



## Goodfellow v. Federal Commissioner of Taxation

77 ATC 4086

**Judges:**

Barwick CJ  
Jacobs J  
Aickin J

**Court:**

Full High Court.

**Judgment date:** Judgment handed down 4 March 1977.

---

**Barwick C.J.:** I have had the advantage of reading the reasons for judgment prepared in this appeal by my brother *Aickin*. I agree with his account and analysis of the relevant legislation and with his reasons for deciding that the features of the payments made to the appellant by the Commonwealth properly call for the conclusion that the payments are of a similar nature to pensions, allowances or payments specified in sec. 23(k) of the *Income Tax Assessment Act 1936* as amended. I do not desire to add anything myself to my brother's reasons for answering the questions asked of the Supreme Court of New South Wales by the Board of Review as follows:

*Question 1:* Unnecessary to answer.

*Question 2:* The Commissioner was bound to be of opinion that those payments were of a similar nature to the pensions, allowances or payments specified in sec. 23(k).

---

**Jacobs J.:** The facts of the case and the contents and history of relevant legislation are set out in the reasons for judgment prepared by *Aickin J.* and I shall not repeat them. I agree with his conclusion that question 2(a) should be answered in the affirmative and on this question there is little which I wish to add. I would emphasise that the comparison which must be made by the Commissioner in reaching an opinion under sec. 23(kaa) is between the nature of the particular pension which is claimed to be exempt income under sec. 23(kaa) and the nature of the pensions, allowances or payments specified in sec. 23(k). It is erroneous to examine the nature of pensions payable generally under, as in this case, the *Defence Forces Retirement Benefits Act* and to attempt to ascertain their general nature and then to compare the nature of such pensions with the nature of pensions payable under the Acts specified in para. (k). When a comparison is made between the nature of the appellant's particular pension and the nature of pensions payable under the specified Acts, the question comes down to this - is the existence of war with, or warlike operations against, an external enemy part of the essential nature of the incapacity pensions which fall under para. (k) so that no pension payable as a result of incapacity arising during service at any other time is, or can be described as, of a similar nature? I do not think that it is. Incapacity for further service, however it arises, is the event which founds the right to pension. The nature of the pension is one received on account of that incapacity. The existence of the wars or warlike operations with which the various statutes deal provides no more than the temporal occasion of service with which the various statutes deal. Sections 51 and 52 of the *Defence Forces Retirement Benefits Act* provide their own temporal occasions but the nature of a pension received under those sections is similar to the nature of the pensions provided for in the various statutes stated in para. (k).

I turn now to para. (kab). Here it is equally if not more important to bear in mind that the comparison is to be made between the particular pension which the appellant receives and the kinds of pension specified in sec. 380(2) of the *Income Tax Act, 1952* (Imp.). I agree with *Sheppard J.* that para. (kab) does not embrace only pensions payable under the Imperial Act. I am content to adopt his reasons on this point; but I take a different view on the question whether the appellant's pension is one of a kind specified in sec. 380(2). With the emphasis which I place upon the particular pension of the appellant, I do not regard it as an over-simplification to say that his pension, being received by him as a consequence of retirement from the Navy on the ground of physical incapacity to perform his duties caused by injury in the course of carrying out his duties as a Lieutenant-Commander in the Navy, was a pension (not relevantly distinguishable from retired pay) granted on account of medical unfitness attributable to his naval service. It therefore falls precisely within a kind of pension specified in sec. 380(2)(b).

---

77 ATC 4088

I would therefore allow the appeal, set aside the answers to the questions and in lieu thereof answers to the questions in the stated case as follows:

*Question 2(a)* - Yes.

*Question 1* - Yes.

---

**Aickin J.:** This is an appeal from the Supreme Court of New South Wales in a proceeding arising under sec. 196(2) of the *Income Tax Assessment Act 1936* as amended. The appellant requested a Taxation Board of Review to refer to the Supreme Court of New South Wales certain questions of law which arose before the Board.

The facts which give rise to these questions of law are straightforward and may be shortly stated. The appellant commenced duty with the Royal Australian Navy on 11 December, 1966 on continuous full time service. He made contributions to the Defence Forces Retirement Fund pursuant to sec. 23 of the *Defence Forces Retirement Benefits Act 1948-1971* from that date onwards. On 15 May, 1969 he was injured and as a result of those injuries he became a paraplegic. He was discharged from the Royal Australian Navy on 21 May 1970 on the ground that he was physically unfit for further naval service. At that date the taxpayer held the rank of Lieutenant-Commander and had not attained the retiring age for his rank. Holding that rank, he would have been bound to retire no later than 14 May, 1978.

Under the provisions of the *Defence Forces Retirement Benefits Act* the taxpayer would upon his retirement qualify for the benefits prescribed by that Act. By reason of having been retired early because of incapacity, the appellant was entitled to a benefit in accordance with sec. 51 and 52 of that Act. Pursuant to sec. 51(2), the Defence Forces Retirement Benefits Board determined the percentage of total incapacity of the appellant in relation to civilian employment at 60% or more. He was thus classified as Class A under sec. 51(2) and his invalidity benefit was accordingly a pension the amount of which was determined in accordance with sec. 52(1). Payment of that pension pursuant to the Act commenced on 9 July, 1970 and has continued since that date by way of fortnightly payments.

On or about 28 July, 1971 the taxpayer submitted to the Commissioner of Taxation a return of his income for the year ended 30 June, 1971 in which he claimed that an amount of \$5,885 received under the *Defence Forces Retirement Benefits Act* was exempt from tax. The Commissioner assessed the taxpayer on the basis that the \$5,885 was not exempt. The taxpayer objected to the

assessment on the ground that the sum of \$5,885 was exempt income by Notice of Objection dated 12 January, 1972. On or about 19 February, 1973 the taxpayer submitted a return of his income for the year ended 30 June, 1972 in which he again claimed that \$5,939 received under the provisions of the *Defence Forces Retirement Benefits Act* was exempt from tax. The Commissioner again assessed the taxpayer on the basis that the \$5,939 was subject to tax and issued a notice of assessment on 4 April, 1973. The appellant objected to that assessment and on 21 June, 1973 the Commissioner disallowed the objections to both assessments. On 14 August, 1973 the appellant requested the Commissioner to refer the objections to a Board of Review.

The matter came before the Board of Review on 21 March, 1975. At that hearing Counsel for the appellant requested the Board of Review to refer to the Supreme Court of New South Wales the following questions of law, arising on agreed facts as set out, namely:

“(1) Was the taxpayer entitled in law by reason of sec. 23(kab) of the *Income Tax Assessment Act* 1936 (as amended) to exemption from income tax on the amounts of \$5,885 and \$5,939 received by him as invalidity benefit payments pursuant to the *Defence Forces Retirement Benefits Act* 1948 (as amended) during the years of income ended 30 June, 1971 and 30 June, 1972 respectively?

(2) Were the aforesaid amounts of \$5,885 and \$5,939 pensions or allowances paid or payments made by the Commonwealth in regard to which the Commissioner was bound in law to form or alternatively in regard to which it was open to him in law to form the opinion pursuant to sec. 23(kaa) of the *Income Tax Assessment Act* 1936 (as amended) that the said amounts were pensions or allowances or payments of a similar nature to pensions allowances or payments specified in sec. 23(k) of the said Act?”

---

77 ATC 4089

It is desirable to set out in full the terms of sec. 23(k), (kaa) and (kab) as they stood in the relevant years: -

“(k) pensions and attendants' allowances paid, and payments of a like nature made, under the *Repatriation Act* 1920-1962, the *Repatriation (Far East Strategic Reserve) Act* 1956-1962, the *Repatriation (Special Overseas Service) Act* 1962 or the *Seamen's War Pensions and Allowances Act* 1940-1961;

(kaa) pensions and allowances paid, and payments made, by the Commonwealth or by the Government of the United Kingdom, being pensions, allowances or payments which, in the opinion of the Commissioner, are of a similar nature to pensions, allowances or payments specified in the last preceding paragraph:

(kab) wounds and disability pensions of the kinds specified in sub-section (2) of section three hundred and eighty of the Imperial Act known as the *Income Tax Act*, 1952;”

Both parties relied upon the legislative history of sec. 23 and of the *Defence Forces Retirement Benefits Act* and like legislation and it is desirable that it should be set out so far as material.

Dealing first with the *Defence Forces Retirement Benefits Act* 1948, one finds its earliest predecessor in sec. 57 of the *Defence Act* 1903 which was as follows:

“When any member of the Defence Force is killed on active service or on duty, or

dies, or becomes incapacitated from earning his living, from wounds or disease contracted on active service or on duty provision shall be made for his widow and family or for himself, as the case may be, out of the Consolidated Revenue Fund at the prescribed rates."

What the section authorises is "provision" and that might take any form thought suitable, either "compensation" or "pension" and no doubt other forms. The Defence (Financial and Allowance) Regulations 1905 set up a scheme for "compensation" whereby a maximum amount equal to three years pay was provided for incapacitated members of the Forces and for widows and other dependants of deceased members. It may well be that these payments, being lump sums once and for all, would have been of a capital nature, as was submitted in argument.

In 1910 separate provision was made in respect of the Naval and the Military Forces. In the *Naval Defence Act* 1910 sec. 43 was in substantially the same terms as sec. 57 of the *Defence Act*, save for substitution of the words "Naval Forces" for the words "Defence Force". At the same time sec. 57 of the *Defence Act* 1903 was amended by substituting the words "Military Forces" for the words "Defence Force". By the *Defence Act* 1917 sec. 57 was amended by substituting the term "war service" for the term "active service" and "war service" was defined. No corresponding amendments were made to sec. 43 of the *Naval Defence Act* 1910 and that section remained in its original form until it was repealed by the *Naval Defence Act* 1964 (No. 93 of 1964). The *Defence Act* 1903-1973 still contains sec. 57 in the form which it was given in 1917. The use of the alternative words "or on duty" show that these Acts were concerned with peacetime service, as well as wartime service.

New regulations to the same effect as those of 1905 were substituted in 1921 (S.R. No. 96), 1927 (S.R. No. 6) and in 1935 (S.R. No. 83). The latter regulations were repealed by the Financial (Military) Regulations in 1947 (S.R. No. 110) and no subsequent regulations appear to have been made. Accordingly since 1947 sec. 57 of the *Defence Act* would appear to have been inoperative.

By the *War Pensions Act* 1914-1916 provision was made for payment of pensions to members of the Forces whose incapacity "resulted from his employment in connexion with warlike operations in which His Majesty is, or has since the commencement of the present state of war, been engaged".

By the *Australian Soldiers' Repatriation Act* 1920 provision was made for pensions to be paid to members of the Forces incapacitated "from any occurrence happening during the period he was a Member of the Forces", the term "Member of the Forces" being defined by reference to the "present war", and the *War Pensions Act* 1914-1916 and the *Australian Soldiers' Repatriation Act* 1917-1918 were repealed. In the *Australian Soldiers' Repatriation Act* 1920 sec. 23(b) provided that the right of any person to payment by way of pension under

---

77 ATC 4090

that Act should be substituted for his right to any payment in respect of incapacity or death which but for that Act would have been due under the *Defence Act* 1903 or the *Naval Defence Act* 1910. Notwithstanding the later history of those provisions, that proviso has remained in the *Repatriation Act* ever since and is now to be found in the proviso to sec. 24(1) of the *Repatriation Act* 1920-1973.

The *Defence Forces Retirement Benefits Act* 1948 made provision for pensions and other payments arising upon retirement in the ordinary course and upon retirement due to incapacity arising from an occurrence in peacetime service, while the *Repatriation Act* covered pensions and

other payments arising upon death or incapacity arising from an occurrence during service in defined periods of war service. Since 1956 special provision has been made for service analogous to war service by the *Repatriation (Far East Strategic Reserve) Act 1956-1962*, and the *Repatriation (Special Overseas Service) Act 1962* which make applicable to the service there referred to the provisions of the *Repatriation Act*.

I defer for the moment a consideration of the material provisions of the *Defence Forces Retirement Benefits Act 1948-1971* and turn to the history of the relevant provisions of the *Income Tax Assessment Act*. The *Income Tax Assessment Act 1915* contained no material exemption, but by the *Income Tax Assessment Act 1918* (No. 18 of 1918) sec. 11 was amended by adding an additional paragraph which made exempt from income tax "pensions paid under the War Pensions Act 1914-1916". The *Income Tax Assessment Act 1922* repealed the previous legislation and contained in sec. 14(1) the following exemption "(i)pensions paid under the *Australian Soldiers' Repatriation Act 1920-21*". That provision was amended retrospectively to 1930 by the *Income Tax Assessment Act 1932* (No. 76 of 1932) by adding a reference to the United Kingdom *Finance Act 1919* so that the paragraph read as follows: -

"(i) Pensions paid under the *Australian Soldiers' Repatriation Act 1920-1921* and wounds and disability pensions of the kinds specified in sub-section (2) of section sixteen of the *Finance Act 1919* of the United Kingdom;"

The *Finance Act 1919* provided by sec. 16(2) as follows: -

".....

(b) retired pay of disabled officers granted on account of medical unfitness attributable to or aggravated by naval, military or air-force service;

(c) disablement or disability pensions granted to members, other than commissioned officers, of the naval, military or air forces of the Crown on account of medical unfitness attributable to or aggravated by naval, military or air-force service;

....."

No further relevant amendment was made to sec. 14 prior to the repeal of the *Income Tax Assessment Act 1922* in 1936. Section 23 of the *Income Tax Assessment Act 1936* provided as follows: -

"23. The following income shall be exempt from income tax -.... (k) pensions paid under the *Australian Soldiers' Repatriation Act 1920-1934*, and wounds and disability pensions of the kind specified in sub-section 2 (of) section sixteen of the *Finance Act 1919* of the United Kingdom;"

Amendments were made in 1941 by deleting the old paragraph and inserting a new one which included a reference to the *Seamen's, War Pensions and Allowances Act 1940* and which read as follows: -

"(k) pensions, attendants' allowances, detention allowances and payments of a like nature paid under the *Australian Soldiers' Repatriation Act 1920-1940* or under the *Seamen's War Pensions and Allowances Act 1940*, and wounds and disability pensions of the kinds specified in sub-section (2) of section sixteen of the *Finance Act 1919* of the United Kingdom;"

Paragraph (k) was again amended by the *Income Tax Assessment Act* 1945 so as to add a reference to "pensions or allowances paid, or payments made, by the Commonwealth otherwise than under either of those Acts, but which, in the opinion of the Commissioner are of a similar nature". Accordingly the section thereafter read as follows: -

---

77 ATC 4091

"(k) pensions, attendants' allowances, detention allowances and payments of a like nature paid under the *Australian Soldiers' Repatriation Act* 1920-1940 or under the *Seamen's War Pensions and Allowances Act* 1940, or pensions or allowances paid, or payments made, by the Commonwealth otherwise than under either of those Acts, but which, in the opinion of the Commissioner, are of a similar nature, and wounds and disability pensions of the kinds specified in sub-section (2) of section sixteen of the *Finance Act* 1919 of the United Kingdom;"

The *Income Tax Assessment Act* 1954 split para. (k) into three paragraphs and introduced for the first time a reference to payments made by the Government of the United Kingdom which in the opinion of the Commissioner are of a similar nature to those specified in para. (k). Paragraph (k), (kaa) and (kab) as then enacted were for all material purposes in the same form as is set out earlier in this judgment save that references to the *Repatriation (Far East Strategic Reserve) Act* 1956 and the *Repatriation (Special Overseas Service) Act* 1962 were first inserted in 1956 and 1962 respectively. The change to the United Kingdom *Income Tax Act* 1952 was machinery only.

In the Court below the Judge asked for detailed information as to the manner in which the English legislation referred to in these sections was in fact administered and both the appellant and the Commissioner placed substantial amounts of material before the Court. In my opinion that material is not relevant to any question arising in these proceedings, and no significant reliance was placed on it by either party.

The general scheme of the *Defence Forces Retirement Benefits Act* 1948-1971 is to establish a Defence Forces Retirement Benefits Board consisting of the President of the Superannuation Board under the *Superannuation Act* 1922-1948, the Commonwealth Actuary and four other members representing respectively the Treasury, the Naval Force, the Military Force and the Air Force. Apart from the first two, the members are appointed by the Governor-General and, in the case of those representing one of the Forces, after nomination by the relevant Service Board and approval by the Minister. They are appointed for a term of two years and the Treasurer is entitled to appoint a deputy to act for any member during his illness or absence (sec. 6), and the Governor-General may terminate any appointment (sec. 7). The Board is to be a body corporate (sec. 11), and the cost of the administration of the Act is to be paid out of monies appropriated from time to time by the Parliament and monies received under that section are to be kept separately from the monies and accounts of the Fund (sec. 13). The Board is to submit each year a report to the Treasurer which is to be laid before both Houses of Parliament (sec. 14).

Under sec. 15 there is to be a Defence Forces Retirement Benefits Fund into which is to be paid "the contributions of members and payments by the Commonwealth under this Act". The income derived from the investment of the Fund is to form part of the Fund and is not to be taxable. Section 15A provides that "payments by the Commonwealth to the Fund shall be made from the Consolidated Revenue Fund, which is appropriated accordingly", Section 15B and sec. 15C are as follows: -

"15B(1) Subject to the next succeeding sub-section, payments in respect of benefits under this Act shall be made from the Fund.

(2) Where the Commonwealth would be liable to pay to the Fund an amount equal to the whole or a part of a payment made to a person from the Fund, that amount may be paid to that person by the Commonwealth instead of from the Fund, and the Consolidated Revenue Fund is appropriated accordingly.

(3) A payment by the Commonwealth under the last preceding sub-section does not affect the liability of the Commonwealth to pay to the Fund an amount referred to in that sub-section.

15C Payments by the Commonwealth to the Fund shall be made on the last day of each financial year and on that day there shall be paid from the Fund to the Commonwealth an amount equal to the sum of the payments made by the Commonwealth under sub-section (2) of the last preceding section during that financial year."

The Commonwealth does not contribute to the Fund in the sense of making regular

---

#### 77 ATC 4092

contributions in respect of each member, which then form part of the Fund to be invested. What the Act provides for is better described as subsidising the Fund to the extent of 80 per cent of every payment due to be made by way of pension under the Act and 100 per cent of other benefits. If the Commonwealth does not itself pay the 80 per cent direct to the pensioner it makes a payment to the Fund at the end of each year equal to 80 per cent of the total of the pension payments made during the year. If the Commonwealth pays the 80 per cent direct to the pensioner sec. 15B(3) requires that it must still at the end of the year pay the total 80 per cent to the Fund, which must immediately repay that same amount to the Commonwealth.

By sec. 16 provision is made for investment of the Fund and by sec. 18 monies uninvested may be lodged either on call or on fixed deposit with the Treasury or with the Commonwealth Bank "and while in the Bank shall be held to be monies of the Crown". By sec. 20 the accounts are to be audited by the Auditor-General and by sec. 22 the state of the Fund is to be investigated by the Commonwealth Actuary at intervals of not less than five years.

By sec. 23 every member (i.e. "a member of the Defence Forces on continuous full time service") is to contribute to the Fund from the date when he becomes a member. Section 30 regulates the amount of the contributions to be made by the members each fortnight. Division 4 is headed "Contributions by the Commonwealth" and in sec. 32(1) it is provided that "in respect of each payment of pension paid under this Act, the Commonwealth shall, except where otherwise provided by this Act, pay to the Fund an amount equal to eighty per centum of that payment". Section 33 provides that "in respect of each payment of benefit (other than a pension or a refund of the amount of a member's contributions) the Commonwealth shall pay to the Fund an amount equal to that payment". Section 37 provides that "the contributions of members shall be deducted fortnightly for their pay and shall be paid, without deduction for postage, forwarding or exchange, to the Board".

Sections 38 to 41A deal with retirement by officers after completion of various periods of service and upon or after reaching the retiring age for the rank held. Sections 42 to 44 deal with pensions and benefits payable to members not being officers. Section 51 deals with what are called "invalidity benefits" and provides that where a member has been retired before attaining the retiring age for his rank "on the ground of invalidity or of physical or mental incapacity to perform his duties (not, in the opinion of the Board, due to wilful action on his part for the purpose

of obtaining a pension or other benefit), he is entitled to benefit in accordance with the next three succeeding sections, but, subject to sec. 60 of this Act, is not otherwise entitled to benefit under this Act". Subsection (2) provides that the Board shall determine the percentage of total incapacity of the person concerned in relation to civil employment and shall classify the person according to the percentage of incapacity as sixty per cent or over - Class A, thirty per cent or over but less than sixty per cent - Class B, and less than 30 per cent - Class C.

Section 52 provides for the rate of invalidity benefits and, in the case of a person classified as Class A, he is entitled to a pension of an amount calculated in accordance with the section. Provision is made by sec. 55 for the payment of pensions on the death of a married member of the Forces and by sec. 57 for payment of pensions to the widows of married pensioners. In the case of pensioners under the age of fifty-seven, commutation of up to one third of a pension may be permitted by the Board in its discretion.

By sec. 83 it is provided that "any dispute under this Act shall be determined in the first place by the Board: Provided that any person aggrieved by a decision of the Board may appeal to the High Court constituted by a single Justice of that Court" and that a decision of the Court shall be final and conclusive without appeal. Section 84 provides that pensions are not capable of being assigned or charged or of passing by operation of law.

It will be convenient to deal first with the second question asked by the Board. The first point for consideration under sec. 23(kaa) is whether the payments which were made to the appellant were "pensions and allowances paid or payments made by the Commonwealth". The facts as stated by the Board of Review do not reveal whether the whole of the payments received by the taxpayer were made by the

---

#### 77 ATC 4093

Defence Forces Retirement Benefits Board out of the Fund under sec. 15B(1) or whether part of the amounts received by the taxpayer were paid direct by the Commonwealth under sec. 15B(2). It is stated only that the payments were received fortnightly by cheque. We were told in the course of the hearing, and this was not challenged by the Commissioner's Counsel, that in fact the payments received by the taxpayer came from the Department of Social Services. On that basis the Commonwealth itself made a direct payment and could have done so only under sec. 15B(2) in respect of 80 per cent of each payment (which payment would in due course have been the subject of an adjustment as between itself and the Fund by payments under sec. 15C, and presumably some adjusting payment was made by the Fund to the Commonwealth in respect of the remaining 20 per cent). It is plain that the Commonwealth under the legislation must either directly or indirectly be the source of 80 per cent of every payment made to the appellant pursuant to the provisions of the Act. To that extent at least it is in my opinion clear that these payments were made by the Commonwealth. As to the remaining 20 per cent they were paid out of, or ultimately borne by, the Fund to which the appellant, along with all other members of the Defence Forces, was obliged to contribute. If they had been wholly paid direct by the Board, a question would be whether the Board was the Commonwealth or the agent of the Commonwealth in respect of 80 per cent, or of the whole, of the pension. This question was not dealt with by the Judge below because he concluded that the payments were not of a similar nature to those specified in para. (k).

The Board performs what is plainly a governmental function in the administration of the Act, payments under which form part of the terms of service of members of the Defence Forces. The considerations which led this Court in *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1 to hold that the Repatriation Commission under the *Australian Soldiers' Repatriation Act 1920* was the Crown, notwithstanding



that it was given separate corporate personality, appear to me to lead to the conclusion that this Board is also the Crown. It is true that the *Repatriation Act* gave to the Commission the general administration of the Act "subject to the control of the Minister" and that this feature was relied upon by the Court, along with the general structure of the Act. In my opinion the absence of an express provision to that effect in the present Act does not require a different conclusion in view of the wholly governmental membership of the Board, and the nature of its functions. The alternative modes for dealing with the payment of 80 per cent of each pension payment emphasises, rather than negatives, the identity of the Board with the Crown. The considerations adverted to in *Inglis v. Commonwealth Trading Bank* (1969) 119 C.L.R. 334, point in the same direction.

It was suggested that the provisions of the Act are such that it would not be possible for a contributor to the Fund to sue the Commonwealth itself to recover amounts due under the Act. That does not appear to me to affect the matter. The Act itself provides a remedy in that disputes under the Act are to be determined in the first instance by the Board from which an appeal lies to this Court in its original jurisdiction. There can in my opinion be no doubt that the decision of this Court in such a proceeding would be enforceable against the relevant agent of the Commonwealth, namely the Board, and payment by the Board would carry with it an obligation under the Act for the Commonwealth to reimburse the Board for 80 per cent of the payment if it did not choose to make it direct under sec. 15B.

For those reasons I am of the opinion that the payments made to the taxpayer were made by the Commonwealth within the meaning of sec. 23(kaa).

The remaining problem arising under para. (kaa) is the nature of this pension as compared with pensions, allowances or payments specified in para. (k). It is essential to bear in mind that sec. 23 (kaa) is not concerned with identity but with similarity, so that there must necessarily be some differences, and for that reason instances may occur in which questions of degree arise, as to which opinions may differ. It seems to me that cases may arise which are so close in character to the pensions referred to under sec. 23(k) that there can be no doubt that they are of a similar nature and other instances may arise where the differences are so great that it would not be possible to describe them as similar in nature. In between a wide range of possibilities may exist in some

---

#### 77 ATC 4094

of which two views may be open. The history of the *Repatriation Act* 1920- 1971 shows that it was first expressed to cover pensions and allowances payable in respect of death or incapacity resulting from an occurrence while a member of the Forces during "the present war", i.e. the war which commenced August 1914. Its operation was extended in 1940 to the war which commenced on 3 September 1939, and in 1950 to the Korean and Malayan operations which commenced in 1950. It is now supplemented by the *Repatriation (Far East Strategic Reserve) Act* 1956-1962 and the *Repatriation (Special Overseas Service) Act* 1962 which make its provisions apply to the operations therein referred to. It therefore covers by a series of ad hoc Acts of Parliament pensions payable in respect of death or incapacity of members of the Defence Forces resulting from occurrences during all wars and warlike operations in which the Commonwealth has been engaged.

In the Supreme Court *Sheppard J.* regarded the *Repatriation Act* as confined in its operation to incapacity arising "as a result of service in a war". In my opinion that view is misconceived. That Act, as I have said above, requires no causal connexion between the death or incapacity and war service, but only a temporal relationship. In this respect the *Defence Forces Retirement Benefits Act*, insofar as it deals with pensions payable on account of incapacity, proceeds on the same basis. The learned judge regarded some causal connexion with war service as essential to similarity in

nature but I do not think that sec. 23(kaa) can be construed in that way. His conclusion is based not merely on a false premise as to the meaning of the *Repatriation Act* but on a mistaken approach to the requirements of similarity. It can seldom be the case that similarity can be determined by the presence or absence of a single characteristic.

When the provision which is now sec. 23(kaa) was first introduced in 1945 the *Defence Forces Retirement Benefits Act* had not been enacted and cannot have been intended as a specific example for the operation of the paragraph. Section 23(kaa) is however expressed in general terms and will apply to existing pensions (if there were any) which already fitted the words used as well as pensions later introduced which fall within those words. It was not demonstrated that there were any such existing pensions but I do consider that any assistance can be derived either way from that circumstance.

One must approach the problem by way of a comparison of the two Acts expressly referred to in para. (k) as originally enacted, with the subsequent addition of the references to the *Repatriation (Far East Strategic Reserve) Act* 1956 and the *Repatriation (Special Overseas Service) Act* 1962 on the one hand, and the *Defence Forces Retirement Benefits Act* 1948 on the other. It is convenient to dispose first of all of a suggestion that a major difference between the *Defence Forces Retirement Benefits Act* and the other legislation is that the former provides for payments by way of pension dependent upon the degree of disability whereas the other legislation has no such feature. In fact, each of the four Acts referred to in para. (k) does provide for payments dependent upon the degree of incapacity. It is true that the number of categories of incapacity differs as between various Acts but the basic policy is common to them all, namely that pensions arising from incapacity differ in amount according to the degree of disability or incapacity - see *Repatriation Act* 1920-1973, sec. 35 and Tables B and C of the Third Schedule, the Fourth Schedule and the Fifth Schedule, the *Seamen's War Pensions and Allowances Act* 1940-1970, sec. 15 and the First, Third, Fourth and Fifth Schedules. The *Repatriation (Far East Strategic Reserve) Act* 1956 makes provision for payment of pensions in respect of incapacity by way of cross-reference to the *Repatriation Act*, as does the *Repatriation (Special Overseas Service) Act* 1962.

Each of the Repatriation Acts referred to in para. (k) makes provision for pensions in respect of incapacity which results from "any occurrence that happened during his war service" - sec. 24(1) of the *Repatriation Act* 1920-1970. In the *Seamen's War Pensions and Allowances Act* the term "war injury" is slightly less wide. It covers employment during war time in a ship as an Australian mariner, presence outside Australia on leave from a ship, proceeding otherwise than on land in Australia to employment in a ship or while awaiting return to Australia and while returning to Australia from employment in a ship. The *Repatriation (Far East Strategic Reserve) Act* 1956 makes provision for what it called "Malayan Service" and provides

---

#### 77 ATC 4095

pensions for incapacity resulting from "an occurrence that happened during the member's Malayan service" and the *Repatriation (Special Overseas Service) Act* 1962 makes provision in sec. 6 for incapacity resulting from "an occurrence that happened during the period of special service of the member". Each is thus concerned with incapacity arising from occurrences within a defined period of time. The interrelation of the three Repatriation Acts is such that further separate consideration of the 1952 and 1956 Acts is not required.

A comparison of the relevant features of the *Repatriation Act* and the *Defence Forces Retirement Benefits Act* may be summarised as follows: - the *Repatriation Act* provides pensions for Members of the Forces incapacitated during service in defined times of war or warlike operations, while the *Defence Forces Retirement Benefits Act* provides pensions for Members of the Forces

incapacitated during service in times of peace. In neither case is any causal connexion required between the service and the occurrence giving rise to the incapacity. In each case the amount of the pension is related to the degree of incapacity as assessed by the administering authority and in each case there is a system of appeals though to different tribunals. Under the *Repatriation Act* no contributions are required while under the *Defence Forces Retirement Benefits Act* contributions, which may be assumed to have been regarded as adequate to finance payment of 20 per cent of the pensions, are required to be made to a Fund, 80 per cent of the pensions being paid out of Consolidated Revenue, but that 80 per cent is not contributed to the income earning Fund - cp sec. 15B and 15C as discussed above. The mode of calculating the amount of the pensions is not identical. Under both Acts the pensions are not capable of assignment. Provision for partial commutation at the discretion of the Board is contained in the *Defence Forces Retirement Benefits Act*, while there is no longer any such provision in the *Repatriation Act*, it having been repealed in 1935.

I do not regard the difference between wartime and peacetime service as significant for present purposes because the history of the *Repatriation Act* demonstrates a consistent policy of extending its operation to wartime service as it arises from time to time. No doubt that policy could change in the future but it is nonetheless relevant to ascertaining the intention of the Parliament in what is now sec. 23(kaa). However provision of pensions under the successive *Repatriation Acts* to members of the Forces in respect of an incapacity arising out of occurrences during service in all the periods of time when the Commonwealth has been engaged in war or in hostile warlike operations provides a positive indication that, those Acts having covered that field, similarity in nature cannot require that the pensions or allowances must arise out of or during wartime service.

The next difference relied upon by the Commissioner was the partly contributory nature of the pension. In a sense this factor may be regarded as one of degree in that it would be difficult to say of a pension one per cent of which was financed by contributions by members to a fund and 99 per cent by the Commonwealth was not similar to a pension paid 100 per cent by the Commonwealth and equally it would be difficult to say that a pension financed 99 per cent out of a fund contributed to by members of the Forces and one per cent by the Commonwealth was one which was similar to a pension paid wholly by the Commonwealth, there being no other material distinction. In my opinion the payment by the Commonwealth of 80 per cent of each pension payment is not in any real sense a contribution to the Fund, which earns interest and builds up the Fund. According to the procedure adopted, it is a direct or an indirect payment by the Commonwealth to the pensioner of an amount equal to 80 per cent of his entitlement under the Act, the remaining 20 per cent is paid out of and borne by the Fund but is paid by the Commonwealth. In my opinion that difference is not sufficient in character or extent to negate similarity. I recognise that a point could be reached at which the proportions of the payments might be a significant factor in determining presence or absence of similarity. I do not consider that that point is reached in the present legislation.

The other differences to which I have referred above are not in my opinion significant and cannot in combination with the principal differences relied on be regarded as leading to the conclusion that the pension now in question is not of a similar nature to those referred to in para. (k). On the other hand the common features and those which

---

#### 77 ATC 4096

demonstrate only minor procedural differences are of a substantial character and do demonstrate the similarity of the nature of this pension to those with which comparison is required. When all the features of the two pensions are looked at together, they demonstrate to me a degree of similarity such that I do not regard as open to the Commissioner a conclusion that they are not of a

similar nature within the meaning of para. (kaa).

In the result therefore I am of the opinion that the Commissioner is bound to form the opinion that these pensions are of a similar nature and that it is not open to him to form a contrary opinion. Accordingly I would answer question 2(a) Yes and would not find it necessary to answer question 2(b).

Having concluded that the amounts in question are exempt from tax under sec. 23(kaa) it is not necessary for me to consider whether they also fall within sec. 23(kab).

**ORDER:**

Appeal allowed with costs.

Order of the Supreme Court of New South Wales set aside and in lieu thereof order that the questions of law referred to that Court be answered as follows:

(1) Was the taxpayer entitled in law by reason of sec. 23(kab) of the *Income Tax Assessment Act* 1936 (as amended) to exemption from income tax on the amounts of \$5,885 and \$5,939 received by him as invalidity benefit payments pursuant to the *Defence Forces Retirement Benefits Act* 1948 (as amended) during the years of income ended 30 June 1971 and 30 June 1972 respectively?

Answer: Unnecessary to answer.

(2) Were the aforesaid amounts of \$5,885 and \$5,939 pensions or allowances paid or payments made by the Commonwealth

- (a) in regard to which the Commissioner was bound in law to form, or alternatively
- (b) in regard to which it was open to him in law to form

the opinion pursuant to sec. 23(kaa) of the *Income Tax Assessment Act* 1936 (as amended) that the said amounts were pensions or allowances or payments of a similar nature to pensions allowances or payments specified in sec. 23(k) of the said Act?

Answer: (a) Yes.

- (b) Unnecessary to answer.

Respondent to pay appellant's costs of the reference to the Supreme Court of New South Wales.

---

**Disclaimer and notice of copyright applicable to materials provided by CCH Australia Limited**

CCH Australia Limited ("CCH") believes that all information which it has provided in this site is accurate and reliable, but gives no warranty of accuracy or reliability of such information to the reader or any third party. The information provided by CCH is not legal or professional advice. To the extent permitted by law, no responsibility for damages or loss arising in any way out of or in connection with or incidental to any errors or omissions in any information provided is accepted by CCH or by persons involved in the preparation and provision of the information, whether arising from negligence or otherwise, from the use of or results obtained from information supplied by

CCH.

The information provided by CCH includes history notes and other value-added features which are subject to CCH copyright. No CCH material may be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way, except that you may download one copy for your personal use only, provided you keep intact all copyright and other proprietary notices. In particular, the reproduction of any part of the information for sale or incorporation in any product intended for sale is prohibited without CCH's prior consent.

© **Commonwealth of Australia**

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the Copyright Act 1968, all other rights are reserved.

Requests and inquiries concerning reproduction and rights should be addressed to Commonwealth Copyright Administration, Attorney General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>