

possible, and the Federal law requires every citizen to vote unless he can furnish a valid and sufficient reason for his failure to do so.

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—

I agree that the appeal fails.

*Appeal dismissed with costs.*

Solicitor for the appellant, *A. C. Roberts.*  
Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.  
B. L.

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } PLAINTIFF;  
AGAINST  
THE AUSTRALIAN BOOT FACTORY LIMITED DEFENDANT.

*Income Tax—Assessment—Company—Taxation where larger distribution to shareholders could reasonably have been made—Determination of Commissioner of Taxation—Right to challenge determination in action—Determination for years prior to 1922—“Assessment”—Notice of assessment—Income Tax Assessment Act 1922 (No. 37 of 1922), secs. 21, 32 (2), 54 (1)\*—Income Tax Assessment Act 1924 (No. 51 of 1924), sec. 2.*

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S Y D N E Y,  
Nov. 15, 22.  
Knox C.J.,  
Isaacs, Higgins,  
Gavan Duffy,  
Powers,  
Rich and  
Starke JJ.

Sec. 32 (2) of the *Income Tax Assessment Act 1922* does not preclude the Commissioner of Taxation from enforcing against a company the provisions of sec. 21 in respect of a financial year prior to the financial year commencing on 1st July 1922.

\* Sec. 21 of the *Income Tax Assessment Act 1922* provides that (1) “Where in any year a company has not distributed to its members or shareholders at least two-thirds of its taxable income, the Commissioner shall determine whether a sum or a further sum (not exceeding the excess of two-thirds of the taxable income of the company over the amount distributed by it to its members or shareholders) could reasonably have been distributed by the company to them . . . . (2) The Commissioner shall calculate the

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The determination of the Commissioner under sec. 21 cannot, in an action by the Commissioner to recover the amount so determined by him to be payable by a company, be challenged on the ground that there were no relevant facts known to the Commissioner at the time of his determination on which he could reasonably have determined as he did.

*Per Knox C.J., Isaacs, Higgins and Powers JJ. :* The calculation under sec. 21 (2) of that Act of "the additional tax, if any, which would have been payable by the shareholders if the sum or further sum determined by the Commissioner in accordance with sub-section 1 of this section had been distributed to them in proportion to their interests in the paid-up capital of the company" is not an "assessment" within the meaning of sec. 54 (1), in respect of which a notice must be given to the company.

#### DEMURRERS.

In an action brought in the High Court by the Federal Commissioner of Taxation against the Australian Boot Factory Ltd. the statement of claim was as follows :—

1. The plaintiff is the duly appointed Commissioner of Taxation within the meaning of the *Income Tax Assessment Act 1922*.

2. The defendant is a company duly incorporated under the laws of the State of New South Wales.

3. The taxable income of the said company for the year ending 31st December 1920 (the accounting period accepted by the said Commissioner for the purposes of the said company's returns of income) amounted to the sum of £13,179, out of which the said company distributed in that year to its members or shareholders a sum not exceeding £2,500, or less than two-thirds of its taxable income for such year.

4. Afterwards and in pursuance of the powers and provisions in the said Act contained and within the time limited in that behalf the plaintiff determined that a further sum of £6,286 (being a sum

additional tax, if any, which would have been payable by the shareholders if the sum or further sum determined by the Commissioner in accordance with sub-section 1 of this section had been distributed to them in proportion to their interests in the paid-up capital of the company, and the company shall pay to the Commissioner the amount by which the additional tax, if any, exceeds the tax payable by the company on the sum or further sum so determined by the Commissioner. . . . (7) This section shall also apply to all

assessments hereafter to be made in respect of any financial year prior to that beginning on the first day of July one thousand nine hundred and twenty-two." Sec. 32 (2) provides that "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," &c. Sec. 54 (1) provides that "Income tax shall be due and payable thirty days after the service by post of notice of assessment."

not exceeding the excess of two-thirds of the taxable income of the said company over the said amount distributed by it to its members or shareholders) could reasonably have been distributed by the company to them, and notified such determination to the defendant.

5. In further pursuance of the powers and provisions in the said Act contained the plaintiff calculated the additional tax which would have been payable by such shareholders if the said further sum so determined as aforesaid had been distributed to them in proportion to their interests in the paid-up capital of the company, and such additional tax so calculated as aforesaid amounted to £2,665 4s. 3d., which exceeded the tax payable by the said company on the sum so determined by the Commissioner by the amount of £1,827 1s. 7d.

6. The plaintiff notified the defendant of the facts and matters in the preceding paragraph mentioned and duly required the said defendant company to pay to him the said sum of £1,827 1s. 7d., in all respects in accordance with the provisions of the said Act in that behalf; but the defendant company has at all times refused and neglected and still refuses and neglects to pay the plaintiff such sum or any part thereof.

7. And the plaintiff further says that the taxable income of the said company for the year ending 31st December 1921 (the accounting period accepted by the said Commissioner for the purposes of the company's returns of income) amounted to the sum of £12,586, of which the said company in that year distributed nil to its members or shareholders.

8. Afterwards, and in pursuance of the powers and provisions in the said Act contained and within the time limited in that behalf, the plaintiff determined that a further sum of £8,176 (being a sum not exceeding the excess of two-thirds of the taxable income of the said company over the sum distributed by it to its members or shareholders) could reasonably have been distributed by it to them and notified such determination to the defendant.

9. In further pursuance of the powers and provisions in the said Act contained the plaintiff calculated the additional tax which would have been payable by such shareholders if the said further sum so determined as aforesaid had been distributed to them in proportion to their interests in the paid-up capital of the company, and such

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additional tax so calculated as aforesaid amounted to £2,525 16s. 5d., which exceeded the tax payable by the company on the sum so determined by the plaintiff by the amount of £1,537 17s. 9d.

10. The plaintiff notified the defendant of the facts and matters in the preceding paragraph mentioned, and duly required the said defendant company to pay to him the said sum of £1,537 17s. 9d., in all respects in accordance with the provisions of the said Act in that behalf; but the defendant company has at all times neglected and refused and still refuses and neglects to pay to the plaintiff such sum or any part thereof.

And the plaintiff claims £3,190 7s. 1d., being the total of the two amounts of £1,827 1s. 7d. and £1,537 17s. 9d. less a sum of £174 12s. 3d. allowed as of grace to the defendant.

The defendant's defence as amended at the hearing was, so far as material, as follows:—

7. In answer to the whole of the statement of claim the defendant says that there were no relevant facts known to the plaintiff at the time of his said determinations on which he could reasonably have determined as set out in pars. 4 and 8 of the said statement of claim wherefore the defendant says that the plaintiff did not determine in pursuance of the powers and provisions of the said Act as alleged.

10. The defendant will object that the statement of claim is bad in law and discloses no cause of action. The grounds of this objection are (*inter alia*): (f) that by sec. 32 (2) of the said Act the defendant is not liable for any tax under such Act in respect of income for any financial year prior to the financial year commencing on 1st July 1922; (g) that by sec. 54 of the said Act the defendant only becomes liable to pay tax thirty days after service upon it by post of a notice of assessment and no notice of assessment in respect of any of the moneys claimed in this action was served upon the defendant.

By his reply the plaintiff demurred to par. 7 of the defence on the grounds, substantially, that when the Commissioner has made his determination the question whether in fact the sums in question could or could not reasonably have been distributed is not examinable in an action, and that the determination of the Commissioner unless and until set aside on appeal by some competent tribunal is conclusive.

The demurrers now came on for argument.

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*E. M. Mitchell* K.C. (with him *Hill*), for the plaintiff. As to ground (f) of the defendant's demurrer, it is answered by sub-secs. 1 and 7 of sec. 21 of the *Income Tax Assessment Act* 1922. As to ground (g), the determination of the Commissioner under sec. 21 is not an "assessment" within the meaning of sec. 32 (2) (see *Federal Commissioner of Taxation v. Australian Tesselated Tile Co. Pty. Ltd.* (1); *R. v. Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (2)). Sec. 32 (2) only applies to the ordinary assessments mentioned in sec. 21 (1).

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*Brissenden* K.C. (with him *Harper*), for the defendant. As to the plaintiff's demurrer to the defence, the Commissioner's functions under sec. 21 are quasi-judicial and, if in performance of those functions he comes to a conclusion for which there is no foundation in fact, his conclusion is examinable by this Court: his decision must be reasonable and bona fide (see *Everett v. Griffiths* (3); *R. v. Board of Education* (4); *R. v. Port of London Authority*; *Ex parte Kynoch Ltd.* (5); *Mooney v. Commissioners of Taxation (N.S.W.)* (6); *Federal Commissioner of Taxation v. Munro* (7)). As to ground (f) of the defendant's demurrer, sec. 21 does not expressly provide that assessments under that section may be made for years prior to 1922, but assumes that they may; but sec. 32 (2) is an absolutely clear direction that the first assessment under the Act is to be made for the year 1922-1923. Sec. 21 (7) only applies to ordinary assessments of a company. As to ground (g), apart from sec. 54 there is no provision of the Act which states when the amount determined by the Commissioner under sec. 21 to be payable becomes a debt due which can be sued for.

*E. M. Mitchell* K.C., in reply. A determination by the Commissioner under sec. 21 is not examinable in this action, the company's only remedy being by an appeal (see *Federal Commissioner of Taxation v. Australian Tesselated Tile Co. Pty. Ltd.* (8); *Cornell v.*

(1) (1925) 36 C.L.R. 119, at p. 127.

(2) (1926) 37 C.L.R. 368.

(3) (1921) 1 A.C. 631, at p. 660.

(4) (1910) 2 K.B. 165, at p. 178.

(5) (1919) 1 K.B. 176, at p. 183.

(6) (1905) 3 C.L.R. 221, at p. 246.

(7) (1926) 38 C.L.R. 153, at p. 208.

(8) (1925) 36 C.L.R., at p. 124.

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*Cur. adv. vult.*

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The following written judgments were delivered :—

ISAACS J. The only questions for the Court's determination are :—(a) Is the Commissioner's ascertainment of the excess amount referred to in sec. 21, sub-sec. 2, an "assessment" within the meaning of sec. 54, and is notice thereof consequently notice of assessment within the meaning of the same section? (b) Does sec. 32 (2) preclude such an assessment for any period prior to 1st July 1922? (c) Is the Commissioner's determination challengeable in this action for the reason alleged in par. 7 of the defence?

These I answer as follows :—

(a) The nature of an "assessment" I have stated in *Hooper's Case* (3), and I apply it to the operations prescribed by sec. 21. It is true that in sec. 21, sub-secs. 1 and 2, the word "assessment" is not used to denote the necessary official operation. Neither is that operation denoted by the word "calculate," which has reference only to a preliminary step in arriving at the final result. The Commissioner is to "calculate" the "additional tax," not an additional tax payable by the *company*, but "which would have been payable by the shareholders"—if the *further* sum had been actually distributed. That is one step. Then the company is directed by the Act to "pay to the Commissioner" the *excess* of that hypothetical "additional tax" over the company's own normal tax in respect of the further sum determined under sub-sec. 1. It is the implied and necessary ascertainment of the "excess," and not the calculation of the "additional tax," which is the final official operation constituting the "assessment," and the notification of that ascertainment is the "notice of assessment" required by sec. 54. If it be not so, then either the explicit direction "shall pay to the Commissioner" in sec. 21 (2) is futile, or else there would have been no appeal open to the taxpayer under

(1) (1920) 29 C.L.R. 39.

(2) (1923) 33 C.L.R. 73.

(3) (1926) 37 C.L.R., at p. 373.

sec. 50 from the Commissioner's ascertainment under sec. 21—each alternative being unthinkable, unless impossible of escape.

(b) As to sec. 32 (2), its provisions apply, it is true, to assessments from the date named. But earlier periods, including that under consideration, are provided for by sec. 2 as amended by sec. 2 of Act No. 51 of 1924.

(c) The third question is really unarguable since the decision in *Cornell's Case* (1). In the *Australian Tessellated Tile Co.'s Case* (2) I stated a principle which applies, and is in line with *Cornell's Case*. I would add that the Act clearly provides appeal as the only method of correcting an erroneous assessment and, apart from mala fides, leaves it unchallengeable in such an action as this.

The Crown, therefore, succeeds on the demurrers.

I am authorized by my brothers the Chief Justice and *Powers J.* to say they have read and agree with this judgment.

HIGGINS J. In my opinion, the grounds for the defendant's demurrer to the statement of claim have not been sustained; but the demurrer of the plaintiff to the defence should be allowed.

It must be understood that we have to confine ourselves to grounds (f) and (g) of par. 10 of the defence, the other grounds not being pressed, and to par. 7 of the defence as amended during the argument.

As for ground (f) of par. 10 of the defence, it is, to my mind, obvious that sec. 32 (2) of the Act—a section which appeared as it now stands in the Act of 1922 as well as in the present Act 1922-1925—applies to what sec. 21 calls the “ordinary assessment” only—the assessment which is based on actual receipts of the shareholder—and not to additional tax calculated or assessed on any further sums that could reasonably have been distributed by the company to its shareholders, under sec. 21. Moreover, sec. 21 (7) shows clearly that the additional tax for dividends that reasonably could have been distributed is applicable to financial years before the year commencing on 1st July 1922. Sec. 21 (7) is to be found even in the Act of 1922.

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(1) (1920) 29 C.L.R., at p. 47.

(2) (1925) 36 C.L.R., at p. 125.

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As for ground (g) of par. 10, the same reasoning applies. I regard sec. 54 as not applying to the additional tax imposed by sec. 21.

As for par. 7 of the defence, to which the plaintiff demurs, I think that the determination of the Commissioner under sec. 21 cannot be impugned in this action under a statement that "there were no relevant facts known to the" Commissioner "at the time of his said determinations on which he could reasonably have determined," &c., or under a statement that therefore "the" Commissioner "did not determine in pursuance of the powers and provisions of the said Act." If the determination seem to be wrong, the remedy is to bring it before a Board of Appeal, or (as it is called by the Act of 1925) a Board of Review (see sec. 21 (5) of the Act of 1922, as it stood before sec. 5 of the Act of 1925; and see sec. 17 of the Act of 1924, and sec. 24 of the Act of 1925). There is nothing in the Act authorizing the Court, in an action for the additional tax, to make a new determination, or to alter a determination of the Commissioner—"to substitute its opinion or satisfaction for that of the Commissioner," as my brother *Starke* said in *Thomson's Case* (1); and see sec. 39 (1).

Dr. *Brissenden* has referred to some remarks of mine made in my judgment in the recent *British Imperial Oil Co's Case* (2). I said in the course of that judgment: "I am not at all satisfied that a person assessed wrongly (e.g., a charitable institution) could not wait till he be sued and then defend the action." But these words were based on the specific provision in sec. 14 that the income of a charitable institution was to be exempt from income tax. A charitable institution does not come even under the definition of "taxpayer" in sec. 4: "A taxpayer means any person chargeable with income tax"; and such an institution is not so chargeable. The elaborate provisions applicable to taxpayers are not applicable to it; and it may well be that the institution is entitled to wait until it be sued, and then show that it is not subject to income tax. No such consideration can apply to an admitted taxpayer who is called upon to pay additional tax under sec. 21.

(1) (1923) 33 C.L.R., at p. 74.

(2) (1926) 38 C.L.R., at p. 208.

GAVAN DUFFY, RICH AND STARKE JJ. We agree that the demurrer of the defendant to the statement of claim should be overruled, and that the demurrer of the plaintiff to par. 7 of the defence should be allowed.

Demurrer of defendant to statement of claim overruled. Demurrer of plaintiff to par. 7 of the defence allowed. Defendant to pay costs. Leave to defendant to amend its pleadings as advised.

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Solicitor for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.  
Solicitors for the defendant, *Minter, Simpson & Co.*

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[HIGH COURT OF AUSTRALIA.]

THE STATE OF VICTORIA AND OTHERS . PLAINTIFFS ;  
AGAINST  
THE COMMONWEALTH . . . . . DEFENDANT.

*Constitutional Law—Powers of Commonwealth Parliament—Granting financial assistance to any State—The Constitution (63 & 64 Vict. c. 12), secs. 51, 96, 99—Federal Aid Roads Act 1926 (No. 46 of 1926), secs. 2, 3, Schedule—Surplus Revenue Act 1910 (No 8 of 1910).*

*Practice—Parties—Action by State against Commonwealth—Declaration of invalidity of Commonwealth statute—Joinder of other States as defendants—Rules of the High Court 1911, Part I., Order II., r. 9.*

*Held*, by the whole Court, that the *Federal Aid Roads Act 1926* is a valid exercise of the power conferred upon the Parliament of the Commonwealth by sec. 96 of the Constitution to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

In an action brought in the High Court by two States and their respective Attorney-Generals the plaintiffs asked for declarations that the *Federal Aid Roads Act 1926* was *ultra vires* the Parliament of the Commonwealth and void, that any agreement made by the Commonwealth with any State in the form or to the effect set out in the Schedule to that Act was *ultra vires* the Commonwealth and void, and that all moneys which purported to be appropriated

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