Commissioner of Taxes v Tourism Holdings Ltd & Anor [2002] NTCA 10

PARTIES:	COMMISSIONER OF TAXES v TOURISM HOLDINGS LIMITED (DN248 179) and TOURISM HOLDINGS AUSTRALIA PTY LTD (ACN 001 789 957)
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP4 of 2002 (20103814)
DELIVERED:	30 October 2002
HEARING DATES:	18 September 2002
JUDGMENT OF:	MILDREN, THOMAS JJ & PRIESTLEY AJ

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	Ms J Kelly
Respondent:	Mr D Russell QC & Mr B O'Loughlin

Solicitors:

Appellant:	Morgan Buckley
Respondent:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Mil02277
Number of pages:	31

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

Commissioner of Taxes v Tourism Holdings Ltd& Anor [2002] NTCA 10
No. AP4 of 2002 (20103814)

BETWEEN:

COMMISSIONER OF TAXES
Appellant

AND:

TOURISM HOLDINGS LIMITED (DN 248 179)
First Respondent

AND:

TOURISM HOLDINGS AUSTRALIA PTY LTD (ACN 001 789 957)
Second Respondent

CORAM: MILDREN, THOMAS JJ & PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 30 October 2002)

MILDREN J:

[1] I agree with Thomas J that this appeal should be dismissed.

[2] The background to this appeal and to the cross-appeal is dealt with by her Honour. This is a case where a party to a transaction, the first respondent Tourism Holdings Limited (Holdings), has agreed with another party to the transaction, the second respondent Tourism Holdings Australia Pty Ltd

(Holdings Australia), to pay the stamp duty on the transaction, notwithstanding that only Holdings Australia is liable under the relevant legislation to pay the relevant duty. Holdings and Holdings Australia are related companies and both were represented by the same solicitors who were from interstate. The appellant's notice of assessment sent to the solicitors, required Holdings Australia to pay the duty. The solicitors lodged an appeal against the assessment with the appellant on behalf of Holdings instead of Holdings Australia within time. No one in the appellant's office noticed the mistake until some six months later. By this time, the right of Holdings Australia to appeal was well out of time.

[3] In some states, this type of problem has been resolved by the legislation allowing anyone with a sufficient interest in the outcome to appeal to the Commissioner and ultimately, if necessary, to a court. I strongly recommend to the responsible Minister that consideration should be given to amending the Taxation (Administration) Act to provide a similar remedy. The present state of the legislation is Dickensian and leads to injustice. I note that this is the fourth such case of this type to reach this Court in the last two years.

[4] So far as s 100(7) of the Taxation (Administration) Act is concerned, that provision is not affected by the common law presumption against retrospectivity. It merely confers a power on the Commissioner to extend time for lodging an objection to the Commissioner. It confers no enforceable rights, other than a right to have an application for extension of

time considered by the Commissioner: see *Padfield & Others v Minister of Agriculture, Fisheries & Food & Others* [1968] AC 997. If the power is exercised in the taxpayer's favour, there is no right in the Commissioner or liability in the taxpayer "which the law had defined by reference to ... past events" (to adopt Dixon CJ's words in *Maxwell v Murphy* (1957) 96 CLR 261 at 267) affected. The Commissioner does not have an absolute right to be free of a legitimate claim by a taxpayer merely because the time within which to appeal an assessment has lapsed. The assessment is not absolutely final as between the taxpayer and the Territory. The duty of the Commissioner is to collect the correct amount of tax, and "not a penny more, not a penny less": see *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155. Section 97(1) empowers the Commissioner to amend an assessment at any time within three years. The amendment may result in more tax being collected, or a refund, depending on the circumstances. If the Commissioner formed the view that a refund was warranted, it would plainly be his duty to amend the assessment and make the refund: see s 97(3). It is not until the three-year period has lapsed that the Commissioner can really assert that the assessment is in any sense final. Section 100(7) is not a provision which revives a cause of action which is barred (cf. *Rodway v The Queen* (1990) 169 CLR 515 at 519), nor is it analogous to such a provision. By itself, s 100(7) does nothing; it merely confers a power on the Commissioner to extend time within which to appeal in certain circumstances. In fact it does not operate retrospectively

at all; the power, if it is exercised, operates only from the time of its exercise.

[5] Furthermore, s 100(7) of the Act is a remedial provision in that it confers a power on the Commissioner to enable him to do justice in circumstances where no such power previously existed. Such a provision should be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which the words used are fairly open, even where the language employed is not ambiguous: *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at [28]. On the face of it, the words employed by the legislature are apt to apply to circumstances such as the present.

[6] Counsel for the appellant relied to some extent upon the fact that in the amending Act which introduced s 100(7), the Taxation (Administration) Amendment Act 2000, s 2(2) made specific provision for some of the provisions of that Act to come into force on a date which preceded the date of assent to the Act by the Administrator, for other parts of the amending Act, including s 100(7), to come into force on a date which was subsequent to the Administrator's assent (s 2(3)) and for the rest of the Act to come into force on the date the Administrator's assent was declared (s 2(1)). However, the effect of s 2(2) is simply that the Commissioner could not exercise the power granted by s 100(7) until on or after 1 July 2000. That does not demonstrate an intention that the power could not be exercised on or after 1 July 2000 in respect of objections not lodged within the thirty-day period

when that period had already expired before 1 July 2000. The argument advanced by the appellant that s 100(7) was postdated in order to protect the revenue and to provide stability of the finances, has little force in these circumstances because, firstly, the Commissioner must be satisfied that the putative objector has a reasonable excuse for not lodging the objection within time so that the power is not open-ended; and secondly, the exercise of the power in extending time will not necessarily result in the objection being allowed. Some additional expense to the Commissioner may be occasioned in having to decide whether or not to permit the extension, but this would probably be minimal. I am, therefore, unable to draw the inference that the intention of the legislature was that the power could not be exercised in circumstances such as have here arisen.

[7] As to the cross-appeal, the cross-appellant now seeks only that issues 3 and 4 be answered 'Yes'. These issues are:

> 3. Does the Defendant have a duty to consider the Plaintiff's request, by letter dated 2 February 2001, that he amend the assessment?
>
> 4. Does the Defendant have a duty to exercise the discretion conferred upon him by s 97 of the Act by either amending or refusing to amend the assessment?

[8] Bailey J at first instance, answered both of these questions 'No', relying upon the decision of Riley J in *Grice Holdings Pty Ltd and Grice Investments Pty Ltd (No 2) v Commissioner of Taxes* [2001] NTSC 88. Counsel for the cross-appellant, Mr Russell QC, submitted that that decision

is in error and should be over-ruled. After considering a number of authorities, including *The Commonwealth Agricultural Service Engineers Ltd (In Liquidation) v Commission of Taxes for South Australia* (1926) 38 CLR 289; *Ex parte The Carpathia Tin Mining Company Ltd* (1924) 35 CLR 552; *Boyded Industries Pty Ltd v Commissioner of Taxation (Cth)* (1985) 81 FLR 293 and *Brownsville Nominees Pty Ltd v FCT* (1988) 19 FCR 169 which dealt with provisions similar to s 97(1) of the Taxation (Administration) Act to be found in Commonwealth income tax legislation as well as state income tax legislation, Riley J concluded that s 97(1):

> does not impose any duty or an obligation upon the Commissioner to make an amended assessment. It is his (the Commissioner's) opinion alone that is applicable. In my opinion he cannot be compelled to exercise the power created by this section.

His Honour further concluded that:

> if ... there is no duty imposed upon the Commissioner to exercise the discretion to amend an assessment then there can be no duty to consider whether to exercise the discretion to amend the assessment.

[9] In my opinion, the principles to be applied to arrive at a resolution to this question derive from two streams of authority. The first is the rule of construction that where the legislature has used an expression such as "it shall be lawful" or "may" to confer a power without providing for the circumstances under which the power is to be exercised, it is a question of construction having regard to the Act as a whole and the purposes for which the power was conferred as to whether or not the power is coupled with a

duty. In *Julius v Lord Bishop of Oxford* (1880) LR 5 App.Cas 214, Earl Cairns LC said, at 222-223:

> The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words "it shall be lawful" might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an applicatioon for a mandamus. And the words "it shall be lawful" being according to their natural meaning permissive or enable words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation.

[10] The second principle derives from the principle of administrative law that every person entrusted with a discretion granted by statute must exercise it in accordance with law and in accordance with the purposes for which the discretion is given. Where the power to make an administrative decision is given in broad terms, the question of whether or not the action taken is within power is to be determined by implication from the subject matter, scope and purpose of the Act: see *Brownells Ltd v Ironmonger's Wages Board* (1950) 81 CLR 108 at 120; *R v Toohey; Ex parte Northern Land*

Council (1981) 151CLR 170 at 186-187; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40 and 56; *National Trust of Australia (NT) v Minister for Lands, Planning and Environment* (1997) 7 NTLR 20 at 30-31.

[11] The starting point, in my opinion, is the discussion of the High Court in *The Commonwealth Agricultural Service* case upon which Riley J placed great reliance. The provision there in question was s 70 of the Taxation Act 1915 (SA) which provided that "it shall be lawful for the Commissioner in any case, whether notice of appeal has been given or not, to alter or reduce any assessment ... and to order a refund of any excess of tax that has been paid in respect thereof". The Full Court (Murray CJ and Poole J), following the principles laid down by Lord Cairns LC in *Julius v The Bishop of Oxford* (1880) L.R. 5 App Cas 214 at 222-223, held that the section merely imposed a power and that there was nothing in the Act which showed that the power was coupled with a duty: see *R v Commissioner of Taxes For The State of South Australia ex parte Commonwealth Agricultural Service Engineers Limited* (1926) SASR 168. On appeal, Knox CJ said that in his opinion the decision of the Supreme Court was right. Gavan Duffy J agreed with Knox CJ. Isaacs J delivered a separate judgment in which he too said that the judgments of Murray CJ and Poole J were "unquestionably correct" and that by the words "it should be lawful", "it is intended that his (the Commissioner's) action is to be entirely voluntary".

[12] However, that case is distinguishable from the situation we are dealing with here. First, in *The Commonwealth Agricultural Service* case, the Commissioner did in fact consider the company's application. In fact, the Commissioner not only considered it, but also considered that the assessment was incorrect. The Commissioner's view was that because s 101 limited the right of the taxpayer to apply to him to a period of twelve months after the assessment, he had no power to reopen the assessment. In the present case, the Commissioner responded to the cross-appellant's letter asking for him to issue an amended assessment, as follows:

> Subsection 97(1) of the *Taxation (Administration) Act (NT)* ("the Act") enables and permits the Commissioner to amend "an assessment by making such alterations or additions to it as he thinks necessary"; it does not impose upon him a duty to do so.
>
> I write to inform you that I decline to consider whether or not to exercise the discretion under s 97(1) of the Act to amend the assessment.

[13] The second distinction is to be found in the terms of ss 97(1) and (3) of the Taxation (Administration) Act Section 97(1) provides:

> The Commissioner may, at any time within a period of three 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.

Section 97(3) provides:

> Where, by reason of an amendment to an assessment, a person has overpaid duty or tax, the amount of duty or tax shall be refunded.

[14] Isaacs J in *The Commonwealth Agricultural Service* case was of the opinion that the Commissioner was not bound to make a refund (see p 294). Clearly that is not the case here.

[15] In my opinion, s 97(1) of the Act confers a discretion on the Commissioner, but the discretion is not entirely absolute. I accept the force of the submission of counsel for the Commissioner, Ms Kelly, that s 97(1) must be considered in the light of the fact that the taxpayer must first file a return and has a statutory right of appeal from the Commissioner's decision. However, Parliament must have intended, when it conferred the power, to promote the policy and objects of the Act. As Lord Reid said in *Padfield v Minister of Agriculture, Fisheries and Food, supra,* at 1030:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

[16] The power conferred by s 97(1) is to be used by the Commissioner "to make such alterations or additions to (the assessment) as he thinks necessary". It is clear that the amendment may have the effect of either increasing or reducing the taxpayer's liability and in the latter case, the taxpayer is entitled to a refund: see s 97(3). If the amendment results in the taxpayer becoming liable to additional tax, the taxpayer has a further right of

objection: see s 100(6). The purpose of the power is clearly to ensure that the correct amount of tax is collected, notwithstanding that there has been an assessment made which has not been appealed. The legislature clearly envisaged that mistakes could be made in the lodging of returns or by the Commissioner's officers in assessing the tax wrongly and conferred a power to ensure that these mistakes can be remedied within the three year period. After that, nothing can be done. The matter is closed. This accords with the notion that the prime duty of the Commissioner is to collect the correct amount of tax: see *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation, supra.* Unlike the situation in *The Commonwealth Agricultural Service* case where there was no provision in the Taxation Act 1915 (SA) authorising the payment of the refund in question, s 97(3) of the Taxation Administration Act specifically authorises a refund, so long as the power is exercised within the three year limit imposed by s 97(1), or within the limits of s 97(2) if applicable. To this extent, s 97(3) amounts to what Brennan J in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 87, described as "an implied appropriation" out of consolidated revenue . Moreover, the wording of s 97(3) of the Act makes it clear that the right to a refund, once an amended assessment is made, is not discretionary, the words of the statute being "...the amount of duty or tax overpaid shall be refunded". Thus, once an amended assessment has been made by the Commissioner pursuant to s 97(1) which results in a refund to the taxpayer, there is both an underlying legal liability to repay, as well as

an implied power of appropriation which flows from s 97(3). These provisions are, therefore, quite different in form and character from the provisions considered by the authorities referred to, and relied upon, by Riley J in *Grice Holdings Pty. Ltd, supra,* and more resemble the provision considered by the majority in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd, supra*, especially at 88, per Brennan J which I note, in passing, applied both *Julius v Lord bishop of Oxford, supra,* and *Padfield v Minister of Agriculture, Fisheries and Food, supra*

[17] In my opinion, it would be a surprising result if the Commissioner, although having a discretionary power to amend an assessment at any time within the limits of s 97(1), could in effect "throw it (the respondent's letter) unread into the water paper basket", to use Lord Pearce's expression in *Padfield, supra,* at 1053. If this be correct, it would place the Commissioner in a unique position. Even Ministers of the Crown who have discretionary powers are required to exercise them according to law: see the observations of Lord Denning MR in *Padfield, supra,* at 1007; Lord Reid at 1030, 1032, 1033; Lord Hodson at 1046; Lord Pearce at 1052-54; Lord Upjohn at 1058; and *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 at 39-44 and 60. That does not mean that in every case the Commissioner is bound to exercise his discretion under s 97(1); but he must at least consider whether he will or will not and in deciding this question, the Commissioner is bound to consider all relevant matters: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

at 224; per Lord Greene, cited with approval in *Padfield, supra,* at 1007, 1076; see also *Minister for Aboriginal Affairs v Peko Wallsend Ltd, supra.* The Commissioner may refuse to exercise his discretion on a number of grounds, including for example that the request is frivolous or vexatious, or that the matter has already been considered and rejected and an appeal lodged which failed; or if no appeal was lodged, he may form the opinion that there are no grounds for thinking that the decision was wrong. So long as the Commissioner properly considers the request, his decision will not be reviewable, because it is afterall, his opinon that counts under s 97(1); but otherwise mandamus will lie.

[18] It follows from this, that I consider that *Grice Holdings Pty Ltd* was wrongly decided and should be over-ruled. I would allow the cross-appeal and answer questions 3 and 4, "Yes".

THOMAS J

[19] This is an appeal and cross appeal from the decision of the primary Judge who was asked to answer four questions, on preliminary issues, before the trial of the proceedings.

[20] The background to this matter is set out in his Honour, the primary Judge's reasons for judgment which I set out below:

> **Background**
>
> [1] On or about 28 October 1999 Messrs Freehill Hollingdale and Page lodged with the Commissioner for assessment of stamp duty a copy of an Asset Sale Agreement dated 31 August 1999,

between Britz Australia Rentals Pty Ltd, Britmore Pty Ltd, Koala Campervans Pty Ltd, Britz New Zealand Rentals Pty Ltd, Backpacker Campervans Ltd, Britz Africa Pty Ltd, Britz Nambia Pty Ltd (as vendors), Gunther Gschwenter, Christine Gschwenter (as guarantors) Tourism Holdings Ltd (the first plaintiff) and Tourism Holdings Australia Pty Ltd (the second plaintiff) (as purchasers) ("the Agreement").

[2] On 11 May 2000, the defendant Commissioner issued a Notice of Assessment of Stamp Duty to the second plaintiff, as purchaser of the Australian assets, assessing duty on the Agreement at $775,417.60 ("the assessment").

[3] By a letter dated 9 June 2000 Freehill Hollingdale and Page as solicitors for the first plaintiff, lodged what purported to be an objection against the assessment.

[4] By letter dated 12 January 2001, the Commissioner replied to Freehills that he had no power or authority to consider the purported objection on the basis that the first plaintiff was not "a person aggrieved by an assessment made in relation to him" under s 100(1) of the *Taxation (Administration) Act* ("the Act"). Consequently, the first plaintiff had no standing to object to the assessment.

[5] By a letter dated 19 January 2001 Freehill Hollingdale and Page as solicitors for the first and second plaintiffs, requested inter alia, that the Commissioner grant an extension of time pursuant to s 100(7) of the Act within which to lodge an objection.

[6] By letter dated 22 January 2001, the Commissioner replied to Freehill Hollingdale and Page advising that as s 100(7) of the Act commenced operation on 1 July 2000, and the second plaintiff's right to object had expired on or about 12 June 2000, s 100(7) did not give the Commissioner power to revive the second plaintiff's rights of objection.

[7] By a letter dated 2 February 2001 Freehill Hollingdale and Page as solicitors for the first and second plaintiffs, requested inter alia, the Commissioner to issue an amended assessment pursuant to s 97(1) of the Act.

[8] By letter dated 15 February 2001, the Commissioner replied to Freehill Hollingdale and Page advising that he "declined to consider whether or not to exercise the discretion under s 97(1) of the Act to amend the assessment".

[9] On 13 February 2001, the plaintiffs filed a Notice of Appeal (Proceeding No LA3 of 2001) purporting to appeal against the following decisions of the Commissioner:

a. the assessment;

b. the decision to refuse to consider the purported objection referred to at para [3] above.

[10] On 14 March 2001, the plaintiffs commenced the present proceedings seeking:

(a) An Order in the nature of mandamus requiring the Commissioner to determine the objection lodged by the plaintiffs on 9 June 2000 (para [3] above) against the assessment which objection the Commissioner has refused to determine.

(b) In the alternative a declaration that the objection lodged by the plaintiffs (or alternatively by the first named plaintiff on its own behalf and/or on behalf of the second named plaintiff) against the assessment is an objection which complies with s 100 of the Act which objection the Commissioner is required by law to determine.

(c) In the alternative, the plaintiffs apply for an order in the nature of mandamus that the Commissioner consider whether or not to exercise its discretion conferred upon him by s 97(1) of the Act to the assessment by either amending it or refusing to amend it in relation to the plaintiffs' letter of 2 February 2001 (para [7] above) requesting the Commissioner amend the assessment.

(d) Alternatively an order in the nature of mandamus that the Commissioner exercise the discretion conferred upon him by s 97(1) of the Act to amend the assessment by either amending it or refusing to amend it.

(e) Alternatively an order in the nature of mandamus that the Commissioner exercise the discretion conferred upon him by s 97(1) of the Act to amend the assessment by amending it according to law.

(f) Further and/or in the alternative the plaintiffs seek an order in the nature of mandamus requiring the Commissioner to exercise the discretion conferred upon him pursuant to s 100(7) of the Act to extend time to permit the issue or re-issue by the plaintiffs of an objection that is in the name of a person aggrieved.

(g) In the further alternative, the plaintiffs seek an order in the nature of mandamus requiring the Commissioner, or alternatively a declaration that the Commissioner is to exercise the discretion conferred upon him pursuant to s 117(1) of the Act to extend time to permit the issue or

re-issue by the plaintiff of an objection that is in the name of a person aggrieved."

[21] The four preliminary issues the parties had identified for the Judge at first instance to address were:

> "(a) Does s 100(7) of the Act empower the Commissioner to grant to the second plaintiff an extension of time within which to lodge an objection against the assessment of stamp duty issued to the second plaintiff on 11 May 2000?
>
> (b) Does s 117 of the Act empower the Commissioner to grant to the second plaintiff an extension of time within which to lodge an objection against the assessment?
>
> (c) Does the Commissioner have a duty to consider the plaintiffs' request by letter dated 2 February 2001 that he amend the assessment?
>
> (d) Does the Commissioner have a duty to exercise the discretion conferred on him by s 97 of the Act by either amending or refusing to amend the assessment?

[22] His Honour answered the four preliminary questions as follows:

> (a) Yes – s 100(7) empowers the Commissioner to grant to the second plaintiff an extension of time within which to lodge an objection against the assessment provided that the Commissioner is satisfied that the second plaintiff has a reasonable excuse for not having lodged an objection within the 30-day period prescribed by s 100(1);
>
> (b) No – s 117 does not empower the Commissioner to grant to the second plaintiff an extension of time within which to lodge an objection against the assessment;
>
> (c) No – the Commissioner has no duty to consider the plaintiffs' request by letter dated 2 February 2001 that he amend the assessment; and
>
> (d) No – the Commissioner has no duty to exercise the discretion conferred on him by s 97 by either amending or refusing to amend the assessment.

[23] The appellant in its Notice of Appeal appealed from that part of the judgment of his Honour given on 1 February 2002 in which his Honour ordered as follows:

> 1. The defendant is ordered to exercise the discretion conferred on him by s 100(7) of the Taxation (Administration) Act by deciding whether or not to extend the time for the second plaintiff to lodge an objection to Stamp Duty Assessment No 62252.

[24] Section 100(7) of the Taxation (Administration) Amendment Act 2000 provides as follows:

> If the Commissioner is satisfied that a person has a reasonable excuse for not lodging an objection within the 30-day period, the Commissioner may extend the time for lodging the objection.

[25] Ms Kelly, counsel for the appellant, submitted that his Honour the Judge at first instance correctly identified the relevant principles to be applied in paragraphs 32 to 36 of his reasons for judgment. In these paragraphs his Honour stated:

> [32] In *Maxwell v Murphy* (1957) 96 CLR 261 at p 267, Dixon CJ stated the general presumption against retrospective operation of legislation in the following terms:
>
> > The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to

> enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at p 69, 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.

[33] His Honour, however, added a note of caution immediately after the above passage:

> The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application.

[34] The particular problems posed by amendment of statutes of limitation (which historically have been classified as procedural rather than substantive) was addressed in the unanimous judgment of the High Court in *Rodway v The Queen* (1990) 169 CLR 515 at p 518-9:

> The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking, where procedure alone is involved, a statute will invariably operate prospectively and there is no room for the application of such a presumption. It will operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon, past events. A statute which prescribes the manner in which the trial of a past offence is to be conducted is one instance. But the difference between substantive law and procedure is often difficult to draw and statutes which are commonly classified as procedural – statutes of limitation, for example – may operate in such a way as to affect existing rights or obligations. When they operate in that way they are not merely procedural and they fall within the presumption

against retrospective operation. But when they deal only with procedure they are apt to be regarded as an exception to the rule and, if their application is related to or based upon past events, they are said to be given a retrospective operation provided that they do not affect existing rights or obligations.

Where a period is limited by statute for the taking of proceedings and the period is subsequently abridged or extended by an amending statute, the amending statute should not, unless it is clearly intended, be given a retrospective operation to revive a cause of action which has become barred or to deprive a person of the opportunity of instituting an action which is within time. If it were given a retrospective operation, the amending legislation would operate so as to impair existing, substantive rights – either the right to be free of a claim or the right to bring a claim – and such an operation could not be said to be merely procedural. This distinction was recognized by Williams J in *Maxwell v Murphy* (1957) 96 CLR 261 at p 278, and his remarks were adopted by the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at p 562. Gibbs J re-examined the question in *Yrttiaho v Public Curator (Q)* (1971) 125 CLR 228 at p 242 and he expressed his view as follows:

'Limitations may be regarded as being only of a procedural nature and, therefore, unless a contrary intention appears, retrospective in operation, if, being an amendment enlarging time, it took effect before the right sought to be enforced had become finally barred by lapse of time, and if, being an amendment reducing time, it left time after its commencement within which an action might be brought.'

It was recognition of the fact that the simple classification of a statute as either procedural or substantive does not necessarily determine whether it may have a retrospective operation which no doubt led Dixon CJ in *Maxwell v Murphy* to formulate the general rule in terms which did not rest simply upon that classification.

[35] More recently, in a case concerning conflict of laws rather than questions of retrospectivity, the High Court has offered some guidance on the nature of legislation providing for limitation periods. In *Pfeiffer v Rogerson* (2000) 172 ALR 625 at p 651, Gleeson CJ, Gaudron, McHugh, Gummow and Hayes JJ held:

… matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters

> that, on their face, appear to be concerned with issues of substance, not with issues of procedure … the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure …

[36] In a separate judgment, Kirby J at p 667 held:

> (1) A law which in substance affects the existence, extent or enforcement of the rights and obligations of both parties shall not be classified as 'procedural'. Without limiting the generality of this statement, a law providing for the limitation of actions or a limitation on the recovery of damages shall be classified as 'substantive'; and (2) Other laws, which are concerned with the actual conduct of court proceedings shall be classified as 'procedural'.

[26] Ms Kelly further submits that the error begins in paragraph [37] of his Honour's reasons for judgment with the following statement:

> … it would be erroneous to adopt too readily the approach that *because* s 100(7) is concerned with matters of substance, not procedure, *therefore* the presumption against retrospectivity must be given full effect and the second plaintiff is to be barred from objecting to the assessment regardless of the reasons for its failure to object within time and regardless of the merits of its objection.

[27] Section 100(7) commenced operation on 1 July 2000. Section 100(7) was introduced by s 47 in Part 8 of the Taxation (Administration) Amendment Act 2000 (Act No. 36 of 2000) s 2(3) of that Act provides that Part 8 is to come into operation on 1 July 2000.

[28] It is the argument on behalf of the appellant that the High Court authorities *Maxwell and Murphy* (supra) and *Rodway v R* (supra) make it clear that s 100(7) would not have a retrospective effect unless it appears with reasonable certainty that this was the intention of the legislature.

[29] The appellant's position is that there are no words in the amended statute indicating it is to operate retrospectively.

[30] Ms Kelly on behalf of the appellant, points to the fact that the assessment in this matter was notified on or about 11 May 2000. The right to object to the assessment was statute barred on or about 12 June 2000 and the Commissioner had no power to extend time. The amending legislation which introduced s 100(7) took effect from 1 July 2000. The submission on behalf of the appellant is that the protection of the revenue (*Molloy v Federal Commissioner of Land Tax* (1938) 59 CLR 608 at 610; *Archer Brothers Pty Ltd (in voluntary liquidation) v Federal Commissioner of Taxation* (1953) 90 CLR 140 at 149) and the stability of the finances (*Commonwealth Agricultural Service Engineers Ltd (In Liquidation) v Commissioner of Taxes for South Australia* (1926) 38 CLR 289 at 292) would be a reason for the legislature to nominate a future starting date for the operation of s 100(7) and not to have the provision operate retrospectively. The appellant's position is that the legislature in setting a future date for s 100(7) to come into effect shows a clear indication that the legislature did not intend this legislation to be retrospective.

[31] Mr Russell QC, counsel for the respondents, supported the reasoning of the Judge at first instance in answering this preliminary issue "yes".

[32] The Taxation (Administration) Amendment Act 2000 s 100(7) gives the Commissioner of Taxes a power he previously did not have. There are no vested rights in the Commissioner which are affected by this amendment.

[33] I accept the submission of Mr Russell QC, counsel for the respondents, that the task for the primary Judge (and now this Court) is to determine the intention of Parliament (*Wilson v Anderson* (2002) HCA 29 unreported Gleeson CJ at par 8):

> The concepts of meaning and intention are related, but distinct. It is not presently necessary to distinguish between construction and interpretation. The words are often used interchangeably. In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the "intention of the legislature". This has been described as a 'very slippery phrase', but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word 'intention', in the Acts Interpretation Act 1901 (Cth), as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will. This is a familiar judicial exercise. …

[34] The Second Reading Speech in Parliament refers to Part 8 of the Bill which includes s 100(7). The relevant parts of that speech are as follows:

> Part 8 of the bill includes a range of miscellaneous amendments that seek to clarify the application of the Act and to improve its administrative operation ……
>
> The second measure proposed by the Bill allows the commissioner to extend the time period that applies for: …. the lodgment of an objection against a decision of the Commissioner, where there is a reasonable excuse to extend the time period.

[35] This amendment had a beneficial effect for the taxpayer in giving the Commissioner of Taxes a power to extend the time for lodgment of an objection against a decision of the Commissioner.

[36] The appellant has not sought to challenge the primary Judge's conclusion in par 42 of his Reasons for Judgment which reads as follows:

> In the present case, it is difficult to see what "injustice" the Commissioner would suffer if s 100(7) is held to apply to those who wish to object to an assessment in circumstances where the 30-day period under s 100(1) has expired. To succeed with an objection, such a person would need to satisfy the Commissioner not only as to the merits of his objection, but also that there was a reasonable excuse for not lodging the objection within the 30-day period. In my view, it is legitimate to ask what possible injustice can there be to the Commissioner in allowing a person the opportunity to argue that he has both a reasonable excuse for delay and a meritorious objection to an assessment. On the other hand, to deny a person who has both a reasonable excuse for delay and a meritorious objection even the opportunity to argue his case would be to impose a manifest injustice upon him.

[37] Mr Russell QC, on behalf of the respondents, supports the approach taken by the primary Judge to this issue which emphasised the importance of the "universal touchstone" of avoiding injustice.

[38] In the circumstances of this case I agree with the approach of the primary Judge to this question. His Honour referred to the statement in Maxwell on Statutes 6th Ed at p 381:

> Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.

[39] This passage was cited by Isaacs J in *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at p 434 (AB 158):

> … That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.

[40] The passage from *Maxwell* was also cited in *Doro v Victorian Railways Commissioners* (1960) VR 84 by Adam J at p 86 to which his Honour the primary Judge made reference:

> … The strength of the presumption against retrospectivity in any particular case, and accordingly the ease or difficulty with which it may be overcome, must, I would think, depend on the nature and degree of the injustice which would result from giving a statute a retrospective operation. Where a palpable injustice would result, the presumption should be given its fullest weight. In such a case it is but common sense to require the clearest indication of legislative intention that such an unjust result was intended. On the other hand, where to give retrospective operation to a statute might be considered to work some injustice to one party, but is clearly required to rectify a manifest injustice to others, there would, on principle, seem little reason for giving much weight to the presumption. In such a case, where the Legislature has used language which is apt to give its statute retrospective operation, it would appear to be a matter of conjecture to presume that it preferred the interests of the one to the others. …

[41] I agree with the conclusions of the primary Judge on this issue that there can be no injustice to the appellant if the provisions of s 100(7) enable the appellant to extend time for lodging this objection but there could be an

injustice to the respondent because "any assessment in respect of which the 30 day period had expired before 1 July 2000 would be unchallengeable irrespective of whether the assessment was right or wrong."

[42] For these reasons I would dismiss the appellant's appeal and endorse the comments of his Honour the primary Judge that the objective of revenue legislation is to collect the correct amount of duty payable (*Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64).

Cross Appeal

[43] The respondents filed a Cross Appeal as follows (AB 170 – 171):

> 1. The Respondents/Cross Appellants cross appeal from that part of the decision of his Honour Justice Bailey of 9 January 2002 whereby it was ordered that the Answers to questions 3 and 4 referred to him by Summons filed on 20 June 2001 should be "No" and from the consequential Orders made by his Honour on 1 February 2002 dismissing paragraphs 3, 4, 5 and 7 of the Respondents'/Cross Appellants' Originating Motion filed 14 March 2001.
> 2. The learned Judge at first instance erred in finding that the Appellants/Cross Respondent did not have a duty to consider the Respondents'/Cross Appellants' request by letter dated 2 February 2001 that he amend the assessment of stamp duty issued to the Respondents/Cross Appellants on 11 May 2000.
> 3. The learned Judge at first instance erred in finding that the Appellants/Cross Respondent did not have a duty to exercise the discretion conferred on him by Section 97 of the Taxation (Administration) Act by either amending or refusing to amend the assessment of stamp duty issued to the Respondents/Cross Appellant on 11 May 2000.

[44] The respondents on the Cross Appeal submit issues 3 and 4 need to be considered against the modern approach to the responsibilities of the appellant. Mr Russell QC, counsel for the respondents, submitted that these responsibilities are well summarised at par [44] and par [45] of his Honour's Reasons for Judgment which are set out below (AB 160 – 161):

> [44] The Commissioner's "task is to ensure that the correct amount of tax is paid, 'not a penny more, not a penny less'" (*Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155). In *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64, Mason CJ observed:
>
> > In approaching that question, the first and foremost consideration is that the Act is a taxing Act and that in terms it confers no authority upon the Commissioner to levy, demand or retain any moneys otherwise than in payment of duties and charges imposed by or pursuant to the Act. In that context, there is no persuasive reason why the grant of a positive discretionary power to make a refund, once an overpayment of duty has been found by the Commissioner to have taken place, should be treated as a source of authority in the Commissioner to retain the overpayment in the absence of circumstances disentitling the payer from recovery. Nothing short of very clear words is sufficient to achieve such a remarkable result. The Court should be extremely reluctant to adopt any construction of s 111 which would enable the Commissioner by an exercise of discretionary power to defeat a taxpayer's entitlement to recover an overpayment of duty.
>
> [45] *Lighthouse Philatelics* and *Royal Insurance* deal with taxation issues which are not raised by the present case. However, both cases are of indirect relevance in emphasising the objective of revenue legislation is to collect the correct amount of duty payable, not whatever can be secured from the taxpayer.

[45] Section 97(1) of the Taxation (Administration) Act provides as follows:

> 97. **Amended assessment**
>
> (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.

[46] His Honour the primary Judge, concluded that the Commissioner of Taxes was under no duty to exercise or to consider exercising the discretion provided by s 97(1). In reaching this conclusion, his Honour agreed with the reasons and conclusion of Riley J in *Grice Holdings Pty Ltd v Commissioner of Taxes* unreported [2001] NTSC 88 delivered 18 October 2001. In that case, Riley J held at par [10] of his reasons for judgment that s 97(1):

> … does not impose any duty or obligation upon him to make an amended assessment. It is his opinion alone that is applicable. In my view he cannot be compelled to exercise the power created by this section.

[47] I do not agree with this conclusion. The question posed is: Does the Commissioner of Taxes have a duty to consider the respondents request by letter dated 2 February 2001 that he amend the assessment?

[48] I agree with the submission of Mr Russell QC for the respondents/cross appellants that the statute plainly supposes there may be proper cases in which there ought to be an amended assessment. Section 97(1) of the Taxation (Administration) Act gives the Commissioner the discretion to decide in which cases there should be an amended assessment. If the Commissioner decides it is a proper case for an amended assessment then he has a further duty to make the amended assessment.

[49] In *Ex Parte The Carpathia Tin Mining Company Limited* (1924) 35 CLR 552, the High Court heard an application on order nisi calling upon the Federal Commissioner of Taxation to show cause why a writ of mandamus should not be issued by the High Court directing the Commissioner to make certain alterations in the assessments of the applicant for Federal Income Tax in order to insure completeness and accuracy of such assessments.

[50] This called for a consideration of s 37(1) of the Income Tax Assessment Act 1922. Rich J refused the application and in doing so stated at 553 – 554:

> Assuming the sums in question to be in the nature of a foregift, in my opinion there is no power in a taxpayer to compel the Commissioner to act under sub-sec. 1 of sec. 33. The Commissioner 'may' at any time make alterations or additions to an assessment, but the sub-section limits them to 'such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy.' No one else's opinion on this subject can be substituted for that of the Commissioner, but, if he forms that opinion, he 'may,' and therefore, as I think, is bound to, make the proper alteration or addition. There are two qualifications on his discretion prescribed by the two provisoes to the sub-section, but it is to be noted that there is no other or further power of alteration or addition given by the section than is found in sub-sec. 1 with its provisoes.

[51] I agree with the submission of Mr Russell QC for the respondents/cross appellants, that in the matter before this Court, the Commissioner has refused to consider whether or not there is a case to amend the assessment and in doing so has refused to perform the duty cast upon him.

[52] The Commissioner of Taxes seek to rely on the decision of *Commonwealth Agricultural Service Engineers Ltd (in liquidation) v Commissioner of Taxes (SA)* (1926) 38 CLR 289.

[53] It is the appellant's contention that the question formulated by Isaacs J at p 292 is the same question to be considered by the Court in construing s 97:

> Does (the section) give to every taxpayer who has been assessed ... a legal right to a hearing and enquiry by the Commissioner with a view to re-opening the assessment? If it does, then mandamus should go; if it does not, then mandamus ought to be refused.

[54] However, the respondents/cross appellants on this appeal are not seeking the relief sought in the abovementioned case. That was a case where the Commissioner did consider the matter but decided not to make a refund.

[55] I agree with the further submission on behalf of the respondents/cross appellants that the words of Isaac J at 294:

> … It is intended that he shall take a high position in this matter and shall not claim for the Crown more than he sees the Crown is entitled to, and he is not to allow any taxpayer to escape payment of any amount which the law intends him to be liable to pay. …

are not consistent with not considering the request at all.

[56] In *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, a refund was ordered per Brennan J at 89:

> It would therefore be unjust that the Commissioner should retain these amounts; they were recoverable under the general law of restitution.

[57] In declining to consider whether or not to exercise the discretion under s 97(1) of the Act to amend the assessment, the appellant has abdicated a power. In *Padfield & Others and Minister of Agriculture Fisheries and Food & Others* [1968] AC 997 at 1055, Lord Pearce observed:

> A general abdication of that power and duty would not be in accord with Parliament's intentions.

[58] If the appellant had exercised his power under s 97(1) capriciously then legal redress would be available. I have concluded that the same position must apply where he declines to consider whether or not to exercise his discretion, as occurred in this case.

[59] I would allow the respondents' cross appeal.

Priestley AJ

[60] I agree with Mildren and Thomas JJ that the appeal in this case should be dismissed and the cross-appeal allowed.

[61] In regard to the appeal, the words of s 100 (7) of the Taxation (Administration) Act carry a straightforward meaning when read as an ordinary reader of English would read them. They say, without qualification, that the Commissioner has power to extend the time for lodging an objection if satisfied that the person who should have lodged it within the required thirty day period but did not, had a reasonable excuse for not doing so. The appellant submitted that the straightforward meaning of the provision should be qualified, saying that the presumption of

construction which is sometimes applied in cases of this general kind, and discussed in the most frequently cited Australian case on this presumption, *Maxwell v Murphy* (1957) 96 CLR 261, should be applied. However, I do not think that in this case the reasons are present which justify the use of that presumption. The extent of the stamp duty payable consequent upon the transaction in question had not, at the time when the appellant requested an extension, been finally settled. This is demonstrated by the existence in the Taxation (Administration) Act of s 97, pursuant to which the assessment could be amended and any time within three years of its having been made. The newly enacted s 100 (7) did not, in my opinion, empower the Commissioner, by granting an extension of time, to set in train a process which might unsettle a previously settled state of affairs in the sense spoken of in the cases of which *Maxwell v Murphy* is an exemplar.

[62] In regard to the cross-appeal, I agree with the reasons of Mildren J.
