No. 22 of 1961.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NEW ZEALAND.

IN THE MATTER of the Land and Income Tax Act, 1954.

BETWEEN

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *Appellant*

AND

THE COMMISSIONER OF INLAND REVENUE *Respondent.*

Case for the Respondent.

RECORD.

1. This is an Appeal from a Judgment of the Full Court of the Supreme Court of New Zealand (Barrowclough, C.J., McGregor and McCarthy, JJ.) given on 21st February, 1961, dismissing an Appeal by way of Case Stated from a determination of the Magistrates' Court (J. S. Hanna S.M.) given on 30th May, 1960, on an objection by the Appellant to an assessment of income tax made by the Respondent for the Appellant's income year ended 31st December, 1955. P. 129. Pp. 87-96.

2. The principal statutory provision relevant to the Appeal is section 149 of the Land and Income Tax Act, 1954 (hereinafter called "the Act") the material subsections of which at all material times were 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 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) . . .

(4) . . .

(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) . . .

(7) . . .

(8) . . ."

The Appellant is a company, resident in Australia and not resident in New Zealand, to which the aforesaid provisions apply.

3. The Appeal falls into two parts which are referred to in the Record as Parts I and II and which give rise respectively to the following issues :—

P. 11, l. 12. (A) PART I.—Whether the Respondent, in making the assessment for the Appellant's income year ended 31st December, 1955, acted correctly in treating a sum of £1,752,083 (instead of £1,409,210 as contended for by the Appellant) as being the allotment of surplus funds by way of reversionary bonuses for the said year in respect of policies comprised in the New Zealand business of the Appellant.

P. 11, l. 19. (B) PART II.—Whether the Respondent, in making the said assessment, acted correctly in allowing a deduction against the said amount of £1,752,083 to the extent only of £14,780 12s. 0d. (instead of £541,929 18s. 4d. as contended for by the Appellant).

It will be convenient, after referring to the course which the proceedings have taken, to deal separately with the said Parts.

4. The Appellant's objection to the said assessment was heard by
P. 2, l. 7. the Magistrate on 29th February and 1st and 2nd March, 1960, and on the
P. 87. 30th May, 1960, the Magistrate delivered judgment in writing rejecting the Appellant's contentions with respect to both the said issues and confirming the assessment.

5. The Appellant having appealed pursuant to Section 35 of the Act to the Supreme Court of New Zealand the said appeal came on for hearing before the Full Court of the said Supreme Court on the 10th,

11th and 12th October, 1960, and on the 21st February, 1961, the Court gave judgment dismissing the appeal. By order of the Supreme Court dated the 31st May, 1961, the Appellant was granted final leave to appeal from the said Judgment to Her Majesty in Council. P. 129, l. 4. P. 97. P. 129, l. 17.

PART I

6. Part I of the case concerns the ascertainment of the surplus funds allotted by way of reversionary bonuses for the year 1955 in respect of policies comprised in the Appellant's New Zealand business.

7. With regard to the surplus funds allotted by way of reversionary bonuses for that year in respect of the Appellant's total business the Appellant's Annual Report for 1955 stated : P. 150.

(A) In the Directors' Report, that on the advice of the Chief Actuary the Directors had " decided to distribute £7,496,295 of surplus funds among the holders of participating Ordinary policies " and that " the corresponding surplus to be distributed to Industrial policyholders " was £1,242,484 (the total of the said sums being £8,738,779). P. 161.

(B) In the Statement of Surplus, certified by the Auditors and the Chief Actuary, that the said respective sums were the " surplus divided and allotted as reversionary bonuses to participating policies." P. 163.

(C) In the Statement of Assets and Liabilities, certified as aforesaid, that the said respective sums were the " surplus divided for year 1955, and allotted as Reversionary Bonuses to participating policies." P. 165.

(D) In the Chief Actuary's Certificate, that " The Reversionary Bonus allotted for the year 1955 to participating policies has required the distribution of £7,496,295 of this Surplus to Ordinary policies, and £1,242,484 to the Industrial Policies " (the total being the sum of £8,738,779 shown in paragraph (A) above). P. 166.

8. With regard to the said allotment of surplus funds the Appellant's Statutory Return to the Insurance Commissioner, Commonwealth of Australia, dated 31st December, 1955, stated : P. 143.

(A) That the surplus in the OrdinaryDepartment was allocated in the manner set out, £7,384,762 being divided among policies with immediate participation and £111,533 among policies with deferred participation (the total of the said sums being £7,496,295). P. 154.

(B) That the surplus in the Industrial Department was allocated in the manner set out, £1,242,484 being divided among policies with participation. P. 157.

9. The said sums of £7,496,295 and £1,242,484 referred to in paragraph 8 (A) and (B) above, and the total thereof, namely £8,738,779, are the same as the sums referred to in paragraph 7 (A) and (D) above.

10. In its return of income to the Respondent for income tax purposes for the year ended 31st December, 1955, the Appellant declared that the surplus funds allotted in respect of policies comprised in its New Zealand business were £1,752,083 which sum, as shown in a certificate by the Chief Actuary annexed to the said return, comprised :—

P. 5, l. 31.
P. 5, l. 39.
P. 6, l. 1.

£15,591	being cash payments made in respect of policies terminated during 1955
£1,736,492	being the cash value of reversionary bonuses of face value £2,929,285.
£1,752,083	

The said sum of £1,736,492 was the due proportion of the sum of £8,738,779 mentioned in paragraphs 7 and 9 above that related to policies comprised in the Appellant's New Zealand business.

P. 6, l. 11.
P. 6, l. 27.

11. Subsequently the Appellant submitted to the Respondent an amended return of income for the said year in which it declared its surplus funds allotted in respect of policies comprised in its New Zealand business to be £1,409,210 which sum, as shown in a second certificate by the Chief Actuary annexed to that amended return, comprised :—

£15,591	being cash payments made in respect of policies terminated during 1955
£1,393,619	being the cash value of reversionary bonuses of face value £2,929,285.
£1,409,210	

12. The difference between the amount of £1,736,492 in the return of income mentioned in paragraph 10 above and the amount of £1,393,619 in the amended return mentioned in paragraph 11 above was that the former was calculated on the basis of interest rates varying according to the type of policy from 2 to $2\frac{3}{4}$ per centum (which were the rates employed by the Appellant in valuing its total net liabilities) while the latter was calculated on the basis of an interest rate of $3\frac{3}{4}$ per centum (which was employed by the Appellant for no other purpose).

P. 44.
P. 44, ll. 34–36.
P. 44, l. 37 to p. 45, l. 5.
P. 45, ll. 32–35.
P. 46, ll. 11–15.
P. 46, l. 35 to p. 47, l. 7.
P. 61, ll. 21–32.

13. In its Answer to the Case Stated by the Respondent the Appellant said :—

P. 23, l. 14.

> (A) That it chose the said interest rate of $3\frac{3}{4}$ per centum as being more suitable than the said rates varying from 2 to $2\frac{3}{4}$ per centum for the purpose of calculating the cash value of the reversionary bonuses, such cash value being the measure of the surplus funds allotted by way of reversionary bonuses for the year ending 31st December, 1955, in respect of policies comprised in the New Zealand business of the Appellant.

(B) That the said rate of $3\frac{3}{4}$ per centum was the rate used by the New Zealand Government Life Insurance Office for the calculation of its net liabilities under its participating policy contracts in force at 31st December, 1955, and was the rate which the Appellant *understood* was used by at least one other Life Office operating in New Zealand for the purpose of calculating the cash value of the reversionary bonuses allotted by it for the same year. P. 23, l. 24.

14. With reference to the said Answer of the Appellant a letter from the Respondent was put in by consent before the Magistrate stating :— P. 141.

(A) That the rate of $3\frac{3}{4}$ per centum used by the Government Life Insurance Office in the year ended 31st December, 1955, for valuing its net liabilities was also used by that Office for ascertaining the present value of the bonuses allotted. P. 141, l. 13.

(B) That one of the life insurance companies operating in New Zealand submitted a tax return using $3\frac{3}{4}$ per centum for calculating the cash value of the reversionary bonuses allotted by it in the year ended 31st December, 1955, and that an assessment was issued to that company on that footing, but, when the Respondent later discovered that the rate of $3\frac{3}{4}$ per centum was not the rate used by that company for calculating its net liabilities for that year, he amended the assessment. P. 141, l. 18.

15. The Respondent declined to accept the amended return mentioned in paragraph 11 above showing the amount of £1,409,210 and he assessed the Appellant with income tax upon the basis of the amount of £1,752,083 shown in the return mentioned in paragraph 10 above. P. 7, l. 10.

16. At the hearing before the Magistrate of the Appellant's objection to the said assessment evidence was given for the Appellant by its Chief Actuary and its Chief Accountant but no evidence was given for the Respondent.

17. In his judgment the Magistrate said that for the purpose of calculation of its New Zealand Income in 1955 for tax purposes the Appellant wished to use a rate of interest of $3\frac{3}{4}$ per centum which was higher than that used by it for all other purposes and which produced for New Zealand income tax purposes the lower figure of £1,393,619 shown in the Chief Actuary's second certificate (paragraph 11 above). That figure was inconsistent with the Appellant's public records and, in the Magistrate's view, the Respondent was correct in saying that the surplus funds allotted must be determined from the only sources available which were the Appellant's records wherein the surplus funds were calculated on rates carrying from 2 per centum to $2\frac{3}{4}$ per centum. The Magistrate therefore disallowed the Appellant's objection and as already stated his decision was upheld on the Appellants appeal to the Supreme Court. P. 90, l. 32. P. 91, l. 1. P. 91, l. 10.

18. In his judgment on the said appeal Barrowclough, C.J., said that the Appellant's Return to the Insurance Commissioner and its Annual P. 97. P. 98, l. 22.

Report showed unquestionably that for 1955 it had " allocated," " allotted," " divided " or " distributed " a total of £8·7 millions providing reversionary bonuses which on maturity would be worth £15·5 millions ; and that the
P. 99, l. 15. Chief Actuary's first certificate (paragraph 10 above) could fairly be regarded as evidence that in respect of New Zealand policies the surplus " allotted "
P. 100, l. 19. within the meaning of section 149 (2) was £1·7 million because that sum bore the same proportion to the £2·9 millions stated in that certificate
P. 101, l. 39. as £8·7 millions bears to £15·5 millions. It had been argued for the Appellant that since in one sense no sum was allotted at all (no sum being taken out of the Appellant's general funds) the section should be read as referring 10
P. 102, l. 1. to the cash value of the reversionary bonuses and not to an allotted fund, and that the Respondent should have accepted the £1·3 million shown in
P. 101, l. 46. the Chief Actuary's second certificate (paragraph 11 above) as being the surplus allotted, that being the cash value ascertained by fair and acceptable
P. 102, l. 31. actuarial methods of the reversionary bonuses of £2·9 millions face value. The contention was that the £1·7 million mentioned in the first certificate
P. 103, l. 35. included £·4 million on which the Appellant should not be taxed because it was not allotted by way of reversionary bonuses but kept as internal reserve. Barrowclough, C.J., however, was unable to accept this con-
P. 104, l. 41. tention. In his view the only allotment which section 149 of the Act 20
P. 104, l. 43. could possibly contemplate was a notional allotment and he thought that the Appellant really accepted this in conceding that £1·3 million was
P. 104, l. 45. " so allotted." The only relevant corporate act which was proved was an allotment of £1.7 million and, there being no evidence which established
P. 105, l. 3. the allotment of any other sum, the Respondent had been right in adopting that sum as the amount of the surplus funds " so allotted " for the year 1955 in respect of policies comprised in the New Zealand business.

P. 111. 19. McGregor, J., said he agreed fully with Barrowclough, C.J.,
P. 111, l. 9. and McCarthy, J., as to Part I. The question was one of fact and the
P. 111, l. 24. burden of proof was on the Appellant. There was cogent evidence by 30 the Appellant's Chief Actuary as to the proper basis of estimating the present value of the reversionary bonuses declared and as to the sufficiency of the lesser sum stated in the Chief Actuary's second Certificate (para-
P. 112, l. 5. graph 11 above) but in its certified accounts and statutory return which had not been amended the Appellant had declared its total surplus and consequent allocations and the sum of £1,752,083 shown in the first certifi-
P. 112, l. 2. cate (paragraph 10), which accorded with that published global information, must be accepted as the sum allocated in respect of its New Zealand
P. 112, l. 25. business. As the amended amount in the second certificate had never been brought into the Appellant's books or used for any purpose other 40
P. 112, l. 29. than the amended New Zealand tax return the Magistrate was justified in accepting what the Appellant had done rather than what it now said
P. 112, l. 44. should or could have been done. If the Appellant had over estimated the present value of the sum required to cover the reversionary bonuses declared it was true that there was in effect an internal reserve which, if brought into account in the future, would result in double taxation, but that would
P. 113, l. 7. result from the Appellant's own acts. In its published returns the Appellant
P. 113, l. 12. had adopted one of two recognised actuarial methods and McGregor, J.,
P. 113, l. 14. did not think the Court could say that the alternative method resulting
P. 113, l. 37. in lower taxation must be adopted by the Respondent. The appeal should 50 be dismissed.

20. McCarthy, J., said that the Appellant's case was that the £1,752,083 in the first certificate was not the true cash value of the reversionary bonuses because, as a result of the adoption of the net premium method of valuation, it included something of the character of an internal reserve. As the Appellant did not in fact set aside in any special account the amounts allocated to bonuses but left them in the global figure of the insurance fund, it was contended that that reserve, to the extent that it was not required for bonuses in that year but left in the insurance fund, would be included in the surplus funds in later years and again subjected to taxation. As the Appellant would have it, the cash value of the bonuses when declared was the true allotment to policy holders for that year. But, in the learned Judge's view, the Respondent was not concerned with the cash value of the bonuses but with the actual allotment of surplus funds, which was not necessarily the same figure. The Respondent's enquiry involved two steps. First, the ascertainment of the amount allotted to all policy holders out of surplus funds by way of reversionary bonuses or otherwise. The published accounts and the statutory return alone satisfied the learned Judge that the amount was £8,738,779. Secondly, the share for New Zealand policies. The Respondent took the amount first certified by the Chief Actuary which was the same proportion of £8,738,779 as the face value of the bonuses for New Zealand policies bore to the face value of the total bonuses. If in truth it included a reserve, that was caught by the words " by way of reversionary bonuses or otherwise " and was a sum allotted for that year. Nor was it of consequence that the method of valuation adopted might result in double taxation in the future for the Appellant could select its own method. It had since, with the Respondent's approval, employed the " bonus reserve " method and it could no doubt have done so earlier. The first question must be answered " Yes."

P. 122, l. 28. P. 122, l. 29. P. 120, l. 14. P. 122, l. 32. P. 122, l. 35. P. 122, l. 37. P. 122, l. 39. P. 122, l. 44. P. 123, l. 1. P. 123, l. 3. P. 123, l. 15. P. 123, l. 16. P. 123, l. 22. P. 123, l. 29. P. 123, l. 48. P. 124, l. 4. P. 124, l. 12. P. 124, l. 13. P. 124, l. 15. P. 124, l. 21. P. 124, l. 30.

Part II

21. The issue in Part II of the case is as to the amount of income derived by the Appellant which should properly be allowed as a deduction from the surplus funds allotted in respect of its New Zealand business in order to ascertain the residue which is deemed, by virtue of section 149 (2), to be the profits derived by the Appellant and therefore its assessable income.

22. The said issue depends primarily on the provision contained in the said section 149 (2) that there shall be deducted from the said surplus funds allotted for any year " 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) ", but the following provisions contained in sections 86 (1), 165 and 167 of the Act are also relevant to this Part of the case :—

> " 86. (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 :—
>
> * * * * *

165. (1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income tax, whether it is derived from New Zealand or from elsewhere.

(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.

167. 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 :—

* * * * *

(*e*) Income derived from shares in or membership of a New Zealand Company . . . :"

P. 9, l. 28. 23. After making various amendments in consequence of information supplied by the Appellant, the Respondent finally assessed the Appellant as follows :—

Surplus funds allotted in respect of policies comprised in New Zealand business ..	£1,752,083	0	0
Less dividends derived from New Zealand ..	14,780	12	0
Assessable Income	£1,737,302	8	0
Tax assessed	£338,773	17	9

P. 24, l. 22. 24. In its Answer the Appellant claimed that the Respondent should have allowed as a deduction from the said surplus funds so allotted the following amounts :—

P. 9, l. 23. P. 10, l. 25. P. 24, l. 25. (A) The said dividends derived from New Zealand	£14,780	12	0
P. 10, l. 27. P. 24, l. 28. (B) Dividends derived from companies incorporated in Australia	65,063	6	4
P. 24, l. 33. (C) All other dividends derived by the Appellant from all sources	462,086	0	0
Making a total deduction claimed of	£541,929	18	4

25. On the hearing before the Magistrate evidence was given by the Appellant's Chief Accountant that the said dividends referred to in paragraph 24 (B) above were dividends in respect of shares held by it for its New Zealand branch. P. 84, l. 25.

26. In his judgment the Magistrate said that there was no issue as to the dividends totalling £14,780 12s. 0d. derived from New Zealand companies, it being common ground that these were exempt under the said section 86 (1) (i) of the Act, but in his view the dividends received from companies outside New Zealand were not "exempt from taxation" under that or any other provision. He considered that the Appellant could gain little help either from the said section 167 (*a*) or from the decision in *Hughes* v. *Bank of New Zealand* [1938] A.C. 366, and in his opinion section 165 (3) was a purely declaratory provision and would (because of its opening words and those of section 149) be overridden by section 149 in the event of there being any conflict between them. P. 92. P. 94, l. 32. P. 95, l. 40. P. 96, l. 14.

27. In his Judgment on the Appeal from the Magistrate, Barrowclough, C.J., said that the only question arising was whether the income in items (B) and (C) of paragraph 24 above was "exempt from taxation" within the meaning of section 149 (2) and therefore deductible. In his view it was not exempted by section 86. Section 165 (3) provided that certain income was not "assessable for income tax" but that was not an exempting provision, first, because in contrast to section 86 (and other exempting sections) it made no reference to exemption but was merely declaratory and, secondly, because if it were an exempting provision, it would apply to every item of income received by the Appellant from every source other than New Zealand and that would result in a manifest absurdity. As to the Appellant's contention that "exempt from taxation" in section 149 (2) meant "not liable or not subject to New Zealand taxation without any requirement of exigibility", Barrowclough, C.J., said that a construction which made exigibility irrelevant would render the enactment futile because in this case it would result in no taxation being payable. Income was not "exempt from taxation" under section 149 (2) unless, but for an exemption, it would be subject to taxation in New Zealand. The Appellant had contended that item (B) was "income derived from a business carried on in New Zealand" and was therefore, by virtue of section 167 (*a*), "deemed to be derived from New Zealand"; that it was therefore exigible for taxation by virtue of section 165 (2) and, being exigible, was expressly exempted by section 86 (1) (i). But, in the view of the Chief Justice, the most that could be said of the income in item (B) was that it was derived in the course of carrying on a business in New Zealand. It was not "derived from" such a business and was therefore not within section 167 (*a*). *Hughes* v. *Bank of New Zealand* [1938] A.C. 366 appeared to lay down no principle at variance with the Chief Justice's interpretation of the phrase "exempt from taxation" in section 149 (2). The Magistrate was accordingly right upon Part II in allowing a deduction of £14,780 12s. 0d. and no more. P. 105, l. 40. P. 105, l. 44. P. 106, l. 19. P. 107, l. 1. P. 106, l. 34. P. 106, l. 40. P. 107, l. 5. P. 107, l. 23. P. 107, l. 27. P. 108, l. 11. P. 108, l. 15. P. 108, l. 36. P. 108, l. 47. P. 109, l. 2. P. 109, l. 22. P. 109, l. 20. P. 109, l. 29. P. 109, l. 38. P. 110, l. 8.

28. McGregor, J., said that section 149 recognised New Zealand taxation as having a territorial application, in accordance with general P. 114, l. 33. P. 114, l. 38.

P. 114, l. 30. principles of construction. The basic figure for the calculation of assessable income was the surplus funds allotted in respect of New Zealand
P. 115, l. 23. business, and the same territorial limitation seemed to him to apply to the deduction of " income derived by the company in that year and exempt from taxation." That phrase, in his view, meant income derived
P. 116, l. 35. in New Zealand and emanating from a New Zealand source which would
P. 116, l. 42. otherwise be exigible to tax under the New Zealand statute but was exempted by it. Applying this to the facts, the first item of £14,780 12s. 0d. was deductible as being exempt under section 86 (1) (i). The second item
P. 117, l. 1. of £65,063 6s. 4d. represented dividends from Australian companies which could only be recovered by the Appellant, an Australian entity, in Australian
P. 117, l. 21. Courts. Australian dividends came within the scope of New Zealand taxation incidence only when received by a New Zealand resident and
P. 117, l. 23. in that case only became exempt. The dividends in question were not
P. 117, l. 24. derived by a New Zealand company and were not the fruit of a business carried on in New Zealand, and the exemption therefore did not apply.
P. 117, l. 26. The remittance of the dividends to the Appellant's New Zealand branch
P. 117, l. 30. was purely a matter of internal management. The income was not segre-
P. 117, l. 32. gated in the accounts. It was Australian income of an Australian company.
P. 117, l. 33. *Hughes* v. *Bank of New Zealand* [1938] A.C. 366 did not seem to assist
P. 117, l. 43. in the present case. McGregor, J., would hold the sum of £65,063 6s. 4d. not deductible and a fortiori the same reasoning would apply to the
P. 117, l. 45. £462,086.

P. 125, l. 6. 29. McCarthy, J., said that the deduction allowable under section 149 (2) was so much of the income derived by the Appellant society as a whole as was exempt from taxation within the context of that section
P. 125, l. 9. and not merely so much as came into the accounting of the New Zealand
P. 125, l. 15. branch and was so exempted. In that context " derived " could not mean more than " received " and, for the reasons given by Barrowclough, C.J.,
P. 125, l. 35. and McGregor, J., income allowable as a deduction must first be caught
P. 125, l. 45. by and later exempted by New Zealand legislation. Under the declaratory
P. 126, l. 6. terms of section 165 the only income of the Appellant subject to New Zealand income tax was income derived from New Zealand. That was
P. 126, l. 10. ascertainable from section 167 and comprised, first under section 167 (*a*),
P. 126, l. 14. the profit on the Appellant's operations in New Zealand as fixed under
P. 126, l. 17. section 149, and secondly under section 167 (*e*) and (*f*), income from invest-
P. 126, l. 25. ments in New Zealand. Income from investments in Australia did not fall within section 167 unless it could be said under paragraph (*a*) to be
P. 126, l. 36. " derived from any business in New Zealand." Whether income was
P. 126, l. 44. so derived was a question of fact. That the income in question comprised dividends on shares bought with funds held in New Zealand and that those
P. 126, l. 47. dividends were credited or sent to the New Zealand Branch did not outweigh the primary facts that the dividends were paid in Australia to the Appellant as registered owner of shares in companies resident in Australia
P. 127, l. 7. and that the Appellant was resident in Australia. On the facts, that
P. 127, l. 20. income was therefore not " derived from a business carried on in New Zealand." The only income of the Appellant, therefore, that was exempted by the New Zealand statute was that falling within section 86 (1) (i).
P. 127, l. 27. In relation to income derived from New Zealand by a non resident that provision could apply only to dividends from New Zealand companies.
P. 127, l. 37. McCarthy, J., therefore held that the £14,780 12s. 0d. received from New

Zealand companies was deductible but that the other two items were not. P. 127, l. 43. P. 128, l. 4. *Hughes* v. *Bank of New Zealand* [1938] A.C. 366 was a decision on particular statutes and rules which did not compel a different conclusion. P. 128, l. 7.

30. The respondent humbly submits that the decision of the Supreme Court of New Zealand was right as to both Part I and Part II of the case and should be affirmed and that this Appeal should be dismissed with costs, for the following among other

REASONS

AS TO PART I :—

(1) BECAUSE under the provisions of section 149 (2) of the Act the first enquiry which falls to be made is as to the allotment of surplus funds made by the Appellant, in respect of the whole of its business, to policy-holders by way of reversionary bonuses or otherwise ; and the second enquiry which falls to be made is as to the amount of such allotment made in respect of policies comprised in the Appellant's New Zealand business.

(2) BECAUSE the Appellant's Return to the Insurance Commissioner and its Annual Report for 1955 showed that £8,738,779 was the surplus so allotted by way of reversionary bonuses in respect of the whole of the Appellant's business.

(3) BECAUSE the evidence showed that the amount of the said allotment of £8,738,779 which was made in respect of policies comprised in the Appellant's New Zealand business was £1,736,492.

(4) BECAUSE the Magistrate did not fall into any error of law in deciding that the said sum of £8,738,779 was so allotted in respect of the Appellant's whole business and that the said sum of £1,736,492 was so allotted in respect of its New Zealand business.

(5) BECAUSE there was no evidence on which the Magistrate was bound to hold, or could properly have held, that sums other than the said sums of £8,738,779 and £1,736,492 were allotted as aforesaid.

(6) BECAUSE the Respondent was right in treating the said sum of £1,736,492, together with cash payments of £15,591, making a total of £1,752,083, as the amount of the surplus funds allotted in respect of policies comprised in the New Zealand business of the Appellant.

AS TO PART II :—

(7) BECAUSE the only deduction authorized by the said section 149 (2) to be made in computing the profits, therein referred to, of a life insurance company, is a

deduction in respect of any income derived by the company in the year in question and " exempt from taxation (whether by virtue of section 86 of this Act or otherwise howsoever)."

(8) BECAUSE the said words " income . . . exempt from taxation " embrace, and embrace only, income which, but for some exempting provision would be exigible to New Zealand income taxation.

(9) BECAUSE the only such income derived by the Appellant in the year 1955 was the dividends totalling £14,780 12s.0d. from New Zealand companies, such income, though otherwise (inasmuch as it was derived from New Zealand) exigible to New Zealand taxation, being by virtue of section 86 (1) (i) exempted therefrom.

(10) BECAUSE the Appellant's income of £65,063 6s. 4d. by way of dividends from Australian companies and of £462,086 0s. 0d. by way of dividends from other sources, being neither derived from New Zealand nor received by a person resident there, was not and could not be " exempt from taxation " within the meaning of the said section 149 (2).

(11) BECAUSE no part of the said income referred to in Reason (10) above was " income derived from any business carried on in New Zealand " for the purposes of section 167 of the Act.

AS TO BOTH PARTS :—

(12) FOR the reasons given by the Supreme Court of New Zealand and by the Magistrate.

H. R. C. WILD.

ALAN S. ORR.

No. 22 of 1961

In the Privy Council.

ON APPEAL

from the Supreme Court of New Zealand.

IN THE MATTER of the Land and Income Tax Act, 1954.

BETWEEN

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *Appellant*

AND

THE COMMISSIONER OF INLAND REVENUE *Respondent.*

Case for the Respondent.

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