[HIGH COURT OF AUSTRALIA.]

THE AUSTRALASIAN SCALE COMPANY LIMITED . . . . . } APPELLANT;

AND

THE COMMISSIONER OF TAXES (QUEENSLAND) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1935.

SYDNEY, *April* 10, 11.

MELBOURNE, *April* 30.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional law—Freedom of trade, commerce and intercourse among the States—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92.

Income Tax (*Q.*)—*Foreign company carrying on business within State—Taxable income—Profits made within State—Statutory provisions where such profits cannot be satisfactorily determined—Proportion of total profits equal to proportion which sales or revenue within State bear to total sales or revenue made or derived by company—Profits unable to be satisfactorily determined—Opinion of the Commissioner—Review on appeal—Finality—Income Tax Act* 1924 (*Q.*) (15 *Geo. V. No.* 34), *sec.* 14 (4) (*iv.*).

The *Income Tax Act* 1924 (Q.), after making provision that the taxable income of a foreign company shall be the amount of the profits made by the company in Queensland, further provides by the second paragraph of sec. 14 (4) (iv.) that "if such profits cannot, in the opinion of the Commissioner be otherwise satisfactorily determined, the taxable income of the company may be assessed by the Commissioner at a sum which bears the same proportion to the total profits made by the company as the sales made in Queensland bear to the total sales made by the company, or, if there are no sales, in the same proportion as the total revenue derived from Queensland bears to the total revenue derived by the company."

Held that the second paragraph of sec. 14 (4) (iv.) did not constitute an interference with trade and commerce among the States of the Commonwealth and did not infringe the provisions of sec. 92 of the Constitution.

Per Rich and *Dixon* JJ.:—The taxation was levied upon a proportion of profits. The ascertainment of that proportion by means of the ratio between the volumes of the two classes of sales imposed no burden on sales made in the course of inter-State commerce.

Per Starke J.: The tax was not imposed upon any operation or act of inter-State commerce but was made after inter-State trade was completed.

Per Evatt and *McTiernan* JJ.:—(1) The adoption of the formula in sec. 14 (4) (iv) could not be regarded as an infringement of sec. 92 of the Constitution, because under the formula (*a*) the increase of the ratio of total sales by reason of an increase of inter-State sales in Queensland was not directly proportionate to the increase of the latter sales and (*b*) increases in the inter-State sales in States other than Queensland tended to reduce, not to increase, the statutory ratio. (2) Although it was possible that, as a result of the adoption of the statutory formula, an assessment upon a foreign company carrying on business in Queensland might include profits not made in Queensland, sec. 14 (4) (iv) was valid as part of a law for the peace order and good government of Queensland.

Held, further, that provided the opinion of the Commissioner of Taxes was honest and not arbitrary or capricious, it was final and was not subject to review on appeal.

Decision of the Supreme Court of Queensland (Full Court): *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes*, (1935) Q.S.R. 159, varied.

APPEAL from the Supreme Court of Queensland.

The Australasian Scale Co. Ltd., a company registered in New South Wales with its head office at Sydney, carried on the business of manufacturing importers, adjusters, and vendors of scales. The company, which was not registered in the State of Queensland, carried on business in each of the Australian States and in New Zealand. A branch office was situated at Brisbane, Queensland. The Commissioner of Taxes for Queensland formed the opinion that the profits of the company could not be satisfactorily determined and accordingly made certain assessments under the second par. of sec. 14 (4) (iv.) of the *Income Tax Act* 1924 (Q.) in respect of profits made in Queensland by the company for the years ended 30th June 1924 to 1929 inclusive. On the company objecting to the assessments, the objections were disallowed and the matter came as an appeal before *E. A. Douglas* J. sitting as a Court of Review. He allowed the appeal and vacated the assessments on the ground that the second paragraph of sec. 14 (4) (iv.) of the *Income Tax Act* 1924 made a discrimination against foreign companies of such a nature as to constitute an interference with trade and commerce among the States, and was therefore repugnant to sec. 92 of the

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Constitution and of no effect (*In re Income Tax Acts* 1924 *to* 1928 [*No.* 1] (1)). At the request of the parties a special case, substantially as follows, was stated for the opinion of the Full Court of the Supreme Court :—

1. The respondent in this appeal Australasian Scale Co. Ltd. has been at all material times and still is a limited company registered in the State of New South Wales with its head office at Sydney, but is not and has never been registered as a limited company under any Act in the State of Queensland. The whole of the shares in the company is held by or on behalf of W. & T. Avery Ltd., a limited company registered in England.

2. The respondent, which carries on the business of manufacturing importers adjusters and vendors of scales, had, during the years in question, branches in each of the Australian States and in New Zealand. In addition to the head office at Sydney the respondent had a separate branch at Sydney and at Newcastle, New South Wales, and also a factory at Sydney in which it manufactured the whole of the respondent's Australasian products.

3. The Queensland branch of the respondent was situated at Brisbane, Queensland.

4. The business of this Queensland branch during the years in question consisted of selling articles which it imported from W. & T. Avery Ltd. at Birmingham, England ; of selling articles which it obtained from the head office of the respondent in New South Wales under the circumstances hereinafter set out and of executing repairs in Queensland. During the years in question in this appeal the Queensland branch imported from W. & T. Avery Ltd. almost as large a quantity of goods as it obtained through the head office in New South Wales.

5. The articles which the Queensland branch imported from W. & T. Avery Ltd. were articles made in England by that company and in comparatively small quantities articles for which that company was the agent or factor. These articles were invoiced direct to the Queensland branch at a price which included a varying profit to W. & T. Avery Ltd. Such price was fixed according to a certain price list issued by that company less certain discounts.

(1) (1933) Q.S.R. 21.

The nett prices of such articles to the Queensland branch were lower than the prices at which merchants carrying on business in Queensland could purchase the same class of goods from W. & T. Avery Ltd. and at which merchant houses in England could purchase the same class of goods from W. & T. Avery Ltd.

6. The articles which the Queensland branch obtained through the head office at Sydney were articles wholly manufactured at the factory in the State of New South Wales.

7. The system upon which the respondent during the years in question conducted the sale of its articles manufactured in Australia was as follows:—(*a*) The head office at Sydney, the factory at Sydney, and the branches in the different States of Australia were treated by the respondent as separate businesses and a separate set of accounts were kept for each. The whole of respondent's products manufactured in Australia were manufactured at respondent's factory in New South Wales. The products when manufactured were invoiced by the factory to the head office at Sydney at the cost of manufacture. The company did not sell direct to any other trader in Australia. The cost of manufacture of each article in the factory in Sydney was obtained by taking the cost of the material and wages directly paid in the manufacture of such article and adding thereto a sum equal to 125 per cent of the wages directly paid to provide for the overhead costs of the factory. That percentage was based on the factory having an estimated turnover of £25,000 for each year. The sum so determined as the cost of manufacture was the price at which each article was invoiced to the head office. During the years in question in this appeal, the books of account kept for the factory showed for the factory in some years a profit, in some years a loss. Whether a profit was made or a loss incurred was determined by the turnover of the factory. Should the turnover of the factory have been more than £25,000 the factory would then have invoiced each article to the head office at a sum greater than cost and consequently have made a profit. Should a turnover of the factory have been less than £25,000 the factory would then have invoiced each article to the head office at a sum less than cost and consequently have incurred a loss. (*b*) The

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

articles invoiced by the factory to the head office were invoiced on the basis of delivery at the factory. These articles were then distributed by the head office to each State branch including Queensland at a price which included in addition to the cost of manufacture (that is, the price charged to the head office by the factory) a sum fixed by the managing director of the respondent with respect to each class of article manufactured. This sum varied as between different classes of articles, but averaged about 10 per cent of the cost of manufacture. Such articles were invoiced and charged by the head office to the Queensland branch at the same rate as similar articles were invoiced and charged to the other State branches. The head office bore certain charges of administration which were incurred for the benefit of respondent throughout Australia as well as transit charges on the goods from the factory to the head office and freight and transit charges on goods from the head office to the various branches.

8. During the years in question in this appeal the books of account for the head office showed for the head office a profit in some years and a loss in some years.

9. Income tax returns were duly furnished by the respondent for the income years ended 30th June 1924 to 30th June 1929 inclusive. With such returns were sent in each year the Australian balance-sheet and trading and profit and loss account and the Queensland balance-sheet and trading and profit and loss account. The returns for the years 1924 to 1929 inclusive showed a loss on the respondent's trading in Queensland.

10. On 20th July 1928 the Commissioner made and issued to the respondent assessments in respect of the years ended 30th June 1924, 1925, 1926, and 1927.

11. Those assessments were made by the Commissioner under the provisions of the third paragraph of sub-sec. 4 (iv.) of sec. 14 of the *Income Tax Act* 1924. In each case the Commissioner assessed the taxable income of the respondent at $7\frac{1}{2}$ per cent of the total sales made by the respondent in Queensland.

12. Objections lodged by the respondent against the assessments were duly considered by the Commissioner and disallowed by him on 23rd August 1929.

13. On 24th September 1929 the Commissioner made and issued to the respondent an assessment in respect of the income year ended 30th June 1928. This assessment was made by the Commissioner under the provisions of the third paragraph of sub-sec. 4 (iv.) of sec. 14 of the *Income Tax Acts* 1924-1928, and in accordance with that paragraph the Commissioner assessed the taxable income of the respondent at 7½ per cent of the total sales made by the respondent in Queensland.

14. An objection lodged by the respondent against that assessment was duly considered by the Commissioner and disallowed by him.

15. Subsequent to the disallowance of the objections mentioned in pars. 12 and 14 hereof and in response to representations by the respondent the Commissioner caused certain investigations to be made by inspectors of the department and following upon such investigations amended assessments were made and issued to the respondent in respect of the income years ended 30th June 1924, 1925, 1926, 1927 and 1928 and an assessment was also made and issued to the respondent in respect of the income year ended 30th June 1929. The notices of these assessments were dated 19th December 1930.

16. The assessments mentioned in the last preceding paragraph hereof were made by the Commissioner under the provisions of the second paragraph of sub-sec. 4 (iv.) of sec. 14 of the *Income Tax Acts* 1924-1928. In accordance with that paragraph the Commissioner assessed the taxable income in each year of the respondent in Queensland at a sum which bore the same proportion of the total profits made by the respondent as the sales made in Queensland bore to the total sales of the respondent in Australia and New Zealand.

17. Objections to the assessments mentioned in par. 15 hereof were duly lodged by the respondent. The grounds of objection in each case were as follows :—(*a*) that such assessment is contrary to law and is excessive ; (*b*) that sec. 14 (4) (iv.) and/or sec. 16 of the *Income Tax Acts* 1924-1928 or alternatively such of the provisions of those sections as are relied on by the Commissioner as the basis of his assessment are contrary to the provisions of the *Commonwealth of Australia Constitution Act* 1900 and are *ultra vires* of the Parliament

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

of the State of Queensland and are unconstitutional and invalid; (*c*) that those sections and each of them or alternatively such of the provisions of those sections as are relied on by the Commissioner as the basis of his assessment (i.) subject in Queensland a subject of the King resident in another State to a disability and discrimination which would not be equally applicable to such subject of the King if such subject were a subject of the King in Queensland, and (ii.) impede, prevent, hinder and restrict the absolute freedom of trade, commerce and intercourse amongst the States; (*d*) if the company is liable to pay any income tax under or by virtue of the *Income Tax Acts* 1924-1928 which is not admitted the company says:—(i.) the amount of the profits, if any, made by it in Queensland plus any expenses or charges which are not allowable deductions under the said Acts could have been and were ascertained by the Commissioner prior to his assessment; (ii.) the Commissioner was not of the opinion that such profits, if any, could not be otherwise satisfactorily determined or alternatively was not satisfied that any information which he was entitled to require under the said sections or either of them could not be obtained or in the further alternative was not satisfied that the profits returned did not disclose the true state of affairs; (iii.) if the Commissioner was of such opinion or alternatively was not so satisfied, which is denied, the reasons for his opinion and/or for his dissatisfaction were irrational and had no foundation in fact; and (*e*) the company should have been assessed on the amount of the profits, if any, made in Queensland plus any deductions which are not allowable deductions under the Acts.

18. The Commissioner considered the last mentioned objections and disallowed the same and gave to the respondent notice of such disallowance whereupon the respondent requested the Commissioner to treat the objections as an appeal and to forward them to a Court of Review for hearing and determination. The Commissioner thereupon transmitted the objections to the Court of Review.

19. The appeals were heard before me sitting as a Court of Review in the presence of counsel for the parties on 28th and 29th April 1932 when I reserved my judgment.

20. For the respondent it was submitted, *inter alia*, (*a*) that sec. 14, sub-sec. 4 (iv.) and particularly the second paragraph thereof

and sec. 42 of the *Income Tax Act* 1924 were in contravention of secs. 92 and/or 117 of the Constitution of Australia and were beyond the legislative competence of the Parliament of Queensland and were unconstitutional and void; and (*b*) that the sections in question were beyond the powers of the Legislature of Queensland as they purport to tax profits earned outside Queensland. In the alternative:—(*c*) that the respondent should have been assessed in accordance with the first paragraph of sub-sec. 4 (iv.) of sec. 14 of the said Act; (*d*) that the Commissioner was not in fact and/or could not reasonably or honestly on the evidence have been of opinion that the profits of the respondent could not be otherwise satisfactorily determined; (*e*) that on the evidence it was proved that the profits of the respondent could be satisfactorily determined; (*f*) that the respondent had an unrestricted right of appeal and that it was my duty sitting as a Court of Review to find on the evidence whether in my opinion the profits could be otherwise satisfactorily determined and to give effect to my opinion; and (*g*) that the Commissioner had purported to exercise his discretion on a wrong view of the law.

21. The Commissioner through his counsel disputed the correctness in law of each of those submissions and submitted that the assessments were valid and that the appeals should be dismissed. The question raised under sec. 117 of the Constitution was not argued before me by reason of the decision of the High Court of Australia in *Australasian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (1).

22. On 24th June 1932 I delivered a written judgment finding facts as therein set out and allowed the appeal and set aside the assessments appealed against on the ground that the second paragraph to sec. 14 (4) (iv.) of the *Income Tax Act* 1924 makes a discrimination against foreign companies of such a nature as to constitute an interference with trade and commerce among the States and is therefore repugnant to sec. 92 of the Constitution and of no effect.

23. I found: (*a*) that the Commissioner did form opinions that the profits of the respondent in each of the years in question could not otherwise be satisfactorily determined; (*b*) that such opinions

(1) (1922) 31 C.L.R. 290.

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMIS-SIONER OF TAXES (Q.).

were honestly formed and were not formed on irrational grounds; and (*c*) that the Commissioner did not omit to take into consideration any matter which should have been considered by him.

24. I was of opinion that the decision of the Commissioner as to any of the years in question was not open to review by me.

The questions reserved for the opinion of the Court were as follows:—

(1) Was I right in my decision that par. 2 of sec. 14 (4) (iv.) of the *Income Tax Act* 1924 is repugnant to sec. 92 of the Constitution of Australia and of no effect?

(2) Are par. 2 of sec. 14 (4) (iv.) and sec. 42 (3) of such Act, or either of such provisions, repugnant to sec. 92 of the Constitution of Australia and of no effect?

(3) Are such provisions of such Act or either of them repugnant to sec. 117 of the Constitution of Australia and of no effect?

(4) Are such provisions of such Act or either of them beyond the legislative power of the Parliament of the State of Queensland?

(5) Was there evidence before me on which I could find, or, in the alternative, was I right in law in finding:—

(*a*) That the Commissioner of Taxes did form opinions that the profits of the company could not otherwise be satisfactorily determined within the meaning of sec. 14 (4) (iv.) of such Act with respect to each of the income years ended June 1924 to June 1929?

(*b*) That such opinions were honestly formed?

(*c*) That such opinions were not formed on irrational grounds?

(*d*) That the Commissioner of Taxes did not omit to take into consideration any matter which should have been considered by him?

(6) Were the decisions of the Commissioner of Taxes with respect to any and which of the re-assessments to income tax in question open to review by me?

(7) Did the Commissioner of Taxes wrongly exercise his discretion in law with respect to any and which of such re-assessments to income tax?

(8) Was I right in my decision that the assessments should be set aside and the appeals allowed ?

(9) By whom should the costs of and incidental to this special case and of the appeals to the Court of Review be paid ?

The Full Court answered the questions as follows:—(1) No; (2) No, as regards sec. 14 (4) (iv.), and sec. 42 (4); (3) No; (4) No, as regards sec. 14 (4) (iv.), and sec. 42 (4); (5) (*a*) Yes; (*b*) Yes; (*c*) Yes; (*d*) Yes; (6) Yes—all of them; (7) No; (8) Yes, to the extent that the assessments included profits made out of Queensland; (9) The costs of the special case should be dealt with in the same way as costs in the appeal to the Court of Review. The costs of the appeal to the Court of Review should be paid as directed by that Court, having regard to the findings of the Judge in pursuance of the opinion of this Court: *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (1).

Pursuant to special leave the Australasian Scale Co. Ltd. now appealed to the High Court against the answers of the Full Court to questions 1, 2, 3, and 4. The Commissioner of Taxes cross-appealed against the answers of the Full Court to questions 6 and 8.

E. M. Mitchell K.C. (with him *Fahey*), for the appellant. If the formula is to be applied it is a formula prescribed, and cannot be reconstructed without making a new Act of Parliament. It is not at all like the position which arose in *W. & A. McArthur Ltd.* v. *Queensland* (2), where there was a word capable of being applied to various other cases. Although the Act is called an *Income Tax Act*, like many others it does not confine itself to income tax in the way the Federal *Income Tax Act* must. For instance, it combines income tax with a tax on profits. This is also found in other Acts where taxation is upon profits from the sale of taxable assets. Any Act that places a direct burden upon inter-State trade is a contravention of sec. 92 of the Constitution, and any Act which purports to tax the gross profits of that sale places a direct burden upon inter-State trade. Any tax which purports to be a tax not upon nett profits of the

(1) (1935) Q.S.R. 159.

(2) (1920) 28 C.L.R. 530.

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

inter-State sales but upon the gross amounts of those sales is outside the statement in the cases which validate or recognize the validity of the tax upon income, and it has to be recognized that it is upon the footing of a sales tax. This is a tax upon trade. The Legislature can give the Commissioner the right to assess such sum as he thinks fit, but since it says he can assess upon trade, then it is on the gross amount of sales. It is sales and sales alone that the Commissioner is directed to take as the criterion of legislation, and that fixes the character of the legislation. In any case, wherever the third paragraph comes in, it can have no other complexion than a sales tax. The second paragraph is nothing else than another percentage tax on gross sales. The way income is arrived at is by taking a proportion of the profits in Queensland and gross sales everywhere. The Legislature cannot, under the guise of calling it a proportion of profits, tax what cannot be anything else than a proportion of gross sales. There would be no objection if it had not introduced the forbidden territory of gross sales, but when it introduced that it made the tax vary according to the volume of gross sales. Instead of taking the proportion of Queensland sales it might have waited and tried to compare sales in Queensland with sales everywhere, and revenue in Queensland with revenue everywhere. There is a direct burden upon the gross sales. First, if trade has been selected as the criterion of liability, and this trade includes intra-State trade, inter-State and overseas trade, then there has been included in the element a declaration of liability of inter-State trade. A State tax imposed upon the business of selling goods in foreign commerce so far as it is measured by gross receipts is a regulation of foreign commerce within the meaning of the Constitution (*Crew Levick Co.* v. *Pennsylvania* (1)). A tax on gross receipts affects each transaction and is a burden on commerce (*United States Glue Co.* v. *Town of Oak Creek* (2)). A tax on gross receipts lays a burden on every transaction of commerce (*Ozark Pipe Line Corporation* v. *Monier* (3)). The real construction of the Act is that the Legislature has said we are going to proceed to lay down a scheme for the foundation of taxation of foreign companies; we will put a tax on the

(1) (1917) 245 U.S. 292, at p. 295; 62 Law. Ed. 295, at p. 298.
(2) (1918) 247 U.S. 321, at p. 328; 62 Law. Ed. 1135, at p. 1141.
(3) (1925) 266 U.S. 555, at pp. 569, 570; 69 Law. Ed. 439, at p. 455.

amount of their profits made in Queensland, but if we cannot find that out satisfactorily to the Commissioner we will not hold ourselves bound to tax it on that but on some other ground. The Legislature can choose any alternative basis that it wishes as long as it does not violate sec. 92, and in choosing this particular basis it has chosen one which does violate sec. 92. The third paragraph is a tax upon sales, and although the Legislature did put it that way, because whatever it was in name it was also a percentage on gross sales; even if regarded as something varying from gross sales, that is something putting a burden on it. This section was dealt with in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1). It was argued in that case that it was not an income tax case, it was a case of gross receipts and the Court overruled the argument and said that that was laid down and permission was given to the Commissioner to inquire there as to what percentage of the gross receipts would really represent, in his judgment, the proper amount of the nett income. That of course was distinctive altogether, where the legislation was framed in different terms so as to avoid the difficulty of fixing it with trade and commerce. It did not in that case adopt as the criterion trade and commerce and it did not adopt any direct percentage but directed the Commissioner to use his discretion to see what amount of it ought to represent the nett income. The matter was dealt with in the judgment of *Knox* C.J. (2) and the judgment of *Isaacs* J. (3). If the section is in contravention of sec. 92 by reason of violating the trade and commerce clause, then it is inseparable and the Court cannot amend or reconstruct it because it cannot create a new numerator.

Under sec. 34 the Commissioner can get the same result, but the Commissioner has not attempted to do it and the thing being indefeasible the party attacked can have resort to the claim that the section is wholly bad. The Queensland Full Court has suggested that the fact that the taxpayer may have an appeal is a relevant circumstance to show that the section is not obnoxious to sec. 92. That is an immaterial element. The amount of tax varies upwards and downwards according to the volume of sales. As sales are

(1) (1925) 35 C.L.R. 422. (2) (1925) 35 C.L.R., at p. 431.
(3) (1925) 35 C.L.R., at p. 440.

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

increased and profits diminished, to that extent is decreased the amount of taxable income. If I have a numerator which is 1,000 representing Queensland sales, and if those sales are then increased by, say, another 1,000, I double the numerator, whereas I only add one other element to the denominator and so the inference is the greater the sales in Queensland the greater the excess to the numerator without corresponding excess to the denominator. The thing is to choose a fraction free from trade and commerce. The trade operations may be only 10 per cent of the whole operations of the company, and if they choose to select that as the criterion for taxability—the trade operations of the company—then that is a tax direct upon trade and commerce and not a tax upon trade.

Real (with him *O'Hagan*), for the respondent. Sec. 14 (4) (iv.) of the *Income Tax Act* does not in any way interfere with the freedom of inter-State trade, commerce and intercourse. Sec. 92 of the Constitution is designed to prohibit legislation which would fetter inter-State trade directly and not merely incidentally. If the intention of the State Legislature is merely to deal with a subject within its own jurisdiction, the fact that the enactment indirectly results in an interference with inter-State trade does not bring it within the prohibition of sec. 92 (*R.* v. *Vizzard*; *Ex parte Hill* (1)). In order to be an interference with inter-State trade and commerce it must affect trade and commerce. The Act is an income tax Act. Sec. 14 sets out first of all to tax the profits of the company. It was never intended to be an attack on trade and commerce, or an interference; it was only a method adopted to arrive at the profit of a company under certain circumstances. The whole scope of the Act is that it only intends to tax profits; if those profits could only be ascertained in the particular way provided for by sec. 14 (4) (iv.) it is entirely the company's fault. A method is adopted, and in order to arrive at it, a certain formula is taken in which two of the elements are sales, and then there is taken a proportion of the total income. That cannot be a tax on the sales themselves. Taking a formula of that sort in order to get at the basis of profits is not a direct attack on the inter-State trade and commerce and it is not

(1) (1933) 50 C.L.R. 30, at p. 47.

a tax on sales. It is solely a tax on profits. If there are no profits there is no tax. The sub-section in question cannot be treated as a tax on sales and does not contain any impediment to trade and commerce. Profits are being taxed, and in order to arrive at the profits, the average price of profit is taken and multiplied by sales in Queensland and attributed to sales in Queensland, but this could not be regarded as an actual tax on the sales and does not put a burden on inter-State trade. The next point for consideration is the question raised in the cross-appeal, and that is whether or not the opinion of the Commissioner as provided for in the second paragraph of sec. 14 (4) is subject to review by the Court of Review (*Moreau* v. *Federal Commissioner of Taxation* (1); *Thomson* v. *Federal Commissioner of Taxation* (2); *Cornell* v. *Federal Commissioner of Taxation* (3)). In all those cases the decision of the matter is left in the hands of the Commissioner so long as he acts bona fide; then according to those decisions, his opinion cannot be interfered with. *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (4) proceeded on somewhat different lines. The Commissioner's opinion, so long as he acts bona fide, is not subject to review by the Court of Review. The answer to question 8 cannot stand. Sec. 45 is the appeal section. If it has been found by the learned Judge that the Commissioner was not unreasonable and did not omit to take into consideration any fact that he should have so taken, the Commissioner's decision will be binding. The application of the formula is not contrary to sec. 92, and there is no power to send the matter back in order that some formula other than that provided by the Act should be applied.

Sir *Thomas Bavin* K.C. (with him *Bowie Wilson*), for the Commonwealth, intervening by leave. In the third paragraph of sec. 14 (4) (iv.) there is a direct burden imposed on inter-State trade; it is a direct burden and not merely a consequential burden. A tax on all sales, by a State Legislature, is bad (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (5)). A State tax on

(1) (1926) 39 C.L.R. 65.
(2) (1923) 33 C.L.R. 73.
(3) (1920) 29 C.L.R. 39.
(4) (1931) 46 C.L.R. 585.
(5) (1926) 38 C.L.R. 408.

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

the gross proceeds of all sales is bad under sec. 92 in so far as it covers inter-State sales, and if the words of the State Act are general words which cover inter-State sales, then, if the only interpretation of that law is that it must cover inter-State sales, it is bad (*Crew, Levick & Co.* v. *Pennsylvania* (1)). That was a case where a tax was imposed on gross proceeds of sales in a State. It was held bad as a direct burden on inter-State trade. That reasoning is adopted by *Isaacs* J. in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2). A tax on gross sales is bad and it is a direct burden (*United States Glue Co.* v. *Town of Oak Creek* (3)). Under all the circumstances a tax which in effect falls upon the gross proceeds of sales—any State tax which in fact under any circumstances falls upon the gross proceeds of sales—is bad under sec. 92 of the Constitution. Applying that to this particular case under any circumstances, the third paragraph of sec. 14 (4) (iv.) is bad. The principle in the second paragraph is the same as the third ; the third is a matter of clear application of the taxing power of the State on gross sales. The section invoked here is a section which does impose a burden and has been invoked in this very case by the Queensland Legislature, and that part of the section clearly imposes a burden on inter-State commerce, more especially as the paragraph which was directly applied in this case is the same. The third paragraph may only be applied subject to certain conditions and subject to the formation of an opinion by the Commissioner. That makes no difference in principle ; it is not material whether the opinion of the Commissioner is final or whether subject to appeal. Under any conditions prescribed by Queensland law if under any circumstances the tax under the section can be imposed on the records of gross sales, then it is bad. It is nothing to the purpose to say that that is only conditional ; whatever the circumstances may be under no circumstances can the Queensland Legislature claim to impose a tax on gross sales ; it is nothing to the purpose to say that this is only an indirect method of getting at profits and that this is a method by which profits are arbitrarily assessed. If this is the method by which profits are to be assessed and is a method that involves a

(1) (1917) 245 U.S. 292 ; 62 Law. Ed. 295. (2) (1926) 38 C.L.R., at p. 424.
(3) (1918) 247 U.S., at p. 328 ; 62 Law. Ed., at p. 1141.

tax on gross sales, then it is bad in any event. As a matter of fact, for the Legislature to say that it is only imposed on profits does not alter the real nature of the tax; the result is the same whether the tax is imposed on a percentage of a total of gross sales or whether it is imposed directly on the proceeds of gross sales. The difference is that where the tax is imposed on net income the burden that falls on the sale and on inter-State commerce or trade, is not a direct burden on that inter-State commerce; if it is imposed on the gross profits, then substantially it is the same as in the case of *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1). Under sec. 92 anything that is a tax which falls on gross proceeds of sales is bad and must be bad. The tax imposed under the third paragraph falls on two classes of inter-State trade. A tax imposed in that way, a tax say of 3 per cent or 5 per cent on all gross sales, necessarily falls on inter-State sales in two ways. First of all it must fall on every first sale of an article imported into Queensland for the purpose of sale. Then it would also fall on other inter-State sales and overseas sales. It is a direct burden on inter-State sales and any tax imposed in that way is bad. Even where it can only be applied if certain conditions exist or come into existence, the Queensland Legislature seeks to do a thing which sec. 92 prohibits. The tax imposed under the second paragraph is clearly a direct burden imposed on inter-State trade. A direct burden on all trade including inter-State trade is necessarily bad so far as inter-State trade is concerned. It is immaterial that the tax imposed by the second paragraph is only conditional. It is a direct tax on total sales in Queensland, and it amounts to the Queensland sales multiplied by the total profits divided by the total sales multiplied by that fraction multiplied by the rate of tax, and in every case where it is imposed there is a direct tax on the gross proceeds of Queensland sales arrived at in that way, with the result that in every case under the second paragraph the actual amount of the tax is greater or less according to the total volume of Queensland sales. In effect, if the Queensland sales are higher then the tax is higher unless some other factors have varied in a certain way, but substantially it is right to say the higher the Queensland sales the higher the tax. It is an

(1) (1926) 38 C.L.R. 408.

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMIS-SIONER OF TAXES (Q.).

imposition of the tax on gross proceeds of all Queensland sales. The result of this formula is that in all cases the tax varies with the variation in the Queensland sales. In principle this second paragraph is the same as the third by reason of the fact that the total amount of the tax varies with the total volume of Queensland sales and that implies a direct burden. Both the second and third paragraphs impose under certain conditions a tax which is a direct burden on inter-State commerce and both of them are therefore obnoxious to sec. 92.

Fahey, in reply. The taxpayer has a right even if the formula is applied against him to come to the Court of Review and show what his Queensland profits are, and notwithstanding the application of the formula insist on the tax being made or levied on those Queensland profits. The first element of the section declares the right of the foreign company to be assessed on the amount of profits made by the company in Queensland plus expenses and charges which are not allowable deductions under the Act. In the second element there is an alternative assessment which the Commissioner may use if in his opinion such profits cannot otherwise be satisfactorily determined. The section does not go on to say that the taxable profits so ascertained by the Commissioner shall be deemed to be the taxable profits of the company. That is a very significant omission from the section. It therefore merely permits the Commissioner, if he is not satisfied, to adopt an alternative method of assessment and there is no reason why a taxpayer against whom that alternative method has been applied should not have the ordinary right of appeal which the taxpayer has in the case of a default assessment. This is only a process in arriving at the assessment; it is very different from the cases dealt with in *Moreau* v. *Federal Commissioner of Taxation* (1). The right of appeal is given in sec. 45. That section is in the widest possible terms. In sec. 47 (2) the Court is directed to hear and determine all objections transmitted to it. There is therefore a direction to the Court not only to hear but to determine all objections transmitted to it. Sec. 45 covers the whole assessment under sec. 14 (4) (iv.) and the whole assessment

(1) (1926) 39 C.L.R. 65.

is subject to review (*Commissioner of Stamp Duties* (*Q.*) v. *Beak* (1)). The sections which were dealt with in the case of *Thomson* v. *Federal Commissioner of Taxation* (2) were markedly distinct from the section which we are dealing with in this case ; that dealt with a section of the *Income Tax Assessment Act* which put the Commissioner in the position of saying whether the section would apply or not, and the distinction is that the Court would not assume to itself a discretion which was placed by Parliament in the Commissioner to be exercised by him alone. In *Moreau* v. *Federal Commissioner of Taxation* (3) and in *Federal Commissioner of Taxation* v. *Clarke* (4), the question was whether the Commissioner was of opinion that there was fraud or evasion of the Act. That is a very different position. Parliament had put it into the hands of the Commissioner to say whether there was fraud or evasion, and if he reasonably said so the Court would not substitute its decision for the Commissioner's. These decisions are so different that they have no applicability to the *Income Tax Acts* of Queensland. On the authority of *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (5) and on the proper interpretation of secs. 45, 47, and 14 (4), the Court of Review had power to ascertain, in a proper case, what the real profits were. Where a company's operations consist of a series of operations there would have to be an allocation of profits (*Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax* (*Q.*) (6)).

Cur. adv. vult.

April 30

The following written judgments were delivered :—

RICH AND DIXON JJ. Assessments have been made upon the appellant company under the provisions of the second paragraph of sec. 14 (4) (iv.) of the Queensland *Income Tax Act* 1924. In this appeal the company attacks the validity of that paragraph upon the ground that, as part of an inseverable provision, it imposes a burden upon inter-State commerce contrary to sec. 92 of the Constitution. The first paragraph of the clause provides that the amount of profits made in Queensland shall be the taxable income

(1) (1931) 46 C.L.R., at p. 597.
(2) (1923) 33 C.L.R. 73.
(3) (1926) 39 C.L.R. 65.
(4) (1927) 40 C.L.R. 246.
(5) (1931) 46 C.L.R. 585.
(6) (1922) 33 C.L.R. 76.

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Rich J. Dixon J.

of a foreign company, that is, of a company with its head or principal office or principal place of business out of Queensland. The second paragraph depends upon the contingency of its being impossible, in the opinion of the Commissioner, to determine such profits otherwise than by means it proceeds to describe. In that event, the taxable income may be assessed by the Commissioner at a sum which bears the same proportion to the total profits of the company as the sales made in Queensland bear to the total sales made by the company. The paragraph goes on to direct an apportionment according to revenue if there are no sales. The third paragraph of this clause deals with the contingency of the Commissioner's being satisfied that the information cannot be obtained, or not being satisfied that the profits returned disclose the true state of affairs. Then he may assess the taxable income of the company at 7½ per cent of the total sales made in Queensland, or, if there are no sales, of the total revenue derived from Queensland. The third paragraph of the clause was used during the argument to illustrate the ground upon which the attack on the second paragraph was based. That ground is that it selects sale of commodities, including inter-State sale, as a criterion of liability to tax; that by doing so it levies a tax upon or in reference to inter-State commerce. It was said that the third paragraph supplied a plain example of the vice ascribed by the argument to the second paragraph. But it was not suggested that the third paragraph was inseparable from the second paragraph which alone was applied to the assessments in question. For the purposes of this case, therefore, the third paragraph of the clause may be put aside.

The validity of the second paragraph appears to us to depend upon the question whether the proportion sum it prescribes actually does adopt as a ground of liability to any part of the tax the making of sales, and so impose a burden on sales made in the course of inter-State commerce. It may be conceded, at once, that in the sales to which the paragraph refers inter-State sales made in Queensland are included, and that the reference to sales is not distributive and is inseparable. But is the making of sales made a ground of liability to any part of the tax? The taxation in cases within the operation of the paragraph is levied upon profits, not on the whole

profits, but on a proportion of profits. It is the making of profits which exposes the taxpayer to liability under this paragraph. The company taxed must carry on business in Queensland, otherwise it could make no sales there. This circumstance removes any objection based upon the territorial restriction of the State's legislative power (cf. *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1)). If the entire profits had been taxed no question of inter-State trade would have arisen. The question arises only out of the ratio prescribed for ascertaining the amount to be taxed of these profits. In adopting as the proportion the ratio borne by the amount of the company's Queensland sales to the amount of its total sales, the second paragraph certainly goes to transactions of commerce to find a basis of calculation. But, unlike the third paragraph, it does not make the volume of those transactions a measure of the tax. It is not the volume but the relation between a part and the whole of the proceeds of the company's selling that affects the amount of tax. This relation forms, moreover, but an element in determining the tax. No doubt the relation is affected to the company's disadvantage by an increase in the volume of the company's sales in Queensland or a decrease in the volume of its sales elsewhere. But this distinction is irrelevant to inter-State trade. Whether a sale does or does not form part of inter-State trade in no way depends upon its being made in or out of the State. It is true that cases may be supposed in which an increase in taxation under this provision is caused by an increase in a company's inter-State operations. But the increase does not occur because the operations are inter-State, nor because they have increased. A disadvantageous consequence is attached to that operation to this extent and no more, namely : the greater the gross proceeds from sales in Queensland the greater is the proportion of the total net profits from all sources assessed as Queensland taxable income. The relation between the sales in Queensland and the total net profits, and between the sales elsewhere and in Queensland, although not accidental, is indeterminate. The liability to tax is, therefore, not necessarily greater because the proceeds of sales in Queensland are greater. On the whole, we think that it is not correct that an

(1) (1934) 51 C.L.R. 172, at p. 187.

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Rich J. Dixon J.

appreciable burden is placed upon a transaction of commerce as such, that is, by reference to characteristics which enter into the description " trade, commerce and intercourse " (cf. *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1)).

For these reasons we think the appeal should be dismissed.

The cross-appeal raises questions of interpretation only. By its answers to the sixth and eighth questions in the special case, considered in combination, we understand the Supreme Court of Queensland to have decided (1) that upon objection and appeal in the case of an assessment under the second or third paragraphs of sec. 14 (4) (iv.), the Court of Review should enter into the question whether the profits made by the company in Queensland can be satisfactorily determined otherwise than by the formula stated in the second paragraph, and, if the third paragraph has been applied, whether the information can be obtained and whether the profits returned do disclose the true state of affairs, and (2) that it is not competent to use either of these two paragraphs so as to make the taxable income of the company greater than that amount, if any, which the company succeeds affirmatively in proving to the Court's satisfaction its actual profits made in Queensland did not exceed. In considering this interpretation of the clause, the first question arising is whether it intends that the subject matter of the appeal shall include the correctness of the opinion of the Commissioner upon the possibility of satisfactorily determining the Queensland profits otherwise than by the formula supplied by the second paragraph, and upon the possibility of obtaining the information or upon the truth of the state of affairs disclosed by the returns. Prima facie the whole process of assessment is subject to objection and appeal, and is examinable under secs. 45 (4) and 47 (2). There are no constitutional difficulties in bestowing upon a State Court or Judge a power of reviewing a discretion, although of an administrative character, exercised by a State officer in making an assessment for State taxation. But, notwithstanding the generality of the powers of the Court of Review, a particular provision may intend to invest the Commissioner with a discretion which is confided to him to the exclusion of that Court. Whether it does so is a question which

(1) (1935) 52 C.L.R. 189, at pp. 204 et seq.

must depend upon the language in which it is expressed and the subject matter with which it deals. The two paragraphs of sec. 14 (4) (iv.) now under consideration deal with a matter notorious for its difficulty, viz., the ascertainment of profits made or derived within a particular territory as a result, it may be, of operations conducted over a wider field. The language of the paragraphs is appropriate to give him an individual discretion. No doubt it is not incapable of the contrary construction, but, having regard to the subject matter and the form of expression, we think it sufficiently appears that the enactment means to withdraw from the consideration of the Court the correctness of the opinion of the Commissioner upon the matters in question. We agree upon this point in the judgment of *E. A. Douglas* J. Of course this does not mean that the validity of the exercise of the Commissioner's discretion, as opposed to the correctness of his opinion, is not examinable. If he exercises his discretion capriciously, or fancifully, or upon irrelevant or inadmissible grounds, it may be set aside. Upon the present appeal no such question arises.

We think the answer of the Supreme Court to the sixth question is erroneous. As we have already said, for the reasons appearing from this Court's decision in *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1) no difficulty arises as to the territorial restriction on the power of the State legislation. The reasons upon which the Supreme Court based their answer to the eighth question included the view that otherwise the paragraph of sec. 14 (4) (iv.) would or might be open to objection on this score. In our opinion the eighth answer also should be set aside.

We think the appeal should be dismissed with costs.

The cross-appeal should be allowed with costs.

The order of the Supreme Court should, in our opinion, be varied by substituting for the answers given to the sixth and eighth questions the answer : No, to each of those questions.

STARKE J. The appellant company is registered in New South Wales, and has its head or principal office there. Its business is manufacturing, importing, and selling scales. It has a branch office

(1) (1934) 51 C.L.R. 172.

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Starke J.

in Queensland, and there carries on business as a seller of scales. The *Income Tax Act* 1924 of Queensland provides, by sec. 14 (4) (iv.), as follows :—" The taxable income of any other foreign company liable to assessment shall be the amount of the profits made by the company in Queensland, plus any expenses and charges which are not allowable deductions under this Act. If such profits cannot, in the opinion of the Commissioner, be otherwise satisfactorily determined, the taxable income of the company may be assessed by the Commissioner at a sum which bears the same proportion to the total profit made by the company as the sales made in Queensland bear to the total sales made by the company." The appellant company is a foreign company liable to assessment under these provisions.

The territorial competence of the legislation cannot be doubted ; Queensland has competence to impose taxes upon persons, natural or artificial, resident or carrying on business within its territory (*Commissioners of Stamps (Q.)* v. *Wienholt* (1) ; *Barcelo* v. *Electrolytic Zinc Co. of Australasia* (2) ; *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (3)). But the provision under which the appellant was assessed, namely, that which provides for the case in which profits cannot in the opinion of the Commissioner be otherwise satisfactorily determined, was attacked on the ground that it infringes sec. 92 of the Constitution : " Trade commerce and intercourse among the States . . . shall be absolutely free." A State must not, therefore, burden inter-State trade, by taxation or otherwise ; it is burdened if a tax be laid upon an operation or act of inter-State commerce. But it has long been recognized, if not actually decided by this Court, that a general income tax imposed by the States is not obnoxious to the provisions of sec. 92, even in cases—which are many—where the income includes receipts from inter-State trade. The reason is that a general income tax is not imposed upon any operation or act of inter-State commerce ; it is laid after inter-State trade is completed, " after all expenses are paid and losses adjusted, and after the recipient of the income is free

(1) (1915) 20 C.L.R. 531, at pp. 540, 541.

(2) (1932) 48 C.L.R. 391, at p. 409.

(3) (1934) 51 C.L.R., at pp. 181-187.

to use it as he chooses." (Cf. *Peck & Co.* v. *Lowe* (1); *United States Glue Co.* v. *Town of Oak Creek* (2).) The Queensland Act (sec. 14 (4) (iv.)), it should be observed, taxes profits made by the company in Queensland, not sales or the gross proceeds of sales. In the case in which those profits cannot, in the opinion of the Commissioner, be otherwise satisfactorily determined, the tax is nevertheless laid upon profits—the total profits made by the company—but they are measured by the proportion that the sales made in Queensland bear to the total sales made by the company. It is simply a means—artificial it may be—of estimating the profits made in Queensland, but no tax is imposed upon the sales or the proceeds of the sales, "either in form or in fact." (Cf. *Maine* v. *Grand Trunk Railway Co.* (3).) In my opinion, a tax so levied in no wise contravenes the provisions of sec. 92 of the Constitution. But I express no opinion upon the validity of the third clause of sec. 14 (4) (iv.) providing for the assessment of taxable income upon total sales made in Queensland; it raises other considerations, as may be gathered from the reasons already given.

Another question raised upon this appeal is whether the Commissioner's opinion that the profits could not otherwise be satisfactorily determined was subject to appeal by virtue of the provisions of secs. 45-48 of the Queensland Act. The Court of Review under the Act has very wide powers, but the condition of the authority conferred by the sections is the opinion of the Commissioner. It is his opinion that is required and is to govern. So long as it is honest and not arbitrary or capricious, that opinion is final and not open to appeal.

The result is that the appeal of the Australasian Scale Co. should be dismissed, but the judgment of the Supreme Court should be set aside in so far as it declares that the opinion of the Commissioner was open to review and a judgment should be given in a contrary sense.

EVATT AND MCTIERNAN JJ. This appeal from the Full Court of the Supreme Court of Queensland has been brought pursuant to special leave. The main question in issue is whether sec. 14 (4) (iv.) of the Queensland *Income Tax Act* of 1924 is repugnant to sec. 92

(1) (1918) 247 U.S. 165, at p. 175; 62 Law. Ed. 1049, at p. 1052.
(2) (1918) 247 U.S. 321; 62 Law. Ed. 1135.
(3) (1891) 142 U.S. 217; 35 Law. Ed. 994.

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Evatt J. McTiernan J.

of the Commonwealth Constitution, which provides that trade, commerce and intercourse among the States shall be absolutely free.

Sec. 14 (4) (iv.) applies to " foreign " companies, that is, companies whose head or principal office, or whose principal place of business is out of Queensland. Its main provision is that the taxable income of foreign companies liable to assessment shall be " the amount of the profits made by the company in Queensland plus any expenses and charges which are not allowable deductions under this Act." But the sub-section goes on to declare that, if the amount of such profits " cannot in the opinion of the Commissioner be otherwise satisfactorily determined " the Commissioner may assess the taxable income at a sum " which bears the same proportion to the total profits made by the company as the sales made in Queensland bear to the total sales made by the company, or, if there are no sales, in the same proportion as the total revenue derived from Queensland bears to the total revenue derived by the company." To the amount so arrived at by the Commissioner, certain other sums are to be added.

The third and last part of the sub-section is as follows :—" If the Commissioner is satisfied that this information cannot be obtained or is not satisfied that the profits returned disclose the true state of affairs, he may assess the taxable income of the company at a sum equal to seven pounds ten shillings per centum of the total sales made in Queensland, or, if there are no sales, at a sum equal to seven pounds ten shillings per centum of the total revenue derived from Queensland."

Over a long period of years, the Courts throughout Australia have been required to deal with the difficult problem of attributing to one State or territory a proportionate part of the income or profits of a person or company who carries on business in more than one State or territory, the problem arising from the fact that a particular legislature has made the subject matter of taxation income or profits made within, or arising from, sources in its own territory. Many illustrations of the resulting difficulties of apportionment are to be found in the decided cases, all of which were discussed recently in *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (1).

(1) (1931) 46 C.L.R. 417.

It is to this very problem that sec. 14 (4) (iv.) is addressed. The Legislature decided to render subject to taxation the amount of the profits made by a foreign company in Queensland. But it was perceived that difficulties would arise in ascertaining the precise amount of such profits. If the difficulties proved so considerable that the profits could not in the Commissioner's opinion be "otherwise satisfactorily determined," the formula set out in the second paragraph of sec. 14 (4) (iv.) is to become operative. That formula requires the ascertainment of the total profits of the company and the fixing of such proportion of those total profits as is represented by the ratio which the company's Queensland sales bears to its total sales or, if there are no sales, by the ratio which the company's Queensland revenue bears to its total revenue.

It is contended by the respondent that the application of the formula places an unlawful burden on trade and commerce among the States. At first sight, the contention appears fanciful, because there does not appear to be any relation between such trade and commerce and the ascertaining of the subject matter of taxation by reference to the formula. But the argument is that, in the case of sales, the result of adopting a formula is this: that, if the amount of a company's sales in Queensland increases, there will be an increase in the subject matter of taxation. But this is a very inaccurate way of expressing the true position. No doubt, in the case of a foreign company which is conducting sales in Queensland, some of such sales may be made in the course of trade and commerce among the States, just as they may be made in the course of domestic or overseas trade. It follows that, *if every other transaction of sale is excluded from the calculation or is treated as irrelevant*, an increase in the company's sales in Queensland will tend to increase the ratio of total sales which has to be ascertained under the formula. But this argument overlooks the fact that, even upon the assumption already mentioned, the increase in the ratio which results from an increase of the inter-State sales in Queensland will not be directly proportionate to the increase of such sales; it also overlooks the fact that inter-State sales by a foreign corporation in other States of the Commonwealth have to be taken account of in the denominator, not in the numerator, of the fraction which represents the required

H. C. OF A. 1935.

AUSTRAL-ASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

Evatt J. McTiernan J.

ratio. The last mentioned fact shows that increases in the inter-State trade of the foreign company in States other than Queensland will tend to reduce, and not to increase, the subject matter of taxation if recourse must be had to the formula of sec. 14 (4) (iv.).

This analysis of the formula reinforces the fact which first impression conveys, viz., that the formula of sec. 14 (4) (iv.) is devised without any reference to inter-State trade and commerce. In order to obtain a fair comparison of the foreign company's Queensland activities with the totality of its business activities, sales are selected as a method of comparison, and, failing sales, a comparison of revenue is to be made ; and the formula is only to be used as a matter of last resort, when the Commissioner is satisfied that otherwise it will not be possible to determine in any satisfactory way the profits made in Queensland. It follows that the adoption of such formula cannot be regarded as infringing in the slightest degree upon sec. 92 of the Commonwealth Constitution.

Finally, it was contended that the third portion of sec. 14 (4) (iv.) is an infringement of sec. 92 because, under it, the taxable income of the company is fixed at $7\frac{1}{2}$ per cent of the total sales made in Queensland, or, if there are no sales, the total revenue derived from Queensland. It was argued that this provision imposes a direct burden upon inter-State trade. It is unnecessary to examine this provision further in the present case, because it has not been applied and it is clearly severable. But it should be emphasized that the provision applies only where essential information cannot be obtained by the Commissioner, or where the Commissioner is not satisfied that the profits returned disclose the true state of the company's affairs. In other words, the provision takes its place in the statutory scheme as a mere proviso to meet a very special class of case. There is certainly no intention to burden that part of the company's inter-State trade which is conducted in the State of Queensland, and any effect upon such trade which the adoption of the provision produces may fairly be described as casual and accidental.

It was argued on the cross-appeal that the answers given by the Full Court to questions 6 and 8 of the special case were erroneous. In the first place, it was held by the Full Court that the decision of the Commissioner of Taxes as to whether the profits of the appellant

could not be satisfactorily determined otherwise than by the adoption of the statutory formula, was open to review by the Court of Review. The better opinion is that such a decision was not open to review. The principal object of sec. 14 (4) (iv.) was to meet the difficulty involved in allocating to Queensland that part of the total profits of the company which should be properly attributed to its business activities in that State. Accordingly, the Commissioner was made the final judge in determining whether recourse should be had to the formula. In a general sense, the Commissioner's decisions are open to objection and appeal, but the particular matter as to which he gives a decision has to be examined in order to ascertain from the legislative scheme whether the general rule applies to that matter.

The other point to which the cross-appeal relates is question 8 of the special case. The Full Court held that if the Court of Review was of opinion that if, by the adoption of the formula in the second part of sec. 14 (4) (iv.), the assessment resulted in the inclusion of profits made out of Queensland within the subject matter of taxation, the assessment could, and should, be set aside. The Full Court was greatly impressed by the argument that invalidity would attach to sec. 14 (4) (iv.) if by any chance profits made out of Queensland were included in the assessment as a result of applying the formula. It must be conceded that the adoption of the formula makes it possible that the subject matter of taxation will include profits not confined to those made within Queensland itself. But the Queensland Legislature is clearly entitled to impose an income tax upon foreign corporations doing business in Queensland, without being limited by any rigid doctrine of territorial competence to the profits made in Queensland alone. The Full Court referred to several cases dealing with this problem of territorial competence, but they do not appear to have considered such cases as *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (1); *Trustees, Executors and Agency Co.* v. *Federal Commissioner of Taxation* (2), and *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (3). In those cases the problem was fully discussed. So long as the Legislature of Queensland in its taxation measures is seen to be legislating for

(1) (1932) 48 C.L.R. 618.
(2) (1933) 49 C.L.R. 220.
(3) (1934) 51 C.L.R. 172.

H. C. OF A. 1935.

AUSTRALASIAN SCALE CO. LTD. v. COMMISSIONER OF TAXES (Q.).

the peace, order and good government of the State of Queensland no additional restriction based upon mere territorial considerations should be placed upon its constitutional powers.

The appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed with costs. Cross appeal allowed with costs. Order of the Supreme Court of Queensland varied by substituting the answer given to the 6th and 8th questions the answer "No" in each case.

Solicitors for the appellant, *Hawthorn, Cuppaidge & Co.*, Brisbane, by *Stephen, Jaques & Stephen.*

Solicitor for the respondent, *H. J. H. Henchman*, Crown Solicitor for Queensland.

Solicitor for the Commonwealth, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

B. J. J.