[HIGH COURT OF AUSTRALIA].

MODERN PERMANENT BUILDING AND INVESTMENT SOCIETY (IN LIQUIDATION) . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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MELBOURNE, *Mar.* 17;

SYDNEY, *April* 2.

Williams J.

Income Tax (Cth.)—Assessable income—Allowable deduction—Building society making advances to members etc. on security of freehold land—Sale of loans prior to voluntary dissolution at price based on total value of outstanding balances less ten per cent—Claim for deduction from assessable income for period in question of sum equal to the ten per cent—Whether society engaged in business of money lending—Whether loans are trading stock within meaning of Act—Whether loss on capital or revenue account—Income Tax and Social Services Contribution Assessment Act 1936-1955 (*No.* 27 *of* 1936—*No.* 62 *of* 1955), *ss.* 6 (1), 28, 36, 51.

Section 6 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 provides that trading stock "includes anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange, and also includes livestock".

Held, that choses in action were not trading stock within the definition.

A building society registered and incorporated under the *Building Societies Act* 1928 (Vict.) confined its business to making advances at interest to members and other persons upon the security of freehold land. Prior to going into voluntary dissolution it sold the outstanding loans to another building society at a price (subject to certain adjustments) equal to the total of the loans less ten per cent. It claimed a sum equivalent to the ten per cent as a deduction from assessable income in the year in question.

Held, that the sum was a capital loss and not allowable as a deduction.

Held, further, that the society was not carrying on the business of a money-lender.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1955.

The Modern Permanent Building and Investment Society (In Liquidation) appealed to the High Court from a decision of the Taxation Board of Review No. 3 disallowing as a deduction from

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the assessable income of the appellant in the period 1st August 1954 to 13th April 1955 the sum of £24,707 14s. 8d.

The appeal was heard by *Williams* J. in whose judgment hereunder the material facts appear.

K. A. Aickin Q.C., for the appellant.

G. H. Lush Q.C. and *N. M. Stephen*, for the respondent.

Cur. adv. vult.

WILLIAMS J. delivered the following written judgment:—

This is an appeal under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955. The question of law involved in the appeal is whether under that Act the sum of £24,707 14s. 8d. was an allowable deduction from the assessable income of the appellant, the Modern Permanent Building and Investment Society, for the period 1st August 1954 to 13th April 1955. The appellant claimed this sum as a deduction in its return of income for that period under the heading "discount in lieu of costs of collection". But the respondent disallowed it.

The material facts are few. The appellant was registered in about 1870 presumably under the *Friendly Societies Statute* 1865 (Vict.) and its registration was continued under the subsequent *Building Societies Acts* of Victoria passed from time to time. The Act at present in force is the *Building Societies Act* 1928 (Vict.) as amended by the *Building Societies Act* 1953 (Vict.). The appellant is registered and incorporated under this Act. It went into voluntary dissolution on 13th April 1955. This explains why the liquidator made a return of income for the above broken period (the appellant's normal accounting period is from 1st August in one year to 31st July in the following year).

Although r. 16 of the rules of the appellant authorised it to employ its funds for several purposes, it had for many years prior to 13th April 1955 confined its business to one of these purposes—namely to making advances at interest to members and other persons upon the security of freehold land. On 31st July 1954 there were current about three hundred such loans. On 22nd September 1954 negotiations with another building society the Fourth Victoria Permanent Building Society for purchase by it of the appellant's outstanding loans were finalised. On 7th February 1955 an agreement in writing was entered into between the two societies whereby the appellant agreed to sell them to this purchaser for the sum of £221,997 13s. 7d.

(subject to a number of adjustments). The purchase price was calculated by adding together the several balances owing to the appellant as at 31st July 1954 in respect of the loans referred to in the first and second parts of the first schedule of the agreement and reducing the sum total so arrived at by one-tenth thereof. This agreement was completed by an indenture dated 7th March 1955 whereby the outstanding balances, after making the necessary adjustments, and the mortgage and other instruments by which the loans were secured were assigned and transferred by the appellant to the Fourth Victoria Permanent Building Society in consideration of the payment by the latter to the former of the sum of £203,231 0s. 9d. The sum of £24,707 14s. 8d. in dispute represents the reduction of ten per cent from the gross purchase price provided for in the agreement. For some reason the respondent disallowed the sum of £24,207 instead of £24,707 14s. 8d. but it is agreed that nothing turns on this difference which would appear to have been a slip.

The appellant objected to this disallowance but the respondent disallowed the objection. The appellant then requested the respondent to refer the matter to a taxation board of review. The reference was heard by the Taxation Board of Review No. 3 which by a majority upheld the respondent and confirmed the assessment.

Mr. *Aickin* for the appellant relied upon the combined operation of ss. 28, 36 and 51 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955. Section 28 provides that " (1) Where a taxpayer carries on any business, the value, ascertained under this subdivision, of all trading stock on hand at the beginning of the year of income, and of all trading stock on hand at the end of that year shall be taken into account in ascertaining whether or not the taxpayer has a taxable income. (2) Where the value of all trading stock on hand at the end of the year of income exceeds the value of all trading stock on hand at the beginning of that year, the assessable income of the taxpayer shall include the amount of the excess. (3) Where the value of all trading stock on hand at the beginning of the year of income exceeds the value of all trading stock on hand at the end of that year, the amount of the excess shall be an allowable deduction." Section 36 provides that " (1) Subject to this section, where—(*a*) a taxpayer disposes by sale, gift, or otherwise of property being trading stock, . . . (*b*) that property constitutes or constituted the whole or part of the assets of a business which is or was carried on by the taxpayer; and (*c*) the disposal was not in the ordinary course of carrying on that business, the value of

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that property shall be included in the assessable income of the taxpayer, and the person acquiring that property shall be deemed to have purchased it at a price equal to that value." The provisions of s. 51 are too well known to need repetition. It is clear that the sale to the Fourth Victoria Permanent Building Society was not a sale in the course of carrying on the appellant's business, but a realisation of its assets preliminary to dissolution, and that the proceeds of such a sale would be according to ordinary usages and concepts of a capital nature. Mr. *Aickin* admitted that he could not rely on s. 51 standing alone. That section is concerned with losses and outgoings incurred in gaining or producing assessable income in the course of carrying on a business and not with losses and outgoings incurred in bringing it to an end. But he contended that the appellant was engaged in the business of money lending, that money is the stock-in-trade of such a business, and that he was entitled to use s. 51 in conjunction with ss. 28 and 36 of the Act to establish that the sum of £24,707 14s. 8d. should be allowed as a deduction from the assessable income of the appellant for the period in question because its loans were trading stock within the meaning of these sections, or alternatively because some concept comparable to that contained in these sections should be applied to profits or losses made on the realisation of the choses in action of a business of money lending.

The first question is whether he can rely on these sections directly. Section 6 (1) contains a definition of " trading stock ". " ' Trading stock ' includes anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange, and also includes livestock ". This definition relates to tangible things only but it does not purport to be exclusive. However it is clear from ss. 28, 29 and 31 of the Act that, whatever else trading stock may include, it does not include choses in action. Section 28, as Mr. *Lush* pointed out, refers to the value of trading stock on hand at the beginning and end of the year and it would be difficult to describe property other than tangible property as being on hand. Sections 29 and 31 require the value of each article of trading stock to be taken into account at the beginning and at the end of each year of income. Section 31 contemplates that each such article can have a cost price or market selling value or a price at which it could be replaced. These provisions support the conclusion that the trading stock to which the ss. 28 and 36 refer must be of a tangible nature. Mr. *Aickin* therefore cannot rely on these sections directly.

The remaining question is whether he can do so by analogy. In other words whether he can contend that because s. 36 provides

that the value of trading stock disposed of not in the ordinary course of carrying on a business shall be included in the assessable income of a taxpayer (which appears to imply that a loss made on such disposal shall be an allowable deduction) any profit or loss made by a moneylender or a banker upon the realisation of its choses in action otherwise than in the ordinary course of business should by parity of reasoning if a profit be treated as part of its assessable income and if a loss as an allowable deduction. He cited the statement of Lord *Thankerton* in *Income Tax Commissioner* v. *Singh* (1) delivering the judgment of the Privy Council: "It has to be remembered that money is the stock-in-trade of a moneylender" (2) and that of *Kitto* J. in *Guinea Airways Ltd.* v. *Federal Commissioner of Taxation* (3): "In the case of a banker, money is his stock in trade, and any profit or loss he makes in dealing with money in the course of his business is on revenue account, notwithstanding that the money is in a sense held in reserve" (4). No doubt money can in a somewhat metaphorical sense be said to be the stock-in-trade of a moneylender or a bank. It is dealing in money and in that which it represents, that is to say, the debts which are owed to it as a result of putting out its money at interest. Any loss upon a loan that such a trader might incur in the course of carrying on its business would be a loss incurred in gaining or producing the assessable income and be an allowable deduction under s. 63 of the Act. But a loss incurred upon the realisation of such loans in order to put an end to the business or part of it would, in the absence of legislation to the contrary, be a capital loss. Apart from legislation, the profit or loss on the realisation of trading stock, for the purposes of winding up a business, would in most cases be a capital accretion or loss. Section 36 of the Act in the case of trading stock to which it applies converts such an accretion or loss into a profit or loss on revenue account. But I can find no warrant for applying its provisions by analogy or otherwise to the disposal by sale of the appellant's outstanding loans with a view to dissolution, even if money can be regarded for some purposes as the stock-in-trade of a moneylender and the appellant was a moneylender.

Further I am of opinion that the appellant was not carrying on the business of a moneylender in the ordinary acceptation of that term. "Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible": per *Farwell* J.

(1) (1942) 1 All E.R. 362.
(2) (1942) 1 All E.R., at p. 365.
(3) (1950) 83 C.L.R. 584.
(4) (1950) 83 C.L.R., at p. 593.

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in *Litchfield* v. *Dreyfus* (1); *Austin Distributors Ltd.* v. *A. H. Paterson Car Sales Pty. Ltd.* (2). The appellant was really carrying on an investment business. It was lending money at interest secured upon freehold property for periods ranging from twelve months to twelve years. It had power to make advances to other persons and corporate bodies as well as members but its rules contemplated that the borrowers, if they were not permanent members, would become borrowing members of the society, that members holding borrowing shares who were in arrears with their subscriptions or other payments should be fined, and that if a member should be in arrears with his payments for a certain period the mortgaged property should be sold. Out of the net proceeds of sale the society was to be reimbursed not only for the principal, and interest due and payable under the mortgage but also for fines and other payments due and payable by the member under the rules. The surplus then remaining was to be paid to the member or his assigns. The appellant was really making a series of investments for the purpose of deriving an income from the interest they produced. It intended to retain the loans during their currency and only to realise upon the security if it became necessary to do so in order to recoup itself for unpaid interest or principal or for unpaid fines or other payments owing by the borrower as a member. Moneys used to make advances of the character made by the appellant could not be said to be used in its trade. They could only be said to be used for the purposes of investment. Whatever the position might be if a profit or loss was made upon an assignment of one or more of the loans in the course of the appellant's business, a mass sale of them in order to put an end to that business could not be other than a sale of capital assets.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *J. T. Brock.*

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

R. D. B.

(1) (1906) 1 K.B. 584, at p. 589.

(2) (1941) 65 C.L.R. 118.