Tourism Holdings Ltd and Anor v Commissioner of Taxes [2002] NTSC 1

PARTIES:	TOURISM HOLDINGS LTD and TOURISM HOLDINGS AUSTRALIA PTY LTD and COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	53 of 2001 (20103814)
DELIVERED:	9 January 2002
HEARING DATE:	13 December 2001
JUDGMENT OF:	BAILEY J

CATCHWORDS:

TAXES AND DUTIES – Stamp duties – Appeal against assessment – preliminary questions – Commissioner has no duty to consider requests to amend Assessments – Commissioner has no duty to exercise discretion conferred under the Act to amend or refuse to amend an Assessment – s 97(1)

Grice Holdings Pty Ltd and Grice Investments Pty Ltd (No. 2) v Commissioner of Taxes (2001) NTSC 88, Supreme Court of the Northern Territory, unreported, delivered 18 October 2001 - Followed

TAXES AND DUTIES – Commissioner has no power to grant an extension of time in which to lodge an objection against an Assessment – s 117

Taxation (Administration) Act – ss 56 , 56A, 56B, 101

Grain Elevators Board (Vic) v Dunmunkle Corp (1946) 73 CLR 70 - Considered

TAXES AND DUTIES – Extension of time in which to lodge an Application – under s 100(7) – Commissioner has the power to grant an extension of time – Commissioner must be satisfied that there was a reasonable excuse for not lodging an objection within the 30 day prescribed period

Taxation Administration Act – s 100(1)

Maxwell v Murphy (1957) 96 CLR 261 - Applied
Rodway v R (1990) 169 CLR 515 - Applied
Pfeiffer v Rogerson (2000) 172 ALR 625 - Applied
George Hudson Ltd v Australian Timber Workers Union (1923) 32 CLR 413 - Considered
Revenue (Victoria) v Royal Insurance Australia Ltd (1994) 182 CLR 51 - Considered
Worrall v Commercial Banking Co of Sydney Ltd (1917) 24 CLR 28 – Considered
Doro v Victorian Railways Commission (1960) VR 84 - Considered
Lighthouse Philatelics Pty Ltd v Commissioner of Taxation (1991) 32 FCR 148 - Referred
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51 - Referred

REPRESENTATION:

Counsel:

Plaintiffs:	D Russell QC and B O'Loughlin
Defendant:	J Kelly

Solicitors:

Plaintiffs:	Ward Keller
Defendant:	Morgan Buckley

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tourism Holdings Ltd and Anor v Commissioner of Taxes [2002] NTSC 1
No. 53 of 2001 (20103814)

BETWEEN:

TOURISM HOLDINGS LTD
First Plaintiff

and

TOURISM HOLDINGS AUSTRALIA PTY LTD
Second Plaintiff

AND:

COMMISSIONER OF TAXES
Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 9 January 2002)

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.

[11] The parties have identified four preliminary issues to be addressed before the trial of the proceeding:

(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?

[12] It is convenient to address ss 100(7), 117 and 97 of the Act in the reverse order to that suggested by the four preliminary questions.

Section 97 : Preliminary Issues (c) and (d)

[13] Section 97(1) of the Act provides:

> "(1) 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."

[14] In brief terms, the submission of the plaintiffs is that the Commissioner is under a duty to exercise, or alternatively, to consider exercising the discretion provided by s 97(1) and accordingly mandamus will lie. Similar submissions were considered in *Grice Holdings Pty Ltd and Grice Investments Pty Ltd (No 2) v Commissioner of Taxes* [2001] NTSC 88, Supreme Court of the Northern Territory, unreported, delivered 18 October 2001. In that case, Riley J held, at para [10] of his reasons for judgment, that s 97(1):

> "… does not impose any duty or obligation upon (the Commissioner) 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 the section."

[15] His Honour also held at para [13] and following:

> "… the submission of the plaintiffs requires the exercise of the power under s 97(1) to be divided into two parts the first being a decision to decide whether to amend and the second a decision in fact to amend. That is not the effect of the section, it simply permits the Commissioner to amend an assessment if he thinks it necessary. It is not a two stage process.
>
> [14] In my view s 97(1) of the *Taxation (Administration) Act* does not impose a duty upon the Commissioner of the kind suggested by the plaintiffs. It follows that there is no duty upon him to take into account the plaintiffs' submissions on the merits of the original assessment. The matter is one entirely for his discretion."

[16] With respect, I agree with the conclusions reached by Riley J as to the nature of the Commissioner's discretion under s 97(1) and the reasons advanced by His Honour in support of those conclusions. Mr Russell QC submitted that the decision of Riley J in *Grice Holdings (No 2)* was inconsistent with relevant authorities and should not be followed. The principal authorities relied upon by the plaintiffs and the Commissioner in the present case were the same as those considered extensively by Riley J. Nothing is to be gained by my repeating the opposing submissions in circumstances where I am in complete agreement with the reasoning and conclusions of His Honour.

[17] Before leaving the Commissioner's discretion under s 97(1), I should refer to one basis upon which Mr Russell sought to distinguish the present case from *Grice Holdings (No 2)*, supra. At para [14] of his reasons for decision, His Honour said:

> "I should add that I am not convinced that the Commissioner did not take into account the plaintiffs' submissions when he decided to decline to consider whether or not to exercise his discretion under s 97(1) of the Act. Although it is not clear from the text of the letter it is possible, indeed more probable than not, that he did so."

[18] Mr Russell submitted that there was no suggestion in the present case that the Commissioner had considered the plaintiffs' submissions as to why he should alter the assessment. A comparison between the Commissioner's letter of 15 February 2001 to the plaintiffs' solicitors and the letter sent to the plaintiffs in *Grice Holdings (No 2)* (the terms of which are referred to in para [3] of Riley J's judgment) reveals that the two letters were in substantially the same terms. I too consider that it is likely that the Commissioner did consider the plaintiffs' submissions in deciding to decline to consider the exercise of his discretion. However, whether he did so or not, I am satisfied that he was under no duty to do so and cannot be compelled to exercise his discretion under s 97(1) in any particular manner.

Section 117 : Preliminary Issue (b)

[19] Section 117 of the Act provides:

> "Where a person is required by or under this Act to do an act or thing in respect of a specified period or within a specified time, the Commissioner may, by instrument served on that person -
>
> (a) allow a further period or extend the time for the doing of the act or thing, notwithstanding that the specified period has expired; or
>
> (b) vary the specified period in respect of which or the time within which that person is required to do that act or thing,
>
> and that person shall do that act or thing accordingly."

[20] The Commissioner's discretion pursuant to s 117 to extend time limits prescribed by the Act is expressed to apply to an act or thing "required" by or under the Act to be done within a specified time. In the plaintiffs' submission, the word "required" is to be construed in its temporal context, ie - where the Act prescribes a particular time limit for the doing of some act or thing, the Commissioner is to have a general discretion to extend time for the doing of that act or thing. Accordingly, in the plaintiffs' submission, the provision is applicable to the 30-day time limit for the lodging of objections to assessments prescribed by s 100(1).

[21] Section 100(1) of the Act provides:

> "(1) A person who is 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."

[22] In substance, the plaintiffs' submission is that where a person chooses to make an objection to an assessment, he is required by the Act to post the objection to, or lodge the objection with, the Commissioner within the 30-day period, subject to the Commissioner's discretion to extend that period under s 117.

[23] On behalf of the Commissioner, Ms Kelly submitted that on its terms, the power to extend time under s 117 is limited to situations where a person is "required by or under" the Act to do an act or thing within a prescribed time or period. In short, it is submitted that the power under s 117 is confined to

provisions which *require* a person to do something (within a prescribed time) and has no application to situations where a person *may* do something, such as lodging an objection, or an appeal, or applying for a refund of stamp duty, but is not obliged to do so by the Act.

[24] Ms Kelly submitted that if s 117 was interpreted in the manner suggested by the plaintiffs and an extension of time was granted, for example, to lodge an objection or appeal, or apply for a refund of stamp duty, s 117 would produce the curious result that a person would be obliged to lodge an objection or appeal or apply for a refund within the further period of extension of time allowed by the Commissioner. Such an anomalous result would flow from the concluding words of s 117 providing that a person "shall" do the act or thing in accordance with the extension of time allowed by the Commissioner. Ms Kelly submitted that such a result could not have been intended by the Legislature. Mr Russell's response was to submit that, where granted, an extension of time would not oblige a person to do a permissive act or thing, but only require that if it was done that it be done within the further period or extension of time allowed by the Commissioner.

[25] If s 117 of the Act is read in isolation, the submissions on behalf of the plaintiffs might be thought to have some merit despite involving some torture to the ordinary and natural meaning of the provision. However, it is, of course, necessary to approach s 117 in the context of the Act read as a whole. I think it is clear that, looking at the scheme of the Act, where the Legislature intended the Commissioner to have power to extend the time

within which a person may do something which is *permitted* (rather than *required)*, the Legislature has enacted a specific power. For example:

(a) Section 101 of the Act permits a person who is dissatisfied with a decision of the Commissioner on an objection to an assessment "within 30 days after service on him of notice of that decision *or within such further time as the Commissioner may allow*, appeal to the Supreme Court" (emphasis added).

(b) Sections 56 and 56A permit a person in specified circumstances to apply for a refund of stamp duty within 90 days of specified events. Section 56B provides:

> "The Commissioner may allow a further period to furnish an application or information under section 56 or 56A if satisfied that there is a reasonable excuse that prevented a person from furnishing the application or information within the 90-day period."

(c) Section 100(1) permits a person who is aggrieved by an assessment within 30 days after the date on which he is informed of the assessment to make an objection to the assessment. Section 100(7) provides:

> "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."

[26] Sections 56B and 100(7) were enacted by the *Taxation (Administration) Amendment Act 2000* and came into operation on 1 July 2000 (ie after the 30-day period during which the second plaintiff had a right to object to the assessment expired on or about 12 June 2000). If the plaintiffs' construction

of s 117 is correct, it would, of course, have been entirely unnecessary to enact subsection (7) of s 100. Mr Russell submitted that the Legislature may have acted to remove any doubt or ambiguity about the application of s 117 to acts or things permitted rather than required by the Act. On this approach, the Legislature would have produced the rather curious result of enacting a narrower discretion to extend time (by requiring a reasonable excuse for delay) than that which already existed under s 117.

[27] It is appropriate to exercise caution in interpreting legislative provisions by reference to amending legislation : see *Grain Elevators Board (Vic) v Dunmunkle Corp* (1946) 73 CLR 70 and Pearce & Geddes, *Statutory Interpretation in Australia* 4th ed, 1996, para [3.18]. However, in the present case, I consider that the text of s 117 is clear and unambiguous and that there is no need to refer to the new provisions of ss 56B and 100(7) for assistance with its proper construction. I am satisfied that the submissions made by Ms Kelly on behalf of the Commissioner are correct and that s 117 is confined to situations where a person is *required* by or under the Act to do an act or thing, see, for example ss 9, 42, 52, 56D, 75 and 81. Such an interpretation is consistent with the direction that where an extension is granted, the person "*shall* do that act or thing accordingly".

Section 100(7) : Preliminary Issue (a)

[28] The terms of s 100(7) of the Act are set out at para 25(c) above. It has also been noted that this subsection came into operation on 1 July 2000.

[29] The assessment was notified to the second plaintiff on or about 11 May 2000. Accordingly, pursuant to s 100(1) (as to the terms of which, see para [21] above), the time for lodgment of an objection by the second plaintiff expired on or about 12 June 2000.

[30] In brief terms, it is the submission of the Commissioner that s 100(1) of the Act confers a right to object to the assessment on the second plaintiff. In accordance with the terms of s 100(1) that right of objection endured for 30 days from the date upon which the second plaintiff was informed of the assessment and then ceased to exist. In Ms Kelly's submission, the 30-day time limit in s 100(1), being a matter affecting the existence of a right of the second plaintiff (ie the right to object to the assessment) and a duty of the Commissioner (ie the duty to consider any objection lodged within time : s 100(3)) is a matter of substance, not procedure. Accordingly, the common law presumption against the retrospective operation of the amendment applies and it follows that s 100(7) does not confer a power on the Commissioner to extend time for a person to lodge an objection in circumstances where that person's right to object has been extinguished prior to the commencement of operation of the subsection.

[31] Mr Russell, for the plaintiffs, submitted that s 100(7) confers a power upon the Commissioner which is exercisable at any time after the amendment came into effect. In his submission, neither expressly or by necessary implication is the power conferred upon the Commissioner limited to objections in relation to instruments executed after the date of

commencement of the amending legislation. It was submitted that the amendment was concerned with matters of procedure, not substantive rights, and accordingly the presumption against retrospectivity had no application. Alternatively, it was submitted that the presumption against retrospectivity (if it would otherwise apply) should in this case give way to the presumption that beneficial legislation should be given a wide meaning consistent with the Legislature's objectives. Under the amendment, the Commissioner was only required to consider a late objection if he was satisfied that there was a reasonable excuse for not lodging an objection within the 30-day period. In such circumstances and against the background that the objective of revenue legislation is to collect the correct amount of tax due, not whatever can be secured from the taxpayer, it was submitted that it could not seriously be suggested that the Legislature would have intended to deny any consideration of a person's objection to an assessment on the basis that the 30-day period had expired before commencement of the amendment.

[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'."

[37] The three High Court authorities of *Maxwell*, *Rodway* and *Pfeiffer*, supra provide very strong support for the submissions made on behalf of the Commissioner that s 100(7) of the Act is concerned with matters of substance not procedure and accordingly, prima facie, the presumption against retrospectivity is applicable. On this basis, the second plaintiff's right to object to the assessment expired at the end of the 30-day period for objections provided by s 100(1) and was not revived by the introduction of s 100(7). However, in the present case, I consider that 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.

[38] The rationale for the presumption against retrospectivity is often said to be that stated in *Maxell 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] In *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, Issacs J after citing this passage continued (at p 434):

> "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 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 presumption against retrospectivity is rebuttable. In the absence of express provision, the presumption will be rebutted if a necessary intendment can be spelt out that the legislation is to operate retrospectively.

In *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28, Barton J delivering the judgment of the High Court held at p 32:

> "Necessary intendment only means that the force of the language in its surroundings carried such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable."

[41] In *Doro v Victorian Railways Commissioners* [1960] VR 84, Adam J after referring to the passage from *Maxwell* set out at para [38] above, continued (at p 86):

> "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 to 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."

[42] 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.

[43] Ms Kelly for the Commissioner submitted that the second plaintiff had lost its vested right to object to the assessment at the expiry of the 30-day period for lodgment of objections. Mr Russell for the plaintiffs submitted that, in reality, the Commissioner was claiming a vested right to assess duty wrongly at excessive amounts and deny any remedy to the plaintiffs. Ms Kelly on behalf of the Commissioner denied any such claim in strong terms. However, the practical effect of upholding the Commissioner's submissions as to the application of s 100(7) would be that any assessment in respect of which the 30-day period had expired before 1 July 2000 would be unchallengable irrespective of whether the assessment was right or wrong.

[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.

[46] The addition of subsection (7) to s 100 was legislation of a remedial character. The amendment permits a person aggrieved by an assessment an opportunity to have his objection considered by the Commissioner only where the Commissioner is satisfied that the person has a reasonable excuse for not lodging an objection within the 30-day period prescribed by s 100(1). The absence of s 100(7) before 1 July 2000 was capable of working a grave injustice to a person who had a reasonable excuse for lodging a (valid) objection out of time. Formerly, such a person was to be refused a hearing, not on the merits, but simply because of a defective objection. The Legislature has moved to remedy this defect in the law.

[47] In all the circumstances, I consider s 100(7) must be construed in accordance with the well-established principles relating to ameliorating legislation. Application of s 100(7) to persons for whom the time for objecting had expired prior to 1 July 2000 has the potential to save them from serious injustice while causing no injustice at all to the Commissioner. Notwithstanding the presumption against retrospectivity, I consider that the Legislature must have intended the amendment to have retrospective effect.

Answers to Preliminary Issues

[48] For the reasons I have endeavoured to express, I answer 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.

[49] I will hear the parties as to the question of costs.

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