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which it aims. Upon an examination of the language, subject matter and scope of sec. 198 (1) (a), in my opinion, the legislature did not intend to authorize the invasion of existing rights which the council has attempted.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *E. Edgar Davies & Co.*
Solicitors for the respondent, *Alan Garden & Green.*

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[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXATION (NEW
SOUTH WALES). } APPELLANT;
RESPONDENT,

AND

LAWFORD RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

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SYDNEY,
April 1.
Latham C.J.,
Rich, Dixon and
McTiernan JJ.

*Income Tax (N.S.W.)—Assessable income—Solicitor—Costs earned prior to death—
—Payment to executrix—“Income derived by” executrix in her “representative
capacity”—Income Tax (Management) Act 1928 (N.S.W.) (No. 35 of 1928),
sec. 79.*

Certain professional costs earned by a solicitor remained unpaid at the date
of his death and were subsequently paid to his executrix.

Held that the moneys so received by the executrix were not income
derived by her in her representative capacity within the meaning of that
expression in sec. 79 of the *Income Tax (Management) Act 1928 (N.S.W.)*.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

Charles Mauduit Lawford died on 6th January 1932, and probate of his will was granted to his widow, Margaret Sutherland Lawford, the executrix named therein. Lawford had been practising at Orange, New South Wales, as a solicitor in partnership with one William Russell Campbell, and at the date of his death he and his partner had earned certain moneys in the nature of costs which had not been paid to the partnership. After Lawford's death these moneys were collected by the surviving partner who prior to 30th June 1932 paid to Lawford's executrix the sum of £882 on account of Lawford's share of the costs earned prior to the date of his death. In a return furnished by the executrix to the Commissioner of Taxation for New South Wales in respect of the period from 6th January 1932 to 30th June 1932, she disclosed to the commissioner this sum of £882, and deducted therefrom the sum of £32, leaving a net amount of £850. The commissioner claimed income tax upon the sum of £675, being this amount of £850 less the sum of £175 allowed by way of general exemption. On the adjustment sheet which accompanied the notice of assessment appeared the following statement by the commissioner: "Assessment is based on a net income of £850 from the partnership of Campbell and Lawford."

The executrix objected to the assessment on the grounds that the money in respect of which it was issued was capital and not income, it represented book debts which formed part of Lawford's estate and were collected by his executrix after his death as part of the capital assets in the estate, and she had already paid probate duty and Federal estate duty upon this sum.

The objections were overruled by the commissioner, who, at the request of the executrix, treated the objections as an appeal and forwarded it to the Court of Review for determination. That court followed the decision in *Trustees of the Estate of the late Amy O. Harrison v. Commissioner of Taxation (N.S.W.)* (1) and dismissed the appeal, but at the request of the executrix stated a case, in which the above-mentioned facts were set forth, for the opinion of the Supreme Court.

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(1) (1935) 3 A.T.D. 269.

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The questions reserved for the opinion of the court were :

- (a) Whether on the facts stated the Court of Review was correct in holding that the appeal should be dismissed ; or
- (b) whether the Court of Review ought to have allowed the appeal.

The Full Court of the Supreme Court answered the questions as follows : (a) No : (b) Yes.

From that decision the commissioner appealed, by leave, to the High Court.

Hooton, for the appellant. The moneys received by the executrix are assessable under and by virtue of sec. 79 of the *Income Tax (Management) Act* 1928. That section provides for cases which do not come within the scope of other provisions of the Act. As regards the expression “unless otherwise provided in this Act” in that section, other provision is made in sec. 34, which provides for all cases where the income in question is income of the trust estate.

[DIXON J. referred to *Executor, Trustee and Agency Co. of South Australia Ltd. v. Federal Commissioner of Taxation* (1) and *Howey v. Federal Commissioner of Taxation* (2).]

The word “answerable” in sub-sec. 1 of sec. 79 means “liable” (*River Wear Commissioners v. Adamson* (3)). A trustee who is the personal representative of a deceased person must include in his returns of income any sum which the deceased person would have had to show as part of his income if he had been alive. It is just as important to consider how the trustee has to deal with the money as it is to consider how the testator, if he had lived to receive it, would have dealt with it himself (*Reid's Trustees v. Inland Revenue Commissioners* (4)). Secs. 59 and 60 deal with income derived by a deceased person and not by the trustee as in sec. 79 ; therefore those sections are in a different category. Sec. 79 is a taxing section and applies to all cases where a trustee derives income, that is, receives, not earns, the income. The expression “income derived” as used in sec. 79 and the Act generally, except in the cases which

(1) (1932) 48 C.L.R. 26.

(3) (1877) 2 App. Cas. 743, at pp. 749, 775.

(2) (1930) 44 C.L.R. 289, at p. 294.

(4) (1929) S.C. 439 ; 14 Tax Cas. 512.

are covered by sec. 8 (4), means income "obtained," or "got" or "acquired" (*Federal Commissioner of Taxation v. Clarke* (1)).

[RICH J. referred to *Liquidator of the North Sydney Investment etc. Co. Ltd. v. Commissioners of Taxation* (2), *Perrott v. Commissioner of Taxation* (3) and *In re the Income Tax Acts* [No. 3] (4).]

The statutory provisions under consideration by the court in those cases are different from the statutory provisions now under the consideration of the court. A trustee may derive income in two ways, (a) by "earning" it, that is, by using the assets which he holds as trustee, plus the effort necessary for the getting of it in, and (b) by simply receiving it without the utilization of assets, or any exertion on the part of himself or his agents. The fact that sec. 79 appears in that part of the Act in which provision is made for miscellaneous matters does not affect its quality as a taxing section.

Kitto and *Hammond*, for the respondent, were not called upon.

The following judgments were delivered:—

LATHAM C.J. This is an appeal in accordance with special leave granted by this court from a judgment of the Full Court of the Supreme Court of New South Wales upon a case stated by a Court of Review established under the *Income Tax (Management) Act* 1928.

The facts appear in the case stated. The respondent in these proceedings, Margaret Sutherland Lawford, is the executrix of the late C. M. Lawford, a solicitor, who died on 6th January 1932. Probate has been granted to Mrs. Lawford. At the time of his death the deceased was carrying on in partnership with Mr. W. R. Campbell a business as solicitors at Orange. At the time of his death certain costs which had been earned by the partnership were unpaid. After his death the executrix received, on account of outstanding costs, a sum of £882, and, a deduction being made of £32, a net amount of £850 was left upon which the commissioner assessed the executrix under the *Income Tax (Management) Act* 1928. Notice of objection to the assessment was given upon the grounds, first, that the assessment was bad, the moneys in respect of which it was issued being capital and not income, and, secondly, that the executrix had paid

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(1) (1927) 40 C.L.R. 246, at p. 261.

(2) (1898) 19 L.R. (N.S.W.) 225; 15
W.N. (N.S.W.) 82.

(3) (1922) 23 S.R. (N.S.W.) 118; 40
W.N. (N.S.W.) 1.

(4) (1900) 25 V.L.R. 554.

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probate duty and Federal estate duty upon the sum in question. No argument has been addressed to the court with respect to the second ground and it is understood that it is not relied upon by the respondent, though the respondent has not been called upon.

The objection was overruled, the executrix appealed and the Court of Review decided against the executrix. A case was stated for the decision of the Full Court and the Full Court decided that these moneys were not taxable under the Act.

The submission made to this court is that the moneys are taxable under sec. 79 of the Act. That section provides :—

“ With respect to every agent, and with respect also to every trustee, the following provisions shall apply unless otherwise provided in this Act :—(1) He shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income derived by him in his representative capacity or derived by the principal by virtue of his agency and the payment of income tax thereon. (2) He shall in respect of such income make the returns and be assessed thereon, but in his representative capacity only, and each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other. (3) If he is a personal representative of a deceased person, the returns shall be the same as far as practicable as the deceased person, if living, would have been liable to make.”

The term “ trustee ” is defined in sec. 4 of the Act to include an executor.

In order to determine whether sec. 79 applies so as to make these moneys taxable, it is, I think, desirable, to refer to the scheme of the Act. Sec. 8 of the Act is the general section which imposes the tax and provides :

“ (1) Subject to the provisions of this Act, income tax at such rates as may be fixed by any Act shall be paid to the commissioner in respect of the taxable income derived by any person during every income year to which this Act applies.”

Sec. 8 applies to the ordinary case of a man who derives income and who is alive at all material times. He derives income, he makes a return, he is assessed, becomes liable under the assessment and pays. That is the normal case in which sec. 8 applies. If, however, a man

derives income and is assessed but dies before the tax is paid under the assessment, the Act provides for such a case in secs. 54 and 56.

Sec. 54 provides:

“(1) The income tax shall be due and payable to the commissioner on such day as shall be fixed in the notice of assessment.”

Sec. 56 provides:

“Income tax or additional tax due to the commissioner under this Act shall be deemed to be a debt due to the King, and shall be collected and received by the commissioner on account of and shall be paid into the Consolidated Revenue. Any income tax unpaid, including any additional tax, may be sued for and recovered in any court of competent jurisdiction by the commissioner.”

Accordingly, in the case which I have put of a man deriving income, being assessed and then dying, the Act provides that a debt has been created for which the commissioner may sue.

A further possible state of facts is also dealt with by the Act: if a man has derived income during his lifetime but has escaped full taxation in his lifetime, sec. 59 deals with the case. Sec. 59 provides that a certain provision “shall apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having made full, complete and accurate returns,” and full provisions are contained in the section to make it possible to recover the tax in such a case.

There is, however, another case which is dealt with by sec. 60. Sec. 60 deals with the case where a person has derived income in his lifetime and has died before income tax has been assessed and paid. Sec. 60 provides that in such a case “the commissioner shall have the same powers and remedies for the assessment and recovery of income tax from the trustees as he would have had against that person if that person were alive.” A sub-section in substantially the same terms appears in sec. 62 of the *Federal Income Tax Assessment Act 1922-1930* and was considered in the case of *Aitken v. Federal Commissioner of Taxation* (1). It was there held that where the facts had brought the case within that provision—sub-sec. 1, that is, of sec. 62 of the Federal Act—the executors were under an obligation to lodge returns and to pay tax upon the income derived by the taxpayer during his life.

This case presents another set of facts. In this case the deceased person did not receive the income during his lifetime, although he

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(1) *Ante*, p. 491.

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earned it ; what would have been income of the deceased if received during his lifetime has been received by the executrix. The question which arises is whether the Act has provided also for this case. It is unnecessary to refer to authorities to show that before a tax can be imposed upon a subject it must appear in clear language that it was the intention of the legislature so to impose it. There is no express provision in the Act dealing in explicit and plain terms with this case. It is said, however, that sec. 34 provides for the making of returns by trustees, including executors, and provides in sub-sec. 2 that a trustee shall pay income tax upon the part of the income of the trust estate which is there specified. It is argued that sec. 79 must *prima facie* be presumed to mean something more than can be discovered in sec. 34. In my opinion the words of sec. 79 must be taken in the first place in themselves, and if they are clear and unambiguous their scope ought not to be either extended or restricted by any other provision unless that provision very plainly is intended to affect the provisions of sec. 79. Now sec. 79 relates only to income derived by an executor in his representative capacity. Unless the alleged income in question is income derived by the executor in his representative capacity none of the provisions of the section apply. In my opinion these moneys received by the executrix in this case were not income derived by the executrix in her representative capacity or at all. It is admitted that the executrix would have to deal with these moneys as part of the capital of the estate. It may be that that fact is not in itself conclusive, but what I base my decision upon is the circumstance that I am unable to find anything which shows that these moneys received by the executrix were income derived by her ; that they were either derived or received by her as income. Accordingly, I am not able to find any provision in the Act which imposes a liability to pay tax in respect of these moneys and I therefore think that the appeal should be dismissed.

RICH J. The facts in this case show that the moneys in question were collected by the surviving partner of the deceased and paid to the executrix. These moneys were not income derived by her. I think that the operation of sec. 79 is confined to income which a trustee has himself derived as such in his representative capacity.

DIXON J. The deceased in his lifetime was assessed upon his share of the actual receipts of the partnership and the commissioner has made no attempt to apply sec. 60 on the footing that by the mere earning of the costs in question, although they then remained unpaid, income was derived by the partnership in respect of which the deceased was liable to assessment. Accordingly the commissioner can sustain the assessment upon the executor only if it is authorized by sec. 79. The application of that section depends upon the words in sub-sec. 1, "income derived by him in his representative capacity." Those words do not, in my opinion, cover the receipt or recovery of a debt by an executor to which in his lifetime a deceased person has become entitled as a result of his personal exertion. In such a case the money if received by the deceased would or might have formed part of his assessable income. But it is not part of the assessable income of the executor. He has not derived it as income. It is a mere debt forming part of the assets which devolve upon him. Sub-sec. 2 has no wider application. It refers only to the income described in sub-sec. 1, for it uses the expression "such income."

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I agree that the appeal should be dismissed.

McTIERNAN J. I agree. The moneys in respect of which the question arises are not, in my opinion, covered by the words "income derived by him in his representative capacity" in sec. 79 (1) of the *Income Tax (Management) Act* 1928, as amended, upon which the appellant relies. In my opinion the judgment of the Supreme Court was correct.

Appeal dismissed. Judgment of the Full Court affirmed. Appellant to pay costs in accordance with undertaking given when special leave to appeal was granted. Appellant to pay costs of the respondent of this appeal as between solicitor and client.

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *J. W. Maund & Kelynack*.

J. B.

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