[HIGH COURT OF AUSTRALIA.]

RUHAMAH PROPERTY COMPANY LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932.

SYDNEY, *Aug.* 10, 18.

Gavan Duffy C.J., Rich, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessable income—State tax wrongly assessed but paid—Appeal pending—Tax deducted by Commissioner from assessable income—No taxable income—Notice of assessment not issued—State tax subsequently refunded—To what extent amount of refund "income"—"Personally liable"—"Assessment"—Income Tax Assessment Act 1922-1930 (*No.* 37 *of* 1922—*No.* 50 *of* 1930), *sec.* 23 (1) (*b*)*—*Income Tax Act* 1924-1930 (15 *Geo. V., No.* 34—21 *Geo. V., No.* 40) (*Q.*), *sec.* 46.

No liability is incurred by a taxpayer under the proviso to par. (*b*) of sec. 23 (1) of the *Income Tax Assessment Act* 1922-1930, unless the refund is of a payment in respect of which the benefit of the main enactment of the paragraph has already been obtained by the taxpayer.

The mere fact that a taxpayer does not seek a deduction under par. (*b*) of sec. 23 (1) of the *Income Tax Assessment Act* does not relieve the Commissioner of the duty of taking into account a deductible item of which he is aware; and where, by the application in the Commissioner's office of the main enactment of the paragraph, a taxpayer is considered to possess no taxable income for a certain year, and no notice of assessment is issued to him, the proviso to the paragraph applies to a subsequent refund of the item taken into account; but, if the amount of the refund is greater than the amount which it was

* Sec. 23 (1) (*b*) of the *Income Tax Assessment Act* 1922-1930 provides that "in calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis, and from it there shall be deducted . . . (*b*) all rates, State and Federal land taxes, and State income tax . . . for which the taxpayer is personally liable and which are annually assessed and are paid in Australia by the taxpayer in the year in which the income was derived: Provided that, when a taxpayer receives a refund of the whole or any part of the rates or taxes mentioned in this paragraph, the amount of the refund shall be brought into account as income in the year in which the refund is received."

necessary to take into account in arriving at the conclusion that the taxpayer had no taxable income, the application of the proviso is confined to the amount necessarily taken into account.

By sec. 46 of the *Income Tax Act* 1924-1930 (Q.), a taxpayer is bound to pay the amount of tax in which he is assessed notwithstanding that proceedings by way of objection and appeal against the assessment are pending.

Held, that upon the making of the assessment, even though in point of law excessive, the amount assessed was an amount of tax for which the taxpayer was personally liable within the meaning of sec. 23 (1) (*b*) of the *Income Tax Assessment Act* 1922-1930.

APPEAL from the Board of Review.

The appellant, the Ruhamah Property Co. Ltd., lodged with the Federal Commissioner of Taxation an objection against its assessment for income tax for the year beginning 1st July 1930—being in respect of the Company's financial year ended 31st December 1929—on the ground that an item of £4,244 18s. 6d., which was shown as taxable income, was neither in fact nor in law a refund of income tax but was merely the repayment during the accounting year of an amount wrongly levied in a State assessment made in 1927, such repayment being in pursuance of the decision in *Ruhamah Property Co.* v. *Federal Commissioner of Taxation* in 1928 (1). The objection was disallowed by the Commissioner, who gave as his reason therefor that, in accordance with the proviso to sec. 23 (1) (*b*) of the *Income Tax Assessment Act* 1922-1930, the amount in question had been correctly brought into account as income of the appellant in the year ended 31st December 1929.

The Board of Review having confirmed the assessment, the Company appealed to the High Court.

The appeal came on for hearing before *Rich* J. and was referred to the Full Court.

The facts are fully stated in the judgment hereunder.

Barton, for the appellant. No notice of assessment for the year ended 30th June 1929 was received by the Company. The intention of the Legislature was that the proviso to sec. 23 (1) (*b*) of the *Income Tax Assessment Act* 1922-1930 should be applied in such a way as to benefit the taxpayer. The interpretation placed upon it by the

(1) (1928) 41 C.L.R. 148.

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Commissioner has the opposite effect. Either the proviso does not apply to such a set of facts as is present in this case, or else its operation must be limited by way of confining the Commissioner's right to bring in as income only such amount as the taxpayer has had the benefit of by way of deduction (*R.* v. *Dibdin* (1)). The Commissioner was not entitled to bring in any part of the £4,244 as income under the proviso. A mere refund of tax is not income. The proviso only applies where the deduction made is under the first part of par. (*b*), and such first part applies only to income tax for which the taxpayer is personally liable. Although the taxpayer was compelled, by statute, to pay, as tax, the amount in question because it was shown in its assessment, such assessment was wrong in law; therefore the £4,244 was not, and never was, income tax for which the taxpayer was "personally liable." Alternatively, the Commissioner cannot force upon a taxpayer a deduction which he does not claim, if the deduction affects his taxable income as here. The Commission's action is not authorized by the Act.

Hooton, for the respondent. The proviso to sec. 23 (1) (*b*) does not in terms state that in order that a refund shall be chargeable or brought into charge it must be a refund of an amount of tax or rate that has been deducted; therefore, the amount here in question was properly included in the assessment. The words used in the proviso do not warrant the contention that the prior deduction of the amount in question is a condition precedent to its subsequent inclusion as income; had the Legislature intended otherwise other and more apt words would have been used in the proviso. In any event, of the amount in question the appellant benefited by deduction to the extent of £3,097 in respect of State income tax for which it was personally liable; therefore, having made a refund, the Commissioner is entitled to regard such sum, at least, as "income." The fact that no notice of assessment for the year ended 30th June 1929 was received by the appellant is immaterial. The calculations, resulting in a minus quantity, made in the Commissioner's office constitute the assessment, which is only the ascertainment and

(1) (1910) P. 57, at p. 125.

fixation of liability (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1)).

Cur. adv. vult.

THE COURT delivered the following written judgment:—

Sec. 23 (1) of the *Income Tax Assessment Act* 1922-1930 contains the following provision:—"In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis, and from it there shall be deducted . . . (*b*) all rates, State and Federal land taxes and State income tax . . . for which the taxpayer is personally liable and which are annually assessed and are paid in Australia by the taxpayer in the year in which the income was derived: Provided that, when a taxpayer receives a refund of the whole or any part of the rates or taxes mentioned in this paragraph, the amount of the refund shall be brought into account as income in the year in which the refund is received." The taxpayer furnished a return of income derived during the twelve months ending 31st December 1927 for the purpose of assessment and levy of Federal income tax for the financial year beginning 1st July 1928. From that return it appeared that, neglecting any deduction under par. (*b*) of sec. 23 (1) on account of State income tax, the taxable income of the taxpayer would be £3,097 2s. 3d. In its return the taxpayer claimed a deduction on account of State income tax of £203 14s. only. In point of fact during the twelve months ending 31st December 1927 a sum of £5,025 5s. 7d. had been demanded from the taxpayer on account of State income tax and had been paid by it. The taxpayer had, however, taken proceedings by way of objection to the assessment of this amount and these proceedings were pending. The collection of Federal and State income tax was administered by the same officers, and the Federal assessing authority was thus aware that in fact £5,025 5s. 7d. had been demanded for State tax and paid. The assessing officer who dealt with the taxpayer's return, after calculating upon a sheet of paper the prima facie taxable income of £3,097

(1) (1926) 37 C.L.R. 368, at pp. 372, 373.

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2s. 3d., wrote underneath it "Less State Income Tax allowed £5,025 5s. 7d. Loss £1,928 3s. 4d." He then initialled this sheet, which was afterwards checked and initialled by another officer. No notice of assessment for the financial year beginning 1st July 1928 was issued and no communication was made to the taxpayer that it had been assessed to no tax for that financial year. During the twelve months ending 31st December 1929, as a result of the objection made to the assessment of State tax in the sum of £5,025 5s. 7d. paid in 1927, the taxpayer obtained a repayment from the State of £4,244 18s. 6d. In point of law the taxpayer had not been assessable to State tax in this amount. In assessing the taxpayer to Federal income tax for the financial year beginning 1st July 1930 upon the basis of the income derived by it during the twelve months ending 31st December 1929, the Federal Commissioner of Taxation has included in the assessable income the amount of £4,244 18s. 6d. so repaid. The taxpayer objected to the inclusion of this sum and its objection was disallowed by the Commissioner and referred to the Board of Review, which decided that the refund formed part of the taxpayer's assessable income by reason of the proviso to sec. 23 (1) (*b*).

The question which arises for our decision is whether the taxpayer is liable to include in its assessable income any part of the sum repaid as an excessive assessment of State income tax levied three years before.

The taxpayer denies that the proviso to par. (*b*) of sec. 23 (1) has any application. The first ground assigned for this contention is that, as it was not liable under the State income tax laws to be assessed in respect of the sum ultimately refunded, that sum did not answer the description contained in sec. 23 (1) (*b*), "a State income tax for which the taxpayer is personally liable." But under sec. 46 of the Queensland *Income Tax Act* 1924-1930 a taxpayer is bound to pay the amount of tax in which he is assessed notwithstanding that proceedings by way of objection and appeal against the assessment are pending. Sec. 23 (1) (*b*) is directed, although perhaps not exclusively, to cases in which under such a provision an excessive payment is exacted from the taxpayer and afterwards refunded. The taxpayer is "liable" to make the payment as and for State income tax because of the State assessment.

Another ground upon which the taxpayer supports its contention that the proviso to sec. 23 (1) (*b*) does not apply is that its operation is limited to cases in which a deduction has been claimed and has been allowed in an actual assessment of a previous year. It is said that no claim to deduct excessive payment of tax was made by the taxpayer in its return or otherwise, and, further, that in fact the assessing officer did no more than ascertain that if the deduction were allowed no tax would be payable and thereupon he desisted from making an assessment.

The Commissioner denies that the proviso is so limited, and insists that upon its proper construction it requires the inclusion in the assessable income of every refund of tax received by a taxpayer during the year of income, whether a corresponding deduction for tax paid has or has not been allowed to the taxpayer in a previous year, and whether the taxpayer has or has not been assessed under the Federal *Income Tax Assessment Act* in respect of the year of income during which the overpayment to the State was made. This contention involves an interpretation of the proviso which makes it independent of the main enactment contained in the paragraph. Such an interpretation is ill-founded.

The office of the proviso is to bring into tax a refund of a payment which has been taken into account pursuant to the main enactment so that the taxpayer has enjoyed in respect of the overpayment the benefit conferred on the footing that it is an outgoing or expenditure of the year of income. When the outgoing of that year is refunded in a subsequent year, the legislation, instead of providing for a reconsideration or alteration of the ascertainment of the taxpayer's liability to tax in respect of the income year during which the overpayment was made, requires the refund to be brought into the assessment for the income year during which the refund was received. No liability is incurred by a taxpayer under the proviso unless the refund is of a payment in respect of which the benefit of the main enactment of sec. 23 (1) (*b*) has already been obtained by the taxpayer.

But the question remains whether the main enactment was applied in favour of the taxpayer in the manner required by the statute.

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Sec. 23 (1) opens with the governing words "In calculating the taxable income of a taxpayer." "Taxpayer" is defined by sec. 4 to mean "any person chargeable with income tax." Sec. 35 requires the Commissioner to "cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied." These provisions raise a doubt whether the leading enactment contained in sec. 23 (1) (*b*) can be considered as operating when the taxpayer has not been actually assessed for some amount of taxable income however small. It must be remembered, however, that sec. 23 (1) is concerned with the process of ascertaining the liability of a potential taxpayer. Given a case in which assessable income is returned, the direction contained in sec. 23 (1) must be followed for the purpose of finding what, if any, taxable income was derived. If the answer which results is none, the Commissioner may be content to make no further communication to the person who derived the assessable income. But his freedom from tax nevertheless results from the provision of sec. 23 (1). When that section requires that the total assessable income shall be taken as a basis and from it there shall be deducted the specified allowances, it is giving directions which must be obeyed before it is ascertained whether any taxable income will remain, and, in spite of its opening words, the provisions which follow may reasonably be understood as operating although no taxable income in fact results.

In the present case, it clearly appears that, because the main enactment of sec. 23 (1) (*b*) was applied in the Commissioner's office, the taxpayer was considered to possess no taxable income derived during the year 1927. This fact brought the case under par. (*b*) of sec. 23 (1) sufficiently to make the proviso apply to the subsequent refund. The circumstance that the taxpayer did not seek the deduction did not relieve the Commissioner of the duty of taking it into account. Accordingly so much of the refund should be included in the assessable income of 1929 as was in fact deducted in arriving at the conclusion that no taxable income remained of the assessable income derived in 1927.

But it does not follow that the entire sum of £4,244 18s. 6d. should be so included. In fact £5,025 5s. 7d. was paid to the State in 1927 and the whole of this sum was thrown against a prima facie

taxable income of £3,097 2s. 3d. Of the sum of £5,025 5s. 7d. paid to the State, £4,244 18s. 6d. has been refunded and £780 7s. 1d. has been retained. But the deduction obtained under sec. 23 (1) (*b*) cannot be considered as the entire sum of £5,025 5s. 7d. but only of the amount needed to reduce the taxable income to nothing, namely, £3,097 2s. 3d. The surplus was not deducted so as to confer upon the taxpayer a benefit giving rise to a corresponding liability upon refund or repayment.

On the other hand, of the entire sum of £5,025 5s. 7d., £780 7s. 1d. has been retained by the State. Of this sum of £780 7s. 1d. an amount of £472 2s. 8d. appears to have been retained by the State upon account of tax accruing on other and later assessments than those in respect of which it was paid, and to the extent of the balance, namely, £308 4s. 5d., the deduction allowed from the 1927 income has not been the subject of subsequent refund. But the Commissioner has for the purpose of the assessment under appeal treated the refund as amounting only to £4,244 18s. 6d. Strictly speaking, he should have included in the assessable income this sum together with the sum of £472 2s. 8d. applied in payment of subsequent taxes, and, then having done so, he should have allowed as a deduction under the main enactment of par. (*b*) of sec. 23 (1) the same sum of £472 2s. 8d. as a payment of State income tax in the year in which the income under assessment was derived. He took the direct course of including in the assessable income in the first instance the net amount of £4,244 18s. 6d. Nevertheless, the truth was that a sum of £4,717 1s. 2d. was refunded. Adopting this figure accordingly, it follows that to the extent of £308 4s. 5d., the amount already mentioned, the payment made in 1927 has not been refunded. In other words, the amount of the prima facie taxable income of 1927 which was annihilated by the deduction of State tax afterwards refunded is £3,097 2s. 3d., less £308 4s. 5d., namely, £2,788 17s. 10d. Of the sum included by the Commissioner as a refund, namely, £4,244 18s. 6d., only this sum, namely, £2,788 17s. 10d., should be included in the assessable income of 1929. Accordingly the assessment of taxable income must be reduced by the difference between these two amounts, which is £1,456 0s. 8d.

The taxpayer should receive the costs of its appeal to this Court.

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Appeal allowed. Declare that the amount of the taxable income assessed should be reduced by £1,456 0s. 8d. Assessment discharged and remitted to the Commissioner for re-assessment consistently with this declaration. Commissioner to pay the costs of this appeal.

Solicitors for the appellant, *W. H. Wilson & Hemming*, Brisbane, by *Russell & Russell.*

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

J. B.

Appr *Newton* v *Federal Commissioner of Taxation* (1958) 98 CLR 1

Discd *Taxation, Federal Commissioner of* v *Newton* (1957) 96 CLR 577

Appl *War Assets Pty Ltd* v *FCT* (1954) 91 CLR 53

Appl *DFCT* v *Evan Ltd* (1933) 49 CLR 480

[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932. SYDNEY, *Aug* 31; *Sept.* 1, 15. Rich, Dixon and Evatt JJ.

Income Tax (Cth.)—Assessable income—Deductions—"Fine, premium or foregift"—Licensed premises—Assignment of lease—Grant of lease—Moneys paid and received therefor respectively—Grant of "tie" to brewers—Consequent diminished value of hotel—Detriment measurable in money—"Outgoings of capital"—Sum "paid"—Arrangement between taxpayer and others—Avoidance of liability to tax—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 16 (*b*) (i.), (*d*), 23 (1) (*a*), 25 (*i*), 93 (*c*)*.

The taxpayer was informed by certain brewers that, subject to his acquiring from the tenant of a hotel owned by the brewers the residue of the tenant's term, the brewers would grant to the taxpayer a new lease for ten

*The *Income Tax Assessment Act* 1922-1925, provided, by sec. 16, that "The assessable income of any person shall include . . . (*b*) in the case of a member" or "shareholder . . . of a company which derives income from a source in Australia—(i.) dividends, bonuses or profits . . . credited, paid or distributed to the member or shareholder from any profit derived from any source by the company . . . Provided . . . that where a dividend or bonus is paid wholly and exclusively out of the profits arising from the sale of assets which were not acquired for the purpose of resale at a profit a member or shareholder shall not be liable to tax on that