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it appears to us that it is fairly within the legislative power they confer to provide that conviction shall operate as a condemnation of the goods involved.

But still another objection to s. 262 has been advanced. It is an objection which relates to s. 262 in its application to s. 229. The objection is made under par. (xxxi.) of s. 51 of the Constitution. That provision empowers the Commonwealth Parliament to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The question whether provisions for the forfeiture of property for an offence committed in connection with that property come within that legislative power, guarded as it is by the requirement that just terms must be afforded, has been adverted to in this Court on more than one occasion, but we have not found it necessary to give any decision on the question. But, in the course of the arguments in which it has been referred to, it has always been treated as obvious that if the purpose of the forfeiture is to bring a penalty upon the offender it could not come within s. 51 (xxxi.), it not being an acquisition of property for any purpose in respect of which the Parliament has power to make laws within that provision. Alternatively it has been said that even if it was within s. 51 (xxxi.) there is nothing unjust in a provision forfeiting the property of the offender as part of the punishment for the offence.

But in the present case s. 262 brings about these further consequences. Facts having occurred, as the Crown alleges, giving rise to forfeiture and the goods having passed out of the hands of the Customs, they may be found in the possession of an innocent person. He has possession of the goods, and, as against everybody but the true owner—who, if the forfeiture has taken place, will be the Crown—he has a possessory title.

It is argued that, as a consequence, s. 262 of the *Customs Act* dispossesses him, or at least seizures may have dispossessed him and then s. 262 makes conclusive the right so to dispossess him; he is thus left without his goods and without any title to his goods, because s. 262 purports to make the conviction of the offender conclusive on the subject. It leaves the innocent purchaser without any right to contest the forfeiture. It is said that that does not give him just terms, because just terms require that he should have a right to contest a forfeiture.

The short answer to this contention is that the whole matter lies outside the power given by s. 51 (xxxi.). It is not an acquisition of property for any purpose in respect of which Parliament has

power to make laws. It is nothing but forfeiture imposed on all persons in derogation of any rights such persons might otherwise have in relation to the goods, a forfeiture imposed as part of the incidental power for the purpose of vindicating the Customs laws. It has no more to do with the acquisition of property for a purpose in respect of which the Parliament has power to make laws within s. 51 (xxxi.) than has the imposition of taxation itself, or the forfeiture of goods in the hands of the actual offender.

For these reasons I am of opinion that the *inter se* questions referred to the Full Court should be answered that the provisions are valid.

That, then, leads to the further question what should be done with the proceedings transferred to this Court from the Supreme Court of Queensland.

Having disposed of the validity of the provisions, we have removed the sole question which appeared to the learned Chief Justice of Queensland to stand in the way of his giving a decision, and it would be competent for this Court to decide the proceeding completely. That, however, does not appear to be altogether a desirable proceeding, because the assessment of damages is a matter outstanding. And it may indeed be possible that the learned Chief Justice of Queensland may not regard other questions as having been covered by the interim reasons that he gave.

It is open to us to remit any part of the cause that we think may require further trial; and in my opinion that is the proper course to take so that final judgment may be given in the Supreme Court of Queensland.

In the order made by *McTiernan* J. referring the matter to this Court, his Honour included the question whether the *Customs Act* operates so as to empower an officer to seize forfeited goods after they have passed into the hands of the bona-fide purchaser for value. That, of course, depends not only on the validity of the provisions, but in some degree upon their interpretation. No argument has been advanced to us which would justify our giving an interpretation to them which would exclude bona-fide purchasers for value. There is no language in any of the provisions which would justify such a form of construction, and it could only be arrived at by a very violent implication based only upon general considerations. We do not think that such an implication can be made.

McTIERNAN J. I agree entirely with the reasons of the Chief Justice. I have nothing to add.

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WEBB J. I agree.

KITTO J. I agree.

Declaration that ss. 203, 229 (b), 229 (i) and 262 of the Customs Act 1901-1950 are valid. Declaration that the Customs Act operates so as to empower an officer of Customs to seize forfeited goods although they have passed into the hands of a bona-fide purchaser for value. Cause remitted to Supreme Court of Queensland for final judgment. Defendant to pay costs of all proceedings in this court, other than those of intervenor.

Solicitors for the plaintiff: *Leonard Power & Power.*

Solicitors for the defendant: *A. L. Steindl Colbert & Co.*

Solicitor for the Commonwealth (intervening): *D. D. Bell*, Crown Solicitor for the Commonwealth.

B. J. J.

GEORGE . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, *April* 17, 30.

Kitto J.

SYDNEY, *Aug.* 15, 18.

MELBOURNE, *Nov.* 3.

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

Taxation—Income tax—Assessment—Increase in assets—Stated income not reconcilable—Income "derived" by taxpayer—Commissioner "not satisfied"—Arbitrary assessment—Objections by taxpayer disallowed—Appeals—Application by taxpayer for order for particulars—Source from which taxpayer alleged to have derived additional amount—Power of deputy commissioner—Dismissal of applications—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *ss.* 6 (1), 8-12, 166, 167, 177 (1), 190 (*b*).

Section 166 of the *Income Tax Assessment Act* 1936-1947, so far as relevant, is as follows:—"From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon."

Section 167 is as follows:—"If . . . (*a*) any person makes default in furnishing a return; or (*b*) the Commissioner is not satisfied with the return furnished by any person; or (*c*) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income, the Commissioner may make an assessment of the amount upon which in his judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of the last preceding section."

Held, that s. 167 is not an independent power conferred upon the commissioner but is epexegetical to s. 166 and mentions with particularity three situations which might arise in carrying out the duty imposed by s. 166.

Held further, that all the powers of the commissioner under these sections may be exercised by a deputy commissioner and that the exercise of these powers and the failure of satisfaction to which par. (*b*) of s. 167 refers are all part of the "due making of the assessment" which by s. 177 (1) is made conclusive upon production of a notice of assessment. Accordingly in the case of a default assessment made under s. 167 (*b*) it is not relevant to order either that the commissioner give particulars of the sources of additional

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taxable income which has been so assessed or particulars of the identity of the officers who made the assessment.

Per Fullagar J. In proceedings on appeal under the *Income Tax Assessment Act* the commissioner is in no real sense a party but is an officer who in the performance of his statutory functions does acts which, prima facie, create an obligation between the Crown and a particular subject and the statute provides means whereby the subject may test before a court the question whether the commissioner has acted according to law. Accordingly, although the commissioner is in many respects subject to orders of the court, it is inappropriate, as in substance was sought to be done in the present case, to order the commissioner to answer interrogatories.

Decision of *Kitto* J. affirmed.

APPEAL from *Kitto* J.

The appellant, William Fergus George, a dentist, lodged a return of income for the year ended 30th June 1946, in which he returned the sum of £1,546 as being his taxable income from personal exertion, and the sum of £128 as being his taxable income from property. By notice of assessment dated 21st July 1947 the Deputy Commissioner of Taxation for New South Wales issued an assessment to the appellant based on those sums respectively. By notice of amended assessment dated 17th May 1948, the deputy commissioner issued an amended assessment to the appellant in which he was assessed as having derived a taxable income of £6,366 from personal exertion and a taxable income of £128 from property during the year of income. A document containing the figures upon which the amended assessment was based, and the notification "claim for race winnings disallowed in the absence of satisfactory verification", accompanied the notice. Other than the particulars shown or referred to above the appellant was not furnished with any particulars showing how the amended assessment had been arrived at. The appellant lodged an objection against the amended assessment on the following grounds:—(a) that the amended assessment was excessive; (b) that he did not derive a taxable income from personal exertion amounting to £6,366; (c) that the taxable income derived by him from personal exertion was less than £6,366; (d) that the commissioner should have assessed him upon the basis of the figures and amounts both of income and deductions included in the return lodged by him for the income year ended 30th June 1946; (e) that the amounts of £90 7s. 0d. and £1,913 described in the amended assessment as "additional tax income understated" were not authorized by law; (f) that those amounts were excessive and should be remitted in whole or

in part ; (g) that s. 226 of the *Income Tax Assessment Act* 1936 was invalid, unconstitutional, and ultra vires the Parliament of the Commonwealth ; and (h) that s. 170 of that Act did not authorize the issue of the amended assessment.

The appellant also lodged a return of income for the year ended 30th June 1947, in which he showed the sum of £1,536 as being his taxable income from personal exertion and the sum of £203 as being his taxable income from property. By notice of assessment dated 16th July 1948, the Deputy Commissioner of Taxation for New South Wales issued an assessment in which the appellant was assessed as having derived a taxable income of £8,666 from personal exertion and a taxable income of £203 from property during the year of income. In a Federal Income Tax Adjustment Sheet which accompanied the notice of assessment the appellant was informed that " as your return is considered to be unsatisfactory, your assessment has been raised in terms of Section 167 of the Income Tax Assessment Act 1936-47, upon the amount upon which in the opinion of the Commissioner of Taxation, tax should be levied against you ". A document which, *mutatis mutandis*, was similar to the document referred to above, also accompanied the notice of assessment. No particulars other than those shown or referred to above were furnished to the appellant.

An objection against the assessment was lodged by the appellant on the following grounds :—(a) that the assessment was excessive as to the amount of taxable income included therein ; (b) that as the commissioner or the second commissioner did not as to one or other of them personally exercise his judgment under s. 167 of the *Income Tax Assessment Act* 1936-1947, the assessment so far as it purported to be issued under s. 167 was not authorized by law ; (c) that he did not derive a taxable income from personal exertion amounting to the sum of £8,666 ; (d) that the taxable income derived by him from personal exertion was less than the sum of £8,666 ; (e) that there was no material before the commissioner or any of his officers which would justify the formation of an opinion that during the year ended 30th June 1947, he, the appellant, derived a taxable income from personal exertion amounting to £8,666 ; (f) that the commissioner should have assessed the appellant upon the basis of the figures and amounts both of income and deductions included in the return lodged by the appellant for that year of income ; (g) that the amount of £1,338 9s. 0d. shown on the notice of assessment as " Total Contribution " was erroneous in amount ; (h) that the amount of £11,104 5s. 0d.

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shown thereon as " Total Income Tax " was erroneous in amount; (i) that if any amount by way of " Additional Amount for Income Understated " had been or was intended to be imposed in the assessment such amount was excessive and should be remitted in whole or in part; (j) that the Act did not authorize the imposition of any " Additional Amount for Income Understated "; (k) that s. 226 of the Act was invalid, unconstitutional and ultra vires the Parliament of the Commonwealth; (l) that s. 36 of the said Act when read with the *Income Tax Act* 1947 imposed a tax in cases where the items of property therein referred to were disposed of by way of gift or disposed of for less than their market value; on the date of disposal the said Act imposed a gift duty as well as a tax upon income and on that account the said Act was invalid, unconstitutional and ultra vires the Parliament of the Commonwealth; (m) that, alternatively to (b), as the Deputy Commissioner of Taxation for New South Wales did not personally exercise his judgment under s. 167, the assessment so far as it purported to be issued under s. 167 was not authorized by law; (n) that the power conferred by s. 167 was not exercised by any person or officer authorized by law to make an assessment of an amount on which income tax ought to be levied; and (o) that the Act was invalid, unconstitutional and ultra vires the Parliament of the Commonwealth.

The deputy commissioner disallowed the objection in each case, and, pursuant to a request by the appellant, he treated the objections as appeals and forwarded them to the High Court for determination.

In both appeals the appellant requested the commissioner to furnish him with particulars in respect of various matters as follows:—

(a) Is the additional sum of £4,820 or the additional sum of £7,130 on which the appellant has been assessed for the year of income ended 30th June 1946, or the year of income ended 30th June 1947, respectively, alleged to have been derived by him from the conduct of his profession as a dentist?

(b) If the answer to (a) above is in the negative, from what source is it alleged that the appellant derived the said sum of £4,820, or the said sum of £7,130?

(c) Is it alleged that any sums derived by the appellant from betting wins on horse races during either of those years of income were derived by him as a professional gambler?

(d) Is it alleged that any moneys won by the appellant during either of those years of income from betting upon horse races constitutes assessable income in his hands?

In addition to the abovementioned particulars the appellant sought the following particulars which he alleged were solely within the knowledge of the commissioner and his officers but upon which he, the appellant, did not have any knowledge. This request was directed to grounds (a), (m) and (n) of the objections taken by the appellant against the assessment issued to him in respect of income derived during the year of income ended 30th June 1947 :—

A. Did the commissioner *personally* make or form a judgment under s. 167 of the *Income Tax Assessment Act* 1936-1947 as to the amount upon which in his judgment income tax ought to be levied upon the appellant for the year of income ended 30th June 1947 ?

B. Did the Second Commissioner of Taxation *personally* make or form a judgment under s. 167 of that Act as to the amount upon which in his judgment income tax ought to be levied upon the appellant for that year of income ?

C. Did Mr. J. W. Hughes, Deputy Commissioner of Taxation, *personally* make or form a judgment under s. 167 of that Act as to the amount upon which in his judgment income tax ought to be levied upon the appellant for that year of income ?

D. If none of the officers specified in A, B and C above personally made or formed a judgment under s. 167, the appellant required the commissioner to supply him, the appellant, with the name of the officer who made or formed a judgment under s. 167 as to the amount upon which in his judgment income tax ought to be levied upon the appellant for that year of income and the date upon which that officer made or formed the said judgment.

On behalf of the commissioner the questions were answered as follows :—" (A) and (B). It is not proposed to answer these questions, the facts being peculiarly within the knowledge " of the appellant. " (C) and (D) No ".

Questions A to D. " It is not proposed to answer these questions as I am advised that you are not entitled to the information sought."

The appellant applied by summons to *Kitto* J. sitting in chambers,

(1) in respect of the assessment for the year ended 30th June 1946, for an order that, *inter alia*, the commissioner furnish to the appellant particulars as to the source from which the commissioner alleged that the appellant derived the additional amount of £4,820 upon which the commissioner had arbitrarily assessed the appellant for the year of income ended 30th June 1946 ;

(2) in respect of the assessment for the year ended 30th June 1947, for an order that, *inter alia*, the commissioner furnish to the

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appellant particulars as to the source from which the commissioner alleged that the appellant derived the additional amount of £7,130 upon which the commissioner had arbitrarily assessed the appellant for the year of income ended 30th June 1947, and particulars as to the person or officer who formed or made a judgment under s. 167 of the *Income Tax Assessment Act* 1936-1947 upon which the assessment issued to the appellant in respect of income derived during the year of income ended 30th June 1947 was based.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

G. E. Barwick Q.C. and *J. D. O'Meally*, for the appellant.

A. B. Kerrigan, for the respondent.

Cur. adv. vult.

April 30.

The following written judgment was delivered in respect of the matters relating to the income year ended 30th June 1947.

KITTO J. This is a summons in an appeal which comes to the Court in consequence of a request by the taxpayer that his objection to an assessment of income tax and social services contribution, having been disallowed by the commissioner, should be treated as an appeal and forwarded to this Court. The assessment in question is an assessment of tax based on the income derived by the appellant during the year ended 30th June 1947. The notice of assessment was issued by the Deputy Commissioner of Taxation in Sydney, and was accompanied by an adjustment sheet which stated: "As your return is considered to be unsatisfactory, your assessment has been raised in terms of Section 167 of the Income Tax Assessment Act, 1936-47, upon the amount upon which in the opinion of the Commissioner of Taxation, tax should be levied against you."

I was informed that the appellant had given to the commissioner certain information as to the annual improvement in his assets position between 1940 and 1947, and that the assessment under appeal was based upon the increase in value which admittedly occurred in the year ended 30th June 1947.

The appellant by his notice of objection asserts that his taxable income in that year was less than the amount assessed; and he also contends that there was no exercise of personal judgment under s. 167 by the commissioner or a second commissioner, or even (if it matters) by the deputy commissioner, and that, that being so, the assessment was not authorized by that section.

The summons asks in the first place that the commissioner be ordered to furnish to the appellant particulars as to the source from which the commissioner alleges that the appellant derived the amount by which the taxable income as assessed exceeds the taxable income disclosed in the appellant's return of income. If at the hearing the onus would be upon the commissioner to establish that the appellant did in fact derive more income in the relevant year than he had disclosed, there would be much to be said for ordering him to give particulars for the purpose of defining the precise issues for trial and preventing surprise. But s. 190 (*b*) places the burden of proving that the assessment is excessive upon the appellant; and in order to carry that burden he must necessarily exclude by his proof all sources of income except those which he admits. His case must be that he did not derive from any source taxable income to the amount of the assessment. That will involve him, of course, in accounting for the increase in his assets, and it may well be that the commissioner will direct his efforts mainly or even wholly to endeavouring to meet the evidence the appellant adduces on this point. But the source of the increase in the assets is not the actual issue in the case; even if it were proved, for example, that that source consisted of winning bets on the racecourse, the issue would still be whether or not from any source the appellant derived as much taxable income as the assessment treats him as having derived.

The object of the present application is really to have the commissioner say whether he is prepared to assign a source or sources for the moneys included in taxable income in the assessment over and above those disclosed as taxable income in the return, and to admit that if they did not come from that source, or from one or more of those sources, those moneys were not liable to be included in the appellant's taxable income. The commissioner may, if he chooses, voluntarily narrow the possible range of evidence in that way, but there could be no justification for ordering him to do so, under the guise of ordering particulars. If he attempts to prove derivation from a particular source and fails, he is none the less entitled under the Act to point to another source, or, without troubling about source at all, to stand upon his assessment and submit that the presumption in its favour has not been displaced. Even if the commissioner at present has in mind to seek to prove that income not disclosed in the return was derived from a particular source, he cannot be pinned to that source, nor would it be proper to order him to reveal his present plan of campaign. He is entitled to say, "I do not allege anything about source at all; I may have

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ideas on the subject, but if I have I shall develop or modify or abandon or replace them as occasion may require, until the evidence on the hearing is complete, and then I shall make my submissions to the Court ".

I was not referred to any authority on the point, and so far as I know there is none. But an analogy may be found in the cases in which the courts in England have considered applications by plaintiffs upon whom lies the onus of proving a negative, for particulars from defendants who have put in issue the plaintiff's negative allegation. The principle laid down is that if it is clear to the court, either from the nature of the case or from the admission of counsel or otherwise, that the defendant intends under his denial of the negative, to set up an affirmative case, particulars of the defendant's case may be ordered ; but not otherwise (*Pinson* v. *Lloyds and National Provincial Foreign Bank Ltd.* (1) ; *Duke's Court Estates, Ltd.* v. *Associated British Engineering Ltd.* (2) ; cf. *Weinberger* v. *Inglis* (3)). So, if in this matter the commissioner were to admit that he intended to set up a case that the additional income upon which he has assessed tax was derived from a particular source, I should think that he ought to give particulars to enable the appellant to meet that case. But the commissioner has made no admission and there is nothing which could entitle me to infer that he has such an intention. All that appears is, as I have said, that the appellant is put to the proof of his negative case. In my opinion it would not be consistent with the authorities I have cited, or with the commonsense of the situation, to order particulars. If the commissioner's case at the hearing of the appeal develops upon lines which the appellant cannot fairly be expected to be ready to meet, the presiding Judge will be in a position to ensure that no injustice results.

The summons next asks that the commissioner be ordered to furnish to the appellant particulars as to the person or officer who formed or made a judgment under s. 167 upon which the assessment was based. This part of the application is misconceived. It is no part of the case which the commissioner will be making at the hearing of the appeal to prove who was the person or officer referred to in the summons. The relevance of the question to the appeal is only that the appellant desires to argue that the assessment is invalid because the Act, on the true construction of ss. 167, 10, 11 and 12, provides as a condition of the validity of an assessment under s. 167 that the commissioner himself, or the second

(1) (1941) 2 K.B. 72, at p. 80.
(2) (1948) Ch. 458.
(3) (1918) 1 Ch. 133.

commissioner, or possibly a deputy commissioner, must decide that he is not satisfied with the return and must form a judgment as to the amount upon which income tax ought to be levied. Accordingly the appellant desires, if he can, to extract from the commissioner an admission that it was someone other than the commissioner or the second commissioner, and perhaps that it was someone lower than the deputy commissioner, who was not satisfied with the return and formed the judgment to which the section refers. No argument was addressed to me on behalf of the appellant to show that I have any power to compel the commissioner, by answering interrogatories or otherwise, to make such an admission; but even if I have some such power, I am of opinion that, having regard to ss. 175 and 177 (1) of the *Income Tax Assessment Act*, I ought not to exercise the power.

For these reasons I dismiss the summons with costs. Certify for counsel.

In a written judgment in respect of the amended assessment relating to the income year ended 30th June 1946, his Honour said that the summons asked only for one order, which was similar to the first of the orders sought in the summons dealt with above, and for the reasons he had stated in dismissing that summons he dismissed this summons with costs and certified for counsel.

From those decisions the appellant appealed to the Full Court of the High Court.

G. E. Barwick Q.C. (with him *J. D. O'Meally*), for the appellant. A specific issue arises as to whether the assessment could, in the circumstances, be made under s. 167 of the *Income Tax Assessment Act* 1936-1947. The assessment was signed by a deputy commissioner. It will be for the commissioner, in this proceeding, to establish that he was not satisfied with the return and that he formed a judgment as to the amount of the taxable income. Those two matters are conditions precedent in the power to make the assessment. The production of a notice of assessment would not prove those facts. The due making of the assessment does not include, for the purposes of s. 177 of the Act, those prerequisites to the power to assess. Therefore the commissioner has a positive case; he has got to prove something, and the appellant should be entitled to particulars in order to prepare to meet that case. The power conferred in s. 167 (*b*) is not susceptible of delegation. Also, as shown by ss. 8-12 of the Act, only the commissioner or the second commissioner can exercise power under s. 167 (*b*). Assuming the

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commissioner to have shown that he formed the judgment and that the prerequisites to the power to assess are present, that the onus has passed to the appellant to show that the amount is excessive, the amount of the assessment which will then include both taxable income and the tax is excessive, the commissioner, in those circumstances, must have some positive case of which the appellant is entitled to particulars. This view is very much concerned with the nature of s. 167 itself. The commissioner's position to the taxpayer is much more than a mere traverse of the taxpayer's assertion that the assessment was excessive. When the commissioner says " In my judgment this is the amount " he has determined an amount and he has formed a judgment about it. It is then for the taxpayer to show that that amount is excessive. Unless he has some positive case the commissioner has no warrant for his assessment. Of necessity it must be an affirmative case because the statute provides that the commissioner cannot make an assessment until he has formed a judgment. This is a matter in the original jurisdiction of the Court. From that there emerges: (i) that powers which come under the general rules of the Court are available for use in the matter; (ii) that the matter is a matter within s. 32 of the *Judiciary Act* 1903-1950, from which stems the Court's powers, very akin to inherent powers, to give all remedies and do all things that are necessary to effect and carry out the rights of the parties; and (iii) that one of the inherent powers of the Court is the power to order particulars and to ensure that the issue is narrowed and surprise is avoided. It is not disputed that the assessment was made under s. 167 (*b*). Neither the dissatisfaction with the return nor the formation of a judgment as to the amount of the taxable income is a formality of the making of the assessment. They are not mere formalities of the making of the assessment; they are rather conditions precedent to the power. The production of a notice of assessment will not prove the existence of those conditions. In s. 177 the distinction is drawn between due making and the amount of the assessment. The words " evidence of the due making " must be given some restricted meaning. That meaning is " conclusive evidence of compliance with formalities ". The dissatisfaction and the exercise of judgment by the commissioner under s. 167 are not mere formalities, they are conditions precedent to the power, and the mere production of the notice of assessment will not prove that he was dissatisfied or that he did exercise his judgment. The Court is aware of the fact that even when s. 39 was in the *Income Tax Assessment Act* 1922, as amended, as distinct from the present s. 177, an issue could arise as to the forming of

those opinions, which issue was not precluded by production of a notice of assessment (*Moreau* v. *Federal Commissioner of Taxation* (1); *Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation* (2); *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (3); *Trautwein* v. *Federal Commissioner of Taxation* (4)). The commissioner has to prove conditions precedent in any case. To test it by what would happen upon an action does not touch or cut down these submissions. Unlike s. 39 of the 1922 Act and *Trautwein's Case* (5), on analysis it depends on the prima-facie validity of the assessment on appeal. The intention to have the assessment without any evidentiary value except as to due making on appeal was quite distinct; it is to have no evidentiary value except as to due making on appeal. *Trautwein's Case* (5) in its last analysis depends entirely upon the evidentiary value of the assessment for all its particulars. Even in a suit the due making and conclusiveness and correctness of the amount will not establish performance of the conditions precedent. The other view is that the conclusiveness and the correctness of the amount supplies the gap when one comes into suit. It does not follow that because one can succeed in an action for the amount of the tax the presumption that the amount was correct involves necessarily the presumption that all the steps necessary to the making of it correct had been taken. It must be granted that s. 177, even read in conjunction with s. 190, is not the same as s. 39 of the 1922 Act; it does not make the notice of assessment prima-facie evidence on the appeal (*McEvoy* v. *Federal Commissioner of Taxation* (6)). The prerequisites under s. 167 are not established by production of the assessment. "Due making" was considered in *Kellow-Falkiner Pty. Ltd.* v. *Federal Commissioner of Taxation* (7). In this case the commissioner must prove two things, namely, dissatisfaction with the return and formation of a judgment. *Kitto* J. would have been disposed to grant particulars if he had accepted this view. The particulars sought are those of the person whose subjective state was the relevant point. The alternative view of ss. 8-12 supports the proposition that the formation of the views as to dissatisfaction and the judgment as to the taxable income, are matters which are not susceptible of delegation and can only be made by the commissioner or the second commissioner. The words "subject to this section" in sub-s. (1) of s. 10 must be a reference to sub-s. (3). There is nothing in sub-s. (2) which would

(1) (1926) 39 C.L.R. 65.
(2) (1944) 7 A.T.D. 333.
(3) (1935) 53 C.L.R. 534.
(4) (1936) 56 C.L.R 63, at p. 88.
(5) (1936) 56 C.L.R. 63.
(6) (1950) 9 A.T.D. 206.
(7) (1928) 34 A.L.R. 276, at p. 279.

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be appropriate to be brought in under those words. It is rather sub-s. (3) which puts the limitation. The words "powers and functions" in sub-s. (1) would have to be read as insufficient in definition—or denotation—to include the making or formation of an opinion or state of mind, whether relevant to the exercise of a power or function. The power of delegation—delegating the ability or the faculty—of forming the opinion or state of mind does not extend to that. A limited meaning must be given to the words "powers and functions" or, perhaps, the precise meaning of those words in s. 10 (1), because of the presence of s. 10 (2). The words in s. 11 should be equally limited. Upon a critical analysis of those sections it appears that s. 10 (2) is such that the forming of the view and the state of mind are antecedent to the performance of the powers and functions. It involves some ability before the power and function came into it. It is not then a power or function and, therefore, under ss. 11 and 12 cannot be delegated to a deputy commissioner. The scheme of the Act is that it should be reserved to the commissioner and the second commissioner to entertain opinions and exercise judgments. Then, after that the deputy commissioners may exercise the more mechanical functions. That makes the precise particulars sought by the appellant particularly relevant. The appellant is entitled to know who, in this case, exercised judgment as to the taxable income. That information is peculiarly within the knowledge of the commissioner. Any delegation to the deputy commissioner can only be without any power of sub-delegation. A delegation under s. 12 (1) must be done directly from the commissioner and not by sub-delegation from the deputy commissioner. If it be right to say that under s. 167 the commissioner on appeal must establish, *inter alia*, that a judgment was formed as to the amount of taxable income then it necessarily follows that the commissioner must have some view. The taxpayer is entitled to know what the suggested source is, so that the issue may be confined. There is not any presumption that the commissioner has a sense of responsibility in exercising the arbitrary powers. It is nothing to the point to say that a taxpayer knows all about his own affairs, if he does not know what is alleged against him. The taxpayer is entitled to have the area narrowed.

[DIXON C.J. referred to *Mullin* v. *Mullin* (1).]

The commissioner has a positive case, unquestionably in the case of an amended assessment. The foregoing observations are *a*

(1) (1901) 1 S.R. (N.S.W.) 60; 18 W.N. 249.

fortiori in the case of an amended assessment to what they are in the case of an original assessment.

F. G. Myers Q.C. (with him *A. B. Kerrigan*), for the respondent. There are not two conditions precedent to the exercise of the power under s. 167 of the *Income Tax Assessment Act* 1936-1947. If there be a condition precedent, there is one and one only. The dissatisfaction with the return furnished could be a condition precedent, but the judgment which the commissioner forms is not something that precedes the assessment, it is the actual assessment or part of the assessment itself. What he assesses does not follow from a judgment that he has formed; it follows from what he judges to be the correct amount. It is the amount on which the tax should be levied. Forming that opinion is exactly similar to the arithmetical calculation that he would make if he accepted all the figures in the return. In either case he forms his opinion as to what the correct figure of assessable income should be. In one case he forms it by reference to something outside the return and something as to which he forms a judgment. Section 167 (*a*), (*b*) or (*c*) is the only prerequisite. The appellant cannot get any particulars other than the fact that the commissioner is dissatisfied. The reasons why he is dissatisfied, or the grounds of his dissatisfaction cannot, except as part of his evidence, form any part of the commissioner's case. Assuming there was an onus on the commissioner to prove compliance with (*b*), all he would have to do would be to allege that he was not satisfied. The grounds or reasons for it would not be anything that the commissioner would have to allege if there were pleadings in the matter. It is not so much particulars but evidence that the appellant seeks. The question of whether the commissioner has to offer evidence to show that he is not satisfied upon appeal proceedings taken against the assessment cannot arise because of the operation of ss. 175 and 177. Section 167 (*b*) is the type of provision of the Act which is referred to in s. 175. Sub-section (*b*) of s. 167 is in a different position from sub-s. (*a*). Under sub-s. (*a*) the commissioner would have to prove the fact that default was made. Sub-section (*b*) is a provision of the Act which must be complied with, and the commissioner is not required to prove it because s. 175 makes the assessment valid whether it is complied with or not. Under sub-s. (*b*) there is not any duty on the commissioner not to be satisfied. Sub-section (*c*) is of a hybrid nature. Section 175 means that the validity of an assessment shall not be affected by reason of any of the conditions of the Act not being complied with by the

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commissioner. Under s. 177 the production of a notice of assessment is conclusive evidence in any case that the assessment has been duly made. "Conclusive evidence of the due making" must mean conclusive evidence that the commissioner has done everything required by the Act in order to render the assessment duly made. Such an assessment is an assessment made by the commissioner after having complied with the relevant provisions of the Act. The commissioner has the benefit of either s. 175 or s. 177, which makes it unnecessary for him to prove that he was not satisfied with the return. Once he has issued his notice of assessment that is a condition which is conclusively proved in his favour. The subject assessment is signed by the deputy commissioner, but it does not contain any statement that the deputy commissioner was dissatisfied, or that it was made under s. 167. On the question as to whether the commissioner or the second commissioner alone have power to express dissatisfaction, it is not correct to draw from s. 10 (2), which relates to the second commissioner, the inference, or to use it as a dictionary which requires the same construction to be given to "powers and functions" in ss. 11 and 12. That could not have been the intention of the Parliament, because it would make the Act unworkable. The large number of sections concerned show that the Act would not work as a practical matter if an opinion or a state of mind must be formed or had personally by the commissioner or by the second commissioner: see, *inter alia*, ss. 36 (8), 65 (1), 205, 210 and 213. There are so many opinions, beliefs and states of mind the commissioner is required to form that it would be a physical impossibility for the commissioner or the second commissioner to do so. Sub-section (2) of s. 10 is redundant. The commissioner's judgment under s. 167 of the amount on which tax ought to be levied is not a condition precedent, but is a fact—the actual making or part of the making of the assessment itself. This, however, is not of any moment because s. 190 places the onus of displacing the commissioner's view upon the appellant. Unless some evidence be given by the taxpayer, the effect of s. 190 is that it proves the amount of income and the amount of tax are correctly stated in the notice of assessment, and it is upon the taxpayer to prove that they are excessive, or for him to prove on the merits in some other way that the assessment is invalid. It is not open to him to challenge any step that the commissioner has taken in making the assessment. "Due making" in s. 177 covers everything that the commissioner is required to do in the making of an assessment. Section 167 (*b*) is something that the commissioner himself is required to do. It is

part of the making of the assessment by him. The due making of the assessment under s. 167 (*b*) means the consideration of the return, the dissatisfaction with the return and the judgment of the amount of income. Once the commissioner has formed the opinion that the source of the moneys out of which capital assets were purchased was taxable or assessable income, and that it is either personal exertion or property, he has fulfilled his function, and there is not any further step that he need take. The commissioner is not obliged to form any judgment as to the source at all. Even if s. 167 did make the opinion of the commissioner as to the amount of income a condition precedent which the commissioner has to establish, there is still not any obligation on the commissioner to give particulars.

G. E. Barwick Q.C., in reply. The Act does not provide in substance that every increase in assets is, prima facie, derived from income. Section 167 lays upon the commissioner a very heavy duty to form a judgment. He must have materials, and it must be a judgment, a rational judgment, that a sum of money is, in the circumstances, taxable income. This being an assessment by the deputy commissioner, there were two conditions precedent to the making of the assessment. Firstly, there was s. 167 (*b*), and secondly, there must have been an amount determined as the taxable income under s. 167 itself. If the deputy commissioner did not have an amount determined as the taxable income under s. 167, he would be limited to the returns or any other information that he had which was related to them. So there were two conditions precedent where an assessment was made with the aid of s. 167, namely, the dissatisfaction with the return, and the determination of a taxable income to which the Act applied to enable the tax payable to be determined. Section 167 (*b*) is just as much a fact to be found or determined as s. 167 (*a*). It is nothing to the point that the Act requires a person on the one hand to furnish a return, and, on the other hand, allows the commissioner to be dissatisfied. There is not any difference, from this point of view, between s. 167 (*a*) and (*b*), or, indeed, s. 170 (2) (*a*). They are all facts and so is the determination of the taxable income in the circumstances. The scheme of the Act, so far as is relevant, is that the taxpayer must show that the amount of taxable income which the commissioner, in his judgment, has thought to be the amount, is excessive. That is the issue (*Danmark Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)). The appellant is entitled to challenge

(1) (1944) 7 A.T.D. 333.

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the existence of the fact that there was a judgment and the due making. As shown by s. 175, the expression "due making" is clearly used in some narrow sense. The assessment under s. 166, where it calls in aid s. 167, is no more than the working out of the tax payable. When an assessment is made under s. 166 with the aid of s. 167 the only function of the assessor is to work out the tax on an amount of taxable income, unexaminably so far as he is concerned, furnished to him. His power to make the assessment must have been upon having what is in fact a taxable amount determined in the judgment of the commissioner. The assessment referred to in s. 177 is the notice of assessment, that is, the documentary assertion of the amount of tax payable. Under the original 1922 Act it was not conceived that anybody but the commissioner could form those opinions. With respect to s. 10 (2) the natural meaning of "power and function" does not include the ability to form states of mind and form opinions where the existence of some power or function is dependent upon the existence of the state of mind. It was necessary to insert s. 10 (2) because naturally the delegation of the power or function would not be sufficient to enable the delegate relevantly to form the state of mind. The mere presence of the power of delegation of powers and functions will not warrant the substitution in the various sections where the commissioner's opinion is relevant, of the words "or of any delegate of his" wherever the word "commissioner" occurs. In this case there are matters which are not concluded by the production of the notice of assessment. Those matters include the matter of fact as to whether or not the commissioner or the second commissioner or some other person did form the necessary judgment. The formation of the judgment, of necessity, in most cases, and probably in this case involves the formation of a view as to the source from which the assets were increased because the judgment was as to taxable income.

Cur. adv. vult.

NOV. 3. The COURT delivered the following written judgment:—

These are two appeals, each from an interlocutory order in an income tax appeal. The orders, which were made by *Kitto* J., dismissed applications by the taxpayer for orders directing the Commissioner of Taxation to furnish him with particulars. The attempt by a taxpayer who appeals from an assessment of the commissioner to obtain an order against him for particulars is a novel experiment, but doubtless the reason for it must be looked

for in the circumstances of the case, which at present by no means fully appear.

The appellant is by occupation a dentist. For the year of income ended 30th June 1946 he returned his income from personal exertion at the sum of £1,546 and from property at the sum of £128. For the following year of income he returned his income from personal exertion at the sum of £1,536, or £10 less than the previous year, and his income from property at £203. For the first of these two years of income an assessment of the appellant's taxable income was made in which the figures in his return were accepted. But before the assessment for the second of the two years was made it was ascertained by or on behalf of the commissioner that the amount of the net assets of the appellant had increased very substantially year by year during a period of four or five years. We were told by the appellant's counsel that the appellant supplied the figures. In the year ended 30th June 1946 the increase was £5,788 and in the year ended 30th June 1947, £7,537.

The commissioner, using that expression to include his officers, took these figures and to the first of them he added an amount of £754 to represent what it must have cost the appellant to subsist. To the second he added £806 for subsistence and a further amount of £572 as the cost of maintaining a race horse or race horses. On the other side the commissioner made small allowances for depreciation. He thus obtained for the first of the two income years in question a sum of £6,494, and for the second, a sum of £8,869 and he treated both the amounts as representing taxable income. The commissioner regarded the amounts which the taxpayer had returned as income from property, viz., £128 for the first year and £203 for the second year, as included within these respective sums and he taxed as income from property so much of them as represented the figures so returned. The result was that he treated the taxpayer as having derived income from personal exertion in the sums of £6,366 and £8,666 respectively for the two years. For the year of income ended 30th June 1946 he amended his assessment to increase the amount of income from personal exertion to £6,366. For the year ended 30th June 1947 the commissioner made an original assessment which stated the income from personal exertion at £8,666.

To the amended assessment and the assessment the appellant lodged objections which the commissioner disallowed and the appellant requested him to treat the objections as appeals and

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forward them to this Court. In both appeals the appellant requested the commissioner to furnish him with certain particulars, which the commissioner declined to do except that he answered no to the question whether it was alleged that any sums derived by the appellant from betting wins on horse races during the years in question were derived by him as a professional gambler and to the further question whether it was alleged that any moneys won by the appellant during those years from betting upon horse races constituted assessable income in his hands. The appellant then applied by summons to *Kitto* J. in chambers for orders in the respective appeals directing the respondent commissioner to furnish particulars. In each appeal the summons sought "particulars as to the source from which the respondent alleges that the appellant derived the additional amount (stating it) upon which the respondent has arbitrarily assessed the appellant for the year of income" (identifying the year). In the appeal relating to the year ended 30th June 1947 the summons also sought "particulars as to the person or officer who formed or made a judgment under s. 167 of the Income Tax Assessment Act 1936-1947". The grounds of objection must be noticed in so far as they raise the issues to which the particulars sought are relevant. In substance the grounds in point with respect to the particulars sought in both appeals are that the assessment was excessive, that the appellant did not derive taxable income from personal exertion in the figures stated but in less sums and that the commissioner should have assessed the appellant on the basis of his returns.

Accompanying the notice of assessment in respect of the year ended 30th June 1947 was a notification that as the appellant's return was considered unsatisfactory, his assessment had been based in terms of s. 167 of the Act upon the amount upon which, in the opinion of the commissioner, tax should be levied against him. In consequence the appellant included in his objections for that year grounds to the effect that the opinion and judgment contemplated by s. 167 had not been formed by the right person and that in any case it had been formed on no material. This explains the additional particulars sought in the appeal concerned with the year of income ended 30th June 1947. The considerations that govern the question whether these additional particulars should be ordered are not the same as those that affect the question whether the commissioner should be ordered to give particulars as to the source from which he alleges that the appellant derived the additional amounts upon which he has assessed the appellant. It is convenient to deal first with the latter question.

Section 190 provides that upon every appeal to the Court the burden of proving that the assessment is excessive shall lie upon the taxpayer. With this provision must be read s. 177 (1), which provides that the production of a notice of assessment, or a document purporting to be a copy under the hand of the commissioner the second commissioner or a deputy commissioner, shall be conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all particulars of the assessment are correct. The word " assessment " is defined by s. 6 (1) to mean the ascertainment of the amount of taxable income and of the tax payable thereon. In conformity with this definition s. 166 directs the commissioner to make an assessment of the amount of the taxable income of any taxpayer and of the tax payable thereon. From these provisions both in their present form and in their slightly different earlier form, the law has always been taken to be that in an appeal from an assessment the burden lies upon the taxpayer of establishing affirmatively that the amount of taxable income for which he has been assessed exceeds the actual taxable income which he has derived during the year of income : *Stone* v. *Federal Commissioner of Taxation* (1) ; *Moreau* v. *Federal Commissioner of Taxation* (2) ; *Federal Commissioner of Taxation* v. *Clarke* (3) ; *Trautwein* v. *Federal Commissioner of Taxation* (4). " The justice of that burden cannot be disputed. From the nature of the tax, the commissioner has, as a rule, no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to circumstances ", per *Isaacs* A.C.J., *Federal Commissioner of Taxation* v. *Clarke* (5).

In the present case it might be expected that the source of the large increase year by year in the appellant's assets would be a matter peculiarly within his own knowledge. If it is a form of gain outside the very wide ambit of what is assessable income, proof of its character will be enough to support the material grounds of his appeals. It is a fact outside any knowledge the commissioner can have except from inquiry into the affairs of the appellant and it is not unreasonable that the onus of proof should be placed by law upon the latter.

(1) (1918) 25 C.L.R. 389, at pp. 392, 393.
(2) (1926) 39 C.L.R. 65.
(3) (1927) 40 C.L.R. 246.
(4) (1936) 56 C.L.R. 63.
(5) (1927) 40 C.L.R., at p. 251.

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These are considerations which, it might be thought, are enough to make it quite wrong to require the commissioner to give particulars of what he alleges the source to be of the appellant's gains, which he has treated as assessable income. But it is contended for the appellant that because the commissioner relied for what he did upon s. 167, a different result ensues.

As has been stated, in his communication accompanying the assessment for the year of income ended 30th June 1947, the commissioner referred to the application of s. 167 and, no doubt, it may be assumed that, once the power to amend the assessment for the previous year arose, s. 167 became applicable in making the amendment. Cf. per *Williams* J., *McEvoy* v. *Federal Commissioner of Taxation* (1). Why the appellant says that a different result ensues once s. 167 is invoked can only be understood from the text of s. 167 and, as its operation is by means of s. 166, it is best to set out both provisions. They are as follows :—

" 166. From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon.

167. If . . .

(*a*) any person makes default in furnishing a return ; or

(*b*) the Commissioner is not satisfied with the return furnished by any person ; or

(*c*) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income,

the commissioner may make an assessment of the amount upon which in his judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of the last preceding section."

The contention is that, before the commissioner may fix the taxable income under s. 167 (*b*) two conditions must be fulfilled and that, in an appeal, the burden is upon him to prove their fulfilment. The first condition is that he must fail to be satisfied with the return furnished. The next is that he must form a judgment of the amount upon which income tax ought to be levied. When, but only when, this has been done, so it is argued, does the amount become, pursuant to the last words of s. 167, the taxable income for the purposes of the process of assessment under s. 166. Almost every step involved in this argument is open to question, but for the moment let it be supposed that it represents

(1) (1950) 9 A.T.D. 206, at pp. 210, 211.

the effect of the provisions. Why should it follow that the commissioner ought to be required to give particulars of the source from which he alleges that the appellant derived the additional amount of taxable income ? Upon this question the need that the commissioner should not be satisfied with the return may be put on one side. That is agreed. His want of satisfaction is a subjective question and even on the footing that he must prove it, that does not show that he must allege or prove the source of the taxable income he imputes to the taxpayer. What is relied upon is the necessity that he shall form a judgment of what the amount is upon which tax should be levied. But the judgment the commissioner has formed is made abundantly clear by the assessments themselves. They each depend upon the amount which he has fixed and they state it. No particulars of the fact that he has formed a judgment of the amount or what that amount is could possibly be required. It is said, however, that he could not form that judgment without materials or without reaching some opinion of the sources whence the increases in the appellant's assets came so as to make the gains income.

But, even were it true that the commissioner must, upon the hearing of the appeal, affirmatively prove by evidence that he formed a judgment of the amount of the income upon which the appellant ought to be taxed, it could not be part of his case to establish the facts upon which he acted in forming the judgment or the grounds on which he proceeded, the materials before him, or the reasoning actuating him. The need supposed of showing that he formed such a judgment could be no ground for requiring particulars of the sources of the taxable income ascribed by the assessment to the appellant. The assumption made, however, has no foundation. The formation of the judgment as to what is the amount of the income that ought to be taxed is no condition precedent to the power to assess. It is part of the very process of assessment itself. Section 166 and s. 167 do not prescribe distinct duties or functions. They combine to show what the commissioner may or must do in performing his single duty of arriving at an assessment. Section 166 on its own terms covers cases where the commissioner depends exclusively on sources other than a return. It says that he is to make his assessment from (1) the returns, (2) from any other information, or (3) from any one or more of these sources. Clearly enough under s. 166 the commissioner can make an assessment which does not adhere to the income returned and yet to do so must involve some want of satisfaction with the

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return. Section 167 is epexegetical to s. 166. It is not an independent power. What it does is to mention with particularity three situations which might arise in carrying out the duty imposed by s. 166, and to direct how in those situations the commissioner shall proceed for the purpose of s. 166. Just as under s. 166 considered alone the commissioner ascertains the amount of the taxable income and thus assesses it so does he under s. 167, used in aid of s. 166, ascertain the amount upon which, in his judgment, income tax ought to be levied and thus assesses it. By definition "assessment" means the ascertainment of the amount of the taxable income, and of the tax payable thereon. This is the view of ss. 166 and 167 adopted by *Williams* J. in *McEvoy* v. *Federal Commissioner of Taxation* (1). The fact is that unless the taxpayer discharges the burden laid upon him by s. 190 (*b*) of proving that this ascertainment or judgment is excessive, he cannot succeed and it can be no part of the duty of the commissioner to establish affirmatively what judgment he formed, much less the grounds of it, and even less still the truth of the facts affording the grounds. Yet that is what is involved when the demand for particulars of the sources alleged of the appellant's income is justified by reference to s. 167. It is an error to treat the formation by the commissioner of a judgment as to the amount of the taxable income as if it were not the ascertainment of the taxable income which constitutes assessment or a necessary part of that process and as if it were but the fulfilment of a condition precedent to the power or authority to assess. If, however, it were a condition precedent the question would at once arise whether the fulfilment of the condition was not part of "the due making of the assessment" of which s. 177 (1) makes the production of a notice of assessment conclusive evidence. But of this it is unnecessary to speak specifically. It is unnecessary to do so not only because the reasons already given are enough to dispose of the request for particulars of the sources of the appellant's additional taxable income, but also because a similar question must now be dealt with in relation to the additional particulars which the appellant seeks in reference to the year of income ended 30th June 1947, that is to say, particulars as to the person or officer who formed or made a judgment under s. 167. The demand for these particulars arises from the view for which the appellant contends that under s. 167 (*b*) it is essential that the want of satisfaction with the return should exist in the commissioner or second commissioner and not a deputy commissioner. If, however, it may exist in a deputy commissioner, at all events, so he

(1) (1950) 9 A.T.D., at p. 211.

contends, it cannot be enough that it exists in some lesser officer to whose opinion the deputy commissioner gives effect by authenticating the assessment. Presumably in the same way the judgment as to the amount of income to be taxed must be formed either by the same higher officer or one of like status. Accordingly the appellant by his summons seeks particulars of the person or officer who formed or made a judgment under s. 167. This, doubtless, was meant to cover the failure to be satisfied under par. (*b*), as well as the formation of a judgment as to the amount of income on which tax ought to be levied.

The contention that it is not competent for a deputy commissioner to invoke s. 167 (*b*) rests upon an interpretation placed by counsel for the appellant upon s. 12 (1). By that provision the commissioner may delegate to a deputy commissioner or other person all or any of his powers or functions under the Act (except the power of delegation) so that the delegated powers or functions may be exercised by the deputy commissioner or person with respect to the matters or class of matters or the State or part of the Commonwealth specified in the instrument of delegation.

The interpretation which it is sought to place upon this provision limits the application of the expression "powers or functions" so that it does not include the formation of any opinion, belief or state of mind upon the existence of which in the commissioner the operation of any provision of the Act is dependent. The reason advanced for so limiting the expression "powers or functions" is that in s. 10, which deals with the second commissioner, there is an express provision making his opinion, belief or state of mind equivalent to that of the commissioner for such purposes. Section 9 (1) says that for the purposes of the Act there shall be a second commissioner. Sub-sections (1) and (2) of s. 10 are as follows:—10. (1) Subject to this section, the Second Commissioner shall have and may exercise all the powers and functions of the Commissioner under this Act. (2) Where in this Act the exercise of any power or function by the Commissioner or the operation of any provision of this Act is dependent upon the opinion, belief or state of mind of the Commissioner in relation to any matter, that power or function may be exercised by the Second Commissioner or that provision may operate (as the case may be) upon the opinion, belief or state of mind of the Second Commissioner in relation to that matter.

It is evident that sub-s. (2) was intended to put beyond doubt the equivalence (subject to sub-s. (3) which does not concern this case) of the second commissioner and the first commissioner for