[HIGH COURT OF AUSTRALIA.]

BOURKE . . . . . APPELLANT;

AND

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

H. C. OF A. 1945.

BRISBANE, *June* 14, 20.

Latham C.J., Rich and Dixon JJ.

Income Tax (Cth.)—Dividend out of amount on which tax paid under Part III., Div. 7, of Act—Rebate—Application of averaging provisions of Part III., Div. 16, in subsequent years—Tax increased by inclusion of dividend—Further rebates—Income Tax Assessment Act 1936-1943 (*No.* 22 *of* 1936—*No.* 10 *of* 1943), *ss.* 107, 149-158; *Income Tax Act* 1943 (*No.* 11), *s.* 4, *Fourth Schedule.*

The income for the year ended 30th June 1942 of a taxpayer who was a primary producer included a dividend paid to him by a company out of an amount in respect of which the company had paid tax under Part III., Div. 7, of the *Income Tax Assessment Act* 1936-1943. Accordingly, in assessing the taxpayer to income tax upon the income of that year, the Commissioner allowed a rebate pursuant to s. 107 of the Act of the amount by which the income tax was increased by the inclusion of the dividend in his assessable income. When calculating the rate of tax, under the averaging provisions of Part III., Div. 16, upon the taxpayer's income for the following year, the Commissioner included the dividend as part of the assessable income of the year ended 30th June 1942 in ascertaining the taxable income of that year. Thus the average taxable income for the purposes of Part III., Div. 16, was greater than it would otherwise have been, and so also was the rate of tax upon the income for the year ended 30th June 1943.

Held that the taxpayer was not entitled under s. 107 to a rebate of the amount by which the income tax upon his income for the year ended 30th June 1943 was thus increased. Section 107 should be interpreted as referring to an increase in the income tax by the inclusion of a dividend in the assessable income of the year under assessment. It therefore allows one rebate only in respect of any one dividend and does not allow further rebates in subsequent years in cases where the averaging provisions of Part III., Div. 16, are applied.

CASE STATED.

Edward Stephen Norman Bourke, being dissatisfied with his assessment to income tax for the year ended 30th June 1943, lodged an objection thereto which was disallowed by the Commissioner. The taxpayer requested the Commissioner to treat his objection as an appeal to the High Court.

Upon the appeal coming on for hearing before *Rich* J., his Honour stated a case which was substantially as follows for the opinion of the Full Court :—

1. Edward Stephen Norman Bourke (hereinafter called the appellant) was at all material times and still is a primary producer within the meaning of that term as defined in s. 157 of the *Income Tax Assessment Act* 1936-1943.

2. During the year of income ending on 30th June 1942 the appellant was paid by way of dividend by the Kamilaroi Pastoral Co. Pty. Ltd., of which he was a shareholder, the amount of £1,601.

3. The amount of such dividend was paid wholly and exclusively out of an amount or amounts in respect of which under Div. 7 of Part III. of the said Act the said company was liable to pay and had paid tax.

4. The amount of the said dividend was assessable income of the appellant for the said year of income and the appellant was not entitled to any deduction under the said Act in respect of the amount of the said dividend.

5. The amount of the said dividend was included in the assessable income of the appellant for the said year of income.

6. Under and by virtue of the provisions of the *Income Tax Assessment Act* 1936-1943 and in particular under and by virtue of the provisions of s. 107 thereof the appellant was entitled to a rebate of the amount by which his income tax was increased by the inclusion of the said amount of £1,601 in his assessable income for the said year of income.

7. In calculating the tax payable by the appellant for the said year of income under the provisions of Div. 16 of Part III. of the said Act and of sub-s. 4 of s. 5 of the *Income Tax Act* 1942 the Commissioner assessed the appellant on his taxable income for the said year of income at the rate of tax applicable to his average income and allowed the appellant a rebate of the amount by which his income tax was increased by

(1) the inclusion in his assessable income of the amount of the said dividend, and

(2) the inclusion of the amount of the said dividend in the aggregate of the taxable incomes of the average years.

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8. Such rebate was calculated by deducting from the taxable income of the appellant for the said year of income the amount of the said dividend and ascertaining the amount of tax which would have been payable by the appellant in respect of the said year of income had the said dividend not been received by him. The amount of tax was calculated at the rate of tax applicable to an amount of an average income after deducting from the aggregate of the taxable incomes of the average years the amount of the said dividend.

9. In calculating the tax payable by the appellant for the year of income ending 30th June 1943, under the provisions of Div. 16 of Part III. of the said Act and of sub-s. 4 of s. 5 of the *Income Tax Act* 1943, the Commissioner assessed the appellant on his taxable income for the said year of income at the rate of tax applicable to his average income. Such average income was calculated by including in the aggregate of the taxable incomes of the average years the said amount of £1,601 received during the year of income ended 30th June 1942 and no rebate was allowed in respect of any increase in tax arising from the inclusion of the said sum of £1,601 in the said aggregate of the taxable incomes of the average years.

10. By reason of the matters set out in par. 9 hereof the rate of tax applicable to the income of the appellant for the year of income ended 30th June 1943 was greater than it would have been if the Commissioner had, in arriving at the average income of the appellant for the said year of income ended 30th June 1943, excluded the amount of the said dividend from the assessable income of the appellant for the year of income ended 30th June 1942 and the amount of tax which the appellant was required to and did in fact pay was thereby increased.

11. The appellant, being dissatisfied with the said assessment, duly lodged an appeal against the said assessment in which he relied upon the following grounds :—"A rebate should be allowed in my assessment of the amount of tax by which my income tax has been increased by the inclusion of the dividend paid by the Kamilaroi Pastoral Co. Pty. Ltd. on 8th July 1941, such dividend being paid wholly and exclusively out of amounts in respect of which the company has paid tax. The amount set out by the Department in respect of this item is £1,601. This amount is included in the sum of £4,498 shown for the income year 1941-1942 in the 'Calculation of average income to determine the rate of tax.' "

12. The Commissioner notified the appellant in writing that he disallowed the said objection.

13. The appellant duly requested the Commissioner to treat his said objection as an appeal and to forward it to the High Court of Australia for determination.

The question for the opinion of the High Court was :—

On the facts stated is the appellant entitled to a rebate of the amount by which his income tax has been increased for the year of income ending 30th June 1943, in the circumstances set forth in pars. 9 and 10 hereof ?

Fahey, for the appellant. The Commissioner should have taken into consideration the amount of the dividend in calculating the assessable income for the year ended 30th June 1943. If the contention of the Commissioner is correct, the taxpayer receives a rebate only in the year in which the dividend is received. Section 107 of the *Income Tax Assessment Act* is clear and unambiguous. It gives the taxpayer a right to a rebate in no way referable only to the year in which the dividend was received. The dividend was assessable income in the year 1942, but the taxpayer was entitled to a rebate. Section 149 speaks of taxable income, i.e., assessable income less all allowable deductions. The benefit of the rebate should be allowed in the year 1943 in ascertaining the taxable income, and therefore s. 107 applies. If the rebate were limited to one particular year it would have been easy for the legislature to have said so (*Sussex Peerage Case* (1) ; *Vacher & Sons Ltd.* v. *London Society of Compositors* (2) ; *The Commonwealth* v. *Queensland* (3)).

Lukin, for the respondent. The rebate allowed by s. 107 applies only to the year of income in which it was received. The section clearly restricts the right of the taxpayer to one rebate. The taxpayer's contention is that although there is only one dividend he is entitled to five rebates. Section 107 refers to the increase in income tax by the inclusion of the dividend in assessable income, whereas s. 149 in describing average income refers to taxable income. Had a series of rebates been allowable, s. 107 would have spoken of taxable income and not assessable income. The rebate is allowed only once and in the year in which it was received (*Douglass* v. *Federal Commissioner of Taxation* (4)).

Cur. adv. vult.

June 20.

The following written judgments were delivered :—

LATHAM C.J. The income of the taxpayer included in the income year 1941-1942 a dividend received from a company. The dividend was included in his assessable income (*Income Tax Assessment Act*

(1) (1844) 11 Cl. & F. 85, at p. 143 [8 E.R. 1034, at p. 1057].
(2) (1913) A.C. 107.
(3) (1920) 29 C.L.R. 1.
(4) (1931) 45 C.L.R. 95.

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1936-1943, s. 44 (1)). The inclusion of the dividend increased both the amount of his income upon which tax was assessed and the rate of tax applicable to that income. Therefore his income tax in respect of the income year 1941-1942 was increased by the inclusion in his income of that dividend.

The dividend in question was paid to him by a company wholly and exclusively out of the amounts in respect of which under Div. 7 of Part III. of the Act (see s. 104) the company had paid tax. The result was that s. 107 became applicable. Section 107, so far as relevant, is as follows :—

" A person shall be entitled to a rebate of the amount by which his income tax is increased by the inclusion in his assessable income of—(*a*) dividends paid to him by a company; . . . where the dividends are paid wholly and exclusively out of any amount or amounts in respect of which, under this Division . . . the company paying the dividends has paid or is liable to pay tax."

The Commissioner ascertained the amount by which the appellant's tax had been increased by reason of the inclusion in his assessable income of the dividend, and in the assessment in respect of the income year 1941-1942 allowed a rebate in accordance with the section.

The appellant was a primary producer within the meaning of Div. 16 of Part III. of the Act (s. 157). In order to ascertain his rate of tax in respect of the income year 1942-1943 it was necessary to ascertain his average taxable income over a period of " average years " (ss. 149 and 156, *Income Tax Act* 1943, Fourth Schedule). The year 1941-1942 was one of the average years which had to be taken into account for the purpose of the assessment of tax in respect of the income year 1942-1943. The Commissioner included the dividend as part of the assessable income of the year 1941-1942 in ascertaining the taxable income of that year, and thus the average taxable income for purposes of Div. 16 of Part III. was greater than it would otherwise have been, and the rate of tax in respect of that year was higher than it would otherwise have been—and the tax for that year was correspondingly higher. The contention of the appellant is that therefore his tax in respect of the income of the year 1942-1943 has been increased by the inclusion in his assessable income of the year 1941-1942 of the dividend and that he is entitled in the assessment for the year 1942-1943 (and for succeeding years until the year 1941-1942 falls out of the averaging period) to a rebate of the increased amount (and amounts) of tax.

In my opinion, this contention should not be accepted. Section 107 is a direction to be obeyed by the Commissioner in making

assessments to tax from time to time. If a dividend of the character described in s. 107 is included in the income under assessment, the Commissioner must allow the rebate prescribed by the section. The Commissioner applied the section in making the assessment in respect of the income year 1941-1942 and, in doing so, gave, in my opinion, full effect to the section. The increase of income tax referred to in s. 107 is an increase in the tax then being assessed by inclusion of the dividend in the assessable income in respect of the tax which is then being assessed, and the words of the section in their natural meaning apply to a single increase of tax by a single inclusion of the dividend in a single assessable income.

The contrary view requires the words to be read as meaning that a person who is taxed as a primary producer is entitled to a series of rebates of the amounts by which his income taxes from time to time are increased by the inclusion in his assessable income of a past year or years of a dividend or dividends received in that year or years. In my opinion, it does violence to the words of the section to construe it in this manner. The words " the inclusion in his assessable income of dividends " mean, in my opinion, the inclusion of such dividends in his income then under assessment. I have had the advantage of reading the reasons for judgment of my brother *Dixon*. I concur in his conclusion and in the analysis of the legislation by which it is supported.

In my opinion the question in the case should be answered—No.

RICH J. The question submitted by the case stated arises rather out of the complexities of the income tax legislation than from any basal difficulty of interpretation or application. I have read the judgment of my brother *Dixon*, which sets out the manner in which the question arises and the chain of provisions by which it is reached.

The case stated, which was agreed upon by the parties, asks one question only, namely:—On the facts stated is the appellant entitled to a rebate of the amount by which his income tax has been increased for the year of income ending 30th June 1943, in the circumstances set forth in pars. 9 and 10 hereof?

The answer, in my opinion, depends upon the meaning which ought to be placed on s. 107 of the *Income Tax Assessment Act* 1936-1943. Indeed, the matter may be further reduced to the meaning or operation of the phrase in the section " increased by the inclusion in his assessable income." Does it cover the proposition that the taxpayer is entitled to successive rebates in one assessment because under the averaging provision the rate of tax applicable to the

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year the subject of assessment is increased by reason of the fact that one, two or three years before, or even four years before, the taxpayer received a dividend from the company of which he was a shareholder and that that dividend forms part of his assessable income ? I think that such a conclusion has no support except in an excessive literalism of construction. The section is obviously trying to give a rebate in relief of double taxation. The averaging provisions may be intended as a benefit for primary producers. The rebate provision in s. 107 is concerned with nothing but avoiding a plain injustice which otherwise might arise from the provisions relating to private companies, ss. 103-109. The injustice would be in taxing one item of income twice. The proposition for which the taxpayer contends has nothing to do with this. Section 107 means, as Mr. *Lukin* epigrammatically put it, to give one rebate for one dividend. When the section speaks of assessable income and gives directions for a rebate it is dealing with the process of assessing in the given year. This process with which we have all grown so familiar is the subject of numerous directions nearly all expressed, like s. 107, in the abstract and upon the plain understanding that it will be brought into action in each successive year—not in relation to years which have been left behind. For each assessment it operates once for all and gives one rebate, not a series of recurring rebates for the one assessment. Interpreting the section in this manner, I answer the question submitted—No.

DIXON J. The question for our decision relates to a claim by a primary producer for a rebate on account of income tax for which he is otherwise liable upon the taxable income he derived in the year ending 30th June 1943. Being a primary producer, for the purpose of ascertaining the rate of tax by which the tax payable upon his taxable income is to be calculated, the Commissioner has applied to his case the averaging provisions contained in ss. 149 to 158 of the *Income Tax Assessment Act* 1936-1943 and s. 5 (4) and the Fourth Schedule of the *Income Tax Act* 1943.

To apply these provisions, you take first in the case of the rate for personal exertion, then in the case of the rate for property, the taxpayer's average income over a period of years. You suppose it to have been in the one case wholly income from personal exertion, and, in the other, wholly from property. On that footing, you find the rates which, on each of these assumptions, would be respectively payable by an ordinary taxpayer. Then you divide the total tax so found in each case by the amount of the average income and

the result gives you, in the one case, the rate of tax applicable to the primary producer's actual taxable income from personal exertion for the year under assessment, and, in the other case, the rate of tax applicable to his actual taxable income from property for that year. It is unnecessary to go into the niceties of the calculation of the average income. It is enough to say that you go back for not more than four years before the year of income and average the amounts of the taxable income for the years you take: See ss. 149, 150, 151 and 157.

From the foregoing it will be seen that the higher the average income the higher the rates of tax. It is needless to add that every increase in the taxable income of any year included in the average increases the average income. It is obvious too that every increase in the assessable income of any year so included increases the taxable income of that year and is consequently reflected in the average.

In the present case, the primary producer's taxable income derived during the year ending 30th June 1942 was included in the average. It happened that his taxable income for that year was increased by the inclusion in his assessable income of a dividend paid to him as a shareholder of a private company within the meaning of Div. 7 of Part III. of the *Income Tax Assessment Act* 1936-1943, ss. 103 to 109. The dividend was paid wholly and exclusively out of an amount or amounts in respect of which under that Division the company was liable to pay and had paid income tax. That means that the profits out of which the dividend was paid had been retained by the company for more than six months after the close of the year of income in which they had been earned and that the Commissioner, considering that the company had not made a sufficient distribution of its income of the year, assessed the company under s. 104 to the aggregate amount of tax to which the shareholders would have been liable in respect of the profits, if they had been distributed amongst them in the form of a dividend. In such a case, as the tax which a dividend out of the profits retained would attract has been paid by the company before a distribution takes place, it is evident that, when the dividend thereout comes afterwards actually to be declared and paid, the tax must be rebated to the shareholders or some other device adopted to avoid double taxation. In fact, s. 107 provides the relief against double taxation by requiring a rebate to the shareholder of the amount by which his income tax is increased by the inclusion of the dividend in his assessable income. In respect of the year of income ending 30th June 1942 in which the dividend in question was distributed and for which it was included in the assess-

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able income of the taxpayer, the Commissioner, in conformity with this provision, did allow a rebate of the amount by which the taxpayer's income tax was increased by the inclusion of the dividend in the assessable income. But the taxpayer now claims that this does not exhaust the benefit to which he is entitled under s. 107. Inasmuch as the inclusion of the dividend in the assessable income of that year increased the taxable income, and as the increase of the taxable income produced an increase of the average income, and as the increased average income resulted, in the manner already explained, in an increased rate or rates of tax, which were applied to his taxable income for the next year, the year ending 30th June 1943, the taxpayer claims that the consequent increase in the amount of tax for that year should be the subject of a rebate for that year.

As the claim rests upon the manner in which s. 107 is expressed, it is desirable to set out so much of the text as is material. It is as follows :—" A person shall be entitled to a rebate of the amount by which his income tax is increased by the inclusion in his assessable income of—(*a*) dividends paid to him by a company . . . where the dividends are paid wholly and exclusively out of any amount or amounts in respect of which, under this Division " (scil. Div. 7.—Private Companies) " . . . the company paying the dividends has paid or is liable to pay tax."

The question really turns on the words " increased by the inclusion in his assessable income." For, if these words refer to the inclusion of the dividend in the taxpayer's income under assessment, it is clear that the section does not authorize the rebate which the taxpayer now seeks. They would, on that meaning, entitle him to the rebate he has already received and no more. For the operation of the section, if read as referring to the income under assessment, would be limited to rebating the relative part of the tax for the year in which the dividend was received by the taxpayer and included in his assessable income, the part of the tax representing the increase resulting from the inclusion of the dividend.

But, on the other hand, if the words " increased by the inclusion in his assessable income " are understood as referring to assessable income for any year, then it is logically correct that the inclusion of the dividend in the assessable income of the year ending 30th June 1942 operates, by the successive steps described, to produce some increase in the rates of tax, and, therefore, the amount of tax, in subsequent years, until the taxable income of the year ending 30th June 1942 is no longer included in the average years adopted for

the purpose of the provisions for averaging the income of primary producers in order to obtain the rates of tax.

In my opinion s. 107, by the words in question, does not refer, as the taxpayer contends, to the assessable income of the taxpayer for any year, but to his assessable income for the year under assessment.

The evident policy of the provision supplies the strongest reason for this interpretation. Its purpose plainly is to relieve against the double taxation which otherwise would result from taxing the profits in the hands of the company under s. 104 before they are distributed, and in the hands of the shareholders when they are distributed.

The expressed principle upon which they are taxed in the hands of the company by s. 104 is that, through retaining them, the company has made an insufficient distribution. Had a sufficient distribution been made, the shareholders would have been liable to include them in their assessable income and been taxable accordingly. Consequently s. 104 imposes the aggregate of the shareholders' tax upon the company. But, when, the profits having been distributed subsequently, the shareholder comes to include them in his assessable income, s. 107 then rebates the increased tax which results. It would be rather absurd if the shareholder were put in a better position when the company fails to distribute within the time set by s. 104 than he would be if it had so distributed profits. In the latter case, there is no need for a rebate in the year of distribution because no tax has been paid, in the former there is such a need. But there is no more point in the former than in the latter in conferring on a taxpayer, who is a primary producer, a right to a rebate of the amount by which his tax in later years is increased through the inclusion of the dividend in the income of a year of averaging. In other words, the relief called for by the operation of s. 104 is fully given by allowing a rebate in the year in which the dividend is received and included in the assessment. The principle to which s. 107 is designed to give effect is exhausted when that is done. The further operation ascribed to it by the taxpayer upon the averaging provisions is quite irrelevant to the relief from double taxation it undertakes to give.

But it is not only the policy on which s. 107 rests that shows it refers only to the year under assessment. The same conclusion is supported by the form in which the *Assessment Act* is cast. For, speaking generally, when the *Assessment Act* gives directions for the ascertainment of assessable income, taxable income, or tax, it does so by expressing, without reference to time, the particular conditions governing the matter specifically in hand, and it does so on the

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footing that the directions apply to the process of ascertaining the liability for each successive year, or accounting period, in the case of the taxpayer, the process of making a return, in the case of the Commissioner, of making an assessment. References to " assessable income " and " taxable income " will, therefore, normally be found to refer to the income of the year under assessment, and references to " tax " to the tax calculated upon the income of the year under assessment for the ensuing financial year. Section 17 begins Part III. with a specific and exact reference to the taxable income of the year of income and it is immediately followed by s. 18 with its equally exact references to substituted accounting periods. An inspection of the sections which follow in Div. 1 will give examples of directions expressed without mentioning time upon the assumption that further references to period are superfluous. In section after section in Div. 2 the expression " assessable income of a taxpayer " is used always in reference to the income under assessment at the time when the section is applied.

In Div. 3, dealing with deductions, the same is true, though here occasional express restrictions to the year of income are found, e.g. s. 53 (in reference to deferred maintenance). In the provisions now standing as s. 57 the words " assessable income " have been considered (Cf. *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1)) and they have been taken to mean the assessable income of the year from which the deduction is made, that is the year under assessment. In s. 63, which deals with the deduction of bad debts, an example will be found where, on a rather vexed subject, exact statements are made contrasting the year of income with other accounting periods (Cf. *Elder Smith & Co. Ltd.* v. *Commissioner of Taxation (N.S.W.)* (2); *Commissioner of Taxes (S.A.)* v. *Executor Trustee and Agency Co. of S.A. Ltd.* (3)) and in doing so the expression " assessable income of any year " is used to describe a situation in which it is not intended to limit the case to " the assessable income," that is, the income of the year under assessment.

In addition to the foregoing general considerations, the exact language of s. 107, as counsel for the Commissioner pointed out, is more appropriate to a single rebate for the inclusion in the assessable income of a dividend, than to a succession of rebates. It says that the taxpayer shall be entitled to a rebate for the amount &c.

For these reasons, I think that s. 107 should be interpreted as referring to an increase in the income tax by the inclusion of a dividend in the assessable income of the year under assessment and

(1) (1935) 54 C.L.R. 295, at pp. 303, 304, 305, 307, 309.
(2) (1932) 47 C.L.R. 471.
(3) (1938) 63 C.L.R. 108, at pp. 129, 156.

that the taxpayer's claim to a further rebate or rebates in respect of a subsequent year fails.

In my opinion the question in the case stated should be answered —No.

Question in case answered—No. Costs of case to be costs in the appeal. Case remitted to Rich J.

Solicitors for the appellant, *Cannan & Peterson.*

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

B. J. J.