[HIGH COURT OF AUSTRALIA.]

HUGHES AND OTHERS . . . . . APPELLANTS;

AND

PHILLIPS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1948.

SYDNEY, *Apr.* 20, 21.

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

Taxation—Income tax—Return—"False in a particular"—Net income understated—Offence—Information—Averments—Sufficiency—Income Tax Assessment Act 1936-1946 (*No.* 27 *of* 1936—*No.* 6 *of* 1946), *ss.* 227, 243.

An income tax return which contains a mis-statement of the taxpayer's net income is "false in a particular" within the meaning of s. 227 (1) of the *Income Tax Assessment Act* 1936-1946. "Particular" in that section is not confined to the subordinate or constituent elements which go to make up the total return.

Ex parte Wood; *Re Williams* (1932) 32 S.R. (N.S.W.) 177; 49 W.N. (N.S.W.) 40, overruled; *Ramm* v. *Gralow* (1931) Q.S.R. 351, distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Phillips*; *Re Hughes* (1947) 48 S.R. (N.S.W.) 86; 65 W.N. 15, reversed.

APPEAL from the Supreme Court of New South Wales.

In an information laid under s. 227 of the *Income Tax Assessment Act* 1936-1946 by William Malachy Brady, an officer of the Department of Taxation, on behalf of Joseph William Robert Hughes, the Deputy Commissioner of Taxation in and for the State of New South Wales, it was alleged that on 28th October 1943, at Sydney, the defendant, Herbert Lewis Phillips, of 27 Shaw Street, Yass, picture showman, made "a return of income derived from all sources in and out of Australia during the twelve months from 1st July 1942 to 30th June 1943 which said return was false in a particular, to wit, the amount of £226 returned by the said defendant therein as net income from his business of a motion picture exhibitor

and commissions, was understated by an amount of £722, contrary to the Act in such case made and provided."

Section 227 of the *Income Tax Assessment Act* 1936-1946, imposes a penalty on " any person who makes or delivers a return which is false in any particular."

At the hearing the prosecutor merely tendered the information in evidence and relied on the averments: *Income Tax Assessment Act* 1936-1946, s. 243.

It was submitted on behalf of the defendant: (i) that the information was bad in that it disclosed no offence; (ii) that the information was bad in that it did not charge falsity in any particular; (iii) that the information was bad in that it did not sufficiently indicate particulars of the alleged falsity in a particular; and (iv) that the summons was bad for the same reason.

The magistrate held that the information disclosed a prima-facie case because it did refer to the particular of a net income, the sources from whence that income was derived, and the amount by which that income had been understated.

Counsel for the defendant thereupon called for and tendered the income tax return for the year in question and closed his case.

The return contained two items only of income, both of them appearing under the heading: " Income from personal exertion." One was: " Commissions . . . £157." The other was: " Other income from personal exertion as per statement attached . . . £69." The statement attached gave the defendant's revenue account as a motion picture exhibitor for the relevant twelve months, showing a net profit of £69 5s. 4d. £226 was stated as the addition of these two sums. The return gave no particulars of the commissions, but it contained a declaration by the defendant " that the particulars shown therein . . . are true and correct in every particular, and disclose without reservation or exception a full and complete statement of the total income derived from all sources, both in and out of Australia by " the defendant during the relevant twelve months.

The defendant was convicted and fined £100. He was also ordered to pay a penalty of £400 and costs. In default of payment he was sentenced to be imprisoned in terms of the *Income Tax Assessment Act* 1936-1946.

A rule nisi for statutory prohibition granted to the defendant against Hughes, Brady and the magistrate, Arthur Edmund Debenham S.M., was made absolute by the Full Court of the Supreme Court of New South Wales: *Ex parte Phillips*; *Re Hughes* (1).

(1) (1947) 48 S.R. (N.S.W.) 86; 65 W.N. 15.

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From that decision Hughes, Brady and the magistrate appealed, by special leave, to the High Court.

There was no appearance by or on behalf of the magistrate.

A. R. Taylor K.C. (with him *Donovan*), for the two first-mentioned appellants. The words " in any particular " in s. 227 of the *Income Tax Assessment Act* 1936-1946 mean " in any respect." That section refers to a return which contains any element of falsity. It is not the respondent's income generally which is alleged to be understated. *Edwards* v. *Jones* (1), referred to by the Chief Justice in the court below, was a different type of case, and although fault is not found with the principles enunciated therein, his reference to that case indicates that, apparently, the view taken by his Honour was on a point not submitted by the person seeking the rule absolute. The information was not so framed as to leave the respondent in doubt as to the charge he had to meet. The requirements of s. 238 would have been satisfied merely by averring in the information that the respondent did make a false return. In *Ramm* v. *Gralow* (2) no offence was, or facts were, alleged in the information sufficient to bring the matter within the terms of s. 64 (1) of the *Income Tax Act* 1924 (Q.). That case does not decide, as was suggested in *Ex parte Wood* ; *Re Williams* (3), that the statement of net income in a return is not a statement of a particular. The word " particular " in s. 227 of the *Income Tax Assessment Act* 1936-1946 includes a statement by a taxpayer as to his net or taxable income from all sources (*Federal Commissioner of Taxation* v. *Galt* (4)). In his statement the respondent understated his net income, and as " false in any particular " in s. 227 means " false in any respect " then the statement so made by the respondent was false because it suppressed the truth ; it created a false impression of the respondent's income (*R.* v. *Kylsant* (5)).

Barwick K.C. (with him *Kenny* and *Robson*), for the respondent. It seems to be conceded on behalf of the appellants that s. 227 at least requires that it should be stated in the information that the return was false in a particular and that the particular must be nominated. An informant by his information must put the defendant in a position to know the charge which he has to meet. It would not be a compliance with the Act, even having regard to s. 238, simply to charge the defendant with making a return which

(1) (1947) 1 K.B. 659.
(2) (1931) Q.S.R. 351.
(3) (1932) 32 S.R. (N.S.W.) 177 ; 49 W.N. 40.
(4) (1947) 8 A.T.D. 272, at p. 275.
(5) (1932) 1 K.B. 442, at pp. 444, 448.

was false in a particular. If it be right to say that the particular needs to be specified then one result that would follow would be that the information, if challenged, would be bad unless the particular were given. That could be cured in the course of the proceedings either by stating the particular or by giving evidence and nominating that evidence as the particular. That course was not followed in this case. The particular must be stipulated in the information. Net income is not a particular within the meaning of the Act. *Ex facie* the information is ambiguous and therefore bad. There is also a latent ambiguity. Section 227 was re-enacted in 1936 in language identical with the language which was the subject of decision in *Ex parte Wood*; *Re Williams* (1). The word "particular" as used in s. 227 should be construed in the sense of an item or detail. To substitute the words, "in any respect" for the words, "in any particular" would be to destroy them. It could not have been intended that an error in addition of a lengthy column, all other items being correct, would lead to a falsity. It is significant that in the declaration the taxpayer is required to declare that the "particulars shown" in the return "are true and correct in every particular." The particular there alleged to be false was set out in the information under consideration in *Brady* v. *Thornton* (2). The purpose of that particular would be to narrow and limit the whole scope of the inquiry. *Ex parte Wood*; *Re Williams* (1) was a specific decision on the identical verbiage used in s. 227. It rightly followed *Ramm* v. *Gralow* (3) which was a decision on similar provisions in s. 64 of the *Income Tax Act* 1924 (Q.). The net income is not a particular within the meaning of s. 227. The information is patently ambiguous because it states "£226 returned by the . . . defendant . . . as net income from his business of a motion picture exhibitor and commissions." On that the question arises: Is the alleged deficiency from the business of a motion picture exhibitor, or is it from commissions, or from both? The latent ambiguity is that it cannot be gathered from the information in relation to the return, whether or not it is any one of those three, or, perhaps, a fourth, that is to say from income from personal exertion. *Ramm* v. *Gralow* (3) and *Ex parte Wood*; *Re Williams* (1) are firm decisions of the court upon statutory provisions in all material respects identical with s. 227, and which show that s. 227, which was enacted in 1936, means that an information laid under it must specify a particular and that the particular must

(1) (1932) 32 S.R. (N.S.W.) 177; 49 W.N. 40.
(2) (1947) 75 C.L.R. 140.
(3) (1931) Q.S.R. 351.

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be something other than the addition or subtraction. The information was defective in substance for want of particularity. Where a court has ruled that an information is not bad in substance, either in respect of duplicity or of uncertainty, the fact that particulars were not asked for is entirely irrelevant. Notwithstanding the provisions of s. 238 of the *Income Tax Assessment Act* 1936-1946, the alleged false particular must be specified (*Smith* v. *Moody* (1)). A return can be false in a particular and yet the net income may be correctly stated because of an understatement by the taxpayer of a deduction, or an omission to make a deduction to which the taxpayer was entitled, or the making of an arithmetical mistake. " Particular " is a particular of the return. Under s. 160 (1) of the Act a return is of the total income, so that all other items are particulars of the return. It follows that the words " false in any particular " apply only to one or more of those items and not to the total figure. The word " particular " means particular of the return and is not confined to income. The phrase, " in any particular " is not comparable with the phrase under consideration in *R.* v. *Kylsant* (2). The submission that the phrase is used in the sense of item or detail and not in the sense of total is supported by the use of the phrase in ss. 170 (5), (7), (8), (8) (*b*), (177) (1) and 185. Section 227 is quite different from, and should not be regarded as a counterpart of, s. 230. The adoption of the contention made on behalf of the respondent would not in any way embarrass the Commissioner, but a decision to the contrary would mean that a taxpayer could be charged in respect of a final figure and he would not be able to determine in what respect he has to meet the charge; the magistrate may or may not insist upon the furnishing of particulars and would not be entitled to insist upon them if the charge were good. The mischief in this information is precisely the mischief the Court said was not proper in *Johnson* v. *Miller* (3). That case covers this case and is relevant because in this case there was no occasion for the prosecutor to be asked to identify the transaction unless his information was bad in substance, because if the information was good in substance he could stand on it. In this case also, as in that case, the defendant was not informed as to the transaction, or false particular, in respect of which he was charged. *Johnson* v. *Miller* (4) decides that there can be an ambiguity in an information which *ex facie* is not ambiguous, that is to say that the ambiguity can appear either from the particulars

(1) (1903) 1 K.B. 56, at pp. 60, 61, 63.
(2) (1932) 1 K.B. 442.
(3) (1937) 59 C.L.R. 467, at pp. 485, 486, 488-492, 496.
(4) (1937) 59 C.L.R. 467.

that are given, or could be rendered ambiguous when sought to be applied to the facts.

A. R. Taylor K.C., in reply. *Johnson* v. *Miller* (1) does not touch this case at all; it simply decided that the information in the circumstances there present did not specify with sufficient particularity pursuant to s. 22a of the *Justices Act* 1921-1936 (S.A.). The understatement of net income in an income-tax return constitutes that return a return which is false in a particular within the meaning of s. 227. There was no lack of particularity in the information. The respondent did not at any time make a request for particulars. The substance of the information is that the respondent did not make a full and complete return of his income.

The following judgments were delivered:—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales making absolute an order nisi for statutory prohibition in respect of the conviction of the respondent to this appeal in proceedings for an offence against s. 227 of the Commonwealth *Income Tax Assessment Act* 1936-1946.

Section 227, sub-s. (1), provides: "Any person who makes or delivers a return which is false in any particular, or makes a false answer, &c. shall be guilty of an offence."

The information upon which the respondent was convicted alleged that the respondent made a return of income derived from all sources in and out of Australia during the twelve months from 1st July 1942 to 30th June 1943, "which said return was false in a particular, to wit, the amount of £226 returned by the said defendant therein as net income from his business of a motion picture exhibitor and commissions, was understated by an amount of not less than £722, contrary to the Act in such case made and provided."

The prosecutor relied upon the averment contained in the information—*Income Tax Assessment Act* 1936-1946, s. 243.

The information was put in evidence and the defendant put in his income tax return. This return showed a net income of £226 from the two sources mentioned, that is, the business of a motion picture exhibitor and commissions, and no other income. It contained a declaration that the particulars shown disclosed without reservation or exception a full and complete statement of the total income derived from all sources, both in and out of Australia, by the taxpayer.

(1) (1937) 59 C.L.R. 467.

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Upon the hearing before the magistrate it was objected on behalf of the defendant that the information was bad in that it disclosed no offence, in that it did not charge falsity in any particular, and in that it did not sufficiently indicate particulars of the alleged falsity in a particular. The same objections were raised to the summons founded upon the information.

The magistrate overruled the objections and fined the defendant.

Upon appeal to the Full Court, the learned Chief Justice was of opinion that the information was bad for duplicity. The other members of the Bench, Mr. Justice *Davidson* and Mr. Justice *Street* did not agree with this view. It is true that the charge contained in the information might have been established by showing understatement of income in respect of either the business of motion picture exhibitor or of commissions ; but this fact, in my opinion, shows only that the charge made could have been supported by more than one class of evidence and not that several charges were made.

The majority of the Full Court held that in order to support a charge under s. 227 it was necessary to establish falsity in a particular in a return and that this could not be done by establishing falsity in the statement of the total income of a taxpayer. That is to say, it was held that the statement of the total income of a taxpayer was not a particular within the meaning of s. 227, but was the result of particulars, that is, the items and the details stated in the return.

Support for this conclusion was found in the New South Wales case of *Ex parte Wood* ; *Re Williams* (1) and a Queensland case, *Ramm* v. *Gralow* (2) although Mr. Justice *O'Bryan* came to a contrary conclusion in the Victorian case of *Federal Commissioner of Taxation* v. *Galt* (3). In *Ex parte Wood* ; *Re Williams* (1) it was held that under a substantially identical provision a mis-statement of the net amount did not amount to a falsity in a particular. *Ramm* v. *Gralow* (2) however, was not a clear decision on the same point ; it was a decision that an offence had not been charged in the words of the section of the Act, and it was also held that an information was bad if it did not specify the particular or particulars in which it was false. The latter criticism of the information was based on the fact that it did not state whether the falsity related to the net income, the income from property, or the income from personal exertion, or the taxable income. In the present case the information

(1) (1932) 32 S.R. (N.S.W.) 177 ; 49 W.N. 40.
(2) (1931) Q.S.R. 351.
(3) (1947) 8 A.T.D. 272.

is very different in form, because it specifies that the falsity was in the amount stated as the income derived from the sources mentioned.

The question which has to be decided is whether the omission of an item or items from a statement of income in a return in which it is stated that the whole of the income has been returned amounts to falsity in a particular in a return.

The statement in the present return is that the whole of the income of the defendant, which was an income derived from the two sources mentioned, amounted to £226. The allegation in the information is that that income amounted to £722 more than that sum. That allegation means that the amount of £226 stated in the return as being the whole of the income of the taxpayer is a false figure, because the income of the taxpayer was in fact a larger amount. Such an allegation, in my opinion, is an allegation that the return is false in a particular.

In my opinion, for those reasons, the decision of the Full Court should be reversed, the order nisi discharged and the conviction restored. The appellants should pay the respondent's costs of the appeal in accordance with an undertaking given upon the application for special leave to appeal.

STARKE J. I agree.

DIXON J. I agree. I think the case entirely depends upon the meaning of the words "false in any particular." If those words cover falsity in the final net figure given in the return, then it follows that the information sufficiently stated the charge and that no complaint can be made against the information on the ground that the false result may be produced by the falsity of one or more of the constituent items in the return. On that construction of s. 227, it would not be necessary to allege the falsity of a constituent item and it would not matter that by more than one possibility could the falsity charged in the final figure be brought about.

On the whole, I have come to the conclusion that the words "in any particular" do cover falsity in the final figure. The choice seems to be between construing those words as referring to the subordinate or constituent elements or items which go to make up the total return confining them to those constituent elements or items, and construing the words as simply meaning "in some specific or definite respect" and I think that the latter is the preferable construction to place upon them. It does not follow that, in a prosecution in which the informant avails himself of the

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construction which I have just assigned to those words, the magistrate may not, if the interests of justice require it, insist upon the prosecutor giving particulars of the specific items in the return the falsity of which leads to the falsity of the final figure. That is a question upon which he has a discretion which he may exercise in order to see that the defendant knows the case he has to meet and is not taken by surprise or otherwise embarrassed.

McTIERNAN J. I agree. I have nothing to add to what has been said by the Chief Justice and my brother *Dixon*.

WILLIAMS J. I agree.

Appeal allowed. Order of the Supreme Court set aside. Order nisi discharged. Conviction restored. Appellants to pay respondent's costs of appeal in accordance with undertaking. No order as to costs in the Supreme Court.

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

Solicitors for the respondent, *Kevin Ellis & Co.*

J. B.