[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . APPLICANT;
PLAINTIFF,

AND

TRAUTWEIN . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1936.

SYDNEY, *Oct.* 19, 20.

Evatt J.

Practice—Final judgment—Leave to enter—Intention of defendant to apply to Privy Council for leave to appeal—Rules of the High Court, Part I., Order XIII.

Income Tax (Cth.)—Additional tax—Penalty—Validity—Payment of tax—Time—Amended assessment—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 55—*Income Tax Assessment Act* 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *secs.* 54, 67.

The Federal Commissioner of Taxation applied under Order XIII. of the *High Court Rules* for leave to enter final judgment in an action for the recovery of income tax and additional tax alleged to be due and payable by the defendant in respect of seven income years. Issues raised on appeals by the defendant to the High Court against the various assessments had been decided against him. He opposed the application on the ground that he intended to apply to the Privy Council for special leave to appeal from the decision of the High Court.

Held that the court should not refrain from allowing final judgment to be entered with its ordinary consequences merely because an application to the Privy Council for special leave was proposed or intended.

The further time within which to pay allowed to a taxpayer by sec. 54 (2) of the *Income Tax Assessment Act* 1922-1934 applies only in respect of additional income tax made payable under an amended assessment. The provisions of that sub-section do not apply where the quantum of tax payable has not been altered or has been reduced.

The provisions of sec. 67 of the *Income Tax Assessment Act* 1922-1934 do not infringe the provisions of sec. 55 of the Constitution.

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Jolly v. *Federal Commissioner of Taxation*, (1935) 53 C.L.R. 206, at pp. 210, 211, *Richardson* v. *Federal Commissioner of Taxation*, (1932) 48 C.L.R. 192, at p. 215, and *Penrose* v. *Federal Commissioner of Taxation*, (1931) 45 C.L.R. 263, referred to.

APPLICATION for final judgment.

The Federal Commissioner of Taxation applied under Order XIII. of the *Rules of the High Court* for leave to enter final judgment in an action commenced on 15th July 1935, by writ of summons specially indorsed under Order V., rule 4, for the recovery of the sum of £162,826 0s. 9d. for income tax and additional tax alleged to be due by the defendant, Theodore Charles Trautwein, the respondent to the application, to the commissioner under the *Income Tax Assessment Act* 1915-1921 and the *Income Tax Assessment Act* 1922-1934 in respect of income derived by the defendant during the years ended 30th June 1921, 1922, 1923, 1924, 1925, 1926 and 1927. Objections lodged by the defendant against the assessments for those years had been disallowed by the commissioner and, except as regards the assessment for the year ended 30th June 1925, had been forwarded to the High Court as appeals. On 9th August 1935 *Evatt* J. stayed proceedings on the writ of summons until 2nd October 1935, upon the defendant undertaking to pay the sum of £5,000 tax to the commissioner and also to expedite the hearing of the appeals. The sum of £5,000 was duly paid. The appeals were heard before *Evatt* J. The matters in issue on those appeals and material facts are set forth in the judgment of his Honour therein (1), and also in a case stated by his Honour for the opinion of the Full Court (2). All the issues were decided against the defendant, who did not appeal therefrom to the Full Court. The commissioner caused an amendment to be made in the assessment for the year ended 30th June 1925, and certain consequential amendments in the assessments for the years ended 30th June 1926, and 1927, with the result that, after making allowance for the payment of the sum of £5,000 referred to above, the amount for which final judgment was sought was reduced to the sum of £143,506 19s., 3d., made up of £42,211 8s. 8d. income tax, and £101,295 10s. 7d. additional tax.

(1) *Ante*, p. 196. (2) *Ante*, p. 63.

The commissioner stated that in his belief there was no defence to the action.

The respondent stated that he intended to apply to the Privy Council for special leave to appeal from the order dismissing his appeals, and requested that, pending the application for special leave and the hearing of the appeal, judgment should not be entered against him for the amount as finally claimed, or any part thereof.

Further facts and the nature of the arguments appear in the judgment hereunder.

Lamb K.C. and *Alroy Cohen*, for the applicant.

Mason K.C. and *Gain*, for the respondent.

Cur. adv. vult.

Oct. 20.

The following written judgment was delivered by EVATT J.:—

EVATT J. This is an application made on behalf of the plaintiff under Order XIII. of the original jurisdiction rules for liberty to enter final judgment in the action No. 24 of 1935. The amount indorsed upon the writ is £162,826 0s. 9d. The writ of summons commencing the action was issued on July 15th, 1935. Appearance was entered by the defendant on July 25th, 1935. The action was brought in respect of income tax and additional tax alleged to be due and payable under the various Commonwealth *Income Tax Assessment Acts* in respect of the seven income years of the taxpayer from 1921 to 1927 inclusive. At the time, appeals in respect of these seven years were pending and in order to retain the benefit of these appeals the defendant applied on August 8th, 1935, to stay proceedings in the action pending the hearing of his appeals. Accordingly, on August 9th, 1935, upon the defendant undertaking to pay £5,000 tax to the commissioner and also to expedite the hearing of his appeals, the court stayed proceedings until October 2nd, 1935.

Subsequently, the hearing of the appeals was proceeded with before me. It involved a very close investigation of the affairs of the defendant over a period of many years. The matters in issue on the appeals are referred to at length in my judgment delivered

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on September 9th last (1). Upon the hearing I stated a case for the opinion of the Full Court upon certain questions of law involving the interpretation of certain sections of the *Income Tax Assessment Act*. The appeals formally before me numbered six, being in respect of all the income years above mentioned except the income year 1925. With respect to that year I expressed the opinion on the evidence before me that the commissioner should make a deduction in respect of certain outgoings of the defendant. But the six appeals themselves were all dismissed.

Since my judgment was delivered, the commissioner has acted upon my opinion in respect of the income year 1925 and amended the assessments of the taxpayer in respect of that year and also in respect of the income years 1926 and 1927. As a result of this the tax payable by the defendant in respect of these three years has been reduced because the averaging provisions of the statute gave the taxpayer the benefit in respect of the years 1926 and 1927 of the deduction of £16,821 which I considered should be made in respect of the income year 1925.

As a result of these adjustments of the three years mentioned and of the payment of £5,000 by the defendant under the order which I made for stay of proceedings in 1935, the amount owing by the defendant became reduced to the sum of £143,506 19s. 3d. The statement of liability is set out in the letter referred to in par. 10 of the affidavit of the deputy commissioner and the special indorsement upon the writ of summons will be amended to accord with the particulars of debt set out in the commissioner's letter and repeated in par. 12 of his affidavit filed in support of the present summons.

A case like the present is eminently one for the exercise of the court's jurisdiction to allow summary judgment to be entered. All the objections of the defendant to the commissioner's assessments in respect of the six years investigated on the appeals, were dealt with in the judgment of the court dismissing those appeals. The time for an appeal to the Full Court has long since elapsed. All the issues were decided against the defendant upon the six appeals, so that there is no possible defence to the present action on the merits.

(1) *Ante*, p. 63.

This position is practically conceded by the defendant and the only ground upon which he opposes summary judgment is that the taxpayer intends to apply to the Judicial Committee so that the prerogative of granting special leave to appeal may be exercised in respect of my judgment dismissing the six appeals and of the Full Court's judgment upon the case stated upon which, in certain important respects, I acted in delivering my own judgment. But this intention of the defendant amounts really to a request to the court, not so much to refrain from allowing final judgment to be signed in the action as to making an order staying proceedings in the action until the Privy Council disposes of his application.

The defendant contended before me that a number of substantial or important questions of law were involved in the six appeals and I shall refer to several of these.

I. The first matter of law suggested is the validity of sec. 59 of the *Income Tax Assessment Act* 1915-1921, which provided in the case of failure on the part of a taxpayer to include assessable income in a return a liability to pay by way of additional tax " the amount of one pound or double the tax which would have been evaded if the assessment had been based on the return lodged, whichever is the greater." Under that section the commissioner was empowered in any particular case and for reasons which he thought sufficient, to remit the additional tax or any part thereof. Sec. 59 of the Act mentioned controlled the present taxpayer's liability to additional tax in respect of the income year 1921. In respect of the income years from 1922 to 1926 inclusive, the section governing the question of " additional tax " was sec. 67 of the Act of 1922. The terms of it, so far as relevant, correspond to sec. 59 of the Act of 1915-1921. In respect of the income year 1927, sec. 67 was changed by Act No. 32 of 1927 (sec. 27) to a form which made the taxpayer, failing to include assessable income in his return, liable to pay by way of additional tax, the amount of £1 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.

For the purposes of dealing with the question of the invalidity of the above sections, all creating a liability to additional tax, their form is of no special significance. In the case of each section the

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argument is that it either confers upon the commissioner, a non-judicial officer, the power of inflicting a penalty which, as part of the judicial power, can only be exercised by the courts, or else it imposes a tax, not upon income but upon a subject of taxation different from income, contrary to sec. 55 of the Constitution which provides that laws imposing taxation shall deal only with the imposition of taxation and (except for customs and excise laws) with one subject of taxation only. In my judgment upon the six appeals I dismissed the argument summarily. Further my recollection was that the defendant did not really press the point. Upon the present application I was referred to the transcript, from which it appears that the point was undoubtedly taken, though apparently as a "formal point," senior counsel for the defendant stating that he did not wish to argue the point personally. His learned junior did not argue it. My statement that the point was not pressed, although I was under that impression, is of no consequence because I definitely overruled the point. As the matter may be debated in the Privy Council, I should add the following references to my decision that sec. 67 (and the earlier sec. 59) is valid.

(1) The doctrine of the separation of powers has not so full an application under the Australian Constitution as under that of the United States (*Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (1)). But the Federal Parliament cannot vest what is strictly judicial power, except in the courts mentioned in sec. 71 of the Constitution.

(2) But the commissioner does not, under the section challenged, impose a penalty at all. The statute imposes the additional tax in the nature of a penalty and the amount of that is fixed precisely by the statute. The power of the commissioner is the power to remit, a power which belongs essentially to the executive and not to the judicial power.

(3) Further, there is no infringement of sec. 55 of the Constitution. The *Income Tax Assessment Act*, broadly speaking, defines the subject matter of taxation. Taxation is imposed by a separate Act, viz., the *Income Tax Act*. Sec. 67 is one of a number of provisions which, taking the 1922 Assessment Act by way of example, is found

(1) (1931) 46 C.L.R. 73, at pp. 115-121.

in Part VII. of the Act, the heading of which is—Penal Provisions. The object of the section is to impose a heavy penalty so as to ensure the accuracy of returns, upon which the whole income tax system of the Commonwealth is based. The penalty is imposed " by way of additional tax," but, as I endeavoured to point out in *Richardson* v. *Federal Commissioner of Taxation* (1), although the penalty is collected *via* the machinery of assessment, the section is clearly a penal provision. The mention of the £1 in sec. 67 ensures a minimum penalty and the full liability is dependent upon the extent to which the taxpayer's return, when sent in, was inaccurate. Sec. 55 was never intended to prevent the inclusion of incidental penal provisions in the Assessment Acts. Such provisions are an essential part of any income tax system and have always been recognized as essential in Australia and elsewhere. See, for instance, the English *Income Tax Acts*, 43 Geo. III. c. 122, secs. 128, 155, 156, 157 ; 5 & 6 Vict. c. 35, sec. 55.

(4) Until the reference to the point in *Jolly* v. *Federal Commissioner of Taxation* (2) by *Rich* and *Dixon* JJ., no objection to the constitutional validity of the additional tax penal provision has ever been made. Their Honours' reference to it in *Jolly's Case* (3) is a very guarded one and designed not to indicate a doubt but merely to keep the point open if an argument should be addressed to the court at some subsequent stage. If the point had been sound, *Richardson's Case* (4) must have been decided differently, as well as a large number of previous cases.

II. The second point of alleged substance is that my judgment on the six appeals failed to give effect to the decision of *Starke* J. in *Penrose* v. *Federal Commissioner of Taxation* (5). In that case *Starke* J. held that, inasmuch as by the Amendment Act, No. 32 of 1927, sec. 67 was altered so as to make the taxpayer liable to pay £1 or double the amount of the difference between the tax properly payable and the " tax assessed upon the basis of the return lodged," it was necessary, before the latter liability could attach, that a formal assessment must have been made by the commissioner upon the basis of the inaccurate return. I refrain from saying anything

(1) (1932) 48 C.L.R. 192, at p. 215.
(2) (1935) 53 C.L.R. 206, at pp. 210, 211.
(3) (1935) 53 C.L.R., at pp. 210, 211.
(4) (1932) 48 C.L.R. 192.
(5) (1931) 45 C.L.R. 263.

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about the correctness of this decision. It was sought to be attacked in *Richardson's Case* (1), but, owing to the smallness of the amount involved, the commissioner did not proceed with the appeal and no opinion upon the point was expressed by the Full Court. At first glance one might have supposed that sec. 67 did not intend that a defaulting taxpayer failing to include assessable income in his return should be in a better position in respect of liability merely by reason of the fact that a formal assessment upon the basis of the return had not been made ; and that it might possibly have been intended that the word " assessed " in the amending Act of 1927 either means " estimated " or else refers to the assessment which is made by the commissioner for the purpose of imposing the penal liability under sec. 67 itself.

But had the question become necessary for me to decide, I should certainly not have refused to follow the decision of *Starke* J., without previously inviting the opinion of the Full Court. Of course I accept counsel's assurance that the *Penrose Case* (2) was mentioned incidentally in the course of the lengthy hearing of the appeals. But the question involved was certainly never argued in such a way as to suggest any possible application of *Penrose's Case* (2) to the facts of the six appeals and this is shown by the absence from my judgment of any reference to the case.

However, it is perfectly plain that my judgment does not run counter in any way to the *Penrose* decision. The form of sec. 67 dealt with in *Penrose's Case* (2) was introduced for the first time by No. 32 of 1927, and sec. 32 (3) of the same Act provides that the new sec. 67 was to apply only to assessments for the financial year 1927-1928 and subsequent years. In respect of all the assessments appealed against (except for the income year 1926-1927), the terms of sec. 67 made the taxpayer liable to pay double the tax he would have evaded " *if* the assessment had been based on the return lodged." In all such cases it is obvious that a comparison had to be made between the true liability to pay tax and the liability which would have existed if the inaccurate return had been acted upon, for the tax which would have been evaded would have been

(1) (1932) 48 C.L.R., at p. 197.

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

the difference between these two amounts. Therefore *Penrose's Case* (1) could have no relation to any assessment of the taxpayer except the last. Finally, *Penrose's Case* (1) can have no relation to the income year 1927 because in that year (case stated, pars. 1 and 8) the return of the appellant for the year 1927 was £4,604 and the commissioner duly made his first assessment in respect of that year based upon such income of £4,604. Accordingly, if the decision of *Starke* J. was applied, the assessment of liability to additional tax for the year 1927 would necessarily be correct.

Therefore it is clear that the decision in *Penrose's Case* (1) does not assist the taxpayer in respect of any of his six appeals.

III. The other questions of law referred to as "substantial" by counsel for the defendant were the decision of the Full Court upon the question of onus of proof under the statute and my own decision upon the facts as to the taxpayer's being engaged in the betting business. In reference to the latter, even if the question as to betting being conducted as a business had been decided in favour of the taxpayer, the commissioner contends that the assessments must still stand because it is not possible for the court to find affirmatively what profit the taxpayer made from his betting transactions.

Whilst the importance of one or more of the questions mentioned is clear, I do not think that the court should refrain from allowing the commissioner to obtain final judgment with its ordinary consequences merely because an application to the Privy Council for special leave is proposed or intended. Under certain circumstances there may arise cases where this court should exercise its discretion and grant a stay of proceedings. But such cases will be very rare and in the history of the Commonwealth there have not been more than one or two such cases. There is no right of appeal to the Privy Council, and, even if special leave were granted, it is not the practice either of the Privy Council, or of this court to stay proceedings upon the judgment of this court. Apart from these general principles, the special considerations applicable to this case make it undesirable, in my opinion, that there should be further delay by the taxpayer in meeting his established liability. That

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

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liability relates to years long since past and is based upon assessments which should in the ordinary course have been followed by payment. Moreover, I do not think it at all unlikely that further delay may increase the commissioner's difficulties in recovering that part of the defendant's debt to which he is clearly entitled. Further, if an appeal succeeded, the Commonwealth would of course be in a position to make an immediate refund.

A point was taken by the taxpayer in respect of the recent amendment of the assessment for the year 1925 which reduced the tax in accordance with my recently expressed opinion and of the amended assessments for the years 1926 and 1927 consequential upon the deduction allowed in respect of the year 1925. It was argued that, under sec. 54 of the Assessment Act, the taxpayer must be allowed a further sixty days to pay from the date of the service of the three assessments. In my opinion this contention is erroneous. Sec. 54 (2) makes it clear that, where there is an amended assessment, it is only the additional income tax made payable thereunder for which the taxpayer is given a further time of sixty days within which to pay. For the purposes of sec. 54, amended assessments like the present, which reduce the taxpayer's liability, do not have the absurd result of conferring upon a taxpayer further time to meet an established liability which has been included in an earlier assessment and has long since been due and payable by the taxpayer.

During argument, however, learned counsel for the commissioner announced that it was the intention of the commissioner to consider or reconsider the question of a remission of penalty under sec. 67 in the light of certain considerations which were pointed out in my judgment upon the six appeals. Solely in view of this fact, I now give the plaintiff liberty to enter final judgment not for the full amount of the claim as amended, but for the amount of £41,510 6s. 5d. and I shall allow the action to proceed in respect of the residue of the plaintiff's claim as now particularized in the affidavit of Mr. McMahon. In reaching the figure mentioned, I omit liability for the year 1925 in respect of which final judgment on the appeal has not been given. I also omit the penalties in respect of the six years dealt with on the appeal because I do not think that it is right to enter final judgment for penalties until the commissioner

himself reaches a final conclusion upon the question of all such penalties. Treating the defendant as having applied for a stay of proceedings upon the judgment which the plaintiff is now at liberty to enter, I refuse a stay.

The defendant will pay the costs of the present summons which I referred into court and I certify for counsel, including senior counsel.

Application granted in part.

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

Solicitors for the respondent, *A. R. Baldwin & Co.*

J. B.

[On 26th April 1937 the Privy Council refused special leave to appeal from the above decision and the decisions in *Trautwein* v. *Federal Commissioner of Taxation*; *R.* v. *Federal Commissioner of Taxation*, *ante*, p. 63, and *Ibid.* [*No.* 2], *ante*, p. 196.]

[HIGH COURT OF AUSTRALIA.]

EX PARTE BUCKNELL.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Appeal—High Court—Leave to appeal—Interlocutory judgment of State Court—Principles governing grant of leave—Judiciary Act 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), *sec.* 35 (1).

Principles in accordance with which applications under sec. 35 (1) of the *Judiciary Act* 1903-1934 for leave to appeal against an interlocutory judgment of a State Court should be determined, stated.

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SYDNEY, *Nov.* 30; *Dec.* 15.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

APPLICATION for leave to appeal from the Supreme Court of New South Wales.

The Commercial Banking Co. of Sydney Ltd. brought an action in the Supreme Court of New South Wales against Norman Charles Bucknell for moneys lent by the plaintiff to the defendant by way of overdraft and for interest and charges thereon to the amount, in all, of £2,272 15s.