

[HIGH COURT OF AUSTRALIA.]

PATTERSON AND ANOTHER . . . . . APPELLANTS ;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

*Income Tax (Cth.)—Assessment—Taxing Act passed after death of taxpayer—Income derived up to date of death—Liability of executors—“Accounting period”—Income Tax Assessment Act 1922-1932 (No. 37 of 1922—No. 76 of 1932), sec. 62.*

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SYDNEY,  
Dec. 4.  
Latham C.J.,  
Rich, Dixon  
and McTiernan  
JJ.

A taxpayer whose returns for purposes of Federal income tax were made up for an accounting period coinciding with the calendar year died in June 1932. His last payment of income tax was for the financial year 1931-1932, based on income derived by him during the twelve months' period ended 31st December 1930. No return was made in respect of the financial year 1932-1933, so, in respect of that year, the Commissioner of Taxation, under secs. 36 and 62 (3) of the *Income Tax Assessment Act 1922-1932*, made an assessment on the taxpayer's executors. The taxing Act imposing income tax for that financial year was passed on 5th December 1932. The taxpayer's estate was liable to duty under the *Estate Duty Assessment Act 1914-1928*.

*Held* that 31st December 1931 was “the end of the accounting period immediately preceding the” taxpayer's death within the meaning of that expression in sec. 62 (4) of the *Income Tax Assessment Act 1922-1932*; therefore, under sec. 62, his executors were liable to pay income tax for the financial year 1932-1933 in respect of the income derived by the taxpayer during the year ended 31st December 1931.

*Aitken v. Federal Commissioner of Taxation, ante*, p. 491, followed.

*Per Dixon J.*: The liability of executors under sec. 62 is as representatives and extends only to the assets of the deceased coming to their hands or which ought to come to their hands.

CASE STATED.

On an appeal to the High Court by John Hunter Patterson and William Leslie Prendergast, executors and trustees appointed under



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the will of Percy Landale, deceased, from an assessment for Federal income tax a case, which was substantially as follows, was agreed on by the parties and was, at their request, stated by *Evatt J.* for the opinion of the Full Court.

1. This is an appeal by the trustees of the estate of the late Percy Landale from an assessment of income tax under the *Income Tax Assessment Act* 1922-1932 for the financial year 1932-1933 and based upon income derived in the year ended 31st December 1931.

2. Landale died on 26th June 1932 and the appellants are the trustees and executors of his estate.

3. The income of Landale could not be conveniently returned as for the year fixed by the Act and the commissioner accepted returns made up for periods of twelve months ending on the dates of the annual balances of the accounts of Landale. For the financial year 1922-1923 the assessment of income tax was made on the taxable income derived by Landale during the accounting period of twelve months ended on 31st December 1921, and for each subsequent financial year up to and including the financial year 1931-1932 the assessment was made on the taxable income derived during the accounting period of twelve months ended on 31st December immediately preceding the commencement of the financial year for which the tax was levied.

4. The assessment dated 7th January 1932 for the financial year 1931-1932 states that the assessment is based on income derived during the year ended 30th June 1931, although in fact it was based on the income derived during the accounting period of twelve months ended 31st December 1930.

5. The estate of Landale is liable to estate duty under the *Estate Duty Assessment Act* 1914-1928.

6. Income was derived by Landale during the period commencing on 1st January 1931 up to the date of his death, 26th June 1932, and no return was lodged by him during his lifetime of income derived after 31st December 1930, nor was any tax assessed or paid during his lifetime on that income.

7. No income was derived by the trustees of the estate from 26th June 1932 to 30th June 1932.



8. On 5th June 1935 the deputy commissioner, in default of a return of income tax being furnished by the trustees and executors, made an assessment of Federal income tax in pursuance of sec. 36 of the *Income Tax Assessment Act* 1922-1932 for the financial year 1932-1933. The amount of income was estimated by the commissioner under the provisions of sec. 62 (3) of that Act.

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9. Objections to the assessment were lodged by the appellants on 24th June 1935, and at the same time they lodged under protest an accurate return of assessable income derived during, and deductions claimed for, the period of twelve months ended on 31st December 1931. On 17th July 1935 further objections were lodged. The material ground of objection was that the assessment was incorrect and/or ineffective and/or unenforceable for reasons which were stated substantially as follows: (a) Because there was no liability on the deceased taxpayer outstanding at the date of his death in respect of furnishing a return or paying tax in respect of the financial year 1932-1933; therefore (b) there was no liability on the executors and/or trustees in their representative capacity. (c) Because the assessment purported to have been made pursuant to sec. 62 (3) of the *Income Tax Assessment Act*, which only became operative if the deceased person failed to furnish a return, and in this case there was no such default by the deceased person. In the light of the liabilities imposed by secs. 13, 32 and 54 the obvious and equitable meaning of the term in sec. 62 (4), "the end of the accounting period (where the returns lodged were for an accounting period) immediately preceding his death" is the accounting period for which returns were accepted by the commissioner in substitution for the period ending 30th June immediately preceding the taxpayer's death, or, alternatively, the accounting period on which the financial year in which he died was calculated. Hence the remedies provided by sec. 62 can only be effective if there had been any default in rendering a return or in the issuing of an assessment or in the payment of a tax in respect of any financial year prior to the death of a taxpayer. (d) Neither sec. 62 nor, in the absence of a breach of trust or breach of its provisions, sec. 89 imposes on executors any liability additional to the liabilities imposed by secs. 13, 32, and 54, and, as the deceased was not in default, no liability arose under sec. 61. (e) The



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assessment issued by the commissioner under the *Estate Duty Assessment Act* was based on a return which included an unpaid liability for income tax for the financial year 1931-1932, and which was accepted as correct, and that assessment became final and conclusive for all purposes twelve months after payment of the estate duty on 24th October 1933, and the commissioner was thereby estopped from claiming and enforcing payments of any further income tax.

10. On 3rd September 1935 the Deputy Commissioner of Taxation made a certain determination upon the said objections.

11. On 3rd September 1935 an amended assessment was made by the commissioner based upon the return of assessable income for the period of twelve months ended 31st December 1931 furnished by the appellants as aforesaid.

12. On 10th September 1935 the appellants gave the commissioner formal notice of appeal and at their request the appeal was forwarded to the High Court.

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

Are the appellants as executors and trustees of the estate of the said Percy Landale liable to be assessed to income tax for the financial year 1932-1933 in respect of any and what income of the said deceased derived by him subsequent to 31st December 1930 ?

*Leaver*, for the appellants. The income referred to in the assessment comes within the scope of sub-sec. 4 of sec. 62 of the *Income Tax Assessment Act* 1922-1932, and, therefore, is not taxable income. The expression "accounting period" has no meaning apart from its substituted effect in sec. 32 (3). An "accounting period" is a period accepted by the commissioner. The last accounting period immediately preceding the death of the deceased was the last accounting period in respect of which the commissioner accepted returns from the deceased. That period ended 31st December 1930. The deceased was not in default ; therefore sec. 61 does not, but sec. 62 does, apply. The adoption of the commissioner's contention works an inequality against the deceased and his estate because, by having an accounting period ending 31st December instead of 30th June, tax on six months' income is required which otherwise would



not be required. The appellants are not liable for tax on the income derived during the financial year 1932-1933 (See *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1) ). It is recognized that the benefits provided in pars. *a* and *b* of sub-sec. 4 of sec. 62, are alternative and not cumulative benefits. Although sec. 62 (1) imposes a liability on the executors (*Aitken v. Federal Commissioner of Taxation* (2) ), it does not measure the amount on which that liability is to be assessed. Recourse then must be had to sec. 13 (1). The appellants, who, as executors, are the taxpayers (*Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (3) ), received no income in the previous twelve months or in the previous accounting period, although it is admitted that the deceased received income during that period. Therefore, so far as the executors are concerned, there is not any liability. There is no obligation upon the commissioner to accept a return based upon an accounting period, but having accepted such a return he is bound by his acceptance. Alternatively, there is no accepted accounting period, because the deceased, being dead, did not send in a return ; therefore exemption should be accorded under par. *a* of sub-sec. 4 of sec. 62 in respect of income derived between 30th June 1931 and the date of the death of the deceased. Sec. 62 applies only to the case of a person who dies on or after 1st July and before the date on which tax is imposed for that particular year (*Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1) ). If a person dies after the date of the taxing Act, the liability to tax is that of the deceased, and if in such a case, sec. 62 applies, then liability is imposed on his personal representatives also. Thus there is a double liability for the same tax. Therefore, sec. 62 cannot apply to a case where death occurred after the date of the imposition of the tax and before the end of that financial year. Income is an annual tax, that is, it is imposed yearly. Where the source of income terminates prior to the commencement of the year of tax, that is, the year for which taxation is imposed, there is no tax applicable, there is nothing by which to measure the tax (*Whelan v. Henning* (4) ; *Brown v. National Provident Institution* (5) ).

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(1) (1925) 36 C.L.R. 98, at p. 117.

(3) (1926) 38 C.L.R. 63, at p. 67.

(2) *Ante*, p. 491.

(4) (1926) A.C. 293.

(5) (1921) 2 A.C. 222, at pp. 234, 235.



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[DIXON J. referred to *St. Lucia Usines and Estates Co. v. Colonial Treasurer of St. Lucia* (1).]

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The liability imposed under sec. 62 is not a representative liability (*Aitken v. Federal Commissioner of Taxation* (2) ), it is a substituted liability. Under that section there is an implied indemnity (*Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (3) ), but under sec. 89 the person concerned is made personally liable.

*E. M. Mitchell* K.C. and *Roper*, for the respondent, were not called upon.

The following judgments were delivered :—

LATHAM C.J. This is an appeal by the trustees of the estate of the late Percy Landale from an assessment of income tax under the *Income Tax Assessment Act* 1922-1932 for the financial year 1932-1933. The trustees are also executors of the will of Mr. Landale. The assessment is based upon income derived in the year ended 31st December 1931, the commissioner having accepted a period ending on 31st December in each year as an accounting period under the provisions of sec. 32 (3) of the Act. I will say something later as to the precise significance of the phrase “the accounting period.” Mr. Landale died on 26th June 1932. He paid income tax for the financial year 1931-1932 on income derived by him during the twelve months period ended 31st December 1930. No return was made in respect of the financial year 1932-1933.

Upon these facts the question which has been stated by my brother *Evatt* for the opinion of the court is :

“Are the appellants as executors and trustees of the estate of the said Percy Landale liable to be assessed to income tax for the financial year 1932-1933 in respect of any and what income of the said deceased derived by him subsequent to the 31st December 1930 ? ”

The appellants contend that they are not liable to be assessed in respect of any income derived since 31st December 1930 ; the commissioner, on the other hand, contends that they are liable to be assessed in respect of income derived during the year ended 31st December 1931.

(1) (1924) A.C. 508.

(2) *Ante*, p. 491.

(3) (1926) 38 C.L.R., at p. 72.



The decision of this appeal depends principally upon the interpretation of sec. 62 of the *Income Tax Assessment Act* 1922-1932. This section was recently considered by the court in the case of *Aitken v. Federal Commissioner of Taxation* (1) and Mr. Leaver has recognized the difficulties which that decision places in his way. I would like to say that we appreciate the manner in which argument has been addressed to us by Mr. Leaver in support of the contentions of his clients.

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Counsel endeavoured to raise contentions which were not covered by the decision in *Aitken's Case* (1), in which the facts however, were indistinguishable, so far as all matters of principle are concerned, from those of the present case.

His first contention was based upon the words of sec. 62 (4). Sec. 62 provides :

“(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.”

It was held by the court in *Aitken's Case* (1) that this provision, combined with the other provisions of sec. 62, was effective to impose a charge of tax upon the personal representatives in the cases to which it applied. Sub-sec. 4 provides :

“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 deceased person in this case is liable to estate duty under that Act.

The first contention on behalf of the appellants, as I have said, is based upon sub-sec. 4 and particularly upon the words “the end

(1) *Ante*, p. 491.



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of the accounting period (where the returns lodged were for an accounting period)." It has been contended that "the accounting period" here means a specific period of a particular twelve months which has been accepted by the commissioner as a period in respect of which the taxpayer may properly render a return instead of the normal period ending 30th June in each year. The other view is that "accounting period" means, not the particular last period so accepted, but a twelve-monthly period which has, under the provisions of sec. 32, been substituted for the aforesaid normal period ending 30th June in each year. Sec. 32 provides in sub-sec. 3:

"When the income of any person cannot be conveniently returned as for the year fixed by this Act, the commissioner may accept returns made up for a period of twelve months ending on the date of the annual balance of the accounts of that person (in this Act referred to as 'the accounting period')."

The final words of sub-sec. 3 are: "in such case the person shall not be entitled, without the consent of the commissioner, to alter the period for which his returns are made."

These words show that there is, in relation to a person to whom the section applies, not a series of separate accounting periods, each of which is accepted by the commissioner from time to time, but an accounting period ending on a particular day in the year, being the day to which the annual balance of the accounts of that person is made up, and that that accounting period continues as an accounting period from year to year until altered by the commissioner.

Accordingly, I am of opinion that "accounting period" in respect of Mr. Landale means the period ending 31st December in each year. Therefore "the end of the accounting period" immediately preceding the death of this deceased person is 31st December 1931 and not 31st December 1930.

Counsel's second point was founded upon the contention that because the taxing Act, in the case of the financial year 1932-1933, was not passed until 5th December 1932, there was no liability resting upon the deceased at the time of his death. The trustees are now charged as taxpayers, and they are charged in respect of a period when the deceased was alive and when, therefore, the trustees as such received no income. The argument is that there is nothing



upon which the trustees can be taxed—that there is no provision in the Act which makes it possible to determine an amount upon which they can be taxed.

In my opinion the answer to this argument is to be found in the words of sec. 62 (1), which provides that “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” the deceased “person, if that person were alive.” The commissioner has the same powers against the trustees as he would have had if the person whom they represent had been alive. If the deceased person had been alive the commissioner would have had power to assess him in accordance with the rule laid down in sec. 13 (1) of the Act, which provides :

“Subject to the provisions of this Act, income tax shall be levied and paid for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the period of twelve months ending on the thirtieth day of June preceding the financial year for which the tax is payable.”

In this case the accounting period is substituted for the period ending 30th June. The assessment is to be in respect of income derived during the accounting period and I can see no difficulty in applying that proposition to the trustees.

The third and final argument for the appellants was that sec. 62 should be considered by the court as applying only in the case of a taxpayer who dies after 30th June in a year and before the date when the taxing Act was passed which imposes the tax for that year. This contention was founded upon a consideration of the possible consequences of adopting a contrary construction, but it derives little support from the actual words of the section. The argument is to this effect—if the deceased person dies after the taxing Act is passed, then the liability is that of the deceased person himself (See *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1) ) ; next, if sec. 62 applies in such a case, it imposes—in such a case—a liability for the tax also upon his personal representatives ; therefore, it is said, there is a double liability for the same tax ; therefore, the Act should be interpreted

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as applying only to a case of death after 30th June and before the taxing Act is passed. In my opinion the answer to this contention is, first, that there is not in any real sense a double liability—it is the same liability for the same tax and one payment will discharge the liability. But further, the words are, I think, inconsistent with the contention—the words are general and there is nothing in them which makes it possible to read down the section in the manner suggested.

The court has been furnished with diagrams and other information showing the irregular and uneven results which follow from the section as it stands. The diagrams compare the consequences of furnishing returns for the normal year ending 30th June with the consequences of furnishing returns for an accounting period ending on 31st December throughout the operation of the *Federal Income Tax Acts*. If returns had throughout been furnished for the normal period, the taxpayer and his estate would have been free from income tax for the financial year 1932-1933. But the consequences of the adoption, for purposes of convenience only, of an accounting period ending on 31st December is that tax must be paid in respect of that financial year. Thus the result is that, under all the circumstances, which can only be said to be fortuitous, his estate bears a much heavier tax than could be exacted in other cases. Where an accounting period has been adopted, the liability to tax may vary very greatly according to the date upon which death happens to occur. This unexpected operation of the legislation might well receive the attention of the legislature.

In my opinion the question in the case should be answered in the following way: Yes, in respect of the income derived by the deceased during the year ended 31st December 1931.

RICH J. Accepting the basis laid down in the recent case of *Aitken v. Federal Commissioner of Taxation* (1), I do not think that the objections so earnestly and persuasively urged by Mr. Leaver differentiate this case from *Aitken's Case* (1). I agree with the order proposed by the Chief Justice.

(1) *Ante*, p. 491.



DIXON J. The first argument advanced on behalf of the taxpayer was in fact employed in *Aitken v. Federal Commissioner of Taxation* (1) and is, I think, covered by that decision. The contention is based upon the view that for a given financial year there can be no accounting period substituted for the ordinary year of income until the commissioner has accepted for that financial year a return of the taxpayer based on the income of the accounting period, that is, until he has accepted the return either by assessing the taxpayer upon the return or in some other manner. If that were correct, either of two possible consequences might ensue in the application of sec. 62 (4) of the *Income Tax Assessment Act* 1922-1934. The two possible applications of the proposed construction can be illustrated by the facts of the present case. It might be said that the last occasion upon which the return was so accepted was in relation to the income of the calendar year ended 31st December 1930, with the consequence that under the exemption in sub-sec. 4 the income was excluded which accrued or was derived during the period from that date until the death of the taxpayer on 26th June 1932. On the other hand, it might be said that sub-sec. 4 applied to exempt income from the 30th June preceding death unless returns for an accounting period had been accepted for the purpose of the financial year of tax following the date of death. In that case the income of the period from 30th June 1931 to 26th June 1932 would be exempt. But, in my opinion, the basis of the contention is mistaken and the answer to it already given by the Chief Justice is correct. The expression "accounting period" in sub-sec. 4 refers to recurring periods of time between the same dates in each accounting year fixed by the fact that the commissioner has at some time accepted a return for such a period and has not revoked his acceptance of that period for ensuing financial years.

The second of the contentions advanced on behalf of the taxpayer appears to me to be inconsistent with the construction which the court has given to sec. 62 (1). We have construed it as meaning, subject to the special exemption given in cases where estate duty is payable, to bring into tax the deceased's income right up to the day

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of his death, so that his executors or administrators are assessed for and liable to pay the same tax as he would pay were he still living. All income is made subject to tax for the financial year for which it is relevant having regard to the existence of an arrangement to accept an accounting period or the absence of any such arrangement. It might have been possible to construe sec. 62 as relating only to collection of tax for which a taxpayer who dies or the executor after him is elsewhere made liable. But that view did not meet with the approval of the court and the contrary view is that it is a section imposing liability and imposing liability upon the whole of the income right up to the day of the taxpayer's death, subject always to the special exemption given by sub-sec. 4.

The third ground relied upon does not appear to me to receive any support from the language in which the section is expressed. It is based upon the view that there could not be, or that it ought to be assumed there would not be, two independent sources of liability in the Act for the one tax. Thus it was said that, if, at the time of his death, a liability to taxation upon the income had been incurred by the deceased, the liability might descend to his executors but another liability to pay the same tax would not be independently imposed on them by sec. 62 (1). This abstract reasoning has no foundation and overlooks the fact that sec. 62 (1) endeavours to express in one statement what in the previous legislation was contained in more than one provision. It brought under liability to tax under a description expressed in one phrase the whole of what may be called the uncharged income of the deceased. It is not concerned whether a deceased had before the day of his death incurred a liability to taxation cognizable at law for such purposes as those which the court was considering in the two Western Australian cases, *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (1) and *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd.* (2). It imposes a direct liability upon the executors for tax upon the income which had not borne tax at the time of death. I may add that, in my opinion, the section charges them as executors so that their

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

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



liability is as representatives and extends only to the assets of the deceased coming to their hands or which ought to come to their hands.

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McTIERNAN J. I agree that the question should be answered in the way proposed by the Chief Justice.

*Question in the case answered: Yes, in respect of income derived by deceased during year ended 31st December 1931. Costs of the case will be costs in the appeal and the case will be remitted to Evatt J.*

Solicitor for the appellants, *L. McLeod White*.

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

J. B.