

Appeal allowed. Order of Full Court discharged and in lieu thereof order that a new trial be had upon all the issues raised under the third and fourth counts of the declaration except the issue raised by the second plea. Respondent to pay the costs of the appeal to this court. Costs of the first trial and of the appeal to the Full Court to abide the event of the new trial.

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O'CONNOR
v.
S. P. BRAY
LTD.

Solicitors for the appellant, *Rosendahl & Devereux.*
Solicitors for the respondents, *J. W. Maund & Kelynack.*
J. B.

[HIGH COURT OF AUSTRALIA.]

AITKEN AND ANOTHER APPELLANTS ;
AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

Income Tax (Cth.)—Taxing Act passed after death of taxpayer—Liability of executors —Income Tax Act 1934 (No. 31 of 1934)—Income Tax Assessment Act 1922-1934 (No. 37 of 1922—No. 18 of 1934), secs. 13, 62.

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MELBOURNE,
Oct. 22.
SYDNEY,
Nov. 26.
Latham C.J.,
Starke, Dixon
and McTiernan
JJ.

A taxpayer whose returns of income for the purposes of Federal income tax were made up for an accounting period of 1st January to 31st December died in April 1934. His last payment of tax was for the financial year 1933-1934, based on his income for the year ending 31st December 1932. The *Income Tax Act 1934*, imposing income tax for the financial year 1934-1935, did not come into operation until after the taxpayer's death. The taxpayer's estate was liable to estate duty under the *Estate Duty Assessment Act 1914-1928*.

Held that, under sec. 62 of the *Income Tax Assessment Act 1922-1934*, the taxpayer's executors were liable to pay income tax for the financial year 1934-1935 in respect of the income derived by the taxpayer during the calendar year 1933.

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Upon the disallowance of an objection to assessment for income tax for the financial year 1934-1935 George Lewis Aitken and The Union Trustee Co. of Australia Ltd., the executors of Andrew Spence Chirnside deceased, requested that their objection should be treated as an appeal to the High Court pursuant to sec. 50 (4) of the *Income Tax Assessment Act 1922-1934*. *Starke J.* stated a special case, which was substantially as follows, for the opinion of the Full Court :—

1. Andrew Spence Chirnside died on 17th April 1934 leaving a will by which he appointed the appellants his executors.

2. Probate of the will was duly granted to the appellants by the Supreme Court of Victoria on 13th July 1934.

3. Income tax was assessed under the relevant Commonwealth *Income Tax Assessment Acts* and paid by the deceased for the financial year commencing 1st July 1915 and all subsequent years up to and including the financial year 1932-1933, and income tax was assessed under the Acts for the financial year in which he died, being the financial year 1933-1934, and paid after his death by the appellants, such assessment in each case being an assessment of the taxable income derived by the deceased during the antecedent accounting period hereafter mentioned.

4. During his lifetime, the income of Andrew Spence Chirnside could not be conveniently returned as for the year fixed by the *Income Tax Assessment Act* as amended from time to time, and the commissioner, from and including the occasion of the first return, accepted returns made up for a period of twelve months ending on the date of the annual balance of the accounts of Andrew Spence Chirnside.

5. For the financial year 1915-1916, an assessment was accordingly made of the taxable income derived by Andrew Spence Chirnside during the accounting period of twelve months ended 31st December 1914, and for each subsequent financial year up to and including the financial year 1933-1934 the assessment was in respect of the taxable income derived during the accounting period of twelve months ended 31st December in the financial year immediately preceding the financial year for which tax was levied. Returns were made by the deceased in each financial year of his income

for the antecedent accounting period, his returns of income for the year ending 31st December 1932 being made on 31st October 1933 on extension of time granted for such lodgment.

6. At no time during his life did Andrew Spence Chirnside, nor at any time after his death did the appellants, seek to alter the period for which the returns of income of the deceased were made, nor did the commissioner at any time consent to any such alteration.

7. For the purpose of the assessment and levy of income tax for the financial year 1934-1935 the commissioner, pursuant to sec. 32 of the relevant *Income Tax Assessment Act*, by notice published in the *Gazette* on 5th July 1934 required returns of all income derived during the year ending 30th June 1934 to be furnished in the prescribed form on or before dates subsequent to such notice and specified therein.

8. On or about 12th August 1935 the respondent requested the appellants to lodge with him a return of income derived by the deceased during the year ending on 31st December 1933. The appellants on 7th October 1935 lodged a return of such income together with a letter in which they denied liability to taxation.

9. Except as hereinbefore stated income tax had not been assessed or paid on income derived by the deceased up to the date of his death.

10. The estate of the deceased was liable to estate duty under the *Estate Duty Assessment Act* 1914-1928.

11. On 4th November 1935 the respondent caused an assessment to be made on the appellants for the financial year 1934-1935, being an assessment of the taxable income derived by the deceased during the year ending on 31st December 1933 and demanded payment of the amount of tax assessed therein.

12. On 11th December 1935 the appellants gave notice of objection to the assessment. On 13th December 1935 they gave notice of additional grounds of objection.

The grounds of objection were substantially as follows :—(1) That Andrew Spence Chirnside died on 17th April 1934 before the beginning of the financial year in respect of which tax is sought to be recovered. (2) That no tax was imposed for that financial year until 4th August 1934. (3) That Andrew Spence Chirnside was not a taxpayer or

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chargeable with tax for the financial year. (4) That sec. 62 of the *Income Tax Assessment Act* 1922-1934 is not a charging section and no tax not charged under Part III. of the *Income Tax Assessment Act* when incorporated in the appropriate *Income Tax Act* is recoverable thereunder. (5) That sec. 62 only enables the commissioner to recover from the executors of a deceased person income tax charged on the deceased or his estate by Part III. when incorporated in the appropriate *Income Tax Act*.

13. On 3rd March 1936 the commissioner gave notice to the appellants that he had considered the objection and that the same had been disallowed.

14. On 17th March 1936 the appellants in writing requested the respondent to treat their objection as an appeal and to forward their objection to this honourable court, which the respondent did on 21st May 1936.

The following question was stated for the opinion of the Full Court :—

Are the appellants as executors of the said deceased liable to be assessed to income tax for the financial year 1934-1935 in respect of any and what income of the deceased derived by him subsequent to 31st December 1932 ?

Herring K.C. (with him *Dean*), for the appellants. The testator died on 17th April 1934 and it is sought to recover income tax for the financial year 1934-1935, during which the testator was not alive, in respect of income received during the calendar year 1933. The testator always adopted the calendar year instead of the financial year. He was assessed as at the beginning of the calendar year instead of as at 1st July of each year. He has paid all the tax he was bound to pay, but the commissioner has called on the executors to make a return of income for the calendar year 1933. The case is covered by the following propositions :—(1) Income tax is an annual tax. (2) It is a periodical tax and is imposed on persons in respect of income. (3) A person not alive during the year of charge, i.e., during the financial year, cannot, therefore, be a taxpayer. (4) Executors can only be made liable by a provision which throws on them an independent and not a substitutional liability. (5) There

is no such provision in the *Income Tax Assessment Act*. Sec. 62 is relied on, but it is not such a provision. (6) Sec. 62 is a machinery section inserted merely to ascertain and recover tax. It is not a charging section. The charging section is sec. 13. It is necessary to look at the *Income Tax Act* 1915 in order to ascertain the nature of the Act. The *Income Tax Act* is passed as and for a particular year. The testator paid tax for the year 1915-1916 in respect of income received during the calendar year 1914. The taxpayer must be alive during the year of charge, and, if he is not, the Act is silent as to him. Sec. 5 of No. 41 of 1915, which is the original *Income Tax Act*, provides that income tax shall be levied in and for the financial year beginning on 1st July 1915. Until that date there was no liability on anyone to pay income tax. There must be a taxpayer in "the year of charge," and his liability to tax is measured by some previous income. The *Income Tax Act* 1934, sec. 6 (2), looks forward and not back. That provision was first introduced in 1918. It allowed action to be taken for the collection of income tax in anticipation of the annual *Income Tax Act*. Sec. 210 of the *Income Tax Act* 1918 (8 & 9 Geo. V. c. 40) is similar. The original of the section was contained in the *Provisional Collection of Taxes Act* 1913 (3 & 4 Geo. V. c. 3), which was passed in consequence of *Bowles v. Attorney-General* (1) and *Bowles v. Bank of England* (2). The following statutes and cases deal with the liability to tax:—*Income Tax Act* 1895 (Vict.), (No. 1374); *Income Tax Act* 1842 (5 & 6 Vict. c. 35); *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (3); *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (4); *Whitney v. Inland Revenue Commissioners* (5); *In the Matter of the Income Tax Acts* [No. 3] (6); *In the Matter of the Income Tax Acts* [No. 6] (7); *In the Matter of the Income Tax Acts* [No. 3] (8); *Birt, Potter & Hughes Ltd. v. Commissioners of Inland Revenue* (9); *Astor v. Perry* (10). Sec. 13 does not impose a tax

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(1) (1912) 1 Ch. 123.

(2) (1913) 1 Ch. 57.

(3) (1925) 36 C.L.R. 98.

(4) (1926) 38 C.L.R. 63.

(5) (1926) A.C. 37.

(6) (1897) 23 V.L.R. 429; 19 A.L.T. 128.

(7) (1898) 23 V.L.R. 578; 19 A.L.T. 217.

(8) (1902) 28 V.L.R. 338; 24 A.L.T. 55.

(9) (1927) 12 Tax Cas. 976, at p. 990.

(10) (1935) A.C. 398.

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on a person who has died. Sec. 46 of No. 34 of 1915 became sec. 61 of the present Act. Sec. 46A, added by No. 47 of 1915, and secs. 46B and 46C, added by No. 18 of 1918, became sec. 62.

Sholl, for the respondent. The executor is chargeable with income tax upon the previous year's income. Sec. 13 (1) imposes a tax on income and prescribes who shall pay it. Liability is imposed on the executor to implement this obligation, and the liability is instituted by assessment on the person liable to pay the tax (*Cape Brandy Syndicate v. Inland Revenue Commissioners* (1)). See *Land and Income Tax Assessment Act* 1907-1931 (W.A.). The position is different in England, as there income tax is charged on income for the current year (*Whelan v. Henning* (2); *Commissioner of Taxes v. Jellicoe* (3)). The *Income Tax Act* 1895 (Vict.) had the same effect. In the Federal Act the tax is upon the previous year's income. The "year of income" and "year of tax" are defined by Act No. 18 of 1934.

Herring K.C., in reply. If the testator died before the liability was imposed, there must be some special imposition of liability on the executors. If a man dies in the financial year, sec. 62 transfers the liability to his executors, but the testator died before the financial year in question. Sec. 62 (4) is an exempting provision and the converse cannot be inferred from it (*Brown v. National Provident Institution* (4)).

Cur. adv. vult.

Nov. 26.

The following written judgments were delivered :—

LATHAM C.J. The question raised by the case stated is whether the executors of the estate of the late Andrew Spence Chirnside are liable to pay Federal income tax upon the income received by their testator during the calendar year 1933. The testator died on 7th April 1934.

The tax in question is that imposed for the financial year 1934-1935. In the ordinary case that tax is assessed upon income derived

(1) (1921) 2 K.B. 403.
(2) (1926) A.C. 293.

(3) (1905) 25 N.Z.L.R. 887.
(4) (1921) 2 A.C. 222, at p. 257.

during the year ending 30th June 1934, but the testator had always returned his income and been assessed for a calendar year. Thus for the financial year 1915-1916 the testator paid tax upon income derived during the calendar year 1914. This was originally done by virtue of the provisions of sec. 28 (3) of the *Income Tax Assessment Act* 1915, which provided that when the income of any person could not be conveniently returned as for the year fixed by the Act, the commissioner might accept returns made up to the date of the annual balance of the accounts of such person.

In later legislation the period so substituted for the year fixed by the Act is described as "the accounting period" (See *Income Tax Assessment Act* 1922-1934, sec. 32, sub-secs. 3 and 4). Thus the amount of the claim now made upon the executors for income tax is determined by reference to the income derived by the testator during the calendar year 1933.

The *Income Tax Act* 1934 came into operation on 4th August 1934—some months after the date of the testator's death. This Act imposes a tax for the financial year 1934-1935. It is contended that as income tax is a tax imposed upon persons in respect of income, the death of a person before the imposition of the tax makes it impossible to tax him or to assess his executors and to recover from them any tax as a tax payable by the deceased. This argument is supported by the case of *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1), in which it was held by this court that income tax imposed by a taxing Act while a person is alive is a debt even though he has not sent in any return and has not been assessed. The principle underlying this decision was applied in *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (2), where it was held that a person who died before the annual Act imposing taxation had come into operation was not liable to pay the tax even though he had sent in a return.

The principle of these decisions is that income tax is actually imposed by the annual taxing Act and that it can be imposed only upon living persons. It is, therefore, necessary to inquire whether the Federal *Income Tax Assessment Act* makes any provision for

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(1) (1925) 36 C.L.R. 98.

(2) (1926) 38 C.L.R. 63.

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The answer to this question depends upon the construction of sec. 62 of the *Income Tax Assessment Act* 1922-1934. I quote from sec. 62 the following sub-sections :—

“(1) Where at the time of a person’s death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death, the commissioner shall have the same powers and remedies for the assessment and recovery of tax from the executors and administrators as he would have had against that person, if that person were alive. (2) The executors or administrators shall furnish a return of any income derived by the deceased person in respect of which no return has been lodged by him. . . . (4) This section shall not apply to the income derived by a person from—

(a) the thirtieth day of June ; or

(b) the end of the accounting period (where the returns lodged were for an accounting period)

immediately preceding his death to the date of his death, if his estate is liable to estate duty under the *Estate Duty Assessment Act* 1914-1916.”

The estate of the testator was liable to estate duty under the Act mentioned.

It is contended for the commissioner that the effect of these provisions is to impose a liability on the executors to pay income tax upon income derived by their testator up to the time of his death, subject only to the exception provided by sub-sec. 4, which, it is contended, gives exemption from the end of the accounting period (31st December 1933) and not from 30th June 1933.

The contrary argument is based upon the contention that sec. 62 (1), while conferring powers and remedies for the assessment and recovery of tax, does not itself charge any person with tax. It is said that the frame of the Act, as shown by the division of the Act into (*inter alia*) Part III. (Liability to Taxation), Part IV. (Returns and Assessments), Part VI. (Collection and Recovery of Tax), shows that a clear distinction is drawn between the imposition of a liability

to taxation, the sending in of returns and making of assessments, and the recovery of tax.

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Attention is also directed to sec. 46B of the *Income Tax Assessment Act* of 1918, where words similar to those used in sec. 62 (1) of the Act of 1922-1934 are used to apply to the case of a person who had died after 1st July in a year and after sending in a return of his income for the preceding year. This provision is contrasted with the provisions of sec. 46A dealing with the case of a person's death on or after 1st July in a year before furnishing a return—in which case it is provided not only that the executors or administrators shall furnish a return of the income derived by the deceased person during the year preceding 1st July and that they shall be assessable in respect thereof but also that “ they shall be chargeable with and pay tax thereon.” The latter words are not to be found in sec. 62 (1).

Secs. 46A and 46B were passed before the decisions of the High Court to which I have referred at the beginning of this judgment, and at a time when it had been decided in Victoria that liability to income tax in respect of the income of a deceased person depended upon whether or not he had made a return before he died. See *In the Matter of the Income Tax Acts* [No. 3] (1), *In the Matter of the Income Tax Acts* [No. 6] (2) and *In the Matter of the Income Tax Acts* [No. 3] (3). This view was rejected in the High Court in the cases which I have cited and the matter must now be considered in the light of those cases.

The arguments based upon the provisions contained in the Act of 1918 cannot have weight if the provisions of sec. 62 are clear. Sec. 62 (1) deals with the case where at the time of a person's death tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death. These are the introductory words of the section and it is natural therefore to expect that the section will provide for the case described by the words. The section goes on to say that in such a case the commissioner shall have the same powers and remedies for the assessment and recovery of tax against the executors and administrators as he would have had

(1) (1897) 23 V.L.R. 429 ; 19 A.L.T. 128. (2) (1898) 23 V.L.R. 578 ; 19 A.L.T. 217.
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against the deceased person if that person were alive. The section therefore assumes that the deceased person is alive for the purpose of applying the provisions which it contains and which are directed to the recovery of the tax from the executors or administrators. If the deceased person had been alive he could have been required to send in returns so that an assessment could be made, he would have been liable to be assessed in respect to the income in question, and the commissioner would have been able to recover the assessed tax from him. Therefore, in my opinion, it is clear that the executors are, subject to sub-sec. 4, made liable by sub-sec. 1 to pay tax upon the whole of the income derived by their testator up to the time of his death. This principle is carried out by sub-sec. 2, which provides that the executors or administrators shall furnish a return of any income received by the deceased person in respect of which no return has been made by him. It is clear upon the construction of these words that the executors in this case must furnish a return of all the income derived by the testator up to the time of his death. When such returns have been furnished the commissioner may then assess the tax and recover it from the executors under sub-sec. 1. The charge of the tax upon the executors is, in my opinion, to be found in the express provision relating to the powers and remedies for the assessment and recovery of tax from the executors which are given to the commissioner. This provision applies, for example, the whole of Part VI. of the Act providing for the "Collection and Recovery of Tax" assessed.

The view which I have taken is supported by the terms of sub-sec. 4 of sec. 62, which I have quoted above. Upon the view submitted on behalf of the executors this sub-section has no meaning whatever. The sub-section, which applies to cases where estate duty is payable, excludes from the application of the section the income derived from 30th June or the end of the accounting period immediately preceding the death of a person. Unless, apart from sub-sec. 4, such income would have been income to which the section applied, the sub-section is meaningless. The sub-section, however, has a real significance if the other provisions of the section would, apart from the sub-section, apply to such income. This consideration supports the view of the whole section which I have taken.

The question asked in the case is as follows :—

“ Are the appellants as executors of the said deceased liable to be assessed to income tax :—for the financial year 1934-1935 in respect of any and what income of the said deceased derived by him subsequent to the 31st December 1932 ? ”

It should be answered by stating that the appellants as executors of the said deceased are liable to be assessed to income tax for the financial year 1934-1935 in respect of the income of the said deceased derived by him during the year ending 31st December 1933.

STARKE J. Income tax is levied for each financial year, that is, the twelve months ending 30th June, upon the taxable income derived during the period of twelve months ending on 30th June preceding the financial year for which the tax is payable. When the income of a person cannot conveniently be returned as for the year fixed by the *Income Tax Acts*, the commissioner may accept returns made up for a period of twelve months ending on the date of the annual balance of accounts of that person, and tax is levied upon the taxable income derived by that person during this substituted year or accounting period.

During his lifetime, the income of Andrew Spence Chirnside could not conveniently be returned as for any year fixed by the Acts, but was returned as for the period of twelve months ending on the date of the annual balance of his accounts, namely on 31st December in each year. Chirnside paid tax in respect of each financial year based on the income derived by him for the period of twelve months ending on the date of the balance of his accounts, and his last payment was for the financial year 1933-1934, based on the income derived by him during the twelve months which ended on 31st December 1932. Chirnside died on 17th April 1934. The appellants are the executors of his will. Upon being requested to lodge a return for the financial year 1934-1935 based upon the income derived by the testator during the twelve months which ended on 31st December 1933, the appellants lodged a return for such income, but disputed their liability to taxation. Tax for the financial year 1934-1935 was imposed by the *Income Tax Act*, No. 31 of 1934, which received the Royal assent after the death of the testator,

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namely, on 4th August 1934. It is therefore argued that the testator was not liable for the tax, as he was dead when it was imposed, and there is no provision in the *Income Tax Acts* which throws upon the executors any liability for it.

In my opinion, the argument fails, because the *Income Tax Assessment Act*, upon its proper construction, does throw the liability upon the executors. The provisions of sec. 62 are as follows:—

“(1) Where at the time of a person’s death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death, the commissioner shall have the same powers and remedies for the assessment and recovery of tax from the executors and administrators as he would have had against that person, if that person were alive. . . . (4) This section shall not apply to the income derived by a person from—(a) the thirtieth day of June; or (b) the end of the accounting period (where the returns lodged were for the accounting period) immediately preceding his death to the date of his death, if his estate is liable to estate duty under the *Estate Duty Assessment Act* 1914-1916.”

Now it was suggested that this section is merely a machinery provision, concerned only with the ascertainment and recovery of a tax already charged, and is not in itself a charging provision. But it is a fair inference from the words used—if not an express provision—that, if a deceased person has not been assessed to and paid income tax up to the date of his death, then his whole income up to that time shall nevertheless be subject to tax. It is for this purpose that the commissioner is given the same powers and remedies for the assessment of the executors to tax and for its recovery from them as if the deceased person were alive. Again, the exemptions contained in sub-sec. 4 strongly support the inference, for income derived by a person from the 30th June immediately preceding his death would only become taxable in the financial year succeeding his death. It is the executor who is charged, not as a substitute for the deceased but on a liability that would have fallen upon the deceased had he lived (See *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1)). Finally, I would add that sub-sec. 4

does not give what was called a cumulative exemption, but provides for alternative cases arising out of the provisions of sec. 32 (3) and sec. 13 of the Acts.

The question stated should be answered: Yes, in respect of the income derived by him during the period of twelve months ending on the date of the annual balance of his accounts, namely 31st December 1933.

DIXON J. From the time when the Federal income tax was first imposed until his death the returns of the deceased taxpayer's income was made up for an accounting period substituted for the twelve months ending 30th June preceding the financial year for which income tax was payable. The accounting period consisted of the calendar year and in his case income tax was levied and paid for each financial year upon income derived by him during the calendar year which closed six months before the commencement of the financial year. He died on 17th April 1934. For the financial year then current, namely, that ending on 30th June 1934, he had been assessed upon his income derived during the calendar year 1932. For the next financial year after his death, that beginning on 1st July 1934, his executors have been assessed to income tax upon the income derived by him during the calendar year 1933. They object that they are under no liability for income tax for that financial year. Their testator was dead before it began. For the last financial years of his life he had paid income tax and on his death he ceased to be a taxpayer. Federal income tax, they say, is levied upon persons, not upon property. It is a tax upon a man in respect of his income. It is imposed upon him for the financial year and measured by his income of the immediately preceding twelve months or for some other substituted accounting period. The financial year is the period in and for which he incurs liability. His income for the preceding period is not a fund subject to an impersonal levy or charge, but is a basis for calculating his personal liability. Accordingly, the executors say, the estate of the deceased taxpayer falls under no liability to income tax for the financial year following his death, unless in the legislation some special charging provision can be found imposing the liability in clear terms. It is conceded that in the *Income Tax Assessment Act* 1915-1921 such a

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provision existed. Sec. 46c of that Act, which was introduced into it by Act No. 18 of 1918, provided that, where a person dies during a financial year and his estate is not liable to duty under the *Estate Duty Assessment Act* 1914, the executors or administrators of that person shall furnish a return of the income derived by that person during the financial year up to the date of his death, and shall be liable for tax in respect of that income. The last words of the section imposed a liability in express terms. The provision was limited to cases where estate duty was not payable, evidently upon the view that the intermediate income derived between the beginning of the previous financial year and death ought not to be taxed except in that event. The executors rely upon these features as confirming their view that liability to tax in respect of that income would not arise out of the general provisions of the Assessment Act and that nothing but a special charging section expressed in clear terms would suffice to impose it. They deny that this is done by any provision of the *Income Tax Assessment Act* 1922-1934. In that Act sec. 62 replaces secs. 46A, 46B and 46C of the earlier Assessment Act. Sub-sec. 1 of sec. 62 is as follows :

“Where at the time of a person’s death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death, the commissioner shall have the same powers and remedies for the assessment and recovery of tax from the executors and administrators as he would have had against that person, if that person were alive.”

The sub-section does not say, as sec. 46c did, “the executors or administrators . . . shall be liable for tax in respect of that income.” It speaks of “powers and remedies for the . . . recovery of tax,” and of “tax” that “has not been assessed and paid.” These expressions, the executors contend, presuppose a liability for tax imposed elsewhere and refer to the process of ascertaining and enforcing it ; they are not apt to create an original or independent liability. It is, they say, a collecting provision and not a charging provision.

I am unable to accept this view. On the whole, I think the language of sec. 62 expresses with sufficient clearness an intention to impose upon the legal personal representatives of a deceased

person a liability to income tax in respect of all income derived by the deceased up to his death which has not been taxed in his lifetime. The condition of its operation is that tax has not been assessed and paid on the whole of the income derived by the deceased up to the date of his death. This description implies that the whole income, scil., the whole taxable income, derived up to death is or is to be liable to taxation notwithstanding death. Whether it imply an assumption that it is so or an intention that it shall be so, the ensuing words appear equally apt to effectuate the assumption or intention. For they expose the executors or administrators to the powers and remedies of the commissioner for the assessment and recovery of tax to which the deceased would have been exposed were he alive. The hypothesis that he still lived would mean that he was taxable in respect of that income. His liability would be notional only until assessment. It is natural to treat powers and remedies for assessment and recovery as the test, if not the source, of liability. But sub-sec. 4 of sec. 62 makes it clear, I think, that sub-sec. 1 intends to impose liability. It provides as follows :

“This section shall not apply to the income derived by a person from—(a) the thirtieth day of June ; or (b) the end of the accounting period (where the returns lodged were for an accounting period) immediately preceding his death to the date of his death, if his estate is liable to estate duty under the *Estate Duty Assessment Act* 1914-1916.”

Income derived by a person after 30th June immediately preceding his death could only be taxable for the financial year beginning after his death. The negative or exemptive provision of sub-sec. 4 imports that the main provision would bring that income under liability to income tax. For, if sub-sec. 1 merely assumed the existence of liability elsewhere imposed, sub-sec. 4 would not suffice to relieve from that liability when estate duty was payable. It is only because sub-sec. 1 is an independent source of liability that sub-sec. 4 is expressed as an exemption from sec. 62. If the language of sub-sec. 1 were incapable of accomplishing the result or inapt to do so, the inference from sub-sec. 4 would not, perhaps, suffice to impose the tax. But sub-sec. 1 being expressed in language itself capable of imposing tax, sub-sec. 4 is confirmatory and establishes

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that that is its intention. Sub-sec. 1 is, I think, expressed in terms wide enough to cover a variety of cases; to cover, for example, the death of the taxpayer after the commencement of the financial year as well as before, after making a return as well as before, after assessment as well as before, that is, after assessment but not payment, and probably after assessment on a part only of the income and payment of tax on that part. It is for that reason that it refers to remedies and is expressed in such general terms.

The later sub-sec. 3A relates only to a particular case, and it uses language which limits that case to a liability incurred by a deceased himself in his lifetime. But it does not restrict the generality of sub-sec. 1.

In my opinion sec. 62 does impose upon the executors the liability to income tax for the financial year beginning 1st July 1934 based upon the income derived by the deceased during the calendar year 1933. Sec. 64 (4) refers, I think, to two alternative cases and does not, as was suggested, give an exemption in both cumulatively so as to exempt the income of a deceased taxpayer who made returns for a substituted accounting period from the end of that period or 30th June, whichever was the earlier.

The question in the case stated should be answered: Yes, in respect of the income derived by him during the calendar year 1933.

MCTIERNAN J. I agree that the question in the case should be answered: Yes. Sec. 62 of the *Income Tax Assessment Act* 1922-1934 does, upon its true construction, impose a liability to tax on the personal representative of a deceased person in respect of income derived by the deceased which had not been taxed in his lifetime. I have nothing to add to the reasons which have been given for this conclusion.

Question answered: Yes, in respect of the income derived by the said deceased during the year ending 31st December 1933. Appellants to pay costs of case. Matter remitted to Starke J. for determination of the appeal.

Solicitors for the appellants, *Aitken, Walker & Strachan*.

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

H. D. W.