


[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION PLAINTIFF ;

AND

RILEY DEFENDANT.

Sales Tax—Photographer—Photographs taken of and supplied to clients for reward—
“Goods manufactured” or “produced”—Sales Tax Assessment Act (No. 1)
1930-1935 (No. 25 of 1930—No. 8 of 1935), sec. 3 (1), 17.**

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SYDNEY,
June 13, 20.
—
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

Photographs, whether tinted or untinted, taken of, and supplied to, clients for reward in the course of a photographer's business carried on within the Commonwealth are “goods manufactured in Australia” within the meaning of the *Sales Tax Assessment Act*, and accordingly are liable to tax.

So held by Rich, Starke, Dixon and McTiernan JJ. (Evatt J. dissenting).

CASE STATED.

The Federal Commissioner of Taxation claimed, in a writ of summons, the sum of £7 15s. 9d., which he alleged was payable by

* The *Sales Tax Assessment Act* (No. 1) 1930-1935 provides :—By sec. 3 (1), that “ ‘goods’ includes commodities . . . ; ‘manufacture’ includes production, and also the combination of parts or ingredients whereby an article or substance is formed which is commercially distinct from those parts or ingredients . . . ; ‘manufactured’ has a meaning corresponding to that of ‘manufacture’; ‘manufacturer’ means a person who engages, whether exclusively or not, in the manufacture of goods, and includes a printer, publisher, lithographer or engraver, and a person (not being an employee) who makes up goods, whether or not the materials out of which the goods are made are owned by

him, but, where one person makes goods for another, wholly or in part out of materials supplied by that other, and the goods are not required for the private, domestic or other personal use of that other, the person supplying the materials shall be deemed to be the manufacturer, and the person so making the goods shall not be deemed to be the manufacturer.” By sec. 17 : “Subject to, and in accordance with, the provisions of this Act, . . . sales tax . . . shall be levied and paid upon the sale value of goods manufactured in Australia . . . by a taxpayer and . . . sold by him or treated by him as stock for sale by retail or applied to his own use.”

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the defendant, Sidney Riley, as and for sales tax under the provisions of the *Sales Tax Assessment Act* 1930-1935. For the purpose of determining the defendant's liability to sales tax the parties stated for the opinion of the High Court a case which was substantially as follows :—

1. At all material times the defendant carried on business and still carries on business as a photographer at 251A Pitt Street, Sydney, in the State of New South Wales.

2. In carrying on that business the defendant employed and employs the following methods, processes, and procedure :—(a) *Reception of clients.*—Clients are received at the defendant's business premises and are interviewed by an employee of the defendant, called a "receptionist," who shows clients samples of various styles, and sizes of photographs, and supplies particulars of charges, and any other information required and ascertains whether the client requires plain or tinted photographs and other particulars. (b) In the event of a client deciding to have his or her photograph taken, he or she may then and there give an order for a certain number of photographs, or may decide to be photographed and to view the proofs before ordering any photographs. It is usual to obtain a deposit from the client before taking any photographs. (c) The client is next shown to a dressing-room, where any preparation for the sitting is made, and from the dressing-room the client enters the gallery or studio, which is a room containing the camera and other accessories. (d) *Taking of photographs.*—An employee of the defendant, called an "operator," who has received from the receptionist full details of the nature, style and size of the photograph required, interviews the client and decides the particular pose and type of lighting that will together with harmonious composition produce a picture to represent the most salient features or most pleasing aspects in the character of the sitter. He then poses the sitter and arranges the lighting with the assistance of artificial aids, such as screens, light diffusers, floodlights, and spotlights, with the object of obtaining a true likeness of the sitter. (e) The operator having placed a film or plate in the camera, focussed the camera correctly, and obtained a satisfactory expression on the face of the sitter then makes an exposure by releasing the shutter of the camera, the effect

of which is to allow light to pass through the lens to the film or plate. (f) On an average, five or six exposures are made for each sitter and on each occasion the lighting pose and expression may be changed by the operator. (g) *Developing and fixing of films and plates.*—After the exposures have been made the client departs, and the films or plates exposed are taken to a room known as the “dark room” where, by the aid of a red light they are developed, fixed, and washed, by the operator. Each of these last-mentioned processes consists in the immersion of the film or plate in tanks for certain periods in water of a certain temperature and containing certain chemicals. The chemical solution is kept in continual motion during these processes by means of a rocker on which the tank rests, the object of the agitation being to ensure a uniform development of the film or plate. After each of these processes the film or plate is washed for varying periods in water, and, after the final process, the film or plate is allowed to dry. Care is required in each of these processes to ensure that the plate or film is of the right density, and that the respective processes are not underdone or overdone, and to produce the particular effect which the operator desires to obtain. (h) *Proof prints.*—When the film has passed through the above processes and has been dried it is known as a “negative.” The negatives are given to a person in the defendant’s employ who is called a “retoucher” to do a proof retouching, which is a partial retouching. A proof print is then taken from the negative and handed to the client, who may or may not order prints to be made. The proof prints are printed by daylight in simple contact printing frames on printing out paper. The prints are merely taken from the printing frames and without further treatment are supplied to the client to give him an idea of pose, likeness and expression. (i) *Retouching negatives.*—When the client places an order for prints the procedure is as follows:—The negative is given to a person in the defendant’s employ who is called a retoucher. The partial retouching which had been previously made is removed to enable a full retouching process to be now performed. A retoucher is an employee of experience whose duty it is to take out any blemishes or freckles that appear on the negative, to model the face and remove heavy shadows (such as those under the eyes) and to give the skin

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a fine texture. This work is done by pencil and etching knife. The process adopted in retouching is as follows :—The negative is placed on a retouching desk in which an electric light is so fixed as to show up the image and a retouching solution is rubbed over the face of the negative to make it take the retouching pencils. Retouching pencils are of various grades, soft and hard, and are used by the retoucher in perfecting the negative. The retouching is performed by rubbing out or shading with a pencil those parts of the negative where it is desired to improve the image. The time required for retouching varies from about half an hour to one hour per negative, dependent upon the size of the negative and the condition of the image on the negative. (j) *Final retouching*.—If the client orders prints the selected negatives go back to the retoucher, who finally retouches them, and they are then sent to the printing room, where the required number of prints are taken from the negative by an employee of the defendant called a “printer.” (k) *Printing*.—The process of printing is as follows :—A machine known as a “projection printer” is used. The machine is supported over a table by means of an arm, a counterweight allowing its adjustment by raising or lowering. The lens of the projector is pointed downward towards a table beneath. The negative is placed on a glass, put into a wooden frame, and then inserted in the projector, which is then focussed to give a print of the required size. The table is called a “masking table” and on this table sensitized printing paper is laid in position and an exposure is made from the negative in the projector, the light being directed on to the paper through the lens. The time required for making an exposure is about one minute, and is judged by the printer from experience. (l) *Development and fixing of prints*.—The printer then develops the prints by immersing them in a solution of chemical and water, and watching until the image reaches the density required ; the print is then removed from the developer and immersed in water, and is then fixed in another chemical bath and finally washed in water for one to one and one-half hours, and dried. (m) *Toning of print*.—The prints obtained from the above process are black and white ; if it is required to finish them in some other colour the prints are returned to the printer, who subjects them to certain chemical baths and washing until the

tone required is obtained. Operations in pars. (k), (l) and (m) are supervised by the operator. (n) *Mounting of photographs*.—The photographs pass from the printer to another employee of the defendant, who is known as a “finisher,” and whose duty it is to mount the photographs. The procedure is for a dry mounting tissue to be placed on the back of the photograph, which is then trimmed to the required size. The dry mounting tissue is made to partly adhere to the photograph by means of a small heated touch iron. The photograph and tissue are thereupon placed in position on the mount and the whole is inserted in an iron press, called a dry mounting machine, where, under regulated heat and pressure, the photograph is permanently attached to the mount. (o) *Treatment by artist*.—The mounted photograph is handed to another employee of the defendant known as the “artist.” The artist by the exercise of individual taste and judgment removes any slight imperfections, and removes any spots or blemishes, and finally touches the photographs up generally to improve their appearance and finish. The artist uses a brush and water colours contained in small tubes. (p) The photographs are now finished and in the condition in which they are supplied to the client unless the client has ordered the same to be tinted or coloured as hereinafter mentioned. If this has been done the photographs are not finished and in the condition in which they are supplied to the client until they have been tinted or coloured. Before the photographs are delivered to the client payment is made or arranged. (q) *Materials and equipment*.—The following and other necessary material and equipment are purchased ready for use by the defendant:—The camera and equipment used in connection therewith; films and plates used in the camera; the chemicals used in developing and fixing the films or plates; developing and fixing dishes; the retouching medium and pencils used in retouching; the equipment and material used in the printing process, namely, projector and fittings, developing and fixing dishes, chemicals and printing papers; the mounts and dry mounting tissues, trimming tools, touch-iron and iron press; the brush and water colours (small tubes) used by the artist. (r) *Colouring or tinting*.—Clients sometimes order photographs to be coloured or tinted. In such cases the artist does the tinting when he or she

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receives the mounted photographs. The tinting is performed by means of the brush and water colours, and any record kept by the receptionist of the colour of the eyes, hair, clothing, &c., is utilized by the artist. If no record has been kept the artist employs her general knowledge of art and colouring to achieve the desired result. Tinted or coloured photographs are supplied to clients at a higher price than untinted or uncoloured prints and the charges for tinting or colouring photographs is included by the defendant in the total amount payable by the client. About five per cent of the photographs supplied by the defendant are tinted or coloured.

3. The defendant does not stock goods available for purchase by any person who comes to his place of business and his business consists entirely of supplying photographs in the manner aforesaid to the order of individual clients.

4. The total value of the defendant's average yearly output of photographs so supplied is in the opinion of the plaintiff in excess of £500.

5. At all material times the defendant has been registered and still is registered as a manufacturer under the Act.

6. The plaintiff claims that for the purposes of the *Sales Tax Assessment Act* 1930-1935 the several processes hereinbefore mentioned result in the manufacture and production by the defendant of goods, viz., the photographs finished and in the condition in which they are supplied to the client and that the defendant is a "manufacturer" as defined by the Act.

7. The plaintiff claims that the photographs are prescribed goods manufactured to the order of individual clients within the meaning of the Act.

8. In ascertaining the amount of sales tax payable by the defendant in respect of such of the photographs as are tinted or coloured the plaintiff claims to be entitled to regard as part of the total amount payable by the client the additional cost to the client of such tinting or colouring.

9. Until October 1934 the defendant furnished returns of sales and of sales tax as required by the Act and paid the tax in respect thereof.

10. For October 1934 the defendant furnished returns of sales and of sales tax as required by the Act.

11. The defendant has refused and still refuses to pay sales tax in respect of such photographs so supplied to clients in and for October 1934 and alleges that he is not liable under the Act for the payment of sales tax in respect of the photographs supplied by him to clients, whether those photographs be tinted or untinted or at all. The plaintiff does not charge the defendant with a desire to evade or make deliberate default in payment of the tax and the defendant has refused to pay the tax with the intention only of testing the applicability of the Act to the production of photographs in the manner stated herein.

12. The plaintiff claims that under the circumstances hereinbefore detailed the defendant was, during October 1934, liable as a manufacturer in respect of the photographs, whether tinted or untinted, for the payment of sales tax ascertained in the manner prescribed by the Act and the regulations thereunder on the sale value of the photographs mentioned in pars. 10 and 11 hereof.

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

- (a) Are the photographs goods manufactured in Australia within the meaning of the *Sales Tax Assessment Act (No. 1) 1930-1935* ?
- (b) If the answer to question (a) is in the affirmative is sales tax payable in respect of so much of the cost to the client as is attributable to the tinting or colouring of the photographs?

It was agreed between the parties that if question (a) were answered in the affirmative judgment was to be entered for the plaintiff with costs in the sum of £7 9s. 2d., and if both questions were so answered judgment was to be entered for the plaintiff with costs in the sum of £7 15s. 9d., the amount so entered to be subject to a penalty, as prescribed by sec. 29 of the Act, at the rate of ten per cent per annum from 22nd November 1934 to the date of payment. It was further agreed that if the questions were answered in the negative judgment was to be entered for the defendant with costs.

E. M. Mitchell K.C. (with him *Betts*), for the plaintiff. The defendant carries on business as a portrait photographer. He

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does not, as does a portrait painter, give his personal services to the production of a work of art. An essential feature of his business is the production of goods for sale. The production of goods for the use of individual customers is contemplated by the *Sales Tax Assessment Act* (see secs. 18 (5A), 20 (1) (d)). The fact that in the first Schedule to the Act "photographs for use in the production of newspapers" are exempted from its operation is a strong indication that the Legislature intended other photographs to be caught within the operation of the Act (*Dominion Press Ltd. v. Minister of Customs and Excise* (1)). The question in *Clay v. Yates* (2) was as to the form of action when goods contracted for had not been produced. The facts here are different from those present in *Clay v. Yates* (2), *Lee v. Griffin* (3) and *Robinson v. Graves* (4). They show that it is not merely a question of work and labour on the part of the defendant; the finished articles they produce are, in the circumstances, goods produced for sale and delivery (*R. v. Wood Green Profiteering Committee; Ex parte Boots Cash Chemists (Southern) Ltd.* (5)). Therefore the defendant is a manufacturer or producer of goods within the meaning of those words as used in the Act (*Dominion Press Ltd. v. Minister of Customs and Excise* (1)). If any activity can, as a matter of fair and reasonable construction, be called a production of goods it comes within the scope of the Act. The words "goods" and "commodities" should be given a wide meaning, provided only that violence is not done to the English language. Photographs are no less "goods manufactured in Australia" than are newspapers (*John Fairfax & Sons Ltd. and Smith's Newspapers Ltd. v. New South Wales* (6)). The defendant carries on a business with the aid of a large staff of assistants who by mechanical means and other processes reproduce the likeness of customers. The contract between the defendant and the various customers is not one for the employment of skilled service as in *Adams v. Rau* (7). A photographer engages in the business of selling photographs. He is, therefore, a "manufacturer" who engages in the manufacture of goods within the meaning of

(1) (1928) A.C. 340.

(2) (1856) 1 H. & N. 73; 156 E.R. 1123.

(3) (1861) 1 B. & S. 272; 121 E.R. 716.

(4) (1935) 51 T.L.R. 334.

(5) (1920) 89 L.J. K.B. 55.

(6) (1927) 39 C.L.R. 139.

(7) (1931) 46 C.L.R. 572.

those terms as used in the Act, and as ordinarily applied in English speech (*Federal Commissioner of Taxation v. Rochester* (1)).

[DIXON J. referred to *In re Searls Ltd.* (2).]

McIntosh, for the defendant. What is done by the defendant, as a photographer, is more in the nature of a service than of a sale. A photograph is made for a particular person. The transaction is not comparable to that of the sale of an article in a shop. A special relationship exists between a photographer and his clients (*Pollard v. Photographic Co.* (3); *Boucas v. Cooke* (4)). The latter part of the definition of "manufacturer" in sec. 3 of the Act is inapplicable to the case of the taking of a photograph and the reproduction on sensitized paper of the likeness of the sitter. Unless the language of the Act clearly indicates that a particular transaction is within its scope, the matter should be decided in favour of the taxpayer (*Adams v. Rau* (5)). Regard must be had to the substance of the transaction (*Munro v. Commissioner of Stamp Duties* (6)). Following upon the decisions in *Adams v. Rau* (7) and *Federal Commissioner of Taxation v. Rochester* (8), respectively, the Schedule to the Act, relating to exemptions, was amended so as to exempt also the goods, commodities or services there dealt with. This shows that the Schedule is not conclusive as to the scope and intendment of the Act. The words "manufacture" and "production" should be given their ordinary and natural meaning (*Adams v. Rau* (9)). The essential features in that case are similar to those in this case. Here the transaction approximates more closely to that of a contract for work and labour than to the sale of an actual photograph.

[McTIERNAN J. referred to *Boucas v. Cooke* (10).]

The person photographed is attracted by and relies upon the skill of the photographer selected by him. The resultant photograph is for the private use only of the client. The defendant is not, in the circumstances, a manufacturer; to hold otherwise would impose

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(1) (1934) 50 C.L.R. 225, at p. 227.

(2) (1932) 33 S.R. (N.S.W.) 7; 49 W.N. (N.S.W.) 195.

(3) (1888) 40 Ch. D. 345.

(4) (1903) 2 K.B. 227.

(5) (1931) 46 C.L.R., at p. 578.

(6) (1933) A.C. 61, at p. 68; 34 S.R. (N.S.W.) 1, at p. 7.

(7) (1931) 46 C.L.R. 572.

(8) (1934) 50 C.L.R. 225.

(9) (1931) 46 C.L.R., at pp. 577, 578.

(10) (1903) 2 K.B., at p. 236.

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an undue strain upon the meaning of that word. He is not a manufacturer in the general acceptance of that word (*R. v. Pedrick & Palen* (1)).

Cur. adv. vult.

The following written judgments were delivered :—

RICH, DIXON AND MCTIERNAN JJ. This is a special case stated by the parties in an action brought by the Commissioner of Taxation to recover sales tax from a photographer conducting a portrait studio.

The course of business is elaborately stated in the special case, which gives prominence to the part played by the individual consideration and treatment of the client, the arranging of the pose, setting and lighting, and the operations in the studio and retouching room. The business side of the transaction is more briefly dealt with. It is said that when the client comes to be photographed he may then order a certain number of photographs, or he may decide to view the proofs before ordering any; but it is usual to obtain a deposit from the client before taking his photograph. Before the photographs are delivered to him payment is made or arranged.

Under the *Sales Tax Assessment Act* (No. 1) 1930-1935, sales tax is levied and paid upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or treated by him as stock for sale by retail or applied to his own use (sec. 17).

The special case raises no question as to the sale or sale value of the photographs, and this, no doubt, accounts for the economy of statement in reference to the terms upon which the clients' requirements are supplied. That the transaction is a sale is not, and doubtless could not, be disputed. What is in question is whether photographs are goods manufactured in Australia.

By the statutory definition, manufacture includes production. This description is very wide. It appears to cover all operations conducted for the purpose of bringing tangible things into existence for sale. But there are many vocations and pursuits in the exercise of which physical things incidentally come into existence, and become the property of the client or customer, although the essential character of the work is the performance of skilled services and not the supply

of things. A conveyancer who makes a will and hands it over to the testator, a writer who composes an article for a journal and sends in the typescript, a shorthand writer who transcribes his notes and supplies a transcript are examples. The last was dealt with by this Court in *Rau's Case* (1). To such cases the language of sec. 17 is inapplicable; one or other of the elements is lacking that are required to satisfy the description sale value of goods manufactured, or produced and sold by the taxpayer, or treated as stock for sale by retail or applied to his own use.

In the present case, it is the element of "manufacture" or "production" which the taxpayer says is not present. The argument in support of his contention is, in effect, that the photographer is employed to exercise his art to obtain a portrait possessing the qualities that are demanded by the taste it is his purpose to consult, and that the end of his labours is not the production of so many material objects regarded as vendible articles. The contention is open to the observation that it does not strictly adhere to the question in the special case, which assumes the sale of the photographs as goods, and inquires, are they produced or manufactured? But it is right, perhaps, that the taxpayer should not be tied down to that question as one isolated from the remainder of sec. 17. In any case, we think the contention cannot prevail. The end of the organized business of a portrait photographer is to produce as many copies of a picture as his customer will buy, and to sell them to him with a view to profit. It differs from many other productive arts in the fact that its products must be designed in each case for one individual, and in its attempt to secure some aesthetic value. But it is a process practised commercially to produce an article which will be bought. A tailor must attempt to fit his individual customer and the manufacturer of ornaments might claim that his designs had an aesthetic purpose.

In our opinion the first question in the case stated should be answered: Yes.

The second question seeks to distinguish tinting and colouring when that is practised, a distinction we are not prepared to admit. It also should be answered: Yes.

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We think the order should be:—Questions in the special case answered: Yes. Pursuant to the agreement of the parties, enter judgment in the action for the plaintiff for £7 15s. 9d. with costs.

STARKE J. Sales tax is imposed upon the sale value of goods manufactured in Australia by a taxpayer and sold by him, or treated by him as stock for sale by retail, or applied to his own use (*Sales Tax Acts*, 1930 No. 26; 1930 No. 63; *Sales Tax Assessment Act (No. 1)* 1930-1935). Goods includes commodities. Manufacture includes production; manufactured has a meaning corresponding to that of manufacture. Manufacturer means a person who engages, whether exclusively or not, in the manufacture of goods, and includes a printer, publisher, lithographer, or engraver, and a person (not being an employee) who makes up goods, whether or not the materials out of which the goods are made are owned by him (*Sales Tax Assessment Act (No. 1)* 1930-1935, sec. 3).

The taxpayer carries on the business of a photographer; clients go to him and sit for their photographs; the taxpayer takes the photographs, and supplies copies in a finished condition, tinted or untinted, to his client as ordered. A charge is made for the photographs supplied to the client, and the charge is greater for a tinted than for an untinted photograph. The question is whether photographs so taken by the taxpayer and supplied to clients are goods manufactured in Australia, within the meaning of the *Sales Tax Acts*.

The primary meaning of the word manufacture is something made by hand as distinguished from a natural growth. But machinery has largely supplanted the manual method, and a manufacture is thus any article or material produced by the application of physical labour or mechanical power (*Oxford English Dictionary*, s.v. "manufacture"). It is said that a photograph cannot fall within such a description, any more than could a painting or a statue or any other work of art the result of an artist's skill or genius. But we must turn to the Act itself (*Dominion Press Ltd. v. Minister of Customs and Excise* (1)). It is framed in comprehensive terms and the exemption of certain works of art in 1931 and 1933 indicates in no uncertain manner the scope of the legislation.

Again, as already stated, manufacture includes production, which would cover coal, gas or electric current, but for their exemption in the Schedule; and the term manufacturer includes a printer, publisher, lithographer, or engraver, who may do no more than change the condition of an article already manufactured. The taxpayer produces an article—a photograph—and supplies it to his client for a price.

Having regard to the various provisions of the Acts, the production of photographs and supplying them to clients for a price in the ordinary course of the taxpayer's business constitutes, in my opinion, a manufacture of goods within the meaning of the Sales Tax Acts above referred to.

The questions submitted in the special case should be answered in the affirmative, and judgment entered as agreed between the parties.

EVATT J. In certain circumstances, photography may be part of the process of manufacture, but, on the facts, it is not possible to regard the photographer as a "manufacturer" of goods or a "producer" of commodities. Certainly, the service he performs for his client is finally embodied in the photograph, and payment has to be made for the actual chattel delivered as well as for the service rendered. But, having due regard to the whole of what is done, it is properly regarded as being in the nature of an artistic service of a personal character. The service is so confidential that, without the client's consent, the law prevents the further reproduction of the photograph. In applying the general words of the *Sales Tax Assessment Act* to the present case, little or no assistance is derived from the list of exemptions, and we are remitted to the general question whether the personal service performed is included in the denotation of "manufacture" or "production." If the matter were left in doubt, presumably the doubt should not be resolved in favour of the tax-gatherer. But, in my view, the application of the words "goods manufactured" to cases like the present is unreal, and almost whimsical.

The questions asked should be answered in the negative.

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Questions in the special case answered: Yes. Pursuant to the agreement of the parties, enter judgment in the action for the plaintiff for £7 15s. 9d. together with an additional tax upon the amount of the tax unpaid at the rate of ten per cent per annum from 22nd November 1934 until payment. Defendant to pay costs.

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

Solicitor for the defendant, *J. F. Arnott*.

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[HIGH COURT OF AUSTRALIA.]

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SYDNEY,

June 13, 20.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

Sales Tax—Photographer—Films exposed by customers—Developed, and prints therefrom supplied to customers for reward—"Goods manufactured" or "produced"—Sales Tax Assessment Act (No. 1) 1930-1935 (No. 25 of 1930—No. 8 of 1935), secs. 3 (1), 17.

The defendant carried on the business of developing photograph films exposed by amateur photographers and making prints from the films after development. The films and the prints were handed over to the defendant's customers on payment of a charge made by him.

Held, by Rich, Starke, Dixon and McTiernan JJ. (Evatt J. dissenting), that the prints were "goods manufactured in Australia" within the meaning of the Sales Tax Assessment Act, and accordingly were liable to tax.