No. 22 of 1961.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NEW ZEALAND.

BETWEEN

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *Appellant*

AND

THE COMMISSIONER OF INLAND REVENUE *Respondent.*

Case for the Appellant.

RECORD.

1. This is an Appeal from a Judgment of the Supreme Court of New Zealand (sitting as a Full Court) dated the 21st day of February, 1961, dismissing (by the judgments of Barrowclough, C.J., McGregor and McCarthy, J.J.) an appeal by the Appellant from the determination of a Magistrate dated 30th May, 1960, in favour of the above-named Respondent. Such determination was given in respect of a Case stated by the Respondent pursuant to Regulation 25 of the Land and Income Tax Regulations, 1946 (Serial Number 1946/74), following an objection by the Appellant to its assessment of Income Tax for the tax year ended 31st March, 1956 (in respect of which the Department of Inland Revenue accepted figures as at the Appellant Society's balance date of 31st December, 1955, for the purposes of assessment) the said objection being made and thereafter dealt with in accordance with the provisions of Part III of the Land and Income Tax Act, 1954 (hereinafter referred to as the Act). The questions for determination were stated in the said Case Stated by the Respondent as being :— pp. 97, *et seq.* p. 11, l. 12.

(A) Whether the Respondent, in making the assessment for the income year ended on the 31st day of December, 1955, as set forth in paragraph 32 hereof acted correctly in treating the said amount of £1,752,083 as being the surplus funds allotted for the said year in respect of policies comprised in the New Zealand business of the Appellant, and, if not, in what respects should such amount be varied.

(B) Whether the Respondent, in making the said assessment, acted correctly in allowing a deduction against the said amount of £1,752,083 only to the extent of the said amount of £14,780.12.0 and, if not, in what respects should the amount of such deduction be varied.

p. 21. 2. The Appellant duly filed an Answer to the said Case Stated and as required so to do, set forth the grounds of its appeal (meaning "a proceeding in a Magistrate's Court under Part III of the Act for the determination of an objection made under the Act to an assessment of land tax or income tax" within the terms of Regulation 22 of the 10
p. 24, l. 12. said Regulations) as follows :—

(A) That the Respondent in making the assessment for the income year ended on the 31st day of December, 1955, as set forth in paragraph 32 of the Case Stated did not act correctly pursuant to the Land and Income Tax Act, 1954, in treating the said amount of £1,752,083 as being the surplus funds allotted for the said year in respect of policies comprised in the New Zealand business of the Appellant and that the sum of £1,409,210 is the correct amount of the surplus funds so allotted.

(B) That the Respondent in making the said assessment did 20 not act correctly pursuant to the Land and Income Tax Act, 1954, in allowing a deduction against the said amount of surplus funds to the extent only of the amount of £14,780 12s. 0d. and that the Respondent should have deducted further sums (as referred to in paragraphs 35, 36 and 37 of the Case Stated) namely,

(i) The sum of £65,063 6s. 4d. being dividends derived from companies incorporated in Australia and received by the Appellant's New Zealand Branch in respect of shares held by such Branch :

(ii) All other dividends derived by the Appellant from all 30 sources, amounting to £462,086.

3. The case has so far been dealt with in two separate parts as substantially the questions involved in the Appeal are quite distinct. It is common ground that both parts relate directly to Section 149 of the Act, which reads as follows :

(1) Notwithstanding anything to the contrary in this Act, every company engaged in carrying on in New Zealand the business of life insurance shall for the purposes of this Act be deemed to have derived and to derive profits from that business in accordance with the following provisions of this section, and all such profits 40 shall be deemed accordingly to be assessable income of the company.

(2) In the case of any such company which makes to its policyholders, or to any class or classes of its policyholders, an annual allotment of surplus funds by way of reversionary bonuses or otherwise, the residue of the surplus funds so allotted for any year in respect of policies comprised in the New Zealand business

of the company, after deducting therefrom any income derived by the company in that year and exempt from taxation (whether by virtue of section eighty-six of this Act or otherwise howsoever), shall be deemed to be profits derived by the company in that year.

(3) In the case of any such company which makes to its policyholders, or to any class or classes of its policyholders, an allotment of surplus funds by way of reversionary bonuses or otherwise at periodical intervals greater than a year, the residue of the surplus funds allotted for any period in respect of policies comprised in the New Zealand business of the company, after deducting therefrom any income derived by the company in that period and exempt from taxation (whether by virtue of section eighty-six of this Act or otherwise howsoever), shall be deemed to be profits derived by the company during that period, and the average annual amount thereof shall be deemed to have been derived in each of the years wholly or partly included in that period.

(4) If any company to which this section applies has for any year or other period paid any dividends to shareholders out of profits derived from its business of life insurance, there shall be added to its profits computed in the manner provided by subsection two or subsection three of this section, as the case may be, an amount equal to the additional amount that would have been allotted in respect of policies comprised in the New Zealand business of the company if the amount so paid to shareholders had been included in the surplus funds allotted for any year or other period as aforesaid by way of reversionary bonuses or otherwise among all the policyholders of the company entitled by virtue of their policies to share in its profits.

(5) From the assessable income of any company for any year computed as hereinbefore in this section provided there shall be deducted all special exemptions to which the company may be entitled under this Act, and the residue shall be the taxable income of the company for that year. No company to which this section applies shall, in respect of its business of life insurance, be assessable for income tax otherwise than as provided in this section.

(6) If for any year of assessment any company carrying on the business of life insurance as aforesaid is unable to furnish returns as to the profits derived or deemed to have been derived by it in accordance with the foregoing provisions of this section during the preceding year, its profits for that year shall be deemed to be not less than the profits derived by it in accordance with this section during the last preceding year for which returns are available, and income tax shall be assessed and payable thereon accordingly, and any adjustments, whether by way of the payment of additional tax or the refund of tax, shall be made as soon as practicable thereafter.

(7) No company which carries on in New Zealand the business of life insurance shall be entitled to any exemption from income tax under paragraph (k) of subsection one of section eighty-six of this Act in respect of interest payable out of New Zealand.

(8) For purposes of income tax the Government Insurance Commissioner shall be deemed to be a company carrying on in New Zealand the business of life insurance, and shall be assessable and chargeable with income tax accordingly.

It is proposed in this Case to set out separately hereafter, in like order to that adopted in the Magistrate's Court and the Supreme Court of New Zealand, matters relating to Part I and Part II of the Case. The question (A) set out in paragraph 1 hereof and the contention included in sub-paragraph (A) of paragraph 2 hereof both relate to Part I of the Case whilst question (B) in paragraph 1 hereof and the contention included in sub-paragraph (B) of paragraph 2 hereof both relate to Part II of the Case.

4. The material facts in relation to Part I aforesaid, as appearing in the said Case Stated and the evidence adduced are as follows :—

p. 3, l. 5. (i) The Appellant is a mutual insurance society incorporated in New South Wales in the Commonwealth of Australia under the Australian Mutual Provident Society's Act, 1910, as amended by
p. 3, l. 13. the Australian Mutual Provident Society's Act, 1941, having no shareholders and having its registered office at 87 Pitt Street, Sydney : the Appellant's business comprises ordinary life insurance (including annuity business) and industrial insurance and is carried on by the Appellant in Australia, New Zealand and the United Kingdom.

p. 5, l. 24. (ii) The Appellant in furnishing its return of Income dated 18th July, 1956, to the Respondent for the income year ended on the 31st day of December, 1955, and declaring its assessable income, referred to its surplus funds as follows :—

" Surplus funds allotted in respect of policies comprised in the New Zealand business of the Appellant .. .. £1,752,083."

p. 5, l. 34. (iii) The said amount of £1,752,083 was comprised as shown in the Certificate of the Chief Actuary to the Appellant Society, which certificate was annexed to the said return and which read as follows :—

p. 5, l. 39. " I the undersigned, Leslie George Oxby of Sydney, N.S.W., Chief Actuary for Australian Mutual Provident Society, do hereby certify that the surplus funds of the said Society allotted to its policy holders for the year ended 31st December, 1955, in respect of policies comprised in the New Zealand business of the Society were as follows :—

(*a*) Cash payments totalling £15,591 made in respect of policies terminated during 1955.

(*b*) Reversionary bonuses for a total face value of £2,929,285 allotted to policies in force at 31st December, 1955. The cash value of the Reversionary bonuses of face value £2,929,285 according to the respective bases employed by the Society in valuing its policies was £1,736,492 at 31st December, 1955.

Dated at Sydney this twenty-sixth day of June, 1956.

(L. G. OXBY,) Sgd."

(iv) By an amended return dated the 25th day of January, 1957, the Appellant showed as its "Surplus Funds allotted in respect of policies comprised in the New Zealand business of the Appellant" an amount of £1,409,210. p. 6, l. 11.

(v) The said amount of £1,409,210 was comprised as shown in the Certificate of the Chief Actuary to the Appellant Society, which certificate was annexed to the said return and which read as follows :— p. 6, l. 25.

"I the undersigned, Leslie George Oxby of Sydney, N.S.W., Chief Actuary for Australian Mutual Provident Society, do hereby certify that the surplus funds of the said Society allotted to its policyholders for the year ended 31st December, 1955, in respect of policies comprised in the New Zealand business of the Society were as follows :—

(*a*) Cash payments totalling £15,591 made in respect of policies terminated during 1955.

(*b*) Reversionary bonuses for a total face value of £2,929,285 allotted to policies in force at 31st December, 1955.

The cash value of the Reversionary Bonuses of face value £2,929,285 according to the A1924–29 ultimate Table of mortality and an interest rate of $3\frac{3}{4}\%$ per annum, was £1,393,619 at 31st December, 1955.

Dated at Sydney this twenty-second day of January, 1957.

(L. G. OXBY) Sgd."

(vi) In the published reports of the Appellant Society for the year ended 31st December, 1955, the total sum of £8,738,779 was shown as being distributed so as to provide reversionary bonuses on Ordinary Life and Industrial Insurance policies, this sum being a substantial portion of the Surplus of the Appellant for that year, which sum provided reversionary bonuses of about £14,524,000. p. 5, l. 16. p. 22, ll. 31-32. p. 39, l. 13.

(vii) Of the said sum of about £14,524,000, £2,929,285 related to policies comprised in the Appellant's New Zealand business whilst £1,736,492 of the said sum of £8,738,779 likewise related. p. 39, ll. 14-17.

p. 47, l. 3. (viii) That for the purposes of assessing income tax pursuant to the Act, and in particular Section 149 thereof, the Respondent has accepted as the basis of such taxation a return as to the cash value of the reversionary bonuses, and has assessed tax upon such cash value.

p. 101, l. 5, *et seq.* (ix) That the allotment of reversionary bonuses involves the allotment of a specific reversionary bonus to each individual policy, which bonus is payable in full when and only when the policy becomes subject to a claim upon the death of the life assured or the maturity of the policy by effluxion of time.

p. 28, l. 11. (x) That in order to ascertain the amount of its surplus a life office computes, by means of actuarial calculations, its net
p. 28, l. 32. liability under its policies. The amount, if any, by which its life insurance fund exceeds this net liability constitutes the Surplus.
p. 28, l. 35. In practice the bulk of the Surpluses of well-established offices operating in Australia and New Zealand is absorbed in the distribution of reversionary bonuses to participating policyholders.

p. 39, l. 37. (xi) The calculation of the net liability of the Appellant made as at the 31st day of December, 1955, was made upon a net premium
p. 34, l. 16. basis which requires than an artificially low interest rate be used for the purpose of calculating (inter alia) the face values of reversionary bonuses corresponding to the amounts of Surplus which are to be absorbed in the distribution. Such artificially low interest rate is an important element in the " Net Premium Valuation " but is nonetheless unreal as are other important elements; it is one element
p. 33, l. 2. in the device of valuation which contributes in a simple manner
p. 33, l. 6. to the production of end results which are consistent with the system of compound reversionary bonuses and which the policyholders consequently might expect to receive.

(xii) That the return by the Appellant dated 18th July, 1956, and the Certificate of the Chief Actuary (referred to in subparagraphs (ii) and (iii) hereinbefore) showed a figure for cash
p. 44, l. 31. value of Reversionary bonuses calculated upon the bases employed in the valuation of the policies, viz., using the artificially low interest rate.

(xiii) That the amended return dated the 25th day of January, 1957, and the Certificate of the Chief Actuary (referred to in subparagraphs (iv) and (v) hereinbefore) showed a figure for cash value of Reversionary bonuses calculated at the interest rate set
p. 21, l. 33. out in the said Certificate, which prevents or avoids an over-
p. 52, ll. 29–34. statement of the allotment of Reversionary Bonuses.

(xiv) That the use of the " Net Premium Valuation " method
p. 35, ll. 23–29. requires that its artificial low interest rate be used for the purpose of calculating the face values of reversionary bonuses corresponding to the amounts of surplus which are to be absorbed in the distribution; such amounts of surplus include, by reason of the method of valuation, part of what has been termed in the evidence the

Additional Reserve. This part of Additional Reserve is subsequently released and added to the cash Surplus allotted to policy holders in later years of the policy's existence. p. 34, l. 20. p. 36, l. 9.

(xv) The evidence of the Chief Actuary for the Appellant was that the total amount of surplus funds allotted to policyholders by the Appellant for the year ending 31st December, 1955, by way of reversionary bonuses or otherwise in respect of policies comprised in its New Zealand business was thus £1,409,210. It was accepted by the Court and indeed not disputed " that the cash value of £1·7 million as determined by the first method is more than would be sufficient to produce, on maturity of the policies, the amount of bonuses declared for the relevant year." p. 39, l. 30. p. 102, l. 28 to l. 31.

5. Part I of the Appeal therefore involves the question as to the meaning of the words of Subsection (2) of Section 149 of the Act and in particular as to what is meant by " an annual allotment of surplus funds by way of reversionary bonuses, or otherwise " and the words " so allotted."

6. Their Honours, in dismissing the Appeal in the Supreme Court of New Zealand very largely based their conclusions upon the words used in the published Report of the Society and certain extracts from the Return of the Appellant to the Insurance Commissioner of Australia. The Chief Justice proceeded in his reasoning from this view :— Ex. D, p. 159. Ex. C, p. 143.

" Nevertheless we start with the proved and undisputed fact that £8·7 millions was allocated, allotted, divided or distributed by way of reversionary bonuses to all the appellant's policyholders (including policyholders in New Zealand) thereby providing reversionary bonuses which would ultimately be worth £15·5 million." p. 98, l. 37.

(NOTE : The reference here and in other places in His Honour's judgment to "£15·5 million" is, it is submitted, clearly incorrect: the sum involved in respect of reversionary bonuses is £14,524,000 being the sum of the figures of £12,996,000 in respect of participating Ordinary policies and £1,528,000 in respect of Industrial policyholders.) His Honour then refers to the Certificate dated 26th June, 1956, of the Chief Actuary of the Appellant and goes on to say :— p. 160, Ex. D. p. 161, Ex. D. p. 5, l. 38.

" This certificate was obviously prepared for the purposes of Section 149 (2) of the New Zealand Act but surprisingly it certifies two matters which are not strictly relevant. The subsection makes no reference either to the face value or the cash value of reversionary bonuses." p. 99, l. 9.

It is common ground, nevertheless, that the Commissioner of Inland Revenue has for many years and does still accept a certificate as to the cash value of reversionary bonuses as establishing the measure of the amount of the annual allotment of surplus funds by way of reversionary bonuses or otherwise. If this were not done, the true basis of taxation could be reached by the issue or crediting to the Commissioner of Inland Revenue of a credit certificate in respect of the tax on each reversionary

bonus allotted to each policy, which credit could be redeemable by the Commissioner at the same time as the policy matures, be it by death or by the effluxion of time. It is contended, however, that so long as the relevant statute [viz. Sec. 149 (2)] founds taxation upon " surplus funds so allotted," the amount of surplus funds not only is solely determinable by reference to the cash value of the portion of the fund allotted but also must be limited to the funds appropriated to the individual policyholders seriatim.

The learned Chief Justice then proceeded to infer from the proportions
p. 100, ll. 20-24. mentioned in his judgment that it was clearly established that " the sum allotted, ' allocated divided or distributed ' . . . for the year 1955 by way of reversionary bonuses in respect of policies comprised in the Society's New Zealand business was £1·7 million." The proportion relied upon by His Honour is non-existent, having regard to the erroneous use of the figure of £15·5 million, and in any event even if the appropriate figure of
p. 39, l. 13. about £14,524,000 were adopted, the proportion still does not remain.

His Honour then went on to consider the use of the words " so
p. 100, l. 26. allotted " within the meaning of that expression in subsec. (2) of Sec. 149 of the Act, and based his conclusion as to allotment upon the view that the sum of £1·7 million was the only sum in respect of which a " relevant corporate act " was proved. In support of that view he directs attention
p. 104, l. 18. to para. 8 (E) of the Return furnished by the Appellant to the Insurance
Ex. " C." p. 154. Commissioner of Australia and founds his conclusion upon the fact that the Additional Reserve (to which reference is made herein and in the evidence) was not mentioned therein and was not differentiated in any way in the books of the Appellant from the funds allotted.

p. 111, l. 9. 7. Mr. Justice McGregor dealt with Part I of the Appeal as being
p. 112, l. 38. entirely a question of fact. Whilst agreeing that the acceptance by the
p. 113, l. 4. Respondent of the figure first returned by the Appellant as being the cash value of its surplus funds allocated in respect of the New Zealand business will in effect result in double taxation, he concluded that the Court could not, in view of the Appellant's published and certified returns say that
p. 113, l. 16. the alternative method resulting in lower taxation to the Society must be the one which the Respondent should adopt.

8. Mr. Justice McCarthy considered that the Appellant's case had
p. 122, l. 47. been dominated excessively by its enquiry into the cash value of the bonuses declared. His Honour accepted that there was at most a notional
p. 123, l. 37. allotment and was satisfied that the surplus allotted was £8,738,779 in respect of the whole business of the Society, being satisfied to reach that conclusion upon the documents to which he refers, namely, the published
p. 160, Ex. D. accounts of the Appellant society as issued to its policyholders and the
p. 143, Ex. C. Return to the Insurance Commissioner of the Commonwealth of Australia.
p. 124, l. 5. After accepting that figure, His Honour then dealt with the New Zealand
p. 124, l. 13. share of that fund upon a proportionate basis and concluded " that it seems not to matter that that sum may have been more than was required to meet the immediate cash value of the bonuses."

9. It is submitted that the meaning to be ascribed to the words " so allotted " in Section 149 of the Act, is governed by the words preceding

them in the Section, viz., the words " which makes to its policyholders " and further by the words " in respect of policies comprised in the New Zealand business of the company." Thus the allotment of surplus funds by way of reversionary bonuses or otherwise which is relevant is the allotment which is made to policyholders in respect of policies comprised in the New Zealand business. Whilst the word " allot " normally carries the dictionary meaning of :—

> *Shorter Oxford Dictionary.*—1. To distribute by lot or in such way that the recipients have no choice : to assign shares authoritatively, to apportion. 2. To assign as a lot or portion to.

> *Webster.*—1. To distribute by lot : 2. To distribute or parcel out in parts or portions or to each individual concerned : to assign as a share or lot or to a particular person or for a particular purpose ; to set apart as one's share.

> *Funk and Wagnall's New Standard Dictionary.*—1. To assign by or as by lot (a definite thing or part of a certain person) : distribute as by authority or in a manner not within the control of the recipient. 2. To appoint or assign by absolute authority. 3. To set off or assign for a certain purpose,

in the context of the sub-section which is relevant, it must also be interpreted in relation to the recipients of the sums allotted. In other words it is respectfully submitted that in having regard predominantly to the entries in the Appellant's published accounts and report as to Surplus divided, distributed, allocated or allotted, as the case may be, the Supreme Court paid insufficient regard to the wording of the Section relating to an annual allotment to policyholders.

10. The questions involved in Part II of this Appeal, as appears from the question and contention respectively set out in the Case Stated p. 11, l. 19. and Answer by the Appellant (and referred to in paragraphs 1 (*b*) and 2 (*b*) p. 24, l. 22. hereof) relate to the deductibility of dividends from Companies, such dividends having been received by the Appellant or its New Zealand branch as part of its investment income.

11. These questions relate primarily to the interpretation to be placed upon the words :—

> " after deducting therefrom any income derived by the company in that year and exempt from taxation (whether by virtue of Section eighty-six of this Act or otherwise howsoever) . . ."

Other material sections of the Act are as follows :—

Section 149 (5) which reads :—

> " From the assessable income of any company for any year computed as hereinbefore in this section provided there shall be deducted all special exemptions to which the company may be entitled under this Act, and the residue shall be the taxable income

of the company for that year. No company to which this section applies shall, in respect of its business of life insurance, be assessable for income tax otherwise than as provided in this section."

Section 149 (7) which reads :—

" No company which carries on in New Zealand the business of life insurance shall be entitled to any exemption from income tax under paragraph (*k*) of subsection one of section eighty-six of this Act in respect of interest payable out of New Zealand."

Section 2, as to these definitions :—

" Company " means any body corporate whether incorporated in New Zealand or elsewhere but does not include a local or public authority.

" Dividends " has the meaning assigned to it by section four of this Act.

Section 86 (so far as it is material) which provides :—

" (1) The following incomes shall be exempt from taxation :—

(*i*) Dividends and other profits derived from shares or other rights of membership in companies, other than companies which are exempt from income tax :

* * * * *

(*k*) Income derived by a person who is not (within the meaning of this part of this Act) resident in New Zealand, from stocks or debentures which have been issued by the Government of New Zealand or by any local or public authority and the interest on which is payable out of New Zealand :

* * * * *

(*x*) Income expressly exempted from income tax by any other Act, to the extent of the exemption so provided."

Section 165 reads as to subsections (2) and (3) :—

" (2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income tax."

Section 167 which reads :—

"Subject to sections one hundred and sixty-eight and one hundred and sixty-nine of this Act, the following classes of income shall be deemed to be derived from New Zealand :—

(*a*) Income derived from any business carried on in New Zealand : "

Section 170 of the Act reads :—

"(1) Income derived by a person resident in New Zealand but not derived from New Zealand shall be exempt from income tax if and so far as the Commissioner is satisfied that it is derived from some other country or territory within the Commonwealth and that it is chargeable with income tax in that country or territory.

(2) In determining the country or territory from which income is derived the Commissioner shall apply the same rules, with the necessary modifications, as are applicable in determining whether income is derived from New Zealand.

(3) In this section 'income tax' means, in respect of any country or territory other than New Zealand, any tax which in the opinion of the Commissioner is substantially of the same nature as income tax under this Act."

12. The material facts relating to Part II of the Appeal are as follows :—

(i) The New Zealand branch of the Appellant for the income year in question received dividends from Companies incorporated in New Zealand amounting to £14,780 12s. 0d.: this sum has been allowed by the Respondent as a deduction and no question arises in respect thereof. p. 11, l. 21.

(ii) The New Zealand branch of the Appellant for the income year in question received further dividends amounting to £65,063 6s. 4d. in respect of shares in Companies incorporated in Australia : such shares were held by the New Zealand Branch of the Appellant and the dividends were remitted from Australia to that branch, with the exception of that portion of the dividends which consisted of bonus issues of shares. p. 72, l. 27. p. 73, l. 33. p. 84, l. 25.

(iii) Further dividends were received by the Appellant from shares held by its Australian and United Kingdom branches and amounted to £462,086. p. 74, l. 19.

(iv) None of the above-mentioned dividends were derived from companies exempt from income tax in the country of their respective incorporation. p. 73, l. 35. p. 74, l. 26.

(v) There being a deficiency in the Appellant's New Zealand branch funds and in its United Kingdom branch funds all such p. 40, l. 25.

dividends as are referred to in sub-paragraph (iii) hereof as arising in Australia and amounting to £409,566 contributed towards surplus funds allotted for the year 1955 by way of reversionary bonuses to policyholders in respect of policies comprised in the
p. 41, l. 6. New Zealand Branch business of the Appellant. Such income was assessable income for taxation purposes in Australia.

(vi) Had there not been a Surplus in the Australian funds of
p. 40, l. 36. the Appellant as at 31st December, 1955, there could not properly have been an allotment of reversionary bonuses to policies comprised in the New Zealand business of the Appellant. 10

13. Their Honours in delivering the judgment of the Supreme Court of New Zealand, founded their respective views primarily upon the con-
p .125, l. 26. clusion that the word " exempt " should prima facie be read as applying to income which is, first of all, subjected to taxation by the general provisions of the law of New Zealand and is later exempted by that same law whether by s. 86 of the Act or by other statutory provision. Thus
p. 108, l. 11. the Chief Justice concluded :—

" Looking fairly at this enactment it seems to me that a construction which makes exigibility a prerequisite of exemption is much more in accord with the intention of the legislature than 20 a construction which makes exigibility entirely irrelevant. The latter construction would render the enactment utterly futile and that obviously was not intended."

p. 108, l. 31. The judgment then proceeds to demonstrate how an absurd result, in the learned Judge's mind, would be achieved if exigibility were not imported as a necessary ingredient in the concept of the construing of the word " exempt." The Chief Justice, having applied that view to the claimed deduction of £462,086 then proceeded to apply the same reasoning
p. 109, l. 6. to the claim in respect of £65,063 6s. 4d. and held that Sec. 167 (*a*) of the Act had no application. The judgment proceeded upon a basis unsupported 30 by the evidence when His Honour treated the shares from which the
p. 105, l. 28. dividends derived in this connection as being held in Australia by the
p. 72, l. 27. Appellant. The evidence is that such shares were held in New Zealand and that the dividends resulting therefrom were remitted to the New
p. 73, l. 34. Zealand Branch of the Appellant.

14. Mr. Justice McGregor noted that two conditions must exist before a deduction can be allowed and adverted to the first of these conditions as being a primary question as to what is included in the
p. 114, l. 21. expression " income derived by the company in that year." He cites the observations of Lord Esher in *Colquhoun* v. *Heddon* 25 Q.B.D. 129 40 and goes on to say that the phrase mentioned seemed to him to have the necessary territorial restriction and construed the real meaning of the
p. 115, l. 17. phrase regulating the deduction as " any income derived by the Company
p. 115, l. 26. in New Zealand and exempt from taxation (i.e. New Zealand taxation)." That seemed to the learned Judge to be a question of fact.

In dealing with the topic of the item of £65,063 (dividends and bonus issues from shares held by the New Zealand branch in companies incorporated in Australia) the learned Judge commented " The fact that the

A.M.P. Society in Australia remits the dividends received from Australian investments to its New Zealand branch seems to me to have no bearing." There is no evidence to support the comment, the evidence simply being that the dividends were remitted from Australia to the New Zealand branch: in point of fact, they (excepting that portion relating to bonus issues of shares) were first received by the Appellant in New Zealand. p. 117, l. 26.

The learned Judge having reached the view that the sum of £65,063 was not deductible, then considered a fortiori the same reasoning would apply to the deduction of £462,086. p. 117, l. 44.

15. Mr. Justice McCarthy agreed with the other members of the Court as to the answers given but added some observations of his own. In particular he agreed with McGregor, J., that "all the indicia are that the Legislature was speaking territorially when it used the particular words." He referred to the consequences demonstrated by the Chief Justice in his judgment and concluded that those consequences emphasised the necessity to apply the restricted meaning which he had given to the word "exempted." His Honour then concluded that Section 165 was a declaratory Section and went on to consider whether the dividend income received by the Appellant Society in respect of the shares held by its New Zealand branch fell within the class of income described in Section 167 (*a*), viz. "income derived from any business carried on in New Zealand." His Honour believed it to be a question of fact as to whether or not in any case any particular income is derived from a business carried on in New Zealand. He considered the facts and included amongst the matters which appeared to influence him an erroneous interpretation unsupported by evidence when he said: "The dividends were paid to the Society in Australia. To my mind the facts that the shares were bought with funds held, at the time of purchase in New Zealand and that as a matter of internal accounting the head office of the Society credited the New Zealand branch or forwarded to that branch the income arising from time to time on the shares does not outweigh the primary facts which are that these shares were purchased out of funds belonging in law to an Australian society, that the society became the registered holder of those shares and that the dividends were paid to the Society in Australia from companies which are resident in Australia." Nevertheless His Honour conceded that there may be cases where the income received from foreign shares by a branch of a non-resident company carrying on business in New Zealand could be taxable as income derived by the parent organisation in New Zealand. His Honour then considered that Section 86 (1) (i) had no application to exempt the dividends in question and accordingly answered the questions in manner similar to that expressed by other members of the Court. p. 119, l. 1. p. 125, l. 32. p. 125, l. 45. p. 126, l. 10. p. 126, l. 36. p. 126, l. 43. p. 127, l. 9–14.

16. It is submitted respectfully that too much weight was paid by their Honours to the possibility of absurdity, as it was called, arising from the plain interpretation of the words of the Statute. Such absurdity as was contemplated in the judgment can well arise in the case of a life insurance company which might have invested the bulk of its funds in shares in companies incorporated in New Zealand.

17. It is contended that the words of Section 149 (2) in their plain meaning, particularly having regard to the words in parenthesis following the words " exempt from taxation " must enable a deduction of income " not subject to tax," and that that is the proper meaning of the words " exempt from taxation." That view is consonant with the interpretation applied by Dixon, J. (as he then was) in *Australian Machinery Investment Co.* v. *Deputy Commissioner of Taxation*, 3 A.I.T.R. (at p. 383) and is in accord with the dictionary meaning of " exempt " as being " free " (Concise Oxford Dictionary). To require the words " or otherwise howsoever " to be limited to meaning " by any other section or Act " is to negate the effect of Section 86 (1) (x). As to the alternate claim in respect of £65,063 it is submitted that that sum is income within the meaning of Section 167 (*a*) and satisfies the test of exigibility, if that be the test (*Hughes* v. *The Bank of New Zealand* (1938), A.C. 366). Further and in the alternative, it is composed of dividends which are themselves exempt under Section 86 (1) (i).

18. The Appellant therefore humbly submits that this Appeal ought to be allowed for the following amongst other

REASONS

In respect of Part I of the Appeal :—

(1) BECAUSE the words " so allotted " contained in Section 149 (2) of the Act require interpretation in the light of the preceding words " which makes to its policyholders " and the following words " in respect of policies comprised in the New Zealand business " and, so construed, relate only to the actual portion of surplus funds appropriated from the surplus to each and all individual policies entitled.

(2) BECAUSE the true measure of the annual allotment of surplus funds is that set forth in the Certificate of the Chief Actuary dated 22nd January, 1957.

(3) BECAUSE the assessment adopted by the Respondent involves the Appellant in double taxation.

(4) BECAUSE the Act is a taxing Act and no tax can be imposed except with words clearly showing the intention to lay the burden on the taxpayer.

(5) BECAUSE the method adopted and contended for by the Appellant does produce the fairer result.

In respect of Part II of the Appeal :—

(6) BECAUSE (in relation to the claim for deductibility of all dividends) the words " exempt from taxation " where used in Section 149 (2) of the Act, mean " not subject to tax," particularly having regard to the words in parenthesis which follow in that subsection.

(7) BECAUSE (in relation to the claim for deductibility of all dividends) the words "or otherwise howsoever" in subsection (2) of Section 149 of the Act are words of such wide import as to require an unrestricted meaning.

(8) BECAUSE to give to the words "or otherwise howsoever" a meaning restricted by limitations as to exigibility (as suggested in the judgments of the Supreme Court) is to deny the plain meaning of the words and furthermore to render them nugatory having regard to Section 86 of the Act.

(9) BECAUSE to interpret Section 149 (2) and other relevant Sections in the light of absurdities which may arise is unwarranted having regard to the artificial nature of the Section, and the unreal basis of assessment of taxation.

(10) BECAUSE (in relation to the alternative claim for deductibility of £65,063) if exigibility be the test (which is denied) then these dividends are exempt from taxation pursuant to Section 86 (1) (i) of the Act.

(11) BECAUSE, and alternatively, as all the dividends referred to are not assessable for taxation pursuant to Section 165 (3) of the Act, they are exempt from taxation.

(12) BECAUSE the interpretation of Section 165 (3) of the Act as an exempting provision in relation to the taxation of life insurance companies is necessary to ensure equality of taxation as between resident and non-resident companies.

In respect of both Parts I and II of the Appeal :—

(13) BECAUSE the Act being a taxing Act, and being both difficult and ambiguous of interpretation, that interpretation should be adopted which is most favourable to the taxpayer.

(14) BECAUSE the Judgment of the Supreme Court of New Zealand is wrong and ought to be reversed.

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No. 22 of 1961.

In the Privy Council.

ON APPEAL

from the Supreme Court of New Zealand

BETWEEN

AUSTRALIAN MUTUAL PROVIDENT SOCIETY . *Appellant*

AND

THE COMMISSIONER OF INLAND REVENUE . *Respondent*

Case for the Appellant

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