

[HIGH COURT OF AUSTRALIA.]

G. E. STUART LIMITED APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF }
TAXATION } RESPONDENT.

Income Tax—Assessment—Company—Taxable income not distributed among shareholders—Determination by Commissioner that income could reasonably have been distributed—Agreement by company to pay income to creditor—Agreement preventing operation of Act—Income Tax Assessment Act 1922-1923 (No. 37 of 1922—No. 27 of 1923), secs. 21, 93. H. C. of A.
1927.
SYDNEY,
April 29.

Isaacs,
Rich and
Starke JJ.

In ascertaining, for the purposes of sec. 21 of the *Income Tax Assessment Act 1922-1923*, whether a company could reasonably have distributed up to two-thirds of its taxable income among its shareholders, the Commissioner must take into consideration a bona fide undertaking of the company not to distribute any of its income among the shareholders but to pay the whole of it to a creditor. Such an undertaking is not an agreement “preventing the operation of this Act in any respect,” within the meaning of sec. 93.

APPEAL from a Board of Review.

On 13th August 1913 by memorandum of agreement Sir Samuel McCaughey agreed to sell and George Ernest Stuart to buy certain station properties, called “Goolgumbbla” and “Singoremba,” with all stock and plant thereon, the price for the land being £146,916 2s. 10d. and for the stock and plant £33,820 10s. Certain payments on account were to be made on specified dates; and it was provided that payment of the balance of purchase-money, amounting to £140,737 12s. 10d., and interest thereon at $4\frac{1}{2}$ per cent per

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annum should be secured by mortgage which should contain (*inter alia*) a covenant that "the purchaser shall pay the vendor the balance of the purchase-money by paying over to him from time to time the whole of the net proceeds of all sales of live-stock wool or produce made from the said two stations and all rents collected by the purchaser from station lands that he may at any time lease to any person for agistment or other purposes until the purchase-money is paid." Mortgages were accordingly executed each containing a covenant in those terms. On 20th December 1920 George Ernest Stuart entered into agreements to sell to Herbert Michael Salenger, as trustee for a proposed company to be registered as G. E. Stuart Ltd., the two stations at the price of £147,720 and the stock and plant thereon at the price of £24,124. It was a term of these agreements that the company should pay and satisfy the mortgages given to Sir Samuel McCaughey. On 18th February 1921, pursuant to those agreements, George Ernest Stuart by indenture assigned and transferred to G. E. Stuart Ltd. all his estate, right, title, &c., in the two stations and the company covenanted for itself and its assigns that it would save harmless and keep indemnified George Ernest Stuart, his heirs, executors, &c., from the mortgages given by him to Sir Samuel McCaughey, and all claims and demands in respect thereof.

During the year ending 30th June 1923, while there was still due under the mortgages a sum exceeding £25,642, the company made a net profit of £22,412, none of which was distributed to the shareholders, since the company in pursuance of the mortgages paid all moneys received from sales of stock, wool, produce and rents to the representative of Sir Samuel McCaughey. On 19th July 1924 the Federal Commissioner of Taxation gave notice to the company that he had determined under sec. 21 of the *Income Tax Assessment Act* 1922-1923 that of the net profits £13,404 could reasonably have been distributed to the shareholders. On 6th May 1925 the Commissioner gave to the company notice that he had calculated the additional tax which would have been payable by the shareholders if the sum of £13,404 had been distributed among them, that such additional tax amounted to £2,208 13s. 2d., and that the company was required to pay that amount. The company appealed to the

Board of Review against that determination, the material ground of objection being that the Commissioner had not taken into consideration that, owing to the covenants of the mortgages with Sir Samuel McCaughey, the company was unable to distribute any part of its income until after the mortgage debt had been paid. The Board of Review having dismissed the appeal, the company now appealed to the High Court.

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E. M. Mitchell K.C. (with him *Bowie Wilson*), for the appellant. The Commissioner, when acting under sec. 21 of the *Income Tax Assessment Act* 1922-1923, is not entitled to disregard the terms of the agreement for sale that all moneys received were to be paid in reduction of the purchase price. Sec. 93 does not give him any such authority. [Counsel was stopped.]

Brissenden K.C. (with him *K. W. Street*), for the respondent. The agreement prevents the operation of the Act because, if it is valid as against the Commissioner, it prevents him from applying sec. 21, since while it stands he cannot determine that a sum could reasonably have been distributed. If the agreement prevents the operation of the Act detrimentally to the collection of tax, then, under sec. 93, the agreement must be ignored entirely for the purposes of the Act.

PER CURIAM. The decision of this case lies in a very small compass. We need not recapitulate the facts, they are assented to and undisputed, and the reason we think the appeal ought to be allowed is this: that in order to give full operation to sec. 21 of the Act, that is, in order to ascertain whether the company could reasonably have distributed up to two-thirds of its taxable income, it was necessary for the Commissioner to take into consideration a bona fide business undertaking of the company, whereby it had agreed that it should not distribute that money, but should pay it to a creditor. That being so, the agreement could not possibly fall within the only portion of sec. 93 under which it is suggested it did fall, namely, par. (d), "preventing the operation of this Act in any respect." That portion of sec. 93 is the only reason why it

H. C. OF A. 1927. was suggested that the additional tax was properly assessed. That failing, the appeal should be allowed with costs.

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Appeal allowed with costs.

Solicitors for the appellant, *Biddulph & Salenger.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

HENRY DEAN & SONS (SYDNEY) LIMITED . APPELLANT;
PLAINTIFF,

AND

P. O'DAY PROPRIETARY LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. 1927. *Sale of Goods—C.i.f. contract—Action for non-delivery—Readiness and willingness of buyer—Refusal to take up draft—Goods shipped not in accordance with contract—Invoice not covering goods.*

SYDNEY,
Mar. 30, 31;
May 6.

Knox C.J.,
Isaacs, Higgins,
Powers and
Starke JJ.

By a contract in writing the respondent agreed to sell and the appellant to buy "150 bales first selection Liverpool wheat-sacks" of a specified quality at a certain price per dozen "c.i.f.e. Sydney." Delivery was to be during November 1925 and the terms were "net cash against bill of lading or ship's order which will enable buyers to obtain delivery of the goods." On 10th November 1925 the respondent shipped in Melbourne certain sacks for delivery in Sydney in alleged performance of the contract, but the sacks were in fact not in accordance with the contract. On the same day the respondent sent to the appellant an invoice in which the goods were described as "150 bales Liverpool sacks," and drew on the appellant through a bank for the amount