[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE FEDERAL COMMISSIONER OF TAXATION; Ex Parte SIR KELSO KING.

H. C. of A. 1930.

MELBOURNE, *June* 3, 4.

SYDNEY, *Aug.* 11.

Gavan Duffy, Rich, Starke and Dixon JJ.

Income Tax (Cth.)—Rebate—Tax payable more than three years prior to claim for rebate—Time for claiming rebate—No time limited—No alteration of assessment involved—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *secs.* 18*, 37 (2)*.

The allowance of a rebate of income tax under sec. 18 of the *Income Tax Assessment Act* 1922-1928 does not involve an "alteration in an assessment" under sec. 37 (2) of that Act, and consequently the proviso to sec. 37 (2) does not impose a time bar to the taxpayer's application for relief under sec. 18; therefore an application for a rebate under sec. 18 need not be made within three years from the date when the tax payable on the assessment was originally due and payable.

RULE NISI for mandamus.

This was a rule nisi for a mandamus to the Commissioner of Taxation obtained by the prosecutor, Sir Kelso King, as attorney

* Sec. 18 of the *Income Tax Assessment Act* 1922-1928 provides:—"18 (1) Any person who has an amount of income which is liable to income tax for any year of assessment—(*a*) under this Act and in the United Kingdom, or (*b*) under this Act and in the United Kingdom and in a State of the Commonwealth of Australia, and who satisfies the Commissioner as to (*c*) the amount of the income which is so liable; and (*d*) the amounts of taxes to which the income is so liable, together with the rate or rates of those taxes, shall be entitled to a rebate of tax upon that amount of income at a rate which shall be ascertained as follows:—" [Then follow the method of computing the rate, a definition clause, and an evidentiary provision]. Sec. 37 (2) provides:—"When any alteration in an assessment has the effect of reducing the taxpayer's liability the Commissioner may refund the taxpayer any tax overpaid: Provided that where the alteration in the assessment is due to an application by the taxpayer no refund shall be given if the application has not been made within three years after the tax was originally due and payable."

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

under power for Jane Hall, an absentee taxpayer, who had an amount of income derived from sources in Australia during the year ended 30th June 1924 which was liable to income tax for the year of assessment ended 30th June 1925 (1) under the *Income Tax Assessment Act* 1922-1925, (2) in the United Kingdom, and (3) in two States of the Commonwealth. Through her attorney she furnished to the Commissioner information or proof of the amount of income which was so liable, and of the amount of taxes to which the income was so liable together with the rate or rates of those taxes, and she claimed to be entitled under sec. 18 of the *Income Tax Assessment Act* 1922-1925 to a rebate of tax upon that amount of income at a rate ascertained in the manner prescribed by that section. The Commissioner refused the claim upon the ground that the taxpayer's application for the rebate was not made within three years from the date when the tax payable on the assessment was originally due and payable, and relied upon the proviso to sub-sec. 2 of sec. 37. It appeared that more than three years and sixty days before she claimed the rebate, an assessment for the financial year ended 30th June 1925 had been made and a notice thereof had been sent to the taxpayer directed to the care of her attorney; and it was apparently taken for granted that sixty days after service of a notice of assessment upon the prosecutor the tax under sec. 54 (1) became due and payable within the meaning of the proviso to sec. 37 (2). Had the claim for the rebate been made within three years from the date when the tax was payable, it was not disputed that the taxpayer would have been entitled to the rebate. The Commissioner having refused to allow the rebate, *Rich* J. granted a rule nisi for a mandamus directing him to allow it.

The rule nisi now came on for argument before the Full Court of the High Court.

Ham K.C. (with him *Russell Martin*), for the prosecutor. Sec. 37 (2) of the *Income Tax Assessment Act* 1922-1925 refers only to an alteration in an assessment which has the effect of reducing the taxpayer's liability, and it is only to such an alteration of an assessment that the limitation of three years in the proviso applies. The

claim for a rebate under sec. 18, which is made in this case, does not involve an alteration of the assessment under sec. 37. Sec. 18 presupposes assessments in England and in Australia, and provides for a rebate of tax being allowed after a comparison of the tax assessed in the different countries. "Assessment" as used in secs. 35 and 37 of the Act means "ascertainment of the taxable income." The Commissioner was wrong in refusing to consider the application for a rebate, merely on the ground that it was made more than three years after the tax was due and payable, and if the Court was satisfied that the Commissioner was wrong in refusing to consider the matter a writ of mandamus should issue.

Robert Menzies K.C. (with him *Herring*), for the Commissioner of Taxation. The rebate provided for under sec. 18 could be made effective only by a deduction being made and appearing in the assessment or by a subsequent alteration of the assessment, so that in either view the rebate will appear as a constituent element in the assessment on which the taxpayer is ultimately liable. Assessment in sec. 37 means the determination of the tax to be paid. The assessment is the instrument by which the tax to be paid is determined and determines the amount of tax to be paid. In granting a rebate under sec. 18 (2) (*a*) the Commissioner would make the alteration in the assessment under sec. 37 (*The King* v. *Deputy Federal Commissioner of Taxation* (*S.A.*); *Ex parte Hooper* (1); *Federal Commissioner of Taxation* v. *Australian Boot Factory Ltd.* (2)). Though sec. 18 says that the taxpayer shall be entitled to a rebate, this only means that he shall be entitled if he enforces the machinery of the Act. If the Commissioner did alter the assessment he should refuse to make any rebate owing to the claim being beyond the three years allowed by the Act, and the Court should not issue a writ of mandamus to order an amendment if it would not secure a refund. If the application had been made within the three years from the date when the tax was payable, the Commissioner had power to amend and could have been compelled to do so. In *Ex parte Hooper* the taxpayer's claim was capable of being dealt with

(1) (1926) 37 C.L.R. 368, at p. 373. (2) (1926) 38 C.L.R. 391.

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

by way of objection and, if necessary, by way of appeal, and is therefore distinguishable from the present case.

Ham K.C., in reply. A rebate under sec. 18 does not require a refund under sec. 37. The taxable income cannot be arrived at until all the deductions allowed by the Act have been made. A rebate is not a deduction contemplated by the Act. There is no provision in the Act enabling a rebate to be recovered except the provision giving the right to get a rebate (*Ex parte Carpathia Tin Mining Co.* (1); *Kensington Income Tax Commissioners* v. *Aramayo* (2)). The word "assessment" in sec. 37 has the same meaning as in secs. 35 and 36. It includes everything on the piece of paper commonly referred to as an "assessment." Sec. 18 draws a distinction between a liability under the Act and under English and State legislation, and the gist of the argument is that the assessment is only an assessment of the liability under this Act. Sec. 37 has no application to rebates which do not require or are not affected by alterations of the assessment.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered:—

GAVAN DUFFY AND STARKE JJ. This is a rule nisi for a mandamus to the Commissioner of Taxation. Jane Hall is a taxpayer, and claimed, through her attorney, Sir Kelso King, a rebate of income tax pursuant to the provisions of sec. 18 of the *Income Tax Assessment Act* 1922-1928. The provisions of sec. 18 confer, undoubtedly, a right upon a taxpayer to a rebate in certain conditions. And it was conceded at the Bar that the present case fell within those conditions, though the Commissioner contended that certain provisions of the Act precluded the taxpayer's claim. It is the Commissioner's duty under the Act to cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied (sec. 35), and any person dissatisfied with an assessment may lodge an objection with the Commissioner. If his objection be disallowed he may appeal (secs. 41-53). The rebate was not allowed in the assessment and the taxpayer lodged

(1) (1924) 35 C.L.R. 552.

(2) (1916) 1 A.C. 215, at pp. 227, 229.

no objection. Again, under sec. 37 of the Act the Commissioner may make such alterations in, or additions to, any assessment as he thinks necessary to insure its completeness and accuracy, and when any alteration in the assessment has the effect of reducing the taxpayer's liability the Commissioner may refund the taxpayer any tax overpaid. Provided that where the alteration in the assessment is due to an application by the taxpayer, no refund shall be given if the application has not been made within three years after the tax was originally due and payable. The provisions of sec. 37 enable and permit the Commissioner to make alterations in or additions to the assessments, but they do not impose upon him any duty so to do. Sometimes, we suppose, the powers given by the section are used for the benefit of taxpayers; but more frequently, we should think, for increasing their liability. Be this as it may, the powers and authorities conferred by sec. 37 in no wise diminish or cut down the right to a rebate conferred by sec. 18. At best they give a sort of discretionary indulgence to the Commissioner, so far as the taxpayer is concerned, if the taxpayer has not otherwise exerted his right in proper form and at a proper time. So we are driven back upon a consideration of the question whether the taxpayer must have his right to a rebate allowed in the assessment originally, or by means of objection, or appeal, or else lose that right. Clear words or a necessary implication are necessary to cut down the right given by sec. 18. To provide, as does the Act, that a taxpayer shall be entitled to a rebate of tax, that is, a repayment of tax or a deduction from a sum of money to be paid as tax, suggests that the tax has already been assessed and ascertained. But the provisions of sec. 18 render any other view almost unintelligible and practically impossible. The rebate of tax to which the taxpayer is entitled depends upon a comparison of the Commonwealth, State and British rates of tax. The Commonwealth rate means the rate ascertained by dividing the *total amount of income tax paid or payable* for the year by the taxpayer (before the deduction of rebate granted under this section) by the amount of the total taxable income in respect of which tax paid or payable under this Act has been charged for that year. An assessment must be made or the calculation is impossible. Rebate is not a

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

deduction from assessable income but from the tax ascertained, paid or payable after taxable income has been ascertained and assessed. Consequently, in our opinion, the rule should be absolute for the issue of a writ of mandamus to the Commissioner requiring him to consider and determine according to law the taxpayer's claim for a rebate.

Rich J.

RICH J. This case is of great importance and probably governs a large number of cases where persons are fortunate or unfortunate enough to be possessed of income subject to English and Australian income tax. The Australian *Income Tax Assessment Act* is a thing of shreds and patches, and resembles a kind of statutory Joseph's coat. From time to time patches of many hues have been made to stop or mend leaks and holes and to meet the decisions of this Court. And frequently these patches do not fit or harmonize with the main garment of the Act. In this connection I respectfully adopt the language of Lord *Wrenbury* in *Kensington Income Tax Commissioners* v. *Aramayo* (1), which aptly describes the condition of the Australian Act. His Lordship says :—" My Lords, this case affords a striking illustration of the involved and almost unintelligible expression of the law contained in the statutes relating to income tax. It is difficult to reconcile one section with another. The same word is used here in one sense and there in another. There is no sequence or orderly arrangement of matter. Your Lordships will, I hope, agree with me in thinking that a taxing statute, particularly one upon which taxation to so large an amount is now collected, ought to be expressed in plain language, free from the defects to which I have pointed, and that the matter demands, as soon as opportunity offers, the early attention of the Legislature." A careful codification of the Act by a draftsman accustomed to legal ideas, and acquainted with the fundamental conceptions upon which the taxation of income has proceeded for a century in Great Britain, might at least give the taxpayer or his advisers relief from crossword puzzles and the mere interpretation of a lawful but disorderly assembly of words. In my opinion the difficulty in this case, such as it is, arises altogether from a mistaken desire to force the provisions of sec. 18

(1) (1916) 1 A.C., at p. 225.

into a place in the procedure laid down for assessment which that section in its plain terms is incapable of occupying and was never intended to take. Sec. 18 was not introduced into the Australian Act until 1921 (No. 31 of 1921, sec. 5) whereas the time limit proviso had been added to sec. 37 three years previously by sec. 24 of the 1918 Act. It can scarcely be suggested that by some legislative prophecy the prescription of time is attributable to the rebate section. There is nothing upon the face of sec. 18 which either indicates or implies an intention to incorporate sec. 37. It is said that the machinery of assessment must be resorted to for the purpose of ascertaining the amount of tax payable after the rebate is allowed. This appears to me to be a gratuitous assumption warranted by nothing contained in the section. On the contrary, the formula prescribed for determining the rebate in terms refers to the case of the tax having already been paid, which plainly means that the assessment must have been made and notified. The correct ascertainment of the rebate in such a case presupposes a complete and accurate assessment. The suggestion that because afterwards a rebate becomes payable under sec. 18 the assessment becomes incomplete and inaccurate so that the Commissioner may alter it by including the rebate appears to me to have nothing but ingenuity to recommend it. It imputes to the Legislature the unworthy intention of conferring in terms sounding fair to the taxpayer's ear a right to a rebate which upon examination turns out to be no more than a right to solicit the favourable exercise of the Commissioner's discretion. Sec. 18 of the Act is an attempt to carry out the reciprocal arrangement entered into between England and the Dominions where income taxes are imposed by the respective countries resulting in double taxation. If the contention of the Commissioner is right the attempt is a failure and the relief illusory —a delusion and a snare. No time is limited for giving notice of a claim for relief under the English Act, and, if the claim is not established before the first of January in the given year of assessment, relief is granted by way of repayment of the tax (10 & 11 Geo. V. c. 18, sec. 27 (2)). Moreover, it is difficult to suppose that the Legislature thought it desirable that a limit of time to relief should be imposed where the distance between the two countries is so great

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

Rich J.

and the means of communication difficult and tedious. The process of assessment is long drawn out and necessitates inquiries which can only be satisfied by an interchange of precise information. I see no reason for declining to give to sec. 18 the simple meaning which its words express, namely, that the taxpayer shall be entitled to a rebate of tax in the stated conditions. This seems to me to mean an allowance of the tax to which he is assessed. There is nothing about time or discretion to be found in the section, and neither time bars nor discretionary qualifications need be or, without violence to settled principles of construction, can be imported from other parts of the Act. For these reasons the rule nisi should be made absolute with costs. The mandamus should direct the Commissioner to consider and determine the prosecutor's application for the rebate.

DIXON J. An absentee taxpayer had an amount of income derived from sources in Australia during the year ended 30th June 1924 which was liable to income tax for the year of assessment ended 30th June 1925, (i.) under the *Income Tax Assessment Act* 1922-1925, (ii.) in the United Kingdom, and (iii.) in two States of the Commonwealth. Through her attorney, she furnished to the Commissioner of Taxation information or proof of the amount of income which was so liable, and of the amount of taxes to which the income was so liable together with the rate or rates of those taxes, and she claimed to be entitled under sec. 18 to a rebate of tax upon that amount of income at a rate ascertained in the manner prescribed by that section. The Commissioner refused the claim upon the ground that the taxpayer's application for the rebate was not made within three years from the date when the tax payable on the assessment was originally due and payable, and referred the taxpayer to the proviso to sub-sec. 2 of sec. 37. It appears that, more than three years and sixty days before she claimed the rebate, an assessment for the financial year ended 30th June 1925 had been made and a notice thereof had been sent to the taxpayer directed to the care of her attorney. It seems to have been taken for granted that sixty days after service of a notice of assessment upon the attorney the tax under sec. 54 (1) became due and payable

within the meaning of the proviso to sec. 37 (2). The questions were not discussed whether the attorney was notified of the assessment as under sec. 89 and, if so, whether, having regard to secs. 40, 54 (1) and 57, such a notification set time running against the taxpayer under sec. 37, and, if on the other hand notification was not sent to the attorney as under sec. 89, whether it was "given to the person liable to pay the . . . tax" within sec. 40 (1) and "served by post" within sec. 54 (1) as affected by sec. 29 of the *Acts Interpretation Act* 1901. These questions, however, do not arise unless the limitation of time prescribed by sec. 37 applies to the right of a taxpayer to a rebate under sec. 18, and I am clearly of opinion that it does not so apply. The limitation of time relates only to alterations in or additions to assessments made under sub-sec. 1 of sec. 37. This sub-section says that the Commissioner may at any time cause to be made all such alterations in or additions to any assessment as he thinks necessary to ensure its completeness and accuracy.

The nature of this provision has been explained in *Ex parte Carpathia Tin Mining Co.* (1); *Ex parte Hooper* (2); *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (3); and the *Federal Commissioner of Taxation* v. *S. Hoffnung & Co.* (4). In the last case the present Chief Justice said (5):—"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 question, therefore, really is whether the rebate under sec. 18 is an allowance to the taxpayer in his assessment, i.e., a deduction which ought to be made in assessing him, or on the other hand is a rebate of the tax for which he would be liable upon the assessment.

The first view may be expressed by saying that sec. 18 (1) must be understood as if it said that the taxpayer "shall be entitled *in his assessment* to a rebate of tax." The second view may be expressed by saying that sec. 18 (1) must be understood as if it said that the taxpayer "shall be entitled to a rebate of the tax *paid or payable*

(1) (1924) 35 C.L.R. 552.
(2) (1926) 37 C.L.R. 368.
(3) (1927) 38 C.L.R. 256.
(4) (1928) 42 C.L.R. 39.
(5) (1928) 42 C.L.R., at p. 54.

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

Dixon J.

upon his assessment." The sub-section goes on to provide that the rebate shall be at a rate ascertained by reference to the "Commonwealth rate" and this expression is defined by sub-sec. 2 (*a*) to mean: "the rate ascertained by dividing the total amount of income tax paid or payable for the year by the taxpayer (before the deduction of rebate granted under this section) by the amount of the total taxable income in respect of which the tax paid or payable under this Act has been charged for that year;" The result of this definition is that the rebate to be allowed is ascertained by reference to (i.) the amount of income tax paid or payable for the year by the taxpayer; (ii.) the amount of total taxable income in respect of which the tax paid or payable has been charged for that year. This clearly contemplates the ascertainment of the rebate (i.) either after or before the income tax has been paid from which it is to be allowed; (ii.) after the total taxable income is known in respect of which the tax paid or payable under the Act has been charged for the year, and (iii.) after the tax has been "charged." Every one of these three events appears to me to require the previous making of the assessment. Of the first there can be no doubt. Income tax is paid, not before but after assessment. Thus, by giving the rebate before or after payment of the tax, the provision, at least in one alternative, necessarily allows it from the tax already assessed. This consideration alone establishes that the rebate need not be made in the assessment. But a consideration of the second of the three conditions set out goes far to show that the rebate cannot be made in the assessment. For in practice the amount of taxable income can never be known until it is assessed although in legal theory it may be open to a taxpayer to foretell the figure to be assessed if his assessable income and his claims for deductions include no discretionary elements. But even in legal theory it is not possible for the taxpayer to know in advance the amount of his taxable income when it is affected by the exercise of a discretion in the Commissioner as it very often is. The extent to which the amount of the taxable income depends upon the judgment or discretion of the Commissioner is illustrated by secs. 16C, 17, 21, 23 (1) (*e*), 23 (1) (*h*) (ii.), 23 (1) (*j*), 23 (1) (*n*), 23 (1) (*p*), 23 (1A), 23 (1B), 25 (*g*), 25 (*i*), 27 and 28.

The nature of the third of the three conditions set out is more doubtful. The phrase "amount of the total taxable income in respect of which the tax paid or payable under this Act has been charged for that year" contains an ambiguous expression. The word "charged" may mean imposed by the taxing Act or levied by the Commissioner. But the use of the word in the succeeding phrase seems to show that it has the latter meaning. The reference to "tax charged on an amount other than the ascertained amount of actual profits" appears to relate to cases in which the Commissioner has exercised his power under sec. 36 of making a default assessment of the amount upon which, in his judgment, tax ought to be levied, or his power under sec. 27 or 28 of fixing an arbitrary figure in lieu of income in the circumstances dealt with by those sections. In such cases, it is the Commissioner by whom the tax is "charged on an amount other than the ascertained amount of actual profits." Further the expression "tax charged in respect of the amount of the total taxable income" seems more appropriate to the Commissioner's levy than the legislative imposition. If this be the correct interpretation of the phrase, it cannot be said before assessment that "tax has been charged in respect of total taxable income."

If, therefore, an interpretation of sec. 18 were adopted which made it grant, not a rebate from the tax payable under the assessment, but a rebate allowable only in the assessment, it would be necessary to suppose that the Legislature entertained the contradictory intention that a rebate should be ascertained after assessment in order to be allowed in the assessment. To resolve this plain inconsistency it was contended that the enactment meant that an assessment should be made and that if and when afterwards the rate was ascertained at which a rebate should be allowed the assessment should be altered. This contention requires the supposition that the Legislature meant that an assessment should be made, and then used for the purpose of ascertaining a rebate which thereupon should be included in that assessment by way of amendment, the tax in the meantime remaining payable or being paid. There is nothing in sec. 18 to hint at such an intention, and the only reasons assigned in support of it appear to me to rest upon an a priori view of the manner in which a taxpayer's liability should be evidenced and in

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

Dixon J.

which refunds should be made founded upon inference from sections framed before the introduction into the legislation of the special provisions now standing as sec. 18.

If it were a correct generalization from these sections that an assessment was intended to disclose the precise liability of the taxpayer in respect of tax, I should, nevertheless, think it difficult to find in it an answer to the question whether sec. 18 meant to give the taxpayer a rebate from the liability thus disclosed, or a reduction in the process of assessment. But the generalization is by no means perfect. The liability of a company to further tax under sec. 21 of the Act of 1922 was independent of the assessment and, under the amendments of 1928, a second assessment is necessary. Probably additional tax under sec. 67 is not the subject of assessment. And like payment and set-off the reduction of liability under sec. 31 (3), proviso, would not appear in the assessment. Moreover, the use of the power to make alterations in or additions to an assessment as a means of deducting from the tax correctly assessed a rebate depending upon extraneous and subsequent events seems at variance with the explanation of the provision given in *Ex parte Hooper* (1) and the other cases already cited.

But be that as it may, the contention should fail because it imputes still another inconsistency to the Legislature. Sec. 37 (1) appears plainly to be enabling and permissive, yet sec. 18 plainly says that the taxpayer shall be entitled to the rebate, and that it shall be ascertained by a definite calculation. Thus, if sec. 18 meant that the rebate was to be allowed in the assessment and not deducted from the tax imposed by reason of the assessment, then in one of the alternatives to which the section expressly refers, the taxpayer could only obtain it when and if the Commissioner considered that he should exert in favour of the taxpayer the power to cause to be made all such alterations in or additions to the assessment as he thinks necessary in order to ensure its completeness and accuracy. A taxpayer left in this situation would regard the statement that he was " entitled to a rebate " as a misuse of language.

Further, if it were intended that the rebate should be allowable only in the assessment, original or as amended, then in the event of

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

the Commissioner failing to grant it or the whole of it, whether because he was not satisfied of the two factors set out in pars. (*c*) and (*d*) of sec. 18 (1) or because he differed from the taxpayer in the method of calculation or otherwise, the taxpayer would be entitled to take the matter to the Board of Review under sec. 50 and sec. 44 if the question arose in the original assessment, but he would not be able to do so if it arose after the original assessment and fell to be dealt with by "alteration" under sec. 37. It is needless to say that no such anomaly was intended.

The truth is that sec. 18 like the proviso to sec. 31 (3) deals with a rebate from tax the liability for which is established by an assessment and not with a deduction to be made in assessing. When sec. 18 (2) (*a*) speaks of "income tax paid or payable for the year by the taxpayer" it means paid or payable as a result of an assessment. In fact, for once, the simple application of a statutory definition gives the true meaning. For, by sec. 4, "income tax" means "income tax imposed as such by any Act as assessed under this Act." If the words of sec. 18 (2) (*a*) were read in accordance with this definition "income tax . . . as assessed under this Act paid or payable for the year by the taxpayer," there would be little room for controversy.

This conclusion, which is required by the considerations stated, has the additional advantage of assigning to the section a meaning which makes its operation practicable in relation to sec. 21, not only in the present form of sec. 21, but also in the form it took when in 1922 it was enacted with sec. 18, and in relation to sec. 28, and in other cases where the amount of taxable income can be known only after assessment. It also avoids imposing a time limit which revenue practice here and in Great Britain appears to make quite unreasonable and which would involve a grave departure from the scheme disclosed in the *Finance Act* 1920, sec. 27, a departure very undesirable in statutes giving effect to an arrangement between Governments.

It follows from what has been said that sec. 37 does not impose a time bar to the taxpayer's application for a rebate under sec. 18, and that the Commissioner has refused to entertain it upon a ground erroneous in law. His counsel said that there was no doubt about

H. C. OF A. 1930.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE KING.

the two conditions specified in sec. 18 (1) (*c*) and (*d*) of which the Commissioner has to be satisfied, but, as the Commissioner has not himself expressed his satisfaction, the mandamus should take the modified form of commanding him to determine the taxpayer's application for a rebate according to law. The order nisi should be made absolute with costs.

Rule nisi absolute with costs. Order that a writ of mandamus issue directed to the Commissioner to consider and determine according to law the taxpayer's application for a rebate under sec. 18 *of the Income Tax Assessment Act* 1922-1928.

Solicitors for the taxpayer, *Blake & Riggall.*

Solicitor for the Commissioner of Taxation, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.