Ct. Bk. No. 25 of 1957

IN THE HIGH COURT OF AUSTRALIA

PRINCE

V.

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

ORIGINAL

Judgment delivered at MELBOURNE

on MONDAY, 17TH AUGUST, 1959.

W. M. Houston, Govt. Print., Melb.

PRINCE

v.

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA

JUDGMENT

MENZIES J.

PRINCE

v.

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA

The taxpayer, David Howard Prince, has lodged objections against eighteen amended assessments of income tax for the years 1940 to 1957 inclusive and each of these objections, having been disallowed by the Commissioner, has been treated as an appeal to the Court. All the appeals have been heard together. The amended assessments appealed against in this manner were based upon a betterment statement constructed by the Commissioner after an investigation of the taxpayer's affairs and which arrived at the taxpayer's net assets first on the 30th June 1939 and then on each succeeding 30th June until the 30th June 1954. During this period, according to the statement prepared, the taxpayer's net assets increased from £16,596 to £205,851. To each yearly increase in net assets, there were added items properly to be regarded as expenditure out of net income, e.g., person expenditure and capital losses, and from the total so reached there were deducted items that could not be regarded as assessable income, e.g., capital profits and concessional deductions, to reach a taxable income upon a betterment basis for each year. From this there was then deducted the income which the taxpayer returned for the year, to arrive at a figure for income understated. This for the period totalled £175,000 approximately. On the taxable income calculated as aforesaid, tax was assessed for each year with additional tax in respect of the income understated. What was claimed from the taxpayer was the total of these amounts, less the tax already paid. The amended assessments increased the taxpayer's tax by £190,439.3.3 for Commonwealth tax for the period 1940 to 1954 inclusive, and by £1,820.18.1 for State Income Tax and Unemployment Relief Tax for the years 1940 and 1941, giving a total of £192,260.1.4.

The objections for the years 1955 to 1957 inclusive depended entirely upon the taxpayer's claim that as a primary producer he was entitled to the advantage of averaging his income in the manner provided by Div. 16 of Part III of the Income Tax Assessment Act. During the hearing, however, it became clear that the taxpayer during those years had an income in excess of that entitling him to the application of these provisions so that the appeals for the years 1955 to 1957 inclusive can be dismissed from further consideration.

There is no doubt that in each year from 1940 to 1954 inclusive the taxpayer had a taxable income substantially in excess of that shown in his income tax returns; indeed, in the final submission made to me on his behalf, a betterment statement was submitted which showed that over the period, income had been admittedly understated to the extent of £146,000 approximately. To take this at its face value might, however, be unfair to the taxpayer, because part of his case consisted of an attempt to show that the growth of the assets appearing in this betterment statement was due to large betting winnings between 1949 and 1954, which, it was claimed, were not part of his assessable income because betting was not then part of his business.

For the Commissioner, a revised betterment statement was constructed to take into account further assets which, it was claimed, had come to light in the course of the hearing, so that I have, as part of the submissions made to me, a revised betterment statement constructed by the Commissioner (Exhibits 29 and 199) and a betterment statement constructed for the taxpayer, each covering the period 1940 to 1954 inclusive. What I propose in the first place is to deal with the matters upon which these betterment statements do not agree and, with the exception of the most important item of Commonwealth bonds which I will postpone

for separate consideration, I will, after some general observations, deal with the items of difference in chronological order.

The general observations relate to the manner in which I should regard the evidence of the taxpayer himself and certain witnesses called on his behalf.

The taxpayer is now a man seventy-four years of age. He impressed me as a man of considerable ability who is, and has at all times been, the master of his own affairs. I judge him to be careful, resourceful and resolute. To those whom he regarded as having a claim upon him, he was open-handed and helpful to the point of quite mistaken loyalty. One instance of this is the very incident which resulted in the investigation which ultimately led to the making of the amended assessments under appeal. For some years, he had as a partner in a bookmaking business one Derbyshire who, in 1946, after returning from war service, wanted to get a licence as a paddock bookmaker; to assist Derbyshire to satisfy the appropriate authorities that he was a man of means, the taxpayer provided him temporarily with £10,000 worth of Commonwealth bonds which he could pretend he owned and which, in fact, he deposited for a short time with the Commercial Bank of Australia, 245 Elizabeth Street, Melbourne. It would seem that this kind of "loyal deceit" is not regarded as dishonourable among bookmakers (indeed, Dr. Coppel told me that what the taxpayer and Derbyshire did is just common practice), so that in the taxpayer's day of need, it is not surprising that there should appear friends to be "falsely true" to him. I am prepared to believe that at any point where the taxpayer felt his personal honour engaged he would do "the right thing" even if it were to his disadvantage, but I am satisfied that his accepted code of conduct did not require the observance of laws or standards which he regarded as oppressive, or forbid him the use of

deception in the evasion of such laws. In the category of oppressive laws he put the income tax Acts and I am satisfied that the taxpayer regarded the burden which these laws imposed upon everyone as something that those who were shrewd and bold were justified in evading. The methods of evasion which the taxpayer himself adopted were not elaborate or immediately expensive: he just understated his income and concealed his assets. When in the course of the hearing it became obvious that his income had been greatly understated, he took the next inevitable step for his own protection and sought to lay the blame upon others. I have no doubt, for instance, that the blame which the taxpayer sought to lay upon Mr. Hoy, who prepared his taxation returns up to 1952 (when he was succeeded by Mr. Burman), has been brought home to the taxpayer personally, who kept everybody in the dark as to his real income. It is apparent that Hoy made annual betterment statements as a means to calculate or check the taxpayer's income and that many assets which the taxpayer now acknowledges as having belonged to him were not disclosed to Hoy. A simple instance - and it is only an instance - is provided by reference to the personal loans made by the taxpayer. It is now admitted that the taxpayer lent at interest in the aggregate large sums of money as personal loans, rising in 1954 to over £31,000. This aggregate was lent to many people in small amounts and the taxpayer kept, and kept to himself, a card index recording details of these loans. In the betterment statement prepared by Hoy, there is little trace of such loans. In the year 1948, when it now appears that such loans increased in amount from £10,056 to £19,038, Hoy's betterment statement for the year, which is available and was in 1954 signed by the taxpayer, shows nothing beyond one advance of £2,533, and the only item "Interest on Loans other than Commonwealth Bonds" is the insignificant sum of £39. Another instance of the taxpayer's direct methods of tax evasion - and,

again, it is only an instance - is that having £2,000 of S.E.C. loans, when in 1952 he acquired a second £2,000, the interest, unlike that on the first, was not paid into his bank account but was paid/directly to him by cheque and his income tax return showed interest on £2,000 only. The taxpayer put such omissions down to oversight, but that I do not accept. It is in these circumstances that I have reached the conclusion that where the evidence of the taxpayer is in conflict with documents contemporaneous with events, I should prefer the evidence of the documents to that of the taxpayer even when it is supported by the evidence of friendly witnesses. Furthermore, in cases where the taxpayer is shown to have been the legal owner of property, I cannot readily accept evidence that the purchase price was provided in cash by his wife or some other person, or that the beneficial interest lay elsewhere. It is my conclusion that the taxpayer's bold and unscrupulous disregard of the income tax laws has been carried to the further point of the fabrication and the suppression of evidence in an endeavour to escape their operation. In this connexion, an unsatisfactory feature of the hearing was the absence of original records shown to have been in existence during the investigation of the taxpayer's affairs. I will have occasion later to refer to particular cases where such documents have disappeared.

The first item of difference relates to premiums paid upon an assurance policy effected on the life of the taxpayer in 1940 with the City Mutual Life Assurance Society Ltd. In that year, £2,018.15.0 was paid to cover premiums for five years; of this, £1,955 was paid in notes and the balance by the taxpayer's cheque; in 1944, there was another payment of £2,018.15.0 in cash to cover premiums from 1945 to 1950; further premiums were paid annually, and one during the lifetime of the taxpayer's wife was paid with the taxpayer's own cheque; after 1953, the taxpayer has admittedly paid all the annual premiums. The taxpayer's case is that his wife insured

his life, that the policy belonged to her, and that until her death on 1st July 1952 she paid the premiums. In addition to the taxpayer's own evidence, D. L. Marcussen, who was the agent who wrote the policy, gave evidence to the effect that when the taxpayer had agreed with him upon the insurance, the taxpayer called out to his wife that she was to insure him and she then brought a huge bundle of notes into the room of their home. After the lapse of nearly twenty years, Marcussen's account of what occurred was not entirely convincing, but, even taking it at its face value, I am not satisfied that the policy belonged to Mrs. Prince and the premiums were paid out of her money. Against such a conclusion, there are the following considerations: (1) that the taxpayer, and not his wife, was the policy holder; (2) that part of the first premium was paid by the taxpayer's own cheque; (3) that during the life of his wife, the taxpayer certainly paid one annual premium by cheque; (4) that the taxpayer, as a bookmaker, was in the habit of having in hand large sums of cash; (5) that although his wife had means of her own, there is no evidence but the taxpayer's that she had in their home thousands of pounds in cash, which the taxpayer himself attributed at one time to unidentified wins at the races and another to gifts from her relations in New Zealand; (6) that the taxpayer negotiated with Marcussen for interest on the premiums prepaid; and (7) that upon the death of his wife, the policy was treated as the policy of the taxpayer and not as part of the estate of his wife. Upon the evidence as a whole, I find that the policy was at all times the policy of the taxpayer and that the premiums were paid with his money.

The second item of difference is a sum of £1,000 admittedly given to the taxpayer's son, George Prince, in 1940 by way of an investment in Sunshine Homes Pty. Ltd. The taxpayer says that the gift was made to the son not by him but

by his wife. In a contemporaneous case for opinion of counsel relating to this transaction (Exhibit 14) and prepared by Davis, Cooke & Cussen, the taxpayer's solicitors, it is stated:- "We act for Mr. David Prince" and "Mr. Prince invested a total of £1,500 - £1,000 of which was invested in the name of his son, George Prince, who is at present a prisoner of war in Germany, and £500 in his own name." It is said on behalf of the taxpayer that these statements need modification in the light of what appears in the solicitors' file but, after examination of the file, I still regard the statements in the case for opinion as representing the solicitors' understanding of the matter. The passages I have quoted from the case for opinion were put to the taxpayer and he was asked whether they were true. He said "Yes", but later retracted this. Upon the whole, I find the gift was made by the taxpayer.

The third item of difference concerns the purchase of a brooch for £345 in 1941. That a brooch was bought for that sum is not in dispute, but the taxpayer says it was paid for by an insurance company to replace a brooch which his wife had lost. I am satisfied that a piece of jewellery was lost and replaced by the insurers, but I find that it was a ring and not a brooch. In doing so, I rely upon the evidence of E. H. Fox, the departmental officer in charge of the investigation of the taxpayer's affairs, relating to an interview with the taxpayer on the 21st June 1954 when, upon going through a list of jewellery which covered both the brooch and a ring, the taxpayer said it was a ring that had been lost and replaced by the insurance company and there was a discussion about the brooch without any suggestion from the taxpayer that it was a replacement for a lost brooch. I find, therefore, that the brooch was bought by the taxpayer for £345.

The fourth item of difference relates to the furniture purchased in 1942 and 1943 for the taxpayer's house at The Esplanade, Brighton, part of which was sold in 1948.

For the Commissioner, it was said that £3,017 was spent in 1942 and 1943; for the taxpayer, it was in the long run conceded that in this period £2,517 had been spent. The evidence of the price paid for what had been bought then was necessarily vague after a lapse of seventeen years and I am not prepared to find that more was spent than was finally admitted on behalf of the taxpayer. So far as the sale of furniture was concerned, it is said for the taxpayer that so much of the furniture as was sold in 1948 realised £4,750; for the Commissioner, it is said that the amount was £3,750. An item in the betterment statement prepared by Mr. Hoy for the taxpayer for 1948 shows the sale price of the house and furniture at £12,467. The taxpayer's contention is that this is wrong and the total was £13,467. In this instance, I prefer the contemporaneous document which was signed by the taxpayer before it was delivered to Mr. Fox in 1954. As it is common ground that the price of the house was £8,717, I find the sale price of the furniture was £3,750.

The fifth item of difference relates to balances after 1942 in what has been called the "Samuel Smith Bank Account" and, as this concerns the betting problems that I will have to consider later, I will defer it for the time being.

The sixth difference relates to a horse, "Gliding Star", purchased in 1948 for £800 which was paid by the taxpayer. The taxpayer claims that one-half of this sum was provided by another person, that is, the trainer. His evidence about this was vague and, on the whole, I find no sufficient reason for finding that part of what he paid was refunded to him. This conclusion is reinforced by the circumstance that when the horse was sold in 1950, there is no evidence that any part of the selling price was paid by the taxpayer to any other person.

The seventh difference concerns a loan of £500 which, it is claimed by the Commissioner, was made to Mrs. T. J. Prince in 1949. There is no evidence to warrant a conclusion that

there was such a loan. I do find, however, that in the same year the taxpayer paid £133 for Mrs. Prince for shares in Mount Morgan Limited. The payment by the taxpayer's cheque is admitted, and the point for decision is whether Mrs. Prince gave him the money. I am not satisfied that she did.

The eighth difference is one that must be dealt with in some detail. It concerns the beneficial ownership of 5,000 shares of £1 each in a company, Trans Otway Limited, in which the taxpayer was interested with A. J. B. Deacon. Both were shareholders, both were directors, and it seems clear that the taxpayer's interest in the company was due to Deacon. The 5,000 shares in issue were allotted to Deacon and both the taxpayer and Deacon have given evidence that the shares always belonged to Deacon and that the taxpayer had no interest in them whatsoever. For a contrary conclusion, the Commissioner relies upon a declaration of trust (Exhibit "X") dated the 17th December 1948 prepared by the taxpayer's solicitors upon, as I find, the taxpayer's instructions, and which was executed by Deacon. This deed, wherein the taxpayer is called the beneficiary and Deacon the trustee, contains the following recital and declaration of trust:-

"WHEREAS the Beneficiary has laterly purchased or caused to be purchased Five thousand fully paid up £1. Shares in a Company registered under the Companies Act of the State of Victoria and known as Trans Otway Limited AND WHEREAS the Purchase was made by the Trustee as nominee for the Beneficiary who provided the money for such purchase as aforesaid and it was agreed prior to the date of such purchase that the Trustee should execute a Declaration of Trust as is hereinafter contained NOW THESE PRESENTS WITNESSETH:

1. THE Trustee hereby declares that he holds the Shares, namely, Five thousand fully paid up £1. Shares in the capital of a Company incorporated in the State of Victoria under the

Companies Act 1938 under the style or name of Trans Otway Limited and that he holds the said Shares and all dividends and interest accrued or to accrue upon the same upon trust for the Beneficiary his executors administrators and assigns and agrees to transfer pay and deal with the said shares dividends and interest in such manner as he or they shall from time to time direct."

It is established that Deacon, about October 1948, paid £10,000 for the purchase of the San Toy Cafe, Lorne, for Trans Otway Limited. The company was not then in business and Deacon obtained the £10,000 from the taxpayer, of which £5,000 was without question the money of the taxpayer. The other £5,000, according to the taxpayer and Deacon, was won from the taxpayer who was then a registered bookmaker, upon a double. The £5,000 admittedly advanced by the taxpayer was used to subscribe for shares in his own name which were issued to him on the 2nd February 1949 : Certificate 263 is the share certificate for these shares. On the same day, 5,000 shares were issued to Deacon (who also obtained a further 500 shares) : Certificate 271 was the share certificate for these 5,000 shares. On the 5th April 1949, Certificates 263 and 271 were lodged with the Commercial Bank of Australia, 245 Elizabeth Street, Melbourne, under the name of the taxpayer. Share Certificate 271 was taken away from the Bank on the 22nd December 1952. The entries in the Bank's Safe Custody Register relating to lodgment of these shares appear as follows (Exhibit 10):-

Date of Lodgment	Nature of Instrument etc.	Date of Instrument etc.	Description	Signature of Person Receiving Documents	Date of Delivery
			Certificate No. 271 lodged on behalf of A.J.B. Deacon		
5/4/49	Scrip	2/2/49	Certificate No. 271 Trans Otway Ltd. £1- fully paid 5000 shares	(Signed) A.J. DEACON (Signed) D.H. PRINCE	22.12.52
	"	2/2/40	Certificate No. 263 Trans Otway Ltd. £1- fully paid 5000 shares	(Signed) D.H. PRINCE	30.11.57

The signature "A.J. Deacon" is the signature of Deacon, and the signature "D.H. Prince" is the signature of the taxpayer. It is not possible to be certain about what happened at the Bank but, having regard to the evidence as a whole, my reconstruction is that the two scrip certificates were lodged with the Bank on the 5th April 1949 and entered under the name of the taxpayer among other assets lodged by him, so that Certificate 271 could not be withdrawn from the Bank without the taxpayer's authority. Probably then, but it may be at some later time, the words "Certificate No. 271 lodged on behalf of A.J.B. Deacon" were written by a Bank officer. When these words were written, Deacon signed "A.J. Deacon". Just why this was done I do not know. When Certificate 271 was withdrawn on the 22nd December 1952, the taxpayer has signed "D.H. Prince" and added his signature. An unsuccessful attempt was made by the Commissioner to prove that Deacon accounted to the taxpayer for the dividends he received with the 5,000 shares in question. On the one hand, there is, therefore, the evidence of the taxpayer and Deacon that the shares belonged to Deacon and the circumstance that it is not proved that Deacon accounted to Prince for dividends. On the other hand, there is the declaration of trust and the lodging of the share certificate in the taxpayer's name. In these

circumstances, I do not feel it possible to accept the evidence of the taxpayer and Deacon, and I prefer to rely upon the contemporaneous document and the lodging of the scrip certificate with the Bank so that it was under the taxpayer's control. I should say that Deacon gave two explanations of the declaration of trust, but neither was consistent with the contents of the document that he executed. I do not accept the evidence that of the £10,000 handed by the taxpayer to Deacon, £5,000 was the proceeds of a winning double. The evidence was that it was a course bet at Caulfield at the Melbourne Racing Club meeting on the 30th September 1948, settled at the Victorian Club during the following week. Deacon admitted that he had told people it was a Williamstown meeting, and the taxpayer's income tax return for the year ended the 30th June 1949 shows that at the meeting at Caulfield on the 30th September 1948, he finished up a winner of £526/10/-. I find that the taxpayer was the beneficial owner of the shares in question by virtue of the declaration of trust executed by Deacon.

The ninth item in dispute is the price of a Fiat motor car purchased in 1950 for £754 in cash. It is clear that the car was purchased, registered in the taxpayer's name and sold upon his instructions, but it is his evidence that it was paid for in cash by his wife and, when it was sold, the proceeds went to his brother, for whose use it had been bought. The fact that it was registered as the taxpayer's motor car weighs more with me than the evidence that the cash used to pay for it belonged to the taxpayer's wife. My conclusion is, I think, supported by the fact that the net proceeds of the sale of the car in June 1954, that is, £340, together with the insurance repaid, £4/0/9, were paid into the taxpayer's bank account on the 11th and 18th June respectively, and there is nothing to show that these sums were paid by the taxpayer to his brother.

Item ten in dispute relates to a capital profit claimed by the taxpayer on the sale of dollars won by the taxpayer at poker in Paris. That the taxpayer won some dollars I accept; that he sold 200 of them for £61 I also accept; but I am not prepared to accept the very vague evidence that the capital profit was larger because some uncertain number of dollars were sold for 10/- each to some person unnamed in Sydney.

Item eleven in dispute relates to a capital profit claimed by the taxpayer upon the purchase and sale of property in the circumstances which I will set out. One S. J. Cuddigan was one of the executors of the will of J. E. Fraser, deceased, whose estate included a pair of shops and dwellings in Bay Road, Sandringham. Cuddigan told the taxpayer that the property was being sold by the executors and would bring about £7,000, at which price it would be a bargain. He lent the taxpayer £2,000 to help purchase the property and on the 13th June 1951 the taxpayer bought it at auction for £6,700. On the 14th August 1951 the taxpayer sold the property to Cuddigan for £7,306. On the 24th September 1951 the taxpayer gave Cuddigan a cheque for £500 which he described on the cheque butt as "Refund. J. Cuddigan". Light is thrown upon this transaction by a copy of a letter of the 20th August 1951 from the taxpayer to Hoy, his taxation agent, (which I admitted as secondary evidence because the original has disappeared since it was inspected and copied by the departmental investigators), advising Hoy that the taxpayer had arranged with Cuddigan to buy the property and sell it to Cuddigan at cost plus expenses and plus £500. In these circumstances, whether or not the £500 "Refund. J. Cuddigan" relates to the property transaction - and the taxpayer denied that it did - the circumstances are such that the taxpayer's claim for a capital profit of £500 cannot be sustained. There was either no profit, or any profit was income, not capital.

Item twelve of difference arises in 1954 as to two personal loans - one of £200 to R. Ryan and the other of £2,000 to one Dooley. The question is whether these loans were outstanding on the 30th June 1954, and I find they were not. I regard the entry in the taxpayer's settling book for the 1st July 1954: "Bob Ryan 2L." as more consistent with the making of a loan on that day than with the repayment of a loan. So far as the Dooley loan is concerned, there is nothing to show that money lent previously was outstanding on the 30th June 1954.

In considering the items in dispute, I have disregarded what the taxpayer claims to be capital profits and capital losses on racehorses; I have done this because, for reasons to be stated later, I have come to the conclusion that at all times material, racing was part of the business of the taxpayer and any profits or losses upon the acquisition or disposal of horses was of a revenue character.

This brings me to the question of what Commonwealth loans the taxpayer had during the period, and about this there is a most important difference which can be determined only by the detailed examination of a good deal of evidence. The holdings by the taxpayer in his own name have been agreed and in no year does the total exceed £6,817, which was reached in 1950. It is the taxpayer's case that at no time did he beneficially own any other bonds, except those held from day to day in lieu of cash for the conduct of his bookmaking business. The Commissioner, on the other hand, treats the taxpayer from 1944 on as owning many other bonds, reaching a maximum total of £50,270 in 1950. The additional bonds the Commissioner alleges were for the most part bought and sold by the taxpayer in names other than his own. The taxpayer admits the purchase, but not the sale, of some bonds in the

name "D. Howard", but in no other name, and says as to the "D. Howard" bonds that he had no beneficial interest in them and that they were bought for his very good friend, Harold Allen, a bookmaker who needed assistance because his affairs were under investigation by the Taxation Department. Harold Allen died in April 1953 and in December 1953 the taxpayer, who was then a widower, married Mr. Allen's widow. The taxpayer's evidence was that all bonds purchased by him for Harold Allen were handed over to Allen and none remained in the taxpayer's possession. The questions then are:- (1) Did the taxpayer not only buy but sell bonds in the name "D. Howard"? (2) Did the bonds purchased in the name "D. Howard" belong to the taxpayer or to Harold Allen? (3) Did the taxpayer buy or sell bonds in names other than his own and "D. Howard"?

The Commissioner submitted a Bond Movement Analysis (Exhibit 41), which I find it necessary to incorporate in my judgment as follows:-

D. H. PRINCE - BOND MOVEMENT ANALYSIS

Name of Account	Purchase Account: Date	Denomination and Series	Bond No.	Selling Account: Bond No.	Denomination and Series	Selling Account
D. Howard - Davis, Cooke & Cussen	2/11/43 ex L. Mildred & Co.	500 3¼ 58	AK 1210	AK 1210	500 3¼ 58	J. Howard. Davis, Cooke & Cussen
		" " "	AK 1364	AK 1364	" " "	" " " " "
		" " "	AK 4507	AK 4507	" " "	D. Howard. Lindsay Mildred & Co.
		" " "	AK 5371	AK 5371	" " "	" " " " "
	27/10/43 ex L. G. May	500 3¼ 58	AK 5393	AK 5393	500 3¼ 58	D. Howard. Lindsay Mildred & Co.
		100 " "	AK 13044	AK 13044	100 " "	J. David. Guest & Bell
		100 " "	AK 19346	AK 19346	100 " "	" " " "
		100 " "	AK 26029	AK 26029	100 " "	" " " "
		100 " "	AK 23419	AK 23419	100 " "	" " " "
		1100 " "	No records	AK 4227	100 " "	" " " "
				AK 13085	100 " "	" " " "
				AK 23194	100 " "	" " " "
				AK 23420	100 " "	" " " "
				AK 25901	100 " "	" " " "
				AK 26006	100 " "	" " " "
				AK 26069	100 " "	" " " "
				AK 26070	100 " "	" " " "
				AK 26078	100 " "	" " " "
				AK 26080	100 " "	" " " "
				AK 26138	100 " "	" " " "
	26/3/45 ex L. G. May	1000 3¼ 57	AJ 5494 ✱	AJ 5494	1000 3¼ 57	J. Smith. Guest & Bell
		" " "	AJ 5537	AJ 5537	" " "	J. Oliver. L. Mildred & Co.
	30/5/46 ex L. G. May	1000 3¼ 57	AJ 5422 ✱	AJ 5422	1000 3¼ 57	J. Smith. Guest & Bell
		" " "	AJ 5461 ✱	AJ 5461	" " "	" " " "
D. Howard - L. Mildred & Co.	7/9/44	1000 3¼ 57	AJ 5457 ✱	AJ 5457	1000 3¼ 57	J. Smith. Guest & Bell
		" " "	AJ 5459 ✱	AJ 5459	" " "	" " " "
	19/11/45	1000 3¼ 50/58	AK 5662 ✱	AK 5662	1000 3¼ 50/58	" " " "
		500 " "	AK 1254	AK 1254	500 " "	D. Howard. L. Mildred & Co.
		100 3¼ 57	AJ 1762	AJ 1762	100 3¼ 57	J. David. Guest & Bell
		" " "	AJ 5440	AJ 5440	" " "	" " " "
		" " "	AJ 5629	AJ 5629	" " "	" " " "
		" " "	AJ 17409	AJ 17409	" " "	" " " "
		" " "	AJ 19854	AJ 19854	" " "	" " " "
	6/5/49	1000 3¼ 55/58	AV 2111	No record	1000 3¼ 55/58	Safe Custody. N.B.A. Mornington
		500 " "	AV 366	" "	500 " "	" " " "
		100 " "	AV 2745	" "	100 " "	" " " "
		100 " "	AV 4794	" "	100 " "	" " " "
		100 " "	AV 5044	" "	100 " "	" " " "
		100 " "	AV 10553	" "	100 " "	" " " "
		100 " "	AV 10782	" "	100 " "	" " " "
J. David - Guest & Bell	29/5/46	1000 3¼ 59	AP 6816 ✱	AP 6816	1000 3¼ 59	J. Smith. Guest & Bell
		" " "	AP 6932 ✱	AP 6932	" " "	" " " "
	21/6/46	1000 3¼ 61	AT 1524	AT 1524	1000 3¼ 61	J. McAllister. L. J. Callaway
	9/7/46	1000 3¼ 59	AP 88			J. David. Davis, Cooke & Cussen (to I. Potter & Co.)
	9/7/46	1000 3¼ 59	AP 160	AP 160	1000 3¼ 59	J. McAllister. L. J. Callaway
	16/8/46	1000 3¼ 57	AJ 1053	AJ 1053	1000 3¼ 57	J. Oliver. Lindsay Mildred & Co.
	18/11/46	1000 3¼ 61	AT 1507	AT 1507	1000 3¼ 61	J. McAllister. L. J. Callaway
		" " "	AT 3024	AT 3024	" " "	" " " "
	20/12/46	1000 3¼ 55/58	AV 379	AV 379	1000 3¼ 55/58	J. Robertson. (Robinson) Guest & Bell
		500 " "	AV 202	AV 202	500 " "	" " " "
		500 " "	AV 406	AV 406	" " "	" " " "
		500 " "	AV 221	AV 221	" " "	Cancelled in Queensland
		500 " "	AV 427	AV 427	" " "	" " "
	22/5/47	1000 3¼ 61	AT 372	AT 372	1000 3¼ 61	J. McAllister. L. J. Callaway
		" " "	AT 3427	AT 3427	" " "	" " " "
	22/3/48	1000 3¼ 60	AR 1082	AR 1082	1000 3¼ 60	J. David. Davis, Cooke & Cussen (ex Reid & Co.)
	22/3/48	1000 3¼ 60	AR 1180			J. David. Davis, Cooke & Cussen (t'fer to Belot Estate)
	17/3/49	1000 3¼ 55/58	AV 365	AV 365	1000 3¼ 60	Cancelled Queensland
		" " "	AV 2060	AV 2060	" " "	" "
	25/10/49	1000 3¼ 55/58	AV 2120	AV 2120	1000 3¼ 55/58	A. George. Guest & Bell
		" " "	AV 2177	AV 2177	" " "	" " " "

		Purchase Account			Selling Account		
Name of Account	Date	Denomination and Series	Bond No.	Bond No.	Denomination and Series	Selling Account	
J. David - Guest & Bell (Cont.)	24/11/49	1000 3⅛ 63	BD 2115	No record	1000 3⅛ 63	Safe Custody.	N.B.A. Mornington
		1000 " "	BD 2870	" "	1000 " "	"	" " "
J.D. Harrison - L. G. May	30/6/47	1000 3⅛ 59	AY 528	AY 528	1000 3⅛ 59	Cancelled	Queensland.
		" " "	AY 529	AY 529	" " "	"	"
B. Price - Byron Moore, Day & Journeaux	28/11/45	100 3¼ 57	AJ 1331	AJ 1331	100 3¼ 57	J. David.	Guest & Bell
		" " "	AJ 5767	AJ 5767	" " "	"	" " "
		" " "	AJ 6039	AJ 6039	" " "	"	" " "
		" " "	AJ 6217	AJ 6217	" " "	"	" " "
		" " "	AJ 6225	AJ 6225	" " "	"	" " "
		" " "	AJ 10528	AJ 10528	" " "	"	" " "
		" " "	AJ 10756	AJ 10756	" " "	"	" " "
		" " "	AJ 16820	AJ 16820	" " "	"	" " "
		" " "	AJ 16918	AJ 16918	" " "	"	" " "
		" " "	AJ 19758	AJ 19758	" " "	"	" " "
		" " "	AJ 19853	AJ 19853	" " "	"	" " "
		" " "	AJ 19896	AJ 19896	" " "	"	" " "
		" " "	AJ 19897	AJ 19897	" " "	"	" " "
	28/11/45	500 3¼ 57	No record	AJ 3059	500 3¼ 57	J. Howard.	Davis, Cooke & Cussen (L. G. May)
		100 " "	" "	AJ 2465	100 " "	J. David.	Guest & Bell
		50 " "	" "	AJ 4041	50 " "	"	" " "
		10 " "	No record	AJ 4898	10 " "	"	" " "
		10 " "	AJ 4756	AJ 4756	10 " "	"	" " "
		10 " "	AJ 8593	AJ 8593	10 " "	"	" " "
		10 " "	AJ 9829	AJ 9829	10 " "	"	" " "
		10 " "	AJ 9833	AJ 9833	10 " "	"	" " "
A. George - Guest & Bell	5/4/48	1000 3¼ 60	AR 1455	AR 1455	1000 3¼ 60	A. George.	Guest & Bell
	8/6/48	1000 3¼ 55/58	No record	AV 2073	1000 3¼ 55/58	A. George.	Guest & Bell
	14/7/48	1000 3¼ 59	AP 6918	AP 6918	1000 3¼ 59	"	" " "
	10/6/49	2000 3¼ 55/58	No record	AV 572	1000 3¼ 55/58	"	" " "
				AV 2116	1000 " "	"	" " "
	18/10/49	2000 3¼ 55/58	" "	AV 204	" " "	"	" " "
				AV 2132	" " "	"	" " "
Purchase Account not located	Y/E 30/6/45	1000 3¼ 57	AJ 5541 ✱	AJ 5541	1000 3¼ 57	J. Smith.	Guest & Bell
		1000 3¼ 50/58	AK 555 ✱	AK 555	100 3¼ 50/58	"	" " "
		100 x 10 3¼ 61	AT 31501 -31600	AT 31501 -31600	100x 10 3¼ 61	J. David.	Guest & Bell
Mrs. P. J. Prince - Direct application lodged S/C E.S.A. North Brighton from 6/1/44 to 14/3/44	12/10/43	500 3¼ 59	AP 5514	AP 5514	500 3¼ 59	J. David.	Guest & Bell

✱ Bonds loaned to W. Derbyshire and deposited by him for Safe Custody at C.B.A. 245 Elizabeth St. on 4/6/46. Withdrawn 11/6/46.

(This copy of Exhibit 41 incorporates certain agreed amendments.)

The first thing to be said is that I find this statement does record accurately what happened, with the reservation for the present that it is a matter for decision:- (1) whether the bonds lodged in safe custody with the National Bank of Australasia, Mornington, were the same bonds as those set out opposite on the "Purchases Account" side of the statement; (2) whether the bonds for which no "Purchase Account" was located were purchased as is set out; and (3) whether the bonds on the "Purchases" side for which no numbers are recorded were bonds with the numbers of those set out opposite on the "Selling Account" side of the statement. I am also satisfied that the ten £1,000 bonds each marked with a "A" were handed by the taxpayer to Derbyshire at the beginning of June 1946 and were held for Derbyshire in safe custody at the Commercial Bank of Australia at 245 Elizabeth Street, Melbourne, from the 4th June 1946 to the 11th June 1946. It is also fully established that the bonds of the issues and denominations shown as held in safe custody at the National Bank of Australasia, Mornington, were held by the Bank for the taxpayer.

Before I come directly to the questions of disputed identity, there are findings to be made about collateral matters that have an important bearing upon these questions, and it is convenient here to record these findings as follows:-

(1) Mr. A. F. H. Davis, a member of the firm of Davis, Cooke & Cussen and the taxpayer's solicitor in these proceedings, acted for him in various matters during the whole period with which I am now concerned. Davis knew whether or not "J. David" and "J. Howard" were two names for the taxpayer because his books show that he bought and sold bonds for a person or persons so described. Moreover, Davis, in addition to knowing that the taxpayer used the name "D. Howard", knew whether that name was used by any other person for whom he bought bonds.

(2) For the period from 1943 to July 1946, the records of Davis, Cooke & Cussen must have contained entries relevant to the purchase of bonds for a client who used the name "D. Howard", that is, the taxpayer. There is a significant gap in the firm's records. The ledger book is kept on the loose-leaf system and, although the page relevant to "D. Howard" was in existence while the investigation of the taxpayer's affairs was proceeding - because it was photographed and the photostat is Exhibit 25 - the original has not been produced and no explanation of its absence has been given. Indeed when this ledger account was called for, Mr. Davis handed to Mr. Burman, who was then in the witness box, a book which began in July 1946. The other missing record is the cash book of Davis, Cooke & Cussen for the period from March to July 1946. This too must have contained relevant entries. I am not prepared to assume that the non-production of the records is to be explained simply by the innocent loss of part of the ledger and of a cash book; on the other hand, I reject the suggestion made by Mr. Eggleston that the cash book for the period May 1944 to March 1946 (Exhibit 200) originally ran until July 1946 and has been mutilated by the extraction of the last folded section covering the period from towards the end of March until July. However, in the course of the hearing, I intimated the circumstances that gave rise to doubts about the genuineness of Exhibit 200 and I should say that the explanations put forward by Mr. Aickin have not entirely removed these doubts. I am left, therefore, in an uncertain state of mind about the genuineness of Exhibit 200 and the earlier part of Exhibit "00" which follows it, and I am not satisfied that the cash book entries recorded in those books from May 1944 to the 1st June 1947 are original entries.

(3) A block of cheque butts of Davis, Cooke & Cussen containing the original butt of cheque 26110 with the following notation:

"26110
3. 9. 54
J. Howard
D. Prince
£1451.10/- "

(the amount of the cheque was £1,451/10/- and the initial "1" has not been reproduced upon the photostat (Exhibit 188), which I admitted as secondary evidence of the butt) has not been produced, and the circumstances of its non-production are more consistent with deliberate suppression than with innocent loss because, in the course of the investigation by officers of the Taxation Department, this cheque butt was a subject of discussion between an officer and Davis.

(4) Having regard to his knowledge of the identity and dealings of "D. Howard", "J. David" and "J. Howard", and the fact that the genuineness of his records was seriously in question and has not been satisfactorily resolved, the decision, of which the taxpayer showed himself aware, not to call Davis as a witness on his behalf is to be explained only on the footing that his evidence would not have assisted the taxpayer. The significance of the taxpayer's failure to call Mr. Davis is something that I will return to later in dealing with particular matters that I have to decide.

(5) It is highly probable that the identities of the following clients were known in the following stockbroking firms at the following dates when transactions with them were recorded:-

Client	Stockbroker	Date
"D. Howard"	Lindsay Mildred & Co.	1943-1949
"J. Oliver"	Lindsay Mildred & Co.	1954
"J. David"	Guest & Bell	1946-1950
"A. George"	Guest & Bell	1948-1952
"J. Smith"	Guest & Bell	1953
"J. Robertson" (or "Robinson")	Guest & Bell	1953
"B. Price"	Byron Moore, Day & Journeaux	1945
"J.D. Harrison"	L. G. May & Son	1947

(6) It is also highly probable that Mr. Bell, who is at present a partner in Guest & Bell, knows the identities of "David", "George", "Smith" and "Robertson", and that Mr. Carver, who is a partner in Byron Moore, Day & Journeaux, knows the identity of "Price".

Neither Mr. Bell nor Mr. Carver nor any witness from a stockbroking office who admitted to personal knowledge of any of the clients whose names I have stated was called on behalf of the Commissioner, and no witness from a stockbroking office was called on behalf of the taxpayer, so that the question of identification is left to inference from proved facts and from records which were put in evidence. The problem is complicated because some records are missing; in some cases this is, no doubt, simply because over a long period the records have been lost, but in one case records that were in existence until quite recently have been allowed out of the custody of the stockbroking firm concerned and have disappeared. There are also alterations to some of the records that I will deal with particularly later.

(7) Harold Allen's affairs were first investigated by the Taxation Department after his death in 1953 and default assessments were issued to his executrix, the second Mrs. Prince, based upon a betterment statement (Exhibit 184) which the taxpayer presented to the Department on behalf of his wife towards the end of 1954. This betterment statement, signed by Mrs. Prince, showed net understatements of income from 1945 to 1953 amounting to some £16,000 and showed that from 1945 to 1952 Allen held considerable sums of cash in hand. It also showed a holding of £2,000 of Commonwealth bonds from 1945 to 1949 but the evidence in this case has shown that there were in addition bonds not discovered by the investigators and sold by the taxpayer on behalf of Mrs. Prince, the proceeds being received in cash. I am satisfied that none of the bonds held by Harold Allen at his death were bonds appearing in Exhibit 41.

(8) It was sought to identify "McAllister" and "Harrison" with the taxpayer by evidence (i) that the bonds sold by "McAllister" and purchased by "Harrison", and the coupons from such bonds, were discoloured in a distinctive fashion, as were certain other bonds bought by "J. David" (who, it was alleged, was the taxpayer) and cancelled in Queensland, and (ii) that coupons from the "McAllister" and "Harrison" bonds were cashed at the E. S. & A. Bank, Williamstown, on the 12th December 1955, and later coupons from the "Harrison" bonds were, together with those from other bonds purchased by "J. David", presented for payment at the A.N.Z. Bank, East Malvern. Although I am satisfied that these bonds and some of the coupons were discoloured, the evidence fell short of providing any sound ground for the inference that "McAllister" and "Harrison" were identical with "David". At most, it gives rise to a suspicion that they were.

This brings me to a number of questions of disputed identity. The starting point of the investigation "Who bought and sold the bonds set out in Exhibit 41?" is naturally the admitted identity of the taxpayer and "D. Howard". It was argued for the taxpayer that it is not a proper inference that all the transactions in the name "D. Howard" were the taxpayer's transactions, because he denied some of them and it is possible (so it was said) that Harold Allen himself used the name "D. Howard". I find that all the "D. Howard" transactions, both sales and purchases, were the taxpayer's transactions, and I do so for the following reasons :- (1) The taxpayer admits that he used the name "D. Howard" for the purchase of bonds. (2) "D. Howard" is, in fact, part of his own name, David Howard Prince. (3) There is nothing whatever to indicate that Harold Allen ever used the name "D. Howard". (4) I do not accept the taxpayer's evidence that the purchases by him in the name "D. Howard" were made for Harold Allen, and his explanation why he made such purchases does not fit the facts of the investigation by the Taxation Department of the affairs of Harold Allen. That investigation took place in 1953 and 1954 after Allen's death and while the taxpayer's own affairs were under investigation, whereas the purchases were between 1943 and 1949. (5) It appears from Exhibit 24, which is information supplied by the taxpayer's accountant, Burman, that Lindsay Mildred & Co., stockbrokers, kept records of transactions in the name "D. Howard" from 1943 to 1949, which ended with a sale of bonds on the 4th May 1949. That record is not consistent with "D. Howard" at one time being the taxpayer and at another time somebody else. The taxpayer's evidence of the "D. Howard" transactions is quite inconsistent with sales by him in that name and the records to which I have just referred show clearly that the one person both bought and sold bonds under the name "D. Howard".

There is one further aspect of the "D. Howard" transactions to which I should refer, because Dr. Coppel relied upon it. Early in May 1949, £2,000-worth of bonds were sold by Lindsay Mildred & Co. for "D. Howard", and £2,000-worth of bonds were bought by Lindsay Mildred & Co. for "D. Howard". The taxpayer denies participation in either of these transactions and Dr. Coppel has relied upon the incongruity of what occurred. The contemporaneous sale and purchase does seem peculiar, but I have no doubt it occurred and, having regard to the books of Lindsay Mildred & Co., I have no doubt the purchase and sale were made on behalf of the same person. In these circumstances, the oddness of the transaction seems to me to throw no light whatever upon who was the seller and the buyer. If the occurrence of the transaction were in issue, something might be made of the fact that it would seem to be irrational, but where it is proved that both the sale and the purchase took place, it seems to me unnecessary to find out what reason there was for what occurred.

My findings that "D. Howard" was from 1943 to 1949 a name used by the taxpayer, and that the purchases and sales under that name were for himself and not for Harold Allen, have a significance beyond showing that the taxpayer bought, owned and sold particular bonds. It has an important bearing upon the significance of a transaction to which I have already referred, that is, the taxpayer in June 1946 providing Derbyshire with £10,000 in bonds. Of the ten £1,000 bonds which were handed to Derbyshire by the taxpayer, no less than six had, as I find, been purchased by the taxpayer for himself in the name "D. Howard", and, of these, two had been purchased as late as the 30th May 1946. The taxpayer's evidence was that he had obtained £4,000-or £6,000-worth of the bonds provided for Derbyshire from Harold Allen, and £6,000 or £4,000, as the case may be,

from another bookmaker, Charles Allen. The finding that I have just made means that the bonds which the taxpayer says he borrowed from Harold Allen belonged to the taxpayer himself and that his account of what occurred is a fabrication. Charles Allen was called and gave a circumstantial but unconvincing account of how he had obtained £6,000 of bonds from another bookmaker, Miller, now deceased, and had handed them over to the taxpayer. This I do not believe. My incredulity is increased by a further circumstance which I will have to consider later, that on the 24th May 1946 two of the bonds which the taxpayer handed to Derbyshire were purchased by "J. David". It was suggested for the taxpayer that "J. David" might be Miller but, in the light of my finding in relation to the "D. Howard" purchases, the only way that Miller could have been in possession of the £6,000-worth of bonds which Charles Allen said he had, is by having obtained some of them from the taxpayer himself. In any event, I see no foundation whatever for the suggestion that "J. David" was Miller and, as will appear hereafter, I think there is a much simpler explanation of why bonds purchased on the 29th May 1946 in the name of "J. David" came to be in the taxpayer's hands before the 4th June 1946. Before I come to this, however, there is another feature of the "D. Howard" bonds that is significant. They were all in the taxpayer's hands in June 1946; with others they were sold together in the name "J. Smith" through Guest & Bell in December 1953 when the cheques in settlement were opened by Mr. Bell, of Guest & Bell, so that they could be cashed by the unidentified "J. Smith". It is in the highest degree unlikely that the ten bonds, being in the hands of one person in June 1946, were separated and came together again for sale in one lot. It is far more likely that they stayed in the hands of the person who had them in June until they were sold in 1953. Before, however,

I make a finding as to the identity of "J. Smith", it is necessary to deal with "J. David".

I have already referred to the fact that bonds purchased in the name "J. David" on the 29th May 1946 were in the taxpayer's hands a day or two later and that he treated them as his own in entrusting them to Derbyshire. I have also referred to the fact that these bonds, together with bonds bought by the taxpayer for himself under the name "D. Howard", were, with two other bonds, sold by "J. Smith" in December 1953. There is also other evidence and, on the whole, I am satisfied that "J. David" was the taxpayer. This other evidence, which relates to the records of Guest & Bell, I will now examine.

It appears from these books that a purchase by the taxpayer in August 1946 of two lots of shares in York Motors Limited was entered in the firm's "J. David" ledger account, and a payment by the taxpayer for those shares made some ten days later was also recorded in the "J. David" account. It was suggested for the taxpayer that this might just be a mistake because the day book, from which the entries on one side of the ledger were made, shows a "J. David" purchase of bonds and the taxpayer's purchase of the first of the York Motors shares as having occurred on the same day and it would be possible, so it is said, by mistake to carry both entries to the one ledger account. Such an unusual mistake - and it is unusual because there are always a number of daily entries to be transferred from one book to another and the entries I am concerned with did not even adjoin one another - would not of itself explain the entries because there were two entries relating to the purchase of the York Motors shares which were made - to judge from the ledger card - at different times, and certainly from different folios in the day book. Furthermore, the transfer of the payment by the taxpayer for the York Motors shares to the "J. David" account

must have been a separate inexplicable mistake because that entry was transferred, not from the day book, but from the cash book. The mistake theory, therefore, postulates three mistakes at least, none of which would be likely and two of which would be extremely unlikely. That is not all, however, because it is clear from the day book that the purchase of the York Motors shares was intentionally carried to the "J. David" ledger account because, the taxpayer having no account with Guest & Bell at that time, the reference in the day book was to "D.21", whereas for the purchases of bonds in the name of "J. David", the reference was simply to "21". The addition of the "D" in relation to the purchase by the taxpayer in his own name, was to make certain that the entries were carried to the "J. David" ledger account. But the matter does not even stop there. After the ledger had been written up and a balance struck, an attempt has been made to obliterate the entries relating to the taxpayer's York Motors shares. Not content with using a pen to cover up the entries, a pencil has been used to block out completely something which appeared in brackets after each entry of the York Motors shares and which was, no doubt, an identification of some sort. This obliteration was not made just to strike out an incorrect entry; it was obviously made to prevent the entries being read. Who did it, when it was done, where it was done, I do not know, and Miss Broadbent, who was called from the office of Guest & Bell, could throw no light at all upon it. Her attitude was that although what was done was singular, it was also inexplicable. The tampering with the records, however, does not suggest to me that the original entries were made in error. It suggests rather that somebody wanted to destroy correct and significant entries.

A related matter concerns the £1,000 bond purchased in the name of "David" on the 12th August 1946, that is, the same day as the first purchase of York Motors shares. This

bond was paid for by the taxpayer with his cheque for £1,009/7/6 dated the 16th August 1946. Furthermore, in a copy of Hoy's betterment statement for 1947 (Exhibit 46), (which I admitted as secondary evidence because the original, which was in existence in the course of the investigation, has now disappeared), there is an entry which shows that during the year ended the 30th June 1947, the taxpayer bought with a cheque for £1,009/7/6, £1,000 of Commonwealth bonds, although I should add that Hoy's statement describes the bonds as "repayable in 1961" whereas the "David" bonds were "repayable in 1957".

The next clue to the identity of "J. David" from the books of Guest & Bell is provided by the day book for the 15th November 1950 (Exhibit 147), which shows that an original entry "D. Prince, account J. David" has been altered by crossing out "D. Prince, account". This entry relates to the sale of bonds which could have been bought by the taxpayer himself on the 20th April 1945 when he purchased some £10 bonds which are not otherwise identified or accounted for beyond this, that the £10 bonds sold were in fact issued on the same day as the taxpayer was taking part in a bond-selling drive, in the course of which he bought some bonds.

Then in March 1949 there are some important entries. The first entries in the Guest & Bell cash book for the 17th March show that there were originally entered, adjoining one another, a receipt of £1,500 for "J. David" and a receipt of £543/15/- for the taxpayer. The receipt of the £543/15/- was carried to the "D. Prince" ledger account but this was crossed out and there was credited in the "J. David" ledger account a sum of £2,043/15/-, which is clearly enough the sum of the £1,500 and £543/15/-. The original entry in the cash book was altered to credit the £543/15/-, which was paid in cash, to "J. David".

Apart from the entries to which I have referred, a connection between the taxpayer and "J. David" appears from the circumstances that a number of bonds bought by the taxpayer in the name "D. Howard" were sold by Guest & Bell for "J. David", and a £500 bond which Mrs. Prince had subscribed for in October 1943 was in July 1950, while Mrs. Prince was still alive, sold by Guest & Bell for "J. David".

Passing now from Guest & Bell's records, the next matter that points to the identification of "J. David" with the taxpayer is that in February 1950 the taxpayer, wanting to provide security for an overdraft with the National Bank of Australasia Ltd., Mornington, lodged £4,800 of bonds as security, of which £800-worth were transferred from Queensland and £4,000-worth corresponded exactly in issues and denominations with seven bonds purchased by the taxpayer in the name "D. Howard", and two bonds purchased by "J. David". The bonds lodged with the National Bank at Mornington were never identified by numbers and were cancelled in March 1950, according to a procedure which I do not think it is necessary to set out, but which had the consequence that when the taxpayer wanted to sell his lodged bonds in August 1951, the Bank would obtain different bonds of the same issue for sale. The taxpayer's account of the source of the £4,000 in bonds was that they were received by him as part settlement of a winning bet upon "Tivoli Star" with Mr. Miller. Mr. Eggleston worked out a number of permutations and combinations to show how unlikely it was that by coincidence the bonds paid in satisfaction of a bet should be of the same denominations and issues as those shown to have been purchased in the names of "D. Howard" and "J. David" and not otherwise accounted for. All I need say is that I am satisfied on the probabilities that the £4,000 in bonds lodged with the National Bank at Mornington were the bonds purchased in the name "D. Howard" and "J. David". I do not accept the evidence of the win upon "Tivoli Star".

The evidence to which I have now referred in some detail affords good ground for an inference that "J. David" was the taxpayer, and that inference I draw the more readily because Mr. Davis was not called to prove the identity of "J. David". Dr. Coppel relied upon the failure of the Commissioner to call Mr. Bell, of Guest & Bell, but as to that all I need say is that Guest & Bell were the taxpayer's stockbrokers, and the taxpayer had the same opportunity as the Commissioner to call Mr. Bell.

Having found that the taxpayer purchased six bonds of £1,000 each in the name "D. Howard" and two bonds of £1,000 each in the name "J. David" and that he entrusted these bonds, together with two other bonds of £1,000 each, to Derbyshire in the manner already stated, when I find that the ten bonds were sold together in December 1953 through Guest & Bell by someone giving the name "J. Smith" but who was otherwise unidentified and who received the proceeds in cash because Mr. Bell opened cheques for him, I am not unready to infer that "J. Smith" was, or was the person who acted for, the taxpayer. As I have already said, it is most unlikely that the bonds, having been in the hands of the taxpayer, were separated and came together again in entirely different hands. In any event, these bonds having belonged to the taxpayer but no longer belonging to the taxpayer, it is an inevitable conclusion that he disposed of them at some time; this is the only disposal of which I have any evidence.

There is also an entry in the books of Guest & Bell that has some significance upon this question of identity. An amount of £6/5/- owing by the taxpayer to Guest & Bell in respect of the purchase of some Lancefield shares was carried to the "J. Smith" account and eventually written off there. Why this debit was not paid has not been explained, since the taxpayer who owed the money was known to Guest & Bell and there can be no doubt that Guest & Bell knew who "J. Smith" was too. It is

probable that it was just overlooked for some time and then a decision was made to do nothing about the entries or the amount. What happened cannot be regarded as anything beyond a slight indication of an identification by Guest & Bell of the taxpayer with "J. Smith".

The next question is the identity of "J. Howard". In 1954, Davis, Cooke & Cussen sold for "J. Howard" three bonds of £500 each, two of which they had purchased for the taxpayer in the name "D. Howard". The only information that can be said to bear upon the purchase of the other bond is that a bond of the same denomination and issue was bought by somebody called "B. Price" in 1945 and its disposal has not been otherwise traced. On the 3rd September 1954 Davis, Cooke & Cussen drew the cheque (No. 26110 - see Exhibit 188, to which I have already referred) for payment to "J. Howard" of the proceeds of these bonds. The disappearance of the original cheque butt and the failure to call Davis to give evidence make it easier to draw the inference, which in any case seems to me sound, that the identification of "J. Howard" with D. Prince upon the cheque butt was made when the cheque was drawn. I find that "J. Howard" was a name for the taxpayer.

Up to the present, I have dealt with cases where I consider the evidence warrants the conclusion that the taxpayer used other names, viz., "D. Howard", "J. David" and "J. Howard", for his own transactions. I pass now to cases where I am not prepared to make a finding of identity. I take first the bonds bought in the name "J. D. Harrison" in 1947 and cancelled in Queensland in August 1956. It is, I think, clear from Exhibit 166 that the entry in the books of L. G. May & Son relating to the purchase of £2,000 in bonds for "J. D. Harrison" has been altered since it was made, but I am quite unable to say what it was before it was altered and it seems to me likely that the

alteration was made soon after the original entry. The only other evidence whereby the Commissioner sought to identify "Harrison" with the taxpayer was the evidence of Markham, to which I have already referred in relation to the discolouration of the bonds and the cashing of the coupons. The circumstances as a whole do no more than give rise to a suspicion that "Harrison" was, or represented, the taxpayer and are not sufficient to draw an inference that that was so. Similarly as to "B. Price" I am satisfied that in August 1950 the taxpayer, in the name of "J. David", sold all but one of the bonds purchased in the name of "B. Price". On the 1st September 1954, the taxpayer's solicitors sold the other for him under the name "J. Howard", so that the bonds purchased in the name "B. Price" at some time or other came to the taxpayer's hands, but this does not, of itself, justify my drawing an inference that when the bonds were purchased by or in the name "B. Price" in November 1945, they were bought by or for the taxpayer. Again, the only basis for an inference that "J. Oliver" and "J. Robertson" were names used by the taxpayer or were persons representing him, is that they sold for cash and without leaving any record of their identity, bonds bought from seven to ten years earlier by the taxpayer in the name "D. Howard" or "J. David". The only additional circumstance in relation to "J. McAllister" is one to which I have already referred, namely, that the bonds were discoloured. In none of these cases do I think there is sufficient evidence from which to infer that the sellers were, or represented, the taxpayer.

The case of "A. George" is a little different in that "A. George" was both a buyer and a seller of bonds through Guest & Bell, and two of the bonds sold by "A. George" in May 1952 had previously been bought by the taxpayer under the name "J. David" in 1949. This, however, is not sufficient to justify an

inference that the taxpayer was "A. George" and, although there is other evidence which does link "A. George" with some member of the Prince family, it does not, I think, link him with the taxpayer.

To summarise my conclusions upon the questions of the identity of the taxpayer with those who bought or sold bonds set out in Exhibit 41, I find that the taxpayer used the names "D. Howard", "J. David", "J. Howard" and "J. Smith" for the transactions recorded in their names, but it has not been proved that the transactions of "J. D. Harrison", "A. George", "J. Oliver", "J. McAllister" or "J. Robertson" were those of the taxpayer. I add that I am satisfied that bonds AJ.5541 and AK.555, which were among those handed by the taxpayer to Derbyshire, belonged to him in June 1946 and remained his property until their sale in 1953. I am also prepared to infer that the hundred £10 bonds AT.31501-31600 which were sold by the taxpayer in the name "J. David" in November 1950 were bonds which he bought in April 1945.

The consequence of these findings is that I exclude the bonds purchased in the names of "Harrison" and "A. George" from the statement of assets shown to have been owned by the taxpayer between 1940 and 1954, and I am unable to make any finding in what year the taxpayer acquired the bonds purchased in the name of "B. Price", although I find that he did so during the period, or when the taxpayer sold the bonds sold in the names of "J. Oliver", "J. McAllister" and "J. Robertson", and those purchased in the name of "J. David" and sold in the name of "A. George", though in each case I am satisfied that these bonds were, at the dates of purchase shown in Exhibit 41, the property of the taxpayer. It follows from this that all the bonds set out in Exhibit 41, except the £2,000 in bonds bought in the name of "Harrison" and £7,000 in bonds bought in the name of "A. George", were at some time within the period 1940 to 1954

the property of the taxpayer. So far as Mrs. Prince's bond is concerned, I do not find that it, or its proceeds, was ever the property of the taxpayer.

Before I leave the item Commonwealth bonds, I must advert to a point made by Dr. Coppel that because the Commissioner's betterment statement attributes the "J. Smith" sales in December 1953 to the taxpayer and because no assets have been found in the hands of the taxpayer the equivalent of the proceeds of the bonds sold, there has been introduced in the betterment statement an item of £13,481 which is no more than a balancing figure to account for those proceeds and which does not represent assets. It is, of course, true that the Taxation Department has made an intense investigation of the taxpayer's affairs which it is evident did not stop at the 30th June 1954, and I assume that no assets have been found into which the proceeds of the bonds have, or could be thought to have, gone. From this, I might be prepared to guess that the taxpayer has not invested the proceeds of the sale of the "J. Smith" bonds, but the absence of an investment is of little importance in determining whether or not the taxpayer received those proceeds. The example of Harold Allen's estate, to which I have already referred, shows that an investigation does not always uncover what has been concealed and nothing I have said should be taken as tantamount to a positive finding that as at the 30th June 1954, the taxpayer had no assets beyond those which the Commissioner's betterment statement attributes to him. The disclosure of hitherto undiscovered assets that has taken place in the course of the hearing of these appeals and the marked difference between the taxpayer's position from year to year as disclosed in Exhibit "D", Mr. Burman's yearly balances, as it was submitted at the beginning of the case and as it now stands with agreed alterations, makes it obvious that the taxpayer has at no time been prepared to make full disclosure of his assets as they have stood from time to time.

I leave the betterment statements at this point to return to them later, after I have dealt with questions concerning the taxpayer's racing and betting activities. The taxpayer has throughout his life been a racing man with a many-sided interest in all that goes to make up racing. While he was a registered bookmaker, he was, for a time at least, the proprietor of a starting price business and he was the owner of horses. When he ceased to be a registered bookmaker, he continued to be an owner and soon became the proprietor of a training establishment where some horses belonging to him and some horses belonging to other owners were trained by one McDonell, who was an employee of the taxpayer (see Exhibit 17). His activities as an owner and punter went hand in hand, and his evidence was that he often ran a horse in an unimportant country race merely for the purpose of backing it profitably. When backing his horses, he did what I understand is customary and used commissioners to make a planned onslaught upon the ring. One part of the taxpayer's evidence which, if it be true, seems out of character is that, when some of a commission was for other people, he did not treat them as entitled to the odds actually obtained upon the execution of the planned campaign if it happened that the price shortened thereafter; he regarded his duty to them as satisfied by allowing them a price between the price obtained and starting price, and in this way he secured odds for himself better than those actually obtained. His explanation of this was that it was legitimate for an owner, who took all the risk and trouble and who made all the arrangements, to obtain an advantage of this kind. Whether this occurred or whether the evidence should be regarded as no more than an unsatisfactory explanation of a transaction that looked inconsistent with the taxpayer's evidence that after 1949 he backed but did not lay horses, is of no great importance for, if

the explanation be correct, it would certainly be an indication that betting was the taxpayer's business. It was certainly part of the taxpayer's practice to follow bets at long odds with "hedging" bets or "crush" betting, as it is called, which consisted in laying the horses at odds shorter than those obtained. It is not sufficient, however, to deal with the taxpayer's racing activities generally : it is necessary to examine them both historically and in detail.

The taxpayer's career as a bookmaker began in about 1914 and for many years he held a paddock licence and carried on business at all metropolitan courses and some country courses in Victoria. He maintained an office at 245 Elizabeth Street, Melbourne, and he was a member of the Victorian Club. Before 1939 he ran a starting price business with Walter Derbyshire and bought him out in 1940. He gave evidence and a document (Exhibit 1) was produced to show that he sold his starting price business in 1942 and he claimed that thereafter he had no connexion with it at all. This the Commissioner disputes. He remained a registered bookmaker until 1949 and while he was a registered bookmaker he conducted an extensive doubles business both on and off the course. He has raced his own horses since before 1949 and has been interested with others in the ownership and running of horses. When he gave up his bookmaker's licence, he became a member of the various racing clubs and his activities as an owner grew. In 1950, he acquired a property, Montana Stud Farm, which was, as I have already said, used as a training establishment.

While he was a registered bookmaker, his income tax returns included not only a bookmaking return, but also a race-horse account. So, for instance, in 1949 he showed a bookmaking profit of £6,942 and a profit in the racing account of £3,386. This latter amount included £2,210 from betting upon his own horses, although in earlier years it would seem that any such

winnings were not shown separately but were, to the extent they were shown at all, included as part of the bookmaking business.

On the 27th September 1949, Mr. Hoy, the taxation agent, sent the Deputy Commissioner of Taxation a communication as follows (Exhibit "B"):-

"re D.H. Prince - File No. 321811

When lodging the 1949 return, I notified you that Mr. D. H. Prince, who is 64 years of age, had retired from all Racecourse activities. However, the Return was lodged prior to a notification to that effect being signed by Taxpayer.

Mr. Prince therefore desires to submit the following declaration:-

I hereby declare that my interest in horse racing is spasmodic, and that I am not sufficiently interested in horse racing or betting to regard such as a business, and that any future interest I have in the sport will be purely as a hobby.

(SGD) David H. Prince.

In view of this declaration, I would be obliged if you would exclude the personal exertion income when calculating the Provisional Tax.

Yours faithfully,

(SGD) C. Hoy. "

The reference in this communication to the notification at the time of the making of the 1949 return is no doubt a reference to the following note upon that return:- "Taxpayer ceased operations as a bookmaker on the 19th March 1949, surrendered all licences and retired from the Race Course Business". The

1949 return covered bookmaking profits and the profits on the taxpayer's racehorse account up to the 19th March 1949, but from that date his betting and horseracing were not treated by the taxpayer as sources of income and profits made therefrom were omitted from his returns. The Commissioner, it would seem, acquiesced in this for some years. The question I now have to decide is whether or not this was right.

It is common ground between the taxpayer and the Commissioner that the taxpayer's horseracing and betting go together, so that both are, or are not, sources of assessable income. This seems to me to be correct and I proceed on this basis.

What I propose to do in the first place is to summarise the taxpayer's racing activities apart from betting. It appears from Exhibit "P", which is a statement prepared by Burman, that the results of the taxpayer's horseracing were as follows:-

Year	Profit	Loss
1949	£578	
1950	£3,911	
1951		£78
1952	£662	
1953		£2,290
1954		£3,398

During the years, the number of horses which won or were placed rose from twenty-five in 1950 to thirty-six in 1954. Training and agistment in 1950 cost £1,575 and in 1954, £5,252. There is evident over the period, except for the year 1951, a steady increase in racing activity. This is confirmed by Exhibit "D", Burman's yearly balances, which shows that as at the 30th June 1949 the taxpayer had eleven racehorses, and by the 30th June 1954 he had fifteen horses. The position is, then,

that up to the 19th March 1949, horseracing was part of the business of the taxpayer, and from that time on his activities increased rather than diminished. Looking at these activities alone, there is no ground for concluding that what was part of his business before the 19th March 1949 ceased to be part of his business on that date. The taxpayer's case on the point depends, however, upon the character of his betting rather than his activities as an owner, and it is to this aspect of the case that I now turn.

When the taxpayer's betting is looked at, the first point in favour of his contention that betting ceased to be his business on the 19th March 1949 is that on that day he did cease to be a registered bookmaker. He says further that at the same time he ceased to conduct the doubles business that he had. Furthermore, he maintains that from 1942 on he had no interest whatever in any starting price business and he denies that at any time thereafter, he had any financial interest in Prince & Prince. I propose to consider the matter in the first place on the footing that all this is true and that the only betting with which I am concerned is what, according to the taxpayer, is to be regarded as "punting".

What the taxpayer claims is that he was a heavy and successful punter and that for the period between the 19th March 1949 and the 30th June 1954, what he won exceeded what he lost by £76,578. This gratifying result, it is said, was the by-product of a "hobby" and a "spasmodic interest" in horseracing (Exhibit "B"). This rewarding hobby was systematically pursued with energy, and a wealth of accumulated experience. Moreover, the taxpayer was not only an owner, but he had a training establishment, at which he spent a good deal of time. Often, he ran his horses not for the stake or for the joy of winning, but to make favourable bets. His betting was systematically conducted so as to get the most favourable odds obtainable and, as I have already indicated, the account of the way in which bets were laid

suggests a tactical operation rather than a gamble. Commissioners were used who acted in accordance with a previously devised plan; when good odds were obtained, there were crushing bets to lessen or exclude the element of chance; the laying of bets for others was, according to the taxpayer, turned to his own advantage. Furthermore, money-making by wagering was pressed to the point where the taxpayer from time to time laid the odds to bookmakers and other punters. He says now that all these operations were crushing bets, but this is not supported by his records. After considering the whole of the evidence that was given, I am satisfied that the taxpayer was a racehorse owner and a gambler in a big way, not because he loved horses (although I accept his statement that he did), not because he enjoyed taking a chance, not because he was addicted to betting, but because as a matter of business he turned his wide knowledge, his experience and his ability to making his living out of horses and racing; particularly out of horses that carried not only his colours but his money.

The taxpayer's financial methods confirm my view that betting was his business and that the racing of horses was in the main a means of successful betting. His racebooks recording progress totals were used to keep him informed of how he stood after each race; he kept settling books which departed but little from those which he kept as a bookmaker. Staff from Prince & Prince, starting price bookmakers, from time to time represented him at settlings. In short, his betting shows all the indications of a strenuously conducted money-making business rather than those of a pleasant pastime. It may be thought a relaxing hobby to attend a race meeting now and then and to bet upon the horses racing, but to back horses sometimes at three meetings a day and some ninety meetings a year indicates not mere pleasure but either an addiction to gambling or a business;

between these two there is no doubt that in the taxpayer's case it was a business. It may be added that it was a business which, when he was away on a trip overseas in 1949, he left his son to manage, and the fruit of that management was a win of £3,350 on the taxpayer's horse "Spoor". I find, therefore, that on the taxpayer's own account of his activities, it was part of his business to race horses and make what he could by organised betting.

It would, I think, be possible to stop here, but because it was contended for the Commissioner that the taxpayer retained an interest in the starting price business of Prince & Prince right down to 1954, I think I should deal with this matter.

Perhaps the argument relied upon most strongly was that because the taxpayer's winnings as a punter were grossly overstated, he must have had a hidden source of income to amass the wealth that he did and that this source was the Prince & Prince business. As to the first part of the proposition, I am satisfied that the taxpayer's figures of betting wins are quite unreliable and that his records overstate his winnings. For instance, I am inclined to think that Exhibits 192 and 195 correctly show that his winnings, particularly for the years 1953 and 1954, have been overstated and were less than the amounts claimed at least by some £1,000 in 1953, and £7,000 in 1954. Next, it is said that the premises occupied by Prince & Prince at 245 Elizabeth Street, Melbourne, were premises occupied by the taxpayer as well and of which he was the tenant. This was proved. Reliance is also placed upon the fact that between 1942 and 1949, when the taxpayer was a registered bookmaker but claimed he was not a starting price bookmaker, staff at 245 Elizabeth Street, Melbourne, looked after the starting price business and the taxpayer's own business and, in doing so, drew no sharp distinction between the two. Moreover, it was

pointed out that the taxpayer told Mr. Fox that George Prince, Senior, had no interest in the business of Prince & Prince, whereas the agreement of sale (Exhibit 1) of the 2nd November 1942, which was put forward by the taxpayer as a genuine record of what occurred, showed George Prince, Senior, as the purchaser of a one-tenth interest. This agreement was, the Commissioner contended, a sham. More substantially, it was shown that when the business belonged to the taxpayer, there was an account, the "Samuel Smith" account, which was without doubt his account, and the account continued without any discernible change after the starting price business was ostensibly disposed of by the taxpayer. It was also shown that the taxpayer took some interest in the affairs of Prince & Prince and, among other things, gave his brother, George Prince, Senior, a bond as a retiring allowance upon his leaving the business. Another matter relied upon is the inference from Exhibit 21 (the Prince & Prince account with the Bank of New South Wales at 372 Lonsdale Street, Melbourne) that from 1946 until 1954 a doubles business was conducted in which the taxpayer was interested. I am satisfied that Exhibit 21 does relate to doubles business but it has not been proved that any part of the profits of that business went directly or indirectly to the taxpayer. Finally, it is admitted that right up to 1954 the staff of Prince & Prince at 245 Elizabeth Street, Melbourne, continued to look after the taxpayer's affairs. These things, taken together, give rise to a suspicion that the taxpayer retained some interest in Prince & Prince after 1942, but their combined effect falls short of satisfying me that he did and I am not prepared to infer that at any time after 1942 the taxpayer had any interest in Prince & Prince.

The last thing I want to say about the taxpayer's betting is perhaps implicit in what I have already said, but I want to make it clear that I do not regard the taxpayer's

settling books and race books as any reliable guide to his winnings. I have already said that I am satisfied that the settling books overstated winnings but, for the taxpayer himself, it was said that the race books omitted cash bets and his evidence was to the effect that he was accustomed to bet in cash in a large way and that the number of the bets recorded in the race books where he appeared to be laying the odds were no more than crush bets made following a large unrecorded cash bet. Be that as it may, the consequence is that I am unable to determine how much the taxpayer won in any year. Dr. Coppel, appreciating this difficulty, contended it would be proper to assume that any betterment income that could not be attributed to a proved investment should be regarded as a punter's winnings, but I am not prepared to take this course. To do so would be to substitute an affirmative finding for what is no more than a negative finding that I am not satisfied that the taxpayer had, after 1942, an interest in the business of Prince & Prince.

Upon this survey of the taxpayer's racing and betting activities, I find that these were part of his business and the profits are accordingly taxable. It was argued by Dr. Coppel that this case falls within the authority of Martin v. Federal Commissioner of Taxation (1953) 90 C.L.R. 470. A comparison between the findings there and the findings here satisfies me that the case is distinguishable.

In view of my findings, or lack of findings, as to the taxpayer's participation in starting price betting, it follows that I should not treat any balances in the "Samuel Smith" account (Exhibit 5) as assets of the taxpayer. This was a matter which I reserved earlier for later consideration.

Having now dealt with the evidence and stated my findings, it is necessary to consider the meaning and application of ss. 177(1) and 190 of the Income Tax and Social Services

Contribution Assessment Act. These provisions are as follows:-

"177.-(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct."

"190. Upon every such reference or appeal -

(a) the taxpayer shall be limited to the grounds stated in his objection; and

(b) the burden of proving that the assessment is excessive shall lie upon the taxpayer."

It was pointed out by Dr. Coppel that before 1936, s. 39 of the Income Tax and Social Services Contribution Assessment Act made the production of a notice of assessment not only conclusive evidence of the due making of the assessment but, upon appeal against the assessment, prima facie evidence that the amount and all the particulars of the assessment were correct, whereas now s. 177 does no more than make the production of a notice of assessment upon an appeal conclusive evidence of the due making of the assessment, while s. 190(b) imposes upon the taxpayer the burden of proving that the assessment is excessive. This Dr. Coppel claimed as a change in favour of the taxpayer. He also argued, resting upon ss. 185-187, that it is the objection that is treated as an appeal and that what the Court has to decide is whether to uphold the objection with the result that s. 190(b) is something which relates to the consequences of the hearing of an appeal rather than the conduct of proceedings during appeal.

As to these submissions, all I need say is that my understanding of ss. 177, 185-187 and 190(b), so far as they bear upon these proceedings, is that it is for the taxpayer who appeals to prove his objections to the extent they have been disallowed by the Commissioner and except to the extent that the taxpayer does so, the assessment, i.e., "the ascertainment of the amount of taxable income and of the tax payable thereon" (s. 6(1)) stands. To use the language of Kitto J. in McAndrew v. Federal Commissioner of Taxation (1956) 98 C.L.R. 263, at p. 275, "the burden rests upon the taxpayer of making good his challenge to the amended assessment". That case was concerned with a different problem but what was said there about s. 190(b) and the effect of the changes made when it was introduced support the view I have expressed. See Dixon C.J., McTiernan and Webb JJ. at p. 271; Kitto J. at pp. 275 and 276; Taylor J. at pp. 282 and 283.

What I have said does not mean that as to every issue arising in an appeal, the burden of proof is upon the taxpayer and I have from time to time found that, upon the evidence, the Commissioner has not proved particular issues as to which I consider that s. 190 does not impose the burden of proof upon the taxpayer. The importance of s. 190(b) at the present stage is, however, that unless I am satisfied that in any year the taxable income and tax have been assessed at excessive amounts, the assessment must stand and that I should reduce an assessment only to the extent to which the taxpayer has satisfied me that it is excessive. On the other hand, where the Commissioner alleges (as he does here) that an assessment is too low, I must be satisfied that it is so before I exercise the power which I have under s. 199 to increase the assessment. In short, the assessment stands unless the taxpayer has proved that it is too high, when I would reduce it by the excess proved; or unless the Commissioner has proved that it is too low, when I would increase it by the deficiency proved.

In a case where an appeal is concerned only with particular items in the calculation of taxable income, there is no difficulty in applying these principles, but where, as here, they have to be applied to taxable income calculated upon a betterment basis, it seems to me more difficult, because a decision that an asset should not be included in a betterment statement may not carry with it as a necessary consequence the conclusion that the assessment based upon the statement should be varied in favour of the taxpayer because of the possibility of some unproved asset or source of income. It seems to me, however, that proper weight is given to s. 190 by following the course of requiring the amendment of an assessment based upon a betterment statement to give effect to the exclusion of some asset therefrom with a consequent reduction of taxable income, unless the evidence also proves a compensating addition so that, notwithstanding the exclusion, it cannot be said that the assessment is excessive.

The items which I think should be excluded altogether from the Commissioner's revised betterment statement (Exhibit 29 as adjusted by Exhibit 199) are (1) the balances to the credit of the "Samuel Smith" account after 1942; (2) £500 for furniture (1943); (3) the loans W. Dooley £2,000 (1954), Robert Ryan £200 (1954), and £500 of the loan Mrs. P. J. Prince (1949); (4) the bonds bought in the name "A. George"; (5) the bonds bought in the name "J. D. Harrison". So far as the bonds purchased by "B. Price" are concerned, the position is that I find they became the property of the taxpayer at some time during the period 1940 to 1954, and I have nothing to indicate when they did so. So far as the bonds sold by "Oliver", "Robertson" and "McAllister" are concerned, I find they were the property of the taxpayer when they were purchased and I cannot

say when he disposed of them. In these circumstances, my proper course is not to direct any variation of any of the assessments by the exclusion from the betterment statement of the bonds so bought and sold.

Before I state the order to be made, I must refer to the fact that in his final address, Dr. Coppel announced that the appeal in respect of the assessment for the year 1941 was abandoned, and cited Caltex Ltd. v. Federal Commissioner of Taxation (1953) 10 A.T.D. 301 as authority for his right to adopt this course. That was an appeal to the Court against a decision of a Board of Review and Kitto J. decided that the taxpayer, offering appropriate costs, could abandon his appeal in the sense of not going on with it all, notwithstanding the refusal of the Commissioner to agree. It seems to me this decision has no application to the circumstances of this case where the taxpayer's objection has been treated as an appeal, the Court has proceeded to hear the appeal and has before it the full evidence of both parties, and some order of this Court is necessary to dispose of the appeal. In these circumstances, I do not see why a so-called abandonment of the appeal should prevent the Court in making its order from exercising any of the powers conferred upon it by s. 199.

The order I make is that the assessments appealed against covering the years 1940 to 1954 inclusive, be varied so as to assess the taxpayer's taxable income and tax for those years upon the basis of Exhibits 29 and 199, with the exclusion therefrom of the following items:-

(1)	The balances to the credit of the "Samuel Smith" account.		(After 1942)
(2)	£500 for furniture.		(1943)
(3)	The loans : Mrs. P.J. Prince -	£500.	(1949)
	W. Dooley -	£2,000.	(1954)
	Robert Ryan -	£200.	(1954)

(4) The bonds bought in the name "A. George" - £7,000.

(5) The bonds bought in the name "J.D. Harrison" - £2,000.

(6) The bond for £500 subscribed for by Mrs. P.J. Prince.

The appeals will otherwise be dismissed. I will grant liberty to apply to permit a more exact formulation of this order, if that is found to be necessary. The order for costs that I make is that the taxpayer should pay three-quarters of the Commissioner's taxed costs.