[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;
RESPONDENT,

AND

McCOMAS . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 14, 15, 22.

Knox C.J., Isaacs and Rich JJ.

Income Tax—Assessment—Deduction—War-time profits tax—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 18 (1) (*b*)—*War-time Profits Tax Assessment Act* 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *sec.* 15 (6).

Sec. 18 (1) of the *Income Tax Assessment Act* 1915-1918 provides that "In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted . . . (*b*) all rates and taxes, including State and Federal land taxes and State income tax, actually paid in Australia by the taxpayer during the year in which the income was received but not including any tax paid under this Act but including the amount of war-time profits tax payable in Australia in respect of any part of the income"; &c.

Held, that the only deduction from the assessable income received by a taxpayer in a given year allowed by sub-sec. (1) (*b*) of sec. 18 in respect of war-time profits tax is the amount of that tax which was payable in respect of any part of that assessable income, and that the sub-section does not permit a deduction of war-time profits tax paid during the year of assessment in respect of profits earned during the preceding year or years.

Decision of the Supreme Court of Victoria (*Cussen* J.): *In re Federal Income Tax Assessment Act* 1915-1921, (1922) V.L.R., 810; 44 A.L.T., 92, reversed.

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APPEAL from the Supreme Court of Victoria.

On an appeal to the Supreme Court of Victoria by Robert Bond Wesley McComas from an assessment of him by the Federal Commissioner of Taxation for war-time profits tax for the year ending 30th June 1918, the parties stated for the opinion of the Court a special case, which was substantially as follows :—

1. The war-time profits tax payable by the appellant, Robert Bond Wesley McComas (hereinafter called "the taxpayer"), on war-time profits from his business for the year ending 30th June 1916 (hereinafter referred to as "the said war-time profits tax") was not ascertained until a date after the date when the taxpayer had been assessed in respect of income tax payable for the financial year ending 30th June 1917.

2. The respondent, the Commissioner of Taxation (hereinafter called "the Commissioner"), reduced the said war-time profits tax, assessed at £8,769, by £2,740, being the amount by which the income tax payable for the financial year last aforesaid would have been reduced if a deduction had been made of the said war-time profits tax at the time of making of the assessment of such income tax.

3. The taxpayer on 31st October 1918, pursuant to sec. 28 (1) of the *Income Tax Assessment Act* 1915-1918 of the Commonwealth of Australia, furnished to the Commissioner a return setting forth a statement of the income received by him during the financial year ending on 30th June 1918.

4. From the said return the Commissioner caused an assessment to be made for the purpose of ascertaining the taxable income upon which income tax should be levied upon the taxpayer for the financial year ending 30th June 1919.

5. In the said assessment the Commissioner disallowed the claim of the taxpayer that in calculating the taxable income of the taxpayer the sum of £5,000 should be deducted from the total assessable income, such sum being in fact an amount of tax actually paid on 18th June 1918 by the taxpayer under the *War-time Profits Tax Assessment Act* during the aforesaid year ending 30th June 1918, and being portion of the full amount of £6,029 being the amount of the said war-time profits tax after the reduction mentioned in par. 2 above.

6. On 1st March 1919 the Commissioner caused notice in writing of the said assessment to be given to the taxpayer.

7. On 24th March 1919, being within thirty days after the service of the last-mentioned notice, the taxpayer, being dissatisfied with the said assessment, lodged with the Commissioner an objection in writing dated 5th March 1919 against the assessment; and therein stated that the reason for the objection was that the Commissioner had incorrectly rejected as a deduction £5,000 paid by the said taxpayer during the year under review for tax under the *War-time Profits Tax Assessment Act*. A copy of the said objection is annexed hereto and forms part of this case.

8. On 3rd April 1919 the Commissioner, having considered the said objection, gave to the taxpayer written notice wholly disallowing such objection, and the taxpayer, being dissatisfied with the decision of the Commissioner, gave notice in writing requesting the Commissioner to treat his said objection as an appeal and to forward it to the Supreme Court of the State of Victoria for hearing.

9. The question for the opinion of the Court is as follows :—

Should the said sum of £5,000 be allowed as a deduction from the assessable income of the taxpayer received by him during the financial year ending 30th June 1918 under the said *Income Tax Assessment Act* ?

10. If the Court shall be of opinion in the affirmative to the question, then judgment shall be entered for the appellant for £2,030 12s. and costs of the appeal. If the Court shall be of opinion in the negative to the question, then judgment shall be entered for the respondent with costs of the appeal.

The special case was heard by *Cussen* J., who answered the question in the affirmative and ordered that judgment should be entered for the appellant, Robert Bond Wesley McComas, for £2,030 12s. with costs: *In re Federal Income Tax Assessment Act* 1915-1921 (1).

From that decision the respondent, the Federal Commissioner of Taxation, now appealed to the High Court.

Pigott (with him *J. H. Moore*), for the appellant.

(1) (1922) V.L.R., 810; 44 A.L.T., 92.

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Sir Edward Mitchell K.C. and *Ham*, for the respondent.

[During argument reference was made to *Attorney-General* v. *Lamplough* (1); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2); *Greenwood* v. *F. L. Smidth & Co.* (3).]

Cur. adv. vult.

Mar. 22.

The following written judgments were delivered :—

KNOX C.J. During the year 1st July 1915 to 30th June 1916 the respondent derived profits from a business carried on by him. In respect of these profits he was assessed to war-time profits tax in the sum of £8,769. This assessment was not made until after the respondent had been assessed to income tax in respect of the income derived by him during the same period, *i.e.*, 1st July 1915 to 30th June 1916. The appellant, in these circumstances, in accordance with the provisions of sec. 15 (6) of the *War-time Profits Tax Assessment Act* reduced the assessment of £8,769 by £2,740, being the amount by which the income tax payable for the financial year 1916-1917 in respect of income derived during the year 1915-1916 would have been reduced if a deduction had been made of the war-time profits tax from the assessable income of the respondent at the time of making the assessment of such income tax. On 18th June 1918 the respondent paid to the Commissioner the sum of £5,000 on account of the sum of £6,029, at which he had been assessed to war-time profits tax in respect of the profits of his business during the year 1915-1916. In October 1918 the respondent furnished to the Commissioner a return as required by the *Income Tax Assessment Act* 1915-1918 setting forth the statement of the income received by him during the year 1st July 1917 to 30th June 1918, and in such return claimed to have deducted from his assessable income the sum of £5,000 so paid in respect of the war-time profits tax. The Commissioner disallowed the respondent's claim to this deduction, and in due course a special case was stated for the opinion of the Supreme Court of Victoria on the question whether the

(1) (1878) 3 Ex. D., 214.
(2) (1891) A.C., 531.
(3) (1922) 1 A.C., 417.

deduction so claimed should have been allowed. The case was heard by *Cussen* J., who decided in favour of the taxpayer, the present respondent; and the Commissioner appeals against this decision.

The answer to the question whether the deduction shall be allowed depends on the true construction of sec. 18 (1) (*b*) of the *Income Tax Assessment Act* 1915-1918, which is in the following words:—"In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted . . . (*b*) all rates and taxes, including State and Federal land taxes and State income tax, actually paid in Australia by the taxpayer during the year in which the income was received but not including any tax paid under this Act but including the amount of war-time profits tax payable in Australia in respect of any part of the income."

"Assessable income," by sec. 3, means "gross income . . . not exempt from taxation." Par. (*b*) of sec. 18 (1), which begins with the words "all rates and taxes," may be conveniently divided into three parts—the first, from the beginning of the paragraph to the word "received"; the second from the word "received" to the word "Act"; and the third from that word to the word "income" which immediately precedes the proviso. There is no difficulty in ascertaining the meaning of the words used in each of these limbs of the paragraph if each is considered separately. The first specifies a class of rates and taxes the amount of which is to be deducted from the assessable income in any given year. That class consists of all rates and taxes actually paid in Australia by the taxpayer during the year in which the income, *i.e.*, the assessable income for that year, was received. The second limb excludes from the class constituted by the first a particular tax—the Federal income tax. The joint effect of the first and second limbs is to provide for a deduction of all rates and taxes (except Federal income tax) paid in the year in which the assessable income was received. The assessable income is the income derived during the financial year immediately preceding that in which the assessment is made. The meaning of the words of the third limb of the paragraph taken by itself is no less clear. It provides that there shall be included in the class

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constituted by the first limb war-time profits tax payable in Australia in respect of any part of the income.

Remembering that this is found in a section the object of which is to prescribe the deductions to be made from assessable income, it is, I think, not open to doubt that the expression "the income" in this limb of the paragraph means "the assessable income," that is, the income derived during the financial year immediately preceding that in which the assessment is made. It is in this sense that the same expression is used in the earlier part of the paragraph, and there is nothing in the context to require that a different meaning should be attributed to it in this place.

But it is not so easy to ascertain the intention of Parliament from the words it has used if the paragraph be read as a whole.

The difficulty arises from the inaccurate use of the words "but including," which introduce the last limb of the paragraph. Read literally, these words require that there shall be included in a given class that which from its description is incapable of coming within that class. The class consists of taxes paid in a given year; the matter to be included in that class is a tax which cannot be ascertained, and consequently cannot be paid, until that year has expired. For instance, if part of the income derived by a taxpayer during the financial year 1917-1918 consisted of the profits of a business, it is manifest that the profits of the business could not be ascertained until after 30th June 1918. This being so, the amount of the war-time profits tax in respect of those profits could not be ascertained, and consequently could not be paid, during the financial year 1917-1918. As the taxes paid by a taxpayer during a given year cannot include the war-time profits tax in respect of the profits of his business made during that year, it is obvious that the words of the paragraph cannot be given their literal meaning. There are three possible alternatives: the first, that only the war-time profits tax paid in the year in which the income was received is to be deducted; the second, that both the tax paid in that year and the tax payable in respect of the profits made during that year are to be deducted; and the third, that only the tax payable in respect of the profits made during that year is to be deducted in each case from the assessable income. The first construction suggested renders

wholly superfluous the words "but including the amount of war-time profits tax payable in Australia in respect of any part of the income." But these words were added by an amending Act (No. 39 of 1916, sec. 10), and presumably were intended by the Legislature to effect some alteration in the paragraph as it stood. The second suggested construction can only be reached by substituting for the word "including" the words "in addition to." In order to adopt the third suggested construction it is necessary to recognize—as the fact is—that the words "but including" are insensible in the context in which they are found, and to treat the last limb of the paragraph as a proviso dealing specially and exhaustively with the case of war-time profits tax.

Each of these constructions involves the doing of some violence to the words of the paragraph, but, as these words read literally as a whole are insensible, this cannot be avoided. The result of adopting the first would be to render the provisions of sec. 15 (6) of the *War-time Profits Tax Assessment Act* wholly nugatory, for in this event no case could possibly arise in which they could be applied. This sub-section was obviously framed on the hypothesis that the only amount which could be deducted from the taxpayer's assessable income in respect of war-time profits tax was the amount of that tax payable in respect of profits included in the assessable income under consideration. If the second suggested construction were adopted, the result might be that a deduction could be claimed from the assessable income of each of two separate years in respect of one amount of war-time profits tax. For instance, if in the financial year 1917-1918 the assessment to war-time profits tax on profits made during the year 1916-1917 were made before the assessment to income tax of income derived during the same year, the taxpayer could claim a deduction from his assessable income of the amount of war-time profits tax so assessed as being payable in respect of part of his assessable income, and, if the amount of war-time profits tax so assessed were paid during the year 1917-1918, the taxpayer could claim in the financial year 1918-1919 a deduction of the amount from his assessable income received during the year 1917-1918 on the ground that it was a tax paid during that year. The intention to permit this can hardly be imputed to Parliament.

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The result of adopting the third construction, having regard to the provisions of sec. 15 (6) of the *War-time Profits Tax Assessment Act*, is that the taxpayer gets the benefit of a deduction either from his war-time profits tax or from his income tax in respect of every payment that he is called on to make in respect of war-time profits tax. Moreover, this construction gives effect to the words introduced by amendment into sec. 18 (1) (*b*) of the *Income Tax Assessment Act* and to the provisions of sec. 15 (6) of the *War-time Profits Tax Assessment Act*.

In these circumstances I am of opinion that sec. 18 (1) (*b*) should be construed as allowing a deduction from the assessable income received by the taxpayer in a given year in respect of war-time profits tax of only the amount of that tax which was payable in respect of any part of such assessable income. It follows that, in my opinion, the question submitted in the case stated should have been answered in the negative.

ISAACS J. I agree that this appeal should be allowed. The question turns on the proper interpretation of par. (*b*) of sec. 18 (1) of the *Income Tax Assessment Act* 1915-1918, which at the time the controversy arose was the relevant enactment. In order to gather properly the true meaning of this paragraph it is necessary to trace its structure.

In the original Act (No. 34 of 1915) passed 13th September 1915, it stood thus: "all rates and taxes, including State and Federal land taxes and State income tax, actually paid by the taxpayer during the year in which the income was received." The words "all rates and taxes" were wide enough to include rates and taxes other than those specifically mentioned. But they had to be "actually paid" during the year in which "the income" (which obviously meant the "total income derived" referred to in the opening words of the section) was received. The "total income derived" in sec. 18 means the income derived during the financial year (sec. 10 (1)). This led to an amendment on 15th November 1915, by Act No. 47 of 1915, which by sec. 6 inserted (*inter alia*) after the word "paid" the words "in Australia" and after the word "received" the words "but not including any tax paid under this

Act." That amendment cut down the allowable deductions in two ways: first, only rates and taxes paid "in Australia" were deductible, and, next, taxes paid under the *Income Tax Assessment Act* were entirely excluded.

Next came, on 21st December 1916, a further Act—*Income Tax Assessment Act* (*No.* 2) 1916, No. 39 of that year. By sec. 10 of this Act, sec. 18 was amended in various ways, including the following: In the governing words, "total income derived" became "total assessable income derived"; and at the end of par. (*b*) these words were added—"but including the amount of war-time profits tax payable in Australia in respect of any part of the income." At that time there was no legislation in Australia establishing a war-time profits tax.

The final words "the income" could not possibly in that amendment at that time have meant anything but "the total assessable income derived" at the head of sec. 18. Nothing occurred to alter that meaning; and so, that must have been their meaning in par. (*b*) at all times material to this appeal. Consequently, so far as the taxpayer's case is dependent on the effect of the concluding part of par. (*b*), it falls, because the amount in question here was not payable in respect of any part of the income assessable in respect of the year for which the deduction was claimed.

There remains an important question, namely, whether notwithstanding the concluding passage, the taxpayer is entitled to come within the first part "all rates and taxes . . . paid in Australia . . . during the year in which the income was received." As I have said, that part, as it originally stood, would have embraced it; and the question resolves itself into this: "Do the succeeding words exclude it?" I give full weight to the numerous and authoritative decisions that a tax must be clearly imposed, and that all ambiguity must be resolved in favour of the taxpayer. But on careful consideration I think the matter is clear. The ambit of the original provision was cut down unambiguously by the exclusion of "any tax paid under this Act," that is, Federal income tax. In December 1916, when amending the *Income Tax Assessment Act*, Parliament modified its rigid exclusion by declaring, in effect, that, if at any time any sum for war-time profits tax should become payable in respect

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of any part of the income assessed for any year under the *Income Tax Assessment Act*, the amount of that war tax should be deductible from the assessable income in order to arrive at the taxable income of the taxpayer. Such a war-time profits tax is manifestly in the nature of a tax on income, though, from the occasion and the surrounding circumstances, at an extraordinarily high rate. It is so closely associated in nature with the ordinary income tax that the final clause is plainly intended as a modification of the total exclusive clause regarding income tax. This construction gives a natural and consistent interpretation to the whole paragraph and avoids a strange duplication of provisions—one specific and the other general—in relation to the same subject matter, provisions which, however, clash. The concluding passage limits "the income" to income for the one financial year, but if actual payment during that year is the test under the first paragraph, "the income" in respect of which the war-time profits tax was payable might extend to any previous year.

Any hardship that might arise from difficulties in the way of timely assessment is foreseen and provided for, so far as Parliament thinks fit, by sec. 15 (6) of the *War-time Profits Tax Assessment Act*, and that provision has been applied by the Commissioner and availed of by the taxpayer in the present case. The law, in my opinion, gives him no further rights, and all we have to do is to apply the law as it stands.

RICH J. The respondent has been allowed under sec. 15 (6) of the *War-time Profits Tax Assessment Act* 1917-1918 a reduction of part of the war-time profits tax levied on profits from his business during the year 1915-1916. The sum of £5,000, part of this tax paid by the respondent on 18th June 1918, is claimed by him as a proper deduction to be allowed from his taxable income for the year 1917-1918. This claim involves the construction of sec. 18 (1) (*b*) of the *Income Tax Assessment Act* 1915-1918. It is clear from the history of par. (*b*) that the word "income" at the end of the paragraph means "the assessable income." It follows that, as the sum, the subject of this controversy, was payable in respect of the year 1915-1916, the Commissioner was right in disallowing

the deduction so far as the deduction was claimed under this part of the paragraph. Then it is said that the deduction should be allowed under the first part of the paragraph; but the whole of the paragraph must be read together, and, although it is not expressed in very apt words, the intention of the Legislature can be gathered with sufficient clearness. The generality of the phrase "all rates and taxes," &c., is controlled and limited by words which follow it, and which expressly exclude income tax. The question then is whether it is a reasonable interpretation of the paragraph that the war-time profits tax, which, as *Cussen* J. said, is in some sort an "income super-tax," is to be expressly limited in one part of the paragraph and wholly unlimited in a previous part. I think that would be an improbable and fantastic meaning to attribute to the Legislature.

I agree that the appeal should be allowed, and the question asked by the special case should have been answered in the negative.

Appeal allowed. Order appealed from set aside. Question answered: No.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *J. W. McComas.*

B. L.