers might thereafter vest in the trustees in accordance with elaborate provisions which limited investments of the trust to the shares or debentures of specified companies and securities authorized for the investment of trust funds.

The beneficial interest in the trust fund was originally divided into 1,700 units (cl. 6), but it was provided that this number might increase as additions should be made to the investments comprising the trust fund (cl. 7). The managers, who were entitled initially to the whole beneficial interest in the trust fund, were empowered to nominate any person including themselves to receive a certificate or certificates as the holder of units, and the trustees were required thereupon to issue to such person a registered certificate (cl. 8), specifying the number of units to which it related and bearing a distinctive number or letter (cl. 9). The trustees were to retain the trust fund in trust for the certificate holders and, subject thereto, in trust for the managers or as they might direct (cl. 2 (A)), and were to recognize the certificate holders or their executors or

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administrators as the only persons having any right or interest in the units in respect of which they should be registered (cl. 21). Every holder of a registered certificate was to be entitled to transfer the units or any of the units held by him by an instrument in writing (cl. 20). The managers were to be at all times entitled to the benefit of any unit except during such periods as there should be some other person registered as the holder of the unit or entitled to be so registered under certain provisions of the deed (cl. 10).

A holder of 3,000 units or any exact multiple of 3,000 units was given a right to exchange his units for cash and securities, or securities only, forming a proportionate part of the trust fund (cl. 14 (A)); and any certificate holder might at any time surrender his units for cash (cl. 14 (D)).

The Trust was to determine on 15th January 1955 unless previously determined under provisions operating in certain specified events (cl. 7); and upon its determination the trust fund was to be distributed in specie or cash amongst the certificate holders in proportion to their respective unit-holdings (cl. 18).

The deed contained no power to traffic in securities. Indeed it provided that except for purposes of the deed the trustees should not sell any of the investments until the determination of the trust (cl. 5). But in addition to conferring on the trustees a power to sell investments in order to give effect to certain provisions directed to ensuring that the uncalled liability in respect of any of the investments could be met (cl. 4 (C)), the deed gave a wide power to vary investments. It provided (cl. 3 (A)) that if, in the opinion of the managers, it should at any time or times become in the interests of the certificate holders desirable to realize any investments for the time being comprised in the trust fund, or advantageous to reduce the amount of any particular investment in order to increase the amount or amounts of others, the managers might request the trustees to give their consent (which they might give or withhold as they should in their sole discretion think proper) to the sale of the whole or part of such particular investments and re-investment of the net proceeds of sale in the purchase of securities designated by the managers and approved by the trustees. If the trustees should give their consent they were to act accordingly. Moreover, in respect of, *inter alia*, any rights in respect of new share issues the deed provided that the trustees with the consent of the managers might exercise such rights or sell them (cl. 13 (C)).

The trustees were to receive all moneys rights and property which should be paid or distributed in respect of the investments by way of dividend, bonus or otherwise (cl. 12); and they were to make half-yearly distributions to the certificate holders in proportion to their respective numbers of units (cl. 13 (A)). The fund to be distributed on each occasion was called "the cash produce" which should have arisen in respect of the trust fund during the preceding half year. This expression was defined (by cl. 13 (B)), to include, first, all cash received or to be received by the trustees by way of dividend, bonus income appropriation, dividend equalization, or otherwise in respect of the trust fund, where in the opinion of the trustees the same should represent income; secondly, all cash received in respect of any sale of, *inter alia*, any rights, which the managers with the consent of the trustees might decide to sell and the proceeds of which they should decide to treat as cash produce; and thirdly, at the discretion of the managers, any profits realized, less any losses sustained, on the sale of any of the securities. The provisions in respect of the half-yearly distributions were subject to a power in the managers with the consent of the trustees to retain intact or to invest the proceeds of any capital distributions (cl. 13 (A)), and they were also subject to provisions for treating cash produce accruing late in a half-year as if it had accrued in the next following half-year (cl. 13 (D)).

It was provided (cl. 27 (A)) that the trustees should not be entitled to any remuneration out of the trust funds in respect of their services under the deed, but that the managers should pay them by way of remuneration such sums as might be agreed upon from time to time, and if not agreed upon, reasonable sums. It is evident that in order to meet this liability and any other expenses of their management, and to remunerate themselves for promoting and managing the trust, the managers had to look to the proceeds of sale of units. Consequently the prices they charged were somewhat in excess of the value which would be attributed to the units by the process of adding together the respective market values of the trust investments and dividing the total by the number of units. In a brochure issued by way of advertisement, the excess was described as a service charge and was stated to amount to seven and one-half per cent on the current stock exchange price of the securities adjusted to cover dividends received, stamp duties, transfer fees and brokerage.

In the relevant year, the appellant participated in half-yearly distributions of "cash produce". The amounts distributed included moneys belonging to each of the three classes comprised in the definition: dividends, proceeds of sale of rights, and profits realized on sales of securities. The question presents itself at once

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whether the case is distinguishable in any material respect from a case in which moneys of the same descriptions are distributed amongst beneficiaries by the trustees of a will or settlement, to whose hands the moneys have come in consequence of the exercise of usual powers to invest and to vary investments, and to whom the trust instrument gives a discretionary power to make such distributions. The assumption is that in the handling of the investments the trustees of the will or settlement are not carrying on a business. In such a case the character of the moneys in the hands of the trustees is clear: dividends are income, whether the companies concerned have paid them out of income profits or out of capital profits: *Inland Revenue Commissioners* v. *Reid's Trustees* (1); proceeds of sale of rights are accretions to capital, on the reasoning of *Inland Revenue Commissioners* v. *Blott* (2); and profits realized on sales of securities are necessarily capital. And in such a case the position of a beneficiary in respect of income tax upon the moneys distributed is equally clear. In so far as dividends are concerned, the case falls within s. 101 of the *Income Tax Assessment Act*, with the result that the beneficiary is deemed to be presently entitled to the amount paid to him out of the dividends as income of the trust estate, and as a consequence that amount is either included in his assessable income by force of s. 97 or taxed as a separate assessable income in the hands of the trustees by force of s. 98, according as the beneficiary is or is not free from legal disability; see the discussion of this group of sections in *Federal Commissioner of Taxation* v. *Belford* (3). In so far as the proceeds of sale of rights and the profits realized on sales of securities are concerned, however, neither general principle nor statutory provision requires that such capital moneys of the trust should be treated as assessable income of the beneficiaries when distributed to them. Is there any such distinction between a case of that kind and the present that a different conclusion should here be reached?

At first sight it may seem that a person who invests in units under a trust deed such as that which is here in question does so with a view to obtaining the half-yearly distributions for which the deed provides, just as he might have bought shares in an investment company with a view to deriving half-yearly dividends from them; and that the periodical distributions received should be regarded as income in the one case just as they would be in the other. Some such view, indeed, would appear to be suggested by the brochure which the managers issued, for the amount to be received by a unit holder in a half-yearly distribution is spoken of throughout

(1) (1949) A.C. 361.
(2) (1921) 2 A.C. 171.
(3) (1953) 88 C.L.R. 589.

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that document as income of the unit. But the view is untenable, for a unit held under this trust deed is fundamentally different from a share in a company. A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property; and if a portion of the company's assets is distributed among the shareholders the question whether it comes to them as income or as capital depends upon whether the corpus of their property (their shares) remains intact despite the distribution: *Inland Revenue Commissioners* v. *Reid's Trustees* (1). But a unit under the trust deed before us confers a proprietary interest in all the property which for the time being is subject to the trust of the deed: *Baker* v. *Archer-Shee* (2); so that the question whether moneys distributed to unit holders under the trust form part of their income or of their capital must be answered by considering the character of those moneys in the hands of the trustees before the distribution is made.

A more difficult question, however, is whether it is not true to say of the entire amount of each half-yearly distribution that as a whole, without any distinction being drawn amongst its ingredients, it should be put into the category of income as being the fruit of the carrying out of a plan or scheme, devised by the managers, carried out by the managers and the trustees in co-operation, and joined in by the certificate holders, for the purpose of yielding regular periodical returns to the certificate holders upon their invested capital. This was not exactly the view taken by the commissioner when he made the assessment; he was content to treat that portion of the distributed fund which came from dividends received by the trustees as the income of the certificate holders derived from property; and it was only that portion which came from the proceeds of sale of rights and from profits on realizations of investments that he took to be the certificate holders' income from personal exertion as having arisen from the carrying out of a profit-making scheme. In order to support one or other of these views, counsel for the commissioner devoted a great deal of attention to the history of the dealings in securities and rights which actually took place in the course of the administration of the trust. The evidence established that these dealings were considerable; they occurred frequently and produced substantial profits. Indeed, most sales of securities were made at prices in excess of cost. Moreover, all the profits thus made, less such losses as were sustained, were paid out to the certificate holders in the half-yearly distributions, the managers exercising the discretion given them by cl. 13 (B)

(1) (1949) A.C., at p. 373.

(2) (1927) A.C. 844.

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to include all these profits (less losses) in the " cash produce ". This was a course of action which obviously had been contemplated from the beginning ; and if the proper conclusion from the evidence were that the managers and the trustees co-operated in pursuing a systematic course of buying and selling securities for the purpose of producing profits and thereby swelling the half-yearly amounts of " cash produce " available for distribution to certificate holders, the commissioner's opinion that such profits should be treated as assessable income of the certificate holders when paid over to them would be clearly correct. But the evidence of the only witness in the case, Mr. T. R. Groom the managing director of Unit Trusts Ltd. was that at no time were securities acquired for the express purpose of re-sale at a profit, and that sales were normally made when the managers anticipated a fall in the value of shares. The purpose (he explained in effect) was to preserve for the fund any increase in value which had occurred and which it seemed likely would otherwise be lost. He said (p. 115) that the general policy of the managers was to hold the securities as investments, and that their " standard idea " in buying was to buy the best available securities and to hold them unless there appeared to be some very good reason for selling. The factors they had before them in buying, he said (p. 114), were security, realizability, yield and possibility of capital appreciation, in that order. They had said something similar in a report for the half-year ended 15th December 1946 : " . . . it is not the policy of the managers to buy securities with a view to their resale at a profit . . . " Now, Mr. Groom's evidence on these points was accepted by the Board of Review who saw him as a witness, and on this evidence the majority of the Board made findings which a member, Mr. Bock, expressed in these words (p. 14) : " The over-riding consideration in the changing of investment was to ensure security of capital, which, in the manager's view, included not only the purchase cost to them but also any advance in the market price which may have taken place after the date of purchase. From the witness's evidence I think it must fairly be said that during the relevant period the managers kept themselves closely informed of market trends and wherever they were of the opinion that securities were likely to fall in market value, parcels of shares were sold to avoid a reduction in value of each unit in the trust which would be consequent upon a decline in market value of the shares held ". We would not be justified in taking a different view, and the case therefore cannot be treated as one in which beneficiaries receive from trustees profits made by the sale of property acquired for the purpose of profit-making by sale.

The view adopted by the Board of Review appears to have been that the amounts distributed to certificate holders ought not to be dissected and treated as partly income and partly capital according as the components of the fund of "cash produce" were derived as income or as capital by the trustees, but should be treated as distributive shares of a blended fund, provided for by the trust deed as the source from which investors in the trust fund should receive regular periodical returns, and possessing as a whole the income character of its principal ingredient, namely dividends and interest. But the fact that half-yearly distributions were prescribed by the trust deed, and that the moneys to be distributed were given by the deed a collective title, cannot suffice to change the character of those moneys. It is true that in the advertising matter which the managers used to promote sales of units—and thereby to obtain the seven and one-half per cent "service charge" which provided them with their remuneration for launching and carrying out the scheme—the language used was calculated to divert the attention of prospective investors from the fact that distributions would include capital moneys as well as income; and it could hardly fail to lead them, when weighing the relative advantages of investment in Trust units and investment in shares by purchase on the stock exchange, to think of the total sums likely to be received in half-yearly distributions under the Trust as comparable with the dividends likely to be derived from shares. But to obscure the facts is not to alter them. We are considering here moneys which fall into the distributable fund because they are the proceeds of sale of rights or profits realized on the sale of capital assets of the trust not acquired for the purpose of sale at a profit. The title of the participants to have those moneys included in the distribution depends, therefore, upon the very facts which give them their capital nature. The case is not like that of an annuity payable out of a capital fund, for the very conception of an annuity imparts its own character to the payments made, notwithstanding the character of the fund resorted to for the payment. Here, it is as capital moneys of two particular descriptions that the sums in question find their way, via the distributable fund, into the hands of the certificate holders.

It remains to consider one argument upon which counsel for the commissioner relied. They contended, in effect, that even if the position be accepted that the course pursued in the administration of the Trust cannot properly be described as the carrying on of a business of stock-jobbing, still it amounted to a business of making profits of various kinds for the certificate holders, and that the selling of rights, and the buying of securities and re-selling them at

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prices in excess of cost, were part and parcel of the sum of activities by which those profits were made. In such a situation, counsel submitted, cases such as *Punjab Co-operative Bank Ltd., Amritsar* v. *Commissioner of Income Tax, Lahore* (1) and *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (2) show that the whole of the profits realized, even though some part of them would otherwise be of a capital nature, are to be regarded as income. To accept this argument, however, would be to ignore the evidence already mentioned, which is inconsistent with the notion that the activities of the managers, or of the managers and the trustees together, were different in kind from those in which trustees normally engage who hold a portfolio of shares with power to vary investments from time to time as they consider the interests of the beneficiaries require. According to that evidence, the moneys in question arose, not (as in the cases cited) from transactions forming incidents in the conduct of a business or a profit-making scheme, but from transactions effected in the course of performing a fiduciary duty to preserve for beneficiaries as far as practicable the assets comprising the trust fund and any increments in the value of those assets which might appear from time to time to be in jeopardy. The case therefore differs fundamentally from the cases relied upon by counsel for the commissioner.

It will be observed that the conclusion depends wholly upon the acceptance of the evidence given by Mr. Groom as to the purposes which animated the managers in acquiring shares and in deciding to hold or sell shares and to exercise or sell rights. This evidence we cannot but accept, since it was accepted by the Board before which it was given. In this Court the witness was not called, the written depositions alone being before us.

The appeal should be allowed, the decision of the Board of Review should be set aside, and the assessment should be reduced by the exclusion of the moneys in dispute from the appellant's assessable income.

Appeal from decision of the Board of Review allowed with costs. Order that the assessment be varied by reducing the taxable income by £390 *and that the tax be recalculated accordingly.*

Solicitors for the appellant, *Morris Fletcher & Cross*, Brisbane.

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

J. B.

(1) (1940) A.C. 1055.

(2) (1946) 73 C.L.R. 604.