[HIGH COURT OF AUSTRALIA.]

LEVER BROS. PROPRIETARY LIMITED . APPELLANT;

AND

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

H. C. OF A. 1948.

SYDNEY, *Sept.* 15, 27.

Williams J.

Income Tax (Cth.)—Australian business controlled abroad—Undistributed income—Further tax—Taxable income—Notional taxable income—Material facts necessary for assessment—Full and true disclosure—Assessment pursuant to s. 166 *and Part IIIA. of Act made subsequent to disclosure—Further assessments pursuant to s.* 136 *and Part IIIA. in respect of same income years—Liability of taxpayer increased—"Amended assessments"—Right to make assessments—Irregularities in assessments—Scope of Part IIIA.—Income Tax Assessment Act* 1936-1941 (*No.* 27 *of* 1936—*No.* 69 *of* 1941), *ss.* 6, 136, 160C, 166, 169, 170 (3), 175, 196.

In respect of the years of income ended 30th June 1936 to 1941 inclusive, a company duly furnished to the Commissioner returns setting forth a full and complete statement of the total income derived by it, and of any deductions claimed by it during these years. From these returns the Commissioner made assessments of the taxable income of the company and of the tax payable thereon. In October 1942 the Commissioner, under s. 136 of the Act, gave the company notices of assessment, referred to therein as "amended" assessments, in respect of the same years of income, and by each assessment increased the taxable income of the company and the amount of tax payable by it. Credit was given for payments made under the first-mentioned assessments. On 31st March 1941 and 14th May 1942, the Commissioner gave the company notices of assessment under Part IIIA. of the Act of further tax on the company's undistributed income derived during the years ended 30th June 1940 and 30th June 1941 respectively. These taxes were based upon the same taxable income as that assessed for these years in the first-mentioned assessments. In March 1943, the Commissioner gave the company notices of assessments, called amended assessments, under Part IIIA. based on the notional taxable income derived during the years ended 30th June 1940 and 30th June 1941 respectively, determined under s. 136 of the Act. These assessments increased the amounts of tax beyond the amounts payable under the previous assessments. Credit was given for payments made under the previous assessments.

Held, (1) that the assessments made in October 1942 pursuant to s. 136 of the *Income Tax Assessment Act* 1936-1941, and the assessments under Part IIIA. made in March 1943, were original assessments and not amended assessments;

(2) that there was nothing in s. 170 (3) which prevented the Commissioner making the assessments under s. 136; and

(3) that the Act confers upon the Commissioner a right to make an assessment under s. 169 pursuant to a determination under s. 136, which right is separate and distinct from his ordinary right to make an assessment under s. 166.

APPEAL under *Income Tax Assessment Act*.

Lever Bros. Pty. Ltd. appealed under s. 196 of the *Income Tax Assessment Act* 1936-1941 to the High Court against a decision by the Board of Review upholding the decision of the Federal Commissioner of Taxation by which he disallowed objections made by the appellant against six assessments made pursuant to s. 136 of the Act in respect of the years of income ended 30th June 1936 to 30th June 1941 inclusive, and two assessments of further tax on undistributed income made pursuant to Part IIIA. of the Act.

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

Weston K.C. and *O'Meally*, for the appellant.

A. R. Taylor K.C. and *Dillon*, for the respondent.

Cur. adv. vult.

Sept. 27.

WILLIAMS J. delivered the following written judgment:—

This is an appeal by Lever Bros. Pty. Ltd. under the provisions of s. 196 of the *Income Tax Assessment Act* 1936-1941 from a decision of the Board of Review given on 22nd March 1948. The appeal concerns the refusal of the Board to overrule the decision of the Commissioner of Taxation disallowing objections lodged by the Company against six assessments made pursuant to s. 136 of the *Income Tax Assessment Act* and two assessments of further tax on undistributed income made pursuant to Part IIIA. of that Act. Although s. 196 refers to the proceedings in this Court as an appeal, they are proceedings, as has so often been stated, in the original jurisdiction, but the parties have agreed that the evidence given before the Board so far as relevant shall be considered to be evidence given in these proceedings. A number of grounds were taken in the notice of appeal, but the only ground

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pressed was that the Board should have held that the Commissioner was precluded by s. 170 (3) of the Act from making the eight assessments in question.

The facts relevant to this ground can be shortly stated. In respect of the years of income ending approximately 30th June 1936 to 1941 inclusive, the Company duly furnished to the Commissioner returns setting forth a full and complete statement of the total income derived by it and of any deductions claimed by it during these years. From these returns the Commissioner made assessments of the taxable income of the Company and of the tax payable thereon. I shall call these assessments ordinary assessments. They were made on 25th March 1937, 24th February 1938, 21st March 1939, 18th March 1940, 31st March 1941 and 16th May 1942 respectively. On 15th October 1942 the Commissioner gave the Company notices of assessment in respect of the same years of income under s. 136 of the Act, and by each assessment increased the taxable income of the Company and the amount of tax payable by the Company. Credit was given for payments made under the ordinary assessments. The notices referred to these assessments as amended assessments.

On 31st March 1941 and 14th May 1942, the Commissioner gave the Company notices of assessment under Part IIIA. of the Act of further tax on the undistributed income of the Company derived during the years ended 30th June 1940 and 30th June 1941 respectively. These taxes were based upon the same taxable income as that assessed for these years in the ordinary assessments. On 16th March 1943 the Commissioner gave the Company notices of assessments called amended assessments under Part IIIA. based on the notional taxable income derived during the years ended 30th June 1940 and 30th June 1941 respectively determined under s. 136 of the Act. These amended assessments increased the amounts of tax beyond the amounts payable under the previous assessments. Credit was given for payments made under the previous assessments.

The contention of the appellant is that the six assessments made under s. 136 and the two assessments made under Part IIIA. on 16th March 1943 were all amended assessments and all void because they contravened s. 170 (3) of the Act. This provides, so far as material, that 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.

The assessments under discussion can be divided into three classes :—(1) the six assessments which I have called the ordinary assessments ; (2) the six assessments made pursuant to s. 136 ; and (3) the four assessments made pursuant to Part IIIA. The assessments in the first class were made under the authority conferred upon the Commissioner by s. 166 of the Act. They were based on the information contained in the returns and were assessments of the actual taxable income as defined by s. 6 of the Act. The assessments in the second class were of a different nature. An assessment can only be made under s. 136 where the business carried on in Australia is a business which is controlled principally by non-residents or is carried on by a company having the characteristics therein mentioned, and it appears to the Commissioner that the business produces either no taxable income or less than the amount of taxable income which might be expected to arise from that business. It is therefore an assessment based not on the actual income derived from the business during the year of income but on a notional income. The section provides that the person carrying on the business in Australia shall, notwithstanding any other provision of the Act, be liable to pay income tax on a taxable income of such amount of the total receipts (whether cash or credit) of the business as the Commissioner determines. An assessment of the tax payable on this notional taxable income is not made under s. 166, but under s. 169. It is an original assessment made on a different basis altogether to an ordinary assessment and under a different section. It is not in any sense an amendment of an ordinary assessment.

I adhere to the opinion expressed in *Cadbury-Fry-Pascall Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) that s. 170 (3) must be read distributively with respect to every separate assessment which the Commissioner is authorized to make under the Act, and that it does not prevent him issuing separate assessments although the effect of the later assessment may be to increase the liability of the taxpayer under the earlier assessment. In my opinion, therefore, there is nothing in s. 170 (3) which prevented the Commissioner making the six assessments under s. 136. These assessments were called amended assessments whereas they were in law original assessments. But no reliance was placed by Mr. *Weston*, rightly in my opinion, on this misdescription. They were expressed to be assessments made under s. 136 and the fact that they were called amended assessments was an irregularity covered by s. 175 of the Act.

(1) (1944) 70 C.L.R. 362, at pp. 393, 394.

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The original assessments under Part IIIA., the validity of which has not been challenged, were the assessments made on 31st March 1941 and 14th May 1942. The two assessments of 16th March 1943 were stated to be amendments to these assessments. These amendments were made on the basis that the substitution of a notional taxable income under s. 136 for the years of income ending 30th June 1940 and 30th June 1941 respectively for the actual taxable income increased the portion of the taxable income of the Company which had not been distributed as dividends.

It is unlawful for a company to pay dividends except out of profits. The notional taxable income determined under s. 136 would be an amount, a part or even the whole of which, would not be profits of the company. It would therefore be in part or whole income which the company could not lawfully distribute by way of dividend. In the absence of a clear intention to the contrary, it might have been thought that Part IIIA. of the Act was intended to deal with income which could lawfully be distributed by way of dividend and therefore with the actual taxable income as defined in s. 6 and assessed under s. 166 of the Act. But s. 160C. enumerates deductions which may be made in order to ascertain that portion of the taxable income of a company which has not been distributed as dividends. One of these deductions is the net loss, except to the extent to which it is a loss of a capital nature, incurred by the company in the year of income in carrying on its business out of Australia, provided that this deduction shall not be made in the case of a company the taxable income of which is assessed under Div. 13 (that is under s. 136). It is therefore clear that when the notional taxable income determined under s. 136 is substituted for the actual taxable income, Part IIIA. is concerned with that notional taxable income, and the company becomes liable to pay further tax on that portion of that income which, less all allowable deductions, is not distributed as dividends. There is no specific section of the Act which entitles a taxpayer, who is first assessed under an ordinary assessment and pays tax and is then re-assessed under s. 136, to set off the amount he has paid on the first assessment against his liability under the second assessment. But it seems to me that, when the Commissioner determines the amount of the notional taxable income under s. 136, this amount must be substituted for the actual taxable income. The assessment of the taxpayer on his notional taxable income under s. 169, as the Board said, replaces the assessment of the taxpayer on his actual taxable income under s. 166, and the moneys paid under the earlier assessment must be refunded or set off against his liability under the new assessment.

Further the taxpayer, if a company, may, as in the present case, have been assessed and paid further tax under Part IIIA. of the Act on that portion of its actual taxable income which has not been distributed as dividends. The determination by the Commissioner of a notional taxable income for the Company under s. 136 in lieu of its actual taxable income would then necessitate an assessment of the Company for further tax under Part IIIA. upon that portion of the notional taxable income which has not been distributed as dividends. The new assessment would again replace the previous assessment. It would not be an amendment of that assessment. It would be an original assessment.

It was also contended that the rights of the Commissioner to assess the appellant under s. 166 and under s. 169 pursuant to a determination under s. 136 were alternative and that, since the Commissioner had elected to assess the appellant on its actual taxable income, he could not subsequently assess the appellant on its notional taxable income. But there is no express provision in the Act which compels the Commissioner so to elect and there is nothing in the policy of the Act from which I can draw such an implication. The Act gives the Commissioner a right to assess under s. 169 pursuant to a determination under s. 136 which depends upon the taxpayer having certain characteristics, and this appears to me to be a right which is separate and distinct from his ordinary right to assess under s. 166. It is a means of exacting from such a taxpayer additional tax to that for which he would be liable on an ordinary assessment.

For these reasons I am of opinion that all the appeals fail and I must order that they all be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant, *W. O. A. Astridge.*

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

J. B.