BETWEEN:

COLEMAN C. ABRAHAMS ..... APPELLANT;

AND

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

Toronto 1966 Oct. 4-7

Ottawa Nov. 8

(No. 2)

Income tax—Assessment—Re-assessments—Second re-assessment based on assumed correctness of first re-assessment—Whether second re-assessment barred—First re-assessment nullified by second—Re-assessment of total tax due distinguished from additional assessment—Costs of appeal—Whether appellant entitled to—Income Tax Act, s. 46 (4).

On September 6th 1963 appellant was re-assessed to income tax for 1961 and on February 17th 1965 appealed therefrom to this court. On February 24th 1965 appellant was re-assessed a second time for 1961 on the basis that his income was the amount on which the first re-assessment was based plus an additional amount. Appellant appealed

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to this court from the second re-assessment and contended that the Minister had no power to make a second re-assessment while the first re-assessment was *sub judice*.

Held, appellant's contention must be rejected.

1. The Minister's power to re-assess under s. 46(4) of the *Income Tax Act* may be exercised as often as circumstances require regardless of the fact that an appeal has been initiated.
2. The first re-assessment was nullified by the second re-assessment. (It would be different if it were not an assessment of the taxpayer's total tax for the year but merely an assessment of an amount of tax in addition to that already assessed.)
3. When the second re-assessment was made the appeal from the first re-assessment should have been discontinued or an application made to have it quashed.
4. As the second re-assessment was based on a new view of the facts and not upon a discovery of facts previously known to the taxpayer and not to the Minister the Minister must pay the costs of the appeal incurred by appellant prior to setting it down for hearing.

APPEAL from income tax assessment.

John G. McDonald, Q.C. and *M. L. O'Brien* for appellant.

Sydney L. Robins, Q.C. and *T. Z. Boles* for respondent.

JACKETT P.:—This is an appeal to this Court from a re-assessment of the appellant for the 1961 taxation year made on September 6, 1963.

The appellant objected to the re-assessment of September 6, 1963 (hereinafter referred to as the "first re-assessment") on September 21, 1963 and, the respondent having taken no action with reference to the objection, a Notice of Appeal to this Court bearing date February 8, 1965, was filed on February 17, 1965. That is the appeal that is the subject matter of these reasons.

A week later, on February 24, 1965, the respondent issued a further re-assessment (hereinafter referred to as the "second re-assessment"). That re-assessment is the subject of a separate appeal to this Court.

On August 26, 1965, the Minister filed a reply to the Notice of Appeal that had been filed in this Court with regard to the first re-assessment.

In due course, both appeals were set down for the same general sittings and, by consent, it was ordered that they should be tried together.

The difference between the first re-assessment and the second re-assessment is that, by the second re-assessment, the appellant is assessed on the basis that his income is the amount on which the first re-assessment was based plus an additional amount.

The power to re-assess is found in subsection (4) of section 46 of the *Income Tax Act* as amended by chapter 43 of the Statutes of 1960, which reads as follows:

> 46 (4) The Minister may at any time assess tax, interest or penalties under this Part or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the taxation year, and may
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> (*a*) at any time, if the taxpayer or person filing the return
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> (i) has made any misrepresentation or committed any fraud in filing the return or in supplying any information under this Act, or
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> (ii) has filed with the Minister a waiver in prescribed form within 4 years from the day of mailing of a notice of an original assessment or of a notification that no tax is payable for a taxation year, and
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> (*b*) within 4 years from the day referred to in subparagraph (ii) of paragraph (*a*), in any other case,
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> re-assess or make additional assessments, or assess tax, interest or penalties under this Part, as the circumstances require.[1]

No suggestion has been made that either re-assessment was made outside the four-year term referred to in paragraph (*b*) of subsection (4). The only attack made on the validity of either re-assessment is the contention that the second

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[1] Reference has also been made to subsection (3) of section 58 of the Act, which reads as follows:

> (3) Upon receipt of the notice of objection, the Minister shall with all due despatch reconsider the assessment and vacate, confirm or vary the assessment or re-assess and he shall thereupon notify the taxpayer of his action by registered mail

If it could be said that, "Upon receipt of the notice of objection", the respondent had "with all due despatch", re-assessed, it might be that this section would have authorized a re-assessment not authorized by subsection (4) of section 46 On the facts of this case, however, I do not regard subsection (3) of section 58 as relevant.

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re-assessment is invalid because it was made after an appeal had been instituted to this Court from the first re-assessment. The argument is that, the first re-assessment being, on that account, *sub judice,* the Minister had then no power to re-assess. Reference was made to *Irving Brown v. Minister of National Revenue*,[1] but it was agreed that that was a decision on a different question.

I can find no principle of interpretation that restricts the clear effect of subsection (4) of section 46, which expressly authorizes the Minister, within the four-year period defined by paragraph (*b*) to "re-assess" "as the circumstances require". When read with section 31 (1) (*e*) of the *Interpretation Act,* R.S.C. 1952, chapter 158, which provides *inter alia* that, in every Act, unless a contrary intention appears, "if a power is conferred...the power may be exercised...from time to time as occasion requires", I am of opinion that the power conferred by section 46(4) may be exercised from time to time as circumstances may require. If this were not so, the Minister would not be able to make a second or third re-assessment for the purpose of reducing a taxpayer's liability when circumstances reveal that the taxpayer has been over-taxed. Furthermore, the power is the same in the case of a re-assessment made within the four-year period contemplated by paragraph (*b*) of section 46(4) as it is in a case of "fraud" or "waiver" covered by paragraph (*a*) of that subsection and it would seem clear that the scheme of the Act calls for as many re-assessments as the circumstances require in such cases. The fact that an appeal has been initiated should not make any difference in the application of the provision.

Assuming that the second re-assessment is valid, it follows, in my view, that the first re-assessment is displaced and becomes a nullity. The taxpayer cannot be liable on an original assessment as well as on a re-assessment. It would be different if one assessment for a year were followed by an "additional" assessment for that year. Where, however, the "re-assessment" purports to fix the taxpayer's total tax for the year, and not merely an amount of tax in addition

[1] 64 D.T.C. 1221; 35 Tax A.B.C. 197.

to that which has already been assessed, the previous assessment must automatically become null.

I am, therefore, of opinion that, since the second re-assessment was made, there is no relief that the Court could grant on the appeal from the first re-assessment because the assessment appealed from had ceased to exist. There is no assessment, therefore, that the Court could vacate, vary or refer back to the Minister. When the second re-assessment was made, this appeal should have been discontinued[1] or an application should have been made to have it quashed.[2]

This appeal is therefore dismissed, but, having regard to the fact that the second re-assessment appears to have been based on a new view of the facts and not upon a discovery of facts previously known to the taxpayer and not to the respondent, the respondent is ordered to pay such of the appellant's costs of the appeal as were incurred prior to the setting down of the appeal for hearing.

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[1] The appellant could have asked the respondent to agree to pay his costs as a condition to his discontinuing. If the respondent had refused, he could have applied for leave to discontinue on terms that the respondent be ordered to pay his costs of the appeal that had been made abortive by the second re-assessment.

[2] An alternative view is that the appeal should be allowed and the assessment appealed from declared null. I am of the view that the correct view of the statute is that there is no basis for an appeal from an assessment that has become null by virtue of a re-assessment. Certainly such an appeal is unnecessary and it would be an unnecessary expense and expenditure of time and energy if the practice of taking such appeals developed.