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No. 123 of 1929.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA. 31 OCT 1958

UNIVERSITY OF LONDON
INSTITUTION OF BANKERS
LEGAL DEPARTMENT

Between THE SHELL COMPANY OF AUSTRALIA
LIMITED formerly named BRITISH
IMPERIAL OIL COMPANY LIMITED *Appellant,*

15044

AND

THE FEDERAL COMMISSIONER OF
TAXATION *Respondent.*

Case

OF THE RESPONDENT.

1. This is an appeal from two judgments of the High Court of Australia viz: (1) a judgment dated 25th August 1926 determining a case stated by the Supreme Court of Victoria arising out of an assessment on the Appellant to Federal Income Tax for the financial year 1924-5 and (2) a judgment (following upon the decision of the case stated) dated the 31st October 1927 dismissing the appeal of the Appellant from a judgment of the Supreme Court of the State of Victoria (Cussen J.) dated the 16th September 1927 whereby it dismissed the appeal of the Appellant from such assessment.

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p. 8, l. 10.
p. 49, l. 1.
p. 46, l. 1.

10 2. The Appellant is a company incorporated in Great Britain and carrying on in the Commonwealth of Australia the business of selling oil, petrol and petroleum products.

3. In this appeal the Appellant is disputing the validity of certain Income Tax Assessment Acts under which it was assessed as being contrary to paragraphs 71, 72 and 55 of the Commonwealth of Australia Constitution Act.

These paragraphs are as follows:—

“ 71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other federal courts as the Parliament creates, and in

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such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.”

“ 72. The Justices of the High Court and of the other courts created by the Parliament—

(i) Shall be appointed by the Governor-General in Council :

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity :

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(iii) Shall receive such remuneration as the Parliament may fix, but the remuneration shall not be diminished during their continuance in office.”

“ 55. 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.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of 20 excise only.”

4. Owing to the fact that under Section 53 of the Constitution the Senate cannot amend proposed laws imposing taxation it has been the practice in the Commonwealth Legislature to have each year two Acts dealing with Income Tax. One “ an Act to impose taxes upon income ” which the Senate cannot amend; another an “ Income Tax Assessment Act ” dealing with methods of assessment, rights of objection and appeal, collection and so forth. This latter Act is subject to amendment by the Senate and is expressly incorporated in the Act imposing the tax.

5. The Income Tax Assessment Act 1922-1924 set up a Board of 30 Appeal whose members held office for a term of seven years to which in certain cases a taxpayer objecting to an assessment could resort, and from decisions of which on matters of law an appeal lay to the Courts. The constitutionality of that Board of Appeal was challenged and in the case of *British Imperial Oil Company v. The Federal Commissioner of Taxation* 1925 C.L.R. 422 the High Court of Australia held contrary to the contentions of the Respondent that it was not validly constituted. The grounds of that decision were that Parliament had purported to confer on the Board powers which were part of the judicial power of the Commonwealth; that by Section 71 of the Constitution such 40 powers could only be vested in a Court whose members had the tenure of office prescribed by Section 72; and that the members of the Board of Appeal had not that tenure.

6. The construction of Section 72 on which the High Court based their judgment was the construction placed on it by the majority in the case of *Waterside Workers v. Alexander* 25 C.L.R. 434. In that case it was held by the High Court (Higgins and Gavan Duffy, JJ., dissenting) that Section 72 required that every Justice of the High Court or any other Court created by the Federal Parliament should, subject to the power of removal contained in that section, be appointed for life.

7. In the present appeal the Respondent submits that this construction is wrong. The High Court in the case cited held that the words in Section 72 (ii) “ shall not be removed ” (see paragraph 3 *supra*) covered a cessation of office by the expiry of a term of appointment for a period of years or otherwise limited in time—for example by the attainment of a certain age. Such a cessation it was held was forbidden by the section. The minority construed removal as covering only removal during the term of appointment whatever that term might be.

8. It is submitted that the minority were right. The word “ removed ” is a wholly inapt word to apply to a cessation of office on the expiry of a defined term of office, and is never so used. Further, if it had been intended that all appointments should be for life, such intention would, it is submitted, have been expressly enacted.

9. The point was not open in the present case to the Respondent in the High Court who decided in his favour on other grounds. The Respondent, however, desires to take the point in this appeal and if accepted it does, as will be seen, dispose of all but one of the Appellant's contentions.

10. Subsequent to the decision in the *British Imperial Oil Company v. The Federal Commissioner of Taxation* 1925 C.L.R. 422 referred to in paragraph 5 hereof the Federal Parliament passed the Income Tax Assessment Act 1925, which repealed certain provisions of the earlier Act, amended others and enacted further provisions. Briefly it reconstituted the Board of Appeal as a Board of Review to which in certain cases a taxpayer could go to have a decision of the Commissioner reviewed. The Appellant in the High Court as part of his argument contended that the Board of Review was not validly constituted having regard to Section 71 of the Constitution and was open to the same objection as the former Board of Appeal; that the provision under which he was assessed was inseparably bound up with the provisions as to the Board of Review; and that therefore his assessment was invalid.

11. The points under Section 55 arise in the following way. The Act of 1922-1924 Section 28 (1) and (3) under which the Appellant was assessed provided as follows:—

“ (1) When any business which is carried on in Australia is controlled principally by persons resident outside Australia and it

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appears to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business as the Commissioner in his judgment thinks proper."

"(3) A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal and the Commissioner shall refer the case accordingly."

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12. The Appellant's arguments under Section 55 are two in number. The first proceeds on the basis of a contention similar to that set out in paragraph 10 as applied to the unamended 1922-1924 Act viz. that the provision in Section 28 (1) and assessments thereunder are invalidated by the decision which held the Board of Appeal not to be validly constituted. If this which is disputed is correct then the assessment made on the Appellant was no doubt invalid when made as at that date namely on 28th March 1925 the Act of 1925 had not been passed. That Act however expressly validates such assessments and further enacts that Section 28 (3) of the 1922-1924 Act referring to the Board of Appeal is to be deemed to have been repealed as from 1922. The material sections are as follows:—

"SECTION 7. Section 28 of the Principal Act is amended by omitting Sub-section (3) thereof."

"SECTION 16. Every assessment determination or decision of the Commissioner, Assistant Commissioner or Deputy Commissioner made under the Income Tax Assessment Act 1922, the Income Tax Assessment Act 1922-1923 or the Principal Act shall be as valid and effectual as if made under the Principal Act, as amended by this Act, and, for the purposes of any such assessment, determination or decision, the amendments contained in Sections 3, and 5 to 14 inclusive, of this Act shall be deemed to have been in force at the time of the assessment, determination or decision was made or given."

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"SECTION 17. Every assessment of the Commissioner, Assistant Commissioner or Deputy Commissioner, made under any Act repealed by the Principal Act, shall be as valid and effectual as if any Board of Appeal under the Act so repealed had been a Board of Review constituted in the same manner, and having the same powers and functions, as a Board of Review, under the Principal Act as amended by this Act."

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"SECTION 24. . . section 7 of this Act shall be deemed to have commenced upon the date of the commencement of the Income Tax Assessment Act 1922."

13. In the first place the Appellant contended :—

(a) That the effect of those sections was to impose taxation in that by validating invalid assessments they imposed a liability which but for those provisions would not have existed.

(b) That the Act therefore offended against the first part of Section 55 of the Constitution in that it imposed taxation but did not deal only with the imposition of taxation.

14. Apart from the above contentions the Appellant further contended :—

10 (a) That Section 28 of the 1922-24 Act introduced a new subject of taxation, i.e., a subject other than income, and imposed taxation on such new subject.

(b) That the whole of the rest of the Act therefore fell under the first part of Section 55 and was of no effect.

20 (c) That Section 28 of the 1922-24 Act being incorporated, as it was, into the contemporaneous " Act to impose Taxes upon Incomes " thereby introduced into that Act a second subject of taxation and the whole—namely the ordinary income tax and the tax under Section 28 were invalidated under the second paragraph of Section 55.

15. The notice of assessment in question in the present case was given to the Appellant on the 28th March 1925 in respect of income for the year 1923-24, and in respect of tax payable during the year 1925. Such assessment was made under Section 28 of the 1922-24 Act and was prior to the passing of the 1925 Act. p. 3, l. 18.

16. On the 4th May 1925 the Appellant lodged an objection in writing against the said assessment, and in such objection challenged the validity of the assessment in writing and the legislation under which it was made. On the 1st December 1925 after the passing of the 1925 Act the Respondent by notice in writing disallowed the objection and on the 24th December 1925 the Appellant requested the Respondent to treat its objection as an appeal and to forward it to the Supreme Court of the State of Victoria. p. 4, l. 31. p. 6.

17. On the 7th May 1926 the case came before the Supreme Court of the State of Victoria and His Honour Mr. Justice Macfarlan stated a case in writing for the opinion of the High Court upon the following questions :— pp. 1-3.

(1) Did the assessment cease to be valid or operative upon the arising of the dissatisfaction of the Appellant therewith?

40 (2) Is the assessment appealed against good in law?

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 pp. 9-45.
 p. 46, l. 1.
 p. 49, l. 1.

18. The High Court by a majority (Isaacs, Higgins, Gavan Duffy, Rich and Starke, J.J.; Knox, C.J. dissenting) answered the questions in favour of the validity of the assessment. The case was thereupon referred back to the Supreme Court, who dismissed the Appellant's appeal on the 16th September, 1927. From this order the Appellant appealed to the High Court in its Appellate jurisdiction and the High Court dismissed the appeal on the 31st October, 1927. The present appeal is against both decisions of the High Court.

19. If the Respondent is right in his contention that the case which decided the unconstitutionality of the Board of Appeal was wrongly 10 decided all the Appellant's contentions except one fail *in limine*. The only one which would remain to be considered would be that in paragraph 14. It is, however, necessary to consider and set out shortly the alternative answers to the Appellant's contentions which are substantially those accepted by the High Court.

20. The Appellant it will be seen did not exercise his right to go to the Board of Review but chose the alternative course open to him to go to the Supreme Court of Victoria. The constitutionality of the Board of Review therefore only arises on the contention that the provisions of Section 28 are inseparably connected with those giving a 20 right to go to the Board of Review, and that therefore the former stand or fall with the latter.

21. It is submitted that there are no grounds for this contention. Section 28 (1) provides a method of assessment in a particular class of case. The Legislature enacted that a taxpayer who objected to a decision of the Commissioner under that section could at his option either have that decision reviewed by the Board of Review or appeal to the High Court or Supreme Court. This is provided by Section 50 (4) of the 1922-1924 Act which as amended by the 1925 Act is as follows:—

“SECTION 50 (4). A taxpayer who is dissatisfied with the 30 decision of the Commissioner, Assistant Commissioner or Deputy Commissioner may within thirty days after the service by post of notice of that decision:—

(A) in writing, request the Commissioner to refer the decision to a Board of Review for review; or

(B) in writing, request the Commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State.”

22. It is submitted that there is no principle of construction by which the invalidating of Section 50 (4) (A) would involve the invalidat- 40 ion of the Commissioner's decision and the assessment originally made. Any such argument must be based on the suggestion that the Legislature

if told they could not validly constitute a Board of Review would have abandoned Section 28 (1).

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23. The Respondent further submits that the Board of Review as constituted under the 1925 Act is not a court within Section 71 and Section 72 of the Constitution. The material provisions are as follows :—

1922-1924 Act as amended by 1925 Act :—

“ SECTION 41 (1). For the purposes of this Part, there shall be a Board or Boards of Review.

10 (2) Each Board shall consist of a Chairman and two other members who shall be appointed by the Governor-General.

(3) The persons who were, prior to the commencement of this section, appointed, in relation to income tax, to be members of a Board of Appeal, shall be deemed, as from the commencement of this Act, to have been appointed to be members of a Board of Review and shall continue to hold office as such members as if appointed under this Act.

(4) The members of a Board shall hold office for a term of seven years, but shall be eligible for re-appointment.”

20 “ SECTION 44 (1). A Board of Review shall have power to review such decisions of the Commissioner, Assistant Commissioner or Deputy Commissioner as are referred to it by the Commissioner under this Act and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and the decisions of the Board upon Review, shall, for all purposes (except for the purposes of Sub-section (4) of Section 50 and Sub-section (6) of Section 51 of this Act) be deemed to be assessments, determinations or decisions of the Commissioner.”

30 “ SECTION 50 (1). A taxpayer who is dissatisfied with the assessment made by the Commissioner under this Act may, within forty-two days after service by post of the notice of assessment, post to or lodge with the Commissioner an objection in writing against the assessment stating fully and in detail the grounds on which he relies.

(2) The Commissioner shall consider the objection, and may either disallow it, or allow it, either wholly or in part.

(3) The Commissioner shall give to the objector written notice of his decision on the objection.

40 (4) A taxpayer who is dissatisfied with the decision of the Commissioner, Assistant Commissioner or Deputy Commissioner

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may within thirty days after the service by post of notice of that decision :—

(A) in writing, request the Commissioner to refer the decision to a Board of Review for review; or

(B) in writing, request the Commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State.”

“ SECTION 51 (1). Where a taxpayer has, in accordance with the last preceding section, requested the Commissioner to refer a decision to a Board of Review, the Commissioner shall, if the tax-10 payer’s request is accompanied by a deposit of such amount as is prescribed for the particular class of case, refer the decision to the Board not later than thirty days after receipt of the request.

(2) A taxpayer shall be limited on the review to the grounds stated in his objection.

(3) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment to be dealt with by the Board under the next succeeding sub-section.

(4) The Board, on review, shall give a decision and may either 20 confirm the assessment or reduce, increase or vary the assessment.

(5) The Board may, if it considers the reference to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount deposited in accordance with Sub-section (1) of this section.

(6) The Commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law.”

“ SECTION 51A. (1) Where a taxpayer has, in accordance with Section 50 of this Act, requested the Commissioner to treat his objection as an appeal and to forward it to the High Court or the 30 Supreme Court of a State, the Commissioner shall forward it accordingly.

(2) The appeal shall be heard by a single Justice of the Court.

(3) A taxpayer shall be limited, on the hearing of the appeal, to the grounds stated in his objection.

(4) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment appealed from.

- (5) On the hearing of the appeal, the Court may make such order as it thinks fit, and may reduce, increase or vary the assessment.
- (6) An order of the Court shall be final and conclusive on all parties except as provided in this section.
- (7) The costs of the appeal shall be in the discretion of the Court.
- 10 (8) On the hearing of the appeal, the Court may, if it thinks fit, state a case in writing for the opinion of the High Court upon any question which in the opinion of the Court is a question of law.
- (9) The High Court shall hear and determine the question, and remit the case with its opinion to the Court below, and may make such order as to costs of the case stated as it thinks fit.
- (10) The Commissioner or a taxpayer may appeal to the High Court, in its appellate jurisdiction, from any order made under Sub-section (5) of this section."

24. It is submitted that the Board of Review is essentially and plainly administrative machinery, to which the taxpayer can resort at his option, in order to have his contentions reconsidered. The decision
20 is deemed to be a decision of the Commissioner, that is an administrative decision except for the purposes of Section 50 (4) and Section 51 (6). Section 50 (4) is irrelevant to the present consideration. Section 51 (6) shows that the decision of the Board of Review differs only from the Commissioner's decision in that it is final if in the opinion of the High Court questions of fact only are involved. As stated by Isaacs J. in his judgment "The power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action. That is an attribute common to administrative bodies, to subordinate bodies that are adjuncts to legislation, and to judicial bodies." . . . "Government
30 could not be carried on without some administrative power of finally determining disputed facts." The learned judge proceeds to refer to analogous provisions of the Trade Marks Acts, the Patents Act and the Commonwealth Public Service Act.

p. 18, l. 28.

25. It would be, it is submitted, a most remarkable result if the Legislature of the Commonwealth could not set up administrative machinery for the final determination of facts, even apart from the circumstance of the present case that the subject need not unless he chose resort to that machinery but can disregard it and submit his contentions both of fact and law to the Courts.

40 26. It is submitted that the first argument under Section 55 of the Constitution which is set out in paragraph 13 *supra* is fallacious. In the first place the Respondent submits that assessments under Section 28

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of the 1922-1924 Act as unamended were not invalidated by the decision which held the Board of Appeal not to be validly constituted. The argument is the same as that set out in paragraph 22.

27. Alternatively the scheme of the taxing legislation is plain and in accordance with the Constitution. The tax is imposed by the "Act to impose taxes upon incomes." The Assessment Acts assume such imposition and deal with its assessment, collection, etc. The distinction between the imposition of the tax on the one hand and the necessary steps or machinery by which the amount payable is determined and legal liability created on the other is fundamental and patent. The sections 10 in the 1925 Act come merely to this:—Certain steps which have been taken in the past are in law steps which create an actual liability to pay an amount in respect of the tax imposed by the Act to impose taxes.

28. On any other view the whole scheme of the legislation falls to the ground. In order to create liability the amount of taxable income must be ascertained. This is done under the Assessment Acts. Part III of the Assessment Act 1922-1924 is intitled "Liability to Taxation." The whole Act is full of provisions but for the existence of which no liability would in particular cases be created. As is stated by Isaacs J. dealing with a similar argument based on Section 22 of the 1925 Act in the case of 20 *Munro v. The Federal Commissioner of Income Tax* which was heard with the present case by the High Court and is dealt with in the same judgments "Section 22 is merely an amendment of the former Assessment Act and deals with official formalities. It does not purport to 'impose taxation'; it assumes the existence of a law imposing taxation, it assumes official action under an assessment law relating to such taxation, and then it prescribed the nature of a sufficient official act for the purpose of recovering the tax already imposed and ascertained by assessment."

p. 23, l. 20.

29. The answer to the second argument set out in paragraph 14 30 *supra* is that Section 28 does not deal with a new subject of taxation. The subject of taxation is income. Section 28 is one among other provisions of the Assessment Act laying down how the amounts on which the tax is to be levied are to be ascertained. It deals with cases in which circumstances offer facilities for evasion, and where therefore the normal method of ascertaining the profits arising in Australia does or may break down. The income, that is the profits really being made, is to be ascertained and assessed by the Commissioner as a percentage of total receipts. It is submitted there are no grounds for suggesting that in these circumstances a fresh subject of taxation is being introduced. 40

pp. 9-45.

30. Very full reasons are given by the majority in the judgments in the High Court dealing with this and the other case referred to above, to which the Respondent will refer and on which he relies.

31. The Respondent submits that the decisions of the High Court were right and should be affirmed for the following amongst other

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REASONS

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- (1) Because a court within Section 71 of the Constitution can be validly constituted of members whose tenure of office is for seven years.
- (2) Because the decision in the *British Imperial Oil Company v. The Federal Commissioner for Taxation*, 25 C.L.R. 422, which held the Board of Appeal constituted under the 1922-4 Income Tax Assessment Act to be invalid was wrongly decided and ought to be overruled.
- (3) Because the provisions as to the Board of Review are separable from the provisions under which the Appellant was assessed, and the validity of the constitution of the Board of Review is not material to this appeal.
- (4) Because the Board of Review is validly constituted and the law establishing it does not and does not purport to confer on it judicial power within the meaning of Section 71 of the Commonwealth of Australia Act, 1900.
- 20
- (5) Because the provisions as to the Board of Appeal were separable from the provisions under which the Appellant was assessed and the invalidity of the Board of Appeal did not invalidate the assessment made on the Appellant at the date when it was made or at all.
- (6) Because the validating by the Income Tax Assessment Act 1925 of the assessment in question in this appeal does not make that Act a law imposing taxation within the meaning of Section 55 of the Commonwealth of Australia Act 1900.
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- (7) Because an assessment under Section 28 (1) of the Income Tax Assessment Act 1922-1924 or 1922-1925 is an assessment in respect of income tax within the meaning of the "Act to Impose Taxes upon Incomes" 1924, and the section does not and does not purport to introduce a fresh subject of taxation within the meaning of Section 55 of the Commonwealth of Australia Act 1900.
- (8) Because the assessment in question in this appeal did not cease to be valid or operative upon the arising of the dissatisfaction of the Appellant therewith.
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- (9) Because the assessment in question in this appeal is good in law.
- (10) Because the judgments of the Courts below are right and ought to be affirmed.

D. B. SOMERVELL.

In the Privy Council.

ON APPEAL
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BETWEEN

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OF THE RESPONDENT.

COWARD, CHANCE & CO.,
30, MINCING LANE, E.C. 3,
Respondent's Solicitors.