[HIGH COURT OF AUSTRALIA.]

JOHN DAVIES . . . . . APPELLANT;

AND

THE COMMISSIONERS OF TAXATION (NEW SOUTH WALES) . . . } RESPONDENTS.

ON APPEAL FROM THE FULL COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 9, 14.

Griffith C.J. Barton and O'Connor JJ.

Land and Income Tax Assessment Act 1895 (*N.S.W.*) (59 *Vict. No.* 15) *secs.* 23, 27, 28, 30, 31, 32, 39—*Land and Income Tax Income Tax* (*Amendment*) *Act* 1897 (*N.S.W.*) (*No.* 21), *sec.* 6—*Land and Income Tax* (*Amendment*) *Act* 1904 (*N.S.W.*) (*No.* 17), *sec.* 3 (1)—*Income tax—Default assessment—Prior return acted on by Commissioners—Alteration of assessment books—Agent—Income received from sale of imported goods—Taxable amount—Deductions.*

After a return of income tax has been furnished by a taxpayer under sec. 30 of the *Land and Income Tax Assessment Act* 1895, and the assessment book has been made up by the Commissioners under sec. 31, and the tax as assessed has been paid by the taxpayer, the Commissioners are not entitled, upon subsequently becoming dissatisfied with the correctness of the return, to make a fresh assessment under sec. 39, without requiring a further return from the taxpayer under sec. 30. Sec. 6 of the *Land and Income Tax* (*Amendment*) *Act* 1897 which provides that, after the Commissioners have certified that the assessment book is complete, they may add to the book the assessment and other particulars in respect of land or income which may, after so certifying, be ascertained to be liable to land or income tax, did not introduce any new method of correcting errors, but merely authorized the correction of the assessment book by the Commissioners when the assessment had been otherwise lawfully altered.

Secs. 32 to 38 of the Act of 1895, which give power to the Commissioners to add to and amend assessment books, relate to land tax only, and have no application to income tax.

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Per Griffith C.J. and *O'Connor* J.—The taxable amount of the income derived by an agent from the sale of imported goods on behalf of his principal under sec. 23 of the *Land and Income Tax Assessment Act* 1895 is 5 per cent. of the total amount received from the sale of the goods, whether by the principal or agent.

Per Barton J.—The 5 per cent. is to be calculated upon the total amount received by the principal.

Held, also, by *Griffith* C.J. and *O'Connor* J., *Barton* J. dissenting, that the agent is not entitled to deduct from the taxable amount so ascertained the expenses incurred by him in the production of his income.

W. Cooper v. *Commissioners of Taxation*. 19 N.S.W. L.R., 356, followed on this point.

Decision of the Supreme Court, *Davies* v. *Commissioners of Taxation*, 11 S.R. (N.S.W.), 143, reversed.

APPEAL by special leave from the decision of the Supreme Court dismissing an appeal upon a case stated by *Murray* D.C.J. sitting as a Court of Review under the Land and Income Tax Acts.

The appellant, trading as Ariell & Co., in the years 1906 to 1909 inclusive acted as agent for the Nestlé and Anglo-Swiss Condensed Milk Co. Ltd., a company registered and carrying on business outside the State, and as such agent sold goods in the State for his principals, to whom the balance of the money received, after deduction of all expenses and his own commission, was forwarded.

The appellant duly furnished to the Commissioners of Taxation for the years 1907, 1908 and 1909, returns of the income derived by his principals from the sales as required by sec. 23 of the *Land and Income Tax Assessment Act* 1895. The return for 1907 stated the amount received for goods sold in 1907 as £22,016, and the gross taxable income £1,101, being 5 per centum on £22,016, and claimed to deduct £1,676 from the taxable amount under sec 28 for sundry general expenses incurred in the production of the income, thus showing that there was no income chargeable with income tax for 1907.

The Commissioners refused to allow the said deductions, and assessed the income at £1,101 and the tax at £27 10s. for the year 1907. They entered the assessment in the assessment book,

certified that the said book was complete so far as the information at their disposal permitted, and appointed a day for payment. The tax so assessed was paid. The procedure was the same with regard to the returns for 1907 and 1908, the amounts being only slightly different.

In September 1909, after payment of the tax assessed for these years, the Commissioner served on the appellant as agent for his principals additional notices of assessment of income tax for the years 1907, 1908 and 1909 respectively. The notices stated that since previously certifying that the assessment books were complete the Commissioners had ascertained that the appellant was liable for income tax on the further sums set out in the notices, that such additional assessments had been added to the assessment books, and that the appellant was therein assessed for income tax in the additional amounts specified. From each of these additional assessments the appellant appealed to the Court of Review. The appeals were dismissed and a case was stated for the determination by the Supreme Court of the following questions:—

1. Whether the Commissioners, having made a default assessment under sec. 39 of the *Land and Income Tax Assessment Act* 1895, and having certified under sec. 6 of the *Land and Income Tax Amendment Act* 1897 that the assessment book of income tax for the year of assessment is complete so far as the information at their disposal will permit, income tax having been duly paid on the income so assessed, were entitled to make a second default assessment in respect of the income of the appellant for the same year.

2. Whether the Commissioners, having certified under sec. 6 of the *Land and Income Tax Amendment Act* 1897 that the assessment books of income tax for the years 1907, 1908 and 1909, were complete so far as the information at their disposal permitted, income tax having been duly paid by the appellant upon his income as therein assessed, were entitled to add to the assessment books, and charge the appellant with further income tax in respect of his income for the said years, without having first ascertained income of the appellant in addition to

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the amount already assessed to be liable to income tax for that year.

3. Whether I was in error in holding that the Commissioners of Taxation had ascertained additional income of the appellant to be liable to income tax within the meaning of sec. 6 of the *Land and Income Tax (Amendment) Act* 1897.

[4. Dealt with the admission of evidence and is not now material.]

5. Whether on the true construction of sec. 23 sub-sec. (1) of the *Land and Income Tax Assessment Act* 1895, the taxable amount of income derived by the principal from the sale of goods in New South Wales should be assessed at five pounds per centum upon the total amount received by the principal for such goods or at five pounds per centum upon the total amount received by the agent on the sale of the said goods.

6. Whether, from the taxable amount of income assessed under sec. 23 of the *Land and Income Tax Assessment Act* 1895, the taxpayer is entitled to the deductions provided by sec. 28 sub-sec. (1) of that Act in respect of the annual amount of losses, outgoings (including interest), and expenses, actually incurred in New South Wales by him in the production of his income.

7. Whether, under the *Land and Income Tax Assessment Act* 1895, the *Income Tax Act* 1895, and the Acts amending the same, the Commissioners of Taxation are entitled, in assessing the taxable amount of the appellant's income under sec. 23 of the first-mentioned Act for the years 1907, 1908, and 1909, to take as the basis of assessment the amount of taxable income derived by the appellant during the years 1906, 1907 and 1908, respectively, from the sources mentioned in that section.

8. Whether the Commissioners of Taxation were entitled to make the said additional assessments for income tax for the years 1907, 1908, and 1909, or any of them.

The Supreme Court answered all these questions in favour of the respondents, and dismissed the appeal (1).

Knox K.C. and *Harper*, for the appellant. The appellant was entitled under sec. 28 of 59 Vict. No. 15 to deduct from the tax-

(1) 11 S.R. (N.S.W.), 143.

able amount of income assessed under sec. 23 the expenses incurred in the production of that income. If secs. 27 and 28 do not apply to sec. 23, as was held in *W. Cooper* v. *Commissioners of Taxation* (1), there is no basis of taxation at all, as sec. 23 does not refer to any year. "Income chargeable" is defined by sec. 68 as the taxable amount, less the deductions allowed under the Act. The taxable amount is fixed by sec. 23, and is subject to the deductions specified in secs. 27 and 28. Income tax is payable on the amount of income as assessed under the Act: sec. 68. Sec. 31 (3) clearly differentiates between "income chargeable" and "taxable amount." The effect of the decision in *W. Cooper* v. *Commissioners of Taxation* (1) was to substitute the words "income chargeable" for the words "taxable amount" in sec. 23. It is impossible to make anyone liable under sec. 23 unless he is brought under sec. 27, because the tax is always payable for any one year on the business of the year before, and sec. 23, as it does not refer to any year, cannot stand by itself. Sec. 3 (1) of the Act of 1904 repeals sec. 27 (1) of the Act of 1895 but leaves that position unaltered. Sec. 23 merely adds another class of income to those mentioned in sec. 15. The "amount received for such goods" in sec. 23 means the amount received by the principal. Secs. 32 to 38 apply to land tax only, and have no application to income tax. Sufficient additional powers with regard to income tax are provided by sec. 30 (4) and (6). Sec. 39 gives power to make a default assessment, but not to do so from time to time. The power can only be exercised once. In any event a default assessment cannot be made a second time without calling upon the taxpayer to send in a new return. Sec. 6 of the amending Act 1897, No. 21, was passed only to cure the effect of the decision in *Cooper* v. *Commissioners of Taxation* (2). It does not mean that, if a taxpayer's name is already in an assessment book, the Commissioners can arbitrarily, *ex mero motu*, insert other particulars in the book, without any proceedings being taken under the 1895 Act to get a fresh return from the taxpayer. At the time the fresh assessment was made the appellant was not in default under sec. 39. He had never been called upon to furnish

(1) 19 N.S.W.L.R., 356. (2) 19 N.S.W.L.R. Eq., 1.

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any new return. "Ascertained" in sec. 6 of 1897, No. 21, means duly ascertained under the provisions of the Principal Act.

Brissenden and O'Reilly, for the respondents. *W. Cooper* v. *Commissioners of Taxation* (1) was rightly decided, and the taxable amount of income assessed under sec. 23 is not subject to the deductions mentioned in secs. 27 and 28. The amount taxable is the income received by the agent. The Commissioners were entitled to make the default assessment in September 1909. The original assessments were not default assessments. All the Commissioners then did was to disallow the deductions, while accepting the returns made by the appellant as correct. After those assessments had been made the Commissioners ascertained that the prior returns had probably been made on a wrong basis, and they demanded to see the appellant's books, and were refused. It is not a condition precedent to making a default assessment that the Commissioners should call upon the taxpayer to furnish a better return. The Commissioners are given a discretion to disbelieve the taxpayer's returns. Sec. 31 empowers them to assess the taxpayer at such amount as they consider is his taxable income, and the taxpayer can appeal to the Court of Review and show that the assessment is excessive. "Ascertained" in sec. 6 of the 1897 Act does not mean clearly proved, but means that the Commissioners from whatever source of knowledge is open to them have satisfied themselves of the taxpayer's liability. The proviso to sec. 6 was inserted to enable the Commissioners to exercise the powers conferred upon them by sec. 31 of the Principal Act even after the assessment book has been completed. If at any subsequent time they are dissatisfied with the return they can make a default assessment under sec. 39, and the taxpayer can appeal from this assessment. There is no requirement necessary to enable the Commissioners to make any assessment, whether original, amended, or on default. It is quite immaterial that the Commissioners were at first satisfied with the original return. There is nothing in the Act to support the contention that secs. 32 to 38 apply only to land tax.

Cur. adv. vult.

(1) 19 N.S.W.L.R., 356.

GRIFFITH C. J. The appellant in this case is a person liable to income tax as an agent carrying on business in New South Wales for a firm outside the State. The questions raised by the special case fall under two heads, the first relating to the procedure to be adopted when, after a return of income tax made by a taxpayer has been accepted and acted on by the Commissioners, an error is alleged to have been discovered in the return. The other question relates to the principles upon which the income tax payable by persons in the position of the appellant is to be calculated. Both questions depend entirely upon the construction of the Act, and I will deal with them in order.

The facts, so far as they are relevant, are very simple. Returns were made by the appellant for the years 1907, 1908 and 1909, in each of which he claimed certain deductions. The Commissioners disallowed the deductions claimed, made their assessments, and the amounts assessed were duly paid. Afterwards in 1909 the Commissioners notified to appellant that they had made fresh assessments for each of the three years, and in each case for double the amount of the original assessment. The appellant appealed to the Court of Review.

Now, in order to see whether the Commissioners were entitled to take this course, it is necessary to refer to the general scheme of the Act. The Act in question is the *Land and Income Tax* 1895, sec. 30 of which deals with both land and income tax, and hence sometimes there is a little apparent confusion. Sec. 30 requires all persons liable to income tax to send in returns of their income in the prescribed form.

Sub-sec. 4 provides that if a person fails to make a return the Commissioners may appoint a person to make a return on his behalf.

Sub-sec. 6 provides that the Commissioners may, when and so often as they think necessary, require any person to make a fresh or fuller return respecting any matter of which a return is authorized or prescribed by the Act or by the regulations.

Sec. 31 provides that from the returns or from any other available source the Commissioners are to prepare assessment books in respect of income tax, and like books in respect of land

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tax, but the books in respect of the land tax are to be made up once in every five years, and for income tax every year.

Sub-sec. 2 of sec. 31 provides that the assessment books in respect of land tax shall contain particulars arranged in the prescribed manner of all lands liable to land tax, and shall remain in force until new assessment books are completed and notice given to the parties concerned.

Sub-sec. 3 of the same section provides that the assessment books in respect of income tax shall be so prepared as to show the gross and taxable amount of income of every taxpayer, income chargeable, and the amount of tax to be paid by the taxpayer.

Then follows a proviso to this effect: that any alteration in the assessment book authorized on appeal to the Court of Review is to be made, and further that if (and these words are important) upon the completion of the assessment by the assessors, and after the sittings of the Court of Review, it is at any time found that the assessed value of any land or income respectively is higher than is declared in the return or returns relating thereto, such excess shall be liable to taxation, and the tax levied in respect thereof paid by the person who shall be chargeable, or if he is dead by his representative, notwithstanding that the year in which the tax was originally assessed and paid is closed or that he holds a receipt in full for the year. This proviso does not, in my opinion, authorize the Commissioners to make an assessment without regard to the general provisions relating to assessments. It declares a liability to taxation if the liability has been ascertained, that is to say, if it is found, in whatever way the fact is to be ascertained, that the assessable value is more than has been originally assessed.

Sec. 32 provides that "during the time that any assessment-book is in force the Commissioners may, from time to time (1) place thereon the name of any person of whose liability to taxation they are satisfied, and erase therefrom the name of any person not so liable; (2) In their discretion, whether notice of appeal has been given or not, alter or reduce any assessment or class of assessments and order a refund of any excess of tax that may have been paid in respect thereof."

Mr. *Knox* contended that that section had no application to income tax. The introductory words "during the time that any assessment book is in force" evidently relate to sub-sec. 2 of sec. 31, which relates to land tax only. The assessment books for the land tax are to be made up and remain in force till a new assessment is made at the end of five years. And in sub-sec. 1 the power to place the name of any person on the assessment book is clearly applicable to land tax only. Income tax is payable by the individual, but land tax is payable in respect of land, whoever may be the owner of it from time to time while the assessment is in force. And the words "in force" themselves have the same meaning. An assessment book, in the ordinary sense of the words, remains "in force" so long as any tax payable by virtue of that assessment is unpaid. When it is paid the effect of the assessment is spent. Otherwise there would be no limit to the period within which alterations could be made under this section, although that period is clearly limited to the time during which the assessment book is "in force." The words, therefore, seem to be entirely inapplicable in regard to income tax, and both applicable and apt with regard to land tax. A further examination of the other provisions of sec. 32 leads to the same conclusion. Sec. 32 is one of a group ending with sec. 38, all of which relate to land tax only.

Sec. 39 provides for what is called a default assessment:—"If any person makes default in furnishing any return of lands or income, or if the Commissioners are not satisfied with the return made by any person, they may make an assessment of the value or amount on which, in their judgment, tax ought to be charged, and the tax shall be payable accordingly."

It was pointed out in the case of *Commissioners of Taxation (N.S.W.)* v. *Mooney* (1) that there are two alternate conditions precedent to the power of the Commissioners to make a default assessment; one, that the person liable to furnish a return has made default in furnishing it; the other when a person has made a return and the Commissioners are dissatisfied with it. It is only on one of these events happening that the Commissioners are entitled to make a default assessment.

(1) 4 C.L.R., 1439.

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Sec. 42 provides that upon the completion of the assessment books the Commissioners are to give notice to each taxpayer of the particulars of and the amount of tax payable. In the year 1897 it was held by the Supreme Court of New South Wales that land tax was not payable by any one until the assessment books were completed as to every taxpayer, a view which might put off indefinitely the time when a tax could be collected from any one. In the same year an Act was passed called the Amending Act of 1897, by which it was provided, in sec. 6, that "no assessment-book in respect of land tax or income tax shall be deemed incomplete, and no notice given in respect of land tax or income tax shall be deemed invalid, by reason of any error or omission in any such book or in any such notice; Provided that the Commissioners have certified under their hands that such book is complete, so far as information at their disposal will permit. But the Commissioners may, after certifying as aforesaid, add to the book the assessment and other prescribed particulars in respect of any land or income which may, after so certifying, be ascertained to be liable to land tax or income tax."

The notice in the present case purported to be made under the provisions of this section. The Commissioners have not called for any further return under the power conferred by sec. 30, sub-sec. 6, and the notices on which this appeal was brought to the Court of Review recite that the Commissioners have certified, in the words of sub-sec. 6, that, since so certifying, the Commissioners of Taxation have ascertained that the appellant was liable for income tax on the further sums set out in the said notices respectively.

I think that the word "assessment" and the words "which may be ascertained" both import that the assessment is to be made, and the Commissioners are to ascertain, in the way prescribed by the Principal Act, whatever that is. The Commissioners contend that, *ex mero motu*, and at any time, they can alter an assessment and demand an increased amount from the taxpayer. The Supreme Court was of opinion that this section did not introduce any new method of correcting errors, but merely authorized the correction of the assessment book by the

Commissioners when the assessment had been otherwise lawfully altered. I entirely agree with that conclusion.

But the Supreme Court thought that secs. 32 and 39 applied to the case. As to sec. 32, I am unable to agree with their Honors. For the reasons I have stated, I think it has no application to income tax.

The respondents' case must therefore rest upon sec. 39. They contend that that power can be exercised from time to time, and that when once a return has been made, the Commssioners may first be satisfied and then dissatisfied, and, I suppose, when they have been satisfied again they can become dissatisfied again, and so on *ad infinitum*. In my opinion, when the Commissioners have made an assessment, whether on a return or in default of a return, and the tax has been paid, they cannot, *ex mero motu* and without requiring a further return from the taxpayer, make a fresh assessment on the ground that they have changed their mind, and are now dissatisfied. There must be first a fresh default, that is to say, they must take advantage of sub-sec. 6 of sec. 30. It follows that the first two questions must be answered in the negative. These are the questions asking whether, under the circumstances, the second default assessment could be made and the assessment book added to. The third question, whether his Honor was in error in so holding, must be answered in the affirmative.

The other point in the case is possibly one of more importance, the extent of the liability to taxation. It is now necessary to refer to a different set of sections.

Sec. 23, on which the question directly arises, provides:— "Where a person or company outside the Colony (herein termed 'the principal'), by means of a company registered in the Colony, or carrying on business therein, or by means of a person in the Colony (herein termed 'the agent'), sells or disposes of goods in the Colony for the principal (whether the moneys arising therefrom are paid to or received by the principal directly or otherwise), the taxable amount of the income derived therefrom by the principal shall be assessed at an amount equal to five pounds per centum upon the total amount received for such goods, and the amount so assessed shall for the purposes of income tax be deemed to be income derived by the agent."

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The term "income chargeable" is in the definition clause defined as "the taxable amount, less the deductions allowed under the Act." Part IV. of the Act deals with income tax. Sec. 15 provides that income tax shall be payable in respect of incomes exceeding a certain amount arising from various sources. Then follow a number of sections dealing with special cases. Sec. 12 exempts certain incomes, and the income of certain persons. Sec. 18 makes provision as to persons by whom income tax is payable other than those who really get the benefit of the income. Sec. 19 deals with the liability of what are called representative taxpayers. Sec. 20 deals also with representative taxpayers. Sec. 21 deals with trustees and receivers, and sec. 22 with companies who borrow money on debentures.

Then comes sec. 23, which I have read. Sec. 24 provides for cases of incomes of shipowners, and sec. 26 for the case of incomes of married women. Then comes sec. 27, which prescribes rules for determining the taxable amount on which the tax is payable. It lays down certain rules. It begins:—

"For the purpose of ascertaining the sum, hereafter termed the 'taxable amount,' on which (subject to the deductions hereinafter mentioned) income tax is payable, the following directions and provisions shall be observed and carried out."

Sub-sec. 6 is:—"In all other cases the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources except to the extent of the exemptions provided by sec. 17."

Then sec. 28 deals with deductions, and provides that "from the taxable amount so ascertained as aforesaid" (that is in accordance with the directions contained in sec. 27) "every taxpayer shall be entitled to deductions in respect of" (amongst other things) "the annual amount of losses, outgoings, including interest and expenses actually incurred in New South Wales by the taxpayer in the production of his income." The question is whether a deduction incurred in the production of the income of the agent in the case of a business such as that carried on by the appellant is to be made from the 5 per cent. prescribed by sec. 23?

In 1898 the Supreme Court of New South Wales in the case of

W. Cooper v. *Commissioners of Taxation* (1) held that sec. 23 had no application to such cases, and that ruling has of course been followed ever since.

Now, if sec. 23 in this Act followed sec. 28, I think there could have been no doubt that it would have been construed in the nature of a proviso or exception to the general rules laid down in secs. 27 and 28. Its present position in the Act amongst the sections dealing with special cases and special kinds of taxpayers is easily accounted for. It had to be put in one place or the other. The draughtsman appears to have thought it convenient to group it amongst other cases dealing with taxpayers of a special kind, and I think it is almost impossible to doubt that the intention of the legislature was in sec. 23 to lay down an absolute rule. But the appellant contends that it is impossible to apply that principle because of the words of sub-sec. 6 of sec. 27 :—"In all other cases"—*i.e.*, other than those previously mentioned, of which this is not one—"the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources except to the extent of the exemptions," etc ; and because also of the introductory words of sec. 27 :—"For the purpose of ascertaining . . . . the taxable amount on which subject to the deductions hereinafter mentioned . . . ."

In my opinion, a mere verbal criticism of the section is sufficient to get over that difficulty, if there is anything in it. The words used in sec. 23 are :—"The taxable amount of the income derived therefrom" (the business) "by the principal shall be assessed at an amount equal to five per centum upon the total amount received for such goods," while the deductions referred to in sec. 28 are to be made only "from the taxable amount so ascertained as aforesaid," that is to say, ascertained by means of calculations prescribed in sec. 27, which have no application to the cases mentioned in sec. 23. In sec. 23 "the taxable amount of the income derived by the principal" does not depend upon any calculation or deduction. It is fixed by an arbitrary rule, five per cent. of the gross receipts, which was no doubt a rough and ready rule that it was thought would work fairly all round. I am of opinion, therefore, that the decision of

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W. Cooper v. *The Commissioners of Taxation* (1), followed by the Supreme Court in the present case, is correct.

The fifth question submitted was whether, on the true construction of sec. 23, the five per cent. should be assessed on the total amount received by the principal, or on the total amount received by the agent. The Supreme Court answered the question in favour of the respondents. The attention of the learned Judges was not, apparently, drawn to the exact words of the section. It seems to me that neither answer to the two questions submitted would be quite correct, because they are not exclusive alternatives. The amount dealt with is the total amount received in payment of the goods, whoever receives the payment.

The seventh question raised the point whether the Commissioners were to take as the basis of the taxable amount the income of the previous year. The question was not argued before us, but it seems to me quite impossible to say that the Commissioners are not entitled to take the taxable income of the previous year into consideration. Sec. 3 of the Act of 1904 provides that, in assessing income tax for the year 1905 or any subsequent year, the taxable amount of income from all sources for the year preceding shall be the taxable amount for the year of assessment; and that applies to all cases.

The result is that questions 1 and 2 should be answered in the negative; question 3 in the affirmative; as to question 4, the admissibility of evidence, we are not asked to give any opinion; as to question 5, the answer should be varied by saying: "The taxpayer should be assessed at five per cent. upon the total amount received from the sale of goods by whomsoever received"; question 6, as to deductions, answered in the negative; and question 8, whether the Commissioners were entitled to make the additional assessments, answered in the negative. The order of the Supreme Court should be varied accordingly.

BARTON J. read the following judgment. Substantially there are two questions raised. The first is whether in cases under sec. 23 of the *Assessment Act* 1895 the amount of the income derived by the principal is subject to the deductions allowed

(1) 19 N.S.W. L.R., 356.

by sec. 28. The Supreme Court has, on this question, followed its decision in *W. Cooper* v. *Commissioners of Taxation* (1). By sec. 1 of the *Income Tax Act* 1895 (59 Vict. No. 17), the tax of sixpence in the pound is imposed on all "incomes chargeable" under the *Assessment Act*. By that Act (59 Vict. No. 15), sec. 68, "income chargeable" means "the taxable amount less the deductions allowed under this Act." Sec. 31 (iii.) requires the assessment books to be so prepared as to show, among other particulars, the "gross and taxable amounts" of every taxpayer's income and "the income chargeable." This provision does not except any income, and it implies that, where the facts warrant it, deduction of some kind from the taxable amount is allowable in all cases, in order to arrive at the "income chargeable." It is not affected by the terms of any other provision in the Act. Sec. 27 makes "directions and provisions" for the purpose of ascertaining "the sum . . . . on which, subject to the deductions" in the Act after mentioned, that is, in sec. 28, "income tax is payable." This sum, says the section, is "*hereinafter* termed the taxable amount." But sec. 23, on which the Commissioners rely, is of course prior, not subsequent, to sec. 27. I need not read it again. Where goods are sold or disposed of by an agent in New South Wales for a principal outside that State, is "the taxable amount of the income derived therefrom by the principal" subject, as other incomes are, to the deductions allowed by sec. 28? Is "taxable amount" in sec. 23 to be understood in the same sense as it bears in secs. 27, 28, 31 and 68, as being subject to deduction, or is it to bear a different sense because sec. 27 describes it as being so termed later in that section and later in the Act? I think the sense is the same in all these cases, as indicating "the sum . . . on which, subject to the deductions" allowed, "income tax is payable. Sec. 23 arrives at this amount, for the purpose of arbitrarily fixing the principal's rate of profit, by assessing it at 5 per cent. on the "total amount received" for the goods. The 5 per cent., "the amount so assessed," is not the tax, but is deemed to be income derived by the agent, who is to "make the returns, be assessed, be liable to income tax," &c., as if the income so arrived at were

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his own. That the taxable amount, whether in sec. 23, sec. 27 or sec. 28, is subject to the deduction is, in my mind, strongly indicated by the definition in sec. 68, which involves the making of the deductions allowed from the "taxable amount" in all cases as the method of arriving at the income chargeable. That is the plain meaning of the definition, and I find no context to require any other meaning. The word "hereinafter" in sec. 27, relied on by the Commissioners, seems to be a slip of the draughtsman, and, even if it is not one, it is mere matter of description, and does not take away from the otherwise clear meaning of the term in sec. 23. To the contention that sec. 23 is totally independent of sec. 27, as it stood originally, it is well answered that such a construction creates a serious difficulty. Sec. 23 does not prescribe any previous year with reference to which the taxable amount of the current year's income is to be arbitrarily ascertained or the tax assessed. But without such a reference as was contained in sub-sec. 1 of sec. 27 the agent cannot well make any return, since he cannot possibly return the actual income of a year still current. This difficulty does not seem to have been perfectly appreciated by the Supreme Court in 1898, when it decided the case of *W. Cooper* v. *Commissioners of Taxation* (1), and the judgments do not refer to it. Since then the Act of 1904, sec. 3, sub-sec (1) has repealed sub-sec. 1 of sec. 27. Then by sub-sec. 2 it provides that for the future "the amount of taxable income from all sources for the year immediately preceding the year of assessment shall, subject to the provisions of sec. 27 of the Principal Act, be the taxable amount for the year of assessment." This new provision seems to me to be of special importance. It is not framed as a mere amendment of sec. 27, but there is first a repeal and then a fresh substantive provision as a separate affirmative enactment of the new Statute. It clearly makes applicable to all returns of income that which, according to *W. Cooper's Case* (1), sec. 27 did not prescribe in respect of returns under sec. 23, namely, the ascertained income of a previous year on which to base the taxable amount for the current year. But it does more. The amount taxable for the immediately preceding year is made without any exception the taxable amount

(1) 19 N.S W. L.R., 356.

for the year of assessment, *subject to the provisions of sec. 27.* But by sec. 27 the taxable amount is subject to the deductions allowed by sec. 28. The legislature had learned in 1898 that, whatever its purpose had been in 1895, the Supreme Court held the view that there was no connection between secs. 23 and 27, and that the "taxable amount" in the one had not the incidents of the "taxable amount" in the other. When we consider that in 1904 the legislature acted not by mere amendment in the body of sec. 27, but by repealing a sub-section judicially held not clear enough to apply to sec. 23, and by framing a fresh enactment as to the future, entirely general in its terms, and those terms sufficient to embrace the expression "taxable income" wherever it occurs in the Principal Act, we can have little doubt of what the legislature meant to effect. Whether it was re-affirming its will—as I think it probably was—or had changed its mind, it intended the untouched provisions of sec. 27—among them that for deduction—to be made applicable to every taxable income.

Apart then from other grounds, I think the taxable amount dealt with in sec. 23 is subject to the deduction for outgoings claimed.

Holding this view, it is perhaps not necessary that I should express a decisive opinion as to whether, in sec. 23, the "total amount received" is that received by the principal or by the agent; for if the opinion already expressed is correct, the deduction can be made from the same sum in the return *quâcunque viâ*. I am inclined, however, to the view that the 5 per cent. is to be calculated on the total amount received by the principal. The section provides that whether the moneys arising from sale or disposal "are paid to or received by the principal directly or otherwise," the taxable amount of the income the principal derives is to be assessed at 5 per cent on the "total amount received for such goods." The words seem to suggest as the natural and grammatical construction that the "total amount received" means the moneys arising from the sale or disposal, whether "paid to or received by the principal directly or otherwise,"—which, I take it, means, whether they are remitted to the principal directly or through the agent. In any case it is the

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agent to whom the Commissioners must look for the tax assessable upon the percentage.

The second question is whether the additional assessments described in the ninth paragraph of the special case, and made in 1909 after the amounts assessed as in paragraphs 6 and 8 had been paid, are valid assessments. It depends upon the construction of sec. 6 of the Amending Act of 1897, but it is necessary to refer to other enactments. Sec. 31 of the Principal Act shows how the assessment books are to be prepared, and there are two provisoes, of which the second is important. It is contended for the Commissioners that the additional assessments are justified by this proviso, regard being had to the words "If, upon completion of the assessment by the assessors, and after the sittings of the Court of Review, it is at any time found that the assessed value . . . of . . . any income . . . is higher than is declared in the return or returns relating thereto, such excess shall be liable to taxation, and the tax levied in respect thereof shall be paid by the person chargeable, ... notwithstanding that the year for which the tax was originally assessed and paid has closed, or that such person . . . may hold a receipt in full for the tax paid for the said year." It is argued that under this proviso an additional assessment may be made without calling on the taxpayer for any better return, but in view of sec. 30, sub-sec. (vi.), I think the intention of the legislature was that by a resort by the Commissioners to the process there authorized the taxpayer should be given the opportunity of first making the further or fuller return. It is not to be concluded unless under the pressure of clear words that the Commissioners are given the very arbitrary power to make additional assessments on their own initiative and without asking for a return, although an express power is given them to require one "when and so often as they think necessary." This proviso then does not in my opinion give validity to the additional assessments in this case. Reliance was placed on sec. 39 sub-sec. (1). There had already been assessments for each of the three years in assumed pursuance of this section, the Commissioners being "not satisfied with the return made." It is clear to me that the power to make a default assessment can only be exercised once in respect of the same

failure to make a return; and there is nothing to show that the power can be exercised more than once in respect of the same return under the second branch of this sub-section. The power of assessment without further return is allowed in respect of one default or one unsatisfactory return. I do not think the section warrants an assessment under it where an assessment has already been made and, as in this case, the tax assessed has been paid. The further or additional assessments therefore are not warranted by sec. 39. Sec. 32 does not help the Commissioners for the reasons given by the Chief Justice.

It remains to see whether these additional assessments are justified by the bare terms of sec. 6 of the Act of 1897. But here there is one difficulty in the way which of itself is insuperable. Where the Commissioners have certified to the completeness of the assessment book, they are empowered to add to it the assessment, &c., in respect of "any land or income which may after so certifying be *ascertained* to be liable to land tax or income tax." It is not in this case, any more than in the case of the second proviso to sec. 31, to be held, unless the words are so clear as to compel such a construction, that the Commissioners have been invested with the very arbitrary power to make additional assessments, on their own initiative, or upon some speculative ground. The income must be *ascertained* to be liable to the tax, says the Act, and it seems to me that at the least the ascertainment must be made by the processes prescribed in the Principal Act for the ascertainment of liability to tax. Those processes have not been adopted, and it follows, in my judgment, that these additional assessments are invalid.

I agree that the questions must be answered as proposed, except that I think the answer to question 5 should be, "upon the total amount received by the principal, whether directly or indirectly."

O'CONNOR J. read the following judgment:—I agree that the case of *W. Cooper* v. *Commissioners of Taxation* (1) was rightly decided, and I do not think it necessary to supplement what was said by the learned Judges who took part in that decision. It follows that the questions in this appeal, which turn on the con-

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struction of secs. 23, 27 and 28 of the *Land and Income Tax Assessment Act* 1895, were properly determined in the Commissioners' favour in the Courts below. As to all the points submitted I agree with what my learned brother the Chief Justice has said, and I propose to add nothing except with reference to the assessment alleged to have been made under the authority of sec. 6 of the Act of 1897. The Commissioners purported to exercise the right to make the new assessment by virtue of that section. Grammatically, no doubt, the words of the last paragraph of the section are open to the interpretation which the Commissioners seek to place upon them, but, having regard to the scheme of assessment which the Principal Act has provided and to the object for which the amending section was passed, that interpretation does not give effect to what is in my opinion the intention of the legislature as expressed on the face of the enactment. Nor can I assent to the view as to the relevant sections of the Principal Act upon which the learned Judges of the Supreme Court held that the Commissioners' action could be supported. In considering the ground taken by the Commissioners I shall deal with that view.

Under the Principal Act every person liable to income tax is bound to send in his return of income and is entitled to state therein his income according to his own view. The return, when sent in, is *primâ facie* the basis of the assessment. The Commissioners are in no way bound by it, they may disagree with its correctness, they may call for a further return, they may, under sec. 31, make use of other available sources of information. If the return is not furnished, or is unsatisfactory, they make a default assessment under sec. 39. The assessment made in accordance with these various provisions, and recorded in the Assessment Book, represents the determination by the Commissioners of the question at issue between the taxpayer and themselves, namely, on what amount of income (if any) the tax is to be paid. Sec. 31 further deals with the position which may arise if, after the completion of the Assessment Books, and after the sittings of the Court of Review are over, it should be at any time found that the amount of any income is higher than is declared in the taxpayer's return. It is enacted that in

that case the excess "shall be liable to taxation" and the tax levied in respect thereof shall be paid by the person chargeable. The phrase "shall be liable to taxation" clearly implies that, before the taxpayer can be called upon to pay a definite amount in respect of the excess, the same method of ascertaining that amount must be followed as in the case of the original assessment. In other words, the Commissioners must call for a return in respect of the excess and proceed afterwards to deal with it as with the original income. If the return is not furnished, or if they are not satisfied with the return furnished, they may make a default assessment under sec. 39. But until the taxpayer has had the opportunity of sending in a return, in which he may put his view of the income alleged to have been understated in his original return, a default assessment in respect of the excess cannot be made. Such were, in my opinion, the rights respectively of the Commissioners and the taxpayer under the Principal Act with respect to the re-opening of an assessment duly made, recorded and acted upon, when the Amending Act of 1897 became law. It was passed, as is well known, to remedy a defect in the law brought to light by the case of *John Cooper* v. *Commissioners of Taxation* (1). Under the original Act, as interpreted in that case, land tax did not become a charge upon any portion of land until the Assessment Book was complete, that is to say, until there had been recorded in it assessments in respect of substantially all the land in the State. Sec. 6 is obviously directed to remedy that defect. It perhaps goes a little beyond the remedy because the words used are wide enough to include the adding of assessment and particulars in respect of income of taxpayers already assessed in the book as originally completed. But, in all the cases covered by the section, the powers conferred on the Commissioners to add the assessment in respect of an additional amount of income arise only after the additional amount of income has been "ascertained to be liable" to income tax. The words "ascertained to be liable" must be read as importing into the section the methods by which, under the Principal Act, the Commissioners are directed to ascertain the liability of the taxpayer to pay a definite amount in respect of income tax in the

(1) 19 N.S.W.L.R. (Eq.), 1.

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first instance. To read the section otherwise would be to assume without any warrant that the legislature intended by the general words it has used to deprive the taxpayer in respect of re-opened assessments of the right which, as I have pointed out, the Principal Act conferred on him of stating in his own return the portion of income in controversy from his own point of view—a right the loss of which would be by no means compensated for by preserving to him the opportunity of appealing to the Court of Review. A taxing Act will not be construed to take away existing rights or to impose new obligations unless under the compulsion of very clear words. I am therefore of opinion that sec. 6 did not confer on the Commissioners any power to make the new assessment without following the procedure which I have pointed out was necessary in the re-opening of assessments under sec. 31 of the Principal Act.

I agree therefore that in respect of the questions involving the interpretation of sec. 6 of the Act of 1897 the Commissioners and the Court of Review came to an erroneous conclusion, that the view of the Supreme Court as to the new assessment cannot be supported, and that the appeal must be allowed. I concur in the form of answer stated in the judgment of my brother the Chief Justice.

Order of Supreme Court varied. Respondents to pay costs of appeal.

Solicitors, for appellant, *Minter, Simpson & Co.*

Solicitor, for respondents, *J. V. Tillett,* Crown Solicitor, New South Wales.

C. E. W.