Q. at 615 - 106 C.L.R. 448
Ref to. (1975) 1 WLR. 745.
App at pp. 617/8. 52 ALJR. 1.

[HIGH COURT OF AUSTRALIA.]

FOSTER . . . . . APPELLANT;

AND

H. C. OF A. 1951.

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

MELBOURNE, *March* 15, 16.

SYDNEY, *April* 27.

Latham C.J., Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Income Tax (Cth.)—Assessment—Amended assessment—"Full and true disclosure of all the material facts"—"Amendment . . . to correct . . . a mistake of fact"—Facts known to Commissioner but not to Deputy Commissioner from whose office assessment issued—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *ss.* 104, 107, 170.*

The appellant included in a return of his income made to the Deputy Federal Commissioner of Taxation at Hobart a statement indicating that he had received a dividend from a company which had paid tax under s. 104 of the *Income Tax Assessment Act* in respect of the amount of previously undistributed profits out of which the dividend was paid. A notice of assessment which issued out of the Deputy Commissioner's office at Hobart showed that the appellant was allowed a rebate under s. 107 of the Act in respect of the dividend. The company had in fact paid the tax under s. 104, but an appeal by it against its assessment to that tax had, unknown to the Deputy Commissioner, been allowed after the appellant had made his return but before his assessment was made. Subsequently the Deputy Commissioner purported to amend the assessment by assessing the appellant on the amount of the dividend.

Held that, by reason of s. 170 (3) of the *Income Tax Assessment Act* 1936-1947, there was no power to make the amendment. The appellant had fully disclosed the material facts to the Commissioner by the statement in his return. The fact that an appeal by the company was pending was already

* The *Income Tax Assessment Act* 1936-1947 provided, by s. 170: "(1) The Commissioner may, subject to this section, at any time amend any assessment . . . as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment. . . . (3) Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error in calculation or a mistake of fact,"

known to the Commissioner though not to the Deputy Commissioner at Hobart, and therefore it was not necessary for the appellant to state it. The amendment was not " to correct an error in calculation or a mistake of fact " and the assessment was correct on the facts as they existed when it was made.

CASE STATED.

On an appeal by Francis Henry Foster against an assessment to Federal income tax, *Latham* C.J. stated for the Full Court of the High Court a case which was substantially as follows :—

1. The appellant was at all material times the registered holder of 58,678 fully paid shares of £1 each in the capital of North Australian Pastoral Co. Ltd. (hereinafter called " the company "), and a director thereof.

2. The company was incorporated at Darwin in the Northern Territory of Australia on 30th March 1931 and carries on grazing pursuits on Alexandria Station in the Northern Territory. From the date of its incorporation the company has duly furnished income-tax returns to the appropriate Deputy Commissioner of Taxation.

3. [A copy of the assessment for income tax dated 19th April 1941 issued to the company in respect of the income year ended 30th June 1940 was exhibited and marked " A ".]

4. [A copy of the assessment for additional tax on undistributed income dated 27th April 1942 issued to the company in respect of the income year ended 30th June 1940 was exhibited and marked " B ".]

5. The company had made to the commissioner a full and true disclosure of all the material facts necessary for the assessments referred to in pars. 3 and 4 hereof.

6. On 18th June 1941 the company paid the income tax for which it had been assessed in the assessment marked " A ", together with an amount estimated to, and which did in fact, cover payment of the amount of additional tax on undistributed income for which it was subsequently assessed in the assessment marked " B ".

7. During the income year ended 30th June 1943 the company made appropriations out of the amount of the undistributed income referred to in the assessment marked " B " for the year ended 30th June 1940. After these appropriations a sum of £28,961 19s. 2d. remained, which was transferred in the books of the company to a " Tax-free Reserve Account ", and the balance sheet as at 30th June 1943 shows : " Tax-free Reserve Account.. £28,961 19s. 2d."

8. On 20th September 1944 the company passed a resolution as follows : " Resolved that a dividend at the rate of 5% on the

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paid-up capital of the company be paid, absorbing £8,100, and that this amount be paid wholly and exclusively out of the profits of the company in respect of the year ending 30th June 1940 and in respect of which the company has paid tax under Division 7 of the Federal Income Tax Act, such profits being shown in the tax-free reserve ". This dividend was paid on 6th October 1944.

9. The company appealed to the High Court of Australia against its assessments in respect of the income years ending 30th June 1940, 1941, 1942 and 1943 respectively, the main question for determination being whether the company was a resident of the Northern Territory within the meaning of, and therefore entitled to exemption of part of its income under, the provisions of s. 23 (*m*) of the *Income Tax Assessment Act* 1936 as amended.

10. The appeals were heard by *Dixon* J., and on 19th July 1946 his Honour pronounced judgment in favour of the company (1).

11. Amended assessments dated 8th October 1946 were issued to the company in respect of the financial year ended 30th June 1940. These amended assessments were issued as a result of the judgment referred to in par. 10 hereof. Both the amounts of tax referred to in the assessments marked " A " and " B " which had been paid by the company were refunded to the company on 30th October 1946.

12. In September 1945 the appellant furnished an income-tax return to the Deputy Commissioner of Taxation, Hobart, in respect of the income derived during the calendar year 1944 (the accounting period adopted in lieu of the year ended 30th June 1945). [In this return the appellant inserted a note to the effect that he had received from the company a dividend of £2,933 18s. " on which notional tax has been paid by the company ", but he did not include the amount in the statement of his income.] The only information given to the Commissioner of Taxation or to the Deputy Commissioner of Taxation at Hobart by the appellant in respect of the dividend from the company was that set out in his income-tax return.

13. At the date of the return the appellant was aware that the dividend referred to in par. 12 was paid to him pursuant to the resolution referred to in par. 8 and that the company had appealed against its assessment in respect of its income for the year ending 30th June 1940.

14. An assessment for income tax dated 13th August 1946 was issued to the appellant in respect of the appellant's income year ended 31st December 1944, by which the appellant's liability

(1) (1946) 71 C.L.R. 623.

to tax was assessed at nil and a credit of £1,659 5s. 0d. was allowed. [The assessment treated the appellant as being entitled to a rebate under s. 107 of the *Income Tax Assessment Act* 1936-1944 of the amount by which his tax had been increased by the inclusion in his assessment of the amount of the dividend.]

15. The assessment issued on 13th August 1946 was prepared at Hobart for issue prior to the decision of *Dixon* J. referred to in par. 10, and at the time of preparation none of the officers in fact concerned with the preparation thereof was aware that proceedings by way of appeal were then pending in respect of the liability of the company for payment of tax for the relevant or any prior years. At the date of the issue of the assessment from the office of the Deputy Commissioner at Hobart, information had not been received at that office of the decision of *Dixon* J., nor was the Deputy Commissioner or any person in fact concerned in the preparation and issue of such assessment aware of such decision.

16. After becoming aware of the decision of *Dixon* J. and being of opinion that the original assessment of 13th August 1946 was affected by a mistake of fact, the Deputy Commissioner at Hobart on 12th March 1948, made an amendment to such assessment for the purpose of giving effect to such decision. An amended assessment for income tax dated 12th March 1948 was issued to the appellant in respect of the appellant's income year ended 31st December 1944, by which the appellant's liability to tax was assessed at £1,875 17s. 0d.

17. The appellant gave notice of objection to the amended assessment.

18. The objection was disallowed and was treated as an appeal to the High Court.

19. The contentions of the appellant include the following :—

(*a*) that the amended assessment was not made to correct an error in calculation or a mistake of fact and was not authorized by s. 170 of the *Income Tax Assessment Act.*

(*b*) that the dividend of £2,934 included in his assessable income in the amended assessment was paid to the appellant by the company out of an amount in respect of which the company had paid Division 7 tax and accordingly the appellant was entitled to a rebate under s. 107 of the amount by which his income tax was increased by the inclusion of the dividend.

20. The contentions of the respondent include the following :—

(*a*) that the appellant is not entitled to a rebate under s. 107 of the *Income Tax Assessment Act* in respect of the

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dividend of £2,934 received from the North Australian Pastoral Co. Ltd. because the same was not paid out of an amount in respect of which the company paying the dividend paid or was liable to pay tax.

(*b*) that the provisions of s. 170 (3) of the *Income Tax Assessment Act* did not preclude the lawful issue of the amended assessment dated 12th March 1948 because—

(i) the amended assessment in so far as it disallowed a rebate wrongly allowed previously in purported compliance with s. 107 was not " an amendment of the assessment increasing the liability of the taxpayer " within the meaning of s. 170 (3);

(ii) the appellant had not made a full and true disclosure of all material facts necessary for his assessment prior to making the original assessment;

(iii) the amendment of the assessment was made to correct a mistake of fact.

The following questions were submitted for the opinion of the Court:—

(*a*) Whether the provisions of s. 170 (3) of the *Income Tax Assessment Act* 1936-1947 preclude the lawful issue of the said amended assessment dated 12th March 1948.

(*b*) Whether a rebate under s. 107 of said Act is allowable in respect of the dividend of £2,934 received by the appellant from the North Australian Pastoral Co. Ltd.

J. B. Tait K.C. (with him *J. McI. Young*), for the appellant. The provisions of s. 170 (3) of the Act are conclusive against the commissioner in this case. The appellant's statement in his return to the effect that the company had paid the tax under s. 104 was " a full and true disclosure of all the material facts necessary for his assessment ". The disclosure is to be made to the commissioner. To tell him what he already knew, that an appeal by the company was pending, would not be a " disclosure " in any real sense of the word. It is not suggested that it matters; but, if it does, the case stated does not show any delegation by the commissioner to the deputy commissioner at Hobart under s. 12 of the Act. Moreover, facts " necessary " for the assessment do not include facts already known to the commissioner; it is not " necessary " that there should be a repetition of known facts. There was no error in calculation within s. 170 (3), and the only way in which the amended assessment could be supported would

be by showing that there was a mistake of fact within the subsection. There was none, it is submitted. The original assessment of 13th August 1946 was correct on the facts as they then existed. The tax had in fact been paid by the company at that time, and it then remained in the state of having been "paid". The question is not one of "paid" in the sense of ultimately paid, as in *D. & W. Murray Ltd.* v. *Federal Commissioner of Taxation* (1). The Act there concerned gave very wide powers of amendment; moreover, it was a case of refund before assessment. The date of the assessment, 13th August 1946, is the latest date that could conceivably be relevant either as to disclosure or mistake.

A. D. G. Adam K.C. (with him *B. J. Dunn*), for the respondent. The question under s. 170 (3) is not one of a duty of disclosure; it is only that, if the requisite disclosure is made, certain consequences follow. Where the return of income is made to a deputy commissioner, it is not to the point that the commissioner has personal knowledge of certain facts. Disclosure must be made to the deputy commissioner to whom the return is made: see s. 13 of the Act. The appellant's statement in his return that tax had been "paid" was merely a partial truth. "Paid" in this connection must mean paid out and out, as in *D. & W. Murray Ltd.'s Case* (1). [He referred to s. 202 of the Act.] Moreover, the requirement of disclosure must exist up to the time when the taxpayer receives the assessment. No doubt, the question of the company's liability to tax in the circumstances of this case was one of law, but, once the question of law was determined, the question of the amount of tax for which the appellant was liable was one of fact. There was, therefore, a mistake of fact in the original assessment as to the amount for which, as it ultimately appeared, the appellant was liable, and the amended assessment was properly made under s. 170 (3) to correct a mistake of fact. As to what constitutes a mistake of fact, see *Words and Phrases Judicially Defined* (U.S.), at p. 4543; see also, as to mistake of law, 59 L.Q.R. 327.

J. B. Tait K.C., in reply.

Cur. adv. vult.

April 27.

The following written judgments were delivered:—

LATHAM C.J. This is a case stated in an appeal from an amended assessment made under the *Income Tax Assessment Act* 1936-1945 in respect of income of the appellant Francis Henry Foster

(1) (1927) 40 C.L.R. 148.

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derived during the year 1st January 1944 to 31st December 1944. The appellant in 1944 held 58,678 fully-paid shares of £1 each in the North Australian Pastoral Company Limited. That company was a private company within the meaning of s. 104 of the *Income Tax Assessment Act*. The company was therefore assessed in respect of the aggregate additional amount of tax which would have been payable by its shareholders if the company had made a sufficient distribution of its income of the year to the shareholders. Section 107 provided that a person should be entitled to a rebate of the amount by which his income tax was increased by the inclusion in his assessable income of dividends paid to him by a company where the dividends were paid wholly and exclusively out of any amount or amounts in respect of which under the relevant division of the Act (Division 7 of Part III.) the company paying the dividends had paid or was liable to pay tax. The company on 18th June 1941 in fact paid ordinary income tax, and also tax under Division 7 of Part III. in respect of undistributed income. Subsequently, during the income year ended 30th June 1943, the company made an appropriation out of the amount of the undistributed income of a sum of £28,961 to a tax-free reserve account. On 20th September 1944 the company passed a resolution in the following terms:— " Resolved that a dividend at the rate of 5% on the paid-up capital of the Company be paid, absorbing £8,100, and that this amount be paid wholly and exclusively out of the profits of the Company in respect of the year ending 30th June 1940 and in respect of which the Company has paid tax under Division 7 of the Federal Income Tax Act, such profits being shown in the tax-free reserve ". A dividend in pursuance of the resolution was paid to the appellant taxpayer on 6th October 1944. On 27th September 1945 the taxpayer made his return for the year 1st January 1944 to 31st December 1944, and included in his return a statement that he had received a dividend of £2,933 from the North Australian Pastoral Company " on which Notional Tax has been paid by the Company ". Accordingly, as the company had in fact paid tax under s. 104 the taxpayer was entitled to a rebate under s. 107. On 13th August 1946 an assessment was issued by the Deputy Commissioner of Taxation, Hobart, by which the rebate was allowed in full. Accordingly the taxpayer was not required to pay any tax in respect of the dividend received from the company.

In the meantime the company had appealed against its assessment to ordinary tax and to additional tax under Division 7, Part III. The appeal related to tax in respect of the income years ending 30th June 1940, 1941, 1942 and 1943. The appeals were

heard by *Dixon* J. and on 19th July 1946 judgment was given in favour of the company: see *North Australian Pastoral Co. Ltd.* v. *Federal Commissioner of Taxation* (1). On 8th October 1946 the commissioner issued amended assessments of the company's income stating the tax payable as nil, and the amount of £14,812 which had been paid as additional tax was repaid to the company.

The assessment of the appellant taxpayer was made in the office of the deputy commissioner at Hobart. The commissioner, of course, was aware of the appeal and of the result of the appeal, but this information was not communicated to the deputy commissioner, and on 13th August 1946, as already stated, he assessed the appellant, allowing a rebate under s. 107 of the Act, with the result that the tax payable by the appellant was stated as nil.

When the appellant made his return he knew that the company had appealed against its assessment and that the appeal was pending.

None of the officers at Hobart who actually prepared the taxpayer's assessment knew of the appeal or of the result of the appeal at the time when the assessment was prepared and issued.

On 12th March 1948 the deputy commissioner at Hobart amended the appellant's assessment by disallowing the s. 107 rebate and claimed payment of £1,875 17s. 0d. as tax. The taxpayer objected, the objection was disallowed and the taxpayer appealed to this Court. A case was stated under s. 198 (1) of the *Income Tax Assessment Act* 1936-1949 by which the following questions were submitted to the Court:—"(*a*) Whether the provisions of s. 170 (3) of the *Income Tax Assessment Act* 1936-1947 preclude the lawful issue of the said amended assessment dated 12th March 1948. (*b*) Whether a rebate under s. 107 of said Act is allowable in respect of the dividend of £2,934 received by the appellant from the North Australian Pastoral Company Limited."

The first question is whether s. 170 (3) of the Act precludes the lawful issue of the amended assessment in which the rebate was disallowed.

Section 170 contains in sub-s. (1) a general power to amend assessments "subject to this section". Section 170 (2) provides for the case where a taxpayer has not made to the commissioner full and true disclosure of the facts necessary for his assessment. In such a case where there has been an avoidance of tax the commissioner may, where he is of opinion that there has been fraud or evasion, amend the assessment at any time and in other cases

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within six years of the date when the tax became due and payable. The amendment which is authorized under this provision is such amendment as the commissioner thinks necessary to correct an error of calculation or a mistake of fact or to prevent an avoidance of tax.

It is contended for the taxpayer that this provision is not applicable because this is not a case in which the taxpayer has not made a full and true disclosure of material facts. The taxpayer contends and the commissioner denies that s. 170 (3) is applicable to the case. Section 170 (3) is as follows :—" Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error in calculation or a mistake of fact ; and no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under that assessment."

No question arises in the present case of an error in calculation, and therefore, if the taxpayer made the full and true disclosure specified in the sub-section, the commissioner may amend the assessment so as to increase the liability of the taxpayer only in order to correct a mistake of fact. The two questions which arise, therefore, are (1) whether the taxpayer made to the commissioner a full and true disclosure of all the material facts necessary for his assessment ?—and (2) if he did make such a disclosure, was the amendment disallowing the rebate an amendment made to correct a mistake of fact ?

In *Federal Commissioner of Taxation* v. *Westgarth* (1) it was held that disclosure of " all the material facts necessary for making an assessment " under s. 20 (1) of the *Estate Duty Assessment Act* 1914-1942 meant disclosure of relevant facts known to the taxpayer or of relevant beliefs held by him, and that it did not involve making the commissioner aware of facts unknown to the taxpayer. In the present case it is urged for the commissioner that the taxpayer did not disclose to the commissioner the facts that the appeal was pending, and that the company succeeded upon the appeal. But the commissioner, as the taxpayer must have known, was already aware of those facts and he was aware of them as facts having a direct relation to the assessment of the company in which the taxpayer was a shareholder. In my opinion it is not possible, according to the ordinary use of

(1) (1950) 81 C.L.R. 396.

language, to " disclose " to a person a fact of which he is, to the knowledge of the person making a statement as to the fact, already aware. There is a difference between " disclosing " a fact and stating a fact. Disclosure consists in the statement of a fact by way of disclosure so as to reveal or make apparent that which (so far as the " discloser " knows) was previously unknown to the person to whom the statement was made. Thus the taxpayer could not add anything to the commissioner's knowledge with respect to the appeal. In my opinion in these circumstances it should be held that the failure of the taxpayer to repeat to the commissioner what he already knew did not constitute a failure to disclose material facts.

The deputy commissioner at Hobart was not aware of those facts. But s. 170 (3) refers to disclosure made to the commissioner. There are no provisions in the Act which require a disclosure to the particular deputy commissioner who happens to be the officer dealing with the assessment of a particular taxpayer.

The next question is, if (as I think was the case) there was the full and true disclosure of material facts referred to in s. 170 (3), whether the amendment by disallowing the s. 107 rebate was an amendment made to correct a mistake of fact. When the assessment was made it was correct upon the facts as they then existed. The company had actually paid tax under s. 104. There was no mistake about that fact and, that being so, the assessment was quite correct. If the deputy commissioner had known that the appeal was pending he probably would have delayed issuing assessments to shareholders in the company. But a mistake consisting in issuing an assessment instead of withholding it for a period is not a mistake of fact in the making of the assessment itself. In my opinion the mistake of fact referred to in s. 170 (3) is a mistake of fact which affects the making of the assessment and not the issue of the assessment at a particular time.

It is true that a refund of the additional tax paid was made to the company. It is argued that therefore the company had not " paid " the tax. The decision upon the appeal was that the company was not liable to pay the tax. Accordingly, it is argued that the company had neither paid nor was liable to pay the tax. The refund to the company, however, was not made until 8th October 1946. The assessment of the appellant had been made on 13th August 1946. On that date the true position was that the company had paid tax under Division 7 of Part III. of the Act. Accordingly there was no error in the making of the assessment,

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though if further facts had been known the issue of the assessment would have been delayed.

For these reasons I am of opinion that the provisions of s. 170 (3) of the Act precluded the lawful issue of the amended assessment and that a rebate under s. 107 of the Act was allowable in respect of the dividend received from the company.

DIXON J. This matter comes before us by way of a case stated under s. 198 (1) of the *Income Tax Assessment Act* 1936-1949 in an appeal by a taxpayer from an amendment of an assessment for the financial year ended 30th June 1945 based upon income derived during the year ended 31st December 1944. The notice of the original assessment which has been amended was issued from the office of the Deputy Commissioner of Taxation at Hobart on 13th August 1946.

On 6th October 1944 (that is, during the year of income) the taxpayer received from the North Australian Pastoral Company Limited a dividend upon certain shares in that company of which he was the holder. The payment amounted to £2,933 18s. 0d. The dividend had been distributed by the company out of profits in respect of which the company had been assessed for additional tax under Division 7 of Part III. of the *Income Tax Assessment Act*. The profits were earned during the year ended 30th June 1940 and additional tax was levied upon them by notice of assessment dated 19th April 1941. The additional tax was paid by the company. The appellant, in his return of income for the year ending 31st December 1944, a document dated 27th September 1945, included among the dividends received by him that of £2,933 18s. 0d. from the North Australian Pastoral Company, but he added the statement that "notional tax" had been paid upon the dividend by the company and he did not extend the figures £2,933 18s. 0d. into the column of items of income. The return was furnished to the deputy commissioner in Hobart. The assessment issued on 13th August 1946 was prepared in the deputy commissioner's office. It treated the taxpayer as entitled under s. 107 of the *Income Tax Assessment Act* 1936-1944 to a rebate of the amount by which his income tax had been increased by the inclusion in his assessment of the dividend because it was paid wholly and exclusively out of an amount in respect of which, under Division 7, the company paying the dividend had paid tax. Having regard to the allowances and deductions to which the taxpayer was entitled from his other assessable income, this meant that an assessment to no tax for the current year should be made upon

the taxpayer, and the notice of assessment was expressed accordingly as " nil assessment ".

Some time after he had thus assessed the taxpayer, apparently a considerable time afterwards, the deputy commissioner in Hobart became aware that though the company had in truth paid the additional tax upon its profits for the year ended 30th June 1940 it had nevertheless appealed against the assessment under Division 7 as well as against its ordinary assessment. The chief ground of the appeal was that the profits formed income exempt under s. 23 (*m*) as income derived directly and in the first place from primary production in the Northern Territory of Australia by a resident of that Territory. The appeal was allowed: *North Australian Pastoral Co. Ltd.* v. *Federal Commissioner of Taxation* (1). The order allowing the appeal was made on 19th July 1946, that is nearly eight weeks before the assessment upon the taxpayer was notified. The tax and additional tax which the company had paid in respect of the income year ended 30th June 1940 was refunded on 30th October 1946—that is to say, some considerable time after the notice of assessment had been issued to the taxpayer with whom we are now concerned. Eighteen months later the deputy commissioner proceeded to amend the assessment by excluding the rebate and assessing the taxpayer upon the dividends. It is from this amendment that the taxpayer appeals.

The authority of the commissioner to make an amendment under s. 170 (1) is, in the circumstances of this case, restricted by s. 170 (3). If the taxpayer is considered to have made a full disclosure of all the material facts necessary for his assessment prior to the making of the original assessment, then the amendment could not be made unless it was to correct an error in calculation or a mistake of fact. Obviously it is not a case of error in calculation. If at the time the assessment was made it was the only assessment that could lawfully be made, I do not see how it could be said that the amendment was " to correct a mistake of fact " even if it be true, as probably it is, that the deputy commissioner would never have issued the notice of assessment at that juncture had he been aware that an appeal had been instituted by the company and allowed.

I do not agree with the contention which I understand to be made for the commissioner that, if at the date when the amendment is made the facts are such that the original assessment no longer represents what would be the liability of the taxpayer were he to be thus assessed for the first time, that is enough to enable

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the commissioner to "correct" it, provided it appears that some misapprehension existed. I think that there must be something incorrect in the original assessment as at the time it was made, something then needing correction.

In my opinion there was nothing incorrect in the assessment as at that date. It was the only assessment which at that time could have been made. At that time the company had "paid" the tax under Division 7 in respect of the amount from which the dividend was declared within the meaning of s. 107 and the commissioner had not refunded the tax. The mistake which the deputy commissioner made was in issuing the notice of assessment at that date and in not waiting until the tax was refunded, as he probably would have done had he known of the appeal and the order allowing it. Because the additional tax had not been repaid at the time the original assessment was made, it seems to me to be impossible to say that at that date it was not still in a condition of being "paid" within s. 107. The cases of *D. & W. Murray* v. *Federal Commissioner of Taxation* (1) and *W. & A. McArthur* v. *Federal Commissioner of Taxation* (2) could have no application unless and until the tax was refunded. An argument was advanced for the commissioner that the additional tax was paid only in pursuance of s. 201, which makes tax recoverable notwithstanding that there is an appeal against an assessment, and that the payment was provisional and therefore no longer a payment within s. 107 when the appeal was allowed. This appears to me to be a fallacious argument. The payment was not made to be held in suspense. It was made to satisfy a demand which by reason of the assessment was enforceable. It satisfied an obligation. If the appeal were to be allowed, a counter obligation on the part of the commissioner to repay it would arise. Until it was repaid, it did not cease to be "paid". The mere existence of the obligation to refund does not seem to me enough to undo the fact of payment. Section 107 distinguishes between the liability to pay and the fact of payment by making these alternative conditions, either of which will confer a right to the rebate. I do not think that because the order set aside the assessment imposing the liability it can be said that the payment actually made and accepted as and for additional tax lost that character.

The limitation upon the commissioner's power of amendment arise under s. 170 (3) where a taxpayer has made to the commissioner a full and true disclosure of all the material facts necessary for the assessment and an assessment is made after the disclosure.

(1) (1927) 40 C.L.R. 148. (2) (1930) 45 C.L.R. 1.

This condition was, in my opinion, fulfilled. The taxpayer did not, it is true, tell the deputy commissioner that the company had appealed, but he knew that the commissioner was aware of this fact. The commissioner was, in fact, a party to the appeal. It may be doubted whether this was a fact " necessary for the assessment ". It bore only on the wisdom of withholding an assessment till the appeal was determined, not on the contents of the assessment, if made. But a taxpayer can hardly be said to fail to disclose to the commissioner a fact which is not only within the commissioner's knowledge in connection with the exercise of his functions in the very matter, but which the taxpayer knows so to be within his knowledge.

In the view that I have taken it is unnecessary to pursue the question whether the ignorance of the deputy commissioner of the facts known to the commissioner amounted to, or gave rise to, a mistake of fact within the meaning of s. 107. But it is perhaps desirable to say that the case stated does not contain a delegation under s. 12 or raise any question concerning the operation of s. 13 (*b*) with respect to the position of the deputy commissioner under s. 170 (3) where there is disclosure to the commissioner but not to him.

For the foregoing reasons I think that s. 170 (3) did preclude the making of the amendment the subject of the notice of amended assessment of 12th March 1948 and that the rebate under s. 107 was allowable at the date of the assessment it was then sought to amend.

There are two questions in the case stated both of which use the present tense. To avoid misunderstanding I would use the past tense in answering both questions, in question (*a*) because the answer relates to the date of the amendment and in question (*b*) because the answer relates to the date of the assessment. I think the questions should be answered as follows :—(*a*) The provisions of s. 170 (3) of the *Income Tax Assessment Act* 1936-1947 precluded the amendment of the assessment of which notice was given by the notice of amended assessment dated 12th March 1948. (*b*) A rebate under s. 107 of the said Act was allowable in respect of the dividend of £2,934 received by the appellant from the North Australian Pastoral Company Limited. Costs of the case stated to be dealt with by the Justice disposing of the appeal.

McTIERNAN J. I agree with the reasons for judgment of my brother *Dixon* and his answers to the questions.

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WILLIAMS J. I agree with the reasons for judgment of the Chief Justice and *Dixon* J. In my opinion the questions asked in the case stated should be answered as proposed by *Dixon* J.

WEBB J. I agree with the judgments of the Chief Justice and *Dixon* J.

FULLAGAR J. In this case I agree with the judgment of my brother *Dixon* and I have nothing to add.

Questions in case stated answered :—

(*a*) *The provisions of s.* 170 (3) *of the Income Tax Assessment Act* 1936-1947 *precluded the amendment of the assessment of which notice of amended assessment was given by the notice of amended assessment dated* 12*th March* 1948.

(*b*) *A rebate under s.* 107 *of the said Act was allowable in respect of the dividend of* £2,934 *received by the appellant from the North Australian Pastoral Company Limited.*

Costs of the case stated to be dealt with by the Justice disposing of the appeal.

Solicitors for the appellant, *Arthur Robinson & Co.*

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

E. F. H.