[HIGH COURT OF AUSTRALIA.]

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

AND

OPIT . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 29; *May* 5.

Latham C.J., Rich and Dixon JJ.

*Income Tax (N.S.W.)—Income omitted from return—Additional tax—How calculated—"Upon the basis of the return lodged"—Income Tax (Management) Act* 1928 (*N.S.W.*) (*No.* 35 *of* 1928), *sec.* 68 (1) (*b*).

By sec. 68 (1) of the *Income Tax (Management) Act* 1928 (N.S.W.) it is provided that "any person who . . . (*b*) fails to include any assessable income in any return . . . shall be liable to pay by way of additional tax an amount of one pound or double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged, whichever is the greater."

*Held* that the phrase "tax assessed upon the basis of the return lodged" refers to an amount calculated upon the basis of the return lodged by the taxpayer, and does not require that there should have been an actual assessment upon that basis.

*Penrose* v. *Federal Commissioner of Taxation*, (1931) 45 C.L.R. 263, not followed.

Decision of the Supreme Court of New South Wales (*Halse Rogers* J.), reversed.

APPEALS from the Supreme Court of New South Wales.

Separate appeals were made to the Supreme Court of New South Wales by Eva Opit, wife of Lesser Opit, against assessments made by the Commissioner of Taxation of New South Wales in respect of her income for the years ended 30th June 1928 and 30th June 1929 respectively.

During the period under review Mrs. Opit was not assessed on the return of income lodged by her for each of those years. The income so shown by her was transferred by the department to the return of income lodged by her husband, who was assessed on the increased amount of income thus ascertained. Objections made by the husband received the consideration of the department for some years and were eventually upheld, whereupon the income was retransferred to Mrs. Opit's account and she was assessed upon a certain basis.

The return for 1928 was signed by the taxpayer and was dated 15th November 1928. It showed a gross income of £9,038, consisting of one item, rent. The deductions consisted of rates and taxes, State income tax and Federal land tax, insurance and interest, amounting to £5,995, and, with repairs, commission, gas, electric light, &c., to £7,797, thus leaving a net income of £1,241.

The first return for 1929 was signed by Lesser Opit as agent and was dated 12th November 1929. It showed the gross income as £9,374, from rents, and deductions which resulted in a net income of £876. There was another return for the same year signed by the taxpayer personally.

In respect of the year 1928 no assessment at first issued because of the transfer by the department of the income to the account of the taxpayer's husband but, after he had appealed and his objection had been upheld in 1935, the first assessment in respect of 1928 was issued to Mrs. Opit. That showed taxable income £247, and tax £10 15s. 9d. It was accompanied by an adjustment sheet whereon it was stated that in the absence of definite details of net rents received from certain property acquired in 1913: "It has been decided to assess you on the amount deemed to have been received by you during the year ended 30th June 1928, based approximately on income derived therefrom during 1926 and 1927,

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viz., £470." Then later there were two amended assessments for the same year. The notice of the first amended assessment was issued on 24th July 1936. This showed an income of £6,070, and tax £997 18s. 2d. Then there was what was shown as " omitted income, £1,995 16s. 4d." That was by way of a penalty, being exactly twice the amount of the tax payable on the sum shown, and the two added together came to £2,993 14s. 6d. There was a credit for £10 15s. 9d., leaving a balance claimed to be due of £2,982 18s. 9d. There was a further amended assessment dated 11th September 1936, showing income at the same figure and tax at £997 18s. 2d., and then, instead of the figures which were mentioned for omitted income, there were the words and figures " omitted income, £1,736 13s. 2d.," and " for late payment, £98 14s. 3d.," the three items totalling £2,833 5s. 7d., which, after deducting therefrom a credit of £10 15s. 9d., left a balance claimed of £2,822 9s. 10d.

A departmental officer gave evidence that the tax payable on the basis of the return lodged by the taxpayer for the year ended 30th June 1928 was calculated as being £129 11s. 7d. That was deducted from the sum of £997 18s. 2d., shown as tax, giving an amount of £868 6s. 7d. That last amount was doubled and the amount of £1,736 13s. 2d. was thus arrived at.

As to the year ended 30th June 1929, the first notice of assessment was issued on 11th January 1935. That showed an income of £247, a tax claim of £10 5s., and accompanying it was an adjustment sheet with a statement in language similar to that contained in the adjustment sheet referred to above. For the year 1929 there was an amended notice of assessment dated 21st July 1936, showing income at £3,206, tax at £338 6s. 9d., and additional tax for omitted income at £716 13s. 6d., totalling £1,375 0s. 3d.; credit was given for the sum of £10 5s. referred to above, and a balance of £1,064 15s. 3d. was claimed. A further notice of assessment was issued in September 1936 showing income and tax at the same figure, but an additional tax for omitted income at £467 0s. 10d., and the penalty for late payment was £34 16s. 2d., making a total of £860 3s. 9d., reduced by the credit of £10 5s. to £849 18s. 9d.

The departmental officer stated that the amount of tax calculated to be due on the basis of the return lodged by the taxpayer in respect

of the year ended 30th June 1929 was £124 16s. 4d. That amount was subtracted from the tax of £358 6s. 9d., as calculated by the department on the "true figures" as determined by its officers, which showed that the amount of tax avoided was £233 10s. 5d. That last amount doubled produced the sum of £467 0s. 10d., shown in the further notice of assessment as additional tax.

Objections made by the taxpayer and disallowed by the commissioner were treated as the grounds of the appeals.

The objections were that a deduction of £9,000 in respect of the year ended 30th June 1928, and of £8,000 in respect of the year ended 30th June 1929, being the loss incurred in the respective income years in the business of buying and selling properties, had not been made, such deduction being provided for by sec. 22 of the *Income Tax (Management) Act* 1928 (N.S.W.); that the penalty incurred in the notice of amended assessment in respect of the amounts treated by the commissioner as omitted income had not been incurred and should be withdrawn; and, alternatively, that the penalty imposed was excessive having regard to all the circumstances of the case and should be reduced.

After hearing evidence tendered in respect of the various grounds of appeal, *Halse Rogers* J. held that the taxpayer had failed on that part of the case which claimed that there should have been deductions allowed on account of the loss incurred by the taxpayer in the relevant years from the buying and selling of properties. As to that part of the case which concerned the imposition of a penalty of double tax for omitted income, his Honour, without expressing any personal opinion on the point, followed the decision in *Penrose* v. *Federal Commissioner of Taxation* (1) and upheld the appeals by the taxpayer as to the ground that the respective sums of £1,736 13s. 2d. and £467 0s. 10d., charged against her pursuant to sec. 68 (1) of the *Income Tax (Management) Act* 1928, on account of her having failed to include assessable income in her return for the respective income years, had not been duly charged, levied, or imposed against or upon her. His Honour ordered that the respective assessments be reduced by those amounts respectively.

(1) (1931) 45 C.L.R. 263.

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The commissioner appealed to the High Court against such parts of those decisions as were adverse to him.

*Dovey* K.C. and *Hooton*, for the appellant.

*Dovey* K.C. The evidence shows that before the notices of further amended assessment were forwarded to the respondent there had been in the office of the commissioner an ascertainment of the amount of the taxable income and an ascertainment of tax to be imposed on the basis of the return as originally lodged. An " assessment " is an ascertainment, calculation or adjudgment of the amount due (sec. 4, *Income Tax (Management) Act* 1928). Here the form of the claim shows that a calculation had been made ; that calculation was an assessment within the meaning of sec. 68 of the Act. That assessment was upon the basis of the return lodged by the respondent, which means that the proper corrections and adjustments were made by the appellant. " Assessment " does not mean notice of assessment, as seems to be indicated in *Penrose* v. *Federal Commissioner of Taxation* (1). In that case there was not any evidence of an ascertainment. The words " tax assessed under this Act " refer to the tax as assessed for the purpose of imposing penal tax. If the decision in *Penrose's Case* (1) means that there must be something more than ascertainment then that case was wrongly decided. Alternatively, it can be distinguished on the ground that the meaning of the word " assessment " as used in the *Income Tax (Management) Act*, is defined in sec. 4 of that Act. There can be an assessment of income and an assessment of tax. The alternative meaning of sec. 67 of the *Income Tax Assessment Act* 1922-1930, the terms of which are similar to those of sec. 68 of the State Act, was discussed in *Richardson* v. *Federal Commissioner of Taxation* (2) and *Trautwein* v. *Federal Commissioner of Taxation* (3). The procedure followed by the appellant is in conformity with sec. 68. In the circumstances, he is entitled to the double tax. It is a provision which is only availed of in cases of fraud.

(1) (1931) 45 C.L.R. 263.
(2) (1932) 48 C.L.R. 192, at p. 209.
(3) (1936) 56 C.L.R. 196, at pp. 217-219.

*Hooton.* The word " assessed " should not be given a technical or semi-technical significance. That word simply means calculated, or computed, or ascertained. If the decision in *Penrose's Case* (1) is correct, it is necessary to make a formal assessment on the basis of the return lodged, although that return is clearly inaccurate, and to give notice of that assessment which, in the circumstances, the commissioner does not intend should be paid. The legislature could not have intended that such an idle proceeding should be taken.

*Maughan* K.C. (with him *Bruxner*), for the respondent. The facts show that in this matter the appellant made an assessment on the basis of the respondent's books, to which he had statutory access, and not on the basis of the return lodged. Thus for the purpose of calculating the additional tax the appellant did not have one of the essential integers. Mere departmental calculations do not constitute an assessment. Sec. 68 of the *Income Tax (Management) Act*, being a penal provision in a taxing Act, should be strictly construed. Upon a literal and grammatical reading of that section its true construction is as appears in *Penrose's Case* (1). The integer to be taken is the tax assessed upon the basis of the return lodged. Read as a whole, the definition of the word " assessment," as it appears in sec. 4 of the Act, shows that that word means the ascertainment of the amount of tax imposed on the taxpayer. Here, assuming that the tax was assessed, it certainly was not imposed. This view is supported by sec. 54; see also secs. 41, 47, 48 and 53. Those sections show that a duty is cast upon the appellant of serving a notice of every assessment whenever made; that duty is not discharged by mere departmental calculations. They show, also, that the words " assessment " and " assessed," as used in sec. 68, refer to the process by which is calculated the income upon which tax is to be paid, and the tax to be paid on that income. An assessment is an official act; it is not an act done casually or haphazardly (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (2)). The position here is similar to the position in *Penrose's Case* (1), which was correctly decided. The procedure adopted by the

(1) (1931) 45 C.L.R. 263. (2) (1926) 37 C.L.R. 368, at p. 373.

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appellant is an irrational one. It is not in accord with the intention of the legislature, which was that, in order to provide some protection to the taxpayer, the amount of tax, for which he should be liable, should be determined upon the figures furnished by him in his return subject to proper adjustments. The penalty imposed by sec. 68 is double the difference between the amount so determined and the amount eventually found to be properly payable.

*Dovey* K.C., in reply. The procedure followed by the appellant was precisely that which was required to be done in order to constitute an assessment (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (1) ).

*Cur. adv. vult.*

May 5. The following written judgments were delivered :—

LATHAM C.J. These are appeals from those parts of two judgments of *Halse Rogers* J. which adjudged that certain additional tax charged against the respondent under sec. 68 of the *Income Tax (Management) Act* 1928 (N.S.W.) had not been duly charged and that she was not liable to pay the said tax.

The relevant parts of sec. 68 are as follows: "Any person who . . . (*b*) fails to include any assessable income in any return . . . shall be liable to pay by way of additional tax an amount of one pound or double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged whichever is the greater."

The learned judge followed the case of *Penrose* v. *Federal Commissioner of Taxation* (2). Upon this appeal the Full Court is invited to review that decision.

The appeals relate to income received in the years ending 30th June 1928 and 30th June 1929. It has not been suggested that there is any difference in substance between the relevant facts in each year. The respondent, Eva Opit, made a return of her income

(1) (1926) 37 C.L.R. 368, at p. 373. (2) (1931) 45 C.L.R. 263.

and in that return claimed a number of deductions. The commissioner disallowed certain deductions claimed and, taking the view that certain income was really income of the respondent's husband, transferred that income to the husband for purposes of assessment. The result was that the taxable income of the respondent was reduced below the taxable amount and no notice of assessment was given to the taxpayer and no tax was paid.

In the year 1935 an examination of the respondent's affairs was made on behalf of the commissioner and as a result she was assessed in respect of the years in question upon a basis which the commissioner thought proper. After the respondent's husband had lodged certain objections to his assessment a new estimate of the taxable income of the respondent for 1928 was made and an assessment was issued under which the respondent was charged a much larger amount of tax, together with additional tax on account of income which she had omitted from her original return. Errors in these assessments led to the issue of further amended assessments. In the case of 1928 the amount charged by way of additional tax on omitted income is £1,736, and in respect of 1929 it is £467. It is not disputed that the respondent did fail to include assessable income in the return made by her in respect of each year.

Sec. 68 requires the ascertainment of, first, " the tax properly payable " and, secondly, " the tax assessed upon the basis of the return lodged." The difference between these amounts of taxation is then ascertained, and double that amount may be charged by way of additional tax. The learned judge, following *Penrose's Case* (1), held that the section was applicable only in a case where an assessment had actually been made upon the basis of the return lodged ; that the phrase " tax assessed upon the basis of the return lodged " did not mean " the amount of tax which would be payable *if* the taxpayer were assessed upon the basis of that return " ; it meant " the amount of tax which *had actually been assessed* to the taxpayer upon the basis of that return." As *Dixon* J. expressed the two possible views of the section in *Richardson* v. *Federal Commissioner of Taxation* (2), the phrase " the tax assessed upon the

(1) (1931) 45 C.L.R. 263.

(2) (1932) 48 C.L.R., at p. 209.

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basis of the return lodged " means either " what the taxpayer would have been required to pay if his return had been adopted for his assessment, or what he has actually been required to pay by an assessment actually made upon the basis of the return lodged." It is the latter view which was adopted by *Starke* J. in *Penrose's Case* (1).

The words of the section are, in my opinion, prima facie capable of either meaning. They are capable of an interpretation which requires the existence of an actual assessment assessing the taxpayer to tax upon the basis of the return lodged by her. But they are also capable of the other interpretation, namely, as requiring only the calculation of tax upon the basis of that return. In my opinion the latter interpretation is to be preferred.

If the words " tax assessed " are limited to tax actually assessed, then they are limited to a tax which the taxpayer could properly in accordance with the provisions of the Act be required to pay upon a notice of assessment being given under secs. 47 and 54 of the Act. Such an assessment should be issued only where the commissioner is really of opinion that the amount of tax specified in the assessment is, at the time when he makes the assessment, properly payable by the taxpayer. Accordingly, if the position of affairs, for any reason, is such that the commissioner is not of opinion that the amount of tax of which he is entitled to demand payment can be ascertained upon the basis of the return lodged by the taxpayer, he cannot properly issue an assessment seeking to charge him with tax upon that basis. Therefore, when the commissioner is not prepared to assess upon the basis of the return lodged, sec. 68, upon the view taken in *Penrose's Case* (1), cannot be applied, and double tax cannot be imposed. Thus, if a return made by a taxpayer were immediately discovered by the commissioner to be false by reason of omissions of income, no assessment upon the basis of that return could properly be made. The commissioner could not make an actual assessment alleging what he knew to be a false amount of income to be the true income and claiming tax accordingly. Thus the commissioner could never apply sec. 68 in

(1) (1931) 45 C.L.R. 263.

such a case. If, on the other hand, the commissioner were successfully deceived by the return and issued an assessment upon the basis of it, he would be able to apply sec. 68 when he subsequently discovered that income had been omitted or that otherwise the conditions of sec. 68 had been satisfied. There is no basis in reason for such a distinction between cases. If the words of the section compel this conclusion it must be accepted, but if another interpretation of the section is fairly open, that other interpretation should preferably be adopted.

The words " upon the basis of the return lodged " are important. It may be argued that tax is assessed upon the basis of a return when that return is taken as the foundation of the assessment, even although the particulars included in the return are altered in the course of the assessment. I am, however, unable to regard this as a fair interpretation of these words appearing in their context in a taxation statute. If it is once conceded that an assessment may be an assessment " upon the basis of " a return even although that return is altered for the purpose of making the assessment, it appears to me to be difficult, if not impossible, to prescribe any limit to such potential alteration. The additional tax chargeable is double the difference between the two amounts mentioned in the section. If " the tax assessed upon the basis of the return lodged " includes a tax assessed upon that return as altered by the commissioner, strange results follow. For example, the commissioner may disallow deductions claimed in the return. The result will be that the amount of tax assessed upon that return will be increased. Therefore, the difference between such amount and the amount of tax properly payable will be decreased. Thus the amount of additional tax chargeable will be decreased as a result of the taxpayer having improperly claimed a deduction. If, on the other hand, the commissioner found that a mistake had been made by the taxpayer in failing to claim an allowable deduction and the commissioner accordingly allowed and made the deduction, the result would be that the amount of tax assessed upon the return as so altered would be less than if the tax were assessed upon the basis of the return as lodged. Thus, the difference between that amount of tax and the amount of tax properly payable would be greater

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than otherwise, and, accordingly, the taxpayer would be liable to pay a larger amount by way of additional tax than if he had not made an involuntary error against himself in the return lodged by him.

These considerations support the view that the words " upon the basis of the return lodged by him " should be given their natural meaning. They refer to the actual return lodged, without any emendations, alterations, additions or subtractions by the commissioner. Any other view appears to me to drift into indefiniteness and vagueness. If this be so, then the principle of the section is seen to be that the measure of the liability to pay additional tax is to be found in the difference between the amount of tax which the taxpayer is liable to pay upon the basis of what he himself has put forward as his true income and the amount of tax properly payable.

It is probably an unusual thing for the commissioner actually to issue an assessment " upon the basis of " a return lodged in the sense in which I have stated that I think that those words ought to be construed. In many cases the commissioner makes corrections and adjustments, because taxpayers often make errors which the commissioner corrects readily and as of course. Sec. 68 would have very little operation, and, where it did operate, would operate most capriciously, if it applied only to cases where the commissioner had in fact made an actual assessment upon the return lodged with all its particulars unaltered.

The discussion of the considerations mentioned helps towards the true construction of the section. The section requires a comparison to be made between the amounts mentioned in the section for the purpose of ascertaining the difference between them. One amount is an amount described as the amount properly payable. An amount is actually payable by a taxpayer only when notice of assessment is given to him in sec. 54. But the amount which is regarded as the amount properly payable for the purposes of the section cannot be regarded as the actual amount which the taxpayer is required to pay by a particular assessment of the commissioner after he has calculated omitted income, &c. The taxpayer may have already paid some amount on account of the tax, and the result of a further assessment would, therefore, be that a further

amount became payable. The amount properly payable for the purpose of sec. 68, however, will be the sum of the two amounts mentioned. It is a calculated amount, not necessarily an amount actually required to be paid by any particular notice of assessment.

The other amount which the section requires to be ascertained is "the tax assessed upon the basis of the return lodged." These words also refer to a calculated amount. They are directed simply to the ascertainment of an amount. That amount is to be ascertained by taking the return lodged and then assessing the tax upon the basis of that return. An assessment in relation to tax is the ascertainment of the amount of tax (See definition of assessment in sec. 4). Such an ascertainment can be made at any time, and sec. 68 requires two such ascertainments to be made for the purpose of applying the section.

The section is intended to apply to all cases where a person has sent in a return and has omitted to include income. Upon the construction which I suggest should be adopted, the section will apply in every such case and it will apply with certainty. The application of the section will require only the calculation of the amount of tax upon the basis of the return lodged by the taxpayer, leaving all the particulars of that return precisely as they appear in the return as lodged. The contrary view requires that an actual assessment should have been made for the purpose of charging the taxpayer the amount of tax charged in the assessment. As I have already said, such an assessment is probably rarely made, and in many cases, for reasons which I have stated, the commissioner could not with propriety make such an assessment, and the result would be that the section would be applicable only in very few cases, and then most arbitrarily and capriciously as between different taxpayers. In my opinion an interpretation of the section which brings about such results should not be adopted if another interpretation is open. For the reasons which I have given, in my opinion the other interpretation mentioned is open and should be adopted.

The result is that in the present case the commissioner is claiming as additional tax less than the amount which he is entitled to claim. In calculating tax upon the basis of the returns lodged, the commissioner has not taken the returns as actually lodged. He has disallowed deductions claimed in the returns as lodged, has therefore

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increased the amount of tax assessed, and so has decreased the difference between that amount and the amount properly payable. If the taxpayer had been assessed upon the basis of her returns, the tax assessed upon those returns would have been smaller and the amount of the difference larger, and accordingly she would have been charged a greater amount of additional tax. The commissioner is, however, entitled to the smaller amount which he has claimed.

I am of opinion, therefore, that the appeals to this court should be allowed and that the orders of the Supreme Court should be varied by striking out the parts of the orders which allowed the appeal with respect to the sums charged as additional tax. The assessments should be affirmed.

RICH J. I have read the judgments of the Chief Justice and *Dixon* J. and agree that the appeals should be allowed.

I am glad to see that the legislature has in the model Federal *Income Tax Assessment Act*, No. 27 of 1936, sec. 226 (1), settled the difficulty which occurred in the interpretation of sec. 67 of the *Income Tax Assessment Act* 1921-1928.

DIXON J. Under sec. 68 of the *Income Tax* (*Management*) *Act* 1928 of New South Wales a taxpayer who fails to include any assessable income in any return or who includes in any return as a deduction an amount which is in excess of that actually expended or incurred by him is liable to pay by way of additional tax the amount of one pound or double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged whichever is the greater.

The taxpayer in the present case has been assessed under this provision to additional tax upon the footing that she failed to include assessable income in her returns for each of two successive years. In fact her returns did omit income. But, at first, the commissioner took the view that the income which she actually returned should be included in her husband's assessments. Later, he assessed her to tax in respect of a small part of the income, a particular description of income. Afterwards, by amendments of the assessments so made upon her, he assessed her upon the income

she had formerly returned and much more besides. For the purpose of these amended assessments, he calculated the difference between the tax which the amended assessments imposed as properly payable and the tax which would have been payable if the returns had been accepted or adopted as a basis of assessing her taxable income. Each of the two amended assessments places upon her a liability to double the amount of this difference by way of additional tax, or, as it is more commonly called, by way of penal tax.

She objects to this imposition upon the ground that on the facts of her case no application can be found for the expression in sec. 68 : " double the amount of the difference between the tax properly payable and the tax assessed upon the basis of the return lodged." The reason why she denies the application of the expression depends upon the construction given to the words " the tax assessed upon the basis of the return lodged." According to that construction, they require an antecedent assessment of tax upon the basis of the return made by the taxpayer. In order to make up the amended assessment of which she now complains, it was, of course, necessary for the commissioner to compute the amount of the tax which would be assessed if the return lodged were adopted as the basis for ascertaining the income. For the additional tax included by the amendments is double the difference between that amount and the amount properly payable. But no anterior assessment was made of the taxpayer's taxable income ascertained on such a basis If, therefore, the construction for which she contends be correct, she is not liable to additional or penal tax except to the extent of £1 in respect of each assessment. The same construction was placed by *Starke* J. in *Penrose* v. *Federal Commissioner of Taxation* (1) upon the corresponding words in sec. 67 of the Federal *Income Tax Assessment Act* 1922-1928, from which the State sec. 68 was transcribed. The language in question produces a different effect upon my mind and I find myself unable to concur in the view which commended itself to his Honour.

The rival interpretations may, perhaps, be made clearer by writing the material part of the section with the addition of words which would fix the meaning of the language actually used. The

(1) (1931) 45 C.L.R. 263.

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commissioner's interpretation appears to me to be brought out by writing in either "if" or "when" before "assessed." Thus: "double the amount of the difference between the tax properly payable and the tax *if* (or *when*) assessed upon the basis of the return lodged." The taxpayer's contention is brought out by writing in the same place either "already" or the words "which had been." Thus: "double the amount of the difference between the tax properly payable and the tax *already* (or *which had been*) assessed upon the basis of the return lodged." The result of adopting the latter meaning is that the provision would hit no taxpayer unless he had succeeded, even if only temporarily, in obtaining an assessment understating his taxable income. For it means that one limb of the comparison, the lower limb, if the expression be allowed, can exist only when before the amount properly payable came to be assessed the commissioner had made an assessment on the false assumption that the return correctly stated the components from which the taxable income should be ascertained. That limb of the comparison would not apply to any case where before assessing at all the commissioner had questioned the correctness of the return and upon investigation discovered the true income and assessed accordingly. Nor would it apply to any case in which the commissioner in his original assessment so departed from the taxpayer's return that the assessment was not made on the basis of the return. No reason suggests itself for making such a distinction. The natural meaning of the language appears to me to be opposed to it. For, to my mind, the whole phrase describes a comparison between figures arrived at on two opposed calculations, one made on the proper basis, and the other made on the basis of the return. It does not appear to me to express or imply an intention that the second calculation must antecedently have been made and translated into an assessment of tax upon the taxpayer who makes the erroneous return.

Since the decision in *Penrose's Case* (1), the income tax law has been consolidated, and statutes in the same form have been adopted by the Commonwealth and States. In this legislation the important words have been redrawn as follows: "an amount equal to double

(1) (1931) 45 C.L.R. 263.

the difference between the tax properly payable by him and the tax that would be payable if it were assessed upon the basis of the return furnished by him" (See sec. 274 (2) of the *Income Tax (Management) Act* 1936 (N.S.W.). Doubtless the change was occasioned by *Penrose's Case* (1), but the language chosen appears to me to express the real intention of the section we are construing.

A consideration of some weight arises from the difficulty, if not impossibility, of giving effect to the contrary interpretation by means of the procedure of the *Income Tax (Management) Act* 1928 (N.S.W.). The Act was framed according to the model of the Federal enactment then in force—the *Income Tax Assessment Act* 1922-1928. An assessment made for a given financial year may afterwards be amended and altered. But the alterations are amendments of an existing determination of the taxpayer's liability, which, as altered from time to time, stands as the appropriate record of his taxable income (*Hooper's Case* (2) ). Under sec. 44 the only alterations or additions authorized are those which are thought necessary to insure the completeness and accuracy of the assessment. If, before penal or additional tax of the description in question can be imposed, there must be a prior assessment made upon the false basis of the incorrect returns, it is clear that the amount properly payable can be levied only by amendment, that is, alteration of or addition to this original assessment. But, on the construction of sec. 68 contended for, how could the penal tax be included ? It would be difficult to say that the penal tax could be put in by an alteration for the purpose of insuring the completeness and accuracy of the original assessment. According to the construction contended for, it is only because an assessment has been made corresponding to the return and therefore incomplete or inaccurate that the penal tax is imposed at all. On that contention it could never have been included in the original return. How then can the original return be made complete and accurate by including it ? Yet, in *Richardson's Case* (3), *Starke*, *Evatt*, *McTiernan* JJ. and I all decided that penal tax should be included in the assessment. Doubtless, it is a mistake to give too much weight to arguments

(1) (1931) 45 C.L.R. 263.
(2) (1926) 37 C.L.R. 368.
(3) (1932) 48 C.L.R. 192.

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based on inconsistency. But the interpretation relied upon by the taxpayer brings about an artificial result, and I think that general considerations may be invoked to confirm what appears to me the more natural construction of the language in question.

For these reasons I am of opinion that the assessment rightly imposed a liability for additional tax consisting in double the difference between the two calculations of tax, that on the proper basis and that on the basis of the returns.

I think the appeals to this court should be allowed with costs. The orders of the Supreme Court should be discharged and in lieu thereof the appeals from the two assessments in question should be dismissed with costs.

*Appeals allowed with costs. Orders of Supreme Court discharged and in lieu thereof order that the appeals of the taxpayer to the Supreme Court be dismissed with costs and the assessments confirmed.*

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

Solicitors for the respondent, *A. J. McLachlan, Arnott & Co.*

J. B.