

[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES EXECUTORS AND  
 AGENCY COMPANY OF AUSTRAL-  
 ASIA LTD. AND ANOTHER . . . } APPELLANTS ;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

(CHISHOLM'S CASE).

[No. 2].

H. C. OF A. *Costs—Case stated—Different parties succeeding on different independent questions*  
 1954. *—Necessity to raise and argue questions not ultimately requiring answer by*  
 { *reason of answers to other questions.*

MELBOURNE,

Feb. 23 ;

March 2.

Fullagar J.

In an appeal to the High Court by administrators against an assessment of estate duty a case was stated for the opinion of a Full Court. Question 1 of the case set forth three alternatives and questions 2, 4, and 5 related to matters which might or might not arise, depending on which of the alternatives in question 1 was held to be correct. Question 3 dealt with an independent matter involving a substantial sum of money. The Full Court answered question 1 (a) affirmatively in favour of the appellants from which the answers to questions 1 (b) and 1 (c) followed automatically, and it became unnecessary to answer questions 2, 4 and 5. The answer to question 3 was in favour of the respondent.

*Held* that, in the circumstances, the appellants should have their costs of the case stated, except such costs as were exclusively attributable to question 3, the respondent's costs of which should be paid by the appellants.

APPEAL under the *Estate Duty Assessment Act*.

In an appeal by the National Trustees Executors and Agency Company of Australasia Limited and Abigail Chisholm, as administrators of the estate of Colin Joseph Chisholm, deceased, against an assessment of the estate to estate duty, *Fullagar J.* with the concurrence of the parties and pursuant to s. 28 of the *Estate Duty Assessment Act* 1914-1950, stated a case for the opinion of a Full Court. The relevant portions of the case are set out in the report of the decision of the Full Court (1)



By the order of the Full Court the costs of the case stated were reserved for the judge disposing of the appeal.

Further facts appear in the judgment hereunder.

*K. A. Aickin*, for the appellant.

*C. I. Menhennitt*, for the respondent.

*Cur. adv. vult.*

The following judgment was delivered by :—

FULLAGAR J. In this appeal against an assessment of estate duty I stated a case in which I submitted five questions for the opinion of the Full Court. Actually the case was drawn in a form agreed by the parties and approved by me. The first question posed three alternatives, which were stated in three sub-paragraphs, (a), (b) and (c). I was not a member of the Full Court which sat to hear the case stated. The Full Court answered question 1 (a) in the affirmative. From this answer the answers to questions 1 (b) and 1 (c) followed automatically, and it became unnecessary to answer questions 2, 4 and 5. Question 3 was an independent question, which was answered by the Full Court. The answer to question 1 (a) was in favour of the taxpayer. The answer to question 3 was in favour of the commissioner. The appeal is now remitted to me to be dealt with in the light of the answers to these questions. The order of the Full Court reserved for my decision the question of the costs of the case stated. All other costs of the appeal are, of course, matters for me.

It is clear that the answers of the Full Court to the questions which I submitted dispose of all the substantial matters in controversy between the taxpayer and the commissioner, and counsel are agreed as to the order which I ought to make. Argument, however, took place before me with regard to the costs of the case stated. Mr. *Aickin*, for the taxpayer, submitted that the taxpayer should have the costs of the appeal, including the costs of the case stated. Mr. *Menhennitt*, for the commissioner, submitted that the commissioner should receive some part of the costs of the case stated, or at least that some part of the costs of the case stated should not be allowed to the taxpayer.

I understood Mr. *Menhennitt* to make, in effect, two points. He said, in the first place, that a substantial part of the costs of the case stated should be attributed to questions 2, 4 and 5, and that it would be wrong to allow to the taxpayer any costs so attributed. He said, in the second place, that some part of the costs of the case

H. C. OF A.  
1954.

NATIONAL  
TRUSTEES  
EXECUTORS  
AND AGENCY  
CO. OF  
AUSTRALASIA  
LTD.

v.  
FEDERAL  
COMMIS-  
SIONER OF  
TAXATION.  
[No. 2].

March 2.



H. C. OF A.  
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NATIONAL  
TRUSTEES  
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COMMISSIONER OF  
TAXATION.  
[No. 2].

Fullagar J.

stated should be attributed to question 3, that that question had been determined in favour of the commissioner, and that the commissioner was entitled to have any costs so attributed.

The first point I consider to be untenable, and, if it had been the only point raised, I should not have reserved my judgment. It was necessary and proper for the taxpayer to raise and argue questions 2, 4 and 5—questions which might or might not arise according as question 1 should be answered in one way or another. The fact that questions 2, 4 and 5 did not require an answer followed merely from the answering of question 1 in favour of the taxpayer. It is a corollary or incident of the taxpayer's success on question 1 that any costs properly attributable to questions 2, 4 and 5 are properly counted as costs properly incurred by the taxpayer in the course of its successful appeal. It is only putting the matter in another way to say that the taxpayer's primary contention *was* that question 1 should be answered in such a way that questions 2, 4 and 5, although it was necessary to argue them, would not really arise. In this primary contention the taxpayer was successful.

Mr. *Menhennitt's* argument with regard to question 3, however, seemed to me to require a little consideration. The whole case was one of some complexity. I had not had the matter before me after signing the case stated, and I thought it better to take a little time to examine the position. Having considered it, I am of opinion that I ought to accede to Mr. *Menhennitt's* argument. The point raised by question 3 seems to me to have been a separate and distinct point, and on that point the commissioner has succeeded. If it had been the only point in the case, the commissioner must have had his costs. It may be added that a quite substantial sum was involved. In all these circumstances I do not think that I should be justified in denying to the commissioner any costs of the case stated which are properly attributable to question 3.

I have by no means overlooked matters forcefully put by Mr. *Aickin*. It may be, and probably will be, difficult to attribute any very substantial part of the material before the Court, or of instructions to counsel, to question 3, and I understand that, comparatively speaking, only a small part of the time occupied in argument was devoted to question 3. But I am not prepared to say that it is a case of a minimum about which the law ought not to care. It has seemed to me that there was here what was in effect a separate issue, that there is a principle involved, and that I ought to give effect to that principle, if the commissioner insists on it. The questions other than question 3 occasioned undoubtedly the great



bulk of the costs of the case stated, and the proper order, on the whole, seems to me to be that the taxpayer should have its costs of the case stated except such costs as are exclusively attributable to question 3, which costs are to be paid by the taxpayer, and that there should be a set-off. I have considered whether I might not myself make some apportionment, but it has seemed to me that I cannot satisfactorily do so, and that I ought not to attempt to do so. It may well prove possible for the parties to reach agreement as to the amount involved.

I am very far indeed from wishing to suggest an appeal in such a case as this. But, partly because I have acted on what I conceive to be a principle, and partly because I was not a member of the Court which heard the case stated, I am prepared to give either party leave to appeal, under s. 27 of the *Judiciary Act* 1903-1950, from that part of my order which relates to costs.

The order which I make on the whole case is as follows:—

*Appeal allowed. Assessment set aside. Remit assessment to commissioner to reassess conformably to the answers of the Full Court to the questions in the case stated. Order that the commissioner pay the appellants' costs of the appeal including the costs of the case stated except such costs as are exclusively attributable to question 3, that the appellants pay the costs of the commissioner which are exclusively attributable to question 3, and that there be a set-off of costs. Leave to either party to appeal from this order so far as it relates to costs.*

Solicitors for the appellants, *Leach & Thomson*.

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

R. D. B.

H. C. OF A.  
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