[HIGH COURT OF AUSTRALIA.]

CHARLES MOORE & CO. (W.A.) PTY. LTD. APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1956.

MELBOURNE, *Oct.* 23;

SYDNEY, *Dec.* 14.

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.

Income Tax (Cth.)—Assessable income—Deduction—"Losses . . . incurred in gaining or producing the assessable income . . . except to the extent to which they are . . . of capital or of a capital . . . nature"—Loss of departmental store's takings by armed robbery while being conveyed from store to bank—Whether loss of capital or income—Whether allowable deduction—Income Tax and Social Services Contribution Assessment Act 1936-1952 (*No.* 27 *of* 1936—*No.* 28 *of* 1952) *s.* 51 (1).

A taxpayer carrying on the business of a departmental store banked the takings thereof daily. It was the practice every business morning for the cashier accompanied by another employee to take the previous day's takings to the bank some two hundred yards away and pay them to the credit of the taxpayer. On 5th August 1952 while on their way to the bank the two employees were held up at gun point and robbed of £3,031 which formed part of the trading receipts of the previous day. The money was not recovered and the taxpayer was not insured against such a loss.

Held, that the loss was incurred in gaining or producing the assessable income of the year in question within the meaning of s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 and was not a loss or outgoing of capital or of a capital nature, and was consequently a deduction from assessable income in such year.

CASE STATED.

Charles Moore & Co. (W.A.) Pty. Ltd., a company incorporated in the State of Western Australia appealed to the High Court from the decision of a board of review constituted under the *Income Tax*

and Social Services Contribution Assessment Act 1936-1953. The appeal was heard before *Dixon* C.J. who, on 12th September 1956 stated a case, substantially as follows, for the opinion of a Full Court.

1. The appellant company was incorporated at Perth in the State of Western Australia on 21st August 1951 and carries on the business of a departmental store at Hay Street Perth.

2. On the morning of 5th August 1952 the cashier and another member of the staff of the appellant company were held up at gun point and robbed whilst they were on their way to the company's bank to deposit the cheques and money hereinafter referred to being the trading receipts of the appellant for 4th August 1952.

3. The cashier was carrying to the said bank a bag containing cheques to the value of £447 1sh. 9d. and 8sh. 8d. in cash (part of the said trading receipts). The other member of the staff was carrying a bag containing £3,031 in banknotes (the remainder of the said trading receipts).

The bag containing £3,031 in bank notes was stolen.

4. The trading receipts of the appellant for 4th August 1952 were made up as follows :—

(a) cash sales	£2,684	18	3
(b) customers' accounts	788	8	0
(c) sundry receipts ..	5	4	2
	£3,478	10	5

The item described as " customers' accounts " includes mail orders, letters of credit, lay-by payments, lay-by deposits, payments on delivery and staff ledger accounts, as well as customers' current trading accounts.

5. In its return of income for the year ended 31st August 1952 (adopted in lieu of the financial year ended 30th June 1952) the company claimed the sum of £3,031 as an allowable deduction from its assessable income. With its return of income the appellant company forwarded a statement concerning the money stolen. It was the practice of the company to deposit with its bank each day the previous day's trading receipts. The company was not insured against losses such as the one described in par. 3 hereof and received no compensation for such loss.

6. It was the practice of the appellant company to deposit with its bank each day the previous day's trading receipts. Such a

H. C. OF A. 1956.

CHARLES MOORE & CO. (W.A.) PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

practice conforms to the practice of other companies and firms in Perth and elsewhere in Australia which carry on the business of a retail department store. It was the practice of the company to send two of its employees to the bank with the money. One was the cashier and the other a despatch driver who acted as escort. Both were unarmed. There is no uniform practice adopted by companies or firms carrying on the business of a retail department store as to the manner in which the moneys are transported to the bank. Some companies adopt a practice similar to that of the appellant company whilst others employ the service of companies which provide an armoured car for the purpose. The appellant company had considered the use of such a vehicle but decided against doing so; one of the grounds for such decision being that it is necessary to appoint a fixed daily time for such a vehicle to call and the appellant company felt that it would be unable to tell sufficiently accurately at what time each day the money would be ready for taking to the bank, and preferred to have the money carried to the bank by its own employees as soon as they were ready to do so. The distance from the appellant company's store to its bank is approximately 200 yards. Some firms and companies carrying on businesses similar to that of the appellant company insure against losses of moneys in circumstances such as those described in par. 3 hereof, but the appellant company was not insured against such losses and received no compensation from any source for the loss of the sum of £3,031 as described in the said par. 3. The appellant company had never prior to 5th August 1952 sustained the loss of any of its trading receipts whilst the same were being transported to the bank by its employees nor is there any record of the trustees who until 31st August 1951 conducted the business now carried on by the appellant ever having sustained such a loss.

7. The moneys deposited each day by the appellant company with its bank in pursuance of the practice described in par. 6 hereof usually consist of the entire cash takings within the store on the previous day. Such cash takings usually consist of the following:— (i) Cash received for sales within the store of the company's stock in trade. (ii) Payments of customers' accounts which are rendered monthly. (iii) Payments received for goods ordered and despatched by mail. (iv) Payments made by customers for what are known as "letters of credit" which is an arrangement under which a customer may purchase goods to a certain value upon the undertaking to make certain periodical payments. (v) Payments of deposits and

periodical payments on lay-by accounts. (vi) Payments received on "staff ledger accounts" for goods purchased by the company's employees. (vii) Payments made for goods delivered to customers upon the condition that the goods are paid for on delivery. (viii) Sundry receipts which are usually small in amount for such services within the store as weighing machines, retiring rooms and telephones.

The payments referred to in sub-pars. (i) to (vii) above inclusive are all received for goods sold by the appellant company in the ordinary course of its business. The total sales of the company for the year ended 31st August 1952 amounted to £1,109,146.

8. By an assessment for income tax and social services contribution dated 21st May 1953 issued to the appellant company in respect of the income year ended 31st August 1952, the respondent disallowed the appellant's claim for a deduction from assessable income of the sum of £3,031.

9. Notice of objection dated 17th July 1953, to the said assessment was lodged by the appellant with the respondent.

10. By notice dated 22nd September 1953 the respondent disallowed the objection and on 25th September 1953 the appellant gave notice to the respondent that it was not satisfied with his decision and required the objection to be referred to a board of review.

11. The said reference was heard by Board of Review No. 3 on 10th May 1955 and on 10th June 1955 the said board of review by a majority upheld the decision of the respondent and confirmed the said assessment.

12. By notice of appeal dated 6th July 1955 the appellant appealed to the High Court from the decision of the board of review.

13. On the hearing of the appeal before me the following questions which, in my opinion, are questions of law have arisen and which at the request of the parties I state for the opinion of the High Court. On the facts appearing from this case thereto—(a) am I bound to hold that the said sum of £3,031 constituted an allowable deduction for the purposes of s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 ? (b) is it open to me to hold that the said sum of £3,031 constituted an allowable deduction for the purpose of s. 51 (1) of the said Act ?

D. I. Menzies Q.C. (with him *J. McI. Young*), for the appellant. This case depends entirely on s. 51 (1) of the *Income Tax Assessment Act*. The section refers to losses and outgoings. The taxpayer

H. C. OF A. 1956. CHARLES MOORE & CO. (W.A.) PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

here suffered a loss rather than an outgoing. The loss was incurred in gaining assessable income. [He referred to *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (1).] "Necessarily" in the section means no more than that the loss was suffered in carrying on the business in the way in which it was carried on by the taxpayer. *Commissioner of Taxation (N.S.W.)* v. *Ash* (2) on which the Board of Review relied is not in point here on the facts but is in favour of the appellant inasmuch as it indicates that defalcations by an employee of money forming part of assessable income would be an allowable deduction. [He referred to *Commissioner of Taxes (N.Z.)* v. *Webber* (3).] [He was stopped.]

L. Voumard Q.C. (with him *J. A. Nimmo*), for the respondent. The loss was not incurred in gaining or producing the assessable income. It could not reasonably be contemplated and it was not one of the ordinary hazards of the business. [He referred to *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (4); *Commissioner of Taxation (N.S.W.)* v. *Ash* (5).] There are three possible meanings to "losses necessarily incurred". The first is that a loss is not necessarily incurred unless it was an inevitable incident of the carrying on of the business. The second meaning is that it was necessarily incurred if there was a very high degree of probability that it would happen. [He referred to *Gavin* v. *Ayrshire County Council* (6).] The third meaning is that it was necessarily incurred if it was a natural and probable incident of carrying on the activity in question. Accordingly on any of these meanings the loss was not necessarily incurred. In any event it was a loss of a capital nature. Once this money had come into the hands of the taxpayer it formed a part of the totality of his assets and it then became irrelevant to consider the particular source from which it was derived. [He referred to *Vallambrosa Rubber Co. Ltd.* v. *Farmer* (7).]

J. McI. Young, in reply.

Cur. adv. vult.

(1) (1949) 78 C.L.R. 47, at pp. 56, 57.
(2) (1938) 61 C.L.R. 263.
(3) (1956) N.Z.L.R. 552; 11 A.T.D. 76.
(4) (1937) 56 C.L.R. 290, at p. 305.
(5) (1938) 61 C.L.R. 263, at pp. 277, 281, 282.
(6) (1950) S.C. 197.
(7) (1910) 5 Tax. Cas. 529, at p. 536.

THE COURT delivered the following written judgment:—

This case stated concerns the allowance, from a trader's assessable income, of a deduction in respect of a loss of part of a day's takings through the robbery at pistol point of the cashier and his escort while on their way to deposit the money in the bank.

The taxpayer claiming the deduction conducts a departmental store in Hay Street, Perth. It was the practice every business morning for the cashier accompanied by another employee to take the previous day's takings to the bank some two hundred yards away and pay them in to the credit of the taxpayer.

On the morning of 5th August 1952, while on their way to the bank unarmed, the two employees were held up at gun point and robbed. The money they carried consisted of cheques and cash forming the trading receipts of the previous day. A bag containing the cheques escaped but the bag containing cash, which amounted to £3,031, was stolen and never recovered, and the taxpayer was not insured against a loss of such a description.

In the return of the taxpayer's income for the year in which the robbery occurred the amount was claimed as a deduction from the assessable income, but the claim was disallowed by the commissioner and the disallowance was upheld by a majority of a board of review.

We are unable to concur in the view that the loss does not form an allowable deduction. We can see no reason why it should not be considered a loss incurred in gaining or producing the assessable income within s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 and we do not think that it should be regarded as a loss or outgoing of capital or of a capital nature. The words "incurred in gaining or producing the assessable income" mean, as has been stated many times, "in the course of gaining or producing the assessable income": *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (1); *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (2). In the case of a large departmental store such as the taxpayer carries on, the ordinary course of business requires that, day by day and as soon as may be, the takings shall be deposited in the bank. It is as necessary to the conduct of the business as it is to place goods on the shelves or to deliver them to the customers. They are all operations in the course of gaining or producing the assessable income by means of carrying on the business. The

(1) (1937) 56 C.L.R. 290.

(2) (1949) 78 C.L.R. 47, at p. 57.

H. C. OF A. 1956.

CHARLES MOORE & Co. (W.A.) PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon C.J. Williams J. Webb J. Fullagar J. Kitto J.

assessable income to which the sub-section relates is (apart from exemptions) the total amount of the receipts of an income nature derived during the twelve months forming the accounting period. " A very wide application should be given to the expression ' incurred in gaining or producing the assessable income '. But the words refer to the assessable income from which the deduction is to be made." : *Amalgamated Zinc (de Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1). It is the total of one side of the account. For that reason it is impossible, without misapplying the provision, to base the disallowance of the deduction on the ground that the assessable income is constituted by the particular item of £3,031 and that the item was already produced or gained as assessable income before it was lost.

Banking the takings is a necessary part of the operations that are directed to the gaining or producing day by day of what will form at the end of the accounting period the assessable income. Without this, or some equivalent financial procedure, hitherto undevised, the replenishment of stock in trade and the payment of wages and other essential outgoings would stop and that would mean that the gaining or producing of the assessable income would be suspended.

In *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (2), it is said : " For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end . . . In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income " (3). Properly understood the place which the banking of money takes in a merchandising business brings the operation within the principle thus stated. It is an essential, or at all events highly expedient, part of the conduct of the business, a necessary or recognised incident or concomitant, and is relevant as well as incidental to the end in view, the gaining of the assessable income. The " occasion of the loss " in the present case was the course pursued in banking the money. In *Commissioner of Taxation (N.S.W.)* v. *Ash* (4), *Rich* J. said : " There is no difficulty in understanding the view that involuntary outgoings

(1) (1935) 54 C.L.R. 295, at p. 309.
(2) (1949) 78 C.L.R. 47.
(3) (1949) 78 C.L.R., at pp. 56, 57.
(4) (1938) 61 C.L.R. 263.

and unforeseen or unavoidable losses should be allowed as deductions when they represent that kind of casualty, mischance or misfortune which is a natural or recognized incident of a particular trade or business the profits of which are in question. These are characteristic incidents of the systematic exercise of a trade or the pursuit of a vocation" (1). Even if armed robbery of employees carrying money through the streets had become an anachronism which we no longer knew, these words would apply. For it would remain a risk to which of its very nature the procedure gives rise. But unfortunately it is still a familiar and recognised hazard and there could be little doubt that if it had been insured against the premium would have formed an allowable deduction. Phrases like the foregoing or the phrase "incidental and relevant" when used in relation to the allowability of losses as deductions do not refer to the frequency, expectedness or likelihood of their occurrence or the antecedent risk of their being incurred, but to their nature or character. What matters is their connection with the operations which more directly gain or produce the assessable income.

It was argued for the commissioner that even conceding the foregoing the loss was of a capital nature. This argument depends upon the view that before the money was stolen it had come home to the taxpayer so as to form part of its capital resources. But that is not a tenable view of the matter. Attempts have been made in *Sun Newspapers Ltd. and Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2), and *Broken Hill Theatres Pty. Ltd.* v. *Federal Commissioner of Taxation* (3), to formulate the tests for distinguishing between on the one hand losses, outgoings and expenditure of an income, and on the other hand those of a capital nature. For the purposes of this case it is enough to refer to the passages cited and to point out that we are here dealing with a loss incurred in an operation of business concerned with the regular inflow of revenue, not with a loss of or concerning part of the "profit yielding subject", the phrase in which Lord *Blackburn* in *United Collieries Ltd.* v. *Inland Revenue Commissioners* (4) summarised the characteristics of a business undertaking or enterprise considered as an affair of a capital nature.

For the foregoing reasons the questions in the case stated should both be answered: Yes.

(1) (1938) 61 C.L.R., at p. 277.
(2) (1938) 61 C.L.R. 337, at pp. 359-363.
(3) (1952) 85 C.L.R. 423, at pp. 433, 434.
(4) (1930) S.C. 215, at p. 220; (1929) 12 Tax. Cas. 1248, at p. 1254.

H. C. OF A. 1956.

CHARLES MOORE & CO. (W.A.) PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Both questions in the case stated answered: Yes. Costs of the case stated reserved for the judge disposing of the appeal.

Solicitors for the appellant, *Hedderwick, Fookes & Alston.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. D. B.