

CASE LAW

TAXATION CLAIMS AGAINST INSOLVENT ESTATES

STAPLETON v. COMMISSIONER OF TAXATION

The imposition of taxes by the legislature and the liability of the taxpayer to pay them are a game in which the dice are always loaded in favour of the player who calls the tune and makes the rules by which the other players must abide. It matters little whether Parliament, in enacting taxing legislation, casts its net widely or narrowly, for wherever the Act is clear and unambiguous, there is no escape for the taxpayer.¹ The courts have long recognised this situation and over the years have adopted the practice of strictly construing a taxing measure. This practice was once more demonstrated in the recent case of *Stapleton v. Commissioner of Taxation*² which focussed attention on the question of priority of payment of income tax.

The facts in *Stapleton's Case*³ may be briefly stated as follow. The taxpayer died on 7th June, 1951, and on 3rd July, 1953, the executors obtained an order for the administration in bankruptcy of the deceased debtor's estate under s.155 of the Bankruptcy Act, the Official Receiver being appointed trustee thereof. On 4th August, 1953, the Commissioner issued to the Official Receiver notices of amended assessments for the years ended 30th June, 1946, 1947, 1949 and 1950, totalling £32,290.6.0, and an original assessment for the period 1/7/1950 to date of death amounting to £21,170.5.0. The Commissioner claimed a first charge on the taxpayer's estate in the hands of the trustees under s.216(d) of the Income Tax and Social Services Contribution Assessment Act,⁴ or, alternatively, under s.221(1)(b)(i) that he was entitled to prove against the estate for this amount in priority to all unsecured creditors except those claiming in respect of debts to which priority is given by s.84(a), (d) and (e) of the Bankruptcy Act.⁵

The relevant provisions of the Income Tax and Social Services Contribution Assessment Act are:⁶

216. The following provisions shall apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full complete and accurate returns:—

- (a) The Commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living.

¹ Subject to any rights he may have under the Constitution Act, 1900 (Eng.); 63 & 64 Vict., c. 12.

² (1955) A.L.R. 905, now reported 93 C.L.R. 603.

³ *Ibid.*

⁴ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.) No. 27, 1936-No. 81, 1953.

⁵ Bankruptcy Act 1924-1954 (Cwlth.) No. 37, 1924-No. 83, 1954.

⁶ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

- (b) The trustees shall make such returns as the Commissioner requires for the purpose of an accurate assessment.
- (c) The trustees shall be subject to additional tax to the same extent as the taxpayer would be subject to additional tax if he were still living:

Provided that the Commissioner may in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof.

- (d) The amount of any tax payable by the trustees shall be a first charge on all the taxpayer's estate in their hands.

221.—(1) For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—

- (a) . . .
- (b) Notwithstanding anything contained in any other Act or State Act—
 - (i) A person who is a trustee within the meaning of the Bankruptcy Act 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date of the order of sequestration) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (a), (d) or (e) of sub-sec. (1) of section eighty-four of that Act.

On appeal from the Court of Bankruptcy, the High Court⁷ held that no priority was granted to the payment of income tax by either of these two sections in the circumstances of the case, and that the whole amount should rank *pari passu* with the ordinary unsecured creditors. The court's decision was based on three points:

1. The court held that "the estate of the taxpayer" as used in s.216⁸ meant the estate of the testator which comprehended that to which he was entitled at his death, and where assets were charged he was entitled to them subject only to the charge and it was his interest in such assets which formed part of his estate. Where both death and an administration order intervene before the assessment of tax the estate of the deceased in the hands of the Official Receiver for the purpose of s.216 was constituted by the estate which passed to him "subject to all liens, charges and rights subsisting in other persons."⁹

The court compared the two situations:

- (i) that of a living person who escapes taxation up to the date of sequestration where the priority of taxation is governed by s.221(1)(b)(i)¹⁰ and is granted over all unsecured debts save those referred to in paragraphs (a), (d) or (e) of s.84(1) of the Bankruptcy Act.¹¹
- (ii) that of a deceased person who escapes taxation during his lifetime and whose estate is administered under s.155 of the Bankruptcy Act.¹² The Commissioner is entitled under s.216¹³ to a first charge on the estate subject to any charges. To decide that income tax took priority over secured debts in this instance would entitle the Commissioner to appropriate in payment of the assessment not only the "property" of the deceased but also the "property" belonging to other persons. The court was satisfied that s.216¹⁴ did not produce this result and

⁷ Dixon, C.J., McTiernan, Williams, Webb and Taylor, JJ.

⁸ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

⁹ *Hasluck v. Clark* (1899) 1 Q.B. 699; *Lloyd v. Public Trustee (N.S.W.)* (1930) 44 C.L.R. 312; *Vacuum Oil Co. Pty. Ltd. v. Wiltshire* (1945) 72 C.L.R. 319.

¹⁰ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

¹¹ Bankruptcy Act 1924-1954 (Cwlth.).

¹² *Ibid.*

¹³ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

¹⁴ *Ibid.*

could not see any valid reason why the intervention of death should have such an affect on the rights of the Commissioner as between the two situations.

The court decided, therefore, that the priority granted by s.216¹⁵ would, if it applied in the circumstances of *Stapleton's Case*,¹⁶ be very little higher than that granted in s.221(1)(b)(i).

2. The court then considered the position of the Official Receiver appointed trustee under s.155 of the Bankruptcy Act¹⁷ in relation to s.221(1)(b)(i) of the Income Tax and Social Services Contribution Assessment Act.¹⁸ Section 155(4) of the former Act provides that with the modifications mentioned in this section, all the provisions of this Act relating to the administration of the property of a bankrupt and to trustees shall, so far as they are applicable, apply to the case of an order for administration under this section in like manner as to a sequestration order, and s.155(4A) states that the provisions of s.80 of this Act and the provisions of Division 4 of Part VI of this Act shall so far as they are applicable, apply to the case of an order for administration under this section in the like manner as to a sequestration order. It is clear, therefore, that whilst for the purposes of administration, the estate of a deceased debtor under s.155 of the Bankruptcy Act¹⁹ is regarded as the estate of a bankrupt, the deceased cannot posthumously attain the status of a bankrupt, and he is therefore not a bankrupt; and similarly whilst an order for administration under s.155²⁰ is regarded for the purposes of the Act as a sequestration order, such an order is not a sequestration order. As a result, s.221 of the Income Tax and Social Services Contribution Assessment Act²¹ does not apply to the case because the estate of the deceased debtor and an order for administration under s.155 of the Bankruptcy Act,²² although assimilated to the "estate of the bankrupt" and a "sequestration order" under the Bankruptcy Act for the purposes of administration are not the "estate of the bankrupt" and a "sequestration order" under s.221 of the Income Tax and Social Services Contribution Assessment Act.²³ Section 221 was introduced into the Income Tax and Social Services Contribution Assessment Act²⁴ by the Income Tax Assessment Act ((Cwlth.) No. 22 of 1942) and was expressed to be an amendment to that Act. Although its provisions override those of s.84 of the Bankruptcy Act,²⁵ it does not operate as an amendment of the latter Act nor are its provisions incorporated into it to render it applicable in the administration of a deceased estate as one of "the provisions of this Act" pursuant to s.155(4).²⁶

3. No priority was afforded by s.216 of the Income Tax and Social Services Contribution Assessment Act,²⁷ for although by s.216(a) the Commissioner has the same powers and remedies against the trustees as he would have against the taxpayer if he were still living, the liability of the trustees is limited to the extent of the trust estate in their hands and payment to this extent is a charge on the estate, and not an original and independent liability of the trustees. The distinction is drawn between the estate in the hands of a trustee under s.216²⁸ and the estate in the hands of the Official Receiver as a

¹⁵ *Ibid.*

¹⁶ (1955) A.L.R. 905.

¹⁷ Bankruptcy Act 1924-1954 (Cwlth.).

¹⁸ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

¹⁹ Bankruptcy Act 1924-1954 (Cwlth.).

²⁰ *Ibid.*

²¹ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

²² Bankruptcy Act 1924-1954 (Cwlth.).

²³ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

²⁴ *Ibid.*

²⁵ Bankruptcy Act 1924-1954 (Cwlth.).

²⁶ *Ibid.*

²⁷ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

²⁸ *Ibid.*

trustee under s.155 of the Bankruptcy Act.²⁹ The court held that in s.216³⁰ "the estate of the deceased taxpayer" has its natural meaning, i.e. the estate that passes to his personal representatives on death, whereas the estate in the hands of the Official Receiver as trustee under s.155³¹ is constituted by the "property of the bankrupt", which in any particular case may or may not comprehend the whole of the estate of the deceased. If the assessment had been issued to the executors prior to the making of the order for administration, the Commissioner would have been entitled to the first charge on the taxpayer's estate under s.216(d)³² (i.e. "subject to all liens, charges and rights subsisting in other persons"), and upon the making of the order, this priority might have been claimed by virtue of the charge previously acquired.

Priority of Income Tax Generally

Debts may fall into four classes—secured, unsecured, preferential³³ and postponed.³⁴ Traditionally income tax is a "debt due to the King", which implies the prerogative right of priority of payment of such debts over debts due to the subjects.³⁵ But the secured debt of a subject will take preference over an unsecured Crown debt so far as concerns the subject matter of the security. Furthermore, the priority of Crown debts may be derogated from by statute which is expressed to be binding on the Crown.

Such an Act is the Bankruptcy Act³⁶ which establishes the order or priority of unsecured debts³⁷ and lists sixthly³⁸ with municipal and other local rates, "all assessed land tax and income tax assessed under any Act or State Act prior to the date of sequestration and not exceeding in the whole one year's assessment . . .". The priority of income tax as a Crown debt is therefore derogated from by these provisions. However, s.221(b) (i) of the Income Tax and Social Services Contribution Assessment Act³⁹ improved the Commissioner's position under the Bankruptcy Act⁴⁰ by providing that trustees should apply the estate of the bankrupt in payment of tax due whether assessed before or after the date of the order of sequestration in priority to all unsecured debts except those classified in s.84(1)(a) (d) and (e) of the Bankruptcy Act.⁴¹ This had the effect of overruling *pro tanto* the order established by s.84 and giving the Commissioner priority in respect of tax on all income earned prior to sequestration, whether assessed before or after that date.

The decision in *Stapleton's Case*⁴² has thus established that the priority granted by s.221⁴³ does not apply in the case of the estate of a deceased debtor administered under s.155 of the Bankruptcy Act,⁴⁴ where the assessment is

²⁹ Bankruptcy Act 1924-1954 (Cwlth.).

³⁰ Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

³¹ Bankruptcy Act 1924-1954 (Cwlth.).

³² Income Tax and Social Services Contribution Assessment Act 1936-1953 (Cwlth.).

³³ See Bankruptcy Act 1924-1954 (Cwlth.), s. 84.

³⁴ See *id.*, ss. 85, 86.

³⁵ This is expressly provided in s.208 of the Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

³⁶ Bankruptcy Act 1924-1954 (Cwlth.).

³⁷ Sections 84 and 88A. Briefly the order is:—1. Costs of administration (subject to the priority of costs of a previous administration). 2. Funeral and testamentary expenses of a deceased debtor. 3. Wages or salary of any employee (subject to certain limitations). 4. Compensation to any employee for personal injury in the course of employment. 5. Payment to an apprentice or artied clerk. 6. Municipal or other local rates, land tax and income tax. 7. Rent. 8. Certain preferences priorities and advantages as agreed to by special resolution.

³⁸ Cf. Bankruptcy Act, 1914 (Eng.); 4 & 5 Geo. 5, c. 59. The order of preferred debts is:—(a) Rates and taxes up to one year's assessment. (b) Wages of clerks and workmen. (c) Compensation to an employee. (d) Insurance Contributions of employees under National Insurance Acts.

³⁹ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁴⁰ Bankruptcy Act 1924-1954 (Cwlth.).

⁴¹ *Ibid.*

⁴² (1955) A.L.R. 905.

⁴³ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁴⁴ Bankruptcy Act 1924-1954 (Cwlth.).

issued after the order for administration. It would follow that the same argument could be applied to compositions under Part XI and deeds of arrangement under Part XII of the Bankruptcy Act,⁴⁵ for in an administration under either of these Parts the debtor could not be described as a bankrupt, nor is the composition or deed a sequestration order. The only priority available to the Commissioner is under s.84(1)(h) of the Bankruptcy Act,⁴⁶ i.e. sixthly and for one year's tax assessed before the composition or deed. For any amount in excess of this, or not assessed at that date, he would be required to prove with the other unsecured debtors.

*Stapleton's Case*⁴⁷ also disposes of the question of priority under s.216⁴⁸ for income tax in the case of a deceased taxpayer who has escaped full taxation in his lifetime by reason of not having duly made full, complete and accurate returns where an order for administration under s.155 of the Bankruptcy Act⁴⁹ has intervened (on the grounds that the section comprehends the normal meaning of the words "trustees of the estate of the taxpayer" as being the trustees of the deceased estate, and that the Official Receiver is not the trustee of such an estate). The same argument could therefore be applied to s.217⁵⁰ where an Order for Administration has been granted under s.155 of the Bankruptcy Act⁵¹ prior to the issue of the assessment. Section 217 provides that where at the time of death, tax has not been assessed and paid on the whole income derived up to date of death the court shall have the same powers and remedies for the assessment and recovery of tax from the trustees of that person's estate as he would have had against that person if that person were alive. The words "trustees of that person's estate", following the decision in *Stapleton's Case*, would refer to the trustees of the deceased estate and not to the Official Receiver as trustee under s. 155 of the Bankruptcy Act.⁵² The Commissioner would therefore have no priority.

Summary

From the foregoing, the priority of payment of income tax in various circumstances could be summarised as follows:

- I. A living person, who is not bankrupt and to whom Parts XI and XII of the Bankruptcy Act⁵⁵ do not apply—by s.208⁵⁶ priority is granted to tax as a debt due to the Crown over debts due to subjects (i.e. subject to the rights of the secured creditor as to the security).
- II. A deceased person, who is not bankrupt and to whom s.155 and Parts XI and XII of the Bankruptcy Act⁵⁷ do not apply—
 - (1) Where tax is not paid by reason of not having made full complete and accurate returns during lifetime—by s.216⁵⁸ tax is a first charge on the taxpayer's estate in the trustee's hands (i.e. gross estate subject to all other liens charges and rights subsisting in others).
 - (2) Where an assessment has issued prior to but has not been paid as at the date of death—the priority gained by the Commissioner under s.208⁵⁹ during the life of the taxpayer would subsist against the trustees of the estate of the deceased taxpayer.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ (1955) A.L.R. 905.

⁴⁸ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁴⁹ Bankruptcy Act 1924-1954 (Cwlth.).

⁵⁰ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁵¹ Bankruptcy Act 1924-1954 (Cwlth.).

⁵² *Ibid.*

⁵³ Bankruptcy Act 1924-1954 (Cwlth.).

⁵⁴ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁵⁵ Bankruptcy Act 1924-1954 (Cwlth.).

⁵⁶ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁵⁷ *Ibid.*

- (3) Where tax is not assessed up to date of death—the Commissioner has the same rights against trustees under s.217⁶⁰ as he would if the taxpayer was still living, therefore, presumably s.208⁶¹ applies to give priority.
- III. A living person, who is bankrupt under the Bankruptcy Act—⁶²
- (1) Whilst s.84 of the Bankruptcy Act⁶² gives sixth priority to “tax assessed under any Act or State Act prior to the date of the order of sequestration and not exceeding one year”, s.221 of the Income Tax and Social Services Contribution Assessment Act⁶³ overrides this provision by granting fourth priority to any Commonwealth Income Tax whether assessed before or after sequestration order as regards income earned prior to sequestration.
 - (2) This priority would subsist if the bankrupt died after the date of the sequestration order.
 - (3) As regards income earned after sequestration—no priority.^{63a}
- IV. A deceased person, who was not bankrupt and to whom Parts XI and XII of the Bankruptcy Act⁶⁴ did not apply at date of death, but whose affairs are subsequently administered by the Official Receiver as trustee under s.155 of the Bankruptcy Act—⁶⁵
- (1) If the assessment is issued to the taxpayer prior to but was not paid as at date of death—whilst the priority conferred by s.208⁶⁶ as a debt due to the Crown would subsist against his personal representatives, if the amount were not paid by the latter before the estate vested in the Official Receiver under s.155 of the Bankruptcy Act,⁶⁷ the priority is derogated to sixth place under s.84 of the Bankruptcy Act⁶⁸ as regards one year’s assessment only. (Assessments in excess of one year would rank with ordinary unsecured debts.)
 - (2) If the assessment is issued to the trustees of the deceased estate before the Official Receiver assumes control of the estate and
 - (a) the assessment is rendered by reason of the taxpayer not having made full returns during his lifetime—priority is conferred by s.216 as a first charge on the taxpayer’s estate in the hands of the personal representative (i.e. subject to all liens rights and charges subsisting in the other persons) which continues when the estate vests in the Official Receiver as trustee under s.155;

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Bankruptcy Act 1924-1954 (Cwlth.).

⁶³ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

^{63a} *Re Wilson, ex p. Official Receiver* 15 A.B.C. 113. Although no priority of tax on after-earned income is provided in the Bankruptcy Act 1924-1954 (Cwlth.), the Commissioner’s position in this regard could be set out as follows:

- (i) Where the bankrupt was in business on his own account and this is carried on by the trustee in bankruptcy, income tax on profits earned after the date of sequestration would be a cost of administration and would have priority under Class I of s.84 of the Bankruptcy Act. See note 37 *supra*.
- (ii) Where the bankrupt is an employee, his instalments of tax on income earned after date of sequestration would be deducted by the employer from each payment of salary or wages, the Commissioner thus gaining a *de facto* priority.
- (iii) Where income has been received after the date of the sequestration order, it is always open to the Commissioner to seek a second sequestration order, when his priority would again arise as in III(1) above.

⁶⁴ Bankruptcy Act 1924-1954 (Cwlth.).

⁶⁵ *Ibid.*

⁶⁶ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁶⁷ Bankruptcy Act 1924-1954 (Cwlth.).

⁶⁸ *Ibid.*

- (b) the assessment relates to tax not assessed up to date of death—s.217 would give the Commissioner the same rights against the personal representatives as if the taxpayer were still living and therefore the priority of a debt due to the Crown under s.208 would apply. Should the amount not be paid by the personal representatives before the estate vests in the hands of the Official Receiver, the priority of tax in the hands of the latter would be sixthly under s.84 of the Bankruptcy Act as regards one year's assessment only (assessments in excess of one year would rank with ordinary unsecured debts).
- (3) If the assessment is not issued until after the order for administration under s.155⁶⁹—
- (a) in circumstances as in IV(2)(a)—no priority (after *Stapleton's Case*);⁷⁰
 - (b) in circumstances as in IV(2)(b)—no priority (on the same grounds as in *Stapleton's Case*⁷¹) because a trustee under s.155⁷² is not a trustee of the taxpayer's estate within the meaning of s.217,⁷³ and the estate is not the estate of a bankrupt nor is the order for administration a sequestration order under s.221.⁷⁴

V. Where the affairs of a living person are being administered under Parts XI and XII of the Bankruptcy Act⁷⁵—there is no priority under s.221,⁷⁶ therefore the only priority conferred is sixthly under s.84⁷⁷ as regards one year's tax already assessed.

A point raised but not decided by the court in *Stapleton's Case*⁷⁸ was the authority of the Commissioner to make assessments to the trustee under s.155⁷⁹ in the circumstances of the case. As the Official Receiver had admitted liability, the court dealt only with the question of priority. This question remains to be settled by the court.

Group Income Tax Deductions

It may be convenient here to examine the question of Group Income Tax Deductions from salary and wages, although this was not considered in *Stapleton's Case*,⁸⁰ nor has the question been before the court in any other case. Thus, whilst there is no authority for the views expressed here, the following is submitted as a possible interpretation of the relevant sections.

Section 221P of the Income Tax and Social Services Contribution Assessment Act⁸¹ provides as follows:—

- (1) Where an employer makes a deduction for the purposes of this Division, or purporting to be for those purposes from the salary or wages paid to an employee and fails to deal with the amount so deducted in the manner required by this Division or to affix tax stamps of a face value equal to the amount of the deduction as required by this Division, as the case may be, he shall be liable, and

⁶⁹ Bankruptcy Act 1924-1954 (Cwlth.).

⁷⁰ (1955) A.L.R. 905.

⁷¹ *Ibid.*

⁷² Bankruptcy Act 1924-1954 (Cwlth.).

⁷³ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁷⁴ *Ibid.*

⁷⁵ Bankruptcy Act 1924-1954 (Cwlth.).

⁷⁶ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁷⁷ Bankruptcy Act 1924-1954 (Cwlth.). As regards schemes of arrangement under Part XI, see *Australian Bankruptcy Law and Practice* (3 ed.) 510-511.

⁷⁸ (1955) A.L.R. 905.

⁷⁹ Bankruptcy Act 1924-1954 (Cwlth.).

⁸⁰ (1955) A.L.R. 905.

⁸¹ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

where his property has become vested in or where the control of property has passed to a trustee, the trustee shall be liable to pay that amount to the Commissioner.

- (2) Notwithstanding anything contained in any other Act or State Act, an amount payable to the Commissioner by a Trustee in pursuance of this section shall have priority over all other debts whether preferential, secured or unsecured.

And the first subsection of s.221R is in the following terms:—

An amount payable to the Commissioner under the provisions of this Division shall be a debt due to the King on behalf of the Commonwealth and payable to the Commissioner, and may be sued for and recovered in any court of competent jurisdiction by the Commissioner or a deputy Commissioner suing in his official name.

No difficulty is encountered in any case where the assets of an employer failing to deal with deductions as required by the Act⁸² exceeds his liabilities to the extent of the amount due to the Commissioner whether the assets are in the hands of the employer or vest in or are under the control of trustees. A problem arises only where a deficiency would be created by the payment of the amount due to the Commissioner and where the property vests in or the control of it passes to a trustee.

The amount due to the Commissioner under this Division is a debt due to the Crown, and priority of payment is granted "notwithstanding anything contained in any other Act or State Act".⁸³ This priority cannot be read down by reference to any other Statute, and the rights of the Commissioner depend entirely on the interpretation placed on ss.221P and 221R.⁸⁴

The amount payable to the Commissioner is stated to take priority over all other debts, but it would probably be postponed to the costs of administration of the employer's estate, for these are not "debts".⁸⁵

The provision that taxation deductions under the Division shall be a debt due to the Crown⁸⁶ implies a priority over all other debts, but this is a *priority as to payment* and does not interfere with the rights of a secured creditor as to the subject matter of the security, i.e. the notion does not import a *priority of charge* over the property the subject of the security, it merely requires payment of the debt due to the Crown prior to that due to a secured or any other creditor. It is submitted that s.221P⁸⁷ does not alter this understanding of the law.

The liability on the trustee is not a personal one and is imposed on him in a representative capacity only. It therefore ceases when his trusteeship terminates. Furthermore, the liability of a trustee is limited to the extent of the trust estate in his hands. On this latter point, the court in *Stapleton's Case*⁸⁸ rejected the argument that the liability of the trustee was an "original and independent liability", and held that the liability was imposed on the trustee in a representative capacity and that the amount was enforceable only to the extent of trust estate in his hands.

⁸² It is not proposed to consider in this Note the question of whether an employer is a trustee of the employee's deductions until payment to the Commissioner.

⁸³ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.), s.221P(2).

⁸⁴ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁸⁵ To hold otherwise would create difficulty, for a trustee in bankruptcy or a liquidator would be unwilling to accept the position if the costs of administration were postponed under the section.

⁸⁶ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.), s.221R(1).

⁸⁷ *Id.*, s.221P.

⁸⁸ (1955) A.L.R. 905, at 907, 910. The court was here considering the effect of the words "first charge on the taxpayer's estate" in their (the trustees') hands for the purposes of s.216. It was said that to hold otherwise would allow the Commissioner to have "not only the deceased's 'property' but also property of persons other than the deceased appropriated in payment of the assessment."

The application of s.221P⁸⁹ therefore raised two separate but interdependent questions—firstly, who is a trustee? And secondly, what is the trust estate in his hands to the extent of which he will be liable?

"Trustee" is widely defined in the Act⁹⁰ and includes *inter alia* a trustee under the Bankruptcy Act⁹¹ (whether in bankruptcy, or under Parts XI and XII or s.155), as well as a liquidator (whether appointed in or out of court). The property in the hands of a trustee under the Bankruptcy Act⁹¹ is the property of the bankrupt, but this does "not affect the power of any secured creditor to realise or otherwise deal with his security."⁹² It is expressly provided in the various State Companies Acts that the same rules as to the rights of secured creditors shall apply in the winding up of an insolvent company as are in force under the law of bankruptcy.⁹³ In *Stapleton's Case*⁹⁴ the court held that the property in the hands of a trustee under s.155 of the Bankruptcy Act⁹⁵ consisted of assets passing to him "subject to all liens, charges and rights subsisting in other persons".⁹⁶

In all these cases, the rights of the secured creditor as to the security property are not disturbed, and the trustee's rights regarding the security property are subject to those of the secured creditor.⁹⁷ The liability imposed on the trustee by s.221P⁸⁸ is to pay the amount due to the Commissioner in priority to all other debts. The preference accorded the debt due to the Commissioner is as to the order of payment and does not constitute a charge on property whether previously charged by the employer as security for a debt or not. It is submitted that the words "where property has become vested in or where the control of property has passed to a trustee"⁹⁹ are merely descriptive of the circumstances when the liability is imposed on the trustee and do not serve to vest in him any greater rights as to security property than he would otherwise have. The fact that a trustee has control of property the subject of a charge does not alter the secured creditor's rights thereto.¹⁰⁰

It is in the exercise of his rights as to the property charged that a secured creditor may encounter difficulty under s.221P.¹⁰¹ A mortgagee is not a trustee for the mortgagor, nor does he act in a fiduciary capacity. He therefore does not come within the definition of a "trustee" in s.6.¹⁰² A mortgagee has many rights as to the security property, including the right to sell, the right to enter into possession, and the right to appoint a receiver. Whilst in the exercise of all his rights, with the exception of appointing a receiver, the mortgagee would not be liable under s.221P,¹⁰³ a receiver comes within the definition of a

⁸⁹ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁹⁰ *Id.*, s.6 states:

'trustee' in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes—

- (a) an executor or administrator, guardian, committee, receiver, or liquidator; and
- (b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability.

⁹¹ Bankruptcy Act 1924-1954 (Cwlth.).

⁹² *Ibid.*

⁹³ E.g. Companies Act, 1936-1955 (N.S.W.), s.296.

⁹⁴ (1955) A.L.R. 905.

⁹⁵ Bankruptcy Act 1924-1954 (Cwlth.).

⁹⁶ See *supra* n.90.

⁹⁷ This statement proceeds on the assumption that the security is enforceable (e.g. that a Bill of Sale is kept registered) and that it has not been affected by the operation of "relation back" or is not void as a preference. It is interesting to note that a secured creditor has no priority as to payment, but only rights as to the security property.

⁹⁸ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

⁹⁹ *Id.*, s.221P.

¹⁰⁰ Where the value of the security exceeds the amount of the secured debt together with the amount due to the Commissioner, there is no difficulty.

¹⁰¹ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

¹⁰² *Supra* n.90.

¹⁰³ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

"trustee" in s.6,¹⁰⁴ and the receiver would be liable to pay the amount due to the Commissioner in priority to all other debts, including the secured debt of the mortgagee who appointed him, although the mortgagee himself is not so liable.¹⁰⁵ This anomalous position has the effect of creating a charge on the property in favour of the Commissioner which has preference over that of the secured creditor, and entitles the Commissioner to receive payment out of the "property" of a person other than the defaulting employer,¹⁰⁶ where the value of the security property is not equal to or greater than the sum of the secured debt and the amount due under s.221P.¹⁰⁷ A secured creditor may need to consider carefully which of his rights he will pursue in the circumstances of the case, if he desires to avoid the application of s.221P.¹⁰⁸

As far as the employee is concerned, provided the Commissioner is satisfied that deductions have been made from wages, he may apply the amount of the deductions in satisfaction of any tax payable by the employee, where the employer has not dealt with the amounts in terms of the Act.¹⁰⁹

It will be seen that the priority of payment of income tax is of considerable interest, for the legislature in its desire to advance and protect the priority of the Commissioner has created a multiplicity of provisions to meet the various circumstances in which liability to pay income tax is imposed, and to overcome as far as possible any interpretation of the court which would defeat these objects. This has been provoked by the knowledge born of experience that the air of "spirit of and intendment" which prevails over the law of charity is entirely lacking in the court's approach to a taxing measure. The court will always strictly construe a taxing measure, and its decisions have on occasion produced results wholly unintended by the legislature—as in *Stapleton's Case*,¹¹⁰

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¹⁰⁴ *Supra* n.90.

¹⁰⁵ The question is further complicated in that a receiver under the Conveyancing Act, 1919-1954 (N.S.W.), s.115 is the agent of the mortgagor, but a receiver under a bill of sale or for debenture holders may be the agent of the mortgagee or the mortgagor depending on the terms of the bill, etc., and the particular term under which his appointment is made.

¹⁰⁶ There are statutes which do have the effect of postponing a secured creditor as to his security, e.g. Conveyancing Act, 1919-1954 (N.S.W.), s.115, but in these instances the debts which have priority are related to the property, such as rents, taxes, rates, insurance, affecting the mortgaged property. It is interesting to note that s.215 of the Income Tax & Social Services Contribution Assessment Act 1936-1955 (Cwlth.) which provides that a receiver for debenture-holders shall set aside amounts to cover the company's tax, does not give the Commissioner preference over debenture-holders or other secured creditors. See Gunn's *Commonwealth Income Tax Law and Practice* (3 ed. 1951) 1047.

¹⁰⁷ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.).

¹⁰⁸ It is submitted, however, that it could be argued that if the mortgagee is not primarily liable as a trustee, it could logically follow that the pursuit in that capacity of all his rights as to the security property, including the appointment of a receiver, should not have the effect of bestowing a priority on the Commissioner. But the provision as it now stands has this effect. It could therefore be said that as far as the appointment by a mortgagee of a receiver is concerned, there is written into every charge a prior right as to payment to the Commissioner over the secured creditor. In these circumstances, the creditor becomes a watchdog for the Commissioner to ensure that the value of his security does not diminish.

This could arise in curiously unrelated circumstances. For instance, a mortgagee with security over a block of flats would, if he appointed a receiver, find his rights affected, if the mortgagor were a merchant and owed an amount to the Commissioner as employee's group deductions. The two circumstances are not related *per se*, and yet the secured creditor's right to appoint a receiver has the effect of giving the Commissioner a prior right as to payment.

¹⁰⁹ Income Tax and Social Services Contribution Assessment Act 1936-1955 (Cwlth.), s.221Q.

¹¹⁰ (1955) A.L.R. 905.