meaning more limited than it usually bears when applied to the subject matter of wireless telegraphy and telephony.

H. C. OF A. 1935.

THE KING v. BRISLAN; EX PARTE WILLIAMS.

Appeal dismissed. The appellant to pay costs of appeal including costs of first hearing before the High Court but not of the subsequent further argument.

Solicitor for the appellant, *T. F. Williams.*

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

J. B.

[HIGH COURT OF AUSTRALIA.]

AMALGAMATED ZINC (DE BAVAY'S) LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1935.

MELBOURNE, *Nov.* 15; *Dec.* 19.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Deductions—Compulsory contributions to fund—Fund for benefit of taxpayer's employees—Taxpayer's business discontinued—Obligation to contribute to fund continuing—Outgoings "actually incurred in gaining or producing the assessable income"—Loss made "in carrying on a business"—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 51 *of* 1934), *secs.* 23 (1) (*a*), 26.

A company carried on a business in which it employed workers who came within the *Workmen's Compensation (Broken Hill) Act* 1920 (N.S.W.), so that the company was obliged to contribute to the compensation fund established under that Act. The company discontinued its business, but remained liable to make, and made, payments to the fund in subsequent years. The company claimed to deduct the amount of these payments from its assessable income. Its income, after it had discontinued the business, was derived solely from investments.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Held that the company was not entitled to the deduction claimed: The amount paid was not an outgoing "actually incurred in gaining or producing the assessable income" within the meaning of sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1934, and it could not be deducted under sec. 26 (1) (*a*) of that Act as a loss made "in carrying on a business."

CASE STATED.

On the hearing of an appeal to the High Court by Amalgamated Zinc (de Bavay's) Ltd. from an assessment of that company by the Federal Commissioner of Taxation to income tax for the years ended 30th June 1933 and 1934 respectively, at the request of the parties a case was stated, which was substantially as follows, for the opinion of the Full Court:—

1. Amalgamated Zinc (de Bavay's) Ltd. (hereinafter called "the company") is a company duly incorporated under the law of Victoria and was so incorporated on 1st September 1909.

2. The registered office of the company and its central administration have at all material times been situated at Melbourne in the State of Victoria.

3. In addition to its office in Melbourne the company has maintained at all material times and still maintains a branch office in London and until September 1929 also maintained an office at Broken Hill in the State of New South Wales.

4. From the date of its incorporation the company for many years carried on the business of treating tailings and ore and producing zinc concentrates and other metalliferous substances at Broken Hill aforesaid.

5. On and from 31st December 1920 the company became liable to pay money annually pursuant to the *Workmen's Compensation (Broken Hill) Act*, No. 36 of 1920, of the Parliament of New South Wales and subsequent amendments thereto.

6. The said annual payments are in respect of compensation payable to employees of mine-owners at Broken Hill (including the company) who have contracted pneumoconiosis or tuberculosis or to the dependants of deceased employees. The company is still liable to pay and does still pay the sums prescribed by the said Acts.

7. During the year 1924 the company discontinued the production of zinc concentrates and has not since produced zinc concentrates.

By the year 1929 the company had disposed of its plant and machinery save as set out in par. 17 hereof. In the year 1924 the company had on hand a large quantity of zinc concentrates and other materials produced by it.

8. At all material times the zinc concentrates produced by the company were sold to Zinc Producers Association Pty. Ltd., a company duly incorporated under the law of Victoria but now in liquidation. The arrangement between the company and Zinc Producers Association Pty. Ltd., under which the latter company marketed the whole output of zinc concentrates of the company, required that periodical statements of account and adjustment of payments should be rendered and made by Zinc Producers Association Pty. Ltd. to the company.

9. Between the year 1924 and the month of July 1929 the company gave delivery to Zinc Producers Association Pty. Ltd. of the whole of its stocks which were on hand when the production of zinc concentrates was discontinued.

10. In or about the month of September 1929 the office of the company at Broken Hill was closed, but the local records and papers of the company have remained and still remain at Broken Hill in charge of an agent there.

11. The company has at all material times invested portion of its funds in the purchase of shares in other companies and Government bonds and has lent money on fixed deposit or at call and has received and still receives income by way of dividends and interest from such investments. During the years ended 30th June 1932 and 30th June 1933 the whole of the assessable income of the company was derived from the aforesaid investments, save and except the sums set out in pars. 13 and 16.

12. In the month of November 1920 the Broken Hill Protestant Hall Co. Ltd. (in liquidation) sold, and one Edward Walter Outhwaite purchased, certain land and buildings at Broken Hill, known as the Protestant Hall, together with certain furniture therein. The purchase price of the Protestant Hall was contributed by the following companies:—Amalgamated Zinc (de Bavay's) Ltd., North Broken Hill Ltd., Junction North Broken Hill, No Liability, British Broken Hill Pty. Co. Ltd., The Broken Hill Pty. Block 14

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Co. Ltd.,the Broken Hill Pty. Ltd., the Sulphide Corporation Ltd., the Broken Hill Pty. Block 10 Co. Ltd., the Broken Hill South Ltd. and the Zinc Corporation Ltd. On 30th November 1920 Edward Walter Outhwaite executed a declaration of trust whereby he declared that he held the land and the title therefor and the buildings and furniture in trust for the above-mentioned companies in the proportions therein set out. In February 1920 the Government of the State of New South Wales and the above-mentioned companies installed an X-ray plant and other medical equipment in the hall to be used in connection with a commission appointed by the Government to inquire into lead-poisoning among miners in Broken Hill. The plant and equipment has since been used by the State Department of Labour and Industry for the purpose of examining miners applying for employment in the Broken Hill mines and for the purpose of examining miners applying for compensation who have worked in the Broken Hill mines. The Protestant Hall has been used and is still used by persons and bodies who hire the same for social and other purposes. The net receipts from the letting of the Protestant Hall are divided annually among the above-mentioned companies in proportion to the beneficial interest which each company holds in the said premises.

13. During the year ended 30th June 1932 the company received, in addition to income derived from the aforesaid investments, the following amount in cash :—

1931		
25th August.	On account company's proportion of excess of receipts over expenditure at Protestant Hall, Broken Hill	£13 1 1

14. During the year ended 30th June 1932 the company became liable to pay and did pay under the *Workmen's Compensation (Broken Hill) Act* the sum of £1,207 0s. 2d.

15. During the year the company also paid to the Postmaster-General of the Commonwealth the sum of £4 16s. on 23rd September 1931. This sum was paid for a lost telephone which had been used by the company in connection with telephone service, Broken Hill 503, which was disconnected on 5th June 1930 and for which lost telephone an account was rendered in August 1930.

16. During the year ended 30th June 1933 the company received, in addition to income derived from the aforesaid investments, the following amounts in cash :—

1932		
2nd August.	On account company's interest in Protestant Hall, Broken Hill	£10 10 10

17. During the year ended 30th June 1933 the company also received, on 4th August 1932, the sum of £5 upon the sale by it of a field assay balance which had formed part of the equipment used by it in connection with its business of treating concentrates.

18. During the year ended 30th June 1933 the company became liable to pay and did pay under the *Workmen's Compensation (Broken Hill) Act* the sum of £1,175 11s. 6d.

19. Prior to the year 1929 one A. J. de Bavay lent to the company an apparatus known as an autoclave for use in connection with its business of treating ore. In the year 1932 A. J. de Bavay demanded the return of the said autoclave, but the company was unable to return same as it had either been worn out or lost or otherwise disposed of and the company agreed to pay to the said de Bavay the value thereof. The company accordingly on 28th October 1932 paid to A. J. de Bavay the sum of £25 as the value of the said autoclave.

20. During the year ended 30th June 1934 the company paid to one Johnson its agent at Broken Hill the sum of £3 3s. for services rendered. During the same year, as the result of prolonged negotiations between the company and Zinc Producers Association Pty. Ltd., it was agreed that the company was liable to repay to Zinc Producers Association Pty. Ltd. sums received by the company by way of exchange on the sale price of concentrates sold prior to 1929 by it to Zinc Producers Association Pty. Ltd. Accordingly, on 19th June 1934, the company paid to Zinc Producers Association Pty. Ltd. the sum of £4,365 10s. 5d.

21. In the year ended 30th June 1934 the company also became liable to pay and did pay under the *Workmen's Compensation (Broken Hill) Act* aforesaid the sum of £1,244 4s. 4d.

22. During the year ended 30th June 1934 the company did not receive any sums in connection with its business as a producer of concentrates, but there is still owing to the company by Broken

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Hill South Ltd. the sum of £841 4s. 8d. This sum represents the proportion of the sum of £4,365 10s. 5d. mentioned in par. 20 hereof which the last-mentioned company is liable to contribute to the company pursuant to a joint working agreement entered into between Broken Hill South Ltd. and the company in the year 1909.

23. The respondent has refused to allow the company, in ascertaining its taxable income derived in the years ended 30th June 1932 and 30th June 1933 respectively, to deduct from its total assessable income the sums of £1,207 0s. 2d. and £1,175 11s. 6d. paid in such years respectively pursuant to the Acts referred to in par. 5 hereof.

24. The company claims that it is entitled to deduct each of the two last-mentioned sums from its assessable income for the respective years as being a loss made in each such year by the company in carrying on the business of a producer and seller of zinc concentrates in Australia.

The following questions were stated for the opinion of the Full Court :—

> On the facts stated in the special case, am I (1) at liberty, (2) bound as a matter of law, to find that the company is entitled to deduct either and which of the sums from its assessable income in ascertaining its taxable income for the relevant year ?

Coppel, for the appellant. The question is whether the company is entitled to deduct from its assessable income the sums paid in each assessable year into the fund established by the *Workmen's Compensation (Broken Hill) Act* of New South Wales, the contributions to the fund being for the former employees of the company or their dependants. The question is whether it is deductible under sec. 23 as a loss or outgoing or under sec. 26 as a loss in a business carried on in Australia. These sums paid as workmen's compensation are deductible under sec. 23 (1) (*a*) as a loss or outgoing incurred in producing the assessable income and that is so even though they are not incurred in the year of deduction. Alternatively, under sec. 26 (1) (*a*) the sums are deductible as losses incurred in the carrying

on of a business in Australia. The company is still carrying on business within the meaning of sec. 26, though it is not engaged in mining business, as it has assets from which it derives assessable income. The liability of the company to pay may continue for many years and vary from time to time, although the employment has ceased before the assessable period commenced. It is not open to the Commissioner to say that under a proper construction of the New South Wales Act the company need not have paid. It must be assumed that the company was under a legal compulsion to pay. These payments were losses or deductions which, if they were incurred while the company was carrying on business, would have been properly deductible under sec. 23 (1) (*a*). Sec. 25 (*e*) limits the range of deduction and does not limit it to losses and deductions incurred in any particular year (*Federal Commissioner of Taxation* v. *Gordon* (1); *Ward & Co.* v. *Commissioner of Taxes* (2)). The expression "the assessable income" is no narrower than "assessable income." Losses and outgoings incurred in gaining the income of previous years are deductible (*Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (3); *Maryborough Newspaper Co.* v. *Federal Commissioner of Taxation* (4)). Under sec. 26 the only question is one of fact, viz., whether the company is carrying on business at all in the years in question. The main purpose of sec. 26 was to allow a deduction of personal or partnership losses (*Doherty* v. *Federal Commissioner of Taxation* (5)). In fact the appellant was still carrying on business though it had given up part of it. If the company carries on any business the section applies. The company is still producing concentrates and will be so doing for a long time.

Moore, for the respondent. The only deductions which can be made under sec. 23 (1) (*a*) are those incurred in producing the income for the year in question. The deductions must be relevant to some period. Under sec. 26 "loss" must mean surplus of expenditure over receipts; if so, there is no evidence of any such loss: If the company had in fact been carrying on the business of

(1) (1930) 43 C.L.R. 456.
(2) (1923) A.C. 145, at p. 148.
(3) (1932) 48 C.L.R. 113, at p. 118.
(4) (1929) 43 C.L.R. 450.
(5) (1933) 48 C.L.R. 1.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

mining, it might be said that it came under the section, but it had ceased to carry on such a business for a long time (*Smith* v. *Anderson* (1); *Butchers* v. *Barnes* (2)). There must be an intention to carry on a business as a business. In 1924 the company ceased to produce concentrates. By 1929 it had disposed of all its plant except a small portion, and there is no evidence of the company carrying on business during the next two years. There was no carrying on of any business during the relevant period and, therefore, there was no loss within the meaning of sec. 26. The business came to an end in 1929. Then, even assuming there was a loss, it was not a loss incurred in carrying on a business.

Coppel, in reply. Sec. 26 (6) does not purport to give a definition of "loss" for all purposes of that section. It is merely indicating that where the whole or part of the income is derived from abroad it is to be treated in the way indicated. There is nothing to show that any of the income was earned abroad. Sec. 26 enables a person who shows a loss on one business to deduct it from any profit he may have made in some other business (*Melrose* v. *Federal Commissioner of Taxation* (3)).

Cur. adv. vult.

Dec. 19

The following written judgments were delivered:—

LATHAM C.J. In the first place the taxpayer company claims that the sums sought to be deducted are outgoings "actually incurred in gaining or producing the assessable income" (*Income Tax Assessment Act* 1922-1934, sec. 23 (1) (*a*)). The sums in question were contributions paid by the company to a fund in pursuance of a statutory obligation under the *Workmen's Compensation (Broken Hill) Act* 1920 (N.S.W.). The fund provides compensation for "mine-workers" (or their dependants) if the mine-workers suffer from certain diseases or if they die in consequence of those diseases. The definition of "mine-worker" limits the application of the term to persons whose names were on the pay-sheet or who were

(1) (1880) 15 Ch. D. 247, at pp. 277, 278.

(2) (1921) V.L.R. 148, at p. 151; 42 A.L.T. 167, at p. 168.

(3) (1919) 26 C.L.R. 494.

in the employ of any of the Broken Hill mines on 1st May 1919. The company was on that date engaged in the business of treating tailings and producing zinc concentrates and other metalliferous substances, and the company employed mine-workers in these operations. The company discontinued this business in 1924. The liability to contribute to the fund still continues, and in the years ending 30th June 1932 and 30th June 1933 the contributions paid by the company were £1,207 0s. 2d. and £1,175 11s. 6d. respectively. During those years the company did not derive any income from the treatment of tailings or the production of zinc concentrates &c. The assessable income of the company in those years was derived from investments and from a hall at Broken Hill in which it had an interest.

The phrase "losses and outgoings actually incurred in gaining or producing the assessable income" may, in relation to outgoings, be read as meaning that the outgoings must be an expenditure which has an effect in gaining or producing income, e.g., the purchase price of goods which are subsequently sold. But it is difficult to see how a loss, as distinct from an outgoing, can ever gain or produce income. On the contrary a loss, as distinguished from an outgoing, simply and merely reduces income—or capital, as the case may be. In order to make the section intelligible it must, in my opinion, be read as meaning "losses and outgoings actually incurred in the course of gaining or producing the assessable income."

In this case, however, the outgoings in question have no relation whatever to the assessable income of the years in question. It is true that, in cases of continuing businesses, it has been conceded (perhaps upon a not very strict construction of this or a similar legislative provision) that expenditure may be allowed as a deduction though it produces and is possibly designed to produce results in the way of income in a future year and not in the year in relation to which income is being assessed (*Ward & Co.* v. *Commissioner of Taxes* (1)). So it has also been held that expenditure which has a direct relation to income of a past year can be deducted in a later assessment year where it is of such a character that, in a continuing business, it must be met from time to time as a part of the process

(1) (1923) A.C. 145.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

of gaining assessable income (*Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (1)). But even this benevolent interpretation cannot assist the taxpayer in a case like this, where there has been a complete cessation of the income-producing operations out of which the necessity to make the outgoing arose.

In the second place, it is claimed that the sums in question should be deducted under sec. 26 (1) (*a*) of the *Income Tax Assessment Act* 1922-1934. I agree with what my brother *Dixon* says as to the great difficulties of interpreting and applying this section, but I also agree with him that it is not necessary to deal with these difficulties in this case. The provision relied upon cannot apply, for the reason that the "loss" claimed was not made "in carrying on a business." If it is to be regarded as a "loss" (as distinct from an outgoing), it takes place whether the company carries on any business or not. The position is the same if the section is read as being limited to the case of a taxpayer who conducts more than one business, so as to enable him to deduct a net loss in one business from what would be the taxable income derived from his other business or businesses. Upon this construction the loss claimed as a deduction must still be a loss made in carrying on a business.

Upon the view which I have taken it is not necessary to consider whether deductions allowed under secs. 23 and 26 can be excluded by the provision of sec. 25 (*e*) that a deduction shall not, in any case, be made in respect of money not wholly and exclusively laid out or expended for the production of assessable income.

In my opinion the questions asked should be answered in the negative.

RICH AND EVATT JJ. The appellant company was incorporated in 1909 and thereafter, until it discontinued its business, carried on the business of treating tailings and ore and producing zinc concentrates and other metalliferous substances at Broken Hill, New South Wales. On and from 31st December 1920 the appellant as a mine-owner became and is still liable under the *Workmen's Compensation (Broken Hill) Act* 1920 to make annual contributions in respect of

(1) (1932) 48 C.L.R. 113.

compensation payable to such employees of mine-owners at Broken Hill as have contracted pneumoconiosis or tuberculosis or to the dependants of deceased employees. The fund established by the Act is maintained as to one-half by contributions from the mine owners and as to the remaining half by contributions from the Government (Schedule, Part III., clauses 12-18). During the two relevant years the appellant, pursuant to the *Workmen's Compensation (Broken Hill) Act* 1920, paid as its contribution to the fund the respective sums of £1,207 0s. 2d. and £1,175 11s. 6d. and now claims to deduct each of these sums from its assessable income for the years ending 30th June 1932 and 30th June 1933 respectively as being a loss made in each such year by the appellant in carrying on the business of a producer and seller of zinc concentrates in Australia. In 1924 the appellant discontinued the production of zinc concentrates and by the year 1929 had disposed of its plant and machinery. Between the year 1924 and the year 1929 the appellant sold the whole of its stock on hand and closed its office at Broken Hill. During the relevant years ending 30th June 1932 and 30th June 1933 the whole of the appellant's assessable income was derived from certain investments in shares, Government bonds and money on deposit or at call. In addition the appellant received during these years two trifling sums in respect of its interest in a hall established by the Broken Hill mine-owners. The question for determination is whether, upon the facts stated in the case, the appellant company is entitled to deduct either and which of the sums mentioned from its assessable income in ascertaining its taxable income for the relevant year.

In our opinion the contribution or levy paid under the *Workmen's Compensation (Broken Hill) Act* 1920 cannot on any reasonable construction be said to be a loss or outgoing "incurred in gaining or producing the assessable income" when in fact the mine-owner at the periods in question was not carrying on a business founded on the ownership of the mine. We also think that sec. 26 of the *Income Tax Assessment Act*, which was called in aid, has no bearing on this case. The question submitted should be answered in the negative.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

STARKE J. Case stated under the *Income Tax Assessment Act* 1922-1934, sec. 51A (8).

The appellant carried on the business of treating tailings and ore and producing zinc concentrates and other metalliferous substances at Broken Hill. It closed its mine, and during the year 1924 discontinued the production of zinc concentrates. But it had on hand a large quantity of zinc concentrates, the whole of which was, between the years 1924 and 1929, sold and delivered to the Zinc Producers Association. During the financial years 1931-1932 and 1932-1933, the appellant contributed to a fund established under the *Workmen's Compensation (Broken Hill) Act*, 1920, No. 36, and its amendments, in respect of compensation payable to employees of mine-owners at Broken Hill (including the appellant) who had contracted pneumoconiosos or tuberculosis, or to the dependants of deceased employees. In the year 1931-1932 the appellant contributed or paid to the fund established under this Act the sum of £1,207 0s. 2d., and in the year 1932-1933 the sum of £1,175 11s. 6d. And it claims to deduct these sums from its assessable income for those years derived from property held or various investments made by it. But this income was not derived from mining operations carried on by the appellant.

Income tax is levied for each financial year upon income derived directly or indirectly during the period of twelve months preceding the financial year for which the tax is payable (*Income Tax Assessment Act* 1922-1934, sec. 13). The twenty-third section of the Act, however, provides: "In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis, and from it there shall be deducted—(*a*) all losses and outgoings (including commission, discount, travelling expenses, interest and expenses, and not being in the nature of losses and outgoings of capital) actually incurred in gaining or producing the assessable income." Then sec. 25 (*e*) provides: "A deduction shall not . . . be made in respect of any . . . money not wholly and exclusively laid out or expended for the production of assessable income." The question is whether the expenditure of the two sums already mentioned was actually incurred in gaining or producing the assessable income.

In *Ward & Co.* v. *Commissioner of Taxes* (1) the Judicial Committee observed, upon a somewhat similar provision: "In considering that question, their Lordships put aside the circumstance that the expenditure was not of such a nature as to produce income in the actual tax-year in which it was incurred. In every trade, much of the expenditure in each year—such as expenditure in the purchase of raw material, in the repair of plant or the advertisement of goods for sale—is designed to produce results wholly or partly in subsequent years; but, nevertheless, such expenditure is constantly allowed as a deduction for the year in which it is incurred." Taxable income may be estimated, I gather, in accordance with the principles of commercial trading, subject to any limitations prescribed by the Act. A taxpayer may deduct expenditure in the year of assessment (which is not capital outlay) incidental to or connected with his operations or earnings of that year. He has not to track, as *Ferguson* J. said in *Toohey's Ltd.* v. *Commissioner of Taxation for New South Wales* (2), each item of expenditure, and allocate it to some definite item of income. But in the present case the expenditure had nothing whatever to do with the appellant's income in the years in question. It was connected with and incidental to its mining operations, which had ceased long before the years in which the deduction is claimed. It was not, therefore, actually incurred in gaining the assessable income of the years 1931-1932 and 1932-1933.

Next it was contended that the appellant was entitled to a deduction under sec. 26 (1) (*a*) of the Act. The section, which is an obscure one, provides for bringing a loss in a business against assessable income gained from sources other than the business; against the net amount of that income, that is, the net amount or residue remaining after all other deductions allowed by the Act have been made. But the present case does not fall within the provision. The appellant had not a business and a source of income other than that business; in truth the appellant had but one business, though its major operations had ceased; and that business was the source of its income, though accruing from investments and rents.

The questions stated should be answered in the negative.

(1) (1923) A.C., at p. 148.

(2) (1922) 22 S.R. (N.S.W.) 432, at p. 440.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J. The taxpayer was the owner of a Broken Hill mine on 31st December 1920 when the *Workmen's Compensation (Broken Hill) Act* 1920 (N.S.W.) was passed, and its name appears in the list of mines and of their then owners annexed to the pneumoconiosis-tuberculosis compensation scheme to which that Act gave effect as a schedule. The scheme established a fund for the purpose of providing the compensation payable under it in respect of men who were employed in any of the mines on 1st May 1919 and who should suffer from pneumoconiosis or tuberculosis. The fund is maintained by contributions as to half by the mine-owners and as to half by the government of New South Wales. Unless otherwise agreed, the share of the mine-owners is contributed by each of them paying into the fund half the amount of compensation payable to the mine-workers, who, on or before 1st May 1919, were last employed by that mine-owner, together with a corresponding proportion of half the cost of administration. A joint committee administers the fund and fixes, levies and enforces, payment of the contributions.

During the twelve months ending 30th June 1932, the taxpayer's contribution amounted to £1,207 0s. 2d., and during the next twelve months to £1,175 11s. 6d. In ascertaining its taxable income derived during each of the periods, it seeks to deduct from its assessable income these respective amounts.

The taxpayer formerly carried on the treatment of tailings and ore and the production of zinc concentrates, but those operations it had discontinued some years before. It had sold its stocks and plant and shut up its office at Broken Hill. During the periods in question its sources of income consisted in shares in other companies, Government securities and loans in which its funds had been invested and in a very small return from an institution it had joined the other mine-owners in establishing at Broken Hill. In these circumstances the Commissioner refused to allow the deduction of the taxpayer's contributions to the compensation fund on the ground that they were not outgoings actually incurred in gaining or producing the assessable income. The liability to make the contributions was incurred by, or imposed upon, the taxpayer in the course of, or in consequence of, operations conducted for the purpose of profit. But the payments are annually recurring, and they have extended

into a period of time when those operations have entirely ceased and no further gain from them is receivable.

Sec. 23 (1) (*a*) does not authorize a deduction of outgoings unless incurred in gaining or producing the assessable income. A very wide application should be given to the expression "incurred in gaining or producing the assessable income." But the words refer to the assessable income from which the deduction is to be made. In a continuing business, items of expenditure are commonly treated as belonging to the accounting period in which they are met. It is not the practice to institute an inquiry into the exact time at which it is hoped that expenditure made within the accounting period will have an effect upon the production of assessable income and to refuse to allow it as a deduction if that time is found to lie beyond the period. And, in the case of expenditure for which the taxpayer contracted a liability during an earlier accounting period than that in which it has matured, it is not the practice to consider whether its effect upon the production of income of a still continuing undertaking has already been exhausted. The terms of sec. 23 (1) (*a*) have never been understood as requiring such a thing (see *Ward & Co.* v. *Commissioner of Taxes* (1) and *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (2)). The expression "in gaining or producing" has the force of "in the course of gaining or producing" and looks rather to the scope of the operations or activities and the relevance thereto of the expenditure than to purpose in itself. Purpose in itself may be the criterion expressed by the word "for" which occurs in the correlative prohibition contained in sec. 25 (*e*). This provision, however, does not prefix the definite article to the words "assessable income" and, therefore, is satisfied if the purpose is the production of income considered independently of division into periods of account. The practice which prevails in the case of continuing businesses is, therefore, not inconsistent with the interpretation of sec. 23 (1) (*a*) which makes it refer to the assessable income from which the deduction is to be made. The intention to refer to the assessable income under assessment is, I think, clearly expressed. This construction has been given by the Privy Council to the Indian *Income Tax Act*

(1) (1923) A.C., at p. 148.

(2) (1932) 48 C.L.R., at p. 118.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

1922, sec. 12 of which speaks of "expenditure . . . incurred solely for the purpose of making or earning *such* income." Lord *Tomlin* said, in delivering the judgment of the Board: "In their Lordships' view, on the true construction of that sub-section, the allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. Upon that footing, therefore, there can be no justification for deducting from the profits and gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred many years before" (*Income Tax Commissioner* v. *Basant Rai Takhat Singh* (1)). The expenditure there in question consisted in the cost of erecting buildings on leasehold land, and the taxpayer sought unsuccessfully to spread it over the term of the lease and deduct the proportionate parts from his gross income as an annual depreciation or loss.

In the present case, the actual expenditure was met in the current year. But it was completely dissociated from the gaining or producing of the assessable income of that year. The payment, in effect, did no more than keep down an annual charge arising out of a business which had closed. It is a charge of uncertain duration and of uncertain amount. It is not clear whether it is levied because no new owner has been found for the mine in respect of which it was imposed by the statutory scheme, or because the liability is considered to remain with the taxpayer notwithstanding a change of ownership of the mine. But these, in my opinion, are matters of no importance. What is important is the entire lack of connection between the assessable income and the expenditure. None of the assessable income arose out of the business in the course of which the taxpayer became liable to the charge. The sources from which the assessable income did arise included no operations in the course of which the payment was made. It was a payment independent of the production of the income, not an expenditure incurred in the course of its production.

In the difficulties which beset the taxpayer under sec. 23 (1) (*a*), its counsel turned to sec. 26. This complicated and obscure provision

(1) (1933) L.R. 60 Ind. App. 307, at p. 312.

presents many difficulties. Two of those which are relevant to this case should not be passed by, although, in the view I take, they do not now call for decision. The expression "net assessable income" describes one of the elements essential to the operation of sub-sec. 1. It is defined by sub-sec. 6 (*a*) to mean "the income by reference to which the deduction under section twenty-four of this Act would, but for the deduction allowable under this section, be calculated." But sec. 24 does not apply to companies. Only in the case of an individual can there be any income by reference to which the deduction under sec. 24 would be calculated. Does sec. 26 apply to companies, or is it, too, restricted to individuals?

The second difficulty is connected with the same definition of "net assessable income." In this Court the view has been adopted that the provisions of secs. 23 (1) (*a*) and 25 (*e*) apply in ascertaining the net "proceeds of any business carried on by the taxpayer," words forming part of the definition of income from personal exertion (sec. 4). Thus the net profits of the business may not be calculated first on ordinary commercial principles and then taken into the assessable income which is governed by secs. 23 (1) (*a*) and 25 (*e*) (see *Webster* v. *Deputy Federal Commissioner of Taxation (W.A.)* (1); *Federal Commissioner of Taxation* v. *Gordon* (2)). But, if the process required by this interpretation is pursued, ought not the gross proceeds of the business to be taken first into the general assessable income of the taxpayer and the gross losses and outgoings, so far as they are allowable deductions, subtracted from the mass? If so, how is sec. 26 worked? Or, perhaps, the question should be: What was the need for it except as to partnership losses? It appears to have been framed upon the view that inasmuch as, upon the hypothesis of a loss, the assessable income of the business must be less than the outgoings and allowable gross losses, the difference could not be deducted from other assessable income because *ex hypothesi* it was not incurred in the gaining or producing of that assessable income, but solely of the assessable income of the business. Perhaps it implies that in such a case the theory of *Webster's Case* (1) ceases to be applicable.

(1) (1926) 39 C.L.R. 130.

(2) (1930) 43 C.L.R., at p. 461.

H. C. OF A. 1935.

AMALGAMATED ZINC (DE BAVAY'S) LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon J.

Whatever may be the answer to these questions, I am clearly of opinion that sec. 26 does not apply to the present case. The "loss" to which its first two paragraphs refer is a net loss in carrying on a business, not a gross loss. The case intended to be met is that of a taxpayer with two or more independent potential sources of income, one of which is a business. If the business produces a net loss, the provision enables the taxpayer to throw that loss against his "net assessable income" from the other sources. The taxpayer in the present case did not have two independent sources of income, one of them a business. There was, in my opinion, no business producing a net loss.

An attempt was made to support the view that its metalliferous business notionally continued because one or two very trivial matters connected with the past unexpectedly arose during the years in question, and, in the following year, the taxpayer repaid a large overpayment which was found to have been made to it. But the very character of the incidents, their fewness and the triviality of all but the last, really serve to confirm and to illustrate the conclusion that the taxpayer's metalliferous business had altogether terminated.

The questions in the special case, in my opinion, should be answered: No.

McTIERNAN J. I agree that the questions asked should be answered in the negative.

The language of sec. 23 (1) (*a*) is quite inapt to authorize a deduction of the appellant's contribution to the compensation scheme referred to in the special case. Nor are these contributions deductible under sec. 26, for, assuming that this is a case to which the section might apply if sec. 26 (1) (*a*) were satisfied, there is no proof that the loss incurred by paying the compensation was made in carrying on a business in Australia. The evidence, indeed, shows that the appellant had ceased to carry on the business of mining when the contributions were paid.

Questions answered in the negative. Case remitted. Costs to be costs in the appeal.

Solicitors for the appellant, *Pavey, Wilson & Cohen.*

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

H. D. W.