
1960

Jan. 25, 26, 27, 28

Nov. 29

BETWEEN:

LAWRENCE B. SCOTT .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Income or capital—Income Tax Act R.S.C. 1952, c. 148, ss. 46(1)(2)(3)(4)(6)(7), 51(1), 52(1), 56, 57(1), 58(1) and 61—Sale of inventory on cessation of business for lump sum—Lump sum is income subject to tax—"Day of assessment"—Proper notice of mailing of a notice of assessment to a taxpayer—Duty to send "a notice of assessment to the person by whom the return was filed"—Appeal allowed.

Appellant between 1945 and 1952 carried on business as a registered broker-dealer under the *Securities Act of Ontario*. In association with others he caused the incorporation of a company for the purpose of exploring and exploiting certain gas and petroleum rights. Through underwriting agreements appellant became the owner of shares of the capital stock of three companies. In 1952 appellant's registration as a broker-dealer

was cancelled by the Ontario Securities Commission. He thereupon sold all his stock holdings in bulk and received for them the sum of $100,000. This he did not report in his income tax return for 1952 and the Minister in making a re-assessment for that year added that sum to his taxable income. Appellant contends that the amount received was capital and not income. Appellant filed his income tax return for 1952 in April 1953 giving his correct residence and business address. Appellant also contends that the re-assessment was not made within the four years limited by the Act. The original notice of assessment was mailed to appellant on May 28, 1953. After 1953 appellant terminated his business and moved his residence to a place unknown to the department. On May 16, 1957 an assessor in the department made a recalculation of appellant's tax for 1952 and on May 28, 1957 a notice of re-assessment was mailed to appellant in care of a solicitor who had represented him on an earlier tax problem. The solicitor photostated the contents of the letter and returned envelope and contents to the District Taxation Officer the next day stating he did not represent the appellant. The photostats were sent by the solicitor to an accountant who had acted for appellant earlier. The department on June 7, 1957 again mailed the notice of re-assessment to appellant's actual residence. There was no allegation of fraud or misrepresentation by the appellant.

Held: That the sale of appellant's stock was the final act in a joint profit-making scheme between appellant and his associate and the sale having occurred in the course of carrying on business the profit therefrom was income and subject to tax, and the fact that it was a bulk sale did not alter its character as income.

2. That the mailing of the notice of re-assessment on May 28, 1957 to the solicitor who had no authority to receive it nor to act for the appellant was not a valid discharge of the Minister's duties under s. 46(2) of the Act which requires him to send "a notice of assessment to the person by whom the return was filed".

3. That the re-assessment was invalid not having been made within the four year period prescribed by the Act.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

J. G. McDonald and *David A. Ward* for appellant.

Gordon W. Ford, Q.C. and *F. J. Dubrule* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (November 29, 1960) delivered the following judgment:

This is an appeal from a re-assessment of income tax made in 1957 in respect of the appellant's income for the year 1952. Two questions are involved in the appeal, the

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first being that of whether a profit realized by the appellant in 1952 was income and the other being whether the re-assessment was made within the limitation period of four years from the day of the original assessment provided by s. 46(4) of *The Income Tax Act*, R.S.C. 1952, c. 148, as amended by Statutes of Canada, 1956, c. 39, s. 11.

The profit in question was realized in the following circumstances. The appellant was registered in 1945 as a broker-dealer under *The Securities Act of Ontario* and thereafter carried on business as a dealer in shares under the firm name of L. B. Scott & Company. In 1949, prompted by the appellant, one George Tabor who was the manager of a collecting agency in Toronto and a long-time friend of the appellant, secured certain natural gas and petroleum rights in Alberta and transferred them to Alsa Holdings Limited, a corporation formed in July, 1949, for the purpose of exploring and exploiting these rights. The consideration for the transfer was 256 shares of Alsa Holdings Limited. At about the same time, Capitol Petroleums Limited and Mammoth Petroleums Limited were incorporated and Tabor transferred 128 of the shares of Alsa, held by him, to Capitol, in consideration of 800,000 shares of that company, and the other 128 to Mammoth in consideration of 800,000 shares of that company. Capitol thereupon entered into an underwriting agreement with L. B. Scott & Company for the sale to Scott of some of its shares, with options to purchase additional shares, which agreement was subsequently expanded as to the number of shares, and extended in time. In 1950 and 1951, Scott purchased and sold to the public upwards of 1,000,000 shares of Capitol, thereby providing that company with funds with which it in turn financed the exploratory operations carried out by Alsa. During the same period, Albert N. Richmond was the under-writer of shares of Mammoth which he sold to the public and thus enabled Mammoth to assist on an equal basis with Capitol in financing Alsa. Initially, all but 80,000 of Tabor's 800,000 shares of Capitol were in escrow in the sense that they could not be sold without prior consent of the Ontario Securities Commission, but in April, 1950, 40,960, and in May, 1950, an additional 259,040 of these shares were released. Early in June, 1950, the whole of Tabor's holdings

of Capitol shares were transferred to Scott who says he paid Tabor $10,000 for them. Shares of Capitol not subject to escrow arrangements were being traded at that time at fifty cents a share. Within a month afterwards, on payment of a like sum, Tabor transferred his shares of Mammoth to Richmond. More than 200,000 of the shares of Capitol transferred to Scott by Tabor, had been sold by Scott to the public in the course of his business when, on June 23, 1952, Scott's registration as a broker-dealer was cancelled by the Ontario Securities Commission. Over a period of four months preceding this event, inquiries had been received by Scott from time to time as to his willingness to sell the whole of his Capitol holdings, but he had declined to sell them in bulk. One or more of these inquiries had been made on behalf of a man named Roman and on receipt of the notice of cancellation of his licence, the appellant immediately advised Mr. Roman that he would be interested in making such a sale. Five days later, on June 28, 1952, the appellant and Richmond jointly sold to Roman all their holdings in Alsa, Capitol and Mammoth, and in two other companies as well, for $250,000, of which the appellant ultimately received $100,000 as his share.

On receipt of the notice of cancellation of his licence, the appellant also dismissed all but two of his fourteen employees, had all but one of his fourteen telephones disconnected, sold his office furniture, and arranged with his landlord to find a sub-tenant to take over his office premises. One of the remaining employees stayed on the job for two weeks after the cancellation of the licence, and the other, an accountant, remained for a month, during which securities belonging to clients were delivered and other details of the closing of the business were carried out, but no new purchases of shares were made and no sales of shares save that above mentioned were made. Scott later applied for registration as a salesman, but was refused, and he has not at any time since then been engaged in dealing in securities.

The sum of $100,000 so received was not reported as income by the appellant in his 1952 income tax return and the Minister, in making the re-assessment, assumed that the appellant had received $150,000 of the $250,000 and

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that the whole of the $150,000 was income of the appellant, and he assessed tax and interest thereon accordingly. As there is no evidence that the amount received by the appellant was $150,000, and no contradiction of the appellant's evidence that what he received was $100,000, I find that the latter amount is what Scott in fact received.

The appellant's contention on this branch of the appeal was that the sum so received was not income but a capital sum realized on the closing of his business and the liquidation of its assets. The Minister, on the other hand, submitted that from the inception of the three corporations, Alsa, Capitol and Mammoth, the appellant and Richmond were engaged in a joint scheme for making profit by promoting the sale of and selling shares of Capitol and Mammoth, that Tabor was a mere nominee and never was the real owner of the shares which he at one time held, that the sale of the shares of Capitol and Mammoth by the appellant and Richmond was but the final act in carrying out their scheme for profit making and that the profit realized in that transaction was accordingly profit from a business within the meaning of *The Income Tax Act* and income for the purposes of that Act.

While the appellant stoutly denied that Tabor was a mere nominee or that he and Richmond were engaged in any joint scheme for profit making, the inference is clear in my opinion that whether Tabor was a mere nominee or not, and whether there was or was not what might technically be called a joint scheme, there was clearly a scheme in which the appellant was a participant if not the guiding genius for making profit by promoting the sale of and selling shares of Capitol and of Mammoth to the public. And despite the fact that the appellant, by the cancellation of his licence, may have been prevented from selling by retail the remainder of the shares transferred to him by Tabor, I am of the opinion that the sale in question was indeed but the final act in carrying out that scheme and that the profit therefrom was accordingly a "gain made in an operation of business in carrying out a scheme for profit making" as described in the well known test set forth in *Californian Copper Syndicate v. Harris*[1].

[1] 5 T.C. 159.

It was submitted on behalf of the appellant that the case is governed by the judgment of the Supreme Court of Canada in *Frankel Corporation v. M. N. R.*, but in my opinion that case is widely different on the facts from the present one. For even if the present case is regarded as merely one of disposal of inventory on going out of business, it is neither a case of the sale of a manufacturing business, or indeed of a business at all, nor was the sale a slump transaction in which a single consideration was paid for both the revenue and capital assets of a business. Here what was sold was simply inventory and it was inventory of a business which consisted of mere buying and selling. As to this kind of a case, Lord Phillimore said in *Doughty v. Commissioner of Taxes*[1]:

> Their Lordships would repeat that if a business be one of purely buying and selling, like the present, a profit made by the sale of the whole of the stock, if it stood by itself, might well be assessable to income tax; but their view of the facts (if it be open to them to consider the facts) is the same as that of Stout C.J.—that is, that this was a slump transaction.

In *Frankel Corpn. Ltd. v. M. N. R.*[2], Martland J. in delivering the judgment of the Court, said at p. 724:

> The test to be applied is the often quoted one stated by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*, which was last applied in this Court in *Minerals Ltd. v. Minister of National Revenue*:
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> * * *
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> To be taxable the profit must be one from the exercise of trading activity, not the profit from a sale of capital as such. Mere realization of assets does not constitute trading. *Commissioner of Taxes v. British-Australian Wool Realization Association, Ltd.*
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> In *Doughty v. Commissioner of Taxes*, Lord Phillimore, at p. 331, says:
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> > Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.
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> He goes on to say:
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> > It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business, or a sheep rearing business, where the principal objects are the production of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connection with the sale and winding up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with

[1] [1927] A.C. 335.

[2] [1959] S.C.R. 713.

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the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

It is the proposition stated in the first of these last two paragraphs which appears to me to be applicable in the present case.

Here, however, put in the most favourable light for the taxpayer, the case does not fall within the first of the last two paragraphs quoted by Martland J. from the *Doughty* case, but is of the kind referred to in the second of those paragraphs, for in the present case the business was one of mere buying and selling shares. Moreover, the sale in question was a sale of what was inventory of the business, and nothing else. Now when the sale here in question was made, the appellant had no doubt determined, because of the cancellation of his licence, to go out of business, and the sale itself probably differed from sales formerly made in the ordinary course of his business in that he was now concerned to effect a bulk sale of the whole of his Capitol and other shares, rather than to dispose of them piecemeal. But these features, while consistent with "mere realization", do not conclude the matter. The mere decision by the appellant to go out of business did not necessarily or in fact put an immediate end to his business or trading activity. The evidence is that on the day he received notice of the cancellation of his licence, he proceeded to let one of the persons who had previously inquired, know that he would now be interested in making a sale of his holdings; a day or so later he provided the same party with information respecting the holdings, and a few days later, when an offer was made, he persuaded Richmond to join with him in accepting it. This, it appears to me, is manifestly a case of the appellant continuing to exercise his trade or business of selling shares until the last of them has been sold and the fact that the

final sale was of a bulk character does not, in my view, make it any the less a sale in the course of that trade or business or the profit therefrom any the less a profit "from the exercise of trading activity". No doubt the sum received from the sale was in a sense a realization of the value of the appellant's shares, but it was in my view a realization achieved by the appellant by continuing to exercise his trade. On this branch of the case, I would accordingly hold that the sum received by the appellant from the sale in question, that is to say, $100,000, was income and that the appeal should be allowed only in so far as the re-assessment relates to the other $50,000.

I turn now to the other question raised in the appeal, that of whether or not the re-assessment was made within the period of four years limited by the statute. For this purpose, it will be convenient to refer at the outset to the relevant provisions of the statute. *The Income Tax Act* is divided into parts, of which Part 1 deals with Income Tax and is itself divided into a number of divisions. Division A contains charging provisions and Divisions B, C, D, E, G and H contain various provisions by which the income, the taxable income and the tax liability so imposed are to be measured. Division F, comprising ss. 44 to 61, provides for returns of income, assessments of tax, times for payment of tax, and appeals. These provisions prescribe the procedure by which the amount of the taxation imposed by the statute on each taxpayer is to be ascertained and settled. In the first instance, the taxpayer is required to furnish the relevant information and to estimate the tax. The Minister is then charged with the duty of examining the taxpayer's return of income and of assessing the tax. In so doing he obviously may agree or disagree with the taxpayer's estimate of the tax, but whether he agrees or not, he is required to send the taxpayer notice of assessment. The taxpayer then has the right to object to the assessment and subsequently to appeal therefrom. For the present purpose, the most important of these provisions is s. 46 which, as applicable to the case at bar, reads as follows:

46. (1) The Minister shall, with all due despatch, examine each return of income and assess the tax for the taxation year and the interest and penalties, if any, payable.

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.

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(3) Liability for tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

(4) The Minister may at any time assess tax, interest or penalties and may

(*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and

(*b*) within 4 years from the day of an original assessment in any other case,

re-assess or make additional assessments.

(6) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

(7) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

In s. 61 it also provided that no assessment shall be disturbed on appeal by reason only of fault in the observance of any directory provision of the Act.

In Part VII of the Act, which is entitled "Interpretation", it is declared in s. 139(1)(*d*) that "In this Act 'assessment' includes a re-assessment."

The present case raises the question as to what is meant by "the day of an original assessment" in s-s. (4), which in turn involves consideration of what is an assessment within the meaning of s. 46 and when is it made. The case also involves the question of what is meant by the word "send" in s. 46(2).

The facts relevant to this part of the matter are as follows: The appellant's income tax return for the year 1952 was filed on about April 30, 1953, at the District Taxation Office in Toronto, and in it, as required by the prescribed form of return, the appellant gave as his address 100 Old Colony Road, R.R. 2, York Mills, and he also gave as a business address, L. B. Scott & Company, Suite 302, 366 Bay St., Toronto, Ontario.

During the month of May, 1953, the return was examined and checked by several persons employed in the District Taxation Office, a notice of assessment was prepared, and on May 28, 1953, the notice was sent by post to the appellant at 100 Old Colony Road, R.R. 2, York Mills, the address given in the return. The examination of the

return and the calculation of the tax as assessed, as well as the signature by an assessor of a file copy of the notice, which differed in some minor respects from the notice sent to the appellant, had, however, all been completed on or before May 20, 1953. Subsequently, on May 16, 1957, in view of information which had come to light, an assessor of the Department prepared a re-calculation of the appellant's income for the year 1952 and of the tax thereon, together with a report setting out the reason therefor, from which a notice of re-assessment was later prepared and a file copy signed by him. The notice was checked by another employee on May 22, 1957, who also signed the file copy, a calculation of interest was subsequently added, and on May 28, 1957, the notice of re-assessment, which purports to bear the printed signature of the Deputy Minister of Naitonal Revenue for Taxation but not those of the assessor or checker, was mailed to the appellant "c/o Mr. Wolfe D. Goodman, 88 Richmond St. W., Toronto, Ont.".

The reason for so addressing the notice was that the assessor apparently knew that 100 Old Colony Road, R.R. 2, York Mills, Ont., was no longer the appellant's place of abode, that a letter sent a few weeks earlier to the appellant at another Toronto address, that of the same George Tabor already mentioned, which the appellant had given in his 1955 income tax return, had been returned undelivered and that Mr. Goodman had some years previously represented Mr. Scott in connection with a tax question which arose in respect of the taxation of the appellant for a previous year. Mr. Goodman was not in fact the solicitor or agent of the appellant on May 28, 1957, when the notice of re-assessment was so mailed and he returned it to the District Taxation Office on the following day without communicating with the appellant. His instructions in the earlier case had, however, come from Mr. Ralph Fisher, a chartered accountant then representing Scott, and before returning the notice, Mr. Goodman telephoned Mr. Fisher and at his suggestion had the notice photographed. The next day he sent one set of the photographs to Mr. Fisher and on June 4, 1957, on instructions from either Mr. Fisher or from MacCarthy & MacCarthy, a firm of solicitors, he forwarded the remaining photographs to the latter firm. The explanation given by Mr.

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Fisher of his interest in the notice was that he was engaged by George Richmond in resepct of an assessment of his share of the profit which arose out of the same transaction. Mr. Fisher also explained his interest in the notice on the ground that since he had prepared the appellant's income tax return for the year in question, he wanted to be in a position to advise the appellant as to his position, if, on receiving the notice, the appellant should consult him. For that purpose he had requested opinions on several questions pertaining thereto from several solicitors, including MacCarthy & MacCarthy, without communicating with the appellant. This somewhat surprising interest in a problem as to which he had no instructions may excite one's suspicion, but I do not think there is any reason to presume that Mr. Fisher was in fact the appellant's agent, and in any event, I think the preponderance of evidence favours the view that Fisher was not at that time the appellant's agent. On the return of the notice to the District Taxation Office, inquiries were made as to the appellant's address and on June 7, 1957, the notice was mailed to him at another address in Toronto where it reached him.

It was not alleged or argued that there had been any misrepresentation or fraud on the part of the appellant in filing his 1952 return or in supplying information under the Act so as to authorize re-assessment at any time pursuant to clause (*a*) of s. 46(4), and the matter falls to be decided under clause (*b*) of that subsection.

The present appeal has been pending in this Court since May 12, 1959, and is not affected by the amendments enacted by Statutes of Canada, 1960, c. 43.

The appellant's submission was that if the "day of an original assessment" referred to in s. 46(4) is taken as the day the calculations of the appellant's tax were completed, the four year period ran from May 20, 1953, and that the evidence showed that the re-assessment was not completed prior to May 22, 1957, which was beyond the time limited by s. 46(4). Alternatively, if the day of mailing the notice is to be taken as the day of assessment, he argued that for the purposes of the statute, the notice of re-assessment was not effectively sent by addressing it c/o Mr. Wolfe Goodman, and accordingly the re-assessment was not made before June 7, 1957, which was more than four years after May 28,

1953, when the notice of the original assessment was sent.

On behalf of the Minister, it was submitted that an assessment and a notice of assessment are two different things and that an assessment necessarily precedes a notice thereof, that an assessment is complete when but not until the Minister has finally put it out of his power to alter it by posting out notice thereof to the taxpayer, that the day of the original assessment was accordingly May 28, 1953, and the day of the re-assessment May 28, 1957, since despite the fact that the notice mailed on that day was returned, the mailing of it on that day established that the re-assessment was complete on that day, which was a day within four years after the day of the original assessment.

There is, I think, no reason to doubt that an assessment and a notice of assessment are not the same thing. *Vide Pure Spring Co. Ltd.*[1], where Thorson P. said at p. 500:

> The assessment is different from the notice of assessment; the one is an operation, the other a piece of paper. The nature of the assessment operation was clearly stated by the Chief Justice of Australia, Isaacs A.C.J., in *Federal Commissioner of Taxation v. Clarke*, (1927) 40 C.L.R. 246 at 277:
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> "An assessment is only the ascertainment and fixation of liability." a definition which he had previously elaborated in *The King v. Deputy Federal Commissioner of Taxation* (S.A.): ex parte Hooper, (1926) 37 C.L.R. 368 at 373:
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> > An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount he sends by post a notification thereof called "a notice of assessment" . . . But neither the paper sent nor the notification it gives is the "assessment". That is and remains the act or operation of the Commissioner.
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> It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

See also *Provincial Paper Ltd. v. M. N. R.*[2]

But it does not, in my opinion, follow from the foregoing that the giving of a notice of assessment is not itself part of the fixation operation or procedure which is compendiously referred to in the statute as an "assessment", or if the giving of notice is not strictly part of the assessment

[1] [1946] Ex. C.R. 471. [2] [1955] Ex. C.R. 33.

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itself that the assessment itself is complete until the notice has been effectively given. In *Irving and Johnson (SA) Ltd. v. C. I. R.*[1], Watermeyer C.J. discussed the meaning of assessment as follows at p. 28:

> Now the word "assessment" is defined in the Act as "the determination of an amount upon which any tax leviable under this Act is chargeable" unless the context otherwise indicates. An examination of various sections will show that the word is used in the Act in more senses than one. The word may denote something subjective, i.e., the mental process or act of determining such amount, but it is more usually used to denote something objective, i.e., the visible representation of words and figures of that mental process. Subjectively, an assessment is an abstraction which has no real existence until it is published by being expressed in symbols which convey a meaning to others. So long as it is locked up in the mind of the assessing officer, who is not necessarily the Commissioner, it cannot be dealt with as required by the Act. Its particulars cannot be recorded by anyone except the assessing officer; they cannot be filed (see sec. 67(2)); the Commissioner cannot issue the assessment (see sec. 67(8)), nor can he alter it. It seems clear, therefore, that in most places in the Act the word "assessment" does not mean the unexpressed thoughts of the assessing officer, but the written representation of those thoughts. Again assessment must result in a figure, it is an "amount" which has to be determined and it is that "amount" or figure which the Commissioner may "reduce" or "alter" under sec. 77(6). (See *Commissioner for Inland Revenue v. Taylor* (1934, A.D. 387), *Commissioner for Inland Revenue v. Orkin & An.* (1935), A.D. 18).)
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> It is inappropriate to speak about "reducing" a "thought" or reducing a mental process. It is also somewhat difficult to see how the Commissioner can "alter" the mental processes of his subordinates who assess; he can, however, alter the expressed result of their mental processes, and this must require some formal act. Presumably what is done is that the record of the assessment is altered on the instructions of the Commissioner. He probably does not make any alteration himself but gives instructions that it should be done.

In s. 46(1) of *The Income Tax Act,* the verb "assess" appears in a context which contains nothing to indicate the exact limits of what is embraced therein. Nor is there anything in the subsection to prescribe the form in which the operation is to be carried out or recorded. As used in s. 46(1) the word "assess" appears to me to be roughly equivalent to "ascertain and fix" and it seems to have two possible senses in one of which the mere acts of ascertaining and calculating only are included, and the other that of computing and stating the tax in the manner prescribed by the statute. In the latter sense, the stating is as much a part of the assessing operation itself as is the computing of the tax, and in the absence of some statutory provision

[1] 14 S.A.T.C. 24.

for stating in another way, it would, in my opinion, be necessary to state it in such a way as to make the taxpayer aware of it.

In which of these two possible senses is the word used? If it is used in the first sense, it seems to me that because of the absence of any statutory method for recording the assessment "the day of . . . . assessment" referred to in s. 46(4), which I think in its ordinary meaning refers to the day the assessing is done, is, in my opinion, left in uncertainty with no convenient means prescribed for establishing it. Nor do I think there would be any sufficient basis or reason for holding that "the day . . . . of assessment" is the day when the Minister by sending out notice puts it out of his power to alter the assessment, for the last of the computations may have been made some days earlier and *ex hypothesi* it is these computations which constitute the assessment. To my mind, the difficulties and the questions which interpreting the word in this sense would raise suggest that in the absence of any statutory prescription of a means or form of recording the assessment in some official document, it is the other sense in which the word "assess" is used in s. 46(1) and this is, I think, to some extent confirmed by s. 46(2) which requires that a notice of assessment be sent to the person by whom the return was filed—not after the making of an assessment but—"after examination of a return". At first blush it might seem that an assessment must be complete before notice of it can be given, but I see nothing in the statute to require such an interpretation, for it appears to me to be quite consistent with the language used to interpret the subsection as requiring notice to the taxpayer, not that an assessment has been made, but that an assessment is being made. Nor do I think that Parliament, in setting up a procedure by which the rights of the Crown and the taxpayer would be affected, would have used the expression "after examination of a return" if indeed what was meant was "after making an assessment".

Moreover, perusal of the subsequent provisions of Division F appears to me to lend further support to this view. Under s. 46(2), the requirement is that a notice of assessment be sent. It subsequently appears from ss. 51(1), 52(1) and 56 that times for paying the balance of taxes

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assessed and for objecting to the assessment are limited and ascertained by reference to the date of mailing of notice of assessment. The right to object is, however, a right to object to the assessment itself and it would seem to me that to interpret the provisions so that the right to object arises immediately upon the assessment being made is more in harmony with the scheme of the provisions than to interpret them in such a way that there can be a period of uncertain duration between the day when the assessment is made and the day of mailing of notice which, under s. 58(1) is the time when the right to object to the assessment first arises.

I also think that s. 46(7) lends support to this interpretation, for I think it is unlikely that Parliament while providing no form for recording an assessment, nevertheless intended that a mere calculation of tax by an assessor should have binding effect either on the Crown or the taxpayer notwithstanding any error, defect or omission therein or in any proceeding relating thereto before the notice required by s. 46(2) has been given.

I am accordingly of the opinion that the giving of notice of assessment is part of the fixation operation referred to as an assessment in the statute and that an assessment is not made until the Minister has completed his statutory duties as an assessor by giving the prescribed notice. See *Y.W.C.A. v. Halifax*[1].

In this view, "the day of . . . original assessment" referred to in s. 46(4) was in the present case May 28, 1953, and it remains to be considered whether the re-assessment under appeal was made within four years from that day. This, it seems to me, turns on whether what was done on May 28, 1957—which was the last day of the four year period—completed the re-assessment and it raises the question whether the mailing of the notice to the appellant in care of Mr. Wolfe Goodman was a valid discharge of the Minister's duty to give notice to the appellant and thereby to complete the re-assessment. It was not disputed that s. 46(2), which requires the Minister to send "a notice of assessment to the taxpayer", applies as well to a re-assessment as to an original assessment. Now, nowhere in the statute is there any express definition of what Parliament

[1] [1933] 1 D.L.R. 713.

intended by the word "send" in s. 46(2), but inferentially from the references in ss. 51(1), 52(1), 57(1) and 58(1) to the "mailing of notice of assessment" and the prescription of times by reference thereto, it would seem apparent that Parliament intended that such notices should be given by post. This, however, being itself an inference from language used in the statute, it is in my opinion also to be inferred that Parliament never intended that such a notice could be given effectively by the "mailing" of it to the taxpayer at some wrong or fictitious address and I find nothing in the statute to suggest that Parliament intended that a taxpayer should be bound by an assessment or fixed with notice of an assessment upon the posting of a notice thereof addressed to him elsewhere than at his actual address or at an address which he has in some manner authorized or adopted as his address for that purpose. *Vide Societa Principessa Iolanda Margherita di Savoia (fondata dai Bonitesi), Inc., v. Broderick*[1], where in a different context Kellogg J., speaking for the Court of Appeals of New York, said at p. 384:

> When the statute says that the superintendent "shall cause said notice to be mailed" to all creditors "whose names appear . . . upon the books," we think the intent clear that the notice must be "mailed" with an appropriate address upon the envelope;

In the present case, the notice of re-assessment which was put in the mail on May 28, 1957, while directed to the appellant, was not directed to his actual address nor was it directed to either of the addresses stated in his 1952 income tax return. Had it been so directed—despite the fact that the appellant no longer lived at the residential address or carried on business at the business address—and even despite the fact that the assessor was aware of these facts—it might well be that in the absence of any act on the part of the appellant to notify the Minister of a change of address, he would be bound by the sending of a notice to either of the addresses so given. That, however, was not done and it is accordingly unnecessary to decide what the effect would have been if it had been done. Nor was the notice sent to the address given by the appellant in his 1955 income tax return and for the same reason it is unnecessary to decide what might have been the effect if the notice had been directed to that address. These, however, were the only

[1] [1932] 183 N.E. 382.

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addresses which the appellant had indicated to the Department and it is not shown that Mr. Wolfe Goodman or any other person was in fact authorized to receive notices on his behalf. In this situation, while it was open to the appellant to adopt and ratify and thus give effect to the sending of notice to that address as a valid notice to him, he was under no obligation to adopt or ratify it and on the evidence I do not think he ever did so. Nor does it appear that the notice so sent in fact reached him as a result of the mailing of it on May 28, 1957, either in the ordinary course of post, or later. In my opinion, such a mailing or sending was not a valid mailing or sending of the notice within the meaning of s. 46(2) of the Act, and it follows that the re-assessment was not made within the four year period limited by s. 46(4). Nor, in my opinion, can the requirement of s. 46(2), that a notice of assessment be sent to the taxpayer, be regarded as a directory provision of the Act. *Vide Nicholls v. Cumming*[1].

The appeal will therefore be allowed with costs and the re-assessment vacated.

Judgment accordingly.