[PRIVY COUNCIL.]

THE COMMISSIONERS OF TAXATION (NEW SOUTH WALES) . . . } APPELLANTS;

AND

MOONEY . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1907.

July 4.

Income—Persons obliged to furnish returns—Default assessment—How far conclusive—Profits arising from sale of mine—Land and Income Tax Assessment Act 1895 (*N.S.W.*), (59 *Vict. No.* 15), *secs.* 30, 39, 56, 57, 58—*Regulations* 1*st December* 1899, *Paragraphs II., V.—Form D.*

Where property is sold by a person who does not traffic in that kind of property, the proceeds of such sale are capital and not income.

By Regulations made under the *Land and Income Tax Assessment Act* 1895 (N.S.W.), (not brought to the notice of the Supreme Court or the High Court) every person in the enjoyment of an income, whatever the amount may be, is required to make a return to the Commissioners of Income Tax, and a default assessment, not questioned in the manner provided, becomes binding and conclusive on such person.

Appeal from the decision of the High Court (*Mooney* v. *Commissioners of Taxation* (*New South Wales*), 3 C.L.R., 221), allowed on this ground.

APPEAL by special leave to His Majesty in Council from the decision of the High Court: *Mooney* v. *Commissioners of Taxation* (*New South Wales*) (1).

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the High Court of Australia. By a majority of two Judges to one that Court reversed the unanimous judgment of the Full Court of New South Wales.

*Present. — The Lord Chancellor, Lord Ashbourne, Lord Macnaghten, Lord Collins, Sir Arthur Wilson.

(1) 3 C.L.R., 221.

PRIVY COUNCIL. 1907.

COMMISSIONERS OF TAXATION (N.S.W.) v. MOONEY.

The case involves a question of some importance in the administration of the income tax laws of New South Wales.

By the combined effect of the *Land and Income Tax Assessment Act* 1895 (59 Vict. No. 15), and the *Income Tax Act* 1895 (59 Vict. No. 17), a tax of 6d. in the £1 is imposed on all incomes exceeding £200 per annum. Incomes below that amount, after all authorized deductions are made, are not liable to income tax.

The respondent, Edward Joseph Mooney, a resident in New South Wales, omitted to furnish a return of his income for the year 1903 required by the Commissioners of Taxation as the basis of assessment for the year 1904. The Commissioners, having discovered that he had been in the receipt of large sums of money in 1903, treated him as a person in default, and made according to their judgment an assessment upon him. Due notice of this assessment was given. Mooney, however, disregarded the notice altogether. Thereupon the Commissioners proceeded to make up the assessment book, and charged Mooney with £225 as income tax payable by him for the year 1904. As Mooney did not question this assessment in the Court of Review, the Court specially appointed to hear and determine income tax appeals, the Commissioners in September 1904 brought this action to recover the £225 together with the prescribed fine. They relied upon the assessment book as conclusive evidence of the defendant's liability. At the trial, after evidence had been given on the part of the defendant to explain his receipts in 1903, the jury were discharged by consent and a formal verdict was entered for the defendant with leave to the plaintiffs to move before the Full Court to have the verdict entered for them. The Full Court gave judgment for the plaintiffs for the amount claimed. The Court held that the assessment, not having been appealed from in the prescribed manner, had become conclusive, and that it could not be disputed in the action.

The defendant then appealed to the High Court by special leave of that Court. The appeal was allowed, with costs, and the verdict in favour of the defendant was restored.

Special leave to appeal to His Majesty was granted on the terms of the Commissioners submitting to abide by any direction His Majesty might be pleased to make as to the amendment of

the assessment, and also, if so directed, to pay the respondent's costs of the appeal in any event as between solicitor and client.

In the High Court *Griffith* C.J., and *Barton* J., held that the default assessment was not conclusive, and that the Commissioners were in error in treating Mooney's receipts in 1903 as income for the purpose of assessing income tax, as those receipts were proved at the trial to have been proceeds of the sale of Mooney's share in a mineral property. They also held that inasmuch as Mooney's income for the year 1903, excluding those receipts, was below £200, he was not (to use the expression of the Chief Justice) "within the area of taxation" (1), and therefore not bound by anything in the Act No. 15 of 1895 to make a return at all.

O'Connor J., on the other hand, agreed with the Full Court of New South Wales. Taking a broader view of the Act, he held that every person in the enjoyment of an income, whatever the amount might be, was bound to make a return to the Commissioners, and he held, further, that the default assessment, not having been questioned in the only manner in which it was competent for Mooney to question it, became binding and conclusive.

It is not necessary, in their Lordships' opinion, to compare or discuss the conflicting views of the learned Judges of the High Court, because it appears to them that if the attention of the High Court had been called to certain regulations under the Act of 1895 which "have the force of law," the Chief Justice and the learned Judge who agreed with him would probably have concurred in the result at which *O'Connor* J. arrived.

The provisions in the Act as regards "assessments, returns, &c.," are contained in Part V., which is so headed, and are as follows:—

"30. (i.) The Commissioners shall, in the prescribed manner, give or cause to be given, not less than 30 clear days' public notice of the time and place at which all persons liable to taxation personally, or in any representative capacity under the provisions of this Act, shall furnish returns for the purpose of assessment of Land and Income Tax; such notice shall state the place at which the prescribed forms of return may be applied for and obtained, and it shall be the duty of all such persons, and of all persons required by this Act or any regulation thereunder to furnish any such

(1) 3 C.L.R., 221, at p. 231.

PRIVY COUNCIL. 1907.

COMMISSIONERS OF TAXATION (N.S.W.) v. MOONEY.

returns, to apply for the prescribed forms of returns, and any person failing to furnish any such return shall not be relieved from any penalty by reason only of his having received no notice to furnish the same, or of the prescribed form of return not having been delivered to him; but the Commissioners may, if they deem it so advisable, cause forms to be delivered by the Assessors or sent by post.

"(ii.) Every such person shall, upon the publication of such notice, prepare and deliver, in the prescribed manner, within the period to be mentioned in such notice, to the person appointed to receive the same, a return in the form prescribed . . . of the particulars of the income, and of all other details in relation thereto which may be prescribed; such return shall be signed by the tax-payer, or by his agent duly authorized in that behalf.

* * * * *

"(v.) The returns furnished by or on behalf of every person required to furnish returns under this Act shall contain such particulars, be in such form, and be furnished to the Commissioners at such time as may respectively be prescribed or publicly notified.

"39. (i.) If any person makes default in furnishing any return of lands or income, or if the Commissioners are not satisfied with the return made by any person, they may make an assessment of the value or amount on which in their judgment tax ought to be charged, and the tax shall be payable accordingly.

"(ii.) Every such assessment shall be subject to appeal."

In Part VI., headed "Appeals, Collections of Taxes, &c., Regulations, Penalties, &c.," secs. 56, 57, and 58 are in the following terms:—

"56. The Governor may by regulation prescribe and regulate:—

* * * * *

"(iii.) The returns to be furnished to the Commissioners, and the form and contents thereof, and the time and mode of furnishing the same; the form, time, and manner of giving notices of appeal.

* * * * *

"57. The Governor may make all such other regulations, either applicable generally or to meet particular cases, as may be neces-

sary or desirable to carry out the objects and purposes of this Act, or as may be convenient for the administration thereof

"58. All such Regulations shall be published in the *Gazette* and shall be laid before both Houses of Parliament within fourteen days from the publication thereof, if Parliament be then sitting, and if Parliament be not then sitting, then within fourteen days after the beginning of the next Session, and upon publication in the *Gazette* all such regulations shall have the force of law."

Commenting upon these sections the learned Chief Justice says (1):—"I cannot doubt . . . that the Governor might make regulations requiring persons in receipt of money from any source to furnish returns for the purpose of ascertaining whether the money so received was income, or whether it exceeded £200 in the year, and was so liable to income tax."

Then he adds, "No such regulations, however, have been made." That seems to have been the view both of the learned Judges and the learned counsel on both sides in the High Court.

On the argument before this Board the attention of the Court was called to certain regulations duly made and gazetted which seem to meet exactly the point suggested by the Chief Justice.

Regulations made under the Act and gazetted on the 12th February 1896, provided, paragraph II., that those regulations were to be construed and read according to the interpretations provided by the Act, as well as by the interpretations therein additionally provided. As regards "returns and assessments, &c.," paragraph V. provided that the return of income required by the Act to be made "by or on behalf of a person" should be in the form marked D in the Schedule. The original Form D was amended more than once. The form current in the year 1904 was published in the *Government Gazette* of the first of December 1899. It is headed by a reference to the Income Tax Acts. Then follow the words:—

"RETURN OF INCOME.

"FOR THE YEAR ENDING 31ST OF DECEMBER, 189 .

"PERSON, FIRM, OR TRUSTEE.

"In pursuance of the above Acts and of the regulations made thereunder every person in receipt of income within the meaning

(1) 3 C.L.R., 231, at p. 232.

PRIVY COUNCIL. 1907. COMMISSIONERS OF TAXATION (N.S.W.) v. MOONEY.

of the said Acts is required to fill up the following return as far as is applicable to his particular case, and deliver the same at or forward it by post to the office of the Commissioners of Taxation, Sydney, on or before the day of

"Commissioners of Taxation."

Then, after a reference to the penalties for default, come the usual particulars required in such a return, including details of income from all sources, and a statement of account intended to show the net amount of income, and a declaration by the person making the return to the effect "that the same and the statements therein referred to or accompanying such return contain true and accurate details of the several matters and things set forth, and in particular contain a true and accurate account of all income derived by" the declarant "during the year ending 31st December 189 ."

The word "income," as defined in the Act, "includes profits, gains, rents, interest, salaries, wages, allowances, pensions, stipends, charges, and annuities."

The learned counsel at the Bar were unable to explain how it was that this regulation was not called to the attention of the High Court. It was not denied that Form D requires every person in receipt of income within the meaning of the Income Tax Acts, whatever the amount of such income may be, to make a return to the Commissioners. It was not disputed that the regulation prescribing Form D was authorized by sec. 57 of the Principal Act even without calling in aid secs. 30 and 56. It certainly is convenient for the administration of the *Income Tax Act*—it must be desirable, and indeed necessary, in order "to carry out the objects and purposes" of the Act—that all persons in receipt of income should be bound to make returns if so required. If everybody is to be a law unto himself, and to judge whether he is within the "area of taxation," it would no doubt result in there being a wide margin of debateable ground, and the powers of the Commissioners would be crippled, if not paralysed.

The learned counsel for the respondent suggested that the expression "income within the meaning of the said Acts" ought to be understood as confined to income exceeding £200 a year.

The language, however, as well as the purpose of the regulation, appears to their Lordships to be too clear to admit of any construction other than the plain and natural meaning of the words used.

It was not disputed that in the year 1903 the respondent Mooney was in receipt of income to the amount of £50, or income not exceeding £50. He was therefore, in their Lordships' opinion, bound to make a return in the prescribed form. Not having done so he was in default, and the Commissioners therefore were apparently within their rights in making a default assessment.

Having regard to the terms of the order granting special leave to appeal, their Lordships do not think it necessary to consider whether it would have been competent for the respondent in the action brought against him by the Commissioners to question the assessment if there had been no regulation in force requiring returns from all persons in receipt of income. They agree with the High Court that a change in the form of property by a person who does not traffic in that kind of property cannot be regarded as producing income taxable under the Income Tax Acts. They propose therefore to amend the assessment.

Their Lordships think the justice of the case will be met by an order discharging the order of the High Court, except as to costs, and directing a verdict to be entered for the Commissioners for a nominal amount, and ordering the Commissioners to pay the respondent his costs of this appeal as between solicitor and client. Their Lordships will therefore humbly advise His Majesty accordingly.