Privy Council Appeal No. 123 *of* 1929.

The Shell Company of Australia, Limited - - - - *Appellants*

v.

The Federal Commissioner of Taxation - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1930.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
CHIEF JUSTICE ANGLIN.

[*Delivered by* THE LORD CHANCELLOR.]

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.

The judgment dated 25th August, 1926, was given on a special case stated by the Supreme Court of Victoria arising out of an assessment on the appellants to Federal Income Tax for the financial year 1924–5. The judgment dated 31st October, 1927 (following upon the decision of the case stated), dismissed an appeal of the appellants from a judgment of the Supreme Court dated 16th September, 1927, which, following also upon the same decision, had dismissed outright the appeal against the assessment made by the appellants to that Court.

In their appeal to His Majesty in Council against these judgments the appellants have disputed the validity of certain Federal Income Tax Assessment Acts under which they were assessed as being contrary to Sections 71 and 72 of the constitution of the Commonwealth which is set forth in Section 9 of the Commonwealth of Australia Constitution Act, 1900. Although the facts upon which

that contention is based are undisputed they are of a complicated character and the law applicable to them is somewhat intricate, but many points raised and decided in the High Court were not again ventilated on the appeal, and the questions that were actually argued before their Lordships may be compendiously stated as follows :—

1. Is the Board of Review, which, under Section 41 (1) of the Australian Income Tax Assessment Act, 1922-25, is constituted to review the decisions of the Commissioner of Taxation, a Court exercising the judicial power of the Commonwealth within the meaning of Section 71 of the Constitution above referred to, or is it merely an executive or administrative tribunal ?
2. If it is a Court exercising the judicial power of the Commonwealth, can the members thereof be appointed for a term of years ? Or must they be appointed for life subject to the power of removal contained in Section 72 ?

Under Section 41 of the Income Tax Assessment Act, 1922-25, Members of the Board of Review are appointed for seven years. The broad case of the appellants accordingly was—

1. That the Board was a Court exercising the judicial power of the Commonwealth.
2. That the appointment of the members of such a Court for a term of years was unconstitutional ; and
3. That as a necessary result, an assessment made upon the appellants for Federal Income Tax and justified only by a statute unconstitutional in that respect could not be upheld.

Before the Board, each one of these assertions was challenged by the respondent. The first of them, especially, had failed in the Court below. The High Court of Australia by a majority (Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ., Knox C.J. only dissenting) had held that the Board of Review was an administrative or executive tribunal and that consequently objection taken to the limited tenure of office by its members was not well founded. It was to the decision on that point that the present appeal as argued on behalf of the appellants was confined. Learned Counsel for them did not before the Board contend that the appeal could succeed on any other ground if it failed there. As to the second of the above questions, it was not contested in the High Court by the respondent for the reason that, so far as that Court was concerned, the matter was concluded by its own decision in the year 1918, in the case of *The Waterside Workers' Federation of Australia* v. *Alexander*, 25 C.L.R. 434, where it was held, to quote the words of Knox CJ. in *The British Imperial Oil Co.* v. *Federal Commissioner of Taxation*, 35 C.L.R., 422—

> " 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

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."

The decision in the *Waterside Workers' Federation* case, however, not being a decision binding on their Lordships' Board, the respondent at the hearing, as a further answer to the appeal, contested its correctness and submitted that it should now be overruled.

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 they have derived income taxable under the Income Tax Assessment Acts of the Commonwealth of Australia. Their business is controlled principally by persons resident outside Australia. The present difficulty originates in that fact, inasmuch as, in the view of the Federal Commissioner of Taxation, it brought the appellants within the exceptional taxing provisions of S. 28 of the Income Tax Act, 1922, which so far as is now material was in the following terms :—

" (1) Where any business which is carried on in Australia is controlled principally by persons residing 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.

" (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."

The principal sections of the Act relating to the Board of Appeal in this last subsection mentioned have been constantly under reference in the present case, both in the judgments delivered in the High Court and in the course of the arguments before the Board, and it is not inconvenient at once to set them forth : it will be found that a comparison between them and statutory provisions relating to Boards of Review substituted for them in 1925, and later set forth, may be of assistance to the decision of the appeal. They are to be found in Part V of the Act which deals with " objections and appeals " and are as follows :—

" S. 41.—(1) For the purposes of this Part, there shall be a Board or Boards of Appeal . . .

(4) The Members of a Board shall hold office for a term of seven years but shall be eligible for reappointment.

S. 44.—(1) A Board of Appeal shall have power to hear such cases as are prescribed or are referred to it by the Commissioner under this Act.

(2) The provision of Section 51 of this Act shall apply so far as applicable to references by the Commissioner to the Board as if these references were Appeals.

S. 50.—(5) Objections which are treated as Appeals to a Board of Appeal shall, if the taxpayer's written request is accompanied by a deposit

of such amount as is prescribed for the particular class or case, be forwarded to the Board of Appeal by the Commissioner not later than thirty days after receipt by him of the request.

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

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

(8) When the appeal is to the High Court or a Supreme Court it shall be heard by a single Justice of the Court.

S. 51.—(1) On the hearing of the appeal the Court or Board of Appeal may make such order as it thinks fit and may either reduce or increase the assessment.

(2) An order of the Board on questions of fact shall be final and conclusive on all parties.

(3) An order by the Court shall be final and conclusive on all parties except as procured in this section.

(4) The costs of the Appeal shall be in the discretion of the Court or the Board as the case may be.

(5) The Board shall, if it considers an appeal to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount mentioned in subsection (5) of the last preceding section.

(6) On the hearing of the Appeal the Board shall, on the request of a party, and the Court may, if the Court thinks fit, state a case in writing for the opinion of the High Court upon any question arising in the appeal which in the opinion of the Board or the Court, as the case may be, is a question of law.

(7) The High Court shall hear and determine the question, and remit the case with its opinion to the Court below or to the Board, as the case may be, and may make such order as to costs of the case stated as it thinks fit.

(8) An appeal shall lie to the High Court, in its appellate jurisdiction, from any order made under subsection (1) of this section except a decision by the Board on a question of fact."

The Commissioner, acting upon his view, already stated, that Section 28, as just set forth, applied to the appellants, proceeded, instead of assessing them to income tax upon the taxable income derived from their business, to assess and charge them with income tax upon ten per cent. of the total receipts (whether cash or credit) of their business. The appellants did not accept that position. On the contrary they at once took steps to question its correctness in relation to the first assessment upon them—the assessment for the financial year 1922–1923—and in 1924 that dispute was still undecided. In relation to the assessment now under review—that for 1924–1925—the appellants, took up the same position. They treated themselves as ordinary taxpayers, and, on the 30th September, 1924, pursuant to Section 32 of the Income Tax Assessment Act, 1922–23, furnished in due form to the respondent a return setting forth a statement of the income derived by them during the year beginning the 1st July, 1923, and ending the 30th June, 1924. In response, the respondent, once more purporting to act under the above-stated section 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 the 30th June, 1924) at £21,365 17*s.*, being an amount equal to one shilling in the pound on ten per centum of the appellants' gross receipts for such period, which gross receipts were £4,273,169.

The appellants on the 4th May, 1925, lodged with the respondent an objection in writing against the said assessment and in such objection challenged the validity of the assessment and of the legislation under which it purported to be made.

The case which the appellants then proposed to put forward under their objections was that which they had already made with reference to the 1922–23 assessment, and it turned mainly upon the provisions above-quoted of the Income Tax Act, 1922, with reference to the status of the Board of Appeal. That Board was, they objected, a "Court" exercising the judicial power of the Commonwealth and was unconstitutional in that it was composed of members appointed only for a term of years. To their objection the Commissioner made no immediate answer, and by the 1st December, 1925, when for the first time he did respond, the situation as it stood at the date of the objections had greatly changed.

In the first place, the objections taken by the appellants to the assessment of 1922–23 were during that interval disposed of by the High Court of Australia and in the sense contended for by the appellants. (Incidentally, and to avoid confusion, it should be stated here that these objections were taken by the appellants under their then registered name of the British Imperial Oil Company and it is under that name that the proceedings with reference to them are reported in (1925) 35 C.L.R. 422.) In that instance the appellants required their objections to the assessment then made upon them to be referred to the Board of Appeal under S. 28 (3) of the Act of 1922, and with reference to these objections that Board stated a case for the opinion of the High Court of Australia, submitting therein, *inter alia*, the following questions :—

> 1. 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 ?
>
> 2. 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 ?

The contentions put forward by the appellants have been already indicated. More particularly they were :—

(*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.

In making the above contentions the appellants, as in the present case, relied upon the interpretation of the Constitution settled by the decision of the High Court in *The Waterside Workers' Federation of Australia* v. *Alexander* (1918), 25 C.L.R., 434, already referred to.

As has been stated, the High Court accepted these contentions of the appellants, and the Board of Appeal being on that footing invalidly constituted, the Court by its judgment, dated the 9th April, 1925, ordered that the case stated by it should be struck out.

No appeal against that judgment was brought by the respondent, but, doubtless as a result of it, an amending Federal statute was passed and became law on the 26th September, 1925, this being the second event which brought about the change in the previously existing situation already referred to. Under this amending Act, the Board of Appeal disappeared and a Board of Review was constituted in its place, the sections of the 1922 Act already set forth being dealt with so far as is presently material in the following way.

By Section 7 of the new Act—which by section 24 thereof was to be deemed to have commenced upon the date of the commencement of the Act of 1922—Section 28 of the Act of 1922 was amended by omitting Sub-section (3).

By Sections 9, 10, 11 and 12, Sections 41, 44, 50 and 51 of the Act of 1922 were so dealt with as to produce the result following :—

9. Section forty-one of the Principal Act is amended—

(*a*) by omitting from sub-section (1) thereof the word "Appeal" and inserting in its stead the word "Review"; and

(*b*) by omitting sub-section (3) thereof and inserting in its stead the following sub-section :—

"(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."

10. Section forty-four of the Principal Act is repealed and the following section inserted in its stead :—

"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 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 twenty-one of this Act shall not be invalidated by reason of the fact that it is not made within the time prescribed by that section."

11. Section fifty of the Principal Act is amended by omitting sub-sections (4), (5), (6), (7) and (8) thereof and inserting in their stead the following sub-section :—

" (4) A taxpayer who is dissatisfied with the 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

12. Section fifty-one of the Principal Act is repealed and the following sections inserted in its stead :—

" 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 taxpayer'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 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.

" 51A.—(1) Where a taxpayer has, in accordance with section fifty of this Act, requested the Commissioner to treat his objection as an appeal and to forward it to the High Court or the 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.

" (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."

Finally, Clause 16 of this amending Act is in these terms:—

"Every assessment, determination or decision of the Commissioner . . . made under the Income Tax Assessment Act, 1922 . . . shall be as valid and effectual as if made under the Principal Act as amended by this Act, and for the purposes of 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 the assessment, determination or decision was made or given."

Such then was the position with regard to the appellants' objections to the present assessment when, on the 1st December, 1925, the respondent by notice in writing, disallowed them all. The response of the appellants was immediate. On the 24th of the same month they requested the respondent to treat their objections as an appeal and to forward them to the Supreme Court of the State of Victoria.

The appellants, it will be seen, in taking this course did not exercise the right given them by the amending Act, to have the Commissioner's decision referred to the Board of Review. They chose one of the other two alternatives open to them.

It follows that the constitutionality of the Board of Review in the present case only arises on the contention that the provisions of Section 28 of the Income Tax Assessment Act, 1922–1925 are inseparably connected with those of Section 50 (4) (*a*) of the same Act as enacted in 1925 which give to the appellants the right to have the Commissioner's decision referred to the Board of Review, and that the former stand or fall with the latter. This contention, it should at once be stated, was disputed by the respondent and a submission in the contrary sense was put forward by him as a separate answer to the present appeal.

The objections 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:—

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 as so stated was argued before the High Court of Australia, judgment given upon the 25th August, 1926, and the answers given by the Court, Knox CJ. dissenting, were to (1) "NO," and to (2) "YES."

The ground upon which the majority of the learned Judges of the High Court proceeded when so answering these questions was that in their opinion, the Board of Review, if in the present case the objections of the appellants had been referred to it, would not in entertaining them have been

a Court exercising the judicial power of the Commonwealth, but would have been merely a tribunal engaged in the administration of the statutes and one, therefore, quite properly constituted. The great question which has been argued on the appeal is whether the learned Judges were right in that conclusion.

Now, it is hardly doubtful that the Federal Legislature, accepting as presumably it did, the correctness of the High Court's judgment of the 9th April, 1925, set itself by its amending Act of 1925 to get over the administrative difficulties which that judgment created. Indeed, a close examination of the sections of the new Act already set forth shows that suggestions to that end made by the learned Judges who took part in the decision have therein been adopted and embodied. The learned Counsel for the appellants urged that not only had the Federal Legislature no power to do as it did, but that, in effect, it had not succeeded in creating a new tribunal (the Board of Review) which was more valid than the old tribunal (the Board of Appeal). Without any disrespect, he suggested that the new Board of Review was, in effect, in just the same position as the old Board of Appeal, and that the legislation was camouflage.

It becomes necessary, therefore, to examine somewhat minutely not only the difference between the old Board of Appeal and the new Board of Review, but to consider the position of the Board of Review itself.

It seems clear to their Lordships, as appears from a comparison of the provisions on the subject of the Act of 1922, with those of the Act of 1925, that there is a very real difference between the two Boards ; a difference which, in the present case, is well worked out in the judgment of Mr. Justice Isaacs, where he sums up the situation in that regard.

After pointing out that amongst other sections of the 1922 Act, Section 28 was altered by leaving so far as that section is concerned, the Commissioner's decision absolutely final, and that this was done by eliminating all reference to a Board, the learned Judge proceeds :—

> "(*c*) In Section 41 the title of the Board was altered from 'Board of Appeal' to 'Board of Review.' (*d*) Section 44, which previously expressly applied sections creating judicial powers to the Board, is absolutely transformed. Instead of assimilating the Board to the Court, as in the old Section 44, the Board in the new Section 44 is assimilated to the Commissioner. Instead of the Board being given the powers and functions of the Court, it is given 'the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act.' Those are the only powers and functions conferred upon the Board for the purposes of decision. Other powers of formulation *after* decisions are given, but these are incidental only. (*e*) Section 44 then takes up the 'decisions' of the Board and says they are for all purposes (with certain exceptions) to be deemed those 'of the Commissioner.' (*f*) The first exception is patently immaterial here. It is merely to prevent the taxpayer having a double choice instead of an alternative choice of tribunal from the Commissioner. (*g*) The second exception, when carefully examined, is really to negative the notion of the Board being judicial. It allows an

appeal to the Court from any decision which, in the opinion of the Court, is a question of law . . . The fact that the Commissioner may appeal as well as the taxpayer only indicates that the Crown as well as the subject may invoke the Court to correct a misconstruction of the law, which would, of course, affect not merely that taxpayer but all taxpayers in a similar position. (*h*) The Board's decision, when given may, by Section 51 (4), be formalized by confirming, reducing, increasing or varying the assessment. This is form only. (*i*) By the next sub-section it may order the forfeiture of the deposit if it thinks the reference frivolous or unreasonable. Administrative 'orders' are numerous, and in this instance, the exercise of the power rests, not on law, but on opinion. In any event, the sub-section is quite subsidiary."

Mr. Justice Starke, speaking of the Board of Review, describes its position as follows :—

"It has power to review the assessments of the Commissioner, and its decisions are to be deemed to be assessments, determinations or decisions of the Commissioner (Act No. 28 of 1925, Section 10). Now, the Commissioner causes assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied (Act 1915–1921, Section 31 ; Act of 1922, Section 35). His function is to ascertain the amount of income upon which the tax is imposed. That does not, in my opinion, involve any exercise of the judicial power of the Commonwealth ; it is an administrative function. The decision of a Board of Review stands, as we have seen, precisely in the same position. Its functions are in aid of the administrative functions of government. So far, then, a Board does not exercise the judicial power of the Commonwealth.

We then come to the right of appeal to this Court from determinations of Boards of Review. That is a right given both to the Commissioner and to the taxpayer. A right of appeal in itself does not establish the vesting of judicial power either in the Commissioner or in a Board of Review. The Parliament may have imposed upon the Courts the duty of reviewing administrative determinations."

Is this right ? What is "judicial power" ? Their Lordships are of opinion that one of the best definitions is that given by Griffith CJ. in *Huddart Parker & Co.* v. *Moorshead & Co.* (1908), 8 C.L.R. 330, at page 357, where he says :—

"I am of opinion that the words 'judicial power' as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision, whether subject to appeal or not, is called upon to take action."

This definition of "judicial power" suggests to their Lordships a further material difference in the status of the two Boards not alluded to by Isaacs J.

It will have been noticed that under the new section 51A, the orders which the Court, under sub-section (5) may make are by sub-section (6), made final and conclusive on all parties except as provided by the section ; and that by sub-section (10), it is provided that the Commissioners or a taxpayer may appeal to the High Court in its appellate jurisdiction from any order made by the Court under sub-section (5). But under the new Section 51, dealing with the orders of the Board of Review, there is no

provision in any way corresponding to these sub-sections 6 and 10 of Section 51A. The orders of the Board of Review are not there stated to be conclusive for any purpose whatsoever. On the other hand, under Section 51 (2) of the Act of 1922, the orders of the Board of Appeal on questions of fact were expressly declared to be final and conclusive on all parties.

The distinction is, their Lordships think, both striking and suggestive. The decisions of the Board of Review are under the amending Act made the equivalent of the decision of the Commissioner. No assessment of his, even when paid, is conclusive upon him. He retains under Section 37 the fullest power of subsequent alteration or addition, and it would appear that that power remains with him notwithstanding any decision in respect of the same assessment by the Board of Review. It is only the decision of the Court which, in respect of an assessment, is now made final and conclusive on all parties : a convincing distinction, as it seems to their Lordships between a " decision " of the Board and a " decision " of the Court.

The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court.

In that connection it may be useful to enumerate some negative propositions on this subject :

1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision.
2. Nor because it hears witnesses on oath.
3. Nor because two or more contending parties appear before it between whom it has to decide.
4. Nor because it gives decisions which affect the rights of subjects.
5. Nor because there is an appeal to a Court.
6. Nor because it is a body to which a matter is referred by another body.

(See *Rex* v. *Electricity Commissioners* [1924], 1 K.B. 171).

Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer " If you want to have the assessment reviewed judicially, go to the Court. If you want to have it reviewed by business men, go to the Board of Review."

It has been seen that by Section 50 of the 1922–25 Act, a taxpayer who is dissatisfied with the decision of the Commissioner may request him (*a*) to refer the decision to a Board of Review

for review, or (*b*) to 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 which regulates reference to the Board is to be compared with Section 51 (A), which regulates appeals to the Court. The differences between the two sections have already been referred to. The sections may again in this connection usefully be contrasted. Although superficially apparently minute, the contrast indicates that the status and function of the two tribunals are by no means the same. The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered.

An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an *ad hoc* tribunal an exercise by a Court of judicial power.

Their Lordships find themselves in agreement with Mr. Justice Isaacs, where he says—

> "There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action. If consistent with either strictly judicial or executive action, the matter must be examined further . . . The decisions of the Board of Review may very appropriately be designated 'administrative awards,' but they are by no means of the character of decisions of the Judicature of the Commonwealth."

They agree with him also when he says that unless—

> "it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will."

In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution because the Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself; namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive.

As to the second point, namely,

> "Whether it is competent to appoint to a Court strictly so-called judges for a term of years."

the opinion of their Lordships that the Board of Review acts as an executive body and is not a Court within the meaning of Section 71 of the Constitution is sufficient to determine the fate of this appeal, and renders it unnecessary to pronounce any formal judgment upon the question which was argued as to tenure of judicial office. But though relieved of the necessity of giving a decision upon the point, their Lordships desire to make it quite clear that, as at present advised, they are not

prepared to assent to the view that it is competent, either with or without legislation by the Federal Parliament, to appoint justices of the High Court or of the other courts created by the Parliament under Section 71 of the Constitution, with other than a life tenure of their office.

It is not necessary to consider the various other points which emerged during argument. Counsel for the appellants, at the Bar, finally accepted the position that if the Board of Review was validly constituted, or in other words, if it is an executive as distinguished from a judicial tribunal, the judgment of the High Court of Australia must stand. Their Lordships have arrived at the conclusion that the Board of Review is an administrative as distinguished from a judicial tribunal, and in these circumstances will humbly advise His Majesty to dismiss this appeal, with costs.

In the Privy Council.

THE SHELL COMPANY OF AUSTRALIA, LIMITED

v.

THE FEDERAL COMMISSIONER OF TAXATION.

DELIVERED BY THE LORD CHANCELLOR.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.