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MELBOURNE
CORPORATION
v.
BARRY.

Bannon v. Barker (1) merely followed that in *Rider v. Phillips* (2) under a different Act, and laid down no definite construction of the words of the particular power, or any definite principle other than as to unreasonableness.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *H. E. Elliott*.
Solicitors for the respondent, *Warming & Mulcahy*.

B. L.

(1) (1884) 10 V.L.R. (L.), 200. (2) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.

[HIGH COURT OF AUSTRALIA.]

F. & G. HOOPER LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION } RESPONDENT.

H. C. OF A.
1922.
BRISBANE,
June 21.
SYDNEY,
Sept. 8.
Knox C.J.
Gavan Duffy
and Starke JJ.

War-time Profits Tax—Partnership—Sale of business to company—Majority of shares held by former partners—Method of assessment—Pre-war standard of profits—War-time Profits Tax Assessment Act 1917-1918 (No. 33 of 1917—No. 40 of 1918), secs. 7, 16.

Sec. 16 of the *War-time Profits Tax Assessment Act 1917-1918* provides, by sub-sec. 3, that “the pre-war standard of profits shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the business on the average of any two of the last three pre-war trade years, to be selected by the taxpayer,” &c. ; and, by sub-sec. 6, that “where owing to the recent commencement of a business there has not been one pre-war trade year the pre-war standard of profits shall be . . . (b) a profits standard computed by reference to the income arising from any trade, business,” &c., “whether

liable to war-time profits tax or not, carried on by the taxpayer before his new business commenced as if it were the same business but only to the extent to which the income from the former trade, business," &c., "has been diminished."

Two persons carried on a manufacturing business in partnership for many years. In 1915 they formed a company in which they held the large majority of shares, and which took over and carried on the business. They devoted the whole of their time to the business of the company.

Held, that the pre-war standard of profit of the company was properly taken to be the average amount of the profits of the business for the years 1911-1912 and 1913-1914, and that the company was properly assessed to war-time profits tax in respect of the profits for the year 1918-1919 computed upon the profits of those two years as the pre-war standard.

Quære, whether sec. 16 (6) (b) applied to the above case.

CASE STATED.

On the hearing of an appeal to the High Court by F. & G. Hooper Ltd. from an assessment of the company for war-time profits tax for the year 1918-1919, *Knox* C.J. stated a case, which was substantially as follows, for the opinion of the High Court :—

1. For some years prior to 1st July 1915 Frank George Hooper and George Robert Hooper carried on business in partnership at Too-woomba, as sauce, pickle and jam manufacturers, under the style or firm of F. & G. Hooper.
2. On or about 1st July 1915 the said partnership sold the said business and the assets thereof, save as to certain real property portion thereof, to a limited liability company called F. & G. Hooper Limited, the above-named appellant, in consideration (*inter alia*) of certain shares in the said company.
3. The said partnership was thereupon dissolved.
4. The said company was registered and incorporated on 29th June 1915, and from 1st July 1915 the said company carried on the business of sauce, pickle and jam manufacturers theretofore carried on by the said partnership and has continued to carry on the said business until the present date.
5. The said Frank George Hooper and George Robert Hooper at all material times owned between them the majority of the shares of the said company, that is to say, 12,700 shares out of 12,806 shares issued, the balance of the said shares being held as to 101 shares

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thereof by John G. Cochrane, an employee of the said company, and five other shareholders holding one share each.

6. Since 1st July 1915 the said Frank George Hooper and George Robert Hooper have devoted the whole of their time to the business of the company.

7. The said Frank George Hooper and George Robert Hooper ceased to carry on any part of the said business theretofore carried on by them in partnership under the style of F. & G. Hooper, save in so far as conducting the business of the company may be deemed carrying on the partnership business, and drew no further income from the said partnership and relinquished the whole of the income from the said partnership on the establishment of the said company on 1st July 1915, but received the directors' fees as in the next paragraph hereof mentioned out of the profits of the business of the said company.

8. The profits of the said company for the years ending 30th June in each year since its formation were as follows: 1916, £2,664; 1917, £2,087; 1918, £2,546, and 1919, £2,319. The amounts of the said profits paid to the said Frank George Hooper and the said George Robert Hooper as directors' fees, such fees being distributed equally between them, were: 1916, £2,500; 1917, £2,000; 1918, £2,500, and 1919, £2,300. The amounts of the said profits remaining undistributed were: 1916, £164; 1917, £87; 1918, £46, and 1919, £19.

9. The income of the said partnership for the year 1914-1915 amounted to the sum of £2,460 or thereabouts, on which sum the said partnership was assessed for the purpose of Federal income tax and which sum, if adjusted for the purposes of war-time profits tax, would give a pre-war standard of £2,256.

10. The profits of the said company for the year 1918-1919, as adjusted for the purposes of the *War-time Profits Tax Assessment Act* 1917-1918, amounted to the sum of £2,029. The said sum includes the sum of £1,780 part of the £2,300 drawn by the directors as aforesaid, which said sum of £1,780 was disallowed by the Commissioner as a deduction for the purposes of the said Act.

11. The profits arising from the business of the said partnership for the years 1911-1912 and 1913-1914 as adjusted for the purposes

of the said Act were £1,259 and £1,777 respectively, and amounted on the average to the sum of £1,518, which sum was the profits on the average of two of the last pre-war trade years as provided by sec. 16 of the said Act as appears from the balance-sheets and profit and loss accounts of the said partnership.

12. On 27th July 1921 the Deputy Federal Commissioner of Taxation issued an assessment to the said company under the said Act in which he fixed the pre-war standard of profits of the said company at the said sum of £1,518.

13. On 22nd August 1921 the said company gave a notice of objection to the said assessment on the ground that the pre-war standard had not been correctly calculated and that it should be calculated giving effect to sec. 16, sub-secs. 6 (b), 7, 13 and 14.

14. On 24th January 1922 the said Deputy Federal Commissioner of Taxation disallowed the said objection.

15. On 17th February 1922 the said company notified the said Deputy Federal Commissioner that they desired he should treat the notice of objection as a notice of appeal, and requested that the same be set down for hearing before the High Court in Brisbane.

The questions of law arising for the determination of the High Court are as follows:—

- (1) Was the Deputy Federal Commissioner entitled in law to fix the pre-war standard of profits of the company at the sum of £1,518 for the purpose of assessing the company under the *War-time Profits Tax Assessment Act 1917-1918* in respect of the profits for the year 1918-1919?
- (2) If the appellant should be assessed in accordance with sec. 16 (6) (b), should the profits standard therein mentioned be determined (a) by reference to the average profits of the partnership of F. & G. Hooper for any two of the last three pre-war trade years; or (b) by reference to the profits of the said partnership for the year immediately preceding the incorporation of the company, viz., the year 1914-1915; or (c) upon what basis should the said profits standard be calculated?
- (3) By whom should the costs of and incidental to this special case be paid?

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Stumm K.C. (with him *E. A. Douglas*), for the appellant. Sub-sec. 6 of sec. 16 is made applicable by reason of sub-sec. 7 and sub-sec. 13, or one of them. The business of the company is a new business; if it is the same business as that of the partners, there has been a change of owners; the pre-war standard should be taken to be the profits of the partnership in the 1913-1914 or 1914-1915 financial year.

Feez K.C. (with him *Real*), for the respondent. On the facts no change of ownership was made. Sub-sec. 6 has no application; the reference prescribed by that sub-section is to profits of a particular business, not profits of a particular form of ownership of a business. If sub-sec. 6 does apply, the assessment in the present case is still correct in amount.

Cur. adv. vult.

Sept. 8.

THE COURT delivered the following written judgment:—

Prior to 1st July 1915 F. & G. Hooper carried on the business of pickle and jam manufacturers in co-partnership. The average profits of this business during the years 1911-1912 and 1913-1914 amounted to £1,518. In June 1915 the partners formed a company which took over the business and carried it on from 1st July 1915. The partners owned the majority of the shares in this company and devoted the whole of their time to its business. The Commissioner of Taxation assessed the company to war-time profits tax for the financial year 1918-1919, allowing the sum of £1,518 as the pre-war standard of profits of the company, pursuant, as he claimed, to the provisions of secs. 7 and 16 of the *War-time Profits Tax Assessment Act* 1917-1918.

It is not disputed that the assessment was correct if the pre-war standard of profits was rightly assessed at the sum of £1,518. Mr. *Stumm* for the appellant argued that the provisions of sub-sec. 6 of sec. 16 of the Act applied to this case, either by virtue of sec. 16, sub-sec. 7, or by virtue of sec. 16, sub-sec. 13, and that under clause (b) of sub-sec. 6 the pre-war standard of profits was either the income of the partnership business for the year ending 30th June 1915,

which amounted to £2,256, or the income of that business for the year ending 30th June 1914, which amounted to £1,777. In the view which we take, it is not necessary to decide whether the provisions of sub-sec. 6 (b) apply to this case or not, for, even if they do, we think it is clear that the assessment of £1,518 is correct.

Omitting provisions irrelevant to this case, the words of sub-sec. 6 of sec. 16 are as follows: "the pre-war standard of profits shall be . . . (b) a profits standard computed by reference to the income arising from any trade, business, office, employment or profession of any sort, whether liable to war-time profits tax or not, carried on by the taxpayer before his new business commenced as if it were the same business but only to the extent to which the income from the former trade, business, office, employment or profession has been diminished." In order to apply this provision to the present case, it is necessary to treat the business carried on before incorporation and that carried on since as the same business, and then to proceed with the process of basing the pre-war standard of profit on that hypothesis. The method of fixing the pre-war standard is to be found in sub-sec. 3 of sec. 16, which provides that "the pre-war standard of profits shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the business on the average of any two of the last three pre-war trade years, to be selected by the taxpayer"; and that is the method which has been adopted by the Commissioner in fixing the pre-war standard in this case at £1,518.

The answer to question 1 of the case stated is "Yes." It is unnecessary to answer question 2. The answer to question 3 is that the costs therein mentioned shall be costs in the appeal.

Questions answered accordingly.

Solicitors for the appellant, *McNab, Dowling & Wilson.*

Solicitors for the respondent, *Chambers, McNab & McNab*, for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

J. L. W.

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