THE TAXATION OF PROFESSIONAL INCOMES

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Delivered at a meeting of the Medico-Legal Society held on 6th October 1973 at 8.30 p.m. at the Royal Australasian College of Surgeons, Spring Street, Melbourne. The Chairman of the meeting was the Legal Vice-President, the Rt. Hon. Mr. Justice Stephen.

One of the difficulties faced by the Committee of this Society is that the papers delivered do not always deal with the nominated topic in the manner intended by the originator of the topic or the Committee which adopts the idea. So I fear it may be tonight. I can only hope that I shall not be too wide of the mark. What I shall have to say concerns mostly the self-employed person, which is what I suppose most of the members of this society are. I hope that what I say does not sound too gloomy. If it does, it must be because I have concentrated too much upon our own position. For I do not find income tax a gloomy subject, so long as one is talking about someone else's tax. When one is doing that, the perpetual game of cat and mouse played between taxpayers on the one hand and the Revenue on the other is a fascinating game and sometimes even quite amusing. I also hope that those who have come here this evening in the hope of learning how to order their affairs so as to minimize the incidence of income tax will not be too disappointed. I do not have in my bag a supply of new tax dodges and even if I did I am not sure that this would be the time and place to let them out.

What I shall attempt to do is to look briefly at the structure of the Commonwealth Income Tax Assessment Act to see how, in very broad outline, we have reached the position we are in today, to see how the position of the self-employed person compares with that of the employee and to see what can and should be done to improve that position. It seems to me that our professions in this country are at a very critical point in their history and the crisis is not by any means unrelated to the incidence of income taxation. That is to say I think the incidence of taxation is having an effect upon professional standards and will continue to do so. If the professions do not offer rewards comparable to other occupations something will have to go and in any com-

parison of rewards the incidence of income tax cannot be ignored.

Let me remind you that although taxation in various forms is nearly as old as man himself, income tax in its present form is of comparatively modern origin. In fact it was William Pitt whom we have to thank for it. He first introduced it in 1798, as a temporary measure to finance the war against France and, surprisingly enough, it proved to be temporary although it was imposed in most years until the end of the war in 1815. Thereafter it was not imposed again until Sir Robert Peel revived it in 1842 for three years only. But it has been imposed ever since in England. However, it was not until 1st January 1896 that income tax was first imposed in New South Wales—at a rate, I think, of sixpence in the pound. Victoria, which first introduced income tax at about the same time always had a graduated scale, the rate in 1905 for income from personal exertion being on the first £500, threepence in the pound, rising to a maximum of sixpence in the pound. The Commonwealth Government first entered the field in 1915 imposing tax upon a graduated scale ranging from threepence to five shillings. That imposition was of course largely to finance Australia's part in the First World War, but unlike the tax imposed by Pitt there was nothing temporary about it. It has never been repealed and it has been with us ever since. As you know, until the Second World War residents of Australia were required to pay two income taxes, State and Commonwealth but in 1942 the present system whereby all income tax is imposed and collected by the Commonwealth and the States are effectively excluded from the field came into operation and it is the system then introduced which we still enjoy today.

Of course the rates were originally very low, or so they now seem to us, but they have steadily increased and from time to time individuals have had to pay something in excess of one hundred cents in the dollar or twenty shillings in the pound.

It is interesting to reflect upon the fact that even when rates were low people were interested enough to talk about fairness and even more interesting to recall what Adam Smith regarded as the three essential conditions necessary to make income tax consistent with justice. They were, first that incomes below a certain amount should be altogether untaxed, the minimum not being higher than the amount which suffices for the necessaries of the existing population. The second condition was that incomes above the limit should be taxed only in proportion to the

surplus by which they exceed the limit. Thirdly, that all sums saved from income and invested should be exempt from the tax: "or, if this be found impracticable, that life incomes and incomes from business and professions should be less heavily taxed than inheritable incomes, in a degree as nearly as possible equivalent to the increased need of economy arising from their terminable character: allowance being also made, in the case of variable incomes for their precariousness". (Adam Smith, "Political Economy", Book V, Chapter III, para. 5.) But it is just no good trying to go back to Adam Smith. When William Pitt first introduced income tax it was quite clearly to raise revenue to prosecute the war against France. But the notion that the sole purpose of the taxation of income is the raising of revenue has long since been abandoned. Taxation in every form is now regarded as a means of raising revenue for the State and as a means of carrying out social or economic policies.

With this in mind if you looked at the Income Tax Assessment Act today and disregarded the way it had grown up you might be pardoned for thinking that one of the non-revenue raising objectives which it sets out to achieve is the extermination of the self-employed person. Now of course it would be wrong to equate the members of our two professions to the whole class of self-employed persons, but no doubt the self-employed members of the medical and legal professions form a not insignificant group in the larger class.

It would equally be wrong to conclude that one of the objectives of the income tax legislation is to exterminate the self-employed person or even to exterminate doctors or lawyers. But although I do not think it is an intentional objective of the legislation it is a question whether it may not be one of the by-products.

The Commonwealth entered the field of income tax in 1915 (by Act No. 34 of 1915) with a little Act of sixty-five sections. Most of it was mere machinery relating to the administration and recovery of the tax and Part III which imposed the liability to tax comprised only eighteen sections. But it contained the seeds of our present difficulties. Thus it exempted from tax the income of a provident, benefit, or superannuation fund established for the benefit of the *employees* in any business (section 11(f)) and it permitted the deduction of sums paid by an employer to a fund to provide pensions or retiring allowances to employees (section 18(j)).

Successive Commonwealth governments tinkered with that Act until 1936 when another Income Tax Assessment Act was produced (No. 27 of 1936). This time it comprised 266 sections and Part III (which again was the Part which imposed liability to tax) comprised some 144 sections. The structure of the Act has not substantially altered since that day. And it remains basically a simple piece of legislation. Like the 1936 Act it still starts with section 1 and finishes with section 266 but you would almost certainly be wrong to suppose that it contains 266 sections. I do not know how many it contains and I know of no way of finding out except by laboriously counting them or perhaps tracking down someone in Canberra who knows the answer. I do not know which would take longer and in any case it does not matter, but the reason why I cannot tell you how many sections the Act contains is that it has been amended by well over seventy-five later Acts; sections have been taken out and many others put in. When sections are put in they are given a number and a capital letter or letters. So you have section 80A, 103A and so on. You also have section 160AL, 160AO and so on. And you even have section 221YRA. I think the lettering follows some supposedly logical sequence but it is never the one you expect.

However, in spite of all this the basic structure remains the same and it remains basically simple.

Part III which imposes liability to tax simply provides that you pay tax on your taxable income which means your assessable income less all allowable deductions. Neither income nor, really, assessable income is defined anywhere in the Act, but speaking generally it is everything that comes in that is not a receipt of a capital nature, everything that is to say which is received on revenue account. Again, speaking generally, allowable deductions are those outgoings which are incurred in gaining or producing assessable income except to the extent that they are outgoings of a capital, private or domestic nature.

Now all that is fairly simple and that is what I mean by saying that the structure of the legislation is simple. That is all contained in the first three Divisions of Part III. But then there are some twenty-seven more Divisions in Part III dealing with specific problems, very often specific types of taxpayer and very often giving benefits to a particular class of taxpayer, benefits not shared by other taxpayers or classes of taxpayer and benefits brought about by the successful action of a pressure group. I am not concerned to suggest that any of these special benefits ought

not to be granted. I am only concerned to draw attention to the existence of these provisions and to the absence of any division dealing specifically with self-employed persons. Part of the reason for this is of course that self-employed persons have not formed themselves into a sufficiently strong or coherent group to be able to exert a sufficient influence on the government. But I do not think that is the whole reason. Another very significant factor is that a company is of course a person in law and liable to be taxed as such. But a company is really a very different sort of person to a natural person and companies have been found to afford a very substantial number of uses in the minimization of the burden of taxation. This is not the place to go into those uses but the fact of their existence has led many professional groups to examine their professional codes of conduct to see whether their members might be allowed to turn themselves, as it is put, into companies. Again the desirability of doing so for reasons other than taxation benefits is beyond the scope of this paper. Personally I regret the necessity to contemplate it, though contemplate it I most certainly would if it could confer benefits by way of a reduction of the burden of taxation. But I regret the necessity to contemplate it because our professions ultimately stand or fall by virtue of the quality of the work of the individual practitioner and the relationship which that practitioner has with his patient or client. No doubt it is possible to maintain individual responsibility and a proper relationship behind the veil of incorporation but in one way or another it seems to require the adoption of fictions or devices which I think we would be better without. But there is also, I think, a practical reason against incorporation. It is that by doing so one would be caught up, as it were, in the maelstrom of the taxation of companies and one knows not where that may lead. I am not speaking here of individual companies or particular tax schemes; they can often include satisfactory escape routes and in any case a company can always be liquidated. But I should prefer not to see our professions tied to that part of the tax legislation which relates to companies if that can be avoided. Companies vary enormously in size and type, and yet, speaking generally, they are all dealt with in the same way by the tax legislation. I should prefer to see the income and allowable deductions of self-employed persons separately dealt with and dealt with in a way that is suitable to their situation. Of course the class of self-employed persons embraces many more than the members of our professions but if it

were not possible to provide properly for us without conferring similar benefits upon, say, jockeys, then we might echo the thought of that great campaigner for the rights of the individual, the late Sir Alan Herbert, who said: "Jockeys are entitled to justice too".

At a meeting of this Society—I was going to say a recent meeting until on checking the date I found it was already eighteen years ago—the late Dr. G. R. Weigall and Sir Douglas Menzies, who was then in practice at the Bar as Mr. D. I. Menzies, Q.C., delivered papers under the general title of "Professional People" [(1955) VII, *Proceedings of the Medico-Legal Society of Victoria*, p. 38]. The papers were largely based upon a book entitled "Professional People" written by two Englishmen, Roy Lewis and Angus Maude. The authors of the book painted a somewhat gloomy picture of the position and the influence of the professions in England at the time and Dr. Weigall and Mr. Menzies were concerned to look at the position of the respective professions in Australia and to consider whether what Messrs. Lewis and Maude had written was applicable to us. I shall not attempt to summarize what they then said, it is there in the proceedings of the Society for all to read. They did, however, think that the situation demanded the greatest vigilance from professional people and from professional organizations in the maintenance and improvement of professional standards. Now, although they did mention the incidence of taxation and recognized that what Mr. Menzies called "crippling taxation" affected professional men more than other people in the community, they did not, I think, sufficiently emphasize the effect which the taxation system has upon the status of our professions and upon professional standards. Perhaps the effect had not become so marked then as it has now. But it is fair to remember that Sir Douglas Menzies did say ". . . it is a matter of first-rate importance for all professional people to obtain the right to have as a taxation deduction some proper provision for their own superannuation". So far efforts in this direction seem to have had only minimal success.

Proper provision for superannuation seems to me to outweigh in importance any other aspect of the taxation of professional incomes and to be the aspect to which the efforts of professional organizations ought to be directed. I believe that unless professional people can make adequate provision for their proper maintenance and support in old age (to borrow a phrase from another jurisdiction) fewer people of the right type will enter

private professional practice and professional standards will decline. Indeed I believe that the taxation system has already had an adverse impact upon professional standards but that it would not do so (or would not do so to anything like the same extent) if, notwithstanding, high rates of tax, a professional man in private practice could obtain a really substantial deduction for contributions to a superannuation fund.

Of course your taxation advisers will tell you of all sorts of ways by which you can so order your affairs as to minimize the incidence of income tax and I do not mean that you should not engage in such of them as appeal to you and as are within the law, although the administration of the tax law does not always seem to be consistent in the way it treats what professional men do. For instance, a service company may be formed to provide a range of facilities to professional men although for some peculiar reason (as Mr. N. H. M. Forsyth recently pointed out in a paper delivered at the Seventeenth Legal Convention of the Law Council of Australia) the Commissioner seems more ready to accept the practice in the case of architects and engineers than in the case of medical and legal practitioners.

Again, deductions may be obtained for some costs incurred at home upon the basis that most professional men in private practice do a good deal of work at home in the evening and at week-ends and it is proper to regard some of the costs so incurred as business expenses. The law on this subject is perhaps not so clear or so logical as it should be.

Deductions may be obtained for wages paid to wives if such wages are a proper business expense.

But these are what for present purposes I would call the minutiae. The standards of our professions will not rise or fall according to whether we can claim deductions for wages paid to our wives, although all these things help to reduce to a greater or lesser extent the burden of taxation. They are part of what I might call the cat and mouse aspect of the taxation game. Someone gets hold of a good idea for a deduction, claims it and it is allowed. Then others copy the idea and as likely as not overdo it. Some assessor somewhere disallows it and the taxpayer appeals. If he wins, well and good—for the time being—but if the resultant amounts are significant from the point of view of the Revenue, and sometimes, I suspect, when they are not, the Act is amended and the whole process starts all over again. That is all good fun—especially for those who practise in the field of taxation—and I

would not for one moment wish to deter anyone from that kind of course.

But these are individual remedies—remedies which may assist an individual from time to time—rather than matters to be taken up by professional organizations. I do not see any future for instance in professional organizations campaigning to have the Act amended so as to permit the deduction of portion of the interest on money borrowed for the erection of a house upon the ground that one of the rooms was a study used almost exclusively for activities connected with the taxpayer's profession. I take this as an example because the High Court has recently denied that such a claim is an allowable deduction. See *Thomas v. Federal Commissioner of Taxation*[1]; *Federal Commissioner of Taxation v. Faichney*.[2] Nor is it useful for professional organizations to support appeals in such matters.

What professional organizations should do in my view is to seek not temporary benefits but lasting benefits, not an increase in the number or amount of what I might call ordinary business deductions but a substantial alteration in the deduction for superannuation contributions. There may be other fields of importance too, but the field of superannuation, in my view transcends all others in importance.

In 1959 a Committee was appointed under the chairmanship of Sir George Ligertwood, a South Australian Supreme Court Judge, to inquire into the existing laws of the Commonwealth relating to the taxation of income and the operation of those laws for the purpose of ascertaining any anomalies, inconsistencies, unnecessary complexities and other similar defects. It reported in June of 1961.

When it dealt in its Report with Superannuation Funds (chapter 22) the Committee drew attention to the fact that section 82H (as it then stood) allowed a deduction to a taxpayer for amounts paid by him

(a) for premiums for life assurance and other specified forms of insurance;
(b) to superannuation funds and similar funds for provident purposes;

The total deduction then allowed under the section was £400. (It is now $1,200 and perhaps under threat of reduction.) The Committee pointed out that the deduction was allowable to all

1 (1972), 46 A.L.J.R. 397.
2 (1972), 47 A.L.J.R. 35.

taxpayers so that employees and self-employed persons were on the same basis in respect of their own contributions to superannuation funds. But it was submitted to the Committee on behalf of self-employed persons that the employee had a further advantage under the Act in that his employer might in each year of income contribute up to £200 or 5 per cent of the employee's salary to a fund for the benefit of the employee and that the sum so contributed was an allowable deduction to the employer. So it was said that the employee had available to him the benefit of a £600 tax deductible contribution to a superannuation fund whereas the self-employed person was limited to the benefit of a £400 tax deductible contribution.

With the mastery of understatement which Commissions of Enquiry invariably seem to possess, the Committee said: "We think there is merit in the submission". In order to correct the inequity the Committee recommended that provision should be made for those self-employed persons who were members of approved superannuation funds to be allowed a deduction of up to £200 in respect of contributions to such a fund in addition to the £400 already allowed for premiums for life assurance.

As you know that recommendation was unfortunately not accepted by the Government.

Some submissions to the Ligertwood Committee had asked that the allowable deduction should be £200 or 5 per cent of the self-employed person's income from personal exertion. This would have been a real and substantial advance but the Committee did not favour it. They said: "We do not favour this extension. There are obvious reasons against it. In any case, it is undesirable to press too far the analogy between the self-employed person and the employed person".

The reasons against it are, I must say, not obvious to me, unless it was meant that self-employed persons' gross incomes from personal exertion tended to be somewhat higher than those of employed persons. I do not know that to be true but I imagine that it must be so. But I should have thought that if it were possible to plot on a graph the average net earnings of self-employed professional people and the average net earnings of those of comparable qualifications employed in commerce and industry, it would be seen that the gap was narrowing. Our overheads are continually increasing and although fees have increased I should have thought that overheads might have increased in the last twenty years considerably more than fees have increased

and that the proportion of overheads to gross earnings has also very substantially increased.

So far from agreeing with the Ligertwood Committee that it is undesirable to press too far the analogy between the self-employed person and the employed person, I would be disposed to think that it is difficult to exaggerate the disadvantage from the point of view of income tax of the self-employed person in comparison with an employee of comparable qualifications.

These disadvantages can be seen in a number of ways. So, for instance, a company executive is provided with a car by his employer. The arrangements will vary but in some companies the company buys the car (perhaps at a favourable price having regard to fleet owner's discounts) and sells it to the employee over a period of years at a very favourable interest rate; some companies are able to provide their employees with cheap petrol and further to subsidize their car maintenance as well. Of course all these benefits are strictly speaking taxable in the hands of the recipients, but what commonly happens is that, as an administrative measure, an arrangement is made with the Commissioner of Taxation whereby an agreed and very moderate amount is taken in to the employee's assessable income. Again an employee often receives benefits in the form of subsidized canteen services, an advantageous loan to buy a house and so on which never appear (even if they should) in his income tax return. The self-employed person cannot share in any of these benefits and accordingly it seems to me that it would not be unfair if he were allowed a substantial deduction for superannuation purposes.

In the paper on "Professional People" to which I have already referred, Sir Douglas Menzies, in suggesting that a proper deduction should be granted for superannuation contributions, said that it should be granted, "because the professional man's only asset is himself and the results of his depreciation are only too obvious".

Everyone knows, I suppose, that a deduction can be obtained for tax purposes for the depreciation of equipment used in a business. The rates vary according to the item involved but at least a deduction can be obtained. General depreciation is provided for in section 54 of the Income Tax Assessment Act which in substance says that depreciation of any property, being plant or articles owned by a taxpayer and used by him during the year for the purpose of producing assessable income shall be an allowable deduction. Then section 55 provides that an estimate

shall be made by the Commissioner of the effective life of the unit of property in question, assuming that it is maintained in reasonably good order and condition and the annual percentage depreciation is to be fixed accordingly. Section 56 provides for how depreciation is to be calculated.

Now clearly the most important item of plant used in any professional practice is the practitioner himself or, if you like, his brain. Further it is beyond argument that the brain is owned by the taxpayer and is used by him for the purpose of producing assessable income. All the requisites of section 54 seem therefore to be satisfied. All that one has to do then is to fix upon the prime cost of the taxpayer's brain at the time when it is taken into practice—and in the case of a professional man who had been through years of expensive education that cost must be very high indeed—then estimate the life of the brain and work out the appropriate depreciation accordingly.

The Act provides alternative methods under which the deduction for depreciation may be calculated viz. the diminishing value method or the prime cost method, but we need not at this moment go into the details of the calculation. It will be obvious to you from what I have already said that a very large deduction indeed would be available to each one of us. Indeed we might find our position transformed. What is therefore needed is a practitioner with the appropriate resolution and resources to carry a test case to the highest court in the land. He can no longer take it any further.

But of course you treat the suggestion with scepticism and the lawyers present will at least wish me to develop the argument more fully.

At first sight of course there is an apparent difficulty. Can it be said that a taxpayer's brain is plant or an article? Well, whatever might be said about it being plant, I should have thought that it was clearly an article. The meaning of "article" is of course much controlled by the context in which it is found. So it has been held not to include a goldfish (*Daly v. Cannon*[3]) but our own Court in Victoria has held that a maggot is an article (*Palmer v. B. J. Clarke's (Hampton) Pty. Ltd.*[4]) Indeed in that case Starke J. said of the word "article": "I can see no reason for construing it as excluding an object animate or inanimate however small it

[3] (1954), 1 W.L.R. 261.
[4] (1966), V.R. 7.

may be". So I do not see why a brain should not be an article for depreciation purposes.

It might be said that there is authority for the view that a taxpayer's body or part of it cannot be regarded as plant. So in *Norman v. Golder*,[5] a decision of the Court of Appeal in England, a professional shorthand writer in the Royal Courts of Justice incured medical expenses as a result of working in unfavourable working conditions. He claimed, amongst other things that the medical expenses were allowable deductions under what are called in England "the wear and tear" clauses. The taxpayer who had clearly learnt his law whilst engaged as a shorthand writer in the Courts appeared in person and I am sorry to say that his argument received rather rough treatment. The Master of the Rolls (Lord Greene) who presided said (at p. 354):

> The next point relates to the deduction of his doctor's bills. It is much to be regretted that he had to incur those bills, and I may perhaps be permitted to say that I am glad to see that the trouble from which he suffered is now apparently passed and that he is restored to health, but his argument there is that they are permissible deductions on one of two grounds—one on general grounds; the other under the wear and tear clauses. I hope I may be forgiven if I say that so far as the wear and tear argument is concerned, it is quite impossible to say that the taxpayer's own body is a thing which is subject to wear and tear, and that the taxpayer is entitled to deduct medical expenses because they relate to wear and tear. It is wear and tear of plant or machinery. Your own body is not plant. Your horse conceivably may be. I do not know what it is under the Income Tax Acts. It certainly has, under the Employers Liability Acts, been held to be plant in a suitable case, but I have never heard it suggested by anybody that the taxpayer's own body could be regarded as plant. In fact the point has only, I think, to be stated.

The other basis for his claim to deduct the expenses also failed upon the ground that they were not wholly and exclusively laid out or expended for the purposes of his profession.

The passage I have quoted from the judgment of the Master of the Rolls might be thought to be some authority against the view that a man's brain could be regarded as plant. It is of course no authority for the view that it is not an article. But even on the question of plant the passage is of doubtful authority for it ap-

[5] (1945), 1 All E.R. 352.

pears to have been given *per incuriam*, which is a lawyer's polite way of saying that the Court has made a mistake, generally through not taking enough trouble to find earlier authorities.

As it happens it is not quite true to say (as Lord Greene suggested) that it had never before been argued that a taxpayer's own body could be regarded as plant. There is, in fact, earlier authority in which just that was held. It is true that the earlier authority was not technically binding upon the Court of Appeal but it was the pronouncement of a most distinguished jurist made about fifteen years earlier. In the case in which it was pronounced, the taxpayer was an author who claimed, *inter alia*, that he was entitled to certain deductions for the wear and tear of machinery and plant. The plant in question was the author's brain. The appeal succeeded, but let me read you a passage from the judgment:

> The appellant in this case . . . asks for a declaration that he is . . . entitled to certain allowances or deductions for income tax purposes under the heading of . . . wear and tear of Machinery and Plant. . . .
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> Now the theory of Income Tax (under Schedule D) is that it is a tax upon the *profits* of occupations, professions, or businesses. The manufacturer of soap, who makes and sells soap to the value of ten thousand pounds, at a cost to himself of eight thousand pounds, is taxed upon two thousand pounds. If there is no profit there is (in theory) no tax. He is not taxed on what comes into the till, but upon what goes into the savings bank. Further, it is recognized by the State that his soap-manufacturing machinery and plant must in the nature of things suffer wear and tear with the passage of time, and on account of that depreciation he is allowed to deduct certain sums from his income, apart from the day-to-day expenses of his business.
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> The position of the author, artist, or composer is very different. But it is [the appellant's] first complaint that the Commissioners treat him as if he were in the same position as the soap-manufacturer, except where it would benefit him to be treated so. In the vulgar phrase, he says, they have it both ways. The author is taxed, practically speaking, not on profits but on *receipts*, on almost everything that comes into the till. For the small deductions allowed to him on account of professional expenses are meagre and in no way comparable to the expenses side of the soap-manufacturer's profit-and-loss accounts. . . .

> Next, as to wear and tear. One of the constant disadvantages of the author's trade is that he is a one-man business, at once his own employer, designer, technician, machine-minder, and machine. Once the soap-manufacturer has equipped and organized his factory he may relax; a week's holiday, a month's illness will not suspend the output of his soap or the growth of his income. But when the author stops the machine stops and the output stops. He is unable, on holiday, in sickness, or in age, to depute his functions to any other person. Here is one more reason why a hundred pounds earned by the author should not be treated and taxed on the same terms as a hundred pounds accruing as profit to the soap-manufacturer. "Yet", says [the appellant], "since this is done, let it be done thoroughly and logically. The author's machinery and plant are his brain and his physique, his fund of inventiveness, his creative powers. These are not inexhaustible; they are seldom rested (for the reasons given above); the strain upon them increases as the years go by, and in some cases, I understand, is aggravated by late hours and dissipation. If it is proper for the soap-manufacturer to be relieved in respect of the wear and tear of his machinery and the renewal thereof (which money can easily buy), how much more consideration is owing to the delicate and irreplaceable mechanism of the writer!
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> Under this head [the appellant] has repeatedly appealed for relief in respect of sums expended on doctor's accounts, on sunlight treatment, on nourishing foods and champagne, and upon necessary holidays at Monte Carlo and Cowes. The Commissioners have refused, and I find that they were wrong.
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> Under both heads, therefore, [the appellant's] appeal succeeds. He estimates that if his expenses be properly calculated on the basis already explained he has never yet made a taxable profit; for at the end of every year of his literary operations he has been a little more in debt than the year before. In every year, therefore, he has been wrongly assessed and unlawfully taxed; and I order the Commissioners to reopen the accounts for the past seven years and repay to [the appellant] the very large sums owing to him.

It seems to me that what was said in that case about an author is equally applicable, *mutatis mutandis*, to a doctor or a lawyer.

The distinguished jurist who wrote what he himself called "these frolics of jurisprudence" (see the dedication of "Still more Misleading Cases") was of course Sir Alan Herbert, better known as A. P. Herbert. The "decision" from which I have quoted was

the judgment attributed to Radish J. in the case of *Haddock v. Board of Inland Revenue* and it is to be found in the collection of Misleading Cases published under the title of "Uncommon Law" (at p. 231). (And see Megarry "Miscellany-at-Law" pp. 177-8.) As Radish J. said "The appellant in this case is a Mr. Albert Haddock, a pertinacious litigant whom we are always glad to see".

The frolics in jurisprudence of which *Haddock v. Board of Inland Revenue* is one were said by their author to be "sometimes essays in reform as well, and are shyly intended not only to amuse but to amend". It is in that sense that I place it before you tonight.

Haddock v. Board of Inland Revenue has achieved a fame and a prominence denied to the case of the shorthand writer for it has been cited and relied upon in no less a place than the Congress of the United States of America (see *Congressional Record*, 18th March 1954, p. 3350). Representative Eugene J. Keogh, speaking in the debate on a Bill designed to permit self-employed professionals to set aside portion of their income in a tax-free retirement fund, called the attention of members of Congress to Mr. Haddock's plight. Mr. Keogh did not discuss the technical provisions of the Bill but pointed to an obvious omission to which he drew attention by reading a few passages from the judgment of Radish J. Mr. Keogh concluded by declaring that Haddock's plight was the plight of every professional and self-employed person in the country, the great body of millions of people who either cannot by law or who choose not to operate under the corporate form of business. (See (1954) 40 A.B.A.J. 666.) Many of us cannot by law or custom put on the corporate mantle, but even if we could, why should we? Why should we not be allowed to choose (without penalty) not to operate the corporate form of business?

You may find a moral in all this but I am not quite sure what it is. I would like to conclude by recounting an observation made by a taxpayer to his counsel just before the hearing of his tax appeal began. Counsel expressed some anxiety as to the outcome of the case to which the taxpayer replied: "Oh, don't worry about it. After all we're only arguing about money." That is the sort of client to have and the anecdote perhaps illustrates that income tax can be fun as long as you are talking about someone else's tax.

DR. J. B. CURTIS:

I was fortunate in having the opportunity of reading Mr. Young's paper before this evening's discourse, and it seemed to me that there are three salient points in it, which I will quote:

1. Our professions ultimately stand or fall by virtue of the quality of the work of the individual practitioner and the relationship which that practitioner has with his patient or client.
2. Proper provision for superannuation seems to me to outweigh any other aspect of the taxation of professional incomes, in importance; and, if not provided, fewer people of the right type will enter private professional practice and professional standards will decline.
3. I have found great attraction in contemplating the idea that the professional man's brain is his plant, machinery or equipment and therefore should be treated to a system of depreciation—no doubt, of course, at variable rates, according to the intensity of its use and, of course, not unnaturally, as I am sure all your minds would have drifted in the same way as our President's, I thought of professions older than the law or medicine and felt that the learned discourse we have heard tonight should not be limited to those professions.

Surely the wear and tear clause should be more carefully considered with regard to this profession. It is senior to both of us and now, with investment allowances and depreciation of special types are being denied and suddenly removed by our Ministers from those rural producers who crop up from time to time in different walks of life, should not now a special plea be put forward, not limited to our profession but applying to all professions?

When one contemplates it, of course, the mind rather boggles at the wear and tear clause and the special provisions which might be made. One would even suspect the possibility that the proper authorities with an appreciation of the subject might even come to the conclusion that a depreciation of the order of 200 per cent might easily be the right and equitable amount to arrive at.

I then came to the question as to whether a doctor or a lawyer should have a private professional relationship with his patient or client and whether he would be of greater value to the community or himself if he were, alternatively, an employed person.

I would put forward a strong plea—and I will give you later the qualifications which I had in mind—that, in essence, the standard of the profession rests ultimately on pride in one's work and the proper rewards for merit and effort or some variable combination of these two.

Now, that statement is not inconsistent with the recognition of the fact that pride and rewards vary greatly with different people. Some may be more modest or more vain, with respect to either; but I would still maintain that, without both, the standards and skills of our professions and other professions, too, would inevitably fall.

Pursuing that idea, I would consider that it is to the advantage of the community to maintain these two principles and, therefore, some other policy of either social or economic type to evolve the proper taxation method whereby the income may be balanced in the professional man's life so that he can be properly rewarded on the average over the years, bearing in mind, of course, that there is a relatively short period after training and before senescence in which there may be the full flowering of his abilities and skills.

Now, by saying that, I wish to remind you, of course, that either self-employed or employed members of our professions have community roles and their own individual desires to be fulfilled. It is fortunate that both these professions, by virtue of the very training and nature of the profession, provide many and diverse occupations which vary from the pure academic to the impure practitioner, from cloistered shelter to the full blast of the world; from the theory of thought and contemplation to the rough and tumble of operating theatre or clinic.

But these are complementary to each other, work against and with each other, and each section needs some special consideration to preserve the whole of the individual profession, and it would appear to me that the personal practitioner, providing personal service of the self-employed type, has been the particular practitioner, in my professional life, who has suffered from the greatest disadvantage. Provided one has the health and stamina to run the course, or economic circumstances which can make provision by other means, or that quality of luck in gambling which brings off coups, one may be all right; but in the absence of these, the effect may well be disastrous.

It is in the contemplation, therefore, of superannuation and

the wear and tear of plant, machinery and mind that I would bring the direction of the meeting this evening.

MR. TODD:

I hesitate to introduce a very serious note at this stage, but I was taken with the reference to other professions than the medical and the legal professions—indeed, to the oldest. In a recent case before the Taxation Board of Review, the taxpayer was the proprietress of a substantial establishment in King's Cross or somewhere and some days were occupied, not so much on the assessability of the income, but on the nature and extent of the deductions, especially the laundry. The Board was constrained to adjourn for one day, owing to the arrival in Port Jackson of a squadron of the United States Navy.

The other point that concerned me a little as I saw Dr. Curtis standing there, and having regard to what I have heard of some of his research activities that he has been conducting in his not very substantial spare time, was in relation to brain transplants. Is there a danger, I would like to ask Mr. Young, in claiming depreciation at the outset when there might be a very substantial deduction to be claimed for repair and replacement?

MR. YOUNG:

It all goes to show that one ought never to use uncommon law.—I had intended the reference only to be in a general sense—not only to amuse, but also to amend, to suggest that perhaps one of the considerations that ought to be at the forefront of the mind of anyone seeking to ameliorate the position of the self-employed person, and particularly the professional man, is that his chief asset is himself and that some provision ought to be made for the depreciation of that asset. I do not think it is wise to pursue too far the depreciation analogy which I so unwisely opened up.

MR. SEARBY:

If one looks at the 1936 Act, it seems to me that the way in which the Act stands at the present time represents, as Mr. Young said, a very simple structure; but what has been grafted to it is effectively the successful representations of various lobbying groups whose cases have met with some response. If you take depreciation allowances and investment allowances, allowances made where companies are exporting goods and so on, these are

all particular cases which have been put to the Taxation Commissioner or to the Government authorities and the case has been pressed and a recognition has been granted to these facts in the Act. So far, nobody seems to have been successful in doing anything of that description on behalf of professional people; and it is often said, particularly to me at home, that that is the fault of the professional people themselves because they are not inconsiderable in number, nor ought they to be without influence. I would like to ask Mr. Young whether he has any suggestion as to a practical method of approaching this question.

The second matter is this: superannuation appears to me to be substantially analogous to a provision for depreciation and wear and tear. The notion must essentially be that, when you reach a certain age, you are no longer able, satisfactorily at least, to continue to carry out the task in which you have been engaged during your lifetime. One hesitates to speak with more precision on this matter because, in the case of people in many leading companies, the age at which you are regarded as fit for retirement is 60. In Commonwealth recognition, it might be at 65 or 60, depending on your sex. Supreme Court Judges, of course, go on until 72 and High Court Judges are regarded as being indefinitely capable of practising with unlimited success. Is there any real concern, apart from the jocular aspect, to provide for depreciation for wear and tear? Is it not, as Mr. Young said earlier, that an adequate allowance for superannuation is, in effect, an allowance for depreciation? And what is the overseas attitude towards this?

Some two or three months ago, I was talking to an English lawyer who was out here, a barrister who was a member of the Patent Bar and, on that account, had probably had the principles of taxation quite clearly fixed in his mind in an uncomplicated fashion; and he said that the allowance in England was 15% of gross income. If one takes that type of provision compared with the type of allowance which is made in Australia, is not there ex facie a very good argument for saying that the Australian system is simply very much out of line with overseas systems? That leads me back to the first point: may not some argument be presented to the taxation authorities or to the politicians for the purpose of presenting the situation of the professional man? Cannot arguments and analogies be drawn from overseas to show that the position here is relatively unfavourable, and might it not be practicable to do something positively about that

instead of, as my wife keeps reminding me, talking about it every year and getting nothing done?

MR. YOUNG:

I think that what Mr. Searby says has a great deal of force. In so far as I can make any suggestions as to what ought to be done, I would have thought that what ought to be done is that our professional organization ought to make very strong representations—and some, I think, have been made, but perhaps not with sufficient coherence—to the present committee concerned to inquire into the taxation laws, that is, the committee being presided over by Mr. Justice Asprey, but that is only part of it.

I would have thought that, very likely, one could get, with sufficient representation, a favourable finding from that committee, which would be a committee likely to appreciate the position of the self-employed person or professional man. But it doesn't stop at that committee, as it did not stop at the Ligertwood Committee which made some recommendation in favour of increased superannuation for the self-employed person, but even their modest recommendation was not adopted by the Government. I think it is not sufficient to make a representation to the committee. It is necessary for the professional organizations to keep at it, so to speak, with their appropriate members of Parliament and Government departments and ministers until something is done.

What should be done, in my view, is wholly concerned with superannuation. Mr. Searby quite rightly says, in my view, that the wear and tear suggestion is related to another aspect of superannuation or, to put it another way, proper provision for superannuation is merely to cope with the depreciation of the professional man's chief asset, which is himself.

So far as comparison with overseas situations is concerned, I always find this very difficult indeed. I made some attempt to examine the position in England of the professional man. I am not sure that it is quite as favourable as Mr. Searby represents, but I think that the deduction for superannuation based upon a percentage of gross income has got a ceiling to it which is very much lower than one might find useful; but probably support can be drawn from overseas situations.

The reference that I made to the Bill in Congress some years ago introduced by Representative Keogh was a recognition there of the necessity for professional people to be able to superannuate

themselves properly, and I think support can be drawn from the position in other countries; but the reason why it is so difficult is because you have to compare the whole of the tax structure, the whole of the method of assessment of taxation, the whole of the allowable deductions, and then you have got to make some adjustment for the value of the money in different countries. I think something can be done, but it is by no means an easy exercise.

The principal answer that I would make is that I think we ought to press our professional organizations to take this matter up with the Taxation Committee and to keep taking it up even after that committee has reported.