[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . Applicant, } Appellant;

AND

STRANGER . . . . . Respondent. Respondent,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, *April* 26.

Gavan Duffy C.J., Rich, Starke, Evatt and McTiernan JJ.

Bankruptcy—Priority of debts—Income tax—"Not exceeding in the whole one year's assessment"—Assessments for several years unpaid—Extent of preference—Bankruptcy Act 1924-1932 (*No.* 37 *of* 1924—*No.* 31 *of* 1932), *sec.* 84 (1) (*h*).

Sec. 84 (1) of the *Bankruptcy Act* 1924-1932 provides that the estate of a bankrupt shall be applied by the trustee "in the following order of priority . . . (*h*) sixthly, in payment of . . . all assessed . . . income tax, assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding in the whole one year's assessment."

Held that where there are unpaid tax assessments for more years than one the priority of payment conferred by sec. 84 (1) (*h*) extends to an amount equal to, but not exceeding, the amount of the largest of such assessments.

Gowers v. *Walker*, (1930) 1 Ch. 262, and *In re Cockell*; *Jackson* v. *Attorney-General*, (1932) W.N. 172, referred to.

Decision of the Court of Bankruptcy: *Re Blinkhorn's Deed of Arrangement*, (1933) 6 A.B.C. 230, reversed.

APPEAL from the Court of Bankruptcy (District of the State of New South Wales and the Territory for the Seat of Government).

On 10th September 1931, William Augustus Harold Blinkhorn executed, under Part XII. of the *Bankruptcy Act* 1924-1930, that

form of a deed of arrangement referred to in sec. 190 (3) (*c*) of the Act as a deed of inspectorship, and on 1st April 1933 he executed, under the same Part, that form of a deed of arrangement referred to in sec. 190 (3) (*a*) as an assignment of property. Each deed was duly registered. The latter superseded the former. Under each of these deeds of arrangement the respondent, Richard Stranger, was appointed trustee. On 23rd June 1933, after the execution of the second deed of arrangement, proofs of debt were lodged thereunder by the Deputy Federal Commissioner of Taxation, claiming income tax assessed for the year ended 30th June 1928, £231 11s. 6d.; for the year ended 30th June 1929, £46 10s. 7d.; and for the year ended 30th June 1930, £35 9s. 9d. Claims made for fines were not pressed by the Deputy Commissioner. The proofs were admitted by the trustee, but he disallowed a claim by the Deputy Commissioner for priority under sec. 84 (1) (*h*) of the *Bankruptcy Act* 1924-1932 in respect of the income tax of £231 11s. 6d. for the year ended 30th June 1928. Sec. 84 (1) provides, so far as is material, that the "trustee shall apply the estate of the bankrupt in the following order of priority . . . (*h*) sixthly, in payment of . . . all assessed . . . income tax, assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding in the whole one year's assessment." By motion before Judge *Lukin* the Deputy Commissioner sought to have the trustee's decision disallowing the claim to priority set aside on the ground that sec. 84 (1) (*h*) expressly conferred not only the right to a priority, but also, by reason of its unrestricted terms, the right to select any unpaid assessment for any year the creditor thought fit to choose. Judge *Lukin* decided against the Deputy Commissioner. His Honor held that there was no right of selection under sec. 84 (1) (*h*) in either the creditor or the trustee, and said that, although not necessary for a decision in the matter, he thought the trustee would be warranted in accepting as a claim for priority the last year's assessment only, that is to say, the last prior to the date of the order of sequestration, or the equivalent of that date under a deed of arrangement (*Re Blinkhorn's Deed of Arrangement* (1)).

(1) (1933) 6 A.B.C. 230.

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From that decision the Deputy Commissioner now appealed to the High Court.

Sir *Thomas Bavin* K.C. (with him *Telfer*), for the appellant. Under sec. 199 (1) (*a*) of the *Bankruptcy Act* 1924-1932, a trustee under a deed of arrangement is bound by the other provisions of the Act as to payment in priority of the debts due by the debtor. The priority given by sec. 84 (1) (*h*) of the Act to all assessed income tax is not to the amount assessed for any one year, but is to all income tax not exceeding in the whole one year's assessment. The Act does not confer a right of selection as to the " year " upon either the trustee or the creditor. The words " not exceeding in the whole one year's assessment " in sec. 84 (1) (*h*) mean all assessed income tax not exceeding in the whole *any* one year's assessment unpaid prior to the date of the sequestration order (*Gowers* v. *Walker* (1); *In re Cockell*; *Jackson* v. *Attorney-General* (2): see also *Attorney-General* v. *Jackson* (3)). Any other construction would render the words " in the whole " meaningless. It follows then that the amount to which preference is given is the amount of the largest assessment. It is not a matter of selection, but is a matter of the operation of the words of the sub-section. The remarks of *Romer* L.J. in *Commercial Bank of Scotland* v. *Campbell* (4) are *obiter dicta* only, and are not applicable, as here there is no question as to the right of selection. If the Legislature had intended that the preference should be limited to the assessment for the year last assessed prior to the date of the sequestration order, or the equivalent date under a deed of arrangement, as suggested by Judge *Lukin*, it could, and would, have expressed that intention in clear and apt words. This is shown by the limited preference to payment of municipal and other local rates conferred in par. (*h*) itself, and also by the limitation imposed in pars. (*e*) and (*i*) of the sub-section. The words now under consideration are materially different from those under consideration in *Ex parte Fox*; *In re Smith* (5): that case is, therefore, not applicable.

(1) (1930) 1 Ch. 262.
(2) (1932) W.N. 172.
(3) (1932) A.C. 365.
(4) (1923) 10 Tax Cas. 585, at p. 588.
(5) (1886) 17 Q.B.D. 4; 3 Morr. 63.

Abrahams K.C. (with him *Stephen*), for the respondent. The expression " not exceeding in the whole one year's assessment " is as equally referable to a year in respect of which the assessment has been paid, as to a year in respect of which the assessment remains unpaid. Also it does not necessarily follow that the preference accorded by the sub-section is measured by the amount of the largest assessment; the limitation imposed could be equally referable to the amount of the lowest assessment. The expression refers neither to the highest nor to the lowest assessment but to the last year for which there has been an assessment next before the date of the sequestration order. Regard should be had to the objects of sec. 84 which are (*a*) to prevent the assets being absorbed by " stale " claims, and (*b*) to prevent priority being given to creditors who have allowed the bankrupt to maintain a fictitious air of solvency. The insertion of the word " any " after the word " whole " as suggested by the appellant would render the concluding part of par. (*h*) of sub-sec. (1) out of harmony with the other part of that paragraph. In *Ex parte Fox*; *In re Smith* (1) it was held that the period referred to in the relevant section of the English *Bankruptcy Act*, was the period next before the date of the sequestration order. A similar decision as regards the relevant provision in sec. 51 of the Canadian *Bankruptcy Act* was arrived at in *In re Olympia Cafe Co.*; *Ex parte Bedoli* (2). The matter was not argued in *Gowers* v. *Walker* (3), which renders the decision in that case, as well as the decision in *In re Cockell*; *Jackson* v. *Attorney-General* (4), which followed it, of doubtful value to this Court, which is not bound by those decisions. In *Attorney-General* v. *Jackson* (5) the matter, although referred to, was left open.

[Sir *Thomas Bavin* K.C., referred to *Queen Anne's Bounty* v. *Executors of William Blocklocks* (6).]

The following judgments were delivered :—

GAVAN DUFFY C.J. Sec. 84 (1) of the *Bankruptcy Act* 1924-1932 directs the trustee to apply the estate of a bankrupt in the order prescribed by that section. Sub-sec. 1 (*h*) is as follows :

(1) (1886) 17 Q.B.D. 4; 3 Morr. 63.
(2) (1927) 8 Can. B.R. 81.
(3) (1930) 1 Ch. 262.
(4) (1932) W.N. 172.
(5) (1932) A.C. 365.
(6) (1934) 78 Sol. Jo. 135.

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"Sixthly, in payment of all municipal or other local rates due from the bankrupt at the date of the order of sequestration and having become due and payable within twelve months next preceding that date; and all assessed land tax and income tax, assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding in the whole one year's assessment; and in repayment of any advance made to the bankrupt, or in payment of any amount owing by the bankrupt for goods supplied to him, under any Act or State Act or law of a territory relating to or providing for the improvement, development or settlement of land, or the aid, development or encouragement of mining: Provided that, if the bankrupt has given security for the payment or repayment of the amount due, this paragraph shall only apply to the balance due after deducting the net amount realized from the security." The question for our consideration is the construction to be put upon the words "and all assessed land tax and income tax, assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding in the whole one year's assessment."

In my opinion these words direct the trustee to give priority to all assessed land tax and income tax, subject to this condition, that if there be assessments for more years than one the priority must not extend to an amount larger than the amount of the largest of such assessments.

The appeal should be allowed.

RICH J. This case concerns the interpretation of sec. 84 (1) (*h*) of the *Bankruptcy Act* 1924-1932. Sec. 84 provides the order of priority of preferential debts. Sub-sec. 3 of sec. 5 makes the provisions of the Act dealing with this subject bind the Crown. The common law right of the Crown to priority in claims competing with those of a subject is entirely displaced by the statutory order (see *Commissioners of Taxation for New South Wales* v. *Palmer* (1); *Food Controller* v. *Cork* (2)). But in that order a preference is given to land and to income taxes. No distinction is drawn between State and Federal taxes, and somewhat surprisingly the place given is as low as sixth in the order of priority. Moreover, that rank is

(1) (1907) A.C. 179.

(2) (1923) A.C. 647.

shared with municipal rates and with other claims. Nevertheless the enactment is in derogation of the Crown's rights, and must be so construed. So far as it is material it is as follows: "(*h*) sixthly in payment of . . . all assessed land tax and income tax, assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding in the whole one year's assessment."

In the present case the Crown has proved for three years' State and Federal income tax, all of which was assessed before the required date. But the assessment for the first of these three years was for a larger amount than that for either of the two succeeding years, the amount of the third assessment being the smallest. His Honor Judge *Lukin* has construed the provision as restricting the Crown to the assessment before the bankruptcy, so that the Crown's preference is only in respect of the last, the smallest, assessment. I am unable to agree with this construction. It depends upon an interpretation of the expression "one year's assessment" which I cannot think tenable. If it is right, those words must mean an assessment for one year before the bankruptcy. But every assessment is in respect of a financial year and is based on the earnings of the taxpayer within the preceding twelve months. To what would the provision refer on such a construction? The date of a bankruptcy does not generally coincide with the end of a financial year. If the year referred to is always that ending with the bankruptcy then a period of two assessments must usually be included. How is the tax for such a year to be ascertained? Is a new calculation of income for this twelve months to be made, or are the taxes to be apportioned over it?

I think it is reasonably clear that "one year's assessment" does not mean to refer to twelve months as opposed to other periods of assessment, or to a period ending with the bankruptcy. The emphasis is upon the "one." It means to limit the proof to one, as opposed to two or more, annual assessments.

One year's assessment does not mean a year's assessment, but a single assessment for a year. If the expression were equivocal, it should be construed so as to impose the less, not the greater, restriction upon the Crown. But, in any case, I think its true

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meaning is that of the years in respect of which the Federal or State Commissioner, as the case may be, has proved for assessed land and income tax, he shall have a preference in respect of one. There is no question of electing which year. The total of all the assessments is the proved debt. Of this total so much is preferred as does not exceed the maximum attained by any one year's assessments for land and income tax.

The appeal should be allowed, with costs out of the estate.

The order of the Court of Bankruptcy should be discharged, and it should be declared that the proofs by the respective Commissioners should be treated as preferential to the extent of any one year's assessment.

STARKE J. The best we can do is to try and express clearly the meaning of the priority section. I would express it in this way: sixthly, in payment of all land tax and income tax assessed and unpaid prior to the date of the order of sequestration, but if the tax assessed be for more than one year, then the priority shall not exceed the amount for the year in respect of which the largest assessment is made. The result in these cases would be that the Federal authorities should be admitted to a priority claim in respect of £231 11s. 6d., and the State authority to a priority claim in respect of £294 10s. 11d. The English cases of *Gowers* v. *Walker* (1) and *In re Cockell*; *Jackson* v. *Attorney-General* (2) are in line with this view.

EVATT J. The question for decision on this appeal is the meaning of the phrase " not exceeding in the whole one year's assessment " in that part of sec. 84 (1) (*h*) of the *Bankruptcy Act* giving a " sixth " priority, *inter alia*, to assessed Federal income tax and to assessed State income tax. In my opinion the argument of Sir *Thomas Bavin* is right and the word " any " should be understood after the words " in the whole," so that although, prima facie, priority is accorded to *all* unpaid assessments of Federal as well as of State income tax, its extent is qualified by limiting the amount to a sum " not exceeding . . . any one " of the unpaid tax assessments. It

(1) (1930) 1 Ch. 262. (2) (1932) W.N. 172.

necessarily follows that the largest unpaid assessment of Federal income tax obtains the described priority, not because of any selection or election by the trustee or by the creditor, but because of the operation of the section itself, properly construed.

Mr. *Abrahams* concluded that a general principle of pre-established harmony unites the whole list of debts which are given priority by sec. 84 (1), the principle being that all " stale " claims are excluded. But his construction of sec. 84 (1) (*h*), that priority is given to the amount of the unpaid assessment next preceding sequestration, also involves the position that a very old claim may secure priority. Either construction, therefore, admits the possibility of having to go back to a year preceding the twelve months before sequestration. Further, Sir *Thomas Bavin's* construction involves little or no change in the wording of the sub-section, and it seems to find solid support in the English cases to which unfortunately *Lukin* J. was not referred, *Gowers* v. *Walker* (1); *In re Cockell*; *Jackson* v. *Attorney-General* (2); and the *obiter dictum* in *Commercial Bank of Scotland* v. *Campbell* (3). Nor does Lord *Atkin's* observation in *Attorney-General* v. *Jackson* (4) really point in the contrary direction.

The appeal should be allowed.

McTIERNAN J. I agree. I have nothing to add except to say that the conclusion at which we have arrived is, in my opinion, supported by *Gowers* v. *Walker* (1) and *In re Cockell*; *Jackson* v. *Attorney-General* (2).

Appeal allowed with costs.

Solicitor for the appellant, *W. H. Sharwood*, Commonwealth Crown Solicitor.

Solicitors for the respondent, *Deane, Haselhurst & Howard.*

J. B.

(1) (1930) 1 Ch. 262.
(2) (1932) W.N. 172.
(3) (1923) 10 Tax Cas. 585.
(4) (1932) A.C., at p. 373.