

Privy Council Appeal No. 78 of 1929.

The Commissioner of Taxes - - - - - *Appellant*

v.

The Union Trustee Company of Australia, Limited - - *Respondents*

FROM

THE SUPREME COURT OF QUEENSLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH NOVEMBER, 1930.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD BLANESBURGH.

LORD MERRIVALE.

LORD HANWORTH.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD BLANESBURGH.]

This appeal arises out of an assessment to income tax under the Queensland Income Tax Acts 1924 to 1926, upon one Arthur Herbert Whittingham for the income tax year ending the 30th June, 1924. Mr. Whittingham has died in the course of these proceedings. The respondent company is the executor of his will.

The testator—it will be convenient so to refer to him—on the 15th April, 1925, duly made his Income Tax return for the year in question and notice of the assessment was served upon him on the 26th May following. The assessment was made under the Income Tax Act 1924 only. Objections to it were duly lodged by the testator on the 4th June, 1925, and these were followed by an amended assessment, notice of which was served on the 3rd November, 1925. On the 29th November, 1926—that is to say more than a year later—the Income Tax Act, 1926, received the Royal Assent, and on the same day the Commissioner disallowed the testator's objections and duly notified his decision. The Commissioner while still maintaining his contention that

the assessment was justified under the Act of 1924, has been mainly concerned to support his action by reference to the amending Act of 1926, the relevant provisions of which are thereby made retrospective. In due course the testator requested that his objections, treated as an appeal, should be forwarded for determination to a Court of Review. On the 3rd June, 1927, MacNaughton J. sitting as such a Court without however assigning any reasons therefor, gave judgment over-ruling the testator's objections, formally confirmed the assessment and dismissed the appeal. The learned Judge purposely refrained from expressing any opinion of his own upon the questions submitted to him. His object, and he attained it, was through the medium of a special case stated by himself, to have the whole matter referred to the Full Court.

The case came first before that Court in the presence of three learned Judges, and after a prolonged debate was adjourned that it might be heard by a Court of five. The Court as reconstituted gave judgment on the 12th October, 1928. They allowed the appeal with one dissentient Douglas J., declaring the assessment upon the testator to have been invalid. And they ordered the special case to be remitted to the Court of Review for the necessary action to be taken in accordance with their opinion. This is an appeal by the Commissioner from that order.

The assessment upon the testator was made in respect of certain moneys received by him from a Victorian company called the British Australian Wool Association, Limited, in respect of 10,781 shares in the Association registered in his name. The testator was a Queensland sheep grazier and wool grower. He first became possessed of the shares in question as the final result, so far as he was concerned, of the scheme first arranged between the Commonwealth Government and the Imperial Government in the year 1916, whereby the latter Government, for the supply of the Allied forces and other requirements of the War, secured the whole of the wool clip of Australia during the wool years 1916-17 to 1919-20. The testator between November, 1916, and July, 1920, had, under that scheme, disposed of his clips to Government and had received therefor the appraised prices provided by the Imperial Government in that behalf. The shares in the Association allotted to him in 1921 represented his allocated proportion of the Commonwealth Government share of the profit realised by the sale of so much of the surplus wool as remained after the requirements of the British and Allied forces had been satisfied. Their Lordships, in their judgment just delivered in the case of the *Commissioner of Taxes for Victoria v. The Association*, have traced in outline the history of that great scheme—the circumstances in which the Association was formed and the nature of its activities while it remained in active existence. The incidents in the history so far as they relate to the questions now at issue are detailed again in the special case. It will, accordingly, not be necessary that more should in this

judgment be done than to summarise in relation to the Association and the issue of its shares, those salient facts and conclusions which have a bearing upon the present claim to Queensland Income tax in respect of the testator's shares therein.

The Association was in the year 1921 registered in the State of Victoria under the provisions of the Victorian Companies Act, 1915, as a company limited by shares. Its registered office has always been at Melbourne. Its share register has at all times been kept there. Its main purpose was to realize the whole of the surplus wool already referred to—as to one-half of it under transfer from the Commonwealth Government, as to the other half as agent for the Imperial Government. The payments made by the Association to the testator as holder of 10,781 of its issued shares represent, broadly, the proportion attributable to these shares of the distributed proceeds of realisation of wool which had become the property of the Association, and for which proceeds it was not accountable to the Imperial Government. No part of any surplus wool which the Association realised by sale had, in its hands, in any true sense an Australian source. The place where the wool was originally grown had become an accident. The entire property in it had passed by sale from the different wool-growers to the Imperial Government, and the agreed price had been paid in full to them. It was from that Government, mediately or immediately, that the title of the Association to all the wool it sold was derived. About 101,619 bales were, it is true, on the 1st January, 1921, in store in Queensland on account of the Imperial Government, but during that year the whole of the stored wool was shipped to countries outside Australia. No wool was sold by the Association in Queensland. With the exception of a few bales—quite negligible in number—none was sold even in Australia. All contracts for sale were made outside Australia; no part of any of them was carried out in Queensland. Beyond allowing some of the wool stored there to remain where it was for a time before shipping it out of Australia, and beyond selling some storage sheds situated in Queensland, no part of its business of realisation was conducted by the Association in that State. And the Association had no other business. With or even without the application of the rule *de minimis*, it is, in their Lordships' judgment, true to say, upon the facts stated, that no moneys at any time distributed by the Association amongst its shareholders had any source in Queensland. Indeed, their Lordships did not understand the appellant seriously to dispute this conclusion, which seems very apparent. But the fact, it will be seen, when so found, is of almost decisive importance here.

The testator had no legal claim upon the Commonwealth Government for all or any of the 10,781 of the shares in the Association, which by its direction were allotted to him. These shares, in point of law, were in the nature of a gift from the Commonwealth Government to the testator. They were none the less so, because, at the time it was made, the gift was one

which, for political reasons, that Government might have found it difficult, in some form, to withhold. Whether rightly or not, however, these shares were for Queensland Income Tax purposes treated as part of the testator's income for the year 1921 in which they were received. They were brought into account at their then market value of 12s. 6d. per share, and on that footing Queensland Income Tax was duly paid upon them by the testator. And that in the testator's view, should have been the end. But it was not so to be.

The present proceedings result from two distributions of capital since made by the Association to its shareholders. The first was made in April, 1923, pursuant to a special resolution for reduction passed by the Association on the 20th July, 1922, and sanctioned by an order of the Supreme Court of Victoria dated the 19th October in the same year. The second was made in February, 1924, pursuant to a like special resolution passed by the Association on the 17th May, 1923, and sanctioned in like manner on the 12th October, 1923. The first distribution consisted of 10s., and the second of 9s. per share. No assessment to tax is sought to be made upon the testator in respect of the first of these distributions, nor in respect of 2s. 6d. per share of the second distribution, these amounts—in the aggregate one of 12s. 6d. per share—being regarded as covered by the tax paid in respect of the market value of the shares at the date of issue. But the balance of 6s. 6d. per share was ultimately treated by the Commissioner as taxable by virtue of the extensions of the Income Tax Act, 1924, effected by the Amendment Act of 1926, and alternatively by virtue of the Act of 1924 alone. This is the assessment to which the objection taken by the testator has been upheld by the Supreme Court.

Now, it is, their Lordships think, clear, and, indeed, that view was hardly contested by the appellant, that the scheme of the Queensland Income Tax Act, 1924, was to subject to Income Tax in Queensland only such "income" as is derived directly or indirectly from a source locally situate in Queensland. Accordingly, the principal issues raised on the appeal have been (1) Whether the amending Act of 1926 must on its true construction be taken to have extended the operation of the 1924 Act to receipts from shares of a Victorian Company when none of these receipts, even so far as that Company was concerned, were derived from a Queensland source; and (2) whether, if so, such an extension was within the power of the Queensland Legislature. The appellant, however, separately contended that, on the facts, the sums sought to be taxed were really profits of the testator's Queensland business being, in effect, an addition to the appraised price at which he had sold his wool to Government, so that the receipts were taxable as truly income from a Queensland source. It was on this ground that Douglas J., the dissentient Judge in the Supreme Court, upheld the present assessment.

In the Supreme Court, Macrossan J., who delivered the leading judgment, expressed his opinion to be that under the 1924 Act the personal residence of the taxpayer in Queensland was "irrelevant as a test of liability and that the local situation of the source of the income is a condition precedent to liability unless some express exception is clearly shown."

This conclusion of the learned Judge appears to their Lordships to be amply warranted by the sections of the statute which he cited in support of it. For this purpose, and without quoting them at length, their Lordships would themselves refer to the definitions of "absentee," "Income from personal exertion," and "Income from the produce of property," in section 4: to section 7, the charging section, section 16, section 19, section 20, section 30, providing for the returns to be made by the taxpayer, and to section 50 of the Act. These sections lead them to the same conclusion as that reached by the learned Judge. The Legislature in the Act is exercising its general power "to make laws for the peace, welfare and good government of the Colony in all cases whatsoever," and the frame of the Act indicates, their Lordships agree, that the fact on which territorial jurisdiction is founded is not the personal residence of the taxpayer in Queensland but the local situation of the source of income.

Nor is section 10 of the Act different in its effect or intention, although its provisions are not like the others in express terms restricted to a "Queensland Source." As this section is the basis of the extensions introduced by the Act of 1926, it may be convenient to set out its introductory provisions. They are as follows:—

"Without limiting the force or effect of any other provision of this Act assessable income shall expressly include as income from personal exertion:—

"1. All net gains or profits from the sale of any real property . . .

"2. All net gains or profits arising from the sale of any personal property whatsoever . . . whether or not arising from any business carried on by the taxpayer . . ."

Now it must be agreed that these words are comprehensive. It is, however, not questioned that they must be subjected to some limitation. It is, it has to be conceded, almost *ex necessitate rei* that notwithstanding the absence of any limitation in the terms employed, the real property referred to in subsection 1 must be confined to such property locally situated within the State. And when the observation of Lord Hobhouse, in *Blackwood v. The Queen*, 8, App. Cas. 82, in dealing with a Victorian probate statute, is remembered, the necessity of restricting the generality of the section in its application to personal property is hardly less compelling.

"It is said," Lord Hobhouse observes in the case cited,

that the expression "real estate" carries its own limitation with it, because it is something inconceivable—almost a violation of the law of nations—that a State should tax its subjects on the basis of their foreign real estate. But in fact personalty in England is as far beyond the direct power of the Victorian Legislature as realty in England."

Accordingly their Lordships cannot doubt that the opinion of Starke J. in *Mount Morgan Gold Mining Company v. Commissioner of Income Tax*, 33 C.L.R. 76, 114, dealing with its precursor is applicable also to this section. "It is confined to personal property situate in Queensland."

It might have been necessary to say something about the provisions numbered respectively (i) and (ii) of subsection 2 of section 10, had these provisions not been repealed by the Act of 1926, other provisions by that Act being inserted in their place. It is upon these new paragraphs that the argument has mainly turned and to them it is necessary to refer with some care.

The first of them numbered (i) (a) deals with a case where a person has purchased or acquired shares in a company "being a Queensland Company or a Company carrying on business in Queensland" and proceeds to tax liquidation dividends in respect of such shares, providing by paragraph (c) that in the application of the subsection to a "Company which, not being a Queensland Company, carries on business in Queensland" the amount of any liquidation dividend taxable "shall bear the same proportion to the full amount of the dividend received as the amount of the assets in Queensland of such company bore to its total assets at the commencement of the liquidation."

The second of the substituted provisions is that more directly in point now. So far as its terms are immediately material they are as follows :—

"(ii) (a) When any person at any time, on or after the 1st day of July 1921, having sold or disposed of or delivered for appraisement or any other purpose or supplied or having made or entered into any dealing or transaction with respect to goods produced in Queensland afterwards has received or receives whether in consideration of or in consequence of or otherwise directly or indirectly in relation to such sale, disposal, delivery, supply, dealing, or transaction or pursuant to any scheme being carried into effect or to be carried into effect by a company (where-soever incorporated) certificates issued by or shares in such company, the value of such certificates or shares on the date on which they were or are so received by such person shall be treated as income of that person but not arising from a sale

"(b) If such person has received or receives from the company any moneys in respect of or in any wise in relation to such certificates or shares the following provisions shall be applicable

And then follow the conditions on which the "moneys" referred to are to be "income" of the taxpayer, for the purposes of taxation. These are the provisions upon which the Commissioner here relies.

Upon them the question at once arises :—

Is the Association such a company as is in provision (ii) referred to and are any "moneys" received from it by the testator liable to tax ?

It would be affectation to doubt that the Association was directly in the view of the draftsman of these new provisions and it

is not less probable that the testator's shares therein and the sums received by him in respect thereof were just the kind of receipts which the draftsman was intent to capture for taxation if he could. But the intentions or desires of a draftsman are of no importance in such matters. The question is whether the Legislature has accepted and made itself responsible for words which have that effect. It remains true of these provisions incorporated as they are into the Act of 1924 "that the local situation of the source is still a condition precedent to liability unless some express exception is clearly shown." Is that exception sufficiently apparent here?

Put in a concrete form the question is whether in provision (ii) (b) after the word "company" a Court of construction can imply such words as "whether carrying on business or possessed of assets or deriving its profits from sources in Queensland or not;" words of necessary implication if the provision as it stands is to have the effect contended for by the appellant.

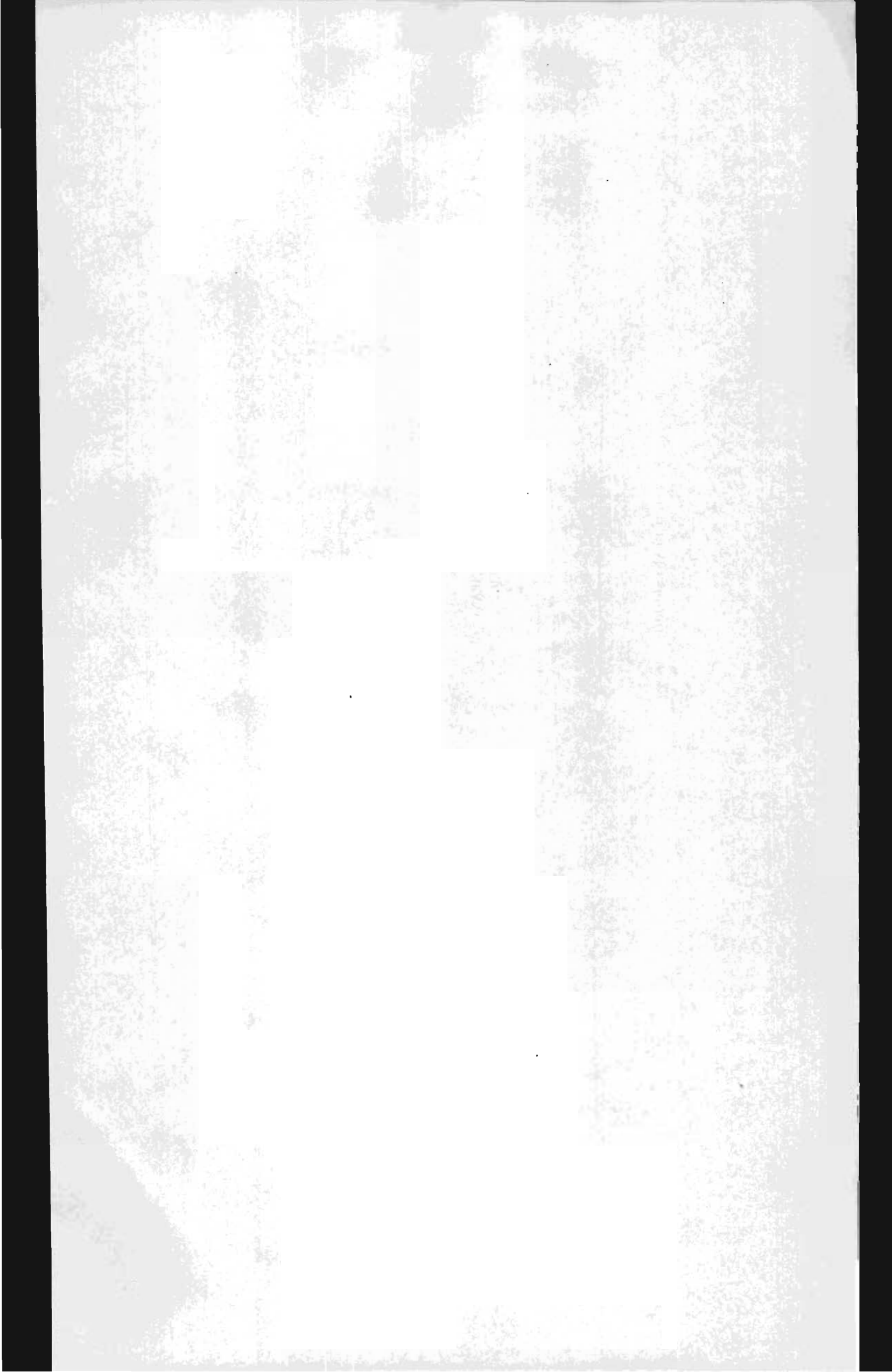
In provision (ii) (a) in view of its subject matter such words might be implied without damage to the structure of the Act: but in provision (ii) (b) their presence must destroy that structure entirely. Are the words then to be implied? The answer, their Lordships think, must be, no. It is true that the company referred to may be a company "wheresoever incorporated." But these words add nothing to the defined meaning of the word "company" in section 4 of the principal Act: and it is significant, as it seems to the Board, that while the place of its incorporation is left expressly at large, no words are inserted in the provision to extend the area of the source from which the company's taxable receipts may be derived. It is significant, too (and the omission can judicially, their Lordships think, be best accounted for by the fact that the company referred to in the provision must be in every respect except registration, a Queensland company), that you find in this sub-clause no such limitation on the taxable fund as is expressed in provision (i) (c). In the result, in their Lordships' judgment, provision (ii) (b) is not so framed as to bring within its scope such a company as the Association has been shown to be and the assessment upon the testator cannot be justified by reference to it. If the Queensland Legislature essay without ambiguity of phrase to include such a company as the Association within the ambit of the enactment a very serious question as to its validity must arise. But that question, in their Lordships' view of the provision in its present form, does not yet call for decision.

It was, however, contended by the appellant that even so, the assessment upon the testator might be justified under the Act of 1924 alone upon the view that the sums received by him upon the successive reductions of capital in the Association in excess of the market value of his shares at the time they were received by him were profits of his business as a sheep breeder and wool grower. With reference to this contention their Lordships are willing to assume without deciding that the shares when received

by the testator might have been regarded as a further price for the wool which he disposed of to Government and be taxed accordingly as they were. But so soon as income tax assessed upon the shares at their then value had been paid, these shares ceased in the testator's hands to be other than a form of property with its own incidence to income tax, if any there was attached to it. It is conceded that had the testator sold the shares, such would have been their position in the hands of a purchaser. Again, had he with the proceeds bought other shares in the Association such would have been the position of these shares in his hands. So with the shares in question. The further sums received by the testator in respect of them are no more a profit of his business than, if the total of the sums received had been less than their originally assessed value, would the difference have constituted a loss of such business.

In the judgment of the Board this contention also fails.

On the whole case their Lordships are of opinion that the order of the Supreme Court of the 12th October, 1928, was right, and they will humbly advise His Majesty that this appeal therefrom be dismissed with costs.



In the Privy Council.

THE COMMISSIONER OF TAXES

v.

THE UNION TRUSTEE COMPANY OF
AUSTRALIA, LIMITED.

DELIVERED BY LORD BLANESBURGH

Printed by

Harrison & Sons, Ltd, St. Martin's Lane, W.C.2.

1930.