

**In the Privy Council.**

UNIVERSITY OF LONDON  
 31 OCT 1956  
 LEGAL STUD

ON APPEAL  
 FROM THE HIGH COURT OF AUSTRALIA

15043

BETWEEN THE SHELL COMPANY OF AUSTRALIA  
 LIMITED formerly named BRITISH  
 IMPERIAL OIL COMPANY LIMITED APPELLANTS

AND

THE FEDERAL COMMISSIONER OF  
 TAXATION - - - - RESPONDENT.

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**CASE OF THE APPELLANTS.**

RECORD.

1. This is an Appeal by Special Leave granted by Order of the King in Council dated 29th January 1929 from two Judgments of the High Court of Australia dated respectively the 25th August 1926 and the 31st October 1927. Doc. No. 9, p. 49.  
Docts. 2 and 7, pp. 8 and 49.

2. The Judgment dated 25th August 1926 was given on a Special Case stated by the Supreme Court of Victoria for the opinion of the High Court of Australia pursuant to Section 51A of the Income Tax Assessment Act 1922-1925, such case arising out of an assessment on your Petitioner to Federal Income Tax for the financial year 1924-25. The Judgment dated 31st Doc. No. 1, p. 1.  
 20 October 1927 dismissed an Appeal arising out of the same assessment from a Judgment of the Supreme Court of Victoria dated 16th September 1927. Doc. No. 4, p. 46.  
 The Judgments of the 16th September 1927 and the 31st October 1927 were based upon the conclusions arrived at by the High Court in deciding the case stated.

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3. No question of fact is involved in the case. The question involved is whether certain provisions of the Income Tax Assessment Acts of the Commonwealth of Australia are void, as infringing the provisions of the Constitution designed to control or check the exercise of legislative powers vested in the Parliament of the Commonwealth. The relevant Acts relating to tax are the Income Tax Assessment Act 1922-24 and the Income Tax Assessment Act 1925. The assessment in question was made under the former Act. It is convenient to state at the outset the substance of the leading provisions of the Constitution and of the Income Tax Assessment Act 1922-24 and at a later stage to deal with the provisions of the Income Tax Assessment Act 1925, as that Act enters into the history of the case. 10

4. The more directly material provisions of the Constitution are those contained in Sections 55, 71 and 72 in the Commonwealth of Australia Act 1900 which are as follows (63 and 64 Vict. c. 12.) :—

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 20 duties of excise shall deal with duties of excise only.

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 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. 30
- (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.
- (iii) Shall receive such remuneration as the Parliament may fix ; but the remuneration shall not be diminished during their continuance in office.

5. The method of legislation as regards income tax adopted by the Commonwealth Parliament is to prescribe the rates of Income Tax by annual Income Tax Acts and to include in a general Assessment Act provisions relating to the assessment to tax. 40

6. Section 13 (1) and (1) (A) of the Income Tax Assessment Act 1922-24 is as follows :—

13 (1) Subject to the provisions of this Act, income tax shall be levied and paid for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the period of 12 months ending on the 30th day of June preceding the financial year for which the tax is payable.

(1A) The income tax payable by a Company shall be at such rate as is declared by the Parliament.

10 7. Section 28 of the Income Tax Assessment Act 1922-24 provided as follows :—

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

20 (2) The provisions of Section 20 of this Act shall not apply in any case in which the person assessed under this section is a Company.

(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.

8. By Part V. of the same Act provision was made for the institution functions and procedure of Boards of Appeal and for Appeals to Boards of Appeal and to the Court.

By Section 41 (4) it was provided as follows :—

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

Under other sections provision was made (Section 44) as to the power of the Board to hear such cases as were thereby prescribed or referred to it by the Commissioners under the Act (Section 48) as to the removal of a member of the Board by the Governor-General on an address for his removal by the Senate and House of Representatives (Section 50) as to the making by taxpayers of appeals to the Board or the Court (Section 51) as to the effect of the orders of the Board and the Court and (Section 53) as to the making of Rules relating to practice and procedure.

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Rules known as The Income Tax Appeal Board Rules 1922 relating to procedure were made which (*inter alia*) provided (Rule 16) that the Board should take all evidence on oath or affirmation and (Rule 20) that summaries of the decisions of the Board might be published.

9. The material facts are as follow :—

10. The Appellants are a Company duly incorporated in Great Britain and carry on in the Commonwealth of Australia the business of selling oil petrol and petroleum products from which it has derived income taxable under the Income Tax Assessment Acts of the Commonwealth of Australia. Their business is controlled principally by persons resident outside Australia. 10.

11. The Federal Commissioner of Taxation in the successive financial years ending 30th June 1922 to 1927 instead of assessing the Appellants to income tax upon the taxable income derived from their business assessed and charged the Appellants with income tax upon ten per cent. of the total receipts (whether cash or credit) of their business. The assessment under review is the assessment made for the financial year 1924-5.

12. On the 30th September 1924 the Appellants pursuant to Section 32 of the Income Tax Assessment Act 1922-23 by James L. Kirkland its Public Officer furnished to the Respondent a Return setting forth a statement of the income derived by them during the year beginning 1st July 1923 and 20 ending the 30th June 1924.

p. 3. 13. Purporting to act under Section 28 of the Income Tax Assessment Act 1922-1924 the Respondent on the 28th March 1925 gave notice to the Appellants that he had assessed the Federal Income Tax payable by them for the financial year 1924-25 (*i.e.* in respect of income derived during the year ending 30th June 1924) at £21,365 17s. 0d. being an amount equal to one shilling in the pound on ten per centum of the Appellant's gross receipts for such period which gross receipts were £4,273,169.

p. 4. 14. The Appellants on the 4th May 1925 lodged with the Respondent an objection in writing against the said assessment and in such objection 30 challenged the validity of the assessment and of the legislation under which it purported to be made.

p. 6. 15. On the 1st December 1925 the Respondent by notice in writing disallowed the objection, and on the 24th December 1925 the Appellants requested the Respondent to treat their objection as an Appeal and to forward it to the Supreme Court of the State of Victoria.

p. 7. The Respondent complied with such request on the 29th April 1926 and the matter came before His Honour Mr. Justice Macfarlan on the 7th May 1926.

16. The legislation under which the assessment was made consisted of the Income Tax Assessment Act 1922 as amended by the Income Tax Assessment Act 1923 (No. 27 of 1923) (together cited as the Income Tax Amendment Act 1922-23) and as amended by the Income Tax Assessment Act 1924 (No. 51 of 1924) (all together cited as the Income Tax Assessment Act 1922-24). This legislation remained in force without amendment until the 26th September 1925.

17. Before the Commissioner on the 1st December 1925 disallowed the objection of the Appellants in relation to the aforesaid assessment and therefore before the matter came before the Supreme Court of the State of Victoria a special case which had been stated by the Board of Appeal to the High Court of Australia in relation to various matters raised by the Appellants in respect of an assessment which was made under Section 28 for the financial year 1922-23 and which the Appellants had required to be referred to the Board of Appeal had come before and been decided by the High Court of Australia. That case submitted for the opinion of the High Court (*inter alia*) the following questions :—

20 Is Section 28 of the Income Tax Assessment Act 1922 and are the Income Tax Acts 1922 and 1923 so far as they operate thereon within the legislative powers of the Parliament of the Commonwealth ?

Is the Income Tax Assessment Act 1922 and are the Income Tax Acts 1922 and 1923 within the legislative powers of the Parliament of the Commonwealth ?

18. This case was argued before the High Court in February 1925. The Appellants in that case :—

- (1) relied upon Section 55 of the Commonwealth Constitution and
- (2) in addition contended particularly :—

30 (A) That Sections 44, 50 and 51 of the Income Tax Assessment Act 1922 sought to confer judicial power upon the Board of Appeal, and that as such Board did not have a life tenure (Section 41) such attempted conferring of judicial power was having regard to Sections 71 and 72 of the Constitution invalid.

(B) That Section 28 (3) of the Income Tax Assessment Act 1922 being thus invalid, the whole of Section 28 was invalid because Sub-Section 3 was not severable from the rest of the section.

19. In making such contentions the Appellants relied upon the interpretation of the Constitution settled by the decision of the High Court in *Waterside Workers' Federation of Australia v. Alexander* (1918) 25 C.L.R. 434 which as Knox C. J. afterwards said in his Judgment in 35 C.L.R. at page 432 “ establishes that the judicial power of the Commonwealth can only be vested in ‘ Courts ’ that is in Courts of law in the strict sense ; and that if

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any such Court be created by Parliament the tenure of office of the Justices of such Court by whatever name they may be called shall be for life, subject to the power of removal contained in Section 72 of the Constitution.”

20. On 9th April 1925 the High Court delivered Judgment and was unanimous in upholding the objection to the Board of Appeal. The result was that the case stated by the *de facto* Board of Appeal was not a proceeding which the law recognised and the case was ordered to be struck out. The Judgments are printed in 35 Commonwealth Law Reports at page 422.

21. Soon after this decision the Parliament of the Commonwealth passed an amending Act assented to on 26th September 1925 and called the 10 Income Tax Assessment Act 1925 (No. 28 of 1925). This Act dealt with and amended the Income Tax Assessment Act 1922-1924 (to which it referred as “the Principal Act”) and it dealt in particular with the Board of Appeal and with the decisions theretofore given by the Board of Appeal.

22. The substance of the material provisions of this Act are set out in the next succeeding paragraphs.

23 (A) The Act (Section 7) in the first place repealed Sub-section 3 of Section 28 of the Act of 1922-24 which had in terms entitled the taxpayer to refer his case arising under the application of Section 28 to a Board of Appeal. This repeal took effect as from the commencement of the Income 20 Tax Assessment Act 1922 (Section 24).

(B) The name of the Board was altered from “Board of Appeal” to “Board of Review,” and the existing members of a Board of Appeal became members of a Board of Review (Section 9).

(C) In lieu of Section 44 of the Act of 1922-24 which gave the Board power to hear cases the powers of the Board were stated as follows in Section 10.

10. “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 30 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 fifty and Sub-section (6) of Section fifty-one of this Act), be deemed to be assessments, determinations or decisions of the Commissioner.

(2) Notwithstanding anything contained in this Act, a determination made by the Board under Section 21 of this Act shall not be invalidated by reason of the fact that it is not made within the time prescribed by 40 that Section.”

(D) By Section 11 the taxpayer objecting to a decision of the Commissioner might require any decision of the Commissioner to be referred to the Board of Review for review or might require his objection to be treated as an Appeal to be forwarded to the Court.

(E) By Section 12 of the Act, Section 51 of the Principal Act was repealed and provision was made as to the proceedings and decisions of the Board of Review and appeals to the Court from its decisions.

24. In addition the Act of 1925 contained (Section 16) the following section purporting to validate past assessments :—

10           “ 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 three and five to fourteen inclusive of this Act shall be deemed to have been in force at the time the assessment, determination or decision was made or given.”

25. By Section 18 of the Act of 1925 further provision was made by  
20 which in substance decisions of the Board of Appeal were to be treated as decisions of the Board of Review.

26. Following upon this Act the Income Tax Regulations 1922 were amended and rules were made for the conduct of reviews including the taking of evidence on oath (Rule 38E) and the compilation of summaries of the decisions of the Board of Review (Rule 38F).

27. In this state of decision and legislation the present case came before the Supreme Court of the State of Victoria (Mr. Justice Macfarlan) on the 7th May 1926 when His Honour after discussion stated a case in writing for the opinion of the High Court upon the following questions :—

30           (1) Did the assessment cease to be valid or operative upon the raising of the dissatisfaction of the Appellants therewith ?

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

The case stated is set out in the Record hereto.

Doc. No. 1, p. 1

28. The case stated was argued before the High Court in May, 1926, and on 25th August 1926 the High Court delivered Judgment answering the questions in favour of the validity of the assessment appealed against. The majority of the Judges (Isaacs, Higgins, Gavan Duffy, Rich and Starke J. J.) were of opinion that the Board of Review provisions were not open to the same objections as had been successfully urged against the Board of

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Appeal provisions and they did not accept the other contentions of the Appellants. Knox C. J. dissented, being of opinion that the Board of Review was open to the same objections as the old Board of Appeal, that the assessment was originally invalid and that the validation of assessments purported to be made by Section 16 of the 1925 Act was conditional on the existence of the Board of Review. The Judgments (together with the Judgments in the case of one Munro heard and determined at the same time) as delivered are printed in the Record and the Case will be found reported at 38 Commonwealth Law Reports p. 153. The formal Judgment will be found at p. 8 of the Record.

Doc. No. 3, p. 9.

Doc. No. 2, p. 8.

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29. The Answers of the High Court having been returned to the Supreme Court of Victoria the hearing of the Appeal in that Court was resumed before Mr. Justice Cussen, and on the 16th September 1927 all questions of law being admittedly concluded against the Appellants (so far as the Supreme Court was concerned) by decision of the High Court upon the case stated His Honour dismissed the Appeal. His reasons and the order will be found at p. 46 of the Record.

Docts. 4 and 5, p. 46.

30. From this decision the Appellants appealed to the High Court in its appellate jurisdiction. Such Appeal was heard on 31st October 1927 when Counsel for the Appellants stated in view of the decision of the High Court upon the case stated by the Supreme Court he acknowledged that the Appeal must be dismissed. The Appeal was accordingly dismissed. The formal order will be found at p. 49 of the Record.

Doc. No. 7, p. 49.

31. Having regard to the complexity of the considerations which are reviewed in the Judgments of the High Court the Appellants deem it convenient to set out their submissions *seriatim* as follows:—

(A) The Appellants submit in the first place that the Board of Review set up under the Income Tax Assessment Act No. 28 of 1925 is (A) a Tribunal in which some part of the judicial power of the Commonwealth has been by the same Act vested and (B) does not fulfil the requirements of Sections 71 and 72 of the Act of Constitution. It has therefore no existence in law and its acts are invalid and of no effect.

This submission of the Appellants is supported by the following (amongst other) considerations:—

(i) that the jurisdiction of the Board of Review arises only upon the invitation of the taxpayer who alone can set it in motion;

(ii) that the matter upon which the jurisdiction of the Board arises is a dispute between the taxpayer and the Commissioner affecting the rights or obligations of the parties;

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(iii) that the procedure by which those rights or obligations are determined is appropriate to a Court of Law reference being herein made to the Statutory Rules made under the Income Tax Assessment Acts;

(iv) that the determination by the Board of Review of the matter under review is made final and conclusive of the rights of the parties except where the decision involves a question of law;

(v) that an Appeal is permitted to the High Court from any decision which in the opinion of that Court involves a question of law.

It is not, in the submission of the Appellants correct to say that the matter so referred to the Board of Review is purely administrative and non-justiciable, for the same matter may under the same Act be alternatively referred to the High Court or the Supreme Court of a State.

The submissions of the Appellant in regard to the Board of Review are applicable with at least equal if not greater force to the old Board of Appeal.

(B) The Appellants next submit that upon the assumption that the Board of Appeal and the Board of Review were alike invalidly constituted, the assessment here in question was not validated by Section 16 of the Act of 1925; for that section gives to the assessment only the same validity as it would have had if made under the Income Tax Assessment Acts 1922-1924 (therein called "the Principal Act") as amended by the said Act of 1925 and in the submission of the Appellants an assessment under the Principal Act as so amended is itself invalid by reason of the invalid constitution of the Board of Review.

(c) The Appellants next submit (this submission being complementary to (B)) that an assessment under Section 28 of the Principal Act is invalid by reason of the invalid constitution of the Board of Appeal and that in the same way an assessment in fact made under Section 28 of the Principal Act but deemed to be made under Section 28 of the Principal Act as amended by the Act of 1925 is invalid by reason of the invalid constitution of the Board of Review, the Appellants here contending that in either case the assessment and the safeguards provided by the Legislature in the interest of the taxpayer for reviewing that assessment are so closely connected with each other that, the one failing, the other also must fail.

(D) The Appellants next submit that, even if, contrary to their earlier submissions the Board of Review is validly constituted, yet, if the Board of Appeal was not validly constituted, the assessment here in question was not validated by the Act of 1925 since in their submission it was not competent for the Legislature to validate retrospectively an assessment which it could not make valid prospectively.

(E) The Appellants next submit that the provisions of Section 28 alike of the Principal Act and of the Principal Act as amended by the Act of 1925

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are obnoxious to Section 55 of the Act of Constitution inasmuch as their effect is to join with the taxation of income the taxation of something other than income thereby infringing the cardinal rule that the laws imposing taxation shall deal with one subject of taxation only.

(F) The Appellants next submit that in any case the Act No. 28 of 1925 is in all material respects invalid because Section 16 of the Act in validating past assessments operated immediately upon the Statute receiving the Royal Assent to impose liability upon the taxpayer assessed and that therefore the Statute was a law imposing taxation within the meaning of the first paragraph of Section 55 of the Constitution and that all other provisions of the Act were consequently invalid. 10

The Appellants humbly submit that the Judgment of the High Court on the Special Case and the Judgments of the Supreme Court of Victoria and of the High Court based on the Special Case were wrong for the following amongst other

#### REASONS.

1. Because neither the Board of Appeal nor the Board of Review was validly constituted or had any existence in law.
2. Because the assessment was not validated by Section 16 of the Act of 1925 in that the Board of Review was not in law set up. 20
3. Because the assessment if treated as made under Section 28 of the Act of 1922-24 is invalid in that the Board of Appeal was not in law set up, and if treated as made under the Act of 1922-24 as amended by the Act of 1925 is invalid in that the Board of Review was not set up.
4. Because assuming that the Board of Review was validly set up and that the Board of Appeal was not validly set up the assessment was not validated by the Act of 1925 in that it was not competent to the legislature to validate retrospectively an assessment which it could not make valid prospectively.
5. Because the effect of Section 28 of the Act of 1922-24 and of that Act as amended in 1925 is to join with the taxation of income the taxation of something other than income and that Act is in all material respects invalid in that it infringes the second paragraph of Section 55 of the Constitution. 30
6. Because the Act of 1925 is in all material respects invalid in that by reason of the provisions of Section 16 it was a law imposing taxation and that by virtue of the first paragraph of Section 55 of the Constitution all other provisions in that Act were invalid.
7. Because the answers given by the High Court to the questions asked by the Special Case were wrong. 40

GAVIN T. SIMONDS.

A. ANDREWES UTHWATT.

In the Privy Council.

ON APPEAL  
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**CASE OF THE APPELLANTS.**

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