[HIGH COURT OF AUSTRALIA.]

HUGHES . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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1957, SYDNEY, *Sept.* 27, 30;

1958, MELBOURNE, *Mar.* 11.

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

Income Tax—Assessment—Assessable income—Taxpayer—British subject—Resident in Australia—Malayan tin companies—Resident in Malaya—Shares owned by taxpayer—Profits of companies—Dividends—Sources out of Australia—Chargeable income—Set-off—Deduction—Malayan income tax—Credit—Income Tax and Social Services Contribution Assessment Act 1936-1953, (*No.* 27 *of* 1936—*No.* 81 *of* 1953), *ss.* 6 (1), 44 (1), 45, 196 (2)—*Income Tax Ordinance* 1947-1953 (*Malaya*), *ss.* 10 (1), 12, 26, 36, 39, 40, 42, 68, 89.

During the year ended 30th June 1954 the appellant taxpayer, a resident of Australia, owned shares in three companies all of which were residents in the Federation of Malaya. In that year of income the companies declared dividends out of profits derived in the Federation. The *Malayan Income Tax Ordinance* 1947, as amended, imposed company tax and entitled a company resident in the Federation to deduct from dividends tax at the rate paid or payable by the company; it provided that whether or not a deduction was made the company should furnish each shareholder with a certificate setting forth the amount of the dividend actually paid to the shareholder and the amount of tax which the company had deducted or was entitled to deduct in respect of the dividend. The Ordinance provided that in his return the taxpayer should put in the gross amount that is the dividend declared before deduction of tax; he was then entitled to a set-off of the amount set forth in the certificate. In fact, each of the companies deducted tax and in accordance with the above provisions the appellant taxpayer set out in his return the sum of the dividends he actually received and the amounts stated in the certificates and against his tax there was set off the amounts stated in the certificates as deducted. In his return under the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 (Cth.), the appellant included in his assessable income the full amount of each of the Malayan dividends as declared before deduction of tax, and in respect of that full amount claimed a credit under s. 45 of the Act. The respondent commissioner assessed the appellant upon the amount of the dividends he actually received, that is after deduction of tax by the companies, and no credit under s. 45 was allowed.

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Held: that the sums deducted were calculated with reference to the companies' tax and were so characterised, and they were not paid or payable for or on account of the taxpayer by the companies; and that the deduction of tax and issue of a certificate could not be considered a distribution or crediting of that amount to the taxpayer by a company.

Jolly v. *Federal Commissioner of Taxation* (1934) 50 C.L.R. 131, discussed.

REFERENCE to the High Court.

This was a reference by a board of review to the High Court of Australia under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 of a question of law.

The reference was in the form of a case stated, the provisions of which were substantially as follows:

1. The appellant, Sam Hughes, is a British subject and is and has been at all relevant times a resident of Australia and during the year ended 30th June 1954, was liable to pay income tax under the *Income Tax and Social Services Contribution Assessment Act* 1936-1953.

2. During the year ended 30th June 1954, the appellant had shareholdings in and derived dividends from the following Malayan tin companies all of which are residents of Malaya:

Kuala Kampar Tin Fields Ltd. ..	(200 shares)
Thabawleik Tin Dredging Ltd. ..	(300 shares)
Pungah Tin Dredging Ltd.	(100 shares)

3. During the year ended 30th June 1954, dividends were declared by the above-mentioned companies out of profits of the companies derived from sources out of Australia. The amounts calculated in respect of the shares held by the appellant exclusive of Malayan income tax were as follows:

	Australian Currency.	Malayan Currency.
Kuala Kampar Tin Fields Ltd.		
8th July 1953—6s. stg. per share	£75 0s. 0d.	$514.29
20th January 1954—1s. 6d. stg. per share	18 15s. 0d.	128.57
	£93 15s. 0d.	$642.86
Thabawleik Tin Dredging Ltd.		
18th September 1953—6s. stg. per share	£112 10s. 0d.	$771.43
26th March 1954—5s. stg. per share	93 15s. 0d.	642.86
	£206 5s. 0d.	$1,414.29

Pungah Tin Dredging Ltd.									
9th April 1954—1s. stg. per share	£6	5s.	0d.	$42.86					

Annexed to the case were copies of the resolutions declaring such dividends: a typical resolution is sufficiently set out in the judgment of *Kitto* J. hereunder. Also annexed were copies of the dividend advice notes forwarded by those companies to the appellant and also annexed were copies of the balance sheets, profit and loss accounts, and directors' reports setting out particulars of the dividends.

4. Under s. 39 of the Malayan *Income Tax Ordinance* 1947, as amended, tax was levied on the income of the respective companies at the rate of thirty per cent on every dollar of the chargeable income.

5. Under the provisions of s. 40 (1) of the Malayan *Income Tax Ordinance* 1947, as amended, the respective companies deducted from the amounts stated in par. 3 above the sums shown in col. 2 hereunder being Malayan income tax at the rate of thirty per cent:

	Col. 1 Amount mentioned in par. 3 above.	Col. 2 Malayan Tax.	Col. 3 Balance.
Kuala Kampar Tin Fields Ltd.			
8th July 1953	£75 0s. 0d.	£22 10s. 0d.	£52 10s. 0d.
20th January 1954	18 15s. 0d.	5 12s. 6d.	13 2s. 6d.
	£93 15s. 0d.	£28 2s. 6d.	£65 12s. 6d.
Thabawleik Tin Dredging Ltd.			
18th September 1953	£112 10s. 0d.	£33 15s. 0d.	£78 15s. 0d.
26th March 1954	93 15s. 0d.	28 2s. 6d.	65 12s. 6d.
	£206 5s. 0d.	£61 17s. 6d.	£144 7s. 6d.
Pungah Tin Dredging Ltd.			
9th April 1954	£6 5s. 0d.	£1 17s. 6d.	£4 7s. 6d.

6. The amounts shown in col. 1 of par. 5 above were subsequently assessed to the appellant in accordance with the provisions of s. 10 (1) and s. 26 of the Malayan *Income Tax Ordinance* 1947, (as amended).

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7. In such assessments made on the appellant he was allowed under s. 42 of the ordinance as a set-off against the tax charged on his chargeable income the amounts set out in col. 2 above and was also allowed the deduction directed by s. 36 of that ordinance. The amount so set off and the amount so deducted together exceeded the tax on the appellant's chargeable income and he thereby became entitled under s. 89 of the ordinance to have the amount of the excess tax paid refunded to him.

8. In his Australian income tax return for the year ended 30th June 1954, for the purposes of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 the appellant included the amounts shown in col. 1 of par. 5 above, as dividends from the above-mentioned companies and claimed a credit under s. 45 of that Act in respect of such amounts.

9. So far as dividends from such companies were concerned the appellant was assessed by the Commissioner of Taxation for the year of income ended 30th June 1954, upon the amounts shown in col. 3 of par. 5 and no credit under s. 45 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 was allowed.

The appellant objected to the assessment, but the objection was disallowed. The appellant having the objection to be referred to a Board of Review, the Board, at the request of the parties, submitted the following questions of law for the opinion of the High Court :—

1. Should the appellant, in respect of dividends from the said Malayan companies taxable under the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 for the year ended 30th June 1954, have been assessed: (a) upon the amounts as shown in col. 1 of par. 5 hereof; or (b) upon the amounts as shown in col. 3 of par. 5 hereof.

2. If the answer to question 1 (a) is in the affirmative, is the appellant entitled under s. 45 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 to a credit: (a) of the amounts shown in col. 2 of par. 5; or (b) of the difference between the total of the amounts shown in col. 2 and the sum of £A51 6s. 9d. referred to in par. 7 of the stated case.

Relevant facts and statutory provisions are shown in the judgments hereunder.

Sir *Garfield Barwick* Q.C. (with him *F. J. D. Officer*), for the appellant. If there is an actual deduction of tax made by the dividend-paying company, the taxpayer for Malayan tax must

return the gross amount of the dividend before deduction of the tax. If, on the other hand, the dividend-paying company does not make any deduction of tax, then the dividend is deemed to be actual dividend declared and paid plus tax thereon at the rate at which the company's profits were taxed at the particular time. It is grossed-up in either event, whether the deduction were made or not. The scheme of the Malayan tax laws is that the shareholder is to be taxed on the distributed income; he is liable personally to pay tax on the dividend. This case is distinguishable from *Jolly* v. *Federal Commissioner of Taxation* (1). The appellant was paid that amount in respect of which he was liable to tax under the Malayan law. He is brought to tax for the full amount of the dividend. In one sense it is immaterial to the appellant as to whether the money was paid directly or by deduction, but from another point of view it has some significance to answer it specifically. The words of s. 45 (1) suggest that the income tax in respect of that dividend which is first spoken of is apt to refer to the income tax for which he primarily becomes liable and the bracketed words contemplate that the primary liability may be subject to some reduction. The taxpayer was liable under s. 39 (*b*) of Malayan law in respect of that dividend for thirty per cent tax. No occasion arises for the use of the words in brackets in s. 45 (1) (*a*) (i).

[DIXON C.J. referred to *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (2) and *W. & A. McArthur Ltd.* v. *State of Queensland* (3).]

The whole of the amount deducted should be credited in this case because what was deducted was income tax. It was income tax in respect of the dividend, and it was income tax in respect of the dividend to an amount for which the taxpayer was personally liable under s. 39, and that sum, that tax, did not suffer any deduction nor was he given any credit in respect of it to which he was entitled in respect of the dividend. Under s. 36 he had the other assessment and as a result he did get a refund but it was not a refund in respect of the dividend nor was it a refund in respect of, purely, that income tax. In the alternative, the income tax in respect of the dividend for which he was personally liable was the rateable sum derived by the use of ss. 36 and 39 in the manner of the adjustment. [He referred to *Case G67* (4); *Jolly* v. *Federal Commissioner of Taxation* (5); *Gold Fields American Development Co. Ltd.* v. *Consolidated Gold Fields of South Africa Ltd.* (6) and

(1) (1934) 50 C.L.R. 131.
(2) (1927) 40 C.L.R. 148.
(3) (1920) 28 C.L.R. 530.
(4) (1956) 7 T.B.R.D. 361.
(5) (1934) 50 C.L.R., at pp. 140, 145, 148, 149.
(6) (1926) Ch. 338, at p. 356.

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Inland Revenue Commissioners v. *Reid's Trustees* (1).] The amount of the dividend on which the appellant was liable to pay tax was the gross amount, and the amount of the dividend which was paid to the appellant was the gross amount paid by the company. The dividend was paid by deduction, and the amount deducted was the amount for which the appellant was personally liable in the first place. Alternatively, it was either paid directly or by deduction. The first question in the case stated should be answered in the affirmative. If the answer to question 1 (a) is in the affirmative the answer to question 2 (a) should be " Yes ". Under 2 (a) the appellant would get credit for the full amount of the deduction less the rebate by the use of s. 36. The conclusion in *Jolly's Case* (2) is inappropriate in this case.

R. Else-Mitchell Q.C. (with him *E. N. Dawes*), for the respondent. The answers to the questions should be: 1. (a) No; 1. (b) Yes; 2. (a) No; and 2. (b) Yes. On its true understanding the Malayan ordinance was intended to provide the same system in substance as the United Kingdom provisions discussed in *Jolly's Case* (3). All that was there said in respect of this ordinance is adopted by the respondent. The so-called net amount is the proper amount of dividend which should have been returned for tax purposes (*Jolly's Case* (4)). The only right that the shareholders obtained was a right to the residual figure. Section 44 (1) (*a*) which brings to tax dividends as part of the income of an Australian resident includes only sums paid to him and therefore embraces only the net sum he receives. The declaration in its terms shows a right to something less than six shillings, and the legal right therefore is a legal right to recover less than six shillings. The reference to the income tax is a reference to s. 40 of the ordinance. It is s. 44 (1) (*a*) that brings the dividend to tax in this country. Section 26 of the ordinance cannot be called in aid for the purpose of interpreting the provisions of the *Assessment Act*. The precise rate less than thirty per cent which may be deducted is something which depends upon administrative working out by the comptroller and which can only be done at a point of time probably subsequent to the declaration of the dividend. The alternate rate which is to be deducted cannot be determined until the completion of the administration of the particular company taxpayer's affairs in the year of income; that is something which cannot be assumed to

(1) (1949) A.C. 361.
(2) (1934) 50 C.L.R. 131.
(3) (1934) 50 C.L.R., at pp. 134-151.
(4) (1934) 50 C.L.R., at p. 149.

antedate the declaration of the dividend. The right of the shareholders against the company cannot diminish or increase according to the administration at a later point of time by the comptroller of the affairs of a particular company. That supports the view that one does not look behind the thirty per cent to see how the deduction will work out in terms of the tax ordinance. All that can be done is to treat it as a deduction of a flat figure and treat the dividend as being the balance. The rights of the shareholder are the rights to the balance after the deduction of the thirty per cent. The payment that represented the refund in this case is a payment which answers the description in s. 26A in the *Assessment Act*. The respondent relies upon s. 26A in aid of s. 45 (1). Section 26A is intended to bring to tax the amount which would otherwise be refunded to the taxpayer and representing, in this case, the difference between the actual Malayan tax and the amount of thirty per cent deducted. The respondent adopts the majority reasons in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1). If the net figure is not prescribed by s. 45 (1) it certainly is prescribed by the words in brackets in s. 45 (1) (*a*) (*i*)—it does not escape at both points.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Mar. 11, 1958

The following written judgments were delivered by :—

DIXON C.J., MCTIERNAN AND WILLIAMS JJ. In our opinion the taxpayer fails in his claim under s. 45 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, on the ground that the facts do not satisfy the initial condition which the opening words of the sub-section impose. Section 45 (1) in effect provides that in the conditions which it specifies a taxpayer who resides in Australia shall be entitled to a credit in respect of a dividend included in his assessable income but derived from a company which is a resident of a country outside Australia. The sub-section contains provisions for the computation of the amount of the credit. The initial condition to which we refer is expressed in the apparently simple words with which s. 45 (1) opens, " where a dividend paid by a company ". The word " dividend ", however, is defined by s. 6 (1) of the *Assessment Act*, and so is the word " paid " when used in relation to dividends. The material part of the definition of " dividend " provides that it shall include any distribution made by a company to its shareholders, whether in money or other property, and any amount credited to them as shareholders. It is only when the condition expressed in the

(1) (1927) 40 C.L.R. 140.

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words quoted, as amplified by the two definitions, is fulfilled that the taxpayer obtains any foundation for a claim to a credit in respect of the tax paid in the other country in respect of the dividends. In the present case the taxpayer has derived dividends from companies resident in Malaya during the Commonwealth year of income ended 30th June 1954. The companies declaring the dividends were subject to income tax in Malaya imposed by the *Income Tax Ordinances* 1947-1953. The plan of those ordinances with respect to the taxation of companies and in respect to dividends to their shareholders appears to have a general similarity to that dealt with by a board of review in *Case G*67 (1), in the case of Ceylon, but doubtless there are differences in the detailed provisions. Section 39 of the ordinance imposes a tax upon every company at the rate of thirty per cent on every dollar of the chargeable income thereof. The section also imposes a tax on every person (other than a company) who is not resident in Malaya, at the rate of thirty per cent of his chargeable income. Up to 1953 the rate was twenty per cent, but that is not material in the present case. It is mentioned only to show that the identity of rates is not essential to the plan. By s. 10 (1) (*d*) dividends are brought into charge. Income tax is, by that provision, payable upon the income of any person accruing in or derived from the Federation of Malaya in respect of dividends. By s. 68 every person chargeable with tax is to be assessed. Section 40 (1), however, provides that every company which is resident in Malaya shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at the rate paid or payable by the company . . . on the chargeable income of the year of assessment within which the dividend is declared payable. Sub-section (2) of s. 40 provides that every such company shall upon payment of a dividend, whether tax is deducted therefrom or not, furnish each shareholder with a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend. Section 42 includes a provision that any tax which a person (and that includes a company) has deducted or is entitled to deduct, under the provisions of s. 40, shall, when such dividend is included in the chargeable income of any person, be set off for the purposes of collection against the tax charged on that chargeable income. Part of the plan of the ordinance is to allow certain personal reliefs to a taxpayer. That may result in any particular case in the reduction of his tax with the result that the set-off provided by s. 42 may

(1) (1956) 7 T.B.R.D. 361.

operate to entitle him to be recouped portion of the tax. But this has little, if any, bearing upon the point upon which our decision turns.

In the present case the taxpayer received dividends declared by companies each of which deducted tax in pursuance of sub-s. (1) of s. 40 of the ordinance and furnished to the taxpayer a certificate in compliance with sub-s. (2). In declaring the dividends the deduction was provided for. For example, the resolution of one company resolved that a dividend of so much per share, less income tax at the rate of thirty per cent, be paid in respect of the financial year specified. The several declarations of dividend varied but slightly, and immaterially, from this formula. The taxpayer was assessed under the Malayan ordinance and, as s. 26 of that ordinance requires, upon the full amount of the dividends. The assessment, however, allowed the set-off provided for by s. 42. As he was entitled to some personal relief the set-off resulted in some recoupment of tax. It is in these circumstances that he claims to be entitled to a credit from the Commonwealth Commissioner of Taxation under s. 45 of the *Assessment Act* 1936-1953.

Our opinion is that the claim fails *in limine* because the provisions of the Malayan ordinance which we have described do not involve a payment in full of the dividend declared by any of the Malayan companies. Adopting, as it seems, this view the commissioner, in his assessment, has included not the whole of each dividend, but that dividend less thirty per cent. He has, in other words, included the amount actually paid to the shareholder by the company and has refused to include the further thirty per cent which the company has deducted in pursuance of sub-s. (1) of s. 40 of the ordinance. It is plain, if this is right, as we think it is, that s. 45 (1) of the *Assessment Act* (Cth.) has no application to the case; it cannot entitle the taxpayer to the credit he claims. It may be conceded that if the thirty per cent deducted, or on account of which the deduction is made, had been paid for or on behalf of the taxpayer or to satisfy a liability imposed on him as a Malayan taxpayer it might have been brought, if not within the natural meaning of the word " paid ", at all events within the extended meaning of the definition of that word. But under the Malayan ordinance the company pays its tax on its own behalf and not in a representative capacity. It is left to the company to deduct or not to deduct from dividends at the rate paid or payable by the company. The deduction, as will be noticed, may precede payment to the Malayan revenue.

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When s. 40 (1) of the ordinance says that the company shall be entitled to deduct from the amount of any dividend paid to any shareholder tax paid or payable by the company and so on, no doubt it uses language which gives the deduction a character. But the character is that of tax paid or payable by the company, that is to say of tax levied on the company in respect of its chargeable income of the year of assessment. It may be remarked that the dividend may have been a distribution of profits of some previous year. The point, however, is that it is not a deduction of an amount paid or payable by the company for or on account of the shareholder as his agent. It may be conceded that s. 45 (1) of the *Assessment Act* contemplates the possibility of a dividend being "paid by a company which is resident outside Australia", notwithstanding that the payment involves a deduction from that dividend of the shareholder's income tax in respect of that dividend. That is shown by the language of s. 45 (1) itself which we have thought it unnecessary to set out in full. It is shown by the phrase "and the taxpayer has paid either directly or by deduction income tax in respect of that dividend for which he was personally liable". But s. 45 (1) contemplates no more than a deduction by way of recoupment or by way of payment in account between the shareholder and the company in respect of some disbursement made on behalf of the shareholder in payment of his tax. When the resolution already mentioned declaring the dividend speaks of a dividend at so much a share less income tax at the rate of thirty per cent, it follows the terms of s. 40 (1) of the ordinance and accordingly refers to the company's income tax. As has been pointed out already it is little more than an accident that at the relevant time the rate of tax imposed on the individual was the same as that imposed on the company. It had not been so.

The situation created by the ordinance is not identical with that arising with dividends nor, for that matter, with tax free dividends under Schedule D of the *Income Tax Act* 1918 (Imp.) in relation to the *Income Tax Assessment Act* 1915-1921, with which *Dixon* J. (as he then was) dealt in *Jolly* v. *Federal Commissioner of Taxation* (1). But although that situation contains additional elements pointing to the conclusion that the whole dividend is not paid to the shareholder, there is a basal similarity underlying the plan upon which the very differently expressed provisions of the ordinance are conceived. At all events we think that we may properly repeat as applicable the following observations then made. "The liability

(1) (1934) 50 C.L.R. 131, at pp. 139-150.

of the company to assessment upon its profits is not that of a representative or agent but of a principal. Its legal personality is as separate from that of its members for the purpose of the income tax as for any other purpose" (1). "There is no appropriation to or for the use of the shareholder; nothing done by the company on his account or for his use" (2). "The destruction or prevention of the shareholder's liability to tax would be a consequence ensuing from the deduction as a result of an express provision of positive law, a statutory phenomenon, and not a discharge by payment or appropriation of money for the purpose. The money would not be credited to the taxpayer and applied by the company in discharge of his liabilities" (3). No doubt it is part of the plan of the ordinance to collect the tax at the source and at the same time to avoid double taxation of the same profit or income. To effect that purpose it is enough for the ordinance to confer on the shareholder a right to set off the amount paid by the company against his own tax. It is true that the incidence or economic burden of the tax is intended by the ordinance to fall upon him, as is shown by the operation of the provisions relating to relief. But it remains true that no payment is made by the company to the revenue which could be considered a distribution to him or a crediting to him of the thirty per cent of the dividends.

It might be suggested perhaps that when a company, in pursuance of s. 40 (2), furnished the taxpayer with a certificate of the amount of the dividend paid to him and the amount of tax which the company had deducted or was entitled to deduct in respect of that dividend, the company thereby gave to him an instrument possessing a value equivalent to the thirty per cent of the dividend and, in that manner, made a distribution to him of that amount. It will be seen that the unexpressed hypothesis involved in this suggestion is that the certificate has, at all events to the taxpayer, a pecuniary value representing thirty per cent of the dividend. But even if the hypothesis could be sustained, it would not be easy to bring the certificate within the words "distribution . . . whether in money or other property". But the hypothesis that the certificate is a valuable instrument equivalent to the tax deducted from the dividend has nothing to support it. Neither the Malayan ordinance nor the regulations thereunder contain anything which confers upon the certificate any status giving it value. It does not constitute the shareholder's title to the right of set-off conferred by s. 40 (1). Its production is not even a condition precedent to the allowance

(1) (1934) 50 C.L.R., at p. 145.
(2) (1934) 50 C.L.R., at p. 149.
(3) (1934) 50 C.L.R., at pp. 149, 150.

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of the set-off. Needless to say it is not transferable. At most it has an evidentary effect under the ordinance, but even that is not expressly provided.

It is for these reasons that we think that no more than seventy per cent of the dividends was paid by the companies.

The questions which the board of review in pursuance of s. 196 (2) of the *Assessment Act* has stated should, in our opinion, be answered as follows :—1. (a) No. (b) Yes. 2. Does not arise.

The costs of the reference by the board of review to this Court forming the stated case should be paid by the taxpayer.

WEBB J. This is a reference under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 of a question of law arising before a board of review. The appellant is a British subject and a resident of Australia. During the year ended 30th June 1954 he had shares in and derived dividends from three Malayan tin companies, all residents of Malaya, and dividends were declared out of profits of the companies derived from sources out of Australia. In respect of each dividend the directors of the particular company resolved that a dividend of a stated amount per share, less Malayan income tax, be paid. The resolution was followed by a notification to the shareholder that the declared amount on his shares was the stated amount, less the Malayan income tax. A relative dividend warrant was attached to the notification which certified that the income tax deducted had been or would be accounted for by the company to the Malayan income tax authority. Entries relating to these dividends appeared in the reports of each company and also in its balance sheet and profit and loss account.

The amount of the dividend as declared, without any deduction for Malayan income tax, was assessed to the appellant under ss. 10 (1) and 26 of the Malayan *Income Tax Ordinance* 1947 as amended in 1953. But in such assessment the appellant was allowed, under s. 42 of the ordinance as a set-off against the tax charged on his chargeable income, the amount of Malayan income tax paid by the company; and he was also allowed the deduction directed by s. 36. These two amounts exceeded the tax on the appellant's chargeable income and so he became entitled to a refund under s. 89.

The appellant in his income tax return under the *Income Tax and Social Services Contribution Assessment Act* for the year ended 30th June 1954 included the amounts of the dividends as declared, and not those amounts less Malayan income tax. But he also claimed a credit under s. 45 of that Act in respect of the full amounts

returned. However, the respondent commissioner assessed him upon the amounts returned, less the Malayan income tax, and so allowed him no credit under s. 45. Section 44 (1) (*a*) includes in assessable income dividends paid out of profits. The questions that arise are whether the appellant should have been assessed by the commissioner upon the amount returned by him, without any deduction of Malayan tax, or upon the difference between that amount and the Malayan tax. In the event of the first question being answered in the affirmative a further question arises as to the amount of the credit that he should be allowed.

Section 45 (1) (*a*) (i) provides, so far as it is material, as follows :— " (1) Where a dividend paid by a company which is a resident of a country outside Australia is included in the assessable income of any year of income of a taxpayer who is a resident of Australia, and the taxpayer has paid either directly or by deduction from the dividend income tax in respect of that dividend for which he was personally liable under the law of that country, the taxpayer, shall, subject to sub-sections (6), (7) and (8) of this section, be entitled to a credit—(a) where the whole of the dividend is paid out of the profits of the company derived from sources out of Australia—(i) of the amount of that income tax (as reduced by the amount of any refund or credit of that income tax to which the taxpayer is entitled in respect of the dividend) . . .".

It will be noted that the concession given by s. 45 (1) (*a*) (i) is restricted to a dividend *paid*; but by s. 6 (1) of the Act " paid in relation to dividends includes credited or distributed ". However, I take this to mean credited in favour of the shareholder as against the company, whether in the books or accounts of the company or otherwise, and there appears to me to be no proof of such crediting in respect of any dividend in question here, whether as the result of the operation of the Malayan ordinance or independently of its operation.

The provisions of the Malayan ordinance, so far as they appear to me to be relevant, are in :—

Part III—Imposition of Income Tax.

" 10. (1) Income tax shall . . . be payable . . . upon the income of any person accruing in or derived from the Federation or received in the Federation from outside the Federation in respect of— . . . (*d*) dividends . . .

26. The income of a person from a dividend . . . shall, where any such tax has been deducted therefrom, be the gross amount before making such deduction; where no such deduction has been

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made, the income arising shall be the amount of the dividend increased by an amount on account of such taxes corresponding to the extent to which the profits out of which the said dividend has been paid have been charged with such taxes."

Part V—Ascertainment of the statutory income.

"31. (1) . . . the income of any person for each year of assessment . . . shall be the full amount of his income for the year preceding the year of assessment from each source of income possessed by him at any time during the year of assessment . . .",

Part VI—Ascertainment of assessable income.

"33. (1) The assessable income of any person from all sources chargeable with tax . . . shall be the remainder of his statutory income . . . after the deductions allowed in this Part . . . have been made."

Then follow certain deductions, including losses in business and gifts to charities.

Part VII—Ascertainment of chargeable income and personal reliefs.

"34. The chargeable income of any person . . . shall be the remainder of his assessable income . . . after the deductions allowed in this Part . . . have been made."

Then follow personal allowances to residents and deductions for wives and children and for life insurance.

"36 (1). In the case of an individual who is not resident in the Federation . . . there shall be allowed such relief as will reduce the amount of tax payable by that individual to an amount which bears the same proportion to the amount of tax which would be payable by him if he were resident in the Federation during the year of assessment and if the tax were charged on his aggregate income as the amount of his assessable income bears to the amount of his aggregate income."

The "aggregate income" means the sum total of all income, whether accruing in, derived from, or received in the Federation or elsewhere.

Part VIII—The rates of tax and rates of deduction and allowances for tax charged.

"39. Subject to the provisions of section 3[illegible] . . . there shall be levied and paid for each year of assessment upon the chargeable income of—(*a*) every company, tax at the rate of thirty per centum . . . of the chargeable income thereof; (*b*) every person not resident in the Federation, . . . tax at the rate of thirty per centum . . . of the chargeable income thereof . . .".

The amount of the tax under (b) was increased from twenty per cent to thirty per cent by an amending ordinance in 1953.

"40. (1) Every company which is resident in the Federation shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at the rate paid or payable by the company, as reduced by any relief granted under sections 43, 44 or 46 of this Ordinance, on the chargeable income of the year of assessment within which the dividend is declared payable . . . (2) Every such company shall upon payment of a dividend, whether tax is deducted therefrom or not, furnish each shareholder with a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct . . .".

Sections 43, 44 and 46 provide for relief against double taxation payable in the British Commonwealth and in foreign countries with which arrangements have been made for tax credits.

"42. Any tax—(a) which a person has deducted or is entitled to deduct from any dividend under the provisions of section 40 . . . shall, when such dividend . . . is included in the chargeable income of any person be set off for the purposes of collection against the tax charged on that chargeable income."

"89. (1) If it be proved to the satisfaction of the Comptroller that any person . . . has paid tax, by deduction or otherwise, in excess of the amount with which he is properly chargeable, such person shall be entitled to have the amount so paid in excess refunded . . . . The Comptroller shall certify the amount to be repaid and shall cause a repayment to be made forthwith . . .".

I have set out the whole of what I think are the material provisions of the ordinance. From those provisions it appears that nowhere does the ordinance require a crediting of any sum by the company to the shareholder as against the company as s. 6 (1) of the *Income Tax and Social Services Contribution Assessment Act* contemplates. Nor is there any such crediting in any document brought into existence by the company, that is to say, in its minutes, notification of dividends, share warrants, certificates, reports, balance sheets or profit and loss accounts, or in any other document in evidence. The company is not required by the ordinance to credit the shareholder as against the company with the payment of any amount deducted and paid by the company in respect of taxation and has not done so. The object of the certificate which the company gave the appellant, and which it is required by s. 40 (2) to give to the taxpayer, is to prevent income tax being paid twice on the same sum of money, firstly by the company and again by the shareholder.

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But it involves no "crediting", and the company has done no "crediting", within the meaning of s. 6 (1). If there is any crediting under the ordinance it is as against the Malayan tax authority, and the certificate issued by the company is in implementation of such crediting.

In other words, the ordinance operates so as to give to the company a right to a reduction of its income tax at the expense of the shareholder, who, if the right is exercised by the company, is given a corresponding credit by way of reduction of his income tax, not, however, as against the company, but as against the Malayan tax authority; and the documents brought into existence by the company implement these provisions of the ordinance. At no stage is any credit required, nor was any given, against the company, either by the ordinance or by the company in favour of the taxpayer; and so there was no payment by the company to the appellant in the extended sense contemplated by s. 6 (1), and the dividend for the purpose of s. 44 (1) (*a*) and s. 45 (1) (*a*) (i) was not the full amount declared by the directors of the company but was the amount actually paid to the appellant after deduction by the company of its Malayan tax.

This being the position as I see it the respondent commissioner cannot allow a further credit to the appellant in respect of Malayan income tax. To do so would be to disregard the credit allowed by the ordinance against the Malayan tax authority, and proceed to treat it as a credit allowed in favour of the shareholder as against the company, which it is not. Then the "dividend paid" within the meaning of s. 44 (1) (*a*) and s. 45 (1) (*a*) (i) is, in respect of all the dividends in question here, limited to the amount actually paid to the appellant taxpayer by the company after deducting its Malayan tax.

I would answer the questions—(1) (a) No; (b) Yes. (2) (a) and (b) Unnecessary to answer.

KITTO J. This is a reference by a board of review, under s. 196 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 (Cth.), of certain questions of law which have arisen before the board in its consideration of an objection by a taxpayer against an assessment of tax in respect of income derived in the year ended 30th June 1954.

In that year the taxpayer, a resident of Australia, was a shareholder in each of three companies which were resident in the Federation of Malaya, and he participated in distributions by those companies of profits derived from sources out of Australia.

Each distribution—and there were five of them altogether—was made pursuant to a resolution of directors, the earliest of which may be quoted as typical of them all. The minute recording the resolution reads: "Resolved, pursuant to Article No. 126 of the Articles of Association, that a Dividend, the thirty-second, of six shillings (6s.) per share, less income tax at the rate of thirty per cent, be paid in respect of the financial year ended 31st March 1953 ex Malayan Profits, to all shareholders whose names appear on the Company's Register on 24th June 1953 and that the said Dividend be paid on 8th July 1953 at the par rate of exchange ruling on that day."

In accordance with this resolution, thirty per cent of the amount which the full dividend of six shillings per share would have produced to the taxpayer was deducted by the company, and only the balance reached him in cash. This gives rise to a problem in the assessment of the taxpayer's Australian tax, which depends for its solution on the construction of two provisions of the *Income Tax and Social Services Contribution Assessment Act*. The first is in s. 44 (1) (*a*), by which (subject to other provisions, which are immaterial) there are included in the assessable income of a shareholder who is a resident of Australia "dividends paid to him by the company out of profits derived by it from any source". In this context, by virtue of the definition in s. (6) (1), "dividend" includes any distribution made by a company, and "paid" in relation to dividends includes credited or distributed. The second of the two provisions is in sub-s. (1) of s. 45. That sub-section provides that in certain circumstances a taxpayer who is a resident of Australia shall be entitled to a credit which, as appears from sub-ss. (2) and (3), is to be a debt due and payable to the taxpayer by the commissioner, subject to a power in the latter to apply the whole or any part of it in total or partial discharge of any debt of the taxpayer to the Commonwealth or any liability of the taxpayer in respect of tax or contribution assessed to him. The provision applies only where a "dividend paid" by a company which is a resident of a country outside Australia is included in the taxpayer's assessable income and the taxpayer has paid either directly or by deduction from the dividend income tax in respect of that dividend for which he was personally liable under the law of the country of which the company was a resident. The amount of the credit is prescribed by par. (*a*) or par. (*b*) of the sub-section, according as the whole of the dividend is or is not paid out of profits of the company derived from sources out of Australia. Where the whole of the dividend is paid out of such profits (as is the case here,

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on any view of the matter), the credit is to be whichever is the less of two amounts. It is agreed that the less in the present case is that described in sub-par. (i) of par. (*a*), viz. " the amount of the deducted income tax (as reduced by the amount of any refund or credit of that income tax to which the taxpayer is entitled in respect of that dividend)".

The taxpayer puts forward a contention which means, in the instance which has been taken as typical, that the whole dividend of six shillings per share should be considered as " paid " to him, in the sense in which the Act uses the expression, notwithstanding the deduction by the company of a part of it. If this is correct, his assessment should be on the basis that his assessable income includes the whole six shillings per share ; but this result is welcomed by the taxpayer, and indeed is contended for by him, because it takes him a considerable distance towards making good his claim to a credit under s. 45, and the credit if he is entitled to it and is right in an argument he advances as to its quantum, will more than compensate for the resulting increase in his tax. The assessment now before the Board of Review, however, includes in the taxpayer's assessable income that portion only of the six shillings per share which he actually received, and it allows no credit under s. 45.

It is common ground that the resolution of the directors operated as a declaration of a dividend of six shillings per share, and that the direction therein for deduction of income tax depended for its legal effect upon s. 40 of the *Income Tax Ordinance* 1947 of the Federation of Malaya, as amended to 1954. Sub-section (1) of that section entitles every company resident in the Federation to deduct from the amount of " any dividend paid to any shareholder " tax at the rate paid or payable by the company, as reduced by any relief granted under certain sections relating to double taxation, on the chargeable income of the year of assessment within which the dividend is declared payable. The section makes other provisions also, but they contain nothing of assistance on the present problem. It seems clear that the operation of sub-s. (1), in a case such as this, is that for the purposes of Malayan law the amount of the declared dividend is to be considered as paid in full when payment is made of the excess of that amount over the amount of the authorised deduction.

The rate of tax referred to as paid or payable by the company is prescribed in par. (*a*) of s. 39, a paragraph imposing, upon the chargeable income of every company, tax at the rate of thirty per cent of every dollar of the company's chargeable income. This rate may be reduced in particular instances by reliefs under

ss. 43, 44 and 46 relating to double taxation. It will be noticed that the reference in s. 40 (1) is not to the rate of tax paid or payable on the profits comprised in the dividend, or out of which the dividend is paid. It is to the rate of tax on the company's chargeable income of the year of assessment within which the dividend is declared payable; and that income is found, when one works back through s. 34 and s. 33 to s. 31, to consist of the income for the year preceding the year of assessment, less certain deductions. The distinction is not without practical importance, for the general rate fixed for companies may not always continue at its present level of thirty per cent, and, even while it does, the operation of the double taxation relief sections in the case of a particular company may result in the rate of tax paid or payable by that company on its chargeable income of the year in which a dividend is declared being different from the rate paid or payable on its chargeable income of the year in which the relevant profits were derived.

The plan of the ordinance in relation to dividends is entirely different from that which exists in the United Kingdom with respect to dividends paid by English companies, and accordingly reasoning employed with regard to the latter, in such cases as *Jolly's Case* (1) in this Court and *Inland Revenue Commissioners* v. *Reid's Trustees* (2) in the House of Lords, has no direct application in this case. The ordinance, by s. 10 (1) (d) expressly makes income tax payable upon the income of any person which accrues in or is derived from the Federation in respect of dividends. By force of ss. 31, 33 and 34 such income is made an element in the computation of his chargeable income, and on his chargeable income he is taxed—according to a graduated scale if he is resident in the Federation (s. 38) and at a flat rate if he is not (s. 39 (*b*)). The company is by s. 39 (*a*) subjected to a separate and independent liability to tax upon its own chargeable income; and, again by force of ss. 31, 33 and 34, the company's income profits must form an element in its chargeable income. Thus, so much of a company's income profits as it distributes is taxed twice, once as income of the company and again as income of the shareholders. And neither the payment by the company of its tax on its chargeable income which includes those profits nor the payment by a shareholder of his tax on his chargeable income which includes the dividend operates in relief of any tax burden of the other. Section 40, which has already been mentioned, enables the company to throw a proportion of its current year's tax against its distributable profits in diminution

(1) (1934) 50 C.L.R. 131. (2) (1949) A.C. 361.

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of the amount which otherwise would be paid thereout to shareholders. In the case of shares carrying preferential rights as to dividends the effect of making a deduction under the section may be to alter, as between the holders of such shares and the holders of other shares, the practical incidence of the tax paid or payable by the company in respect of its chargeable income of the current year. On the other hand, the making of a deduction from a dividend declared on shares carrying no preferential rights as to dividends results in the shareholder receiving the same amount as he would have got under a declaration of a smaller dividend. But in neither case is there a prepayment of any part of a shareholder's tax. The " tax " which the section says may be deducted is a proportion of the company's tax, not the shareholder's; and the ordinance may be searched in vain for any provision giving to a deduction the effect of a payment *pro tanto* of any tax payable by the shareholder.

There are two provisions other than those already mentioned upon which reliance is placed by the taxpayer. They are ss. 26 and 42. The former is the only provision in the ordinance by virtue of which it makes any difference in assessing the tax liability of a shareholder whether a declared dividend has been satisfied wholly by actual payment or partly by means of a deduction under s. 40 and only as to the balance by actual payment. If a deduction has been made, s. 26 requires that the shareholder's income from the dividend be treated as the gross amount before making the deduction. If, on the other hand, no deduction has been made, his income from the dividend is to be the amount of the dividend increased by an amount on account of the company's tax corresponding to the extent to which the profits out of which the dividend has been paid have been charged with such tax. Then s. 42 provides for a set-off, for the purposes of collection, against the tax charged on the chargeable income of a shareholder when a dividend is included in his chargeable income. But the set-off is the same, whether or not a deduction under s. 40 has been made from the dividend. The amount in either case is the amount of the tax which the company " has deducted or is entitled to deduct " from the dividend under the provisions of s. 40, the result being that the shareholder's tax on the chargeable income which includes his dividend is reduced by a proportion of the tax imposed on the company's chargeable income.

The crucial point for our present purpose is that the shareholder's right to a set-off against the tax payable by him upon his income which includes a dividend is made to depend upon the existence,

not the exercise, of the company's right to deduct part of its own taxes from the dividend. The deduction, if it is made, is to be considered a *pro tanto* payment of the dividend, but it does not operate as a *pro tanto* payment of the shareholder's tax on the dividend. It has not the effect of a payment by the company to the shareholder followed by a payment by the shareholder to the Government. The amount deducted is deducted by the company for its own benefit; it has not to be accounted for to the revenue authorities. And the right to make the deduction exists whether the company has or has not paid the tax by reference to which the amount of the deduction is calculated.

The position in a case like the present therefore is that the amounts which were deducted from the taxpayer's dividends cannot be said to have enured nevertheless for his benefit. In particular, they cannot be said to have reached him in the form of a set-off against any Malayan tax which he would otherwise have been liable in Malaya to pay. The only relation between the deductions and the set-off to which s. 42 entitled him was that they were the same in amount, the set-off being defined by reference to the amount to which the right of deduction extended. The only respect in which the making of the deductions affected the tax position of the taxpayer in Malaya was that by virtue of s. 26 the dividends had to be treated for assessment purposes as being only of their gross amount before the deductions, instead of being treated as of their gross amount plus a proportion of the tax imposed on the companies in respect of the profits out of which they were respectively paid.

It is true that any liability of the companies to pay the amounts of the declared dividends must have arisen by force of Malayan law, and, as has already been mentioned, for the purposes of that law the amounts deducted must no doubt be regarded, by virtue of s. 40 of the ordinance, as having been paid. This means that in Australia it must be conceded that, upon the payment by each company to its shareholders of the amount of the declared dividend less the amount of the authorised deduction, s. 40 operated to absolve that company from the liability created by the declaration of dividend. But it is one thing to say that a statutory discharge of a debt in the country under whose law the debt arose will be recognised here also as discharging it—a proposition for which the classic statement by *Bovil* C.J. in *Ellis* v. *M'Henry* (1) is ample authority —and quite another thing to say that a statutory discharge which is to be deemed a payment in the country where the debt arose

(1) (1871) L.R. 6 C.P. 228, at p. 234.

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is to be deemed here also to be a payment. What is to be considered a payment in applying a law of this country depends upon the meaning of the term in that law. No doubt anything which would support a plea of payment at common law will be a payment in the sense in which the word is used in ss. 44 and 45 of the *Income Tax and Social Services Contribution Assessment Act*, but what has already been said is sufficient to show that no such thing occurred in this case. Nor did anything occur which can be said to constitute a crediting of the amounts deducted from the dividends, so as to amount to a payment of those amounts by virtue of the definition of " paid " in s. 6 of the Act. The taxpayer has not obtained the benefit of those amounts (i.e. as against the companies), " by way of credit entry, set-off or other statement of account "—to use the expression of *Knox* C.J. and *Gavan Duffy* and *Starke* JJ. in *Webb* v. *Federal Commissioner of Taxation* (1), nor has there been any appropriation to or for his use or in discharge of any claim to which he is liable, or anything done by the company on his account or for his use—to use expressions found in the judgment of *Dixon* J. in *Jolly's Case* (2).

For these reasons I am of opinion that of the relevant dividends only the seventy per cent which the taxpayer actually received is included in his assessable income as dividends paid to him within the meaning of s. 44 (1), and that only that portion of them constitutes dividends paid by the companies within the meaning of s. 45 (1).

No question arises as to the application of s. 45 to any Malayan income tax paid by the taxpayer in respect of so much of the dividends as was actually paid to him. The reason is that the set-off to which s. 42 of the ordinance entitled him was greater than the tax payable by him on the chargeable income which included the dividends, and because of this, far from paying any tax in respect of the dividends, he received a refund of the excess.

In my opinion the questions in the case stated should be answered : (1) (a) No. (b) Yes. (2) In view of the answers given to question (1), this question does not arise.

Questions in the case stated to be answered as follows : 1. (*a*) *No.* (*b*) *Yes.* 2. *Does not arise. Costs of the case stated to be paid by the appellant.*

Solicitors for the appellant, *Arthur Muddle & Stephenson.*

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

J. B.

(1) (1922) 30 C.L.R. 450, at p. 461. (2) (1934) 50 C.L.R., at pp. 142, 149.