Refd to Commercial Union Aust Mortgage Insur Co Ltd v FCT (1996) 140 ALR 231
Cons Commercial Union Australia Mortgage Ins Co Ltd v FCT (1996) 69 FCR 331
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[HIGH COURT OF AUSTRALIA.]

MOREAU . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1926.

SYDNEY, *Aug.* 31; *Sept.* 1.

MELBOURNE, *Sept.* 17.

Isaacs J.

Income Tax—Assessment—Alterations or additions after three years—Avoidance of tax owing to fraud—Belief of Commissioner—Conclusiveness of reason for belief—Evidence—Income—Purchase of goods abroad—Price payable in foreign money—Variation of rate of exchange—Notice of assessment—Burden of proof cast on appellant—Weight of statutory evidence—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *secs.* 33, 35—*Income Tax Assessment Act* 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 37, 39.

Sec. 37 of the *Income Tax Assessment Act* 1922-1925 provides that "(1) The Commissioner may at any time make all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy, notwithstanding that income tax may have been paid in respect of income included in the assessment: . . . Provided . . . that an alteration or addition shall not be made in or to an assessment after the expiration of three years from the date when the tax payable on the assessment was originally due and payable, unless the Commissioner has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion."

Held, that, for the purposes of that proviso, (1) the existence of fraud or attempted evasion is a matter for belief by the Commissioner and not for proof as a fact; (2) unless the ground or material on which the belief of the Commissioner is based is so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden; (3) the circumstances which induced his belief are examinable only for the purpose of ascertaining whether the alleged reason really existed and, if it did, whether it was so irrational as to be outside the limits of the administrative discretion with which the Commissioner is invested and really in disregard of the statutory condition.

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Goods were purchased in France at a certain price payable in francs. At the time the purchase-money became payable the value of the franc in pounds sterling had fallen.

Held, that for the purposes of the *Income Tax Assessment Act* the cost price of the goods was the number of pounds sterling which were actually required to pay the purchase-money, and not the number of pounds sterling which at the time the goods were purchased represented the purchase price.

Sec. 39 of the *Income Tax Assessment Act* 1922-1925 having made the notice of assessment prima facie evidence on an appeal from the Commissioner, the burden is thrown on the appellant to establish his right to the benefit he claims, but the weight of the statutory evidence varies according to the circumstances.

APPEALS from the Federal Commissioner of Taxation.

Appeals to the High Court were brought by Henri Moreau from assessments for Federal income tax, and were heard by *Isaacs* J., in whose judgment hereunder the material facts are stated.

E. M. Mitchell K.C. and *Spender*, for the appellant.

Lamb K.C. and *Bowie Wilson*, for the respondent.

Cur. adv. vult.

Sept. 17.

ISAACS J. delivered the following written judgment:—These were five appeals under the Income Tax Assessment Acts. Some come under the Acts prior to October 1922, primarily at all events; the rest under the Act No. 37 of 1922, as amended.

The appeals are in respect of the following respective financial years, commencing on 1st July in the first-mentioned year and ending on 30th June in the last-mentioned year: No. 1 for 1918-1919, No. 2 for 1919-1920, No. 3 for 1920-1921, No. 4 for 1922-1923, No. 5 for 1923-1924. The relevant income-earning year is, of course, in each case, the immediately preceding year. Assessments were originally made in regular course. Alterations by way of increase of the assessments were subsequently made, and are now the subject of appeal. The notices of assessment in dispute are dated as follows: as to No. 1, 25th March 1925; as to No. 2, 25th March 1925; as to No. 3, 25th March 1925; as to No. 4, 1st August 1924; as to No. 5, in 1925. In each of the first three cases the

alteration or addition was made after the expiration of three years from the date when the tax payable on the assessment was originally due and payable.

As to those appeals a question of law has arisen—whether upon the true construction of the statute law, as it stood, or, by retrospection, as it stands now, the Commissioner had power to make the increase alterations absolutely notwithstanding the expiration of the three years mentioned, or whether he had that power only if he had "reason to believe" that there had been an avoidance of tax owing to fraud or an attempted evasion. If it were necessary to determine this issue of law, I should require further time for consideration. The arguments have satisfied me that the answer is by no means a simple matter, if entanglements and inconsistencies are to be avoided. I therefore neither express nor form any definite opinion with respect to it.

The necessity for determining the point does not arise, because, in my opinion, the condition predicated has been fulfilled. I am satisfied that the Commissioner had reason to believe there was an avoidance of tax owing to an attempted evasion. The increase alterations were the consequence of that belief. That does not mean that, in my opinion, there was in fact any attempted evasion. The two things are quite distinct. Before me the bona fides of the appellant and of Mr. King, his representative, was questioned, and I was invited to say that they were guilty of fraud or attempted evasion. Judging by the evidence before me, and remembering that such an imputation must be clearly proved, I find as a fact they were not guilty. Mr. Moreau was not called; he is not in Australia. Mr. King was called, and I thoroughly accept him as honest and on his evidence accept Mr. Moreau as free from the imputation suggested.

But that in no way shakes the Commissioner's official conclusion that there had been an attempted evasion, and even fraud, on the part of Moreau. His function is to administer the Act with solicitude for the Public Treasury and with fairness to the taxpayers. He is necessarily armed with great powers. Up to three years an assessment is open to his unreserved consideration. After that time it is—as I assume for the purposes of this case and as it certainly

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is now as a rule—closed, unless he has "reason to believe" the taxpayer has defrauded or attempted to evade the revenue law. If he has such reason, he has the power, and, I would add, it is his duty, to reopen the door and demand the amount legally owing. His conclusion is not a judicial decision, but an administrative decision. It does not determine anything but the Commissioner's own official duty to proceed so as to obtain what the taxpayer was always bound to pay, if the increase is justified at all. The decision is not to be preceded by any judicial or quasi-judicial inquiry; it is not, and could not be, subject to any appeal. His "reason" may be the result of official information, or his own investigation, or may come from any source he considers reliable. He may, if he thinks right, call upon the taxpayer for an explanation, or he may think that unnecessary, inadvisable or useless. Fair play would, of course, usually induce him to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable. In this case, having regard to the many communications that had taken place, I do not consider the Commissioner unreasonable in not giving any new opportunity to explain before amending the assessment. The Commissioner is not bound to look for corroboration or further test. His reason is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief, for the mere purpose of determining whether he should proceed to collect what is strictly due by law; and no other tribunal can substitute its standard of sufficient reason in the circumstances or its opinion or belief for his. Unless the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden. The substantial meaning of the provision is that if the Commissioner has no reason to believe that there has been an attempt to overreach the revenue, so as to throw him off his guard in assessing the taxpayer, then three years is a quieting period, otherwise he should collect what is owing by law, irrespective of the lapse of time.

It has not been necessary for me to say what presumption would arise in the absence of any affirmative evidence that the

Commissioner had "reason to believe," and did believe, the stated fact. The Commissioner was called, and asserted he had "reason to believe," and did believe, the necessary fact. He also stated with much particularity the circumstances which induced his belief. I held, and still hold, that such evidence is not sacrosanct. If given, it is open to cross-examination. As long as it is not a case of State secrets, or violation of some statutory provision, or of some recognized public policy, there is no legal reason why the test of cross-examination should be excluded. But that is only for relevant purposes—the purposes of ascertaining whether the alleged reason really existed, and, if it did, whether it was so irrational as to be outside the limits of administrative discretion with which the Commissioner is invested, and as to be really in disregard of the statutory condition. That constitutes the point of difference between the belief of the Commissioner for the purpose of founding his increased assessment, and the impeachment of the taxpayer's honesty before the Court. The one is not within the Court's function to decide upon; the other is. I am fully satisfied that the Commissioner was well within his rights on the material then before him in forming the conclusion that Mr. Moreau had been guilty of attempted evasion. The circumstances then before him called for very clear and cogent explanation. Some of them were unusual and striking, and, if not satisfactorily explained, presented a suspicious appearance. They have been explained to me satisfactorily; but that, as I have said, is another matter. I need not enter into details. But I feel bound to express the view that the Commissioner and his officers, in a very difficult and trying situation, acted with fidelity to the Treasury, and with great care and consideration towards the taxpayer.

I have now to deal with the merits of the appeals. The nature of the questions which I have to consider may be placed under three categories. In logical order, the first is a question of principle, namely, as to the effect of the profitable conversion of pounds sterling into francs, for the purpose of paying French creditors for goods purchased for and disposed of in the Australian business. The second question is one of isolated fact, namely, the nature and circumstances of a certain "bonus." The third is one of quantum, namely, the true account of sales and commissions in certain

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income-earning years. This, however, involves one question which may, in a sense, be termed a question of principle, and has been stoutly fought.

As to the first question, it seems to me simplicity itself. When goods were purchased from France, the price was agreed upon in francs, and as francs the price was inalterable. On arrival into stock, the cost price in francs was entered, but alongside that actual price there was a conversion into pounds sterling at the rate of 25 francs to the pound. That was the estimated or probable price in pounds, which, unlike the price in francs, was not invariable. It happened that before the price became payable, the value of the franc fell so that fewer pounds sterling had to be taken out of the business in order to provide the necessary number of francs. That reduced the number of pounds sterling that turned out to be the actual price reckoned in pounds sterling. The taxpayer's contention is that the number of pounds sterling originally reckoned at 25 francs to the pound is the proper cost price for income tax purposes; the Commissioner contends that the number of pounds sterling eventually and actually used to pay for the goods is the true cost price. I agree with the Commissioner. The taxpayer's error arose in thinking the Commissioner wished to tax the foreign profit made in conversion as an independent source of income. That is not so. The Commissioner really taxes the profits of the business and ignores the conversion as an independent transaction. It certainly enabled the trader to use a less number of pounds sterling to pay for his goods, but the important and only relevant fact in this connection is the actual amount of Australian money used for the purpose.

[The judgment then dealt with the second question.]

The third branch has been more difficult. I have had very full opportunity of considering this part of the case, and it has not been easy. There are certain initial considerations that weigh with me. The statutory probative force of the notice of assessment must be overcome by the taxpayer. Sec. 39 makes the notice of assessment prima facie evidence on an appeal of this nature. That is, it throws the burden on the appellant to establish his right to the benefit he claims. It is apparent that the weight of the statutory evidence must vary according to the circumstances. The

weight of all evidence is subject to that consideration. It was laid down a century and a half ago by Lord *Mansfield* in *Blatch* v. *Archer* (1) that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." Here the circumstances are that the taxpayer's method of keeping accounts, the shortcomings of a former employee and the taxpayer's own unfortunate destruction of books and vouchers, though explained to me so as to exonerate him from bad faith, have seriously complicated the inquiry. Some explanations on his behalf, while operating in one direction in his favour, tell necessarily against him in another.

With these general observations I proceed to the merits.

[The judgment then dealt with the merits of the third branch.]

Assessments varied in first two appeals. The other appeals dismissed. Appellant to pay costs.

Solicitors for the appellant, *Turner, Nolan & Bender.*

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

B. L.

(1) (1774) 1 Cowp. 63, at p. 65.