

To 2 of 1940

IN THE HIGH COURT OF AUSTRALIA.

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**ORIGINAL**  
**O. L.**

BARRIPP

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V.

THE COMMISSIONER OF TAXATION OF THE  
STATE OF NEW SOUTH WALES.

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**REASONS FOR JUDGMENT.**

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*Judgment delivered at* SYDNEY.

*on* Monday the 21st April, 1941.

BARRIPP V. COMMISSIONER OF TAXATION (NEW SOUTH WALES)

O R D E R.

*Brown*

Appeal dismissed with costs.

BARRIPP

V.

COMMISSIONER OF TAXATION  
OF STATE OF NEW SOUTH WALES.

JUDGMENT.

RICH A.C.J.

1.

BARRIPP V. COMMISSIONER OF TAXATION OF THE STATE OF N.S.WALES.

Judgment

Rich A.C.J.

In this matter the appellant made a return of income tax for the year ended 30th June 1927. In 1928 the Commissioner issued his original assessment but in 1939 made an amended assessment on the footing that a sum of £3,923:17;7 had been erroneously omitted from this return. The interval of time between the two assessments necessitated the Commissioner being of opinion that there had been an avoidance of tax due to fraud or evasion, sec. 210 Income Tax (Management) Act 1936 which is the relevant Act for the purposes of this case. The taxpayer being dissatisfied with the Commissioner's amended assessment appealed to the Board of Appeal which confirmed the Commissioner's opinion that the avoidance of tax in respect of the sum of £3,924 was due to fraud or evasion. The taxpayer next appealed to the Full Court of the Supreme Court. That Court in the first instance remitted the matter to the Board of Appeal with the direction that it should state in writing its finding of fact with respect to the matter and its reasons in law for its decision as

required by section 242 (2) of the Act in question. This was accordingly done and the appeal was heard by the Full Court. In the result that Court dismissed the appeal whereupon the taxpayer lodged an appeal to this Court. I find it unnecessary to pass upon the question "as to the extent to which the Board's ~~opinion~~ decision is examinable" because, even if the opinion of the Commissioner or of the Board were reviewable, I agree with Bavin J. in thinking that the evidence in this case justifies the conclusion of the Board that the avoidance of the tax in the year in question was due to fraud and evasion.

3.

It is, I think, inexpedient to attempt ~~and~~ to give an inclusive and exclusive definition of these expressions. In the past Lord Hardwicke and Lord Eldon declined to define fraud as a general proposition "lest other means of avoiding the equity of the Court should be found out", Lawley v. Hooper, 3 Atk. 278 at p. 279; Mortlock v. Buller, 10 Ves. 291 at p. 306. And where these learned persons have feared to tread with regard to fraud and its infinite variety it would be vain for me to rush in with a definition of evasion.

For these reasons I am of opinion that the appeal should be dismissed.

BARRIPP V THE COMMISSIONER OF TAXATION OF THE STATE OF NEW  
SOUTH WALES.

JUDGMENT.

STARKE J.

Appeal from a judgment of the Supreme Court of New South Wales, which dismissed an appeal on the part of the appellant Barripp from a decision of the Board of Appeal constituted under the Income Tax (Management) Act 1936.

In 1928, the Commissioner of Taxation, pursuant to this Act, assessed the appellant to income tax for the year of income which ended on 30th. June 1927, and in 1938 he amended that assessment by adding thereto a sum of nearly £3924 which had been omitted by the appellant from the return of his income for the year of income already mentioned. This sum represented the profit on sale of certain property at Bondi which, it is not denied, was taxable income.

By Sec.210 of the Act, the Commissioner is authorised at any time to amend any assessment by making such alterations thereon or additions thereto as he thinks necessary, notwithstanding tax may have been paid in respect of the assessment, where the Commissioner is of opinion that there has been an avoidance of tax and that the avoidance is due to fraud or evasion. Both the Commissioner of Taxation and the Board of Appeal were of opinion that there had been an avoidance of the tax in respect of the sum mentioned and that the avoidance was due to fraud or evasion. It was contended for the Commissioner, on the authority of *Moreau v Federal Commissioner of Taxation*, 39 C.L.R. 65, that the opinion of the Commissioner of Taxation and the Board of Appeal that tax had been avoided by fraud or evasion could not be overridden not examined in any Court of law unless the opinion were so fantastic and capricious that it could not have been formed in good faith or at all. The learned Chief Justice of the Supreme Court, with reluctance, and Roper J. also acceded to

this argument, but Bavin J. did not find it necessary to express any opinion on the matter, for he reached the conclusion that, assuming the whole matter, including the correctness of the opinion as to fraud or evasion, were open to review, still there was no ground for disturbing the conclusion of fact which the Commissioner and the Board had reached.

It appears to me, as it did to Bavin J., that it is unnecessary in this case to resolve the important question whether the opinion of the Commissioner and the Board is or is not examinable, for the evidence supports the finding or opinion of the Commissioner and the Board of Appeal that there had been an avoidance of tax on the part of the appellant for the year of income and that the avoidance was due to fraud or evasion. But I may point out that the opinion of the Commissioner and the Board merely authorises the amendment of an assessment, which is a mere administrative act: it does not preclude a taxpayer from disputing his liability to assessment under Sec. 230 on other grounds, though, if Moreau's Case is rightly decided, the opinion of the Commissioner would preclude him challenging the authority of the Commissioner to amend the assessment.

It is conceded in the present case that the appellant was assessable to tax in respect of the sum of £3924 for the year of income which ended on 30th. June 1927. The sum was shown in the revenue account in his books for the six months ended 30th. June 1927 as a profit on sale. It was never returned as income, and tax was avoided. The excuse put forward was that the sum represented a balance of purchase money which had not been paid or received by the appellant but had been secured by mortgage. The Commissioner may not have heard, but the Board heard the confused account of the appellant and his accountant in relation to the matter, but did not accept the view that the



appellant omitted the sum from his return for the reason assigned. The Commissioner and the Board had no doubt, I think, nor have I, that the sum was knowingly omitted from the appellant's return and was concealed from the tax authorities for many years. The Board of Appeal, which saw and heard the appellant, was in a better position to reach a proper conclusion than is any tribunal which has not had that advantage. Moreover, the evidence establishes that in other years the appellant had not made the mistake now suggested but had returned his profits on the sale of land when he ascertained them.

This appeal should be dismissed.

BARRIPP v. THE COMMISSIONER OF TAXATION OF  
NEW SOUTH WALES.

JUDGMENT:

McTIERNAN J.

The appellant's assessment for income tax for the year ending 30th June 1927 was amended by the Commissioner in February 1939. The Commissioner exercised the powers which he has under the terms of sec. 210 (2) of the Income Tax (Management) Act 1936. The legal basis for the Commissioner's action was that he formed the opinion that there had been an avoidance of tax by the appellant on the sum of £3923.17.7, part of the appellant's income in the year ending 30th June 1927 and that the avoidance was due to fraud or evasion. The taxpayer appealed to the Board of Appeal constituted under Part V of the Act against the disallowance by the Commissioner of an objection to the amendment of the assessment. The appeal was made under sec. 231 which gives a taxpayer a right of appeal to the Board only, the alternative right of appeal to the Court being expressly excluded by the section. The Board dismissed the appeal. In giving its decision it stated that "on the evidence submitted the Board is not prepared to disturb the Commissioner's decision that the omission of this amount (£3923.17.7) was due to fraud or evasion". The taxpayer appealed to the High Court against the judgment of the Full Court. He again contests the correctness of the Board's finding. But there is also the question whether an appeal lies to the Full Court against a decision of the Board affirming a decision of the Commissioner given in the exercise of a discretion conferred on him under the Act. This Court took the course of examining the appellant's criticism of the Board's decision before embarking on a full consideration of the question whether the appeal has any statutory foundation. Both questions were argued by appellant's Counsel but after hearing the Commissioner's Counsel in support of the Board's decision the Court did not trouble him with the

other question. I therefore pass no opinion on it. I shall not repeat the evidence. The facts proved come down to these. The appellant received the omitted income in that year. He knew that he received it in that year. He omitted it from his return. He knew or the knowledge ought to be imputed to him that it was omitted. He gave as an explanation that he believed it was not taxable in that year. But the question whether the excuse offered could change the complexion of the facts proved is only an abstract one because the reality of the excuse was not established. The case therefore stands in this situation. The appellant intentionally omitted the income from the return and there is no credible explanation before the Court why he did so. His conduct in my opinion answers to the description of an avoidance of taxation at any rate by evasion. In my opinion the appeal should be dismissed with costs.

Judgment.

Williams J.

The appellant is a taxpayer who omitted from his income tax return for the year ending 30th June 1927 the sum of £3923-17-7 of admittedly taxable income.

He had been for some years prior to that date engaged in the business of buying and selling real estate and the sum in question represented the profit on the sale of certain properties at Bondi Road Bondi. In subsequent years he continued to be engaged in this business.

His practice was to enter the profit on any sale in his books in the year it was completed, whether the sale was for cash or part of the purchase money was left outstanding on mortgage. In every case, except the one in question, this profit was returned as income in the income tax return for the same year.

In February 1939 the Commissioner made an amended assessment for the year ending 30th June 1927, and, as more than six years had elapsed since the date upon which the tax became due and payable under the original assessment, he did so on the basis that he was of opinion that there had been avoidance of tax and that the avoidance was due to fraud or evasion. See sec.210(2)(a) of the Income Tax Management Act (New South Wales) 1936.

The appellant appealed to the Board of Review and the Board held that it was not prepared to disturb the opinion of the Commissioner. It certified the amount of tax in dispute between the appellant and the Commissioner exceeded the sum of £300; and he appealed, in accordance with sec.249 of the Act, to the Supreme Court consisting of three Judges which dismissed the appeal with costs. Two grounds were <sup>taken</sup> argued on the appeal to this Court (1) the extent to which the decision of the Board of Review not to disturb the opinion of the Commissioner was open to review under this section; and (2), if there was a general right of appeal, whether the evidence adduced before the Board established that the avoidance of the tax was due to fraud or evasion. Both grounds were fully argued by counsel for the appellant. Counsel for the respondent was then called upon to argue the second ground first; and, the Court being against the appellant on this ground, he was then relieved from arguing the first ground. I do not feel, therefore, that I ought to express any opinion on the first <sup>ground</sup> point.

except to say that I agree with the view of the Supreme Court that there is no evidence which suggests that the Commissioner or the Board acted capriciously or fancifully or upon legally irrelevant or inadmissible grounds."

With respect to the second ground I am satisfied that the Board came to a correct decision.

It is inadvisable to attempt to define what is meant by evasion in the Act. Its meaning is discussed in *Wilson v. Chambers & Co. Pty. Ltd* 38 C.L.R. 131. It is sufficient for the purpose of this appeal to say that where a taxpayer makes a profit, which he knows to be taxable income, and wilfully omits this profit from his income tax return, he would be guilty of evasion in the absence of some satisfactory explanation for the omission. That is exactly the position in the present case. The appellant's books, which show that the profit was carried to his revenue account for the year ending 30th June, 1927, were kept by his Accountants; and they have attempted to suggest that the amount may have been omitted from his income tax <sup>return</sup> for that year because the profit was not received in cash but remained outstanding on mortgage. Their evidence is vague and unsatisfactory and they obviously have no real recollection of why the item was omitted. Their attempted explanation is pure guess work and the evidence shows that it is inaccurate. If it was accurate the profit would have been placed in a Suspense Account or otherwise segregated, so as to insure that it would be brought into the Revenue Account, and returned in the appellant's income tax returns, as and when the outstanding amounts were received in cash. But this was not done, and, although <sup>some to talking</sup> over £1900 have in fact been got in, no part of this <sup>amount</sup> ~~sum~~ has been included in any subsequent return.

This is not the only case in which the appellant has failed to return taxable income. For the year ending 30th June 1925 he failed to return the sum of £2219 being part of the profit made on the sale of properties in Oxford Street. For several years he failed to return commissions which he had received for obtaining Insurance policies amounting to several hundred pounds. In partnership with his Mother he owned certain shops and flats at Hall Street, Bondi. When a settlement occurred, causing a crack in the walls of the flats, he proceeded to sell these properties at a substantial profit. The settlement became

worser and the purchaser threatened to rescind the contract but the appellant resisted. The defect was due to an underground sewer, owned by the Water and Sewerage Board, which agreed to resume the property at a price which gave the purchaser a 10% profit. When the appellant heard of this, he expressed a willingness to rescind the contract, apparently in the hope of acquiring this profit, in addition to the substantial profit he had already made on the sale. He did not return this profit as taxable income. The Commissioner included it in an amended assessment but the Board of Review held that ~~it~~ <sup>the property</sup> had been acquired otherwise than for the purposes of re-sale at a profit. It is possible that the profit in question on this appeal was omitted in the same way as that profit, and that, when they were subsequently challenged, he found he had a good excuse in the one case but that a different excuse would have to be invented to meet the other.

The evidence also shows that he made himself a party to a transfer of assets belonging to his Mother from her name into that of his Father for the express purpose of avoiding income tax, and to the placing of other assets belonging to his Mother in his own name and those of her other children for the same purpose.

Such a taxpayer can hardly complain that the Commissioner and the Board should have formed the opinion that his avoidance of tax was, in the particular instance as in other instances, due to fraud or evasion or that a Court of Appeal should form the same opinion.

The appeal should be dismissed with costs.