

18
IN THE HIGH COURT OF AUSTRALIA.

*Australian Machinery and
Investment Company
Limited*

v.

*The Deputy Commissioner
of Taxation*

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at *Melbourne*
on *Monday, 8th October 1948*

AUSTRALIAN MACHINERY INVESTMENT CO. LTD.

v.

DEPUTY COMMISSIONER OF TAXATION

ORDER.

- (1) Declare that the business and operation from which the appellant company derived its profit were carried out in part in Australia and in part in the United Kingdom, and that for the purposes of sec. 23(q) of the Income Tax Assessment Act 1936 the income of the company is derived in part from sources out of Australia.
- (2) Declare that in ascertaining the profits derived from the sale of shares in the 27 Western Australian subsidiary companies the value of the consideration paid in English shares should be brought into account, and for that purpose sec. 21 of the Income Tax Assessment Act 1936 is applicable. Further declare that the operations of the taxpayer company amounted to carrying on a business for the purposes of sec. 28 and corresponding previous enactments, and that shares and options formed trading stock within the meaning of that section and of section 31 and corresponding previous enactments.
- (3) Declare that profits made from the realization of shares in English companies and options over such shares received as part of such consideration were derived partly from a source within Australia and partly from a source outside Australia, and the question (and what part from a source outside Australia) what part is derived from a source in Australia is a matter to be determined by the Commissioner subject to review and appeal under the provisions of the Income Tax Assessment Act 1936.

- (4) Declare that from the transaction between the appellant company and the Lalla Rookh Gold Mines Ltd. carried out in June and July 1936 the appellant company derived no profit and that in ascertaining the profit derived from the transaction with the English company Meekatharra Gold Mines Ltd. there should be deducted from the proceeds of sale the sum of £10,553, together with incidental expenses.
- (5) Declare that from the transaction between the appellant company and the Comet Gold Mines Ltd. carried out in October 1936 the appellant company derived no profit and that in ascertaining the profit from the transaction with English companies by which the appellant company contracted to sell shares acquired by the appellant company in Comet Gold Mines Ltd. there should be deducted from the proceeds of sale, viz. £A60,000, the sum of £44,754:2:6, together with any incidental expenses.
- (6) Declare that in so far as the cost of acquiring properties in Australia is allowable as a deduction in ascertaining the profits or taxable income of the appellant company it ought not to be apportioned but ought to be allowed in full.
- (7) Set aside the assessment appealed from.
- (8) Remit matter to the Commissioner to be dealt with under ~~the Income Tax Assessment Act 1936~~ the Income Tax Assessment Act 1936 and also for the reassessment of the appellant company's taxable income consistently with this order.
- (9) No order as to costs of appeal.

AUSTRALIAN MACHINERY AND INVESTMENT COMPANY LIMITED

v.

THE DEPUTY COMMISSIONER OF TAXATION

JUDGMENT

RICH J.

AUSTRALIAN MACHINERY AND INVESTMENT COMPANY LIMITED

V.

THE DEPUTY COMMISSIONER OF TAXATION

JUDGMENT

RICH J.

In this case, in relation to the specific questions which have now been submitted to me, the course has again been taken of arguing only matters of principle. Like questions of greater celebrity, they are in some respects puzzling, and, like them, they admit only of a wide solution.

Question A.

I answer this question as follows. The extent to which the appellant company made a profit or a loss by disposing in England of the shares of the 27 Western Australian companies to the 7 English companies in any year is an element to be taken into consideration in determining whether it made a profit, and if so, how much, during the year. Any such profit would have been derived partly from the Western Australian shares and partly from the English sales, and therefore partly from a source in Australia. The appellant company must have made during the year the whole of any profit derived from such dispositions during the year, unless in its other transactions it incurred losses which diminished or eliminated this profit. As to how the dispositions should be brought into ^{the} accounts for any year to which sections corresponding with sections 21 and 31 of the Act of 1936 are applicable - any consideration received otherwise than in cash must in the first instance be brought in at its money value under section 21. If still on hand at the end of the year, it must, under section 31, be then brought in at its cost price (that is, what had to be given to get it) unless the appellant company had elected to adopt the basis of market value, in which case it must be brought in at its value as at the end of the year.

According to the facts as stated, it cost the appellant company £52,836. 5. 8 to get the Western Australian shares which it sold in England to 7 English companies for £481,945.2.0 cash, shares of a nominal value of £1,075,000, and options to take up shares to the nominal value of £1,247,500.

/If

If the appellant company elected to proceed on a cost basis, its position was that it began these selling transactions with property which had cost it £52,836. 5. 8, and, without having bought or been made, a present of anything more, finished with £481,945. 2. 0 in cash, and a large number of shares and options. Thus, it made a cash profit of about £429,000 and had in addition a large number of English shares and options which had cost it nothing beyond what it had had to part with to realize the money profit. Hence, the increment in its trading stock constituted by the English shares and options had cost it nothing. On this basis, until it realized English shares or options it realized no more profits in respect of this transaction.

If the appellant company elected to proceed on a value basis, its position was that it began with Western Australian shares which had cost it £52,836. 5. 8, but might have been worth a great deal more or a great deal less. It finished with £481,945. 2. 0 in cash and a large number of English shares and options. On a value basis, it is necessary to ascertain the value of the Western Australian shares when the appellant company began to trade with them, and also to ascertain the sum of what it had realized in money and of the value of what it had on hand in forms other than cash when it finished its trading operations. The difference represents its profit or loss.

If the trading extended over more than one year, the appropriate process must be performed for ^{each} year: sections 29 and 31.

Since no argument has been addressed to me as to the figures or the details of the appellant company's selling transactions, I cannot give any more specific answer to this question.

Question B.

When the appellant company disposed in Australia of English shares or options over English shares, any resultant profit was derived partly from an English source, the shares /and

and options, and partly from an Australian source, the dispositions. The whole of the profit is liable to Federal income tax unless the part of it derived from the English source is not exempt from income tax in England, in which case this part is not liable to Federal income tax.

Question C (i)

As stated in the material submitted to me, the transaction was one by which the appellant company in effect transferred assets which had cost it £10,553 to a new Australian company floated to acquire them, and received for the assets fully paid shares in the new Australian company of a nominal amount of £42,000. As there is nothing to suggest that the appellant derived any benefit from the transaction (except that the new assets could be more readily marketed than the old), I answer C (i) in the negative.

C (ii)

As stated, the appellant company, in England, sold the shares in the Australian company to an English company for £42,000. The profit on this transaction consists of the amount by which £42,000 exceeds what it cost the appellant company to acquire the original assets and to cause them to be represented in the appellant company's hands by the shares sold to the English company.

Question D (i)

For the reasons stated in the answer to question C (i), I answer this in the negative.

D (ii)

Yes, by deducting the sum of £44,754. 2. 6 together with any incidental expenses: see answer to C (ii).

D (iii)

Since the appellant company was carrying on the business of trading in shares, its profits should be ascertained, not by the cash-basis mode but by the earnings-basis mode, which is the usual mode applicable to the assessment of the profits of a trading business which buys and sells: *Inland Revenue Commissioners v. Morrison*, 1932

S.C. 638 at 642; Commissioner of Taxes (S.A.) v. Executor Trustee & Agency Co. of South Australia Ltd., 63 C.L.R. 108 at 152-7.

Any income derived from the Comet transaction which is liable to Federal income tax is liable in the year in which the appellant company became legally entitled to the immediate receipt of the moneys which created the profit, not necessarily the year in which the contract was made or the year in which the moneys were actually received: Hall & Co. v. Inland Revenue Commissioners, 1921 3 K.B. 152.

Question E.

By section 51, all losses and outgoings, to the extent to which they are incurred in gaining or producing the assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income are allowable deductions, except to the extent to which they are incurred in relation to the gaining or production of exempt income. The outgoings here in question were not incurred in connection with deriving income from any of the English sources which may be exempt under Section 23 (q). To the extent to which they are allowable as outgoings, they are therefore allowable in full.

Question F.

These are questions of fact, and there is no sufficient material before me to enable me to answer them. In any event, as at present advised, I think this to be a matter to be determined in accordance with the regulations if there are any which are appropriate (and I have not been referred to any), or, failing any, by the Commissioner. If necessary, the assessment should be remitted to the Commissioner to deal with this matter.

Question G.

This is covered by the answer to Question F.

I was asked to grant a commission to take evidence in England. As I am remitting the matter to the Commissioner for reassessment I shall not, of course, accede to this request at the present stage. If the reassessment is appealed, nothing I have said will prevent an application for the purposes of that proceeding.

I have given careful consideration to the difficult question of costs. In all the circumstances of the case, and having regard to the partial nature of the success of the appellant, and to the order I am making, I think my discretion will be best exercised by making no order as to the costs of this appeal.
