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SHIRE OF HEIDELBERG v. GREEN.

STARKE J. I agree that upon the facts of this case the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Fink, Best & Miller.*

Solicitors for the respondent, *Maddock, Jamieson & Lonie.*

B.L.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR SOUTH AUSTRALIA; EX PARTE HOOPER.

H. C. OF A. 1925-1926.

MELBOURNE, *Oct.* 20, 1925; *Mar.* 22, 1926.

KNOX C.J., ISAACS AND RICH JJ.

Income Tax—Assessment—Amended assessment—Alteration not increasing liability—Right of taxpayer to object—Income Tax Assessment Act 1922-1924 (*No.* 37 *of* 1922—*No.* 51 *of* 1924), *secs.* 37, 50.

A taxpayer who had objected to his assessment for Federal income tax and whose objection was disallowed by the Commissioner did not, within the time limited by sec. 50 (4) of the *Income Tax Assessment Act* 1922-1924, request the Commissioner to treat his objection as an appeal. Subsequently the Commissioner gave the taxpayer notice that the assessment had been amended by allowing certain deductions, and the effect of the amendment was that the amount of tax payable was reduced. The notice, by mistake, contained a statement that the taxpayer might, within forty-two days, lodge an objection to the assessment and, if he were dissatisfied with the decision of the Commissioner thereon, might within thirty days after the service of the notice request the Commissioner to treat his objection as an appeal.

Held, that the amended assessment was not an "assessment" within the meaning of sec. 50 (1), and that, as its effect was not to impose any fresh liability or increase any existing liability, the taxpayer had, under sec. 37 (1), no right to object to it.

RULE NISI for mandamus.

Naomi Hooper obtained a rule nisi in the High Court calling upon the Deputy Federal Commissioner of Taxation for South Australia to show cause why a writ of mandamus should not be directed to him commanding him to consider and/or treat as an appeal a certain objection in writing, dated 27th March 1925, lodged by the applicant against a certain amended assessment for Federal income tax, dated 6th March 1925, based on income alleged to have been derived by the applicant in the financial year ending 30th June 1923, whereby the applicant was required to pay the sum of £833 10s. 11d. for such Federal income tax.

The material facts sufficiently appear in the judgments hereunder.

The rule nisi now came on for argument.

Tenison Woods, for the appellant. Under sec. 35 of the *Income Tax Assessment Act* 1922-1924 the Commissioner may make as many assessments of one taxpayer as he chooses. The amended assessment of 6th March 1925 was in substitution for the original assessment, and is an " assessment " within sec. 50 to which the taxpayer may object. Sec. 37 has not the effect of taking away the right of objecting which a taxpayer would otherwise have.

Russell Martin, for the respondent. Sec. 35 contemplates only one assessment being made in respect of the income of a taxpayer for a particular year. Once that has been made, the right of objecting to it is given by sec. 50. What was done by the amended assessment was an alteration of the assessment, and sec. 37 does not permit an objection to be made to it unless it creates a fresh liability or increases an existing liability, which was not the case here.

Tenison Woods, in reply.

Cur. adv. vult.

Mar. 22, 1926.

The following written judgments were delivered :—

KNOX C.J. This is an application to make absolute an order nisi for a writ of mandamus directed to the Deputy Federal Commissioner of Taxation commanding him to treat as an appeal an objection in writing dated 27th March 1925 lodged with him by Naomi Hooper against an amended assessment to Federal income tax. The relevant

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facts are as follows :—On 4th December 1924 Mrs. Hooper received notice of assessment requiring her to pay £898 11s. 2d. as Federal income tax in respect of income alleged to have been received by her during the year ending 30th June 1923. An objection to this assessment was duly lodged with the Commissioner, and on 5th February 1925 the taxpayer was informed that her objection had not been allowed, and that if she desired to have the objection treated as an appeal she must within thirty days request the Commissioner so to treat it. The thirty days would expire on 7th March 1925. On 6th March 1925 notice was served on the taxpayer that the assessment made in December 1924 had been amended by allowing certain deductions not covered by the objection which had been lodged but subsequently brought to the notice of the Commissioner. The effect of the amendment was to reduce the amount of tax payable to £833 10s. 11d. Printed on the back of this notice was an intimation that an objection might be lodged within forty-two days, and that, if the taxpayer should be dissatisfied with the decision of the Commissioner on such objection, he might, within thirty days after notice of the decision, request that his objection should be heard as an appeal. It is said on behalf of the Commissioner that it was by inadvertence that this intimation was not struck out or cancelled on the notice sent to the taxpayer. On 27th March 1925 the taxpayer lodged an objection to the amended assessment, and on 1st April she was informed that the Commissioner could not accept the objection, his view being that an amended assessment could only be objected to when the alteration had the effect of imposing a fresh liability or increasing an existing liability. Further correspondence followed, in which the Commissioner maintained the attitude which he had taken up; and eventually the taxpayer applied for and obtained the order nisi which she now seeks to have made absolute.

The question at issue depends on the meaning to be given to sec. 50 of the *Income Tax Assessment Act* 1922-1924. That section provides, by sub-sec. 1, that a taxpayer who is dissatisfied with the assessment made by the Commissioner under the Act may, within forty-two days after service of notice of the assessment, lodge an objection in

writing. The question for decision is whether the amended assessment of which notice was given on 6th March is an "assessment" within the meaning of this section. If the section had to be construed apart from and independently of the other provisions of the Act, I should feel some difficulty in agreeing with the view put forward by the Commissioner. But, having regard to the provision of sec. 37 of the Act, I think it is reasonably clear that the right to lodge an objection to a so-called "amended assessment" exists only in cases in which the effect of the alteration is to impose a fresh liability on or increase an existing liability of the taxpayer. That being so, it follows that the order nisi must, in my opinion, be discharged, but, as it appears probable that the taxpayer may have been misled by the notice given by the Commissioner, I think no order should be made as to costs.

ISAACS J. Naomi Hooper applies for a writ of mandamus commanding the Deputy Federal Commissioner of Taxation for South Australia to consider and treat as an appeal a certain objection in writing dated 27th March 1925 lodged against an amended assessment for income tax dated 6th March 1925 and numbered 5754.

The relevant facts are these:—On 4th December 1924 the applicant was notified by the Deputy Commissioner that, by assessment H.7085, he had assessed the tax payable by her for the financial year 1923-1924 at £898 11s. 2d. About 24th December the applicant, pursuant to sec. 50, sub-sec. 1, of the Assessment Act, objected in writing to the assessment, claiming a reduced basis of taxation. On 5th February 1925 she received a reply notifying her that the objection was disallowed, and informing her that under sec. 50 (4) of the Act of 1922 she could within thirty days have her objection treated as an appeal if dissatisfied with the decision. The period of thirty days would expire on 7th March. Meanwhile on 19th February she asked that certain specified payments amounting to £279 18s. 10d. should be allowed, and that she be reassessed accordingly. On 7th March she received notification of an amended assessment dated 6th March, No. 5754, whereby her assessment was

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reduced by £65 0s. 3d., leaving the net amount of tax assessed at £833 10s. 11d. In fact, of the £279 18s. 10d. claimed as deductions the Commissioner allowed £269 9s. This notification, however, had endorsed upon it that an objection might be lodged within forty-two days and that, if dissatisfied with the decision of the Commissioner thereon, the applicant might appeal within thirty days. On 27th March a fresh objection was lodged to this assessment, claiming generally to be assessed on a greatly reduced basis, as if it, the amended assessment, were entirely an assessment *de novo*. On or about 1st April the Deputy Commissioner acknowledged receipt of the objection of 27th March, and declined to treat it as an objection as the amendment was by way of reduction. This was contested by the applicant, who now seeks by mandamus to compel the Deputy-Commissioner to treat the amended assessment of 6th March, No. 5754, as an independent assessment, entirely replacing the original assessment of 4th December, No. 7085. The various steps have been narrated as the matters of general importance.

The endorsements on the amended assessment were apparently by clerical inadvertence allowed to remain. That is always regrettable, as a recipient might be thereby misled. There was that possibility in this case, as the amended assessment was received on 7th March. But there are many thousands of such notices to issue and such a slip might easily occur. It is certainly due to the Deputy-Commissioner to say that there is no evidence that anyone was actually misled by the endorsement. In any event, my province is to apply the relevant law, as I understand it, to the facts set out.

The applicant contends that the Act contemplates the possibility of repeated independent and substitutory assessments, each of which, when made, created a new starting-point for liability, objection and appeal. The Crown contends that there is one, and only one main assessment, though there may be amendments of that assessment which are separately dealt with according to their nature. To my mind an examination of the statute makes the matter very simple, and supports the Crown's view.

Before indicating in detail the successive provisions of the Act, one general deduction from those provisions may be stated, a deduction

possibly obvious, but very necessary to remember. It is as to the nature of an assessment. An " assessment " is not a piece of paper: it is an official act or operation ; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called " a notice of assessment." And then, says the Act (sec. 54), " income tax shall be due and payable sixty days after the service by post of a notice of assessment." The section adds that, where by amendment of an assessment additional income tax is thereby payable by a taxpayer, it is due and payable thirty days after notice of amended assessment. But neither the paper sent nor the notification it gives is the " assessment." That is and remains the act or operation of the Commissioner.

I now turn to the words of the statute. Part IV. is headed " Returns and Assessments," and consists of a group of sections—secs. 32 to 40. Sec. 32 says, in sub-sec. 1, that for the purpose of " assessment " returns are to be made. Sub-sec. 2 is of the utmost importance in this case, and, as I view it, practically decisive. It says :—" The *first assessment* of income tax under this Act shall be for the financial year commencing on the first day of July one thousand nine hundred and twenty-two, and *each subsequent assessment* shall be for the succeeding financial year : Provided that nothing in this sub-section shall prevent the Commissioner requiring returns to be furnished to him before the commencement of any financial year for which income tax is to be *assessed*." So far, it is that for each year, commencing with 1922, there is *one assessment*. A " subsequent assessment " must be for a subsequent year, that is, a subsequent main or basic assessment. Then sec. 33, in sub-sec. 1, provides for returns specially required and further and fuller " returns." Sub-sec. 2 then says : " All the provisions of this Act shall extend and apply to any such return or further and fuller return, and *assessments* may be made upon or in respect of it by the Commissioner in such manner as may be necessary." This sub-section is relied on by the applicant as indicating that an

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assessment already made for the financial year may be abandoned and treated as if never made. That is not its meaning. It means, not that any yearly assessment already made is to be abandoned as if it never had been made, but that, notwithstanding the provisions of sec. 32 (1), which provide directly for returns on which to base assessments, the special returns mentioned in sec. 33 may be utilized for the same purpose. But what assessments may be made must depend on other sections of the Act. Sec. 35 places a statutory duty on the Commissioner to make assessments. Sec. 36 provides for exceptional cases in relation to returns where assessments may be made. Up to that point provision is actually made simply for one yearly assessment. But sec. 37 provides (sub-sec. 1) for "*alterations in or additions to any assessment*" as the Commissioner thinks necessary in order to insure its completeness or accuracy. Obviously an "alteration" may be for or against a taxpayer. If against him, the proviso to sub-sec. 1 requires it to be "notified" to him, that is simply an "alteration or addition," and that shall, unless made by consent, be "subject to objection." If in his favour, there is no statutory requirement to notify, because no objection is provided for. That is only natural and common sense. But in that case a refund may take place, and naturally will, except where otherwise provided. Secs. 38 and 39 are immaterial for present purposes. Sec. 40 requires notice of any assessment to be given. But omission to give notice does not invalidate the "*assessment.*"

Collecting, so to speak, the points of the matter, it appears there is one main or basic assessment which is amendable. If any amendment increases the liability, that is separately open to objection and appeal. If an amendment decreases liability, there is nothing in itself to object to and it does not affect the reduced assessment. No office error or unauthorized notification can alter the statutory provisions as to the effect of an assessment or the conditions of objection or appeal. The notice of amended assessment of 6th March gave no new right of objection or appeal. It was a mere "alteration" of the main assessment, and an alteration which did not increase liability.

The rule nisi should be discharged.

RICH J. I agree.

Rule nisi discharged.

Solicitor for the appellant, *J. G. Tenison Woods.*

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

B.L.

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THE KING *v.* DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.); EX PARTE HOOPER.

[HIGH COURT OF AUSTRALIA.]

KENCH . . . . . APPELLANT;
INFORMANT,

AND

BAILEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Mar.* 30; *April* 12.

Knox C.J., Isaacs and Gavan Duffy JJ.

Pure Food—Offence—Dismissal of prosecution—Right of prosecutor to appeal—Pure Food Act 1908 (*N.S.W.*) (*No.* 31 *of* 1908), *secs.* 1*, 10, 36, 39, 40*—*Public Health Act* 1902 (*N.S.W.*) (*No.* 30 *of* 1902), *secs.* 107*, 109—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *secs.* 4, 101*—*Interpretation Act* 1897 (*N.S.W.*) (*No.* 4 *of* 1897), *sec.* 12.

When an information for an offence against the provisions of the *Pure Food Act* 1908 (N.S.W.) is dismissed by a Stipendiary or Police Magistrate in the exercise of his summary jurisdiction, the prosecutor has the right of appeal

* The *Justices Act* 1902 (N.S.W.), sec. 101 (1), provides that "any party to the proceedings, if dissatisfied with the determination by any justice or justices in the exercise of their summary jurisdiction of any information or complaint as being erroneous in point of law, may . . . apply in writing to the said justice or justices to state and sign a case . . . setting forth the facts and grounds of such determination for the opinion thereon of the Supreme Court." The *Public Health Act* 1902 (N.S.W.), sec. 107, provides, by sub-sec. 1, that "penalties imposed by this Act . . . may be recovered before, and offences against this Act may be heard and determined by, a police or stipendiary magistrate or any two justices in petty sessions in a summary manner according to the provisions of the Act or Acts for the time being regulating