

[HIGH COURT OF AUSTRALIA.]

SCOTT FELL AND OTHERS APPELLANTS ;

AND

THE FEDERAL COMMISSIONER OF TAXA- }
TION } RESPONDENT.

H. C. OF A. *Estate Duty (Cth.)—Assessment—Dutiable estate—Deductible debts at date of death—*
1944. *Income tax unpaid by deceased—Tax partly remitted after death—Estate Duty*
SYDNEY, *Assessment Act 1914-1928 (No. 22 of 1914—No. 47 of 1928), s. 17—Income Tax*
Aug. 30 ; *Assessment Act 1922-1934 (No. 37 of 1922—No. 18 of 1934), ss. 52, 54 (1),*
Sept. 12. *57 (1), 67, 95.*

Williams J. Income tax assessed in respect of the income of a taxpayer remained unpaid at his death and a part thereof, after objections had been disallowed by the Commissioner, was subsequently remitted by a Board constituted under s. 95 of the *Income Tax Assessment Act 1922-1934*.

Held that, until the part thereof had been remitted, there was an existing liability to pay the full amount of the tax as assessed, therefore this amount was deductible from the gross value of the deceased's estate as being a debt "due and owing by the deceased at the time of his death" within the meaning of s. 17 of the *Estate Duty Assessment Act 1914-1928*.

APPEAL from the Federal Commissioner of Taxation.

William Bain Scott Fell, John Wilson Scott Fell and Linda Wheeler, the executors and executrix of the will of William Scott Fell, who died at Sydney on 7th September 1930, appealed to the High Court against the assessment by the Federal Commissioner of Taxation of the estate of the deceased to Federal estate duty, on the ground that the Commissioner had not allowed as a debt deductible from the estate of the deceased under s. 17 of the *Estate Duty Assessment Act 1914-1928* the whole amount of income taxes as assessed during the lifetime of the deceased but remaining unpaid at the date of his death, instead of the balance thereof remaining

after some of those income taxes had been remitted under s. 95 of the *Income Tax Assessment Act* 1922-1930 by a Board constituted under that section.

The appeal was heard by *Williams J.*, in whose judgment the facts and relevant statutory provisions are sufficiently set forth.

Weston K.C. and *Kerrigan*, for the appellants.

Maughan K.C. and *Holmes*, for the respondent.

Cur. adv. vult.

WILLIAMS J. delivered the following written judgment:—

This is an appeal by the executors of the estate of William Scott Fell deceased, who died at Sydney on 7th September 1930, against the assessment by the respondent of his estate for the purposes of Federal estate duty.

The evidence consists of a statement of facts tendered by Mr. *Weston* on behalf of the appellants and agreed to by Mr. *Maughan* on behalf of the respondent subject to relevancy and to the production of documents therein referred to when called for. The only paragraphs to which Mr. *Maughan* objected as irrelevant, namely pars. 5, 7, 15, 20 and 24, were not pressed by Mr. *Weston* and all documents or copies thereof called for by Mr. *Maughan* were produced and put in evidence. In addition Mr. *Weston* withdrew par. 11 of the statement of facts which was subsequently replaced by a new par. 11.

On 27th March 1931 the appellants made a return for the purposes of duty in accordance with the *Estate Duty Assessment Act* 1914-1928 in which they showed the assets in the estate to be of the value of £75,962 and the liabilities to be £20,628, leaving a balance for duty in round figures of £55,000. But the liabilities did not at that stage contain any amounts in respect of unpaid Federal or New South Wales income taxes, although the existence of these liabilities was referred to.

During his lifetime the deceased had been assessed in respect of the years 1915-1916 to 1927-1928 inclusive for Federal income taxes (including additional penal taxes) amounting to £179,156 and notices of these assessments had been given to him more than sixty days before his death. He had also during his life been assessed for State income taxes which had become due and payable in his lifetime amounting to £22,881, in respect of which he had paid £5,000,

H. C. OF A.

1944.

SCOTT FELL
v.

FEDERAL
COMMISSIONER OF
TAXATION.

Sept. 12.

H. C. OF A.
1944.

SCOTT FELL
v.
FEDERAL
COMMISSIONER OF
TAXATION.

Williams J.

leaving £17,881 unpaid. After the date of his death these assessments for State income taxes were amended and the outstanding liability reduced to £6,091. After the date of his death Federal income taxes for the years 1928-1929 and 1931-1932 were assessed, amounting to £32, and State income taxes in respect of the years 1929-1930, 1930-1931 and 1931-1932, amounting to £1,300.

The deceased had prior to his death lodged objections against all the State and Federal income tax assessments which had then been issued.

Prior to his death the objections to State income tax assessments had been disallowed and appeals instituted by the deceased in respect of each of the same. The appeals were all by consent dismissed with costs on 8th September 1932. The objections to Federal income tax assessments were all disallowed on 21st December 1934 and no appeals in respect thereof were instituted.

The appellants lodged several applications for relief against the assessments of Federal and State taxes. The applications for relief in respect of State taxes failed, but, in the case of Federal taxes, after several refusals, on 2nd November 1938 the Board constituted under s. 95 of the *Federal Income Tax Assessment Act 1922-1934* granted relief in respect of the taxes and additional taxes for the years 1915-1916 to 1922-1923 both inclusive, the remissions totalling £170,616 out of the sum of £179,156 already mentioned, leaving a balance, including the sum of £32, of £8,572. On 16th January 1939 the Commissioner of Taxation remitted from penal sums included in this sum of £8,572, amounting to £5,686, the sum of £2,834, leaving a balance of £2,852 still to pay. The total liability of the appellants for Federal income taxes assessed prior to death then became £5,738.

On 23rd February 1940, the Board constituted under the *New South Wales Income Tax Management Act 1936*, s. 301, in part released the appellants from their liability for State income taxes by partly reducing the taxes and partly remitting the penalties, thereby reducing the liability of the appellants for State income taxes from £7,492 to £6,500.

The effect of these remissions of Federal and State taxes was that the amount of Federal and State taxes for which the appellants remained liable on 16th September 1942 was apparently £15,084.

On that date the respondent, allowing this sum as a deduction, forwarded to the appellants a statement showing the balance of the estate of the deceased for duty to be £40,265 and assessed the estate duty at £2,362.

The appellants objected to the assessment on eight grounds, all of which were disallowed by the respondent.

On 24th April 1944, the appellants duly requested the respondent to treat the objection as an appeal and forward it to this Court.

The only ground of objection pressed on the appeal was ground 6, that the respondent had wrongly only taken into account the Federal and State income taxes and penalties in respect of the income of the deceased as finally reduced and had not made an allowance as debts for the amounts of such taxes and penalties as first imposed and as due and payable at the date of death. If this contention is correct with respect to the Federal taxes, amounting to £179,156, which were due and payable at the date of death, the appeal must succeed, and I need not discuss the position with respect to State taxation, although it would appear to be the same.

Some of the Federal taxes assessed during the lifetime of the deceased were imposed under the provisions of the *Income Tax Assessment Acts* 1915 to 1921 and others under the provisions of the *Income Tax Assessment Act* 1922-1930. But the relevant provisions of the two Acts are in substance the same and I need only refer to the later Act. Section 52 of that Act provides that (1) the fact that an appeal or reference is pending shall not in the meantime interfere with or affect the assessment the subject of that appeal or reference; (2) if the assessment is altered on appeal or reference a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded, and amounts short paid shall be recoverable as arrears. Section 54 (1) provides that income tax shall be due and payable sixty days after the service by post of a notice of assessment. Section 57 (1) provides that income tax shall be deemed when it becomes due and payable to be a debt due to the King on behalf of the Commonwealth and payable to the Commissioner in the manner and at the time prescribed. Section 67 provides for the additional penal taxes which were imposed in the present case. Section 95 provides that in any case where it is shown to the satisfaction of a Board consisting of the Commissioner, the Secretary to the Treasury and the Comptroller-General of Customs or of such substitutes for all or any of them as the Minister appoints from time to time—(a) that a taxpayer liable to pay income tax has become bankrupt or insolvent; or (b) that a taxpayer has suffered such a loss or is in such circumstances, or, owing to the death of a person, who, if he had lived, would have paid tax, the dependants of that person are in such circumstances, that the exaction of the full amount of tax will entail serious hardship, the Board may release the taxpayer or the executor or administrator of the deceased person

H. C. OF A.

1944.

SCOTT FELL

v.

FEDERAL
COMMISSIONER OF
TAXATION.

Williams J.

H. C. OF A.
1944.

SCOTT FELL
v.
FEDERAL
COMMIS-
SIONER OF
TAXATION.

Williams J.

(as the case may be) wholly or in part from his liability, and the Commissioner may make such entries and alterations in the assessment as are necessary for that purpose. Section 17 of the *Estate Duty Assessment Act* 1914-1928 provides, so far as material, that for the purpose of assessing the value for duty of the estate all debts due and owing by the deceased at the time of his death shall be deducted from the gross value of the assessable estate.

The submission made by Mr. *Maughan* on behalf of the respondent was, shortly stated, that when income tax is assessed, although for the purposes of collection in the meantime it is a debt which becomes due and payable sixty days after notice of assessment, it is a debt to which are annexed certain statutory incidents, those incidents being that it may be objected to and discharged, reduced or increased on appeal to the Board of Review or to the Court or that relief may be granted in whole or in part under the circumstances mentioned in s. 95, so that, for the purposes of duty, whatever the inchoate amount of the debt may appear to be at the date of death, the true debt, and therefore the debt that should be deducted under s. 17 of the *Estate Duty Assessment Act*, is the amount for which the estate becomes ultimately liable when all the processes contemplated by the Act have been exhausted and the ultimate fate of the assessment finally determined. As at present advised I am strongly inclined to agree with this submission where the amount of the liability is contested. The true debt is the amount of tax which the taxpayer is legally liable to pay according to law. If the Commissioner assesses the taxpayer for the wrong amount he is entitled to object, and, if the Commissioner disallows the objections, to appeal to the Board of Review or to the Court. If the amount for which he has been assessed is reduced or discharged or increased on appeal the necessary adjustments must be made. But the position is, to my mind, radically different where relief is granted under s. 95. As *Swinfen Eady* L.J. said under somewhat analogous circumstances in *Furtado v. City of London Brewery Co.* (1):—"On these applications, the validity of the assessment is not disputed, but admitted, the claim for relief being based upon something which has happened since the assessment was made, and which could not have been made the subject of an appeal against the assessment."

At the date of the death of W. Scott Fell the sum of £179,156 imposed for Federal income taxes was due and owing, and indeed payable, by the deceased to His Majesty, and that debt, or to be more accurate the greater part of it, was not released until eight years later. It is true that the deceased had, prior to his death, lodged objections

to all the assessments, but these objections were all disallowed by the Commissioner on 21st December 1934, and no appeals in respect thereof were instituted. At the time, therefore, that the Board constituted under s. 95 of the *Income Tax Assessment Act* made such a generous remission it had been determined that the true amount of the debt, or, in other words, the amount which the deceased was legally liable to pay according to law, was £179,156. There was no obligation on the Board to release any part of that debt. It had an absolute discretion in the matter. The remission could only operate as a release from the date upon which it was made, and I am unable to understand how that release could affect the amount that was due and payable according to law at the date of death. Mr. *Maughan* referred me to the decision of *Poole J.* in *In re Brougham* (1). That was a decision on a different statute, and is not binding on me. But I fail to see how any importance can be attached to the consideration, adverted to by his Honour (2), that the power given by the Act there in question to grant a release did not rest in the Commissioner, nor in the Crown, but in a Board.

The important passage for Mr. *Maughan* is the statement that "bound up with the imposition of the tax is the right of the taxpayer to apply for its partial or total release, and until his application is refused it cannot be said that in the ultimate and final result the liability to pay exists" (3).

But it seems to me that the true position is that the right to apply for a release is, as *Swinfen Eady L.J.* pointed out in *Furtado's Case* (4), based on the existence of an admitted and existing liability, so that, until that liability is released in whole or in part, there is an existing liability to pay the full amount of the debt. However accurate the statement may have been in relation to the Act then under consideration, it cannot apply, in my opinion, to s. 17 of the *Estate Duty Assessment Act* in view of the clear provision in that section that all debts due and owing by the deceased at the time of his death are deductible. The debt under consideration was, in my opinion, at the date of death in the same position as, say, a debt due to a money-lender that might be subsequently reduced under the provisions of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.), or a debt that might be the subject of adjustment under the *National Security (Contracts Adjustment) Regulations*. Mr. *Maughan* suggested that the position might be different under s. 17 if a debt due and owing at death to an ordinary creditor was subsequently released, but I cannot see any distinction. No doubt it

H. C. OF A.
1944.

SCOTT FELL
v.

FEDERAL
COMMISSIONER OF
TAXATION.

Williams J.

(1) (1926) S.A.S.R. 159.

(2) (1926) S.A.S.R., at p. 164.

(3) (1926) S.A.S.R., at p. 165.

(4) (1914) 1 K.B., at p. 713.

H. C. OF A.
1944.

SCOTT FELL

v.

FEDERAL
COMMISSIONER OF
TAXATION.

Williams J.

was necessary to provide authority in the *Income Tax Assessment Act* for the Commissioner to release the tax or part of it as it was a release of public money, but, if that could affect the operation of the release, then, if the debt was owing to or under the control of an ordinary individual in a fiduciary capacity and he required authority under a statute or a trust instrument to release it, the release of this debt would be in a different position under s. 17 from a debt released by the absolute owner of a chose in action.

For these reasons I am of opinion that the appeal should be allowed and that the assessment should be set aside.

Appeal allowed with costs. Assessment set aside.

Solicitors for the appellants, *Minter, Simpson & Co.*

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

J. B.