[HIGH COURT OF AUSTRALIA.]

CADBURY-FRY-PASCALL PROPRIETARY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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MELBOURNE, *Oct.* 5, 6; *Nov* 10.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Constitutional Law—Law imposing taxation—Income Tax Assessment Act—Provision for assessment of private companies in respect of undistributed income—Incorporation of Assessment Act in Income Tax Act—Income Tax Assessment Act 1936-1939 (*No.* 27 *of* 1936—*No.* 30 *of* 1939), *ss.* 104, 105—*Income Tax Act* 1939 (*No.* 31 *of* 1939).

Income Tax (Cth.)—Private company—Additional tax—Notional distribution to shareholders—Notional distribution through interposed companies, &c.—Application of both provisions in one year—Assessment to additional tax—Whether amendment of previous assessment—Income Tax Assessment Act 1936-1939 (*No.* 27 *of* 1936—*No.* 30 *of* 1939), *ss.* 17, 104, 105, 166, 169, 170.

The *Income Tax Assessment Act* 1936-1939 is not a law imposing taxation within the meaning of s. 55 of the Constitution. Accordingly, neither s. 104 nor s. 105 of that Act of itself imposes a tax, but the *Income Tax Act* 1939, by incorporating the provisions of the Assessment Act, validly imposes tax in accordance with the terms of each of those sections.

A company may be assessed to tax in accordance with s. 104 of the *Income Tax Assessment Act* 1936-1939 and also in accordance with s. 105 in respect of the same financial year.

The Commissioner of Taxation assessed a private company upon its taxable income under s. 17 of the *Income Tax Assessment Act* 1936-1939 to tax in respect of its income for the financial year ending 30th June 1939, and subsequently assessed it to additional tax in accordance with s. 105 of the Act. Thereafter, by what he described as an "amended assessment," he assessed the company to tax in accordance with s. 104, thereby increasing its liability.

Held that the provisions of s. 104 and s. 105 authorize assessments, not by way of amendment of any other assessment, but as separate and independent assessments of additional amounts of tax; therefore s. 170 (3) of the Act could not operate to invalidate the assessment of the company to tax under s. 104.

CASES STATED.

Cadbury-Fry-Pascall Pty. Ltd. appealed to the High Court against an assessment made by the Federal Commissioner of Taxation in accordance with s. 31B of the *Income Tax Assessment Act* 1922-1934 (the subject of appeal numbered 7 of 1943), and also against assessments made in accordance with ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939 (the subject of appeal numbered 8 of 1943). In each appeal, *Latham* C.J. stated a case for the opinion of the Full Court. The cases stated were substantially as follows :—

Appeal No. 7 *of* 1943.

1. Cadbury-Fry-Pascall Pty. Ltd. (hereinafter called " the appellant ") is a company duly incorporated in the State of Tasmania. It carries on business in that State and in the other States of the Commonwealth.

2. The appellant has duly appealed to this Court against an assessment of additional income tax in respect of the undistributed amount of the income derived by it in Australia during the year ending 30th June 1934 made by the Federal Commissioner of Taxation (hereinafter called " the respondent ").

3. The appellant is and was at all material times a private company within the meaning of s. 31A of the *Income Tax Assessment Act* 1922-1934 and did not, before the expiration of nine months after the close of the year of income, make a " sufficient distribution " of its income of that year, as defined by s. 31A.

4. Purporting to act pursuant to s. 31B of the Act, the respondent estimated the aggregate amount of income tax and additional tax which would have been payable by the shareholders of the appellant if the appellant had on the last day of the year of income paid the undistributed amount (as defined in s. 31A) as a dividend to the shareholders who would have been entitled to receive it.

5. Such additional income tax was estimated in each case by reference to the provisions of the *Income Tax Act* 1934 declaring the rate of tax payable by individuals in respect of income from property.

6. The respondent has assessed the appellant and claims that the appellant is liable to pay as income tax the aggregate amount of income tax and additional tax estimated as aforesaid which would have been so payable by its shareholders.

7. The appellant contends that there is no provision in the *Income Tax Assessment Act* 1922-1934 or in the *Income Tax Act* 1934 which imposes upon a company the tax claimed and further that there is no authority for assessing the appellant company to tax in any

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amount which is calculated in accordance with provisions imposing tax only upon individuals.

The question for the opinion of the Court was :—

Is the respondent entitled to assess the appellant to additional tax in respect of the "undistributed amount" of its income as defined in the *Income Tax Assessment Act* 1922-1934 ?

Appeal No. 8 *of* 1943.

1. Cadbury-Fry-Pascall Pty. Ltd. (hereinafter called "the appellant") is a company duly incorporated in the State of Tasmania. It carries on business there and in the other States of the Commonwealth of Australia.

2. The respondent, the Federal Commissioner of Taxation, assessed the appellant in respect of income derived during the year ending 30th June 1939 to income tax under the provisions of the *Income Tax Assessment Act* 1936-1939 upon the income of the appellant under s. 17 of the Act. After various adjustments had been made tax was paid under this assessment, and there is no appeal in relation to it.

3. The appellant is and was at all material times a private company within the meaning of s. 103 of the Act.

4. On 25th June 1941, the respondent assessed the appellant to additional tax as a private company under s. 105 of the Act. The amount of tax assessed was £8 5s. 9d., the amount being calculated at rates applicable to an individual person. On 5th February 1942, by what purported to be an amended assessment, the respondent assessed the appellant to additional tax as a private company under s. 104 of the Act. The amount of tax claimed was £1,998 12s., credit being given for an amount of £8 5s. 9d. previously paid, namely, the amount claimed in the notice of assessment dated 25th June 1941. The amount of tax, £1,998 12s., was calculated at rates applicable to a company.

5. The appellant objected to both of the assessments referred to in par. 4. The objections were disallowed, and the appellant appealed to the High Court.

6. The appellant contends—(*a*) That there is no legislative provision in any relevant *Income Tax Assessment Act* or *Income Tax Acts* which imposes on a company the tax which is referred to as additional tax in ss. 104 and 105. (*b*) That there is no legislative provision authorizing the taxation of a company at rates applicable to an individual, and that for that reason the amount of £8 5s. 9d. is not claimable under the assessment of 25th June 1941. (*c*) That as the respondent had assessed additional tax under s. 105 he could not

thereafter assess additional tax under s. 104. (*d*) That, if the appellant is liable to additional tax under the *Income Tax Assessment Act*, it is so liable only under s. 105 thereof. (*e*) That the assessment of 5th February 1942 referred to in par. 4 was made in contravention of the provisions of s. 170 (3) of the Act.

7. During the year ending 30th June 1939 (hereinafter called "the income year"), the appellant derived non-exempt income from its business within the meaning of s. 25 of the Act.

8. The appellant did not before the expiration of nine months after the close of the income year distribute any of its income of such year to its shareholders, and there was in relation to the appellant an "undistributed amount" within the meaning of s. 103.

9. During the income year, the shareholders in the appellant company and the number of shares held by them were as follows:—

Cadbury Brothers Ltd.	163,750
V. C. Smith	24,000
N. P. Booth	20,000
H. V. McKernan	5,000
Total Issued Capital	212,750

Each of the shares has a nominal value of £1 and is fully paid. Cadbury Brothers Ltd. is a company incorporated in England and carrying on business there. The other above-mentioned shareholders hold the shares registered in their names upon trust for Cadbury Brothers Ltd. and for this reason are "nominees" of such company within the meaning of s. 103.

10. The whole of the ordinary shares in Cadbury Brothers Ltd. are held by or on trust for British Cocoa and Chocolate Co. Ltd., a company incorporated in England and carrying on business there.

11. The whole of the shareholders in British Cocoa and Chocolate Co. Ltd. are persons resident in England or companies incorporated and carrying on business there.

13. The respondent, in making the assessment dated 25th June 1941, calculated what he considered to be the additional amount of tax which would be payable by persons (not being a company, trustee or partnership), namely, the individual persons who were shareholders in British Cocoa and Chocolate Co. Ltd., if there had been successive distributions of the relative parts of the "undistributed amount" (as defined in s. 103) to and by Cadbury Brothers Ltd., a company which was interposed between the appellant and the said shareholders who would in such event have received the sum otherwise than as shareholders in the appellant company.

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14. Such additional tax was estimated by reference to the provisions of the *Income Tax Act* 1939 declaring the rate of tax payable by individuals in respect of income from property.

15. Only one shareholder in British Cocoa and Chocolate Co. Ltd. would have received any taxable income had there been successive distributions of the undistributed amount (after deducting statutory exemptions and rebates applicable to such shareholders). That shareholder would have been taxable in the sum of £8 5s. 9d., which is the amount of the additional tax assessed against the appellant in the assessment dated 25th June 1941.

16. There were no preference shareholders in the appellant company. There were preference shareholders in Cadbury Brothers Ltd. and British Cocoa and Chocolate Co. Ltd., but if there had been successive distributions of the said undistributed amount no part of such distributions would have been payable to any such preference shareholders.

17. The respondent, in making the assessment dated 5th February 1942, calculated the aggregate additional amount of tax which would have been payable by the shareholders of the appellant as set out in par. 9 hereof if the appellant had on 30th June 1939 paid the whole of the undistributed amount as a dividend to Cadbury Brothers Ltd., one only of the shareholders in the appellant company.

18. Such additional tax was estimated by reference to the provisions of the *Income Tax Act* 1939 declaring the rate of tax payable by companies.

19. Cadbury Brothers Ltd. was not resident in Australia within the meaning of the Act and by reason of the provisions of s. 3 of the *Income Tax Assessment Act* 1939 was not entitled under s. 46 of the Act of 1936-1939 to any rebates in respect of dividends received by it. The amount of tax which would have been payable by Cadbury Brothers Ltd. if the appellant had on 30th June 1939 paid the undistributed amount to Cadbury Brothers Ltd., would have been £1,998 12s., which is the amount of the additional tax assessed against the appellant in the assessment dated 5th February 1942.

20. The appellant made to the respondent a full and true disclosure of all the material facts necessary for its assessment, and the assessments referred to in par. 4 hereof were made after that disclosure. There is no evidence that the respondent at any time made any error in calculation or any mistake of fact save and except that he first issued a notice of assessment under s. 105 and subsequently formed the opinion that the appellant was liable to tax under s. 104 and issued the assessment of 5th February 1942 thereunder.

The questions for the opinion of the Court were :—

1. Is the appellant liable to pay any " additional tax " in respect of the income of the said income year ?
2. Is the appellant liable to pay any " additional tax " in respect of the said income—
   (*a*) at rates applicable to an individual person ?
   (*b*) at rates applicable to a company ?
3. Did the fact that the respondent had assessed the appellant in respect of " additional tax " under s. 105 of the Act deprive the respondent of power thereafter to assess the appellant to " additional tax " under s. 104 thereof ?
4. Is the appellant liable to pay " additional tax " in respect of the said income—
   (*a*) under s. 104,
   (*b*) under s. 105 of the said Act ?
5. In view of the facts stated in par. 20 of this case, did the respondent have power to make the assessment of 5th February 1942 referred to in par. 4 of this case ?

Ham K.C. (with him *Fullagar* K.C. and *Dean* K.C.), for the appellant. It is proposed to deal first with the appeal No. 8 of 1943, relating to the year 1939. The assessment there appealed from is the amended assessment whereby the Commissioner purported to assess the appellant under s. 104 of the Assessment Act of 1936-1939 after he had already made an assessment under s. 105 of that Act. Section 104 does not apply in the present case ; in that section the word " shareholders " means individuals ; it does not include companies, trustees or partnerships. That this is so is shown by s. 105, which expressly provides for the case where a company, &c., is interposed between the private company and the individual who is ultimately entitled to participate in the income. Thus, the sections are alternatives, one relating to individual shareholders, and the other to shareholding companies, &c. In any event, it is apparent from the nature of the two sections that they cannot both be applied in respect of one income year. Accordingly, the Commissioner, having assessed the appellant under s. 105 in respect of the relevant year, had no power to make a further assessment under s. 104. Moreover, the amended assessment purporting to apply s. 104 contravened s. 170 (3) of the Act. Section 17 of the Assessment Act of 1936-1939 is the key section, but in order to impose liability an *Income Tax Act* (See Act No. 31 of 1939, ss. 4, 5 (2), 8, Seventh Schedule) is necessary. The *Income Tax Act* 1939 prescribed the rate of tax payable by companies, but it declared no

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rate for the purposes of s. 104 or s. 105 of the Assessment Act. Thus, the purported assessment under s. 104 would increase the tax payable by the appellant beyond the rate authorized by the *Income Tax Act* 1939. [He referred to *Commissioner of Stamp Duties (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (1); *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (2).] Section 104 cannot be regarded as itself imposing a tax; the result would be a contravention of s. 55 of the Constitution. Taxation must be imposed in clear and unambiguous terms. [He referred to *Attorney-General* v. *Milne* (3); *Greenwood* v. *Smith F. L. Smidth & Co.* (4).] As to the appeal relating to 1934, the material provision is s. 31B of the Assessment Act of 1922-1934, and the relevant Act is the *Income Tax Act* 1934. The 1934 tax Act is in the same position as that of 1939, inasmuch as it declared no rate for the purposes of s. 31B of the Assessment Act (which is in substantially the same terms as s. 104 of the subsequent Assessment Act), and, having regard to s. 55 of the Constitution, s. 31B cannot be treated (any more than s. 104 of the later Act) as itself imposing a tax.

Eager K.C. (with him *Coppel*), for the respondent. Sections 104 and 105 are applicable cumulatively and not alternatively, and the Commissioner was not bound to elect in respect of one or other of them. The appellant's argument that shareholding companies are excluded from s. 104 is not tenable. If it were correct, trustees and partnerships would also be excluded, and there is no room for the suggested implication from s. 105 in this regard. There is no reason why s. 104 should not be given its literal meaning, and in that meaning it is applicable to the present case whether or not s. 105 is also applied. The *Income Tax Assessment Acts* are not Acts *imposing* taxation within the meaning of s. 55 of the Constitution, and they do not contain any provisions which contravene s. 55: See *Stephens* v. *Abrahams* [*No.* 2] (5). However, the *Income Tax Act* 1939 (and likewise the Act of 1934) incorporated the provisions of the relevant Assessment Act and in that way imposed and declared the taxes defined in the Assessment Act: See *Federal Commissioner of Taxation* v. *Munro* (6); *Osborne* v. *The Commonwealth* (7). [He

(1) (1926) 38 C.L.R. 63, at pp. 69, 70, 72.
(2) (1925) 36 C.L.R. 98.
(3) (1914) A.C. 765, at pp. 772, 781.
(4) (1922) 1 A.C. 417, at p. 423.
(5) (1903) 29 V.L.R. 229.
(6) (1926) 38 C.L.R. 153, per *Higgins* J., at pp. 208, 210; per *Starke* J., at p. 214.
(7) (1911) 12 C.L.R. 321, per *Griffith* C.J., at p. 336; per *Barton* J., at p. 349; per *O'Connor* J., at p. 355.

also referred to *Resch* v. *Federal Commissioner of Taxation* (1); *Jolly* v. *Federal Commissioner of Taxation* (2); *National Trustees, Executors & Agency Co. of A/asia Ltd.* v. *Federal Commissioner of Taxation* (3).] Accordingly, the *Income Tax Act*, by incorporating s. 104 of the Assessment Act, imposed tax, at the rate defined in s. 104, by way of addition to the tax at the ordinary company rate as declared by the *Income Tax Act*. This disposes of the appellant's contention that the *Income Tax Act* 1939 did not declare any rate of tax for the purposes of s. 104; it also disposes of the objection to the assessment relating to the year 1934. Assessments under sections similar to those here relevant were upheld, though the present objections were not taken, in *Neal's Motors Pty. Ltd.* v. *Federal Commissioner of Taxation* (4); *Commissioner of Taxation* v. *Public Requisites Ltd.* (5); *Kellow-Falkiner Pty. Ltd.* v. *Federal Commissioner of Taxation* (6); *Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation* (7). Section 170 (3) of the *Assessment Act* of 1936-1939 does not assist the appellant. Nothing in the Act requires that the assessment to tax prescribed by s. 104 shall be part of the company's ordinary assessment to income tax; it may properly be the subject of a separate assessment, and the mere fact that the Commissioner, in giving notice of the assessment in accordance with s. 104, described it as an amended assessment is immaterial. That there can be more than one assessment is shown by *R.* v. *Federal Commissioner of Taxation*; *Ex parte King* (8).

Fullagar K.C., in reply. At least there can only be one assessment under Part III., Div. 7, of the *Assessment Act* of 1936-1939; there is only one additional tax under that Division. Sections 166, 168-170, would have no effect unless an assessment were made once and only once; thereafter, all the Commissioner has power to do is to amend.

Cur. adv. vult.

Nov. 10.

The following written judgments were delivered:—

LATHAM C.J. One of these cases is stated in an appeal against an assessment of the appellant company to income tax in respect of the income year ending 30th June 1934. In that year, the company was assessed under s. 31B of the *Income Tax Assessment Act* 1922-1934. The company objects that there is no valid statute

(1) (1942) 66 C.L.R. 198.
(2) (1935) 53 C.L.R. 206.
(3) (1916) 22 C.L.R. 367.
(4) (1932) 48 C.L.R. 233.
(5) (1927) 33 A.L.R. 413.
(6) (1928) 34 A.L.R. 276.
(7) (1944) 7 A.T.D. 333.
(8) (1930) 43 C.L.R. 569, per *Dixon* J., at p. 580.

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which imposes on the company the tax assessed and, more particularly, that there is no authority for requiring a company to pay additional tax calculated by reference to the rates which its individual shareholders (being natural persons) would have paid if what s. 31B describes as a sufficient distribution of its income had been made.

The second case is stated in two appeals against assessments relating to the income year ending 30th June 1939. The Commissioner assessed the company first under the ordinary provisions of the *Income Tax Assessment Act* 1936-1939 applying to all companies, and the company paid the flat rate of tax, 24 pence in the pound, imposed by the *Income Tax Act* 1939. Then the Commissioner assessed the company under s. 105 of the Act, claiming a tax of £8 5s. 9d. The Commissioner then further assessed the company under s. 104 of the Act, claiming £1,998 12s., credit being given for the sum of £8 5s. 9d. paid under the previous assessment. The company raises the same objection as in the other case, namely, that no tax is imposed on the company by the sections under which it was assessed (in this case ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939) or by any other statutory provision, and, more particularly, that there is no authority to require a company to pay any tax calculated by reference to rates applicable to individual persons. It is also contended that only s. 105 is applicable, and not s. 104, and, further, that, if both sections are applicable, the Commissioner must elect between the sections and, having already assessed under s. 105, could not then assess under s. 104. The company further contends that the assessment under s. 104 was an amended assessment and that s. 170 (3) prevents any amendment of the previous assessment so as to increase the liability of the taxpayer because the company had made a full and true disclosure to the Commissioner of all the material facts necessary for its assessment before the earlier assessment was made, and there was no error in calculation or any mistake of fact, which is required by the section in order to justify the amendment of an assessment in such circumstances. It will be most convenient to consider first the case relating to the income year ending 30th June 1939.

The *Income Tax Assessment Act* 1936-1939, s. 104 (1), is in the following terms :—

> " Where a private company has not, before the expiration of nine months after the close of the year of income, made a sufficient distribution of its income of the year, the Commissioner may assess the aggregate additional amount of tax which would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed

amount as a dividend to the shareholders who would have been entitled to receive it, and the company shall be liable to pay the tax so assessed."

Section 105 (1) is in the following terms :—

"Where, in relation to any private company, there is an undistributed amount, and any person (not being a company, trustee or partnership) would, otherwise than as a shareholder of the private company, have received a part of that amount if there had been successive distributions of the relative parts of that amount to and by each of any companies, trustees or partnerships interposed between the private company and that person the Commissioner may also, in addition to any other tax assessable under this Division, assess the additional amount of tax, if any, which would in that event have been payable by that person, and the private company shall be liable to pay the tax so assessed."

I propose first to deal with the objection that the taxes claimed have not been imposed by any valid legislation. This objection depends upon ss. 53 and 55 of the Constitution, upon the terms of ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939, and upon the *Income Tax Act* 1939.

Section 53 of the Constitution provides :—"Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate . . . The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government."

Section 54 provides : "The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation."

These provisions relate to proposed laws, that is, to parliamentary Bills. The sections deal with parliamentary procedure. In a strict sense, no proposed law can impose taxation or appropriate revenue. The reference is plainly to Bills which propose to impose taxation or to appropriate revenue. The sections deal with Bills, not with separate clauses of Bills, as appears most plainly from the first sentence of s. 53.

Section 55 contains the following provision : "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

This section deals with laws, that is, with statutes, and not with parliamentary Bills. It has the effect of invalidating in a law imposing taxation any provision which deals with any other matter than the imposition of taxation.

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In exercising the power conferred by s. 51 (ii.) to make laws with respect to taxation, Parliament has followed the practice of passing Assessment Acts which provide machinery for the assessment and collection of a tax to be imposed by another Act. Thus, for example, in the *Income Tax Assessment Act* 1936-1939 s. 6 defines income tax as meaning " the income tax imposed as such by any Act as assessed under this Act."

If the Assessment Act is an Act imposing taxation, it cannot be amended by the Senate—s. 53. If, on the other hand, it does not impose taxation, it can be amended by the Senate. Section 53 provides that " except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

The *Income Tax Act* 1939, s. 2, provides that " income tax is imposed at the rates declared in this Act." Section 3 of that Act provides that the *Income Tax Assessment Act* 1936-1938 shall be incorporated and read as one with the Act. Section 5 (8) and the Seventh Schedule impose the following tax upon a company under the heading of " Rates of Tax Payable by a Company "—

" (*a*) Subject to the last preceding Schedule " (which relates to trustees), " for every pound of the taxable income of a company the rate of tax shall be 24 pence.

(*b*) For every pound of interest in respect of which a company is liable, pursuant to sub-section (1.) of section one hundred and twenty-five of the *Income Tax Assessment Act* 1936-1938 to pay income tax, the rate of tax shall be 24 pence."

Section 125 is a section which declares that a company shall be liable to pay tax in respect of certain interest at the rate declared by the Parliament. In this instance, though liability is declared by the Assessment Act, the Parliament imposed a tax in par. (*b*) of the Seventh Schedule of the Tax Act to give effect to that liability. There is no such provision in the Tax Act corresponding to ss. 104 and 105. The appellant contends that the two taxes referred to in pars. (*a*) and (*b*) of the Seventh Schedule are the only taxes imposed on a company by the Tax Act, and that the Assessment Act does not impose any tax upon any taxpayer.

The effect of the provision quoted from s. 55 of the Constitution is not to invalidate any provisions in any statute which impose a tax or deal with the imposition of a tax. It invalidates only any provision dealing with any other matter. Thus, if ss. 104 and 105 are to be construed as imposing a tax, the consequence is, not that they are invalid, but that any provision in the Assessment Act not dealing with the imposition of the tax is of no effect. No attempt was made

to point out provisions in the Assessment Act which, if ss. 104 and 105 imposed a tax, would be invalid as not dealing " with the imposition of taxation."

But a decision that these sections, as they appear in the Assessment Act, do impose a tax would involve the consequence that the whole Assessment Act would, as a Bill, not be amendable by the Senate—Constitution, s. 53. Sections 53, 54 and 55 represent an endeavour to deal with a matter which has for many years been a subject of acute controversy. Both in Australia and in England the powers of a second chamber in relation to money Bills have caused many difficulties. In the Australian Constitution an attempt has been made to specify the rights of the House of Representatives, and, in addition, in order to protect the Senate against the incorporation in such Bills of provisions dealing with matters which do not clearly relate to the appropriation of moneys for ordinary annual services or to taxation, it is provided in s. 54 that the annual appropriation Act shall deal only with such appropriation, and in s. 55 that a law imposing taxation shall deal only with the imposition of taxation, and that any other provision therein dealing with any other matter shall be of no effect.

Parliamentary practice has given effect to these provisions by distinguishing between Tax Assessment Acts and Tax Acts in the manner stated. Acts of the former type provide means for assessing and collecting tax—they give authority to officers to assess and collect the tax, and they impose duties upon persons to make returns in order to make such assessment and collection possible. The Tax Acts contain the grant of money—they impose the burden upon the people. It is the latter Acts and not the former which have been regarded as imposing taxation, and therefore as not capable of originating in the Senate or of being amended by the Senate.

This practice has been recognized by this Court as carrying out the constitutional provisions upon a correct basis. It has been held on several occasions that various Assessment Acts do not impose taxation, and it has been so held though such Acts contain provisions that a person should be liable to pay tax or be chargeable with tax.

In *Osborne* v. *The Commonwealth* (1), four Justices expressed the opinion that the *Land Tax Assessment Act* 1910 was not an Act imposing taxation within the meaning of s. 55 of the Constitution. The Act (s. 3) defined land tax as meaning " the land tax imposed as such by any Act, as assessed under this Act." Section 10 of the Act provided that land tax should be levied and paid upon the unimproved value of the land and that land tax should be at such

(1) (1911) 12 C.L.R. 321.

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rates as were declared by the Parliament. Section 11 provided that land tax should be "payable" by owners of land. Section 12 provided that land tax should be "charged on land" as owned at a particular time. The Act also contained provisions stating that a person should be "liable" for land tax in certain cases, e.g. ss. 27, 28, 31, 33, 35, 39, 40, 43 and 62. *Griffith* C.J. said that the Assessment Act, when examined, did not impose taxation at all. He said that the Act made "provision for assessing and levying the tax, which it assumes to have been imposed by another Act" (1). See also (2). In this case, *Higgins* J. did not assent to the opinion that the assessment Act did not impose taxation (3).

In *Federal Commissioner of Taxation* v. *Munro* (4), it was held by five Justices that neither the *Income Tax Assessment Act* 1922-1924, nor the *Income Tax Assessment Act* 1922-1925, nor either of the *Income Tax Acts* which incorporated those Acts, was obnoxious to any of the provisions of s. 55 of the Constitution. The provision which was particularly under consideration was s. 28 of the *Income Tax Assessment Act* 1922-1924, which provided that in a certain case a person should be assessed "and chargeable" with income tax upon a percentage of the receipts of a business (instead of upon taxable income as ascertained under the ordinary provisions of the Act). It was held that this provision in the Assessment Act did not impose taxation. *Isaacs* J. examined the matter very fully and explained the difference between assessing, levying and collecting tax on the one hand—acts of officials which require legislative authorization—and on the other hand the imposition of a tax—that is, the grant of the tax by Parliament in a statute (5). *Higgins* J. in this case agreed with the opinion that the Assessment Act was not a law imposing taxation within the meaning of s. 55 of the Constitution (6). *Starke* J. (7) referred to the sections in the Assessment Act which create a duty to pay tax, but, agreeing with the decision of the Full Court of the Supreme Court of Victoria in *Stephens* v. *Abrahams* [*No.* 2] (8), held that such provisions did not impose any tax (9).

These and other decisions of the Court were cited, and the effect of all of them was summarized by *Starke* J. in *Resch* v. *Federal Commissioner of Taxation* (10), where, with reference to the *Income Tax Assessment Act* 1922-1930, it was said that it was "not a law

(1) (1911) 12 C.L.R., at p. 336.
(2) (1911) 12 C.L.R., per *Barton* J., at p. 349; per *O'Connor* J., at pp. 355-356; and per *Isaacs* J., at pp. 364, 365.
(3) (1911) 12 C.L.R., at p. 372.
(4) (1926) 38 C.L.R. 153.
(5) (1926) 38 C.L.R., at pp. 184 et seq.
(6) (1926) 38 C.L.R., at p. 208.
(7) (1926) 38 C.L.R., at p. 213.
(8) (1903) 29 V.L.R. 229.
(9) (1926) 38 C.L.R., at p. 214.
(10) (1942) 66 C.L.R. 198, at p. 212.

imposing taxation within the meaning of the constitutional provisions: it makes provision for assessing and collecting the tax: it has nothing to do with the imposition of the tax except that it is legal machinery by which the obligation declared by the imposition is effectuated."

In accordance with these decisions of the Court, it appears to me to be necessary to hold that ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939 do not impose any tax.

In order to discover what tax is imposed on the company in this case, it is necessary to look at the *Income Tax Act* 1939. As already stated, the Act incorporates the prior Assessment Act, and therefore incorporates ss. 104 and 105 but, as already stated, it does not include in the schedules any provision specifically imposing the tax mentioned in those sections. The difficulty arises that, if these sections on their true construction do not in the Assessment Act impose a tax (as is the case according to the decisions of the Court), it is not easy to see how they can operate to impose a tax when they are repeated in the Tax Act, because there is nothing in the latter Act which can be relied upon as modifying their meaning. But here again the decisions of the Court provide guidance and control. In *Munro's Case* (1) s. 28 of the relevant Assessment Act, declaring that a person should be chargeable with tax upon a percentage of the receipts of a business, was regarded, when incorporated in the Tax Act, as effective to impose a tax, though the schedules of the Tax Act related only to rates upon taxable income—and the tax referred to in s. 28 was in respect of a sum expressly distinguished in the section from taxable income as defined in the Assessment Act. Section 28, as incorporated in the Tax Act, was regarded as creating a special measure of taxable income (2). It is possible in the present case, upon the authority of *Munro's Case* (1), to hold that ss. 104 and 105, when they re-appear in the Tax Act together with provisions fixing rates of tax in the case of individual persons, trustees and companies, create a liability to pay additional tax as specified in the sections, and so to hold without causing any difficulty to arise under ss. 53 and 55 of the Constitution.

It is now necessary to consider the objections that ss. 104 and 105 are alternative and not cumulative provisions, and that the Commissioner, having assessed the company under s. 105, is precluded from subsequently assessing it under s. 104.

Section 104 applies where the following conditions are fulfilled :—

(1) The company is a private company.

(1) (1926) 38 C.L.R. 153.

(2) (1926) 38 C.L.R., at p. 185.

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The appellant company is a private company—see par. 3 of the case.

(2) The private company has not, before the expiration of nine months after the close of the year of income, made a sufficient distribution of its income of the year.

This condition is also satisfied—see par. 8 of the case.

The Commissioner was therefore entitled to " assess " the aggregate additional amount of tax which would have been payable by the shareholders of the company if the company on the last day of the year of income had paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it. This the Commissioner has done, and the parties accept that the calculation of £1,998 12s. is correct as a calculation. (No objection is taken to the Commissioner acting upon the basis that, as the shareholders of the private company consisted of one company and three individual persons and those persons were the nominees of that company, the company owned all the shares in the private company.) It would appear to follow, therefore, that, in the words of the section, the company is " liable to pay the tax so assessed."

Section 105 applies when the following conditions are satisfied :—

(*a*) The company is a private company.

This condition is satisfied.

(*b*) There is " an undistributed amount."

This condition also is satisfied—see par. 8 of the case.

(*c*) There are persons who were not companies, trustees or partnerships who would otherwise than as shareholders of the private company have received a part of that amount if there had been successive distributions of the relative parts of the amount to and by each of the companies &c. interposed between the private company and those persons.

Under this provision, the Commissioner can follow the undistributed amount through a company or trustee or partnership which is a shareholder in a private company to the individual persons who would have received the undistributed amount if it had been distributed. The Commissioner can do this even if several companies, trustees or partnerships are interposed between the private company and those individual persons. The Commissioner has assessed the additional amount of tax which would have been payable if a distribution of the amount had been made by the private company and through its shareholders (which included a company) and through another company which was a shareholder in that shareholding company, and ultimately to individual persons. The amount calculated, £8 5s. 9d., is admitted to be correct as a matter

of calculation. It would therefore appear to follow that the private company is "liable to pay the tax so assessed"—s. 105 (1).

The "tax so assessed" which the Commissioner "may *also* . . . assess" is the additional amount of tax which would have been payable "in addition to any other tax assessable under this Division," that is, Div. 7. The tax assessable under s. 104 is a tax assessable under Div. 7. Therefore the tax assessed under s. 105 is plainly intended to be cumulative upon the tax assessed under s. 104. This is the reply to the objection taken that the Commissioner must elect between the two sections, and that he can apply only one of them in any given year.

The operation and effect of these sections depends, not only upon their own terms, but also upon two other provisions in the relevant legislation; first, the provision in the Tax Act which imposes a graduated tax upon individual persons so that the rate of tax increases with the amount of income, some taxpayers paying a rate higher than the company rate; secondly, s. 46 of the Assessment Act, which provides, as amended by the *Income Tax Assessment Act* 1939, as follows:—

> "(1.) Subject to this section, a shareholder (other than a company which is a non-resident) shall be entitled to a rebate in his assessment of the amount obtained by applying to that part of the dividends which is included in his taxable income a rate equivalent to—
>
> (*a*) the rate of tax payable by him on income from property; or
>
> (*b*) the rate of tax payable by companies for the year of tax,
>
> whichever is the less."

Sections 104 and 105 proceed upon the hypothesis of the distribution of an amount of the taxable income of the private company which in fact has not been distributed. In the case of shareholders who were individual persons, whether any additional amount of tax would have been payable by them upon such a distribution would depend upon the rate of tax payable by them on income from property. If that were higher than the company rate, an additional amount of tax would have been payable by them. If it were lower than the company rate, no additional tax would have been payable by them—s. 46. If any of the undistributed income of the private company had been distributed to other companies which were shareholders in it and were resident in Australia, those companies would, by reason of the provisions for rebate, not have paid any additional amount of tax, and s. 104 would produce no effect

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when applied to the private company by reference to such companies. If, however, a shareholder of the private company was a non-resident company, then the effect of s. 46 would be that that company would not be entitled to any rebate and an additional amount of tax would have been payable by that company if it had received part of the undistributed amount of the taxable income of the private company.

In order to apply the policy of the sections, it is necessary, where a company—or a trustee or a partnership—is a shareholder of a private company, to bring s. 105 into operation. Section 105 enables the Commissioner to consider what additional tax would have been payable by the shareholders of, for example, a company which was a shareholder in the private company, if part of the undistributed amount had been distributed to the shareholding company and then distributed to the shareholders of that company. In this case, the shareholding company would be a company interposed between the private company and the shareholders of the shareholding company. Once again a calculation is made as to whether the shareholders of the shareholding company would have paid any additional tax if they had received part of the undistributed amount in their capacity as shareholders of the shareholding company. Whether or not they would have paid any additional tax in that event will again depend upon whether those shareholders are companies entitled to a rebate or not, and, if they are individual shareholders, upon their rates of tax. By applying s. 105, the Commissioner is able ultimately to reach the individual shareholders, that is, shareholders other than companies, trustees or partnerships, who would ultimately receive the undistributed amount of the taxable income of the private company.

Thus it is not only possible, but sometimes it is necessary, to apply both sections in order to bring about the obviously intended result that the failure of a private company to distribute its revenue does not prevent the Treasury from receiving as much by way of tax as if that company and any other companies, trustees or partnerships which were shareholders in it had distributed the undistributed amount. A calculation is first made under s. 104. If all the shareholders of the private company are individual persons, that is the end of the matter, and there is no room for the application of s. 105, which deals with the interposition of companies, trustees or partnerships, between the private company and the ultimate notional recipients of the undistributed income who are individual persons. But if any of the shareholders of the private company are companies, trustees or partnerships, then the Commissioner applies

s. 105, and, if the application of this section, following the undistributed income into the hands of the individual persons who would have received part of the income of the undistributed amount if it had been distributed, shows that those persons would have paid a greater amount in tax than they actually did pay, that additional amount of tax is declared to be payable by the company. In the present case, the application of s. 104 results in a much higher tax than an assessment under s. 105, because the amendment of s. 46 of the *Income Tax Assessment Act* 1936-1938 made by the *Income Tax Assessment Act* 1939, s. 3, deprived a non-resident company, which was a shareholder in the private company, of the rebate of the company rate to which, before that amendment, a non-resident company would have been entitled.

In my opinion, ss. 104 and 105 may both be applied to a private company in relation to the same income year.

The remaining objection of the appellant depends upon s. 170 (3) of the Assessment Act. Section 170 (1) provides that the Commissioner may, subject to the section, at any time amend any assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment. Sub-section 2 deals with the case of a taxpayer who has not made a full and true disclosure of all material facts. Sub-section 3 is in the following terms :—

> " Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error in calculation or a mistake of fact."

This provision does not authorize an amendment of an assessment to correct a mistake in law.

The case states (par. 20) :—" The appellant made to the respondent a full and true disclosure of all the material facts necessary for its assessment, and the assessments referred to in par. 4 hereof were made after that disclosure. There is no evidence that the respondent at any time made any error in calculation or any mistake of fact save and except that he first issued a notice of assessment under s. 105 and subsequently formed the opinion that the appellant was liable to tax under s. 104 and issued the assessment of 5th February 1942 " (the assessment under s. 104) " thereunder."

The appellant does not press this objection as against the second assessment (under s. 105) but contends that the third assessment (under s. 104) is an amendment of the second assessment and that

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it was made, not to correct any mistake of fact or error in calculation, but only because the Commissioner made a mistake as to the law which was applicable.

Notice of the third assessment is headed "Notice of amended assessment", and credit is given for the sum of £8 5s. 9d. paid under the second assessment, which had been made under s. 105. The Commissioner apparently took the view (before the appeal) that he could apply either s. 104 or s. 105, but not both.

If the third assessment is an amendment of the second assessment, it is plainly prohibited by s. 170 (3). It was made, not to correct a mistake of fact, but in order to apply the view formed by the Commissioner after he made the second assessment that he had made a mistake in applying s. 105, and that he should, instead, have applied s. 104. Such a mistake (there having been a full and true disclosure of all material facts) could only be a mistake in law.

If, however, the third assessment is an authorized independent assessment, and not an amendment of a preceding assessment, no question arises under s. 170 (3). It is necessary to examine the Act in order to ascertain whether it provides for more than one assessment in a particular case: See, e.g., *R.* v. *Federal Commissioner of Taxation*; *Ex parte King* (1), where it was held that s. 21 of the *Income Tax Assessment Act* 1922 authorized, in a case to which it was applicable, the making of a second assessment.

The word "assess" appears in both ss. 104 and 105. But that which the Commissioner is to "assess" under the sections is the additional amount of tax which would have been payable by persons other than the private company if the undistributed amount had been distributed. The Commissioner does not, under these provisions, assess those persons. What he does is to calculate what those persons would have paid upon a certain hypothesis. Accordingly there is no assessment of those persons to tax, nor is there in those "assessments" any ascertainment of the taxable income of the taxpayer sought to be made liable, viz., the company.

Section 6 provides that, unless the contrary intention appears, "assessment" means the ascertainment of the amount of taxable income and of the tax payable thereon. The word "assess" in ss. 104 and 105 is not used in a sense corresponding to this definition of "assessment." An assessment in the sense of s. 6 was made when the taxable income of the company and the tax payable thereon at the company flat rate was ascertained under the ordinary provisions of the Act. The word "assess" is used in ss. 104 and 105 in the meaning of "calculate." Accordingly I do not regard the

(1) (1930) 43 C.L.R. 569, at p. 580.

use of this word in these sections as authorizing separate assessments thereunder of the company. There are many separate provisions of the Act which require the Commissioner to take into his calculations various items in ascertaining the taxable income of a taxpayer, as, for example, ss. 25, 26, 28, 36, 37, 44 and 84. But these provisions do not, in my opinion, justify separate assessments under each of these sections.

Section 166 is the section which applies to the ordinary case of assessment. It provides :—

> " From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon."

One assessment only can be made under this provision, all the relevant terms of the Act which determine the taxable income or tax payable being taken into account by the Commissioner. An amendment of such assessment is not a new assessment : See *Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.* (1).

But there are several provisions in the Act which make a taxpayer " liable to pay tax " upon a basis other than that of his taxable income and of the tax imposed thereon. An assessment made under s. 166 would not apply to such cases. Examples may be found in ss. 125, 126, 128, 132, 133, 136 and 137, and in ss. 104 and 105. In order to deal with such cases as these, s. 169 provides as follows :—

> " Where under this Act any person is liable to pay tax, the Commissioner may make an assessment of the amount of such tax."

This provision confers a power additional to that created by s. 166. It authorizes an assessment of the amount of any tax when any person is " liable to pay tax " under the Act. Section 169, unlike s. 166, contains no reference to taxable income, because the provisions to which it refers cannot be applied by ascertaining the taxable income of the taxpayer and applying provisions as to the rates of tax to that income regarded only as the taxable income of the taxpayer. The amount of tax payable may be determined in these cases by the tax which would be payable in circumstances which do not actually exist and by persons other than the taxpayers, as in the case of s. 104 and s. 105. In my opinion, s. 169 confers an authority to make an assessment wherever it is declared by the Act that a person is liable to pay tax and therefore enables the Commissioner to make separate assessments to tax

(1) (1928) 42 C.L.R. 39, at p. 54.

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under ss. 104 and 105—i.e., assessments additional to any assessment made under s. 166. Accordingly, in my opinion, the assessments made in this case under these sections are separate assessments, not amendments of any other assessment, and s. 170 (3) has no application.

It is now necessary to deal with the case stated in the appeal against the assessment made under the Act of 1922-1934. The determination of the question arising in this case depends upon the true construction and effect of s. 31B of that Act. This provision is similar to, though not identical with, s. 104 of the 1936-1939 Act.

The foregoing reasoning (as to all objections except that based upon s. 170 (3)) is as applicable to this section as to s. 104, and accordingly I am of opinion that it should be held that s. 31B does not impose a tax. The relevant Tax Act is the *Income Tax Act* 1934. The provisions in the Fifth Schedule of this Act relating to the rates of tax payable by a company (imposed by s. 3) are the same (except as to actual rates) as those contained in the *Income Tax Act* 1939. Therefore the same conclusion follows—the company has been duly assessed to this tax. The question in the case relating to the income year ending 30th June 1934 is :—

" Is the respondent entitled to assess the appellant to additional tax in respect of the ' undistributed amount ' of its income as defined in the *Income Tax Assessment Act* 1922-1934 ? "

This question should be answered : Yes.

The questions in the case relating to the income year ending 30th June 1939 should be answered as follows :—

" (1) Is the appellant liable to pay any ' additional tax ' in respect of the income of the said income year ? "

Answer : Yes.

" (2) Is the appellant liable to pay any ' additional tax ' in respect of the said income—

(*a*) at rates applicable to an individual person ?

(*b*) at rates applicable to a company ? "

Answer : (*a*) Yes. (*b*) Yes.

" (3) Did the fact that the respondent had assessed the appellant in respect of ' additional tax ' under s. 105 of the Act deprive the respondent of power thereafter to assess the appellant to ' additional tax ' under s. 104 thereof ? "

Answer : No.

" (4) Is the appellant liable to pay ' additional tax ' in respect of the said income—

(*a*) under s. 104,

(*b*) under s. 105 of the said Act ? "

Answer: (*a*) Yes. (*b*) Yes.

"(5) In view of the facts stated in par. 20 of this case, did the respondent have power to make the assessment of 5th February 1942 referred to in par. 4 of this case?"

Answer: Yes.

RICH J. Two appeals heard together.

The objection which stands on the threshold of these appeals is that the tax in question is not validly imposed. The basis of this objection is that the *Income Tax Assessment Act* which contains ss. 104 and 105 is obnoxious to the Constitution, s. 55. This objection, however, has been discussed in previous cases heard in this Court and disposed of by its decisions that the Act does not impose taxation within the meaning of this section of the Constitution. Sections 104 and 105 are reproduced in the relevant taxing Act by the incorporation in it of the Assessment Act. In the taxing Act they impose taxation, but this is within the ambit of s. 55.

I pass then to consider the effect of these sections. They have been analysed in other judgments and I shall not attempt any further dissection of them, except to add that having regard to the provisions of s. 105, which empowers the Commissioner to assess an additional amount of tax in addition to any other tax assessable under this Division, i.e. Div. 7, this section clearly indicates that the tax which can be imposed is a tax which is distinct and independent of income tax which can be imposed under s. 104. Section 170 (3), upon which reliance was placed during the argument, cannot afford any relief to the taxpayer because it has no application on its proper construction to the case where distinct and independent assessments are made, as is the case when they are made under ss. 104 and 105. In conclusion, I join my brother *Williams* in suggesting that s. 105 calls for amendment so as to prevent excessive taxation of such companies.

The questions submitted with regard to the 1939 appeal should be answered—(1) Yes. (2) (*a*) and (*b*) Yes. (3) No. (4) (*a*) and (*b*) Yes. (5) Yes.

For similar reasons I answer the question in the 1934 appeal—Yes.

STARKE J.—*Appeal No. 7 of* 1943.—A case stated under s. 51A of the *Income Tax Assessment Act* 1922-1934 and s. 18 of the *Judiciary Act.*

The question is whether the Commissioner was entitled to assess the appellant to additional tax in respect of its undistributed income pursuant to s. 31B of the *Income Tax Assessment Act* 1922-1934.

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That section is in much the same terms as s. 104 of the *Income Tax Assessment Act* 1936-1939, and the question stated is governed by the decision given in the case stated between the appellant and the Commissioner under that Act.

It should be answered in the affirmative.

Appeal No. 8 *of* 1943.—Case stated pursuant to the *Income Tax Assessment Act* 1936-1939 and the *Judiciary Act* 1903-1940. It raises questions as to the validity of an assessment of the appellant —the taxpayer—to additional tax as a private company under ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939.

1. The taxpayer attacked the validity of the Act on the ground that it contravened the provisions of s. 55 of the Constitution: "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only." But this contention has been disposed of by this Court adversely to the taxpayer.

(*a*) The relevant *Income Tax Act*, which incorporates the Assessment Act, deals with one subject of taxation only (*Federal Commissioner of Taxation* v. *Munro* (1); *Resch* v. *Federal Commissioner of Taxation* (2)). Indeed, two Justices of this Court have expressed the opinion that it is not unlawful to include in a taxing Act provisions incidental and auxiliary to the assessment and collection of the tax (*Munro's Case* (3); *Resch's Case* (4)).

(*b*) The relevant *Income Tax Act*, which incorporates the Assessment Act, deals only with the imposition of taxation: See cases *supra*.

(*c*) The Assessment Act is not a law imposing taxation: See cases *supra*. And, if the Assessment Act did impose any tax, still, in my opinion, the Act would deal only with the imposition of taxation, for its other provisions are but incidental and auxiliary to the assessment and collection of tax.

2. The taxpayer next relied upon the provisions of s. 170 (3) of the Assessment Act: "Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error

(1) (1926) 38 C.L.R. 153.
(2) (1942) 66 C.L.R. 198.
(3) (1926) 38 C.L.R., at pp. 209, 215-216.
(4) (1942) 66 C.L.R., at p. 213.

in calculation or a mistake of fact; and no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under that assessment."

The Commissioner assessed the taxpayer to income tax under s. 17 of the Act in respect of income derived during the year which ended on 30th June 1939. After various adjustments tax was paid under this assessment.

In 1941, the Commissioner assessed the taxpayer to additional tax under s. 105 of the Act. The amount was paid.

In 1942, the Commissioner assessed the taxpayer to additional tax under s. 104 of the Act. And credit was given for the sum paid in respect of the assessment under s. 105.

In my opinion, the provisions of s. 104 authorize an assessment, not by way of amendment of any other assessment, but as a substantive and independent assessment of an additional amount of tax pursuant to its terms. And it may be that in s. 169 may be found another source of authority for the assessment in this case. Thus, the assessment under s. 104 relates, not to the taxable income of a private company, but to the income which shareholders would have received if the company had made a sufficient distribution of its income of the year. It is in respect of this income that the Commissioner may assess, and that the company must pay, additional tax if it has not made such distribution before the expiration of nine months after the close of the year of income. Therefore the section itself contemplates an assessment dependent upon an event after the close of the year of income of the company and possibly at a time when its taxable income assessed pursuant to s. 17 has been assessed and tax paid. The provisions of s. 168, which relate to the *taxable income* derived by any taxpayer, do not, I think, detract from these observations.

3. The taxpayer also contended that ss. 104 and 105 were alternative provisions and that the Commissioner was precluded from assessing the taxpayer under s. 104 because he had already assessed it under s. 105.

In my opinion, the contention cannot be sustained. Under s. 104, the Commissioner may assess the additional tax that would have been payable by shareholders, whilst s. 105 relates to the additional tax that would have been payable by persons (not being a company, trustee or partnership) otherwise than as a shareholder, and, further, s. 105 expressly provides that the tax under that section is in addition to any other tax assessable under Div. 7 (Private Companies). It was also suggested that the shareholders of the company mentioned in s. 104 should be confined to individuals, but the words " its shareholders " are apt to include both companies and individuals, though

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the Commissioner in the present case has ignored, without objection on the part of the taxpayer, the individual shareholders, who were in fact nominees of the taxpayer. And it was also suggested that no authority could be found in ss. 104 and 105 to assess the taxpayer at rates applicable to individuals and that no individual rate had been fixed by the Tax Act or any other Act.

No individual has in fact been assessed under s. 104, and the suggestion only touches the application of the sections. Subject to the rebate provision in s. 46, the scheme of s. 104 is to throw upon a private company the tax that would have been payable by its shareholders if undistributed income had been paid to them by way of dividends, which involves an application of the relevant Tax Acts fixing the rates of tax for the shareholding companies and individuals respectively. And somewhat similar observations apply to s. 105.

There remains for consideration the assessment made by the Commissioner under s. 105. Question 4 (*b*) is whether the appellant is liable to pay additional tax in respect of the said income under s. 105 of the said Act. The amount assessed was £8 5s. 9d., and the parties do not dispute the amount. But the case does not make clear to me how the amount was calculated, nor is the calculation important, for the Commissioner does not seek to recover the amount but gives the taxpayer credit for its payment in the assessment made under s. 104. Therefore the question stated raises no real issue between the parties and its decision is a matter of complete indifference to them in this case. Under these circumstances, I would refrain from answering this question: Cf. *Sun Life Assurance Co. of Canada* v. *Jervis* (1); *Sutch* v. *Burns* (2).

Questions (1), (2), (4) (*a*) and (5) should be answered in the affirmative and Question (3) in the negative.

McTIERNAN J. I agree with the Chief Justice's answers to the questions in these cases and with his Honour's reasons.

WILLIAMS J. These are two cases stated which have been heard together, the first relating to the assessment of the appellant company for additional income tax under s. 31B of the *Income Tax Assessment Act* 1922-1934 in respect of the undistributed amount of its income within the meaning of that section derived in Australia during the financial year ending 30th June 1934, the second relating to the assessment of additional tax under ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939 in respect of income derived in Australia during the year ending 30th June 1939.

(1) (1944) A.C. 111. (2) (1944) 1 K.B. 406.

As the second case raises the greater number of questions, the answer to one of these questions will determine the question asked in the first case and was argued first I shall proceed to discuss the contentions raised in this case in the first instance. These contentions are set out in par. 6 of the case.

As to contentions (*a*), (*b*) and (*d*), ss. 104 and 105 of the *Income Tax Assessment Act* 1936-1939 are, so far as material, as follows :—

" 104 (1.) Where a private company has not, before the expiration of nine months after the close of the year of income, made a sufficient distribution of its income of the year, the Commissioner may assess the aggregate additional amount of tax which would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it, and the company shall be liable to pay the tax so assessed. . . ."

" 105 (1.) Where, in relation to any private company, there is an undistributed amount, and any person (not being a company, trustee or partnership) would, otherwise than as a shareholder of the private company, have received a part of that amount if there had been successive distributions of the relative parts of that amount to and by each of any companies, trustees or partnerships interposed between the private company and that person, the Commissioner may also, in addition to any other tax assessable under this Division, assess the additional amount of tax, if any, which would in that event have been payable by that person, and the private company shall be liable to pay the tax so assessed."

Section 3 and sub-ss. 1, 2, 7 and 8 of s. 5 of the *Income Tax Act* 1939 are as follows :—

" 3. The *Income Tax Assessment Act* 1936-1938 shall be incorporated and read as one with this Act."

" 5. (1.) The rate of income tax in respect of a taxable income derived from personal exertion shall be as set out in the First Schedule to this Act.

(2.) The rate of income tax in respect of a taxable income derived from property shall be as set out in the Second Schedule to this Act. . . .

(7.) The rate or rates of income tax payable by a trustee shall be as set out in the Sixth Schedule to this Act.

(8.) Subject to sub-section (7.) of this section, the rates of income tax payable by a company shall be as set out in the Seventh Schedule to this Act."

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The Seventh Schedule to the Act is as follows :—

" Rates of Tax Payable by a Company.

(*a*) Subject to the last preceding Schedule, for every pound of the taxable income of a company the rate of tax shall be 24 pence.

(*b*) For every pound of interest in respect of which a company is liable, pursuant to sub-section (1.) of section one hundred and twenty-five of the *Income Tax Assessment Act* 1936-1938 to pay income tax, the rate of tax shall be 24 pence."

The Assessment Act deals with and provides the machinery for the imposition of taxation but it does not contain any provisions prescribing any rate of tax and does not of itself impose any taxation. It is not therefore an Act within the ambit of s. 55 of the Constitution. The tax is imposed by the Tax Act, which prescribes the rates of taxation. This Act incorporates the Assessment Act and provides that the two Acts are to be read together. My own view, to which I adhere, as to the effect of such a section, is stated in *Perpetual Trustee Co. (Ltd.)* v. *Wittscheibe* (1) as follows :—" In *In re Woods' Estate* ; *Ex parte Her Majesty's Commissioners of Works & Buildings* (2) the Court of Appeal held that if a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that is to write those sections into the new Act just as if they had been actually printed into it. It has also been held that where two Acts are to be read together the Court must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the latter Act has to some extent modified something found in the earlier Act : see *Hart* v. *Hudson Bros. Ltd.* (3) ; *Phillips* v. *Parnaby* (4), and *Williams* v. *Tooth & Co. Ltd.* (5)."

The Tax Act and the incorporated Assessment Act is, therefore, a single Act and one which falls within this section of the Constitution. But the only effect of the section is to invalidate any provision therein dealing with any other matter than the imposition of taxation.

It was contended by counsel for the appellant that the only tax imposed upon a company is that imposed by s. 5 (8) and the Seventh Schedule of the Tax Act. It was said, therefore, that although the legislature intended to impose additional income tax upon companies by ss. 104 and 105 of the Assessment Act it has failed in its purpose. I am unable to agree with this contention. Sections 104 and 105

(1) (1940) 40 S.R. (N.S.W.) 501, at p. 510 ; 57 W.N. 166.
(2) (1886) 31 Ch. D. 607.
(3) (1928) 2 K.B. 629, at p. 634.
(4) (1934) 2 K.B. 299, at p. 304.
(5) (1939) 39 S.R. (N.S.W.) 46, at p. 53 ; 56 W.N. 15.

state in the clearest terms that the respondent may assess the tax and the company shall be liable to pay the tax so assessed. These sections are, as I have said, incorporated in and form part of the Tax Act, and that Act contains in the schedule every rate of tax which it is necessary to apply in order to ascertain the additional amount of tax which the shareholders referred to in s. 104, whether they were individuals or companies, and the individuals referred to in s. 105 would have had to pay if the company had on the last day of the year of income paid the undistributed amount of its income in the manner contemplated by s. 104.

In the present case, the Commissioner first made an assessment under s. 105 on 25th June 1941 of £8 5s. 9d., and subsequently made a further assessment under s. 104 on 5th February 1942 of £1,998 12s. The appellant has appealed against both assessments, and it becomes necessary to express an opinion upon the proper construction of the sections. Section 104 does not, I think, raise any difficulty. In order to determine what additional tax the company has to pay under this section, the respondent must take the actual shareholders in the company as appearing in its register of members on the last day of the year of income in question, whatever beneficial interests these shareholders have in the shares. He must then ascertain what aggregate additional income tax these shareholders would have had to pay if the company had distributed to them by way of dividend the undistributed income referred to in the section. This aggregate is the amount for which the company can be assessed under the section. In the present case, the Commissioner made this assessment on 5th February 1942. He should have ascertained the additional tax which each of the four shareholders referred to in par. 9 of the case would have had to pay, but, as the three individuals were trustees for Cadbury Bros. Ltd., he made the assessment on the basis that this company was the only shareholder. This was admittedly wrong but no objection has been taken to the assessment on this ground. But some of the shareholders in a private company might be trustees of their beneficial interest, and as beneficiaries who are presently entitled to a share of the income of a trust estate and not under any legal disability and not their trustees are the taxpayers, a notional distribution to trustees would not in such a case cause them to become notionally liable to pay any additional tax, or the company through them to become liable for any additional tax under s. 104. Further, where a beneficiary is under a legal disability and the trustee is liable to be assessed, the trustee is only liable to be assessed on the net income of the trust estate as if it were the income of an individual, whereas

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the beneficiary might derive income from other sources, so that the additional tax which the trustee would become notionally liable to pay on behalf of the beneficiary would be less than the additional amount which the beneficiary would become liable to pay if the amount of the notional dividend was added to the rest of his taxable income. Partnerships which hold shares in companies become registered members of companies in various ways. In *Buckley on the Companies Acts*, 11th ed. (1930), at p. 56, it is stated :— " A partnership firm is not a ' person ', and the partners in a firm have no right as such to be registered as members in the firm name. Partners in a firm may, however, be joint members ; and, *semble*, if under the constitution of the partnership it be within the authority of one partner to accept shares so as to bind the firm, the acceptance of shares by one partner and registration of the shares in the firm name may render all the partners joint holders of the shares."

Assuming that partners were registered as joint holders of the shares, s. 104 would only cause the company to become liable for additional taxation on the basis that the amount distributed was appropriated between the partners in equal shares, whereas the beneficial interests of the partners might be unequal, and, moreover, the Act provides for the assessment of partners upon their individual income, including their interests in a partnership. A company and not its shareholders is the legal and beneficial owner of its shares. The *Income Tax Assessment Act* 1936, s. 46 (1), provides, so far as material, that a shareholder shall be entitled to a rebate in his assessment of the amount obtained by applying to that part of the dividends which is included in his taxable income a rate equivalent to—(*a*) the rate of tax payable by him on income from property ; or (*b*) the rate of tax payable by companies for the year of tax, whichever is the less. If a private company had paid a dividend to a shareholder which was another company, the latter company would not have had to pay any income tax on that dividend, so that the payment of a notional dividend out of the undistributed income to a company under s. 104 would likewise not have produced any additional tax under that section on the undistributed income of the private company. But the *Income Tax Assessment Act* 1939, s. 3, provides that s. 46 of the Principal Act is amended by inserting in sub-s. 1, after the word " shareholder," the words " (other than a company which is a non-resident)." After this amendment a non-resident company which was a shareholder in a private company would have to pay income tax upon a dividend on its shares at the flat rate applicable to companies, so that, in respect of a notional dividend upon the shares out of the undistributed income, the private company would be assessed for the same amount under s. 104.

At the date when s. 105 was enacted, full effect would not have been given by s. 104 in the case of companies, trustees and partnerships to the evident intention of the legislature to make the undistributed income taxable in the hands of a private company to the same extent as it would have been if it had been actually paid to persons beneficially entitled thereto, and it is evident that it was to make this intention fully effective that s. 105 was enacted. Under that section, the respondent is entitled to continue the notional distribution of the whole of the relevant amounts which would have been paid to companies, trustees and partnerships as shareholders under s. 104 through any successive number of companies, trustees and partnerships until these relative amounts would have formed part of the taxable income of a person or persons if he or they had received them.

The words in the section " in addition to any other tax assessable under this Division " refer to the tax assessable under s. 104. The words " undistributed amount " mean the same thing as " undistributed amount " in s. 104. In many cases, s. 104, at the date it was enacted, would not have produced any tax in respect of the relative parts of an undistributed amount notionally distributed by way of dividend to shareholders who were companies or trustees, and the whole tax in respect of these parts would have been produced by s. 105. But in the case to which I have referred of a shareholder who was a trustee for a beneficiary under some legal disability who also derived income from some other source, the operation of s. 104 would produce some tax, and the operation of s. 105 would produce some additional tax. But, if there had been an actual distribution, the person who received a relative part through a trustee would be entitled to a deduction from the tax assessed upon the sum he received of any tax paid by the trustee on his behalf, and the tax for which he would be assessed would only be an amount additional to or in other words in excess of the amount of tax already paid by the trustee, so that if the respondent calculated the amount of tax which the trustee would have had to pay under s. 104, he could then only calculate the amount of tax in addition to that tax which the beneficiary or in other words the person would have had to pay under s. 105. Otherwise the private company would have to pay more tax in respect of that part under Div. 7 than would be payable upon an actual distribution. In this way, full effect is given to the words in the section " the Commissioner may . . . assess the additional amount of tax . . . which would in that event have been payable by that person." Interposed companies are placed in the same category as trustees under s. 105, and the successive distributions by the companies concerned are deemed to take

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place without reference to their financial position as though, like trustees, they hold the moneys in a fiduciary capacity. If the shareholding company is in fact a trustee of the shares for the person referred to in s. 105, there is no difficulty. The company would not own the shares beneficially and would not be liable to pay tax except in the circumstances already mentioned on behalf of the person.

Prior to the amendment of s. 46 of the Principal Act by s. 3 of the Act of 1939, there was also no difficulty where the company owned the shares beneficially, because the notional dividend was not subject to any tax in its hands under s. 104, and additional tax on the whole of the dividend could be calculated under s. 105. After this amendment, tax would have to be calculated under s. 104 upon a notional dividend to a non-resident company. But until s. 46 of the Principal Act was further amended by s. 4 of the *Income Tax Assessment Act (No. 2)* 1940, the respondent in calculating the tax payable upon this notional dividend when it was distributed to persons in accordance with s. 105 would have had to allow as a rebate the amount already calculated upon it in the hands of the interposed company under s. 104, and I assume that this was done in the present case in arriving at the amount of £8 5s. 9d. Section 4 of the Act of 1940 provides that s. 46 of the Principal Act is amended (*a*) by omitting sub-s. 1 and inserting in its stead the following sub-section:— "(1.) Subject to this section, a shareholder, being a company which is a resident, shall be entitled to a rebate in its assessment of the amount obtained by applying to that part of the dividends included in its taxable income" the amounts therein mentioned. Since the amendment introduced by this section it would appear that, where a company is a shareholder in a private company, tax has first to be calculated under s. 104 on the amount of the notional dividend at the flat rate applicable to companies, and has then to be calculated under s. 105 as though the whole amount of the dividend had been distributed to persons without any deduction in respect of the tax already calculated under s. 104. But, if there had been an actual dividend, the interposed company, which had paid income tax on the amount of the dividend at the existing flat rate for companies, could at most have distributed to persons the balance of the dividend after deducting the sum required to pay the tax, and the persons would then have had to pay tax on the balance and not the full amount of the dividend. It would appear, therefore, that private companies, in respect of parts of their undistributed income notionally distributed to shareholders who are companies, may now have to pay more tax than would be payable

if the undistributed income had been actually paid to its shareholders, and that under the existing rates of tax private companies on some parts of their undistributed income may easily be assessed at well over 20s. in the pound. Thus it seems apparent that s. 105, which was capable of a reasonable operation in the framework of the original Act to fulfil the purpose already mentioned, may now work a grave injustice, and that the section urgently requires reconsideration and amendment to bring this purpose into conformity with the existing Act. But it follows from what I have said that, in my opinion, subject to the contentions with which I have still to deal, the assessments of the appellant under s. 104 and s. 105 are both valid.

As to contention (*c*) : I am unable to find anything in ss. 104 and 105 to suggest that the respondent has an option in respect of which he must elect to assess a private company under either s. 104 or s. 105 in respect of any portion of its undistributed income. The liability under the sections is, in my opinion, cumulative and not alternative.

As to contention (*e*) : Paragraph 20 of the case states that the appellant made to the respondent a full and true disclosure of all the material facts necessary for its assessment and the assessments of 25th June 1941 and 5th February 1942 were made after that disclosure. It also states that there is no evidence that the respondent at any time made any error in calculation or any mistake of fact, save and except that he first issued a notice of assessment under s. 105 and subsequently formed the opinion that the appellant was liable to tax under s. 104 and issued the assessment of 5th February 1942 thereunder. On these facts, counsel for the appellant has contended that the respondent was prohibited by s. 170 (3) of the Assessment Act from making the assessment of 5th February 1942.

In addition to the two assessments already mentioned, the respondent had previously assessed the appellant for income tax upon its taxable income under s. 17 of the Act, so that the assessment of 25th June 1941 was the second and that of 5th February 1942 the third assessment of the appellant. The first assessment was made under the provisions of s. 166 of the Act. It was the ordinary assessment of the taxable income of the appellant computed in accordance with Part III., Divs. 2 and 3, of the Act, and, as it was accepted and paid, the appellant is entitled to the benefit of s. 170 (3) in respect of that assessment. But s. 170 (3) must, in my opinion, be read distributively with respect to every separate assessment which the respondent is authorized to make under the Act. If, as the appellant contended, he can only make one assessment of a company under the

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Act, the assessments of 25th June 1941 and 5th February 1942 would both be avoided by the sub-section, but the assessments provided for by ss. 104 and 105 are separate and distinct assessments from the ordinary assessment of a company on its taxable income. The liability of a private company to pay tax under these sections depends upon an event which does not arise until nine months after the close of the year of income, and they provide for assessments on a completely different basis to that on which an ordinary assessment is made. The real question is whether the respondent, having made an assessment under either s. 104 or s. 105, can later make another assessment under the other section increasing the liability of the taxpayer.

But the authority to assess conferred upon the respondent by s. 105 is expressly stated to be in addition to the authority conferred upon him by s. 104. As s. 170 (3) does not prevent the respondent issuing separate assessments, he can assess under each section, although the effect of the later assessment may be to increase the liability of the taxpayer under the earlier assessment. Further, I agree with the Chief Justice that the respondent was authorized to issue the two assessments by s. 169 of the Principal Act. In the present case, the respondent, having made an assessment under s. 105, called his subsequent assessment under s. 104 an amended assessment, whereas it was in truth an original assessment. But this is an irregularity which would be covered by s. 175.

For these reasons I am of opinion that the questions asked in the 1939 case should be answered as follows:—(1) Yes. (2) (*a*) and (*b*) Yes. (3) No. (4) (*a*) and (*b*) Yes. (5) Yes.

It follows from the reasons already given that the question asked in the 1934 case should be answered Yes.

(*Appeal No.* 7 *of* 1943).—*Question in case answered: Yes. Costs of case to be costs in the appeal. Case remitted to Chief Justice.*

(*Appeal No.* 8 *of* 1943).—*Questions in case answered:*—1. *Yes.* 2. (*a*) *and* (*b*) *Yes.* 3. *No.* 4. (*a*) *and* (*b*) *Yes.* 5. *Yes. Costs of case to be costs in the appeal. Case remitted to Chief Justice.*

Solicitors for the appellant, *Blake & Riggall.*

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

E. F. H.