[HIGH COURT OF AUSTRALIA.]

DENVER CHEMICAL MANUFACTURING COMPANY . . . . . APPELLANT;

AND

THE COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1949.

SYDNEY, *July* 27-29.

Dixon, McTiernan, Williams and Webb JJ.

Taxation (N.S.W.)—Income tax—Assessable income—Foreign company—Local branch—Sales of products in New South Wales and other States—Assessment at percentage of gross proceeds—Returns disclosing sales in New South Wales only—Amended assessments on basis of net profits—Avoidance of tax . . . due to . . . evasion"—Discretionary power of commissioner—Opinion—"As he thinks necessary"—Review by Board of Appeal, State Supreme Court and High Court—Income Tax (Management) Act 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *s.* 18—*Income Tax (Management) Act* 1928 (*N.S.W.*) (*No.* 35 *of* 1928), *ss.* 25, 26, 27—*Income Tax (Management) Act* 1936 (*N.S.W.*) (*No.* 41 *of* 1936), *s.* 210 (1), (2)*—*Income Tax Management Act* 1941 (*N.S.W.*) (*No.* 48 *of* 1941), *ss.* 238, 248, 255.*

From 1923 to 1934 W., the agent in New South Wales of a company incorporated in New York and, since 1906, registered in this State as a foreign company, sold in this and other States of Australia a medicinal commodity manufactured in New South Wales out of materials obtained in part locally

*Section 210 of the *Income Tax (Management) Act* 1936, provides: "(1) The Commissioner may subject to this section amend any assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that the tax may have been paid in respect of the assessment. (2) An amendment may be made under this section—(*a*) where the Commissioner is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion—at any time." By virtue of s. 305 (1) and the first schedule of that Act, s. 210 is made applicable to all assessments made under the *Income Tax (Management) Act* 1912, and by virtue of s. 305 (2) and the second schedule of the 1936 Act, s. 44 of the *Income Tax (Management) Act* 1928 is amended by inserting at the end a new sub-s. (4) in the following terms: "The provisions of s. 210 of the *Income Tax (Management) Act* 1936 shall as from the commencement of that Act, apply to assessments made under this Act." The *Income Tax Management Act* 1941 provides: by s. 238, "Notwithstanding anything contained in

and in part from the company abroad. Each year W., on behalf of the company, made a New South Wales income tax return disclosing only, and unknown to the Commissioner of Taxation, gross sales in this State instead of gross sales in Australia as had been arranged with the commissioner. State income tax was assessed at a certain percentage of the gross amount disclosed. Having become aware of the undisclosed sales in other States, the commissioner formed the opinion that there had been avoidance of tax by evasion and, in July 1941, under s. 210 (1) of the *Income Tax (Management) Act* 1936 (N.S.W.), issued amended assessments in respect of those years upon the basis not of a percentage of gross sales but of net profits. The decision of the Board of Appeal dismissing appeals against the amended assessments was upheld by the Supreme Court. Upon appeal to the High Court,

Held, (1) that by virtue of ss. 210 (1) and 305 (1) and the First Schedule of the *Income Tax (Management) Act* 1936 (N.S.W.) the commissioner had power to amend the assessments, and was not prevented by s. 18 of the *Income Tax (Management) Act* 1912, or ss. 25, 26 or 27 of the *Income Tax (Management) Act* 1928 from amending them as he had done; (2) that in the formation of its opinion the Board of Appeal did not commit any error of law; and, therefore (3) that the appeal should be dismissed.

The Board of Appeal, and not the Court, is the tribunal to review opinions formed by the Commissioner of Taxation (N.S.W.) in the exercise of the discretion conferred upon him by s. 210 of the *Income Tax (Management) Act* 1936 (N.S.W.). Once the Board of Appeal has expressed its opinion upon an appeal to it, the Supreme Court is no longer concerned with the opinion of the commissioner. Unless the Court is satisfied that the Board of Appeal acted in error of law or misconception of its duty, capriciously or arbitrarily, or upon irrelevant considerations, an appeal against an opinion of the Board must fail.

The combined effect of ss. 238, 248 and 255 of the *Income Tax Management Act* 1941 (N.S.W.) is to confine an appeal to the Supreme Court under s. 255

this Act a taxpayer who is dissatisfied with any opinion, decision or determination of the Commissioner given in the exercise of a discretion conferred upon him under this Act and who is dissatisfied with the assessment made pursuant to or involving such opinion, decision or determination shall, after the assessment has been made, have the same right of objection in respect of such opinion, decision or determination and assessment as is provided in this Part and also the same right of appeal as is provided in this Part against any decision of the Commissioner upon any such objection, except that such appeal shall be to the Board only"; by s. 248, "For the purpose of hearing and determining appeals the Board shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act and such assessments, determinations and decisions of the Board and its decisions upon appeals, shall for all purposes (except for the purpose of objections thereto and appeals therefrom) be deemed to be assessments, determinations or decisions of the Commissioner"; and by s. 255, "(1) The Commissioner or taxpayer may . . . appeal to the Court from any decision of the Board which involves—(*a*) a question of law; or (*b*) a question of fact where the Board certifies that the amount of tax in dispute . . . exceeds the sum of three hundred pounds."

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from an opinion by the Board of Appeal, to an opinion on a question of law under sub-s. (1) (*a*). An appeal from such an opinion is not a question of fact within sub-s. (1) (*b*).

The word " evasion " as used in s. 210 (2) of the *Income Tax (Management) Act* 1936 (N.S.W.) contemplates some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible.

Once it has been found that there has been fraud or evasion the commissioner is at liberty, under s. 210 (1), to reconsider the whole matter, and he is not limited merely to rectifying the consequences of the fraud or evasion.

Decision of the Supreme Court of New South Wales (Full Court): *Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation*, (1949) 49 S.R. (N.S.W.) 195; 66 W.N. (N.S.W.) 77, affirmed.

APPEAL from the Supreme Court of New South Wales.

The Denver Chemical Manufacturing Co. appealed to the High Court against the decision of the Full Court of New South Wales dismissing appeals from the decisions of the Income Tax Board of Appeal (N.S.W.) dismissing appeals against amended assessments for income tax made by the Commissioner of Taxation for the State of New South Wales, for each of the years ended 30th June 1923 to 30th June 1934 inclusive.

The company was incorporated in the United States of America and had had a branch in Sydney since prior to 1906. " Antiphlogistine," a medical product of the company, was sold by the Sydney branch to purchasers in all States of America and in New Zealand. Until 1917, antiphlogistine was imported from America, but in that year, manufacture was commenced locally from ingredients partly imported from America and partly obtained locally.

In original assessments for purposes of New South Wales income tax in respect of all the said years up to and including the year ended 30th June 1934, the taxable income was determined on the basis of a percentage of the amount of the sales disclosed in the returns furnished by the company. In the years 1923 to 1928 inclusive the percentage was five; in the years 1929 to 1931 inclusive the percentage was seven and one-half; and in the years 1932 to 1934 inclusive the percentage was five.

An investigation made by the commissioner in 1940 revealed that, in respect of each of the twelve years respectively ended 30th June 1923 to 30th June 1934 the sales shown in the returns comprised sales to purchasers in New South Wales only, and did not include sales to purchasers in other States or New Zealand. The commissioner, being of opinion that there had been an avoidance of tax and that the avoidance was due to fraud or evasion, amended the

assessments in respect of the years mentioned and issued notices of the amendments on 2nd July 1941, the total further tax payable under the twelve amended assessments being £27,675 7s. 6d. For purposes of the amended assessments, the taxable income of the company was determined by the application of the method known as the betterment principle. In addition to the tax charged in the amended assessment in respect of each of the seven years ended 30th June 1928 to 30th June 1934 inclusive, " additional tax " was charged by way of penalty for omission of income, the total additional (penalty) tax so payable being £3,008 11s. 1d. The *Income Tax (Management) Act* 1912 (N.S.W.) did not contain any provision which authorized the charging of such additional tax in the amended assessments in respect of the earlier years.

Appeals to the Income Tax Board of Appeal were made by the company in respect of these amended assessments on, *inter alia*, the following grounds :—1. that the amended assessments were precluded by reason of s. 210 of the *Income Tax (Management) Act* 1936 (N.S.W.) and by the first and second schedules of that Act ; 2. that there was no avoidance of tax due to fraud or evasion, that the commissioner should not have formed an opinion that the avoidance, if any, was due to fraud or evasion, and that any such opinion formed by the commissioner was not properly formed and should be set aside ; and 3. that in the exercise of a discretion, the commissioner fixed five per cent of the sales as the proportion of profits arising from sales made in the State, attributable to sources in the State, and was not entitled to alter such percentage or to adopt the basis followed in the amended assessments for the purpose of arriving at the profit derived from sources in the State.

The company did not appeal in respect of the amended assessments issued for each of the years ended 30th June 1912 to 30th June 1922 respectively. Appeals made by the company in respect also of the disallowance by the commissioner of objections relating to unemployment relief tax and special income tax are not material to this report.

In October 1906 the company appointed one James Garfield Woodward to be the manager of its Sydney branch. At that time the annual taxation returns were prepared by a taxation agent on the basis of the gross amount received each year in respect of the sales made in Australia, and the New South Wales income tax assessed as payable, and paid, was a certain percentage of this amount, and he continued to do so until 1913 when, in order to save the taxation agent's fee, Woodward either made the annual returns himself or had them made by his staff, the returns so

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prepared following the practice established by the taxation agent. Just prior to the commencement in 1917 of the local manufacture of antiphlogistine there was some concern as to whether the compilation of future returns on the basis hitherto adopted would be adequate. An employee of the company discussed the matter at length with an officer or officers of the income-tax department and the advice orally given to the employee, who duly informed Woodward, was that, until the department instructed otherwise, the company's returns should continue to be made up on the same basis as previously. This was done for each of the years ended 30th June 1918 to 30th June 1922 respectively. But in 1923 Woodward made a change in the method of compiling the return—the sales shown in the return for the year ended 30th June 1923, and also in the returns for subsequent years, were restricted to sales to New South Wales purchasers. In making this change Woodward was influenced by advice given him, sometime between 1921 and 1923, by a close personal friend who had since died but who at that time was assistant manager of a company of American origin, the Australian branch of which was registered in New South Wales as an Australian company and had a resident representative in each of the other Australian States. The company concerned, so Woodward was informed by his friend, furnished returns and paid tax in each State, but he, the friend, was of opinion that Woodward's company, being a foreign company having its only Australian branch in New South Wales and having no resident representative in other States, was liable to taxation on New South Wales sales only. Woodward did not seek other advice before deciding to show, in the 1923 return, sales to New South Wales purchasers only. He said it seemed to him obvious that that was the right way to compile the return and that the method adopted in compiling earlier returns was incorrect. He said he was convinced that the company had made overpayments of tax in respect of the earlier years but it did not occur to him to seek a refund from the department of the amounts overpaid. At the time the New South Wales sales represented about one-third of the total sales in Australia and Woodward realized that an effect of the change would be to reduce substantially the amount of tax payable in New South Wales.

In December 1928, the New South Wales Commissioner in a letter to the company's Sydney branch said that for the purpose of calculating rebate allowable to shareholders under s. 11 (*b*) of the *Income Tax* (*Management*) *Act* 1928 (N.S.W.) and if the company derived income in more than one State during the year ended 30th June 1928 and the accounts already lodged covered New South

Wales income only, he required to be forwarded to him (*a*) detailed aggregate balance sheets as at 30th June 1927 and 30th June 1928, respectively, and (*b*) detailed profit and loss accounts, showing the total income derived by the company from all sources, both inside and outside New South Wales, during the years ended 30th June 1927 and 30th June 1928 respectively.

Correspondence ensued between Woodward and the company's head office at New York, and in March 1929 that office forwarded to Woodward copies of relevant balance sheets, accounts and other information. The "Australian Profit and Loss Account" so forwarded disclosed that sales for the year ended 30th June 1928 totalled £47,687 14s. 2d. (the amount of New South Wales sales shown in the return submitted by Woodward was £15,836) and that the net profit, after debiting, *inter alia*, £326 18s. 5d. in respect of Federal and New South Wales taxes, and £2,529 11s. 1d. in respect of "Head Office Overhead," was £20,209 12s. 9d. The "cost of sales" debited by transfer from the manufacturing account was shown as £20,597 6s. 1d. so that the rate of net profit on cost approximated 100 per cent and the profit on sales 42.37 per cent.

The detailed accounts forwarded by the company's head office were not submitted to the department. Woodward's advice to this effect and the intimation that "we shall not file them unless we are compelled to do so" were acknowledged by the company in a letter to Woodward in June 1929.

At the hearing before the Income Tax Board of Appeal Woodward referred to the commissioner's letter of December 1928 and said that as the company had no Australian shareholders he concluded it was not necessary to supply the information asked for. In so concluding he was, he stated, also influenced by the considerations that the tax for the year concerned had in the meantime been paid in respect of an assessment on the basis of sales and that the department had not replied specifically to an inquiry made by him as to whether the information so asked for applied to foreign companies registered in New South Wales.

In May 1938, a return of income derived by the company during the year ended 30th June 1937 and an accompanying full set of accounts, intended for lodgment at the Federal taxation department, were lodged in error with the New South Wales Commissioner of Taxation. Because of the information disclosed by these accounts the New South Wales Commissioner initiated an investigation into the liability of the company for income tax. The investigation was made at the company's branch office at Sydney during the later

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part of 1940. The company's letter of March 1929 and the accompanying documents were not with the file, and Woodward informed the investigating officer that he had no knowledge of their whereabouts, but they were produced at the hearing before the Board.

The amended assessments made in July 1941 under s. 210 of the *Income Tax (Management) Act* 1936 were not made on the basis of a percentage of the gross sales in Australia but on the basis of tax payable according to the results of an ordinary profit and loss account.

Upon appeals by the company against the amended assessments the Income Tax Board of Appeal said it was not for the Board to say whether the grounds upon which the commissioner formed his opinion were adequate, the duty of the Board was to examine the facts for itself. The Board confirmed the amended assessments and dismissed the appeals.

Appeals from the Board's decisions were dismissed by the Full Court of the Supreme Court of New South Wales : *Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation* (1).

From that decision the company appealed to the High Court.

F. Louat, for the appellant. The whole matter, including the issue of evasion, is before the Court (*Barripp* v. *Commissioner of Taxation (N.S.W.)* (2)). The sole question on this aspect in *Moreau* v. *Federal Commissioner of Taxation* (3) was the power of the Commissioner to act retrospectively beyond a certain period of time. The evidence taken as a whole does not warrant the finding of evasion. Evasion should be strictly proved. On the evidence the question of whether the income was, in the circumstances, New South Wales income or income from other States was one of fine distinction. A mistake by a layman should not, in the circumstances, be held to be evasive. Woodward gained no material advantage from the alleged evasion, and the company was, as found by the Board, completely innocent of the matter (*R.* v. *Australasian Films Ltd.* (4)). It is conceded by the Board that there was not any real motive for the evasion. The critical thing for examination was Woodward's state of mind and the fact that the Board accepted Woodward's belief as to the incidence of taxation in Australia and in America is important. It is clearly contemplated by the *Income Tax Management Act* 1941, that the Board in a substantial number of its cases would be dealing with instances in which the opinion of the commissioner was

(1) (1949) 49 S.R. (N.S.W.) 195 ; 66 W.N. 77.
(2) (1941) 6 A.T.D. 69, at p. 70 ; (1940) 41 S.R. (N.S.W.) 16.
(3) (1926) 39 C.L.R. 65.
(4) (1921) 29 C.L.R. 195.

involved, since all cases of that description are directed to the Board. Section 238, in conjunction with s. 255 of that Act, shows that where a taxpayer goes by way of the Board on a question involving an opinion of the commissioner that question is, by the relevant sections, made fully open to be litigated. In any case where there is an appeal involving an opinion of the commissioner, that renders the second branch of the right of appeal quite nugatory because, *ex hypothesi*, the Board has formed an opinion and by substituting its opinion for that of the commissioner it has to close all inquiry at that. Remedial provisions which are designed to confer rights on a class which has not got many rights are open to the construction that upon an appeal to it the Board is entitled to determine whether the commissioner's opinion had been rightly formed. The question for the Board in this case was whether there was evasion, not whether the commissioner had an opinion that there was evasion. That is a fact which the Board determines, and it is upon that question of fact that the appeal is made to the Court. When there is an appeal from one tribunal to another on both law and fact regard is had to what were the issues before the lower tribunal. Unquestionably there was an issue of fact litigated before the Board. The issue of fact was whether evasion took place, and the right of appeal is a right to appeal in respect of that fact. The whole obvious intention of s. 255 would be frustrated if there could not be an appeal on this question. Under s. 255 (3), there being an appeal on a question of fact, the Court is entitled to do what the Board did or ought to have done. *Moreau* v. *Federal Commissioner of Taxation* (1) is inapplicable because the appeal sought in that case was from an opinion whereas in this case there was, subsequent to the decision of the commissioner, a hearing by a quasi-judicial tribunal of evidence, and a finding on that evidence, and it is from that finding that it is sought to appeal, which is a very different thing from an appeal against an opinion.

[DIXON J. referred to *Commissioner of Stamp Duties (Q.)* v. *Beak* (2).]

Alternatively, there is not any rational basis disclosed in the evidence for the opinion formed by the Board. The Board arrived at its decision by applying a legally irrelevant test. It has never been judicially said regarding the meaning of evasion, that if a man genuinely holds a belief that he is not liable to tax, he is bound to put before the commissioner the material on which the commissioner may raise a contrary contention. The meaning of " evasion "

(1) (1926) 39 C.L.R. 65.

(2) (1931) 46 C.L.R. 585, at p. 597.

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was discussed in *Wilson* v. *Chambers & Co. Pty. Ltd.* (1). The facts do not show " intentional avoidance of something disagreeable " nor do they show anything " in the nature of conscious artifice." The amended assessments seek to make the company liable for moneys not legally exactable under the relevant legislation. Grounds of objection are not to be considered unduly strictly against the taxpayer. The commissioner was not empowered to amend the basis of assessment from a percentage basis to a profit and loss basis : see ss. 9, 11, 15, 16 and 18 of the *Income Tax (Management) Act* 1912. In making amended assessments the commissioner is limited to remedying the consequences of evasion. The company was resident " out of the State " and Woodward was its " agent," that is to say, " the person who was acting for the company " in making the sales in New South Wales (*Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (2) ; *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (3) ; *Waterloo Pastoral Co. Ltd.* v. *Federal Commissioner of Taxation* (4)). The deed to which the law attaches liability for income tax is selling goods by an agent. It is irrelevant to the operation of ss. 11 and 18 what may have been done by way of preparation to sell. The company fell within the words of s. 18, therefore it was the duty of the commissioner to tax on that basis. The assessments for the years 1928-1934 inclusive could only have been made under s. 25, or s. 27, or, remotely possible, s. 29 of the *Income Tax (Management) Act* 1928. The making of a determination under s. 25 was not part of the process of assessing, but was, on the contrary, the selection of a basis for assessing (*Ferrando* v. *Pearce* (5)). Upon the making of that determination the taxpayer became liable to taxation in a way different from the way in which hitherto he had been liable to it. Section 216 of the *Income Tax Management Act* 1941, which took the place of s. 210 of the 1936 Act, is a legislative recognition, (i) that the determination is not part of the making of the assessment, and (ii) that s. 210 of the 1936 Act did not include power to alter such a determination. An amended assessment is not a new assessment, it is simply an old assessment amended (*R.* v. *Deputy Federal Commissioner of Taxation (S.A.)* ; *Ex parte Harper* (6) ; *Liverpool and London and Globe Insurance Co. Ltd.* v. *Federal Commissioner of Taxation* (7) ; *Federal Commissioner of Taxation* v. *S. Hoffnung & Co. Ltd.* (8)). An amended assessment must be in the character

(1) (1926) 38 C.L.R. 131, at pp. 136, 141, 144, 148, 151.
(2) (1929) A.C. 1.
(3) (1941) 64 C.L.R. 241.
(4) (1946) 72 C.L.R. 262.
(5) (1918) 25 C.L.R. 241, at p. 256.
(6) (1926) 37 C.L.R. 368, at pp. 372, 373.
(7) (1927) 40 C.L.R. 108, at p. 112.
(8) (1928) 42 C.L.R. 39.

of the original assessment. It is an amendment of the calculation and is not the re-selection of the statutory measure of liability. The discretion conferred by s. 210 of the 1936 Act is not an unfettered one (*Re Income Tax Acts* (*No.* 4) (1)). The word " necessary " as used in that section means " necessary to ensure the completeness and accuracy of the assessment." In relation to an assessment on the footing of fraud or evasion it would mean " necessary in a case of fraud or evasion to rectify the consequences of the fraud or evasion." It certainly does not mean necessary in order to levy the largest possible amount of income tax which the commissioner can impose by the use of all the powers of discretion conferred upon him, or the abandonment of it. In any event the facts do not provide any rational basis for an opinion as to the necessity of changing the basis of taxation (*Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (2)). There is nothing from which an inference can be drawn that the commissioner was not satisfied that the true state of affairs was disclosed in the returns. If the foregoing submissions are not correct an anomalous position would arise in respect of other " foreign " companies carrying on large businesses in Australia. The very possibility of those anomalies is itself a propelling influence in the construction of s. 210 (*Astor* v. *Perry*; *Duncan* v. *Adamson* (3)). There is a general principle in the nature of a presumption that the legislature does not intend retrospectively to open closed transactions any further than is specifically provided for.

K. W. Asprey, for the respondent. The Court is not entitled to investigate for itself whether the Board could or ought to have come to the opinion that there had been an avoidance of tax due to evasion, except to the extent of ascertaining whether the Board had acted fancifully or capriciously on irrelevant or legally inadmissible grounds. Under s. 248 of the 1941 Act the Board's opinion is in substitution of the opinion of the commissioner. Section 237 provides for objections against assessments, and includes amended assessments. An objection under s. 238 is not against assessments but is in respect of the commissioner's opinion, which precedes assessments, and is against the exercise of his discretion. Section 238 should be read in conjunction with s. 248, and, so read, upon an objection to an opinion of the commissioner the Board, under s. 248, exercising all the powers and functions of the commissioner, may come to such an opinion as it thinks fit. The power to test the

(1) (1933) Q.S.R. 166.
(2) (1935) 53 C.L.R. 534, at p. 555.
(3) (1935) A.C. 398, at pp. 413, 415.

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commissioner's opinion is conferred upon the Board alone, and is reserved from the Court. The words " a question of fact " in s. 255 (1) (*b*) of the 1941 Act are wholly inappropriate to test the question of the commissioner's opinion under s. 210 (1) (2) of the 1936 Act. The question of whether there was evasion is not a question of fact. Neither the commissioner nor the Board stated that there was evasion, but both expressed themselves as of opinion that there was evasion. In *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (1) the opinion was in making up the assessment, but the opinion referred to in s. 210 has nothing whatever to do with the form or substance of the assessment; it is an opinion, or a state of mind at which the commissioner arrives as a condition precedent to the power to make his assessment. In *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (1) there was not any limitation of the right of appeal and the decision of the commissioner under s. 47 of *The Succession and Probate Duties Acts* 1892 *to* 1920 (Q.) was a decision on a question of fact. The Court is not entitled to and should not substitute its opinion for the opinion of the Commissioner or the Board (*MacCormick* v. *Federal Commissioner of Taxation* (2); *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (3)).

[WILLIAMS J. referred to *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (4).]

The words used in s. 255, when contrasted with the provisions of ss. 238, 247 and 248, are not apt words to displace the opinion of the commissioner. The question is not whether there has been evasion in fact, but is whether or not the commissioner and then the Board, because of the Board's substitution of the functions of the commissioner, were of opinion that there had been evasion as such. The Board in coming to its conclusion did not act upon any fanciful, capricious or legally inadmissible or irrelevant ground. " Evasion " should be given the interpretation as in *Wilson* v. *Chambers & Co. Pty. Ltd.* (5). The onus is not upon the respondent to show motive. Even assuming that the matter of evasion is one for the Court, the evidence discloses several matters which show that there was evasion within the meaning of the statute. The Board had ample grounds for its finding that Woodward had acted evasively. The expression " resident out of the State " in s. 4 of the 1912 Act, refers to natural persons only. Section 18 of that Act and s. 9 of the 1928 Act were never applied. There is not any evidence that the commissioner applied either s 25 or s. 27 of the

(1) (1931) 46 C.L.R. 585.
(2) (1945) 71 C.L.R. 283, at pp. 300, 307.
(3) (1935) 53 C.L.R., at pp. 554, 557-559.
(4) (1949) A.C. 24.
(5) (1926) 38 C.L.R., at p. 151.

1928 Act. Section 9 of the 1912 Act, plus the definitions in that Act, and ss. 8, 11 and 19 of the 1928 Act, together with the definitions therein, might have given the commissioner power to do what he in fact did in the amended assessments, and he was not limited to percentage. Section 210 of the 1936 Act conferred very wide powers upon the commissioner which empowered him to act as he did in this case. An amendment could be a complete re-arrangement of the assessment and the basis of it. The word "necessary" in s. 210 means "as best he can, having regard to the means at his disposal".

F. Louat, in reply. Section 248 of the 1941 Act makes it clear that the Board's finding in this case is not deemed to be the opinion of the commissioner. Whatever may be the meaning of "evasion" in a general sense and where the section is used in another context, regard must be had to that context to ascertain its meaning in relation to the Act. If the Board has weighed the circumstances by a measure which does not take full account of what evasion means in s. 210 (2) (*a*) of the 1936 Act, then that is a vitiating circumstance so far as its finding is concerned. *Wilson* v. *Chambers & Co. Pty. Ltd.* (1) is not in point with regard to that section. It was neither unreasonable nor wrong for Woodward, a layman, to act upon the advice of a friend. The principle referred to in *Davies & Fehon Ltd.* v. *Federal Commissioner of Taxation* (2) as having been laid down in *Blatch* v. *Archer* (3) is obviously right, but in this case it operates in reverse. The appellant discharged the onus of showing under what sections he was assessed by showing that it was in fact assessed to a percentage of sales. The onus then passed to the respondent. Section 25 of the 1928 Act was available to be used by the commissioner. The principle of the interpretation of statutes expressed in *Ferrando* v. *Pearce* (4) is applicable to the statutes now under consideration. The commissioner was not entitled to depart from the determination made by him.

Cur. adv. vult.

July 29.

The following judgments were delivered:—

DIXON J. This proceeding is an appeal by a taxpayer from a decision of the Board of Appeal established under the *Income Tax (Management) Act* of New South Wales. The decision confirmed amended assessments for years of income ended on 30th June 1923 and 30th June of each succeeding year to 1934. The amendments

(1) (1926) 38 C.L.R. 131.
(2) (1926) R. & McG. 83.
(3) (1774) 1 Cowp. 63, at p. 65 [98 E.R. 969, at p. 970].
(4) (1918) 25 C.L.R., at p. 256.

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were made on 2nd July 1941, that is, before the *Income Tax Management Act* 1941 came into operation.

Having regard to the date of the notices of objection and of the decisions of the commissioner thereon, the Act of 1941 operates in respect of procedure in the proceedings both before the Board of Appeal and in the courts. But the liability of the taxpayer to tax and the measurement of its income is governed by the earlier Acts. As to the years from 30th June 1923 to 30th June 1928, the substantive liability of the taxpayer is governed by the Act of 1912. As to the years 30th June 1928 to 30th June 1934, it is governed by the Act of 1928.

The taxpayer is incorporated in New York and is registered in New South Wales as a foreign company and at all material times it carried on business here under the direction of a branch manager. During the years under consideration the business consisted of the manufacture and sale of a preparation which is called " Antiphlogistine " and is used in the course of medical treatment. Ingredients for the manufacture of the commodity, or some of them, were imported from the United States of America by this foreign company. Presumably the company was controlled and administered from New York and, at all events, the circumstances are such that its residence for fiscal purposes would no doubt be considered to be abroad. The manufacturing operations were conducted in Sydney. Canvassers were sent to other States of the Commonwealth, but, according to the evidence, with negligible exceptions, no sales were actually made in the other States of the Commonwealth. Not only were nearly all sales made in New South Wales, but deliveries were made either to purchasers in New South Wales or else, I presume, to carriers to whom the goods were entrusted on behalf of the purchasers.

The result of that would be, speaking in general terms, that all the income of the company arising from its Australian business was derived in or from New South Wales. The Commissioner of Taxation, from a date anterior to 1923, adopted a basis of the assessment of the company's income which did not consist of an attempt to arrive at the general or assessable income or the general income of the company and then to deduct from the assessable income the outgoings incurred in the production of that income. He adopted what may be considered an arbitrary basis of assessment. He took a percentage of the revenue which the company obtained from the sales in Australia of its product. In the years 1923-1928 he took a percentage of five per cent ; in the years 1929 to 1931 he took a percentage of seven and one-half per cent ; and in the years

1932 to 1934 he reverted to a percentage of five per cent. Up to the year 1923 returns had been made by the company on the footing that all its sales were New South Wales sales and were subject to New South Wales income tax. That meant that on the basis I have described all sales were returned as liable to inclusion in the gross receipts of the company on which the respective percentages were calculated.

Apparently an arrangement had been made in 1917 with the commissioner to make returns of sales and not of income based on profit and loss. The manager of the branch, a gentleman named Mr. Woodward, unfortunately had a friend named Mr. Wrigley, who was an amateur expert in taxation. The latter made the suggestion that many of the sales of antiphlogistine made to people dwelling in other States might well be excluded from the returns. As a result of this suggestion Mr. Woodward, in his returns for 1923, did not include sales to persons who resided in other States, but confined his returns to sales to persons who resided in New South Wales or who were sufficiently connected with New South Wales to fall outside Mr. Wrigley's opinion of what could be excluded. However, Mr. Woodward who, besides being the manager of the company, was its public officer, did not see fit to communicate this change in the character of his returns to the commissioner and did not divulge to him the alteration in the basis upon which the returns were constructed.

For the years 1923 and onwards till 1927, that seems to have been done without any communication on the subject from the commissioner or to the commissioner. In December 1928, however, the commissioner, though he did not raise any question, asked that the profit and loss accounts and aggregate balance sheets of the company for the two last years should be furnished to him. The branch manager replied to him questioning whether balance sheets and detailed profit and loss accounts were really necessary. After some delay, the commissioner in March 1929 made a rather formal and peremptory reply saying he needed them and they had to be given. The accounts on which the information could be properly compiled were kept in New York. A communication was made by Mr. Woodward to the New York head office and with a little delay and somewhat grudgingly they supplied him with the information. However, Mr. Woodward decided that, having got the information, it would be better to withhold it from the commissioner which he accordingly did. That was in May 1929.

Returns continued to go in on the basis which had been adopted in 1923 in consequence of Mr. Wrigley's assistance. It was not

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until 1941, or perhaps a little earlier, that as a result of what the commissioner learnt, he decided upon an investigation of the matter. The result was that the assessments of the company were ripped up and on 2nd July 1941 amended assessments were issued covering the years I have mentioned, that is, the years ended 30th June 1923 to 1934, together with certain other years with which we are not concerned.

In these amended assessments the commissioner deserted his percentage of sales basis and adopted the ordinary principles for ascertaining taxable income. That is to say he assessed the income liable to tax by taking what may be called the assessable income of the company, although that phrase did not come into use in the tax laws of New South Wales until 1928, and by deducting therefrom the appropriate outgoings or expenditure. That resulted in a very much larger income being assessed to tax for all relevant years than had been yielded by a percentage of sales. The taxable income ascertained on ordinary principles was not only much greater than an income calculated on a percentage of sales as returned in these years. It was a much larger one than would have resulted had returns been rendered of sales to residents in all the States of the Commonwealth.

Appeals from the amended assessments were taken to the Board of Appeal by the ordinary method of objection. The Board of Appeal considered the matter and dealt with the questions, first whether any amendment ought to have been made, and second, whether, amendments having been made, the particular amendments made should stand. The decision of the Board of Appeal confirmed the amended assessments. Appeals were brought to the Supreme Court of New South Wales, which confirmed the Board's decision. From the decision of the Supreme Court of New South Wales the present appeal was brought to this Court.

The appeal to the Supreme Court of New South Wales is given by s. 255 of the *Income Tax Management Act* 1941, which says that a commissioner or taxpayer may, upon taking appropriate proceedings, appeal to the Supreme Court from any decision of the Board which involves questions of law or questions of fact, if in the latter case the Board certifies that the amount of tax in dispute between the taxpayer and the commissioner exceeds the sum of £300. The appeals are to be heard by a Full Court of the Supreme Court.

In the present case, the amendments were made under s. 210 of the Act of 1936. Having regard to the period of time that had elapsed, it was necessary that the case should be brought under

sub-s. (2) (*a*) of s. 210, which provides that an amendment may be made at any time " where the Commissioner is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion."

The first question for the Board of Appeal was whether the circumstances as I describe them, coupled with some additional detailed evidence which they had before them, warranted the conclusion that the avoidance of tax was due to evasion, and to that question they duly addressed themselves. They concluded that there had been an avoidance of tax due to evasion. For the appellant company it is maintained that the decision of the Board of Appeal on that question is subject to appeal to the Supreme Court. The attack upon the decision is supported on two grounds. The first is that if a discretion lay with the Board of Appeal and it was a discretion which could only be examined to see whether it had been correctly exercised and not to see whether the Board's conclusion itself was right in substance, nevertheless the Board had gone astray and incorrectly applied their minds to the problem. The second ground is that it is not true that under the section the discretion lay with them so that the substantive question could not be re-examined; and the Supreme Court, therefore, had jurisdiction to say for itself whether there had been an avoidance of tax due to evasion and the Supreme Court having that jurisdiction this Court should in the present appeal find that the avoidance of tax was not in fact due to evasion.

In my opinion s. 210 intends to repose in the commissioner a discretionary power to say whether there has been, in his opinion, an avoidance due to fraud or evasion, and the sections of the Acts of 1936 or 1941 dealing with objections and appeals intend to repose only in the Board of Appeal the authority to re-examine that discretion on the merits. The provisions of the Act substitute the Board of Appeal for the commissioner, once there has been a reference to the Board of Appeal as a result of an objection by the taxpayer to the exercise of the discretion, the objection having been overruled by the commissioner.

I think that that conclusion is the necessary result of the interpretation which has been given to provisions of the same character as the *Income Tax (Management) Act* over a period of years. I am alive to the fact that it might have been possible to take a very broad view and say that the ascertainment of taxable income must in all respects be dependent upon opinions, judgments, and conclusions on the part of the commissioner and that it was not very

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material whether the statute authorizing assessments spoke specifically of his opinion on a particular matter or left it generally to him to ascertain the income of the taxpayer and form a conclusion. In either case the appeal from the assessment made by him might have been considered to cover every matter dependent on his opinion or judgment because the whole assessment represents his determination of the taxpayer's liability and of every matter on which it rests. But in reference to the Federal legislation on which the New South Wales Act of 1928 is based a completely contrary view has been taken from the beginning and there is every indication in the present Act and in the 1936 Act that the New South Wales Parliament intended to legislate in the same sense. Nor does it seem to matter that an appeal from the Board on a question of fact is given. Many questions of fact must necessarily be decided by the Board and s. 238 of the Act of 1941 shows clearly enough that the Board and not the Court is to review opinions and the like given in the exercise of a discretion.

I do not propose to mention the cases that are dealt with in the judgment of the Chief Justice of the Supreme Court but a long experience of the manner in which discretionary decisions of the Federal Commissioner and Board of Review are dealt with in this Court would be quite enough to convince one that the gallant enterprise of Dr. *Louat*, who set out to overcome that practice, was doomed to failure.

The next question is what is the test to be applied by the Supreme Court in examining the Board's decision to see whether the discretion has been lawfully exercised. In the first place, I think it is quite clear that once there has been an appeal to a Board of Appeal and the Board has expressed its opinion the Supreme Court is no longer concerned with the opinion of the commissioner. If the Board has stated that there has been an avoidance due to evasion it is for the Supreme Court to examine processes by which the Board arrived at that conclusion in order to see whether there has been any error in law or misconception of the Board's duty or any such miscarriage as will show that it cannot stand.

It is not perhaps either necessary or desirable to attempt to state all the grounds upon which the exercise of discretion by such a body as the Board of Appeal may be invalidated but it has to be borne in mind that the question is whether they have exercised their functions according to law and it is a question of the validity of their conclusion rather than its intrinsic correctness. If the Board has not addressed itself to the question which sub-s. (2) (*a*) of s. 210 formulates or if the conclusion of the Board is affected by

some mistake of law, or if the Board takes some extraneous reason into consideration or if it excludes from consideration some factor which should affect the determination, then I think on those grounds the conclusion of the Board is liable to review in the Supreme Court.

Again, although it is not this case, the fact that the precise reasons on which the Board acted are not stated and are not known will not prevent the judicial review of their decision. But in such a case it is probably necessary that, on a full consideration of the material which the Board had before it, the Court should be able to say that the decision of the Board could not be explained on any ground which would be consistent with the valid exercise of functions committed to it. That is a broad statement of the considerations which will induce the Court to overturn a discretionary decision by an administrative tribunal. But the recent cases of the *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (1) and *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (2) are two decisions of the Privy Council which provide guidance in such a matter. To those citations I should add a reference to the case mentioned by *Williams* J., *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (3).

To apply these principles it is necessary to consider what relevant conduct amounts to evasion and whether the Board correctly applied their minds to the question of evasion. I think it is unwise to attempt to define the word " evasion." The context of s. 210 (2) shows that it means more than avoid and also more than a mere withholding of information or the mere furnishing of misleading information. It is probably safe to say that some blameworthy act or omission on the part of the taxpayer or those for whom he is responsible is contemplated. An intention to withhold information lest the commissioner should consider the taxpayer liable to a greater extent than the taxpayer is prepared to concede, is conduct which if the result is to avoid tax would justify finding evasion.

In the present case the Board concluded that the appellant intentionally omitted the income from the return and that there was no credible explanation before them why he did so. They thought that the conduct of the taxpayer answered the description of an avoidance of tax by evasion. The majority of the Board expressed their conclusion thus by adopting the expressions used by *McTiernan* J. in *Barripp* v. *Commissioner of Taxation* (4).

(1) (1947) A.C. 109, particularly at pp. 122, 123.
(2) (1940) A.C. 127, particularly at p. 136.
(3) (1949) A.C. 24.
(4) (1941) 6 A.T.D. 69.

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That part of their reason seems to me to be a statement which brings the case completely within s. 210 (2) (*a*) and to state a conclusion which exhibits no error of law and I do not think that what they said prior to announcing that conclusion shows any actual failure to apply the considerations which I have mentioned with reference to what is an evasion. In the formation of the opinion of the Board of Appeal no error of law appears.

The next point which was made was that, assuming that it was open to the Board to conclude that an amended assessment could be made, nevertheless the amendment which was actually made went beyond the power given by s. 210 to the commissioner, and so beyond the power of the Board, because the amendment was not limited to correcting the assessment so as to overcome the effect of the avoidance and impose a liability for the tax which had been avoided by the evasion. That contention was supported by the view that the commissioner, having adopted the percentage basis initially, could not desert the percentage basis and proceed to amend the assessment so as to ascertain the actual income of the taxpayer by ordinary methods of accounting. On the hypotheses which our decision adopts there had been avoidance of tax because an inadequate account had been given of the sales which had been made, that is to say, sales made in other States had been omitted. It was contended that the commissioner was limited in his amendment to rectifying that position and to including the sales made to residents in other States so that he might obtain the same result as would have existed had returns been made in the year 1923 and the following years on the same basis as had been made in the years 1917 to 1922. In my opinion s. 210 (2) (*a*) does not limit the commissioner in that manner. Section 210 (2) (*a*) is a provision which provides that in a case of fraud or evasion there shall be no time bar to the exercise of the power given by s. 210 (1) to amend the assessment. In other words, if there is fraud or evasion its effect is to remove the time bar which exists under the other subsections.

I am of opinion that, once it is found that in relation to any particular topic there has been fraud or evasion, the commissioner is at liberty to reconsider the whole matter, at all events in relation to everything that is material to the assessment of the tax under the head of liability affected. In this case the whole question was what should be the assessable and taxable income of the taxpayer. The commissioner had considered that and had adopted the view that he might take a percentage of sales. Because of evasion there was an avoidance of liability in relation to the assessable income.

It appears to me that, when it was found that that was the case, he was at liberty to reconsider the whole question of how he would ascertain the assessable and taxable income of the taxpayer and he was not limited merely to rectifying the result which would have been produced by a candid use by the taxpayer of the basis which the commissioner had been prepared to adopt.

It was then said for the appellant company that we should reach the same result by holding that the commissioner is not at liberty by a subsequent use of the sections authorizing amendment of assessments to depart from the opinion which he had formed that a percentage basis was the correct method of assessing the tax. That argument was founded on the sections which, as the appellant asserts, were relied upon by the commissioner for the purpose of assessing the taxpayer on a percentage of sales. In the years 1923 to 1928 s. 18 of the *Income Tax* (*Management*) *Act* 1912 was, it is said, the necessary basis of his taking five per cent on sales. That is not a section the application of which rests on opinion; it is a section which operates on the facts themselves. I do not think it is necessary to examine the provision in detail; it is sufficient to say that, in my opinion, it is inapplicable to the present case. It deals with an agent selling goods in the State of New South Wales on account of a resident out of the State or on account of a foreign company not registered in the State. The present company was registered in the State and I do not think it can be brought within the scope of the section, although no doubt for fiscal purposes it may be considered as a resident of New York. I do not think it can be brought within the application of the provision because properly understood the section is addressed, not to the case of a company carrying on a manufacturing or other business here by means of a branch organized with a manager, officers and servants, but to the case of a company carrying on an undertaking abroad and employing an agent here to sell its goods or enter into transactions in a representative capacity. The distinction is between the company being here and merely being represented by an agent here.

For the years that follow there are two provisions which are or may be in point. To s. 27 of the *Income Tax* (*Management*) *Act* 1928 there is a proviso which, it is said, was availed of by the commissioner in fixing a percentage of seven and one-half upon the sales for the years 1929 to 1931. In the case of this enactment it is not necessary now to examine its provisions in detail, but having read the section carefully I am disposed to think that that proviso should be construed as a true proviso ought to be construed, that is as something which operates as a qualification upon, and within

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the general scope of, the main provision of the section. The leading provision says that in the case of any person carrying on business both in and outside the State, income derived from sources within the State shall be determined as follows; and then are set out a number of ways of arriving at a proper apportionment or proper proportion of the income in New South Wales. The first direction relates to cases where the taxable income derived from sources in the State is capable of being kept separate and apart from income derived from sources out of the State. That is the present case. It is a case of a company deriving its business at material times in the manufacture of a commodity and selling it in New South Wales. The proviso contemplates a case in which the necessary information cannot be obtained or one of failing to state the true state of affairs. If the commissioner was satisfied that the necessary information could not be obtained he was wrong. He did not quarrel with the correctness of the information. For the years 1931 to 1934, s. 25 of the Act of 1928 must, it is said, have been applied. That provision again raises some difficulties of interpretation, but it applies to a case where a person in the State acts on behalf of a principal resident or carrying on business out of the State or on behalf of a foreign company.

Again, I think that in the present case that is not an appropriate section, for reasons which I gave in connection with s. 18 of the Act of 1912. This is a company carrying on business here by its servants. I do not doubt that it is possible that the commissioner did apply those sections, but I do not think that, if he did so, he did so correctly. In any case I would not be prepared to say that if he had applied them, and in the case of ss. 26, 27 and 25 of the 1928 Act, if he had formed a valid opinion in accordance with the provisions they contain, he could not depart from them for the purpose of ascertaining the true taxable income appropriate to the circumstances of this case. The power of amendment in s. 210 appears to me to be sufficient for the purpose.

That, I think, covers the grounds which are taken and, for the reasons which I have given, I am of opinion that the appeal should be dismissed.

McTIERNAN J. I entirely agree. I do not wish to add anything.

WILLIAMS J. I also agree and shall state my reasons shortly for reaching this conclusion. The right of the commissioner to issue the amended assessments depended upon s. 210 of the Act of 1936. There were no limitations as to the time when the commissioner

could make the amendments authorized by the section except the limitations imposed by the section. In the present case the commissioner contended that the section imposed no limitation as to time because he was of opinion that there had been an avoidance of tax and that the avoidance was due to evasion. The appellant objected to this opinion of the commissioner and appealed to the Board of Appeal. Under s. 248 of the Act of 1941 the opinion of the Board of Appeal then became the opinion of the commissioner for all the purposes of the Act except for the purpose of objections thereto and appeals therefrom. Objections and appeals therefrom were no doubt expressly excepted to make it clear that a taxpayer could not lodge an objection to the opinion of the Board similar to the objection which he could lodge to the original opinion of the commissioner.

The Board was of the same opinion as the commissioner. I agree with *Dixon* J. that the combined effect of ss. 238, 248 and 255 of the Act of 1941, as the Supreme Court held, is to confine the appeal to the Supreme Court under s. 255 from this opinion to an appeal on a question of law under sub-s. 1 (*a*) and that an appeal from such an opinion is not an appeal on a question of fact within sub-s. 1 (*b*). This construction of the sections is in line with *Moreau* v. *Federal Commissioner of Taxation* (1) and the other cases in this Court referred to in the judgment of *Jordan* C.J. in the Supreme Court. It is also in line with the reasoning of the Privy Council in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (2) and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (3). The jurisdiction of this Court, like that of the Supreme Court, is therefore limited to examining the materials on which that opinion was formed and unless the appellant can satisfy the Court that the Board acted capriciously or arbitrarily or upon irrelevant considerations the appeal on this ground must fail. In *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (4), Lord *Macmillan* said " The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise." There was in the present case evidence on which the Board could reasonably find that from 1923 Woodward intended to withhold from the commissioner the fact that he was no longer returning as the total

(1) (1926) 39 C.L.R. 65.
(2) (1947) A.C. 109.
(3) (1949) A.C. 24.
(4) (1949) A.C., at p. 36.

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sales of the company the total sales to persons in Australia but was only returning the total sales to persons in New South Wales. To my mind that was evidence sufficient in law to justify the Board forming a valid opinion that the avoidance of tax was due to evasion.

The commissioner was therefore entitled to amend the assessments and to make such alterations therein or additions thereto as he thought necessary. The expression " as he thinks necessary " in s. 210 means, in my opinion, as he thinks necessary to assess the taxpayer for the full amount of tax legally payable by him under the provisions of the relevant Act. For this purpose he can make such alterations in and additions to the existing assessments as he thinks necessary. The expression confers a wide authority to amend the existing assessments and I think that the words are wide enough to authorize the commissioner to alter the whole basis on which the assessments had previously been made if the commissioner bona fide considers that such an alteration is necessary to make a proper assessment of the income tax payable by the taxpayer. It is therefore unnecessary to determine whether the original assessments could legally be and were made, in the case of the years 1923 to 1927 under s. 18 of the Act of 1912, and in the case of the subsequent assessments under ss. 25 or 27 of the Act of 1928, because, assuming that they could be and were so made, s. 210 (1) would still authorize the commissioner to change from such a basis to the ordinary basis of the actual assessable income less all deductions authorized by the Act derived in each relevant year in order to determine the true taxable income.

I agree that the appeal should be dismissed.

WEBB J. I agree with the judgment of *Dixon* J., but with some hesitation as regards the meaning of the words " as he thinks necessary " in s. 210 (1) of the *Income Tax (Management) Act* 1936.

Appeal dismissed.

Solicitors for the appellant, *A. N. Harding & Breden.*

Solicitor for the respondent, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.