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Reynolds v  
DCT (1984)  
71 FLR 27

[HIGH COURT OF AUSTRALIA.]

LEAN . . . . . APPELLANT;  
DEFENDANT,

AND

BRADY . . . . . RESPONDENT.  
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Wages Tax—Company—Failure to pay—Public officer—Personal liability—Income*  
1937. *Tax (Management) Act 1928 (N.S.W.) (No. 35 of 1928), sec. 78—Special Income*  
SYDNEY, *and Wages Tax (Management) Act 1933-1934 (N.S.W.) (No. 13 of 1933—*  
Dec. 1, 15. *No. 17 of 1934), secs. 15 (1), 16.*  
Starke, Dixon  
and McTiernan  
JJ.

Under the *Special Income and Wages Tax (Management) Act 1933-1934* (N.S.W.), the public officer of a company which is in default in paying to the Commissioner of Taxation wages tax collected by it from its employees is under neither a liability to fine or imprisonment for non-payment of the wages tax owing by the company, nor a civil liability enforceable against him personally for the amount owing.

Decision of the Supreme Court of New South Wales (Full Court) : *Ex parte Lean* ; *Re Brady*, (1937) 54 W.N. (N.S.W.) 114, reversed.

APPEAL from the Supreme Court of New South Wales.

George Beattie Lean was the public officer of a company, having been duly appointed in accordance with sec. 78 of the *Income Tax (Management) Act 1928* (N.S.W.). The company collected wages tax from its employees under sec. 16 (1) of the *Special Income and Wages Tax (Management) Act 1933-1934* (N.S.W.), but did not pay the amount of such tax to the commissioner as required by sec.

16 (1) (b) (ii). Lean was prosecuted summarily, on an information laid by William Malachy Brady, for having failed to pay such amount himself. He was convicted, and his conviction was upheld by the Supreme Court: *Ex parte Lean*; *Re Brady* (1).

He appealed, by special leave, to the High Court from this decision.

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*Snelling* (with him *Redapple*), for the appellant. The question is whether, where a company fails to pay to the Commissioner of Taxation the wages tax collected by it from its employees, the public officer of the company is personally bound to pay the amount thereof under penalty of conviction. Sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934 does not mean that the machinery provisions of the *Income Tax (Management) Act* 1928 apply to the special machinery provided by the 1933 Act. The latter machinery is alternative to and not cumulative upon the former. The marginal note to sec. 15 of the 1933 Act is misleading and is not part of the Act (*In re Charles Baldwin* (2)). The employee is the person liable to the wages tax (secs. 16 (1) (b) (ii) and (iii), 16 (1) (c) of the 1933 Act) and the employer, who is responsible whether or not he collects the tax, is the collector (secs. 2 (3), 14, 16 (1) (a), 17 (4)). The words "shall be applicable to the tax as if such taxes were the income tax under the principal Act" in sec. 15 (1) confer upon the commissioner rights only against non-employees (in the case of special income tax) and employees (in the case of wages tax), and do not apply the old machinery provisions to the duties of an employer under Part IV at all. This is shown by the fact that virtually none of the old provisions could be applied to Part IV, and such as could be applied have been substantially repeated therein, and also by the fact that it is apparent that Part IV is a self-contained and complete set of provisions. Alternatively, these words show that the old provisions apply only to impose the old duties and not to impose new types of duties specified in Part IV. The public officer is not penally or civilly liable for tax due from the employer to the commissioner. Failure to pay the tax is not an act which is visited with a penalty, and sec. 78 of the 1928 Act

(1) (1937) 54 W.N. (N.S.W.) 114. (2) (1891) 12 L.R. (N.S.W.) (L.) 128, at p. 130



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means that the public officer is liable only for the doing of such acts. Only companies that derive income are bound by sec. 78 to have public officers. The wages tax, however, applies to all employer companies, and the public officer does not handle the company's moneys but is merely a functionary for carrying out the machinery provisions. Therefore the legislature did not intend that he should be liable to imprisonment for failing personally to pay the tax which his company should have paid. The statement in sec. 2 of the 1933 Act that that Act shall be read with the 1928 Act does not assist the court (See *Halsbury's Laws of England*, 1st ed., vol. 27, p. 167, par. 319). In any case there is no reasonably clear imposition of the liability on the public officer (*Attorney-General v. Till* (1)). Where a personal liability was imposed on a representative party by the 1928 Act, it was done in clear terms, e.g., secs. 58, 63 (2), 79 (1), 80 (d). It is clear from the wording of sec. 16 (8) that only the employer himself is subjected to the various sanctions mentioned therein.

*Telfer*, for the respondent. The statutes are explicit. Sec. 16 of the 1933 Act provides that certain things shall be done. Sec. 16 (8) provides that the employer shall be liable to a penalty if he fails to carry out the provisions of the Act. Sec. 15 (1) means that the provisions of the 1928 Act shall be applied to everything relating to the wages tax in so far as they can reasonably be applied. Then sec. 78 of the 1928 Act makes the public officer personally liable for the tax itself. There has been a default by the company, and therefore a penalty could be imposed. The legislature has shown an express intention to carry over the legal powers given by sec. 78 of the 1928 Act and, in particular, to aid, if necessary, the powers of the commissioner to recover against the employer or, in the event of default by the employer, against the public officer. As well as the remedies provided by the 1933 Act the commissioner still has open to him the ordinary remedies that he could pursue by calling on the employer to make a return and then assessing in the ordinary way.

(1) (1910) A.C. 50, at pp. 51, 52.



*Snelling*, in reply. If it were intended to superimpose one lot of machinery on the other, sec. 15 of the 1933 Act would have been placed at the end of the Act. Its position in Part III suggests that it does not cover Part IV, and that Part IV is an added provision, giving a remedy against the employer, while sec. 15 provides a remedy against the person liable to the tax.

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*Cur. adv. vult.*

The following written judgments were delivered :—

Dec. 15.

STARKE J. The appellant is the public officer of the Stafford Building Co. Ltd. for the purposes of the *Income Tax (Management) Act* 1928. He was charged upon summons as such public officer with contravening the provisions of the *Special Income and Wages Tax (Management) Act* 1933-1934.

It was alleged that the company was an employer within the meaning of the Act and liable to pay tax upon income from wages and that, the company being in default in paying the tax, the appellant as such public officer failed to pay the same to the Commissioner of Taxation. He was convicted on the charge and fined £50.

The Supreme Court affirmed the conviction and special leave to appeal to this court was granted. The question is whether the conviction is right and it depends upon the meaning of some provisions in the Acts already mentioned. A special income and wages tax is imposed by the *Taxation Reduction Act* 1933, No. 11. The *Special Income and Wages Tax (Management) Act* 1933-1934 provides that every employer shall collect from his employees by deduction or otherwise the amount of the wages tax, keep records and pay the tax in the manner prescribed. "Any employer who fails to carry out or observe any provision of this section shall . . . be liable to account for and pay to the Commissioner any tax which by or because of his failure remains unpaid. . . . Such employer shall upon summary conviction be liable to a penalty. . . ." (sec. 16 (8) ).

The appellant was not an employer and standing by itself this provision did not apply to him. But sec. 15 (1) enacted : "The



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provisions of Part IV (Returns and Assessments); Part V (Objections and Appeals); Part VI (Collection and Recovery of Tax); Part VII (Penal Provisions); and Part VIII (Miscellaneous) comprising sections thirty-eight to ninety-two inclusive of the principal Act" (that is, the *Income Tax (Management) Act* 1928 as amended by subsequent Acts) "and any regulations made to give effect to such sections, shall be applicable to the tax as if such taxes were the income tax under the principal Act."

Under the principal Act, Part VIII, sec. 78, every company which derives income shall at all times be represented by a person residing in the State called the public officer of the company. He is liable, without prejudice to the liability of the company, for the doing of all such things as are required to be done by or on behalf of the company under the Act and in case of default in doing any such things is liable for all penalties imposed for any breach of the provisions of the Act.

It is contended that the effect of these provisions is to render the appellant, the public officer of the Stafford Building Company Ltd., liable to do what the company should have done, and in default of so doing to subject him to a penalty or conviction.

In my opinion the argument, though plausible, is not the true meaning of those provisions. Income tax under the *Income Tax (Management) Act* 1928 is a debt due to the Crown and may be sued for and recovered in any court of competent jurisdiction by the commissioner. Many duties are cast upon the public officer of a company under that Act, such as making returns, giving information and so forth. But nowhere is there imposed upon the public officer any personal obligation to pay the tax and nowhere in the Act is there any penalty imposed upon him for default of payment of such tax by the company or by himself (Cf. secs. 79, 80, 81).

All that sec. 15 of the Special Act requires is that the provisions of the principal Act should be applicable to the wages tax as if such taxes were the income tax under the principal Act. The sub-section does no more than apply those provisions, so far as they are applicable, to the wages tax, and it does not create duties and sanctions of another and a different character. If the intention of the legis-



lature were to create such duties and sanctions, then it should have used language more precise and unmistakeable.

The appeal should be allowed.

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DIXON J. This appeal raises the question whether the public officer of a company is penally liable for the failure of the company to pay wages tax to the Commissioner of Taxation.

The appellant is, or was, the public officer of a company which collected the tax from its employees, but did not account for and pay to the commissioner the whole of the tax. The appellant was prosecuted summarily for contravening the provisions of the *Special Income and Wages Tax (Management) Act* 1933-1934 in that the company being an employer and liable to pay the commissioner the amount of tax in question and being in default he, as public officer, failed to pay such amount to the commissioner at the times and in the manner prescribed. He was convicted and fined and his conviction was upheld by the Supreme Court, from whose decision this appeal is brought by special leave.

By sub-sec. 8 of sec. 16 of the *Special Income and Wages Tax (Management) Act* 1933-1934 an employer who fails to carry out or observe any provision of that section, unless exempted, is liable to account for and pay to the commissioner any tax which by or because of his failure remains unpaid together with a fine to be fixed by the commissioner, not exceeding ten per cent of such tax. The employer is liable upon summary conviction to a fine and upon conviction on indictment to imprisonment, and the court before which he is convicted may order payment of the amount of tax.

Other sub-sections of sec. 16 set out what are the duties of an employer with regard to the tax payable upon income from wages. He is required to collect the wages tax from his employees by deduction or otherwise. He must keep records of all payments made by him to his employees. If he employs not less than a prescribed number of employees, he is under a direct liability to pay to the commissioner the amount of the tax payable upon the wages he pays and he must affix to his records the official receipts in respect of such payments. If he employs less than the prescribed number of employees, he must obtain wages tax stamps to



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the amount of the tax and affix them to his records. He is required to send in his records from time to time to the commissioner and to produce them for inspection. The company fell under all these duties and was liable to prosecution under sub-sec. 8 of sec. 16 for its failure to account for, and pay to the commissioner the amount of tax which by or because of such failure remained unpaid.

The *Special Income and Wages Tax (Management) Act* 1933-1934 does not itself contain any express provision for the appointment by companies of public officers to represent them. But to some degree the provisions of the *Income Tax (Management) Act* 1928 are incorporated by reference and under sec. 78 of that Act every company which derives income must be represented by a duly authorized agent or attorney called a public officer. His responsibilities in connection with the company's obligations with respect to income tax are set out in paragraphs of that section. The conviction of the appellant for the failure in payment of the wages tax payable by the company rests upon the effect which the incorporation of these provisions of the *Income Tax (Management) Act* 1928 is said to produce. The incorporation is the work of two provisions of the *Special Income and Wages Tax (Management) Act* 1933-1934, secs. 2 (1) and 15 (1).

The question upon which the liability of the appellant as public officer to conviction depends is whether these sections, or either of them, so apply the provisions of the *Income Tax (Management) Act* 1928 as to impose a vicarious penal responsibility upon public officers of companies for the defaults of the companies in respect of wages tax. Sec. 2 (1) provides no more than that the *Special Income and Wages Tax (Management) Act* 1933-1934 should be read with the *Income Tax (Management) Act* 1928 and that in the former Act the latter is referred to as the principal Act. Sec. 15 (1) is as follows: "The provisions of Part IV (Returns and Assessments); Part V (Objections and Appeals); Part VI (Collection and Recovery of Tax); Part VII (Penal Provisions); and Part VIII (Miscellaneous) comprising sections thirty-eight to ninety-two inclusive of the principal Act, and any regulations made to give effect to such sections, shall be applicable to the tax as if such taxes were the income tax under the principal Act." The operative words of this



enactment are: "shall be applicable to the tax" (i.e., the special income tax or the wages tax) "as if such taxes were the income tax under the principal Act." The direction contained in such a provision must be understood as qualified by the unexpressed condition that the provisions drawn into the *Special Income and Wages Tax (Management) Act* 1933-1934 from the other legislation shall be capable of application. For very many provisions of the *Income Tax (Management) Act* 1928 are quite incapable of application to the special scheme for the collection of wages tax and many others deal with matters which are the subject of some express and inconsistent provisions in Part IV of the *Special Income and Wages Tax (Management) Act* 1933-1934. But, apart altogether from this necessary implication, the meaning of the words "applicable to the tax as if such taxes were the income tax under the principal Act" requires examination. They direct that an assumption shall be made. The assumption to be made is that the special income tax or wages tax, as the case may be, is income tax. The words then require that the income tax provisions shall be applied to the new tax on that hypothesis. This appears to me to mean that every authority given to the commissioner by so much of the income tax legislation as is made applicable, every liability thereby imposed on taxpayers or others, every process prescribed for ascertaining the income tax and exacting its payment and every incidental right or immunity should, if consistent with the particular provisions made by the *Special Income and Wages Tax (Management) Act* 1933-1934, be exercised, incurred, pursued or enjoyed in respect of special income tax or wages tax to precisely the same extent as in the case of income tax, but no further. If, under the *Income Tax (Management) Act* 1928, the public officer is liable personally for the discharge of the income tax payable by the company which he represents, then he is liable for the payment of the wages tax payable by that company. For his liability in respect of the company's income tax would arise under the provisions of the *Income Tax (Management) Act* 1928 which are to "be applicable to the" (wages or special income) "tax as if such taxes were the income tax under the principal Act." But, if a public officer is not liable personally under the provisions of the *Income Tax (Management) Act* 1928 to pay his

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company's income tax, then I do not think that by applying those provisions to wages tax a personal liability can be imposed upon him to pay what his company has left unpaid in respect of wages tax. To impose in that case such a liability for wages tax would be to do more than make the income tax provisions applicable to that tax as if it were the income tax under the *Income Tax (Management) Act* 1928.

The duties and obligations of a public officer with respect to income tax are prescribed, so far as material, by par. e of sec. 78 of the *Income Tax (Management) Act* 1928. It provides that he shall be liable for the doing of all such things as are required to be done by or on behalf of the company under that Act, and that in case of default in doing any of such things he shall be liable for all penalties imposed for any breach of the provisions of the Act. The paragraph is declared to be without prejudice to the liability of the company, which is to be liable, as well as the public officer, for such penalties. Now the liability of a taxpayer to pay the amount of income tax to which he is assessed is enforceable as a civil debt due to the Crown. The tax assessed is recoverable by civil remedies only and failure to discharge the obligation is not punishable as an offence. When sec. 78 (e) speaks of the doing of all such things as are required to be done by or on behalf of a company, it is, in my opinion, referring to the discharge of the various responsibilities placed upon the taxpayers in relation to the administration of the income tax law of which, perhaps, the best example, because the most commonplace, is making annual returns of income. The language of the paragraph is not apt to describe the payment of tax, the satisfaction of a debt. The imposition upon a servant or agent of a company of a personal liability for the tax owing by the company is a thing to be accomplished only by a very clear expression of legislative intention. The general words, "doing of all such things as are required to be done," ought not to receive such a construction, and, in my opinion, were never intended to bear it. Default in doing such things is visited by the same penalties as are imposed on the company and non-payment of income tax is not an offence. This confirms the view that the "things required to be done" do not refer to payment of tax but to the active responsibility falling on



taxpayers in connection with returns, assessments and ancillary matters. Accordingly, in my opinion, the public officer of a company is not personally liable for his company's income tax. Still less is he liable to fine or imprisonment for failure to pay it. According to the construction I have adopted of the operative words of sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934, it follows that the public officer is under neither a liability to fine or imprisonment for non-payment of the wages tax owing by the company, nor a civil liability enforceable against him personally for the amount owing.

The contention on behalf of the commissioner in opposition to this conclusion and the reasoning upon which it is based consists of a succession of steps. First, he relies upon sub-sec. 8 of sec. 16 of the *Special Income and Wages Tax (Management) Act* 1933-1934 as the source of both a civil and a penal liability upon the company as an employer for failure to account for and pay wages tax. In this he begins with a step the correctness of which is undeniable. Then, he goes to par. *e* of sec. 78 of the *Income Tax (Management) Act* 1928 and claims that it is a general provision imposing on the public officer the same liabilities as those of his company and exposing him to the same penalties, that is, for the purpose of income tax. Next, he turns to sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934 for the transfer of this principle to wages tax. Lastly, he concludes that the principle makes the public officer answerable exactly as the company is under sec. 16 (8). The fallacy of this reasoning lies, in my opinion, in supposing that the words of sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934 make par. *e* of sec. 78 of the *Income Tax (Management) Act* 1928 apply to sec. 16 (8) of the former Act. Sec. 16 (8) is a positive enactment which should be understood as intended to operate according to its terms. When it describes the objects upon which it operates as "employers," it means what it says. It does not say and it does not mean "employer and in the case of companies their public officers." Par. *e* of sec. 78 of the *Income Tax (Management) Act* 1928 on its terms applies to the things which under that Act a company must do and to the liabilities that Act imposes. Sec. 15 (1) of the *Special Income and Wages Tax (Management) Act*

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1933-1934 does not pick up the paragraph and apply its terms to the express and particular provisions that statute proceeds to enact and so give those provisions an operation which they would not otherwise produce. What sec. 15 (1) does is to add to the express and particular provisions of the statute of which it forms a part the interconnected series of provisions of the *Income Tax (Management) Act* 1928 with no other change than the substitution of special income tax or wages tax for income tax. The provisions, so resorted to, are not meant to produce new consequences and effects, the difference being only in the nature of the tax forming the subject of the application. This, I think, is the natural meaning of the words of sec. 15 (1), but, in any event, something much clearer and explicit would be necessary, in my opinion, before a court would be justified in holding that a legislative intention sufficiently appeared to impose either a civil or criminal liability upon the public officer of a company for the default of the company in paying wages tax.

For these reasons I think the appeal should be allowed with costs, the order of the Supreme Court discharged and the order nisi for statutory prohibition made absolute with costs.

McTIERNAN J. The appellant, who was not an employer, was convicted of a contravention of sec. 16 (1) (b) of the *Special Income and Wages Tax (Management) Act* 1933-1934 and fined. Sec. 16, which was enacted "with regard to the tax payable upon income from wages," imposes a number of obligations upon "every employer," and under that name he is made liable upon summary conviction to a penalty or upon conviction on indictment to imprisonment. Sub-sec. 8, which attaches these sanctions to what is commanded by the section, concludes by empowering the court to order the defaulting employer to pay the amount of the tax or any fine certified by the commissioner to be unpaid or both the tax and the fine in addition to imposing punishment.

Briefly stated the obligations of "every employer" under sec. 16 include the following: first, to collect from his employees the amount of the wages tax for which they are liable on their incomes from wages (sec. 16 (1) (a) ), secondly, to record all payments made by him to his employees (sec. 16 (1) (b) (i) ), thirdly, where his



employees are not less than a specified number, to pay to the Commissioner of Taxation the amount of tax payable on the wages paid to the employees (sec. 16 (1) (b) (ii) ).

The appellant was the public officer of a company which defaulted in its obligations as an employer under sec. 16 (1) (b) (ii). He was charged and convicted upon the assumption that, as the public officer of the company, he was liable to pay to the Commissioner of Taxation the amount of wages tax owing by the company.

The *Special Income and Wages Tax (Management) Act* 1933-1934 under which the appellant was convicted contains no independent provisions for the appointment of a public officer or the definition of his duties. But sec. 78 of the *Income Tax (Management) Act* 1928, as amended, provides for the representation by a public officer of every company which derives income. This section is one of the provisions of the *Income Tax (Management) Act* 1928, which sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934 enacts "shall be applicable to the tax as if such taxes were the income tax under the principal Act." The tax means the special income tax or wages tax and the principal Act means the *Income Tax (Management) Act* 1928. Sec. 78 (e) is in the following terms: "Without prejudice to the liability of the company, the public officer shall be liable for the doing of all such things as are required to be done by or on behalf of the company under this Act or the regulations in force thereunder, and in case of default in doing any of such things, shall be liable for all penalties imposed for any breach of the provisions of this Act or such regulations, and the company, as well as such public officer, shall also be liable for such penalties." The liability of the public officer of a company under these provisions does not extend beyond the things which the company is required to do as a taxpayer under the Act. But sec. 16 (1) (b) (ii) of the *Special Income and Wages Tax (Management) Act* 1933-1934 does not impose any liability on the employer as a taxpayer. In the case of wages tax the taxpayer is the employee from whom the employer is bound to collect the amount of wages tax which, under sec. 16 (1) (b) (ii), he is liable to pay to the Commissioner of Taxation. If that tax were income tax under the principal Act, which is the assumption which has to be made, it would not be the company's income tax but the income tax of its employees, and it is clear that the public officer would not be under any liability, even upon the widest possible construction of sec. 78 (e) of the

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that to which the company was assessed under the Act. As the application of sec. 78 (e) to wages tax is limited by the assumption expressed in sec. 15 (1) of the *Special Income and Wages Tax (Management) Act* 1933-1934 it may not be applied so as to impose on a public officer a liability in respect of wages tax wider than that to which these provisions might expose him if that tax were actually income tax and to bind him to pay the wages tax of the employees of the company which he represents.

For these reasons I think that the conviction was wrong. It is not material to the steps by which this conclusion has been reached to decide whether sec. 78 (e) of the *Income Tax (Management) Act* 1928 imposes a liability on the public officer personally to pay the income tax at which the company which he represents has been assessed. The basis of the conclusion is that, whatever be the precise list of things which sec. 78 (e) makes the public officer liable to do, those provisions do not make him liable to pay the income tax of any taxpayer other than the company. Hence these provisions cannot, consistently with the assumption upon which they are applicable, apply so as to render the public officer of a company liable for failure to discharge its obligations under sec. 16 (1) (b) (ii) of the *Special Income and Wages Tax (Management) Act* 1933-1934. I agree, however, that the language of sec. 78 (e) of the *Income Tax (Management) Act* 1928 is not sufficiently clear to impose a liability on the public officer to pay the company's own income tax or to expose him to fine or imprisonment if it is not paid.

The appeal should be allowed, the rule nisi for statutory prohibition made absolute, and the appellant's costs here and below paid by the respondent.

*Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof order that rule nisi for statutory prohibition be made absolute with costs.*

Solicitors for the appellant, *Harold J. Price & Co.*

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