[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA ... PLAINTIFF;

AND

CLYNE ... DEFENDANT.

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1957, SYDNEY, *Nov.* 12, 13, 14, 15;

1958, *Apr.* 2.

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

Income Tax (Cth.)—Provisional tax and contribution—Whether within power to make laws with respect to taxation—Not separate tax but liability ancillary to income tax and social services contribution—Constitutional validity—Matters other than taxation—Whether combined in statute imposing taxation—Collection of provisional tax not acquisition of property on unjust terms—Prescribed area—Zone allowances—Discrimination between States or parts of States—Validity of section introducing discriminatory provision—Invalid ab initio—Never valid part of Principal Act—Preference to one State or part thereof over another State or part thereof—The Constitution (63 & 64 *Vict., c.* 12). *ss.* 51 (*ii.*) (*xxxi.*), 55, 99—*Income Tax and Social Services Contributions* (*Individuals*) *Act* 1956, *s.* 12—*Income Tax and Social Services Contribution Assessment Act* 1936-1956, *ss.* 79A, 221YA.

The system of provisional tax and contribution as prescribed by Div. 3, Pt. VI of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is within the power conferred on the Parliament of the Commonwealth by s. 51 (ii.) of the Constitution.

So *held* by the whole Court.

Per *Dixon* C.J., *McTiernan, Williams, Kitto* and *Taylor* JJ.: The liability to pay provisional tax and contribution is not a liability to a separate and distinct tax but is ancillary to the liability to income tax and social services contribution required by s. 17 of the *Assessment Act* to be levied and paid upon the taxable income derived during the year of income by any person. The purpose of the provisional tax and contribution provisions is not simply to ensure payment of tax but to bring the discharge of the burden of tax into closer temporal relation with the accrual of the income upon which the tax is levied. The execution of such a policy is fairly within the power in s. 51 (ii.) of the Constitution even if it be described as incidental. The main purpose of that power is expressed by the words " with respect to taxation ". It gives a legislative authority which includes prima facie whatever is reasonably and properly incidental to the effectuation of the purpose. There is no reason why the means described in Div. 3 of Pt. VI for giving effect to the principle should not be regarded as proper for the effectuation of the power to make laws in respect to taxation.

In imposing provisional tax s. 12 of the *Income Tax and Social Services Contribution (Individuals) Act* 1956 deals with a liability incidental to the liability to the principal tax and is therefore a provision in a law dealing " only with the imposition of taxation " within the meaning of the first paragraph of s. 55 of the Constitution.

The words " imposition of taxation " are not to be construed narrowly in the sense that there must be a distinction between provisions directed to the collection of taxation and the actual grant or imposition of the tax—*per Dixon* C.J., *McTiernan*, *Williams*, *Kitto* and *Taylor* JJ.

Observations of *Isaacs* J. in *Federal Commissioner of Taxation* v. *Munro* (1926) 38 C.L.R. 153, at pp. 185-193 commented upon.

Division 3, Pt. VI, of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is outside s. 55.

So *held* by the whole Court.

Difficulties, in applying s. 99 of the Constitution, in appreciating the supposed distinction between the selection by an enactment of an area in fact forming part of a State for the bestowal of a preference upon the area and the selection of the same area for the same purpose " as part of the State ", discussed by *Dixon* C.J.

Upon the assumption that s. 79A of the *Assessment Act* introduced therein by Act No. 4 of 1945, s. 11, is inconsistent with the requirements expressed in ss. 51 (ii.) and 99 of the Constitution, such section was invalid *ab initio* and never became a valid part of such Act.

Section 4 of the *Income Tax and Social Services Contribution (Individuals) Act* 1956, in providing that the *Assessment Act* is incorporated in and read as one with that Act, means that only so much of the *Assessment Act* is so incorporated as has been validly enacted by the legislature in a lawful exercise of its power. Therefore, upon the assumption made, s. 79A does not become incorporated therein and accordingly the validity of the *Income Tax and Social Services Contribution Act* is not affected.

The legislative requirement of the payment of provisional tax and contribution does not offend against s. 51 (xxxi.) of the Constitution as representing an acquisition of property on terms not just.

So *held* by the whole Court.

Per *Webb* J.: (1) Section 79A of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is not invalid as discriminating between States or part of States contrary to s. 51 (ii.) or as constituting a preference contrary to s. 99 of the Constitution.

(2) If, after incorporation in the *Income Tax and Social Services Contribution (Individuals) Act*, s. 79A enacting the concessions, or the provisional tax independently of those concessions, were found to be invalid, then, assuming that an invalid section could effectively be so incorporated there is no reason why the remaining sections should not be sustained as valid. There is no such interdependence between the one group of sections and the other that the excision of the one would destroy any scheme of income tax embodied in this legislation.

Decision of the majority in *Elliott* v. *The Commonwealth* (1936) 54 C.L.R. 657 affirmed by *McTiernan* J.

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DEMURRER.

The Commissioner of Taxation of the Commonwealth of Australia issued a writ of summons out of the High Court of Australia on 4th September 1957 against one Peter Leopold Clyne seeking to recover from the defendant the sum of £752. By his statement of claim delivered on the following day the commissioner alleged that his claim was for £752 being money due and payable by the defendant to the plaintiff under the *Income Tax and Social Services Contribution (Individuals) Act* 1956 and the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 for provisional tax and contribution within the meaning of the said Act lawfully ascertained in respect of the income of the defendant for the year of income ending 30th June 1957.

On 1st October 1957 the commissioner at the request of the defendant but without admitting the necessity therefor supplied the defendant with the following particulars and by agreement between the parties such particulars were treated as part of the statement of claim :—(1.) The amount of £752, being provisional tax, was not assessed but was ascertained on or about 9th April 1957 and was notified on the notice of assessment of the income tax payable by the defendant in respect of the income of the year ended 30th June 1956. (2.) The said amount was ascertained under the *Income Tax and Social Services Contribution Assessment Act*, and, in particular, under Div. 3 Pt. VI of the Act. (3.) The tax claimed is " provisional tax " within the meaning of the said Act and as defined in s. 221YA.

On 14th October 1957 the defendant demurred to the whole of the statement of claim upon the grounds (*inter alia*) :—(1.) The *Income Tax and Social Services Contribution (Individuals) Act* 1956 is beyond the powers of the Parliament of the Commonwealth and is void for the reason—(a) the *Income Tax and Social Services Contribution (Individuals) Act* 1956 incorporates and imposes *inter alia* provisional tax and contributions in accordance with the provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. (b) The *Income Tax and Social Services Contribution Assessment Act* 1936-1956 discriminates between those parts of certain States of the Commonwealth which are described in Pts. I and II of the second schedule to the said Act and those parts of the said and other States of the Commonwealth which are not so described as aforesaid. (c) The *Income Tax and Social Services Contribution (Individuals) Act* 1956 is therefore not a law made for the peace order and good government of the Commonwealth with respect to taxation but so as not to discriminate between States or parts of States within the meaning of s. 51 (ii) of the *Commonwealth of Australia*

Constitution Act 1900 (as amended). (2.) *The Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 and the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 are and each of them is beyond the powers of the Parliament of the Commonwealth and void for the reason that (a) the *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 incorporates and imposes *inter alia* provisional tax and contributions in accordance with the provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. (b) The *Income Tax and Social Services Contribution Assessment Act* 1936-1956 gives preference to those parts of certain States of the Commonwealth which are described in Pts. I and II of the second schedule to the said Act over those parts of the said and other States of the Commonwealth which are not so described as aforesaid. (c) The *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 and the *Income Tax and Social Services Contributions Assessment Act* 1936-1956 are and each of them is a law of revenue within the meaning of s. 99 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (d) The *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 and the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 therefore are and each of them is a law of revenue giving preference to one State or a part thereof over another State or part thereof contrary to the provisions of s. 99 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (3.) Section 12 of the *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 is beyond the powers of the Parliament of the Commonwealth and is void for the reason that it is not a law for the peace order and good government of the Commonwealth with respect to taxation within the meaning of s. 51 (ii.) of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (4.) Section 12 of the *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 is beyond the powers of the Parliament of the Commonwealth and void and of no effect for the reason that (a) the provisions of the *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 (other than s. 12 thereof) constitute a law imposing taxation within the meaning of s. 55 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (b) The provisions of s. 12 of the said Act deal with a matter other than taxation contrary to the provisions of s. 55 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (5.) The *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 is beyond the powers of the Parliament of the Commonwealth and is void for the reason that (a) the *Income Tax and Social*

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Services Contribution (Individuals) Act 1956 is a law imposing taxation not being a law imposing duties of customs or of excise within the meaning of s. 55 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (b) The said Act deals with more than one subject of taxation contrary to the provisions of s. 55 of the *Commonwealth of Australia Constitution Act* 1900 (as amended). (6.) The *Income Tax and Social Services Contribution (Individuals) Act* and in particular s. 12 of the said Act and such provisions of the *Income Tax and Social Services Assessment Act* 1936-1956 as provide for the assessment and payment of provisional tax and for matters incidental thereto are beyond the powers of the Parliament of the Commonwealth and are void for the reason that they constitute laws with respect to the acquisition of property from a person for certain purposes in respect of which the said Parliament has power to make laws and failed to provide for such acquisition on just terms as provided by s. 51 (xxxi.) of the *Commonwealth of Australia Constitution Act* 1900 (as amended).

The demurrer came on for argument before the Full Court of the High Court.

The defendant in person in support of the demurrer. The *Income Tax and Social Services Contribution (Individuals) Act* 1956 (the *Taxing Act*) imposes a discriminatory tax in that it taxes persons in some areas of the Commonwealth more highly than persons in other areas and therefore contravenes ss. 51 and 99 of the Constitution. [He referred to ss. 3-6 of the *Taxing Act*.] To see whether they are discriminatory the *Taxing Act* and the *Income Tax and Social Services Contribution Assessment Act* (the *Assessment Act*) must be taken as one piece of legislation. The necessity for looking at both Acts together is seen from *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (1), and *R.* v. *Barger* (2). On the authorities there is discrimination if the legislature itself discriminates as distinct from a situation where discrimination results from inequality of circumstances or from the scheme or legislative context in which that legislation occurs. The very thing which the Constitution prohibits is a tax which brings about uniformity and which offsets the inequalities of circumstances by saying that residence in a certain area may involve the payment of less tax. If the taxing statute is discriminatory in what it does in order to bring about uniformity of result, then it is unconstitutional. There is discrimination within s. 51 (ii.) where one finds discrimination

(1) (1940) A.C. 838, at pp. 849, 853, 854; (1940) 63 C.L.R. 338, at pp. 341, 345, 346; (1939) 61 C.L.R. 735, at p. 783.

(2) (1908) 6 C.L.R. 41, at p. 65.

between different localities even if it cannot be said that the discrimination occurs because those localities are situated in different States. [He referred to *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1); *R.* v. *Barger* (2), and *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (3).] In the light of these passages, s. 79A of the *Assessment Act* has introduced an element of discrimination within the prohibition of s. 51 (ii.). If there is discrimination between localities and such localities are situated in different States then s. 51 (ii.) is contravened. [He referred to *R.* v. *Barger* (4); per *Griffiths* C.J., *Barton* and *O'Connor* JJ. (5); per *Isaacs* J. (6); per *Higgins* J. (7).] The majority view expressed in the joint judgment is the one to be accepted. [He referred to *Cameron* v. *Deputy Federal Commissioner of Taxation* (8), per *Knox* C.J. (9); per *Isaacs* J. (10); per *Higgins* J. (11); per *Rich* J. (12); per *Starke* J. (12).] In that case the view of *Isaacs* J. in *Barger's Case* (13), not what he had earlier said in the same case (14), was adopted. [He referred to *James* v. *The Commonwealth* (15); *Elliott* v. *The Commonwealth* (16); per *Latham* C.J. (17); per *Evatt* J. (18).] The view of *Evatt* J. in *Elliott's Case* (18) although a dissenting judgment states my argument and is respectfully adopted. The view of *Latham* C.J. in the passages cited should be departed from because it is founded on portion of the judgment of *Isaacs* J. in *Barger's Case* (14) which has never been generally adopted in this Court. [He referred to *Moran's Case* (19).] The passage cited supplies no support for the proposition that a statute is discriminatory only if the localities between which it discriminates are so treated because they are parts of different States. The majority view in *Barger's Case* (20) should be adhered to. The prohibition against discrimination in s. 51 (ii.) must because of s. 51 (iii.) mean something different from a requirement of uniformity. If under s. 51 (ii.) there is lack of uniformity the discrimen must not depend on locality or residence in different parts of the Commonwealth. Section 79A offends in this regard and is consequently invalid. It is immaterial whether the discrimination is in the form of an

(1) (1906) A.C. 360, at p. 367.
(2) (1908) 6 C.L.R., at pp. 66, 67, 69, 70, 71.
(3) (1940) A.C., at p. 856; (1940) 63 C.L.R., at pp. 347, 348.
(4) (1908) 6 C.L.R. 41.
(5) (1908) 6 C.L.R., at pp. 49, 78, 80.
(6) (1908) 6 C.L.R., at pp. 106, 107, 108.
(7) (1908) 6 C.L.R., at pp. 131-133.
(8) (1923) 32 C.L.R. 68.
(9) (1923) 32 C.L.R., at pp. 71, 72.
(10) (1923) 32 C.L.R., at pp. 76, 77.
(11) (1923) 32 C.L.R., at p. 78.
(12) (1923) 32 C.L.R., at p. 79.
(13) (1908) 6 C.L.R., at p. 110.
(14) (1908) 6 C.L.R., at pp. 106, 107.
(15) (1928) 41 C.L.R. 442, at pp. 455, 464.
(16) (1936) 54 C.L.R. 657.
(17) (1936) 54 C.L.R., at pp. 666, 667, 668, 672-674.
(18) (1936) 54 C.L.R., at p. 685 et seq.
(19) (1940) A.C., at pp. 856, 857; (1940) 63 C.L.R., at p. 348.
(20) (1908) 6 C.L.R., at pp. 78, 80.

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exemption or deduction or difference in tax which is imposed. Section 79A being invalid severability is not here possible, because after excision there would not be left an Act which substantially represents the intention of Parliament and the whole Act is unconstitutional either in being outside s. 51 (ii.) or in contravening s. 99. If s. 79A has had no legal basis since 1945 then each year since that time Parliament has imposed a *Taxing Act* under a misapprehension as to the amount of tax which it was going to collect, and the amount it was going to collect was related to the amount which it needed to collect. One cannot assume that had Parliament known that the deduction granted was not legally permissible it would have imposed the rate in fact imposed. The Court will not save parts of the tax legislation if that has the effect of introducing a tax burden different from that intended by Parliament. [He referred to *R. v. Barger* (1).] The present argument goes beyond the validity of s. 11 of Act No. 4 of 1945 considered alone. One cannot say that s. 11 is invalid as being discriminatory because s. 11 standing alone is not discriminatory. What is discriminatory is the *Assessment Act* looked at as a whole after the introduction of s. 11. It is at that stage that the problem of severability arises. [He referred to *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (2).] In re-enacting the *Taxing Act* each year Parliament cannot be said to intend that its taxing scheme shall be imposed only on so many parts of the *Assessment Act* as are valid, but according to the text of the *Taxing Act* as it stands. [He then referred on the question of provisional tax to the *Taxing Act* 1956, ss. 4, 5, 12, and to the relevant sections of Pt. VI Div. 3 of the *Assessment Act.*] Provisional tax is either a tax or not a tax. It is submitted that whilst it bears some it does not bear all the hallmarks of a tax. A tax has to be something in the nature of a final exaction and not merely a loan or a temporary payout. [He referred to *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (3), and *Parton* v. *Milk Board (Vict.)* (4).] The requirement of a lodgment of money to ensure that when tax is imposed it can be paid is not a tax. Similarly the provisions relating to refunds, ascertainment in place of assessment and the absence of a right to object to or appeal against it show that this cannot be intended to be a tax. If provisional tax is not a tax then it is outside the incidental or marginal power of taxation created either by implication from s. 51 (ii.) or by reference to s. 51 (xxix.). Notwithstanding

(1) (1908) 6 C.L.R., at pp. 78, 80, 81, 111.
(2) (1939) 61 C.L.R. 735, at pp. 780, 807, 808.
(3) (1922) 31 C.L.R. 421, at p. 444.
(4) (1949) 80 C.L.R. 229, at p. 258.

Moore v. *The Commonwealth* (1) it is not true to say that something is properly incidental to taxation merely because it renders easier the collection of tax when imposed. *Moore's Case* (1) is distinguishable because the liability to pay tax there imposed arose only as the money was flowing in. There is a liability to pay provisional tax even if no money has come in between 1st July and March in any year. [He referred to *Moore's Case* (2).] The taxpayer can be required to pay more by way of provisional tax than he will ultimately have to pay for income tax. At the root of *Moore's Case* (1) is the view that whatever is done to facilitate the collection of tax when it has been imposed is within the incidental power but the majority opinion of this Court in *State of Victoria* v. *The Commonwealth* (3) illustrates a departure from that view. If provisional tax is not a tax, even if it be properly within what is incidental to taxation, then it is not sufficiently incidental to the imposition of income tax to escape the prohibition of the first part of s. 55 of the Constitution. A law within s. 55 must deal only with the imposition of taxation but matters incidental thereto are not thereby excluded. There is however a crucial difference between what is incidental to taxation so as to fall within s. 51 (ii.) and what is incidental to the imposition of taxation so as to save it from the first part of s. 55. [He referred to *Federal Commissioner of Taxation* v. *Munro* (4), per *Isaacs* J. (5).] Provisional taxation is not within the passages cited as linked in any sufficient way with the imposition of taxation. The *Taxing Act* 1956 deals in s. 12 with a matter other than the imposition of taxation and therefore s. 12 is by virtue of s. 55 of no effect. The only meaning which can be given to the concept of imposing taxation is to create a liability to pay tax and it is not incidental to the creation of a liability to provide for its discharge.

[TAYLOR J. So far as your quotation from the judgment of *Isaacs* J. in *Munro's Case* (5) is concerned the proposition there enunciated was not concurred in by any other member of the Court.]

No, but I adopt what was there said as my argument. Upon the assumption that provisional tax is a tax, the *Taxing Act* 1956 imposes tax on two subject matters and contravenes therefore the second part of s. 55. The two subject matters are income so far as s. 5 of such Act is concerned and future or estimated income so far as s. 12 is concerned. [He referred to *Osborne* v. *The Commonwealth* (6); *Morgan* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (7); *Waterhouse* v. *Deputy Federal Commissioner of Land*

(1) (1951) 82 C.L.R. 547.
(2) (1951) 82 C.L.R., at pp. 563, 581.
(3) (1957) 99 C.L.R. 575.
(4) (1926) 38 C.L.R. 153.
(5) (1926) 38 C.L.R., at pp. 186, 187, 188, 191.
(6) (1911) 12 C.L.R. 321.
(7) (1912) 15 C.L.R. 661.

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Tax (S.A.) (1); *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (2); *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (3); *Harding* v. *Federal Commissioner of Taxation* (4); *Cornell* v. *Deputy Federal Commissioner of Taxation (S.A.)* (5); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (6); *Munro's Case* (7); *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (8); *Jolly* v. *Federal Commissioner of Taxation* (9), and *Resch* v. *Federal Commissioner of Taxation* (10).] Taking without qualification the doctrine to be extracted from the cases cited that a broad interpretation of the word " income " is to be given when one says that the subject matter of the *Income Tax Acts* is income, nevertheless, if s. 12 imposes a tax, it cannot be said that it imposes a tax on income because there is at the time of the imposition no income on which a tax can be so paid. Something coming into existence in the future cannot be said to be within the subject matter of income. Finally, even if the legislation is within power and consistent with s. 55 it involves an acquisition of property on unjust terms contrary to s. 51 (xxxi.) of the Constitution. The mere fact that legislation falls within s. 51 (ii.) or some other paragraph of that section does not prevent it from contravening s. 51 (xxxi.). " Money " is property within s. 51 (xxxi.) and the acquisition of provisional tax is unjust in that some moneys are collected ahead of the time when they become due and no interest is paid in respect thereof and the remainder are collected and after some portion thereof is found not to be due at all it is refunded again without any allowance by way of interest. In addition the statute provides for the permanent retention of some of the taxpayer's money in that additional tax can be imposed as a sanction to ensure the payment of provisional tax. For those reasons the demurrer should be upheld.

W. J. V. Windeyer Q.C. (with him *J. R. Gibson*), for the plaintiff. The defendant's contention based on discrimination in contravention of ss. 51 (ii.) and 99 of the Constitution would, if sound, invalidate not only provisional tax but also the whole income tax, unless s. 79A be severable. The defendant not being himself a resident of Zone A or Zone B is only indirectly interested in contending that s. 79A is invalid. It only avails him if he can bring down the whole income

(1) (1914) 17 C.L.R. 665.
(2) (1915) 20 C.L.R. 148.
(3) (1916) 22 C.L.R. 367, at pp. 371, 372, 378.
(4) (1917) 23 C.L.R. 119.
(5) (1920) 29 C.L.R. 39.
(6) (1925) 35 C.L.R. 422, at p. 434.
(7) (1926) 38 C.L.R. 153.
(8) (1934) 51 C.L.R. 172.
(9) (1935) 53 C.L.R. 206, at p. 210.
(10) (1942) 66 C.L.R. 198, at pp. 224, 225.

tax scheme and get what temporary advantage he can from that. The *Tax Act* and the *Assessment Act* are to be read together in the sense of *Williams* J.'s judgment in *Cadbury, Fry & Pascall Pty. Ltd.* v. *Federal Commissioner of Taxation* (1). So read it emerges that the tax is a tax on income; it is a tax on whatever sum is the taxable income and the taxable income is not taxed at different rates in different places. The differentiation arises not in the tax but in the manner of calculating the taxable income. In arriving at what is the taxable income a great variety of concessions and deductions are allowable. They are a miscellany and it is not easy perhaps to see any unity of principle running through them. Section 79A allows a deduction because to live and work in the prescribed zones involves disadvantages and hardships and the Court must assume that the legislature desired to encourage persons to live and work there as beneficial to the nation. The effect of the limitation in ss. 51 (ii.) and 99 is summed up by *Latham* C.J. in *Elliott's Case* (2). The origin of the limitations on power in both sections is in the historical fact of federation. They were apparently designed to prevent any State being at the mercy of the new federal body—see *Quick & Garran*: *The Annotated Constitution of the Australian Commonwealth*, (1901) p. 550; *Moran's Case* (3). One must look to see whether the challenged legislation be aimed at a State as a State or at part of a State because it is part of a State, bearing in mind that the purpose of the constitutional limitation is the protection of the constituent partners in a federation. That is the purpose of the constitutional limitations, not to provide for equality throughout Australia. Contrast the United States Constitution. All the judgments in *Elliott's Case* (4) other than the dissenting judgment of *Evatt* J. are consistent with this view. *Dixon J.* (as he then was) dissented but we submit very largely because he took the view that selection of the port was equivalent to selection of the State. Under the United States Constitution duties imports and excises must be uniform, for reasons stated by *Story*; and no doubt there were as a matter of policy very sound reasons for it, but uniformity is not what our Constitution requires in s. 51 (ii.)—cp. s. 51 (iii.): see *Story*: *Commentaries on the Constitution—Abridgement* (1833) p. 352. There is nothing in the United States Constitution exactly comparable to s. 51 (ii.) because of the requirement of uniformity of duties etc. Nor is there anything comparable to s. 99 because the corresponding section in the United States Constitution forbids a preference to the

(1) (1944) 70 C.L.R. 362, at p. 388.
(2) (1936) 54 C.L.R., at p. 675.
(3) (1940) A.C., at pp. 855, 856; (1940) 63 C.L.R., at pp. 347, 348.
(4) (1936) 54 C.L.R. 657.

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ports of any State. In the early draft of our Constitution " ports " not " parts " did appear. See *Willoughby* on *The Constitution of the United States*, 2nd ed. (1929) vol. 2, p. 700, par. 403. Whether there be a discrimination on the basis of States has been taken as the decisive matter in all judgments of the High Court except in that of the majority in *Barger's Case* (1) and of *Evatt* J. in *Elliott's Case* (2). In *Barger's Case* (1) the primary ground on which the majority held the law invalid was that it was an invasion of the State sphere. This was expressed in a way which cannot be said to be appropriate since the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (3), but it coloured the question of discrimination, the second ground on which the majority relied. The majority view (4) is the very part of the judgment which has not received approval in later cases. [He referred at length to *Cameron* v. *Deputy Federal Commissioner of Taxation* (5); *James* v. *The Commonwealth* (6), and *Elliott's Case* (2).] On the severability of s. 79A, if it be severable, then it is not necessary to decide the question of the validity of s. 79A, e.g., see *Allpike* v. *The Commonwealth* (7); *Insurance Commissioner* v. *Associated Dominions Assurance Society Pty. Ltd.* (8), and *Steele* v. *Defence Forces Retirement Benefits Board* (9). Section 79A was introduced into an existing Act. It is an amendment. It is de facto on the statute book and was intended by Parliament to operate in relation to the pre-existing body of law—and every Act unless it be purely and truly declaratory is intended to alter the pre-existing law. When Parliament inserts a new provision into an existing law it assumes that the law will be valid as altered although it does not necessarily assume it was valid before alteration, because the purpose of the alteration may be to cure an invalidity. But here it is the new provision which creates the invalidity alleged. If the whole *Assessment Act* with s. 79A in it had been enacted at one and the same time then on ordinary principles of interpretation and by s. 15A of the *Acts Interpretation Act* 1901-1957, s. 79A would be severable. [He referred to *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (10), and *Bank of N.S.W.* v. *The Commonwealth* (11).]

[DIXON C.J. It does not seem to me that we are concerned with severing out something and saying whether it is inter-tangled. It is purely a question of whether when the Act of 1945 was passed it gave a preference. If so the discrimination would go out; and the only

(1) (1908) 6 C.L.R. 41.
(2) (1936) 54 C.L.R. 657.
(3) (1920) 28 C.L.R. 129.
(4) (1908) 6 C.L.R., at p. 78.
(5) (1923) 32 C.L.R. 68.
(6) (1928) 41 C.L.R. 442.
(7) (1948) 77 C.L.R. 62.
(8) (1953) 89 C.L.R. 78, at p. 86.
(9) (1955) 92 C.L.R. 177.
(10) (1945) 71 C.L.R. 29, at pp. 92, 93.
(11) (1948) 76 C.L.R. 1, at pp. 369-371.

remaining question is how do you construe the Act of 1956 when it refers to the previous enactment.]

I come to that approach. If the previous enactment of s. 79A was completely beyond power it never came into operation as a legislative instrument at all, and therefore it is not a question of severing it but of disregarding it. It never formed a lawful part of the *Assessment Act*. The question then is whether the 1956 Act when speaking of the *Assessment Act* is referring to supposed or actual law. If it be construed as actual law, then the invalid matter is severable. On the basis that it refers to supposed law it is nugatory.

[DIXON C.J. referred to the *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1).]

There is a difficulty if s. 15 of the *Acts Interpretation Act* has to be read as " every Act which validly amends another Act shall be construed with such other Act if it be valid ". It makes problems of interpretation of federal statutes somewhat difficult. As to the defendant's argument on s. 51 (xxxi), see *Burton* v. *Honan* (2). On the question of the validity of the provisional tax provisions either s. 12 of the *Tax Act* 1956 imposes a tax or it is an ancillary provision for the collection of income tax or there are not two provisions imposing different obligations but two provisions which together determine the obligation created under a continuing system of taxation. Whichever view be taken the legislation is within the taxing power aided if need be by s. 51 (xxxix). [He referred to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (3); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (4); *Parton* v. *Milk Board (Vict.)* (5); *Moore* v. *The Commonwealth* (6); *Resch* v. *Federal Commissioner of Taxation* (7); *Cadbury-Fry-Pascall's Case* (8); *Federal Commissioner of Taxation* v. *Munro* (9), and *Morgan* v. *The Commonwealth* (10).] Either the zone allowances are valid, or it may not be necessary, as the defendant does not get the benefit of them, to come to a conclusion that they are invalid. In any event s. 79A does not by its presence infect the rest of the legislation. It is either removable by surgical operation or is to be treated as a foreign body and disregarded.

The defendant in reply.

Cur. adv. vult.

(1) (1925) 35 C.L.R. 422.
(2) (1952) 86 C.L.R. 169, at pp. 180, 181.
(3) (1940) 63 C.L.R. 278, at p. 315.
(4) (1933) A.C. 168.
(5) (1949) 80 C.L.R. 229.
(6) (1951) 82 C.L.R., at pp. 568, 569, 577.
(7) (1942) 66 C.L.R., at p. 223.
(8) (1944) 70 C.L.R. 362.
(9) (1926) 38 C.L.R. 153.
(10) (1947) 74 C.L.R. 421.

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COMMISSIONER OF TAXATION v. CLYNE.

April 2, 1958.

The following written judgments were delivered :—

DIXON C.J. This suit is brought by the Commissioner of Taxation against a taxpayer to recover a sum of £752 as provisional tax and contribution due under the provisions of the *Income Tax and Social Services Contribution (Individuals) Act* 1956 (No. 102 of 1956) as that Act operates upon the *Income Tax and Social Services Contribution Assessment Act* 1936-1956.

The suit is brought under the authority of ss. 208 and 209 of the latter Act as applied to provisional tax and contribution by sub-s. (2) of s. 221YA. Sub-section (3) of that section provides that the ascertainment of the amount of any provisional tax (an expression including contribution) shall not be deemed to be an assessment within the meaning of any of the provisions of the *Assessment Act*, but s. 221YD provides in effect that the amount may be notified on the notice of assessment of the income of the year next preceding the year of income and shall become due and payable on the date specified in the notice or on 31st March next if that be the later date. Section 221YH makes the notice of assessment prima facie evidence that the amount of provisional tax and all particulars relating thereto are correct.

The commissioner's statement of claim alleges that the amount claimed is for provisional tax and contribution, within the meaning of the Acts mentioned, lawfully ascertained in respect of the income of the defendant for the year of income ending 30th June 1957. By particulars treated by agreement as part of the pleading it is stated that the amount of £752 was ascertained on 9th April 1957 and notified on a notice of assessment of the income tax payable by the defendant in respect of the income of the year ended 30th June 1956. It is also stated that the amount was ascertained under Div. 3 of Pt. VI of the *Assessment Act* and that the tax claimed is provisional tax within the meaning of the Act and as defined by s. 221YA.

To this statement of claim the defendant demurs on grounds, stated at length in his demurrer, impugning the validity of the legislation under which a liability for provisional tax is imposed. The legislation is said to be invalid on grounds forming two alternative lines of reasoning which are quite independent one of the other.

According to one line of reasoning the provisions dealing with provisional tax are either outside altogether the power conferred by s. 51 (ii.) of the Constitution to make laws with respect to taxation and are simply invalid for want of power or, if within the scope of s. 51 (ii.), offend against one or other paragraph of s. 55. A further, if somewhat desperate-looking, argument was adduced under this

alternative, namely that if some footing was found for the provision as incidental to s. 51 (ii.), s. 51 (xxxi.) applied and required that there should be just terms, because on such a footing provisional tax must be treated as an acquisition of property for a purpose in respect of which the Parliament has power to make laws.

The other line of reasoning on which the validity of the imposition of provisional tax was attacked goes to the validity of the whole *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 (No. 102) and for that matter the *Income Tax and Social Services Contribution* (*Companies*) *Act* 1956 (No. 28 of 1956). Indeed the argument affects the validity of the whole system since 1945. It is based on the assertion that there is a failure to observe both the condition of the power given by s. 51 (ii.) that there shall be no discrimination between States or parts of States and the command of s. 99 of the Constitution that the Commonwealth shall not by any law or regulation of revenue give preference to one State or any part thereof over another State or any part thereof. The discrimination or preference which the defendant claims to have discovered has nothing to do with the circumstances of his particular case but, of course, he can as a person sued for tax rely upon it if it be true that it brings down the whole edifice of income tax. It lies in s. 79A of the *Assessment Act*, a section which few persons in the more populous parts of Australia have occasion to read or notice. Section 79A (1) states that for the purpose of granting residents of the prescribed area an income tax concession in recognition of the disadvantages to which they are subject because of the uncongenial conditions and high cost of living in a zone called A and to a lesser extent in a zone called B in comparison with parts of Australia not included in the prescribed area, an amount ascertained in accordance with the section should be an allowable deduction. It is unnecessary at this point to go into the details of the provision. It is enough to say that within the very extensive areas to which it refers, covering parts of five States, one or other of two deductions from his assessable income is allowed to the taxpayer. It is this which is said to produce a forbidden discrimination or preference. Section 79A was inserted in the *Assessment Act* by Act No. 4 of 1945 which commenced on 15th June 1945 and, though it has since been amended, there can be no doubt, if the argument be right and justify the conclusion, that it is at that time that the total invalidity claimed for the imposition of income tax must have set in.

It is convenient to consider first the ground of attack based upon the character of provisional tax and the alleged want of power to impose it or, if otherwise its imposition be within power, the

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suggested contravention of s. 55 or of the condition attached to s. 51 (xxxi.) of the Constitution.

The first question which necessarily was raised by the argument in support of this ground is the question whether s. 51 (ii.) covers the provisional tax as established by Div. 3 of Pt. VI of the *Assessment Act* and imposed by s. 12 of the *Tax Act* 1956, and if s. 51 (ii.) does so cover it, why ? By why, is meant whether s. 51 (ii.) covers it because provisional tax is itself a tax or, on the other hand, because the imposition of a liability to pay provisional tax falls within the conception of what is incidental to the legislative power to make laws with respect to taxation.

Beginning thus the argument in relation to the ensuing steps, not unnaturally, was presented with an elaboration of the respective consequences which would flow from each of the alternative solutions to which this primary or initial question concerning the power to impose a provisional tax was said to be open. It is unnecessary however to follow the course of recapitulating the contentions as to the consequences which flow from the various solutions proposed to the question. It is sufficient to deal with the question itself and, having determined it, to proceed from that point without complicating the matter with an account of alternative possibilities which on that footing become hypothetical only.

To my mind the system of provisional tax and contribution as prescribed by Div. 3 of Pt. VI is clearly within the power conferred by s. 51 (ii.) of the Constitution to make laws with respect to taxation. It is not a separate tax but a liability ancillary to the income tax and social service contribution which s. 17 of the *Assessment Act* provides shall be levied and paid, at the rates declared by the Parliament, for each financial year, upon the taxable income derived during the year of income by any person. That is the tax that is imposed. The liability to pay provisional tax is ancillary to that ; it is not a liability to another and distinct tax. There is no objection to saying that provisional tax is an incident of the imposition of the income tax but that does not take it outside the power conferred by s. 51 (ii.) to make laws with respect to taxation. To distinguish the ancillary liability from the principal tax has no purpose under s. 51 (ii.) ; so far as the power conferred by that paragraph is concerned it is not only without purpose, it is almost without meaning. It is under s. 55 that for the purpose of the argument the distinction is given an importance whether real or supposed. For s. 55 provides that laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect. It is contended

by the defendant that once it is conceded that the liability for provisional tax is not imposed as a tax, or " the " tax, it follows that it must be " another matter " within the meaning of s. 55 so that the provisions dealing with it are of no effect, at all events the provisions dealing with it in the *Tax Act*, if not also in the *Assessment Act*.

Before dealing with this contention it is necessary first to state why I think that it is within the legislative power conferred by s. 51 (ii.) of the Constitution to impose a liability to provisional tax notwithstanding that I think that it is not a distinct and separate tax.

If you turn to the provisions of Div. 3 of Pt. VI of the *Assessment Act* 1936-1956 the material characteristics of the liability will be seen. Its purpose is described as that of enabling the income tax and social service contribution which will be payable by taxpayers to whom the system applies to be collected during the financial year for which the income tax and social service contribution is levied : see s. 221YB (1). It is payable in respect of the year of income which of course means, in relation to an individual, the financial year for which income tax is levied or the accounting period, if any, adopted in lieu of that financial year : see ss. 6 (1) and 221YB (2). Provisional tax is not payable unless the taxing Act for the year of income provides that it shall be payable : s. 221YB (3). The amount of the provisional tax is prima facie an amount equal to the income tax assessed in respect of the taxable income of the previous year, subject to an increase or decrease according to any variation in the rates of income tax that may have been declared for the current financial year : ss. 221YC (1) and (2). But a taxpayer receiving a notice of assessment on which is notified the amount of the provisional tax is entitled before the due date for payment or the 31st March, whichever may be the later, to make an estimate for himself showing, to put it briefly, the amount of provisional tax payable. If the commissioner has reason to believe that his taxable income for the year will be or is already greater than what he has estimated, the commissioner may serve him with an estimate of his own ; but failing that the taxpayer's estimate stands : see s. 221YDA. In any case there is a deterrent to taxpayers who might be minded to make an under estimate. If a taxpayer's estimate proves lower by four-fifths than his last year's taxable income and the taxable income of the year in question, he becomes liable by way of penalty to additional tax : see s. 221YDB.

When provisional tax has been paid the commissioner is to credit the amount paid first against such income tax, if any, as is payable by the taxpayer in respect of the income, next against any provisional tax in respect of the income of the ensuing year, and thirdly against

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any other income tax payable by the taxpayer. If after these successive credits there still be a balance, it is to be refunded to the taxpayer: s. 221YE. It will be seen that there is no appeal provided against the notification by the commissioner of his estimate. The taxpayer however may make his own estimate and that the commissioner must accept unless he has reason to believe that the taxable income will be greater. From that liability the taxpayer cannot relieve himself by any legal process until he is assessed to income tax. He may of course then appeal against the assessment and reduce its amount. If in the event the commissioner has proved mistaken in his refusal to accept the taxpayer's own estimate, the commissioner must refund the excess after making the credits already described. The taxpayer is therefore not without an ultimate remedy and the fact that the machinery is such that he is under an interim liability cannot be enough to invalidate the provisions.

For the year in respect of which the suit is brought s. 12 of the *Income Tax and Social Services Contribution (Individuals) Act* 1956 (No. 102 of 1956) provides that provisional tax and contribution is imposed and is payable in accordance with the provisions of the *Assessment Act* in respect of the income of the year of income which commenced on 1st July 1956. It is plain that these provisions assume the existence of an income tax and provide means for an anticipatory payment. The payment is compulsory but the liability to make it is not imposed as a separate tax. It is provisional as its name implies. Payment made in pursuance of the liability for provisional tax is applicable in discharge of the ultimate liability to income tax and is otherwise repayable. The purpose is not simply to ensure payment of tax. The purpose is to bring the discharge of the burden of tax into a closer temporal relation with the accrual of the income upon which the tax is levied. The execution of such a policy appears to me to be fairly within the power expressed in s. 51 (ii.) of the Constitution even if it be described as incidental. The main purpose of that power is expressed by the words " with respect to taxation ". It gives a legislative authority which includes prima facie whatever is reasonably and properly incidental to the effectuation of the purpose. There is no reason why the means described in Div. 3 of Pt. VI for giving effect to the principle should not be regarded as proper for the effectuation of the power to make laws in respect to taxation. I therefore think that the provisions are covered by the power conferred by s. 51 (ii.).

No doubt the *Income Tax and Social Services Contribution (Individuals) Act* 1956 (No. 102 of 1956) is an Act imposing taxation

within the meaning of s. 55. It follows that it may deal only with the imposition of taxation and any provision dealing with any other matter is of no effect. Let it be assumed that s. 12 in imposing provisional tax and contribution deals with an incidental liability. Why should it follow that it deals with a matter other than the imposition of taxation ? When s. 55 uses the expression " imposition of taxation " it employs a term of somewhat indefinite connotation. In *Federal Commissioner of Taxation* v. *Munro* (1) *Isaacs* J. discusses the meaning of the first paragraph of s. 55 and gives his reasons for adopting what may be called a narrow interpretation of the words " imposing taxation ". A much wider meaning appears to have been adopted by other members of the Court. *Isaacs* J. however distinguished sharply between the provisions of the *Assessment Act* directed to the collection of the tax and the actual grant or imposition of the tax. His Honour, however, did not have in view any process for requiring provisional payment of the proportion of income as part of a scheme of taxation in which the burden or incidence of the tax, the source from which the burden should be borne, and the ultimate ascertainment of the tax finally payable formed a closely associated congeries of liability. It does not seem probable that his Honour would have regarded this as no part of the imposition of taxation within s. 55. No other judge who has dealt with this subject has adopted quite so strict an interpretation of the words " imposition of taxation " in s. 55 and it does not seem that any of the judges of the past would have doubted that s. 12 of Act No. 102 of 1956 came within the words " imposition of taxation " and did not form another matter. For these reasons I am of the opinion that neither s. 12 of Act No. 102 of 1956 nor Div. 3 of Pt. VI of the *Assessment Act* 1936-1956 is obnoxious to the first paragraph of s. 55 of the Constitution. Little need be said of the argument based upon s. 51 (xxxi.) of the Constitution. The argument is that " provisional tax " is paid provisionally and returned without interest in the event of no tax accruing due. That is said to be an acquisition of property on terms not just. Once it is held that provisional tax is authorised by s. 51 (ii.) it seems absurd to say that, within the meaning of s. 51 (xxxi.), the sums paid or payable as provisional tax constitute property acquired for a purpose in respect of which Parliament has power to make laws. The purpose of the power itself which is conferred by s. 51 (ii.) is to acquire money for public purposes and that is no less so if the money is raised provisionally and in advance of the actual accrual of the tax as *debitum in praesenti solvendum in praesenti.*

(1) (1926) 38 C.L.R., at pp. 185-193.

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From the foregoing it follows that the provisions referred to are not invalid under the first of the two independent grounds taken by the defendant in support of his demurrer.

It is necessary now to turn to the second of those grounds. Section 11 of Act No. 4 of 1945 introduced into the *Assessment Act* s. 79A upon which is based the contention that there has been a disregard both of the prohibition against discrimination between States and parts of States and of the prohibition contained in s. 99 of giving preference by a regulation of revenue to one State or any part thereof over another State or any part thereof. The introductory words of sub-s. (1) of s. 79A have been set out early in this judgment. The enacting part of the sub-section provides that in the case of a resident of the prescribed area an amount ascertained in accordance with the section should be an allowable deduction. Sub-section (2) then declares what amounts may be deducted. There have been amendments of s. 79A increasing the fixed amounts of the deduction. See Act No. 11 of 1947, s. 14, and Act No. 101 of 1956, s. 12. It is enough now to give the amounts in the figures as they stand at present. The prescribed area, which is defined in a schedule added to the *Assessment Act* by s. 19 of Act No. 4 of 1945, is divided into Zones A and B. A resident of Zone A of the prescribed area is to receive a deduction of £180, a resident of Zone B a deduction of £30, if he has not resided or actually been in Zone A during any part of the year of income. There is an elaborate definition of " resident " in sub-s. (4). A man is a resident who resides in an area for more than half the year of income or has actually been in the area whether continuously or not during more than half of the year of income or who, provided he does not come within the foregoing, has died during the year of income and at the date of his death resided in the area. There is necessarily a third category of deduction covering persons who cannot be considered residents of Zone A within the definition or a resident of Zone B who has not resided or actually been in Zone A during any part of the year of income. Such persons are to receive a deduction of such an amount being not less than £30 and not more than £180 as in the opinion of the commissioner is reasonable in the circumstances. The prescribed areas in the zones are set out in a schedule. As the schedule stood in 1945 Zone A comprised the whole of that part of Australia which lies north of an imaginary line drawn in an irregular fashion across the continent from west to east. The line began at Exmouth Gulf, went down in an irregular way to the limit of the tropic of Capricorn, followed the meridian marking the tropic easterly to somewhere beyond the border of Queensland and then took an irregular course

in a north-easterly direction to Cape Tribulation, the latitude of which may be stated with sufficient approximation as about 16 deg. south. Zone B was a zone south of Zone A bounded in an irregular fashion by a line beginning on the west coast near Geraldton and going south-east to Point Hood and then along the coast through Hopetoun and Esperance and the coastline of the Australian Bight towards Ceduna. Before Ceduna the line left the coast to go inland in such a way as to exclude the Eyre Peninsula, pass through Port Augusta, exclude Quorn and Peterborough, and then pass easterly into New South Wales and then northerly considerably east of the Darling into Queensland and again, after a westerly turn, northerly through the centre of Queensland, turning to the coast so as to meet it at approximately Broadsound which is somewhat north of Townshend Island. Zone B also included the south-western portion of Tasmania.

It will be seen that the State of Victoria is wholly excluded from the prescribed area. It will further be noticed that while the deductions operate to prefer a large geographical area of Australia to that portion of Australia which is excluded from the areas, there is also a preference between the areas enclosed in the respective zones, that is to say a preference in favour of the residents of Zone A over the residents of Zone B. The limits *inter se* of the two zones have been altered by s. 23 of Act No. 101 of 1956 so that the southern boundary of Zone A has been brought down to the twenty-sixth degree of south latitude, along which it runs to the border of Queensland, whence the line turns to the north as a projection of the westerly border of New South Wales until it meets the old line again. It may be added that the various Territories outside Australia are included.

The legislative plan by which all this is done is attacked as involving the violation both of ss. 51 (ii.) and 99. Section 51 (ii.) confers power to make laws with respect to taxation ; but so as not to discriminate between States or parts of States. The full text of s. 99 is as follows :—" The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." We are not of course concerned with a law or regulation of trade or commerce but only with one of revenue. It happens however that the decision of this Court upon s. 99 most discussed during the argument is concerned with a law or regulation of trade or commerce. It is *Elliott* v. *The Commonwealth* (1). In that case the majority of the Court gave to the words " one State or any part thereof over

(1) (1936) 54 C.L.R. 657.

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another State or any part thereof " a restricted meaning. If legislation is attacked as violating that portion of s. 99 it would appear that according to that interpretation the legislation will be good unless in some way the parts of the State are selected in virtue of their character as parts of a State. This view seems to accord with that expressed by *Isaacs* J. in relation to s. 51 (ii.) in *R.* v. *Barger* (1), a view, however, contrary to that taken by the majority of the Court in that case. See further *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation (N.S.W.)* (2). It is a view that was attacked by *Evatt* J. in his dissenting judgment in *Moran's Case* (3). For myself I have the greatest difficulty in grasping what exactly is the requirement that the selection of an area shall be as part of the State. No doubt it may be expressed in various ways, e.g. " in virtue of its character as part of the State " or " *qua* part of the State " or " because it is part of a State " or " as such ". However it may be expressed I find myself unable to appreciate the distinction between the selection by an enactment of an area in fact forming part of a State for the bestowal of a preference upon the area and the selection of the same area for the same purpose " as part of the State ". But I shall not discuss this question further because in the view I take of the case I do not think it is necessary to decide whether s. 79A involves or carries with it a forbidden preference or discrimination. For the purposes of my decision I am prepared to accept the view that s. 79A assumes to give a preference to taxpayers who are residing in Zone A over taxpayers residing in Zone B and to give to the residents of either zone a preference over taxpayers who reside outside the prescribed area. I am further prepared to proceed upon the assumption that in giving this preference s. 79A, as a law or regulation of revenue, gives a preference to parts of five States of the Commonwealth over the State of Victoria and also in the case of each one of those five States gives a preference to part of it over parts of the other four of them. In the same way I am prepared to assume that s. 79A would if valid work a discrimination between Victoria and parts of the other five States as well as a discrimination between a part of each of those five States and parts of the other four of them. It follows that I assume that the provisions of s. 79A are not consistent with the requirements expressed in ss. 51 (ii.) and 99. Section 79A prior to its amendment was enacted in a statute directed to the amendment of the *Income Tax Assessment Act* 1936-1944 which is described as the Principal Act.

(1) (1908) 6 C.L.R. 41.
(2) (1940) A.C., at pp. 849, 853, 854, 855, 856; (1940) 63 C.L.R., at pp. 341, 345, 347.
(3) (1939) 61 C.L.R., at p. 783 et seq.

By s. 11 of Act No. 4 of 1945 it was simply enacted that after s. 79 of the Principal Act the following section is inserted. Thereupon s. 79A was set out in full. By s. 19 of Act No. 4 of 1945 it was provided that the Principal Act is amended by adding at the end thereof the following schedule. Section 19 then set out the schedule containing the description of the zones as they then were defined. But it was by these two sections of the *Income Tax Assessment Act* 1945 (No. 4 of 1945) that it was sought to make the provisions of s. 79A and the schedule part of the *Income Tax Assessment Act*. Act No. 4 of 1945 was assented to on 18th May of that year and its date of commencement was the 15th June 1945. The *Income Tax Act* 1945 (No. 5 of 1945) imposing tax was also assented to on 18th May and also came into force on 15th June 1945. That Act like other *Taxing Acts* provided by s. 2 that the *Income Tax Assessment Act* should be incorporated and read as one with this Act. A like provision is contained in s. 4 of the *Income Tax and Social Services Contribution* (*Individuals*) *Act* 1956 (No. 102 of 1956). The argument for the defendant is that this *Taxing Act* is invalid because it operates on an *Assessment Act* and indeed incorporates the *Assessment Act* containing s. 79A so that the *Taxing Act* embodies an attempt to give by a law of revenue a preference to parts of States over another State or parts of other States and an attempt by a law with respect to taxation to discriminate between a State and parts of other States and between parts of each of those other States and parts of the remaining States. I repeat that I assume that s. 79A with the schedule does attempt to give such a preference and so to discriminate. But this can affect the validity of the *Taxing Acts* only if s. 79A ever became part of the *Assessment Act* upon which the *Taxing Acts* operated. In my opinion this hypothesis or condition never was fulfilled. My opinion is that s. 79A was invalid *ab initio* and never became a valid portion of the *Assessment Act*. Let it be assumed to the full that the provisions of s. 79A would involve a preference forbidden by s. 99 once the *Taxing Act* operated upon them. It appears to me that, because s. 79A would if valid necessarily involve such a preference once the *Taxing Act* operated upon it, the consequence must be that it *never* was within the competence of the Parliament to enact s. 79A. It must therefore be treated as void. It is, I think, equally true that without s. 99 s. 79A on the hypothesis stated would be outside the competence of Parliament because it would conflict with the condition expressed in s. 51 (ii.) that a law with respect to taxation must not discriminate between States or parts of States. There is no problem of severance. Severance is not the point. Sections 11 and 19 of the *Income Tax Assessment*

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Act 1945 (No. 4 of 1945) are plainly severable from the rest of the enactment. The problem is of another description. It is whether the *Taxing Act* when it incorporates the *Assessment Act* is to be read as incorporating the *Assessment Act* as it is written or as it validly exists. Not without some hesitation I have formed the view that the proper construction of the *Taxing Acts* is that they incorporate the *Assessment Acts* not so to speak as pieces of paper but as valid laws of the Commonwealth. Now I do not think that s. 11 of the *Income Tax Assessment Act* 1945 (No. 4 of 1945) ever could become a valid law of the Commonwealth if the assumption upon which I speak be true. That Act must be dealt with as a separate statute, an observation which is by no means unfavourable to the defendant's contention. But as a separate statute it nevertheless is a law of revenue within s. 99. The Act is a law of revenue because it is an exercise of the legislative power to tax given by s. 51 (ii.). As an exercise of the power conferred by s. 51 (ii.) it expresses a discrimination which *ex hypothesi* is forbidden by the condition of the power. Sections 11 and 19 therefore could not begin to exist as valid enactments. Section 20 of Act No. 4 of 1945 provided that these two provisions should apply to all assessments for the financial year beginning on 1st July 1945 and all subsequent years. On the hypothesis which I have accepted they could not validly so apply. It is true that a *Taxing Act* which sought to apply them would itself give a preference. It is for that reason that the critical consideration in this case appears to me to be, and I speak again on the same hypothesis, whether the *Taxing Acts* are to be construed as incorporating what stands in the printer's copy of the *Assessment Acts* or incorporating only what has been validly enacted by the legislature in a lawful exercise of its powers as and for part of the *Assessment Acts*. As in my opinion the latter is the correct view it follows that the defendant's second contention must fail as well as his first. The demurrer should be overruled and judgment entered for the plaintiff for the amount claimed.

McTIERNAN J. In my opinion there is no substance in any of the grounds of the demurrer. It is quite unnecessary to add anything to what the Chief Justice has written. But I would affirm the decision of the majority in *Elliott's Case* (1): see *Moran's Case* (2).

WILLIAMS J. I have had the advantage of reading the reasons for judgment of the Chief Justice. I respectfully agree with those reasons and the order he proposes.

(1) (1936) 54 C.L.R. 657.

(2) (1940) A.C., at pp. 856, 857; (1940) 63 C.L.R., at pp. 347, 348.

WEBB J. This is a defendant's demurrer in an action in the original jurisdiction of this Court brought by the plaintiff commissioner to recover £752 provisional tax and contribution under the *Income Tax and Social Services Contribution (Individuals) Act* 1956, hereinafter referred to as the *Rating Act*, in respect of the income of the year ended 30th June, 1956. The *Rating Act* incorporates the *Income Tax and Social Services Contribution Assessment Act* 1936-1956, hereinafter referred to as the *Assessment Act*, which latter Act in s. 79A provides for the granting of income tax concessions to residents in Zone A and on a smaller scale to residents in Zone B, each of which zones includes parts of some States but not the whole of any State. No part of Victoria is included in either zone. Zone A also includes the Northern Territory and the Territory of Papua-New Guinea and certain islands. These concessions are expressed by s. 79A to be in recognition of the disadvantages to which those residents are subject because of the "uncongenial climatic conditions, isolation and high cost of living" in those areas in comparison with other parts of Australia, and such disadvantages can, I think, be judicially noticed as existing in those areas.

There are six grounds of demurrer each based on one or more of ss. 51 (ii.) and (xxxi.), 55 and 99 of the Commonwealth Constitution. These grounds may be summarised: that provisional tax is quite outside s. 51 (ii.); that the concessions given by s. 79A as incorporated in the *Rating Act* create discrimination contrary to s. 51 (ii.), or preference contrary to s. 99; that provisional tax and income tax are different subjects of taxation and are included in the same law, contrary to s. 55; that compelling payments in advance without providing for interest amounts to taking property on terms that are not just, contrary to s. 51 (xxxi.); and that, notwithstanding s. 15A of the *Acts Interpretation Act* 1901-1950, severance is not permissible because it is the *Rating Act* that creates the discrimination, which did not exist in the *Assessment Act* taken by itself, nor until it was incorporated in and by the *Rating Act*, so that s. 79A of the *Assessment Act* cannot be excised as invalid leaving the rest of the legislation standing as valid; and that, in any event, the Parliament created a scheme of taxation and did not intend that scheme to operate if the concessions were invalid, or to authorise a greater tax liability than the Parliament intended when enacting the invalid provisions.

Dealing first with severance and the effect of s. 15A: If, after incorporation in the *Rating Act*, s. 79A enacting the concessions, or the provisional tax independently of those concessions, were found to be invalid, then, assuming that an invalid section could effectively

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be so incorporated, I see no reason why the remaining sections should not be sustained as valid. I am unable to see such interdependence between the one group of sections and the other that the excision of the one would destroy any scheme of income taxation embodied in this legislation; or any reason why the invalidity of a concession should result in no tax being payable by the taxpayers intended to be benefited. That would be an absurd result not lightly to be attributed to the Parliament in the face of s. 15A. No re-writing of the legislation would be involved; plastic surgery would not be required; mere excision would suffice. However, it is generally accepted, so I understand, that the Parliament in s. 15A does not direct that the challenged legislation shall be upheld to the extent that it could be made valid even at the expense of destroying essential features of any scheme disclosed, however elaborate, or even by the judges acting as draftsmen and re-writing the enactment. I take it that neither the power of the Parliament to delegate its authority, nor the extent of its control over all Australians as individuals in the exercise of its authority, is necessarily questioned; but that the general view is that if the choice is presented of attributing to the language of an enactment a sensible meaning or an absurd one, naturally the former is preferred.

Because of the view I take on the other questions it is really unnecessary for me to deal with severance. I have done so because of the very full argument on this and indeed on all questions raised.

Then turning to other grounds of the demurrer: I will take first what I may call the minor grounds based on ss. 51 (xxxi.) and 55, as both can readily be disposed of with the assistance of the reasoning in *Federal Commissioner of Taxation* v. *Munro* (1), other than that of *Isaacs* J., and in *Moore* v. *The Commonwealth* (2). In substance there is, I think, no difference between the payments in advance from wool proceeds held valid in that case and provisional tax, which, like those payments in advance, is ascertained in the exercise of the power to tax under s. 51 (ii.) and is really income tax at an early stage; "ascertained" but not assessed. It is not a different subject of taxation. This also disposes of the ground that provisional tax is outside s. 51 (ii.). Nor is it an acquisition of property under s. 51 (xxxi.). In *Moore's Case* (2) it was submitted unsuccessfully for the taxpayer that the compulsory payments in advance without providing for interest were an acquisition of property on terms that were not just, contrary to s. 51 (xxxi.). Then neither s. 51 (xxxi.) nor s. 55 applies to invalidate provisional tax.

(1) (1926) 38 C.L.R. 153.

(2) (1951) 82 C.L.R. 547.

As to the remaining ground of the demurrer, i.e. that based on discrimination and preference contrary to ss. 51 (ii.) and 99: It is not, I understand, submitted by the defendant that for the purposes of this case there is any substantial difference between ss. 51 (ii.) and 99, between discrimination and preference. *Dixon* J. as he then was, said in *Elliott* v. *The Commonwealth* (1): "If s. 99 had been expressed to forbid the Commonwealth by a law or regulation of trade, commerce, or revenue to discriminate against a State or part of a State, I do not think its effect would have been substantially varied" (2). I respectfully agree. Then confining attention to s. 51 (ii.), the defendant relies on the reasoning of the majority in *R.* v. *Barger* (3) where *Griffiths* C.J. and *Barton* and *O'Connor* JJ. in a joint judgment, referring to the words "so as not to discriminate between States or parts of States" in s. 51 (ii.), said that those words "recognise the fact that nature has already discriminated, and prescribe that no attempt shall be made to alter the effect of that natural discrimination" (4). Their Honours added that "The varying conditions of climate . . . and of locality . . . make an effectual discrimination for many purposes between several portions of the Commonwealth. Lest, however, the Parliament should desire to bring about equality in the incidence of the burden of taxation, or what has been called an equality of sacrifice, by discriminating between such different portions they were expressly prohibited from so doing." (4) Their Honours then proceeded to say that "States or parts of States" was synonomous with "parts of the Commonwealth" or "different localities within the Commonwealth", and that "it would be a strange thing if Parliament could discriminate in a taxing Act between one locality and another, merely because such localities were not coterminous with States or with parts of the same State" (5). However, *Isaacs* and *Higgins* JJ. dissented, the former saying that the taxation power is required by s. 51 (ii.) "to be exercised over all persons, things and circumstances, without regard to the existence of separate States" (6) and without "differentiating in its measure of taxation between States and parts of States because they were particular States or parts of States" (7); and that the discrimination or preference in s. 51 (ii.) or s. 99 that is forbidden is "in relation to the localities considered as parts of States, and not as mere Australian localities or parts of the Commonwealth considered as a single country" (7). His Honour added that "it does not include a differentiation based on

(1) (1936) 54 C.L.R. 657.
(2) (1936) 54 C.L.R., at p. 683.
(3) (1908) 6 C.L.R. 41.
(4) (1908) 6 C.L.R., at p. 70.
(5) (1908) 6 C.L.R., at p. 78.
(6) (1908) 6 C.L.R., at p. 106.
(7) (1908) 6 C.L.R., at p. 107.

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other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities " (1). If his Honour's view is sound it supports the validity of s. 79A.

Now the view of *Isaacs* J. as stated above was adhered to by *Knox* C.J., *Isaacs*, *Higgins* and *Rich* JJ. in *Cameron* v. *Deputy Federal Commissioner of Taxation* (2), and in *James* v. *The Commonwealth* (3) by *Knox* C.J. and *Powers* J. It was also adopted by the majority in *Elliott's Case* (4). This is strong support for that view, although the contrary view has been expressed forcibly by other members of this Court, more particularly in *Elliott's Case* (4). But conclusive of the matter is the fact that subsequently the Privy Council in *Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation (N.S.W.)* (5) expressly approved of the view of *Isaacs* J. and so it would be useless to carry the discussion further.

In my opinion s. 79A is not invalid as discriminating between States or parts of States, contrary to s. 51 (ii.); or as constituting preference, contrary to s. 99.

I would overrule the demurrer.

KITTO J. In my opinion the order proposed by the Chief Justice should be made. I agree entirely in his Honour's reasons for judgment.

TAYLOR J. I entertain no doubt that the demurrer in this case should be overruled and judgment entered for the plaintiff. I agree entirely with the reasons of the Chief Justice and do not wish to add anything.

Demurrer overruled. Judgment for the plaintiff for £752 *with costs.*

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

Solicitor for the defendant, *R. J. Pettiford.*

R. A. H.

(1) (1908) 6 C.L.R., at p. 108.
(2) (1923) 32 C.L.R. 68.
(3) (1928) 41 C.L.R., at pp. 455, 456.
(4) (1936) 54 C.L.R. 657.
(5) (1940) A.C., at pp. 856, 857; (1940) 63 C.L.R., at p. 348.