

Dist Hadfield Finance Pty Ltd v FCT 19 ATR 1083	Dist DCT (NSW) v Moszyn 18 FCR 260	Dist DCT (NSW) v Moszyn 77 ALR 424	Appl Comr of Taxation v Manners 83 FLR 59	Dist Hadfield Finance Pty Ltd v FCT 79 ALR 249	Cons Healey v FCT 20 ATR 410	Foil Midland Metals Overseas Ltd v C-G of Customs (1991) 24 ALD 424	Cons Social Security, Department of v Hodgson (1992) 108 ALR 322
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Cons
Social
Security,
Department of
v Hodgson
(1992) 27
ALD 309

[HIGH COURT OF AUSTRALIA.]

JOLLY APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Taxpayer's return—Omission of assessable income—Penalty—*
1935. *Additional tax—Remission of additional tax—Power of Board of Review to*
MELBOURNE, *remit—The Constitution (63 & 64 Vict. c. 12), sec. 55—Income Tax Assessment*
*Act 1922-1934 (No. 37 of 1922—No. 51 of 1934), secs. 44, 67.**
March 12 ;
April 30.
—
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

Under sec. 44 of the *Income Tax Assessment Act 1922-1934* the Board of Review has power to review the entire process of assessing additional tax, and for that purpose may exercise the Commissioner's function under the proviso to sec. 67 (1) of the Act of remitting the additional tax so imposed.

So held by Rich, Dixon, Evatt and McTiernan JJ. (Starke J. dissenting).

Quære, per Rich and Dixon JJ., whether sec. 67 (1) of the *Income Tax Assessment Act* in imposing the additional tax or the minimum sum of £1 does not contravene sec. 55 of the Constitution as not imposing a tax upon income, which is the subject matter of the Act, or as not dealing with taxation at all.

*The *Income Tax Assessment Act 1922-1934*, sec. 67, provides :—“(1) Notwithstanding anything contained in the last preceding section, any person who— (a) fails or neglects to duly furnish any return or information as and when required by this Act or the regulations or by the Commissioner; or (b) fails to include any assessable income in any return; or (c) includes in any return as a deduction an amount which is in excess of that actually expended or incurred by him, shall . . . be liable to pay additional tax at the rate of ten per centum per annum upon the amount

of tax assessable to him . . . or the sum of one pound, whichever is the greater, or” (in another event) “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. . . . Provided that the Commissioner may, in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof.”

CASE STATED.

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On an appeal by John Jolly to the Board of Review from a decision of the Commissioner refusing to remit additional tax in respect of the income of the taxpayer assessed for the financial year 1925-1926, the majority of the Board held that it had no power to remit wholly or partly the additional tax imposed by sec. 67 (1) of the Act. From this decision the taxpayer appealed to the High Court, and *Starke J.* stated a special case, which was substantially as follows, for the opinion of the Full Court:—

1. John Jolly, the taxpayer, was assessed to income tax for the financial year 1925-1926.

2. The taxpayer failed to include certain assessable income in his return for the year in question, and became liable to pay by way of additional tax double the amount of the difference between the tax properly payable and the amount of the tax previously assessed to be paid by the taxpayer. The Commissioner, by an amended assessment, assessed the taxpayer to income tax in respect of the additional tax.

3. The taxpayer in due time and on 28th May 1929 lodged an objection in writing to the assessment on the ground (amongst others) that he had not "failed to include any assessable income in any return." The objection also contains the following words:—"The objector contends that in the circumstances no penalty has been incurred and therefore the penal provisions of sec. 67 of the Act do not apply. If it be held that they do, he submits and requests that the Commissioner should, in the circumstances and for the reasons stated, exercise the discretion conferred in the proviso to the section and remit the whole of the additional tax."

4. The Commissioner before he made any decision on the said objection in writing made alterations in the assessment and on 27th July 1931 issued a further assessment in which the taxable income was increased.

5. The taxpayer in due time and on 21st August 1931 lodged an objection in writing to the last-mentioned assessment. He set forth certain objections and repeated the objections contained in his notice dated 28th May 1929.

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6. The Commissioner in a letter dated 7th December 1932 informed the taxpayer that his objections had been disallowed.

7. The taxpayer on 28th December 1932 requested the Commissioner to refer his decision to a Board of Review. The request was in writing.

8. The Commissioner on 28th February 1933 referred his decision to a Board of Review. The reference was made in writing.

9. A Board of Review sat and reviewed the decision of the Commissioner referred to it by the reference of 28th February 1933. The Board reviewed the decision of the Commissioner upon a considerable number of items included in the assessment.

10. But the majority of the members of the Board held that it had no power to remit wholly or partly the additional tax imposed by sec. 67 (1) of the Act.

11. The taxpayer appealed to this Court from the decision of the Board, but limited his appeal to the question whether the Board of Review had, for the purpose of reviewing decisions referred to it by the Commissioner, power to remit additional tax or any part thereof imposed by sec. 67 (1) of the said Acts.

The questions reserved for the consideration of the Full Court were :—

- (1) Was the request of the taxpayer in his objections in writing of 28th May 1929 and 21st August 1931 that the Commissioner remit the additional tax, an objection in writing against the taxpayer's assessment within the meaning of the *Income Tax Acts* 1922-1934 ?
- (2) Was the Commissioner's disallowance of the said objections in writing of 28th May 1929 and 21st August 1931 a decision not to remit the additional tax as so requested ?
- (3) Did the reference by the Commissioner dated 28th February 1933 refer a decision of the Commissioner not to remit the additional tax hereinbefore mentioned to a Board of Review ?
- (4) Has the Commissioner any power or authority to refer to a Board of Review his refusal to accede to a request to remit additional tax imposed by sec. 67 (1) ?

(5) Has a Board of Review any power or authority to review
a refusal of the Commissioner to remit such additional tax ?

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Fullagar K.C. (with him *Herring*), for the appellant.

Tait, for the respondent.

Counsel referred to *British Imperial Oil Co. v. Federal Commissioner of Taxation* (1); *Richardson v. Federal Commissioner of Taxation* (2); *Federal Commissioner of Taxation v. Munro* (3); *Shell Co. of Australia v. Federal Commissioner of Taxation* (4); *Penrose v. Federal Commissioner of Taxation* (5).

Cur. adv. vult.

The following written judgments were delivered :—

April 30.

RICH AND DIXON JJ. In his return for the financial year 1925-1926 the taxpayer failed to include certain assessable income. By an amended assessment, the Commissioner applied sec. 67 of the *Income Tax Assessment Act* 1922-1934, and included additional tax in the assessment. The taxpayer objected that "no penalty had been incurred and therefore the penal provisions of sec. 67 do not apply." He added that, if it be held that they do apply, he submitted and requested that the Commissioner should exercise the discretion conferred in the proviso, and remit the whole of the additional tax. The Commissioner disallowed the objection, and the taxpayer thereupon requested him to refer his decision to the Board of Review. The Board of Review held that the taxpayer was exposed to liability to additional tax under sec. 67, and, by a majority, it further held that the Board of Review had no power to remit any part of the liability. From that decision the taxpayer appealed to this Court. The appeal came before *Starke* J. who stated a case for the Full Court.

(1) (1925) 35 C.L.R. 422, at pp. 432, 445, 446.

(2) (1932) 48 C.L.R. 192, at pp. 202, 203.

(3) (1926) 38 C.L.R. 153, at pp. 157, 182, 183, 212.

(4) (1931) A.C. 275, at pp. 296, 298 :

(5) (1931) 45 C.L.R. 263.

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The substantial question for decision is whether the Board of Review obtains under sec. 44 authority to exercise the power to remit additional tax conferred upon the Commissioner by the proviso to sec. 67.

Sec. 66 of the Assessment Act makes it an offence (a) to fail to furnish a return or information or to give security or to comply with any requirement of the Commissioner under the Act or regulations; (b) without just cause shown, to refuse or neglect to attend and give evidence when required; (c) to make or deliver a return which is false in any particular or to make a false answer. Sec. 67 imposes upon taxpayers a liability to additional tax if they do any one of three things. The first, which is described in par. (a) of sec. 67, is substantially the same as the offence created by par. (a) of sec. 66. The taxpayer in that case shall be liable to pay additional tax at the rate of ten per cent per annum upon the amount of the tax assessable, calculated during the period of default but not beyond the date of actual assessment, or the sum of one pound, whichever is the greater. The second default which exposes a taxpayer to additional tax is the failure to include any assessable income in any return, and the third the inclusion in any return of an amount as a deduction which is in excess of that actually expended or incurred by him. In each of these cases, sec. 67 provides that the taxpayer 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. By a proviso, which covers all three cases, it is enacted that the Commissioner may in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof. Although the provisions of sec. 67 have called for consideration on more than one previous occasion, not until the argument of the present case do doubts appear to have arisen as to its validity. So far the section has been treated, we think, as providing in certain contingencies for an increase in the rate of taxation. Upon this basis it has been tacitly regarded as a provision describing how and upon what basis a defaulting taxpayer's tax upon his net income was to be calculated by means of the rates imposed by the annual taxing Act. In this view of it, the provision,

whether because of its essential strength or of its accidental good fortune, has escaped challenge on the ground that, in effect, it penalized an offence, and that to do this otherwise than by means of the judicial power was not incidental to the legislative power in respect of taxation. But from setting this course away from Scylla a difficulty now appears to arise. A Charybdis exists in sec. 55 of the Constitution, although that provision so far has never pulled down any enactment. The difficulty has been found in the nature of the additional tax. Is it really a tax upon the same subject matter, income? Is there not something to be said for the view that the minimum sum of one pound has no reference to income at all; that it is imposed although there is no income? If so, it may be difficult to treat the so-called additional tax, or, at any rate, the minimum sum of one pound, as really a tax, or if it is really a tax, as a tax imposed upon anything but the default or omission of the taxpayer. But upon the argument these questions were not raised by counsel, and they were not intended to be raised by the special case. We mention them because we think they are worthy of consideration, and if hereafter the validity of the provision is brought before us for determination, the discussion of that question should not be prejudiced by a failure to advert to them on the present occasion.

The questions raised by the special case turn, in our opinion, upon the application of sec. 44 to the proviso to sec. 67. In *Richardson v. Federal Commissioner of Taxation* (1), we decided that the procedure of assessment, objection, review and appeal does apply to additional tax under sec. 67 (see per *Starke J.* (2), *Dixon J.* (3) and *Evatt J.* (4)). This decision means that the additional tax under sec. 67 as well as the ordinary income tax imposed upon the taxpayer must be dealt with by the machinery of assessment and alteration of assessment under Part IV. It also means that a taxpayer may under sec. 50 object to the amount of tax and additional tax which the assessment is expressed to levy. From the disallowance of that objection he may appeal to the Court or to the Board of Review. But the grounds open to him depend on further considerations.

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(1) (1932) 48 C.L.R. 192.

(2) (1932) 48 C.L.R., at p. 195.

(3) (1932) 48 C.L.R., at pp. 201-205.

(4) (1932) 48 C.L.R., at p. 215.

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In *Richardson's Case* (1) *Dixon J.* said :—" 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." It depends upon sec. 44, because it is that section which invests the Board of Review with its powers. When the proviso to sec. 67 was first enacted, it undoubtedly intended to give the Commissioner a discretion which would be final. No Board of Review then existed, and it was evident that the appeal, which then lay to the Court exercising in its original jurisdiction part of the judicial power, did not extend to a review of the Commissioner's discretion. No doubt the judicial power exercised by the Court included authority to control the Commissioner if he failed in his legal duty under the proviso. The Court could, for instance, remit an assessment to him for the proper exercise of his discretion under the proviso if it appeared that so far he had not exercised it according to law. Such a course might be open to the Court if it appeared that the Commissioner had allowed legally irrelevant grounds to affect his judgment. But the discretion is given to him and, subject to secs. 7 to 9, was meant to be exercised by him alone. In this respect it did not differ from other discretionary powers given by the Act. But the Board of Review was brought into existence after these provisions were enacted. One of the purposes it was intended to serve was the independent review of cases falling within the Commissioner's discretionary powers. "The Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself—namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive" (per Lord *Sankey L.C.*, *Shell Co. of Australia v. Federal Commissioner of Taxation* (2)).

But by *Richardson's Case* (3) it is established that the taxpayer may object under sec. 50 (1) to the assessment upon him of additional tax under sec. 67, and that under sec. 50 (4) he may carry the objection

(1) (1932) 48 C.L.R., at p. 205.

(2) (1931) A.C., at p. 298.

(3) (1932) 48 C.L.R. 192.

to the Board of Review. Under sec. 51 (4) the Board must give a decision and either confirm the assessment or reduce, increase, or vary it. *Richardson's Case* (1) shows that, if there is a legal reason why the amount of the additional tax assessed is excessive, the Board must give effect to it. It appears to us to follow at least that if there is a legal ground which vitiates the Commissioner's exercise of discretion under the proviso to sec. 67 (1) such as would make it no legal exercise of the function committed to him, the Board in its review of the amount of the additional tax must treat his discretion as not lawfully exercised. These considerations show that, in the discharge of its functions, the Board must, upon a proper objection, review in some degree at least the fixation of the amount of the additional tax, including the exercise of the power to remit. But sec. 44 (1) provides that a Board of Review shall have power to review such decisions of the Commissioner as are referred to it under the Act (e.g., under secs. 50 and 51), and for the purpose of reviewing such decisions shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under the Act. It goes on to provide that the assessments, determinations and decisions of the Board upon review shall for all purposes, except those of appeal, be deemed to be assessments, determinations or decisions of the Commissioner. In our opinion one of the functions of the Commissioner exercisable in the course of assessing to additional tax is the consideration of the question whether any and what part of the amount *prima facie* imposed by sec. 67 (1) should be remitted. The amount imposed should appear in the assessment. If after assessment part is remitted under the proviso, an alteration of the assessment should be made under sec. 37 to show the amount ultimately to be levied. We think so much almost necessarily follows from *Richardson's Case* (1). The proviso to sec. 67 (1) cannot be treated as a separate authority to forgo a debt due to the Crown exercisable by the Commissioner independently of the question whether the taxpayer is within the conditions which expose him to the *prima facie* liability to full additional tax. As a mere matter of strict construction, the liability is imposed by sec. 67 (1), not absolutely, but subject to the proviso. It is a liability to ten

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per cent or double the difference in tax unless there is a remission. In form the provision does not impose an absolute liability and then confer an independent power of remission. But in substance it is reasonably clear that it was intended that the Commissioner should have in his hands a summary power of imposing upon taxpayers guilty of the kinds of act or omission specified a liability to further exaction commensurate with their fault.

If it be a function of the Commissioner to consider in assessing to additional tax whether the case calls for an imposition of less than the full *prima facie* amount of the additional tax, why is this not a function which in exercising its power of review in relation to assessment of additional tax the Board obtains under sec. 44? It appears to us that sec. 44 must confer upon the Board the function which falls to the Commissioner under the proviso to sec. 67 (1), unless the word "decision" in sec. 44 is not wide enough for the purpose. The powers and functions of the Commissioner pass to the Board for the purpose, and for the purpose only, of reviewing his "decisions." Now the act or determination of the Commissioner which they are called upon to review is the assessment of additional tax, and that includes the determination that one or other of the conditions of liability is satisfied, the calculation of the *prima facie* or maximum amount of liability, its reduction by remission, or, perhaps, in rare cases, as *Richardson's Case* (1) suggests, by some process amounting to legal part satisfaction, and the final statement of the amount payable. Why should not all this be covered by the word "decision"? It is a word of the widest connotation. It has no technical meaning. The Board is only another executive body in an administrative hierarchy. The purpose of erecting it was to enable taxpayers to have a reconsideration or re-examination of the process by which liability had been imposed upon them, particularly in relation to matters where the Commissioner had a discretion. The important discretion given by sec. 67 (1) possesses no features which make it less proper for the Board to review it. Indeed, we should think that all the arguments of fairness were on the side of a review of the ascertainment, including the discretionary remission, of an amount which may prove a ruinous imposition.

In our opinion the Board of Review is empowered to review the entire process of assessing additional tax, and for that purpose may exercise the Commissioner's function under the proviso to sec. 67 (1) of remitting.

The objection in the present case appears to us to have been sufficiently taken, and to include the manner in which the Commissioner's discretion was exercised. Accordingly, we think the Board should have considered whether the whole or any and what part of the additional tax should have been remitted.

We think the questions in the special case should all be answered :
Yes.

STARKE J. Case stated. The question is whether the refusal of the Commissioner of Taxation to remit additional tax, under the power conferred upon him by the proviso to sec. 67 of the *Income Tax Assessment Act* 1922-1930, is reviewable by a Board of Review. It is the Commissioner's duty to cause assessments to be made of the taxable income of taxpayers. But a taxpayer who is dissatisfied with his assessment may lodge objections, and the Commissioner is required to give to the objector written notice of his decision on the objections. Only decisions so obtained are reviewable. "A taxpayer who is dissatisfied with the decision of the Commissioner . . . may . . . request the Commissioner to refer the decision to a Board of Review for review or . . . to treat his objection as an appeal and forward it either to the High Court or to the Supreme Court of a State" (Act, sec. 50). "A Board of Review shall have power to review such decisions of the Commissioner . . . as are referred to it . . . and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions" (Act, sec. 44 ; *Shell Co. of Australia v. Federal Commissioner of Taxation* (1) ; *Richardson v. Federal Commissioner of Taxation* (2)). But it is only decisions upon objections to assessments that are reviewable. Is the remission or refusal to remit additional tax assessed under sec. 67 part of the function or process of assessment ? Clearly not, I should have thought. The tax is not such

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(1) (1931) A.C. 275.

(2) (1932) 48 C.L.R. 192.

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sum as the Commissioner thinks sufficient, but, in this case, double the amount of the difference between the tax properly payable, and the tax assessed upon the basis of the return lodged. Remission of the tax does not alter that liability: it is a discharge from or forgiveness of the liability ascertained and assessed pursuant to the provisions of the Act, and is no part of the assessment of any such liability. But if refusal to remit additional tax is a matter capable of decision for the purposes of sec. 50, it is also the subject of appeal to the High Court or the Supreme Court. And by what legal standard, other than the Commissioner's opinion, could such an appeal be determined? (*Cornell v. Deputy Federal Commissioner of Taxation (S.A.)* (1); *Thomson v. Federal Commissioner of Taxation* (2); and note the provisions of sec. 51B). Further, is the discretion to remit additional tax given by the proviso to sec. 56 also a matter of review? That tax only becomes payable after assessment has taken place.

In my opinion, the questions stated should all be answered in the negative. That would give effect to what is, I feel sure, the true intent of the legislation. But that intent could be made even clearer by placing in the hands of the Governor in Council or some Minister of State the power which the Act now vests in the Commissioner.

EVATT J. Sec. 67 (1) (b) of the *Income Tax Assessment Act* provides that any person who 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 amount of tax previously assessed to be paid by the taxpayer (or, if no amount of tax has previously been assessed, the amount of tax that would be payable by him if he were assessed for tax upon the basis of the return furnished by him, whichever is the greater).

Sec. 67 (1) concludes as follows:

"Provided that the Commissioner may, in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof."

In the present case the taxpayer failed to include certain assessable income in his return for the financial year 1925-1926, and became

(1) (1920) 29 C.L.R. 39.

(2) (1923) 33 C.L.R. 73.

liable to pay by way of additional tax double the amount of the difference between the tax properly payable and the amount of the tax previously assessed to be paid by the taxpayer. The Commissioner, by an amended assessment, assessed the taxpayer in respect of such additional tax. Thereupon the taxpayer lodged an objection to the assessment on the ground (amongst others) that he had not "failed to include any assessable income in any return." The objection stated that the penal provisions of sec. 67 did not apply, and added:

"if it be held that they do, he submits and requests that the Commissioner should, in the circumstances, and for the reasons stated, exercise the discretion conferred in the proviso to the section and remit the whole of the additional tax."

After a further amended assessment and a further objection which repeated the matters already set out, the Commissioner informed the taxpayer that his objections had been disallowed. Thereupon the taxpayer requested the Commissioner under sec. 50 (4) to refer the decision to a Board of Review. The majority of the Board held that it had no power to exercise the authority to remit additional tax conferred upon the Commissioner by the proviso to sec. 67 (1), and the question raised in the present case stated is whether the Board's opinion is correct.

In *Richardson's Case* (1) the Court held that the procedure of assessment, objection, review and appeal was applicable to the imposition of the liability to pay additional tax which sec. 67 (1) imposed upon the persons coming within its scope. Does it follow that the decision of the Commissioner as to the remission of the additional tax under the proviso is to be included in the procedure of assessment?

In the first place, there is a distinction between the functions of the Commissioner under the main provision and under the proviso. In the case of his assessing the primary liability to additional tax, the precise scope of his duty is defined by sec. 67 (1) itself. He must determine, in the case of any person coming within pars. (a), (b) or (c) of sec. 67 (1), what amount of liability is to be imposed upon the taxpayer in accordance with the directions set out in the sub-section. For instance, in the particular case under review, it

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was his duty first to ascertain the tax properly payable as well as the amount of tax previously assessed to be paid by the taxpayer, and then to double the amount of the difference. *Richardson's Case* (1) establishes that it was his duty to include these matters in the assessment because the liability to pay was "by way of additional tax." On the other hand, the proviso does not in itself afford any guide or standard for the exercise of the Commissioner's discretionary power. He is authorized to act upon reasons which appear sufficient to him. These reasons may include matters of hardship, and questions of general policy and administration. It follows that the function of calculating the additional tax is a function which is readily capable of review and amendment; but the function of remission or pardon under the proviso partakes more of the nature of the discretion involved in the exercise of the pardoning power of the Crown, and is not so readily capable of review and amendment.

Nevertheless, under sec. 44 of the Act, the jurisdiction of the Board is to review "the decisions" of the Commissioner. I am disposed to give a liberal construction to this beneficial section of the Act, although it is clear from other provisions that it is not every conclusion reached by the Commissioner in his administration of the statutory provisions which is subject to objection and review. At the same time, it is too narrow a reading of sec. 44 to hold that the decisions of the Commissioner which are the subject of objection and subsequent appeal to the Board of Review are only those decisions which the Act regards as proceeding according to some definite rule or standard impliedly specified in the Act itself.

In my opinion, therefore, there is no clear overriding principle in the Act which should exclude from review the Commissioner's decision to remit under the proviso to sec. 67 (1). If so, the determining factor in the present case is the precise relationship between sec. 67 (1) and the proviso. Although the two functions of the Commissioner are not analogous, "the liability is imposed," as *Rich and Dixon JJ.* say, "not absolutely but subject to the proviso." The liability is to pay the additional tax minus a remission, if it is decided to remit. The proviso being thus interwoven with the main enactment of sec. 67 (1), I am compelled to agree with the

judgment of my brothers *Rich* and *Dixon* that *Richardson's Case* (1) concludes the present matter. I should add that my own observation at pp. 213, 214 of *Richardson's Case* (1) was obviously intended to be directed to excluding from the purview of the Court itself the question of the severity in application of sec. 67 (1). It was not addressed to the question of the Board's functions, which are quite different from those of the Court.

The questions should be answered : Yes.

McTIERNAN J. Sec. 67 (1) of the *Income Tax Assessment Act* imposes a liability on every taxpayer to whom pars. (a), (b) or (c) apply, to pay by way of additional taxation a sum calculated in the manner mentioned in the sub-section, and concludes with an enactment in these terms : " Provided that the Commissioner may, in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof." This sub-section does not operate as a statutory assessment of the additional taxation payable by a taxpayer to whom it applies : its provisions render necessary the assessment by the Commissioner or other proper authority of the additional taxation payable by such taxpayer (see *Richardson's Case* (1)). The power conferred by the proviso is not to remit the whole or part of a statutory obligation imposed on the taxpayer independently of assessment. The power is in effect to determine whether notwithstanding the taxpayer's breaches, he should be assessed for any additional taxation at all, or for the maximum mentioned in the sub-section or a less amount.

It follows that the taxpayer is entitled under sec. 50 to object to the assessment of additional taxation in case the Commissioner declines to remit the whole of it, or makes a less liberal remission than that which the taxpayer contends should be made. The power of the Board of Review under sec. 44, in my opinion, extends to review the decision of the Commissioner in that case.

I agree that the questions should be answered in the affirmative.

All the questions in the special case answered : Yes.

Solicitors for the appellant, *Hedderwick, Fookes & Alston*.
Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

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