[PRIVY COUNCIL.]

PAYNE . . . . . APPELLANT;
APPELLANT,

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1936.
May 21, 22;
June 23.

Income Tax (Cth.)—Assessment—Amount received and retained in sterling in London—Australian assessment—Exchange to be added—Assessed as though transmitted to Australia—Income Tax Assessment Act 1922-1931 (*No.* 37 *of* 1922—*No.* 23 *of* 1931), *secs.* 13, 32, 35—*Income Tax Act* 1931 (*No.* 24 *of* 1931), *secs.* 3, 6, *Second Schedule.*

During the year ending 30th June 1931 a taxpayer, who was resident and domiciled in Australia, received interest amounting to £5,671 from British funded stock. The interest was paid in British sterling to the credit of his bank account in London. The taxpayer used the money in London, and did not cause any part of it to be transferred or remitted to Australia. In his return of income for the financial year beginning 1st July 1931, the taxpayer included the sum of £5,671 so received in sterling as income derived by him during the preceding year. The Commissioner, however, assessed him, not in the sum of £5,671 received in sterling in London, but in the sum of £6,768, being the amount which the sums amounting to £5,671 in London would have produced in Melbourne if transferred to Melbourne at the rates of telegraphic transfer prevailing on or about the respective dates when the sums making up the amount of £5,671 were credited to the taxpayer's bank account in London.

Held that the assessment of £6,768 was correctly made, that both the *Income Tax Assessment Act* 1922-1931 and the *Income Tax Act* 1931, wherever they referred to "pounds," referred to units of Australian currency, and that the

* Present—Viscount Hailsham L.C., Lord Russell of Killowen, Lord Wright M.R., Sir Isaac Isaacs, Sir George Rankin.

assessable income of the taxpayer must, whether the currency in which he derives it be British or foreign currency, always be expressed in terms of Australian currency. The decision of the House of Lords in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co Ltd.*, (1934) A.C. 122, neither necessitated nor justified the contrary conclusion.

Decision of the High Court: *Payne* v. *Federal Commissioner of Taxation*, (1934) 51 C.L.R. 197, affirmed.

APPEAL from the High Court.

On an appeal by a taxpayer to the High Court from an assessment to Federal income tax *Dixon* J. stated a case for the opinion of the Full Court. It appeared that the taxpayer, Arthur Ernest Tyndall Payne was at all material times a resident of, and domiciled in, the State of Victoria. The taxpayer furnished to the Federal Commissioner of Taxation under the *Income Tax Assessment Act* 1922-1931 a return of his income for the year ending 30th June 1931. The return included an amount of £5,671 as income, being interest derived by the taxpayer from British funded stock. The taxpayer received such interest by a credit of £5,671 in English sterling to his account at a London bank. The interest was used by the taxpayer in London. In respect of the receipt of £5,671 the Commissioner caused the taxpayer to be assessed in the sum of £6,768, the latter being the sum which the amount of £5,671 in London would produce in Australian currency if transferred at the prevailing rates of telegraphic transfer at the time of the taxpayer's receipt of the interest in London. The question for the opinion of the Full Court was whether the Commissioner was correct in assessing the taxpayer in the sum of £6,768. The Full Court was equally divided upon the question. *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. held that the assessment of the Commissioner was correct and that under the *Income Tax Assessment Act* the value of the taxpayer's income receipt in London had to be expressed in Australian currency together with every other item of income or outgo in the taxpayer's return. *Rich*, *Starke* and *Dixon* JJ. expressed opinions to the contrary effect, based upon the decision of the House of Lords in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). In the equal division of opinion the opinion of the Chief Justice

(1) (1934) A.C. 122.

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prevailed under sec. 23 of the *Judiciary Act*: *Payne* v. *Federal Commissioner of Taxation* (1). In accordance with this decision *Dixon* J. dismissed the taxpayer's appeal.

By special leave, the taxpayer appealed to the Privy Council from the decision of the Full Court and from the order of *Dixon* J.

Sir *J. W. Jowitt* K.C. and *J. H. Bowe*, for the appellant.

R. G. Menzies K.C. (A.-G. for the Commonwealth), *Gavin Simonds* K.C. and *Wilfrid Barton*, for the respondent.

LORD RUSSELL OF KILLOWEN delivered the judgment of their Lordships, which was as follows :—

The facts relevant to this appeal are not in dispute. The appellant, a resident in Melbourne, Victoria, returned his gross income for the purpose of Federal income tax at £20,173 and included therein the sum of £5,671 as interest on British funded stock, such sum having been received by him by credits to his account with the Union Bank of Australia Ltd., in London, and retained in England. From his gross income he claimed certain deductions, returning his net income at £14,831. The assessing officer added to the total amount so returned a sum of £1,097, representing the difference between the said £5,671 and the sum which would be produced in Melbourne by the telegraphic transfer upon the respective dates of credit of the sums constituting the said £5,671.

The appellant made objections claiming that the sum of £5,671 should not be included at any other figure. His objections were disallowed, and thereupon under the provisions of the Commonwealth *Income Tax Assessment Act* 1922-1931, were treated as an appeal, and the matter was transmitted to the High Court of Australia for hearing.

The appeal came before *Dixon* J. who stated a case for the opinion of the Full Court of the High Court, setting out the facts and asking for the opinion of the Full Court upon the following questions :— 1.—(A) Was the Commissioner right in including in the said assessment or assessments the said amount of £1,097 ; or (B) ought the

(1) (1934) 51 C.L.R. 197.

Commissioner to have included no more, in respect of the interest aforesaid, than the sum of £5,671 ; 2. If both the preceding questions are answered No, upon what basis ought the amount to be included in the appellant's assessment in respect of such interest to be ascertained ?

The Judges of the High Court were divided in opinion as to the answers which should be given. *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ. were of opinion that the assessment was correctly made and answered the questions accordingly. *Rich*, *Starke* and *Dixon* JJ. were of the contrary opinion relying largely as it appears to their Lordships, upon a decision of the House of Lords in the case of *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). By virtue of sec. 23 of the Commonwealth *Judiciary Act* the opinion of the Chief Justice prevailed, and by an order made by *Dixon* J. dated 9th May 1934, the appeal was dismissed.

Their Lordships are of opinion that the appeal was rightly dismissed. The question appears to them to depend upon the true meaning and construction of the *Income Tax* and *Income Tax Assessment Acts* of the Commonwealth of Australia.

Liability to income tax in Australia is imposed by Acts of a permanent nature, called *Income Tax Assessment Acts*, supplemented by annual Acts, called *Income Tax Acts*, which fix, among other things the rate and amount of the tax. In this case the return, the correctness of which was challenged, is dated 18th September 1931. The relevant Acts to be considered are the *Income Tax Assessment Act* 1922-1931 (hereinafter called the Assessment Act) and the *Income Tax Act* 1931 (No. 24 of 1931) which will be referred to as the Taxing Act and which by sec. 2 provides that the Assessment Act " shall be incorporated and read as one with this Act."

By the Assessment Act (sec. 4) " assessable income " means in the case of a resident the gross income derived from all sources whether in Australia or elsewhere, and " taxable income " means the amount of income remaining after all deductions allowed by the Act have been made. By sec. 13 the tax is to be levied and paid for each financial year upon the taxable income derived, directly or indirectly, by every resident from all sources, whether in Australia or elsewhere,

(1) (1934) A.C. 122.

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during the period of twelve months ending on 30th June preceding the financial year for which the tax is payable. By sec. 32 there is imposed upon every resident (not being a company) whose total assessable income is not below specified sums, an obligation (which was binding on the appellant), when called upon by notice in the *Gazette*, to " furnish to the Commissioner in the prescribed manner a return setting forth a full and complete statement of the total assessable income derived by him during the financial year ending on the preceding thirtieth day of June." Sec. 35 is in the following terms :—" From the returns and from any other information in his possession, or from any one or more of these sources, the Commissioner shall cause assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied."

It will be observed that the Assessment Act imposes upon the taxpayer the obligation of supplying the materials from which the Commissioner is to be able (with or without any other information in his possession) to discharge his duty of assessing the taxpayer in an amount of taxable income " upon which income tax shall be levied."

Turning now to the Taxing Act. The tax is imposed by secs. 3 and 6. Sec. 3 provides that income tax is imposed at the declared rates. Sec. 6 provides that it shall be levied and paid for the financial year beginning on 1st July 1931. The rates are declared by the fourth section to be the different rates in respect of the different kinds of income respectively set out in the nine schedules to the Act. In every case the amount payable is ascertained by reference to a rate based on a calculation of pence per pound. It will be sufficient to refer to the Second Schedule which is the schedule relevant to the said £5,671. It runs thus :—

SECOND SCHEDULE.

RATE OF TAX UPON INCOME DERIVED FROM PROPERTY.

For the purposes of this Schedule—T = taxable income in pounds. If the taxable income does not exceed £500,

the rate of tax for every pound of taxable income shall be .. .. $\left\{3 + \frac{T}{100}\right\}$ pence.

If the taxable income exceeds £500 but does not exceed £1,500, the rate of tax for every pound of taxable income shall be .. .. $\left\{1 + \frac{T \times 14}{1,000}\right\}$ pence.

If the taxable income exceeds £1,500 but does not exceed £3,700, the rate of tax for every pound of taxable income shall be .. .. $\left\{4\frac{3}{4} + \frac{T \times 23}{2,000}\right\}$ pence.

If the taxable income exceeds £3,700, the rate of tax for every pound of taxable income up to and including £3,700 shall be .. .. $\left\{4\frac{3}{4} + \frac{3,700 \times 23}{2,000}\right\}$ pence.

and the rate of tax for every pound of taxable income in excess of £3,700 shall be .. 90 pence.

There can be no manner of doubt that these Australian Acts, in referring to pounds and pence, are referring to those units of Australian currency known as pounds and pence respectively and to nothing else. The income tax payable by a taxpayer to the Australian revenue is to be fixed by means of a calculation which involves the multiplication of an ascertained number of one kind of units of Australian currency by the scheduled number of another kind of units of Australian currency, the product being the resultant number of Australian pence. It seems necessarily to follow that to enable this calculation to be made, the assessable income of the taxpayer must, whatever be the currency in which he derives it, all be expressed in terms of Australian currency; in other words if any portion of his assessable income is derived by him in French or Belgian currency, it must before he can be properly assessed to Australian income tax be converted into its equivalent, at the time it was derived, in Australian currency. In exactly the same way, any income derived by him in British currency must be converted into its equivalent in Australian currency. In short when an Australian statute tells the taxpayer to state his derived income in order that a fraction thereof (i.e., so many pence in the pound of

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derived income) may be taken as tax, this can only mean that his derived income is to be stated and dealt with in terms of Australian currency. From this it would accordingly follow that the Commissioner was right in including the amount of £1,097 in the appellant's assessment.

It was, however, contended that a recent decision in the House of Lords was inconsistent with this view and was conclusive in the appellant's favour on the present appeal. Their Lordships are unable to agree with this contention. The case referred to is *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). The actual decision related to a matter very far removed from the question now under consideration. The actual decision was this :—That an obligation to pay a preference dividend of (say) £5 which was originally payable in England but which by an alteration of the company's articles, binding on the preference stock-holder, had been made payable only in Australia, was effectively discharged by a payment in Australian currency although the stock-holder in England received, owing to the rate of exchange, less than £5 in English currency.

Their Lordships can see nothing in that decision inconsistent with the view that for the purpose of assessing an Australian taxpayer to income tax under the Australian revenue legislation, it is necessary that his assessable income should be expressed in terms of Australian currency. It was said, however, that some of the Lords who took part in the debate on the *Adelaide Case* (1) expressed a view which entitled the appellant to say that the £5,671 which he derived in England in British currency should figure in his income tax return, though made in terms of Australian currency, at the same figure and no more. The view in question is a view expressed in terms by three of the noble Lords, viz., that the unit of account symbolized by the £ and originally carried by the early settlers from England to Australia had never been changed, but had remained the same as a measure of obligation, though the discharge of the obligation so measured might be affected by fluctuations in the currency which was legal tender *in loco solutionis*.

(1) (1934) A.C. 122.

Their Lordships are unable to see anything in the views so expressed which would justify, still less necessitate a construction of the Assessment Act and the Taxing Act other than that which they have indicated above : viz., that in order to calculate Australian income tax at a rate of so many pence per pound of " taxable income," it is essential that the " assessable income " should be expressed in terms of Australian currency.

For the reasons which they have indicated their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for the appellant, *Burton Yeats & Hart.*
Solicitors for the respondent, *Coward, Chance & Co.*