

[HIGH COURT OF AUSTRALIA.]

GAAL APPLICANT ;
INFORMANT,
AND
WILSON RESPONDENT.
DEFENDANT,

H. C. OF A. *Income Tax (Cth.)—Group employer—Tax deductions from employees’ wages—*
1956. *Failure to pay deductions to commissioner as required by law—Prosecution—*
 Whether taxation prosecution—Summary proceedings—Conviction—Imposition
 of pecuniary penalty—Order for imprisonment if penalty not paid by stipulated
SYDNEY, *date—Validity of order—Income Tax and Social Services Contribution Assess-*
Aug. 31. *ment Act 1936-1954 (No. 27 of 1936—No. 43 of 1954), ss. 221F (5) (a) (11) (12),*
 222, 233, 243, 247. These sections are set out on pp. 523, 524 (*post*).
Dixon C.J.,
Williams,
Fullagar,
Kitto and
Taylor JJ.

An information alleging an offence against s. 221F (5) (a) of the *Income Tax and Social Services Contribution Assessment Act 1936-1954* is not a taxation prosecution within Part VII of that Act, because of the definition of “taxation prosecution” in s. 222. By virtue of s. 68 of the *Judiciary Act 1903-1955* and s. 43 of the *Acts Interpretation Act 1903-1950* a court of petty sessions has jurisdiction to hear and determine such an information as a summary offence.
Decision of the Court of Quarter Sessions reversed.

MOTION ON NOTICE.

On 18th January 1955 James Victor Gaal, an officer of the Department of Taxation at Sydney, swore out an information against one Wilson claiming that on or before 7th July 1954 at Sydney he Wilson being a group employer who made deductions from the wages of his employees in accordance with Pt. VI, Div. 2 of the *Income Tax and Social Services Contribution Assessment Act 1936-1954* during the month of June 1954, did fail to pay to the commissioner on or before 7th July 1954 the amount of the deductions so made contrary to the provisions of s. 221F (5) (a) of the said Act.
The information came on for hearing before a stipendiary magistrate at the Central Court of Petty Sessions at Sydney on 26th October 1955 when the following objections were taken on behalf of the defendant: (a) that a penalty under s. 221F (12) of the *Income Tax and Social Services Contribution Assessment Act 1936-1954* for an offence under sub-s. (11) of s. 221F and arising out of sub-s. (5) of that section can be imposed only in a taxation prosecution as defined by s. 222 of the Act; (b) that such taxation prosecution must be brought in terms of and subject to s. 233 of the Act.

These objections were resolved in favour of the prosecution and the defendant was convicted. The magistrate ordered that the defendant should forfeit and pay the sum of twenty pounds (£20) and should pay the sum of fifteen pounds six shillings (£15 6s. 0d.) for costs and he further ordered that if the amount of the said sums should not be paid on or before 23rd November 1955 the defendant should be imprisoned in terms of the *Income Tax and Social Services Contribution Assessment Act 1936-1954*.

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The defendant appealed against his conviction to the court of quarter sessions and upon such appeal took the same objections. The learned chairman of quarter sessions upheld the objections being of opinion that the scheme of prosecution comprised in Pt. VII of the *Income Tax and Social Services Contribution Assessment Act 1936-1954* was intended to be an exclusive scheme and the prosecution not being in accordance with such Part could not be maintained.

From this decision the informant now sought special leave to appeal to the High Court.

The relevant provisions of the *Income Tax and Social Services Contribution Assessment Act 1936-1954* are as follows : “ s. 221F (5). A group employer shall (a) not later than the seventh day of the month next succeeding a month in which he has made deductions, pay to the commissioner the amount of the deductions so made.

Section 221F (11). An employer who contravenes, or fails to comply with, any provision of this section which is applicable to him shall be guilty of an offence.

Section 221F (12). The penalty for any failure to comply with paragraph (a) of sub-section (5) of this section . . . shall be a fine not exceeding five hundred pounds or imprisonment for a term not exceeding six months

Section 222. In this Part, ‘ taxation prosecution ’ means a proceeding by the Crown for the recovery of a pecuniary penalty under this Act.

Section 233 (1). A taxation prosecution may be instituted in the name of the commissioner by action in the High Court or in the Supreme Court of any State or Territory of the Commonwealth.

(2) Where the penalty sought to be recovered does not exceed five hundred pounds, or the excess is abandoned, the prosecution may be instituted in the name of the commissioner or a deputy commissioner by information in a court of summary jurisdiction.

Section 243 (4). This section shall not apply to—(b) proceedings for an indictable offence or an offence directly punishable by imprisonment.

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Section 247. Where any pecuniary penalty is adjudged to be paid by any convicted person the Court shall—(a) commit the offender to gaol until the penalty is paid ; (b) release the offender upon his giving security for the payment of the penalty ; or (c) exercise for the enforcement and recovery of the penalty any power of distress or execution possessed by the Court for the enforcement and recovery of penalties or money adjudged to be paid in any other case.”

J. D. Holmes Q.C. (with him *M. H. Byers*), for the applicant. Section 39 of the *Judiciary Act* 1903-1955 gives the magistrate jurisdiction to deal with the offence created by s. 221F (11) the penalty for which is fixed by s. 221F (12) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954, provided it is a summary offence. It is made a summary offence by ss. 43 and 44 of the *Acts Interpretation Act* 1903-1950 and s. 68 of the *Judiciary Act*. The offence under s. 221F (11), (12) is outside Pt. VII of the *Assessment Act*. The learned chairman of quarter sessions took the view that “pecuniary penalty” in s. 222 of the *Assessment Act* included a penalty of imprisonment as a result of s. 243 (4) (b) of such Act. If this be right then either no court has jurisdiction over offences under s. 221F or the only courts having jurisdiction are the High Court and the Supreme Court of a State. The present information was not a taxation prosecution and accordingly s. 233 of the *Assessment Act* did not apply to provide the only method by which such information might be prosecuted.

R. Else-Mitchell Q.C. (with him *J. A. Lee*), for the respondent. The respondent supports the judgment of the learned chairman of quarter sessions. The provisions of the certificate of conviction in this matter show that the prosecution was proceeding under Pt. VII and not otherwise because of the purported attempt by virtue of the direction as to imprisonment to exercise some such power as is to be found in ss. 247, 248 of the *Assessment Act*. Although taxation prosecution is defined by s. 222 as meaning a proceeding by the Crown for the recovery of a pecuniary penalty, provisions following within Pt. VII and as part of its scheme show that taxation prosecution is not restricted to that : see s. 243 (4) (b). The *Acts Interpretation Act* does not apply there being a contrary intention shown in the *Assessment Act* that Pt. VII shall provide its own code of remedies and procedures. There are very few offences in the *Assessment Act* punishable by imprisonment or by imprisonment alternatively to a pecuniary penalty. Such as there

are have been introduced from 1940 onwards. Prior to these all offences were punishable by pecuniary penalty only and this, perhaps, throws some light on the original scheme of the Act and the place of Pt. VII in it. Section 233 (2) provides the only type of offence which may be prosecuted summarily under Pt. VII, viz. one punishable by the imposition of a pecuniary penalty *simpliciter*. If imprisonment also may be imposed the offence does not fall within s. 233 (2), but may be tried in the High Court or Supreme Court under s. 233 (1). If s. 233 does not touch offences where there is an alternative of imprisonment it may be, though it is submitted not, that the *Acts Interpretation Act* would apply.

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J. D. Holmes Q.C., in reply.

The judgment of the COURT was delivered by DIXON C.J. :—

In our opinion special leave to appeal should be given and the appeal should be allowed. We think that the information is not a taxation prosecution within Pt. VII of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954 because it is not a proceeding by the Crown for the recovery of a pecuniary penalty under that Act: see s. 222. The jurisdiction of the court of petty sessions to hear it as a summary offence arises by reason of s. 68 of the *Judiciary Act* 1903-1955 and s. 43 of the *Acts Interpretation Act* 1903-1950. Section 39 of the *Judiciary Act*, of course, is a standing provision conferring federal jurisdiction. We think, however, that so much of the order made by the magistrate as “adjudges that if the amount of the said sum should not be paid on or before 23rd November 1955 the defendant should be imprisoned in terms of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954” is not in accordance with law. But we think that the whole proceeding should be remitted to the court of quarter sessions to deal with according to law.

The order will be: Special leave to appeal granted. Appeal allowed. Order of court of quarter sessions set aside. Cause remitted to the court of quarter sessions to deal with according to law. Pursuant to the appellant’s undertaking, the appellant is to pay the respondent’s costs of the application for special leave and this appeal.

Order accordingly.

Solicitor for the applicant, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *W. A. Mayne*.

R. A. H.