taxing master's authority to disallow any costs which he may think unnecessary.

The appeal will be dismissed with costs.

McTiernan J. I agree.

Appeal dismissed with costs.

Solicitors for the appellant, *Bergin Papi & Finn.*

Solicitors for the respondent, *C. R. Ellison & Co.*

B. J. J.

H. C. of A. 1936.

McDonnell & East Ltd. v. McGregor.

Appl *Vale Press Pty Ltd v Federal Commissioner of Taxation* (1994) 124 ALR 210

Expl *FCT v Australia & New Zealand Savings Bank Ltd* (1994) 69 ALJR 12

Appl *Dalco v FCT* 2 FLR 310 | Cons *Dalco v FCT* 82 ALR 669 | Appl *R v DCT (WA); Ex parte Briggs* 14 FCR 249 | Cons *Dalco v FCT* 19 ATR 1601 | Foll *John Tanner Holdings Pty Ltd v Federal Commissioner of Taxation* 19 ATR 1640 | Appl/Cons *R v DCT (WA); Ex parte Briggs* 72 ALR 365 | Appl *Dalco v FCT* 19 ATR 833 | Foll *EHL Burgess Pty Ltd v FCT* 19 ATR 1407 | Foll *McCauley v FCT* 19 ATR 1443

Appl *Deputy Commissioner of Taxation v Harris* 89 ALR 227 | Appl *Taxation Commissioner of v Swan Brewery Co Ltd* (1991) 30 FCR 553 | Appl *Eldridge v FCT* 21 ATR 897 | Dist *FCT v Kelly Ford Pty Ltd* 3 FCR 469 | Appl *Imperial Bottleshops Pty Ltd v FCT* (1991) 22 ATR 148 | Appl *FCT v Swan Brewery Co Ltd* (1991) 22 ATR 295 | Appl *A A T Case 8227* (1992) 24 ATR 1001 | Appl *A A T Case 8186* (1992) 24 ATR 1025 | Appl *A A T Case 20/93; No 8728* (1993) 26 ATR 1114

Foll *AAT Case 13,428; Re Palmer & FCT* (1998) 41 ATR 1016 | Foll *WR Healy Pty Ltd & FCT, Re* (2003) 52 ATR 1172

Case No (1997) R 1191

[IN THE HIGH COURT OF AUSTRALIA.]

Appl *Vale Press Pty Ltd v Federal Commissioner of Taxation* (1994) 29 ATR 207

TRAUTWEIN . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

THE KING

AGAINST

THE FEDERAL COMMISSIONER OF TAXATION;

EX PARTE TRAUTWEIN.

H. C. of A. 1936.

SYDNEY, *May* 13, 14, 15.

MELBOURNE, *Sept.* 9.

Latham C.J., Starke, Dixon and Evatt JJ.

Income Tax (Cth.)—Assessment—Amended assessment—Alterations or additions—"Imposing any fresh liability, or increasing any existing liability"—Right of taxpayer to object—Unaccounted-for accretion of assets over period of years—Allocation by commissioner—Equal proportion to each year within that period—Validity—Burden of proof—Objections by taxpayer—Duty of commissioner—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *secs.* 36, 37, 39, 50, 51A.

A taxpayer, who had not kept proper records or books of account, objected to assessments for Federal income tax made in respect of his income during each of seven consecutive years. His liability to tax was reviewed by the

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

commissioner in the light of a report by the taxpayer's accountants, which showed that as between the beginning and the end of the seven years period there had been a large unaccounted-for accretion of assets, which the commissioner regarded as of an income and not of a capital nature. The commissioner added a seventh part of the amount of this accretion to the assessable income of each of the seven years. The assessments were then amended. In six of the assessments the amount of assessable income was increased, and in one reduced. Three days later the commissioner notified the taxpayer that his objections to the previous assessments had been allowed to the extent shown in the amended assessments, and his attention was directed to his right of appeal. The taxpayer did not request that his objections be treated as appeals, but lodged objections against the amended assessments. Upon the disallowance of these objections he requested that they be treated as appeals. The taxpayer was unable to prove during what year or years the accretion was earned, or the precise amount of assessable income in each year, but it could not have been the case that in fact the annual increment in his wealth was throughout the seven years always equal in amount.

Held:—

(1) The addition, in equal proportions, to the assessable income of each year within a period of years of income derived during that period but which could not be accurately apportioned did not render the assessments invalid.

(2) The burden was upon the taxpayer of establishing that the amount or some other particulars of each separate assessment were incorrect and that that incorerctness operated to his prejudice.

(3) A re-arrangement of an assessment as a whole upon an entirely new basis constitutes an alteration in or addition to the assessment as a whole, imposing a new or fresh liability within the meaning of the proviso to sec. 37 (1) of the *Income Tax Assessment Act* 1922-1934, against which a taxpayer may, upon a disallowance of his objections, appeal, and this is so notwithstanding that the amount of assessable income has been reduced.

Per Latham C.J. and *Starke* J.: Merely to inform a taxpayer that he can discover from an amended assessment the extent to which his objections have been allowed is no performance of the duty cast upon the commissioner by sec. 50 (3), (4), of the *Income Tax Assessment Act* 1922-1934.

CASE STATED.

Trautwein v. *Federal Commissioner of Taxation.*—On appeals by Theodore Charles Trautwein from assessments for Federal income tax in respect to income received by him during the years ended 30th June 1921, 1922, 1923, 1924, 1926 and 1927 respectively, *Evatt* J. stated a case, which was substantially as follows, for the opinion of the Full Court:—

1. This case is stated in respect of matters arising upon the hearing of appeals in relation to assessments made by the commissioner in

respect of the appellant's income for the years ended 30th June 1921, 1922, 1923, 1924, 1926 and 1927. The appellant made returns of income derived by him during the years ended 30th June 1921 to 1927 inclusive showing the net income derived by him in those years to be nil, £2,508, £3,323, £2,133, £2,305, £2,576 and £4,604 respectively.

2. As regards the income derived during the year ended 30th June 1921 the commissioner caused a notice of an assessment to be given to the appellant on 22nd April 1930 based on a taxable income of £14,754. On 23rd November 1931 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £18,573.

3. As regards the income derived during the year ended 30th June 1922, on 9th May 1923 the commissioner caused a notice of assessment to be given to the appellant based on a taxable income of £2,485. On 22nd April 1930 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £17,493. On 23rd November 1931 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £23,134.

4. As regards the income derived during the year ended 30th June 1923, on 30th April 1924 the commissioner caused a notice of assessment to be given to the appellant based on a taxable income of £3,478. On 27th August 1925 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £6,301. On 3rd May 1927 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £8,024. On 30th August 1927 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £3,528. On 22nd April 1930 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £20,129. On 23rd November 1931 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £20,755.

5. As regards the year of income ended 30th June 1924 the commissioner, on 4th December 1925, caused a notice of assessment

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

to be given to the appellant based on a taxable income of £4,000. On 3rd May 1927 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £2,193. On 30th August 1927 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £2,133. On 22nd April 1930 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £19,219. On 23rd November 1931 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £24,464.

6. As regards the year of income ended 30th June 1925, on 12th March 1926 the commissioner caused a notice of assessment to be given to the appellant based on a taxable income of £5,093. On 3rd May 1927 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £2,725. On 30th August 1927 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £2,733. On 22nd April 1930 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £38,601. On 23rd November 1931 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £20,193.

7. As regards the year of income ended 30th June 1926, on 29th April 1927 the commissioner caused a notice of assessment to be given to the appellant based on a taxable income of £4,041. On 30th August 1927 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £3,965. On 22nd April 1930 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £21,848. On 23rd November 1931 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £28,172.

8. As regards the year of income ended 30th June 1927, on 1st June 1928 the commissioner caused a notice of assessment to be given to the appellant based on a taxable income of £4,604. On

23rd November 1931 the commissioner caused a notice of amended assessment to be given to the appellant based on a taxable income of £60,406. On 21st December 1934 the commissioner caused a notice of a further amended assessment to be given to the appellant based on a taxable income of £56,610.

9. [Stated that copies of each of the notices of assessment and of the adjustment sheets were annexed.]

10. After receipt of the notices given to him by the commissioner on 22nd April 1930 and particularized above, the appellant lodged notices of objection on or about 3rd June 1930. Except that ground 2 did not appear in the notice of objection lodged in respect of the year of income ended 30th June 1921, the grounds set forth in each of the notices were as follows :—(1) I am not liable for the balance of amended tax said to be due or any part thereof. (2) That the assessment is invalid for the reason that such assessment is an alteration or addition to an original assessment and all income tax payable in respect of the income included in such original assessment was duly paid, and the assessment the subject of this objection has been made after the expiration of three years from the date when the tax payable on the original assessment was originally due and payable and that there is no ground or material from which the commissioner has or had or could have had any reason to believe or upon which he can or could reasonably form or hold the opinion that there has been an avoidance of tax owing to fraud or evasion or attempted evasion, or that the avoidance (if any, which is denied) was otherwise than innocent or that such avoidance was due to fraud or evasion, and that any belief or opinion of the commissioner to the contrary is or was based upon grounds or material irrational and insufficient to support such belief or opinion. (3) That the assessment is excessive for the following reasons, that is to say :—(*a*) that the assessment includes as assessable income moneys received by me in connection with certain betting and alleged betting transactions and such moneys should not have been so included : (*b*) that the assessment includes as assessable income capital moneys received by me in connection with sales and other transactions and such moneys are not liable to be so included : (*c*) that if any capital moneys received by me in connection with

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

the sales and transactions mentioned in par. (*b*) are liable to be included in my assessable income, which I do not admit, then no proper deductions have been allowed in respect of outgoings, losses, expenses and liabilities incurred in relation thereto, and which I am by law entitled to deduct from such moneys: (*d*) that the assessment includes as assessable income certain moneys alleged to have been derived by me by way of royalty or bonuses and premiums, fines or foregifts, or consideration in the nature of premiums, fines or foregifts demanded and given in connection with leasehold estates, and if any such moneys were so derived by me, which I do not admit, then the deductions to which I am entitled by law have not been allowed: (*e*) that the commissioner for the purposes of the assessment has apparently calculated my income upon the basis that I am liable to be assessed on moneys received on the disposal of freeholds, leaseholds and licensed premises, liability for which I do not admit, and I claim that if my income is to be calculated upon such basis, he has not allowed all the deductions in connection therewith to which I am entitled under the Act: (*f*) that as the commissioner for the purposes of the assessment has apparently calculated my income upon the basis that I am liable to be assessed on moneys received on the disposal of freeholds, leaseholds, and licensed premises, liability for which I do not admit, and has assessed me in respect of the total sums payable in connection with such alleged transactions as being received in the year of income, the subject of the assessment, I claim that if my income is to be calculated upon such basis, then as the transactions connected therewith, or some of them, were on terms and the payments to me were spread over a number of years, the commissioner has wrongly included in my assessable income the whole of such payments as having been received during the year of income whereas part only of such receipts should have been so included: (*g*) that for the purposes of the assessment the commissioner has wrongly included certain capital assets representing certain shares and other investments and such capital assets have been incorrectly valued for the purpose of calculating my assessable income and have been wrongly included for such purpose. Such capital assets include the following properties amongst others, that is to say: (i) shares in Coogee Bay

Hotel; the Empire Theatre Co.; and the Kensington Hotel Ltd.; (ii) property at Woodville; Parkgate Hotel; and in Barker Street, Kensington; (iii) mortgages re "Captain Cook," Rockdale, Como, and Maroubra Hotels; (iv) live stock; motor car; jewellery; (v) Australian Bank of Commerce, rent account; (vi) interest in Kensington Hotel; (vii) trading stock—Belfield's Hotel; (viii) furniture—Belfield's Hotel; (ix) land at Kogarah; (x) mortgage—Taylor. (*h*) That if the capital assets referred to in par. (*g*) hereof are liable to be included in my assessable income, which I do not admit, then no proper deductions have been allowed in respect of outgoings, losses and expenses incurred in relation thereto and which I am by law entitled to deduct: (*i*) that for the purpose of calculating my assessable income the commissioner has included certain assets belonging to other parties and in respect of which I am not liable to be assessed whether as principal taxpayer or representative taxpayer or otherwise. Such assets include (*inter alia*) moneys relating to Belfield's Hotel, rents of properties adjoining Belfield's Hotel and land at Kogarah: (*j*) that if the assets referred to in par. (*i*) hereof are liable to be included in my assessable income, which I do not admit, then no proper deductions have been allowed in respect of outgoings, losses and expenses incurred in relation thereto and which I am by law entitled to deduct: (*k*) that the commissioner has disallowed certain damages, losses and legal expenses incurred in connection with the income assessed which damages, losses and legal expenses I am entitled by law to deduct from my assessable income. Such damages, losses and legal expenses include (*inter alia*) those in reference to legal proceedings connected with Belfield's Hotel, and the formation of a company called "Belfield's Hotel Ltd." (4) That the assessment is based on an alleged increase of the amount and extent of my property between 30th June 1920 and 30th June 1927, and not upon income received by me and that such alleged increase has been calculated by the commissioner arbitrarily and upon improper values and without taking into consideration or making due allowance for losses, expenses, outgoings and liabilities which ought to be deducted in calculating the amount and extent of my property and that the commissioner in making such calculation has taken an incorrect,

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

improper and inadequate sum as representing the amount and extent of my property on the 30th June 1920, and has also taken an incorrect, improper and excessive sum as representing the amount and extent of my property on 30th June 1927. The following items (*inter alia*) have been incorrectly and improperly included in the calculation of the increase in the amount and extent of my property during the aforesaid period, that is to say: (i) furniture at Belfield's Hotel; (ii) certain live stock; (iii) the Maroubra Hotel; (iv) the Captain Cook Hotel; (v) shares in Empire Theatre; (vi) land at Kogarah; (vii) property at Woodville; (viii) property in Barker Street, Kensington; (ix) Como Hotel; (x) mortgages and loans; (xi) motor car; (xii) jewellery; (xiii) freehold land. The losses, expenses, outgoings and liabilities which have not been deducted as aforesaid include (*inter alia*) the following, that is to say:—(i) re Belfield's Hotel, £82,754; (ii) payments in connection with equity suit re Belfield's Hotel, £15,500; (iii) cost of two counsel, solicitors, &c., re Mrs. Trautwein and the formation of company, £2,000; (iv) moneys paid away for subsistence and expenditure, £7,000; (v) loss on sale of shares, £616; (vi) interest on Coogee Bay Hotel shares, £892; (vii) mortgage on Parkgate Hotel, £3,000; (viii) "Woodville" (part of), £3,000. (5) That in making the assessment the commissioner has disallowed certain losses, outgoings and expenses which I am by law entitled to deduct from assessable income. Included therein are (*inter alia*) the following:—(i) Cost of running motor car used in connection with my business; (ii) depreciation of motor car used in connection with my business; (iii) depreciation of plant, fittings, furniture, and the furnishings used in connection with the business conducted at Belfield's Hotel; (iv) certain business expenses including purchases of trading stock. (6) That the assessment is irregular, erroneous, and not authorized by law.

11. These notices of objection were considered by the commissioner, who on 27th November 1931 forwarded a notice to the appellant. Omitting formal parts the notice was as follows:—"Federal income tax: Years ended 30th June 1921 to 30th June 1926 inclusive.—With reference to the objections lodged by you against your assessments for the years above-mentioned, I desire

to inform you that the said objections have been fully considered and it has been decided to admit your claims to the extent indicated on the notices of amended assessment issued to you on 23rd instant. It is now competent for you to have the objections treated as appeals and, in this connection, your attention is invited to sec. 50, sub-sec. 4, of the *Income Tax Assessment Act* 1922-1928, which provides that a taxpayer who is dissatisfied with the decision of the commissioner, assistant commissioner or deputy commissioner, may within thirty days after the service by post of notice of that decision—(*a*) in writing, request the commissioner to refer the decision to a board of review for review; or (*b*) in writing, request the commissioner to treat his objection as an appeal, and to forward it either to the High Court or the Supreme Court of a State. If you elect to have the objections referred to the board of review, your written request must be accompanied by a deposit of £50 in respect of each objection."

12. As regards each amended assessment, notice of which was given on 23rd November 1931 in respect of each of the above years, the appellant lodged notice of objection on 21st December 1931. The grounds set forth in those notices of objection were, in respect of each of the above years, as follows:—"(1) I am not liable for the tax or any part thereof. (2) I am not liable for the additional taxes for omitted income or any part thereof. (3) The assessment is excessive for the following reasons, that is to say—(*a*) the amount of taxable income is in excess of the taxable income derived by me during the year in question as disclosed by the approximate general profit and loss account for the year as prepared by Messrs. Smith, Johnson & Co. dated 24th June 1930; (*b*) the commissioner is not entitled to assume that the accretion to capital as disclosed by the statements of affairs prepared by Messrs. Smith, Johnson & Co. as at 30th June 1920 and 30th June 1927 represents assessable income derived by me, or to attribute any part of such increase not specifically identified as income derived during the year ended 30th June 1921. Alternatively, if the method adopted is a proper method —which I do not admit—to determine my assessable income for the year in question, then the adjustments made in the amount of capital as at 30th June 1927 and as at 30th June 1920 are incorrect either wholly or in part, and should not have been made. In

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

particular, each addition to the capital as at 30th June 1927 is objected to and claimed to have been incorrectly made, and similarly each deduction from the capital as at 30th June 1920 is objected to and claimed to have been incorrectly made. Moreover, the additions made to the net increase in capital on account of expenditure which would not be deductible for income tax purposes, living expenses and other expenses, have been incorrectly made. The amount of £15,500 paid to Messrs. Laurence & Laurence in respect of a transaction in property should not have been added, neither should the estimated legal expenses, namely, £2,000, in connection with such transaction. The amount of £7,000 representing the estimated living expenses is excessive and should be omitted from the calculation. From the result so arrived at there must be excluded the amounts derived by me from betting, and all other amounts which do not represent income derived from my business or from property. (4) In making the further amended assessment the commissioner has not allowed all the losses, outgoings and expenses and other deductions to which I am by law entitled, and in particular has failed to allow any deduction in respect of depreciation of plant, fittings, furniture, furnishings, machinery &c., used in connection with my business."

Additional grounds taken in respect of the several years were as follows :—

A. As regards the years ended 30th June 1921, 1923, 1924 and 1925 : " The penalty included in the notice of further amended assessment in respect of omitted income has not been incurred, or alternatively has only been partly incurred, and is excessive having regard to all the circumstances of the case."

B. As regards the years ended 30th June 1921, 1922, 1923, 1924, 1925 and 1926 : " I also object to the further amended assessment dated 23rd November 1931 on each and every ground of objection taken to the previous amended assessment in so far as such objections have not been allowed in the further amended assessment and still have application."

C. As regards the year ended 30th June 1921 : " In view of the second proviso to sec. 2 of the *Income Tax Assessment Act* 1922-1930 the commissioner is not entitled to make the further amended

assessment in question, as he had no reason to believe that there had been an avoidance of tax owing to fraud or attempted evasion. If the commissioner had any reason to so believe, his right to amend the assessment terminated upon the issue of the amended assessment dated 22nd April 1930, and he is not entitled to again amend that assessment as purported by the notice of a further amended assessment dated 23rd November 1931."

D. As regards the years ended 30th June 1922, 1923, 1924, 1925 and 1926: "In view of the second proviso of sub-sec. 1 of the *Income Tax Assessment Act* 1922, the commissioner is not entitled to make the further amended assessment dated 23rd November 1931, as, having previously amended the assessment in pursuance of an alleged opinion that there had been an avoidance of tax, and that the avoidance was due to fraud or evasion, such amended assessment cannot be increased as the commissioner has had no additional information other than that supplied by me or my accountants, and in any case such information does not disclose any assessable income which was not either previously included in the assessment, or disclosed to the commissioner."

E. As regards the years ended 30th June 1922 and 1926: "The penalty charged in the amended assessment in respect of omitted income was not incurred, and is incorrectly charged, or alternatively is excessive so far as concerns the amount attributable to the inclusion in the assessment of profits derived from sales of property. If I am liable to assessment in respect of such profits (which I do not admit) then the liability only arises by reason of the amendment of the *Income Tax Assessment Act* 1922-1930 by Act No. 50 of 1930 whereby par. *ba* of the definition of income was inserted in the *Income Tax Assessment Act* and made retrospective. As my return was lodged prior to the retrospective enactment, I am not liable to any penalty in respect of the alleged omission of the profits in question. I am not liable to assessment in respect of the profits made on sales of property, or alternatively, if I am so liable, then my liability is only in respect of the amount of profit on the transactions which was received during the year of income, and the profit attributable to that part of the consideration which was not received during the year of income must be excluded from the assessment."

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

F. As regards the year ended 30th June 1925: "The amount of £17,500 representing amount paid to Laurence & Laurence in connection with Belfield's £15,500, and legal expenses (estimated) regarding Belfield's £2,000, has been incorrectly disallowed as a deduction in arriving at my assessable income for the year in question. If I am liable to assessment in respect of the profits on sales of property, leases, &c., then I am entitled to deduct the expenditure of £17,500 referred to from my assessable income for the year ended 30th June 1925."

G. As regards the year ended 30th June 1927: "(1) The assessment is invalid for the reason that such assessment is an alteration or addition to an original assessment, and all income tax payable in respect of the income included in such original assessment was duly paid and the assessment the subject of this objection has been made after the expiration of three years from the date when the tax payable in the said original assessment was originally due and payable, and that there is no ground or material from which the commissioner has or had or could have had any reason to believe, or upon which he can or could reasonably form or hold the opinion that there has been an avoidance of tax owing to fraud or evasion or attempted evasion, or that the avoidance (if any, which is denied) was otherwise than innocent, or that such avoidance was due to fraud or evasion, and that any belief or opinion of the commissioner to the contrary is or was based upon grounds or material irrational and insufficient to support such belief or opinion. Furthermore, as such amended assessment has been made under the provisions of the *Income Tax Assessment Act* 1922-1927, it is governed by the provisions of sec. 37 of that Act prior to the amendment made by sec. 19 of the *Income Tax Assessment Act* 1930. (2) I am not liable to assessment in respect of the profits made on sales of freeholds, leaseholds and licensed premises or other property. (3) As the commissioner for the purposes of the assessment has apparently calculated my income on the basis that I am liable to be assessed on moneys received on the disposal of freeholds, leaseholds and licensed premises (liability for which I do not admit) and has assessed me in respect of the total sums payable in connection with such alleged transactions as being received in the year of income the

subject of the assessment, I claim that if my income is to be calculated upon such basis, then as the transactions connected therewith, or some of them, were on terms, or were such that the full consideration was not received during the year of income, the commissioner has wrongly included in my assessable income the whole of such payments as having been received during the year of income, whereas part only of such receipts should have been so included. (4) The penalty charged in the amended assessment in respect of omitted income has not been incurred, and is incorrectly charged, or alternatively is excessive so far as concerns the amount attributable to the inclusion in the assessment of profits derived from sales of property. Such sales of property, although omitted from my return, were advised to the department by my accountants. They were omitted on the ground that I was not liable to assessment in respect thereof. If I am liable to assessment in respect of such profits (which I do not admit) then the liability only arises by reason of the amendment of the *Income Tax Assessment Act* 1922-1930 by Act No. 50 of 1930 whereby par. (*ba*) of the definition of income was inserted in the *Income Tax Assessment Act* and made retrospective. As my return was lodged prior to the retrospective enactment I am not liable to any penalty in respect of the alleged omission of the profits in question. (5) The penalty included in the notice of amended assessment in respect of omitted income has not been incurred, or alternatively has only been partly incurred, and is excessive having regard to all the circumstances of the case. (6) I also object to the amended assessment dated 23rd November 1931 on each and every ground of objection taken to the amended assessments for the years ended 30th June 1921 to 1926 inclusive dated 22nd April 1930 and set forth in the notices of objection to such amended assessments dated 3rd June 1930, so far as such objections have application to the amended assessment now made for the year ended 30th June 1927."

13. The appellant did not within thirty days after the receipt of the notice referred to in par. 11 hereof in writing request the commissioner to treat his objections mentioned in par. 10 hereof as appeals and to forward the same to a court.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION: EX PARTE TRAUTWEIN.

14. The commissioner considered the objections referred to in par. 12 hereof and on 15th August 1935 sent to the appellant notices. In the notice in respect of each year except the year ended 30th June 1925, the commissioner informed the appellant that the objection had been fully considered and had been disallowed and that " it is now competent for you to have the objection so far as it relates to alterations or additions, which have the effect of imposing a fresh liability or increasing an existing liability, treated as an appeal." Attention was invited to the sections of the *Income Tax Assessment Act* which provide that a taxpayer who is dissatisfied with the decision of the commissioner may within the prescribed time and in the prescribed manner request that the objection be treated as an appeal and referred to the court. As regards the year ended 30th June 1925, the commissioner informed the appellant that " no notice of objection lies against the assessment therein referred to, it being a reduced amount."

15. The appellant thereupon, within the prescribed time, wrote to the commissioner requesting him to treat the objections referred to in par. 12 hereof relating to the income derived during the years ended 30th June 1921 to 1926 inclusive as appeals and to forward the same to the High Court of Australia, together with an additional ground of objection, in respect of each of those years, that the penalty included in the assessment was invalid and contrary to law and the commissioner had no power to impose same.

16. As regards the amended assessment, notice of which was given on 21st December 1934 in respect to the income derived during the year ended 30th June 1927, the commissioner on 21st December 1934 sent to the appellant a notice similar in terms to the notices for the years other than 1925, shown in par. 14 hereof, and thereupon the appellant within the prescribed time wrote to the commissioner requesting him to treat the objection lodged by him on 21st December 1931 in respect to the said year as an appeal and to forward the same to the court.

17. The commissioner forwarded to the court as appeals, together with all relevant papers, the objections relating to the income derived during the years ended 30th June 1921, 1922, 1923, 1924, 1926 and 1927 which objections are set out in six notices all dated

21st December 1931. In the accompanying letter the commissioner stated, *inter alia*, that except as to the last year, the objections were transmitted as appeals so far only as those objections related to alterations or additions which had the effect of imposing a fresh liability or increasing an existing liability upon the taxpayer beyond the liability imposed by the commissioner's earlier assessments made on 22nd April 1930, in accordance with the terms of the proviso to sec. 37 (1) of the *Income Tax Assessment Act* 1922-1934. The commissioner did not forward to the court as an appeal the objection relating to the income derived by the appellant during the year ended 30th June 1925.

18. The appellant contends that he is entitled to have the objections set out in the seven notices of objection dated 21st December 1931 considered by the court, and that his right of appeal also exists in respect of the year 1925.

19. The commissioner contends that the appellant had no right of appeal in respect of the income derived during the year ended 30th June 1925.

20. The commissioner further contends that as regards the income derived during the years 1921, 1922, 1923, 1924, and 1926 the appellant's right of appeal is limited to the amount only of the respective excess of the income mentioned in the notices of amended assessment dated 23rd November 1931 over the amount of the income mentioned in the notices of assessment or amended assessment dated 22nd April 1930, and that, as regards the income derived during the year 1927, the right of appeal is limited to the amount only of the excess of the amount of income notified on 23rd November 1931 over the amount of income notified on 1st June 1928.

21. After the issue of the series of assessments notified to the appellant in April 1930 the commissioner expressed his willingness to reconsider the question of the appellant's liability in respect of the years 1921 to 1927 inclusive after receipt of a report made by Messrs. Smith, Johnson & Co., accountants, who were investigating the affairs of the appellant. That firm made a report and the figures and details therein were taken by the commissioner as a basis for the amended assessments of November 1931.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

22. In taking such report as a basis, the commissioner proceeded in the following manner. He determined the amount of the assets of the appellant as at 1st July 1920 and then determined the amount of such assets as at 30th June 1927. The amount of assets as at the latter date exceeded the amount as at the former date. Part of the amount of such excess consisted of assessable income of the appellant derived at some time or other during the income years 1921 to 1927 inclusive. The commissioner did not ascertain how much of such part of the excess was derived by the appellant in each of such years. He divided the total amount of such part equally between the seven years under review by him and then added such seventh to the assessable income of each of the seven years which for the purpose of his assessments he treated as already ascertained. The various amounts of the assessable income so treated as already ascertained, were unequal.

23. From the materials and information in his possession at the time of the assessments made by him in November 1931 it was not possible for the commissioner to allocate to each of the seven income years in question its precise proportion of the relevant accretion. But it was possible for the commissioner in respect of each one of such seven years to adopt the course of comparing the assets of the appellant as at the beginning and as at the end of each income year. Owing to the failure of the appellant to keep proper books and accounts the latter course would have entailed considerable labour and expense. The commissioner could not have ascertained the assessable income for each year from the returns and other information and answers to requests furnished to him by the appellant.

24. That part of the amount of the accretion of assets which was due to income earnings of the appellant was derived, not equally but unequally, over the period of the seven relevant income years. But the appellant has failed to prove during what years that part of the accretion representing income was earned and as a consequence has failed to establish affirmatively at what figure the income assessed against him in respect of each of the seven years should be assessed. Thus the amount of taxable income contained in each of the seven assessments under the method adopted by the commissioner is in fact incorrect and one or more must necessarily be

excessive but the appellant has failed to establish affirmatively what is the precise amount of taxable income in each year.

25. The method of allocation adopted by the commissioner affects, *inter alia*, (*a*) the amount of taxable income assessed for the year 1925, and (*b*) the rate and amount of tax chargeable in respect of each part of the total taxable income for each of the years 1921 to 1927 inclusive.

The following questions were reserved for the opinion of the Full Court :—

1. As regards the income derived during the years 1921, 1922, 1923, 1924 and 1926, has the appellant the right of appeal in respect of the amount of income mentioned in the notice of amended assessment given on 23rd November 1931, or is such right limited to the amount whereby the amount of income mentioned in such notice exceeds the amount of income mentioned in the notice of assessment or amended assessment given on 22nd April 1930 ?
2. As regards the income derived during the year 1927, has the appellant the right of appeal in respect of the amount of income mentioned in the notice of amended assessment given on the 23rd November 1931, or is such right limited to the amount whereby the amount of income mentioned in such notice exceeds the amount of income mentioned in the notice of assessment or amended assessment given on 1st June 1928 ?
3. As regards the income derived during the year ended 30th June 1925 is the appellant entitled to have his notice of objection dated 21st December 1931 treated as an appeal and forwarded to this court, and, if so, must the whole of such objection be determined ?
4. In view of the facts stated in pars. 21 to 25 of this case, should any, and if so which, of the assessments under appeal be deemed invalid (*a*) so far as they include the amounts allocated to each of the seven years 1921 to 1927 under the procedure or allocation adopted by the commissioner or (*b*) *in toto*, or (*c*) in any respect ?

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Mason K.C. (with him *McKell* and *Gain*), for the appellant. The appellant's right of appeal is not limited to the amount by which the income shown in the assessments of November 1931 exceeds the income shown in the assessments of April 1930. He is entitled to appeal in respect of the whole of the income shown in the assessments of November 1931. This point was decided by *Macfarlan* J. in *W. Angliss & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1), and was not challenged on the appeal before this court in *Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (2). An examination of the dealings between the appellant and the commissioner shows that these assessments entirely took the place of the immediately preceding assessments and were substituted for them (*Federal Commissioner of Taxation* v. *Hoffnung & Co. Ltd.* (3)). The words "admit your claims" in the commissioner's letter dated 27th November 1931 cannot be given any other interpretation. Under the *Income Tax Assessment Act* there cannot be in respect of any one income year more than one assessment in existence at the one time in respect of the same taxpayer. The commissioner did not by his letter of 27th November 1931 discharge the duty, imposed upon him by sec. 50 (2), (3) of the Act, of disallowing or allowing, either wholly or in part, objections made by the appellant. He did not indicate therein whether he had allowed or disallowed the objections and to what extent (*Federal Commissioner of Taxation* v. *W. Angliss & Co. Pty. Ltd.* (4)). There is a difference between original assessments and amended assessments (*Penrose* v. *Federal Commissioner of Taxation* (5)). A tentative assessment is not really an assessment and can be withdrawn. The withdrawal of an assessment after objections have been made is tantamount to allowing those objections. The assessments of November 1931 do not indicate what has been allowed or disallowed. Where the commissioner has made an amendment to an original assessment and has received objections to the amendment he must, under the Act, deal with those objections and inform the taxpayer whether he allows or disallows them (*W. & A. McArthur Ltd.* v. *Federal Commissioner of Taxation* (6)). The issue by the commissioner of a

(1) (1931) V.L.R. 107, at p. 122.
(2) (1931) 46 C.L.R. 417.
(3) (1928) 42 C.L.R. 39, at pp. 45, 46.
(4) (1931) 46 C.L.R., at p. 436.
(5) (1931) 45 C.L.R. 263.
(6) (1930) 45 C.L.R. 1, at pp. 9, 10, 21.

fresh assessment, following upon the receipt by him of objections, is an allowance by him of those objections. If the objections are allowed *in toto*, to that extent there is an annihilation of the amendment. Although a taxpayer may have omitted to take objections in respect of an increased liability imposed by an intermediate amended assessment, he is entitled to object if that increased liability is repeated in the final assessment (*W. Angliss & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)). The issue of a later assessment wipes out or cancels an intermediate assessment. The taxpayer has a full right to object to the later assessment. A taxpayer is unable to appeal unless and until he is informed of the commissioner's decision upon his objections. For the liability shown in the original assessment the commissioner has substituted a new liability, not a fresh liability, within the meaning of the proviso to sec. 37. From that new liability the appellant has an independent appeal. As regards all years, including 1925, by reason of what happened in the commissioner's office, all the penultimate amended assessments were superseded, and therefore an appeal lies with regard to the ultimate assessments without any restriction. Under secs. 13, 32 and 35 of the Act it is the duty of the commissioner to ascertain the taxable income derived by a taxpayer in a particular year. The method adopted here by the commissioner of apportioning unexplained moneys over a period of years operates unfairly against the taxpayer. That procedure is not sanctioned by the Act, and renders the assessments invalid. The principle is bad because it enables the commissioner, by selecting a long or a short period, always to produce results adverse to the taxpayer. Powers conferred upon the commissioner by secs. 35 and 36 are exercisable only prior to the original assessment. Although under sec. 36 some latitude is allowed to the commissioner, under sec. 35 he has no discretion upon what income tax is to be levied. It must be levied upon the taxable income for the particular year. Once made, an assessment can only be amended in accordance with the provisions of sec. 37 and within the limits of time therein imposed, the obvious intention being that for the protection of the taxpayer there must be some finality. Amendments so made are restricted to those which

(1) (1931) V.L.R. 107.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

ensure "completeness and accuracy" in the original assessments. To amend by adding a sum arbitrarily ascertained necessarily results in inaccuracy, and therefore such an amendment is bad and invalidates the assessment. Unless the commissioner is able to state with accuracy the taxable income for a particular year, he is not in a position to make an assessment for that year. Each year must be taken on its own basis irrespective of the amount of trouble and labour involved, and whether one method would be more convenient to the commissioner than another. The judge of first instance has found as a fact that the amount of taxable income contained in each of the seven assessments is incorrect, and that one or more must necessarily be excessive; therefore those assessments should be set aside, and the matter referred back to the commissioner for amendment. The amended assessments do not purport to have been made under sec. 36. If those assessments are within, and were made under, that section, and are shown by the taxpayer to be excessive, the court may, under sec. 51A, make such order as is just in the circumstances. If the court is unable to say by how much the assessments are excessive the commissioner should make fresh assessments. A duty is cast upon the commissioner to act reasonably, not arbitrarily.

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

Lamb K.C. Although he found that the taxable income shown in the amended assessments was excessive in respect of one or other of the seven years, the judge of first instance was unable, on the material before him, to find that it was excessive in respect of any particular year or years. Under sec. 39 the onus is upon the taxpayer to prove that the amount of taxable income shown in an assessment is not correct (*Stone* v. *Federal Commissioner of Taxation* (1); *Jones* v. *Commissioner of Taxation* (2)). Information to this end is peculiarly within the knowledge of the taxpayer. The commissioner has, under secs. 35 and 36, an absolute right to make an assessment on information he has obtained. He is not bound to show that the

(1) (1918) 25 C.L.R. 389, at p. 392.
(2) (1932) 2 A.T.D. 16. [Noted, 6 A.L.J. 201.]

amount of taxable income determined upon is the precise amount for the particular year. The powers conferred by those sections are exercisable by the commissioner at any time, whether before or after the original assessment (*Stone* v. *Federal Commissioner of Taxation* (1)). An instance of an arbitrary assessment made by the commissioner was before the court in *Union Steamship Co. of New Zealand Ltd.* v. *Federal Commissioner of Taxation* (2). See also *Wall* v. *Cooper* (3)). The court will take into consideration the fact that the procedure followed by the commissioner in this case has been for many years the departmental practice. The appellant has at no time made any suggestion as to how, nor has he produced information or material to show how, the excess income should be apportioned or allocated to the several years. In the circumstances the commissioner, in making the assessments, was entitled to adopt an average for the purpose of attaining " completeness and accuracy." Random assessments based on averages were issued by the commissioner at the implied invitation of the appellant as expressed in the report submitted by his accountants. He is precluded by the provisions of sec. 38 from challenging the validity of the assessments. Regard should be had to the provisions of secs. 35 to 39 inclusive. In view of those provisions the appellant is not entitled to say that the taxable income shown for any particular year is not correct because it was ascertained by striking an average. The onus was upon the appellant to prove that in any particular year or years an excessive amount of taxable income was shown, and the extent of that excess ; he has not done so, and therefore the assessments should be upheld (*Macpherson & Co.* v. *Moore* (4)). The judge of first instance has not found that as regards any year the evidence showed that the amount was excessive. The assessments were made by the commissioner in a proper manner. If an assessment can be set aside merely because it is arbitrary or random, then the provisions of sec. 37 are of no value. An assessment must be accepted as correct until the contrary is proved (*Stone* v. *Federal Commissioner of Taxation* (5) ; *T. Haythornthwaite & Sons Ltd.* v. *Kelly* (6) ; *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 355, par. 726). The procedure

(1) (1918) 25 C.L.R. 389.
(2) (1920) 29 C.L.R. 84.
(3) (1929) 14 Tax Cas. 552.
(4) (1912) 6 Tax Cas. 107, at p. 114.
(5) (1918) 25 C.L.R., at pp. 392, 393.
(6) (1927) 11 Tax Cas. 675, at p. 671.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

followed in this case was the same as that followed in *Union Steamship Co. of New Zealand Ltd.* v. *Federal Commissioner of Taxation* (1), and which received the approval of the court. It is immaterial whether the powers exercised by the commissioner are conferred, or the methods employed by him sanctioned, by any particular section or sections, so long as they are conferred or sanctioned by the Act as a whole (*Borthwick & Sons (Ltd.)* v. *Commissioner of Taxes* (2)). The application of sec. 36 is not limited to original assessments (*Holt* v. *Federal Commissioner of Taxation* (3)). That section and sec. 37 can be taken together. The commissioner is entitled here to invoke the aid of any section as authorizing the making of any or all of the assessments. The earlier assessments made by the commissioner were not tentative, but, on the contrary, created definite obligations (*Federal Commissioner of Taxation* v. *Hoffnung & Co. Ltd.* (4)). Objections made by the appellant against those assessments were not proceeded with by him. If, as suggested by the appellant, the commissioner's letter of 27th November 1931 does not constitute a disallowance of those objections, there cannot be any appeal *qua* the amounts therein stated, because under the Act an appeal lies only if there has been a disallowance of objections. The terms of the letter, however, show that it was a notification of disallowance. The appellant did not appeal therefrom.

Alroy Cohen. The facts here are distinguishable from the facts in *Hoffnung's Case* (4). There the assessments themselves were described as tentative, but here the various assessments were final. As regards the objections referred to in the letter of November 1931, the decision was given on amount, and the explanation was given by reference. It is immaterial that the method of ascertainment is laborious, so long as it is reasonably clear a taxpayer is not entitled to allege the imposition of an increased liability, or that his claim has not been admitted or rejected, or that he has not been informed of the decision. The objection dated 21st December 1931 is only an objection in respect of the excess. For that reason the

(1) (1920) 29 C.L.R. 84.
(2) (1909) 29 N.Z.L.R. 321, at p. 327.
(3) (1929) Ratcliffe & McGrath's Income Tax Decisions (1928-1930) 85. [Noted, 3 A.L.J. 68.]
(4) (1928) 42 C.L.R. 39.

third question does not arise, or, alternatively, it should be answered that there is no appeal except in respect of the excess. A taxpayer has no right to object unless an amending assessment imposes a fresh liability or increases an existing liability (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1); *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (2)), so in any event an appeal does not lie in respect of the amended assessment for the year ended 30th June 1925. Each of these appeals is entirely separate from the others. Sec. 38 provides a complete answer to the contention that the further amended assessments are invalid. The commissioner may at any time call in aid secs. 35 to 39 inclusive, or any other section of the Act, to meet a particular case, or to justify any action taken by him (*Stone's Case* (3); *Attorney-General* v. *Till* (4)). The fact that the commissioner decided upon a figure which happened to be wrong is immaterial.

Mason K.C., in reply. The commissioner did not by his letter of November 1931, discharge the duty put upon him by the proviso to sec. 37 (1) of the Act of notifying to the appellant the alterations and additions which had the effect of imposing a fresh liability, or increasing an existing liability (*In re London and General Bank* [*No.* 2] (5)). On the question of onus the governing section is sec. 39, not sec. 36.

Cur. adv. vult.

MANDAMUS.

The King v. *Federal Commissioner of Taxation*; *Ex parte Trautwein.*—Trautwein applied upon motion for a writ of mandamus to compel the Federal Commissioner of Taxation to treat the objection lodged by Trautwein on 21st December 1931, in respect of the amended assessment for the income year ended 30th June 1925, as an appeal and to forward it to the court. The material facts are sufficiently set forth above. *Evatt* J. granted an order nisi returnable before the Full Court.

(1) (1926) 37 C.L.R. 368.
(2) (1926) 38 C.L.R. 256.
(3) (1918) 25 C.L.R. 389.
(4) (1910) A.C. 50, at p. 53.
(5) (1895) 2 Ch. 673, at p. 684.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Mason K.C., *McKell* and *Gain*, for the applicant.

Lamb K.C. (with him *Alroy Cohen*), for the respondent. The commissioner is prepared to apply to this matter the principle of the decision to be arrived at by the court in the appeals just argued.

Mason K.C. In view of that intimation perhaps this application should be stood over generally to enable the commissioner to give effect to his proposal.

Cur. adv. vult.

Sept. 9.

The following written judgments were delivered :—

LATHAM C.J. 1. This is a case stated in appeals against assessments to income tax for the years ending 30th June 1921, 1922, 1923, 1924, 1926 and 1927.

The first two questions require a decision as to whether the appellant is entitled to appeal in respect of the amount of income mentioned in the amended assessments against which the appeals are made, or whether his right is limited to the amount whereby the amount of income mentioned in the notices of the assessments appealed against exceeds the amount mentioned in the last preceding notices of amended assessments. In the case of all the years mentioned, the amounts of income upon which tax is assessed in the latest assessments are greater than the amounts upon which tax had been assessed in the last preceding amending assessments. The case stated sets out the several assessments which had been made in respect of the years mentioned, i.e., all years from 1921 to 1927 except 1925, as to which another question arises. The latest amendments were made as a result of the consideration by the commissioner of reports made and accounts prepared by Smith, Johnson & Co., a firm of accountants employed by the taxpayer. Pars. 22 and 23 of the case show the course adopted by the commissioner and par. 24 shows that a precise allocation of income to the years in question is not possible. It is not necessary to restate these paragraphs in detail. They, and other facts stated, show that the taxpayer, having kept no proper record or books of account, has not provided information which enabled the commissioner to

attribute to any particular year certain of the gains which he has made during the seven years 1921 to 1927 inclusive. The commissioner has divided these gains (amounting to £112,354) equally between these seven years. The result is that the alleged taxable income is increased for each of the seven years, except 1925—for which year it is reduced.

2. Sec. 39 of the *Income Tax Assessment Act* 1922-1934 provides (*inter alia*) that the production of any notice or copy notice of assessment under the hand of the commissioner shall be conclusive evidence that the assessment has been duly made and that the amount and all the particulars of the assessment are correct, except in proceedings on appeal against the assessment, when it shall be prima facie evidence only. *Isaacs* J. said in *Moreau* v. *Federal Commissioner of Taxation* (1) that sec. 39 " throws the burden on the appellant to establish his right to the benefit he claims." This statement, if strictly construed, means that the taxpayer appellant does not rebut the presumption created by sec. 39 merely by showing that there is an error in it—and thereby " creating a blank "—he must go further and show either that there ought to be a " blank "—a complete omission of the item in question —or that something else should be substituted for that item. The circumstance that the facts are (or were) peculiarly within the knowledge of one party is a relevant matter in considering the sufficiency of evidence to discharge a burden of proof. (See cases cited by *Isaacs* J. in *Williamson* v. *Ah On* (2).) Obviously the facts in relation to his income are facts peculiarly within the knowledge of the taxpayer.

In the absence of some record in the mind or in the books of the taxpayer, it would often be quite impossible to make a correct assessment. The assessment would necessarily be a guess to some extent, and almost certainly inaccurate in fact. There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively unskilled method of losing either his memory or his books.

(1) (1926) 39 C.L.R. 65, at p. 70.
(2) (1926) 39 C.L.R. 95, at pp. 113-115.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

The application of sec. 39 is not, in my opinion, excluded as soon as it is shown that an element in the assessment is a guess and that it is therefore very probably wrong. It is prima facie right—and remains right until the appellant shows that it is wrong. If it were necessary to decide the point I would, as at present advised, be prepared to hold that the taxpayer must, at least as a general rule, go further and show, not only negatively that the assessment is wrong, but also positively what correction should be made in order to make it right or more nearly right. I say "as a general rule" because, conceivably, there might be a case where it appeared that the assessment had been made upon no intelligible basis even as an approximation, and the court would then set aside the assessment and remit it to the commissioner for further consideration.

It is not necessary, however, in the view which I take of the facts in this case, to consider whether or not the statement which I have quoted from *Moreau's Case* (1), interpreted in the manner suggested, places too heavy a burden upon the taxpayer in an appeal because, as I propose to show, the taxpayer has not, in my opinion, shown any error in the assessment. I add that what I have said does not preclude the court from deciding a principle upon an appeal and remitting the assessment to the commissioner for determination of the facts in accordance with that principle where that course is convenient.

3. Before applying sec. 39 to the facts stated in the case, it will be desirable to consider secs. 36 and 37, which must be interpreted before questions 1 and 2 can be fully answered. The facts stated are not stated as being the whole of the facts, and it is necessary to go further in order to answer the precise question whether the objections made can be relied upon as to the whole amount stated in each last amended assessment or only as to the excess of that amount over some preceding amended assessment. Apart altogether from the question of the distribution in equal parts over the seven years of the lump sum of income mentioned, the taxpayer may be able to show that the commissioner has overstated some receipt, or that he has understated some deduction. Upon the assumption that the evidence adduced to establish such a fact falls within the

(1) (1926) 39 C.L.R., at p. 70.

scope of the objections made (to which the taxpayer is limited by sec. 51A of the Act 1922-1934), can the taxpayer use such evidence so as to apply it to more than the excess income mentioned? I shall first consider the provisions of sec. 36.

Sec. 36 is in the following terms:

"If—(*a*) any person makes default in furnishing any return; or (*b*) the commissioner is not satisfied with the return made by any person; or (c) the commissioner has reason to believe that any person (though he may not have furnished any return) is a taxpayer, the commissioner may cause an assessment to be made of the amount upon which, in his judgment, income tax ought to be levied, and the person assessed shall be liable to income tax thereon, excepting so far as he establishes on objection that the assessment is excessive."

If the assessment in question was made under sec. 36, then the taxpayer is liable to pay the tax as assessed "excepting so far as he establishes on objection that the assessment is excessive." Sec. 36 enables the commissioner to make what have been called arbitrary or random assessments in the cases mentioned in the section. In such cases the onus placed upon the taxpayer, it is said, is heavier than that imposed upon him under sec. 39—that under sec. 36 he can succeed only to the extent to which he proves positively that the assessed income exceeds the real income, while under sec. 39 it may be enough to prove some prejudicial error or excess. It must be remembered, however, that, as the taxpayer is the appellant, he is always bound by the particulars of the assessment excepting so far as he is able to displace them by evidence. Further, as the evidence of a taxpayer on an appeal is always directed towards a reduction of the tax, it may be questioned whether the onus imposed by sec. 36 is really any heavier than that imposed by sec. 39. As, in my opinion, for reasons which I shall state later, the taxpayer has not, on the facts as stated, shown any error or excess in the assessment for any year, it is not necessary for the purposes of this judgment to determine whether sec. 39 should be interpreted as in effect imposing the same onus on the appellant as sec. 36. It must be determined, however, whether sec. 36 applies to the amended assessments which are the subject of appeal.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

It is urged on behalf of the taxpayer that sec. 36 is applicable only to a first assessment and not to an amended assessment, and that therefore the section does not apply to this case, because all the assessments now under consideration are amended assessments. This argument is based upon the fact that sec. 37, dealing with alterations in and additions to assessments, carefully imposes time limits upon the power of amendment of assessments. It is urged that if sec. 36, which is subject to no time limit, were applied so as to enable the commissioner to issue an amended assessment at any time, the result would be to make the time limitation in sec. 37 quite ineffective and nugatory. In my opinion there is an answer to this argument. Full effect can be given to both sec. 36 and sec. 37 by reading them together. The result of reading them together is that the commissioner may act at any time under sec. 36 in the cases mentioned in that section except that where the assessment which he issues under sec. 36 is an assessment which makes alterations in or additions to any existing assessment, he is subject to the time limits imposed by sec. 37 (1A). The result of this construction is that sec. 36 is not limited to first assessments, but that it may also be applied to amended assessments which are duly made under sec. 37, and that, so construed, it does not authorize the commissioner to disregard the time limits provided by sec. 37.

It may be added that the commissioner can act under sec. 36 when a person has made default in furnishing any return or when the commissioner is not satisfied with a return made. Sec. 33 enables the commissioner to require a return or further or fuller return at any time, and sub-sec. 2 of sec. 33 provides that all the provisions of the Act shall extend and apply to such returns, and that assessments may be made upon them in such manner as the commissioner considers necessary. Plainly sec. 33 can be applied after assessment, and it appears to me that sec. 36 is applicable, by reason of its own terms, reinforced by sec. 33 (2), so as to enable the commissioner to make an amended assessment thereunder, but subject, as I have already said, to the time limitations imposed by sec. 37 (1A) in cases when they are applicable.

No facts are stated which are relevant to the provisions imposing these time limits. For the purposes of this case it must be assumed

that the provisions of sec. 37 do not prevent the commissioner from issuing the assessments which are the subject of appeal—otherwise the questions stated in the case would not arise. Upon this assumption and upon the basis of the preceding reasoning, the commissioner had power to avail himself of both secs. 36 and 37 in issuing these amended assessments. I perhaps should add that the power conferred by sec. 37 upon the commissioner is a power to make such alterations in and additions to an assessment as he thinks necessary in order to ensure its completeness and accuracy. A general assumption that the commissioner is acting bona fide is, I think, a warranted assumption—and there is certainly nothing to displace it in this case—and such an assumption implies that he has made the alterations and additions which he has made because, in his judgment, they are necessary in order to make the assessment more complete and more accurate than it was before. I do not think that sec. 37 means that no alteration or addition can be made unless it appears that it actually and absolutely ensures and guarantees completeness and accuracy. It is fair to say that such a contention, though sometimes suggested, was not actually pressed upon the court.

When the commissioner alters an assessment he acts under the Act and under all powers contained in the Act. I can see no reason for holding that he must expressly state that he acts under a particular section, or, when he acts under sec. 37, that he thinks that alterations or additions are necessary for the purpose mentioned. It is open to the taxpayer, if he is not precluded by other sections of the Act, to show that the additions or alterations do not make the assessment more complete or more accurate.

Similar considerations apply to sec. 36. It seems obvious that in this case the commissioner was not satisfied with the returns made and the information provided from time to time by the taxpayer, and that therefore a condition empowering him to act under sec. 36 was fulfilled. If he had been satisfied he would not have issued notices of amended assessments. It was not necessary for the commissioner to proclaim that he was not satisfied with the returns made by the taxpayer in order to justify the exercise of the powers conferred by sec. 36.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

Thus, in my opinion, both sec. 39 and sec. 36 apply to this case. If so, the taxpayer is liable to pay tax upon the amount stated in the assessment as that upon which income tax ought to be levied, unless he displaces the prima facie presumption created by sec. 39. Further, sec. 36 imposes the same liability excepting so far as he establishes on objection that the assessment is excessive.

4. I consider the matter first in relation to sec. 39.

It is at least clear that sec. 39 places upon the taxpayer the burden of showing in relation to a particular year under consideration, say 1921, that the amount or some of the particulars of the assessment are incorrect and that their incorrectness operates to his prejudice. The same question arises separately in relation to each year. Most probably all the estimates of the income of the taxpayer are wrong, some in his favour, some against him. But has the taxpayer shown that he is prejudiced in relation to any particular year? In my opinion he has not. Of course the chances are that each particular year is wrong, but, if each year is taken by itself, all that the taxpayer has shown is that the method adopted by the commissioner is such that it is very unlikely that he has reached an accurate result. He has not shown positively that the total amount, or that any particular item going to make up that amount, is wrong.

An argument, even if it were completely well-founded, that there must be something wrong somewhere in respect to some years, does not displace the statutory presumption created by sec. 39. If the appellant adduced evidence that any particular item was wrong, then (upon the assumed interpretation of sec. 39, an interpretation less strict than that suggested in *Moreau's Case* (1)), the result would be that the presumption would disappear as to that item and the matter would (so far as sec. 39 is concerned) be open for decision on all the evidence submitted by appellant and respondent. As a general rule, proof that a particular item was wrong would also show what should be substituted for it. In other words, proof of what is right is the ordinary method of disproving what is wrong. But in some cases, mere proof of error might be adduced, without showing what, if anything, should be substituted in order to produce an accurate statement. If this were a case of that kind, it would

(1) (1926) 39 C.L.R. 65.

be necessary to consider quite definitely the applicability of the statement quoted from *Moreau's Case* (1). In my opinion, however, as I have already said, this is not such a case—the taxpayer has not, so far as this aspect of the case is concerned, shown that there is any error in respect of any particular year.

Similar reasoning applies when consideration is given to sec. 36, imposing an onus of proof on the taxpayer heavier than that which I have assumed to be imposed by sec. 39. The facts stated in the case do not establish that in any particular one of the years in question the assessment is excessive. The assessment for a particular year may or may not be so excessive. Upon the facts stated no one can say whether it is so or not. The result of the statutory provision is that, as the taxpayer has not established, in respect of any year, that the assessment is excessive, he is liable (upon the basis of the facts stated, i.e., no more appearing than those facts) to pay tax upon the assessment for each year.

5. What I have said is all relevant to the first and second questions but it is necessary to go further in order to answer them. The considerations which I have mentioned show, in my opinion, the nature of the onus of proof resting upon the taxpayer. It is now necessary to deal with a provision in sec. 37 which limits the rights of the taxpayer in respect of objections to an amended assessment made under sec. 37.

Sec. 37 (1), giving the commissioner power to make alterations in and additions to any assessment, contains the following proviso: "Provided that every alteration or addition which has the effect of imposing any fresh liability, or increasing any existing liability, shall be notified to the taxpayer affected, and, unless made with his consent, shall be subject to objection."

It is, I think, plain that the object of the section is to prevent an amended assessment from being treated as a new assessment so as to give the taxpayer a new and unlimited right of objection and appeal under sec. 50, and at the same time to treat the taxpayer fairly by providing that he shall be entitled to object and appeal when the alteration imposes a fresh liability or increases an existing liability. If the whole of every amended assessment was intended to be open

(1) (1926) 39 C.L.R., at p. 70.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

to appeal under sec. 50, the proviso to sec. 37 (1) would be unnecessary and meaningless. An amended assessment is not an entirely new assessment substituted for its predecessor so as to open up again full rights of appeal. The right of objection and appeal in the case of an amended assessment is limited by the proviso quoted (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1); *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (2)).

An alteration in an assessment may affect either the debit or the credit side of the account the credit balance of which represents the taxable income of the taxpayer. A "fresh" liability means a liability which is new in character—as, for example, alleged income from a source not disclosed by the taxpayer or not considered in a previous assessment, e.g., as suggested in argument, from such a source as betting, where no income from that source had previously been taken into account in the assessment. Further, if it is shown that the amended assessment, as to some items, is not related in any way to the former assessment with which it is compared, the new items should, if the reduction or omission of them in the case of receipts or the increase of them in the case of deductions would result beneficially to the taxpayer, be regarded as imposing a fresh liability. Where, as in this case, there has been a re-assessment upon a new principle which affects the allocation of income to all years, and where the basis of assessment is so changed that it is difficult, if not impossible, to identify items in an amended assessment with items in the preceding relevant assessment, the proper method of applying the provisions of the Act is to allow the taxpayer a right of appeal in respect of the amount of income mentioned in the amended assessment. I agree with what my brother *Starke* says in his judgment, in greater detail, upon this aspect of the case.

An "increased" liability as distinguished from a fresh liability refers only to the subject of amount. The liability appears from a prior assessment—for example, income from hotels—but the commissioner, in an amended assessment, increases the amount of income from that source of income. Similarly, the striking out, in an amended assessment, of a previously allowed deduction, increases

(1) (1926) 37 C.L.R. 368.

(2) (1926) 38 C.L.R. 256.

the amount of tax which the taxpayer has been under a liability to pay on account of his income. This therefore is another case of increasing an existing liability. (The final words of the first paragraph of sec. 37 (1), "notwithstanding that income tax may have been paid in respect of income included in the assessment," show that the word "liability" covers the case of a liability to tax which has been discharged by payment.)

6. Further, the right given to the taxpayer by the proviso to sec. 37 (1) should not be limited in any given year by reference only to the total increase, if any, in taxable income or in income tax. For example, A.B. sends in a return showing income only as a grocer, and is assessed and pays £50 tax. Then the commissioner reconsiders the matter and re-assesses him, reducing his income as a grocer, but adding an alleged income as a bookmaker. This involves a fresh liability. On the amended assessments the tax payable is only £25. But A.B. has a full right of objection in respect of all the income alleged to be derived from bookmaking, though his taxable income and the tax alleged to be payable by him have been reduced, and not increased.

It follows from what I have said that I am unable to agree with the decision of the Supreme Court of Victoria in *W. Angliss & Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) that when notice is given of an amended assessment, the taxpayer is entitled to object to the whole of the assessment as it then stands, and not merely to the alterations or additions. This decision is based upon what was said by *Isaacs* J. in *Hoffnung's Case* (2). That decision is not, in my opinion, inconsistent in any way with *Hooper's Case* (3) and *Williams, Kent & Co.'s Case* (4) to which I have already referred.

7. In determining whether the amended assessment does impose a fresh liability or increase an existing liability, the comparison must be made between the amended assessment which is the subject of objection, on the one hand, and, on the other, the latest previous assessment under which the taxpayer paid tax or was compellable to pay tax. Where no objections had been lodged to a prior assessment and the time for lodging objections had expired, or where

(1) (1931) V.L.R. 107.
(2) (1928) 42 C.L.R., at p. 54.
(3) (1926) 37 C.L.R 368.
(4) (1926) 38 C.L.R. 256.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

objections had been made and disallowed, but no request was made that they should be treated as a notice of appeal, that assessment constitutes the base in relation to which the imposition of a fresh liability or the increase of an existing liability by the next subsequent amended assessment is to be estimated. In each case the initial question must be: What were the liabilities to tax existing at the time when the amended assessment which is the subject of appeal was issued?

In this connection it is necessary to consider the effect of the commissioner's letter of 27th November 1931. In this letter the commissioner informed the taxpayer that the objections lodged by him to the previous assessments of 22nd April 1930 for the years 1921 to 1926 had been fully considered. The letter proceeded :—"It has been decided to admit your claims to the extent indicated on the notices of amended assessment issued to you on 23rd instant. It is now competent for you to have the objections treated as appeals," and attention was directed to sec. 50 of the Act. In fact the effect of the amendments made was to increase the tax claimed in each year except 1925. Although the letter stated that the objections were allowed to "an extent," the letter, read as a whole, shows that they were in effect disallowed—otherwise the intimation that the taxpayer could, if he so desired, have all of them treated as appeals, would be quite meaningless. They were thus all disallowed, at least to some extent. The taxpayer did not ask to have them treated as appeals. The time for making a request to have them so treated has now expired, and accordingly the assessments to which the letter of 27th November refers must be treated as the base in relation to which any question of fresh liability or increases of existing liability must be judged for the purposes of these appeals.

I think it proper to say, however, that, though the commissioner has been greatly impeded in the performance of his public duty by the conduct of the taxpayer, the course followed by the commissioner in dealing with the objections cannot be commended. Under sec. 50 the taxpayer is entitled to a clear decision upon each separate objection. The commissioner, in his decision, should either disallow an objection, or allow it, either wholly or in part (sec. 50 (2)). In this case it is possible to interpret the commissioner's decision as a

disallowance of all the objections, so that the taxpayer has a right of appeal in relation to all of them—limited as already stated by other provisions of the Act. But the commissioner's decision included a statement that it had been decided to "admit your claims to the extent indicated on" certain notices of amended assessment. Those notices do not show in any definite manner to what extent each objection has been allowed or disallowed. Such a practice is confusing, as it tends to defeat the object of the Act in failing to present a clear issue to the court in the event of an appeal.

8. Question 2 deals with the year ending 30th June 1927. The facts are different from those stated in relation to other years. The first notice of assessment was given on 1st June 1928 and was based on a taxable income of £4,604. The commissioner gave notice of amended assessment on 23rd November 1931 based on a taxable income of £60,406. The taxpayer duly made objections and, upon them being disallowed, duly asked, on 12th January 1935, that they be treated as appeals. The commissioner, on 21st December 1934, caused a notice of further amended assessment to be given to the taxpayer based upon a taxable income of £56,610—i.e., a lower amount than that alleged in the preceding amended assessment. But this act of the commissioner does not deprive the taxpayer of his right of appeal which had already accrued. The assessment which can be appealed against, however, is the reduced assessment based upon a taxable income of £56,610 (sec. 51A (4)).

In the case of this year the appeal is also against an amended assessment, and secs. 36 and 37 of the Act apply. The question as to which alterations or additions impose a fresh liability or increase an existing liability is to be determined in the case of this year by comparing the first assessment of 1st June 1928 (income £4,604) and the last (reduced) assessment of 21st December 1934 (income £56,610).

9. Question 3 deals with the year ending 30th June 1925. In the case of this year the amended assessment to which the taxpayer had objected and against which he seeks to appeal is for a less amount than the assessment which preceded it. The commissioner contends that this fact in itself precludes any appeal. For the reasons which

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Latham C.J.

I have given I do not agree that this is the case. The taxpayer has obtained an order nisi for a mandamus to the commissioner to treat the objection dated 21st December 1931 as an appeal and to forward it to this court. In my opinion the taxpayer is entitled to have his objection so treated and forwarded. It is true that he may fail in the appeal either through lack of evidence or by reason of the statutory provisions which impose a particular onus of proof upon him. That possibility, however, is immaterial to the decision of the question whether he is entitled to have his appeal brought before the court. No appeal as to this year is before the court and the question asked therefore cannot be answered upon this case. The taxpayer has, however, obtained an order nisi for a mandamus directing the commissioner to treat his objections as an appeal and to forward them to this court. It may be left to the justice hearing the appeals to deal with the order nisi.

10. The court is asked in question 4 of the case whether the assessments are invalid by reason of the method adopted by the commissioner in distributing equally between the seven years 1921 to 1927 the income which cannot be accurately apportioned. The assessments in question against which the appeals are brought are amended assessments. There is nothing in the case stated which shows that they were not validly made under sec. 36 and sec. 37 of the Act. It was, indeed, urged that the method adopted by the commissioner in arriving at his figures, the results of which are described in par. 24 of the case to which I have already referred, was such as necessarily to invalidate the assessments. This, however, appears to me to be plainly a matter of the correctness and not of the validity of the assessments.

The questions asked should, in my opinion, be answered in accordance with the foregoing reasons and the costs of this case and of the application for a mandamus should be costs in the appeals.

STARKE J. *Trautwein* v. *Federal Commissioner of Taxation.*—Case stated under the *Income Tax Assessment Acts* 1915-1921, 1922-1934, upon appeals in relation to the assessment of Theodore Charles Trautwein to income tax for the financial years 1921-1922, 1922-1923, 1923-1924, 1924-1925, 1926-1927, and 1927-1928.

The questions stated in the case can be dealt with conveniently by reference to one assessment, and I shall take that for the financial year 1926-1927. On 29th April 1927 the commissioner assessed Trautwein to income tax in the sum of £4,041 income from personal exertion for the financial year 1926-1927, based upon his income derived during the year which ended on 30th June 1926. On 30th August 1927 the assessment was amended and reduced to the sum of £3,965 income from personal exertion. On 22nd April 1930 the assessment was again amended, and increased to the sum of £21,225 income from personal exertion, and the sum of £623 income from property. The commissioner made this amendment or alteration in the assessment on the ground that Trautwein had omitted from his return income amounting to £196,455 for the years ended on 30th June 1921-1927 inclusive, and he allocated that sum to various years, and in particular the sum of £17,260 to income from personal exertion and the sum of £623 to income from property for the year ended on 30th June 1926. The sum of £196,455 was arrived at by taking the increase in what is called Trautwein capital account from 30th June 1920 to 30th June 1927, adding thereto various items of expenditure which were not allowable, and deducting therefrom certain income already returned. On 3rd June 1930, and in due time, Trautwein objected to the assessment as thus amended or altered, upon various grounds. On 27th November 1931 the commissioner notified Trautwein that his objections had been fully considered and that it had been decided to admit his claims to the extent indicated in the notices of amended assessment issued to him on 23rd November 1931. On this date the commissioner had amended the assessment, and increased it to the sum of £24,711 income from personal exertion and to the sum of £3,461 income from property. The amendments, the commissioner notified Trautwein, were made in consequence of additional information received in connection with certain items included in the previous assessment and amended assessments. The figures in the amended assessment were arrived at by taking the net increase in the assets for the period 1st July 1920 to 30th June 1927 and adding thereto private and other non-allowable items of expenditure during the period which were not represented by assessments. As far as possible, income

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Starke J.

was allocated to the years in which it was derived. But an amount of £112,354, which could not be allocated to any particular year, was divided equally between the seven years under review, that is, £16,050 to each year. On this basis, the taxable income, after deducting land tax, State income tax, and allowances for children, was, in respect of the year ended 30th June 1926, £24,711 from personal exertion and £3,461 from property. But the basis of this amendment was statements prepared by a firm of accountants who acted for Trautwein. The accountants' figures, apparently, were based upon an independent investigation and bear no relation to the figures adopted by the commissioner when he amended the assessment in April 1930. The general method appears to be the same, that is, ascertaining the value of the assets of the taxpayer as at 30th June 1920 and 30th June 1927 respectively. But, so far as I can discover from the facts stated in the case, identity cannot be established between the items in the accountants' statements and those contained in the commissioner's statement of April 1930. The amended assessment of November 1931 re-arranges the whole basis of the assessment, and it is upon that re-arrangement as a whole that the commissioner ascertains the amount upon which in his judgment income tax ought to be levied. There is no alteration or addition of any specified item of income, but, as I have said, a general re-arrangement of the whole basis of assessment. In December 1931, and within due time, the taxpayer objected to the amended assessment of November 1931 upon various grounds. In August 1935 the commissioner disallowed his objections and notified the taxpayer as follows : " It is now competent for you to have the objection, so far as it relates to alterations or additions which have the effect of imposing a fresh liability or increasing an existing liability, treated as an appeal," and forwarded to this court or the Supreme Court of a State. The taxpayer requested that the objection be treated as an appeal, and forwarded to this court. But the commissioner transmitted the objections as appeals " so far only as such objections relate to alterations or additions which had the effect of imposing a fresh liability or increasing an existing liability upon the taxpayer beyond the liability imposed by the commissioner's earlier assessments made on 22nd April 1930 in accordance

with the terms of the proviso to sec. 37 (1) of the *Income Tax Assessment Act* 1922-1934." It should be observed that the objections of June 1930 to the amended assessment of April 1930 have not been transmitted to the court as an appeal, nor did the taxpayer request the commissioner so to transmit them.

The question stated is whether the taxpayer has a right of appeal in respect of the amount of income mentioned in the amended assessment of November 1931, that is, £24,711 (personal exertion) and £3,461 (property), or whether such right is limited to an amount whereby the amount of income mentioned in the amended assessment of November 1931 exceeds the amount of income mentioned in the amended assessment of April 1930, that is, £21,225 (personal exertion) and £623 (property). Or, in short, is the taxpayer's right of appeal limited to a sum of £6,324 ?

In the circumstances of this case, I should regard such a limitation of the taxpayer's right of appeal as one of great hardship, largely brought about by the commissioner's neglect to determine the taxpayer's objections to the amended assessment of April 1930 in the manner contemplated by the *Income Tax Assessment Acts*. It is the commissioner's duty to consider a taxpayer's objections, and either to allow or to disallow them, wholly or in part. But to inform the taxpayer that he can discover from an amended assessment the extent to which his objections are allowed is no performance of that duty, and still less is it so, where, as in this case, it is quite impossible to ascertain what items the commissioner has allowed or disallowed. Much of the time of this court might have been saved if the commissioner had observed the plain directions of the *Income Tax Acts*. However, no great harm has been done, for the commissioner's contention in limitation of the taxpayer's right of appeal in this case cannot be sustained. That contention depends upon the meaning of two or three sections of the Acts. A taxpayer who is dissatisfied with his assessment must within a limited time lodge an objection in writing stating the grounds upon which he relies. It is the duty of the commissioner to consider and determine such an objection, and if the taxpayer is still dissatisfied, he may request that his objection be referred to a board of review, or

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Starke J.

treated as an appeal and forwarded to a court of law for determination. (See Acts 1922-1934, secs. 50, 51A.) The commissioner, however, may make or cause to be made alterations in or additions to any assessment to ensure its completeness and accuracy, notwithstanding that income tax may have been paid in respect of income included in the assessment: "provided that every alteration or addition which has the effect of imposing any fresh liability, or increasing any existing liability, shall be notified to the taxpayer affected, and, unless made with his consent, shall be subject to objection" (sec. 37 (1)). The time for objections to assessments is rigidly limited by sec. 50, except so far as the proviso to sec. 37 (1) extends (*Hoffnung's Case* (1); *Hooper's Case* (2); *Williams, Kent & Co.'s Case* (3)). But whether an alteration in or addition to an assessment imposes a fresh liability or increases an existing liability cannot be determined by mere reference to the face of the assessment itself. The details which make up "the amount upon which in the judgment of the court income tax ought to be levied" must be examined in order to ascertain whether an alteration in or addition to the assessment imposes a new or fresh liability, or increases an existing liability. Income derived by the taxpayer from a given source may have been wholly omitted from the assessment, and be added, thus creating a new or fresh liability to tax, or income from a given source may have been understated, and the assessment corrected accordingly, thus increasing an existing liability.

In the present case, as already stated, the commissioner has not altered any particular item in, nor added any particular item to, the old assessment, but has re-arranged the assessment as a whole and upon an entirely new basis or set of figures, and it cannot be identified in any way with the old assessment. A re-arrangement of the assessment, such as has been made in this case, constitutes an alteration in or addition to the assessment as a whole, imposing a new or fresh liability.

Another question arising in this case depends upon the application of the provisions of sec. 39 of the Acts to the facts stated: "(1) The production of any notice of assessment . . . shall . . . (*b*)

(1) (1928) 42 C.L.R. 39.
(2) (1926) 37 C.L.R. 368.
(3) (1926) 38 C.L.R. 256.

be conclusive evidence that the amount and all the particulars of the assessment are correct; except in proceedings on appeal against the assessment (when it shall be prima facie evidence only)." It appears that the taxpayer failed to keep proper books and accounts, and it was not possible for the commissioner to allocate to each of the seven years in question on these appeals the precise income of the particular year. So he made what may be described, in the language of the cases, as " random " or " speculative " assessments. He determined the amount of the assets of the appellant as at 1st July 1920, and then determined the amount of such assets as at 30th June 1927. He divided the amount of the excess that he could not allocate to any particular year equally between the seven years already referred to. The amount of taxable income contained in each of the seven assessments under the method adopted by the commissioner is necessarily incorrect, but the taxpayer cannot establish the precise amount of taxable income in any year.

The question stated is: " In view of the facts stated . . . should any, and if so which, of the assessments under appeal be deemed invalid: (*a*) so far as they include the amounts allocated to each of the seven years 1921 to 1927 under the procedure or allocation adopted by the commissioner, or (*b*) *in toto*, or (*c*) in any respect? " It is stated in respect of the year 1926-1927, under sec. 51A of the Acts 1922-1934:—" (8) On the hearing of the appeal, the court may . . . state a case in writing for the opinion of the High Court upon any question which in the opinion of the court is a question of law. (9) The High Court shall hear and determine the question." It is not for this court to determine matters of fact: that is the responsibility and duty of the trial judge, subject to appeal. Matters of fact involved in the question stated cannot be determined, but I shall assume that it means: Do the facts stated preclude the application of the statutory presumption that the assessments are prima facie evidence that the amount and all the particulars of the assessments are correct? So stated, the question is answered by the case itself: " The appellant has failed to prove during what years that part of the accretion representing income was earned and as a consequence has failed to establish affirmatively at what figure the income assessed against him in

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Starke J.

respect of each of the seven years should be assessed." Each assessment is prima facie evidence until the appellant satisfies the court that it is erroneous, and until so satisfied the court is entitled to act upon the assessment.

The questions stated in the case should be answered as follows :—

1. and 2. The appellant has, as to the years mentioned, a right of appeal in respect of the amount of income mentioned in the notices of amended assessments given on 23rd November 1931.

3. No appeal is before the court as to this year, and the question cannot be answered.

4. The facts stated do not preclude the application of the statutory presumption that the assessments are prima facie evidence that the amounts and all the particulars of the assessments are correct.

The King v. *Federal Commissioner of Taxation; Ex parte Trautwein.*—A rule nisi has been obtained calling upon the commissioner to show cause why he should not forward to this court the taxpayer's objections to his assessment for the financial year 1925-1926. The position as to this year is the same as that of the years covered by the case stated, except that the commissioner reduced the assessment instead of increasing it. The commissioner refused to forward the taxpayer's objections to the court on the ground that no objection or appeal lay against a reduced assessment. But the decision on the case stated governs the objections as to the year 1925-1926, and the learned counsel for the commissioner said, on the hearing of the appeals for the years involved in the case stated, that the commissioner would apply the principle of the decision upon that case to the year 1925-1926. The commissioner was in error in refusing to forward the taxpayer's objections for the year 1925-1926 to the court. In the circumstances, it will be enough to remit the rule nisi to the judge hearing the appeals.

DIXON AND EVATT JJ. This case stated raises questions of difficulty in the application of the provisions contained in secs. 36, 37 (1), 39 (1), 50 and 51A of the *Income Tax Assessment Act* 1922-1934.

After the taxpayer had been assessed for all the seven consecutive years in question except the first, the commissioner found reason

for believing that the taxable income had been greatly underestimated. He then re-assessed the taxpayer's income, and, under one date, gave him notices of amended assessment for all the years except the first and the last. For the first year he gave him notice of assessment. The assessment for the last year he did not amend.

The taxpayer lodged objections to the five amended assessments and the assessment. He caused an examination of his affairs to be made by qualified accountants, who constructed income and capital accounts showing what appeared to them to be the taxpayer's probable position in the years of income under assessment. These accounts were laid before the commissioner. Taking them as a basis, the commissioner made up new estimates of the taxpayer's annual income over the septennial period concerned. Many items of income he was able to allocate to particular years. But a very large aggregate gain remained, representing an estimated increase in the course of the period in the assets of the taxpayer which, in the view of the commissioner, was of an income and not of a capital nature. Although by an expensive and laborious examination of the sources of information he might have estimated the growth of the taxpayer's wealth between the beginning and end of each of the seven years constituting the period, the commissioner in fact took the beginning and end of the period and measured the aggregate increase for which the items specifically allocated did not account. He divided its amount by seven and attributed a seventh part to each income year. Having thus arrived at fresh computations of the taxable income of each year, he gave, again under one date, notices of amended assessments. In every year but one the result was to increase the taxable income and in consequence the amount of tax and additional tax. In that year, the fifth in order, there was a reduction. The notices of amended assessment were accompanied by full explanation sheets showing how the commissioner had used the accounts furnished by the taxpayer.

So far the objections lodged by the taxpayer had not been decided. But, by a notice dated three days after the date borne by the latest notices of amended assessment, the commissioner dealt with the objections which had been lodged in respect of the first six years.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Dixon J. Evatt J.

He informed the taxpayer that the objections had been fully considered and that it had been decided to admit his claims to the extent indicated on the notices of amended assessment issued to him. The notice then stated that it was now competent for him to have the objections treated as appeals and invited his attention to the provisions of the Act prescribing the course to be followed by a dissatisfied taxpayer desirous of appealing against the commissioner's decision or obtaining its review.

The taxpayer took no step with reference to these objections, regarding them, it would seem, as affecting only the prior notices of amended assessment and assessment which had been superseded by the latest notices of amended assessment. To the latter he proceeded to object. He gave notices of objection to all seven amended assessments, including that for the fifth year which reduced the amount of the taxable income previously assessed. The commissioner decided the other six objections, but declined to recognize the taxpayer's right to object to an amendment reducing the amount of the taxpayer's liability. His decision was adverse to the taxpayer, and the six notices of objection were forwarded to the court as appeals.

On the hearing of the appeals, the commissioner maintained that the taxpayer could complain only of the increases in the amount assessed which had been made by the amendments last notified. The objections to the prior amended assessments and assessment were not carried to appeal and therefore, according to the commissioner's contention, the amounts which they imposed must be taken to represent the minimum liability of the taxpayer.

The question whether the taxpayer is entitled in respect of the fifth year to object to and appeal against the latest amended assessment has been raised by an application for mandamus.

The extent of the taxpayer's rights of appeal is not the only matter of difficulty raised by the case stated. Another problem arises out of the apportionment among the seven years of such part of the aggregate increase in the taxpayer's wealth as represents income. Upon the hearing of the appeals the taxpayer did not affirmatively establish how much of it should be attributed to each of the respective years.

The case stated includes a finding that the amount of taxable income contained in each of the seven assessments under the method adopted by the commissioner is in fact incorrect and one or more must necessarily be excessive, but that the taxpayer has failed to establish affirmatively what is the precise amount of taxable income in each year. In this state of proof, it becomes a question of law whether the court should disturb the assessment of any year because of its including in the taxable income an equal seventh part of the estimated aggregate of the income gained over the whole septennial period, notwithstanding the falsity of the assumption that in each year there was the same regular increment. But the first question that must be settled is the extent of the taxpayer's right to complain.

The appeals before the court are from decisions disallowing objections to amended assessments. We are bound by authority to regard a notice of an amended assessment as no more than a notification of an alteration or addition made in an assessment under sub-sec. (1) of sec. 37 giving the taxpayer a new right of objection under the first proviso to that sub-section and not otherwise (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1); *Williams, Kent & Co.* v. *Federal Commissioner of Taxation* (2)). The proviso enacts that every alteration or addition which has the effect of imposing any fresh liability or increasing any existing liability shall be notified to the taxpayer affected and, unless made with his consent, shall be subject to objection. The sub-section assumes the existence of an assessment fixing the taxpayer's liability and authorizes alterations and additions which will affect that liability for or against the taxpayer. The assessment is a computation into which components enter that may be altered or added to. When the proviso speaks of imposing a fresh liability or increasing an existing liability, the word "liability" cannot refer to the indebtedness for tax which an assessment expresses in its final figure. For the original assessment must state an amount of tax as the sum for which the taxpayer is a debtor of the Crown. If this were the liability meant, it might be increased by an alteration or addition, but no alteration or addition could impose it as "a fresh liability." The word "liability" thus must refer to the constituent

(1) (1926) 37 C.L.R. 368. (2) (1926) 38 C.L.R. 256.

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Dixon J. Evatt J.

elements in the assessment of taxable income, treating them as separate sources of liability. If the addition or alteration results in the introduction into the assessment of a new source of liability, or in the increase of the liability flowing from a source already included, it is to be open to objection and appeal. Other adjustments may qualify the extent to which the fresh liability or the increased liability is reflected in the final figure of the tax payable. Suppose a taxpayer who has been assessed claims a further deduction, as, for example, the amount of a gift made out of the assessable income to a public charitable institution, and, by an amendment, the commissioner allows the claim. In dealing with the supposed taxpayer's assessment, it may occur to the commissioner that some separate item of revenue has been erroneously omitted from the assessable income. If, by amendment, he brings into the assessment the omitted item of revenue, it would, in our opinion, certainly be open to objection. It would be an addition or alteration having the effect of imposing a fresh liability. The fact that, at the same time, the commissioner allowed the perfectly independent claim to the deduction might very much lessen or entirely nullify the consequential increase in the final amount of tax assessed. But we think that it would still remain true that an alteration or addition had been made having the effect of imposing a fresh liability. That addition or alteration, therefore, would be subject to objection notwithstanding that as the net result of the entire revision of the assessment there had been no increase of tax. It is to be noticed that on the terms of the proviso it is not the fresh liability, or the increase in liability, that is to be subject to objection, but the alteration or objection producing it.

Where specific matters are dealt with by amendment of an assessment which otherwise stands, little difficulty exists in applying the proviso. But in the present case, the assessments were recast altogether. No doubt very many of the same items as appeared in the existing amended assessments found their place in the revised computation. Indeed, it appears from some of the grounds of objection made to the earlier amended assessments that the same or a similar attempt was made in them to estimate income by

finding an aggregate increase in the taxpayer's wealth and apportioning it equally among the seven years. But nevertheless each assessment was a complete rewriting or reconstruction of the account for the year. Moreover, the rewriting was treated by the commissioner, not only as an exercise of the authority conferred by sec. 37 (1), but also as a means of performing his duty under sec. 50 (2), which requires him to consider an objection and disallow or allow it either wholly or in part. He notified the taxpayer that his amendments indicated the extent to which the taxpayer's objections to the existing amended assessments had been allowed. His notification implied that they had been allowed only in part. For it informed the taxpayer that he might appeal.

The course thus taken produces a situation of great difficulty. The difficulty, we think, may be resolved by a strict application of the exact language of the proviso understood in the manner we have already described.

By taking the accounts made up by qualified accountants employed by the taxpayer and adjusting their figures in the manner disclosed by the explanation sheets, the commissioner made an alteration which extended to each and every part of the seven amended assessments. It does not appear from the case stated that his doing so had the effect of imposing any fresh liability of the kind we have attempted to define; but it does appear that in every year but the fifth it did have the effect of increasing the taxable income and thus increasing the existing liability of the taxpayer. In consequence the entire alteration, which in this case means the rewritten assessment, in each of the six years became subject to objection. In the fifth year new items resulting in the imposition of fresh liabilities may have been introduced, but this does not affirmatively appear before us. It seems probable that completely separable items constituting independent sources of liability were so altered as to increase the liability flowing from them. But again this does not affirmatively appear before us. In either case the amended assessment would be open to objection; but only, we think, in reference to the items or constituent elements so introduced or affected. Accordingly we would answer the first and second questions in the case stated that the taxpayer has a right of appeal

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

Dixon J. Evatt J.

in respect of the amount of income mentioned in the notice of amended assessment and that the right is not limited to the amount by which the taxable income fixed in the later notice exceeds the taxable income fixed in the earlier.

In cases such as the fifth year illustrates it would be more convenient if the commissioner adopted a practice of complying with the taxpayer's request to forward the objections to the court, notwithstanding that the commissioner considers no appeal lies. His contention that an appeal cannot be entertained would not be prejudiced by his doing so and he could, in forwarding the objections, notify the registrar and the taxpayer that he had given his decision and forwarded the objection subject to and under the cover of an objection on his part that the alteration or addition was not subject to objection and appeal by the taxpayer. It may be true that under secs. 50 (4) and 51A (1) an absolute duty is not imposed on the commissioner to forward the objection if the objection is one which does not in truth lie and he has treated it as incompetent. It is not necessary for us to decide the point, for the commissioner has said that he will forward the objection if it appears to the court that the amended assessment was open to appeal.

We would not answer the third question which relates to the fifth year and we would allow the mandamus to stand over to be disposed of by the learned judge hearing the appeals.

This conclusion would give importance to the question whether, in the state of proof, the assessment of any year should be disturbed on the ground that included in the taxable income is an equal seventh part of the estimated growth in the taxpayer's wealth over the septennial period. The taxpayer contended that sec. 36 applied only to original assessments, and, accordingly, in making what may be termed a conjectural estimate of each year's income as the foundation of an alteration in an existing assessment, the commissioner exceeded his powers. The alteration, it was said, must therefore be set aside. It is not easy to see how this would help the taxpayer, who would be faced with the prior amended assessments and would be exposed to a fresh exercise of the commissioner's power to amend them. It is true that sec. 36 is in terms confined to the original assessments. In this respect it resembles secs. 35, 38

and 40. But we think sec. 37 implies that, in exercising the power it confers, the commissioner may rely on the powers with which he is armed for the purpose of making original assessments. But, whether that be so or not, we see no reason why any estimate he may make bona fide of the taxpayer's income for the purpose of assessing it as completely and accurately as he reasonably can should be considered an improper basis for an alteration or addition under sec. 37. In our opinion the title of the taxpayer to be relieved against any of the assessments depends upon the question whether it is incumbent upon him to show no more than that the assessment is erroneous, or, on the other hand, to show that it should be reduced by some ascertained amount. If sec. 36 provides machinery which may be availed of under sec. 37, it would, we think, result in imposing upon the taxpayer the burden of showing that the assessment should be reduced by some figure. For he is to be bound, excepting so far as he establishes on objection that the assessment is excessive. But in any case the Act throws upon the taxpayer the burden of objecting to and appealing against an assessment or an amendment (secs. 50 and 51A). The burden lies upon him in the judicial proceedings which he is thus required to take of establishing that the assessment or amendment imposes upon him a liability to which the taxing provisions of the Act do not subject him. Within the limits of his objection he must show that the assessment is contrary to law or to fact. If so much is established, the court may set aside the assessment and remit it for reconsideration, or may itself determine the amount of the liability. But error of law or fact affecting the particular assessment must appear. In every financial year the tax is to be assessed if he derives income during the preceding financial year or other period for which his returns are accepted. For the purposes of assessment, objection and appeal, as well as for the purpose of liability to taxation, each year must be treated separately. It is often convenient to consolidate the hearing of appeals, but to do so does not affect the ultimate question to be decided nor the burden of the taxpayer in establishing his right to relief.

In respect of no one of the seven years can it be correctly said that the taxpayer has shown that the amount allocated thereto from his aggregate gains of the seven years exceeds that which was

H. C. OF A. 1936.

TRAUTWEIN v. FEDERAL COMMISSIONER OF TAXATION.

THE KING v. FEDERAL COMMISSIONER OF TAXATION; EX PARTE TRAUTWEIN.

derived therein. It is not enough for him to prove that in one or more out of the seven this must be so without identifying which it is. He does not show that he has been prejudiced by any departure from legal standards and he does not show that the facts assumed in any particular year are not true of that year.

It follows, in our opinion, that he fails upon this question. We think the fourth question in the case stated should be answered in the negative.

First and second questions in the case stated answered that the taxpayer has a right of appeal in respect of the amount of income mentioned in the notices of amended assessment given on 23rd November 1931 *and that the right of appeal is not limited to the amount by which the taxable income fixed in such notice exceeds the amount of the taxable income fixed in the notice of 22nd April* 1930. *Third question not answered. Fourth question answered: No. Application for a mandamus referred to Evatt J. Costs to be costs in the appeals.*

Solicitors for the appellant and applicant, *A. R. Baldwin & Co.*

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

J. B.