[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND ANOTHER . PLAINTIFFS;

AGAINST

LUNA PARK LIMITED . . . . . DEFENDANT.

H. C. OF A. 1925.

MELBOURNE, *May* 15; *June* 16.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

*Entertainments Tax—Admission to an "entertainment"—"Payment for admission"—Admission to part of a place of entertainment—Place in which several amusements provided with separate charges for admission—Entertainments Tax Assessment Act* 1916 (*No.* 36 *of* 1916), *secs.* 2, 7, 21—*Entertainments Tax Act* 1916-1922 (*No.* 38 *of* 1916—*No.* 15 *of* 1922), *sec.* 4—*Entertainments Tax Regulations* 1917 (*Statutory Rules* 1917, *No.* 227; 1918, *No.* 299; 1920, *No.* 218), *regs.* 16, 29, 30.

The defendant occupied a piece of land enclosed by a fence with entrance gates. Within the enclosure were several smaller enclosures, entrance to which was from the main enclosure. In each of the smaller enclosures the defendant provided an amusement, such as a merry-go-round, a scenic railway, a water chute; in order to participate in any one of these amusements it was necessary to enter the smaller enclosure in which it was provided, but as to some of the amusements persons outside were able to some extent to see what was going on. A separate charge was made to the public for admission to each of the smaller enclosures; but no charge was made after a certain date for admission to the main enclosure.

*Held*, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the whole was one "entertainment" within the definition of that word in sec. 2 of the *Entertainments Tax Assessment Act* 1916 in respect of which the "payment for admission" was, by reason of the definition of that term in sec. 2, the total of the sums paid by a person for admission to those of the smaller enclosures into which he was admitted and the sum (if any) paid by him for admission into the main enclosure.

SPECIAL CASE.

An action was brought in the High Court by the Commonwealth and the Federal Commissioner of Taxation against Luna Park Ltd.

H. C. OF A. 1925.

THE COMMONWEALTH v. LUNA PARK LTD.

in which the plaintiffs' claim was for "(1) the sum of £2,082 2s. 10d. for the period 2nd November 1923 to 26th January 1924, the sum of £853 11s. 7d. for the period 28th January 1924 to 24th March 1924, and for the sum of £341 13s. 8d. for the period 25th March 1924 to 31st May 1924—each of such sums being the amount of entertainments tax for each period mentioned payable under the provisions of the *Entertainments Tax Assessment Act* 1916 and of the Statutory Rules No. 227 of 1917, No. 299 of 1918 and No. 218 of 1920; (2) a declaration or declarations that the defendant is liable to pay entertainments tax in respect of each of the three periods aforesaid on all payments for admission to Luna Park or to side-shows within Luna Park upon the occasion of such admission whenever the aggregate amount paid by any one person amounts to or exceeds the sum of one shilling: And the plaintiffs claim £3,277 7s. 1d." The parties concurred in stating the questions of law arising in the action in a special case for the opinion of the Court, which case was substantially as follows:—

1. The defendant is a company incorporated under the Companies Acts of the State of Victoria.

2. At all material times the defendant occupied a piece of land at St. Kilda in the State of Victoria known as "Luna Park," and there managed and carried on the business described in this case.

3. The said piece of land is enclosed by a fence which is erected on the outer boundary of such land. During the period 2nd November 1923 to 26th January 1924 the said land was entered by the public at an entrance called the "main entrance," and at that place only. During the periods 28th January 1924 to 24th March 1924 and 25th March 1924 to 31st May 1924 the said land was entered by the public at the "main entrance," and also at two other entrances. Persons entering the said piece of land at the main entrance or either of the other entrances gained access to so much of the said piece of land as is not included in certain smaller enclosures or areas within the main enclosure. During each of the three periods aforesaid no amusements or entertainments were provided in any portion of such land which is not so included in such smaller enclosures or areas, and access to such smaller enclosures or areas by persons who had entered the said piece of land as aforesaid

could not be obtained save upon payment of the charge for admission to such smaller enclosures or areas which is hereinafter referred to.

In certain of the said smaller enclosures or areas—called respectively the "Merry-Go-Round," the "Big Dipper," the "Whip," the "Scenic Railway," the "Water Chute" and the "River Caves"—amusements or entertainments were provided which consisted of riding in conveyances or machines provided in such enclosures or areas; and persons so riding could be seen during some part of the courses such conveyances or machines traverse by persons who were in that portion of the said land which is not included in any of the smaller enclosures or areas within the main enclosure. In other of the said smaller enclosures or areas—called respectively "Noah's Ark" and "Funnyland"—entertainments or amusements were provided which could not be seen by persons who had not entered such enclosures or areas.

4. During the period 2nd November 1923 to 26th January 1924 the defendant made the following charges for admission to the said main enclosure and the said smaller enclosures or areas respectively: (a) A charge of sixpence for adults and threepence for children for admission to the main enclosure, which was paid upon entry at the main entrance above referred to; (b) a charge of a sum less than one shilling for adults and half such charge for children for admission to each of the said smaller enclosures or areas within the main enclosure, which was paid upon entry at the entrance to each of such smaller enclosures or areas by persons entering the same.

5. On or about 10th September 1923 the defendant was notified by the Commissioner of Taxation that, if admission to the main enclosure was free, entertainments tax would not be payable upon any payment less than one shilling for admission to any one of the said smaller enclosures or areas.

6. For the period 28th January 1924 to 24th March 1924 the defendant made no charge for admission to the said main enclosure, and charged a sum less than one shilling per adult for admission to each of the said smaller enclosures or areas within the main enclosure, half price being charged for children, which sum was paid upon entry to such smaller enclosures or areas by persons entering the same.

H. C. OF A. 1925.

THE COMMONWEALTH v. LUNA PARK LTD.

7. On or about 24th March 1924 the defendant was notified by the Commissioner of Taxation that entertainments tax was payable on the total payments by any person for admission to the said smaller enclosures or areas within the main enclosure when the total payments aggregated one shilling or more, notwithstanding that admission was free to the said main enclosure.

8. For the period 25th March 1924 to 31st May 1924 the defendant conducted its business at Luna Park in the same manner as is described in par. 6 hereof.

9. Many persons during each of the three periods aforesaid who entered the main enclosure entered at least one, and in many cases two or more, of the said smaller enclosures or areas, and paid the amount charged for entrance to the main enclosure during the first period and the amounts charged for entrance to the respective smaller enclosures or areas as set out in pars. 4, 6 and 8. In many cases the aggregate amounts which each person thus paid exceeded one shilling.

10. On various occasions during each of the three periods aforesaid the smaller enclosure or area called the "Scenic Railway" was open to the public when the other smaller enclosures or areas, and the main enclosure were closed. On such occasions access was gained by the public to the said smaller enclosure called the "Scenic Railway" from an entrance opening on to a street adjoining the land. The charge made for admission to such smaller enclosure or area called the "Scenic Railway" on such occasions was the same as that made to persons who entered the same from the main enclosure when such main enclosure was open to the public.

The question for the opinion of the Court is whether the defendant is liable to pay entertainments tax under the provisions of the *Entertainments Tax Assessment Act* 1916 and of Statutory Rules No. 227 of 1917, No. 299 of 1918 and No. 218 of 1920 in respect of each or any, and if so which, of the three periods aforesaid on any and what payments for admission to the said main enclosure and/or to the said smaller enclosures or areas within the main enclosure.

Judgment shall be entered for the plaintiffs or defendant as follows:—(1) If the Court shall be of opinion that, whenever the payment made by any person for admission to the main enclosure together with a further payment or further payments made by such person for admission to one or more of the said smaller enclosures or areas in the aggregate amounts to or exceeds the sum of one shilling, the defendant is liable to pay entertainments tax in respect thereof, judgment shall be entered for the plaintiffs for a declaration accordingly, and an inquiry shall be directed to ascertain the amount of tax due by the defendant in respect of the period 2nd November 1923 to 26th January 1924. (2) If the Court shall be of opinion that, whenever the payment made by any person for admission to any of the said smaller enclosures or areas together with any further payment or payments made by such person for admission to any other or others of such smaller enclosures or areas in the aggregate amounts to or exceeds the sum of one shilling, the defendant is liable to pay entertainments tax in respect thereof, judgment shall be entered for the plaintiffs for a declaration accordingly, and an inquiry shall be directed to ascertain the amount of tax due by the defendant in respect of the period 25th March 1924 to 31st May 1924 and also in respect of the period 28th January 1924 to 24th March 1924, unless the Court shall further be of opinion that the special case discloses matter by reason whereof the defendant is not compellable to pay entertainments tax for the period 28th January 1924 to 24th March 1924, in which case such inquiry shall be confined to the period 25th March 1924 to 31st May 1924. (3) If the Court shall not be of opinion as in (1) or (2), judgment shall be entered for the defendant. (4) Such order as to costs as the Court thinks fit.

*Sir Edward Mitchell* K.C. (with him *C. Gavan Duffy*), for the plaintiffs. On the evidence the defendant at Luna Park conducts only one "entertainment" within the definition of that term in sec. 2 of the *Entertainments Tax Assessment Act* 1916. When a charge was made for admission to the main enclosure and a separate charge for admission to each of the smaller enclosures, it cannot be doubted that in accordance with the definition in sec. 2 the "payment for admission" was the total of the payments made by any one

H. C. OF A. 1925.

THE COMMONWEALTH v. LUNA PARK LTD.

person for admission to the main enclosure and to those of the smaller enclosures which he entered. When no charge was made for entrance to the main enclosure, the total of the payments made by a person for admission into those of the smaller enclosures which he entered was the "payment for admission" within that definition, for each of the smaller enclosures was a "part of a place of entertainment," and regs. 29 and 30 of the *Entertainments Tax Regulations* 1917 directly apply. Those regulations are not inconsistent with the Act, and are within the power conferred by sec. 21 of the Act.

*Latham* K.C. and *Owen Dixon* K.C. (with them *Spicer*), for the defendant. The payment on which the tax is imposed is a payment which gives the right of admission to an entertainment. On the evidence, in each of the smaller enclosures a different entertainment takes place, and there are no provisions in the Act for aggregating payments for admission to different entertainments. Sec. 8 of the Act assumes that the entertainment is something in respect of which the amount of the tax may be indicated by a ticket given on admission to it. If it be held that there is only one entertainment at Luna Park, there is no means of indicating by a ticket the amount of the tax which is payable. If reg. 29 goes beyond the provisions of the Act, it is invalid. That regulation does not apply, because the only way in which the amount of tax payable can be ascertained is under an arrangement made with the Commissioner as provided for in sec. 8 (see reg. 16). [Counsel referred to *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (1); *Greenwood* v. *F. L. Smidth & Co.* (2); *Finance (New Duties) Act* 1916 (6 Geo. V. c. 11).]

*Sir Edward Mitchell* K.C., in reply.

*Cur. adv. vult.*

June 16. The following written judgments were delivered :—

KNOX C.J. AND STARKE J. A tax is imposed on all payments for admission to any entertainment—which includes any exhibition, performance, lecture, amusement, game or sport (*Entertainments Tax Assessment Act* 1916 ; *Entertainments Tax Act* 1916-1922). The

(1) (1922) 31 C.L.R. 421, at p. 462. (2) (1922) 1 A.C. 417, at p. 423.

question which arises in this case depends, in our view, upon the determination of a matter of fact rather than one of law. The taxpayer carries on a business on a property which it occupies, and styles "Luna Park." It there provides a merry-go-round, a scenic railway, a water chute, &c., for those who delight in such diversions and pleasant excitements. Formerly, the public paid a small sum on entrance to the Park, and further sums on entrance to the merry-go-round, the scenic railway, the water chute, &c., respectively. Now, however, they are allowed free entrance to the Park, but are charged small sums if they enter the enclosures in which the merry-go-round, the scenic railway, the water chute, &c., are respectively conducted.

The taxpayer has in fact, in our opinion, but a single entertainment, made up of various methods and contrivances for amusing and pleasing its patrons, and not several entertainments. Luna Park is the place in which the entertainment is held, and, by sec. 2 of the *Entertainments Tax Assessment Act* 1916, "'payment for admission' includes any payment made . . . by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving tax or more tax is required."

Consequently, the Commonwealth and the Commissioner of Taxation are entitled to the declaration and to the ancillary relief which the parties have agreed upon in their special case.

ISAACS J. The defendant company's business upon the facts stated is, throughout, to provide in one place one diversified entertainment so arranged as to partition off in separate enclosures its various sections. Visitors to the entertainment are admitted according to choice to one or more of the enclosures for separate payment limited to each respective enclosure. When, on what is substantially the same occasion, a visitor is admitted for payment to several enclosures, he partakes piecemeal of the general entertainment provided. The totality of admissions to separate sections represents his combined admission to the entertainment as a whole for that occasion and the aggregation of the sums he has paid is

H. C. OF A. 1925.

THE COMMONWEALTH v. LUNA PARK LTD.

the "payment for admission" to which the *Entertainments Tax Assessment Act* is to be applied.

This amounts, in substance, to an affirmative answer to both questions; and, therefore, in my opinion, judgment as agreed should be entered for the plaintiff in respect of all the periods mentioned.

Higgins J.

HIGGINS J. This case turns on the meaning of an "entertainment," and of a "place of entertainment" in the *Entertainments Tax Assessment Act* 1916.

A has a ride on a merry-go-round for one payment; and B takes a run on the scenic railway for a separate payment: can the merry-go-round and the scenic railway be treated as one entertainment under the circumstances disclosed in this case? The merry-go-round and the scenic railway are in separate enclosures in ground belonging to a company: A pays for admission to the merry-go-round enclosure, B pays for admission to the scenic railway enclosure; but both payments go to the company.

Sec. 7 of the Act enacts that there shall be levied and paid on all payments for admission "to any entertainment" an entertainments tax at such rates as are declared by the Parliament. Under the *Entertainments Tax Act* 1916-1922, the rates are as follows: Payment for admission one shilling—rate of tax one penny; payment for admission exceeding one shilling—rate of tax one penny for the first shilling and one half-penny for every sixpence or part of sixpence by which this payment exceeds one shilling. By sec. 2 of the Assessment Act 1916, "entertainment" includes any exhibition, performance, lecture, amusement, game or sport for admission to which payment is made. Now, as payment is made for admission to the merry-go-round, that payment seems to be clearly within this definition. Under the same section, "admission to an entertainment" includes admission to any place in which *the* entertainment is held. This definition exactly fits the enclosure in which the merry-go-round is worked. There is no payment made for admission to Luna Park, the ground belonging to the company, other than for each enclosure separately; there is no entertainment in Luna Park other than that within each enclosure separately. Luna Park is, no doubt, a place; but how can it be called a place

of entertainment as distinct from each enclosure of entertainment ?

But counsel for the Commissioner of Taxes relies on the definition of " payment for admission." " Payment for admission " includes any payment by a person as a booking fee for admission ; and this must mean admission to any place in which the entertainment is held. So far, the definition is consistent, to say the least, with the merry-go-round enclosure being a place for admission to which a fee is paid ; certainly not Luna Park apart from the enclosures. Then the definition adds—" or by a person who, having been admitted to *one part of a place of entertainment*, is subsequently admitted to *another part thereof* for admission to which a payment involving tax or more tax is required." I do not understand how it is possible to treat the enclosure for the merry-go-round as being one part and the enclosure for the scenic railway as being another part of the same place of entertainment. They are enclosures for separate entertainments.

Counsel for the company suggest that this last definition is meant to apply to such a case as that of a person going to the pit in a theatre and then to the dress circle—another part of the same place of entertainment—on making the extra payment. Such a case would exactly fit the words ; and the expression " for admission to which a payment involving tax or more tax is required " can be explained as excluding from the computation for tax any payments made for admission to entertainments for philanthropic or educational purposes, or for children only (in accordance with sec. 12). Even if the words " place of entertainment " should be regarded (contrary to my opinion) as being equally applicable to Luna Park and to each separate enclosure, it is our duty to reject that meaning which involves taxation (*Rein* v. *Lane* (1) ; *Armytage* v. *Wilkinson* (2) ; *Cox* v. *Rabbits* (3) ). In my opinion, there is no tax payable on any sums aggregating one shilling or more where one sum is paid for admission, e.g., to the merry-go-round, and another sum is paid for admission to the scenic railway.

I assume that the system of payments for each place of entertainment was adopted expressly for the purpose of avoiding the tax.

(1) (1867) L.R. 2 Q.B. 144, at pp. 147, 149.
(2) (1878) 3 App. Cas. 355, at p. 370.
(3) (1878) 3 App. Cas. 473, at p. 478.

H. C. OF A. 1925.

THE COMMONWEALTH v. LUNA PARK LTD.

Rich J.

It is not contended that a taxpayer may not avoid the tax in this fashion.

RICH J. The facts in this case show that the whole area, Luna Park, is required and used for the purpose of the single business of the sole proprietors. That business consists in providing the entertainment of a number of so-called amusements. It is one entertainment and not a number of separate entertainments.

Judgment should be entered for the plaintiffs and an inquiry directed in accordance with the terms prescribed in the first and second forms of judgment set out in the case.

*Judgment for the plaintiffs for the declarations asked, with costs.*

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

Solicitors for the defendant, *Arthur Robinson & Co.*

B. L.