

[HIGH COURT OF AUSTRALIA.]

NEAL'S MOTORS PROPRIETARY LIMITED . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

*Income Tax—Assessment—Company—Profits not distributed as dividends—
Determination by Commissioner of amount that could have been distributed—
Method of calculating tax—Income Tax Assessment Act 1922-1929 (No. 37 of
1922—No. 11 of 1929), sec. 21.*

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Oct. 4.

SYDNEY,

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Rich, Starke,
Dixon and
McTiernan JJ.

On 30th October 1929 the appellant company returned as its income for the year ended 30th June 1929 the sum of £50,484, and the Commissioner made an ordinary assessment for this amount upon the company. The appellant did not distribute any portion of this sum amongst its shareholders before 10th July 1930, the date fixed by the Commissioner for the purposes of sec. 21 (1) of the *Income Tax Assessment Act 1922-1929*. The Commissioner subsequently determined, pursuant to sec. 21, that the appellant could reasonably have distributed £32,397 of such money among its shareholders, and, pursuant to sec. 21 (2), he assessed at the sum of £8,110 the tax or additional tax which would have been payable by the shareholders if the sum of £32,397 had been distributed as dividends. In assessing the tax or additional tax under sec. 21 the Commissioner took as a basis the taxable income derived by each shareholder during the year ending 30th June 1930, and calculated the tax or additional tax as if such sum had been distributed among the shareholders during that year.

Held, as follows :—

(1) By the whole Court, that the method of assessing the tax or additional tax adopted by the Commissioner was not correct ;

(2) By *Rich, Dixon and McTiernan JJ.*, that the Commissioner should have assessed the tax or additional tax by adopting the assumption that a distribution of the sum determined took place on 9th July 1930 among the then shareholders of the appellant company in proportion to the shares which on that date they respectively held ;

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(3) By *Starke J.*, that the assessment should have been made on the assumption that the profits had been distributed in the year in which they were received.

Quære, per Rich J., whether under sec. 21 the Commissioner must not fix in advance the date prior to the making of his determination so that the company may be enabled to consider whether it will distribute any and what amount of its taxable income.

CASE STATED.

On the hearing of an appeal by Neal's Motors Pty. Ltd. against an assessment of it to income tax, *Starke J.* stated, for the opinion of the Full Court, a case which was substantially as follows:—(1) The appellant, Neal's Motors Pty. Ltd. is a company which was incorporated on 28th July 1922 under the provisions of the *Companies Act* 1915 of the State of Victoria as a company limited by shares. (2) On 30th June 1929 and at all times material the issued capital of the appellant Company consisted of £50,871, divided into 50,871 shares of one pound, all of which were fully paid up. The said shares were held amongst seven persons, all of whom reside in Victoria. (3) On or about 30th October 1929 the appellant, pursuant to the provisions of the *Income Tax Assessment Act* 1922-1929, lodged with the respondent a return of its income for the year ended 30th June 1929. The said return showed that the net taxable income of the appellant for the said year for the purposes of the said Act was £50,484. (4) On 26th February 1930 the respondent served on the appellant notice of the ordinary assessment of the taxable income of the appellant for the financial year 1929-1930 based upon its taxable income derived during the year ended 30th June 1929. The said taxable income was so assessed at the sum of £50,484. (5) The appellant did not before 10th July 1930 distribute to its shareholders the said sum of £50,484 or any part thereof. (6) By a determination in writing dated 11th July 1930 the respondent for the purposes of sub-sec. 1 of sec. 21 of the said Act fixed 10th July 1930 as the date prior to the making of the said determination under the said subsection in respect of the appellant, and determined that a sum of £32,397 could reasonably have been distributed by the appellant to its members or shareholders out of the said taxable income. (7) By letter dated 14th July 1930 the respondent notified the appellant that he had made the said determination, and set out how the

said sum of £32,397 had been ascertained. (8) By notice of assessment dated 30th July 1931 the respondent notified the appellant that, in pursuance of sub-sec. 2 of sec. 21 of the *Income Tax Assessment Act* 1922-1930, he had assessed at the sum of £8,110 10s. 6d. the tax or additional tax which would have been payable by the shareholders of the appellant Company if the said sum of £32,397 had been distributed as a dividend in proportion to their interests in the paid-up capital of the appellant Company to those shareholders who would have been entitled to receive it, and required the appellant to pay the amount of £8,110 10s. 6d. so assessed. (9) The respondent, in assessing as aforesaid the tax or additional tax payable by the Company pursuant to sec. 21, (a) took as a basis the taxable income derived by each shareholder in the appellant Company during the period of twelve months which ended on 30th June 1930; (b) took the said sum of £32,397 so determined by him as aforesaid and derived by the appellant Company during the period of twelve months which ended on 30th June 1929, and proceeded to calculate the tax or additional tax which would have been payable by the shareholders if such sum had been distributed to such shareholders as a dividend in proportion to their interests in the paid-up capital of the Company in the same period of twelve months as that in which the taxable income of each shareholder as aforesaid had been derived, namely, the twelve months which ended on 30th June 1930. (10) The said sum of £8,110 10s. 6d. assessed as aforesaid is thus the difference between the total aggregate tax which would have been payable under the provisions of the *Income Tax Assessment Act* 1922-1930 by the shareholders of the appellant Company if the said sum of £32,397 had been distributed to them during the year ended 30th June 1930 as a dividend in proportion to their interests in the paid-up capital of the appellant Company and the total aggregate tax payable by them under the provisions of the said Acts, no part of the said sum of £32,397 being so distributed to them during the said year. (11) If the said sum of £32,397 had been distributed or were treated as distributed to the said shareholders as a dividend as aforesaid during the year ended 30th June 1929, the difference between the total aggregate tax which would have been payable by them under the provisions of the *Income Tax*

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Assessment Act 1922-1929 and the total aggregate tax payable by them under the provisions of the said Act, no part of the said sum of £32,397 being so distributed to them during the said year, would amount to the sum of £4,427 3s. 4d. (12) By notice of objection in writing dated 18th August 1931 the appellant notified the respondent that it objected to the assessment mentioned in par. 8 hereof. The grounds of the objection were as follows:—“(1) That the assessment is invalid because sec. 21 of the *Income Tax Assessment Act 1922-1929* purports to impose an income tax which is not imposed by the *Income Tax Act 1929* (or 1930), and therefore that sec. 21 of the *Income Tax Assessment Act 1922-1929* is invalid and unconstitutional in view of sec. 55 of the Constitution of the Commonwealth. (2) Without prejudice to ground 1, that the method of calculating the tax or additional tax is incorrect because the sum of £32,397 stated in the assessment, although part of the income of the Company for the year ended 30th June 1929, has, in the calculation, been added proportionately to the incomes of shareholders derived during the year ended 30th June 1930 instead of to the incomes derived during the year ended 30th June 1929. (3) Without prejudice to ground 2, that the assessment is incorrect inasmuch as the tax includes, not only the tax or additional tax which would have been payable by the shareholders if the sum of £32,397 had been distributed to them, but also it includes as part of the additional tax which would have been payable by the shareholders, the further income tax imposed by sec. 7A of the *Income Tax Acts 1930*, and this inclusion is contrary to the provisions of sec. 21 (2) of the *Income Tax Assessment Act 1922-1929*, which determines the tax to be collected from the Company.” (13) On 6th November 1931 the respondent notified the appellant that he had considered the objection and had disallowed it; and on 25th November 1931 the appellant in writing requested the respondent to treat the objection as an appeal and forward it to this Court, and on 30th March 1932 the said objection was forwarded accordingly.

The questions for the Full Court were as follows:—

- (1) Did the Commissioner adopt the right method of assessing the tax or additional tax payable by the Company under sec. 21 of the Act?

- (2) Or should he have adopted the method mentioned in par. 11 of the case ?
- (3) Or any other and what method ?

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Wilbur Ham K.C. (with him *Tait*), for the appellant. Sec. 21 is part of the Act based on the general scheme that income tax is payable in respect of particular years of assessment. The proper view is that the Company having earned income for the year 1929 was liable to pay tax on the income for that year and the only Act which imposed tax on that income was the 1929 Act. The Commissioner based his calculation on an Act which was not then passed.

Robert Menzies A.-G. for Vict. (with him *Garran*), for the respondent. The year of earning cannot be the year of assessment. In the normal course of events the Company should have distributed this money as dividends. After its financial year ends it should declare its dividends, and it is after the end of the financial year that the Company would normally have distributed its profits. The method of taxation adopted in this case was the correct method. The terminating day of the year of assessment is the proper time to see if a distribution has been made, and, if a distribution has not in fact been made up to this time, the Commissioner can assess the Company as if a distribution had been made during that period.

[Counsel referred to *Commissioner of Taxation v. Public Requisites Ltd.* (1); *Federal Commissioner of Taxation v. Hyland* (2); *Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation* (3).]

Wilbur Ham K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :—

Nov. 21.

RICH J. The determination of the Commissioner under sec. 21 (1) of the *Income Tax Assessment Act* was not attacked, but I desire to reserve the question whether under that provision he must not fix

(1) (1927) 33 A.L.R. 413.
(2) (1926) 37 C.L.R. 569.

(3) (1928) 49 A.L.T. 266, at pp. 269, 270.

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in advance the date prior to the making of his determination so that the Company may be enabled to consider whether it will distribute any and what amount of its taxable income. The date he in fact fixed was 10th July 1930 but, in assessing the tax or additional tax payable by the Company in consequence of that determination, he took the taxable income derived by the shareholders of the Company in the accounting period of twelve months ending 30th June 1930 and added to their respective incomes so derived the proportional amounts of the Company's taxable income which he determined it should have distributed. I am unable to see upon what basis he took this period. The income was earned in the previous year and the date which he fixed fell in a subsequent year. The year he selected was the financial year in respect of which the income derived by the Company was taxable, but he did not select it as a financial year, i.e., a year of liability to the Treasury, but as an income year—a year of income making up the amount, hypothetical though it might be, of the shareholders' assumed income. Before sub-sec. 1 was amended by the Act of 1928 *Lowe J.*, in *Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation* (1), had decided that the Commissioner was required to determine whether a sum or further sum might reasonably have been distributed out of its taxable income by a company during the year in which it was derived. At that time the sub-section commenced "Where in any year" and *Lowe J.* construed the expression to mean any year of derivation. The Legislature intervened and for the words "in any year" substituted the words "before such date prior to the making of the determination under this sub-section . . . as is fixed by the Commissioner." I think it necessarily follows that the determination of the Commissioner must be addressed to that period. The question for his discretion is whether before that date taxable income might reasonably have been distributed. As *Lowe J.* pointed out, the last words of the sub-section "could reasonably have been distributed" describe an antithesis to the words "has not distributed." The income is, therefore, to be dealt with on the basis that the distribution has been made which according to the determination of the Commissioner ought to have

been made. It is true that the shareholders are not to be the taxpayers, as originally was the case in the earlier forms of these provisions. No doubt, shareholders were unable to find a tax out of a notional distribution, and accordingly the liability to pay it is now imposed upon the Company which retains the fund. But the calculation is still based upon the notional distribution and is a calculation of the increased amount for which the taxpayers would be liable if the notional distribution were real. To my mind it follows that the calculation should proceed exactly as it would if the fiction required were true. When sub-sec. 2 provides that "the Commissioner shall assess the tax . . . which would have been payable by the shareholders if the sum . . . determined by the Commissioner . . . had been distributed as a dividend," it means if the distribution has taken place as according to the determination of the Commissioner it should have done. As the shareholders are or may be a fluctuating body, and as neither rates of tax nor amounts of income possess any stability, there is no escape from the position that some point of time must be taken. What is that point of time? The Commissioner has determined that by the date he has fixed, a distribution might reasonably have been made. The fiction required is that by that date a distribution has been made. There is no warrant for taking an earlier day than the ultimate date of the period in which according to his determination it might reasonably have been made. The point of time as at which the facts must be taken upon which the fictional distribution would operate must be the date which he fixes under sub-sec. 1.

I think the questions in the special case should be answered:—
(1) and (2) No. (3) As if a distribution of the sum took place as prescribed by sub-sec. 2 of sec. 21 on 9th July 1930.

STARKE J. This is a case stated for the opinion of this Court. The facts are fully stated in the case, and need not be repeated. The determination of the case depends upon the proper interpretation of sec. 21 of the *Income Tax Assessment Act* 1922-1929. But it is necessary, in considering that section, to bear in mind that income tax is levied for each financial year upon taxable income derived during the period of twelve months ending on 30th June preceding the financial year

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for which the tax is payable (*Acts Interpretation Act* 1901, sec. 22; *Income Tax Act* 1929, No. 30; *Income Tax Assessment Act* 1922-1930, sec. 13); further, that profits distributed by a company amongst its shareholders are exempt in its hands from income tax, except as provided by the Act (see *Income Tax Assessment Act* 1922-1930, sec. 14 (1) (m), sec. 16 (b)). And the decision in *Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation* (1) must also be remembered.

By sec. 21 of the *Income Tax Assessment Act* of 1922 it was provided that where in any year a company had not distributed to its members at least two-thirds of its taxable income, the Commissioner should determine what sum could reasonably have been distributed by the company, and then calculate the additional tax, if any, which would have been payable by the shareholders if the sum determined by the Commissioner had been distributed amongst them in proportion to their interests in the paid-up capital of the company. *Lowe J.* held that the year here referred to was the year of the earning of the income, and not the financial year. Of course, it was obvious that a distribution in the year of earning was somewhat improbable in the management of any company's business. This consideration led to an amendment of the law, and it is found in sec. 21 of the *Income Tax Assessment Act* 1922-1930:—“(1) Where a company . . . has not before such date prior to the making of the determination under this sub-section in respect of that company as is fixed by the Commissioner, distributed to its . . . shareholders at least two-thirds of the taxable income upon which the company has been assessed for any financial year, the Commissioner shall, within six months after the date of the service on the company of the notice of its ordinary assessment of that taxable income, determine whether a sum or a further sum (not exceeding the excess of two-thirds of the taxable income of the company over the amount, if any, distributed by it to its . . . shareholders) could reasonably have been distributed by the company to them out of that taxable income. . . . (2) The Commissioner shall assess the tax and the additional tax, if any, which would have been payable by the shareholders if the sum or further sum determined by the Commissioner in accordance with sub-section (1) of this section had been distributed as a

dividend, in proportion to their interests in the paid-up capital of the company, to those shareholders who would have been entitled to receive it." This amendment recognizes the dominant provision of the Act that tax is levied for each financial year upon the taxable income earned during the preceding twelve months. But the tax payable upon profits distributed to shareholders was generally greater than that payable by the company on those profits if undistributed. Legislation was therefore directed to the end that the revenue should not suffer if the profits were not distributed. The *Income Tax Assessment Act* of 1915, sec. 16, directed that there should be included in the income of each shareholder a certain proportion of those profits if the company in the opinion of the Commissioner did not in any year distribute a reasonable proportion of the profits. The *Income Tax Assessment Act* of 1918, sec. 10, made another provision in like case, and directed that the taxable income should be deemed to have been distributed to the shareholders in a certain proportion. The *Income Tax Assessment Act* of 1922, sec. 21, under which the *Kellow-Falkiner Case* (1) was decided, provided that where in any year a company had not distributed two-thirds of its profits, then the Commissioner should determine what sum could reasonably have been distributed by the company, and that the company should pay the additional amount of tax that would have been payable had the sum determined by the Commissioner been distributed to shareholders.

All these enactments, as it seems to me, predicate that the shareholders or the company should be assessed to income tax for the financial year upon the profits made during the preceding twelve months, or the year of earning those profits. The period of assessment under the provisions of these Acts is identical, whether the profits be or be not distributed, whether they be or be not treated as distributed. But it is said that the *Income Tax Assessment Act* of 1922-1929-1930 alters this position, and that the date fixed by the Commissioner now determines the period in respect of which the company should be assessed to tax pursuant to the provisions of sec. 21 (2). The argument hinges upon the words "before such date prior to the making of the determination under this sub-section

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(1) (1928) 49 A.L.T. 266.

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in respect of that company as is fixed by the Commissioner.” But those words, to my mind, have nothing to do with the period of assessment. Under the 1922 Act, the company was assessed upon the “year of earning,” unless it distributed to its shareholders at least two-thirds of its taxable income. Such a distribution was almost impossible, as a matter of business. The words quoted from the Act of 1922-1929-1930 enable the Commissioner to fix a more extended period, but do not throw the profits into a different year of assessment. Such a construction leads to manifest inequalities: the dates fixed by the Commissioner will differ according to the financial position of each company, and the rate of tax will probably differ from that applicable to the earning year, sometimes higher, as in the present instance, sometimes, possibly, lower—though not, I fear, for some time. Further, the provisions of sec. 21, sub-sec. 2B must confuse and complicate the position on the suggested construction; at present, I do not follow how they would work on that construction. Again, the provision that the Commissioner shall within six months after the date of service on the company of notice of its ordinary assessment of its taxable income determine what sum could reasonably have been distributed by the company, rather points to the conclusion that the tax which is to be assessed under sec. 21 (2) is in respect of the same period. The section contemplates that only a short period will elapse after the ordinary assessment, but that assessment, which is not ordinary though for the same period, may be made within the limited time.

The result, in my opinion, is that the questions stated in the case should be answered:—(1) No. (2) Yes. (3) Unnecessary to answer.

DIXON J. This case stated relates to the correctness of an assessment upon the appellant Company of tax and additional tax which would have been payable by the shareholders, if, out of its taxable income derived during the year ended 30th June 1929, the Company had distributed a sum which the Commissioner determined could reasonably have been distributed by the Company out of that taxable income. The ordinary assessment of the Company for the financial year ended 30th June 1930 based upon the taxable income derived during the year ended 30th June 1929 was served on 26th

February 1930. The Company did not distribute any part of the taxable income so assessed. Within six months after the service of the ordinary assessment, namely, on 14th July 1930, the Commissioner communicated to the Company the following "determination under sec. 21 of the *Income Tax Assessment Act 1922-29*" dated 11th July 1930:—"For the purposes of sub-sec. 1 of sec. 21 of the *Income Tax Assessment Act 1922-29* I hereby fix the 10th day of July 1930, as the date prior to the making of this determination under the said sub-section in respect of Neal's Motors Proprietary Limited. And whereas the said Company has not before the date hereby fixed as aforesaid or before the date of this determination distributed to its members or shareholders at least two-thirds of the taxable income upon which the Company has been assessed for the financial year 1929-1930. Now I do hereby determine that a sum of £32,397 could reasonably have been distributed by the said Company to its members or shareholders out of that taxable income." The validity of this determination is not attacked in these proceedings. But, on 30th July 1931, the tax to which it exposed the Company was assessed at the sum of £8,110 10s. 6d. The Company appeals against this assessment upon the ground that the tax has been calculated upon an erroneous basis.

In assessing the tax or additional tax payable by the Company in consequence of the determination, the Commissioner (a) took as a basis the taxable income derived by each shareholder in the appellant Company during the period of twelve months which ended on 30th June 1930, and (b) took the sum of £32,397 so determined by him and derived by the appellant Company during the period of twelve months which ended 30th June 1929, and proceeded to calculate the tax or additional tax which would have been payable by the shareholders if such sum had been distributed to the shareholders as a dividend in proportion to their interests in the paid-up capital of the Company in the same period of twelve months as that in which the taxable income of each shareholder had been derived, namely, the twelve months ended 30th June 1930. It follows that the amount of £8,110 10s. 6d. in which the Company has been assessed represents the aggregate increased tax for which the members of the Company would have been liable for the financial year ended 30th June 1931

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upon the income derived during the year ended 30th June 1930, if their incomes then derived had included a distribution by the Company of so much of its taxable income derived by it during the year ended 30th June 1929 as, according to the determination of the Commissioner, it could reasonably have distributed. Thus the taxes imposed under the assessment are those provided by the *Income Tax Acts* 1930 (Nos. 51 and 61). Sub-sec. 2 of sec. 21 of the *Income Tax Assessment Act* contains the provision upon which the correctness of this method of computation depends. The provision is as follows: "The Commissioner shall assess the tax and the additional tax, if any, which would have been payable by the shareholders if the sum or further sum determined by the Commissioner in accordance with sub-section (1) of this section had been distributed as a dividend, in proportion to their interests in the paid-up capital of the company, to those shareholders who would have been entitled to receive it."

The hypothesis which the Commissioner is required to adopt in assessing the Company under this enactment imposes upon him the necessity of finding with exactness what certain definite persons would be liable to pay if specific sums ascertainable by reference to the amount of share capital held by each of them were added to their respective actual taxable incomes. The purpose is, of course, to obtain the increased tax which arises from the aggregation of the income of individuals. To fulfil the requirements of the provision it is essential to fix upon some accounting period as that during which their actual taxable incomes, liable to this hypothetical increase, are derived. Further, it is evident that shareholders are a fluctuating body and neither the identity of the members of a company, nor the number of shares held by each always, or even usually, remains fixed throughout an accounting period of twelve months. It follows that, in order to have a practical operation, the provision must be understood, not only as having relation to a definite year of income of the shareholders, but as referring to some particular point of time within that year. The expression "had been distributed as a dividend" clearly supposes distribution within some period or before some point of time, although it is singularly uninformative as to what period, or what point of time, it contemplates. The expression, however, refers back to sub-sec. 1. The material words of this sub-section

are as follows: Where a company has not before such date prior to the making of the determination under this sub-section in respect of that company as is fixed by the Commissioner, distributed to its members or shareholders at least two-thirds of the taxable income upon which the company has been assessed for any financial year, the Commissioner shall, within six months after the date of service on the company of the notice of its ordinary assessment of that taxable income, determine whether a sum or a further sum . . . could reasonably have been distributed by the company to them out of that taxable income." If this language, which in fact is the result of amendment, is construed as it stands without regard to its history, the words "could reasonably have been distributed by the company" appear to refer back to the condition which the sub-section expresses in its opening words, namely: "Where a company has not before such date . . . as is fixed by the Commissioner, distributed." It seems natural to understand the duty which the later words lay upon the Commissioner, if that condition occurs, to be to determine whether the company, before the date he has so fixed, could reasonably have distributed some or all of its taxable income. In my opinion, the solution of the difficulty is to be found in this consideration. The determination is that, before the date fixed by the Commissioner, a distribution might reasonably have been made. This view is confirmed by the history of the provision. In the *Income Tax Assessment Act 1922-1926* the sub-section, so far as material, was expressed "Where in any year a company has not distributed" &c. Two rival constructions of the words "in any year" were current. One was, "in any financial year," i.e., the year following that in which the company's taxable income was derived. The other was, "in any year of income," i.e., the year in which the taxable income was derived. In *Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation* (1) *Lowe J.* adopted the latter meaning. He said:—"I also think . . . that it is the year of the earning of the income that is referred to by the words 'in any year.' Secs. 16 (b), 20 and 21 are a group of sections which deal with the taxable income of a company

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(1) (1928) 49 A.L.T., at pp. 269, 270.

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and bring it within the net of taxation, whether in the hands of shareholders or of the company. To effect this result it seems to me to be necessary that the same period should be contemplated, and it seems reasonably clear, under secs. 16 (b) and 20, that it is the year of the earning of the income that is referred to. It seems to me that the construction I have placed on these sections is supported by the opinions of *Higgins J.* in *Webb v. Federal Commissioner of Taxation* (1), of *Starke J.* in *Federal Commissioner of Taxation v. Hyland* (2), and of *Knox C.J.* at p. 577 of the same case. I do not overlook the fact that the opinion of *Higgins J.* was on an earlier Act, for I think in relevant respects it did not differ from that which I have to consider; nor that the Legislature has in the Act of 1922 altered its policy as to the incidence of the tax on undistributed income—see per *Isaacs J.* in *Knight v. Federal Commissioner of Taxation* (3). Nor do I overlook the fact that the judgment of *Starke J.* was reversed on appeal, and that the opinion of *Knox C.J.* was a dissenting opinion, inasmuch as I think the opinion of the majority does not impugn the views as to the sections in question of those learned Judges. . . . Lastly, I think that the taxpayer's contention succeeds as to what is the relevant period within which the Commissioner has to determine that a sum or further sum could reasonably have been distributed. The antithesis in the section itself between the phrases 'has not distributed' and 'could reasonably have been distributed' seems to me naturally to point to the same period as being in contemplation in each case, and this view seems to me to be strengthened by the provision at the end of the section, that the determination 'in the case of other financial years' must be made 'within six months after the date of the issue to the company of its ordinary assessment.' The ordinary assessment has relation to the year of income immediately preceding the financial year for which the assessment is made, and the determination which leads to a further assessment must be, I think, for the same 'other year' to the figures of which the ordinary assessment relates."

In support of the alternative interpretation by which the expression "in any year" was understood to refer to the financial year of tax

(1) (1922) 30 C.L.R. 450, at p. 483. (2) (1926) 37 C.L.R., at p. 572.

(3) (1925) 37 C.L.R. 271, at p. 278.

following the year in which the taxable income in question was derived by the Company, a strong practical consideration was the improbability of a company distributing income in the very year in which it was derived and the absurdity of treating it as unreasonable for a company to fail to do so. But, notwithstanding the force of this consideration, a close examination of the language in sec. 16 (2) of the *Income Tax Assessment Act* 1915-1918, and the progress of the amendments therein, where sec. 21 of the *Assessment Act* of 1922 originated, discloses many reasons in favour of the view of *Lowe J.* There is much to suggest that at that time the policy of the legislation was to determine, as at the close of the year of derivation, in respect of what portion of a company's income the shareholders ought to be taxed, either because it had been, or because it ought to have been, distributed and to tax the Company upon what it did not distribute in the year of derivation. But it is not now necessary to determine between the conflicting interpretations of the expression "in any year" in the sub-section before it was amended. What is important is that the words "before such date prior to the making of the determination under this sub-section in respect of that company as is fixed by the Commissioner" have been substituted for the words "in any year," and that the substitution was made in consequence of the judgment of *Lowe J.* No matter which be the year referred to by the words "in any year," the financial year or the year of income, it was apparent that these words operated to describe the period relevant to the question whether a distribution of income by the Company could reasonably have been made. The question which the Commissioner was required to determine was whether within that year a distribution could reasonably have been made.

When a new period is substituted for that expressed by the words "in any year," it is reasonable to suppose that the new period is intended to do what the old was considered to do, namely, to describe the period in respect of which the question is to be determined whether the company could reasonably have distributed the taxable income. Further, the view that the Commissioner is required to determine whether before the date he fixes the company might reasonably have made the distribution, is strengthened not only by

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the nature of the amendment made, but also by the failure to amend the provision in any way to displace *Lowe J.*'s conclusion that the antithesis between the phrases " 'has not distributed' and 'could reasonably have been distributed' seems . . . naturally to point to the same period as being in contemplation in each case."

When sub-sec. 2 directs the Commissioner, in assessing the tax, to suppose that the sum or further sum determined by him under sub-sec. 1 had been distributed as a dividend on paid-up capital to the shareholders who would have been entitled to receive it, can it be understood as requiring any other distribution to be assumed than that which under the preceding sub-section he has determined might reasonably have been made? What he has determined is that taxable income might reasonably have been distributed before the date he has fixed. It follows that the assumption prescribed for computing the tax is that such a distribution has been made before that date. The question remains what point of time does the provision contemplate as that on which the imputed or hypothetical distribution should be regarded as taking place. Once the conclusion is reached that the reasonable capacity of the company to distribute is to be determined in reference to a period expiring on the fixed day, it seems an inevitable consequence that, in the complete absence of any indication of any other date as at which the distribution should be supposed, the latest date must be taken of the period within which a distribution might reasonably have been made. The Commissioner has not positively affirmed that a distribution could reasonably have been made before that date. He has been able to affirm that a distribution could have been made upon that date, if not before.

In my opinion sub-sec. 2 of sec. 21 means that the Commissioner shall assess the tax and the additional tax which would have been payable by the shareholders if the sum determined by the Commissioner had been distributed as dividend at the expiration of the time fixed by him under sub-sec. 1. In the present case this time expired on 9th July 1930. A distribution at that time would have resulted in the inclusion of the dividend in the shareholders' assessable income derived in the year ended 30th July 1931 in reference to which they would have been taxed for the financial year ended 30th July 1932.

This would involve the application of the *Income Tax Act* 1931 (No. 24). At first sight it may seem extraordinary that the Company should be taxed upon part of its taxable income derived during the year beginning 1st July 1928 according to rates declared by a taxing Act which levies income tax for the financial year beginning 1st July 1931, a financial year two years after that financial year in respect of which the Company's ordinary assessment for that income is made. But this effect is produced, not by the taxing Act, but by the joint operation of sec. 21 and that Act. Whether an argument under sec. 55 of the Constitution can be based upon this circumstance need not be considered, for none was raised, and, indeed, after the uniform failure of all such arguments this is not surprising.

In my opinion the questions in the special case should be answered : —(1) No. (2) No. (3) Upon the hypothesis that a distribution of the sum determined took place on 9th July 1930 among the then shareholders of the appellant Company in proportion to the shares which on that date they respectively held. Costs in the appeal.

McTIERNAN J. The appellant derived taxable income during the period of twelve months ending 30th June 1929, but did not distribute any part of it to its members. The Company was assessed on that income for the financial year 1929-1930. Notice of this, the Company's ordinary assessment, was served upon it on 26th February 1930. No part of this sum was distributed to the shareholders before 11th July 1930, the date of the Commissioner's determination. The real problem presented by sub-sec. 2 of sec. 21, which requires the Commissioner to assess the tax and additional tax which would have been payable by the shareholders if the events mentioned in the sub-section had occurred, appears to be to determine the identity of the shareholders who should be deemed to have participated in the distribution of the sums in question as a dividend. The membership of the Company may change from day to day. The solution of that problem depends upon the ascertainment of the date upon which it is to be assumed that such a notional distribution took place. When that date is ascertained the shareholders who would have been entitled to participate in the distribution are also ascertained. The selection of the date must in the circumstances

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be made in a purely artificial way. That way is laid down in sub-sec. 1. This sub-section enables the Commissioner to fix a date for the purpose of enabling the calculation to be made of the tax imposed upon the Company by the section. No question as to the validity of the steps taken by the Commissioner to fix that date is raised in this appeal. Assuming that all conditions precedent to the making of the determination under sub-sec. 1 were duly fulfilled, it follows that the Commissioner became authorized to assess the Company under sec. 21 (2) upon the hypothesis that the sum which he determined could reasonably have been distributed was in fact distributed before 10th July. But at what time prior to that date? As the sum could have been distributed according to the Commissioner's decision on any day before 10th July, I think that the fiction introduced by the section is that, in default of a distribution in fact, the notional distribution occurred on the last day before 10th July 1930.

The questions should, in my opinion, be answered :—(1) and (2) No. (3) As if the Company had distributed the sum mentioned in the determination by way of dividend on 9th July 1930.

Questions in the special case answered :—(1) No. (2) No. (3) The Commissioner should have assessed the tax or additional tax payable by the Company under sec. 21 of the Income Tax Assessment Act 1922-1929 by adopting the assumption that a distribution of the sum determined took place on 9th July 1930 among the then shareholders of the appellant Company in proportion to the shares which on that date they respectively held. Costs in the appeal.

Solicitors for the appellant, *Corr & Corr.*

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

H. D. W.