[HIGH COURT OF AUSTRALIA.]

AUSTRALASIAN CATHOLIC ASSURANCE COMPANY LIMITED . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1959.

SYDNEY, *April* 7-9;

MELBOURNE, *May* 28.

Menzies J.

Income Tax (Cth.)—Life assurance company—Blocks of flats bought as long term investments—Sale dictated by economic considerations—Profit on sale—Whether profit capital gain or income according to ordinary concepts—Income Tax and Social Services Contribution Assessment Act 1936-1950, *s.* 6 (1).

During the year 1951, an assurance company whose principal business was life assurance, sold fourteen blocks of flats, realising a profit on the price for which they were purchased at various times during the years 1934 to 1941. The flats were acquired, not for the purpose of profit-making by sale, but in pursuance of a policy to buy new or recently erected blocks of flats as a long term investment at a price which would give an estimated net yield of ten per cent on the amount outlaid. At the time of the purchase it was hoped that they would be held for about thirty years and then sold for approximately the price paid for them. Economic considerations dictated the sale in 1951.

Held, that the profit on sale was made in the carrying on of the company's business and was assessable income as a profit according to the ordinary usages and concepts of mankind.

Colonial Mutual Life Assurance Society Ltd. v. *Federal Commissioner of Taxation* (1946) 73 C.L.R. 604 applied; *Producers' and Citizens' Co-operative Assurance Co. Ltd.* v. *Federal Commissioner of Taxation* (1956) 95 C.L.R. 26, referred to.

The words "any profit . . . from the carrying on or carrying out of any profit-making undertaking or scheme" in the definition of "income from personal exertion" in s. 6 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 are concerned with profit arising from some special venture rather than with that arising from anything falling within the category of ordinary business, which is covered by the words "the proceeds of any business carried on by the taxpayer" appearing in such definition.

APPEAL under the *Income Tax and Social Services Contribution Assessment Act* 1936-1950.

This was an appeal by the Australasian Catholic Assurance Co. Ltd. from an assessment to federal income tax.

The relevant facts appear fully in the judgment hereunder.

A. Bridge Q.C., and *J. D. O'Meally*, for the appellant.

J. D. Holmes Q.C. and *R. J. Ellicott*, for the respondent.

Cur. adv. vult.

May 28.

MENZIES J. delivered the following written judgment:—

The taxpayer whose objection against an income tax assessment upon its income for the financial year ended 30th June 1951 has been referred to the Court for determination, is an assurance company whose principal business is life assurance which is carried on in all States of the Commonwealth except Tasmania.

During the year 1951 it sold fourteen blocks of flats, realising a net profit of £78,649 on the price for which they were purchased at different times during the years 1934 to 1941, which profit the commissioner, in assessing the taxpayer to income tax, has treated as part of its assessable income. It is to this that the taxpayer objected, claiming that the profit in question fell altogether outside the concept of income according to ordinary usage or any extension of that concept that the *Income Tax and Social Services Contribution Assessment Act* 1936-1950 requires for its purposes.

I find that in 1934 the taxpayer did adopt a definite policy of purchasing new or recently erected blocks of flats as long term investments according to the formula that £1,000 would be laid out for each £2 10s. 0d. of anticipated weekly rents to give a net return of approximately ten per cent. It was hoped that the flats so purchased would be held for thirty years or so, and then sold for around about the price that had been paid for them. I find further that some thirty-four blocks of flats were purchased in accordance with this policy, and the flats sold in 1951 were purchased as follows:—five in 1934, one in 1937, one in 1938, one in 1939 and six in 1941, costing in all about £150,000. (The taxpayer's acquisitions of real estate, other than flats, did not extend beyond an office building in Brisbane in 1933 and office sites in Melbourne and in Sydney in 1936, and some few houses or flats taken over at various times by the taxpayer as mortgagee in the course of salvage operations.) The taxpayer's expectations were, however, disappointed. During the latter part of the war, current maintenance, which had

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previously been done by its own staff, which was dispersed, was not done at all, and after the war heavy costs were incurred to make good the arrears in such maintenance, so that for expenses on the flats sold in 1951, some £12,000 was spent in maintenance during the three years 1947 to 1950. Furthermore, rents were controlled. In 1947, the disposal of the flats began and from 30th June 1947 until 30th June 1950, seven blocks of flats were sold. Land sales control continued in New South Wales up to 20th September 1949. In the early part of 1950 it was decided to sell off the remaining flats and, in August 1950, three agents were given selling instructions covering the fourteen blocks of flats to be sold in that year, specifying the price required and the amount which the taxpayer would allow to remain outstanding on first mortgage. In every case, the selling price specified was substantially greater than the purchase price. Flats were sold between August 1950 and May 1951 for around about £229,000, leaving a net profit of £78,649. Of the sale price, £52,500 was left outstanding on first mortgage. The cash portion of the sale price went into the taxpayer's bank account and with other moneys it was invested otherwise than in the purchase of real estate. I do not know that it is of much significance for present purposes, but it is the fact that the profit of £78,649 was transferred in the taxpayer's books to an existing property realisation reserve and, by a direction given by the managing director on 29th November 1951, the following transfers were made from that account as at 30th June 1951 :—£2,274 to write off deferred repairs ; £30,000 to general reserve ; £46,375 4s. 1d. to the taxpayer's life fund. The account for deferred repairs had been established when maintenance outgoings were so high in relation to gross rentals that it was decided not to treat them as paid in the year they were incurred but to capitalise them and bring them into account over a period. The life fund was the statutory fund established pursuant to s. 37 of the *Life Insurance Act* 1945-1950 (Cth.). All the flats that were sold in 1951 were shown as part of the assets of that fund in the accounts kept by the taxpayer and furnished to the Insurance Commissioner pursuant to the *Life Insurance Act*. Some point was made by Mr. *Holmes*, for the commissioner, about the state of this fund in 1951 and, although I am satisfied that the transfer to which I have referred strengthened the position of the fund quite considerably, I am not prepared to find that the flats that were sold in 1951 were sold for the purpose of obtaining a profit to strengthen the position of that fund. To complete the picture, I should add that the taxpayer's remaining flats were sold two or three years later. There is one other important finding of fact that I make ; namely,

that the flats sold in 1951 were not acquired by the taxpayer for the purpose of profit-making by sale so as to bring the profit that was ultimately made into the taxpayer's assessable income by virtue of the first part of s. 26 (*a*) of the Act.

The main argument for treating the profits in question as assessable income is that they were profits from the carrying on of the taxpayer's life assurance business and were accordingly income according to ordinary concepts, and properly taxable as such. That they were profits from the carrying on of that business is, I think, an inescapable conclusion. The flats were bought as good investments and were sold to avoid their becoming bad investments, which was what was intended from the very first, although it was hoped and, indeed, expected, they would not have to be sold until a long time after 1951. So much was indeed conceded. It was said, however, with the support of weighty authority, that not all proceeds of a business are income for the purposes of the Act. Thus, for instance, in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1) it was said :—" It is not contended that the inclusion of the proceeds of any business carried on by the taxpayer in the definition of income from personal exertion makes all the proceeds of a business income for the purposes of the Act; and it is common ground that, as *Jordan* C.J. held in *Scott* v. *Commissioner of Taxation* (2) in relation to a similar provision in the *Income Tax (Management) Act* 1934 (N.S.W.), the definition only refers to proceeds which would be held to be income in accordance with the ordinary usages and concepts of mankind, except in so far as the Act states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income " (3). It is said that these profits were the proceeds of the business in a very special sense, since they arose out of transactions outside the ordinary course of the taxpayer's business and the sales were forced upon the taxpayer by unexpected developments. I am ready enough to accept this contention to the extent that it was unexpected developments that dictated the sales in 1951, but I cannot agree that the sale of the flats purchased as investments was outside the ordinary course of the taxpayer's business and I do not think that to say that there were but few transactions establishes any such thing. If a block of flats was sold in 1952, it would be difficult, having regard to what occurred between 1947 and 1951, to say that such a sale was outside the ordinary course of the taxpayer's business and yet

(1) (1946) 73 C.L.R. 604.
(2) (1935) 35 S.R. (N.S.W.) 215; 52 W.N. 44.
(3) (1946) 73 C.L.R., at p. 615.

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I cannot think that the sale in 1952 would stand on a different footing from an earlier sale. When investments are bought to be sold eventually, one sale must always precede the others. If, however, the sales were in the ordinary course of the taxpayer's business, as I think they were, the particular reason for deciding to sell cannot be decisive of the question whether the profit made is income or not. As was said in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1) :—" Prima facie the depreciation in or accretion to the capital value of a security between the date of purchase and that of realization is a loss of or accretion to capital and is therefore a capital loss or gain and does not form part of the assessable income : *Lomax* v. *Peter Dixon & Son Ltd.* (2). But in the words of the Lord Justice Clerk in *Californian Copper Syndicate* v. *Harris* (3) which have been so often quoted, ' it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business '." (4) The distinction that I find in this quotation from the Lord Justice Clerk is between a profit which is in the carrying on of a business and a profit which is not, because a change of investments is made which is not in the course of carrying on a business at all, e.g., a doctor selling some shares and buying others, or because it constitutes the realization of the capital assets of a business which has come to an end, e.g., *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (5) or for some other reason. The instant case, it seems to me, is one where the enhanced values were obtained in the carrying on of the taxpayer's business.

It is not necessary to undertake an elaborate discussion of the many authorities that bear upon the problem that faces me here, but there are four cases to which I think I should refer.

In *Northern Assurance Co.* v. *Russell* (6) the Lord President said of an insurance company which had contended that profits on investments realised were capital and not income :—" Where the gain is made by the Company (within the year of assessment or the three years prescribed by the Income Tax Act, Schedule D.), by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the Company " (7). Of this, Lord *Shaw* in *Liverpool and London and*

(1) (1946) 73 C.L.R. 604.
(2) (1943) K.B. 671.
(3) (1904) 5 Tax Cas. 159, at p. 166.
(4) (1946) 73 C.L.R., at p. 614.
(5) (1950) 81 C.L.R. 188.
(6) (1889) 2 Tax. Cas. 571.
(7) (1889) 2 Tax. Cas., at p. 578.

Globe Insurance Co. v. *Bennett* (1) said that it was one of a series of propositions which had never been judicially contraverted as a convenient guide.

In *Punjab Co-operative Bank Ltd., Amritsar* v. *Income Tax Commissioner, Lahore* (2) when the bank realised some securities to meet withdrawals and to make deposits with the Reserve Bank of India, and claimed that it did not deal in the securities which it realised, it was found by the commissioner that the bank had been selling securities in order to take advantage of the high prices obtainable and had been "carrying on business in shares and securities since the closing months of 1934": their Lordships said: "This may well be the correct view, and a sufficient ground for dismissing this appeal; but their Lordships do not wish to give any support to the contention that, in order to render taxable profits realized on sales of investments, in such a case as that before them, it is necessary to establish that the taxpayer has been carrying on what may be called a separate business either of buying or selling investments or of merely realizing them" (3). Later, it was said further: "If, as in the present case, some of the securities of the bank are realized in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words, that it is an act done in 'what is truly the carrying on' of the banking business" (4).

The two authorities just cited were relied upon by this Court in the decision to which I have already referred in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (5) where it was said, after citing the above decision of the Privy Council:—"In our opinion there is no substantial distinction between the business of an insurance company and that of a bank in this respect. The acquisition of an investment with a view to producing the most effective interest yield is an acquisition with a view to producing a yield of a composite character, the effective yield comprising the actual interest less any diminution or plus any increase in the capital value of the securities. Such an acquisition and subsequent realization is a normal step in carrying on the insurance business or in other words an act done in what is truly the carrying on of the business of the society" (6). The decision in that case—that profits arising from the sale of securities were assessable income either as "profit arising from the carrying on or the carrying out of" a

(1) (1913) A.C. 610, at p. 617.
(2) (1940) A.C. 1055.
(3) (1940) A.C., at p. 1072.
(4) (1940) A.C., at p. 1073.
(5) (1946) 73 C.L.R. 604.
(6) (1946) 73 C.L.R., at p. 620.

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" profit-making undertaking or scheme " within the meaning of s. 26 (*a*) of the Act or as a profit according to ordinary usages and concepts—Mr. *Bridge* sought to distinguish by arguing that the decision was really concerned with a special investment technique of " switching " investments and that what happened here was not switching in that special sense. It is true that the Court was dealing with a case which had special features but it was decided upon general principles, and the quotation I have made is of a general character which seems to me to cover this case exactly.

Finally, there is the decision of this Court in *Producers' and Citizens' Co-operative Assurance Co. Ltd.* v. *Federal Commissioner of Taxation* (1) where *Webb* J. decided that a profit made by an assurance company upon the buying and selling of a city building was sufficiently related to the taxpayer's business of life assurance to bring the profit within its assessable income. The building was sold after having been held for thirteen years, and his Honour said :— " I have no hesitation in finding that the Strand Building was not purchased for re-sale at a profit ; I find that the appellant intended to retain it as long as it proved to be a profitable investment. But even so I think the proceeds of the sale in 1948 were assessable income for the reasons that the proceeds of the stock and debentures, sold and matured, in *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (2), were held to be assessable income, that is to say, as a profit within the meaning of the second limb of s. 26 (*a*), or alternatively as a profit according to the ordinary usages and concepts of mankind. There, as here, the policy of the taxpayer was to hold its securities as investments and not to traffic in or make profits from realizing them, and the mode of operation as well as the statutory obligations were similar. It is true that ' every word of every judgment must be read *secundum subjectam materiam* ' (*The Commonwealth* v. *Bank of New South Wales* (3)), i.e. as referring to stock and debentures in the *Colonial Mutual Life Society's Case* (4) and not to freeholds. Still there are observations in the judgment in that case that are of general application, as I understand them, and that point to the proper solution of the problem here " (5). It was argued there, as it was suggested here, that freeholds are in a special category and that cases dealing with the sale of investments such as shares or securities are not to be applied to a case where the investments realised are freehold properties. I am disposed to think that it may be easier to treat the

(1) (1956) 95 C.L.R. 26.
(2) (1946) 73 C.L.R., at p. 621.
(3) (1950) A.C. 235, at p. 308 ; (1949) 79 C.L.R. 497, at pp. 637, 638.
(4) (1946) 73 C.L.R. 604.
(5) (1956) 95 C.L.R., at pp. 32, 33.

profit made upon the sale of securities other than freehold as assessable income than to treat as such a profit made upon the sale of land. It seems to me, however, that the difference is one of degree rather than character. It was said here that if the profit which the taxpayer made is taxable, so is every other profit made by a taxpayer when it sells part of its real estate ; but my decision falls far short of the acceptance of such a conclusion and rests upon the narrower ground that this taxpayer, as part of its ordinary investment business, bought real estate to obtain a high return and sold it profitably when it was found to be producing a low return, and so made a profit upon its buying and selling which I regard as income according to ordinary concepts, because in the ordinary course of carrying on business, the taxpayer must from time to time change its investments to use its funds to the best advantage. What it makes or loses in doing so is, I think, properly to be regarded as something to be taken into account, together with intermediate income, in deciding whether, overall, the investment produced a profit or a loss. Any profit realised on sale is of the same character as the annual income, and both go to make up the return.

In reaching this conclusion, I am not disposed to rely upon s. 26 (*a*) at all because I doubt whether it applies to the taxpayer's life assurance business as a whole and, if it does not, I doubt, further, whether it would be proper to extract from such business a series of transactions such as the purchase and sale of the flats and to label them " the carrying on or carrying out of " a " profit-making undertaking or scheme ". It is to be observed that in the definition in s. 6 of the Act of " income from personal exertion ", " the proceeds of any business carried on by the taxpayer " and " any profit . . . from the carrying on or carrying out of any profit-making undertaking or scheme " are mentioned separately, and I am disposed to think that the former description is that which is applicable to a case such as the present and the latter is concerned with some special venture rather than with anything that falls within the category of ordinary business.

For these reasons, the appeal is dismissed, with costs.

Appeal dismissed with costs.

Solicitors for the appellant : *Duggan & Doyle.*

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

J. B.