[HIGH COURT OF AUSTRALIA.]

McANDREW . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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BRISBANE. *July* 27, 30;

MELBOURNE, *Oct.* 15.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Income Tax (Cth.)—Amended assessment—Objection—Appeal—Condition precedent to power to amend—Failure to make full and true disclosure of material facts and consequential avoidance of tax—Onus of proof—Income Tax and Social Services Contribution Assessment Act 1936-1955, ss. 170 (2), 173, 177 (1), 190 (*b*).

When upon an appeal to the Court against an amended assessment there is an issue as to whether the conditions stated in s. 170 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 are fulfilled and a regular notice of assessment is produced, or a copy under a proper hand, then the burden rests upon the taxpayer of proving to the reasonable satisfaction of the Court the particular fact or facts which take the case outside s. 170 (2).

If the objection of the taxpayer to the amended assessment is that he did make a full and true disclosure of all the material facts necessary for his assessment or that there has not been an avoidance of tax, the *onus probandi* lies on the taxpayer.

So *held* by the whole Court.

Per Dixon C.J., *McTiernan* and *Webb* JJ.: The word "excessive" in s. 190 (*b*) extends over the area in which the conditions mentioned in s. 170 (2) find a place. If the commissioner cannot amend consistently with s. 170 (2) and so increase the amount of the assessment then it must be excessive.

McEvoy v. *Federal Commissioner of Taxation* (1950) 9 A.T.D. 206; *Federal Commissioner of Taxation* v. *Hines* (1952) 9 A.T.D. 413; *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1953) 88 C.L.R. 23; and *George* v. *Federal Commissioner of Taxation* (1952) 86 C.L.R. 183, referred to.

CASE STATED.

This was a case stated by *Dixon* C.J. for the opinion of a Full Court pursuant to s. 198 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 upon certain questions arising in an appeal to the High Court under ss. 187 (*b*) and 197 of that Act.

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On 6th January 1953 the appellant lodged with the Deputy Federal Commissioner of Taxation (Q.) a return of income derived by her during the year ended 30th June 1952. The said deputy commissioner, on 5th March 1953, issued and served a notice of assessment of income tax on the appellant based on her income for the said year. Subsequently the respondent conducted an investigation into the taxation affairs of the appellant and the said deputy commissioner, on 4th November 1954, issued and served a notice of amended assessment on the appellant based on the income for the same year and thereby increased the liability of the appellant. The appellant objected to the said amended assessment by notice in writing dated 21st December 1954. The said deputy commissioner disallowed the objection and on 28th October 1955 gave written notice to the appellant of such disallowance. The appellant requested the said deputy commissioner, pursuant to s. 187 of the Act, to treat her objection as an appeal and to forward it to the High Court, and on 25th June 1956, the respondent duly caused the objection to be forwarded to the High Court at Brisbane accordingly.

On 24th July 1956, *Dixon* C.J., at the request of the parties, stated a case which submitted the following questions for the opinion of a Full Court :—

(i) Has the respondent in this appeal the burden of proving as conditions precedent to his power to amend the original assessment dated 5th March 1953—(a) that the appellant has not made a full and true disclosure of all the material facts necessary for her assessment of tax ; (b) that there has been an avoidance of tax ; and (c) any other and if so what matter or matters referred to in s. 170 (2) of the said Act ?

(ii) If yes to (i), is the respondent's power of amendment limited to the extent or the approximate extent to which avoidance of tax has been proved ?

(iii) If yes to (i) is the question of whether that burden has been discharged by the respondent to be determined in a preliminary way before the appellant is called upon to discharge the burden of proof (if any) cast upon her by s. 190 (*b*) of the said Act ?

Pursuant to an agreement between counsel the respondent was permitted to begin.

C. G. Wanstall Q.C. (with him *J. D. McGill*), for the respondent. There is no onus on the commissioner to show that the matters referred to in s. 170 (2) of the Act existed. It is an incorrect view of s. 170 (2) to hold that any onus is carried by the commissioner

to establish as a fact that there has not been a full and true disclosure or a consequential avoidance of tax because to so hold relieves the taxpayer of the burden which is very clearly placed on him by s. 190 in an appeal against an assessment. An amended assessment is an assessment for all the purposes of the Act (s. 173). Section 190 provides that upon every reference or appeal the burden of proving that the assessment is excessive shall lie upon the taxpayer. He has the full burden of showing that it is bad in law or that it is quantitatively excessive in fact. He may show that it is excessive because the character of the receipts on which he is assessed is not of an income nature or because he did not in fact receive the amount of money which he is charged with having received in his taxable income.

[DIXON C.J. Suppose the issue were whether he was a resident.]

He would have to show that he was not a resident as was the position in *Commissioner of Taxation* v. *Miller* (1). [He referred to *Trautwein* v. *Federal Commissioner of Taxation* (2).] Full disclosure may be said to be one aspect of the way a tax is said to be excessive (*Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (3)). If the taxpayer has made a full disclosure, a higher tax than the correct one on the amount of income disclosed would be excessive. The question as to whether the taxpayer has made a full and true disclosure is peculiarly within his own knowledge yet it is contended that it is a matter which the commissioner has to prove negatively. The difficulty is well illustrated by the *Australasian Jam Co.'s Case* (3). In certain kinds of cases, if that contention were correct, the onus would be impossible for the commissioner to discharge. If s. 170 (2) places upon the commissioner the obligation of proving the existence of certain facts as a pre-requisite to the exercise of his power of amendment, s. 171 becomes unworkable. Once the power to amend the assessment arises, s. 167 becomes applicable in making the amendment (*George* v. *Federal Commissioner of Taxation* (4)). Once the commissioner has made the amended assessment it comes under s. 167 and is supported by ss. 173 and 177. If *McEvoy* v. *Federal Commissioner of Taxation* (5) decides that the commissioner carries a burden of proof it is incorrectly decided. *Williams* J. was wrong in that case in concluding that the deletion of the words " the commissioner is of opinion that " from s. 170 (2) by the Act No. 88 of 1936, s. 16, affected the question of onus of proof. Although *McEvoy's Case* (5)

(1) (1946) 73 C.L.R. 93.
(2) (1936) 56 C.L.R. 63, at pp. 90, 91.
(3) (1953) 88 C.L.R. 23.
(4) (1952) 86 C.L.R. 183, at p. 202.
(5) (1950) 9 A.T.D. 206.

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was applied by the Full Court of the High Court in *Federal Commissioner of Taxation* v. *Hines* (1), when senior counsel for the commissioner in that case was asked by the Court whether he wished to submit any views as to the correctness of the decision in *McEvoy's Case* (2), he said he did not want to do so. Consequently this Court has not deliberately considered *McEvoy's Case* (2) on a reasoned argument. The question of the onus of the commissioner is divisible into two branches. One is that unless the commissioner begins and discharges the onus as a preliminary test of his jurisdiction, as it were, there is no case for the taxpayer to answer. The other is that the onus is on the commissioner to satisfy the Court on the balance of probabilities on the whole of the evidence, when it has been completed, that he had power to amend the assessment. In *McEvoy's Case* (2) and in *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (3), no question of there being a preliminary jurisdiction point arose. *Williams* J. in *McEvoy's Case* (2) considered merely whether the burden of proof had been discharged by the whole of the evidence which was before him. [He referred to *Tudor and Onions* v. *Ducker* (4); *T. Haythornthwaite & Sons Ltd.* v. *Kelly* (5) and *Norman* v. *Golder* (6).]

D. B. O'Sullivan, for the appellant. The commissioner has the burden of proving as conditions precedent to his power to amend an assessment under s. 170 at least the matters referred to in (a) and (b) of the first question in the case stated. The language of s. 170 is not apt to place the burden upon the taxpayer of proving a series of negatives, but it is apt to place upon the commissioner the burden of proving the conditions precedent to his power to amend. Section 170 follows closely s. 167 which gives the commissioner very wide powers of assessment. Section 264 gives the commissioner almost unlimited powers of obtaining information about the taxation affairs of the taxpayer. Sections 167 and 264 combined would give the commissioner all he wanted. The legislature, in effect, says in s. 170: "Notwithstanding the wide powers of the commissioner, notwithstanding his almost unlimited source of information, something may go wrong with the assessment, so we will give the commissioner a power to amend, but a restricted power to amend". Regarding s. 170 in that light it is reasonable to construe it as to postulate as conditions precedent to the application of the section

(1) (1952) 9 A.T.D. 413, at p. 417.
(2) (1950) 9 A.T.D. 206.
(3) (1953) 88 C.L.R. 23.
(4) (1924) 8 Tax Cas. 591, at p. 594.
(5) (1927) 11 Tax Cas. 657, at p. 667.
(6) (1945) 1 All E.R. 352; 114 L.J. K.B. 188; 171 L.T. 369; 26 Tax Cas. 293.

that the commissioner shall prove certain things set out therein. In any event the weight of judicial authority is heavily in favour of placing such an onus upon the commissioner (*McEvoy* v. *Federal Commissioner of Taxation* (1); *Federal Commissioner of Taxation* v. *Hines* (2); *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (3); *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (4)). Although the last case only relates to the onus in relation to mistake under s. 170 (3), it would be difficult to put the onus of proving a mistake or an error in calculation on the commissioner and the onus of proving non-avoidance of tax on the taxpayer. The onus, whether it be to prove an error in calculation or a mistake of fact or an avoidance of tax is, having regard to s. 170 as a whole, the same. There is no reason why under (*a*) of s. 170 (2) the onus rests on the commissioner, under (*b*) on the taxpayer and under s. 170 (3) back on the commissioner. They are all expressed similarly and are all conditions precedent to the commissioner's power to make an amendment. The decision in *White* v. *Federal Commissioner of Taxation* (5) cannot stand if the appellant's main argument is correct, because if that argument is correct the taxpayer in that case must have failed because he could not prove that so far as quantum was concerned the amended assessment was excessive. The introductory question before you get to the question of quantum is: Is this amended assessment authorised by law? That is not concerned with quantum or excessiveness. The commissioner first has to prove that his amended assessment is authorised by law, then so far as excessiveness or quantum is concerned, the onus is on the taxpayer.

[DIXON C.J. Not authorised by law in all respects, because the due making is the question of authority of law.]

Yes, but the due making, as appears from the latter part of the judgment in *George* v. *Federal Commissioner of Taxation* (6), refers only to procedure and has no reference to substantive law. This question goes to substantive law (*White's Case* (5)). The appellant's argument is based on the general proposition in *George's Case* (7). It is noticeable that ss. 167, 177 and 190 are referred to therein but s. 170 is not referred to. This indicates that that general proposition has no application to an appeal from an amended assessment under s. 170 as now enacted.

(1) (1950) 9 A.T.D. 206.
(2) (1952) 9 A.T.D. 413.
(3) (1953) 88 C.L.R. 23, at pp. 32, 33.
(4) (1954) 91 C.L.R. 540, at pp. 573, 574.
(5) (1954) 10 A.T.D. 413.
(6) (1952) 86 C.L.R. 183.
(7) (1952) 86 C.L.R., at p. 201.

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[DIXON C.J. referred to *Kellow-Falkiner Pty. Ltd.* v. *Federal Commissioner of Taxation* (1).]

On the question of onus see *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners* (2); *Dixon and Gaunt Ltd.* v. *Inland Revenue Commissioners* (3); *Commissioners of Inland Revenue* v. *Transport Economy Ltd.* (4). Section 170 as presently enacted is substantially different from s. 37 of the 1922 Act and the opinion expressed by *Latham* C.J. in *Trautwein* v. *Federal Commissioner of Taxation* (5) related to s. 37 and has no application to s. 170. Under s. 170 three matters are referred to. The commissioner may amend to correct a mistake of fact, but only to the extent necessary to correct that mistake. He may amend where there is an error in calculation, but only to the extent necessary to correct that error. In either case he has to prove the mistake or error. Another matter referred to therein is avoidance of tax. To give s. 170 a harmonious construction, he can amend only to the extent of the avoidance and if he proves such an avoidance.

C. G. Wanstall Q.C., in reply.

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered :—

DIXON C.J., McTIERNAN AND WEBB JJ. The purpose of this case stated is to raise for the decision of the Full Court the difficult question whether, when the commissioner has amended an assessment in purported pursuance of the authority conferred upon him by sub-s. (2) of s. 170 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 and the taxpayer appeals, it rests upon the commissioner on the hearing of the appeal to prove to the reasonable satisfaction of the Court that the taxpayer had not made to the commissioner a full and true disclosure of all the material facts necessary for his assessment and that there had been an avoidance of tax.

It is a question upon which there have already been judicial pronouncements in this Court. In *McEvoy* v. *Federal Commissioner of Taxation* (6), *Williams* J. held that the onus lay upon the commissioner of proving that there had been an avoidance of some tax, the decision being, of course, equally applicable to the failure to

(1) (1928) 34 A.L.R. 276; 49 A.L.T. 266; (1928-1930) R. & McG. I.T.D. (A.) 24.
(2) (1942) A.C. 643.
(3) (1947) 177 L.T. 138; 29 Tax Cas. 289.
(4) (1955) 35 Tax Cas. 601.
(5) (1936) 56 C.L.R., at pp. 90, 91
(6) (1950) 9 A.T.D. 206, at pp. 211, 228.

make a full and true disclosure. In *Federal Commissioner of Taxation* v. *Hines* (1) this passage occurs in the judgment of *Dixon* C.J., *Williams* and *Fullagar* JJ.: "In *McEvoy* v. *Commissioner* (2) *Williams* J. held that the burden lay on the Commissioner of proving that there had not been a 'full and true disclosure', and that, unless he proved this, the amended assessment could not stand. This view seems to be clearly correct, and its correctness was not challenged before us" (3). And in *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (4) *Fullagar* J. said, after setting out s. 170 (2): "It is common ground that the Commissioner had no power to amend the original assessment for any year unless the case fell within the terms of this sub-section, and that the burden rests on the Commissioner to establish what is necessary to bring the case within the sub-section: see *McEvoy* v. *Federal Commissioner of Taxation* (2) and *Federal Commissioner of Taxation* v. *Hines* (1)" (5).

The view that an amendment made in purported pursuance of s. 170 (2) cannot be sustained under that provision unless the conditions stated in the sub-section are fulfilled is not one from which there is any sufficient reason to depart. But after full consideration we are constrained to the conclusion that when upon any appeal to the Court under ss. 187 (*b*), 197 and 199, there is an issue as to whether these conditions are fulfilled and a regular notice of assessment is produced, or a copy under a proper hand, then the burden rests upon the taxpayer of proving to the reasonable satisfaction of the Court the particular fact or facts which take the case outside s. 170 (2). This means that the *onus probandi* lies on the taxpayer if his objection is that he did make a full and true disclosure of all the material facts necessary for his assessment or that there had not been an avoidance of tax.

Our reasons for this view may be stated very briefly. In the first place s. 173 places the notice of an amended assessment, that is to say of an assessment as amended, in the same position for the purpose of s. 177 as notice of an original assessment. Then in our opinion the meaning and effect of s. 177 (1) is to give evidentiary effect to such an assessment over the whole ground which by law it is the function of an assessment to cover. Over part of that ground its evidentiary effect is absolutely conclusive, over the rest of the ground it is conclusive except in proceedings on appeal against the assessment. It is given such evidentiary effect by the production

(1) (1952) 9 A.T.D. 413.
(2) (1950) 9 A.T.D. 206.
(3) (1952) 9 A.T.D., at p. 417.
(4) (1953) 88 C.L.R. 23.
(5) (1953) 88 C.L.R., at pp. 32, 33.

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of a notice of the assessment or of a copy under the hand of the commissioner, second commissioner or a deputy commissioner. The ground over which s. 177 (1) gives conclusiveness to the assessment is described as the due-making of the assessment and the correctness of the amount and all the particulars of the assessment. But that appears to us to comprise the whole ground. It is the manifest policy, one may now almost say the historical policy, of the legislation on the one hand to give to the taxpayer full opportunity on objecting to his assessment of contesting his liability in every respect before a court or before a board of review but on the other hand to require that in proceedings for the recovery of the tax the taxpayer will be concluded by the assessment and will not be entitled to go behind it for any purpose. The question whether the conditions laid down by s. 170 (2) are fulfilled so that the commissioner might amend the assessment is clearly within this policy. It would seem remarkable if, in answer to a suit by the commissioner to recover the tax, or to a bankruptcy notice, the taxpayer were entitled to say that the amended assessment was bad because, when the amendment was made, more than three years had elapsed from the date when the tax became due under the original assessment and he had made full and true disclosure.

We are unable to accept the view, which appears to have influenced the opinion of *Williams* J., of the removal from s. 170 (2) by Act No. 88 of 1936, s. 16, of the words " the Commissioner is of opinion that ". These words stood before the phrase " there has been an avoidance of taxation " in s. 170 (2) as it was enacted by Act No. 27 of 1936. We are unable to accept the view that the result was not only to make the objective fact a condition of the power, but also to make it a condition proof of the fulfilment of which lay on the commissioner. The amendment no doubt did place " avoidance of tax " in the same position as " full and true disclosure " had theretofore occupied. No doubt too the standard was objective. But it is quite another thing to say that upon appeal it was for the commissioner to prove the facts and that in proceedings to recover the tax they were matters that might be put in issue. Unless they are matters covered by s. 177 (1) clearly enough they might be put in issue but if they are covered by s. 177 (1) then it seems to us that considerations arise which show fairly clearly that the burden cannot be upon the commissioner of establishing on appeal that there was a failure to disclose and avoidance of tax. That they are so covered appears to us to be shown by the words of s. 177 (1) themselves, viz. " conclusive evidence of the due making and (except etc.) that the amount and all the particulars of the assessment are correct ".

If the existence of the conditions on which the power to amend arises is not part of the due making, it certainly is a matter on which the amount of the assessment must depend. It would not be difficult to regard it as part of the due making of the assessment but the consequence of that would be to deprive the taxpayer of any remedy to enforce the protection which s. 170 (2) seems designed to give him. In *George* v. *Federal Commissioner of Taxation* (1) the Court said : " The clear policy of s. 177 is to distinguish between the procedure or mechanism by which the taxable income and tax is ascertained or assessed on the one hand and on the other hand the substantive liability of the taxpayer. The former involves the due making of the assessment " (2). Section 170 (2) and (3) impose certain conditional time bars which in this dichotomy seem evidently to belong to substantive liability. From this it follows that fulfilment of the conditions which bring a case within s. 170 (2) is part of the matter governed by the words of exception in s. 177 (1), viz. " except in proceedings on appeal against the assessment ". An appeal, however, is a proceeding given by statute to a taxpayer for the purpose of impugning an assessment otherwise conclusively imposing liability upon him. If there were no more than that, it would be enough to cast upon the taxpayer the burden of establishing his objections. On ordinary principles he must establish the facts which give him a prima facie title to the relief he seeks from the Court.

But there is more than that. For s. 190 (*b*) expressly places upon the taxpayer the burden of proving that the assessment is excessive. " Excessive " is the word chosen to correspond with the word " amount " in s. 177 (1). The " amount " no doubt reflects the " particulars ". It is perhaps not a good choice. For the replacement by s. 190 (*b*) of the words which appeared in the corresponding previous legislation in the exception in s. 177 (1) has perhaps caused the difficulty. The words of that legislation were " except in proceedings on appeal against the assessment when it shall be prima facie evidence only ". But bearing in mind that the word " excessive " relates to the amount of the substantive liability it is not difficult to see that it will extend over the area in which the conditions mentioned in s. 170 (2) find a place. For the fulfilment of those conditions goes to the power of the commissioner to impose the liability by amendment. If he cannot amend consistently with s. 170 (2) and so increase the amount of the assessment then it must be excessive.

(1) (1952) 86 C.L.R. 183.

(2) (1952) 86 C.L.R., at pp. 206, 207.

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In our opinion the first question in the case stated should be answered: No. The remaining questions arise only out of an affirmative answer and call for no further consideration.

KITTO J. This is a case stated by the Chief Justice, pursuant to s. 198 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955, for the opinion of the Full Court upon certain questions which have arisen in an appeal to the High Court under ss. 187 (*b*) and 197 of that Act. The appeal is against an amended assessment of the income tax payable by the appellant in respect of income derived during the year ended 30th June 1952.

Notice of the original assessment was served on the appellant on 5th March 1953, and notice of the amended assessment on 4th November 1954. The amended assessment was made after an investigation into the taxation affairs of the appellant had been conducted, and it increased her tax liability.

The questions of law in the case relate to the powers of the commissioner under s. 170 of the Act to amend an assessment, and to the burden, in an appeal to this Court against an assessment amended in a purported exercise of those powers, of proving or disproving the existence of the circumstances in which s. 170 provides that an amendment may be made. Sub-section (1) of that section confers on the commissioner a general power to amend any assessment by making such alterations therein or additions thereto as he thinks necessary, but it is qualified and supplemented by ten other sub-sections, which govern the exercise of the power in particular cases. Of these, only sub-ss. (2) and (3) need be mentioned in any detail. Sub-section (2) applies where a taxpayer has not made to the commissioner a full and true disclosure of all the material facts necessary for his assessment and there has been an avoidance of tax. In such a case the commissioner's power to amend the assessment is limited to making such alterations therein or additions thereto as he thinks necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of tax; and it is provided that he may exercise the power (*a*) if he is of opinion that the avoidance of tax is due to fraud or evasion—at any time; and (*b*) in any other case—within six years from the date upon which the tax became due and payable under the assessment. Sub-section (3), on the other hand, applies where the taxpayer has made a full and true disclosure and an assessment is made thereafter. It provides that in such a case 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 amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under the assessment.

The first question in the case stated is whether the commissioner has the burden of proving, as conditions precedent to his power to amend the assessment of 1953—(a) that the appellant did not make a full and true disclosure of all the material facts necessary for her assessment of tax; (b) that there was an avoidance of tax; and (c) any other and if so what matter or matters referred to in s. 170 (2) (*b*) of the Act.

This is a question concerning the burden of proof in the first of the two senses in which *Phipson* points out that the expression is used (*Phipson* on *Evidence*, 9th ed. (1952), p. 32). That is to say it refers to the burden of establishing a case, fixed at the beginning of the hearing and never shifting during the course of it, in contradistinction to the burden as it exists from time to time during the hearing of introducing evidence to rebut a conclusion which in its absence would have to be reached.

The taxpayer is the moving party. He comes into Court asserting a right to relief against an assessment which, unless the appeal succeeds, will stand as a conclusive determination of his liability for tax, conclusive in the sense that, by virtue of s. 177 (1) to which reference will later be made, a notice of it authenticated as provided in that sub-section will preclude any challenge to its correctness in proceedings by the commissioner for recovery of the amount assessed. Prima facie it follows that, in the case of an appeal against an amended assessment no less than in an appeal against an original assessment, the burden rests upon the taxpayer of satisfying the Court that the facts of the case are such as to entitle him to have the assessment set aside or dealt with otherwise in his favour.

The Act, however, reinforces this position by specific provision. By s. 190 (*b*) it provides that upon every reference or appeal the burden of proving that the assessment is excessive shall lie upon the taxpayer. This provision applies to appeals against amended assessments just as it does to appeals against original assessments; for s. 173 enacts that, except as otherwise provided, every amended assessment shall be an assessment for all the purposes of the Act, and not only is there no relevant provision to the contrary but, as the proviso to s. 185 illustrates, the group of sections in which s. 190 is found (Div. 2 of Pt. V) refers by the term "assessment" to original and amended assessments indifferently. But the argument submitted for the appellant in this case distinguishes between the

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two kinds of contention which may be raised by an objection to an amended assessment. It relies upon the fact that not only may such an objection deny that the taxpayer derived a taxable income as high as that fixed by the amended assessment, but it may deny that even if he did so the commissioner had power to make the amendment in the circumstances of the particular case; and it maintains that s. 190 (*b*) applies only to the issue raised by a denial of the former kind. This contention, however, fails to take into account the fact that an amendment, in so far as it is made in reliance upon sub-s. (2) of s. 170, is an amendment increasing the assessed amount of tax. For that reason an objection that the amendment should not have been made, whether it is based upon a contention that the commissioner has fallen into some error in the course of making it or upon a contention that the commissioner had no authority to amend in the circumstances of the case, is an objection that it has resulted in an assessment fixing the taxpayer with a higher liability than that which attaches to him upon a correct application of the Act as a whole. It is therefore an objection that the amendment has made the assessment excessive, whatever the ground of objection may be.

In the absence of any other material provision in the Act, this would mean that if a taxpayer is to succeed in an appeal against an amended assessment on the ground that the amendment was unauthorised having regard to s. 170 (2), he must discharge the burden of establishing one or more of four propositions of fact: that a full and true disclosure of all material facts was made to the commissioner; if it was not, that there has been no avoidance of tax; if there was such an avoidance and the amendment was made more than six years after the date upon which the tax became due and payable under the assessment, that the commissioner was not of opinion that the avoidance of tax was due to fraud or evasion; and that the alterations in or additions made to the assessment by the amendment did not travel beyond what was thought by the commissioner to be necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of tax. But the production of the notice of amended assessment or a copy of it, under the hand of the commissioner, second commissioner or a deputy commissioner, will preclude the taxpayer from asserting either the third or the fourth of these propositions, for s. 177 (1) makes such production conclusive evidence of "the due making of the assessment". "Due making" in this context is an expression which covers all procedural steps, other than those (if any) which go to substantive liability and so contribute to the

excessiveness of the assessment: *George* v. *Federal Commissioner of Taxation* (1). It therefore covers the step of forming the opinion that an avoidance of tax is due to fraud or evasion, and the step of thinking that particular alterations or additions are necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of tax. The correctness of these steps may be challenged on a reference to a board of review, for s. 177 (1) seems clearly enough to be a provision relating only to evidence in the sense of material to be considered by judicial tribunals. (Doubtless it is for that reason that the words of exception in the sub-section, which refer to proceedings on appeal, make no mention of proceedings on a reference.) But on an appeal, the Act, as *Isaacs* A.C.J. said in *Federal Commissioner of Taxation* v. *Clarke* (2): "so far trusts the commissioner, and does not contemplate . . . a curial diving into the many official and confidential channels of information to which the commissioner may have recourse to protect the Treasury" (3). Accordingly in an appeal on the hearing of which the notice of amended assessment is produced, there remain open for investigation, so far as s. 170 (2) is concerned, only the two questions, whether the taxpayer made a full and true disclosure of all the material facts, and, if he did not, whether there was an avoidance of tax. Upon both these questions, for the reasons given, the burden rests upon the taxpayer of making good his challenge to the amended assessment. And there is no antecedent unlikelihood in this conclusion, for as a rule the material facts relate to the taxpayer's own affairs and are peculiarly within his knowledge and his power to establish by evidence.

The construction of s. 190 (*b*) upon which this view proceeds finds support in s. 177 (1). It is there provided that the production of a notice of assessment, or of a document under the hand of the commissioner, second commissioner, or a deputy commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence, not only, as has already been mentioned, of the due making of the assessment, but also (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct. In the predecessor of this provision, which was found in s. 39 of the *Income Tax Assessment Act* 1922-1934 (Cth.), after the words "except in proceedings on appeal against the assessment", the additional words appeared: "when it shall be prima facie evidence only". In that Act, however, there was no provision corresponding with s. 190 (*b*); and there

(1) (1952) 86 C.L.R. 183, at p. 207.
(2) (1927) 40 C.L.R. 246.
(3) (1927) 40 C.L.R., at p. 276.

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is nothing to account for the dropping of the words " when it shall be prima facie evidence only " unless the view upon which the drafting of s. 177 (1) proceeded was that those words became unnecessary upon the insertion of s. 190 (*b*) in the new Act. The view must have been taken, it would seem, that a taxpayer who denies that " the amount and all the particulars of the assessment are correct " will necessarily be asserting that the assessment is excessive. By the " particulars " of the assessment is meant, presumably, the ingredients or constituent elements (see *Trautwein* v. *Federal Commissioner of Taxation* (1)) in the ascertainment of the amount of tax to be paid ; indeed that appears to be the sense in which the word is used elsewhere in this group of sections : see s. 170 (3), and the proviso to s. 185. To say of those ingredients that they are " correct " is to say that they are rightly treated as ingredients as well as that they are right in point of amount. So the draftsman of s. 39 of the former Act and s. 177 (1) of the present Act evidently considered ; for it would be absurd to suppose an intention that in an action for the recovery of an assessed amount of tax the taxpayer, although precluded by production of a notice of assessment from putting in issue any question of mere amount, should nevertheless be at liberty to challenge the entire assessment by contending that to treat as a proper element in the calculation some item which was in fact included in it was contrary to the Act. The section applies, by virtue of s. 173, in respect of a notice of amended assessment ; and the application to the production of such a notice of what has just been said is that the correctness of the inclusion in the calculation, as well as the correctness in amount, of the ingredient which has been the subject of the amendment is conclusively established (except on appeal) by the production of the notice. If that be so, it seems necessarily to follow that on appeal both the correctness of the inclusion and the correctness of the amount of the ingredient were formerly to be treated (under s. 39 of the earlier Act) as prima facie established by the production of the notice, and that under the present Act both are covered by the provision as to burden of proof in the s. 190 (*b*).

In the argument presented on behalf of the appellant taxpayer, reliance was placed on the fact that in s. 170 (2) as originally enacted the words " the commissioner is of opinion that " appeared immediately before the words " there has been an avoidance of tax ", and that they were omitted by the amending Act No. 88 of 1936. It was contended that the effect of this omission was to throw upon the commissioner the burden of proving that an avoidance of

(1) (1936) 56 C.L.R. 63, at pp. 107, 108.

tax had occurred. But what the omission accomplished was simply the substitution of a reference to one fact for a reference to another. In relation to evidence on an appeal, there is one important result of this, namely that, since the new fact is not part of the "due making" of the amended assessment, s. 177 (1) does not make the production of a notice conclusive proof of it on an appeal. But to take out of the proceedings a question of fact which admits of conclusive proof against the taxpayer and to put in its place a different question of fact which does not admit of such proof is a different thing from altering the burden of proof. It seems clear that the object of including in the sub-section the words referring to avoidance of tax, whether in their unamended or in their amended form, is simply to exclude cases in which, although the taxpayer has failed to make a full and true disclosure, he has nevertheless not been under-assessed. It was plainly more appropriate to that object that the cases falling within the sub-section should be defined by reference to an actual avoidance of tax than to an opinion of the commissioner that there has been an avoidance of tax. In any case, if the sub-section be compared with the corresponding sub-section of the previous Act (s. 37 (1A) of the *Income Tax Assessment Act* 1922-1934), it will be seen that the omission of the words "the commissioner is of opinion that" was made consequentially upon the recasting of the section which had taken place in the course of drafting the new Act. Apparently the need for it was not realised until the Act had been passed. There is nothing to suggest an intention to depart from the general policy, so clearly evinced in Pt. IV of the Act (comprising ss. 161 to 177) and s. 190 (*b*), of making all assessments unchallengeable except in so far as the taxpayer may displace them on appeal. Clear words would almost inevitably have been used if the legislature had really meant that the burden of proof, though remaining on the taxpayer in the case of an original assessment, and even in the case of an amended assessment so far as other matters are concerned, is henceforth to be upon the commissioner in the case of an amended assessment in regard to the one matter of avoidance of tax.

So far, sub-ss. (2) and (3) of s. 170 have been considered separately from one another. They are, however, complementary, covering between them every case in which an amendment of an assessment is required in the interests of the revenue, and for that reason they should be construed together. The substantive grant of power to amend assessments is to be found, as has been mentioned, in sub-s. (1); and although sub-s. (2) is expressed affirmatively, its operation,

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like that of sub-s. (3), is to qualify sub-s. (1) by denying the availability of the power in certain cases. Sub-section (3) gives the taxpayer a large immunity from amendments increasing his liability, and on the construction of its own terms, even unaided by s. 190 (*b*), it quite clearly places upon the taxpayer the burden of proving that the one condition of this immunity is satisfied, namely that he had made a full and true disclosure before he was originally assessed. Sub-section (2) is simply the obverse of this. It provides for the only case in which an immunity from amendment need be given to a taxpayer who does not bring himself within sub-s. (3), namely the case where there has been avoidance of tax. It is only in that case that an amendment increasing the assessment cannot be successfully resisted by reliance upon other grounds. So sub-s. (2) requires that in such a case the power to amend be exercised, if at all, within six years from the date upon which the tax became due and payable under the assessment, unless the commissioner is of opinion that the avoidance of tax was due to fraud or evasion. But the preliminary conditions necessary for its application are fulfilled if the case is not within sub-s. (3) and the amendment has made to the assessed amount of tax an addition which it would have been right to include in the original assessment. If the taxpayer denies that these conditions are satisfied he accepts the burden of proving it; for if he denies that the first condition is satisfied he is simply attempting to bring the case within sub-s. (3) and has the burden of proof because of the terms of that subsection, and if he denies that the second condition is satisfied he is making a case to which s. 190 (*b*), on its narrowest construction, places the burden of proof upon him. It is therefore impossible to construe sub-s. (2) as intending to place upon the commissioner the burden of proving that either condition is not satisfied.

Notwithstanding *dicta* which have been cited in support of the opposite view, the considerations above-mentioned make it necessary to conclude that the commissioner has not the burden of proving any fact upon which the application of s. 170 (2) depends.

The first question in the case stated should therefore be answered No, as to each of its branches. That answer being given, the remaining questions do not arise.

TAYLOR J. On 5th March 1953 the appellant was assessed to income tax in respect of the income received by her during the year ended 30th June 1952. Subsequently, that assessment was amended and her liability to income tax in respect of that income

was increased. Notice of the amended assessment was served upon her on 4th November 1954.

The amended assessment was made, apparently, pursuant to those provisions of the *Income Tax and Social Services Contribution Assessment Act* which permit the commissioner, within six years from the date upon which the tax becomes due and payable under an assessment, to amend the assessment where the taxpayer has not made a full and true disclosure of all the material facts necessary for his assessment. Reference to the grounds of objection lodged by the appellant indicates that the particular matter in dispute in this case is whether the appellant's return of income for the relevant period failed to disclose assessable income. The assessment is founded upon the view that there was such a failure whilst the appellant, by her grounds of objection, alleges, *inter alia*, that there was not. In these circumstances, the question is asked whether the respondent, in this appeal, carries the burden of proving, as a condition precedent to his power to amend the original assessment, that the appellant did not make a full and true disclosure of all the material facts necessary for her assessment of tax and that there has been an avoidance of tax.

Upon the hearing of the appeal considerable discussion took place concerning the provisions of s. 177 (1) and s. 190 of the Act. The latter section expressly provides that upon any appeal the taxpayer shall be limited to the grounds stated in his objection and that the burden of proving that the assessment is excessive shall lie upon the taxpayer. The contention is raised, however, that the word " excessive ", when read in relation to an amended assessment, is concerned only with the amount of the assessment and, accordingly, it is said, the sub-section does not cast upon an appellant the onus of disproving the existence of facts, which upon a consideration of s. 170 (2), must be regarded as a condition precedent to the power of the commissioner to amend. The former section is not concerned with the matter of onus of proof at all ; it merely provides that the production of a notice of assessment 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 the particulars of the assessment are correct.

In these circumstances it is not out of place, first of all, to consider the nature of the proceeding in which the question arises without regard to the statutory provisions to which reference has been made. It may be at once said that decisions of this Court have made it abundantly clear that the proceeding is not an appeal in the strict sense at all. That expression is appropriate to describe an appeal

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from an order made by a court and in such a proceeding as the present, that vital characteristic is entirely lacking. The so called appeal is, therefore, a proceeding in the original jurisdiction of this Court and its purpose is to displace or set aside an assessment purporting to have been made in the exercise of a statutory authority. The making of the assessment, however, does not, itself, constitute an infringement of any right of a taxpayer; it is quite unlike the case of trespass to the person, or trespass to goods, where the facts necessary to support a statutory justification must be proved by the defendant. Perhaps, it may be said that the difficulty in the present case, if there is one, is accentuated by the fact that the proceeding is instituted in an informal way and without pleadings in any real sense. But if pleadings were necessary they would disclose that what the appellant complains of is, not some infringement of her personal or proprietary rights which may or may not be justifiable pursuant to some statutory power, but, on the contrary, the purported exercise of the statutory power itself which, unless denied, will result in subjecting the taxpayer to a monetary liability. In order to displace the assessment the appellant in this case admits the purported exercise of the power but denies the existence of those facts which make the power exercisable. I should think that in those circumstances, and quite apart from the provisions of the statute itself, it would be sufficiently clear that an appellant would be bound to carry the burden of denying the existence of those facts.

The question, then, is whether the statutory provisions require any modification of this view. Reference has already been made to the provisions of s. 177 (1) and it is clear that they are not designed to deal with questions of the onus of proof. The purpose of that sub-section, is, subject to an important qualification, to make the production of a notice of assessment in judicial proceedings conclusive evidence of the due making of the assessment and that the amount and all the particulars of the assessment are correct. The qualification is that upon proceedings on appeal against the assessment, the production of the assessment does not constitute conclusive evidence that the amount and all the particulars of the assessment are correct. It will be seen that the sub-section contains two limbs and that the second limb applies only in proceedings which are not appeals of the character specified. In all other proceedings both limbs apply. But although doubts may exist as to what is comprised in each limb, the existence of these doubts in no way requires a modification of the view previously expressed.

The question of what is embraced by the second limb of the sub-section does not directly arise for decision in this case, but it readily appears that if the existence of the facts upon which the power of amendment under s. 170 (2) may be exercised ought to be regarded as comprehended by the expression " the due making of the assessment " a taxpayer would be precluded entirely, on appeal, from disputing the existence of those facts. In my view, however, " the due making of the assessment " does not involve the ascertainment of the existence of a state of facts prescribed as a condition precedent to the making of an amended assessment. The process of ascertaining the existence of such a state of facts is not in any real sense part of the process of making the assessment and this is the function to which the first limb of the sub-section is precisely addressed. Those who contend for the contrary view would attach importance to the word " due " and will insist that an assessment is not duly made unless it is made in circumstances which render the power to amend exercisable. But in the absence of more compelling language this construction, which would have such far-reaching results, should not be adopted and, in my view, effect should be given to what seems to me to be the natural meaning of the words used.

There seems no doubt that s. 177 (1) was intended to make it impossible for a taxpayer, in proceedings other than appeal against it, to challenge an assessment on any ground and, accordingly, there is every reason for thinking that the second limb in s. 177 (1) covers all grounds upon which an assessment may be challenged other than those covered by the first limb. But in terms, the second limb relates to " the amount and all the particulars of the assessment " and it is contended that these words are not appropriate to preclude a taxpayer from asserting in any proceedings that facts did not exist authorising the exercise of the power to amend under s. 170 (2). It may be conceded that the choice of words is unfortunate and it is possible that the draftsman had in contemplation the case of original assessments rather than amended assessments. But in many cases the question whether an amended assessment correctly states a taxpayer's assessable or taxable income will raise precisely the same problem as the inquiry whether his return of income had made a full and true disclosure of all the material facts necessary for his assessment. Assessable income may have been omitted from the return or unjustifiable claims for deductions may have been made and if, in proceedings other than an appeal of the specified character, the assessment constitutes conclusive evidence of the particulars therein stated, a strange result would follow if the taxpayer should, nevertheless, be at liberty to

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prove, or require the commissioner to prove, in justification of the assessment, that the non-disclosure which the particulars of the assessment assume, in fact, took place. In my view s. 170 (1) should be understood as precluding a taxpayer in proceedings other than an appeal (or a reference) under the Act from challenging an assessment on any ground. This means, of course, that where a taxpayer objects to an amended assessment on the ground that there was no failure to make a full and true disclosure, he alleges, in the words of s. 177 (1), that the assessment, both in amount and the specified particulars, is not correct.

In passing, the observation may be repeated that an inquiry as to the correctness of the amount or the particulars of an amended assessment under s. 170 (2) will in many, though not all, cases raise the same, or substantially the same, question as an inquiry whether the taxpayer has made a full and true disclosure. This circumstance supports the view which I have already expressed concerning the content of the first limb of s. 177 (1) for it would be curious if, upon an appeal under the Act, the former inquiry should be open and the latter precluded against the appellant.

The observations which have already been made are not without importance upon a consideration of s. 190 (*b*) which provides that upon an appeal the burden of proving that the assessment is excessive shall lie upon the taxpayer. The form of words chosen, and particularly the word " excessive ", presents some difficulty. For the appellant it is said that to show that the assessment is not, in the circumstances, authorised at all is not to show that it is " excessive ". That expression, it is said, is limited to questions relating to the quantum of the assessment and does not extend further. But again it may be said that in many cases where amended assessments have been made under s. 170 (2) the questions will frequently be the same. But whether or not this is so the word " excessive " is capable of a much wider meaning than that ascribed to it by the appellant's argument and there is no reason for thinking that an assessment, made in purported but not justifiable exercise of a statutory power, may not properly be described as excessive ; it purports to impose a specified liability and, upon appeal, the claim of the appellant is that he is not liable to pay any part of it. Whether the particular ground upon which he seeks to escape or reduce the liability merely touches the accuracy of the assessment or assails its validity as an assessment, he is, in the words of s. 185, " dissatisfied with " the assessment because it purports to impose upon him a liability in excess of that to which he may lawfully be subjected and I can see no reason why, in either case, his complaint

may not be accurately described as a complaint that his assessment is excessive.

Upon this view of s. 190 (*b*) it may be said that its provisions cast upon an appellant the burden of establishing his objections. That is to say, he is required to establish the grounds upon which he seeks to reduce or avoid the liability which the assessment purports to impose upon him. But in doing this the section requires no more of an appellant than the nature of the relief sought and the form of the proceeding would, otherwise, require.

For the reasons given I agree that the questions raised by the case should be answered as proposed by the Chief Justice.

Questions in case stated answered as follows:—

1. *No.*

2 & 3. *These questions do not arise. Costs of the case stated to be paid by the respondent in accordance with the order of the Chief Justice of 24th July* 1956.

Solicitors for the appellant, *Leonard Power & Power.*

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

T. J. L.