Grice Holdings Pty Ltd & Anor v Commissioner of Taxes [2000] NTSC 88

PARTIES:	GRICE HOLDINGS PTY LTD AND GRICE INVESTMENTS NT PTY LTD v COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20005652 (36 of 2000) and 20006590 (LA6 of 2000)
DELIVERED:	23 October 2000
HEARING DATES:	1 September 2000
JUDGMENT OF:	BAILEY J

CATCHWORDS:

STAMP DUTY – APPEAL AGAINST ASSESSMENT
Whether the plaintiffs/appellants lodged a valid objection – must be a 'person aggrieved' - a person aggrieved is the person liable to pay the duty assessed
Taxation (Administration Act), section 100
McDonald's Australia Ltd v The Commissioner of Taxes, 72/2000, unreported, Supreme court of the Northern Territory, 6th September 2000, applied.

In the absence of a valid objection there is no basis for the court to consider an appeal pursuant to s100 of the act; to grant an order in the nature of mandamus; or to grant a declaration in the terms sought by the plaintiffs/appellants.

REPRESENTATION:

Counsel:

Appellant:	Mr Russel
Respondent:	Ms Kelly

Solicitors:

Appellant:	Paul Maher
Respondent:	Clayton Utz

Judgment category classification:	B
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bai00007

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Grice Holdings Pty Ltd & Anor v Commissioner of Taxes [2000] NTSC 88
No 36 of 2000 (20005652) and LA6 of 2000 (20006590)

BETWEEN:

GRICE HOLDINGS PTY LTD AND
GRICE INVESTMENTS NT PTY LTD
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 23 October 2000)

Background

[1] These proceedings arise from an assessment of stamp duty issued by the Commissioner of Taxes on 22 December 1999.

[2] There are two proceedings:

(a) By originating motion, filed on 17 March 2000, the plaintiffs (Grice Holdings Pty Ltd and Grice Investments Pty Ltd) seek relief in the following terms:

"1. The Plaintiffs appeal to the Court pursuant to section 101 of the *Taxation (Administration) Act* 1978 against an assessment of

Stamp Duty made by the Defendant on 22 December 1999 on a Transfer made on 30 June 1999 in the sum of $194,400, an objection against which was disallowed by the Defendant on 22 February 2000.

2. In the alternative, the Plaintiffs apply to the Court for an Order in the nature of mandamus requiring the Defendant to determine the objection lodged by them (or alternatively by the First Plaintiff on its own behalf and on behalf of the second Plaintiff) against the assessment which objection the defendant has refused to determine.

3. In the further alternative, the Plaintiffs apply to the Court for a declaration that the objection lodged by them (or alternatively by the First Plaintiff on its own behalf and/or on behalf of the second Plaintiff) against the assessment is an objection which complies with section 100 of the *Taxation (Administration) Act* 1978 which objection the Defendant is required by law to determine."

Grounds relating to the appeal under section 101 of the *Taxation (Administration) Act* and to the application for an order in the nature of mandamus or for a declaration are set out in the originating motion which concludes with a claim for orders in the following terms:

"(i) an order that the assessment be varied to nil or accordingly some other amount less than $194,400.00;

(ii) alternatively an order that the assessment be remitted to the Defendant for reassessment according to law;

(iii) in the further alternative, an order directing the Defendant to determine the objection lodged by the solicitors for the Plaintiffs with the Defendant on 20 January;

(iv) in the further alternative, a declaration that the objection lodged by the solicitors for the Plaintiffs with the Defendant on 20 January was an objection for the purposes of section 100

of the *Taxation (Administration) Act* 1978 which the Defendant is required by law to determine; and

(v) costs."

(b) By notice of appeal, filed on 30 March 2000, the appellants (Grice Holdings Pty Ltd and Grice Investments Pty Ltd) appeal from the decision of the Commissioner of Taxes rejecting an objection to the assessment of stamp duty made by the Commissioner on 22 December. The "grounds" of the appeal set out in the notice included applications for relief in the same terms as paragraphs 1, 2 and 3 of the originating motion (set out at (a) above). The notice also includes further grounds relating to the appeal under the *Taxation (Administration) Act* in the same terms as the originating motion (but does not reproduce the grounds relied upon in the originating motion for an order in the nature of mandamus or for a declaration). The orders sought are in the same terms as those sought in sub-paragraphs (i), (ii) and (v) of the originating motion (set out at (a) above).

[3] The originating processes adopted in the two proceedings are clearly defective in attempting to combine in a single document an appeal under the *Taxation (Administration) Act* with an application for an order in the nature of mandamus or, in the alternative, declaratory relief. However, it is clear enough that Grice Holdings Pty Ltd and Grice Investments Pty Ltd wished to pursue:

(a) an appeal pursuant to section 101 of the *Taxation (Administration) Act* against what is said to be a decision of the Commissioner of Taxes disallowing an objection against the assessment in question; and

(b) in the alternative, proceedings seeking an order in the nature of mandamus or a declaration requiring the Commissioner of Taxation to determine the purported objection to the assessment lodged by Grice Holdings Pty Ltd and/or Grice Investments Pty Ltd.

Agreed Facts

[4] The two proceedings were conducted largely on the basis of an agreed statement of facts and issues. In addition the plaintiffs/appellants ("Holdings" and "Investments") relied on three affidavits each sworn on 1 September 2000 by Joseph Scully (accountant to the Grice Family Superannuation Fund), Ian Campbell (accountant to Fannie Bay Investments Pty Ltd and Holdings) and Paul Maher (solicitor for Holdings and Investments). Mr Campbell and Mr Maher also gave brief evidence concerning aspects of their affidavits after objections by Ms Kelly on behalf of the Commissioner of Taxes (the defendant/respondent – the "Commissioner"). Ms Kelly called Ms Rosemary Campbell, a charted accountant, who gave brief evidence concerning aspects of Holdings' accounts.

[5] The agreed statement of facts is in the following form:

"1. On 26 November 1980 Grice Holdings Pty Ltd ACN 009 598 216 ('Holdings') became the registered proprietor of Lot 5279 of Darwin.

2. On 8 July 1987 Holdings became the registered proprietor of Lot 5498 of Darwin.

3. On 14 April 1989 Lots 5279 and 5498 were consolidated into one lot, being Lot 5500 of Darwin.

4. Holdings remained the registered proprietor of Lot 5500 of Darwin until 30 June 1999.

5. On 17 May 1995 the Grice Family Superannuation Fund was created by trust deed ('the Trust Deed') with Fannie Bay Investments Pty Ltd ACN 063 776 214 ('Fannie Bay') as its trustee (Annexure '1').

6. On 9 November 1998:

   (a) the common seal of Fannie Bay was affixed to the document entitled 'First Deed of Amendment' for the Grice Family Superannuation Fund in the presence of two of its directors and with the authority of all three of the directors;

   (b) by notice in writing a majority of the members of the Grice Family Superannuation Fund removed Fannie Bay as trustee and appointed Holdings as the trustee in its place (Annexure '2');

   (c) the minutes of the meeting of directors of Holdings were signed by the persons who at that time were all the directors and secretary of that company (Annexure '3');

   (d) Janice Grice, a director of Holdings spoke the words set out in attachment 'A' to the statutory declaration of Paul Gerard Maher;

   (e) Paul Gerard Maher made the statutory declaration (Annexure '4');

(f) a cheque for $3.6 million on account number 065 901 10129262 in the name of Fannie Bay ('the Account') was written out, signed by the persons whose signatures it bears, and endorsed in succession by the persons named thereon ('the Cheque') (Annexure '5'); and

(g) at the time the Cheque was written out Fannie Bay did not have a credit balance in the Account or an overdraft or other credit facility in place sufficient to allow the Cheque to be honoured.

7. On 13 May 1999 a majority of the members of the Grice Family Superannuation Fund, by notice in writing, removed Holdings as trustee and appointed Grice Investments Pty Ltd ACN 087 278 108 ('Investments') as trustee (Annexure '6').

8. On 30 June 1999 Lot 5500 of Darwin was transferred from Holdings to Investments. The transfer was dated 30 June 1999 and executed by Holding (as transferor) and Investments (as transferee) ('the Transfer') (Annexure '7').

9. On 22 December 1999 the respondent issued a Notice of Assessment to Investments in the amount of $194,000.00 pursuant to section 4 and sub-item 5(1) of Schedule 1 of the *Stamp Duty Act* 1978 (NT) ('the SD Act') on the basis that the Transfer effected a conveyance of the property from Holding to Investments which was not exempt from stamp duty under sub-item 9A(a) of Schedule 2 of the SD Act (Annexure '8').

10. The unencumbered value of Lot 5500 is $3,6000,000.00.

11. The stamp duty assessment was paid in full on 21 January 2000.

12. On or about 20 January 2000 Messrs Noonans lodged with the respondent a document entitled 'Notice of Objection Against Assessment' (Annexure '9') against the assessment ('the purported objection').

13. No other Notice of Objection was lodged with the respondent in respect of the assessment.

14. On or about 22 February 2000 the respondent:

(a) determined that:

(i) he did not have the power or authority to consider the Purported Objection because Holdings is not a 'person aggrieved by an assessment made in relation to [it] under the Act' for the purpose of sub-section 100(1) of the TA Act; and

(ii) if he did have the power or authority to consider the Purported Objection, it would be disallowed because sub-item 9A(a) of Schedule 2 to the SD Act had no application; and

(b) informed Holdings of the above by letter dated 22 February 2000 (Annexure '10')."

[6] It is not necessary for present purposes to reproduce the various annexures referred to in the agreed statement of facts – although it is necessary to describe the "purported objection" (Annexure '9') referred to in paragraph 12 of the agreed statement of facts in some detail.

[7] The purported objection opens with the words:

> "***Grice Holdings Pty Ltd*** ACN 009 598 216 ('Holdings') ***objects*** against the assessment of stamp duty contained in Notice of Assessment of Stamp Duty issued by the Commissioner of Taxes on 22 December 1999……" (emphasis added)

[8] Thereafter, details of the assessment of $194,400 are set out, followed by the statement:

> "***Holdings*** contends that the transfer is exempt from duty under Paragraph 9A(a) of Schedule Two to the Stamp Duty Act……" (emphasis added)

[9] The notice of objection then sets out details of the objection. In essence, it is claimed that the land which is the subject of the transfer and assessment became subject to the Grice Family Superannuation Trust Fund on 9 November 1998 as a result of an oral declaration of trust by a director of Holdings, which at the relevant date was the trustee of the Trust Fund. Subsequently, on 13 May 1999, the trustee of the Trust Fund was changed from Holdings to Investments and the notice of objection claimed that the transfer of the land was exempt from stamp duty pursuant to sub-item 9A(a) of Schedule 2 to the *Stamp Duty Act* as one:

> "…made for the purpose of effecting the appointment of a new trustee on the retirement of a trustee and under which no beneficial interest passed in the property conveyed;"

[10] The notice of objection is signed by Thomas Alexander Walker "a solicitor in the employ of Noonans Lawyers, the solicitors for ***Grice Holdings Pty Ltd***" (emphasis added).

Issues for Determination

[11] The parties have agreed that the following issues are required to be determined by the court:

(1) In relation to the originating motion seeking an order in the nature of mandamus or a declaration:

"(a) was Holdings entitled to lodge an objection against the assessment;

(b) if no to (a), did Investments validly ratify the purported objection so as to render it a valid objection by Investments within the meaning of sub-section 100(1) of the TA Act; and

(c) if yes to (a) or (b):

(i) are the plaintiffs entitled to raise the appeal in this proceeding; and

(ii) should the Court exercise its discretion to grant the relief sought by the plaintiffs (mandamus and declaratory relief)."

(2) In relation to the appeal pursuant to section 101 of the *Taxation (Administration) Act*:

"If yes to 1(a) or (b), is the exemption under Schedule 2 Item 9A(a) of the SD Act available in respect of the Transfer. In particular, is the oral declaration invalid and ineffective to create a trust over the land:

(a) for failure to comply with the requirements of section 7 of the Statement of Frauds and/or;

(b) for want of certainty of objects/beneficiaries."

[12] It will be apparent from the terms of the relief sought by Holdings and Investments in both the appeal under the *Taxation (Administration) Act* and the application for an order in the nature of mandamus or a declaration that a key preliminary issue is the validity of the notice of objection lodged with the Commissioner on 20 January 2000. In the absence of a valid objection, Holdings and Investments must necessarily fail in an appeal from the Commissioner's "disallowance" of the purported objection and there would

be no basis for an order or declaration that the Commissioner "determine" the purported objection. In short, it hardly needs to be spelt out that an appeal pursuant to section 101 of the *Taxation (Administration) Act* can be pursued only where the Commissioner has made a decision concerning a (valid) objection and discretionary relief to order the Commissioner to determine an objection could be contemplated only where a (valid) objection has been made to the Commissioner.

[13] Although it is unnecessary to canvass the issue in detail for present purposes, I add that nothing in these reasons should be taken to endorse the simultaneous pursuit of an appeal under section 101 of the *Taxation (Administration) Act* and an application in the nature of prerogative relief. In *Carrigan v Risdale & Others*, 141/99, unreported, Supreme Court of the Northern Territory, 9 December 1999, Thomas J after considering *Twist v The Council of the Municipality of Randwick* (1976) 136 CLR 106, *Marine Hull & Liability Insurance Co Ltd v Hurford & Anor* (1985) 62 ALR 253 and *Hill & Others v King & Others* (1993) 31 NSWLR 654 observed (at p 9):

> "My understanding of the principle to be distilled from the authorities to which I have referred, is that where a person has a statutory right to appeal, the remedy on appeal should be pursued rather than an application on a prerogative writ."

[14] Gray J in *Gardner v General Manager of the Territory Insurance Office and Ors* (1991) 104 FLR 287 at 293 referred to the remarks of Dixon CJ in *Tooth & Company Ltd v Paramatta City Council* (1955) 97 CLR 492 at 498:

> "But, where the legislature has provided for the very description of case a remedy designed as appropriate and adequate, a court should be careful that mandamus is not used to avoid recourse to the remedy or as a substitute for it. The general rule is that the Court exercises its discretion against granting a writ of mandamus where a remedy is provided by way of appeal or the like which is equally convenient, beneficial and effective. If the writ of mandamus does not provide the party with a more convenient and better remedy, the Court, in such a case, leaves the party with that which has been provided."

[15] With respect, I agree with the observations of Thomas and Gray JJ. In the present proceedings, the application for an order in the nature of mandamus or a declaration would appear to be entirely redundant ***if*** the purported objection was properly made in accordance with the *Taxation (Administration) Act*. In such circumstances, an appeal pursuant to s 101 of the Act would be entirely adequate to resolve the substantive issue between the parties. I also note in the present case that the appeal by Holdings and Investments was filed outside the 30 day time limit provided by s 101 of the Act, while the originating motion filed pursuant to Order 56 of the *Supreme Court Rules* is within the 60 day time limit provided by r 2(1) of o 56. In my view, this would be a further consideration militating against the grant of discretionary relief in favour of Holdings and/or Investments.

The Purported Objection

[16] In the present case, there is no dispute between the parties that:

(a) the notice of assessment issued by the Commissioner on 22 December 1999 was issued with respect to a transfer of real property from Holdings to Investments;

(b) the transfer was a "conveyance" within the meaning of s 4(1) of the *Taxation (Administration) Act*;

(c) the transfer was prima facie dutiable, subject to any applicable exemption (s 4 and Item 5 of Schedule I of the *Stamp Duty Act*); and

(d) Investments as the "conveyee" within the meaning of section 4(1) of the *Taxation (Administration) Act* was the person liable to pay any stamp duty duly assessed pursuant to section 50(1) of that Act.

[17] As the person liable to pay any stamp duty duly assessed, Investments was obliged to lodge the instrument of transfer with the Commissioner for assessment: s 9(1A)(b) of the *Taxation (Administration) Act*. It is not a matter of dispute that Investments did lodge the instrument of transfer (Annexure 7 to the agreed statement of facts) with the Commission – albeit the transfer instrument stated that the value of the transfer was: "Nil – change of trustee".

[18] Section 92 of the *Taxation (Administration) Act* relevantly provides:

> "(1) Where an instrument is lodged with the Commissioner for assessment –
>
> (a) if he adjudges that duty on the instrument is not payable - he may put an impressed stamp on the instrument as provided by section 17(2); or
>
> (b) if he adjudges that duty is payable - he shall assess the amount of the duty.

> (2) The Commissioner shall inform the person lodging the instrument of his assessment under subsection (1), but is not required to give notice in writing of the assessment to that person unless so requested in writing by that person within 30 days after the lodging of the instrument."

[19] Accordingly, pursuant to s 92(2), the Commissioner was obliged to inform Investments of his assessment. It is agreed that the Commissioner informed Investments of his assessment by issuing the Notice of Assessment dated 22 December 1999 (Annexure 8 to the agreed statement of facts).

[20] Section 100 of the *Taxation (Administration) Act* provides:

> "(1) A person aggrieved by an assessment made in relation to him under this Act may, within 30 days after the date on which he is informed of the assessment, post to, or lodge with, the Commissioner an objection in writing to the assessment."

[21] In my view, the meaning of s 100(1) is clear and unambiguous. The only person who is entitled to object to an assessment of the Commissioner is "***a person aggrieved by an assessment made in relation to him***". Mr Russel, on behalf of Holdings and Investments, submitted with a good deal of ingenuity that a wide interpretation should be given to the term "person aggrieved". He submitted that, in a general administrative law sense, the term comprehends almost anyone who has a special interest in the subject matter of the decision greater than that of members of the public generally (*Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51). Mr Russel submitted that Holdings is a "person aggrieved", being a party to the instrument of transfer and as a former trustee, Holdings, would be liable to account to the beneficiaries of the

Grice Family Superannuation Fund for its conduct as a trustee (including liability for negligence resulting in the payment of unnecessary stamp duty). Mr Russel further submitted that the words "made in relation to him" could be interpreted broadly to embrace any potential objector with a genuine interest in a correct assessment and such words were not required to be limited to the person with a primary liability to pay an assessment.

[22] I intend no disrespect to Mr Russel in not setting out the totality of his submissions in favour of a sufficiently broad interpretation of s 100(1) of the *Taxation (Administration) Act* to encompass Holdings as a person with a right to lodge an objection to the assessment issued against Investments. However, I am firmly of the opinion that no matter how generous a construction is given to the words "person aggrieved" in other circumstances and in the context of other legislative provisions, in no sense can the present assessment be said to have been made "in relation to" Holdings. Even if the English language could be legitimately stretched (or tortured) into accommodating Holdings as a "person aggrieved by an assessment made in relation to him" this would not overcome the further qualification in s 100(1) that an objection be lodged "within 30 days after the date on which ***he is informed of the assessment***". The legislation is unambiguous: the only person who is entitled to object to an assessment is the person who is liable to pay the duty assessed and who has been informed of the assessment in accordance with the *Taxation (Administration) Act*.

[23] In the present case, only Investments was entitled to object to the relevant assessment. The purported objection lodged by Holdings was not an objection within the meaning of the Act.

[24] Since the hearing of the present proceedings on 1 September 2000 and the preparation of the above reasons in draft, Riley J has delivered his judgment in *McDonald's Australia Ltd v The Commissioner of Taxes* 72/2000, unreported, Supreme Court of the Northern Territory, 6 September 2000.

[25] Both the Commissioner and Holdings/Investments drew my attention to the *McDonald's Case* and provided written submissions. In that case, McDonald's Australia Ltd entered into licence agreements with a number of companies as licensor under which the licensee companies were granted certain rights to use "the McDonald's system" in restaurants to be run on the premises leased by the licensees from McDonald's.

[26] The Commissioner issued assessments for stamp duty payable in respect of the licence agreements. The assessments were addressed to McDonald's on the basis that the documents were lodged by it. McDonald's paid the duty, although the persons liable to pay such duty were the licensees.

[27] McDonald's lodged objections to each of the assessments claiming to be "a person aggrieved" by such assessments. The Commissioner responded that McDonald's was not a person aggrieved and, therefore, the objections did not comply with s 100 of the *Taxation (Administration) Act*. As with the

present case, notwithstanding this view, the Commissioner went on to consider and reject the grounds of each objection.

[28] McDonald's sought to appeal from the Commissioner's decision to the Court pursuant to s 101 of the *Taxation (Administration) Act.*

[29] In concluding that McDonald's had no standing to pursue an appeal pursuant to s 101 of the Act, his Honour considered the scope and purpose of the legislation (in particular ss 9, 50, 92, 100 and 101). His Honour found that the assessments had not been made "in relation to" McDonald's (see paras [26] to [30]). At para [29], Riley J held:

> "…McDonald's Australia Ltd had no interest in the matter and no obligation imposed upon it. Both as a matter of statute and of contract the obligation in relation to duty fell upon the individual licensees. The fact that McDonald's Australia Ltd has assumed for itself a role in lodging the instrument and paying duty assessed cannot create in it the statutory rights which are reserved to the individual licensees."

[30] His Honour continued at para [30] to [32] of his reasons:

> "[30] In these cases the assessments were made in relation to the licensees. They were not made in relation to McDonald's Australia Limited. No statutory or other liability or obligation rested upon McDonald's Australia Limited at all.
>
> [31] The only interest that McDonald's Australia Limited has in this matter arises indirectly from it being a party to each licence agreement. Any other interest would be for some collateral commercial purpose of McDonald's Australia Limited and, as Gummow J observed (*CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397 at 408), that is not sufficient to amount to "dissatisfaction" in the relevant sense.

> [32] In all of the circumstances I find that McDonald's Australia Limited is not 'a person who is aggrieved by an assessment made in relation to him' for the purposes of s 100 of the Act. Further it is not 'an objector who is dissatisfied with a decision of the Commissioner' for the purposes of s 101(1) of the Act. McDonald's Australia Limited is without standing and the appeal must be dismissed."

[31] I agree with the Commissioner's (written) submissions that the *McDonald's Case* is directly on point with the present case. Here, the "statutory rights" of objection and, hence, appeal, are "reserved to" the transferee, Investments. The most that Holdings has been able to assert is that it is "potentially" liable to the beneficiaries of the Grice Family Superannuation Trust. Holdings has no statutory liability (or indeed any other liability) to pay the stamp duty assessed. Any interest Holdings may assert is at most for "a collateral commercial purpose" and, as such, not sufficient to amount to "dissatisfaction" in the relevant sense (as to which see para [14] and para [31] of the *McDonald's Case*, referring to *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397 at 408 per Gummow J).

[32] In addition to the reasons earlier given, with respect, I would adopt the reasons of Riley J in the *McDonald's Case* in ruling that Holdings has no standing to pursue either its purported appeal or the application for an order in the nature of mandamus or a declaration.

[33] It follows from the above that the answer to the first issued identified by the parties which requires determination (para [11] above: "Was Holdings entitled to lodge an objection against the assessment?") is "No". The second

issue identified by the parties is: "Did Investments validly ratify the purported objection so as to render it a valid objection by Investments within the meaning of s 100 (1) of the *Taxation (Administration) Act*?

[34] I have referred earlier in these reasons to the terms of the purported objection (see para [7] above and Annexure 9 to the agreed statement of facts). On its face, the purported objection is made by Holdings and does not purport to be lodged by Holdings as agent for Investments. This fact alone may well be sufficient to defeat recognition of any supposed later ratification of the purported objection by Investments (*Keighley, Maxsted & Co v Durant* [1901] AC 241 at 247 and 249). However, on a more fundamental level, there is no sufficient evidence that Investments in fact did ratify the action of Holdings in lodging an objection against the Commissioner's assessment.

[35] In his affidavit of 1 September 2000, the solicitor for Holdings and Investments, Mr Paul Maher states (para 12):

> "Prior to the commencement of this appeal and of proceeding 36 of 2000 (the proceedings by originating motion), I advised the directors of the appellants that Grice Holdings Pty Ltd had objected to the stamp duty assessment and it would be desirable if Grice Investments Pty Ltd ratified that action of Grice Holdings Pty Ltd. I received instructions that Grice Investments Pty Ltd ratified that action of Grice Holdings Pty Ltd and that I should commence proceedings on behalf of both appellants on that basis."

[36] Mr Maher was cross examined about this matter. His evidence was that in March 2000 he had spoken to a director of Investments who had told him

that Investments had ratified Holdings' action in lodging the objection. Such evidence falls a long way short of proving that Investments did in fact ratify the action of Holdings. There was no evidence of a resolution by the board of directors of Investments purporting to ratify the action of Holdings. Further, even if there had been such evidence, it would appear that any purported ratification by Investments would have occurred after the expiry of the 30 day time limit for lodgment of an objection (s 100(1) of the *Taxation (Administration) Act*). In this regard, it is to be noted that the purported objection by Holdings was lodged with the Commissioner on 20 January 2000 (para 12 of the agreed statement of facts), that is, one day before the expiry of the 30 day time limit. Although it is unnecessary to decide the issue for present purposes, authorities such as *Dibbins v Dibbins* [1896] 2 Ch 349 at 351/2 and *Firth v Staines* [1897] 2 QB 70 support the proposition that Investments could not validly ratify the purported objection lodged by Holdings after the time for objecting had expired. In *Firth v Staines*, supra, at p 75, Wright J held:

> "To constitute a valid ratification three conditions must be satisfied : first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself."

[37] It follows from the above that there was no valid ratification of the purported objection by Holdings so as to render it a valid objection by

Investments for the purposes of s 100(1) of the *Taxation (Administration) Act*.

[38] In the absence of a valid objection (or a valid ratification of the purported objection lodged by Holdings) there is no basis for this Court to consider an appeal under section 101 of the *Taxation (Administration) Act* and nor is there any basis to grant an order in the nature of mandamus or a declaration in the terms sought by Holdings and Investments. These conclusions make it unnecessary to decide the substantive issue between the parties (namely, whether the conveyance of the relevant land was exempt from stamp duty pursuant to Item 9A(a) of Schedule 2 to the *Stamp Duties Act*). The matter having been fully argued, I have considered whether it would be appropriate to express a view.

[39] With a good deal of reluctance, I have come to the conclusion that it would not be appropriate for me to express any views about the substantive issue for the following reasons.

[40] In the course of submissions, I expressed some surprise at the nature of the proceedings chosen by Holdings and Investments to resolve their dispute with the Commissioner. Earlier in these reasons I have expressed doubts about whether it was appropriate to pursue simultaneously an appeal against the purported objection and an application for an order in the nature of a prerogative writ or, alternatively, a declaration. During submissions, I suggested that most, if not at all, of the procedural difficulties which have

attended the present proceedings could have been avoided if the substantive issue between Holdings/Investments and the Commissioner had been raised in another manner. In particular, I noted that s 97(1) of the *Taxation (Administration) Act* provides:

> "(1) The Commissioner may, at any time within a period of 3 years after the date of an assessment by him of duty, amend the assessment by making such alterations or additions to it as he thinks necessary."

[41] I suggested that, notwithstanding that the time for objecting to an assessment pursuant to s 100(1) of the Act had expired, Investments might request the Commissioner to exercise his discretion to alter the assessment in question pursuant to s 97(1). In the event that the Commissioner refused and Investments could establish that it would be unconscionable for the Commissioner to retain moneys paid because such moneys were not properly due, then an order in the nature of mandamus might lie to require the Commissioner to exercise his discretion in Investments' favour.

[42] Mr Russel sought to adopt my suggestion and applied to amend the originating motion to raise the substantive issue under s 97(1) of the Act. I refused to allow such an amendment, essentially for the reason that at no stage has Investments requested the Commissioner to exercise his discretion under s 97 (1). It remains open to Investments to do so and in the event of a refusal by the Commissioner, if Investments is so minded, to pursue the substantive issue in the manner suggested above. With the existence of that possibility, I do not consider that it would be appropriate for me to express

any view as to the substantive issue between the parties. It would be difficult, or impossible, for a dissatisfied party to appeal any view that I might express and there might remain a possibility for the issue to be relitigated pursuant to s 97(1).

[43] I must emphasise that nothing I have said concerning the Commissioner's powers under s 97(1) should be interpreted as either an encouragement to Investments to pursue the suggested approach or an indication that there is any merit in their submissions on the substantive issue. Whether Investments (or Holdings) wishes to pursue this matter further is entirely a matter for the parties.

Orders

[44] The formal orders of the Court are:

(1) The appeal pursuant to s 101 of the *Taxation (Administration) Act* is dismissed.

(2) The application for an order in the nature of mandamus or, in the alternative, a declaration is dismissed.

[45] I will hear the parties with respect to costs.