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INSTITUTE OF ADVANCED
LEGAL STUDIES
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In the Privy Council.

No 57 of 1946.

ON APPEAL.
FROM THE HIGH COURT OF AUSTRALIA.

IN THE MATTER of the NEW SOUTH WALES INCOME
TAX MANAGEMENT ACT 1941

— AND —

IN THE MATTER of THE PRODUCERS CO-OPERATIVE
DISTRIBUTING SOCIETY LIMITED.

BETWEEN—

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THE PRODUCERS CO OPERATIVE
DISTRIBUTING SOCIETY LIMITED

Appellant

— AND —

THE COMMISSIONER OF TAXATION

Respondent.

CASE FOR THE APPELLANT.

RECORD.

20 1. This is an appeal by Special Leave of His Majesty in Council (given on 20th March, 1946), against a judgment of the High Court of Australia dated 11th December, 1944, affirming on appeal, and by a majority, a judgment of the Supreme Court of New South Wales dated 4th October, 1944. The said judgment had (by a majority) dismissed an appeal by the Appellant against the disallowance of its objections to an assessment to income tax made upon it under the provisions of the New South Wales Income Tax Management Act, 1941, for the year ended 30th September, 1941.

p. 37.

pp. 28-36.

pp. 17-26.

2. The point at issue in the appeal is whether butter is an agricultural product within the meaning of Section 19 (o) of the New South Wales Income Tax Management Act, 1941 (hereinafter called "the said Income Tax Act").

3. The said Section 19 provides *inter alia* as follows:—

"The following income shall be exempt from income tax:—

"(o) the income of a co-operative building society and "the income of a rural society registered as such under the "Co-operation Act, 1923-1941, as amended by subsequent "Acts, if the principal business of that rural society is the "manufacture treatment or disposal of the agricultural "products (as defined in that Act) or livestock of its 10 "members."

4. "Agricultural products", as defined in the said Co-operation Act, are:—

"the products of any rural industry": and "rural industry" is in turn defined in the said Act as

"the cultivation or use of land for any agricultural, pastoral, dairying, or rural purpose".

(Section 5 Co-operation Act, 1923-1941).

5. Incorporating these definitions into Section 19 (o) of the said Income Tax Act it follows that the Appellant's income is exempt 20 from income tax if:—

- (1) the Appellant is a rural Society registered as such under the the Co-operation Act, 1923-1941 (as to which no question arises); and
- (2) if its principal business is the manufacture treatment or disposal of its members' products, being the products of the cultivation or use of land for any agricultural, pastoral, dairying or rural purpose.

6. The Appellant's principal business (hereinafter described in more detail) consists in selling butter made by its members; but the Respondent contends that, on the facts, such butter is not an 30 "agricultural product" as above defined; and that accordingly the Appellant is not entitled to the benefit of the exemption from income tax contained in Section 19 (o) of the said Income Tax Act.

7. The Appellant was incorporated on 9th May, 1929, as a rural society under the Co-operation, Community Settlement, and Credit Act, 1923, of the State of New South Wales, and was registered as

such. The said Act as amended by subsequent Acts, may by Section 2 (2) of Act No. 20, 1941, of New South Wales be cited as the Co-operation Act, 1923-1941.

8. The objects for which the Appellant was formed included the following:—

Exhibit "B."
Rules p. 4.

10 (a) To carry on the business of the purchase, production, and sale of dairy, farm and other produce and generally the business of a Produce and Commission Agency, the policy of the Society being to facilitate and encourage direct export of and the elimination of speculation in any of the products aforesaid.

(b) To dispose of the agricultural products or livestock products of its members or other persons.

9. At all material times the principal business of the Appellant has been the sale on commission of butter belonging to its members.

Exhibit "C."
p. 39.

20 10. During the year ending 30th September, 1941, the total turnover of the Appellant from sales on commission of butter, bacon, cheese, honey, eggs, poultry, grain, fruit, vegetables and similar commodities was £6,787,266, of which 60·03 per cent. arose from the sales of butter. Of the said butter 90 per cent. was supplied to the Appellant by certain of its own members, being shareholders of the Appellant and being themselves also rural societies under the Co-operation Act, 1923-1941. Many of the individual members of these rural societies were also members of the Appellant. The rural societies make the butter out of cream which they buy from dairy farmers who separate the cream from their cows' milk. The butter so made is then forwarded to the Appellant for sale on commission. A provisional selling commission of 3½% is charged by the Appellant to the rural societies, but rebates are made to the latter by the Appellant out of its profits, to the extent 30 sometimes of 20 per cent. of the provisional commission. The rural societies pay a monthly cheque to the farmers for their cream, and an additional payment by way of bonus out of the said rebate received from the Appellant.

Exhibit "C."
p. 39.

40 11. On or about 25th May, 1942, an assessment to income tax was made upon the Appellant in respect of its income for the year ended 30th September, 1941, under the provisions of the said Income Tax Act, and on 22nd June, 1942, the Appellant, in accordance with Section 237 of the same Act, lodged with the Respondent an objection against the aforesaid assessment, on the ground, briefly stated, that the Appellant was entitled to exemption from the said income tax

p. 1.

by virtue of the aforesaid paragraph (o) of Section 19 of the said Income Tax Act.

p. 2.
p. 3. 12. On 10th November, 1942, the said objection was disallowed by the Respondent and on 22nd June, 1943, in accordance with Section 240 of the said Income Tax Act, the Appellant appealed therefrom to the Board of Appeal, constituted under Section 225 of the same Act.

p. 9.
pp. 10-15. 13. The appeal was heard by the Board consisting of Messrs. R. I. Gibson, J. P. Hannan and R. M. Lightband on 21st February, 1944, and on 10th May, 1944, the said Board decided not to uphold the Appellant's objection against the assessment. The members of the Board considered that the question at issue was whether the butter sold by the Appellant could properly be described as "the product of the use or cultivation of land for any dairying purpose" within the meaning of the definitions of "agricultural products" and "rural industry" contained in Section 5 of the Co-operation Act, 1923-1941, (see paragraph 4 above). They thought that the butter would have been an "agricultural product" if the definition had included the terms "the products of the dairying industry", but they considered that the words "manufacture, treatment or disposal of the agricultural products" in paragraph (o) of Section 19 of the Income Tax Management Act, 1941, pointed to a legislative differentiation between agricultural products and products manufactured therefrom; and they held that the butter was a new product of the manufacturing processes applied to a product of the use of the land (i.e. the cream) and was not itself a product of the use or cultivation of land. The assessment upon the Appellant was accordingly confirmed. 10 20

p. 16. 14. On 26th June, 1944, the Appellant by its Attorney filed a notice of intention to appeal in accordance with Section 255 of the said Income Tax Act, to the Supreme Court of New South Wales from the decision of the Board aforesaid; and the appeal came on for hearing by the Supreme Court on 6th September, 1944, when judgment was reserved. 30

p. 17
p. 24, l. 9. 15. On 4th October, 1944, the Supreme Court (Jordan C. J., Davidson and Halse Rogers J. J.) gave judgment dismissing the Appellant's appeal—Jordan C. J. Dissenting. Davidson J. considered it regrettable that although the Appellant was not gaining the profits of a middleman in the real acceptance of that term, but was filling a vital niche in the whole scheme of co-operative rural production and marketing, it should nevertheless be deprived of a material benefit designed by the Legislature for the very purpose 40

of assisting co-operative associations. Halse Rogers J. also expressed regret that the appeal must be dismissed because in his opinion the aim of the Legislature was to exempt from taxation a Society carrying on a business such as the Appellant's. These learned Judges thought, however, that it was impossible to say that the butter which was supplied by the rural societies to the Appellant for sale by it, was so supplied as an agricultural product of a rural industry, in the sense of the commodity being produced from the cultivation or use of the land. Jordan C. J. on the other hand
 10 considered that the appeal should be allowed, since in his view the butter remained a product of the use of land for a dairying purpose notwithstanding that it was made by a purchaser of the cream from the farmer, and made elsewhere than on the farmer's land.

In the result the Appellant's appeal was dismissed with costs.

16. On 20th October, 1944, the Appellant by its Solicitors
 appealed to the High Court of Australia, the said Appeal being
 heard on 25th November, 1944, when judgment was reserved. p. 27.

17. On 11th December, 1944, the High Court of Australia
 (Latham C. J., Starke, Rich, Williams and Dixon J. J.) gave
 judgment dismissing the Appellant's appeal—Starke and Rich J. J.
 20 dissenting. Latham C. J. Williams and Dixon J. J. thought the
 butter was not an agricultural product within the statutory defini-
 tion because the rural societies which supplied it to the Appellant
 did not themselves cultivate or use land for a dairying purpose.
 Latham C. J. was of opinion that it was not permissible to consider
 other provisions of the Co-operation Act, 1923-1941, as explaining
 the definitions contained in Section 5 of that Act, but he thought
 that even if such consideration were permissible, the conclusion
 would be the same. He said that if, contrary to his view, the butter
 30 were an agricultural product within the statutory definition, it
 would fulfil the description of both belonging to the rural society
 which supplied it to the Appellant and of being produced by them
 in the sense of being manufactured by them.

18. Williams J. felt no doubt that in ordinary parlance butter
 was an agricultural product, but said that an agricultural product
 of the dairying industry within the meaning of the Co-operation
 Act, 1923-1941, meant something produced in that industry by the
 cultivation or use of land for that purpose. p. 35, l. 28.

19. Dixon J. differed from Latham C. J. in that he thought it
 40 was correct to refer to the main provisions of the Co-operation Act,
 1923-1941, to interpret the definitions contained in Section 5 of that
 Act, but even so considered that the definition must be read as
 p. 34, l. 15.

p. 34, l. 48.

excluding commodities like cheese and butter, when the manufacturing process was not part of the use of the land for the dairying agricultural, pastoral or rural purpose.

pp. 32-33.

20. Starke and Rich J. J. were, however, of the opinion that the appeal should be allowed. Starke J. considered that the use of land for dairying purposes included the production of butter and observed that the exemption in Section 19 (o) of the said Income Tax Act, depended upon the carrying on of a business involving the manufacture treatment or disposal of agricultural products, which made it plain that the agricultural products in view might have been manufactured, and not necessarily obtained in their natural state. The expression in the said Section 19 (o) namely "of its members" imported no difficulty. It covered products belonging to the Appellant's members as did the butter here in question. 10

p. 31, l. 33.

21. Rich J. said that butter was not a product of the land in the strict literal sense (e.g. milk and honey were products of cows and bees). The word "products" in the context of the statutory definition must therefore be interpreted in relation to reality, and meant products derived at some remove from the land. This meant that the term "any dairying purpose" was the dominating phrase in the definition. When butter produced from cream was the product, it was in his view a product of a use of land for a dairying purpose, whether made by the farmer on his own land, or by a purchaser from him of the cream, on other land. 20

In the result the Appellant's appeal was dismissed with costs.

22. The Appellant humbly submits that the judgment of the High Court of Australia is wrong, and should be reversed, for the following, among other,

REASONS.

1. BECAUSE the Appellant is a rural society registered as such under the Co-operation Act. 1923-1941. 30
2. BECAUSE the principal business of the Appellant is the disposal of the agricultural products (as defined in the said Co-operation Act) of its members.
3. BECAUSE a rural society whose principal business consisted of selling butter made by its members on their farms would admittedly be entitled to the exemption from income tax conferred by Section 19 (o) of the said Income Tax Act: and because the Respondent's case for refusing the said exemption to the Appellant is (erroneously in the Appellant's submission) founded 40

upon the circumstance that the butter in question is made away from the farms where the cream is produced.

4. BECAUSE the said butter does not, by reason of such circumstance, cease to be an agricultural product within the meaning of the relevant definition, being still a product of the use of land for a dairying purpose.
5. BECAUSE (alternatively) upon the true construction of the definition of "agricultural products" in the Co-operation Act, 1923-1941, as applied to the present case, the word "land" does not mean only the farm where the cream is produced: but may include other land where such cream is turned into butter.
6. BECAUSE the reasoning of Jordan C. J. in the Supreme Court of New South Wales and of Starke and Rich J. J. in the High Court of Australia is to be preferred to that of the other learned Judges in those Courts.
7. BECAUSE the income of the Appellant is exempt from income tax under the provisions of Section 19 (o) of the said Income Tax Act.

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TERENCE DONOVAN.

In the Privy Council. No 57 of 1946.

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SOCIETY LIMITED - - - *Appellant*

— AND —

THE COMMISSIONER OF TAXATION
Respondent.

CASE FOR THE APPELLANT.

HERBERT OPPENHEIMER, NATHAN & VANDYK,
20, Copthall Avenue, E.C.2.