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SUPREME COURT OF VICTORIA

DEPUTY COMMISSIONER OF TAXATION v VERMONT CHEMICAL & SEED PTY LTD

Murphy J

21-23, 26-27 July, 16 August 1976 — (1976) 26 FLR 351; 6 ATR 523; 76 ATC 4,269

INCOME TAX – GROUP EMPLOYER FAILING TO PAY WAGES DEDUCTIONS – POWERS OF COMMISSIONER UNDER S221F(7) – TO VARY REQUIREMENTS OF S221F(5) CONSIDERED – ONUS OF PROOF OF SUCH VARIATION ON PROSECUTION – FORM OF INFORMATION – DISTINCTION BETWEEN CRIMINAL PROCEEDINGS AND PROCEEDINGS FOR RECOVERY AMOUNTS PAYABLE TO COMMISSIONER, AND CONSEQUENTIAL EFFECT OF SUCH DISTINCTION ON ONUS OF PROOF AND AVERMENT PROVISIONS (S243) CONSIDERED; AND OTHER MATTERS: *INCOME TAX ASSESSMENT ACT* 1936-75, S221F(5)(a).

By information, the informant alleged that the defendant being a group employer failed to pay to the Deputy Commissioner of Taxation (DCT) the amount of deductions made from the wages of the employees. The information was dismissed by the magistrate. Upon Order Nisi to review—

HELD: Order nisi discharged.

1. The power of the DCT under s221F(7) to vary the requirements of s221F(5) was a power to vary prospectively and not retrospectively.

2. The onus was on the informant to prove that the particular provisions of s221F were applicable to the defendant. The provisions of s221F(7) are not in the nature of an excuse, proviso, exception, exemption or qualification within the meaning of s14 *Crimes Act* 1914-1973 (Cth) and s219 of the *Justices Act* 1958 (Vic).

3. At the conclusion of the evidence of the informant, a *prima facie* case had been made out that the provisions of s221F(5) were applicable to the defendant and had been contravened. Accordingly, the magistrate should not have dismissed the information at that stage.

***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671, applied.**

4. The information did not specify an offence for the purposes of s221F(5)(a) which required payments to be made to the DCT.

5. The information *per se* was not an averment.

6. The information was not signed by the informant as required by s18 of the *Justices Act*.

MURPHY J: ... It seems clear that the Commissioner's power to administer the Act (see s8), and to exercise a great number of discretionary powers extends, in many instance so as to entitle him to abandon what is referred to in the Act as a penalty, namely, the "excess" over certain specified sums. (See, for example, s223, sub-section (2), and s234).

"Additional tax" is encompassed by the word "penalty". See *Jackson v Gromann (No. 2)* [1948] VicLawRp 71; [1948] VLR 408, 409; 2 ALR 513; 48 ALJR 122; 8 ATD 379. *McGovern v Hillman Tobacco Pty Ltd* (1949) 4 AITR 272.

The word "penalty" where used in s233(2) and s234 must, I think, mean the penalty set out in the Act and not the penalty adjudged by the Court or a Judge. (See s235). This power to waive the excess, which is given to the Commissioner is a power analogous to that given to the Controller by the *Customs Act*, (See s245, and *Christie v Permewan, Wright & Co* [1904] HCA 35; (1904) 1 CLR 693, 697-8); 10 ALR 234. But it would be an extraordinary power if the Commissioner could, after an offence had been committed against the Act, by his unilateral decision, absolve, as it were, the offender from that offence by subsequently varying the requirements of s221F(5) (a) and laying down new requirements, the breach of which, in turn, is made an offence by the Act itself.

I am told by counsel that they have found no authority precisely in point, and having regard to the research that has clearly gone into this matter, I am, I believe, safe in assuming that there is none. In the absence of such authority I, myself, should be reluctant to find that the Commissioner had such a power, unless it was clearly spelt out in the Act itself.

In my opinion, s221F(7) clearly does give the Commissioner power by notice in writing served on a group employer before the due date for compliance with the requirements of s221F(5) has arrived, to vary to such extent as he thinks fit any of the requirements of sub-section (5). This is a discretionary power vested in the Commissioner himself.

In other contexts it has been stated that the Commissioner cannot, by his conduct, alter the effect of the Act of Parliament, for no estoppel can be created against the operation of the Act. See *Federal Commissioner of Taxation v Wade* [1951] HCA 66; (1951) 84 CLR 105, per Kitto J at p117; [1951] ALR 962; (1951) 9 ATD 337; (1951) 5 AITR 214; (1951) 25 ALJR 626. It is also clear that the Commissioner's duty is to obey the law, just as it is the taxpayer's duty to do so. See *Maritime Electric Co v General Dairies Ltd* (1937) AC 610, 620-1; [1937] 1 All ER 748.

Similarly, it is not arguable that there is any principle of law which precludes a person such as the Commissioner from "alleging that the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid." See *In re a Bankruptcy Notice* (1924) 2 Ch 76, per Atkin LJ at p97.

But, these references from the foregoing cases may tend to beg the question which arises here. Mr Sweeney referred me, in support of his argument, to Professor Glanville Williams' treatise on the *Criminal Law*, chapter 19, in which the following statement appears under the heading "Consent must be before the Act. Undertaking not to prosecute":

> "There is an exception of doubtful scope where a binding promise may be made not to prosecute. This is where the crime does not amount to a felony, and the circumstances are such that the promisor has a right of action for damage in respect of the crime; here, it is said, he may validly compromise not only his civil action but a criminal prosecution."

I have considered the cases of *Keir v Leeman* [1846] EngR 106; (1846) 9 QB 371; 115 ER 1315 and *Fisher v Apollinaris Co* LR (1875) 10 Ch App at p303, to which the learned author refers.

However, I do not see that a consideration of these cases or of this doubtful exception throws any helpful light on the construction to be given to s221F(7).

Mr O'Bryan submitted, as a generalisation, that it is beyond the power of the Gods to alter the past, but this, though no doubt true, would not prevent Parliament from enacting that the Commissioner has the right to expunge, retrospectively, a breach of the Act, if Parliament chose to give him such a power.

The prior history of what is now s221F(7) appears to me to support the view that the power given is a power to vary prospectively, and not retrospectively. Section 221F(7) had its origin in 1940 in the *Income Tax: Assessment Act* (No. 2) s15, which added Division 2 of Part VI of the *Income Tax Assessment Act* 1936-1940. Section 221D4 insofar as is relevant reads:

> "Where the Commissioner so varies the amounts to be, deducted, he shall notify the employer of the employee or class of employees, in writing, of the variation, and the employer shall thereafter make deductions from the salary or wages payable to the employee or employees in accordance with the amounts so notified."

The power to "vary" is, itself, ambiguous, for in different statutes the word "vary" has been given different meanings according to its context. (See, for example, some of the cases collected in *Young v Young (No.2)* (1962) p218).

In my opinion, therefore, the power of the Commissioner is a power simply to vary prospectively, and not to vary retrospectively. Further it was submitted that the onus of proof of any variation of the requirements of s221F(5)(a) rested on the defendant, and the provisions of s.s.(7) were in the nature of excuse, proviso, exception, exemption or qualification of s.s(5)(a),

so that the onus rested not on the prosecution, but on the defendant. His Honour rejected this submission. In his view, as either the provisions of s.s(5) or the provisions of s.s5(5) as varied by s.s(7) may be applicable to any group employer, it must be proved, by the informant which is applicable. (In the present case there was no direct evidence on the matter).

MURPHY J: continued ... In my opinion on a consideration of all the evidence, and as a matter of law, it could not have been said at the conclusion of the case for the informant that a reasonable Magistrate could not have found, that the provisions of sub-section (5)(a) of section 221F(11) were applicable to this defendant and were breached. It follows that the Magistrate should not have acceded to defendant counsel's submission. (See *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671) The Magistrate made his ruling because he considered that the Commissioner could retrospectively vary the requirements of s221F(5)(a) and had apparently varied them, although how and when, he could not say.

Although I have found that he was wrong on this matter, I am not to be taken as saying that the Magistrate should have found that the provisions of sub-section (5)(a) were in fact applicable to this defendant or that he himself should have been satisfied beyond reasonable doubt or according to any other standard of proof on the matter. This would have been a matter for him to determine on the evidence and in my opinion the onus of proof of this matter rested at all times on the informant. But as a matter of law, since in my view the defendant could on the evidence lawfully have been convicted, a submission of no case to answer on this ground should have failed. The Magistrate, could, following a ruling that there was a case to answer, nonetheless, have decided, even if no further evidence was called, that he was not satisfied beyond reasonable doubt of the defendant's guilt. (See *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671).

[As to the form of the information, His Honour said] ... The information in its originally printed form alleged a contravention of s221F(5) of the Act in that the defendant being a group employer " did fail to pay to the Deputy Commissioner of Taxation" a specified sum.

If there is to be an offence against s224F(5)(a), it must be "a failure to pay to the Commissioner", for it is to the Commissioner only and not the Deputy Commissioner that sub-section (5) refers. The duty to pay to the Commissioner may be satisfied *inter alia* by payment of the sum due to any Deputy Commissioner. (See Regulation 54G, 54H and 54J). It follows that payment to a particular Deputy Commissioner or in the instant case to Leo Thomas Fitzgerald is not the only way in which the defendant or any other group employer for that matter could comply with the provisions of s221F(5)(a).

Accordingly, the printed form of information, when specifying the particulars of the alleged breach of s221F(5)(a) (that is to say, in the words commencing "in that being a group employer" *et cetera*) did not specify any offence against s221F(5)(a). The group employer is not bound to pay "deductions" to the Deputy Commissioner and his failure to do so does not constitute an offence. He may pay the Commissioner in a number of other ways.

The offence is committed only if payment is not made to the Commissioner as required by sub-section (5)( ) in any of the ways specified in Regulation 54G ... *[As to the distinction drawn by the Act between criminal proceedings under s221F, and proceedings for the recovery of the amount payable to the Commissioner, His Honour said]:* "There is a clear distinction drawn by the Act between criminal proceedings against a group employer for an offence against a provision of s221F "which is applicable to him" and proceedings for the recovery of the amount payable to the Commissioner. (See s221R.)

Section 221R relates only to the recovery of the amounts "payable to the Commissioner" and states that such amount "shall be a debt due to the King on behalf of the Commonwealth and payable to the Commissioner". In the case of the "debt" the Commissioner or a Deputy Commissioner may sue "in his official name" to recover it (see s221R(1)), and a certificate in writing signed by specified persons and setting out specified matters as to the debt "shall be *prima facie* evidence of the matters stated in the certificate". (See s221R(2), and as to "prescribed delegate of the Commissioner", see Regulations 3 and 61 of the *Income Tax Assessment Act Regulations*.)

Again, s209 of the Act states, "Any tax unpaid may be sued for or recovered in any court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name". But, again, this section relates only to a civil action to recover the tax due and has no relationship to a prosecution for an offence against the Act.

As a matter of law, the printed information does not disclose any offence, in that the facts particularised do not amount to an offence. *[His Honour went on to consider at length whether the information was a "taxation prosecution", and the consequential effect on the onus of proof and the averment provisions (s243) of the informations not being "taxation prosecutions". He concluded the information, was not a "taxation prosecution". In this regard His Honour said]: ...* Mr Sweeney submitted that the information was not a "taxation prosecution" within the meaning of s222 of the Act. Section 222 is the first section in Part VII of the Act headed "Penal Provisions and Prosecutions" and it reads, "in this Part, 'taxation prosecution' means a proceeding by the Crown for the recovery of a pecuniary penalty under this Act". It is worth noting that the words are "under this Act", and not "under this Part". Other sections of Part VII of the Act were repeatedly referred to and they include s233, 243 and 244.

Mr Sweeney relied upon the decision of the Full Court of the High Court in *Gaal v Wilson* [1956] HCA 52; (1956) 96 CLR 522; [1956] ALR 1198; 11 ATD 358. The judgment of the Court, delivered by Dixon CJ, does not appear to have been a reserved judgment, and although I understand, as I believe, the decision, I have had some difficulty in appreciating what, exactly, is its ration. The information in that case was sworn by a Mr Gaal, an officer of the Department of Taxation in Sydney, and it alleged an offence against s221F(5)(A) of the Act.

The High Court, which comprised Dixon CJ, Fullagar, Kitto and Taylor, (if I may say so, with the greatest respect, a very strong court) held unanimously that "the information is not a taxation prosecution within Part VII of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954 because it is not a proceeding by the Crown for the recovery of a pecuniary penalty under that Act. (See s222.) The jurisdiction of the Court of Petty Sessions to hear it as a summary offence arises by reason of s68 of the *Judiciary Act* 1903-55 and s43 of the *Acts Interpretation Act* 1903-1950".

It is quite clear that s221F is not in Part VII of the Act. It is in Part VI, generally entitled "Collection and recovery of the tax" and is in Division 2 which is entitled, "Collection of 'income Tax by Instalments". In Part VII immediately after s222, which defines "taxation prosecution", there are created in sections 223, 224, 226, 227, 228, 229, 230, 231 and 232 specific offences ranging from failure to furnish returns and refusal to give evidence, to furnishing false returns, certificates or declarations and fraudulent avoidance of tax and obstructing officers. All of those provisions are punishable by pecuniary penalties which are set out. Then s233 appears relating to "taxation prosecution". If I accept *Gaal v Wilson* to be authority to the effect that I am not here concerned with taxation prosecution under the *Income Tax Assessment Act* 1936 as amended, it follows that s243, which I may term the averment provisions, could not be applicable to this prosecution. They would have nothing to do with this matter nor would sections 233 and 244 apply. It has been stated more than once that taxation prosecutions under Part VII partake more of civil proceedings than criminal proceedings and that the onus of proof in taxation prosecution is not properly expressed as an onus to prove the case beyond reasonable doubt. See *Jackson v Butterworth* [1946] VicLawRp 51; [1946] VLR 330; [1946] ALR 382; 8 ATD 214; (1945) 3 AITR 294; *Federal Commissioner of Taxation v McStay* (1945) 7 ATD 527; (1945) 3 AITR 209, 212; *Jackson v Gromann* [1948] VicLawRp 71; [1948] VLR 408; 2 ALR 513; 48 ALJR 122; 8 ATD 379. In *McStay's case*, Mr Justice Williams said of proceedings under Part VII.

> "Further, proceedings under Part VII of the Act are not strictly criminal proceedings. The defendant is not sent to gaol as a direct punishment for having committed the offence. If he was, s243(4)(b) would prevent the section applying to any of the averments."

It should also be appreciated, of course, that if the prosecution to is not a taxation prosecution under the Act, then presumably the onus of proof would be the normal criminal onus of proof.

If, on the other hand, *Gaal v Wilson* is not authority for the proposition that this proceeding is not a taxation prosecution, then I would need independently to decide whether this is a proceeding

by the Crown for the recovery of a pecuniary penalty under the Act so as to render it a taxation prosecution within the meaning of Part VII.

Mr O'Bryan stated that he was instructed to submit that the information was a taxation prosecution and he sought to distinguish *Gaal v Wilson* simply on the ground that the defendant in this case, being a company, could not be imprisoned pursuant to s221F(12). Implicit in his submission was the apparent assumption that where a term of imprisonment could be directly imposed by way of penalty on conviction the proceedings were not a taxation prosecution. Mr O'Bryan no doubt had in mind the precise words of s222. But s243, the averment provisions applicable "in any taxation prosecution", contains sub-section(4)(b), which reads:

> "This section shall not apply to (a) ... (b), proceedings for an indictable offence or an offence directly punishable by imprisonment."

The provision would seem to be mere surplusage, if the sole test to be applied in order to determine whether or not an information for an offence is a taxation prosecution is whether or not it is directly punishable by imprisonment. Nonetheless, I find it extremely difficult to see any point in defining, "taxation prosecution" in s222 as a "proceeding by the Crown for the recovery of pecuniary penalty under the Act" if it also includes proceedings by the Crown for an offence directly punishable by imprisonment under the Act. The precise words of s222 would seem to exclude such a construction, even though it may be that the emphasis in s222 is on "a proceeding by the Crown" as distinct from a proceeding by some other person.

Until *Stuckey v Iliff* [1960] HCA 57; (1960) 105 CLR 164; [1961] ALR 79; 12 ATD 239; 34 ALJR 185, a reserved judgment of the Full Court of the High Court, it seems perhaps to have been accepted, from reading the books, that "taxation prosecution" as defined in s222 only applied to prosecutions for offences against Part VII of the Act, despite the use in s222 of the words, "under this Act". However, *Stuckey v Iliff* makes it clear that a "taxation prosecution" as defined by s222 can be brought in the manner set out in s233(1) or s233(2), whichever is appropriate, for an offence against any part of the Acts. In a joint judgment, Dixon CJ, McTiernan, Kitto, Menzies, Windeyer JJ said:

> "... it is sufficiently clear that a prosecution for the offence created by s251L(1) "(under Part VIIA) "is a prosecution for the recovery of a pecuniary penalty under this Act within the meaning of s222. If the prosecution in this case could be regarded as a proceeding by the Crown it would therefore be capable of falling within the definition which applies to s243."

(See at page 170 above citation).

Fullagar J stated that he was not satisfied that s243 applied to proceedings for an offence against s251L of the Act. He did not state any reason for his lack of satisfaction. But, having regard to his earlier decision in *Jackson v Butterworth* (*supra*) and *Jackson v Gromann* (*supra*) (both whilst a Judge of the Supreme Court of Victoria) and to the apparently popular view held since *Gaal v Wilson* (*supra*) that proceedings for offences outside Part VII were not taxation prosecutions, it may be that these considerations led to his lack of satisfaction. He went on to state:

> "The provisions of Part VII of this Act are notoriously confused and difficult and it would, I think, be a good thing if they were subjected to revision by the Parliament in the near future."

That case was heard and determined some 16 years ago since which sections 222, 243, 244 and 245, all being most material provisions in Part VII, have not been altered in any way, and s233 has been only incidentally amended by Act No. 143 of 1965 (see s6 and the schedule thereto) by merely adding the words, "Or Territory of the Commonwealth". In fact, no amendments have been made to Part VII which attempt to cure the interpretative difficulties flowing from it. These difficulties in my opinion still abound.

In *Iliff's case*, no reference appears to have been made, by counsel in argument or by the Court in its judgment, to *Gaal v Wilson* (*supra*). However, having regard to the decision in *Iliff's case*, the decision of *Gaal v Wilson* must, I think, be considered simply as applying to the facts of that case. Its ratio seems accordingly to be that, because Gaal swore out the information in his own name, the proceeding could not be a "taxation prosecution", which, by s223 must be a proceeding "by the Crown". Nevertheless, the court held that the proceeding was not invalid and

that the Court of Petty Sessions had jurisdiction to hear it by reason of s68 of the *Judiciary Act* and s43 of the *Acts Interpretation Act*.

It also appears that the Chief Justice, Sir Owen Dixon, may have had this question as to whether the information was a "proceeding by the Crown" foremost in his mind when in *Stuckey v Iliff* (at page 166 of the report 105 CLR) he asked Mr Gibbs QC, counsel for the informant, "Where is the provision which enables a prosecution to be maintained on behalf of the Crown by the Commissioner? Is it express or implied?" Mr Gibbs replied that the expression, "by the Crown" in s222 is really defined by s233 and that those words mean, "by the Commissioner or his officers". On looking at the precise wording of s233, sub-section 1 refers to an action "in the name of the Commissioner" and sub-section 2 refers to a prosecution by information, "instituted in the name of the Commissioner or Deputy Commissioner". There is, no reference whatever to what Mr Gibbs referred to as "officers", as far as I can see.

The court in *Stuckey v Iliff* held that if the prosecution in that case could have been regarded as a proceeding by the Crown, it would have been capable of falling within the definition of "taxation prosecution" in s222 which applied to s243, the averment provision. It went on to find that because the complaint was a complaint of Iliff, for his own name appeared as complainant and not that of the Commissioner or Deputy Commissioner, it could not be a "taxation prosecution". It may be important to have regard to the precise facts of that case as set out in 105 CLR at pages 164 to 165.

> "Charles Stuckey was proceeded against in the Court of Petty Sessions, at Brisbane, Queensland, for an offence against s251L(1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1959 (C'th) on the complaint of Edgar Austin Iliff, an officer of the Taxation Branch of the Department of. the Treasury, in the name of and on behalf of the Deputy Commissioner of Taxation for the State of Queensland. The complaint alleged that he was such officer and had been authorised by Philip Gower Johnston, the Deputy Commissioner of Taxation for the State of Queensland, to institute the prosecution in the name of and for and on behalf of the Deputy Commissioner of Taxation..."

The High Court held in *Stuckey v Iliff* that the averment provisions of s243 did not apply. They allowed the appeal and quashed the conviction. However, as I see it, the point decided in that case is again different from the point arising here.

The general rule with regard to the interpretation of penal provisions in taxation statutes is expressed by Lord Haldane in *Lumsden v Inland Revenue Commissioners* (1914) AC 877 as follows:

> "No larger application should be given to the definition ... than clear language or unmistakably necessary intendment requires. Where the words of statute leave the intention obscure, they should be construed as they stand with only such extraneous light as is reflected from within the statute itself; a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words literally interpreted is no sufficient reason for departing from the literal interpretation; to adhere to the literal construction unless the context makes it plain that it cannot be put on the words, is a rule especially important in cases of statutes which impose taxation."

This passage was quoted with approval by Dixon CJ, in *Broome v Chenoweth* [1946] HCA 53; (1946) 73 CLR 583 and 597-598; [1947] ALR 27 and at 3 AITR 472-480.

Bearing this principle in mind, it seems clear that in Part VII a "taxation prosecution", as defined by s222, does not include a proceeding for an offence the direct punishment for which may be a term of imprisonment. That could not be said to be a proceeding for the recovery of a pecuniary penalty.

It appears to me that s244(4), which may by implication tend to suggest otherwise, should not override what is clearly expressed in s222. The provisions of Part VII are not so clear that the rule that one should not readily construe words in a statute as mere surplusage, should override what are, otherwise, plain enough words in s222 (cf. *Income Tax Commissioner v Pemsel* (1891) AC 532 per Lord Macnaghten at p589).

Moreover, it would seem to me to be oppressive to expose a person to the risk of a term of six months' imprisonment on conviction for an offence, even though the tribunal is not satisfied

of his guilt beyond reasonable doubt. One ought not, I think, unless compelled, attribute such an intention to the Legislature.

If, then a prosecution for an offence against s221F(5)(a) or (7) is not to be considered a "taxation prosecution", as defined by s222, if the person charged is an individual and can be sentenced directly to six months' imprisonment, (see s221F(12), can it, nonetheless, be such a taxation prosecution if the person charged with the same offence is a body corporate and unable *per se* to be so imprisoned? There are very few sections of the Act which stipulate that a person may be imprisoned for a breach of the provisions of the Act. Section 221, 6.229 and s221F(12) do so stipulate, and all relate to breaches which are of the nature of true criminal offences such as theft and perjury.

Mr O'Bryan submitted that the fact that the defendant was a company and incapable of being imprisoned made this particular prosecution a taxation prosecution, even though, had the defendant been an individual, it would not have been such. I have already indicated that the cases clearly establish that proceedings by way of "taxation prosecution" under Part VII partake more of civil proceedings than of criminal proceedings. I should also refer to *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198; [1949] ALR 992.

I find it extremely difficult to see how one could consider proceedings under s221F, or, for example, s221 or s229, whether taken against an individual or a company, as a "taxation prosecution", as that word is defined in Part VII and interpreted in the decided cases. I think that the better view is that these proceedings are of their nature, not a taxation prosecution falling within s222.

It may also be helpful to consider whether it could be suggested that proceedings against a company under s221F are a taxation prosecution, but proceedings against a person for aiding and abetting the company to commit the same offence are not. Yet, the person aiding and abetting could, of course, be punished by imprisonment, (cf. *Mallan v Lee* [1949] HCA 48; (1949) 80 CLR 198 at p212; 1949] ALR 992, per Latham CJ, p216-17, Dixon J).

In the present case there was, in any event, no averment such as is commonly made in a statement of claim in an action brought in the High Court or in the Supreme Court of the State. There was no averment of any sort tendered in the way of a document, and I find it difficult to consider the information *per se* as an averment. It was not, as I understand it, tendered before the Magistrate, (cf. *Stuckey v Iliff* (*supra*)). The note of the Magistrate's ruling when he refers to averments is not clear to me, and I find difficulty in knowing exactly what he is referring to at all. In my opinion the averment provisions of s243 of the *Income Tax Assessment Act* are inapplicable in any event, in these Proceedings.

[His Honour upheld submissions.
(a) that the printed name "LEO THOMAS FITZGERALD" appearing (presumably at the bottom of the information particulars) was not a signature;
(b) nor was there evidence that the signature "J Hourigan" appearing beneath the said printed name a signature of a "prescribed delegate" of the Commissioner or Deputy;
(c) that there was no proof L.T. Fitzgerald was the Deputy Commissioner;
(d) that the information was bad because it was not signed by the informant. S18 of Justices Act 1958 (Vic.) applied and that section was not affected by either the Commonwealth Crimes Act s13(b) or the Income Tax Assessment Act s245, which relate only to appearances before the court and not to institution of proceedings. (See Brebner v Bruce *[1950] HCA 36; 82 CLR 161, 166-7; [1950] ALR 811).*
After dealing with several other submissions, some of which he found it unnecessary in the circumstances to rule on, His Honour concluded.]

Many other arguments were ably advanced by Mr Sweeney but I hope I may be excused if I do not touch upon them as it appears unnecessary to do so. In my opinion, there was no evidence before the court below to enable it to say that the proceedings were properly instituted. More of the objections to which I have referred were taken in the court below. No amendments to the information were sought there. I am of the view that s18(b) of the *Justices Act* applies to this prosecution brought apparently pursuant to s13(b) of the *Crimes Act* of the Commonwealth and that there was no signature of the informant on the information. Moreover, there was no evidence of any delegation either to the Deputy Commissioner (if there was power to do so), or of any authority given to J Hourigan to bring these proceedings in the name of the Deputy Commissioner or to

sign the name of Leo Thomas Fitzgerald (if he had done so): It was quite clear that the Deputy Commissioner did not bring the proceedings himself. Even if he did, there is no relevant provision requiring the court to take judicial notice of him.

The information is in the official name, Deputy Commissioner of Taxation. There is no provision in the Act enabling this to be done. J Hourigan purported to be the duly authorised agent of the Deputy Commissioner of Taxation to lay the information in his name, but there was no evidence that he was or that Hourigan even existed. There was no evidence, that Leo Thomas Fitzgerald was Deputy Commissioner of Taxation nor has it been shown that he had power to delegate. Whether the maxim *delegatus non potest delegare* applies is not perhaps necessary here to decide. I am also inclined to the view, having regard to the context of the Act, that, had this been a taxation prosecution, Leo Thomas Fitzgerald should have been the informant suing in his own name and not in his official name. In such circumstances sections 233(2), 243 and 244 could have been called in aid, on the assumption that it was a "taxation prosecution". In any event the particulars of the information, even as amended as they were in the course of argument before me, in my opinion disclosed no offence against s221F(5)(a) or s221F(11). Some of the defects might possibly have been cured by further amendments but others depended on evidentiary material which was absent in the case.

Having regard to all the circumstances I believe that justice would not be served by allowing any further amendments at this stage. The decision of the Magistrate, although, I believe, based upon a finding that could not be sustained, should be upheld on any one of a number of other grounds. In the circumstances it is appropriate to reiterate, with respect, the remarks of Fullagar J in *Stuckey v Iliff* (*supra*) although, as I say, made 16 years ago. The confusion and difficulty to which he referred and which he found in interpreting and implementing Part VII of the *Income Tax Assessment Act* continues today. In a statute of such universal importance it is regrettable that such ambiguities are allowed to continue and that the Commissioner and the Deputy Commissioners, who for practical purposes have the responsibility to administer the Act, are placed in such a difficult position in performing their duties under the Act.
