

Appr Dalton v Commissioner of Taxation 7 FCR 382
Appl R v Cain; Ex parte Evans (1975) 133 CLR 37
Expl Rodenick v Australian & Overseas Telecom Corp Ltd (1992) 111 ALR 355

[HIGH COURT OF AUSTRALIA.]

SUTTON APPELLANT;

AND

COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Amended assessment—Objection by taxpayer—Disallowed by commissioner—Reference to board of review—Request by taxpayer for particulars as to how amended assessments made up—Refusal by commissioner—Request to board to order commissioner to supply particulars—Power of board to do so—Statement furnished by commissioner to board—Whether compliance with regulations—Power of board to order commissioner to furnish further statement—Income Tax and Social Services Contribution Regulations, reg. 35 (1) (c).*
1958-1959.
SYDNEY,
1958,
Dec. 18 ;
MELBOURNE,
1959,
Feb. 26.
Dixon C.J.,
Fullagar,
Kitto,
Taylor and
Windeyer JJ.

A board of review in reviewing at the instance of taxpayers the work of the Commissioner of Taxation in dealing with objections is an administrative tribunal and is not exercising judicial power. Accordingly, the basis does not exist for implying in the board a power over the commissioner as a litigant party to impose on him a legal obligation to formulate his case by pleadings or particulars or to give discovery by answering interrogatories or otherwise or to fulfil some other procedural requirement borrowed from the courts of justice. To enable the board to impose such obligations upon the commissioner express authority would be necessary.

Regulation 35 of the *Income Tax and Social Services Contribution Regulations* provides :—“(1) The Commissioner, in referring a decision to a Board of Review . . . shall furnish the Board with a printed or typewritten statement . . . containing— . . . (c) the Commissioner’s reasons for disallowing the taxpayer’s claim.”

Held, that the board has no authority to impose on the commissioner a legal obligation to give more reasons than are contained in his statement to the board.

Observations on the relations between the commissioner and boards of review.

REFERENCE to the High Court pursuant to s. 196 (2) of the *Income Tax and Social Services Contribution Assessment Act 1936-1958*.

On the hearing before a board of review of objections by a taxpayer, one Ada Sutton, to certain amended assessments issued against her

by the Commissioner of Taxation the board at the request of the taxpayer referred certain questions of law to the High Court pursuant to s. 196 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1958 in the form of a case stated, the material parts whereof were substantially as follows :—

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1. Ada Sutton (hereinafter called the appellant) duly lodged returns of income with the Commissioner of Taxation for each of the years of income ended 30th June 1940 to 1953. Subject to certain specific adjustments notified to her the appellant was assessed on the basis of the incomes disclosed in the returns.

3. By an original assessment dated 13th November 1952 and amended assessments dated 14th November 1952 the commissioner increased the taxable income of the appellant for each of the years ended 30th June 1940 to 30th June 1949 and forwarded an adjustment sheet. [The terms of the adjustment sheet then appeared in full in the case.]

4. By notices dated 17th December 1952 the appellant objected against the original and amended assessments referred to in par. 3 above.

5. By notices dated 25th October 1955 the commissioner disallowed the objections.

6. By notice dated 12th December 1955 the appellant requested the commissioner to refer his decisions on the objections to a board of review for review.

7. By notices of amended and further amended assessments dated 25th October 1955 the commissioner further amended the taxable incomes of the appellant as previously amended for the income years ended 30th June 1942 to 1944 (inclusive) and 1947 to 1949 (inclusive) and he amended the previously notified original assessments for the years ended 30th June 1950 to 1953 (inclusive) and forwarded an adjustment sheet. [The terms of the adjustment sheet then appeared in full in the case.]

8. By notice undated the appellant objected against the amended assessments referred to in par. 7 above.

10. By notices dated 10th January 1956 the commissioner disallowed the objections.

11. By notice dated 25th January 1956 the appellant requested the commissioner to refer his decisions on the objections to a board of review for review.

12. The commissioner referred his decisions on all objections to Board of Review No. 1 by letter dated 29th October 1957.

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15. By letter dated 7th August 1958 the appellant sought from the commissioner particulars as to how the assessments the subject of objection were made up.

16. By letter dated 19th August 1958 the commissioner replied in the following terms :—" I am not prepared to supply the particulars requested. The commissioner has been advised that you are not legally entitled to this information and the circumstances of the case do not provide any reason for departing from the strict legal rule laid down in *George's Case* and *McAndrew's Case*. I am instructed to inform you, however, that the commissioner does not propose to make an affirmative case against either of your clients."

17. Upon the matter coming on for hearing on 1st September 1958 counsel for the appellant tendered the documents referred to in par. 12 of this case (exhibit A) and invited the board to rule that par. (c) of [the statement furnished by the commission to the board] did not comply with the provisions of reg. 35 (1) (c) of the *Income Tax and Social Services Contribution Regulations*. He asked the board to direct the commissioner to so comply and also invited the board to require the commissioner to furnish to the appellant particulars as to how the assessments the subject of objection were made up.

18. Upon counsel for the commissioner submitting that reg. 35 (1) had been complied with and that the board has no power to direct the commissioner to furnish the appellant with the particulars sought, counsel for the appellant requested the board, pursuant to s. 196 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1958, to refer to the High Court the questions of law said to arise as to the board's power to order particulars and as to the board's power to order compliance with reg. 35 (1) (c) of the said regulations.

19. Upon the matter coming on for further hearing on Tuesday, 9th September 1958, counsel for the appellant formally requested the board to refer the following specific questions of law to the High Court for decision :—Question 1 : " Whether in relation to the assessments under review the board of review or the chairman thereof has power to order the Commissioner of Taxation to supply to the taxpayer any one or more of the following particulars : (a) In respect of each assessment under review, whether the said assessment is made up on an assets betterment basis ; (b) If the answer to (a) is yes in respect of any such assessment, details of the figures upon which such assessment is based : (c) If the answer to (a) is no in respect of any assessments, (i) the source or sources in the year of assessment from which the additional income over and above that

returned by the taxpayer is alleged by the commissioner to have been derived ; (ii) the amount alleged by the commissioner to have been derived by the taxpayer in that year of assessment from each source referred to in (i) above ; (d) In respect of each assessment under review how the said assessment is made up ; (e) If the answer to (a) is no in respect of any assessment whether any of the said additional income in that year of assessment is alleged by the commissioner to have been derived from betting transactions and if so the amount alleged to have been so derived ; (f) If the answer to (a) is no in respect of any assessment whether any of the said additional income in that year of assessment is alleged by the commissioner to have been derived from the sale of liquor and if so the amount alleged to have been so derived." Question 2 : "Whether par. (c) of [the statement furnished to the board by the commission] constitutes a compliance by the commissioner with reg. 35 (1) (c) of the *Income Tax and Social Services Contribution Regulations*." Question 3 : "If the answer to (2) is no, whether the board has power to order the commissioner to comply with the said regulation."

20. In accordance with the request of the appellant the board refers for decision of the High Court the questions particularised in the foregoing paragraph.

R. J. Ellicott, for the appellant.

R. G. Reynolds Q.C. and *J. R. Gibson*, for the respondent.

Cur. adv. vult.

THE COURT delivered the following written judgment :—

Feb. 26, 1959.

Section 196 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1958 provides that a board of review shall, upon the request of the commissioner or taxpayer, refer to the High Court any question of law arising before the board.

At the request of the taxpayer the board of review by which this case was dealt with acted under this provision and referred three questions to the Court.

The effect of the first question was to inquire whether the commissioner might be ordered to supply the taxpayer with particulars as to any of a number of matters set out. The second referred to the statement furnished by the commissioner to the board in pursuance of reg. 35 (1) of the *Income Tax and Social Services Contribution Regulations* and asked in substance whether so much of the statement

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as purported to give his reasons for disallowing the objection amounted to a compliance with the requirement of the regulation. The third question asked, if not, whether the board had power to order the commissioner to comply.

It appears from the stated case that after an investigation of her financial affairs by an officer of the commissioner the taxpayer received amended assessments greatly increasing her taxable income for the years between 1st July 1939 and 30th June 1949, and that after a further investigation she received amended assessments affecting some of the years mentioned and increasing her taxable income of the ensuing years up to 30th June 1953. In respect of the first of the above series of amended assessments the commissioner fixed fifty per cent of the tax which according to the assessments had been avoided as the additional tax payable under s. 226.

The taxpayer objected to the amended assessments, the objections were disallowed, and the taxpayer in pursuance of s. 187 (a) requested the commissioner to refer his decision upon the objections to a board of review for review. When the proceedings before the board of review opened, after putting in what may be described as the more formal documents, counsel for the taxpayer asked the board to make two orders. First he objected that, as to the reasons of the commissioner, reg. 35 (1) had not been complied with, and he requested the board to direct the commissioner to give reasons amounting to a compliance therewith. Secondly he requested the board to direct the commissioner to furnish the taxpayer with particulars of how the assessments were made up, a thing the commissioner had refused to do. Counsel formulated the particulars in detail which he sought, but for the purpose in hand it is enough to say that the particulars he desired related to the bases of the assessments, the manner in which the amounts of income had been arrived at, the sources of income imputed to the taxpayer, and, more specifically, whether it was alleged that the income so imputed arose from betting or, if not from betting, from the sale of liquor. Counsel for the commissioner contested the board's power to give either direction, and in any case denied that there had been any failure to comply with reg. 35 (1). It was then that the taxpayer's counsel requested the board to refer the questions to this Court as questions of law and that the board agreed to do so.

It is convenient to deal first with the question relating to particulars, although much that will be said about it affects the question of power to direct the giving of reasons. The first observation to make is that we are not here dealing with a court engaged in determining a judicial proceeding, but with an administrative body. It is

a fact upon which the taxpayer's counsel relied to distinguish our decision in *George v. Federal Commissioner of Taxation* (1), and no doubt that decision can safely be put aside as relating to proceedings in a court. But nevertheless it is plainly to be seen that the familiar powers and procedures of courts of law supplied the underlying assumptions upon which the existence of a power in the board to order particulars was affirmed and denied and upon which the discussion before the board proceeded. This explains too the treatment of the questions as matters of law to be referred to this Court. The assumption was apparent that the commissioner stood in the position of a litigant: that he must, or might be required to, particularise his allegations, even though he was relieved of the *onus probandi*, and he might be directed to formulate as "reasons" the grounds of his claim.

The very existence however of the board of review depends upon its possessing the character of an administrative tribunal. It is an administrative tribunal reviewing at the instance of taxpayers the work of the commissioner in dealing with objections. The board reviews the decisions of the commissioner referred to it, and for that purpose has his powers and functions in making assessments, determinations and decisions: ss. 192 and 193. Of course the board deals with the cases before it in a judicial spirit, and decides them by ascertaining the facts and applying the law as it sees it. That is a duty belonging to *quasi* judicial as well as judicial bodies. Moreover it is armed with the powers given in Pt. V of the Regulations and is governed so far as they go by the directions contained in that Part. But it is not exercising judicial power. The importance of this is that the basis does not exist for implying a power over the commissioner as a litigant party to impose on him a legal obligation to formulate his case by pleadings or particulars or to give discovery by answering interrogatories or otherwise or to fulfil some other procedural requirement borrowed from the courts of justice. To enable the board to impose such obligations upon the commissioner express authority would be necessary. By the case stated we are asked as a question of law about "power" to order particulars and that must mean power to impose a legal obligation. What has been said answers such a question. But the relations of the board to the commissioner should not and doubtless do not begin and end with legal obligation. As an administrative body reviewing his decisions upon objections, if the board finds that it needs the assistance of this or that information as to what the commissioner did there is

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no reason why the board should not ask for it nor is there anything to prevent it asking for the information in some specific form which the board might find useful for the facilitation of the proceedings. Natural justice, it is needless to say, requires that the taxpayer shall know the course that is taken and what is placed before the board. But the procedure of a board is not necessarily a formal or technical affair.

The commissioner is unlikely to withhold any information or assistance which a board might reasonably require, and it would serve no purpose to speculate as to the effect that might legitimately be produced upon the board's determination of the case by a refusal on the commissioner's part to supply information in his possession without which the board could not get at a just conclusion on the merits. The truth is that the course taken in the present case treats the proceedings with an unreal formalism which should not, and one may be sure really does not, attend the performance of the duties of a board of review.

Turning now to the question of compliance with reg. 35 (1) (c) it is necessary to note first what that paragraph requires. It says that the commissioner shall furnish the board with a statement in referring his decision to the board upon the taxpayer's request. The statement is to contain (a) the name and address of the taxpayer; (b) full details of the taxpayer's claim as made to the commissioner; and (c) the commissioner's reasons for disallowing the taxpayer's claim. The reasons which the commissioner in this case forwarded in his statement have the merit of brevity, and the taxpayer complains that they are so concise that they amount to nothing. What they do is to give ultimate conclusions and figures justifying the assessments, and not the steps in reasoning by which they were reached. It is not possible to say that this amounts to nothing, even if it provides less than the author of reg. 35 (1) (c) might have hoped. But again the board has no authority to impose on the commissioner a legal obligation to give more reasons. It is to be observed that reg. 35 (1) (c) is directed not to ensuring that the taxpayer is informed of the commissioner's reasons but to supplying the board with them. It is not the board that appears to be dissatisfied with the commissioner's statement of reasons. In any case, when the time comes for investigating the facts probably the alleged inadequacy of the commissioner's reasons will have ceased to matter.

The questions in the case stated should be answered as follows :
1. The board of review has no power to make such an order imposing a legal obligation. 2. Yes. 3. Does not arise, but see the answer to question number 1.

Questions referred to the High Court by the case stated by the Board of Review answered as follows : Question (1) The board has no power to make such an order imposing a legal obligation. Question (2) Yes. Question (3) Does not arise but otherwise the answer would be covered by the answer to Question (1). Order that the taxpayer pay the costs of the reference to the High Court.

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Solicitors for the appellant, *E. C. Stapleton & Co.*

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

R. A. H.