

HIGH COURT OF AUSTRALIA

Sun Newspapers Ltd.

Vs.

Federal Commr. Of Taxation

(Rich J.)

17 September 1938

Judgment

Rich J

1. These are two appeals, heard together, from assessments to income tax for the financial year beginning 1st July 1933.

2. The assessments are based upon returns by the respective appellants for an accounting period of twelve months ending 24th September 1933 accepted by the commissioner under sec. 32(3) of the *Income Tax Assessment Act 1922-1933*. The appellant, Sun Newspapers Ltd., was incorporated on 29th March 1920. For some years it conducted the Sydney evening newspaper called the *Sun* and the *Sunday Sun*. It also conducted the *Newcastle Sun* and, as part owner, the *Daily Pictorial* and *Sunday Pictorial*. It was conducting these newspapers in the year 1929. Rival newspapers called the *Evening News* and the *Sunday News*, as well as a weekly paper called the *Women's Budget*, were at that time conducted by a company called S. Bennett Ltd. The two companies resolved upon an amalgamation of their interests. On 9th August 1929 they entered into an agreement with a trustee for an intended company to be called Associated Newspapers Ltd. This company, which was registered on 9th September 1929, is the other appellant. Under the agreement it was to issue a large part of its nominal capital to the shareholders of the two constituent companies in exchange for their shares in those respective companies. The number and proportions are set out in the agreement, but they are not material to the questions raised for determination. What is material is the fact that at that time 56,000 shares in Sun Newspapers Ltd. of the face value of 10s., half the face value of the remaining shares, but bearing twice the rate of dividend, were held by employees in that company and upon special terms. These shares were dealt with specially under the agreement and under a supplemental deed dated 31st July 1930. It is sufficient to say that as a

result 22,600 of these employees' shares were outstanding at the beginning of the accounting period upon which the assessments were based and were not held by the appellant Associated Newspapers Ltd. In the agreement for the merger that company was described as a holding company but it did not rigidly adhere to that character. On 24th December 1929 it entered into an agreement for the acquisition of two further existing newspapers, the *Daily Guardian* and the *Sunday Guardian*, which under the agreement passed to it on 31st January 1930. In consequence of this transaction Associated Newspapers Ltd. took over an overdraft which was maintained in its name for various purposes. The *Daily Guardian* and the *Sunday Guardian* were for a time printed and published at the office of the vendors, and then they were transferred to the offices of S. Bennett Ltd. On 19th August 1931 an agreement was executed between Associated Newspapers Ltd. and Sun Newspapers Ltd., the purpose of which was to end the publication by the former of the *Daily Guardian* and by the latter of the *Daily Pictorial* and *Sunday Pictorial* and to provide for the publication at the *Sun* offices of a daily paper to be named the *Daily Telegraph* and for the printing and publishing of the *Sunday Guardian* by Sun Newspapers Ltd. on behalf of Associated Newspapers Ltd. This was quickly followed by an agreement of 14th October 1931, the purpose of which was to provide for the cessation of the *Sunday Guardian* and the publication of the *Sunday Sun and Guardian* in continuation of the *Sunday Sun*. Shortly afterwards, namely, on 10th November 1931, the two companies entered into a further agreement by which Sun Newspapers Ltd. undertook to print and publish the *Daily Telegraph* on certain terms, which included a division of profits with Associated Newspapers Ltd. In the meantime, under the authority of Associated Newspapers Ltd., the publication of the *Evening News* by S. Bennett Ltd. had ceased. Its last issue was published on 21st March 1931. But another evening paper came into the field, the *World*. This was published by a company called Labor Papers Ltd. By an agreement dated 1st November 1932 this company granted an option to an "investor" until 9th November 1932 for a "lease" of the newspaper, including its premises, machinery and plant, at a rent. The optionee was to form a company. This he did under the name of Sydney Newspapers Ltd., and with the co-operation of a journalist who was a son of the managing editor of the appellants' newspapers he made preparations for launching a new evening paper in succession to the *World*, to be called the *Star*. It was announced that this paper would be sold for one penny. The existing morning and evening papers sold for a penny halfpenny. The appellants took alarm and their managing editor was entrusted with the task of preventing the sale at one penny of the threatened evening newspaper. Some doubt is cast on the extent of his authority, but, however that may be, he made an agreement with Sydney Newspapers Ltd. and its two sponsors by which in consideration of a sum of £86,500 they undertook for three years not to be

associated with the production or publication of a daily newspaper within three hundred miles of Sydney, and to control for three years the plant, machinery and premises used in the production of the *World*. The agreement contained other stipulations of minor importance. If during the three years Associated Newspapers Ltd. required it, Sydney Newspapers Ltd. were to produce a daily or a Sunday paper by means of the plant, and if the plant of the former broke down, the latter company was to produce any of its publications. A place was to be found by Associated Newspapers Ltd. on its staff for the son of its managing editor and the same thing was to be done for another journalist who had been employed for the *World*. That newspaper went out of existence on the same day as the agreement was made, 9th November 1932. The agreement was honoured by the appellants' boards. During the course of the accounting period with which these appeals are concerned, payments amounting to £44,830 were made under the agreement in respect of the £86,500. Under the provisions of the agreement for taking over the various responsibilities connected with the *World*, a further sum was paid during the period amounting to £2,831, which with the former sum made £47,661. Although the agreement was made in the name of Associated Newspapers Ltd., these payments were all made by Sun Newspapers Ltd. In the profit and loss account of that company the burden of the £86,500 was spread over three years and for the accounting period under consideration a debit of £24,363 0s. 8d. was made. In the return of the company for income tax it was shown as a deduction. The Commissioner of Taxation disallowed the deduction, and one of the grounds of appeal from the assessment is that a deduction either of £47,661, of £44,830 or of £24,363 0s. 8d. should be allowed from the assessable incomes either of Associated Newspapers Ltd. or of Sun Newspapers Ltd.

3. But a more sweeping claim is made in respect of taxation of the income derived from the newspaper undertakings. It is claimed that Sun Newspapers Ltd., which is now in liquidation, was a mere agent of Associated Newspapers Ltd. for the purpose of conducting the publications and that all the taxable income derived therefrom during the accounting period ended 24th September 1933 should be included in the assessment of Associated Newspapers Ltd. and none of it in the assessment of Sun Newspapers Ltd. One consequence which it is sought to attribute to this view is that none of the income reached Associated Newspapers Ltd. as dividends or in any other guise or form than as income from personal exertion. Under sec. 5(1) of the *Income Tax Act 1933* (No. 41 of 1933) a further tax of six per cent has been imposed upon a portion of the taxable income of Associated Newspapers Ltd. as income from property, amounting to £137,842, that is, a tax of £8,270 10s. 5d. This income from property represents after the

allowance of deductions the amount paid as dividends by Sun Newspapers Ltd. to Associated Newspapers Ltd. The objection that it is not liable to the further or special tax of six per cent constitutes the third question for determination in the appeals. The contention that the business is conducted by Sun Newspapers Ltd. on behalf of Associated Newspapers Ltd. in such a sense that all the profits are assessable as income of the latter company only is based on certain authorities decided under the British Income Tax Acts or at any rate the citation of those decisions was the commencing point of the argument. They are conveniently set out in a note in the article on income tax in *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 91, note (b), under a part of the text which explains the principle on which they rest. The text is as follows: "There are certain examples of English companies holding all or practically all the shares in foreign companies which may appear to be exceptions to the rule that mere shareholding control is not sufficient to establish control of a business. The explanation of the decisions is that in each case there is more than mere shareholding control. The foreign company has been found not to own or carry on a business, but the business has been owned and carried on by the English company, and the foreign company has merely existed to hold land, &c., to conform to local law in that respect. The question to be decided is, Does the foreign company carry on its own business or is the business in fact carried on by the English company? Where a company whose shares are thus held in their entirety, or practically so, by another company is merely acting as a trustee or agent for the shareholding company, or where the company is a mere sham, *simulacrum*, or cloak, or is kept in being for the purpose of presenting the fiction that property is owned by it, it is competent for the commissioners to look at the reality of the situation, and find that the business is carried on by the shareholding company." To the cases cited in the note, which I shall refrain from setting out, it is necessary to add a reference to the discussion of the same authorities by *Phillimore* J., as he then was, in *Kodak Ltd. v. Clark*[\[1\]](#) [\[2\]](#). The recent decision of the Privy Council in *E.B. M. Co. Ltd. v. Dominion Bank*[\[3\]](#) marks the limits of the principle invoked by the appellants. There, after remarking that one of the judges below had been misled by some remarks of *Cozens-Hardy* M.R. in *Gramophone and Typewriter Ltd. v. Stanley*[\[4\]](#), which he quotes, *Lord Russell of Killowen*[\[5\]](#): "But this can mean only that, on the facts of a case, it may appear that the legal entity has not become the owner of a business, but is merely carrying on, as agent for another person, a business which is the property of that other person; just as, on the facts of a case, it might appear that an individual who was carrying on a business was not the owner thereof, but was carrying it on as agent for another person who was the owner thereof. Sir *H. Cozens-Hardy* M.R., did not mean, and, in the face of the *Salomon Case*[\[6\]](#), could not mean, that, notwithstanding that a business is in fact and in law the

property of a separate legal entity, a limited company, it could be held, for taxation purposes, that the business was the property of some other person, and that the company was carrying on the business as agent for that other person." In the present case the great degree of control exercisable and exercised by the board of Associated Newspapers Ltd. over the conduct of the newspaper business is relied upon. The managing editor was appointed by an agreement of 9th September 1931 made with Associated Newspapers Ltd. and under it he was given wide powers of managing the editing, production and distribution of newspapers controlled through other companies as well as newspapers owned by it. During the accounting period, the *Sun*, the *Sunday Sun* and the *Daily Telegraph* were published at the *Sun* office and also the *Women's Budget*. S. Bennett Ltd. remained in existence until 1936, but at that time it did not operate. About 98½ per cent of the shares of Sun Newspapers Ltd. were held by Associated Newspapers Ltd., the rest being in effect employees' shares. In the proceedings of the boards of directors, excepting perhaps the matter of remuneration, no practical distinction was made between the separate individualities of the two companies. The personnel of the two boards was not however quite identical. But as against all this, Sun Newspapers Ltd. acted in every way as the proprietor of the newspapers and the publishing business, kept separate accounts, made separate returns for taxation purposes, declared dividends on its shares and was treated in every way as continuing to be, as it originally was, the company conducting on its own behalf, that is, in the interests of its shareholders, its own extensive enterprise. In the accounts of both companies a moiety of the *Sunday Sun* profits, amounting to £15,084 15s. 1d., was shown as a credit of Associated Newspapers Ltd. against Sun Newspapers Ltd. I am clearly of opinion that there was no relation of principal and agent but that the property in the whole undertaking conducted by Sun Newspapers Ltd. was vested in it and vested in it beneficially, that is, for its shareholders whoever they might be. In fact the employees' shares would have made it difficult to ignore the separate personality of that company even if there had been any resolve to do so. Mr. *Weston* for the commissioner contended that, even if there had been an agency, yet, as Sun Newspapers Ltd. had declared dividends and Associated Newspapers Ltd. received the income under that guise, sec. 16(b)(i) of the *Income Tax Assessment Act* and sec. 5(1)(b) of the *Income Tax Act* would apply, and this may well be so. But on the facts I think that it is clear that these provisions apply to the sum brought under tax as net dividends, namely, £137,842 (£147,015 gross).

4. It remains to deal with the claim to a deduction on account of the moneys paid by Sun Newspapers Ltd. to the optionees over the *World*. It was shown that this transaction or rather the extinguishment of the *World* and the removal of the immediate fear of a penny paper led to some substantial improvement in the net

profits of the *Sun* and was the occasion of the making of some economies. But the obligation to make the payment was that of Associated Newspapers Ltd., and I am not prepared to find that within the meaning of sec. 25 (e) the money so far as it was concerned was wholly and exclusively laid out or expended for the production of assessable income. So far as Sun Newspapers Ltd. is concerned the commissioner contended that the moneys, although actually paid by it, were no more than a voluntary payment made to meet an unfortunate transaction to which the holding company had committed itself. However this may be, I think that the expenditure could not be deducted by either company because it is in the nature of an outgoing of capital: See sec. 23 (1) (a). It is not expenditure of a recurrent nature. It is not an incident, whether normal or unusual, of the regular conduct of the organization for earning profits. The purpose was to buy out opposition and secure so far as possible a monopoly. The fact that the benefit was not perpetual does not deprive it of its capital attributes. If physical assets of a terminating or wasting description were bought, no one would say on that account that the money was a revenue expenditure. The case may not be so striking as *Ward & Co. Ltd. v. Commissioner of Taxes*^[7], but it is more like that case and those mentioned in Lord *McMillan's* opinion in *Van Den Berghs, Ltd. v. Clark*^[8] than such a case as *W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation*^[9], upon which the appellants rely: See, further, *Glenboig Union Fireclay Co. Ltd. v. Inland Revenue Commissioners*^[10], *Dott v. Brown*^[11] and *Collins v. Joseph Adamson & Co.*^[12], a case similar to the present case of the elimination of competition.

I think the appeals should be dismissed with costs.

Appeals dismissed with costs.