Privy Council Appeal No. 16 *of* 1940

W. R. Moran Proprietary Limited - - - - - *Appellants*

v.

The Deputy Commissioner of Taxation for The State of New South Wales Respondent and the Attorney-General of New South Wales and others Interveners.

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM
LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER

[*Delivered by* VISCOUNT MAUGHAM]

This is an appeal by special leave from a judgment of the Full High Court of Australia dated the 7th June, 1939, consisting of the Chief Justice Latham, Mr. Justice Rich, Mr. Justice Starke, Mr. Justice Evatt and Mr. Justice McTiernan. By the judgment it was ordered that the respondent (plaintiff in the action) do recover against the appellants the sum of £85 12s. for flour tax and additional tax alleged to be due to the Commissioner of Taxation under the provisions of two Commonwealth Acts entitled the Flour Tax (Wheat Industry Assistance) Assessment Act, 1938, No. 48, and the Flour Tax (Stocks) Act, 1938, No. 50. The grounds of defence were that the appellants were not indebted as alleged for the reason that the two Acts were invalid and ineffective as being *ultra vires* the Commonwealth Parliament. This defence raises questions of great constitutional importance.

It is not in dispute that the two Acts mentioned, together with several other Acts to be referred to later, were passed to give effect to a scheme which had been agreed between the Prime Minister of the Commonwealth and the Premiers of the six States after a conference at Canberra. The scheme is in fact mentioned in a preamble to one of the Acts in question. Its object and purpose was to ensure to wheat growers in all the States a payable price (as it was called) for wheat, and to raise the necessary sum by imposing a tax upon flour sold in Australia for home consumption. The Premiers on behalf of the States undertook to co-operate in the scheme by passing Acts in the States fixing prices for

flour sold for home consumption and providing for the distribution of the proceeds of the tax among wheat growers in proportion to the quantities of wheat respectively produced by them. The millers it was assumed would pass on the tax to the consumers, so that the ultimate result of the scheme would be that bread and other products of flour would be a little dearer than before, while the growers of wheat would be enabled to continue in business with the assistance of payments by the Commonwealth securing to them a payable price for their wheat. But here there arose a difficulty. Tasmania was in a special position, inasmuch as she alone of the States of the Commonwealth imports wheat from other States, and does so because the quantity of wheat grown in Tasmania is relatively insignificant. The result of this circumstance is that the people of Tasmania, if treated like the other States, would in the end have to bear the excise duty on flour by paying an increased price for bread and other wheat products whilst that State or its inhabitants would receive very little advantage from the distribution of the proceeds of the taxes which were being imposed on flour. This difficulty was by agreement to be met in this way. The scheme was to provide that the tax on flour was to be levied on flour consumed in Tasmania at the same rate as on flour consumed in the other States; but provision was to be made for the relief of Tasmania as a State to an amount not greater than the tax on flour collected in Tasmania. It was intended (following a course which had been previously adopted in Tasmania) that persons who paid the flour tax there would obtain relief out of the sums to be paid by the Commonwealth to Tasmania in the manner hereafter described.

Their Lordships agree with the High Court in the view that in the circumstances of the case there can be no objection to examining the scheme, including the record of what was done at the conference at Canberra; and they also agree that an examination of that record does not add anything to what is apparent upon the face of the Federal and State statutes. There has been no attempt to disguise, still less to conceal, what has been done in this matter and the reasons for doing it. The scheme admittedly could not have been carried out by the Commonwealth Parliament alone, and the main question is whether in the course of taking the predominant part in carrying out the scheme that Parliament has infringed the Constitution. Their Lordships however think it right to add that, at any rate in such a case as the present, where there is admittedly a scheme of proposed legislation, it seems to be necessary when the "pith and substance" or "the scope and effect" of any one of the Acts is under consideration to treat them together and to see how they interact. The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine. In the present case the purpose and substance of the Acts as a whole, which means little more than their scope and effect, may properly be looked at. The purpose in this sense is inseparably connected with the substance. This does not mean that the Court is to seek out

the objects, or the purpose, still less the intentions of the members of the Parliament or the members of the government responsible for passing the measure, but that, just as in construing a statute it is often necessary to ascertain the mischief which it was sought to remedy, so in such a case as the present it is necessary to examine the scheme, and to have regard to its ultimate effect or its function as shown in the various Acts, and also of course to its substance. (See the majority judgment in *The King* v. *Barger* (1908) 6 C.L.R. 41, at pp. 74 and 75.)

The scheme, as will shortly appear, was carried out by six Commonwealth Acts and by certain State Acts passed by the various States. The Acts passed by the Commonwealth Parliament imposing taxation provide, as the Constitution requires, for uniform taxes throughout the Commonwealth; but it is contended by the appellants that those Acts are "part of a scheme of taxation operating and intended to operate by way of discrimination between Tasmania and the other States," and that such Acts and taxes are accordingly contrary to the provisions of section 51 (ii) of the Constitution and are therefore *ultra vires* the Commonwealth and void.

It is convenient to mention here that a number of other objections to the Acts and the taxes were raised before the High Court of Australia and are dealt with in the judgments of that Court; but they were not raised before this Board and need not be further mentioned.

On the 2nd December, 1938, the Commonwealth Parliament passed four Acts imposing taxes upon flour and wheat and also an Act providing the machinery for the assessment of such taxes. These Acts are entitled and briefly provide as follows:—

The Flour Tax Act, 1938 (No. 49), which imposed a tax on flour manufactured in Australia by any person, and on or after the 5th December, 1938, sold by him or used by him in the manufacture of goods other than flour.

The Flour Tax (Stocks) Act, 1938 (No. 50), which imposed a tax on flour in excess of 1,000 lbs. held in stock on the 5th December, 1938, by any person other than the manufacturer of the flour.

The Flour Tax (Imports and Exports) Act, 1938 (No. 51), which imposed a tax on flour imported into Australia and on or after the 5th December, 1938, entered at the Customs for home consumption and also a tax upon wheat exported from Australia on or after a date to be fixed by Proclamation.

The Wheat Tax Act, 1938 (No. 52), which imposed a tax on wheat grown in Australia and on or after a date to be fixed by Proclamation sold to a wheat merchant.

The Flour Tax (Wheat Industry Assistance) Assessment Act, 1938 (No. 48), which provided the machinery relating to the imposition, assessment, and collection of the above taxes.

These Acts were designed according to the scheme to raise money by taxing flour and flour products so as to provide a fund available for the payment of monies to farmers of wheat. The tax was fixed upon the basis that 5s. 2d. per bushel of wheat on rail at Williamstown was a remunerative price, and the Acts were framed so as to secure to the wheat farmers a payment upon the basis of 5s. 2d. per bushel on rail at Williamstown. If the price of wheat rose above that amount a tax was to be imposed on wheat so as to form a fund out of which monies could be paid to millers.

On the same day the same Parliament passed another essential part of the scheme, the Wheat Industry Assistance Act, 1938 (No. 53). There is a preamble to this Act which briefly details (but without reference to Tasmania) the circumstances under which the Acts were passed and the general nature of the scheme which it was hoped to carry into effect. The preamble is in the following terms:—

> " Whereas at a Conference between the Prime Minister of the Commonwealth and the Premiers of the States held in Canberra, at the request of the Premiers, on the twenty-ninth day of August One thousand nine hundred and thirty-eight, the co-operation of the Government of the Commonwealth was sought in putting into operation a scheme to ensure to wheat growers a payable price for wheat.
>
> And whereas the Premiers on behalf of their respective States undertook that if the Commonwealth agreed to co-operate in the said scheme, legislation would be passed by the said States providing for the fixing of such prices for flour sold for home consumption in Australia as would provide for wheat growers a payable average price on all the wheat produced by them;
>
> And whereas in order to ensure a payable price in respect of the wheat sold for home consumption in Australia, it was represented at the said Conference that it would be necessary that a tax be imposed upon flour sold for home consumption in Australia and that the proceeds of the tax be distributed among wheat growers in proportion to the quantities of wheat respectively produced by them;
>
> And whereas the Prime Minister on behalf of the Commonwealth agreed that the Commonwealth would co-operate in the said scheme and that any legislation necessary on the part of the Commonwealth would be submitted to the Parliament of the Commonwealth;
>
> And whereas legislation has been passed by the Parliaments of the States providing for the fixing of prices for Flour sold for home consumption in Australia."

The most material sections of the Act were to the following effect:—

Section 5 provided for the creation of a Wheat Industry Stabilisation Fund into which should be paid all moneys to be collected under the Flour Tax (Wheat Industry Assistance) No. 48 Assessment Act and this covered Flour Tax under the Flour Tax (Stocks) Act, No. 50.

Sections 6 and 7 provided for payment out of the said Fund of certain payments to the States respectively in the nature of financial assistance.

> Section 14 provided for payment out of the said Fund to the State of Tasmania of such amount in each year by way of financial assistance as the Minister should determine, but so that the amount so to be paid in any year should not be greater than the sum by which the amount collected in that year for Flour Tax under the Assessment Act, No. 48, in respect of flour consumed in that State exceeded the total paid to that State in respect of that year under sections 6 and 7 aforesaid and no amount should be payable under section 14 in respect of any year during which no tax (subject to an exception therein mentioned) was collected under the Assessment Act, No. 48.

It will be noted that section 14 provides for special grants to the State of Tasmania in accordance with the scheme, and these are the payments (the greater parts of which were intended to be repaid to the millers) which it is asserted in effect amount to a discrimination in favour of Tasmania.

The State Parliaments had either passed, or had an applicable statute in operation, enabling them to fix the prices (at least maximum prices) of flour and bread in their States. The Tasmanian Act was entitled the Flour Tax Relief Act, 1938, and like all the other Acts was assented to on the 2nd December, 1938. It provided that persons in the State who paid flour tax to the Commonwealth might apply to a State official for relief and might thereupon obtain a payment by way of relief in respect of the flour tax paid by them or at least a large part of it.

The result of the scheme of Federal and State legislation is admirably summarized in the judgment of Latham C.J.:—

> "A federal excise duty is imposed upon flour which is paid upon the same basis by persons in all States. The proceeds of the duty go into the federal Consolidated Revenue. An equivalent sum is then taken from the consolidated revenue and is paid by the Commonwealth by way of financial assistance to the States of the Commonwealth, upon condition that the States apply the monies in the assistance and relief of wheat growers. In the case of Tasmania, however, a special grant is made by the Commonwealth which is not subject to any federal statutory conditions, but which in fact, is applied, and which it was known would be applied by the Government of Tasmania in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of flour consumed in Tasmania."

Its ultimate purpose or effect, whichever word is preferred, is to enable growers of wheat to continue in business.

The first question to be considered is whether inasmuch as the federal taxation Acts (Nos. 48 and 50 of 1938, above shortly stated) do not in any way discriminate between States or parts of States there is anything to invalidate those Commonwealth taxation Acts as being *ultra vires*. Section 51 (ii) of the Constitution provides that the Commonwealth Parliament shall have power to make laws "with respect to taxation, but so as not to discriminate between States or parts of States." This it is truly said relates only to the law-making powers of the Commonwealth. The

ultimate discrimination in favour of Tasmania in this case arises, it is contended, from the Tasmanian Act above mentioned; and the action of that legislature in relation to the sums paid to the State by the Commonwealth cannot be an infringement of section 51 (ii) because that section does not apply to the Parliament of Tasmania. Anything it is suggested will be *intra vires* provided that the Commonwealth's Taxation Act or Acts do not infringe the terms of section 51 (ii). With the greatest respect to those Judges in Australia who may have accepted this contention, it seems to their Lordships to go too far and certainly much further than is necessary for the decision of the present case. It would seem to justify every case in which there is a Taxation Act containing no discriminatory provisions followed by an Appropriation Act or a Tax Assessment Act passed by the Commonwealth Parliaments authorising exemptions, abatements or refunds of tax to taxpayers in a particular State. It was argued before their Lordships that this would be *intra vires*. In the view of this Board it is impossible to separate such an Appropriation or Tax Assessment Act from the Taxation Act in considering the effect of section 51 (ii), or to turn a blind eye to the real substance and effect of Acts passed by the Federal Parliament at or about the same time, if it appears clear from a consideration of all the Commonwealth Acts that the essence of the taxation is discriminatory. Laws imposing taxation must deal with one subject of taxation only (section 53 of the Constitution), and the established practice in Australia is to follow the Taxation Act with an "Assessment" Act providing for the collection and recovery of the tax, for exemptions and for refunds in appropriate cases. In the opinion of their Lordships these Acts are all laws "with respect to taxation", all "relate to taxation," and taken together must not discriminate between States or parts of States.

In the present case however the matter is not so simple. The discrimination in favour of Tasmania, if it should be so described, is effected by the exercise in combination of three powers. One is that of the Commonwealth Parliament derived from section 51 (ii) already mentioned; another is that contained in section 96 of the Constitution under which the Commonwealth Parliament can grant financial assistance to any State or States so long as that power remains in force. The third power is that of the Tasmanian Parliament to distribute the financial assistance obtained from the Commonwealth in giving relief to persons within the State who pay flour tax. A discrimination brought about in this way is asserted to be unobjectionable, since it is not within the prohibition on Commonwealth Powers contained in section 51 (ii).

The first answer of the appellants to this contention is that section 51 (ii) contains a constitutional prohibition against any discrimination as regards taxation between States or parts of States, from which it is said to follow that no grant of financial assistance can be made to any State which would have the effect directly or indirectly of creating

such a discrimination. It is impossible to accept the contention in this wide form, for section 51 relates to a number of powers which are conferred upon the Commonwealth Parliament as regards the laws which may be made by Parliament for the peace, order, and good government of the Commonwealth and these powers are expressly made " subject to this Constitution," a qualification which must include the power under section 96 (for a period which might be limited) to grant financial assistance to any State. So far from section 96 being subordinate to section 51 (ii), or it may be added to section 51 (iii), it would be more plausible to contend that powers conferred by section 51 are subordinate to section 96, and that the power of the Parliament under that section can be exercised even so as to effect a plain discrimination. The question then arises whether this view can be accepted with or without qualification.

In dealing with the true construction of a Constitutional Act such as we are now considering it is necessary to bear in mind that it substitutes a federal commonwealth for a number of separate colonial governments with their own legislative assemblies and powers of self-government. Such matters as tariffs, taxation, bounties, intercommunications have to be agreed between the constituent States before federation is possible, and it is evident that the constitution ultimately agreed upon will contain certain prohibitions intended to provide fair and equal treatment between the States so far as that is reasonably possible in a written constitution. Without travelling into the history of the making of the Australian Commonwealth during the years from 1889 to 1900 or the special circumstances of the six States which by referendum agreed to the bill which contained the Constitution ultimately embodied in The Commonwealth of Australia Constitution Act of 1900, there can be no doubt as to the necessity for the important restrictions or powers contained in the sub-clauses of section 51:—" (ii) Taxation; but so as not to discriminate between States or parts of States. (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth."

On the other hand no one can suppose that these qualifying sentences were ever regarded as affording protection against inequality as between the States in the incidence of taxation or in the advantages to be gained from bounties. The Commonwealth is very rich in minerals of many kinds, but they are, of course, unequally distributed between the States. Moreover, the climatic and soil conditions and the state of development are very different in these various areas. Uniform taxes on selected metals or, for example, on the coal produced in the States may impose a heavy burden on some States whilst leaving other States wholly untouched or only slightly affected; and the same remark is true as to the agricultural produce or the products of stock-raising in the various States. (See *The King* v. *Barger*, 1908, 6 C.L.R. 41, at p. 70.) This was and is obvious, and it would be a mistake to regard the restrictions contained in section 51 (ii)

and (iii) as providing for equality of burden as regards taxation or equality of benefit as regards bounties. That could perhaps have been achieved by provisions of a very different nature which would have had regard to the amounts raised by taxation or the amounts of the bounties received in the different States. There was no attempt to do this in the Constitution, and sub-section (ii) provides only that taxation shall be such that it does not discriminate between States. As Isaacs J. observed in *The King* v. *Barger* (1908) 6 C.L.R. 41, at p. 108—a statement approved in *Cameron* v. *Deputy Federal Commissioner of Taxation for Tasmania* (1923) 32 C.L.R. 68:—

> " . . . the pervading idea is the preference of locality merely because it is locality and because it is a particular part of a particular State. It does not include a differentiation based on other considerations which are dependent on natural or business circumstances and may operate with more or less force in different localities. And there is nothing in my opinion to prevent the Australian Parliament charged with the welfare of the people as a whole from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States."

We must now consider section 96 which is found in chapter IV, " Finance and Trade." It is in these terms:— " During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." There are no restrictions whatever in this section, and it is clear that while the section remains in operation, the Parliament—apart from the restrictions contained in section 51 which must be considered in a moment —may in the matter of financial assistance discriminate between States as much as it thinks fit.

Their Lordships have accordingly to bear in mind first that section 51 (ii) prohibits discrimination between States or parts of States, but is not concerned to deal with the matter of equality of burden, and secondly that section 96 does not prohibit discrimination. It is difficult to see any ground for an attack on the scheme, or on the various Acts which carry it into effect, in so far as that attack is really based on the exercise by the Commonwealth Parliament of its powers under section 96. Those powers are plainly being used for the purpose of preventing an unfairness or injustice to the State of Tasmania or indirectly to some or all of its population. Such discrimination as may result between millers or their customers in Tasmania and in the other States is a by-product, so to speak, of the endeavour to equalise the burden of the legislation by diminishing the special burden on Tasmania; and it is of first importance to note that this is brought about by an exercise of power under section 96 which does not itself prohibit discrimination. Great reliance was placed by the appellants on the scheme; but in the view of their Lordships the scheme adds nothing to the argument; for there is nothing in section 51 to prevent the Commonwealth Parliament from passing measures in concert with

any State or States with a view to a fair distribution of the burden of the taxation proposed, provided always that the Act imposing taxes does not itself discriminate in any way between States or parts of States, and that the Act granting pecuniary assistance to a particular State is in its purpose and substance unobjectionable. In other words it seems to their Lordships, as it seemed to the High Court, that the various Commonwealth and State Acts, if considered together as part of an organic whole, contain nothing which is prohibited in the Constitution.

In coming to this conclusion their Lordships wish to make it clear that, as at present advised, they do not take the view that the Commonwealth Parliament can exercise its powers under section 96 with a complete disregard of the prohibition contained in section 51 (ii), or so as altogether to nullify that constitutional safeguard. The prohibition is of considerable importance; and the Constitution should be construed bearing in mind that it is the result of an agreement between six high-contracting parties with in some respects very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under section 96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be *ultra vires* the Commonwealth Parliament. Their Lordships are using the language of caution because such a case may never arise, and also because it is their usual practice in a case dealing with constitutional matters to decide no more than their duty requires. They will add only that, in the view they take of the matter some of the legislative expedients—objected to as *ultra vires* by Mr. Justice Evatt in his forcible dissenting judgment—may well be colourable, and such Acts are not receiving the approval of their Lordships . In the present case there seems to be no valid ground for suggesting that the sums payable to the Government of Tasmania pursuant to section 14 of the Wheat Industry Assistance Act, 1938 (No. 53), are not in the nature of genuine financial assistance to the State, paid for the purpose of equalizing the burden on the inhabitants of Tasmania of taxation which was being imposed on all the millers throughout the Commonwealth for an end which might reasonably be considered to be both just and expedient.

Having regard to the view above expressed it is not necessary to deal with the point on which Mr. Justice Starke primarily relied, namely, that even if section 14 of the Wheat Industry Assistance Act (No. 53), was invalid, it could be treated as severable and distinct from the other provisions of that Act, and that its invalidity would not affect the legislation as a whole. On this difficult point their Lordships prefer to express no opinion.

In the result their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the respondent's costs. The interveners will bear their own costs.

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In the Privy Council

W. R. MORAN PROPRIETARY LIMITED

v.

THE DEPUTY COMMISSIONER OF TAXATION FOR THE STATE OF NEW SOUTH WALES RESPONDENT AND THE ATTORNEY-GENERAL OF NEW SOUTH WALES AND OTHERS INTERVENERS

DELIVERED BY VISCOUNT MAUGHAM

Printed by His Majesty's Stationery Office Press,
Pocock Street, S.E.1.

1940