[HIGH COURT OF AUSTRALIA.]

SHELL COMPANY OF AUSTRALIA LIMITED APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1949.

MELBOURNE, *May* 31; *June* 1, 2;

SYDNEY, *August* 4.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

Income Tax (Cth.)—Assessment—Stage at which process of assessment concluded—Company—Further tax on undistributed profits—Deduction of taxes paid or payable—Taxes payable in Australia and United Kingdom on same income—Relief against double taxation—"Rebate"—Income Tax Assessment Act 1936-1944 (*No.* 27 *of* 1936—*No.* 28 *of* 1944), *s.* 159, *Part* IIIA., *ss.* 170, 172.

The appellant company was incorporated in the United Kingdom, and it carried on business there and in Australia. In respect of its income for the accounting period adopted by it, being the year ending 31st December 1943, it was assessed under the *Income Tax Assessment Act* 1936-1944 to ordinary income tax and super tax in the sum of £832,083 11s. It was also assessed, in the sum of £30,977 2s., to further tax under Part IIIA. of the Act, a deduction being allowed under s. 160C (5) of the sum of £832,083 11s. as "income payable under this Act." The company also paid tax in the United Kingdom on part of the same income as was taxed in Australia, and it therefore became entitled to a rebate under s. 159 of the Commonwealth Act. It applied for this rebate and was granted it to the extent of £199,700 5s. By an amended assessment the commissioner then purported to re-assess the company to further tax under Part IIIA. of the Act, increasing the amount to £39,677 8s. In making the amendment the commissioner treated the rebate as having the effect of reducing the total amount of the deductions under s. 160C which had been taken into account in the original assessment to further tax.

Held that the commissioner was not entitled so to treat the rebate and the amended assessment was erroneous.

The allowance of a rebate under s. 159 does not have the effect of reducing the amount to be taken into account as tax paid or payable for the purpose of assessment of further tax under s. 160D.

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CASE STATED.

On an appeal to the High Court by the Shell Co. of Australia Ltd. against an amended assessment to tax under Part IIIA. of the *Income Tax Assessment Act* 1936-1944, *Latham* C.J. stated for the opinion of the Full Court a case which was substantially as follows:—

1. This is an appeal against an amended assessment under Part IIIA. of the *Income Tax Assessment Act* 1936-1944. Notice of that amended assessment is more particularly referred to in par. 23.

2. The appellant is a company incorporated in Great Britain and registered as a foreign company in the State of Victoria and in the other States of the Commonwealth of Australia and at all times material to this appeal was carrying on business in the Commonwealth of Australia and in the United Kingdom.

3. Before 31st December 1942 the appellant pursuant to s. 18 of the *Income Tax Assessment Act* 1936 (as amended from time to time) and with the leave of the Federal Commissioner of Taxation adopted an accounting period being the twelve months ending on 31st December in lieu of the accounting period being the twelve months ending on the next succeeding 30th June. Since such adoption the appellant has not adopted any other date as the end of its accounting period.

4. For the financial year commencing on 1st July 1944, the appellant was assessed by the commissioner to income tax on a taxable income of £2,380,011 derived during the accounting period which ended on 31st December, 1943. After allowing a rebate of £669 16s. under s. 160AB. of the *Income Tax Assessment Act* 1936-1944, and adding an amount of £118,750 1s. being super tax at twelve pence for every pound of the taxable income in excess of £5,000 the commissioner assessed the tax payable on the taxable income at £832,083 11s.

5. The assessment referred to in par. 4 was made in accordance with the provisions of the *Income Tax Assessment Act* 1936-1944, and was not objected to, nor is it the subject of any dispute.

6. In respect of income derived during the accounting period, the appellant was assessed to tax amounting to £407,273 10s. 10d. under the *War-time (Company) Tax Assessment Act* 1940-1944. For reasons not material to this appeal, that assessment was amended and the tax was reduced to £169,127 15s. 7d.

7. One of the items which entered into the computation of the war-time (company) tax referred to in par. 6 was the amount of income tax payable by the appellant in respect of its taxable income of the same period, i.e., the accounting period which ended on 31st December 1943. The amount thus taken into account was £832,083.

8. The assessment of war-time (company) tax was further amended at a later date, the amount of the tax being increased as stated in par. 22.

9. In addition to the ordinary income tax and super tax on its taxable income and the war-time (company) tax, the appellant was assessed for further tax under Part IIIA. of the *Income Tax Assessment Act* 1936-1944 on that portion of its taxable income for the accounting period which had not been distributed as dividends. The amount of further tax so assessed was £7,162 12s.

10. By an amendment of the assessment under Part IIIA., the amount of further tax was increased to £30,977 2s. This increase was due solely to the reduction of war-time (company) tax referred to in par. 6, and was not the subject of any objection by the appellant. Notice of the amendment was issued to the appellant on 29th May 1946.

11. The assessment and amended assessment of further tax were made in accordance with the provisions of sub-ss. (1) and (5) of s. 160C. of the *Income Tax Assessment Act* 1936-1944, the appellant having duly elected under sub-s. (5) of s. 160C. that "in lieu of deducting from its taxable income any income tax paid in the year of income under this Act (other than the further tax paid under this Part) or any tax paid under any Act passed by the Parliament imposing a war-time tax upon companies, there shall be deducted any income tax payable under this Act (other than the further tax payable under this Part) or any tax payable under any Act passed by the Parliament imposing a war-time tax upon companies in respect of the income of that year of income." Particulars of the assessment as so amended were shown in the notice dated 29th May 1946 and are substantially as under:

Taxable income as assessed ..	£2,380,011
Less taxes (s. 160C.)	1,070,240
	1,309,771
Less dividends paid out of taxable income	1,000,000
	£309,771

Further tax payable (at 24d. in the £) .. £30,977 2s.

12. The amount of £1,070,240 which was deducted for the purpose of ascertaining the portion of taxable income which had not been distributed as dividends comprised the following items:

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Federal taxes payable in respect of income derived during 1943—		
	£	£
Income tax	713,334	
Super tax	118,750	832,084
War-time (company) tax		169,128
State taxes (less refunds) paid during 1943 in respect of income derived during 1941—		
	£	£
New South Wales	16,999	
South Australia	1,207	18,206
United Kingdom income tax paid during 1943 (less refunds)	£E40,658	
Allowance for exchange at £125 per cent	10,164	50,822
		1,070,240

13. The aforesaid assessments and amended assessments of income tax, super tax, further tax and war-time (company) tax were not objected to by the appellant, and the respective amounts so assessed were duly paid.

14. The appellant was also liable to pay United Kingdom income tax in respect of its said income derived during the accounting period which ended on 31st December 1943, and in respect of that income the appellant was duly charged with United Kingdom income tax for the fiscal year which ended on 5th April 1945.

15. The Commissioner of Inland Revenue (United Kingdom) made a computation of the appellant's income, and the United Kingdom income tax payable thereon for the periods referred to in the last preceding paragraph. That computation is summarized hereunder:

(i) The amount of appellant's taxable income for Commonwealth purposes (viz., £2,380,011) was treated as being equivalent to £1,897,456 in sterling.

(ii) Certain adjustments were made, reducing the amount of £1,897,456 to £1,418,467.

(iii) United Kingdom income tax was assessed in respect of the amount of £1,418,467 at the rate of ten shillings for every pound of that amount, the tax so assessed being £709,233 10s.

(iv) In accordance with provisions for granting relief to taxpayers in cases where the same income is charged with tax both in the United Kingdom and elsewhere the tax on the amount of £709,233 10s. was reduced by half (£354,616 15s.), leaving a net amount of £354,616 15s. payable by the appellant to the Commissioners of Inland Revenue as tax for the fiscal year which ended on 5th April 1945.

16. Payment of the amount of £354,616 15s. last mentioned in par. 15 was duly made by the appellant to the Commissioners of Inland Revenue by three payments of £275,000 on 5th January 1945, £32,884 5s. on 8th April 1946 and £46,732 10s. on 6th January 1947. . . .

18. In support of its claim to the rebate for which provision is made in s. 159 of the *Income Tax Assessment Act* 1936-1944, the appellant sent to the Deputy Federal Commissioner of Taxation, Melbourne, a certificate from the authorities in the United Kingdom together with statements showing how the amount of income chargeable with United Kingdom income tax had been computed.

19. On 4th November 1946 the deputy commissioner gave notice to the appellant that a rebate had been calculated in accordance with the provisions of s. 159, the amount calculated being £199,700 5s. and accompanied the notice with a statement showing how the amount was calculated.

20. In calculating the " Commonwealth rate " under s. 159 (3) (*a*) (87.0309 pence) shown in the calculation, the commissioner included the amount of further tax (£30,977 2s.) payable as shown in the notice of amended assessment of further tax dated 29th May 1946 referred to in par. 10.

21. Part of the rebate of £199,700 5s. was applied by the deputy commissioner towards the discharge of certain taxation liabilities of the appellant, and a cheque for the balance, viz., £78,301 13s. 7d., was forwarded by the deputy commissioner to the appellant on 28th January 1947.

22. On 17th December 1946 the deputy commissioner issued notice of an amendment of the assessment of war-time (company) tax payable by the appellant for the accounting period ended 31st December 1943. The tax was thereby increased by £112,698 5s. 5d., i.e., from £169,127 15s. 7d. (see par. 6) to £281,826 1s. The increase was the result of a recalculation in which the rebate of £199,700 5s. was taken into account, and has been objected to by the appellant under the provisions of the relevant Act. For the purposes of these proceedings it is desired by the parties to obtain a decision with

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respect to the matters arising in this appeal without any decision as to the correctness or otherwise of the amount of £112,698 5s. 5d.

23. On 17th December 1946 the deputy commissioner also issued notice of an amendment of the assessment of further tax payable by the appellant under Part IIIA. of the *Income Tax Assessment Act* 1936-1944. The further tax previously assessed at £30,977 2s. (see par. 11) was thereby increased to £39,677 8s.

24. In making the amendment referred to in the last preceding paragraph, the commissioner treated the rebate of £199,700 5s. as having the effect of reducing the total amount of deductions under s. 160C. The following steps were taken in the course and for the purpose of that amendment:

(i) the deduction under s. 160C. in respect of income tax and super tax payable was reduced by £199,701, i.e., from £832,084 to £632,383;

(ii) the deduction under s. 160C. in respect of war-time (company) tax payable was increased by £112,698 because of the amendment referred to in par. 22;

(iii) that portion of the taxable income which had not been distributed as dividends was increased from £309,771 (the amount shown in par. 11) to £396,774. The difference of £87,003 between those two amounts corresponds and is identical with the difference between the amount of £199,701 and £112,698 mentioned in sub-pars. (i.) and (ii.) hereof;

(iv) the amount of further tax was increased by £8,700 6s., the additional amount shown in the notice of amended assessment dated 17th December 1946.

25. The appellant, by its public officer, lodged notice of objection, dated 13th February 1947, against the amended assessment of further tax referred to in par. 23.

26. The commissioner disallowed the objection, and notice of the disallowance was forwarded to the appellant on 29th January 1948.

27. By notice dated 4th March 1948 the public officer of the appellant requested the commissioner to treat the objection as an appeal and to forward it to the High Court of Australia.

28. The commissioner duly caused the objection to be forwarded to the High Court of Australia at Melbourne.

The questions for the opinion of the Full Court were as follows:—

1. In the assessment of the appellant for further tax under Part IIIA. of the said Act in respect of its income for the year ended 31st December 1943, was the appellant entitled under s. 160C. (5) to a deduction, as "income tax payable under this Act" of the

amount of £832,083 11s., being the amount of income tax and super-tax assessed as stated in par. 4 hereof ?

2. In the circumstances set out in this case, was the commissioner entitled under the provisions of the *Income Tax Assessment Act* 1936-1944, in making the last-mentioned assessment of further tax payable by the appellant in respect of its income for the year ended 31st December 1943, to take into account the rebate of £199,700 5s. under s. 159 referred to in par. 19 hereof, and thereby increase the further tax payable by £8,700 6s. ?

3. If "No" both to Question 1 and to Question 2, but the commissioner was entitled to take any rebate or part of any rebate allowed under s. 159 into account in assessing the further tax under Part IIIA. of the said Act payable by the appellant in respect of its income for the year ended 31st December 1943, how should the amount of such rebate or part of rebate be calculated and taken into account ?

Tait K.C. (with him *J. P. Hannan*), for the appellant. In s. 160C. (5) of the Act "income tax payable under this Act" means payable by and under an *assessment* made in accordance with the Act and at the rates declared in the taxing Act; that is to say, the amount for which there is a *liability to pay* imposed by and under the Acts. That liability to pay is fixed, ascertained and defined in an assessment. The definition in s. 6 of the Act of income tax as meaning tax "as assessed" must be read into s. 160C. (5). This view is supported by the scheme of the Act as exemplified in the following provisions:—ss. 17, 166-168, 170, 172, 174, 177, 185, 199, 201, 202, 204, 208, 209. So, an assessment in accordance with the Act itself imposes a liability to pay and fixes the *tax payable*. A rebate under s. 159 is an allowance *after* the total tax liability of the taxpayer has been ascertained under the Act, not an allowance in order to ascertain the total liability. That liability must be defined before the rebate can be calculated. The rebate does not decrease the amount of tax payable; it is a rebate of part of the amount so payable. Other provisions of the Act providing for rebates form a contrast with s. 159 in that they make it clear that what is meant is an amount to be taken into account in the process of assessment: see, for example, s. 46 (1) (which refers to a "rebate in its assessment"), ss. 160, 160AA., 160AB.; and cf. ss. 160AD., 160AE. (*a*). In s. 159 the word "rebate" is not qualified by any reference to an assessment, and the section does not provide for altering or amending an assessment. If the commissioner sued

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for tax as assessed, the fact that the taxpayer was entitled to a rebate under s. 159 would not afford a defence that the amount sued for was wrong or was not owing; it would be a set-off. Accordingly, a rebate under s. 159 is not a matter for assessment at all (*R.* v. *Federal Commissioner of Taxation*; *Ex parte Sir Kelso King*, (1)). As to assessment generally and amendment, see *R.* v. *Deputy Federal Commissioner of Taxation (S.A.)*; *Ex parte Hooper* (2); *Federal Commissioner of Taxation* v. *S. Hoffnung & Co.* (3); *W. & A. McArthur Ltd.* v. *Federal Commissioner of Taxation* (4). The original assessment itself creates the liability to pay, and it may be amended (Act, s. 170); thus, subject to the processes of objection and appeal, the *tax payable* in accordance with the Act is arrived at. The commissioner's view would make it impossible to give effect to s. 159. Its operation is dependent on the fixing of the "Commonwealth rate" as defined in s. 159 (3) (*a*); in this view the rate could never be fixed conclusively. There is no reason, in this view, why the process of recalculation and amendment should stop at the present stage; the logical result would be a never-ending series of amendments, and finality could never be reached.

T. W. Smith K.C. (with him *Adam*), for the respondent. It is conceded that the rebate under s. 159 must be calculated after assessment; it cannot be ascertained at any earlier stage. The assessment having been made and being the correct assessment at that stage because no-one can then tell whether there will be any rebate, application must be made for the rebate. It must be claimed and the right to it established. When the claim is allowed under s. 159 (6), the result is that the amount properly payable by the taxpayer is reduced. That is the result of the *Sir Kelso King Case* (1). If the assessed tax has not been paid when the rebate is calculated, then the rebate may be set off against what is payable. If the tax has been paid, then the true impost is less than the gross assessed amount. The word "rebate" is apt to cover such situations. An assessment does not always show the true amount of liability. In s. 159 (3) (*a*) the words "other than the rebate granted under this section" in the expression "(after the deduction of all rebates other than the rebate granted under this section)" show that the commissioner can only reduce the deduction under s. 160c. once, and thus the appellant's argument that there would be a never-ending process of amendment is answered. The words

(1) (1930) 43 C.L.R. 569.
(2) (1926) 37 C.L.R. 368, at p. 373.
(3) (1928) 42 C.L.R. 39, at p. 54.
(4) (1930) 45 C.L.R. 1, at p. 10.

"after the deduction" &c. mean after the deduction *from any income tax*. Section 159 (3) (*a*) includes further tax under s. 160C.

Tait K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:—

LATHAM C.J. The Shell Company of Australia Limited in the year ending 31st December 1943, which was the accounting year of the company for income-tax purposes in Australia, carried on business in Australia and the United Kingdom. English and Australian legislation provides for a rebate in the amount of tax payable in each country in order to avoid double taxation. The effect of the joint operation of the provisions is that the taxpayer pays tax on the amount of income taxable in both countries at the higher of the rates applicable in those countries. In each country a rebate is allowed. The amount of rebate depends upon the relation of the Commonwealth rate of tax to the British rate of tax. The Commonwealth rate of tax is ascertained by dividing the total amount of income tax by the amount of the total taxable income. Income tax in Australia includes ordinary income tax and (in the case of a company which has a taxable income of more than £5,000) super tax, and also a further tax upon undistributed income ascertained in the manner prescribed by Part IIIA. of the *Income Tax Assessment Act* 1936-1944—ss. 160A. to 160E. For the purpose of ascertaining this income taxes "paid" (or, at the option of the company, taxes "payable") in the year of income are deducted. Thus the amount of these taxes enters into the calculation of the rebate allowed in Australia. A war-time (company) tax is imposed upon the taxable profit of a company as defined in the *War-time (Company) Tax Assessment Act* 1940-1944. "Taxable profit" is defined in the Act as meaning the amount remaining after deducting from the taxable income of the accounting period as assessed under the *Income Tax Assessment Act*—"(*a*) the income tax payable in respect of that taxable income," and certain other amounts. Thus the amount of war-time (company) tax is affected by the amount of income tax payable in respect of taxable income of the year.

The company paid income tax (ordinary tax, super tax and further tax) in Australia in respect of the income of the year ending 31st December 1943. The taxable income was £A2,380,011. It also paid income tax on part of this income in the United Kingdom. A

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rebate of tax amounting to £E354,616 was allowed in the United Kingdom and a rebate of £A199,700 was allowed in Australia.

The commissioner then treated the rebate of £199,700 as having reduced the amount of income tax payable by the company which could be deducted for the purpose of ascertaining the undistributed income upon which the company was assessable to further tax. He re-assessed the company to further tax, increasing the amount of tax by £8,700. The commissioner also amended the assessment of war-time (company) tax. He again treated the rebate of £199,700 as reducing the amount of income tax payable by the company, and therefore as increasing the taxable profit of the company, with the result that the war-time (company) tax was increased by £112,698. The company has objected to the amended assessment to war-time (company) tax—but that objection is not before this Court in these proceedings. The subject matter of this appeal is the assessment to further tax under the *Income Tax Assessment Act*, the question being whether the commissioner was entitled to regard the rebate of £199,700 as reducing the amount of tax paid or payable for the purposes of assessment of further tax.

The case stated shows that in respect of the relevant year, namely, the year ending 31st December 1943, the company was assessed under the *Income Tax Assessment Act* 1936-1944 to ordinary income tax and super tax in an amount of £832,084.

In respect of the taxable profit of the company during the same period the company was assessed to war-time (company) tax in a sum of £169,128. For the purpose of ascertaining the taxable profit of the company the amount of ordinary income tax was deducted from the taxable profit of the company: see *War-time (Company) Tax Assessment Act* 1940-1944, s. 3—" 'taxable profit' means the amount remaining after deducting from the taxable income of the accounting period as assessed under the Income Tax Assessment Act—(*a*) the income tax payable in respect of that taxable income; (*b*) . . . "

" Income tax " is defined in the same section as meaning the income tax imposed as such by any Act, but as not any tax assessed under Part IIIA. of the *Income Tax Assessment Act.*

The company was also taxed in respect of the same income on portion of its taxable income which had not been distributed in dividends: *Income Tax Assessment Act* 1936-1944, s. 160B. in Part IIIA. Section 160C. provides that for the purpose of the further tax imposed on that portion of the taxable income of a company which has not been distributed as dividends, that portion shall be ascertained by deducting from the taxable income (1) all

taxes which are paid in the year of income—(*a*) under *Commonwealth Income Tax Acts*; (*b*) under the *War-time (Company) Tax Assessment Act*; (*c*) under State or Territorial laws; and (*d*) in any country out of Australia in respect of income taxable in Australia—"less any refund received in the year of income of any tax to which this paragraph refers." Section 160C. (5) allows a company to elect between deduction of income tax "paid" in the year of income (in accordance with the provision already quoted from s. 160C. (1)) and deduction of income tax "payable" under the Commonwealth Acts mentioned in s. 160C. (1). The appellant company elected for deduction of taxes payable in lieu of deduction of taxes paid. Further tax payable under Part IIIA. of the Act was assessed after allowing deduction of taxes payable and dividends distributed. The taxes deducted were income tax and super tax £832,084, war-time (company) tax £169,128, together with State taxes (less refunds) and United Kingdom income tax (less refunds) (s. 160C. (1) (i)), a total of £1,070,240. The taxable income as assessed was £2,380,011. The excess over the taxes deducted was £1,309,771. An amount of £1,000,000 had been distributed as dividends and the balance of £309,771 was assessed to further tax at 2s. in the pound—the tax amounting to £30,977.

The company was liable to pay United Kingdom income tax upon part of its income (£E1,418,467 = £A1,773,084) derived during the accounting period and the amount of tax at the rate of 10s. in the pound was £E709,233. The portion of the income common to Australia and the United Kingdom in respect of which this tax was charged was £E1,418,467.

The United Kingdom *Finance Act* 1920, s. 27, contains the English provisions for relief from double taxation. In accordance with those provisions the tax on the amount of £E709,233 was reduced by half, leaving a net amount of £E354,616 payable as tax in the United Kingdom. That amount was duly paid.

The company then applied for the rebate to which it was entitled under Commonwealth law. The *Income Tax Assessment Act* 1936-1944, s. 159 (1), is the provision which is applicable in this case, the taxpayer having paid tax under the law of the United Kingdom, but not under the law of a State, on income derived from sources in Australia, and the "Commonwealth rate" being greater than half of the British rate. The British rate was, as already stated, 10s. in the pound. The Commonwealth rate was greater than 5s. (half of 10s.). The "Commonwealth rate" (s. 159 (3)) means the rate "ascertained by dividing the total amount of income tax paid or payable for the year by the taxpayer (after the deduction

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of all rebates other than the rebate granted under this section) by the amount of the total taxable income in respect of which the tax paid or payable under this Act has been charged for that year. . . . " Thus in order to ascertain the " Commonwealth rate " the amount of income tax and super tax paid in Australia (£A832,084), together with the tax under Part IIIA. of the Act on undistributed income of the company (£A30,977), amounting in all to £A863,060, was divided by the amount of the total taxable income of the company, namely £A2,380,011. The result of this calculation was that the " Commonwealth rate " was 87.0309d.; half the United Kingdom rate was 60d.; the difference between these rates was 27.0309d. The amount which had been taxed in both Australia and the United Kingdom was £E1,418,467, equivalent to £A1,773,084. The result of applying the " Commonwealth rate " to this sum was to produce a rebate of £A199,700. This amount was in part applied to meeting tax liabilities of the company and the balance was paid to the company. The company contends that the whole matter of tax in relation to the year of income tax, that is ordinary income tax, super tax, further tax and war-time (company) tax, was ended at this point.

The commissioner, however, treated the rebate of £199,700 as reducing the amount of income tax payable by the company. It was treated by the commissioner as reducing the amount of ordinary income tax, and was not distributed over the several heads of tax proportionately. The result of so treating the rebate was to reduce the deduction allowable under the *War-time (Company) Tax Act* (see definition (already quoted) of " taxable income," s. 3) and therefore to increase the amount of " taxable profit," and therefore to increase the amount of tax. The amount of increase in war-time (company) tax brought about in this manner was, as already stated, £112,698.

The commissioner also re-assessed the company to further tax under Part IIIA. of the *Income Tax Assessment Act*. Under s. 160C. (1) and (5) it was proper, in order to ascertain the amount of undistributed income, to deduct the taxes payable in the year of income. The commissioner contends that the taxes payable were the amount of tax (£832,084) less the rebate of £199,700, that is £632,383. The war-time (company) tax had been increased by re-assessment by £112,698. The net result as reached by the commissioner was to increase the amount of undistributed profits by £87,002, the difference between £199,700 and £112,698. The result was that the amount of further tax was increased by £8,700. The appeal is against the amended assessment in which this increase has been made.

Section 160c. (1) (i) provides that taxes deductible for the purpose of ascertaining profits which have not been distributed are certain taxes "less any refund received in the year of income of any tax to which this paragraph refers". The commissioner contends that a rebate allowed under s. 159 is a "refund," with the result that the amount of taxes "payable" under the *Income Tax Assessment Act* is therefore reduced for the purposes of s. 160c. (1) (i). The result which is thus reached is that income tax and super tax are taken for the purpose of the amended assessment to further tax at £632,383, although the assessment to these taxes remains at an amount of £832,084—a tax which the company has paid. Also for the purpose of determining the Commonwealth rate in order to calculate the rebate under s. 159 the sum of £832,084 has been taken as representing those taxes. But for the purposes of war-time (company) tax the taxes deductible from the taxable profits of the company have been decreased by the amount of the rebate —£199,700. The result is that the company has received a rebate of £199,700, but, by reason of this rebate, the war-time (company) tax has been increased by £112,698, and further tax by £8,700, that is, in all, by £121,398. Thus the assessments which were the basis of the calculation of the rebate have been amended by reason of the rebate itself. If those assessments are taken to be correct as they now stand in their amended form, the total amount of income tax upon which the "Commonwealth rate" for the purpose of ascertaining the amount of rebate has been calculated was wrongly stated. The figure should have been £632,383, instead of £832,084, for ordinary and super tax, and it should have been £39,677 instead of £30,977 for further tax. Therefore, if the amended assessments are correct, the rebate should be recalculated. If this were done the whole process would begin again—a different amount as "refund" would be used in determining the amount of further tax payable under Part IIIA. of the Act, and both further tax and war-time (company) tax would be re-assessed. Once again the basis of the calculation of rebate would be wrong and a new calculation would have to be made. This process would never end. No satisfactory argument has been presented which shows that the commissioner's view does not bring about this consequence and such a result is so extraordinary that an interpretation which brings it about should not be accepted unless no other view of the relevant legislative provisions is reasonably open.

In my opinion the difficulty disappears if the "rebate" under s. 159 is not regarded as a "refund" under s. 160c. (1) (i). The rebate provisions assume that the "total amount of income tax

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paid or payable for the year by the taxpayer" (s. 159 (3) (*a*)) has been ascertained. An amendment of assessment duly made will alter that amount. But that amount cannot be altered except by an amendment of the assessment. The calculation and allowance of a rebate under s. 159 does not involve any amendment of any assessment. The rebate is made upon the basis that the taxpayer is liable to pay ascertained amounts of tax in the United Kingdom and in Australia. To allow a rebate calculated upon that basis to bring about an alteration of the amount of tax paid or payable would destroy the basis of the rebate calculation and would, as already stated, commit the commissioner and the taxpayer to an infinite series of calculations.

Section 172 provides that—"Where by reason of any amendment the taxpayer's liability is reduced, the Commissioner shall refund any tax over-paid."

This section shows the nature of a refund. It is a repayment to the taxpayer of tax which he should not have paid. Such a repayment is a refund which is properly used to reduce the amount of taxes which can be deducted under s. 160c. (1) (i), but such a repayment is quite different from a rebate under s. 159. The "refund" is made because of a discovered absence of assumed liability; the "rebate" under s. 159 is allowed because of the presence of actual liability. Thus the rebate does not represent the refund of money not properly claimable as tax; it is an allowance made by the Treasury in accordance with the Act for the reason that the taxpayer had become liable to pay double tax. "Concessional rebates" allowable under s. 160 are quite different in character. Section 160 (1) provides that a taxpayer shall be entitled to a rebate in his assessment of tax of certain amounts. These rebates therefore reduce the amount of tax which is assessed and reduce the amount of tax "payable"—see s. 166. But no change is made in any assessment by the allowance of a rebate under s. 159: *R.* v. *Federal Commissioner of Taxation*; *Ex parte Sir Kelso King* (1).

It was contended for the commissioner that the provisions of the Act properly interpreted did not bring about the result that there could be no end to the calculation and recalculation of rebates and to re-assessments. It was said that the argument that this was the case did not give adequate weight to the provision in s. 159 (3) (*a*) that the Commonwealth rate meant the rate ascertained by dividing the total amount of income tax paid or payable "(after the deduction of all rebates other than the rebate granted under this section)

(1) (1930) 43 C.L.R. 569.

by the amount of the total taxable income." It was argued for the commissioner that the words in brackets meant that the rebate granted under the section, though not deductible in the calculation of the "Commonwealth rate," could be deducted, but once only, for the purposes of calculating further tax, with a consequential result in relation to war-time (company) tax. I was unable to appreciate this argument. The words in brackets are limited in their application to the calculation of the "Commonwealth rate," and have no relation to the process of assessment of tax under any of the provisions of the Act. My brother *Dixon* has dealt with this argument for the commissioner analytically and elaborately in his reasons for judgment and has given several answers to the contention. I cannot usefully add anything on this point to what he has so conclusively said.

The questions submitted in the case are as follows:—"1. In the assessment of the Appellant for further tax under Part IIIA. of the said Act in respect of its income for the year ended 31st December 1943, was the Appellant entitled under Section 160C. (5) to a deduction, as 'income tax payable under this Act' of the amount of £832,083 11s., being the amount of income tax and super-tax assessed as stated in paragraph 4 hereof? 2. In the circumstances set out in this Case, was the Commissioner entitled under the provisions of the Income Tax Assessment Act 1936-1944, in making the last-mentioned assessment of further tax payable by the Appellant in respect of its income for the year ended 31st December 1943, to take into account the rebate of £199,700 5s. under section 159 referred to in paragraph 19 hereof, and thereby increase the further tax payable by £8,700 6s.? 3. If No both to Question 1 and to Question 2, but the Commissioner was entitled to take any rebate or part of any rebate allowed under Section 159 into account in assessing the further tax under Part IIIA. of the said Act payable by the Appellant in respect of its income for the year ended 31st December 1943, how should the amount of such rebate or part of rebate be calculated and taken into account?"

In my opinion the questions should be answered as follows:—(1) Yes; (2) No; (3) Unnecessary to answer.

RICH J. I cannot usefully add to what has been said on the question of the rebate, the subject of the case stated.

In my opinion the sum of £199,700 5s. should not be taken into account under s. 159 of the *Income Tax Assessment Act* 1936-1944.

And I answer questions (1) Yes; (2) No; (3) Not answered. Costs—costs in the appeal.

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DIXON J. This case concerns the inter-relation of the further tax upon a public company's undistributed income with the provision relieving against double taxation which for the future has been superseded by Part IIIB. of the *Income Tax Assessment Act* 1936-1948. What we are called upon to decide is at bottom the question in what order of priority s. 159 and s. 160C. of the Act of 1936-1944 are to be applied in ascertaining the final state of the account between a company and the Commissioner of Taxation in respect of taxation upon the company's profits or income. Section 159 provides for a rebate of tax to a taxpayer part of whose income has been taxed under the law of the United Kingdom and under the law of the Commonwealth. The relief from double taxation afforded by the rebate is based upon the assumption that the taxes to be borne by the taxpayer on the income under the *Income Tax Assessment Act* are ascertained and are paid or are due or payable. On this basis a rebate is calculated, which, when added to relief granted in the United Kingdom pursuant to a reciprocal arrangement between the governments of the two countries, should result in the final burden of the taxpayer being limited to the total amount of the taxes of the country whose imposition is the higher.

Section 160C. relates to the calculation of that portion of the taxable income of a company which has not been distributed in dividends for purposes of the so-called further tax imposed on the undistributed income of public companies. For this purpose the undistributed income is ascertained according to the principle that from the taxable income of the company there should be deducted the dividends paid thereout, certain losses and the taxation borne by the income.

The commissioner claims that to give effect to the policy of this provision as well as to the language in which it is expressed it is necessary to take into account the rebate given by s. 159 and to treat it as reducing the amount of the deductible taxes before you can find the undistributed income. On the other side the taxpayer says you must fix finally the amount of the further tax upon the undistributed income and, to that end, the undistributed income itself, before you can know what ought to be the rebate. Stated in another way it is the contention of the commissioner that only the net amount required for taxation should be deducted in ascertaining the distributable fund in the hands of the company taxed as undistributed profit ; it is the taxpayer's contention that the rebate is an adjustment made after its total ultimate liability in two

countries for the relevant taxes has been determined for the purpose of relieving it of the consequence of double taxation and that the rebate cannot be an integer in determining what is its total tax liability.

The taxes which are deductible from a company's taxable income for the purpose of arriving at its undistributed income liable to further tax include ordinary income tax, super tax and war-time (company) tax of the Commonwealth and also the taxes upon the income payable abroad, though not, of course, the further tax itself. But into the calculation of the amount of the rebate the further tax enters, while the war-time (company) tax does not. Section 160C. in dealing with further tax gives the taxpayer a choice as to the deduction of ordinary income tax and super tax and war-time (company) tax. The choice is between on the one hand deducting from the taxable income of the accounting period those taxes which he pays during the accounting period and on the other hand deducting the taxes payable in respect of the income of the accounting period. The choice does not extend to taxes abroad, or when there was State income tax, to State taxes. In those cases the taxpayer must deduct what he pays during the accounting period, and of course, taxation he pays during an accounting period can only have been assessed in respect of the income of past years.

In the present case the taxpayer company elected in favour of deducting the Federal taxes that were payable in respect of the income of the accounting period instead of the Federal taxes that were paid during that period.

The taxpayer is a company incorporated in the United Kingdom, where presumably its residence is to be found. At all events the income it derived from Australia was included in the income as assessed to United Kingdom income tax for the year ended 5th April 1945. The assessment appears to have been based on the accounting period of twelve months ending 31st December 1943, which is that with which the case before us is concerned. Included in the assessment was an amount of income amounting to Stg. £1,418,467 which was included in the Australian assessment. Upon this amount United Kingdom tax was levied at the rate of 10s. in the £, but pursuant to the *Finance Act* 1920 (10 & 11 Geo. V. c. 18) as amended by the *Finance Act* 1927 (17 & 18 Geo. V. c. 10) Schedule 5 II., relief was granted of half the tax or at the rate of 5s. in the £. As a result the United Kingdom tax borne was £354,616 15s. In Australia, before the rebate granted under s. 159 was brought into account, assessments of the same income had been made, and

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amended, which fixed upon the taxpayer the following liabilities for tax :—

Ordinary income tax	£A713,334
Super tax	118,750
War-time (company) tax ..	169,128
Total	£A1,001,212

These formed the Federal taxes payable in respect of the income of the accounting period to be deducted from the taxable income in ascertaining the portion of the income of the taxpayer that had not been distributed in dividends : see s. 160c. (5). To the figure of £1,001,212 it was necessary to add a sum of £18,206 for State taxation paid during the accounting period and a sum of £A50,822 representing an amount paid within that period for United Kingdom tax : see s. 160c. (1). These additions brought the total to be deducted on account of taxes payable or paid to £1,070,240. In dividends £1,000,000 had been distributed. The difference between the total of these two sums and the taxable income, £2,380,011, was £309,771 and this amount formed the portion of the taxable income of the company which had not been distributed as dividends for the purposes of s. 160B., which provides for the levy of the further tax. The rate of further tax was 2s. in the £. An assessment was made accordingly upon the taxpayer company for further tax in an amount of £30,977.

Armed with these figures the commissioner turned to the claim for a rebate under s. 159. The purpose of insuring that between the two countries the taxpayer shall be exposed to an ultimate burden no greater than the total amount of taxation of the country making the higher imposition is effected by each country relinquishing to the taxpayer such a rebate or measure of relief that when the two are combined they will equal the total amount of taxation of the country making the lower imposition. On the Australian side, when as in the present case the Commonwealth rate is not greater than the British rate, the rebate granted by the Commonwealth is obtained by applying to the income doubly taxed a rate which represents the excess of the Commonwealth rate over half the British rate. " Commonwealth rate " is an expression with a defined meaning. It means the rate ascertained by dividing the total amount of the income tax paid or payable by the taxpayer (after the deduction of all rebates other than the rebate granted by s. 159) by the amount of the total taxable income in respect of which the tax paid or payable under the *Income Tax Assessment*

Act has been charged for that year : s. 159 (3) (*a*). It will be noticed, and it is a point of no small importance, that the further tax forms part of the income tax making up the total amount of income tax paid or payable for the year by the taxpayer. In this case the figures making up the total tax are :—

Income tax	£713,334
Super Tax	118,750
Further Tax on undistributed income	30,977
	£863,061

The taxable income is £2,380,011. Accordingly, in terms of the definition the Commonwealth rate is $\frac{£863,061}{£2,380,011}$ in the £ or 87.0309 pence. As the British rate is 10s. in the £ the excess of the Commonwealth rate over half the British rate is 27.0309 pence. The amount doubly taxed, as already stated, is Stg. £1,418,467, which is £A1,773,084. Applying the rate of 27.0369d. to this figure, a rebate is produced of £199,701. The taxpayer company claims that here the matter ends. It is the final item in the account for the year between the commissioner and the company where it should be placed to the company's credit. But this was not the commissioner's view. He at once treated the grant of the rebate of £199,701 by way of relief against double taxation as a reason for re-opening the assessment to further tax. He amended the assessment, under s. 170, notwithstanding that where there has been a full and true disclosure of all the material facts no amendment increasing the liability of the taxpayer in any particular can be made except to correct an error in calculation or a mistake of fact. It is hard to see any such error or mistake, but no objection has been taken by the taxpayer on that score. The amendment made consisted in reducing by £199,701 the amount of the deductions previously made from the taxable income on account of ordinary income tax (£713,334) and super tax (£118,750) which amounted together to £832,084. The reduction brought the amount of these deductions down to £632,383. But, as will be recalled, there was also a deduction of war-time (company) tax amounting to £169,128. Now under the *War-time (Company) Tax Act* 1940-1944 (s. 3, definition of " income tax " and " taxable profit " par. (*a*) and s. 18) in the assessment of war-time (company) tax there is to be a deduction on account of ordinary income tax but not on account of super tax or further tax. Super tax, however, may form a rebate from the tax : s. 18. The commissioner in like manner

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recalculated the war-time (company) tax by bringing into account the rebate of £199,701 to diminish the deduction of income tax. By doing so he increased the war-time (company) tax by £112,698. This figure he brought into the assessment of further tax on undistributed income that he was amending. He necessarily brought it in as an increase in the amount deductible on account of war-time (company) tax and added it to the former amount of £169,128, making the total deduction for that tax £281,826. The revised total deductions on account of Federal taxes (ordinary income tax, super tax and war-time (company) tax) thus became £914,209 instead of £1,001,212, a diminution of the deduction by £87,003. At a rate of 2s. in the £ this meant an increase in further tax of £8,700 6s.

Now the basis upon which the £199,701 was taken into account as decreasing the deduction of ordinary and super tax was that it was a repayment, refund or recoupment, or a reduction, of these taxes. Yet if this was so at all, it was as much a repayment, refund, recoupment or reduction of the third of the three taxes taken into account in ascertaining the rebate, namely, the further tax itself. Why should the whole amount be thrown against ordinary income tax and super tax ? If it is correct that the rebate is not a relief in gross because of double taxation but a definite repayment in reduction of the specific Federal taxes taken into account it must operate as a reduction of each and every £ of the taxes taken into account in calculating the rebate. In the same way, in recalculating the war-time (company) tax, what warrant was there for treating the whole £199,701 as a reduction of ordinary income tax, as apparently was done ? If the reasoning were accepted which gives the rebate such a character, surely it involves the consequence that a proportionate part of the rebate is attributable to the super tax and another proportionate part to the further tax.

In the assessment in the United Kingdom of the income taxable in that jurisdiction, a deduction was made of the Australian war-time (company) tax at the sterling equivalent of £A169,128. If that figure is to stand increased by £112,698 in the Australian assessment to war-time (company) tax, namely, to £281,826, by reason of the commissioner taking the rebate of £199,701 in to account, then it would seem that British tax should be re-assessed, that is if the law of the United Kingdom allows of the process. It is evident that such a re-assessment would lead to a reconsideration of the assessment of further tax and, if carried far enough, might require a reconsideration of the rebate not only because of the increase in further tax but because of the alteration of the amount

of income doubly taxed. These consequences, however, of the re-assessment of war-time (company) tax and of further tax by taking the rebate into account need be mentioned only as illustrations of the impracticability of the adoption of such a course.

There is a number of considerations which show that the calculation of the further tax must precede the calculation of the rebate and that the application of s. 159 is necessarily the final step. Section 160c. must be applied in priority and its operation must end before s. 159 can be used to ascertain the rebate. In the first place, the definition of " Commonwealth rate " in s. 159 (3) (*a*) is essential to the ascertainment of the rebate. Until all the factors upon which that definition depends are available the rebate cannot be determined. One factor is the total amount of income tax paid or payable for the year by the taxpayer. That factor cannot be obtained until, not only the ordinary tax and the super tax, but in the case of a public company the further tax on undistributed income, is ascertained. If the commissioner were right when the further tax was assessed there would be a preliminary ascertainment of the Commonwealth rate of tax, and the rebate might then be provisionally calculated. No sooner would the rebate have been granted than it would be necessary to re-assess the further tax. As soon as the further tax was re-assessed it would be necessary to recalculate the rebate in order to take the new amount of further tax into the calculation of the rebate. The consequent increase in the rebate would result in a second re-assessment of the further tax. So a never ending reciprocation would be set up between the operation of s. 159 (3) (*a*) and (5) and s. 160c. (5), a *circulus inextricabilis*. This is of course a *reductio ad absurdum* and should be enough to establish the priority in application of s. 160c.

An attempt, however, was made to answer the argument by the use of the bracketed words in s. 159 (3) (*a*) : viz. " (after the deduction of all rebates other than the rebate granted under this section)." It was said that once a rebate calculated under s. 159 had been deducted for the purpose of s. 160c. from the Federal taxes considered as deductions from taxable income under s. 160c. (1) or (5) so that the resulting undistributed income was increased and the tax thereon correspondingly increased, it would offend against the words " other than the rebate granted under this section " if the increased amount of further tax were used to recalculate the rebate. This argument appears to me simply to be a confusion. Nothing is deducted on the supposed second invocation or application of s. 159 (3) (*a*). More further tax is added—that is all. It is true that the increase in the further tax is the result of

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the decrease of a deduction under s. 160C. It is true that the decrease is caused by deducting from the deduction previously allowed from the taxable income under s. 160C. the rebate which under sub-s. (1) of s. 159 is calculated by means of sub-s. (3) (*a*). But that is nothing like a deduction of rebate from the tax paid or payable as a factor in the calculation directed by s. 159 (3) (*a*). In the next place it is proper to compare s. 27 of the *Finance Act* 1920 with s. 159. The comparison makes it plain that the two legislatures were making provisions which were intended to operate after the full liability of the taxpayer in respect of the income common to both fields of taxation had been completely ascertained. At that point the legislation would apply and in effect relieve the taxpayer of the lower of the two liabilities, by the combined effect of rebates from both jurisdictions. It is at variance with the policy of the enactments for the very grant of the rebate itself to set the wheels of assessment revolving again. In the third place s. 159 (6) fixes the point from which time begins to run limiting the period for claiming the rebate and fixes it as the date upon which the tax in respect of which the rebate is sought became due and payable. That indicates that the rebate is the result of taxes finally imposed. The period limited is six years. Yet under s. 160C. (1) (iii.) the period for distributing the dividend is at most nine months after the close of the year of income, that is apart from any extension allowed because of the war. That is still another indication that rebates under s. 159 have nothing to do with s. 160C. Some years might well elapse before a rebate could be calculated and granted. In the fourth place the rebate under s. 159 is not specifically related to any of the taxes involved. It is not a rebate in an assessment. There are many rebates to be made in a taxpayer's assessment because they are concerned with his liability to tax. See for example ss. 160, 160AA., 160AB., 160ABA., 160AE., 160AG., 160AH., and notice how s. 159 is excluded by s. 160AF.: see too s. 160AD. (*a*). The rebate under s. 159 is of an entirely different kind and is granted by way of relief because of the liability to several Commonwealth taxes and the British tax. It is intended as an equalization of what would otherwise be their combined effect. If the view were taken that the rebate related to Federal taxes specifically the difficulty, already mentioned, would arise of knowing how the rebate is to be apportioned among the several Federal taxes. These considerations appear to me to be strong to show that the operation of s. 159 was intended to be ultimate and therefore postponed to the operation of s. 160C. in assessing further tax on undistributed income. But the strength of the argument

to the contrary is to be found in the language of s. 160c. (1) and (5). Section 160c. (1) (i) which represents the original form of the provision, authorizes the deduction of those taxes only which are " paid in the year of income " and it provides that the amount of the taxes so paid allowed as a deduction shall be less any refund received in the year of income of any tax to which the paragraph refers. This no doubt reflects a policy of allowing only the net amount of the tax by which the company's funds are depleted. The decision of the majority of this Court in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1) and the view that prevailed in an equally divided Court in *W. & A. McArthur Ltd.* v. *Federal Commissioner of Taxation* (2) are relied upon to show that a payment recouped is no payment. Section 160c. (5), which gives the election availed of by the taxpayer company in the present case, came in by an amendment of 1942 (No. 50). There the expression is " payable under this Act . . . in respect of the income." It is said, and no doubt with much truth, that sub-s. (5) did not mean to alter the description of things to be deducted beyond substituting at the election of the taxpayer taxes attributable to the income earned in, for taxes collected during, the accounting period. If a tax could not be considered paid when, though payment had been made, a rebate had afterwards been granted under s. 159, neither could a tax remain payable after such a rebate had been granted.

In further support of the conclusion that a rebate under s. 159 destroyed payment and payability alike in the case of taxes taken into account in calculating the rebate, the supposed policy of s. 160c. was vouched. That policy was said to be to leave no net revenue of a company out of further tax unless it was disbursed in dividends or taxes or applied to recoup losses. As a broad statement it may be so. But in my opinion the argument from policy is answered by the consideration that it is a policy concerned with arriving at the taxation which gives rise to the rebate, that is to say, to whatever extent the same taxable fund is taxed in the United Kingdom. It is anterior to the rebate. The argument from the use of the words " paid " and " refund " is of a different kind. It is one to which great weight must be given. For it has recourse to the first duty of a court of construction, namely, to stick to the text and to give effect to the intention the words express. The argument, however, leaves out of account two very important factors. The first is that, however literal and narrow, and however inflexible a meaning may be given to the word " paid," however large a meaning

(1) (1927) 40 C.L.R. 148, at p. 152. (2) (1930) 45 C.L.R. 1.

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may be given to the word " refund," nevertheless the rebate granted by s. 159 is of such a character as not readily to respond to the test which would result. In *R.* v. *Federal Commissioner of Taxation*; *Ex parte Sir Kelso King* (1) the Court examined the corresponding previous provision and decided that the particular rebate fell completely outside the process of assessment to tax. It was considered that the rebate by way of relief from double taxation presupposed the complete ascertainment of the taxpayer's liability to tax.

Though this decision goes no further than putting the rebate as something subsequent to and therefore outside the ascertainment of tax, it suggests the real nature of the rebate. The rebate is of course anomalous in its character because it arises from an attempt to compensate for the consequences of the exercise of a dual jurisdiction to tax the same fund. The association of the rebate with the Federal tax depends rather on causation than upon any question affecting liability. There is no factor in the calculation or ascertainment of Australian tax that gives rise to it. It is not connected with one Federal tax on income rather than another. When the rebate is applied to discharge the Federal tax outstanding, a payment is then affected. The amount of the assessment would not show a reduction, it would show a payment of tax. These are considerations which at least create a preliminary difficulty in saying that the grant of a rebate under s. 159 makes it no longer possible either to say that a tax already paid has not been refunded or to say that a tax unpaid is still payable, if the tax has entered into the calculation of the Federal rate.

But there is a second answer to the argument. That answer is that the problem is not confined to the meaning of s. 160C. Sections 159 and 160C. must be reconciled. Plainly s. 159 presupposes that before it is invoked such provisions as s. 160C. have been exhausted. Almost as plainly when s. 160C. employs the words " paid," " refund " and " payable," it does not contemplate s. 159. These are general words directed respectively to the discharge of a liability to pay, to the refund of tax overcharged and to the existence of a liability. The considerations which point to the conclusion that the intention that s. 159 should be postponed in the order of the application of the provisions and s. 160C. should be applied in priority appear to be so much stronger than the intention to be found in the expressions referred to as to make it reasonably certain that they are inapplicable to a rebate under s. 159. For these reasons I think that the rebate of £199,701 ought not to have

(1) (1930) 43 C.L.R. 569.

been brought into account for the purpose of re-assessing the further tax under s. 160c. (5).

In my opinion the questions in the case stated should be answered :—(1) Yes ; (2) No ; (3) Does not arise.

The costs of the case stated should be costs in the appeal.

McTIERNAN J. I agree with the answers given by the Chief Justice and *Dixon* J. and with their reasons.

WEBB J. We are concerned only with the re-assessment of the further tax.

The rebate is based on the Commonwealth rate of tax which in turn is based on the further tax among others. There is no provision for any re-assessment of the rebate, so the further and other taxes on which the rebate is granted must be assessed finally before the rebate.

The exception of the rebate made by the words in brackets in s. 159 (3) (*a*) may be only a recognition of the fact that the rebate is still to be ascertained ; but in any event it does not in my opinion warrant the conclusion that Parliament intended that the rebate should be a payment creating a further liability to pay the very tax to relieve against which the rebate was granted.

If the commissioner apportioned the rebate and in re-assessing the further tax made no deduction of that part of the rebate apportioned to the further tax, the re-assessment would still be unauthorized, as the rebate is against the taxes in gross. The commissioner needs statutory authority to apportion ; it is not to be implied because the Act does not expressly forbid apportionment.

The questions in the case should be answered as the Chief Justice proposes.

Questions in case answered—(1) *Yes.* (2) *No.* (3) *Unnecessary to answer. Costs of case to be costs in the appeal. Case remitted to Latham C.J.*

Solicitors for the appellant : *Gillott, Moir & Ahern.*

Solicitor for the respondent : *K. C. Waugh,* Acting Crown Solicitor for the Commonwealth.

E. F. H.