IN THE SUPREME COURT OF QUEENSLAND No. 3455 of 1986

FULL COURT

BEFORE:

Mr. Justice Matthews

Mr. Justice Thomas

Mr. Justice Derrington

BRISBANE, 15 OCTOBER 1987



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BETWEEN:

DEPUTY COMMISSIONER OF TAXATION (Plaintiff) Respondent

- and -

LLOYD E. FAINT (Defendant) Appellant

ORDER

MR. JUSTICE MATTHEWS: Again the Court was constituted by Mr. Justice Thomas, Mr. Justice Derrington and by me. For reasons which I am authorised to publish on behalf of Mr. Justice Derrington, I think that the appeal should be dismissed with costs, and that is the order proposed by Mr. Justice Derrington. I would add that I also agree with the reasons and order about to be published by my brother Thomas.

MR. JUSTICE THOMAS: In my opinion the appeal should be dismissed with costs and I publish my reasons.

MR. JUSTICE MATTHEWS: The order of the Court will be: appeal dismissed with costs.

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IN THE SUPREME COURT OF QUEENSLAND Writ No. 3455 of 1986

FULL COURT

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION Respondent

AND:

LLOYD E. FAINT Appellant

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MATTHEWS J.

THOMAS J.

DERRINGTON J.

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Reasons for Judgment delivered on 15th October, 1987 by Thomas J. and Derrington J.

Matthews J. concurring with both of those reasons.

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"APPEAL DISMISSED WITH COSTS."

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IN THE SUPREME COURT OF QUEENSLAND Writ No. 3455 of 1986

FULL COURT

Before the Full Court

Mr Justice Matthews

Mr Justice Thomas

Mr Justice Derrington

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION Respondent

AND:

LLOYD E. FAINT Appellant

**JUDGMENT: THOMAS J.**

Delivered the Fifteenth day of October, 1987.

CATCHWORDS:

Income Tax - conclusive nature of assessments and amended assessments - recovery of summary judgment on earlier smaller assessment, with leave to defend issues relating to later assessment - whether notices inconsistent - only one taxable income each year - application of doctrine of election only when notices are truly inconsistent - (D.C.T. v. Jonrich Pty. Ltd. (1986) 70 A.L.R. 357, 361-2 and Tupicoff v. F.C.T. (1984) 56 A.L.R. 151 distinguished) - no inconsistency when amended assessment is merely an increase or extension of original assessment - the term "tax" includes "additional tax" - (D.C.T. v. Jonrich Pty. Ltd. (1986) 70 A.L.R. 357, 359-61 followed on this point).

Income Tax Assessment Act 177(1) considered; ss. 166, 170, 173, 185, 201, 204, 219 and reg. 53 referred to.

Counsel: Robb for Appellant
Davies Q.C. & Hack for Respondent
Solicitors: Grasso Searles & Romano for Appellant
Australian Government Solicitor for Respondent
Hearing dates: 8th September, 1987.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 3455 of 1986

FULL COURT

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION Respondent

AND:

LLOYD E. FAINT Appellant

**JUDGMENT - THOMAS J.**

Delivered the Fifteenth day of October, 1987.

This is an appeal against a summary judgment given on 2nd April, 1987 in favour of the Deputy Commissioner of Taxation for $704,224.84. Nothing turns on his status as a deputy, and it will be convenient to refer to the respondent as "the Commissioner".

The proceedings were complicated by a number of adjournments and amendments, including an application after judgment, under O. 45 r. 1. The following short summary sufficiently states the history of the matter. On 14th August, 1986 the Commissioner issued a specially endorsed writ seeking the recovery of $659,139.61 for income tax, provisional tax and additional tax referable to the years 1979, 1980 and 1981. The claim was based upon an amended assessment dated 13th May, 1985 in respect of the 1979 year; an assessment dated 30th December, 1982 referable to the 1980 year; and an assessment dated 30th December, 1982 referable to the 1981 year. The appellant delivered a defence. Some months later (on 23rd February, 1987) the Commissioner brought a summons seeking, inter alia, summary judgment. The Senior Master granted the appellant unconditional leave to defend the claim. The Commissioner appealed to de Jersey J. in Chambers, who, in accordance with the rules, heard the application de novo. His Honour delivered his reasons on 19th March, 1987 but deferred the

pronouncing of judgment until a later occasion. The material before His Honour indicated that further amended assessments had been issued by the Commissioner on 27th May, 1986, in each instance substantially increasing the alleged tax liability. Up to that stage there had been no amendment of the writ. His Honour stated in his reasons that apart from certain specified issues concerning relatively small amounts which he identified, there was no sufficiently arguable ground of defence raised with respect to the assessments upon which the action was originally based. His Honour observed that:

> "A need for amendment of the writ ... should not, in the particular circumstances of this case, deny the plaintiff judgment for the amount clearly due, especially where the defendant does not claim that the necessary amendment would give rise to any new defence."

When the matter came back on before His Honour on 2nd April, 1987, leave was granted to the Commissioner to amend the writ by including an alternative claim for $1,542,479.63, on the basis of the further amended assessments. Affidavits of the Commissioner's deponent (Mr. Talty) deposed to the fact that the total payable pursuant to the assessments upon which the original claim was made came to $723,687.21, but that, on the basis of His Honour's findings, there was a triable issue as to $19,442.37, so that the appropriate amount for judgment should be $704,224.84. He further deposed that on the basis of the amendments that were made, the amount for judgment would be $1,732,614.51. His Honour granted judgment on the former basis, which was responsive to the litigation that had been conducted before him. Subsequently a very substantial error was discovered and the Commissioner brought an application under O. 45 r. 1 to reduce the amount of the judgment. The "correct" figure, on the footing upon which His Honour proposed to allow judgment was conceded to be $432,320.05. Accordingly, another Chamber Judge amended the amount of the judgment to that figure. Counsel on the appeal did not elucidate the specific reasoning on which these alterations were based. The appeal before us remains as an appeal

against the order of de Jersey J. that the plaintiff recover $704,224.84, as neither the original judgment or the notice of appeal have been formally amended. Thus the documents in the appeal book present a misleading picture. Notwithstanding this, I take the present appeal to be an appeal against the amended judgment of de Jersey J. granting judgment in favour of the plaintiff for $432,320.05. It may also be taken that sum represents the amounts due pursuant to the notices of assessment on which the original action was based.

References to the Income Tax Assessment Act in the present case will be to the Act prior to 1984 amendments.

The Commissioner may make an assessment of "tax payable" (s. 166). Production of the assessment is conclusive evidence of its due making and that the amount and particulars of the assessment are correct (s. 177(1)). In any action for the recovery of income tax a certificate signed by the Commissioner (or his deputy or delegate) may certify certain particulars of the assessment and of the fact that the sum named in the certificate is at that date due by the taxpayer to the Commonwealth in respect of income tax (Regulation 53 of the Income Tax Regulations). A taxpayer may object to the assessment and bring an appeal or review against a Commissioner's disallowance (ss. 185, 186, 187), but the pendency of an appeal or reference does not interfere with the validity of the assessment. Income tax may be recovered on the assessment as if no appeal or reference were pending (s. 201). Any assessed income tax is "due and payable" by the taxpayer on the date specified in the notice, not being less than 30 days after service of the notice (s. 204). Once due and payable, income tax is a debt due to the Commonwealth and is payable to the Commissioner (s. 208), and may be sued for and recovered in any court of competent jurisdiction (s. 209). Subject only to the special points raised by the appellant on this appeal, the material shows the due making and service of notices of assessment and that the amounts contained therein are recoverable by the Commissioner.

The main point upon which the present appeal is brought is that the Commissioner cannot recover under an assessment which he acknowledges to be wrong, and which has been superseded by amended assessments. This incidentally raises the question whether an assessment may continue to have any effect once an amended assessment is issued.

On the true construction of the Income Tax Assessment Act a taxpayer in any particular year can have only one taxable income which is to be calculated in accordance with the provisions of the Act; and it is upon that taxable income that the tax payable by the taxpayer is to be calculated (ss. 17, 166, 170 and 173). It is also clear that when the Commissioner amends an assessment under s. 170, that assessment creates a new debt. That is to say it brings into existence on a particular day a debt which previously did not exist as such.

The Commissioner (through his counsel) relied upon the conclusive nature of the original assessments under s. 177(1), notwithstanding that they had been amended, and notwithstanding that the amended assessments were also endowed with the same conclusive character (see s. 173, which makes every amended assessment an assessment for all the purposes of the Act). Counsel for the appellant submitted that the amended assessments were complete substitutes which entirely displaced the original assessments (except for limited purposes such as contesting the power of the Commissioner or reascertain), and that it is a nonsense to say that any item can in the same proceedings be conclusively proved to be two different amounts. Whilst one may agree with the latter part of the submission, it does not follow that the Deputy Commissioner can never obtain a summary judgment for the lesser of two overlapping assessments. Nor does it follow that an original assessment and an amended assessment must be necessarily and totally inconsistent with one another. The later assessment may be based upon an assessable income that includes the income on which the original assessment was based, and may include the tax originally assessed.

Thus the possibility of a nonsensical result will depend upon the terms of the assessments, which is a question of fact.

If the original assessment and the amended assessment are truly the basis of alternative rights, it seems to me that the solution would be found in the doctrine of election (O'Connor v. S.P. Bray Limited (1936) 36 S.R.(N.S.W.) 248, 257-260). That doctrine does not apply to the present circumstances because the two sets of assessments are not inconsistent. There was no assertion of two "alternative rights" as that term is properly understood. It was submitted that all assessments and amended assessments are always conclusive evidence, even if they are inconsistent with one another, and that the Commissioner may assert them both at the one time if he chooses. Mr. Davies Q.C. for the Commissioner referred to D.C.T. v. Jonrich (1986) 70 A.L.R. 357, 361-2 as support for such a proposition, but that case was not concerned with inconsistent assessments involving the one taxpayer. Indeed, that case, and Richardson v. F.C.T (1932) 48 C.L.R. 192, and Tupicoff v. F.C.T. (1984) 56 A.L.R. 151, which were the basis of Connolly J.'s comments in Jonrich concerned assessments where the Commissioner had assessed tax on the same income against different persons. In Tupicoff it was argued that an assessment against a taxpayer's wife for her share of family trust income was conclusive against any other assessment in respect of the same income against the husband. Beaumont J. said (at p. 167):

> "In my opinion s. 177(1) has no relevant operation in the present case. It is concerned only with the personal liability of the taxpayer to whom it is issued and it cannot operate, in effect, in rem as the taypayer's argument would suggest."

Different factors may arise in respect of inconsistent assessments against the same taxpayer and the Commissioner's submission in the present case goes too far. If a genuine inconsistency or a nonsensical result were

demonstrated, I would not expect a Court to give effect to it. As already mentioned, absurd results in respect of inconsistent assessments against the same taxpayer may be avoided by application of the doctrine of election. It is not here necessary to consider the point further because the relevant assessments are not inconsistent. The amended assessments do not falsify the original assessments; they organically increase them.

When the assessments in the present case are compared, and the figures therein juxtaposed, it becomes apparent that the amended assessments are based upon the original assessments together with additional estimates of income, income tax and additional tax. In short, they are not inconsistent. One is an extension of the other. The fact that the original assessments had not been paid by the time when the amended assessments were issued produced the result that no credit was given for such payments. Had payment been made, and duly credited by the Commissioner, the amended assessments would have been entirely for additional components resulting from a higher assessment of assessable income. As no payments were made, the amended assessments are for the entire tax payable with respect to the relevant years.

If an amended assessment is merely an increase or extension of the original assessment, I do not think it matters whether a summary judgment is supported on the basis of the original assessment or on the basis of judgment for part of the later assessment on the footing that no triable issue is shown to exist at least to the extent of the amounts contained in the original assessments.

Mr. Davies Q.C. (for the Commissioner) strenuously submitted that this Appeal Court should now, in effect, treat the application for judgment as relating to the amended writ (based on the amended assessments) and grant judgment for the increased amount. There is no doubt that taxpayers are placed under a considerable legislative

disadvantage in proceedings of this kind when the Commissioner seeks a civil judgment. Prima facie he may obtain such a judgment virtually on his own sayso (his assessment) which is deemed to be conclusive (s. 177(1)). Such a right exists even though the taxpayer may have brought an appeal or reference against the assessment and may ultimately succeed in showing it to be wrong. However, so far as the amended claim is concerned, not only is there no cross-appeal, there was no proper opportunity afforded to the appellant to show that there are grounds upon which a trial ought to be held in relation to the additional amounts now claimed. The judgment of the Chamber Judge was based on the original claim. His Honour held that there is no defence or issue fit to be tried at least to the extent of the amounts shown in the original assessments. That was all that was litigated. It is not appropriate that this Appeal Court now act as a Chamber Judge in dealing with an application that has not been properly formulated, let alone fairly litigated.

In the circumstances of the present case there was no inconsistency in granting summary judgment for the amount of the assessments on which the action was originally based. It may be observed that even if both sets of assessments were regarded as conclusive, were asserted at the one time by the Commissioner, and were alternative and inconsistent foundations for the Commissioner's remedy, it is difficult to see how His Honour was in error in a summary judgment application in choosing to give effect to the set of assessments with the lesser effect on the defendant.

The other ground of appeal argued before us was that the term “tax” does not include additional tax for incorrect or late return, and that accordingly triable issues were demonstrated with respect to greater amounts than those identified by His Honour. This submission was premised upon an argument that the Court should not follow the judgments or the reasoning in D.F.C.T. v. Moor 86 A.T.C. 4359 and D.F.C.T. v. Manners 86 A.T.C. 4001. To

these cases there may be added Deputy Commissioner of Taxation v. Jonrich Pty. Limited (1986) 70 A.L.R. 357, 359-61, 376, 377, a decision of this Court. The argument of the appellant in this respect was rejected in all the above cases and there is no sufficient reason to decline to follow those decisions.

The appeal should therefore be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 3455 of 1986

Before the Full Court

Mr Justice Matthews

Mr Justice Thomas

Mr Justice Derrington

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION Respondent

AND:

LLOYD E. FAINT Appellant

JUDGMENT: DERRINGTON J.

Delivered the Fifteenth day of October, 1987.

CATCHWORDS:

Counsel: Robb for Appellant
Davies Q.C. & Hack for Respondent.
Solicitors: Gras so Searles & Romano for Appellant
Australian Government Solicitor for Respondent
Hearing dates: 8th September, 1987.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 3455 of 1986

FULL COURT

BETWEEN:

DEPUTY COMMISSIONER OF TAXATION Respondent

AND:

LLOYD E. FAINT Appellant

JUDGMENT - DERRINGTON J.

Delivered the Fifteenth day of October, 1987.

The facts and relevant statutory provisions are set out in the Judgment of Thomas J. which I have had the privilege of reading. The issues are clearly identified there also.

The conclusivity of the assessment, as evidence that the amount and particulars of the assessment are correct (s. 177(1)) means simply what, it says, that it is conclusive, and the Court is bound by that. The only qualification can arise out of some factor of equal or superior force which of course must be legislative or under the authority of legislation in effect. The only relevant possibility here is an amended assessment, which is also conclusive by virtue of the statute. If the latter is in conflict with the former, then the Court, may be called upon to adjudicate which will prevail because obviously, because of the conflict, both cannot stand at the same time as conclusive. Before that position can emerge, it must be shown that there is conflict between the assessments so that the conclusivity of one is necessarily degraded by the other.

The simple position here is that there is nothing to demonstrate that the assessments are in conflict in any way. The second assessment, upon which the Commissioner did not rely in obtaining the judgment appealed from, is larger in every respect and in every factor than the assessment which formed the basis of the judgment below. Accordingly, there is nothing about, it in the amounts which would

support a suggestion of conflict. Similarly, there is no other feature on the face of the second assessment which throws doubt upon the first assessment, so far as it goes.

The argument for the appellant that, the assessment of a different figure, albeit larger, means that the first assessment was wrong, and that it cannot be assumed that the second assessment is in any way related to the first, misses the point. The speculation is unwarranted and irrelevant. It does not demonstrate that the first assessment was wrong as far as it went, and it is at least, equally open that the second assessment confirms the first but certifies that a further liability of the taxpayer is superimposed upon that first. This being the case, it cannot be assumed, as the appellant would wish, that the second assessment, is in conflict with the first.

In the absence of any such demonstration on the face of the second assessment, or any evidence supporting the assertion of conflict, the first assessment retains its conclusivity as evidence and provides the necessary support for the judgment which was given.

The second line taken by the appellant, that is, that, "additional tax" is not a "tax" which can be proved in this way by an assessment is contrary to the authorities referred to in the judgment of Thomas J. Detailed argument was not pursued in any attempt to reverse those authorities in this Court, but the appellant, reserved his position.

The appeal must be dismissed on all grounds.

The respondent Commissioner tried to have the amount of the judgment amended to accord with the larger amount assessed under the second assessment, but that, was not the foundation of the summary judgment which was applied for and given, and there has been no cross-appeal in respect of that matter. Manifestly the appellant is entitled to have the question of his additional liability litigated in the correct fashion so that he has the opportunity to contest

the matter according to his rights. The application will not be entertained.

The appellant must pay the respondent's costs of the appeal.