[HIGH COURT OF AUSTRALIA.]

RICHARDSON . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

ON APPEAL FROM THE HIGH COURT (STARKE J.).

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MELBOURNE, *Oct.* 20, 26; *Nov.* 13, 1931. *Feb.* 23, 1932.

Starke J.

MELBOURNE, *May* 25-27, 1932.

SYDNEY, *Aug.* 8, 1932.

Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Profits attributed to nominee of taxpayer—Amended assessment — Treble tax — Method of computation — Credit for payment by nominee—Income Tax Assessment Act 1922-1930 (*No.* 37 *of* 1922—*No.* 60 *of* 1930), *secs.* 35, 37, 50, 51, 57, 67*.

The appellant failed to include in his income tax returns certain profits derived from the carrying on of a hotel. These profits were returned as part of the income of C., a nominee of the appellant, and the appellant was assessed on the basis of the returns lodged by him. When the Commissioner discovered the facts he amended the assessments upon the appellant and included these profits in his assessable income. By the amended assessments the Commissioner assessed the appellant to income tax on the income as so increased, and, applying sec. 67 of the *Income Tax Assessment Act* 1922-1930, he added by way of additional tax double the amount of the difference between the tax assessed upon the income as increased and the tax assessed on the basis of the returns lodged.

Held, that the procedure of assessment, objection, review and appeal applied to additional tax under sec. 67, and the High Court had jurisdiction, on an appeal from a Board of Review, to consider the liability of the taxpayer to the additional tax.

* Sec. 67 of the *Income Tax Assessment Act* 1922-1930 provides:—"(1) Notwithstanding anything contained in the last preceding section, any person who . . . (*b*) fails to include any assessable income in any return . . . shall be liable to pay by way of additional tax the amount of one pound or double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged, whichever is the greater, in addition to any additional tax which may become payable by him in accordance with section fifty-six of this Act: Provided that the Commissioner may, in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof."

From the total, the sum so ascertained, *Starke* J. ordered that there should be deducted the amount of tax paid by C. in respect of such profits, and this order was not attacked on appeal:

Held, that it effected all the adjustment to which the taxpayer was entitled and the Commissioner was not precluded by the existence of assessments upon the nominee from assessing the taxpayer in respect of the same income.

Held also, that the method of computation adopted by the Commissioner was correct.

Decision of *Starke* J. affirmed.

APPEAL from *Starke* J.

The taxpayer, James Richardson, objected to amended assessments by which he was assessed to income tax for the years ended 30th June 1925, 1926, 1927, 1928 and 1929, and to an assessment for the year ended 30th June 1930. The Commissioner disallowed the objections, and his decision was, at the request of the appellant, referred to a Board of Review, which upheld the Commissioner's decision. The taxpayer thereupon appealed to the High Court, and the appeal came on for hearing before *Starke* J., in whose judgment (hereunder) the facts are fully stated.

Ham K.C. and *Herring*, for the appellant.

O'Bryan, for the Commissioner.

Cur. ad. vult.

STARKE J. delivered the following written judgment:— Feb. 23, 1932.

These are appeals by James Richardson under the *Income Tax Assessment Acts* 1922-1930, in respect of assessments for the financial years 1924-1925, 1925-1926, 1926-1927, 1927-1928, 1928-1929 and 1929-1930. All are concerned with the inclusion of profits derived from a business carried on in the Exchange Hotel, Melbourne. These profits had been originally returned by one P. H. Collins, as income derived by him in carrying on the business in the hotel, but it is not now disputed that Collins was a nominee or dummy for Richardson, and that the profits were in fact part of the latter's income, for the purposes of the *Income Tax Acts*. Richardson

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failed to include these profits in the returns of his income, and was assessed in the various financial years upon the basis of the returns lodged by him. Richardson was guilty of a fraud upon the revenue, which cannot be excused or palliated, in pretending that the income represented by the profits of the Exchange Hotel belonged to Collins. He thus secured a considerable reduction in the rate of his tax, and thereby greatly reduced the amount of the tax payable by him. When the Commissioner discovered the facts, he amended his assessments upon Richardson, and included the profits from the Exchange Hotel in his assessable income. Thus, for the financial year which ended on 30th June 1924, the net income previously assessed at £13,730 was increased, by the inclusion of profits from the Exchange Hotel, by no less a sum than £11,597, which had been included in Collins's return. The result was to increase the tax payable by Richardson from £6,447 19s. 3d. to £10,223 10s. 5d., an amount of £3,775 11s. 2d. The Commissioner then applied sec. 67 of the Act, and added, as an additional tax, double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged, that is, £3,775 11s. 2d. × 2, or £7,551 2s. 4d. A similar course was followed in each of the succeeding years other than the year 1929. In that year, the Commissioner brought into his assessment an item of £65, profits from the Exchange Hotel which Richardson had failed to include. He thus ascertained the taxable income of Richardson, and assessed him for the full amount of the tax legally payable by him. But he added as a penalty for the omitted income (£65) an additional tax or penalty of £36 11s. 6d. The results for the various years are shown in the following table:—

	Tax assessed on Richardson's returns and paid or payable by him.	Increased tax upon Richardson by reason of inclusion of profits from Exchange Hotel in his assessments.	Additional tax under sec. 67.
1924	£6,447 19 3	£3,775 11 2	£7,551 2 4
1925	7,033 15 6	2,956 2 5	5,912 4 10
1926	7,274 18 7	2,112 7 0	4,224 14 0
1927	6,580 16 3	1,531 11 3	3,063 2 6
1928	4,694 15 1	951 0 5	1,902 0 10
1929	5,527 0 0	—	36 11 6
	£37,559 4 8	£11,326 12 3	£22,689 16 0

The taxation of Collins, however, was increased in the years 1924 to 1928 by the following respective sums, by the inclusion of the Exchange Hotel profits in his return: 1924, £2,054 1s. 6d.; 1925, £1,808 6s. 3d.; 1926, £1,252 15s.; 1927, £978 15s. 7d.; 1928, £693 6s. 3d.: £6,787 4s. 7d. And these amounts have been received by the Commissioner from Collins, the nominee or dummy of Richardson, but he refuses to make any allowance to Richardson in respect of these payments, and has not, so far, made any refund to Collins or any one else in respect of them.

Richardson's income tax therefore amounted in the aggregate, for the years in question here, to £48,885, and he has paid or is liable for that amount. But in addition he is now charged with additional tax by way of penalty under sec. 67 amounting to no less a sum than £22,689. And he is given no credit for the amounts paid by his dummy Collins, amounting to £6,787. Justice requires that some credit should be given to Richardson for this sum of £6,787, or that the money should be refunded.

But the Commissioner's attitude is that, whatever discretion he may have in the matter, Richardson has no legal right to any such credit or refund. Richardson expects but little relief if he must rely upon the discretion of the Commissioner, and I must say, from the evidence and my own observations of the conduct of these appeals, that his want of faith is not wholly unreasonable. The rights of the parties must, therefore, be determined according to law.

The Commissioner has challenged the jurisdiction of this Court to consider the propriety of the additional tax imposed under sec. 67, but my decision in *Penrose* v. *Federal Commissioner of Taxation* (1) is against him. And I adhere to that decision.

The taxpayer challenged the calculation of the additional tax. He denied that the *Income Tax Acts*, on their proper construction, enabled the Commissioner to make the assessments under appeal. Except as to the year 1929, which I shall deal with presently, the Commissioner is, I think, justified by the Acts—and particularly by sec. 67—in the assessments which he has made. He computed

(1) (1931) 45 C.L.R. 263.

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the tax upon the taxable income. Then he ascertained the difference between the tax computed by him—the tax properly payable —and the tax which had theretofore been assessed upon the taxpayer upon the basis of the returns lodged by him. He doubled this amount and charged the resulting sum as additional tax. It is, I think, the method prescribed by sec. 67. There is nothing in *Penrose's Case* (1) to the contrary. But as to the year 1929, *Penrose's Case* is against the Commissioner. As I understand the facts, the Commissioner in this year made only one assessment. He ascertained in the first instance the amount of tax properly payable by the taxpayer. The provisions of sec. 67 predicate, as I said in *Penrose's Case*, a difference between a tax properly payable and *a tax assessed* upon the basis of a return lodged by the taxpayer. The procedure adopted for the additional tax for the year 1929 is not warranted by sec. 67, and the additional tax—£36 11s. 6d.—must be disallowed. This brings me to the payments made by Collins. The taxpayer contended that these sums should be credited against the increase in the amount of the tax payable by him by reason of the inclusion of the profits of the Exchange Hotel in his taxable income, and that the additional tax under sec. 67 should be assessed on the balance. Thus, to take the year 1924 :—Increased amount of tax, £3,775 ; paid by Collins, £2,054 ; balance, £1,721. Here, the additional tax, according to the taxpayer's contention, should be assessed on this sum of £1,721. Justice would thus be done to the taxpayer, though his punishment would still be heavy, for additional taxation by way of penalty would in the aggregate amount to £9,078, instead of £22,689, as now imposed. The provisions of sec. 67 are, I think, too strong. They explicitly enact that the additional tax shall be the difference in amount between the tax properly payable and the tax assessed upon the basis of the returns lodged. Another view is, however, possible. As I have said, the Commissioner, in arriving at his balance of the amount due by the taxpayer in each of the years under appeal has credited the taxpayer only with amounts paid by him, and gives no credit for any amounts paid by Collins. But if the Commissioner treats Collins as a mere nominee or dummy of

(1) (1931) 45 C.L.R. 263.

Richardson, then, to my mind, he should act consistently, and treat all the acts of Collins on the same basis. The *Income Tax Acts* do not authorize the Commissioner to take income tax twice over in respect of the same source for the same period of time. The results on this view appear in the following table :—

	Balance due as assessed by the Commissioner.		Amount paid by Collins.	Balance Actually due.
1924 ..	£11,326 13 6		£2,054 1 6	£9,272 12 0
1925 ..	8,868 7 3		1,808 6 3	7,060 1 0
1926 ..	6,337 1 0		1,252 15 0	5,084 6 0
1927 ..	4,594 13 9		978 15 7	3,615 18 2
1928 ..	2,853 1 3		693 6 3	2,159 15 0
1929 ..	1,534 4 2	Additional tax wrongly levied	36 11 6	1,497 12 8

And, despite the Commissioner's objections, it appears to me that sec. 51 (6), as interpreted in *Ruhamah Property Co.* v. *Federal Commissioner of Taxation* (1), warrants the assumption of jurisdiction by this Court in favour of the taxpayer.

The assessments of the Commissioner will accordingly be reduced to the following amounts: 1924-1925, £9,272 12s.; 1925-1926, £7,060 1s.; 1926-1927, £5,084 6s.; 1927-1928, £3,615 18s. 2d.; 1928-1929, £2,159 15s.; 1929-1930, £1,497 12s. 8d. The Commissioner will pay the costs of each of these appeals. So far as the notice of appeal to this Court does not cover the reductions above allowed, leave is given to the taxpayer to amend it.

From this decision the taxpayer appealed to the Full Court and the Commissioner of Taxation gave notice of cross-appeal.

At the hearing of the appeal counsel intimated that the Commissioner did not propose to persist in his appeal in respect of the last year, relating only to £36 11s. 6d., which involved the correctness of *Penrose* v. *Federal Commissioner of Taxation* (2), or in respect of the appropriation to answer Richardson's liability by the order under appeal of the amounts paid by Collins by reason of the inclusion of Richardson's income in his assessment, and that the taxpayer did not seek a reconsideration of the matter by the Board of Review for the purpose of seeking remission of penalties if the order of *Starke* J. stood.

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

(2) (1931) 45 C.L.R. 263.

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Wilbur Ham K.C. and *Herring*, for the appellant. It is admitted that Richardson is liable to additional tax, but he has been assessed at too high a rate. The trial Judge was right in saying that the *Income Tax Acts* do not permit taxation of the same income twice in the hands of different people. Collins's assessment should have been amended by taking out Richardson's income from Collins's income. The consequence is that the whole of Richardsons's assessment is wrong and should be struck out (*Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (1)). Sec. 67 provides for payment of double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged. Sec. 67 should be read with secs. 54 and 56, and the way the Commissioner is entitled to get the double tax is by amendment under sec. 37. If he calls in aid sec. 67 the Commissioner gets double the rate, but he has assessed under sec. 37 as if it stood apart and then doubled the difference in tax, and thereby gets triple tax. Had the Commissioner alleged fraud, he would only recover treble the amount of the avoided income tax, in addition to the penalties provided by secs. 68 and 69. Sec. 67 only enables the Commissioner to recover double the amount of the difference between the tax properly payable and the tax assessed. The Commissioner cannot recover money under sec. 67 alone (*Penrose* v. *Federal Commissioner of Taxation* (2)). The additional tax payable under sec. 67 is recoverable only under secs. 54 and 57, which apply to the recovery of money under the amended or original assessment. If sec. 67 is not called in aid, the amount is simply the difference between the original and the amended assessments, but if sec. 67 is called in aid the amount payable is double the difference. Under sec. 67 the Commissioner can recover only double the difference. Sec. 71 shows that if the Commissioner recovers money under secs. 68 and 69, he recovers it as a penalty, but the additional tax under sec. 67 is not a penalty. If the Commissioner's view is correct, if there is fraud you cannot recover as much as you could under sec. 67 when no fraud is alleged, as the Commissioner cannot charge double tax under sec. 67 if he proceeds under secs. 68 and 69.

(1) (1931) A.C. 224.

(2) (1931) 45 C.L.R. 263.

There are three attacks on the judgment—(1) that while the assessment on Collins is unamended and retained, the tax is also imposed on the appellant; (2) his Honor assessed under sec. 67 as a penalty twice, as well as under sec. 37 once, making the amended assessment triple instead of double; (3) his Honor, while admitting that Collins is a dummy for Richardson, gives credit for the tax paid by Collins in the wrong place by deducting his payment from three times the alleged short payment, instead of reducing the short payment by crediting the tax paid by the agent before multiplying the difference (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1); *Federal Commissioner of Taxation* v. *Australian Boot Factory Ltd.* (2)).

[DIXON J. referred to *Bradbury* v. *English Sewing Cotton Co.* (3).]

Robert Menzies, A.-G. for Victoria (with him *O'Bryan*), for the respondent. In sec. 67 the method of arriving at the liability is not an assessment. It is not the result of such a process, and it is unrelated to that part of the Act dealing with assessments. Part V. of the Act deals with objections and appeals. Part VII. (penal provisions) deals with a totally different subject matter. It is not a method of assessment and cannot be challenged as provided in Part V.

[DIXON J. referred to *R.* v. *Federal Commissioner of Taxation*; *Ex parte King* (4).]

The treble tax was proper. It is correctly made up of the additional tax and the double penalty. Sec. 67 intends a simple comparison to be made between the true return and the actual false return which was forwarded.

O'Bryan. Once you have got the return that should have been made and the return made, it is a mere matter of arithmetic as to the correct tax, and no question of assessment arises at all. The proviso to sec. 67 enables the Commissioner to remit additional tax or any part thereof. The Commissioner may remit the penalties but not remit the taxation (*Helwig* v. *United States* (5)). The

(1) (1926) 37 C.L.R. 368, at p. 373.
(2) (1926) 38 C.L.R. 391.
(3) (1923) A.C. 744, at p. 760.
(4) (1930) 43 C.L.R. 569, at p. 580.
(5) (1903) 188 U.S. 605, at p. 611.

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additional tax is additional to what is assessed under sec. 37. It presupposes a correct assessment or a notional correct assessment.

Wilbur Ham K.C., in reply. The fallacy at the root of the argument of the Commissioner is that sec. 67 is a penal section. Sec. 67 is not penal and does not apply to a case involving moral turpitude, but only to a case of neglect which is careless but not fraudulent. If this sum were sued for under Part VIII., it could not have been recovered. The history of the Acts is in support of the appellant. Considering the whole of sec. 67 it is fanciful to say that if a taxpayer fails to send in any return at all without any fraud there is this stupendous penalty.

Cur. adv. vult.

Aug. 8.

The following written judgments were delivered :—

DIXON J. These are cross-appeals from an order of *Starke* J. made under sec. 51 (6) of the *Income Tax Assessment Act* by which he allowed in part an appeal from a decision of the Board of Review and reduced the amounts to which the taxpayer had been assessed for tax and additional tax. According to the decision of the Board, which agreed with the Commissioner, the taxpayer in his several returns for the six financial years beginning on 30th June 1924 and ending on 30th June 1930 had failed to include large amounts of assessable income, and therefore became liable to pay in respect of each year by way of additional tax the amount prescribed by sec. 67 (1) of the *Income Tax Assessment Act* 1922-1930, no part of which was remitted by the Commissioner.

The assessable income which the taxpayer failed to include in his returns arose from operations conducted by a person whom the Commissioner and the Board considered to be a nominee of the taxpayer. There is no appeal by the taxpayer from so much of the decision of the Board as determines the facts. The nominee, however, returned as his own the income derived from the operations which he conducted on behalf of the taxpayer, and, except in the last year, with which we are not now concerned, this income was included in his ordinary assessments. The consequence is that, in respect of the income now included in the taxpayer's assessments, tax has

already been levied by the Commissioner although not upon the taxpayer, but upon his nominee, and, not at the rate payable by the taxpayer, but at a much lower rate. The Commissioner has not cancelled or amended the assessments made upon the nominee, and he has retained the full amount of tax paid under them. At the same time, in his amended assessments upon the taxpayer, the Commissioner has refused to take any part of the payments under the nominee's assessments into account, either in reduction of the amount of taxable income derived by the taxpayer from the operations conducted by the nominee, or as part payment of the tax levied upon that taxable income or of the additional tax levied under sec. 67, or as otherwise reducing the total amount payable by the taxpayer. Thus a liability was imposed upon the taxpayer in respect of each year of a total sum consisting of the increase in the amount of tax arising from the inclusion of the omitted income in his assessment and of a further sum equal to double that increase, and neither he nor his nominee received any credit or repayment of the tax already paid by the nominee.

The Commissioner was upheld by the Board of Review, but *Starke* J. ordered a reduction in each year. He reduced the total amount of each assessment thus composed by a sum equal to the increased tax already paid by the nominee by reason of the inclusion in his assessment of the income now taken into the taxpayer's assessment. His Honor proceeded upon the ground that, having treated the person conducting the operations whence the income arose as a mere nominee or dummy for the taxpayer, the Commissioner was bound to act consistently and should treat all his acts upon the same basis. His Honor said: "The *Income Tax Acts* do not authorize the Commissioner to take income tax twice over in respect of the same source for the same period of time."

The appeal of the Commissioner from this order is based upon the single ground that under sec. 51 of the *Income Tax Assessment Act* 1922-1930 neither the Board nor this Court upon appeal from the Board has any authority in respect of additional tax payable under sec. 67. Sub-sec. 1 of sec. 50 provides that a taxpayer who is dissatisfied with the assessment made by the Commissioner under the Act may lodge with him an objection in writing against the

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assessment, and sub-sec. 4 enables a taxpayer who is dissatisfied with the Commissioner's decision upon the objection to request him to refer the decision to the Board of Review. Sec. 51 (4) provides that the Board of Review shall give a decision and may either confirm the assessment or reduce, increase, or vary the assessment. From these provisions it follows that if the additional tax imposed under sec. 67 is properly included in the "assessment," then it is a matter to which the taxpayer may object and his objection may be referred to and decided by the Board. But the question whether an assessment ought to include additional tax imposed under sec. 67 cannot be answered unless an answer is first given to the further question whether an assessment is not a mere ascertainment of taxable income—whether, in other words, the calculation and levying of the tax are not subsequent to and independent of the assessment of taxable income, depending for their efficacy, not upon the Commissioner's determination (subject to review and appeal), but upon the operation of the statute upon his assessment of income. The language of secs. 35, 36 and 37 rather supports this view of the statute, and possibly it represents the intention of the original enactment of 1915. But a number of provisions in the *Income Tax Assessment Act* 1922 and in the amendments of that Act makes it clear that the ascertainment of the rate and amount of tax is part of the process of assessment. To begin with, sec. 13 (2) of the 1922 Act speaks of assessments of tax in which the rate to be applied to the taxable income shall be calculated. Then sec. 20 (4) refers to a rebate of tax in the taxpayer's assessment and to the tax payable in his individual assessment; sub-secs. 3 and 4 of sec. 27 to the tax assessed; sec. 29 to assessment for income tax at a prescribed rate; sec. 30 (1) to a rebate in the taxpayer's assessment of a sum equal to the difference between two amounts of tax; sec. 31 (3) to the tax assessed against a taxpayer; sec. 32 (1) to the assessment and levy of income tax and sec. 32 (2) to assessment of income tax for a financial year; sec. 61 (*c*) to the income tax assessed; sec. 62 (1) to tax not having been assessed; sec. 67 to an amount of tax being assessable to a taxpayer and sec. 71 to assessment and payment of tax. To this evidence further proof that the assessment includes the ascertainment of tax is added by the amending Acts.

It is enough to refer to the amendments, substitutions, or additions made in sec. 16 (*b*), second proviso, by No. 27 of 1923; in secs. 16 (*a*) (ii.) and 16 (*aa*) and 21 (2) and (2A) by No. 51 of 1924; in secs. 62 (3A) and 62 (3D) and the Second Schedule by No. 32 of 1927; in secs. 27 (3), (4) and (4A) by No. 46 of 1928; in secs. 21 (2) (proviso) and 54 (4) by No. 50 of 1930 and in sec. 23 (1) (*a*) by No. 23 of 1931. The adoption of an amount of income tax is, therefore, part of the process of assessment and is accordingly subject to objection, review and appeal.

The Commissioner, however, contends that, although the ascertainment of ordinary tax may lie within the process of assessment and so be open to objection and appeal, that process does not extend to the obligation imposed by sec. 67 upon taxpayers guilty of the acts and omissions which it describes to pay additional tax, unless it be remitted by the Commissioner. It is said that sec. 67 is a penal provision which operates automatically unless the Commissioner exercises his power of remission, and that the additional tax is recoverable independently of assessment by proceedings at law to enforce a statutory obligation to pay a sum of money. Sec. 56 imposes an analogous obligation which must be subsequent to and therefore cannot be the subject of assessment. Under its provisions, upon late payment of the tax assessed, the taxpayer incurs a liability to an "additional tax" of ten per cent per annum unless it is remitted by the Commissioner. On the other hand, all the matters to which sec. 67 relates except, possibly, the furnishing of "information" must from their nature precede assessment and in the case of failure or neglect to furnish information, although no doubt under sec. 97 (1) (*a*) a notice requiring information may be given by the Commissioner after as well as before assessment, yet under sec. 67 upon assessment the period ends in respect of which the percentage per annum is calculated.

Again, the matters which affect the existence and the amount of the liability under sec. 67 are closely associated with assessment. In ascertaining the taxable income for the purpose of assessment, the questions must be dealt with whether assessable income has been omitted from, or excessive deductions have been included in, a return. What tax is "assessable to" the taxpayer or is "properly payable"

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depends upon the assessment as did the question which arose upon the section before the amendment of 1927, namely, what tax would have been evaded if the assessment had been based on the return lodged. It would be a departure from the legislative policy, if, in proceedings to recover additional tax, the questions what tax was properly payable, whether receipts omitted from the return are assessable and whether deductions included are allowable, were not concluded by the existence of a standing assessment but were left for determination as issues of fact upon a trial at law. Findings might be given upon these questions quite at variance with the conclusions adopted by the Commissioner in making his assessment of tax, or by the Board of Review in deciding a reference under the assessment, or by the Court in determining an appeal from the assessment. Further, some notification must be given to the taxpayer of the existence and the amount of his liability under sec. 67. The Commissioner must formulate a claim to additional tax and must make a preliminary determination of these matters as well as consider remitting the liability. Except the process of making, amending and notifying assessments, no method is indicated by the Act in which such a determination or claim should be expressed or communicated. That process and the subsequent proceedings upon objection provide the Commissioner with a convenient method and an appropriate occasion for determining whether the section applies to the case, and, if so, how he will exercise the discretions which it reposes in him, and for recording and communicating the result in a formal manner. Finally the very description " additional tax " gives rise to a presumption that it will be levied and collected in the same way as the principal tax to which it is accessory. Unless some contrary intention appears, the inclusion of additional tax in the assessment is a natural consequence of the view that the ascertainment of the tax, as well as of taxable income, is part of the process of assessing. Notwithstanding the suggestion to the contrary which I hazarded on a former occasion (*R.* v. *Federal Commissioner of Taxation*; *Ex parte King* (1)), I think that the better interpretation of the statute is that the procedure of assessment, objection, review and appeal does apply to additional tax under

(1) (1930) 43 C.L.R., at p. 580.

sec. 67. It does not follow that upon an appeal to this Court under sec. 51 (6) or sec. 51A the discretion of the Commissioner to remit additional tax can be controlled. Whether the Board of Review is, or is not, entrusted with the revision of this discretion depends upon the language of sec. 44, which does not apply to the Court. The decision of *Starke* J. in no way depends upon any exercise of discretion: It does no more than appropriate, in partial discharge of the prima facie liability of the taxpayer, a portion of payments already received by the Commissioner in satisfaction of tax levied upon another person in respect of the same income. Counsel for the Commissioner did not support the Commissioner's appeal against the correctness of this appropriation, but contented himself with denying the authority of the Court or Board to deal with the matter under sec. 51, and with a further contention that what his Honor had done fell outside the limits of the taxpayer's objection. This latter contention depends upon the fact that the objection, so far as material, is confined to the excessive amount of the penalty and upon the suggestion that the order appealed from really reduces the ordinary tax. The order is not so expressed, but, on the contrary, purports to reduce the total liability of each assessment by amounts equivalent to the nominee's contribution to the revenue in respect of the income included in that assessment.

For these reasons the Commissioner's cross-appeal fails.

The first ground upon which the taxpayer complains that the order of *Starke* J. is not sufficiently favourable to him is that the Commissioner ought not to be admitted at all to set up the liability of the taxpayer to be taxed upon the income derived from the operations of his nominee, while the Commissioner maintains the assessment of the nominee in respect of the same income and retains the tax paid under the assessments. The assessments were not made upon the nominee in a representative capacity, and it is plain that two persons cannot be severally liable each in his own right to include in his individual assessment for the same year the same income. It is said, therefore, that, although upon the findings of the Board the income must be taken to be part of the assessable income of the taxpayer, yet so long as assessments upon the nominee which include the income as his are maintained in force to warrant the retention

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of the tax already paid, the Commissioner cannot assess the taxpayer in respect of that income. Although the cases were not cited, I understand the principle relied upon to be that formulated by *Wilde* B. in the Court's judgment in *Cave* v. *Mills* (1); by *Honyman* J. in *Smith* v. *Baker* (2); by *Scrutton* L.J. in *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co.* (3). It is enough for present purposes to say that the general rule is that no person may, after obtaining an advantage by the assertion of rights in relation to another and while retaining it, set up and rely upon other rights against the same person inconsistent with the existence of those already asserted. When the present case was before *Starke* J. the Commissioner insisted that he should retain the whole amounts paid by the nominee under his assessments. This money, the taxpayer submits, must be treated as his upon the view of the facts adopted by the Board of Review. At the same time it is clear that if the Commissioner reduced these assessments by excluding the income now ascribed to the taxpayer, he would be bound to refund the overpayments of tax to the nominee, not to the taxpayer. It may be true that the nominee is, saving all questions of illegality of object, accountable to the taxpayer for the repayments he would so receive. But the Commissioner would not be accountable to the taxpayer. The order of *Starke* J., by crediting the nominee's payments of tax to the taxpayer, accomplishes the very object which would be effected if a refund of the tax was made to the nominee and he accounted to the taxpayer for the refund. The question is therefore reduced to the effect upon the Commissioner's authority to assess the taxpayer produced by the existence of the unaltered assessments upon the nominee. Is the alteration of these assessments so as to exclude the income an essential condition of the Commissioner's power to include the income in the assessments of the taxpayer? In considering this question it must be remembered that the assessments do not affect rights in property but personal liability only. The assessments do no more than ascertain and record the nominee's debt to the Crown. The nominee, being liable to pay to the Crown a sum for income tax calculated upon the

(1) (1862) 7 H. & N. 913, at pp. 927-928; 158 E.R. 740, at p. 747.

(2) (1873) L.R. 8 C.P. 350, at p. 357.

(3) (1921) 2 K.B. 608, at p. 612.

difference between certain of his receipts and of his disbursements during a given period, has caused this difference to be computed at an excessive amount, and has thus incurred a liability upon his assessment of a larger debt to the Crown than he otherwise owed. But those facts considered alone do not affect the taxpayer. What affects the taxpayer is the withholding of his money, if it be his, under colour of the assessments. Again, the case is not one in which a given state of facts exposes two persons in the alternative to a liability at the option of another ; it is not a case in which a public officer has an election between two courses so that he cannot pursue both at once. Upon the state of facts which must be taken to be true the taxpayer alone was exposed to tax in respect of the income in question. The nominee's liability arose only upon a false state of facts. No doubt, when and if the Commissioner arrived at the clear conclusion that to ensure the completeness and accuracy of the nominee's assessments the exclusion of the income he returned was requisite, it became his duty to exercise his power under sec. 37. But it was not unnatural that he should delay relieving one of two persons whom he considered culpable until the liability of the other was established. The questions which may arise out of such situations are no doubt attended with difficulty. For this reason it is not desirable to enter upon them more at large than is necessary for the decision of this appeal. It is enough to say that there is nothing in the character of the power given in sec. 37 or in the nature of the power of assessment which requires the formal alteration of the nominee's assessments before the alteration of the assessment of the taxpayer.

For these reasons the first ground relied upon in support of the taxpayer's appeal fails.

The remaining grounds depend upon the construction of sec. 67. Sec. 67 imposes a liability by way of additional tax for "double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged." The taxpayer desires that in ascertaining this difference the sums should be taken into account which were paid by the nominee because of the inclusion of the taxpayer's income in his assessments. In other words, the order appealed from is said to have erred against the taxpayer in

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deducting these sums after the total amount of tax and additional tax had been made up, and not earlier. The contention is that, of the actual liability to tax to which the true amount of his income exposed the taxpayer, so much must be considered to be already satisfied as is represented by payments made by the nominee in excess of his true liability to the Crown. To meet the difficulty which this contention encounters in the language of the section, counsel for the taxpayer offers two interpretations—either of which would suffice. First, it is said that the expression " the tax assessed upon the basis of the return lodged " should be applied to all tax assessed in respect of the income whether against the taxpayer or against his nominee. No doubt the word " return " includes " returns," so that, for instance, if the complaint was that a taxpayer who had made more than one " return " for the year had included excessive deductions in his statement of taxable income, the section might be applied as if there were one return. But it is quite another thing to construe it as if the identity of the taxpayer were irrelevant to the returns so long as they related to the income. Perhaps returns made under sec. 89 might be considered with returns by the principal, and there may be other cases where persons are responsible for one another in respect of the same income, but the expression " tax assessed upon the basis of the return lodged " cannot, in my opinion, extend to the case of two independent persons assuming to make returns of their individual income. The second interpretation turns upon the phrase " the tax properly payable." This is construed on behalf of the taxpayer as referring simply to the deficiency of tax levied upon items of income, to the amount of tax in respect of any income which the revenue should have, but has not, received, as disregarding the payer and concerning itself only with the payment, so that the amounts paid by the nominee must be allowed in ascertaining what remains to be paid in respect of the income of the taxpayer wrongly included in the nominee's return. Some support for this view of the meaning of the provision was sought in the consideration that the language of the provision was probably adopted merely to avoid the implication of fraud contained in the word " evade " in the provision as it stood formerly, when it was expressed " the tax which would have been evaded if " &c. But, whatever

may have actuated the change, the terms now employed leave no doubt that the tax properly payable means "the tax which the taxpayer ought to have paid." A comparison is required between two amounts. The first amount is that which the taxpayer ought to have paid. The second is either what he would have been required to pay if his return had been adopted for his assessment, or what he has actually been required to pay by an assessment actually made upon the basis of the return lodged. It is for present purposes immaterial which of these alternatives correctly describes the second amount, although *Starke* J., following his decision in *Penrose* v. *Federal Commissioner of Taxation* (1), adopted the latter alternative for the purpose of his decision in respect of the last year of assessment in this case upon which the Commissioner does not persist in this appeal. What is material is the nature of the first amount. It consists not of the loss suffered by the revenue at the time when sec. 67 is put into operation, but of the sum which ought originally to have been levied on, and paid by, the taxpayer. For these reasons it is impossible to take the reductions ordered by *Starke* J. into account at an earlier stage in the calculations than his Honor did, that is, before ascertaining or in ascertaining "the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged."

The last ground urged in support of the taxpayer's appeal is that sec. 67 does not require double this amount to be paid in addition to the full ordinary tax, that is, in effect, not treble the difference, but only double the difference. It is said that the section is dealing with "additional tax" of the same character as that to which sec. 37 applies, and differs only from sec. 37 in that it requires payment of double the difference between the amount of the original assessment and that found to be properly payable as a result of making alterations and additions. Secs. 54 (2) and (3) and 56 speak of the amount of tax payable in consequence of an amendment as "additional tax," and much of the reasoning by which this argument of the taxpayer was supported depends upon the similar description contained in sec. 67. But the use of the same expression does not justify the conclusion. "Additional tax" is a descriptive term

(1) (1931) 45 C.L.R. 263.

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applied to many different kinds of further liability imposed by the income tax legislation. It is used in sec. 21 (2) of the Act of 1922 of a further amount of tax payable by reason of a distribution of profits by a company among its members, and probably in the provision substituted for that sub-section by No. 51 of 1924, sec. 7, it has the same meaning (see also sec. 21, sub-sec. 2A, and sec. 16 (*b*) (ii.) (3)). In sec. 56 it is used in two different senses, first to describe the tax payable as a result of alteration or addition to an assessment and then a further liability of a penal character. In sec. 5 of the *Income Tax Act* 1916 (No. 37 of 1916), and I think in all the subsequent taxing Acts, the phrase is used to describe a further impost consisting of a percentage of the amount of tax resulting from the application of the declared rates to the taxable income. In sec. 65 (6) of the *Income Tax Assessment Act* 1922-1930 it is used in the definition of "tax" to include all these meanings. No doubt, in sec. 57 (2) and sec. 58 its use is ambiguous. Sec. 67 itself applies the expression "additional tax" to a percentage increase by way of penalty, and in its original form (sec. 59 of the *Income Tax Assessment Act* 1915) this percentage increase was the only consequence that ensued from failure to include assessable income in a return, and was described as a liability by way of additional tax. The change made in the provision by sec. 40 of No. 18 of 1918 seems to have been directed not to an alteration in the nature of the liability but to a differentiation between and to an increase in its maximum amounts. Further, the reference to the tax properly payable, to a minimum of one pound, to the additional tax for late payment, and to remission, while none of them is inconsistent with the taxpayer's argument, all suggest its incorrectness. At first sight, the choice given the Commissioner of suing to recover a penalty appears to be still more against the taxpayer's view, but, perhaps, if stress is laid on the words "this section" in the statement "in that case the additional tax payable under this section shall not be charged," the provision may be explained as implying that a single additional tax remains payable under sec. 37.

It follows that sec. 67 intends to impose a liability to the "additional tax" that it describes which is cumulative upon the ordinary liability of the taxpayer for tax in respect of his true taxable income,

and therefore cumulative upon the "additional tax" payable by reason of an amendment made under sec. 37.

For these reasons the order of *Starke* J., in so far as it has been attacked upon this appeal, should be affirmed. Both the taxpayer's appeal and the Commissioner's cross-appeal should be dismissed with costs. Costs to be set off.

EVATT J. This appeal and cross-appeal from the decision of *Starke* J. under the *Income Tax Assessment Acts* 1922-1930 are described by his Honor as follows :—

> "All are concerned with the inclusion of profits derived from a business carried on in the Exchange Hotel, Melbourne. These profits had been originally returned by one P. H. Collins, as income derived by him in carrying on the business in the hotel, but it is not now disputed that Collins was a nominee or dummy for Richardson, and that the profits were in fact part of the latter's income, for the purpose of the *Income Tax Acts*. Richardson failed to include these profits in the return of his income, and was assessed in the various financial years upon the basis of the returns lodged by him. Richardson was guilty of a fraud upon the revenue, which cannot be excused or palliated, in pretending that the income represented by the profits of the Exchange Hotel belonged to Collins. He thus secured a considerable reduction in the rate of his tax, and thereby greatly reduced the amount of the tax payable by him. When the Commissioner discovered the facts, he amended his assessments upon Richardson, and included the profits from the Exchange Hotel in his assessable income."

Taking the income year of 1924 by way of example,—

(1) Richardson's first return resulted in an assessment and payment by him of tax amounting to £6,447 19s. 3d.

(2) If Richardson had included the hotel profits, he would have had to pay an additional tax of £3,775 11s. 2d.

(3) In respect of such profits, included by Collins in his return, Collins was assessed and paid tax amounting to £2,054 1s. 6d.

(4) Subsequently the Commissioner assessed Richardson the £3,775 11s. 2d. which should have been paid by him, and also, by way of liability under sec. 67, twice that sum, i.e., £7,551 2s. 4d., the total additional assessment being £11,326 13s. 6d.

(5) *Starke* J. ordered a reduction of such assessment of £11,326 13s. 6d. by the sum of £2,054 1s. 6d. (Collins's payment) and against that order no objection has been raised by the Commissioner, except so far as it is involved in the general question of the competence of the appeal.

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The taxpayer's grounds of appeal are as follows :—

(1) That the assessment of the taxpayer in respect of the hotel profits is not authorized by the Act because the assessment against Collins includes such profits and it stands unamended.

(2) That the £2,054 1s. 6d. assessed upon and paid by Collins must be taken into account in estimating the amount of the liability which is imposed upon Richardson by sec. 67 (1).

(3) That the taxpayer's only liability is that under sec. 67 and that such liability excludes the ordinary liability to pay tax in respect of the omitted income.

(1) The first point is based upon the general principle that the Act does not intend the same income to be assessed and taxed more than once, and that Collins's amended assessment is incontrovertible evidence of an intention to reach both him and Richardson in respect of Richardson's profits from the hotel. But we are not concerned with Collins's rights, if any, against the Commissioner, and it would be curious if, despite Richardson's " fraud upon the revenue " (as *Starke* J. calls it), he could establish the invalidity of the assessment upon him by production of the assessment arrived at in error through his own misrepresentation.

The general principle invoked need not be questioned. But it cannot be stated, without qualification, that the administration of the Act must be such that tax can never be leviable against two separate individuals in respect of the same income. " One income, one taxpayer, one tax " is the general scheme of the Act. But where A, acting in collusion with B, has returned part of B's income as his own and has been enabled by B to pay the tax assessed in respect of such income, with the result that B is successful in a fraud, I think that it is hopeless for B to claim that he is exempted from his liabilities under the Act unless and until A's assessment is altered and a refund made. Whatever rights A may have to obtain his refund, B cannot say, either that an altered assessment upon him in respect of what is admittedly his own income is unlawful, or that the liability under sec. 67, which springs from his own default, is somehow suspended.

(2) The second question depends upon the meaning of sec. 67. The difference between the two amounts described therein has to be

ascertained, and then doubled. The first amount is "the tax properly payable," the second is "the tax assessed upon the basis of the return lodged." In this case the first amount is considerably greater than the second, but Mr. Ham sought to reduce the difference by increasing the second amount, introducing the assessment upon Collins in respect of *his* return. The tax assessed for the year 1924 would then be £6,447 19s. 3d. assessed upon Richardson and £2,054 1s. 6d. assessed upon Collins, i.e., £8,502 0s. 9d. in all; the tax "properly payable" by Richardson would be £6,447 17s. 3d. plus £3,775 11s. 2d., i.e., £10,223 10s. 5d. On this footing the "difference" would be only £1,721 9s. 8d. Such figure—£1,721 9s. 8d.—certainly represents the sum of which the revenue was deprived in respect of the year 1924 by the combined action of Richardson and Collins. But sec. 67 (1) (*b*) strikes at every person who "fails to include any assessable income in any return." That presupposes a person's returning what is his own assessable income. If Richardson can rely upon Collins's return and assessment for the purposes of sec. 67 (1) (*b*), it seems to me that he can just as well say "I am not hit by the provision at all, because all of the profits of the hotel were included in Collins's return," as say "The tax assessed upon the basis of the return lodged includes that assessed upon Collins in respect of the hotel profits as well as that assessed upon me." In truth sec. 67 (1) (*b*) operates to make Collins's return and assessment irrelevant because "any return" and "the return lodged" must refer to the returns made by the person dealt with by the provision.

Mr. *Herring* ingeniously sought to produce the same result by contending that "the tax properly payable" was not the tax assessed upon the basis of Richardson's returns and paid by him, plus the increase of tax assessable and payable by him if he had included the hotel profits in his return, but those sums minus the tax already paid by Collins in respect of such profits. I think that the same answer applies and that "the tax properly payable" means the tax payable by the taxpayer if he had included the omitted income in his return.

I agree that the rejection of Collins's return and assessment from consideration in measuring the liability of Richardson under sec. 67, operates with as much severity against him, as if there had never

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been any return or payment at all in respect of the hotel profits; and that the measure of liability under the section would as a general rule be only double the amount by which the Treasury was worse off by reason of the act forbidden. But Richardson's omission of hotel profits from his return is clearly within the intendment of the section. Whether, upon the facts, this is a proper case for the exercise of the power of remission, is a matter for the sole consideration of the Commissioner, under the terms of the proviso.

(3) The final argument of the taxpayer is that Richardson's liability to pay under sec. 67 is substituted by the Act for any obligation to pay the extra tax for which he would ordinarily be liable by reason of the inclusion of the hotel profits in the altered assessment under sec. 37. The contention is that, in respect of the year 1924, Richardson's total liability is limited to twice £3,775 11s. 2d., under sec. 67, and does not include his ordinary liability as a taxpayer, under the Act, to pay £3,775 11s. 2d. in respect of the hotel profits. This argument is untenable. If it were conceded, the Commissioner would be given power, under the proviso to sec. 67 (1), to remit the whole of the liability thereunder, thereby leaving the taxpayer under no liability whatever in respect of the omitted part of his assessable income. But sec. 67 is a penal provision, as is indicated by the heading to Part VII., and the amount of liability therein specified is an amount in the nature of a penalty. The liability is not to pay "additional tax" but to pay an amount "by way of" additional tax. The liability is ascertained by the Commissioner, and the ordinary procedure of assessment and collection *via* the Commissioner is adopted. But the penal liability is in no sense a substitute for, but is cumulative upon, the ordinary liability to pay, and that the Act imposes upon those who do not, as well as upon those who do, include all their assessable income in their returns. Cases of unfairness or harshness are for the Commissioner to consider in the exercise of his discretionary power.

The last matter argued, logically the first, is the only one raised by way of cross-appeal. It is a matter of jurisdiction and raises the question whether an assessment of the taxpayer by the Commissioner is an assessment subject to objection under sec. 50 (1), review by the Board of Review under sec. 51 (4) and appeal to this Court

under sec. 51 (6) or sec. 51A. In *Penrose* v. *Federal Commissioner of Taxation* (1), *Starke* J. entertained an appeal in respect of an objection by a taxpayer in relation to liability alleged to have been validly incurred and assessed under sec. 67. And he was of opinion that the ascertainment by the Commissioner of the rate and amount of tax "is a function within the duty of assessment." In spite of a contrary indication suggested by sec. 35, I agree with the opinion of *Starke* J.

It has already been pointed out that sec. 67 is a penal provision, but the procedure for meeting the liability to pay imposed by it is expressly stated to be "by way of additional tax." The amount of such liability depends not only upon the tax assessed upon the basis of the return lodged but also upon the "tax properly payable." The ascertainment of the amount of tax being "within the duty of assessment," it seems reasonably clear that the amount of liability is to be levied and collected through the medium of assessment in all respects as if it were an "additional tax." The liability assessed should, therefore, like an ordinary or amended assessment, be subject to objection and appeal. The result is both just and convenient, and I think that the Act secures that result.

It follows that both the appeal and cross-appeal have failed, and the judgments of *Starke* J. should be affirmed.

McTIERNAN J. I agree that the appeal and cross-appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hedderwick, Fookes & Alston.*

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

H. D. W.

(1) (1931) 45 C.L.R. 263.