two clauses afford a complete answer to the appellant's claim, even if he be at liberty now to press for common law damages.

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WALDON v. ROSTREVOR ESTATE LTD. (IN LIQUIDATION).

STARKE J. I agree that the resale by the company was justified by clauses 9 and 12 of the conditions.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. L. Sutherland.*

Solicitors for the respondents, *Robert Homburg*; *J. L. S. Treloar.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LIMITED (IN LIQUIDATION) . . . . . APPELLANT;

THE COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Income Tax (S.A.)—Assessment—Power to alter assessment—Duty of Commissioner of Taxes —Right of taxpayer—Mandamus—Taxation Acts 1915-1918 (S.A.) (*No.* 1200—*No.* 1337), *secs.* 50, 70, 101.

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ADELAIDE, *Sept.* 27.

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

Sec. 70 of the *Taxation Acts* 1915 to 1918 (S.A.) provides that "it shall be lawful for the Commissioner in any case, whether notice of appeal has been given or not, to alter or reduce any assessment . . . and to order a refund of any excess of tax that has been paid in respect thereof."

Held, that the section imposes no duty upon the Commissioner, and confers no right upon a taxpayer, which can be enforced by the taxpayer by way of mandamus.

Decision of the Supreme Court of South Australia (Full Court) affirmed.

H. C. OF A. 1926.

COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD. (IN LIQUIDATION) v. COMMISSIONER OF TAXES (S.A.).

APPEAL from the Supreme Court of South Australia.

The Commonwealth Agricultural Service Engineers Ltd. was, pursuant to the *Taxation Acts* 1915 *to* 1918 (S.A.), assessed for income tax for the year ended 30th June 1923 on an income of £20,443, and £2,500 6s. 4d. was levied and paid by the company in respect thereof. The company went into voluntary liquidation on 4th June 1925 and Archibald Robert Stewart Craig and Michael John O'Flaherty were appointed liquidators. On examining the accounts of the company the liquidators discovered that in respect of the year ended 30th June 1923 the company, instead of making a profit of £20,443, had made a loss of £9,536. On 6th October 1925 the liquidators applied to the Commissioner of Taxes for an amendment of the assessment for the year ended 30th June 1923. On 4th December 1925 the Commissioner stated that he was prepared to admit that the claim of the liquidators as to the amount of the income was correct; that he considered that sec. 70 of the *Taxation Act* 1915 had no application as it only provided for the Commissioner amending, and did not apply where a taxpayer made application; that in his opinion sec. 101 applied where a taxpayer made application; that that section was limited in operation to twelve months after the overpayment, and that he had no discretion as to time. After certain correspondence the Commissioner on 26th February 1926 stated that he could not reopen the question of the 1923 assessment.

On 17th June 1926 the company obtained a rule nisi calling upon the Commissioner to show cause why a writ of mandamus should not issue commanding him to consider whether he should or should not make an order under sec. 70 in respect of the assessment of income for the year ended 30th June 1923 made against the company. The rule nisi came on for hearing before the Full Court of the Supreme Court (*Murray* C.J. and *Poole* J.), and was discharged.

From the decision of the Full Court the company now appealed to the High Court.

Thomson, for the appellant. Sec. 101 of the *Taxation Act* 1915 applies only to formal overpayments, and does not apply to alterations or corrections of assessments. It is independent of sec.

70, and does not limit it. Sec. 70 gives the Commissioner power in a proper case to reduce an assessment irrespective of whether an application or an objection has been made by the taxpayer. That power is given for the benefit of the public generally, and in particular for the benefit of the taxpayer, its object being to adjust the proper relation of the Crown and the taxpayer. There is therefore an obligation in law upon the Commissioner to consider all the facts which an interested taxpayer may put before him and to apply his discretion to those facts. Although it may not be possible for the taxpayer to compel the Commissioner to exercise that discretion in a particular way, he may yet compel the Commissioner to exercise it in some way. [Counsel referred to *Julius* v. *Lord Bishop of Oxford* (1); *Smith* v. *Watson* (2); *R.* v. *London County Council* (3); *R.* v. *Arndel* (4); *Ex parte Carpathia Tin Mining Co.* (5); *Metropolitan Meat Industry Board* v. *Finlayson* (6); *R.* v. *Vestry of St. Pancras* (7); *Ex parte Napier* (8); *R.* v. *Guardians of Lewisham Union* (9).]

Hannan, for the respondent, was not called on.

KNOX C.J. In my opinion the decision of the Supreme Court was right and the appeal should be dismissed, but, I think, without costs.

ISAACS J. I agree that the appeal should be dismissed. I think that the judgments of *Murray* C.J. and *Poole* J. were unquestionably correct. The matter is of considerable importance, and Mr. *Thomson* has placed his views so elaborately and so well before the Court that I feel I should state in my own words why I think the application for mandamus should fail. The application to the Supreme Court was for a peremptory writ of mandamus. That Court had no discretion to grant the writ unless it first decided that the prosecutor had a legal right to obtain what was demanded of the Commissioner as in the performance of his public duty towards the prosecutor. That is the position as determined by the cases, including the case of *R.* v. *Churchwardens of All Saints, Wigan* (10).

(1) (1880) 5 App. Cas. 214, at p. 240.
(2) (1906) 4 C.L.R. 802, at pp. 811, 827.
(3) (1918) 1 K.B. 68.
(4) (1906) 3 C.L.R. 557, at pp. 566, 567.
(5) (1924) 35 C.L.R. 552, at p. 553.
(6) (1916) 22 C.L.R. 340, at p. 350.
(7) (1890) 24 Q.B.D. 371.
(8) (1852) 18 Q.B. 692.
(9) (1897) 1 Q.B. 498.
(10) (1876) 1 App. Cas. 611.

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Isaacs J.

So that the concrete question we have to consider is this: Does sec. 70 of the *Taxation Act* 1915 give to every taxpayer who has been assessed—at all events until the Court has pronounced on the assessment—a legal right to a hearing and inquiry by the Commissioner with a view to reopening the assessment? If it does, the mandamus should go; if it does not, the mandamus ought to be refused. We have no function beyond determining this. If the alleged right exists, then every taxpayer who for any reason has failed to appeal within the statutory period has the same right, and that right, by sec. 75, continues for three years. That would be a very serious inroad upon the express policy of the Act, which limits the right of a taxpayer to challenge the assessment to a period of two months. Such a limitation is necessary for the stability of the finances. In my opinion very clear words or an extremely strong implication would be necessary to support the contention that the right asserted by the appellant exists. The appellant does not contend that there is any express term in sec. 70, which is the only section upon which the argument could rest, that creates the right. The words of that section, so far as they are express, are such as confer upon the Commissioner a discretionary power. It is a power "in any case, whether notice of appeal has been given or not, to alter or reduce any assessment, or class of assessments, and to order a refund of any excess of tax that has been paid in respect thereof." In the absence of any express grant to a taxpayer of a right to apply to the Commissioner to exercise those powers, we have to see whether there is any such implication. There is no necessary implication, because it is quite clear that the Commissioner could of his own motion alter by way of increase any assessment without giving the taxpayer any opportunity of being heard. The taxpayer would not suffer in any way by that, because he would, under sec. 77, have a right of appeal. In the present case the Commissioner does not propose to take any step to alter the legal position of the taxpayer. The taxpayer's rights are already fixed under the Act, and I think that sec. 50 is really the central point of consideration for this purpose. That section is the first provision of Part IX. relating to the procedure for collection of taxes. It provides first for returns being furnished, secondly for assessments being made for the purpose

of ascertaining the amount of tax payable by every taxpayer, "and such assessments may be appealed against as hereinafter provided," and thirdly by sub-sec. 3 it provides that "after the assessment the amount of taxes ascertained thereby to be due and payable shall be recoverable from the taxpayers as hereinafter provided." That, as to income tax, must be read with sec. 67, which says that assessments are to be made "annually." So far, then, there is provision for one assessment for each year and a declaration that the amount of the tax ascertained by the assessment to be due and payable is to be recoverable. That settles the rights of the Crown and the rights and obligations of the taxpayer, subject to whatever express provisions are made in the Act. There are only two ways, so far as I can discover, by which that result can be altered. One is by appeal under sec. 77, which gives the taxpayer a right of appealing from the assessment within two months after the giving of notice of the assessment. If on an appeal a decision is given, I take it that concludes the matter. But there may be a notice of appeal given and yet no decision given. Unless we found something in the Act which would enable the Commissioner to alter his assessment, nothing but an appeal would get rid of sub-sec. 3 of sec. 50, and the amount of the assessment would be the amount which the Crown would be entitled to recover and the taxpayer bound to pay. But the Legislature in 1885 introduced the provision which now appears in sec. 70 of the consolidated Act of 1915. If that section is read as conferring simply a discretionary power on the Commissioner, notwithstanding an assessment has been made and notwithstanding the provisions of sec. 50 (3), to so correct his assessment as to bring it, in accordance with the facts and the law, into such a condition that the right amount of tax is made payable, it is in entire harmony with the rest of the Act. If, however, it be read as coercive on the Commissioner as asserted by the appellant, it is an anomalous provision. The Commissioner is a trusted officer appointed by the Government to put the Act into practical operation, to discover the facts, to apply them and to assess individual taxpayers, and sec. 70, in my opinion, is inserted simply for the purpose of allowing the Commissioner to correct anything which he thinks

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Isaacs J.

is an injustice, either to the Crown or the individual taxpayer. But I think that by the words " it shall be lawful " in that section it is intended that his action is to be entirely voluntary. He is not to be coerced into acting under sec. 70. The rights of the parties are fixed otherwise. It is intended that he shall take a high position in this matter and shall not claim for the Crown more than he sees the Crown is entitled to, and he is not to allow any taxpayer to escape payment of any amount which the law intends him to be liable to pay. There is no reason why the Commissioner should not in a proper case exercise his power merely because he is requested to do so by a taxpayer. The Commissioner's action in such case is none the less voluntary. But I would be unable to give sec. 70 the interpretation suggested by counsel for the appellant and to stop where he stops. I would be unable to say there is an obligation on the Commissioner to hear every taxpayer who, having been assessed, claims a reduction, and to listen to the evidence which might be adduced in order to inform his mind, if the Legislature meant that the Commissioner might do a palpable wrong immediately afterwards by refusing to correct an error made manifest by the inquiry. That would make the section itself so inconsistent and unjust that I could not accept the interpretation. I could not go so far as to say that there is an absolute duty to hear and determine unless I could also say that, having heard and determined, there was an absolute duty to order a refund. It is not like the cases cited of discretionary powers after a necessary hearing, because there the standard of right is the discretion of the tribunal, but here the standard of right is the income tax law. Therefore I think that the Commissioner is entrusted by the Legislature, notwithstanding the normal fixation of the liability of the taxpayer by the assessment, as it ultimately stands after appeal or abstention from appeal, to do what is right to the Crown and the taxpayer as he may throughout voluntarily determine, and I think that he is not to be driven into this avenue of consideration against his will, any more than he can be prevented from entering it if he so wills.

For these reasons I think the appeal fails, and should be dismissed. I am of opinion that the ordinary rule as to costs should be followed.

GAVAN DUFFY J. I agree with the Chief Justice in thinking that the appeal should be dismissed without costs.

Appeal dismissed.

Solicitors for the appellant, *Varley, Evan & Thomson.*

Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

B.L.

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COMMONWEALTH AGRICULTURAL SERVICE ENGINEERS LTD. (IN LIQUIDATION) *v.* COMMISSIONER OF TAXES (S.A.).

[HIGH COURT OF AUSTRALIA.]

WELLS . . . . . APPELLANT;
INFORMANT,

AND

THE ENGLISH ELECTRIC COMPANY OF AUSTRALIA LTD. . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 13.

MELBOURNE, *Oct.* 18.

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

Defence — Compulsory training — Penalizing employee for absence — Master and apprentice — Adding days of absence to period of service — Defence Act 1903-1918 (*No.* 20 *of* 1903—*No.* 47 *of* 1918), *secs.* 125, 127, 134, 135.

By an indenture of apprenticeship an apprentice bound himself apprentice to the respondent to learn a certain trade for a period of five years and for so many additional days as was therein provided for such term, and the respondent bound itself duly to teach and instruct the apprentice in the trade and to endeavour to make him skilled and expert therein. The apprentice agreed that he would not absent himself without proper consent, and that for every day's absence during the term without such consent he would serve one day at the end of each year of the apprenticeship, and that such year should not be considered complete until the additional day or days had been served. In one of the years of the term the apprentice attended a compulsory camp of instruction pursuant to secs. 125, 127 and 135 of the *Defence Act* 1903-1918