

[HIGH COURT OF AUSTRALIA.]

MOLLOY APPELLANT ;

AND

THE FEDERAL COMMISSIONER OF LAND TAX RESPONDENT.

H. C. OF A. *Land Tax (Cth.)—Appeal—Grounds—Ground of appeal not taken as ground of objection to assessment—Bar to appeal—Waiver—Land Tax Assessment Act 1910-1934 (No. 22 of 1910—No. 14 of 1934), sec. 44M (3).*

MELBOURNE,

May 17.

Latham C.J.,
Rich and
Starke JJ.

Sec. 44M (3) of the *Land Tax Assessment Act 1910-1934* is a positive statutory provision that upon appeal a taxpayer is limited to the grounds set out in his objection to assessment, and it cannot be waived by the commissioner.

APPEAL from *Dixon J.*

Upon the hearing of an appeal by Thomas George Anstruther Molloy to the High Court from a decision of *Dixon J.* (1), upholding assessments to land tax of the appellant for the years 1917-1934 inclusive, the Federal Commissioner of Land Tax took the preliminary objection to the appeal that the only ground of appeal to the High Court relied upon by the taxpayer was a ground not stated in his objections to the assessments and was therefore one which he could not rely upon before the High Court, as sec. 44M (3) of the *Land Tax Assessment Act 1910-1934* provides that “a taxpayer shall be limited, on the hearing of the appeal, to the grounds stated in his objection.”

Wilbur Ham K.C. and *Fraser*, for the appellant.

Herring K.C. (with him *Reynolds*), for the respondent. The appellant should be limited on the hearing of his appeal to the grounds stated in the objections. Sec. 44M (3) of the *Land Tax Assessment Act* 1910-1934 limits the grounds of appeal to the grounds stated in the objections. The ground relied on in the appeal was not taken in the objections and is no longer open to the appellant.

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Wilbur Ham K.C., in reply. This point was not taken at the hearing before *Dixon J.* The appeal book was settled by the parties and no mention was made of it. The commissioner is bound by the way in which he conducts his case in the same way as a taxpayer, and he cannot now raise this point. In 1935 an assessment was made going back eighteen years assessing a man who is no longer a taxpayer. The commissioner has not been taken by surprise by the ground raised, and by his conduct of the case has acquiesced in its being taken.

THE COURT delivered the following judgment :—

This is an appeal from a judgment of *Dixon J.* upon appeals from certain assessments to land tax. The decision was against the taxpayer, and the assessments were upheld. The grounds of appeal to this court were originally seven in number, but by notice dated 4th February 1938 all of them were abandoned with the exception of one, namely : That the judge was wrong in law in holding that the making of the assessments was authorized by sec. 21 of the *Land Tax Assessment Act* 1910-1934. On appeal to this court the Commissioner of Land Tax, respondent to the appeal, has raised a preliminary objection that the appellant is not entitled to rely on this particular ground. This objection is founded on sec. 44M (3) of the *Land Tax Assessment Act* 1910-1934, which provides that "a taxpayer shall be limited, on the hearing of the appeal, to the grounds stated in his objection." The ground mentioned was not a ground stated in the objections to the assessments. The question before the court is whether sec. 44M (3) precludes the appellant from relying on this ground upon the appeal to *Dixon J.* and upon the present appeal to the Full Court.

Dixon J. dealt with the point relating to sec. 21 in his judgment, and, it is said, as the question arose on the hearing, it is a proper

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ground of appeal. It was argued that this matter was dealt with by the judge at the trial, and it was suggested that sec. 44M (3) was not then relied upon by the commissioner, so that he must be taken to have waived the objection which he now seeks to raise. This is not a case of an appellant seeking to rely on a point not taken below, but of a respondent attempting to support a judgment in his favour. The counsel who are now present were not before *Dixon J.*, and they have no personal knowledge of the course of proceedings before him. We have, therefore, consulted *Dixon J.*, and he has said that the commissioner did object that this ground was not covered by the notice of objection and that he did not abandon his contention but that no formal ruling was given on the objection, as the appeal was decided upon grounds which made it unnecessary to consider the objection.

Sec. 44M (3) is a positive statutory provision that upon appeal the taxpayer is limited to the grounds set out in the notice of objection. This we regard as an imperative direction to the court, not as a provision merely for the benefit of the commissioner which he is in a position to waive. The provision is made for the purpose of protecting public revenue, and the court is bound to give effect to it.

It is contended that, in the circumstances, the commissioner should pay the costs of the appeal, or at least that the respondent should be relieved from paying the commissioner's costs, but, in our opinion, the commissioner did not purport to abandon this objection and he is not disentitled to take it. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *R. F. Cooper.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

H. D. W.