[HIGH COURT OF AUSTRALIA.]

DEPUTY COMMISSIONER OF TAXATION . PLAINTIFF;

AND

HANKIN . . . . . DEFENDANT.

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1958, SYDNEY, *Dec.* 2, 3;

1959, MELBOURNE, *Feb.* 26.

Dixon C.J., McTiernan, Fullagar, Kitto and Windeyer JJ.

Sales Tax (Cth.)—Sales tax levied on sale value of goods—Computation—Goods entered for home consumption—Tax payable at time of entry for home consumption—Sale value correctly stated—Tax calculated and paid at less than rate appropriate to class of goods imported— Demand by commissioner to recover balance as further tax—Action to recover—Taxpayer required to pay at time of entry sales tax actually payable according to law—Commissioner authorised to calculate tax at correct rate where calculated at wrong rate on correct sale value—Notice specifying liability and letter nominating date for payment sufficient compliance with statute—"Goods"—Onus on defendant in sales tax action to prove goods imported fall within exemptions in definition—Incontestable tax—Not imposed by sales tax legislation—Sales Tax Act (No. 5) 1930-1949—Sales Tax Assessment Act (No. 1) 1930-1942, ss. 3, 39—Sales Tax Assessment Act (No. 5) 1930-1939, ss. 4 (2), 5, 9, 10.

Subject only to cases falling either within the first proviso to s. 4 (2) of the *Sales Tax Assessment Act* (No. 5) 1930-1949 or the proviso to s. 9 of such Act, s. 9 requires payment at the time of entry of the goods for home consumption under the *Customs Act* of the sales tax actually payable according to law on the goods imported.

So *held* by *Dixon* C.J., *Fullagar*, *Kitto* and *Windeyer* JJ., *McTiernan* J. dissenting.

Where, in a case falling outside the first proviso to s. 4 (2) and the proviso to s. 9, the amount of sales tax shown on the import entry form having been calculated and paid at an incorrect rate on the correct sale value of the goods and the commissioner pursuant to s. 10 of the *Assessment Act* (No. 5) having given notice of an assessment to further tax amounting to the balance of the correct amount unpaid at the time of entry and notified the date for payment of such further tax by a letter to the taxpayer which accompanied the notice,

Held: (1) per *Dixon* C.J., *Fullagar*, *Kitto* and *Windeyer* JJ. that it was open to the commissioner to exercise his powers under s. 10 (1) in order to collect the unpaid balance of the tax, *sed quaere* whether it was necessary for him to do so.

(2) per *McTiernan* J. that it was necessary for the commissioner to exercise his powers under the sub-section in order to do so.

(3) by the whole Court that (a) the notice and accompanying letter together constituted a sufficient compliance with sub-s. (2) and (3) of s. 10 ; and (b) the commissioner was entitled to recover the unpaid balance of the tax.

By s. 3 of the *Sales Tax Assessment Act* (No. 1) 1930-1942 incorporated into the *Assessment Act* (No. 5) by s. 12 of the latter Act the word " goods " is defined as including " commodities, but does not include " certain types of goods enumerated in two paragraphs lettered (*a*) and (*b*).

Held, by the whole Court that the enumerations in pars. (*a*) and (*b*) are true exceptions to the general definition and it is for the defendant to prove in proceedings by the commissioner to recover tax that his goods fall within one or other of those paragraphs if he would avoid liability on that ground.

Per *Dixon* C.J., *Fullagar*, *Kitto* and *Windeyer* JJ. : *Quaere* whether the exception contained in par. (*b*) of the definition of " goods " in s. 3 is capable of being applied at all to goods dealt with by *Assessment Act* (No. 5).

The *Sales Tax Assessment Act* (No. 5) in conjunction with the *Sales Tax Act* (No. 5) 1930-1949 does not have the effect of imposing an " incontestable " tax.

So *held* by the whole Court.

In an action brought by the commissioner against a taxpayer assessed to sales tax to recover such tax the production of a document or copy of a document of the type specified in s. 39 (1) of the *Sales Tax Assessment Act* (No. 1) precludes the taxpayer from contending only that some required formality under the Act has not been observed. Any other objection to the assessment may properly be taken by him.

So *held* by *Dixon* C.J., *Fullagar*, *Kitto* and *Windeyer* JJ., *McTiernan* J. dissenting.

Per *Dixon* C.J., *Fullagar*, *Kitto* and *Windeyer* JJ. : The *Sales Tax Assessment Act* (No. 5) is not a law imposing taxation and s. 55 of the Constitution has no application to it.

CASE STATED by *McTiernan* J.

In an action instituted in the original jurisdiction of the High Court of Australia by the Deputy Commissioner of Taxation against one Alec Hankin to recover the sum of £554 15s. 8d. being further sales tax and interest thereon alleged to be payable by Hankin upon the importation into Australia by Hankin of certain goods, *McTiernan* J. stated a case for the opinion of the Full Court of the High Court substantially as follows :—

1. At all material times the defendant was an " unregistered person " within the meaning of that expression in s. 3 of the *Sales Tax Assessment Act* (No. 1) 1930-1942.

2. On or about 8th September 1947 the defendant imported into Australia on board the vessel " Trianon " certain goods, namely, one electric ray gun machine, one auto coin operated phonograph and two auto slot amusement machines ball table games.

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3. On 10th September 1947 the defendant entered the said goods for home consumption under the *Customs Act* 1901-1936. At the time of the entry of the said goods the defendant lodged, for the purposes of the *Sales Tax Assessment Act* (No. 5) 1930-1939, with the Collector of Customs at the port of Sydney in the State of New South Wales an entry in the manner and form prescribed by the *Customs Regulations* and the *Sales Tax Regulations*. [A copy of the said entry was annexed to the case stated.]

4. The sale of the said goods for the purposes of the *Sales Tax Assessment Act* (No. 5) 1930-1939 was £430 7s. 7d. calculated as follows :—

The value, converted into Australian currency, at which the said goods were entered for home consumption under the *Customs Act* 1901-1936	£220	17	6
The duty of Customs payable in respect of the said goods ..	137	15	6
	358	13	0
Add 20 per centum	71	14	7
Sale value of the said goods ..	£430	7	7

5. At the time of the entry of the said goods as aforesaid the defendant paid sales tax amounting to £43 0s. 9d. being tax at the rate of 10 per centum upon the said sale value as aforesaid. Upon payment of the said sum together with certain further moneys due for customs and primage duties the goods were cleared.

6. On or about 31st October 1947 the defendant imported into Australia on board the vessel "Tai Ping Yang" certain goods namely six automatic phonographs (juke boxes) and three electric ray gun amusement machines.

7. On 5th November 1947 the defendant entered the said goods for home consumption under the *Customs Act* 1901-1936. At the time of the entry of the said goods the defendant lodged, for the purposes of the *Sales Tax Assessment Act* (No. 5) 1930-1939, with the Collector of Customs at the port of Sydney aforesaid an entry in the manner and form prescribed by the *Customs Regulations* and the *Sales Tax Regulations*. [A copy of the said entry was annexed to the case stated.]

8. The sale value of the said goods for the purpose of the *Sales Tax Assessment Act* (No. 5) 1930-1939 was £1,220 3s. 1d. calculated as follows:—

The value, converted into Australian currency, at which the said goods were entered for home consumption under the *Customs Act* 1901-1936	£623	19	8
The duty of Customs payable in respect of the said goods ..	392	16	3
	£1,016	15	11
Add 20 per centum	203	7	2
	£1,220	3	1

9. At the time of the entry of the said goods as aforesaid the defendant paid sales tax amounting to £122 0s. 4d. being tax at the rate of 10 per centum upon the said sale value as aforesaid. Upon payment of the said sum together with certain further moneys due for customs and primage duties the goods were cleared.

10. On or about 5th November 1947 the defendant imported into Australia on board the vessel "Wangaratta" certain goods namely five automatic coin operated phonographs (juke boxes).

11. On 10th November 1947 the defendant entered the said goods for home consumption under the *Customs Act* 1901-1936. At the time of the entry of the said goods the defendant lodged, for the purposes of the *Sales Tax Assessment Act* (No. 5) 1930-1939, with the Collector of Customs at the port of Sydney aforesaid an entry in the manner and form prescribed by the *Customs Regulations* and the *Sales Tax Regulations*. [A copy of the said entry was annexed to the case stated.]

12. The sale value of the said goods for the purposes of the *Sales Tax Assessment Act* (No. 5) 1930-1939 was £773 1s. 11d. calculated as follows:—

The value, converted into Australian currency, at which the said goods were entered for home consumption under the *Customs Act* 1901-1936	£393	8	10
The duty of Customs payable in respect of the said goods ..	250	16	1
	644	4	11
Add 20 per centum	128	17	0
Sale value of the said goods ..	£773	1	11

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13. At the time of the entry of the said goods as aforesaid the defendant paid sales tax amounting to £77 6s. 3d. being tax at the rate of 10 per centum upon the said sale value as aforesaid. Upon payment of the said sum together with certain further moneys due for customs and primage duties the goods were cleared.

14. [The invoices relating to the purchase by the defendant of the goods referred to in pars. 2, 6 and 10 of the case stated were annexed to such case.]

15. The goods referred to in pars. 2 and 6 hereof as "electric ray gun machine" and "electric ray gun amusement machines" were electrically operated machines which on the insertion of a coin simulated the firing of a rifle or machine gun aimed at a moving target. The goods referred to in pars. 2, 6 and 10 hereof as "auto coin operated phonograph", "automatic phonographs (juke boxes)" and "automatic coin operated phonographs (juke boxes)" were electrically operated machines which on the insertion of a coin automatically played a selected musical recording. The goods referred to in par. 2 hereof as "auto slot amusement machine ball table games" were electrically operated machines which on the insertion of a coin played a ball table game.

16. Apart from the statement appearing in the invoices which are referred to in par. 14 hereof, there was no evidence of the terms of sale of the goods to the defendant nor from what goods (if any) the said goods were manufactured.

17. The goods referred to in pars. 2, 6 and 10 hereof were goods covered by item 18 (2) in Div. VI in the third schedule to the *Sales Tax (Exemptions and Classifications) Act* 1935-1946 and were not goods the sale value of which was exempted from sales tax under that Act.

18. On 1st November 1948 the Collector of Customs forwarded to the defendant three documents requiring the defendant to present the necessary post entries in respect of the said goods and to pay the duty short paid as specified in such documents. The said documents showed sales tax payable on the sale value of the said goods as set out in pars. 4, 8 and 12 hereof amounting to £605 18s. 2d. being tax calculated at the rate of 25 per cen upon such sale value. After giving credit for £242 7s. 4d. being the amount of sales tax paid by the defendant at the time of the entry of the said goods as aforesaid the documents stated that the additional amounts payable by the defendant totalled £363 10s. 10d. [Copies of the said documents were annexed to the case stated.]

19. On 14th August 1950 the plaintiff forwarded to the defendant a letter enclosing a notice under s. 39 of the *Sales Tax Assessment*

Act (No. 1) 1930-1942 specifying the defendant's liability to pay the said sum of £363 10s. 10d. [Copies of the said letter and notice were annexed to the case stated and, omitting formal parts, the substance of these documents is set out in the joint judgment hereunder.]

20. The defendant has not paid to the plaintiff the said sum of £363 10s. 10d. or any part thereof, denying any liability to pay the same.

21. On 29th November 1955 the plaintiff commenced an action in the original jurisdiction of this Court to recover from the defendant the sum of £554 15s. 8d. being the said sum of £363 10s. 10d. together with additional tax upon such amount calculated at the rate of 10 per cent per annum from 18th August 1950 to 24th November 1955 and amounting to £191 4s. 10d.

22. Upon this action coming on for hearing before me and the facts hereinbefore stated being proved in evidence before me I now state the following question of law for the consideration of the Full Court of this Court namely—Whether the plaintiff is entitled in law to recover from the defendant the said sum of £554 15s. 8d. ?

B. P. Macfarlan Q.C. and *A. F. Mason*, for the plaintiff.

M. H. Byers, for the defendant.

Cur. adv. vult.

Feb. 26, 1959.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR, KITTO and WINDEYER JJ. This is a case stated by *McTiernan* J. in an action in this Court, in which the commissioner seeks to recover from the defendant certain sums alleged to be due and payable by him by way of sales tax together with interest at ten per cent from 18th August 1950 to 24th November 1955. The action was commenced on 29th November 1955. The total amount claimed is £554 15s. 8d. of which £363 10s. 10d. is tax, and £191 4s. 10d. is interest. The relevant Acts are the *Sales Tax Assessment Act* (No. 5) 1930-1939 and the *Sales Tax Act* (No. 5) 1930-1949. By s. 3 of the *Assessment Act* the sales tax imposed by the *Taxing Act* is to be " levied and paid on the sale value of goods imported into Australia by a taxpayer ", and by s. 5 the tax is to be paid by the importer of the goods. Section 4 provides that, for the purposes of the Act, the sale value of goods imported by an unregistered person shall be an amount which exceeds by twenty per cent the sum of (i) the value for customs duty of the goods converted into Australian currency ; and (ii) the customs duty payable in respect of the goods. The defendant was an unregistered person.

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The action is concerned with three importations of goods by the defendant. In the first case the goods arrived in Sydney in the ship " Trianon ", and were entered for home consumption under the *Customs Act* 1901-1936 on 10th September 1947. In the second case the goods arrived in the ship " Tai Ping Yang ", and were entered for home consumption on 5th November 1947. In the third case the goods arrived in the ship " Wangaratta ", and were entered for home consumption on 10th November 1947.

Section 9 of the *Assessment Act* provides (subject to a proviso which is not applicable to the present case) that the sales tax payable under s. 5 shall be paid by the importer at the time of the entry of the goods for home consumption under the law relating to the Customs. Section 7 requires the importer at the time of the entry of the goods under the law relating to the Customs to lodge with the Collector an entry in the prescribed form for the purposes of the *Assessment Act*. A form is prescribed by reg. 25 of the *Sales Tax Regulations*, and the import entry forms used in the present case appear to combine that form with the ordinary customs entry form. The defendant, on the arrival of the goods, paid the customs duty, and paid a sum by way of sales tax. The import entry form stated the sale value of the goods, and showed the amount of sales tax payable as an amount equal to ten per cent of that sum. On payment of the customs duty, and of this amount by way of sales tax, the goods were cleared through the customs. It is not disputed that the sale value of the goods was correctly stated in the import entry form. But it is also not now disputed that, under the legislation then in force, sales tax was payable on that sale value not at the rate of ten per cent but at the rate of twenty-five per cent. The amount of tax which the commissioner seeks to recover in the present action is, in respect of each of the three shipments, the amount of the difference between tax calculated at ten per cent of the sale value and tax calculated at twenty-five per cent of the sale value. Section 30 of the *Sales Tax Assessment Act* (No. 1) 1930-1942 which is incorporated in the *Assessment Act* (No. 5) by s. 12 of the latter Act, provides that sales tax, when it becomes due and payable, shall be deemed to be a debt due to the Queen on behalf of the Commonwealth and payable to the commissioner.

It was not until 1950 that the commissioner took any formal step under the Act. In that year he took action under s. 10 of *Assessment Act* (No. 5). That section provides :—" (1) Where the Commissioner finds in any case that tax or further tax is payable by any person, the Commissioner may—(*a*) assess the sale value upon which tax should be or should have been paid ; and (*b*) calculate the tax or further

tax which is payable. (2) As soon as conveniently may be after an assessment is made, the Commissioner shall cause notice in writing of the assessment and of the tax or further tax to be given to the person liable to pay the tax or further tax. (3) The amount of tax or further tax specified in the notice shall be payable on or before the date specified in the notice, together with any other amount which may be payable in accordance with any other provision of this Act. (4) The omission to give any such notice shall not invalidate the assessment and calculation made by the Commissioner." It may be noted in passing that the term " further tax " in this section is apt to be a little misleading. The term has been used from time to time in the income tax legislation of the Commonwealth in at least two specialised senses. Here it seems plain that it means merely " more tax than has in fact been paid ". An example of a similar use of the word " further " may be found in s. 172 of the *Administration and Probate Act* 1928 (Vict.).

On 15th August 1950 the commissioner forwarded to the defendant a notice, which said :—" Take notice that you are liable under the *Sales Tax Assessment Act* (No. 5) 1930-1939 to pay £363 10s. 10d. which sum became due by you for sales tax on the dates of entry for Customs of the goods referred to hereunder." Then followed " particulars " relating to the three shipments. These stated the sale value of the goods at the same figure as had appeared in the original import entry, but showed the sales tax calculated at twenty-five per cent on that sale value. The notice was accompanied by a letter which said :—" I enclose herewith a notice specifying your liability under the *Sales Tax Assessment Act* (No. 5) 1930-1939. You are hereby required to pay the amount owing, £363 10s. 10d., within three days of the date of this communication."

Before considering the argument for the defendant it is convenient to observe that the general scheme of the *Sales Tax Assessment Act* (No. 5) differs in an important respect from that of the *Income Tax Assessment Act* and some other *Tax Assessment Acts* of the Commonwealth. Under the *Income Tax Assessment Act* the liability of the taxpayer does not come into existence until there has been an assessment by the commissioner of the tax payable and notice of that assessment has been given by the commissioner to the taxpayer. Under the *Sales Tax Assessment Act* (No. 5) the liability of the taxpayer does not depend on assessment or on any act of the commissioner. The liability arises directly on the importation of the goods, and the taxpayer is required by s. 9 to pay the tax at the time of the entry of the goods for home consumption under the *Customs Act*. It is only when no tax, or less tax than is payable by

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law, is paid at the time of the entry of the goods that any "assessment" or "calculation" by the commissioner under s. 10 becomes necessary or appropriate. Such an "assessment" or "calculation" indeed is perhaps never necessary. The liability of the taxpayer is created by s. 9, and is not made expressly to depend on any assessment or calculation or the giving of notice of any assessment or calculation under s. 10. It may well be—it is unnecessary to decide the point—that the commissioner could have brought this action to recover the difference between ten per cent and twenty-five per cent of the sale value without ever resorting to s. 10. The machinery provided by s. 10 is no doubt convenient and fair to the taxpayer, and one may suppose that the commissioner would normally employ it, but s. 10 says only that the commissioner *may* employ it, and the liability of the taxpayer may not depend on its employment.

There is indeed one case in which either a notice under s. 10, or at any rate some kind of formal notice, would seem to be necessary. Section 4 of *Assessment Act* (No. 5) has been cited above only so far as it relates to cases (of which this is one) in which the goods are subject to customs duty. In the case of goods which are not so subject the section provides that the sale value is to be "the value upon which, in the opinion of the Commissioner, an *ad valorem* duty would have been calculated if the goods had been so subject." There is a proviso that, pending the ascertainment of the value for duty in any case, that value shall be taken to be the value at which the goods are entered for home consumption under the *Customs Act*. It would appear, therefore, that, where either (a) the commissioner was not satisfied with the value for duty at which the goods were entered, or (b) he was required to form an opinion before that value could be finally determined, it would be necessary for him to make an assessment and give notice under s. 10 or at any rate to give some formal notice to the taxpayer. It is to be noted that s. 9, which requires the importer to pay sales tax at the time of the entry of the goods, is subject to a proviso. That proviso is in the following terms: "Provided that, in the case of goods the value for duty of which is, under sub-section (2) of section four of this Act, ascertained in accordance with the opinion of the Commissioner, the person liable to pay sales tax upon the sale value of those goods shall, on or before the date specified in the notice by the Commissioner stating the sale value of those goods and the amount of any additional sales tax payable thereon and attributable to an excess in the value for duty so ascertained over the sale value of the goods at the time of entry, pay that additional tax." The proviso is badly drawn, and

its last three lines seem to involve a confusion between " value for duty " and " sale value ", but its meaning does not seem doubtful. It is to be noted that the proviso seems to contemplate that any formal notification of the commissioner's opinion will suffice. On the other hand, it does not apply to a case where the goods are subject to customs duty but the commissioner is not satisfied with the value for duty stated in the entry.

The argument for the defendant was, at least as to its two main points, ingenious and clearly put, but it is possible now to deal fairly shortly with it. We do not think that there is any real substance in it. It was stated in the form of four points, of which the first two may be conveniently dealt with together. It was said that s. 9 does not create a liability on the part of the defendant to pay the sum claimed in this action. It was then said that the only other section in the Act under which such a liability could be actually created was s. 10, and either (a) s. 10 did not apply to the case, or (b) if it did, its terms had not been complied with.

The reason for saying that s. 9 creates no liability here was found in the proposition that that section requires payment at the time of entry only of the amount of tax shown in the import entry form. This is not, in our opinion, a correct view of the function or effect of s. 9. What it requires is payment, at the time of the entry of the goods for home consumption under the *Customs Act*, of the sales tax actually payable according to law on the goods imported. This requirement is subject to two qualifications. In cases to which the proviso to s. 9 applies, the time for payment of part of the total tax payable is postponed until it is fixed by a notification from the commissioner. But the proviso has no application to the present case. The only other qualification to which s. 9 is subject is found in the first proviso to s. 4 (2), which provides that, pending ascertainment of the value for duty, the value for duty shall be taken to be the value at which the goods are entered for home consumption. This also does not affect the present case. Sales tax was paid (whether it was paid " pending the ascertainment " of value for duty or not) on the basis of the value at which the goods were entered for home consumption. But it was paid at a wrong rate, and s. 9 required it to be paid at the right rate.

This view makes it unnecessary to consider Mr. *Byer's* second point. But perhaps an opinion should be expressed upon it. It was said that s. 10 authorised the commissioner, in a case where no tax has been paid or he considers that tax has been paid on a wrong sale value, to assess the sale value and calculate the tax upon it. It does not authorise him, where tax has merely been paid at a wrong rate

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on a correct sale value, merely to calculate the tax at what he considers is the right rate. In other words, there is a single power to do two things, and no power to do the second thing when there is no occasion for doing the first thing. This view clearly cannot be sustained. In order to calculate the tax, the commissioner must adopt a sale value, and, if he adopts a sale value, he is assessing a sale value. It was also said that the notice given by the commissioner on 15th August 1950 was defective because it did not specify a date on or before which the tax was to be paid. But the notice must be read with the letter which accompanied it, and the letter clearly specified a date for payment.

The third point arises in this way. The *Assessment Act* (No. 1) contains in s. 3 a definition of the word " goods ", and s. 3 is one of the sections of Act No. 1 which are incorporated in Act No. 5 by s. 12 of the latter Act. It is in fact incorporated in all the other *Assessment Acts*. It is unnecessary to set out the definition. It is enough to say that it provides that " goods " shall include " commodities ", and that this provision is followed by a long " exception ", which is concerned to exclude goods which are sold as second-hand goods and are manufactured from goods which have gone into use or consumption in Australia. While there is probably no difficulty in applying this exception to goods dealt with by Act No. 1, which are goods manufactured in Australia, it would seem at best doubtful whether it is capable of being applied at all to goods dealt with by Act No. 5. However this may be, the point raised is that in the action the burden rests on the commissioner of proving that the goods imported by the defendant do not fall within the exception contained in the definition. The point is not really open on the case stated, but in any case it is impossible to sustain it. It is for the defendant to prove, if he can, that his goods come within what is clearly stated in the Act as an exception.

The last point raised is that, if the defendant's first and second points are rejected, the effect of the *Assessment Act*, in conjunction with the *Tax Act*, is to impose an " incontestable " tax. That is to say, the Acts, having imposed a tax, give to the commissioner in effect an exclusive and conclusive power to determine whether in a particular case the tax is payable, and what amount of tax is payable. This, it is said, is unconstitutional. The constitutional point raised seems to be in essence that which was so much discussed in *Australian Communist Party* v. *The Commonwealth* (1), and which is sometimes expressed by saying that " a stream cannot rise higher than its source ". It is unnecessary to consider whether, if the

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Acts did impose an " incontestable " tax, the effect would be to make them or any part of them unconstitutional. For the Acts do not, in our opinion, have the effect of imposing an " incontestable" tax.

In order to ascertain the tax payable by any person, it is necessary to determine two factors. The first is the sale value of the goods, and the second is the rate of tax. Questions may arise in connection with the determination of either, and a preliminary question may arise whether the goods are subject to tax at all. So far as sale value is concerned, *Assessment Act* (No. 5) provides for an appeal from a decision of the commissioner to a board of review, and an appeal from a decision of the board on a question of law to this Court : see ss. 40-44 of *Assessment Act* No. 1, which are incorporated in Act No. 5. But on a question whether the goods are subject to tax at all, and on a question as to the rate of tax, it is said that a decision of the commissioner under s. 10 is made conclusive by the Act. This result is said to follow from s. 39 (1) of *Assessment Act* (No. 1), which is incorporated in Act No. 5. Section 39 (1) is in the following terms :—" The production of any document or a copy of a document under the hand of the Commissioner . . . purporting to be a notice or a copy of a notice specifying any liability of a taxpayer under this Act shall be conclusive evidence of the due exercise of any act required by this Act to be done or performed by the Commissioner . . . for the purpose of ascertaining the liability so specified and (except in proceedings on appeal when it shall be *prima facie* evidence only) shall be conclusive evidence of the correctness of any calculations upon which that liability is ascertained."

Section 39 (1) has not, in our opinion, the effect attributed to it. It must, of course, be strictly construed. It ought not to be construed as having the effect suggested unless it appears clearly from its terms that it has that effect. It differs conspicuously from s. 177 of the *Income Tax and Social Services Contribution Assessment Act* and s. 22 of the *Estate Duty Assessment Act*, the plain object of which is to make an assessment conclusive as to everything unless the prescribed procedure by way of objection and appeal is followed. One cannot help thinking that there has been some slip in drafting it, because it does not, as one would have expected it to do, make an assessment conclusive as to sale value except on appeal. The very curious expression " the due exercise of any act " can only refer to the observance of any required formality, and the word " calculations " ought not to be construed as referring to more than the bare arithmetic involved in the making of the assessment. If it be said

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that this leaves the taxpayer at the mercy of a notional mathematical infallibility on the part of the commissioner, and that this is enough to invalidate the Act, the answer must be that the latter part of s. 39 (1) is plainly severable. The whole Act cannot be held invalid because the commissioner might add two and two together and make five. The *Assessment Act* is not a law imposing taxation, and s. 55 of the Constitution has no application to it.

The result is that a taxpayer, who is dissatisfied with an assessment of the commissioner, may refuse to pay the amount assessed, and, when he is sued by the commissioner, may take any objection to the assessment other than the objection that some required formality has not been observed. No liability to pay tax is " incontestably " imposed.

The question asked by the case stated is—Whether the plaintiff is entitled in law to recover from the defendant the sum of £554 15s. 8d. The answer to this question should be—Yes.

McTIERNAN J. Two questions are preliminary to the others which emerge from the argument. The first concerns the meaning of " goods ", and the second the rate of tax. For the meaning of " goods ", you refer to s. 3 of the *Sales Tax Assessment Act* (No. 1). The relevant provision of this section says, in effect, that all goods, including commodities, shall be taxable, except the goods described in the two paragraphs, (*a*) and (*b*). I do not agree with the argument that the plaintiff has the onus of proving that the machines concerned in the case are not within par. (*a*) or (*b*). Each of these paragraphs is a true exception. The correct principle, therefore, is that the defendant has the onus of proving that the machines are within either paragraph, *Metropolitan Coal Company* v. *Pye* (1). It is enough for the purposes of the plaintiff that the machines are " goods " according to the ordinary general meaning of the word; there is nothing in the case stated to bring the machines within par. (*a*) or (*b*). The second question depends upon whether the machines belong to any of the classes of goods covered by item 18 (2) of Div. (VI) of the third schedule to the *Sales Tax* (*Exemptions and Classifications*) *Act* 1935-1947. From the descriptions in the case stated I think it follows that the machines fall within item 18 (2). They were imported since 15th November 1946. The result is that by s. 3 of the *Sales Tax Act* (No. 5) sales tax at the rate of twenty-five per cent was imposed upon the sale value of the machines.

(1) (1934) 50 C.L.R. 614; (1936) 55 C.L.R. 138.

It seems to me therefore that this case stated has to be determined upon the basis that the defendant is chargeable under the *Sales Tax Assessment Act* (No. 5), with sales tax at the rate of twenty-five per cent of the sale value of the machines. The defendant paid sales tax on the entry of each lot for home consumption at the rate of ten per cent of sale value. He is liable to pay £363 10s. 10d. in order to discharge his liability under s. 5 of the Act. It is contended for the defendant that in order to make this amount due and payable an assessment of sale value and a calculation of further tax needed to be made. The plaintiff relied primarily upon s. 9 to establish that the sum of £363 10s. 10d. is due and payable. It has been contended for the plaintiff that s. 9 makes the full amount of sales tax which a taxpayer is liable to pay under s. 5 due and payable at the time of the entry of the goods for home consumption and therefore that nothing needed to be done under s. 10, in the present case. The performance of the duty laid by s. 9 upon the importer is not made subject to assessment or other calculation by the commissioner. Nevertheless it is implicit in the section that it imposes upon the taxpayer an obligation to pay a specific sum. The question is how is the sum ascertained ? If not by some act of the commissioner, by whose act ?

The object of the section is to provide for the collection of sales tax at the time of the entry of the goods. In order that this object might be attained, it may be presumed that the section refers to a sum of sales tax then ascertained. In my opinion what s. 9 refers to is the sales tax ascertained upon the face of the entry lodged in conformity with s. 7. It seems to me that it is straining s. 9 beyond its intended operation to construe it as making the total liability of the importer under s. 5 of the Act a debt due and payable at the time of the entry of the goods for home consumption. Such a construction would lead to the result that sales tax may be made payable on two different dates, one fixed by s. 9, and another fixed under sub-s. 3 of s. 10. I am therefore of the opinion that an assessment of sale value and a calculation of further tax pursuant to s. 10 was needed to make the sum of £363 10s. 10d. due and payable.

Exhibit L purports to be a notice of the assessment of the sale value of each lot of machines and a calculation of further sales tax payable in respect of them. The amount at which the sale value is assessed in the case of each lot is equivalent to the amount disclosed by the entry lodged in relation to such lot pursuant to s. 7. I do not agree with the contention of the defendant that, because of this equivalence, exhibit L is not a notice of assessment of sale value. In my opinion it is a notice of an assessment of sale value and of calculation of further tax which the commissioner is empowered by s. 10

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to make. Exhibit L does not specify a date on or before which the further tax calculated thereby, that is, the sum of £363 10s. 10d., shall be payable. But exhibit K does so. The date specified is in that letter " within three days of the date of this communication ". It is dated 15th August 1950. Exhibit L was sent with exhibit K to the defendant. The two documents, in my opinion, are, taken together, a notice in writing within the terms of sub-s. 2 of s. 10, and satisfy the requirement of sub-s. 3. The production of these documents has, in my opinion, the consequences which s. 39 of the *Sales Tax Assessment Act* (No. 1) attaches to a document, under the hand of a deputy commissioner, specifying a liability of a taxpayer for tax. The provisions of s. 39 apply in the manner provided in s. 12 of the *Sales Tax Assessment Act* (No. 5) in relation to the imposition, assessment and collection of sales tax under this Act. The consequence is that the production of exhibits K and L provides conclusive evidence of the due assessment of sale value and the calculation of tax, because these are acts which are required under s. 10 to ascertain the liability of £363 10s. 10d. specified in the documents; and their production also provides conclusive evidence of the correctness of the calculations in exhibit L upon which that liability is based. It would follow from the production of these documents that the plaintiff proves that he is entitled to recover the sum of £363 10s. 10d.

The right of the taxpayer under s. 41 of the *Sales Tax Assessment Act* (No. 1) to object extends only to the question of sale value and this limitation therefore governs his right to appeal to this Court. The right is given by sub-s. 6 of s. 42. Sections 41 and 42 apply as provided in s. 12 of the *Sales Tax Assessment Act* (No. 5) in relation to the imposition, assessment and collection of sales tax under this Act. I think that the questions whether these machines were imported since 15th November 1946 and whether they belong to any class of goods enumerated in item 18 (2), mentioned above, are questions of fact. The decision whether the rate of tax is ten per cent or twenty-five per cent raises only those two questions. The decision therefore involves no question of law. In my opinion the limitation of judicial review to the question of sale value does not make the power which is given to the commissioner to determine conclusively for the purposes only of assessment the rate of sales tax a usurpation of judicial power. In this view, the validity of the sales tax imposed by s. 3 is not impeachable on constitutional grounds.

In regard to the sum of £191 4s. 10d., the commissioner bases his claim to this sum on s. 29 of the *Sales Tax Assessment Act* (No. 1). The sections 24 and 25, mentioned in s. 29, should, by reason of s. 12

of the *Sales Tax Assessment Act* (No. 5), be read as ss. 9 and 10 of that Act, and the provisions of s. 29, thus amended, apply by force of s. 12, as therein provided, to the imposition, assessment and collection of tax under the last mentioned Act. Applying the provisions of s. 29 with these modifications, it would appear that additional tax became payable under its provisions from 18th August 1950 at the rate of ten per cent per annum. This was the date which the commissioner specified pursuant to s. 10. Such tax, calculated up to 24th November 1955, amounts to the sum of £191 4s. 10d. This action was commenced on the 29th November 1955. The sum of £191 4s. 10d. was, in my opinion, payable by way of additional tax at that date.

The action is founded upon the provisions of s. 30 of the *Sales Tax Assessment Act* (No. 1) as applied in the manner provided in s. 12 of the *Sales Tax Assessment Act* (No. 5) for the purposes of this Act. As both sums claimed in the action became due and payable, as has been stated in the course of these reasons, it follows from the provisions of s. 30 that the total amount is deemed to be a debt due to the Commonwealth, and that the plaintiff has a statutory right to sue for, and recover it in this action. For these reasons I answer the question stated for the opinion of the Court : " Yes ".

Question in the case stated answered—Yes. The defendant to pay the costs of the case stated.

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

Solicitors for the defendant, *Matthew McFadden & Co.*

R. A. H.