[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION, FOR AND ON BEHALF OF THE COMMONWEALTH . . . } PLAINTIFF;

AGAINST

THE AUSTRALIAN TESSELATED TILE COMPANY PROPRIETARY LIMITED . } DEFENDANT.

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MELBOURNE, *June* 2, 16.

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

Income Tax—Company—Profits which might reasonably have been distributed—Determination of Commissioner of Taxation—Communication to taxpayer—Right of taxpayer to be heard—Board of Appeal—Validity of legislation—Income Tax Assessment Act 1922 (*No.* 37 *of* 1922), *sec.* 21.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ., that the word "determination" in sec. 21 (1) of the *Income Tax Assessment Act* 1922 implies a communication of the determination to the taxpayer.

Per Isaacs and *Rich* JJ.:—(1) Sub-sec. 5 of sec. 21 of that Act is invalid for the reasons stated in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation*, (1925) 35 C.L.R. 422, and, therefore, where a taxpayer is dissatisfied with the Commissioner's decision there is no additional tax; but that sub-section is severable, and where a taxpayer is not so dissatisfied the rest of the section operates. (2) In order to constitute a valid determination of the Commissioner under sec. 21 (1) it is not necessary that the taxpayer shall have been heard.

SPECIAL CASE.

In an action brought in the High Court by the Federal Commissioner of Taxation, for and on behalf of the Commonwealth, against the Australian Tesselated Tile Co. Pty. Ltd., the parties concurred in stating, for the opinion of the Court, a special case which (so far as is material) set out the following facts:—

The plaintiff's claim endorsed on the writ was for a sum of £342 1s. 3d., being the amount of income tax due and payable by

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the defendant pursuant to the *Income Tax Assessment Act* 1922. The particulars of the claim were "To the amount of income tax in respect of income derived during the period of twelve months ending 30th June 1921 payable by the defendant to the plaintiff under sec. 21 of the said Act pursuant to a determination thereunder by the Commissioner of Taxation on 2nd June, 1923—£342 1s. 3d." On 27th March 1923 the Commissioner sent to the public officer of the defendant a letter asking him to show cause why sec. 21 should not be applied to the profits of the defendant in respect of the years ending 30th June 1921 and 30th June 1922 respectively. On 14th May 1923 the Commissioner received a letter from Messrs. Wilson, Rattray & Danby, acting on behalf of the defendant, stating reasons why the defendant had not distributed more of its profits than it did distribute during the two years in question. On 2nd June 1923 the Commissioner, after consideration of the matters which were before him, wrote the word "Approved" and his signature at the foot of a document prepared by an officer in the Department which, after setting out, among other things, the financial position of the Company, concluded with these words: "There appears to be no reason why sec. 21 should not apply, and it is recommended that $66\frac{2}{3}$ per cent of the taxable income of both years be deemed distributed."

On 16th July 1923, by a letter addressed to the public officer of the defendant, the Commissioner for the first time gave notice to the defendant of his determination that the defendant could reasonably have distributed a certain additional sum to its members out of the profits of the respective years. On 21st July 1923 the defendant, by a letter written on its behalf, objected to the application of sec. 21 to the profits of the Company for the years in question on the ground that there had been no communication of the Commissioner's determination until the communication of that determination to the defendant on 16th July 1923. Further correspondence followed, in which the Commissioner finally claimed payment of £342 1s. 3d. in respect of the year ending 30th June 1921. The defendant contended (1) that sec. 21 of the *Income Tax Assessment Act* 1922 was *ultra vires* the Commonwealth Parliament; (2) that a determination by the Commissioner, within

the meaning of sec. 21, was a determination made after a proper hearing and/or in the presence of the taxpayer; (3) that a determination within the meaning of sec. 21 was not made until communicated; (4) that sec. 21 required that the Commissioner's determination should be communicated to the taxpayer, in the case of any financial year prior to that beginning on 1st July 1922, not later than 30th June 1923.

The question for the Court was whether on the facts set out in the special case the plaintiff was entitled to judgment for the amount claimed by the endorsement of the writ.

Sir *Edward Mitchell* K.C. (with him *Eager*), for the plaintiff. Notwithstanding that the provisions for a Board of Appeal in sub-sec. 5 of sec. 21 are invalid according to the reasoning in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1), the other provisions of sec. 21 are valid in the absence of dissatisfaction on the part of the taxpayer; and there is no dissatisfaction on the part of the defendant in this case in the sense that he desires a reference to a Board of Appeal. In order that there shall be a valid determination by the Commissioner under sec. 21 (1), it is not necessary that there shall be a communication of the determination to the taxpayer. The determination is in the same position as a further assessment, and the tax is payable thirty days after the notice of the determination is given (sec. 54).

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the defendant. No determination was made within the prescribed period, for there was no effective determination until it was communicated to the defendant.

[STARKE J. referred to *Brooke* v. *Mitchell* (2).]

If the test laid down in *Local Government Board* v. *Arlidge* (3) is applied, it would be in the ordinary course of procedure that a determination of anything against the taxpayer should be communicated to him. The limitation in sec. 21 (1) of the time within which the determination must be made would have no sensible

(1) (1925) 35 C.L.R. 422.
(2) (1840) 9 L.J. (N.S.) Ex. 269.
(3) (1915) A.C. 120.

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meaning unless the determination was to be communicated within that limited time.

[ISAACS J. referred to *R.* v. *Central Tribunal*; *Ex parte Parton* (1).]

The whole of sec. 21 is invalid by reason of the invalidity of sub-sec. 5. That sub-section cannot be severed from the rest of the section, for if the sub-section were taken away the liability created by the rest of the section would be absolute instead of contingent (see *Owners of s.s. Kalibia* v. *Wilson* (2)). Even if sec. 21 without sub-sec. 5 is valid where the taxpayer is not dissatisfied, the defendant in this case was dissatisfied and expressed his dissatisfaction. [Counsel also referred to *Hooper & Harrison Ltd. (in Liquidation)* v. *Federal Commissioner of Taxation* (3); *Cooper* v. *Wandsworth District Board of Works* (4); *Vyse* v. *Wakefield* (5).]

Sir *Edward Mitchell* K.C., in reply. The provisions of sub-sec. 5 of sec. 21 are not a condition of liability under the section. The functions of a Board of Appeal are not judicial. The object of the provisions as to a Board of Appeal is to substitute for the Commissioner, at the option of the taxpayer, a body which is to perform the same duties as the Commissioner. The determination referred to in sec. 21 (1) is preliminary to the question whether any further liability to taxation is to be imposed on a company, and it was not intended that any notice of that determination should be given. After 30th June 1923 the Commissioner could not have modified his determination. The determination need not be in writing, but it is sufficient if it can be established that the Commissioner has in fact determined.

Cur. adv. vult.

June 16.

The following written judgments were delivered:—

KNOX C.J. AND STARKE J. This case can, in our opinion, be decided without considering the constitutional validity of sec. 21 of the *Income Tax Assessment Act* 1922. The section provides that, where in any year a company has not distributed to its members at

(1) (1916) 86 L.J. K.B. 799.
(2) (1910) 11 C.L.R. 689.
(3) (1923) 33 C.L.R. 458.
(4) (1863) 32 L.J. C.P. 185.
(5) (1840) 6 M. & W. 422; 7 M. & W. 126.

least two-thirds of its taxable income, the Commissioner shall determine whether a sum could reasonably have been distributed by the company to them, such determination in the case of any financial year prior to that beginning on 1st July 1922 to be made not later than 30th June 1923. Now, a determination under that section must, in our opinion, be complete and beyond the power of the Commissioner to alter (cf. *Brooke* v. *Mitchell* (1)). On 31st May 1923 an officer of the Commissioner reported to him that there appeared " to be no reason why sec. 21 should not apply," and recommended " that 66⅔ per cent of the taxable income . . . be deemed distributed." The Commissioner minuted that recommendation on 2nd June 1923 " Approved." On 16th July 1923 the Commissioner for the first time communicated the so-called determination to the taxpayer. But until that day the approval of the recommendation by the Commissioner was a mere office memorandum, open to reconsideration and revision by him. It was not final, or a determination within the meaning of sec. 21. Consequently, in our opinion, there was no determination within the time allowed by the statute, and judgment should be entered for the taxpayer.

ISAACS J. This is an action to recover £342 1s. 3d. for income tax under the *Income Tax Assessment Act* 1922. The tax is claimed under sec. 21 of the Act. The defendant resists payment on four grounds: (1) That sec. 21 is *ultra vires*; (2) that a determination under sec. 21 connotes a proper hearing of the taxpayer; (3) that the determination is not made until communicated; (4) that such communication was not made until after 30th June 1923. The first objection, if sustained, at all events sufficiently for the purposes of this case ends the matter. The second is of a broad character affecting determinations of designated officials generally. The third and fourth are of more limited nature and concern rather the internal construction of the section. I shall confine my attention to the first and second objections only—the first, because, in the view I take, it is immaterial how far the Department observed the formalities and conditions of procedure, and the second, because it

(1) (1840) 9 L.J. (N.S.) Ex. 269.

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gives rise to considerations affecting the course of official action generally.

(1) *Invalidity of Section* 21.—It is important from every point of view—that of the Treasury representing the whole community collectively, that of the individual taxpayer, and that of the Commissioner in working his Department—that as little doubt as possible should exist as to how far, even supposing all statutory formalities are observed, it is lawful to demand or compulsory to pay income tax under this and similar sections. In the *British Imperial Oil Co.'s Case* (1) I stated my opinion with regard to sec. 28. It is, I think, desirable to say now that what I there said applies equally to sec. 21 on the question of validity and effect. In substance it amounts to this: Parliament intended by sec. 21 that the Commissioner's decision should be a *factum* upon which its legislative will should operate. If that decision be wholly negative, there is no additional tax. If it be in the affirmative, then an additional tax is imposed. That is final and operative unless the taxpayer is " dissatisfied " with the Commissioner's decision. The Company may accept his decision as to the extra potential distribution, and may contest only other matters. If so, the section operates. But, if the Company is dissatisfied with the decision, that is, contests the justice of the extra potential distribution, in that case, and in that case only, Parliament's intention is that the Commissioner's determination is not to be the accepted *factum* upon which the law is to operate. In that case it is to be the opinion of the Board of Appeal contemplated by the Act. But as, in accordance with the case referred to, the Board of Appeal contemplated by the Act is not legally possible, there can be no *factum*, in the case of dissatisfied taxpayers, on which to base the additional tax under sec. 21. Sub-sec. 5 is incompetent because the " Board of Appeal " there mentioned means a body so organized as to violate the Constitution. It is, however, separable from sub-secs. 1 to 4 and sub-secs. 6 and 7, which are at liberty to operate effectively in all such cases as Parliament *intended* them to operate in. They can and do operate effectively, in my opinion, except where the Commissioner's decision is intended to be superseded by that of the Board of Appeal under sub-sec. 5. In the latter

(1) (1925) 35 C.L.R. 422.

case they fail, not because of their own invalidity, but because Parliament has in such cases intended that they shall not operate without the intervention of the Board of Appeal. The invalid portions are disregarded as respects their legal effect, but they cannot be disregarded in considering how far other provisions were intended by Parliament to operate in their absence. I have somewhat elaborately expressed my views because it is almost inevitable that Parliament should take this Act into its consideration.

Applying this law to the facts, it is clear that the Company taxpayer was "dissatisfied with the decision of the Commissioner" within the meaning of sub-sec. 5. That appears from its letter of 26th September 1923 conveying its objections, the second of which was "that for the said financial year no further sum could reasonably have been distributed by the Company to its members or shareholders." That being established, the Commissioner's decision as the statutory *factum* disappears, and, the substituted *factum* intended by Parliament being not legally possible, the additional tax claimed is not due or payable. The Company, therefore, succeeds, in my opinion, upon an objection that meets us at the very threshold of the section on which its liability depends.

2. *Conduct of Determination.*—It was contended that the words "determination" and "decision" connoted judicial procedure, so far at least as to require some opportunity of being heard in support of the objections of arguing the points so to speak. I am not now engaged in interpreting the word "determination" in sec. 21, and, therefore, do not elaborate its use in other parts of the Act, as, for instance, in sec. 23 (3), where it clearly refers to what the Commissioner "thinks" just and reasonable (sub-sec. 1 (*e*)). I am concerned now merely with a principle. The principle is that, where a duty of determining a question is placed by the Legislature upon a functionary of the State, then, in the absence of some direction as to procedure contained in the legislation itself, it is implied that the ordinary procedure followed by the functionary named is adopted by the Legislature. That is the procedure which in such a case he would be expected to follow. The case of *Local Government Board* v. *Arlidge* (1) definitely establishes that principle on a very

(1) (1915) A.C. 120.

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distinct basis capable of practically universal application to varied circumstances. In that case the Board was an executive organ, a quasi-corporation with statutory directions as to the manner in which its acts and instruments and rules, orders and regulations were to be made, and as to proof of them. Consequently, though it was directed by law to hold a public inquiry as an appeal, it was sufficient as to procedure to follow its ordinary course by having its determination signed, sealed and issued. It was not compelled to pursue an inquiry as a Court of law selected for the purpose would be expected to pursue it. The principle so enunciated has been more lately applied to the decision of the Lieutenant-Governor in Council of a Canadian Province. In *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1) the Privy Council held, following *Arlidge's Case* (2), that the Lieutenant-Governor in Council as the Executive "was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice." (See also *R.* v. *Central Tribunal*; *Ex parte Parton* (3).)

I do not examine the further objections raised by the defendant Company. As, upon the facts stated, sub-sec. 5 is an essential part of the section to create any liability of the defendant, it seems to me useless to consider the interior architecture of a non-existent structure.

HIGGINS J. In my opinion the plaintiff is not entitled to judgment. The plaintiff, it appears, signed "Approved—H. Ewing, Commissioner, 2/6/23," to a memorandum laid before him by an officer of the Department, recommending that $66\frac{2}{3}$ of the taxable income of both years (ending 30th June 1921 and 30th June 1922) be deemed distributed (for the purpose of sec. 21 of the *Income Tax Assessment Act* 1922). But, in my opinion, this was not a "determination" within sec. 21; and inasmuch as any determination had to be made not later than 30th June 1923 as to income derived by the Company in the year ending 30th June 1922, and there was no such determination before that date, the defendant succeeds. There is now no dispute as to the year ending 30th June 1922 and the income derived therein.

(1) (1922) 1 A.C. 202, at p. 214. (2) (1915) A.C. 120.
(3) (1916) 86 L.J. K.B. 799.

The word "determination" in the context must mean an announced or communicated determination—probably in writing. The word is certainly capable of other meanings; but, when used with legal associations, as here, the meaning is that given in the *Oxford Dictionary*: "The ending of a controversy or suit by the decision of a judge or arbitrator; judicial or authoritative decision or settlement (of a matter at issue)." The Commissioner has to "determine" whether a further sum could reasonably have been distributed by the Company out of its taxable income, so that the Company may pay additional tax. The object of the determination would not be attained if not communicated; and, under the section, the determination must be made within a limited time, so that the taxpayer Company may know within a reasonable time whether it is free to use its money or has to hold it for a possible claim from the Commissioner, and may know whether to appeal (sub-sec. 5) or pay. The object of the provisions in sec. 37 is similar—that no alteration or addition shall be made in an ordinary assessment after three years from due date; and sec. 21 (1) itself refers to the analogy of an ordinary assessment—"within six months after the date of the issue to the company of its *ordinary* assessment." The draftsman in fact, treats this sec. 21 as if it were analogous to an extraordinary assessment. I think that the principle expressed in the *Year Books* of Edward IV., and dug out by Lord *Blackburn* in *Brogden* v. *Metropolitan Railway Co.* (1), as to the making of contracts, requires that we shall treat the word "determination" here as implying a communicated determination: "Moreover, your plea is utterly naught, for it does not show that when you had made up your mind to take them you signified it to the plaintiff, and your having it in your own mind is nothing, for it is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is."

Where Parliament has not made itself clear as to its meaning, it is our duty to act on the presumption that it would not treat a taxpayer as liable to further taxation beyond the limits of his ordinary assessment unless it told him so. I may add that sec. 21 (1) of this Act of 1922 is substituted for sec. 16 (2) of the previous

(1) (1877) 2 App. Cas. 666, at p. 692.

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Income Tax Assessment Act 1915-1918, which was considered in *Cornell* v. *Deputy Federal Commissioner of Taxation* (1); and that under that section of the previous Act the opinion of the Commissioner that the Company had not distributed a reasonable proportion of its taxable income had to be communicated to the taxpaying shareholder as part of his ordinary assessment.

Having taken this view of the section, it becomes unnecessary for me to decide whether sec. 21 (5) is valid or invalid, or to deal with the formidable corollary that if sec. 21 (5) is invalid, sec. 21 as a whole is invalid—perhaps the whole Act is invalid. I was not a party to the recent decision of *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2), in which it was held that the provisions of this Act, so far as they purport to establish Boards of Appeal, are *ultra vires*—on the ground that they vest judicial power of the Commonwealth in a body whose members have not a life tenure. This decision all rests on the case of *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3), where it was held that a President of the Commonwealth Court of Conciliation has no power to enforce awards because he has not a life tenure. With my brother *Gavan Duffy* J. I dissented from that judgment; and we stated our reasons. But, of course, so long as that decision is not attacked, it is my duty to obey it—whatever the consequences. In the present case it is not necessary to decide whether *Alexander's Case* applies to the Board of Appeal constituted by sec. 21 (5).

RICH J. The argument before us was confined to the application of sec. 21 of the *Income Tax Assessment Act* 1922 in respect only of the financial year ending 30th June 1921. The claim in this case is based entirely upon what is alleged in the endorsement on the writ as "a determination made by the Commissioner on the 2nd day of June 1923." Among the communications set out in the case is one containing an intimation on behalf of the defendant Company that it denied the reasonableness of distributing a greater sum than it had distributed to its members or shareholders. Whatever other objections there may be to the Commissioner's claim, as

(1) (1920) 29 C.L.R. 39.
(2) (1925) 35 C.L.R. 422.
(3) (1918) 25 C.L.R. 434.

to which I give no opinion, the fact I have just mentioned, namely, the Company's denial of the accuracy of the Commissioner's determination, is, in my opinion, a fatal bar.

I have stated in the *British Imperial Oil Co.'s Case* (1) my opinion upon a section very similar to this, namely, sec. 28 of the *Income Tax Assessment Act* 1922. Sub-sec. 5 of sec. 21 corresponds, for the purposes of this case, with sub-sec. 3 of sec. 28. In each case the inclusion of the Board of Appeal destroys the sub-section, but in each case also the destruction of the sub-section leaves untouched what I consider is the fatal bar here. I mean that, as soon as the Company intimated that it was denying the accuracy of the Commissioner's determination, it was " a taxpayer who is dissatisfied with the decision of the Commissioner under " sec. 21. The Commissioner's determination then, according to the intention of Parliament, went for nothing, and, as that is the only thing relied upon by him in this case, the action fails. Any opinion upon other matters argued would be obiter.

Judgment should be entered for the defendant with costs, including the costs of the case.

Judgment for the defendant with costs, including costs of the special case.

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

Solicitors for the defendant, *Gillott, Moir & Ahern.*

B. L.

(1) (1925) 35 C.L.R. 422.