[PRIVY COUNCIL.]

COMMISSIONERS OF TAXATION (N.S.W.) APPELLANTS;

AND

ADAMS . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1912. Feb. 21.

Income tax—Assessment of income—No taxable income for preceding year—Land and Income Tax Assessment Act 1895 (*N.S.W.*) (59 *Vict.*, *No.* 15), *secs.* 15, 17, 27, 28—*Land and Income Tax (Amendment) Act* 1904 (*N.S.W.*) (*No.* 17 *of* 1904), *sec.* 3 (2)—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *sec.* 150.

By sec. 15 of the *Land and Income Tax Assessment Act of* 1895 (N.S.W.) (the Principal Act) it was provided that income tax should be charged at such rate per pound as Parliament might from time to time enact, on all incomes exceeding a certain amount, arising "from any kind of property, except from land subject to land tax as hereinafter provided." Sec. 17, among other exemptions, specifically excepted income derived from the ownership or directly from the use of land subject to land tax under this Act. Sec. 27 provided that "For the purpose of ascertaining the sum, hereinafter 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:—(I.) The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation. . . . . (VI.) 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."

By sec. 3 (1) of the *Land and Income Tax (Amendment) Act* 1904 (N.S.W.) the first of the directions and provisions in sec. 27 above quoted was repealed, and by sec. 3 (2) it was provided that "in assessing the income tax for the year 1905 or any subsequent year the amount of taxable income from all

* Present—Lord Macnaghten, Lord Shaw, Lord Mersey, and Lord Robson.

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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."

The income of a company was wholly derived from the use of land subject to the land tax above referred to, and the company was exempt from income tax until 1st January 1907, when, by virtue of the *Local Government Act* 1906 (N.S.W.), the operation of the enactments contained in the Principal Act relating to exemption from income tax in consequence of liability to land tax became suspended.

Held, that the company, not having had a taxable income in 1906, was chargeable for income tax for the year 1907 under the provisions of sub-sec. VI. of sec. 27 of the Principal Act, sub-sec. 2 of sec. 3 of the Act of 1904 being applicable only when the taxpayer has been in receipt of "taxable income," that is, income liable to income tax in the year preceding the year of assessment.

Decision of the High Court: *Adams* v. *Commissioners of Taxation*, 10 C.L.R., 180, reversed.

APPEAL from the High Court.

This was an appeal by the Commissioners of Taxation from the decision of the High Court: *Adams* v. *Commissioners of Taxation* (1).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This appeal raises a question under the *Land and Income Tax Assessment Act of* 1895 (No. 15 of 1895), as amended by the Act No. 17 of 1904. The appeal is against a judgment of the High Court of Australia, reversing by a majority of two learned Judges to one the judgment of the Supreme Court of New South Wales on a special case. The case was stated by the Court of Review under sec. 45 of the Act of 1895, which in the Act of 1904 is called the "Principal Act." The appeal is by the Commissioners of Taxation, who obtained special leave to appeal on the terms of undertaking in any event to pay the respondent's costs as between solicitor and client.

In some aspects the situation is peculiar. If the High Court be right, the framers of the Principal Act, on which evidently much thought and great care were bestowed, have made an extraordinary blunder, resulting in the present case in loss to the

(1) 10 C.L.R., 180.

State of income tax on the income of the Seaham Colliery Co. for the year 1907. The Supreme Court avoided this result by placing a non-natural construction on the words "taxable income," two plain English words, which seem to be capable of only one meaning. Oddly enough, the High Court adopts this non-natural construction for the year 1896—the year in which the Principal Act came into operation,—but refuses to carry it any further. So the Supreme Court answered the question proposed in the affirmative. The High Court answers it in the negative. To add to the confusion, a categorical answer, whether it be yes or no, seems to be irrelevant to the real issue. The question proposed does not follow the language of the Act, nor is it in their Lordships' opinion calculated to evoke a reply tending to elucidate the matter in controversy. The real and indeed the only question is this: Is the colliery company liable to income tax for the year 1907?

The Principal Act does not impose taxation. It provides machinery for the collection and payment of land tax and income tax when imposed by Parliament.

The Principal Act was passed on 12th December 1895. On the same day two other Acts were passed, the one imposing land tax and the other imposing income tax, as from 1st January 1896. They are numbered respectively 16 and 17 of 1895.

No. 17 of 1895 is in the following terms:—

"From and after the 1st day of January 1896 there shall be annually levied and paid under the provisions of the *Land and Income Tax Assessment Act of* 1895, and in the manner therein prescribed, an income tax of sixpence in the pound on the amount of all incomes chargeable thereunder.

"This Act may be cited as the *Income Tax Act of* 1895."

No. 16 of 1895 imposed a land tax in similar terms.

Part II. and Part III. of the Principal Act, secs. 10 to 14 both inclusive, deal with the collection and payment of land tax.

Sec. 15 in Part IV., which deals with income tax, provided that, subject to the provisions of the Act and the regulations thereunder, there should be charged, levied, collected, and paid to the Commissioners for the use of Her Majesty an income tax at such rate per pound as Parliament should from time to time

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declare and enact in respect of the annual amount of all incomes exceeding £200 per annum, arising or accruing, as specified in four sub-sections. The fourth sub-section is in the following terms:—"(IV.) Arising or accruing to any person wheresoever residing from any kind of property, except from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding sub-sections."

Sec. 17, among other exemptions, specifically excepts or exempts—"(VII.) Income derived from the ownership of land subject to land tax under Parts II. and III. of" the "Act," and "(VIII.) Income derived directly from the use or cultivation of land subject to land tax under Parts II. and III. of" the "Act."

Sec. 27, so far as material, is in the following words:—

"For the purpose of ascertaining the sum, hereinafter 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:—"(I.) The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation."

Next follow sub-secs. II., III., IV. and V., some of which qualify the provisions of sub-sec. I., while others are of general application, and then comes sub-sec. VI.

"(VI.) 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."

Sec. 28 specifies deductions which may be made from the "taxable amount," and so there is brought out the "income chargeable," an expression defined by the Act as the "taxable amount less the deductions allowed under" the "Act."

Now, it is conceded that income tax was properly payable for the year 1896 although no income tax was imposed by Parliament before the commencement of that year.

It was common ground that the income of the Seaham Colliery Co. was wholly derived from the use of land, and that so long as

land tax was payable by the company the company was exempt from income tax.

On 1st January 1907 the *Local Government Act* 1906 came into operation. Under that Act local government areas were constituted, some of which were designated "municipalities" and others "shires." From 1st January 1907 the land of the Seaham Colliery Co. was included in a shire; shire rates became payable by the company in respect thereof; and as from that date, under or by virtue of a proclamation duly issued by the Governor in accordance with the provisions of the Act, the operation of the enactments contained in the Principal Act relating to exemption from income tax in consequence of liability to land tax were "suspended."

In the meantime the *Land and Income Tax (Amendment) Act* 1904 had been passed. That Act, sec. 3 (1), repealed the first of the directions and provisions contained in sec. 27 of the Principal Act as from 1st January 1905, and contained the following enactment:—Sec. 3 (2).—"In assessing the income tax for the year 1905 or any subsequent year 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."

The drafting of the Act of 1904 is perhaps rather clumsy, but the meaning is perfectly clear that sec. 27 of the Principal Act is to be read as if sec. 3 (2) of the Act of 1904 were substituted for sub-sec. 1. of sec. 27.

In these circumstances the respondent contended that the company was not liable to be assessed for income tax for the year 1907, on the ground that in the preceding year it had no taxable income, that is, no income liable to income tax.

The Supreme Court held that the same non-natural construction of the words "taxable income" which both the Supreme Court and the High Court thought applicable to the first year of taxation should be applied to the present case. The expression "taxable income" in their opinion meant income which would have been taxable if the Income Tax Code had applied to it. The High Court thought that although that construction was

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admissible for the year 1896, it was not admissible for any subsequent year.

Their Lordships think that sec. 3 (2) of the Act of 1904 is not applicable in the present case. They are of opinion that that sub-section, as well as the original sub-sec. I. of sec. 27 of the Principal Act, is only applicable when the taxpayer has been in receipt of "taxable income," that is, income liable to income tax in the year preceding the year of assessment, and that in all other cases as provided by sub-sec. VI. of sec. 27, and in the language of that sub-section, the "taxable amount" is "the total amount of taxable income arising or accruing from all sources" during the year of assessment "except to the extent of the exemptions provided by sec. 17."

If this is not the meaning of the Act, what is to happen in the case of a man who starts a new business while the Income Tax Code is in operation, and, during the first year of trading, makes an income in excess of the non-taxable limit? Is he to pay no income tax? Apparently, according to the view of the Supreme Court he would pay no income tax for the first year, assuming, of course, that he had no taxable income before he started in business. For, although you may perhaps find taxable income in income not in fact taxable simply by supposing the taxing Act to be antedated, it surely passes the wit of man to find a taxable income where there is no income to be found. According to the view of the High Court, logically carried out, a trader in such a position never would pay income tax so long as he carried on the business, and had no other source of income. If he is not to pay for the first year, it is difficult to see how he can be called upon to pay income tax for any succeeding year. Take a more striking instance still, suppose A. carries on a successful business producing (say) £20,000 a year, on which he is paying income tax, and suppose B., engaged in the same trade, is equally prosperous and pays income tax on a like amount, and suppose they agree to combine and form themselves into a limited company or sell their businesses to a limited company, which makes in its first year as much as or more than A. and B. together made in the preceding year. Is the company to pay no income tax for the first year? It certainly had no taxable income during the preceding year. It

had no income at all. It was not in existence. Apparently the only way its income could be reached during the first year of its existence would be under sub-sec. VI. It seems to their Lordships that for 1896, the first year of income tax taxation, all taxable incomes fell under sub-sec. VI., and that in all subsequent years, in all cases where there is no income, or no taxable income during the year preceding the year of assessment, recourse must be had to sub-sec. VI.

Their Lordships have some difficulty in understanding why it was that in the High Court, as well as in the Supreme Court, and in the argument before this Board even in reply, it was sought to confine attention to sub-sec. I. of sec. 27 of the Principal Act and the enactment substituted for it by the Act of 1904. When the point which weighs most with their Lordships was put to the learned counsel for the respondent, he admitted that a new business could not hope to escape taxation for the first year of trading, though there were no income, or no taxable income, for the year immediately preceding the year of assessment. That was inconceivable; in such a case perhaps sub-sec. VI. might, he thought, be applicable. But, certainly, unless their Lordships are mistaken, no plausible suggestion was made of any other means by which the income in question could be reached.

It seems to their Lordships tolerably plain that in cases where there is taxable income for the year immediately preceding the year of assessment, the amount of such income is not to be "included" in assessing the amount of taxable income for the year of assessment as suggested by the question proposed in the special case—for that is not the language of the Act—but is, in the language of the legislature, "the taxable amount for the year of assessment," and that in all other cases, that is, in all cases where there is no taxable income for the year immediately preceding the year of assessment, the rule laid down in sub-sec. VI. must be observed.

If the view which commends itself to their Lordships is accepted, there can be no difficulty in any case. Returns for a current year must be in the nature of estimates—estimates more or less accurate according to circumstances—but still estimates and nothing more, and in a sense provisional. The Commissioners

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have now as full power as they ever had of requiring returns from time to time, of redressing injustice, and of relieving taxpayers from mistakes and overpayments.

Their Lordships will humbly advise His Majesty that the order of the High Court should be discharged except as to costs, and that the question proposed by the special case should be answered by saying that the income derived by the company during 1906 from the use of land in coal mining is not to be included in assessing the amount of taxable income of the company for the year 1907, but that the company is chargeable for income tax for the year 1907, under the provisions of sub-sec. VI. of sec. 27 of the Principal Act.

In accordance with their undertaking the appellants will pay the costs of the respondent as between solicitor and client.

[PRIVY COUNCIL.]

THE MOST REVEREND ROBERT DUNNE AND ANOTHER . . . . . Defendants, } Appellants;

AND

JAMES BYRNE . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1912.

Feb. 22.

Will—Construction—Charitable bequest—Gift for the good of religion—Uncertainty—Religious purposes—Over-riding trust.

A testator left the residue of his estate to "the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

* Present—Lord Macnaghten, Lord Shaw, Lord Mersey, and Lord Robson.