

# HIGH COURT OF AUSTRALIA

Charles Moore & Co. (W.A.) Pty. Ltd.

Vs.

Federal Commissioner Of Taxation

(Dixon C.J.(1), Williams(1), Webb(1), Fullagar(1) and Kitto(1) JJ.)

(14 December 1956)

## CATCHWORDS

Income Tax (Cth.) - Assessable income - Deduction - "Losses . . . incurred in gaining or producing the assessable income . . . except to the extent to & which they are . . . of capital or of a capital . . . nature" - Loss of departmental store's takings by armed robbery while being conveyed from store to bank - Whether loss of capital or income - Whether allowable deduction - Income Tax and Social Services Contribution Assessment Act 1936-1952 (No. 27 of 1936 - No. 28 of 1952) s. 51 (1).

## HEARING

Melbourne, 1956, October 23; Sydney, 1956, December 14. 14:12:1956 CASE STATED.

## DECISION

December 14. THE COURT delivered the following written judgment :-

1. This case stated concerns the allowance, from a trader's assessable income, robbery at pistol point of the cashier and his escort while on their way to deposit the money in the bank. (at p349)
2. The taxpayer claiming the deduction conducts a departmental store in Hay Street, Perth. It was the practice every business morning for the cashier accompanied by another employee to take the previous day's takings to the bank some two hundred yards away and pay them in to the credit of the taxpayer. (at p349)
3. On the morning of 5th August 1952, while on their way to the bank unarmed, the two employees were held up at gun point and robbed. The money they carried consisted of cheques and cash forming the trading receipts of the previous day. A bag containing the cheques escaped but the bag containing cash, which amounted to 3,031 pounds, was stolen and never recovered, and the taxpayer was not insured against a loss of such a description. (at p349)
4. In the return of the taxpayer's income for the year in which the robbery occurred the amount was claimed as a deduction from the assessable income, but the claim was disallowed by the commissioner and the disallowance was upheld by a majority of a board of review. (at p349)
5. We are unable to concur in the view that the loss does not form an allowable deduction. We can see no reason why it should not be considered a loss incurred in gaining or producing the assessable income within s. 51 (1) of the Income Tax and Social Services Contribution Assessment Act 1936-

1952 and we do not think that it should be regarded as a loss or outgoing of capital or of a capital nature. The words "incurred in gaining or producing the assessable income" mean, as has been stated many times, "in the course of gaining or producing the assessable income" : *W. Nevill & Co. Ltd. v. Federal Commissioner of Taxation* (1937) [56 CLR 290](#) ; *Ronpibon Tin N.L. and Tongkah Compound N.L. v. Federal Commissioner of Taxation* [\[1949\] HCA 15](#); [\(1949\) 78 CLR 47](#), at p 57 . In the case of a large departmental store such as the taxpayer carries on, the ordinary course of business requires that, day by day and as soon as may be, the takings shall be deposited in the bank. It is as necessary to the conduct of the business as it is to place goods on the shelves or to deliver them to the customers. They are all operations in the course of gaining or producing the assessable income by means of carrying on the business. The assessable income to which the sub-section relates is (apart from exemptions) the total amount of the receipts of an income nature derived during the twelve months forming the accounting period. "A very wide application should be given to the expression 'incurred in gaining or producing the assessable income'. But the words refer to the assessable income from which the deduction is to be made." : *Amalgamated Zinc (de Bavay's) Ltd. v. Federal Commissioner of Taxation* [\[1935\] HCA 81](#); [\(1935\) 54 CLR 295](#), at p 309 . It is the total of one side of the account. For that reason it is impossible, without misapplying the provision, to base the disallowance of the deduction on the ground that the assessable income is constituted by the particular item of 3,031 pounds and that the item was already produced or gained as assessable income before it was lost. (at p350)

6. Banking the takings is a necessary part of the operations that are directed to the gaining or producing day by day of what will form at the end of the accounting period the assessable income. Without this, or some equivalent financial procedure, hitherto undevised, the replenishment of stock in trade and the payment of wages and other essential outgoings would stop and that would mean that the gaining or producing of the assessable income would be suspended. (at p350)

7. In *Ronpibon Tin N.L. and Tongkah Compound N.L. v. Federal Commissioner of Taxation* [\[1949\] HCA 15](#); [\(1949\) 78 CLR 47](#) , it is said : "For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end . . . In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income" (1949) 78 CLR, at pp 56, 57 . Properly understood the place which the banking of money takes in a merchandising business brings the operation within the principle thus stated. It is an essential, or at all events highly expedient, part of the conduct of the business, a necessary or recognised incident or concomitant, and is relevant as well as incidental to the end in view, the gaining of the assessable income. The "occasion of the loss" in the present case was the course pursued in banking the money. In *Commissioner of Taxation (N.S.W.) v. Ash* [\[1938\] HCA 68](#); [\(1938\) 61 CLR 263](#) , Rich J. said : "There is no difficulty in understanding the view that involuntary outgoings and unforeseen or unavoidable losses should be allowed as deductions when they represent that kind of casualty, mischance or misfortune which is a natural or recognized incident of a particular trade or business the profits of which are in question. These are characteristic incidents of the systematic exercise of a trade or the pursuit of a vocation" (1938) 61 CLR, at p 277 . Even if armed robbery of employees carrying money through the streets had become an anachronism which we no longer knew, these words would apply. For it would remain a risk to which of its very nature the procedure gives rise. But unfortunately it is still a familiar and recognised hazard and there could be little doubt that if it had been insured against the premium would have formed an allowable deduction. Phrases like the foregoing or the phrase "incidental and relevant" when used in relation to the allowability of losses as deductions do not refer to the frequency, expectedness or

likelihood of their occurrence or the antecedent risk of their being incurred, but to their nature or character. What matters is their connection with the operations which more directly gain or produce the assessable income. (at p351)

8. It was argued for the commissioner that even conceding the foregoing the loss was of a capital nature. This argument depends upon the view that before the money was stolen it had come home to the taxpayer so as to form part of its capital resources. But that is not a tenable view of the matter. Attempts have been made in *Sun Newspapers Ltd. and Associated Newspapers Ltd. v. Federal Commissioner of Taxation* (1938) 61 CLR 337, at pp 359-363, and *Broken Hill Theatres Pty. Ltd. v. Federal Commissioner of Taxation* [1952] HCA 75; (1952) 85 CLR 423, at pp 433, 434, to formulate the tests for distinguishing between on the one hand losses, outgoings and expenditure of an income, and on the other hand those of a capital nature. For the purposes of this case it is enough to refer to the passages cited and to point out that we are here dealing with a loss incurred in an operation of business concerned with the regular inflow of revenue, not with a loss of or concerning part of the "profit yielding subject", the phrase in which Lord Blackburn in *United Collieries Ltd. v. Inland Revenue Commissioners* (1930) SC 215, at p 220; (1929) 12 Tax Cas 1248, at p 1254 summarised the characteristics of a business undertaking or enterprise considered as an affair of a capital nature. (at p351)

9. For the foregoing reasons the questions in the case stated should both be answered : Yes. (at p352)

## **ORDER**

Both questions in the case stated answered : Yes. Costs of the case stated reserved for the judge disposing of the appeal

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