

[HIGH COURT OF AUSTRALIA.]

ANDERSON'S INDUSTRIES LIMITED . . . APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. *War-time Profits Tax—Assessment—Company—Voluntary liquidation—Business transferred to new company—Dissolution of old company—Tax on profits made prior to transfer—Assessment of “liquidator” after dissolution—New company also assessed—Both assessments subsequently withdrawn—Fresh assessment upon new company—Effect of prior assessments—Election—“Person for the time being owning or carrying on the business”—War-time Profits Tax Assessment Act 1917-1918 (No. 33 of 1917—No. 40 of 1918), secs. 14*, 24, 25, 47.*

1932.

SYDNEY,

April 13-15.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

A company transferred its business and was wound up. After the company had been dissolved the Commissioner purported to make an assessment upon the liquidator for war-time profits tax in respect of profits arising before the change of ownership.

Held, that the assessment was ineffectual, and the Commissioner was not precluded from assessing the transferee of the business to tax in respect of the same profits under sec. 14 of the *War-time Profits Tax Assessment Act 1917-1918* as the “person for the time being owning or carrying on the business.”

* The *War-time Profits Tax Assessment Act 1917-1918*, by sec. 14, provides as follows:—“(1) The war-time profits tax shall be assessed by the Commissioner. (2) The tax may be assessed on any person for the time being owning or carrying on the business or acting as agent for another person in carrying on the business, or, where a business has ceased, on the person who owned or carried on the business or acted as agent in carrying on the business immediately before it ceased, and where there has been a change of ownership of the business, the Commissioner may, if he thinks fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the tax on the person who owned or carried on the business or acted as agent for the person carrying on the business at that date. (3) Where

a company is being wound up after the commencement of this Act, the liquidator of the company shall give notice to the Commissioner within fourteen days after the approval of the shareholders to the winding up has been obtained or the order for the winding up has been made, and shall set aside such sum out of the assets of the company as appears to the Commissioner to be sufficient to provide for any such war-time profits tax as may become chargeable . . . (5) In any case in which a business is transferred to another person after the commencement of this Act, the person to whom the business is transferred shall be personally liable to pay any war-time profits tax which may subsequently be assessed as payable by the former owner if he fails to secure the payment of that tax to the Commissioner.”

CASE STATED.

On the hearing of an appeal to the High Court by Anderson's Industries Ltd. from an assessment of it to war-time profits tax for the financial year 1918-1919 *Evatt J.* stated, for the opinion of the Full Court, a case which was substantially as follows:—

1. From 1st January 1903 to 31st December 1915 Charles Anderson & Co. Ltd., a company duly incorporated under the law of New South Wales, carried on, in New South Wales, the business of a hat manufacturer and other business connected therewith.

2. On 31st December 1915 Charles Anderson & Co. Ltd. transferred its business to another company bearing the same name and also incorporated under the law of New South Wales. The last mentioned company (hereinafter called "the old Company") continued to own and carry on the business until 30th December 1920, the date of the liquidation thereof.

3. On 29th December 1920 Anderson's Industries Ltd. (hereinafter called "the new Company") was duly incorporated as a company under the law of New South Wales.

4. On 30th December 1920 the old Company went into voluntary liquidation and appointed as liquidator Robert Sorrell Norris, who thereafter carried on the business of the old Company until the business was transferred on 5th January 1921 to the new Company, which has ever since carried it on.

5. The liquidator of the old Company on 10th January 1921 gave the following notice to the Commissioner of Taxation: "I desire to inform you that on the 30th December 1920 Chas. Anderson & Co. Ltd. went into liquidation and I was appointed liquidator." Prior to the dissolution of the old Company, the Commissioner did not determine what sum would be sufficient to provide for such war-time profits tax as might become chargeable in respect of the business, and did not prior to such dissolution require the old Company to set aside out of its assets any sum of money for such purpose. Prior to the dissolution the Commissioner was not requested by the liquidator to state the sum sufficient to provide for the tax.

6. On 29th December 1921 the old Company became dissolved by force of the operation of sec. 142 of the *Companies Act 1899* (N.S.W.).

H. C. OF A.

1932.

ANDERSON'S
INDUSTRIES
LTD.

v.

FEDERAL
COMMISSIONER OF
TAXATION.

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

7. On 21st October 1924 the Commissioner forwarded to the liquidator a document headed "Notice of Assessment." The document was addressed to "R. S. Norris, Esq., Liquidator, Chas. Anderson & Co. Ltd. (In Liq.)," and directed him to take notice that the Commissioner had "assessed the war-time profits tax payable by you for the financial year 1918-1919" at £3,219 3s. 4d.

8. [This paragraph incorporated in the case certain annexures, being copies of documents which were received by the Deputy Commissioner of Taxation, Sydney, from the liquidator and the solicitor of the old Company and from the new Company and of documents which were forwarded by the Deputy Commissioner to the liquidator and to the new Company. In so far as is necessary for the purposes of this report, these annexures are described hereunder.]

9. Prior to 20th November 1924 the Commissioner had no knowledge and no notice of any of the following facts alleged in annexure D, namely, that the liquidator of the old Company had no money in hand to pay the amount of £3,219 3s. 4d. mentioned in the document dated 21st October 1924 and referred to in par. 7 hereof, or that the liquidator had no assets available to pay the said amount, or that all the assets of the old Company had been transferred or distributed or that the winding up of the old Company had been completed some considerable time prior to 17th December 1924.

10. Pursuant to and consequent upon the receipt of the document issued to the new Company and dated 21st January 1925 (annexure G) the new Company paid to the Commissioner the sum of £3,219 3s. 4d., being the amount of the tax claimed in the document headed "Notice of assessment" of 21st October 1924. The said amount was paid in two separate equal instalments on 27th February 1925 and 14th March 1925 respectively. Receipts were given to "R. S. Norris Esq., Liquidator, C. Anderson & Co.," and to "Messrs. Purcell & McCarthy . . . on account of C. Anderson & Co." respectively.

11. Pursuant to and consequent upon the receipt of the document issued to the new Company and dated 29th October 1928 (see annexure J) the new Company paid to the Commissioner the sum of £1,000, being portion of the balance of tax claimed in the document headed "Notice of amended Assessment" of 29th October 1928 (see annexure I). The said amount was paid on 28th December 1928,

and a receipt for it was given to "The Liquidator, C. Anderson & Co. Ltd."

12. On 24th February 1931 the Commissioner commenced an action in the High Court of Australia to recover from the new Company the sum of £1,584 14s. 8d., being the balance of tax claimed under the notice of amended assessment dated 13th June 1929 (annexure N) together with the sum of £158 9s. 5d. as additional tax under sec. 34 of the *War-time Profits Tax Assessment Act 1917-1918*, and on 14th August 1931 the Commissioner discontinued the said action.

13. [This paragraph incorporated in the case certain annexures described hereunder, being copies of documents which were received by the new Company from the Deputy Commissioner of Taxation, Sydney, and of documents received by the Deputy Commissioner from the new Company and its solicitor.]

The following question was reserved for the consideration of the Full Court:—

Whether by reason of the facts and matters set out herein or any of them the Commissioner was precluded from assessing the appellant as in the notice of assessment appealed against.

The annexures referred to in par. 8 of the case consisted of the following documents:—

Annexure C.—A notice by R. S. Norris, dated 20th November 1924, whereby he objected to the assessment referred to in par. 7 of the case on the grounds (*inter alia*) that although notice of the liquidation of Charles Anderson & Co. Ltd. on 30th December 1920 had been duly given to the Commissioner under sec. 14 (3) of the *War-time Profits Tax Assessment Act* "the Commissioner did not require any sum to be set aside by me in accordance with the said sub-section and the company has now been dissolved and I have no moneys in hand to pay the amount claimed to be due in the said assessment and am not liable to pay the same . . . that even if the said company was liable to war-time profits tax I am not liable thereto as I was not at any time a person owning or carrying on the business of the said company or acting as agent for any person in carrying on the said

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMIS-
SIONER OF
TAXATION.

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMISSIONER OF
TAXATION.

business," and claimed that no assessment at all should have been made against him and that he was not liable to pay any war-time profits tax.

Annexure D.—A letter dated 17th December 1924 from Messrs. T. J. Purcell & McCarthy, solicitors, to the Deputy Commissioner stating that "Mr. R. S. Norris has no money in hand to pay the amount claimed in the assessment" referred to in par. 7 "nor has he any assets available to pay the said amount. All the assets of Charles Anderson & Co. Ltd. have been transferred or distributed and the winding up of the said company was completed some considerable time ago."

Annexure E.—A notice of assessment dated 23rd December 1924 addressed to "Charles Anderson & Co. Ltd." which recited that on 1st January 1921 the old Company of Charles Anderson & Co. Ltd., which, prior to the commencement of the *War-time Profits Tax Assessment Act* and up to the date of the transfer, had carried on a business to which the Act applied, transferred such business to a new Company styled Charles Anderson & Co. Ltd., that war-time profits tax was subsequently assessed as payable by the former owner, the old Company, on profits from the business arising in the year ended 30th June 1919, and that the old Company had failed to secure the payment of the tax, and gave notice that, pursuant to sec. 14 of the Act, the new Company was personally liable to pay the tax in question amounting to £3,219 3s. 4d. within thirty days from the date of the service of the notice.

Annexure F.—A letter from Messrs. T. J. Purcell and McCarthy to the Deputy Commissioner, dated 20th January 1925, stating that there was not in existence any company of the name mentioned in the notice (annexure E), that the liquidator of the company known by that name had sold the assets of that company to Anderson's Industries Ltd. on 5th January 1921, the former company being dissolved later in the same year.

Annexure G.—A notice of assessment dated 21st January 1925 directed to Anderson's Industries Ltd. similar in terms and amount assessed to the notice of 23rd December 1924 (annexure E) except that it recited that the business of Charles Anderson &

Co. Ltd. had been transferred to Anderson's Industries Ltd. on 5th January 1921.

Annexure H.—A notice by Anderson's Industries Ltd., dated 19th February 1925, of objection to the assessment (annexure G) on the grounds (*inter alia*) that the business of Charles Anderson & Co. Ltd. was not transferred to it as stated in the notice; that, subsequently to the alleged transfer of the business of Charles Anderson & Co. Ltd. to Anderson's Industries Ltd., war-time profits tax was not assessed as payable by Charles Anderson & Co. Ltd., the alleged former owner of the said business; that Charles Anderson & Co. Ltd. was dissolved and ceased to exist prior to the alleged assessment of war-time profits tax as payable by it; that that company did not fail to secure the payment of war-time profits tax as alleged in the notice; that Anderson's Industries Ltd. was not personally or at all liable to pay either the whole or any part of the tax in question pursuant to sec. 14 of the Act.

Annexure I.—A notice of amended assessment and a covering letter, both dated 29th October 1928, addressed to "The Liquidator, Charles Anderson & Co. Ltd. (In Liq.)." The letter referred to the notice of objection (annexure C) "lodged by you against the assessment issued on the 21st October 1924" and stated that the objection had been partly allowed. The notice stated the balance of the amount of tax due as being £2,584 14s. 8d.

Annexure J.—A letter dated 29th October 1928 from the Deputy Commissioner to Anderson's Industries Ltd. stating that that company's notice of objection of 19th February 1925 (annexure H) could not "be accepted as a valid notice . . . as the High Court does not regard the notice served upon you under section 14 (5) of the Act as a notice of assessment," and that he enclosed an additional notice in accordance with sec. 14 (5) "showing the additional amount payable amounting to £2,548 14s. 8d."

Annexure K.—Notice of objection by Anderson's Industries Ltd. dated 27th November 1928 to the assessment (annexure I), the grounds of objection, so far as material, being similar to those contained in annexure H.

Annexure L—A letter from R. S. Norris acknowledging the receipt of the Deputy Commissioner's letter of 29th October 1928

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

H. C. OF A. (annexure I) and asking that his objection be treated as a notice
1932. of appeal and referred to the High Court.

ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMISSIONER OF
TAXATION.

Annexure M.—A letter dated 13th June 1929 from the Deputy Commissioner to “The Liquidator, Charles Anderson & Co. Ltd. (I.L.)” referring to the former’s letter of 29th October 1928 (annexure I), and stating “I have to request that you will please return the documents enclosed with that letter, the service of which documents was apparently improperly accepted by you in view of the fact that you were not then the person acting in the capacity of liquidator of the company” and that Norris’ request of 27th November 1928 (annexure L) could “not be accepted as a notice given in pursuance of section 28 (4) of the Act because at the time of making such request you were not a person competent to so act.”

Annexure N.—A notice of amended assessment, dated 13th June 1929, addressed to Anderson’s Industries Ltd., the balance of the amount of tax claimed in respect of profits derived from its business by Charles Anderson & Co. Ltd. being shown as £1,584 14s. 8d., and a covering letter informing the company that the notice (annexure J) forwarded on 29th October 1928 “which purported to be a notice of liability under section 14 (5) of the Act was sent in error and should be disregarded. The notice of objection” (annexure K) “lodged by you dated 27th November 1928 . . . is not a valid objection and has been disregarded by the Department.”

The annexures referred to in par. 13 of the case were :—

Annexure R.—A notice of assessment dated 26th August 1931 directed to Anderson’s Industries Ltd. showing the balance of war-time profits tax due from that firm in respect of profits derived from its business by Charles Anderson & Co. Ltd. during the year ended 30th June 1919 as being £1,548 14s. 8d.

Annexure S.—A notice of objection by Anderson’s Industries Ltd. in which reference was made to the previous notice of assessment to which the company had objected and to the fact that upon its refusal to pay the tax the Commissioner had commenced an action in the High Court for its recovery but had discontinued such action upon its being resisted by the company. The company claimed that by reason of the notices of assessment issued both to it and to the former

owner of the business, Charles Anderson & Co. Ltd., and the objections and the correspondence in reference thereto, and the steps taken in the subsequent litigation, the Commissioner was (a) estopped from imposing any liability on Anderson's Industries Ltd. by the notice of assessment of 26th August 1931; (b) bound by his election in assessing the former owner, and was thereby precluded from assessing the present owner or proceeding on the assessment of 26th August 1931; and (c) disentitled to revive by a fresh assessment a claim for the same tax which had previously been made by him and from which claim he had withdrawn. Further objections to the assessment were taken on the grounds that it was in the nature of an attempt by unauthorized methods to make the company liable to the amount of tax as originally assessed by the Commissioner, and that it was not, nor did it purport to be, made by the Commissioner pursuant to sec. 21 or sec. 22 of the Act.

Annexure T.—A notice from the Commissioner that the objections (annexure S) were disallowed.

Annexure U.—A request by the company that the objections be treated as an appeal and forwarded to the High Court.

The question reserved in the case stated now came on for the consideration of the Full Court.

Manning K.C. (with him *Cohen*), for the appellant. By assessing the liquidator of the old Company, being the person carrying on the business at the time of the change of ownership, the Commissioner exercised the option conferred upon him by sec. 14 (2) of the *War-time Profits Tax Assessment Act* 1917-1918. The Commissioner persisted in such election for a number of years and, as a consequence, is estopped from assessing any other person or company in respect of the tax said to be payable.

[STARKE J. How can the fact that bad claims were made affect the statutory liability of Anderson's Industries Ltd. under sec. 14 (5) of the Act?]

Sec. 14 (2) confers upon the Commissioner a choice of three alternative powers, and, having made his choice, he is precluded from availing himself of the other powers (*Federal Commissioner of Taxation v. Hipsleys Ltd.* (1)). Although under sub-sec. 5 a new owner

H. C. OF A.
1932.
ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMISSIONER OF
TAXATION.

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

may be made liable on the original assessment, he cannot be made liable on a fresh assessment. That sub-section is entirely dependent upon the right of the Commissioner to make an election under sub-sec. 2. In respect of prior periods unassessed the Commissioner is still entitled to assess the person who owned the business at the date when the ownership changed (*Boase Spinning Co. v. Commissioners of Inland Revenue* (1)). The Commissioner is bound by his election, and subsequent notices of assessment are inoperative (*Ward v. Day* (2)). Sec. 47 (f), as far as it applies, must be read subject to sec. 14 (2), to the effect that a liquidator of a company who is carrying on the business of the company shall be liable only so far as he comes within the provisions of sec. 14 (2) and then, by reason of sec. 47 (a), only in respect of the profits arising from the business carried on by him in his representative capacity. The Commissioner is not entitled to rely upon the fact that the old Company he originally assessed had ceased to exist, because he persisted in his election to assess that company long after he had been informed of its dissolution. There can only be one assessment for any year to an assessable person; it is not the subject of withdrawal or cancellation.

[DIXON J. referred to *R. v. Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (3).]

[STARKE J. referred to *Liverpool and London and Globe Insurance Co. v. Federal Commissioner of Taxation* (4).]

There can be only one main assessment, although there may be amendments of that assessment separately dealt with as may be necessary (*R. v. Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (5)). The Commissioner is only entitled to issue one assessment. This position was again dealt with by *Isaacs J.* in *Federal Commissioner of Taxation v. Hoffnung & Co.* (6). As the Commissioner, by his notices of 21st January 1925 (annexure G) and 29th October 1928 (annexure J) respectively, had already assessed Anderson's Industries Ltd., he had no power to again assess that company on 26th August 1931 (annexure R); therefore the latter

(1) (1926) Sc.L.T. 307; 135 L.T. 211. (4) (1927) 40 C.L.R. 108.
(2) (1863) 4 B. & S. 337; 122 E.R. 486. (5) (1926) 37 C.L.R., at p. 372, per *Isaacs J.*
(3) (1926) 37 C.L.R. 368. (6) (1928) 42 C.L.R. 39, at p. 54.

notice is invalid. The assessment made in 1924 is still at large. The only method available for correcting an erroneous assessment is by appeal (*Federal Commissioner of Taxation v. Australian Boot Factory Ltd.* (1)).

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMISSIONER OF
TAXATION.

E. M. Mitchell K.C. (with him *E. F. McDonald*), for the respondent. The documents issued prior to the notice of assessment appealed against were, in the circumstances, nullities and should be disregarded. The notice of assessment referred to in par. 7 of the case stated was directed to Mr. Norris in his representative capacity only; this is supported by the fact that his name was omitted from subsequent documents, and is in accord with the provisions of sec. 47 of the *War-time Profits Tax Assessment Act*. Owing to the dissolution of the old Company Mr. Norris was no longer the liquidator thereof at the time of the assessment. A notification addressed to a representative person after he has shed his representative capacity is, under sec. 47, of no effect. In the circumstances Mr. Norris was not competent to accept the notice of assessment or to object thereto. The course which the Commissioner finally pursued was correct, and is not contrary to the Act. The remarks of *Isaacs J.* in *Federal Commissioner of Taxation v. Australian Boot Factory Ltd.* (2) that the only way of correcting erroneous assessments is by way of appeal do not apply to assessments made on non-existent persons such as a person who was formerly the liquidator of a company since dissolved. Such assessments may be disregarded by the Commissioner. The appellant is, by sec. 28 (1) of the Act, bound by his objections wherein he states that the notice of 21st October 1924 was an assessment on a former owner of the business, and not on the liquidator. All the documents that passed between the parties were given and accepted by them as assessments on the old Company, and as there was at the time no old Company such assessments must be nullities. The Commissioner by proper action abandoned, as he was entitled to do, the documents which by error of fact had been sent to the wrong person. The fact that moneys were received under the previous assessments

(1) (1926) 38 C.L.R. 391, at p. 397, per *Isaacs J.*

(2) (1926) 38 C.L.R., at p. 397.

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.

FEDERAL
COMMISSIONER OF
TAXATION.

and retained does not operate by way of estoppel, and is not a valid objection because the appellant has the advantage of such moneys on account. Sec. 14 (2) applies to a liquidator unhindered in any way by sec. 47.

Manning K.C., in reply. The fact that the Commissioner persisted for five years on the original assessment shows that it was not a mere mistake on his part: it was the assertion by the Commissioner of a right. As to whether the grounds of objection are wide enough to cover the points raised before this Court, see *Federal Commissioner of Taxation v. W. Angliss & Co.* (1).

Cur. adv. vult.

April 15.

The following written judgments were delivered:—

RICH, DIXON AND McTIERNAN JJ. This is a case stated upon an appeal from an assessment under the *War-time Profits Tax Assessment Act* 1917-1918. The assessment is made in respect of the profits of a business derived during the year ended 30th June 1919. The appellant, upon whom the assessment was made on 26th August 1931, did not carry on the business in 1919, but took it over on 5th January 1921 from its previous owner, which had derived the profits now brought into assessment.

Sub-sec. 2 of sec. 14 of the Act enables the Commissioner to assess any person for the time being owning or carrying on the business. In the corresponding provision of the British Act the words "for the time being" have been construed to mean the time at which the assessment is made (*Wankie Colliery Co. v. Commissioners of Inland Revenue* (2)). Notwithstanding the observations made by *Higgins J.* in *Federal Commissioner of Taxation v. Hipsleys Ltd.* (3), the same construction should be placed upon the same words in the Australian statute. Indeed, in that case, *Isaacs J.* and *Rich J.* (4) delivered judgments which were based upon the assumption that this construction must be adopted. It follows that, unless the Commissioner was in some way precluded from doing so, he was at

(1) (1931) 46 C.L.R. 417.

(2) (1922) 2 A.C. 51.

(3) (1926) 38 C.L.R., at pp. 234-235.

(4) (1926) 38 C.L.R. at pp. 226, 238.

liberty to make upon the appellant, who at the time of the assessment was carrying on the business, an assessment in respect of the profits earned by its predecessor.

The appellant, however, contends that the Commissioner is precluded from so assessing it by reason of persistent attempts which he made to assess the former owner, which was a company, or its liquidator. Sub-sec. 2 of sec. 14, as it has been interpreted in *Boase Spinning Co. v. Commissioners of Inland Revenue* (1) and *Hipsleys' Case* (2), gives the Commissioner a power when a business has changed ownership to assess the transferor in respect of the profits derived prior to the transfer as well as a power to assess the transferee. These powers are said to be alternatives, so that one or other but not both may be exercised by the Commissioner in a given case. "If under the third branch of sub-sec. 2 the Commissioner elects to assess the former owner, he elects thereby to substitute him for the new owner, who apart from that election would be the person assessable" (per *Isaacs J.* in *Hipsleys Case* (3)).

In the present case the Commissioner began in October 1924 by making an assessment upon the liquidator of the company which had derived the profits and had transferred the business to the appellant. Until 13th June 1929, at least, the Commissioner maintained this assessment on foot, and he relied upon it as a basis for an attempt to impose upon the appellant under sub-sec. 5 of sec. 14 a secondary liability for the tax thereby assessed. It is upon these facts that the appellant rests its case that the Commissioner had conclusively exercised an election to assess the transferor of the business and not the appellant as transferee. The answer of the Commissioner is simple. He says it is true that he did attempt to do what would have amounted to an election, but that his attempt was entirely nugatory because, when he made it, the company whose liquidator he purported to assess did not exist and there was no such liquidator. It appears that the affairs of the company had been fully wound up in 1921 and that on 29th December 1921 (nearly three years before the assessment) the company became dissolved by force of the operation of sec. 142 of the *Companies Act*

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMIS-
SIONER OF
TAXATION.

Rich J.
Dixon J.
McTiernan J.

(1) (1926) Sc.L.T. 307; 135 L.T.
211.

(2) (1926) 38 C.L.R. 219.

(3) (1926) 38 C.L.R., at p. 227.

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

Rich J.
Dixon J.
McTiernan J.

1899 (N.S.W.). It is, therefore, clear that the transferor had ceased to exist. No assessment can be made upon a non-existing person, and a document purporting to be such an assessment could not, we think, operate as an election under sub-sec. 2 preventing the assessment of the transferee of the business. The actual assessment, however, was upon a named person described as liquidator of the company. The definition of "trustee" contained in sec. 4 includes liquidator. If the company had continued in existence and the person assessed had remained its liquidator, the assessment might have been supported under sec. 47, which authorizes assessments upon "trustees" in their representative capacity. But he could be assessed in his representative capacity only, and would incur only a vicarious liability which is limited and is never personal unless he disposes of assets while the tax is unpaid. Whatever might be the effect of secs. 24 and 25 in preventing an attack upon the validity of such an assessment, its effect in producing liability must depend upon the existence of the representative capacity. Since, in this case, the person assessed did not occupy that situation and as the juristic person he was supposed to represent did not exist, the assessment, in our opinion, could not be effective as an election to pursue the authority given by sub-sec. 2 of sec. 14 to assess the transferor to the exclusion of the transferee's liability.

This position is not in itself unjust, because the Commissioner was not at the material time in possession of a choice between two taxpayers. The present appellant was the only taxpayer against whom he had a right of recourse, and his attempt to resort to the transferor company and its liquidator was based upon a mistaken belief in its continued existence. Any appearance of hardship the circumstances may have is due rather to the great length of time which has elapsed and to the Commissioner's failure to notify the liquidator what sum he desired set aside to answer war-time profits tax when he was informed by him of the liquidation before the company was dissolved. No estoppel, however, arises from any of the Commissioner's acts or omissions in this case.

The question in the special case should be answered: No. No costs.

STARKE J. I agree that the question should be answered "No," but I do not wish to accede, at present, to the view that sec. 14 (2) gives only alternative methods of assessment or to the view that the liquidator of the company could be assessed whether it be or be not dissolved.

EVATT J. Although the document called the "notice of assessment" and dated October 21st, 1924, was received by R. S. Norris, it was not directed, nor was it intended to be directed, at him except as liquidator representing the old Company. But at this date the old Company was not in existence, having been dissolved nearly three years earlier, on December 29th, 1921. In relation to it Norris did not possess in the year 1924 any representative capacity. In law there was no assessment at all. Neither the document posted to him nor any preliminary determination by the Commissioner as to the matter, imposed any liability or created any right. And Norris might have treated the document as never having been received by him or even made.

Further, the so-called "notice of assessment" dated January 21st, 1925, which was directed to the appellant as "the person to whom the business is transferred" within the meaning of sec. 14 (5), proceeded expressly upon the basis that there had been a valid assessment upon the old Company in October 1924. So too, the so-called "notice of assessment" dated October 29th, 1928, was made upon the same basic assumption.

As late as October 29th, 1928, the Commissioner purported to make an amended notice of assessment upon "the liquidator" of the "old Company." The error was discovered, and on June 13th, 1929, the Commissioner requested the return of the document which Norris had received, pointing out that he was not at the material time acting in the capacity of liquidator. The appellant was also informed that the notice of liability under sec. 14 (5) which had been forwarded to it had been "sent in error and should be disregarded."

In my opinion all the documents which were brought into existence by the Commissioner upon the mistaken assumption of the continuance in life of the old Company, can and should be disregarded in the present proceedings. There was not, in fact or in law, any decision

H. C. OF A.
1932.

ANDERSON'S
INDUSTRIES
LTD.

v.
FEDERAL
COMMISSIONER OF
TAXATION.

Evatt J.

H. C. OF A.
1932.
ANDERSON'S
INDUSTRIES
LTD.
v.
FEDERAL
COMMISSIONER OF
TAXATION.
Evatt J.

by the Commissioner to assess the tax upon the past owner of the business or upon Norris as the agent of the past owner. No such decision could be made by the Commissioner under the third part of sec. 14 (2), unless the person or company supposed to be the past owner was a real and existing entity.

It follows that, whatever be the true scope and purpose of sec. 24 in preventing the challenge of the validity of an assessment, it does not prevent this Court from holding that the various proceedings taken by the Commissioner against an imaginary company were void. The invalidity of the assessment of 1924 does not spring from non-compliance with the Act, but from mistake of fact as to the existence of the person supposed to have been assessed. The assessment was made upon a mere name.

The Commissioner was therefore entitled to re-adjust the matter by assessing the tax on the profits of the business upon the "person for the time being owning or carrying on the business" (sec. 14 (2)). The decisions show that the time referred to is the time of assessment. The appellant was such a person, the tax was properly assessed upon it, and the question should be answered: No.

Question answered: No. No costs.

Solicitor for the appellant, *T. J. Purcell*.

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

J. B.