


[HIGH COURT OF AUSTRALIA.]

PENROSE APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

<i>Income Tax (Cth.)—Assessment—Income omitted from return—“Additional tax”—</i>	H. C. OF A.
<i>How calculated—Income Tax Assessment Act 1922-1928 (No. 37 of 1922—</i>	1931.
<i>No. 46 of 1928), sec. 67.</i>	
In sec. 67 (1) of the <i>Income Tax Assessment Act 1922-1928</i> it is provided that	SYDNEY,
“any person who . . . (b) fails to include any assessable income in any	April 28;
return . . . shall be liable to pay by way of additional tax the amount	July 30.
of one pound or double the amount of the difference between the tax properly	Starke J.
payable and the tax assessed upon the basis of the return lodged, whichever	
is the greater.”	

Held, that sec. 67 of the *Income Tax Assessment Act 1922-1928* contemplates and predicates a tax assessed upon a taxpayer's return which is less than the amount properly payable, and does not authorize the calculation of the additional tax on the difference between the return as lodged and adjusted by the Commissioner and the return of income made by the taxpayer.

APPEAL from the Federal Commissioner of Taxation.

In the return furnished by William Gould Penrose of income derived by him from all sources during the financial year ended 30th June 1928, he showed a gross income from personal exertion of £453, which by relevant deductions he claimed to reduce to £204, and a gross income from property of £1,204, reduced to £493 by relevant deductions; and from the total of these two net amounts he further deducted £428 (being insurance premiums paid £17, allowance for children £100, medical expenses £54, and dividends from companies £257), leaving £269 as the net amount of his income during the period under review. The assessment notice received

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by him from the Commissioner of Taxation, however, showed his taxable income for the year in question as being £1,202 from personal exertion and £645 from property, the tax payable thereon, after making a rebate in respect of income derived from certain shares, being £113 3s. 8d.; to which amount "additional tax" in the sum of £220 18s. 4d. was added under sec. 67 of the *Income Tax Assessment Act* 1922-1928, in respect of three items of income totalling £1,143 which the Commissioner contended belonged to Penrose and not to his wife. In response to an inquiry by the taxpayer the Commissioner of Taxation stated that the additional tax imposed for omitted income represented double the difference between the tax as assessed and the amount which would have been payable by accepting the figures returned by Penrose. In order to ascertain the amount which, according to the Commissioner, would have been payable, the Commissioner accepted the figures supplied by Penrose as to his gross income, but only allowed deductions to the extent of £123 in respect of income from personal exertion, and £882 in respect of other deductions claimed. The taxable income so found, after allowing statutory exemptions to the extent of £186, was £330 and £136 respectively, the average yearly taxable income for the five year period ended 30th June 1928 being £550, and according to the Commissioner the amount of tax that would have been payable thereon, after deducting a rebate of tax under sec. 16 (b) (iii.) of the Act, was £2 14s. 6d. The taxpayer objected to the inclusion in his return by the Commissioner of the three items referred to above on the ground that the money involved belonged to his wife by virtue of a settlement made by him, bona fide and absolutely, in her favour in 1925, but such objection is not material to this report except that the Commissioner's contention was upheld on appeal by *Starke J.* Penrose also objected to the additional tax on omitted income on the ground that no assessable income had been omitted by him from his original return and, conversely, that if the disputed items were on appeal held to be his income, then particulars of same were not omitted from his return, but, at worst, were lodged late as documentary and other evidence relating to such items was in the possession of the Commissioner's officers a few months after the lodgment of his return and many months prior

to the issuing of the assessment notice. He objected further that the penalty charged was excessive, resulting from an error in calculation. The objections having been disallowed by the Commissioner, they were, at the request of Penrose, treated as an appeal and forwarded for hearing to the High Court.

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E. M. Mitchell K.C. (with him *Bowie Wilson*), for the appellant.

Jordan K.C. (with him *E. F. McDonald*), for the respondent.

Cur. adv. vult.

STARKE J. read the following judgment :—

July 30.

This is an appeal against an assessment to income tax for the year 1928-1929. [After dealing with other matters not material to this report the judgment proceeded :—] The last item to which objection was taken is—Additional tax on omitted income £220 18s. 4d. This question depends upon the provisions of sec. 67 of the *Income Tax Assessment Act* 1922-1928, which, so far as material are as follows :—“ Any person who . . . (b) fails to include any assessable income in any return . . . if a taxpayer to whom paragraph (b) . . . of this sub-section applies, shall be liable to pay by way of additional tax the amount of one pound or double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged, whichever is the greater.” Under sec. 35 the Commissioner causes assessments to be made for the purpose of ascertaining the taxable income upon which income tax is levied, but I think secs. 32 (2), 39, 40, 54, 57, 62 (3A), (3D) and 67 show that ascertaining the rate and amount of tax is a function within the duty of assessment. If that were not the case, then, I suppose, no appeal would lie to this Court against the amount of tax calculated by the Commissioner, for sec. 50 is limited to objections against assessments; on that view, the rate of tax would be regarded as imposed by the Act, and the calculations of the amount would be matter of proof in proceedings taken to recover the tax based upon the assessment of taxable income made by the Commissioner. But in the view I take, the propriety of the

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charge of additional tax upon omitted income falls for decision in this appeal. Now sec. 67 predicates, to my mind, a tax assessed upon the basis of the return lodged. The Commissioner did not assess a tax upon the return lodged, or, in my opinion, upon the basis of that return, but brought into his assessment the items which he alleged the taxpayer had improperly omitted, and thus ascertained the amount of the tax properly payable by the taxpayer in accordance with the provisions of the *Income Tax Assessment Act*. The additional tax was calculated on the difference between the return as lodged and adjusted by the Commissioner and the return of income made by the taxpayer. The provisions of sec. 67 do not, in my opinion, warrant any such proceeding: they contemplate and predicate a tax assessed upon a taxpayer's return which is less than the amount properly payable. No such assessment was ever made. A suggestion was made during argument that the additional tax is calculated on a basis unfair to the taxpayer, and the officer of the Commissioner certainly said that if the average of the existing assessments were taken, the result would be favourable to the taxpayer. But it is unnecessary, on the construction of sec. 67 which I have adopted, to consider or express any opinion upon this aspect of the case.

The result is that the appeal will be allowed as to the additional tax £220 18s. 4d., and otherwise dismissed. The total amount of tax payable is reduced to £113 3s. 8d.

The parties will abide their own costs of appeal.

Appeal allowed on this point; otherwise dismissed.

Each party to abide his own costs.

Solicitors for the appellant, *Faithfull, Maddock & Oakes*.

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

J. B.