[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

S. HOFFNUNG & COMPANY LIMITED . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT (KNOX C.J.).

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MELBOURNE, *Feb.* 27, 28; *Mar.* 5.

KNOX C.J.

May 22-25, 31; *June* 1, 4; *Oct.* 2, 3; *Nov.* 1.

ISAACS, HIGGINS and STARKE JJ.

War-time Profits—Taxpayer deriving profits from sources within and without Australia—Deductions—Excess profits duty paid in England in respect of Australian profits—Deduction from profits of Australian business of amount paid as excess profits duty in respect of such profits—Assessment—Tentative assessments—Final assessment—Decrease in amount of tax—Objection to assessment—"Alteration or addition" in or to assessment—Effect of—Taxpayer entitled to object to basis of tentative assessments—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 7 (2) (*c*), 15 (4), 23, 28.

Sec. 15 (4) of the *War-time Profits Tax Assessment Act* 1917-1918 provides that in the computation of war-time profits "deductions shall not be allowed on account of the liability to pay, or the payment of, war-time profits tax, but a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth."

Held, that, in the computation of the amount of tax payable, the taxpayer was entitled to have deducted from the profits of his Australian business for the accounting period the amount paid by way of excess profits duty under the Imperial *Finance Acts* "in respect of such profits," and that the deduction was not limited to such amount as he may have paid under the Imperial *Finance Acts* in respect of his "war-time profits."

Held, also, that assessments made "tentatively" or "subject to revision" or "to be finalized" are not assessments within the meaning of the *War-time Profits Tax Assessment Act*, and do not preclude objections to a complete and final assessment when made.

Judgment of *Knox* C.J. affirmed.

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APPEAL from the High Court (*Knox* C.J.).

From its assessment by the Federal Commissioner of Taxation to war-time profits tax for the year ending 30th June 1917, S. Hoffnung & Co. Ltd. appealed to the High Court. The appeal was heard by *Knox* C.J. From his judgment the Commissioner appealed to the Full Court of the High Court, and, for the purposes of this appeal, the appellant and the respondent admitted the following facts :—

1. The respondent is a company duly incorporated in England and carrying on business in Sydney. The principal business of the Company is carried on in Sydney aforesaid and the business carried on in London is substantially a buying agency for the Australian house and also a buying agency for certain other persons, firms and companies carrying on business outside of England and outside of Australia.

2. The Company derived profits from sources within Australia and also from sources outside Australia, during the accounting periods of twelve months ended 31st March 1917 and 31st March 1918 respectively.

3. The Company was subject in England to excess profits duty in respect of profits derived in Australia and elsewhere during the said two respective accounting periods, and was also liable to war-time profits tax in Australia in respect of profits derived from sources within Australia during the financial year ended 30th June 1917.

4. Pursuant to Part III. of an Act of the Parliament of the United Kingdom called the *Finance Act (No.* 2) 1915 (as affected by subsequent enactments) excess profits duty was levied on the excess profits of each of the said accounting periods; and pursuant to an Act of the Parliament of the Commonwealth of Australia called the *War-time Profits Tax Assessment Act* 1917-1918 war-time profits tax was levied on the war-time profits arising in the said financial year, such war-time profits being ascertained as required by sub-sec. 2 of sec. 7 of the said Commonwealth Act by reference to the Company's said accounting periods, which ended and commenced respectively in the said financial year.

5. Pursuant to sec. 21 of the said Commonwealth Act the Commissioner from the returns and other information in his possession caused an assessment to be made for the purpose of ascertaining the

profits upon which war-time profits tax should be levied for the said financial year, and pursuant to sec. 26 of the said Commonwealth Act the Commissioner on 26th April 1919 caused notice in writing of the assessment to be given to the Company.

6. Subsequently the Commissioner in pursuance of sec. 23 of the said Act made such alterations and additions in and to the assessment as he considered necessary to ensure its completeness and accuracy, and such alterations and additions were duly notified to the Company on 1st September 1919, 2nd October 1919 and 13th January 1922 respectively.

7. The assessment originally and as altered up to 13th January 1922 did not include any deduction for excess profits duty paid in the United Kingdom under sub-sec. 4 of sec. 15 of the said Commonwealth Act, the Commissioner intimating when making such assessment that this matter remained to be adjusted and that pending such adjustment payment of tax was to remain in abeyance.

8. The amount of tax imposed by the said assessment dated 26th April 1919 was £5,623 11s. 3d., and on 25th June 1919 the Company paid £5,547 on account of this tax. The alterations to such assessment notified to the Company on 1st September 1919 resulted in the assessment of additional tax to the amount of £2,741, and those notified on 2nd October 1919 resulted in a credit to the Company for £1,105 19s. 4d. The unpaid balance of the tax originally assessed, £76 11s. 3d., plus the additional liability of £2,741, less the credit for £1,105 19s. 4d., resulted in a net liability of £1,711 11s. 11d.; which amount was duly paid by the Company on 3rd November 1919. The effect of the alteration notified to the Company on 13th January 1922 was to reduce its liability to tax by £1,776, and the Commissioner gave credit for this sum in part payment of the amount of tax due by the Company for the financial year 1917-1918.

9. On 18th September 1919 the Company paid in London the sum of £5,800 on account of excess profits duty for the accounting period ending on 31st March 1918, and information of this payment did not reach its officer in Australia until 1st December 1919.

10. There were various subsequent adjustments of tax under the said *Finance Act*; and ultimately the amount paid thereunder for

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excess profits duty by the Company in respect of the accounting period ending 31st March 1917 was 65 per cent of £15,841, that is to say, the sum of £10,296 13s., and in respect of the accounting period ending 31st March 1918 was 80 per cent of £39,167, that is to say, the sum of £31,333 12s.

11. Subsequent to 13th January 1922 the Commissioner altered the said assessment to allow (*inter alia*) a deduction of £2,814 in respect of the payment of excess profits duty; and as the alterations had the effect of reducing the Company's liability the Commissioner formally notified the appellant on 18th August 1923 of the effect of the alterations, and in pursuance of sub-sec. 2 of sec. 23 of the said Commonwealth Act refunded to the Company the tax overpaid.

12. Consequent upon the receipt of further information from the Company the Commissioner considered it necessary to make a further alteration in the said assessment to reduce the deduction allowed in respect of the payment of excess profits duty from the said amount of £2,814 to the amount of £1,659. Such alteration was made in consequence of the taxation authorities in England deducting the amount of the losses made by the Company in the years 1915, 1919 and 1921 (£13,048) from the total amount of excess profits duty in which the Company had been assessed for the years 1916, 1917, 1918 and 1920 (£66,434). The alteration was made by a further notice of amended assessment, and as the effect was to impose a fresh liability the Company was duly notified thereof by the respondent on 10th July 1925.

13. The Company did not, save as appears by the correspondence between the parties or their representatives, object to the assessment duly notified by the Commissioner on 26th April 1919 on account of a deduction not being allowed in the said assessment in respect of the payment of excess profits duty nor to any of the said alterations made thereto prior to 10th July 1925, but after the Company had been notified on the said 10th July 1925 that the assessment had been altered so as to impose a fresh liability in respect of the reduced deduction in respect of the payment of excess profits duty the Company, through its duly authorized agents, Starkey & Starkey, lodged with the Commissioner an objection in writing dated 20th July 1925.

14. On 18th February 1927 the Commissioner, having considered the aforesaid objection, gave to the Company written notice wholly disallowing such objection and the Company, being dissatisfied with the decision of the Commissioner, on 3rd March 1927 gave notice in writing requesting the Commissioner to treat its aforesaid objection as an appeal and forward it to the High Court of Australia for determination.

15. On 10th June 1927 the Commissioner by writing forwarded the aforesaid objection to the High Court of Australia at Melbourne.

16. A statement of the figures taken into consideration by the Inland Revenue Authorities in England for calculating the excess profits duty payable by the Company in England for the years ending 31st March 1917 and 1918 is as follows :—Accounting period ended 31st March 1917.—The Inland Revenue Authorities in England assessed excess profits duty in respect of profits derived in Australia and elsewhere during the accounting period ended 31st March 1917 at £10,296 13s., this being 65 per cent of the taxable excess profits computed by the Inland Revenue Authorities to be £15,841. In calculating such taxable excess profit the English authorities arrived at an amount of profits of £98,307 ; and from this made the following deductions—Increased capital allowance £9,796, pre-war standard of profit £72,670 = £82,466 : thus arriving at the said £15,841.

The before-mentioned profits of £98,307 included certain profits derived in Australia which were afterwards taken into account by the Commonwealth Commissioner also in assessing Australian war-time profits tax. By examination of items comprising the said £98,307 and also of the items comprising the profits for the same year taken into account in the Australian war-time profits tax assessment, it was found that Australian profits amounting to £77,427 were included in both assessments and that in addition a sum of £20,880 was brought into account by the English authorities—thus making a total of £98,307.

(A schedule appended to the admissions showed how the sum of £98,307 was computed, and another schedule showed how the profits and taxable excess profits for the purposes of war-time

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profits tax assessment in respect of profits for period ending 31st March 1917 were computed by the Federal Commissioner.)

The Inland Revenue Authorities in England assessed excess profits duty in respect of profits derived in Australia and elsewhere during the accounting period ended 31st March 1918 at £31,333 12s., this being 80 per cent of the taxable excess profits which the Inland Revenue Authorities calculated to be £39,167. In calculating such taxable excess profits the English authorities arrived at an amount of profits of £126,038, and from this made the following deductions:— Increased capital allowance £14,201, pre-war standard of profit £72,670 = £86,871 : leaving as taxable excess profits £39,167.

The before-mentioned profits of £126,038 included certain profits derived in Australia which were also taken into account by the Commonwealth Commissioner in assessing Australian war-time profits tax. By examination of the items comprising the said £126,038 and also of the items comprising the profits taken into account in the Australian war-time profits tax assessment for the same year, it was found that Australian profits amounting to £115,303 were included in both assessments and that, in addition, a sum of £10,735 was brought into account by the English authorities: thus making a total of £126,038.

A further schedule showed how the sum of £126,038 was computed, and another schedule showed how the profits and taxable excess profits for purposes of war-time profits tax assessment in respect of profits for the period ending 31st March 1918 were computed by the Federal Commissioner.

17. The Commissioner, in arriving at the deduction to be allowed to the Company from the profits of the relevant accounting periods for the said financial year for any sum paid in respect of the profit on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth, proceeded in the manner shown in the annexures to the assessment and alterations thereto issued from time to time as aforesaid.

The amendment dated 10th July 1925 stated the total amount of tax payable for the relevant year to be £4,171 15s. 8d., an increase of £776 1s. 11d. over the immediately preceding amended assessment of 18th August 1923 when it was stated to be £3,395 13s. 9d., such

last-mentioned sum itself being a reduction from the original sum assessed, namely, £5,623 11s. 3d.

On the hearing of the appeal before *Knox* C.J., evidence was given, the effect of which is stated above.

Owen Dixon K.C. and *Russell Martin*, for the appellant.

Ham K.C. and *C. Gavan Duffy*, for the respondent.

Cur. adv. vult.

Mar. 5.

KNOX C.J. delivered the following written judgment :—

This is an appeal from an assessment to war-time profits tax for the year ending on 30th June 1917. The substantial question at issue relates to the deduction authorized by sec. 15 (4) of the *War-time Profits Tax Assessment Act*—a deduction of "any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth"; but the first contention raised on behalf of the respondent is that it is not open to the appellant to litigate that question on this appeal, either because it is not raised by the notice of objection dated 20th July 1925 or because the appellant is precluded by sec. 23 of the Act from objecting to the amended notice of assessment dated 10th July 1925. In order to decide this preliminary question it is necessary to examine the dealings and correspondence between the parties. [His Honor then stated the facts, which are substantially set out in the above admissions of fact, and continued :—]

In my opinion these dealings between the parties had the effect of keeping open all questions relating to the allowance to be made under sec. 15 (4) of the Act until the assessment of August 1923. I think it is unnecessary to determine whether Starkey & Starkey's letter of 23rd August 1923 constituted a sufficient notice of objection to this assessment or whether the letter of the Commissioner in reply read with the rest of the correspondence amounted to an undertaking that the question of allowance to be made under sec. 15 (4) should be kept open, because by the amended assessment

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of July 1925 not only was the total liability of the appellant increased but the amount allowed under sec. 15 (4) in the preceding assessment was substantially diminished. The effect of this was in my opinion to give the appellant a right under sec. 23 (1) of the Act to object to the assessment, at any rate in respect to matters in which an alteration had been made having the result of increasing its liability. It follows that, in my opinion, the objection contained in Starkey & Starkey's letter of 20th July 1925 was duly made, and I feel no doubt that the ground of objection on which the appellant now seeks to rely was clearly stated in that letter and the letter of 4th December 1924, which is incorporated by reference in the later letter.

The substantial question is whether the expression " paid in respect of the profits " which occurs in sec. 15 (4) is to be construed as meaning " paid in respect of the profits of the business " or " paid in respect of the war-time profits of the business." The appellant supports the former contention; the respondent the latter. It is common ground that whichever construction be adopted the profits to be considered are limited to profits derived from sources within Australia. In my opinion the contention of the appellant is correct. It is apparent from sec. 7 of the Act that before the amount of war-time profits can be determined it is necessary to ascertain the profits of the business for the accounting period. By sec. 10 the profits of the business are to be determined on the same principles as the profits of the business would be determined for the purpose of Commonwealth income tax but subject to the modifications set out in Part IV. and to any other provisions of the Act. Part IV. consists of sec. 15, and the natural inference is that the provisions of this section are to be applied in determining the profits of the business. This view is confirmed by a consideration of the provisions of the section. The deductions authorized by sub-secs. 2, 3, 7, 8, 9, 11, 13, 14 and 18 and by the proviso to sub-sec. 4 are either expressly or by necessary inference to be made from the profits of the business in the accounting period in order to ascertain the net profits in that period, and the provisions of sub-secs. 10 and 16 relate also to deductions or exclusions from the profits of the business. There is nothing in the section itself or, so far as I can find, in the rest of the Act to indicate that the deduction authorized by sub-sec. 4 is to

be made from a fund other than that from which the other deductions authorized by the section are directed to be made, and in my opinion the deduction for any sum paid in respect of a similar tax imposed outside the Commonwealth must be made from the profits of the business before proceeding to apply the provisions of sec. 7 for the purpose of determining the amount of war-time profits. As my brothers *Isaacs* and *Rich* said in *Hooper & Harrison Ltd. (In Liquidation)* v. *Federal Commissioner of Taxation* (1), computation of profits is the subject of the section and the whole of it is directed to the ascertainment of a sum which represents the net amount of profits of the taxpayer for the accounting period. And, speaking of the sub-section now under discussion, they say (2) "a tax imposed on the profits of that period by the law of another country —say, England—should be treated as an outgoing for that period because the liability arose in respect of the transactions of that period, and should be deducted accordingly."

If this deduction is directed to be made in the course of ascertaining the net profits and the ascertainment of the net profits is a necessary step in the determination of the amount of war-time profits, it follows that the deduction to be made cannot be of the amount of tax paid in respect of the war-time profit of the accounting period, which, *ex hypothesi*, cannot have been determined at the time when the deduction is to be made. It was said on behalf of the respondent that it was necessary to read the words "in respect of the profits" as meaning "in respect of the war-time profits" because the Imperial Act—the *Finance (No. 2) Act* 1915 (5 & 6 Geo. V. c. 89)—provided for a corresponding deduction and the two Acts could not be worked together except by the method adopted by the respondent in this case. But I do not think the provisions of the Imperial Act can be regarded as affecting the construction of the Commonwealth Act. So far as I can see, the only reason afforded by the local Act for looking at the provisions of the Imperial Act is in order to determine whether the tax imposed by the Imperial Act is a war-time profits tax or similar tax.

For these reasons I am of opinion that the appellant is entitled to have deducted from the profits of the Australian business for

(1) (1923) 33 C.L.R. 458, at p. 473. (2) (1923) 33 C.L.R., at p. 474.

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the accounting period the amount paid by way of excess profits duty in respect of such profits and that the assessment must be amended accordingly. In order to afford the parties an opportunity of taking the opinion of the Full Court on the question of construction or of agreeing on the amount at which the tax is to be assessed, I propose to make a declaration to the effect stated above and to reserve the further consideration of the appeal with liberty to apply. The respondent is to pay the cost of the appeal up to and including this order.

From that decision the Commissioner of Taxation now appealed to the Full Court.

Sir Edward Mitchell K.C. and *C. Gavan Duffy*, for the appellant. The taxpayer cannot object to the basis of his assessment. In August 1923 the Commissioner decreased the amount of tax payable, and in July 1925 the Commissioner increased the amount of tax payable. It is only the difference between these amounts which is open to objection by the taxpayer, as the assessment of August 1923 did not impose any fresh liability or increase any existing liability. The word " profits " in sec. 15 (4) is to be read as " war-time profits." [He referred to the English *Finance* (*No.* 2) *Act* 1915, Sched. IV., Part I., clause 4 ; *Hooper & Harrison Ltd.* (*In Liquidation*) v. *Federal Commissioner of Taxation* (1).] The objection is bad and contrary to the provisions of the Act. The sum arrived at for deduction in respect of sec. 15 (4) is wrong, first, because it has been ascertained by taking a proportion of the profits, and, secondly, because the accounting periods have been taken together. As to the interpretation of sec. 15 (4) of the Act the Commissioner objects to the declaration in so far as it says that the respondent is entitled to a deduction " in respect of such profits." The view that " profits " in sec. 15 (4) of the Act means war-time profits is confirmed on a survey of the whole Act. The object of the Act is to tax war-time profits, and the deduction intended to be allowed is any tax which has been paid on those war-time profits in the United Kingdom. As to sec. 23 the actual alteration to which the objection in this case was made was an alteration to diminish the amount of the deduction

(2) (1923) 33 C.L.R, at p. 486.

which had been allowed in respect of sec. 15 (4). The result of the alteration objected to was to make the taxpayer liable to payment of £776 1s. 11d., which is the difference brought about by the amount of the refund on account of excess profits tax. Whatever argument is advanced, the taxpayer's relief is confined to the amount by which the assessment is increased. The alteration of the assessment is not an assessment within the meaning of the Act. It is said that there never was an assessment until the amendment of August 1923, but an assessment is never complete and final because sec. 23 gives the Commissioner the right to make alterations or additions at any time. There is only one assessment and, when it has been made, the right to object to it then arises and is lost if advantage is not taken of it within thirty days. The assessment was made on 26th April 1919, or, if any effect is to be given to the word "tentative," was made on 1st September 1919.

[GAVAN DUFFY J. The objection which comes before the Court is an objection lodged on 22nd July 1925.]

Admissions were made that there was an assessment on 26th April 1919. Upon the admissions it is not now open to the taxpayer to contend that no assessment was made until 1925.

Owen Dixon K.C. and *Herring*, for the respondent. When there is an alteration in an assessment which relates to a particular item of profit the whole assessment is thrown open. The learned Chief Justice found that the Commissioner had concurred with the taxpayer in deferring the whole matter of the assessment until it was finalized. The Commissioner has, in effect, substituted one assessment for another. There are five possible views open: (1) the Commissioner deferred the whole question of deduction under sec. 15 (4) until the final assessment, with the concurrence of the taxpayer, allowing him to object to it as an assessment so far as it relates to sec. 15 (4), when he had finally ascertained what was the right deduction; (2) the Commissioner may be estopped by conduct from raising the contention that the objection is too late; (3) the alteration made enables the taxpayer to object to the whole method of making deductions under sec. 15 (4); (4) the alteration is such that the taxpayer is entitled to object to the assessment in part, that is, as to

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the sum of £776; (5) or it may be that the Commissioner has discharged one assessment intended to be operative and made another. The present assessment is open to objection on the ground that it is said to be an assessment of the tax, whereas the Commissioner should have assessed the profits (sec. 21). Under sec. 23 the taxpayer may appeal against the alteration to the assessment on any ground. The objection lodged in July 1925 was available to the taxpayer in respect of the whole assessment. The provision in sec. 28 (1) is made for the benefit of the Commissioner, and not of the taxpayer, and the Commissioner may waive it and he may consider an objection although it has been lodged out of time. The provision in the proviso of sec. 23 (1) enables the taxpayer to object though no alteration has been made. Sec. 15 (4) means simply that from the profits of each accounting period taken separately there shall be deducted any sum which has been paid in respect of "the profits" on account of any tax similar to the *War-time Profits Tax Assessment Act*. "Profits" in that section means the same as "profits" in secs. 10 (1) and 7 (2) of the Act. Secs. 10 and 15 must be applied in computing the profit arising in the accounting period defined in sec. 7. For the purpose of carrying out the provisions of sec. 7 three factors only are required, the pre-war standard and the respective profits of two accounting periods. The sum mentioned in sec. 7 from which the pre-war standard is to be deducted cannot be ascertained until the provisions of sec. 15 have been applied. The whole argument on the construction of sec. 15 (4) is that the words "a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth" mean that in ascertaining the profits of the accounting period there shall be deducted that sum which has been paid in England for excess profits duty attributable to the Australian profits during the accounting period included in the amount upon which the English excess profits duty was imposed. The deduction is the sum which has been paid in respect of the profits calculated under sec. 15 for the accounting period.

Assuming that the assessment of August 1923 was a final assessment, the Commissioner is estopped by his conduct from asserting that

it was a final assessment and that the assessment of July 1925 was an alteration of that assessment. It was open to the taxpayer to object on the assessment of August 1923, and he did object in fact. The Commissioner never considered that objection, but sent out another assessment. There can be an estoppel against the Crown (*Hoystead* v. *Commissioner of Taxation* (1); *Attorney-General to the Prince of Wales* v. *Collom* (2)).

C. Gavan Duffy, in reply. As to the right to appeal against the whole assessment, the result of the document of 26th April 1919 is that the taxpayer is limited in his appeal to the sum of £776 being the increased amount assessed on 10th July 1925, and he cannot rely on the Commissioner having misinterpreted sec. 15 (4) (*The King* v. *Deputy Federal Commissioner of Taxation* (*S.A.*); *Ex parte Hooper* (3); *Commonwealth Agricultural Service Engineers Ltd.* (*In Liquidation*) v. *Commissioner of Taxes* (*S.A.*) (4)). The document of 18th August 1923 is a notice of an assessment for it purports to be a notification of an assessment, and is conclusive evidence of the due making of the assessment (sec. 25). "Due," in sec. 25, relates to matters of procedure. Until 31st March 1920 there was no mention of an objection under sec. 15 (4). At that date there had already been an assessment, and the only alteration the Commissioner could then have made was one decreasing the liability of the taxpayer and there would be no right of appeal. Sec. 28 only applies to the one assessment and does not apply to the assessment as altered (*The King* v. *Deputy Federal Commissioner of Taxation* (*S.A.*); *Ex parte Hooper*). The power to appeal from an amended assessment is limited by sec. 23 (*Hooper & Harrison Ltd.* (*In Liquidation*) v. *Federal Commissioner of Taxation* (5)).

Cur. adv. vult.

The following written judgments were delivered :—

Nov. 1.

ISAACS J. This is an appeal under sub-sec. 5 of sec. 29 of the *War-time Profits Tax Assessment Act* 1917-1918, from a judgment of the learned Chief Justice under sec. 28 of the Act. The judgment allowed the taxpayer's appeal and made a general declaration of

(1) (1926) A.C. 155; 37 C.L.R. 290.
(2) (1916) 2 K.B. 193, at p. 204.
(3) (1926) 37 C.L.R. 368.
(4) (1926) 38 C.L.R. 289.
(5) (1923) 33 C.L.R. 458.

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principle applicable to the case, and ordered the Commissioner to pay the taxpayer's costs. But all other questions, which of course include the determination of actual amounts, were reserved for future consideration. We are therefore not concerned with any question except that of the principle declared. But then the present appellant has presented arguments which not merely contest the accuracy of the declaration, but also its competency in the circumstances.

The controversy arises with reference to an objection made by the taxpayer in respect of the financial year ending on 30th June 1917. The objection was that the Commissioner had not allowed a proper deduction for sums which the taxpayer claimed it had paid in England under the Imperial *Finance* (No. 2) *Act* 1915 (5 & 6 Geo. V. c. 89) in respect of "the profits" within the meaning of sub-sec. 4 of sec. 15 of the Australian Act. The declaration by the Chief Justice was that the taxpayer "is entitled to have deducted from the profits of the Australian business for the accounting period the amount paid by way of excess profits duty in respect of such profits."

For the Commissioner it is contended (1) that in the circumstances no objection or appeal whatever under sec. 28 was then competent to the taxpayer; (2) that if any objection or appeal was competent, it did not extend to any question of interpretation of sub-sec. 4 of sec. 15 of the Act, but merely as to whether, on the interpretation already acted on by the Commissioner, the additional sum of £776 or some part thereof was taxable income; (3) that in any case the declaration was wrong in law. These contentions to a great extent covered new ground and raised questions both intricate and generally important. I have to acknowledge the Court's indebtedness to learned counsel on both sides for the clearness and force with which their arguments were presented.

The first contention is based on the following considerations:—It is said that prior to 26th April 1919 the Commissioner, pursuant to sec. 21 of the Act, made an assessment for the year in question, and on the date mentioned he gave the taxpayer notice in writing of the assessment. The net tax assessed was stated to be £5,623 11s. 3d., and the latest date for payment without fine was 26th June 1919. The latest date for lodging objections was stated to be 26th May

1919. At various times alterations or amendments were made by the Commissioner and notified to the taxpayer. The latest was dated 10th July 1925, whereby the total amount of tax payable for the relevant year was stated to be £4,171 15s. 8d., an increase of £776 1s. 11d. over the immediately preceding amended assessment of 18th August 1923, when it was stated to be £3,395 13s. 9d., the last-mentioned sum was itself, as is seen, a reduction from the original sum assessed, namely, £5,623 11s. 3d. Therefore, it is said, since the deductions complained of did not impose any fresh liability or increase any existing liability, but reduced a previously existing liability, the Act precluded any objection. It is added that, the original full liability being as a matter of law concluded by the original expiry of thirty days, the Act left it merely to the honest discretion of the Commissioner to make such deductions as he thought lawful and just, and by that the taxpayer is bound. If, however, the latest amendment does in law increase the then existing liability by £776 1s. 11d., then to that extent, and as a mere matter of amount, the objection may be competent.

In my opinion, notwithstanding the words of the fifth admission, there is a fundamental defect in the contention on inspection of the documentary evidence, and on the better construction of facts admitted. Now, the Commissioner relies on secs. 18, 23 and 28 of the Act for the position that there is but one assessment contemplated by the Act for each financial year, that there is a limit of a period of thirty days after service of notice of the assessment, not susceptible of enlargement by the Commissioner, for objections by the taxpayer, that, in respect of alterations or additions to the assessment, only such as have the effect of "imposing any fresh liability, or increasing any existing liability," are "subject to objection." Given, in the first place, an assessment as contemplated by secs. 18 and 23 and a notice of assessment as contemplated by secs. 25, 28 and 33, I should agree with the contention. In that event sec. 25 would make the production of the notice of assessment conclusive evidence of the due making of the assessment, and the legal consequences stated would follow. The cases of *The King* v. *Deputy Federal Commissioner of Taxation* (S.A.); *Ex parte Hooper* (1),

(1) (1926) 37 C.L.R. 368.

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Isaacs J.

and *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (1) are decisive. The two Acts are for present purposes identical, and were so treated in the latter case, with which I entirely agree. It was suggested that there might be a difference where, instead of notifying merely an "alteration or addition," the Commissioner notified a complete "amended assessment." To what I have expressly said in *Hooper's Case* (2) I will add what is there really implicit when the Act is examined. It is this: An "alteration or addition" is not something extraneous to a standing assessment. When an alteration or addition is made the assessment henceforth exists *as altered* or *added to*, and not as previously existing plus independent alteration or addition. The notification required by the proviso to sub-sec. 1 of sec. 23, though of the "alteration or addition," is in effect a notification that the assessment has been amended. This is made quite clear by sec. 32. Sub-sec. 1 makes the tax due and payable thirty days after the service by post of a "notice of assessment"—that is, the original assessment. Sub-sec. 2 says that where an assessment is "amended" (that is, by "alteration or addition") and additional tax is thereby payable, it is due and payable thirty days after service by post of "the notice of *amended assessment*." There is no third case, namely, of service of notice of "alteration or addition" merely. Such a notion is absent from the Act.

It follows that the original thirty days limit applies rigidly to the whole assessment, except so far as the proviso to sub-sec. 1 of sec. 23 extends. And I would observe that that limit has been set by Parliament for public purposes, has been set definitely, without power of extension by the Commissioner, as in the case of "payment" (sec. 33), and does not fall within the class of cases where a right is given to an individual for his private benefit and which he may waive. But all this depends on whether the assessment of 26th April 1919 was an "assessment" contemplated by the Act and whether the notice of that date was a notice intended by the Act. In the first place, the notice itself does not on its face bear out those requirements. It describes the matter as "tentative." The "assessment" and the notice of assessment required by the Act to

(1) (1926) 38 C.L.R. 256.

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

fix the taxpayer with liability for a Crown debt carrying interest and penalties must be definite and certain, or, as it has been described throughout the argument, "definitive," as opposed to "provisional." There is no evidence, or at all events no satisfactory evidence, to displace the self-description in the notice. The facts as admitted and the correspondence taken as a whole confirm the apparently provisional character of the assessment and notice. Since the apparent, that is, the "tentative," character of the departmental operation emanates from the Tax Office, the burden rests on the Commissioner to displace it. The more is this so when it is sought to shut the taxpayer out from establishing, if he can, a right he asserts is given to him by statute.

It was pressed upon us that the fifth paragraph of the admissions of fact had the effect of establishing the legal character of the assessment because of the words "pursuant to sec. 21." Those words, in my opinion, go no further than to indicate that the authority which the Commissioner purported to exercise, so far as he exercised any, was statutory, not that what he did complied in all respects with the requirements of the section. In the same way par. 5 admits that "pursuant to sec. 26" the notice in writing of the assessment was given on 26th April 1919. Mere inspection, as I have stated, shows that it contains the word "tentative"—which clearly shows it was not in compliance with sec. 26. But par. 7 says with reference to the original assessment and the deduction for excess profits duty paid in England, that "the respondent" (that is, the Commissioner) intimated "when making such assessment that this matter remained to be adjusted and that pending such adjustment payment of tax was to remain in abeyance."

If an assessment definitive in character is made, it assumes that, so far as can there be seen, a fixed and certain sum is definitely due, neither more nor less. In short, it ascertains a precise indebtedness of the taxpayer to the Crown. But if an assessment is made which recognizes that one matter is unsettled and remains for settlement, and until it is settled—and probably to the advantage of the taxpayer—then, if that is the basis of the assessment, it is not the assessment contemplated by the Act. Every assessment, of course, contemplates that it may appear thereafter that an alteration or

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addition is necessary. But that is a different thing—there is no then existing matter known to be a presently necessary factor and put aside for future adjustment. Reading the combined evidence as reasonably susceptible of two interpretations, and therefore as raising a fair matter of contest, I adopt the one which seems to me to operate in fact more justly. So reading it, the revenue loses nothing it ought strictly to get, and the taxpayer gets no right to which he is not entitled, and loses nothing which in ordinary circumstances he justly should have. The first point fails.

As to the second, it is unnecessary to consider it; but, if it were necessary, I think it is unsustainable. If "subject to objection," an increased liability may be resisted on any ground whatever not excluded on ordinary principles. The failure by hypothesis to object to the previous charge carried its own penalty—that charge is unchallengeable—but it does not operate as a *res judicata* so as to bind the taxpayer in respect of the further demand. Otherwise, payment of £1 rather than contest it might involve liability to pay £1,000.

On the third point also the appeal, in my opinion, fails. I feel bound to say that the view placed before the Court by Sir *Edward Mitchell*, if I understood it aright, would operate equitably all round, to taxpayer and to all countries concerned. But that supposes it could be worked out by the formula he suggested, and also that every country concerned adopted it. Most of all, so far as the Court is concerned, it supposes the language of the Act permits of its adoption. I am unable to read that last possibility in the enactment. The expression "the profits" in the relevant phrase means the profits of the accounting period, estimated according to the Australian Act, and for this purpose standing exactly as they would stand if the deduction in question had not been provided for. We have, for present purposes, to suppose gross profits on the credit side of the profit and loss account, and then on the liabilities side permitted deductions. Among those permitted deductions, included as a fair item of elimination in order to reach the taxable subject, is whatever sum has been "paid" by way of war-time profit tax elsewhere in respect of the gross profits so taken into account. The expression "the profits" does not mean, as

suggested, the ultimately found "war-time profits," that is ultimately found by the inquiry abroad, but it means the gross profits as found in the Australian process, which, after some foreign legal standard has been applied to them, are subjected to a process of taxation and in respect of which, after that process is completed, a sum has been paid. That is the sum to be deducted under sec. 15 (4) of the Australian Act.

The appeal should be dismissed.

HIGGINS J. The effect of the order of the Chief Justice from which this appeal is made to the Full Court I take to be that the appeal of the Company to the Chief Justice is allowed, so far as the assessment is based on the Commissioner's interpretation of the Act —the *War-time Profits Tax Assessment Act* 1917-1918. The order which is made under sec. 29 not only allows the appeal, but declares that the taxpayer "is entitled to have deducted from the profits of the Australian business for the accounting period" (1st July 1916 to 30th June 1917) "the amount paid by way of excess profits duty" to the British Imperial revenue "in respect of such profits" —that is to say, the profits of the Australian business. But the order expressly reserves all other questions arising under this appeal for further consideration, with liberty to apply. So that it is not for us, but for the Chief Justice, to determine the consequences of our interpretation, the effect of that interpretation on the assessment and the payments (sec. 30 (2)). Therefore I propose to confine myself to the question of interpretation.

Now, subject to certain difficulties, which I propose subsequently to face, arising from the language of the memorandum of the Commissioner in forwarding the taxpayer's objection to the High Court, and assuming that the Chief Justice was not by that memorandum or by the Act precluded from doing justice to both the taxpayer and the Commissioner, I am of opinion that the declaration in the order was perfectly right, and for the reasons stated by the Chief Justice, reasons which I need not amplify. After an elaborate examination of the parties' admissions of fact and the notices, correspondences and dealings generally, in due order of dates. the finding of the Chief Justice is that the dealings between

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the parties had the effect of keeping open all questions relating to the allowance to be made under sec. 15 (4) of the Act. We have had the advantage of following the close and able examination of the facts made by Mr. *Gavan Duffy* on behalf of the Commissioner; but I see no reason for disturbing this finding. On the question of deduction of the British excess profits duty under the British *Finance Act*, the substantial question here, it is expressly stated in par. 7 of the admissions that "the assessment originally and as altered up to 13th January 1922 did not include any deduction for excess profits duty paid in the United Kingdom under sub-sec. 4 of sec. 15 of the said Commonwealth Act, the Commissioner intimating when making such assessment that this *matter remained to be adjusted and that pending such adjustment payment of tax was to remain in abeyance.*" Admissions 8-12 give details of the several alterations in figures; but until the alteration of 18th August 1923 there was nothing to affect the figures by virtue of any payment of any British excess profits duty; and, by the alteration of that date, the words in the form of notice of amended assessment as to the time for objections to that assessment were struck out—showing that the notice was not a definitive notice to the taxpayer, in accordance with the scheme of the Act.

In my opinion, the Commissioner in his so-called assessment as well as in his so-called alterations or amended assessments has adopted a course which is not that permitted by the Act. The Act contemplates an assessment which is definitive, so as to bind the taxpayer subject to the power of the Commissioner to make all such alterations in or additions to any assessment as he thinks necessary (sec. 23). Here, the notice of the original assessment itself (exhibit E), is accompanied by a paper giving details, but headed thus:—Tentative—War-time Profits Tax—Assessment. If the notice is "tentative" merely, how can the taxpayer be expected to lodge an objection within thirty days, or be for ever silent (see sec. 28)? The course which the Commissioner has adopted, that of a "tentative" or experimental assessment or alteration of assessment may be convenient in certain circumstances; but it does not put the taxpayer under an obligation to pay within thirty days after notice of the assessment (secs. 32 and 34), or within thirty days after notice of

the amended assessment. In this case, the taxpayer has made payments in fact. But the Act does not forbid an objection after the thirty days under the circumstances ; for the so-called amended assessment notified on 20th August 1923 was not definitive, inasmuch as the words of the form prescribed intimating that objections may be lodged within thirty days from the notice were struck out by the Commissioner ; so that the first real definitive notice of the mode in which the Commissioner meant to deal with the payments of excess profits duty appears in the notice of 10th July 1925. On this basis, the whole question as to the proper mode of bringing into the accounts their payments for excess profits duty is open to the taxpayer under its objections sent on 20th July 1925.

Owing to an unfortunate defect in the transcript I was much puzzled as to the effect of the memorandum of the Commissioner transmitting to the Court the taxpayer's objection of 20th July 1925. We have now seen the original of that memorandum ; and it appears that the whole of the letter written on 20th July 1925 by the agents for the taxpayer is annexed to the recital of the facts, and is treated as " the said objection " which was transmitted. This letter clearly raises, by way of objection, the whole question as to the Commissioner's interpretation of sec. 15 (4) of the Act ; and, as I have already intimated above, there is nothing in the previous notices or letters to estop or to prevent the taxpayer from taking such an objection. The view of the section which I take is substantially that which has been taken by the Chief Justice—that the deductions mentioned in sec. 15 (4) are in the same category as the deductions mentioned in sec. 15 (3), as well as in sec. 15 (2). Sec. 7 (1) imposes the tax on all war-time profits from the business ; sec. 7 (2) states how the war-time profits in a financial year are to be calculated ; and the amounts of the profits are to be added together, and from the sum so obtained the pre-war standard of profits is to be deducted. The only deductions allowed from the result after deduction of the pre-war standard are certain deductions for small businesses which do not concern us. But the mode of ascertaining the " amounts of the profit " under sec. 7 (2) (*a*) is prescribed by sec. 10—the profits are to be determined on the same principles as for the purpose of Commonwealth income tax,

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subject to Part IV. of the Act; and Part IV. is sec. 15—"Computation of profits." Under sec. 15 (1) the profits shall be taken to be the actual profits arising in the accounting period from sources within Australia; under sec. 15 (2) deductions for wear and tear, &c., shall *not* be allowed for the purposes of the income tax; under sec. 15 (3) deductions shall be allowed for all losses by fire, &c. ((*a*), (*b*), (*c*), (*d*), (*e*)); under sec. 15 (4) "deductions shall not be allowed on account of the liability to pay, or the payment of, war-time profits tax, but a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth." An "excess profits duty" has been imposed in Britain; and it is a tax similar to the Australian war-time profits tax; and the amount paid in respect of the profits—the Australian profits—has to be treated as a deduction on the same level as losses by fire, &c. (sub-sec. 3 (*a*), (*b*), (*c*), (*d*), (*e*)).

If I may sum up the effect of this complicated examination of the relevant provisions, the effect is that the deduction of the sum paid for British excess profits duty has to be made as part of the process of ascertaining the Australian profits under sec. 7 (2) (*c*), and the deduction of the pre-war standard from those profits has to be made subsequently—in order to ascertain the "war-time profits." One can easily conceive of another scheme—probably a better scheme. Perhaps the more logical course would have been to postpone the provision for deduction of the British excess profits duty until the full figures as to the Australian war-time profits tax had been ascertained, to postpone the deduction of the British excess profits duty until the sum payable for Australian war-time profits tax had been settled regardless of the British duty. But in my opinion, such is not the system permitted by the words of sec. 15; for sec. 15 (4) requires us to treat the payments of British excess profits duty as mere deductions from the gross receipts, in the same manner as if they were payments for wages or materials or losses by fire, alterations chargeable to revenue, bad debts written off.

My opinion is, therefore, in favour of the taxpayer on the construction of the Act. But I have still to deal with the question whether the Court is precluded by the Act itself from giving effect

to this opinion. The difficulty arises from the words used in sec. 23, and the decisions in two cases, one under the *Income Tax Assessment Act* and the other—the more recent—under this Act, in which it has been held that there can be no objection entertained by the Court as to such an alteration of an assessment as has the effect of reducing the taxpayer's liability (*Hooper's Case* (1); *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (2)). Here the difference between the taxpayer and the Commissioner is as to the *amount* of reduction of the taxpayer's liability by reason of the British excess profits duty: the Commissioner has allowed a deduction, but the taxpayer says that the deduction is not large enough. The original assessment put the liability to tax at £5,623 11s. 3d.; whereas the last alteration—the alteration to which objection is taken, the amended assessment 10th July 1925—puts the liability at £4,171 15s. 8d. Is it true that the taxpayer has no remedy where the liability is reduced by reason of the payment of excess profits duty abroad, but the Commissioner has allowed (say) £50 only where he ought to have allowed £5,000? If it is true, there is a serious flaw in the Act, a flaw which I should commend to the attention of Parliament. I confess that I should have thought, taking secs. 23, 28 and 32 together, that an appeal is allowed from any amended assessment—whether the amendment be by way of increase—as well as from an original assessment; that the provision for refund of tax overpaid (sec. 23 (2)) does not exclude the general application of sec. 28 to assessments, whether original or as amended; but I am bound by these decisions, which have not been attacked. Probably the difficulty can be met in this particular case by the consideration that the assessment as amended 18th August 1923—the amendment which next preceded the amendment of 10th July 1925—showed £3,395 13s. 9d. as the amount of tax, whereas the amendment of 10th July 1925 shows £4,171 15s. 8d. as the amount. The later notice shows an increase in liability, not a reduction.

If, indeed, it were contended that the logical result of the view that the assessments, original and as amended, are not such definitive documents as the Act contemplated at all, and that therefore there has been no assessment yet to which an objection

(1) (1926) 37 C.L.R. 368. (2) (1926) 38 C.L.R. 256.

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must be lodged within thirty days (sec. 28), I should find it difficult to answer the contention. The result would be that the taxpayer has never yet been under any legal liability for tax for the year in question. But no such contention has been made; and as both parties seem to be willing to treat the document of 26th April 1919 as a valid assessment, and as the construction of sec. 15 (4) must eventually be determined, I see no sufficient reason for refusing to determine it under the circumstances on the basis of the assessment being a real assessment.

STARKE J. This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involves two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by the learned counsel in a few hours. One question is the proper construction of sec. 15 (4) of the *War-time Profits Tax Assessment Act*, providing that in the computation of war-time profits "deductions shall not be allowed on account of the liability to pay, or the payment of, war-time profits tax, but a deduction shall be allowed for any sum which has been paid in respect of the profits on account of any war-time profits tax or similar tax imposed in any country outside the Commonwealth." The Chief Justice declared that the taxpayer was "entitled to have deducted from the profits of the Australian business for the accounting period the amount paid by way of excess profits duty" under the Imperial *Finance Acts* "in respect of such profits," whereas the Commissioner insists that the declaration should be in respect of the taxpayer's war-time profits. It appeared to me somewhat doubtful whether it was possible to ascertain the war-time profits under the Australian Act until deductions had been allowed for excess profits duty imposed under the Imperial *Finance Acts*. Sir *Edward Mitchell* appealed, with triumph, to a calculation by the Commissioner set out in the transcript as a solution of the difficulty, but the Court can rightly, I think, relieve taxpayers of such a calculation, because it is based, in my opinion, upon an erroneous construction of sec.

15 (4). The words " in respect of the profits " in that section refer to the profits of the business directed to be taken into account, in the accounting period, for the purpose of calculating war-time profits : it is the sum paid, in respect of those profits, on account of any war-time profits tax or similar tax, such as excess profits duty, imposed in any country outside the Commonwealth, that is allowed to be deducted.

The other question relates to the proper construction of secs. 23 and 28 of the Act. Under sec. 28, a taxpayer who is dissatisfied with an assessment made by the Commissioner may within thirty days after service of the notice of assessment lodge an objection, and ultimately bring it, if necessary, for determination to a Court of law. Under sec. 23 the Commissioner may make all such alterations and additions to any assessment as he thinks necessary in order to insure its completeness and accuracy, " provided that every alteration and addition which has the effect of imposing any fresh liability, or increasing any existing liability, shall be notified to the taxpayer affected, and, unless made with his consent, shall be subject to objection." In April 1919 the Commissioner made a tentative assessment of the war-time profits payable by the taxpayer, the respondent in the present case, for the financial year 1916-1917, and notified it accordingly, intimating that objection might be lodged not later than 26th May 1917. No deduction for excess profits duty was allowed in this so-called assessment. In September 1919 the Commissioner amended this assessment, increasing the amount of the tax, and so notified the taxpayer, intimating that objection might be lodged not later than 2nd October 1919. No deduction for excess profits duty was allowed in this amendment. In October 1919 the Commissioner again amended his assessment, decreasing the amount of the tax, and so notified the taxpayer, intimating that objection might be lodged not later than 2nd November 1919. Again, no deduction for excess profits was allowed in the amendment. In January 1922 the Commissioner once more amended his assessment, decreasing the amount of the tax, and so notified the taxpayer, but he did not state any time within which objection might be lodged, and he allowed no deduction for excess profits duty. In August 1923 the Commissioner made a still further

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amendment of the assessment, decreasing the amount of the tax, and notified the taxpayer accordingly, but struck out printed words on his notice specifying the time within which objection could be lodged. In this amendment the Commissioner, for the first time in his assessment of the respondent for the financial year 1916-1917, made a deduction for excess profits duty. But he intimated that the assessment might be subject to further revision. The taxpayer objected to the basis adopted for the deduction, and required assurance that the acceptance of a refund of tax would not prejudice its case. The Commissioner gave the required assurance, and intimated that any representations made would receive consideration. In December of 1924 representations were made to the Commissioner on behalf of the taxpayer. In June of 1925 the Commissioner advised that the matter was receiving attention, and that it would "be finalized at an early date." In July of 1925 the Commissioner made a last amendment, increasing the amount of tax, and notified the taxpayer accordingly, intimating that objection to the assessment might be lodged not later than 10th August 1925. On 20th July 1925 the taxpayer lodged his objection, which, on 18th February 1927, was finally disallowed, and, on the request of the taxpayer, was treated as an appeal under the *War-time Profits Tax Assessment Act* and forwarded to this Court for determination.

Now the Commissioner insists that the taxpayer is precluded from relying upon his objection, because the deduction in respect of excess profits duty does not impose upon the taxpayer any fresh liability or increase any existing liability, or, at least, that the objection must be limited to the question whether the amount (£776 1s. 11d.) by which the taxpayer's liability was increased by the assessment of July 1925 is correctly calculated, without any regard to the construction of sec. 15 (4) of the Act, upon which the Commissioner proceeded. The Commissioner has, indeed, a difficult task under the *War-time Profits Tax Assessment Act*, but I cannot think that his attempt to defeat the taxpayer by this argument is either fair or just in the circumstances of this case. The Commissioner has, under sec. 23, the very fullest powers of amendment in order to protect the revenue or to do justice, and the various amendments already mentioned illustrate the extent to which this power has

been exercised. I should have thought that the Commissioner would have welcomed any decision interpreting the provisions of sec. 15 (4), and used his power under sec. 23, in this particular case, to reassess the taxpayer accordingly. Instead, he stands upon the proviso to sec. 23 (1), and seeks to deprive the taxpayer of the benefit of a favourable interpretation of the provisions of sec. 15 (4) of the Act. But the Commissioner fails, in my opinion, because the facts establish that he never made a complete and final assessment—or perhaps I should say any assessment—under the Act, until the so-called amendment of July 1925. Everything else was "tentative" or subject "to further revision" or "remained to be finalized at an early date." Only in July 1925 was a final, or what was called during argument a "definitive," assessment made according to the true meaning and intent of the taxing Acts, of the war-time profits in respect of which the taxpayer was liable to tax. The objection to this assessment was lodged in due time, and opens generally to the taxpayer the question what deduction for excess profits duty should be allowed on it.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Blake & Riggall.*

H. D. W.