

To hand down 49/1928

THOMAS & ROSS LTD. V COMMISSIONER OF TAXATION.

JUDGMENT:

HIGGINS J.

Two appeals from decisions of a Board of Review. Both appeals - one as to the year ending 30th. June 1920, the other as to the year ending 30th. June 1921 - involve the same point of law, and, by consent, have been heard together. The appeals are made under sec. 51(6) of the Income Tax Assessment Act 1922-27.

In the original notice of appeal to this Court, the Board ~~of~~ was made the respondent. This ~~was~~ clearly wrong; but, by consent of counsel for the appellant, and of counsel acting for the Commissioner as well as for the Board, the Commissioner has been substituted ~~for~~ as respondent.

By notice of amended assessment dated 30th July 1926, the Commissioner had added £500 as for "additional tax, omitted income" to the original assessment for the year ended 30th. June 1920; and by notice of amended assessment of the same date the Commissioner had added £500 as for the same reason to the original assessment for the year ended 30th. June 1921. The taxpayer - ~~company~~ - lodged an objection against both additions "on the ground that the income alleged was not earned by the company". On 28th. December 1927 the Commissioner notified the company that he had disallowed the objection; at the request of the company the decision of the Commissioner was referred to a Board of Review for review (sec. ⁵⁰⁽⁴⁾ ~~50(3)~~); on 21st September 1928 the Board dismissed the "appeal" (sic) from the Commissioner. The company did not state as one of its grounds of objec-

Delivered 26.11.1928

THOMAS & ROSS VV COMMISSIONER OF TAXN.

HIGGINS J.

-tion that the additions were made more than three years from the date when the tax payable on the assessments was originally due and payable (see secs. 2 & 37 of the Act 1922-25; secs. 2 & 37 of Act 1922-27); and, in my opinion, the taxpayer was precluded from making use of this ground of objection before the Board of Review. For sec. 51(2) says expressly that "a taxpayer shall be limited on the review to the grounds stated in his objection".

But the appellant contends further that the Board, in considering the objection taken, took up a mistaken attitude as to the burden of proof - that it ~~xxxx~~ treated the appellant as having to satisfy the Board that the addition to the assessment was wrong - that the Board ought to have addressed its mind ^{independently} ~~direct~~ to the question, was the alleged income earned. The Board was meant to be an administrative body, for practical business decisions, ~~not~~ having all the powers of the Commissioner, ^{a body whose} ~~and where~~ decisions are to be deemed to be decisions of the Commissioner (sec. 44); and ^{is urged, it} ~~it~~ ought to make up its own mind ^{as} to the facts independently of the Commissioner. The case of Coghlan V Cumberland (1898 1 Ch. 704) has been cited. That case was an appeal under the Judicature Act and rules from a single judge without a jury; and the words of Lindley M.R. show that it is the duty of the Court of Appeal to rehear the case, to reconsider the materials before the judge with such other materials as it may decide to admit to ~~xx~~ make up its own mind independently.

THOMAS & ROSS V COMMISSIONER OF TAXN.

HIGGINS J.

But here the Commissioner relies on sec. 39 of the Act - "The pro-
"-duction of any notice of assessment or of any document under the
" hand of the Commissioner..... purporting to be a copy of a notice
" of assessment shall

(a) be conclusive evidence of the due making of the assess-
-ment; and

(b) be conclusive evidence that the amount and all the par-
-ticulars of the assessment are correct; except in pro-
-ceedings on appeal against the assessment when it shall be
prima facie evidence only. "

Counsel for the appellant rejoins that a reference of the Commission-
er's decision to a Board of Review is not an "appeal" at all, and that
the words as to the assessment being prima facie evidence are there-
fore inapplicable. But if the reference to the Board is not an
against the assessment,

"appeal"/ then the notice of assessment is conclusive, impregnable,
as to the amount and all particulars of the assessment being correct.

The exception^s is in favour of the taxpayer; and if the taxpayer does
not come within the exception, ^{it}~~he~~ is bound conclusively by the ass-
-essment; and what is then the use of the Board of Review coming
after the Commissioner if it has to treat his assessment as con-
-clusive ?

This section 39 has come down to us from the original Act of
1915, practically unchanged (sec. 35). It applied first to assess-
-ments before there were/ any Boards of Appeal or (so-called) boards

THOMAS & ROSS V. COMR. OF TAXN.HIGGINS J.

of review - when the only appeal was to some Court. It was retained by the legislature after the cataclysm when ~~it was discovered~~ the extraordinary discovery was made that boards of appeal created under the Act of 1921 were an infringement of the ^{several} ~~several~~ judiciary sections of the Constitution. We must treat these words "proceedings on appeal against assessment", as ~~being~~ having some distinctive effect; and the only way in which they can get such an effect is by treating the words as applying to all proceedings in which the assessment ~~is~~ is called in question, whether by way of review ~~or~~ (as the proceeding is now called), or by way of appeal, as the procedure used to be called. At all events, I shall assume, in favour of the company, that the amended assessment is only prima facie evidence against it; and that such evidence can be rebutted. But if it is prima facie evidence, that means that the burden of showing that the alleged income was ^{not} ~~earned~~ ~~fairly~~ falls on the company. The words used by the Board are that it was not satisfied "that the amended assessment was excessive". Probably, the word "excessive" is taken from the present section 36, and that section may not be strictly applicable to this case. But even if so, the error is not fatal to the decision of the Board, as, in effect, the assessment would be "excessive" if no additional income had been earned.

The only function of the Court, under the circumstances, is under sec. 51(6), to hear and decide the appeal from the decision of the Board, if, in the opinion of the Court, it "involves a question

THOMAS & ROSS V COMR. OF TAXN.

HIGGINS J.

of law." In my opinion, the decision of the Board does involve a question of law - the question being whether the onus of proof lies on the taxpayer when a decision of the Commissioner comes before a Board of Review. The Board has frankly and expressly shown that it thinks the onus does so lie; and its attitude on this question directly affects the ~~result~~ decision of the Board on the alleged additional income earned. I think ~~in~~ that the Board was right on the point. I am told that if I decided that the Board was wrong on this point, I should have to investigate the facts as to the alleged income myself (there has been no argument on the subject nor has the evidence been even mentioned/ and the judgment of the majority in the recent case of the Ruhamah Property Co. Ltd. V Commissioner of Taxation (not yet reported) would seem to favour that procedure. But, whether such would be my proper course or not, I have no alternative, when I find that the Board was right on the question of law, but to dismiss this appeal from the Board. The case has been closely and ably argued, but I decide that the decision of the Board on the point of law involved was right, and that the appeal from the Board should be dismissed.

Probably I should add that I offered to give the parties the opportunity of obtaining the opinion of the Full Court on such a subject, assuming that the Judiciary Act sec.18 applies; but the parties have both preferred that I should decide the matter, without prejudice to any such appeal from my decision as may be open to them.