[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT;

AND

BARTON . . . . . RESPONDENT.

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1956, SYDNEY, *Dec.* 7;

1957, MELBOURNE, *Feb.* 18.

Dixon C.J., Kitto and Taylor JJ.

Income Tax (Cth.)—Return of income—Lodgment within time—No assessment within twelve months—Request for assessment—Failure to serve notice of assessment within three months thereafter—Assessment subsequently issued—Amended assessment—Whether assessment competent—Time limit for assessment—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *ss.* 170 (1) (2) (3)*, 171*.

A taxpayer who had made a return of income containing a full and correct disclosure received no notice of assessment within twelve months. The taxpayer in pursuance of s. 171 (1) of the *Income Tax Assessment Act* 1936-1947 requested the commissioner to make an assessment but the commissioner did not make an assessment until after the expiry of the three months mentioned in sub-s. (2) of s. 171.

An objection to the assessment was made on the ground that, since under s. 171 (2) the assessment must be deemed an amended assessment, no such assessment could under s. 170 (3) be made in the circumstances except to correct an error in calculation or a mistake of fact.

*Section 170 of the *Income Tax Assessment Act* 1936-1947 provides:—"(1.) The Commissioner may, subject to this section, at any time amend any assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment.

(2.) 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, the Commissioner may—

(*a*) where 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,

amend the assessment by 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 as the case may be.

(3.) Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error in calculation or a

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Held that the objection was not well founded.

Although the words of sub-s. (2) of s. 171 show that it does not express all the conditions that must be satisfied for the making of an amended assessment under that sub-section, yet no such assessment made after the expiry of the three months set going under s. 171 could be valid if it must satisfy in every respect all the requirements of sub-s. (2) or of sub-s. (3) of s. 170, and s. 171 clearly contemplates that an assessment may be made after the expiry of the three months. In its reference to a notional assessment sub-s. (2) of s. 171 provides no basis for any possible application of the conception of " an error in calculation or a mistake of fact ", although that forms the first restriction made by sub-s. (3) of s. 170 upon the power of amendment conferred by sub-s. (1) of that section. The reference to a notional assessment made by s. 171 (2) provides a completely adequate basis for applying the second restriction imposed upon the power by s. 170 (3) ; and it is that condition only of s. 170 (3) that is incorporated by reference. Accordingly it was competent for the commissioner to make the assessment.

CASE STATED.

Upon an appeal by the Commissioner of Taxation to the High Court from a decision of a board of review coming on to be heard before *Kitto* J., his Honour at the request of the appellant and with the consent of the respondent, the parties being in agreement as to the relevant facts, stated a case for the opinion of a Full Court of the High Court pursuant to s. 18 of the *Judiciary Act* 1903-1955, substantially as follows :—

1. On 23rd November 1945, one Elsie Florence MacNeill Simpson (now deceased), hereinafter called " the taxpayer ", duly furnished to the Commissioner of Taxation, within the time allowed by the commissioner for that purpose, a return of the income derived by her during the year ended 30th June 1945.

2. The taxpayer in the said return made a full and true disclosure of all the material facts necessary for her assessment.

3. No notice of assessment in respect of the said income was served within twelve months after the said 23rd November 1945.

mistake of fact ; and no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under that assessment . . . ".

*Section 171 of such Act provides :— " (1.) Where a taxpayer has duly furnished to the Commissioner a return of income, and no notice of assessment in respect thereof has been served within twelve months thereafter, he may in writing by registered post request the Commissioner to make an assessment.

(2.) If within three months after the receipt by the Commissioner of the request a notice of assessment is not served upon the taxpayer, any assessment issued thereafter in respect of that income shall be deemed to be an amended assessment, and for the purpose of determining whether such amended assessment may be made, the taxpayer shall be deemed to have been served on the last day of the three months with a notice of assessment in respect of which income tax was payable on that day."

4. By letter dated 7th January 1948, and received by the said commissioner on 8th January 1948, by registered post, the taxpayer requested the said commissioner to make an assessment in respect of the said income.

5. No notice of assessment in respect of the said income was served upon the taxpayer within three months after the said 8th January 1948, and until after that date no assessment in respect thereof was in fact made.

6. On 1st April 1948 the taxpayer died, and probate of her will was thereafter granted by the Supreme Court of New South Wales in its Probate Jurisdiction to George Ian Dewart Hutcheson, the sole executor therein named.

7. A notice of assessment dated 10th June 1948 in respect of the said income was issued and forwarded to the address Box 1462 G.P.O., Sydney, the postal address of Messrs. R. W. Nelson, Wheeler & Barton, chartered accountants, by whom the return of the taxpayer had been prepared and lodged.

8. The fact of the taxpayer's death was not known to the Commissioner of Taxation at the time of service of the said notice of assessment.

9. The said notice of assessment was received by the respondent Reginald Bernard Barton, of Messrs. R. W. Nelson, Wheeler & Barton.

10. On the instructions of the executor the aforesaid George Ian Dewart Hutcheson, an objection against the said assessment (and also against an assessment in respect of the taxpayer's income derived during the year ended 30th June 1946) was lodged with the commissioner on or about 17th June 1948, being contained in a letter of that date written to the commissioner by Messrs. R. W. Nelson, Wheeler & Barton, acting on behalf of the said executor, in the following terms :—" We hereby give notice of objection on behalf of the taxpayer against the above assessments on the grounds that registered notice under s. 171 of the *Income Tax Assessment Act* requesting the issue of assessments in respect of the returns for the relevant years was given to you on 7th January 1948, and assessments not having been issued within 3 months of the giving of such notice the deputy commissioner is now precluded from assessing the taxpayer."

11. By letter dated 11th July 1950, the commissioner informed the said executor that he had decided to disallow the said objection.

12. By letter dated 12th July 1950, the said executor, being dissatisfied with the decision of the commissioner, duly requested

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the commissioner to refer the decision to a board of review for review.

13. On 24th May 1954, a board of review, by a majority, upheld the said objection.

15. The commissioner duly appealed to the High Court from the decision of the board.

16. The respondent Reginald Bernard Barton is now the sole trustee of the taxpayer's estate, and by an order made by consent on 31st May 1955 his name was substituted for that of George Ian Dewart Hutcheson as the respondent to this appeal.

The following questions of law were stated by his Honour for the determination of a Full Court :—

(1) In the events which happened was the Commissioner of Taxation precluded by the provisions of s. 170 (3) of the *Income Tax Assessment Act* 1936 as amended from making, after the expiration of three months from 8th January 1948, an assessment of the amount of the taxable income of the taxpayer and of the tax payable thereon in respect of income derived during the year ended 30th June 1945 ?

(2) Had the taxpayer a right of objection under the provisions of the said Act as amended against the assessment a notice of which was served by the Commissioner of Taxation on 10th June 1948 ?

K. W. Asprey Q.C., and *G. P. Donovan*, for the appellant.

The respondent appeared in person.

Cur. adv. vult.

Feb. 18, 1957.

THE COURT delivered the following written judgment :—

The question for decision upon this case stated concerns the operation of s. 171 with relation to s. 170 (3) of the *Income Tax Assessment Act* 1936-1947.

Section 171 places a restriction upon the commissioner's authority to defer or delay the making of an original assessment. It is a condition of the application of the provision that the taxpayer shall have " duly furnished to the commissioner a return of income ". Then if no notice of assessment in respect thereof has been served within twelve months thereafter the taxpayer may in writing by registered post request the commissioner to make an assessment : sub-s. (1). The plan of the provision is to give the commissioner three months from the receipt of the notice to make an ordinary assessment. If he fails to do so within that time any assessment he may afterwards make in respect of the income is to have the

status of an amended assessment. In the present case, within a time allowed under s. 171, a return signed by the taxpayer was made to the commissioner setting forth a full and complete statement of the total income derived by her during the year of income and making a full and true disclosure of all the material facts necessary for her assessment. So there can be no question that the condition was fulfilled requiring that a return should be duly furnished. But no notice of assessment was made within twelve months of the furnishing of the return. After two years had elapsed from that time, the taxpayer made a written request to the commissioner by registered post that he should make an assessment. This he failed to do within three months. After that time had passed the commissioner did make an assessment in respect of the income year for which the return had been made. The question which we are called upon to decide is whether under the combined effect of s. 170 (3) and s. 171 it was competent for the commissioner to make such an assessment at that stage or on the other hand the consequence of conferring upon the assessment the status of an amended assessment is not to make it incompetent for him to do so.

The question depends in the first place upon the terms of sub-s. (2) of s. 171 by which that status is given to the assessment. Subsection (2) is expressed as follows:—"If within three months after the receipt by the commissioner of the request a notice of assessment is not served upon the taxpayer, any assessment issued thereafter in respect of that income shall be deemed to be an amended assessment, and for the purpose of determining whether such amended assessment may be made, the taxpayer shall be deemed to have been served on the last day of the three months with a notice of assessment in respect of which income tax was payable on that day." It will be noticed that the provision states two propositions and in terms which formally might appear inconsistent. The first requires that the delayed assessment shall be deemed an amended assessment. This would seem to mean that it is to have the attributes which belong to an amended assessment one of which is of course validity. The second proposition is, however, introduced by the expression "for the purpose of determining whether such an amended assessment may be made". This introductory statement of purpose means that the validity of the hypothetical amended assessment is not to be taken notionally as wholly established but remains, at all events to some extent, open to question. The proposition then proceeds to state what are the assumptions to be made for the purpose of resolving the question. These assumptions go to establishing notionally a date for two

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events, viz. for the service of notice of the hypothetical original assessment and the time when the tax assessed is to be supposed to have become due and payable.

The conditions governing the power to amend an assessment are stated in s. 170 and in certain cases one of the conditions is that the amendment must be made within a specified time from the date upon which the tax became due and payable under the original assessment. It is obviously for that reason that sub-s. (2) of s. 171 prescribes these assumptions. But there are other conditions involved in the operation of s. 170 with reference to the power to amend these assessments and in relation to this sub-s. (2) of s. 171 provides no assumptions and says nothing. It is this silence that has caused the difficulty. On the commissioner's side it is interpreted as meaning that the validity of the supposed assessment is not to depend upon or to be tested by them. On the side of the taxpayer the contrary view is adopted and, where a condition in s. 170 is of such a nature that it cannot be fulfilled by means of or by recourse to the notional original assessment, the taxpayer says that the consequence of s. 171 (2) is simply that no assessment can be made. From this abstract statement of the difficulty it is necessary to turn to the form and structure of s. 170 and to some of its precise terms. Sub-section (1) of that section confers in general terms the power to amend assessments but confers it " subject to this section ". Sub-section (2) provides for the case of a taxpayer failing to make to the commissioner " full and true disclosure of all the material facts necessary for his assessment " and of there being " an avoidance of tax ". In such a case the commissioner may amend the assessment by 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 as the case may be. If the commissioner is of opinion that the avoidance of tax is due to fraud or evasion he may make the amendment at any time. But if not he must do it within six years from the date upon which the tax became due and payable under the assessment.

The present case does not, of course, fall within this sub-s. (2), because full and true disclosure was in fact made. But the obvious reference in s. 171 (2) to the words in which the time limit contained in s. 170 (2) is expressed makes sub-s. (2) of s. 170 material to the interpretation of the provisions. It is sub-s. (3) of s. 170 that is relied on by the taxpayer as directly affecting the present matter. That sub-section relates to the case of a taxpayer's making to the commissioner a full and true disclosure of all the material facts necessary for his assessment and of an assessment being made after

that disclosure. 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 ". That is one restriction. As will be seen its chief purpose appears to be to exclude amendments made in order to give effect to new or changed views of the law, to remedy, as would be said, errors or mistakes of law. By sub-s. (8) it is made clear that what the commissioner considers an erroneous opinion falls within the category of a mistake of fact where under a provision of the Act his opinion governs some specific matter. But this clarification (or extension if it be so regarded, cf. *Federal Commissioner of Taxation* v. *Westgarth* (1)) of the expression " mistake of fact " is of no importance in the present case. What is important is that in its reference to a notional assessment sub-s. (2) of s. 171 provides no basis at all for any possible application of the conception of " an error in calculation or a mistake of fact ", although that forms the first restriction made by sub-s. (3) of s. 170 upon the power of amendment conferred by sub-s. (1) of that section. But the reference to a notional assessment made by s. 171 (2) provides a completely adequate basis for applying the second restriction imposed upon the power by s. 170 (3). That restriction consists in a time bar. The limitation in point of time is expressed in the following words :— " . . . and no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under that assessment "—viz. the original assessment. As in the case of the time bar imposed where there is no fraud or evasion by sub-s. (2) of s. 170, the words are echoed in the latter part of sub-s. (2) of s. 171. There can be no doubt that the intention of s. 171 (2) is to make the time bars imposed by s. 170 (2) and (3) respectively applicable to assessments governed by s. 171, if made after the three months have expired. Nor can there be any doubt that the question which time bar should apply must depend, as under s. 170, upon the making to the commissioner of a full and true disclosure of all the material facts necessary for the given taxpayer's assessment. In each case time is to run from the expiration of three months from the taxpayer's request for an assessment. As full and true disclosure was made in this case, the time allowed for an assessment would be three years from that date. In fact the assessment was forthcoming within a few months of the expiration of the three months so limited. The objection to the validity of the assessment does not rest on the time bar. It rests wholly on the impossibility of saying that there is a fulfilment of the condition

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

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expressed in the exception when s. 170 (3) says that 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. It is obvious, so it is claimed, that the hypothetical assessment which s. 171 (2) requires one to assume can form no basis for such a correction. All that s. 171 (2) says about the hypothesis is that the taxpayer shall be deemed to have been served on the last day of the three months with a notice of assessment in respect of which income tax was payable on that day. It is indeed true enough that the hypothesis which it is so demanded that one should make does not go to the content of the assessment in any respect. All it requires is that the bare facts which would set time running under sub-s. (2) or sub-s. (3) of s. 170 should be assumed, nothing further. The contents and the amount of the assessment to be assumed are alike treated as irrelevant.

If it is necessary to show that the case falls within the exception stated by s. 170 (3) in order to make it possible to assess after the three months limited by s. 171 (2) have expired, then it must be true that the case cannot be shown to fall within the exception. Further this must be true of every case governed by s. 171 where full and true disclosure has been made, the consequence being that wherever full and true disclosure has been made no assessment is possible after the expiry of the three months limited by s. 171 (2). It would seem too that the same reasoning would produce a like consequence under s. 170 (2). It is true that under that sub-section the amendment may be made for the purpose of preventing avoidance of tax as an alternative to the purpose of correcting an error in calculation or a mistake of fact. But a condition precedent is that there shall have been an avoidance of tax and, whatever that phrase may mean elsewhere, in s. 170 (2) it seems clearly enough to refer to an avoidance by under-assessment. Nothing could be extracted from s. 171 (2) that would enable one to say that the hypothetical assessment was an under-assessment or resulted in an avoidance of tax.

So far as s. 170 (3) is concerned the commissioner made an answer amounting to an attempt to apply the same argument in order to produce the opposite consequence. The answer depended on the words " 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 ". How, it was asked on behalf of the commissioner, does the actual assessment increase the liability of the taxpayer in any particular ? The assumptions required by s. 171 (2) do not touch the particulars

of the assessment any more than the amount. They give no basis for saying that in the supposedly amended assessment there is an increase of liability in any particular or at all. Consequently s. 170 (2) does not operate to impose any restraint upon an assessment to which s. 171 (2) applies. This may be regarded as a *reductio ad absurdum* of the argument made against the validity of the assessment; but it was not so treated by the respondent, whose reply to it was that since s. 171 (2) postulated an assessment and yet gave it the status of an amended assessment, it must be assumed that the liability supposedly ascertained by the hypothetical original assessment had been increased in some particular by the assessment eventually made.

In the same way the commissioner at one stage contended that an objection would not lie under s. 185 because the assessment, which must be regarded as an amended assessment, could not be said to impose a fresh liability or increase an existing liability in respect of any particular. But this contention, though made the subject of the second question in the case stated, was subsequently abandoned. The truth is, however, that all these arguments spring from one common source and that source consists in a single fallacy. That fallacy is that s. 171 (2) means that if an assessment is made after the expiration of a period of three months which has been properly set going under s. 171, the assessment shall not be valid unless it satisfies in every respect all the requirements of either sub-s. (2) or of sub-s. (3) of s. 170. Section 171 (2) is expressed with unfortunate brevity, but if such a result had been intended it could have been produced without any circumlocution by saying in still fewer words that after the three months no assessment could be made.

There can be no doubt, however, that s. 171 (2) does contemplate the issue after the three months of an assessment which may be valid. In terms it describes the assessment as an assessment made thereafter in respect of that income and deems it an amended assessment. In terms the sub-section prescribes the assumptions that are to be made for the purpose of determining whether or not it is valid. The statement of the assumptions is exhaustive and yet it is "for the purpose of determining whether such amended assessment shall be made". Does not this necessarily mean that no other assumptions are required, or, in other words, that these are to afford the test of validity? The preceding statement that the assessment is to be deemed an amended assessment gives the document its hypothetical character; to obtain that character it is made unnecessary that it should fulfil the restricted purpose of

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sub-s. (3) or the less restricted purpose of sub-s. (2) of s. 170. The "deeming" has made that unnecessary. It is only when the legislature turns to the matters affecting the limitation in point of time that the question whether such notice of such an amended assessment may be given is opened. The true inference surely is that only with respect to the time bar was it intended to open the question whether an amended assessment might be made. That is what is meant by saying that the assessment shall be deemed an amended assessment and for the purpose of determining whether "such amended assessment", i.e. that hypothetical amended assessment the form and contents whereof were those of an original assessment, might be made, certain things shall be deemed. The very fact that it was an original assessment in form and contents would make it impossible that it should really comply with the requirements of an amended assessment; but, given the data which s. 171 (2) specifically requires to be assumed, there is no difficulty in applying s. 170 (2) and (3) for the purpose of determining whether the time limit had been exceeded. After all, it is the true meaning of s. 171 (2) that is in question and, however elliptical the sub-section may be considered, the foregoing interpretation is to say the least consistent with its terms, accords with the probable intention of the provision and avoids what may fairly be regarded as absurd consequences. It may well be that the legislature desired also that the assessment should be treated as an amended assessment in case further amendments should be made therein and conceivably for other purposes. But that need not be considered in the present case. It is enough to say that upon the true interpretation of s. 171 (2) the assessment made after the expiration of the three months mentioned in that sub-section is to be deemed an amended assessment which so far as concerns s. 170 (2) or (3) is lawfully made except for the question whether, a time being prescribed by sub-s. (2) or (3) as the case may be for the making of such an assessment, that time had expired. A question may exist whether an assessment covered by s. 171 (2) may possibly fall within par. (*a*) of s. 170 (2), but it is better to treat that question as not necessarily decided by this judgment. Strictly speaking all that is or could be decided now is that, the assessment being within time under s. 170 (3), it is valid.

There is, however, one matter which should be mentioned lest it should be thought that it has been overlooked. It has been found convenient in the foregoing to refer to the taxpayer as if she were the appellant. But the original taxpayer, Mrs. Simpson, in fact died after the notice under s. 171 (1) had been given to the

commissioner and before the notice had expired and accordingly before the assessment was made. The assessment was, however, made upon her in her name. The appellant is the administrator of her estate or trustee. No point as to these matters is made by either party. Probably s. 217 (1) would cover most of the difficulties that otherwise might have been suggested. But for the purpose of this case stated we may ignore them and confine ourselves to the single question that has been argued. That is question 1, which should be answered: No. To the second question it is enough to answer that the right of objection is not now contested by the commissioner.

Questions in the case stated answered as follows:—

1. *No.*
2. *The right of objection is not now contested by the commissioner.*

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

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

R. A. H.