Tourism Holdings Australia Pty Ltd v Commissioner for Taxation
[2005] NTCA 3

PARTIES:	TOURISM HOLDINGS AUSTRALIA PTY LTD (ACN 001 789 957)
	v
	COMMISSIONER FOR TAXATION
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 10 of 2004 (20321824)
DELIVERED:	15 April 2005
HEARING DATES:	3 December 2004
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ

CATCHWORDS:

APPEAL – Stamp Duty – appeal from administrative decision – *Tax Administration Act 1978 (NT) – Supreme Court Rules (NT)* – nature of decision – nature of appeal – original jurisdiction – whether appeal is de novo – appeal allowed

Income Tax Assessment Act 1936 (Cth) s 80(5), s 190(a), Amendment No 48 of 1986; *Pay-roll Tax Act 1971-1980 (Qld)* s 16H; *Stamp Duty Act 1978; Supreme Court Rules* r 83, r 83.18, r 83.20; *Taxation (Administration) Act (NT)* s 4, s 4(1), s 4(1)(b), s 9BA, s 9BB, s 9BB(4), s 86(2), s 86(3), s 97, s 100, s 101, s 101(b), s 101(2), s 101(2)(a), s 104, s 105, s 187(b), s 190

Pearce & Geddes, *Statutory Interpretation in Australia*, 5th ed, Butterworths, 2001

Applied:
Feez Ruthning v Commissioner of Pay-roll Tax [2001] QSC 303; *Moruben Gardens Pty Ltd v Federal Commissioner of Taxation* (1972) 46 ALJR 559

Followed:
Avon Downs Proprietary Limited v The Federal Commissioner of Taxation (1949) 78 CLR 353; *Clerk, Walker and Stops v Commissioner of Payroll Tax (Tas) (*1983) 14 ATR 662; *Insomnia (No. 2) Pty Ltd v Federal Commissioner of Taxation* (1986) 17 ATR 386; *Kaiser Aluminium & Chemical Corporation v The Reynolds Meat Company* (1969) 120 CLR 136; *Kolotex Hosiery (Australia) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1975) 132 CLR 535; *Meyerling v Northern Territory of Australia* (1987) 47 NTR 21; *Plaintiff*

S157/2002 v The Commonwealth [2003] HCA 2, 195 ALR 24; *Vestey v Inland Revenue Commissioners* [1980] AC 1148; *Wigg v Architects Board of South Australia* (1984) 36 SASR 111

Not Followed/Over-Ruled:
Crusher Holdings Pty Ltd v Commissioner of Taxes (NT) (1994) 117 FLR 485; *Ngurratjuta Pmara/Ntjarra Aboriginal Corporation v Commissioner of Taxes [No. 1]* (2000) 155 FLR 146; *Ngurratjuta Pmara/Ntjarra Aboriginal Corporation v Commissioner of Taxes [No. 1]* [2001] NTCA 4; *Plummers Border Valley Orchards Pty Ltd v Commissioner of Taxes (NT)* (2000) ATC 4530

Considered*:*
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd 1976 135 CLR 616; *Commissioner of Taxation of the Commonwealth of Australia v Students World (Australia) Proprietary Limited* (1978) 138 CLR 251; *Commissioner of Taxation v Finn* (1969) 103 CLR 165; *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Limited* (1927) 39 CLR 468; *Federal Commissioner of Taxation v Sagar* (1946) 71 CLR 421; *John French Pty Ltd v The Commissioner of Payroll Tax* [1984] 1 Qd R 125; *Nicholas Paspaley Properties Pty Ltd v Commissioner of Taxes* (1991) 103 FLR 305; *Re Coldham & Ors; ex parte Brideson [No. 2]* (1990) 170 CLR 267

Referred to:
Brisbane City Council v Attorney-General (Qld) (1905) 5 CLR 695; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd and Anor* (1976) 135 CLR 616; *Commissioner for State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR; *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618; *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1994) 117 FLR 485; *Federal Commissioner for Taxation v ANZ Savings Bank Limited* (1994) 181 CLR 466; *Federal Commissioner of Taxation v Dalco* (1989-1990) 168 CLR 614; *Grain Elevators Board (Vic) v President, Councillors and Ratepayers of the Shire of Dunmunkle* (1946) 73 CLR 70; *Hepples v The Commissioner for Taxation of the Commonwealth of Australia* (1991-92) 173 CLR 492; *Lighthouse Philatelics Pty Ltd v Federal Commissioner of Taxation* (1991) 103 ALR 156; *May v The Deputy Commissioner of Taxation* (1999) 163 ALR 357; *R v The City of Munno Para; ex parte John Weeks Pty Ltd* (1987) 46 SASR 400; *Secretary, Department of Social Security v Rurak* (1990) 99 ALR 127; *Trenerry v Bradley* (1997) 6 NTLR 175; *Trust Company of Australia Ltd v Commissioner for State Revenue* [2003] HCA 23

REPRESENTATION:

Counsel:

Appellant:	D. Russell QC with B. O'Loughlin
Respondent:	T. Anderson with C. Smyth

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

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

Tourism Holdings Australia Pty Ltd v Commissioner for Taxation
[2005] NTCA 3

No. AP 10 of 2004 (20321824)

BETWEEN:

TOURISM HOLDINGS AUSTRALIA PTY LTD (ACN 001 789 957)
Appellant

AND:

COMMISSIONER FOR TAXATION
Respondent

CORAM: MARTIN CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 15 April 2005)

Martin (BR) CJ:

Introduction

[1] This is an application for leave to appeal from a decision of Riley J on a preliminary application arising out of an appeal before his Honour from a decision of the respondent assessing stamp duty payable on an agreement for the sale of a business pursuant to the provisions of the Taxation Administration Act 1978 (NT) ("the Act").

[2] The facts are set out in the judgments of Angel and Mildren JJ and I need not repeat them in detail. In substance, the respondent assessed stamp duty on the sale agreement to which the applicant objected. The respondent allowed the objection in part. The applicant appealed to the Supreme Court against the assessment and sought to place before Riley J material additional to that which was before the respondent at the time of the assessment. The learned Judge rejected to the admission of further material. His Honour reached the view that the appeal was limited to the materials which were before the respondent at the time the respondent made the assessment and the Court could not receive additional material. In substance, his Honour rejected the applicant's submission that the appeal was an appeal de novo and held that it was restricted to establishing error on the part of the respondent. Riley J also held that even if error by the respondent was established, his Honour would not receive additional material and would determine the appeal on the basis of only that material which had been before the respondent.

Nature of Appeal – Statutory Provisions

[3] Section 100 of the Act provides that a person aggrieved by an assessment made under the Act may lodge with the respondent an objection in writing to the assessment. The right of appeal to the Supreme Court against a decision of the respondent following an objection is provided in s 101:

> "101 **Appeal to Supreme Court**
>
> (1) An objector who is dissatisfied with a decision of the Commissioner on his objection may, 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.
>
> (2) On appeal –
>
> (a) the appeal shall be limited to the grounds stated in the objection; and
>
> (b) the burden of proving that any assessment objected to is excessive lies on the objector.
>
> (3) If a person's liability or assessment has been reduced on an objection, the reduced liability or assessment shall be the liability or assessment appealed against."

[4] Section 101 does not assist in determining the nature of the appeal. Although s 105 provides that the "Chief Judge" may make rules prescribing the practice and procedure applicable to appeals, no rules have been made pursuant to s 105. The appeals are governed by Order 83 of the Supreme Court Rules which does not assist in determining the nature of the appeal.

[5] Section 105 also provides that pending the making of rules pursuant to s 105, a Judge "make give such directions as to the practice and procedure applicable to the hearing of an appeal as he sees fit." It does not appear that Riley J was asked to give directions pursuant to s 105 admitting additional material. No submissions were directed to that issue and I express no opinion as to the extent of the powers of the Judge in that regard.

Nature of Appeal – Original Jurisdiction

[6] In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 Mason J, with whom Barwick CJ and Stephen J agreed, identified a number of factors which are relevant to a consideration of whether an appeal is an appeal stricto sensu or an appeal by way of rehearing and, if an appeal by way of rehearing, whether that means an appeal de novo. His Honour said (621):

> "Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Despite some suggestion in argument to the contrary, I do not read *Ex parte Australian Sporting Club Ltd.; Re Dash* (1947) 47 SR (NSW) 283 as enunciating such an absolute rule. There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch. III of the Commonwealth Constitution. The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.
>
> On the other hand the character of the function undertaken by the administrative authority in arriving at its decision may differ markedly from the instances already supposed. The authority may be required to determine justifiable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross-examination; to keep a transcript record; to apply the rules of evidence; and to give reasons for its

> determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance."

[7] The general rule and factors to which Mason J referred all exist in the matter under consideration and strongly favour the view that the appeal to the Supreme Court pursuant to s 101 is a hearing de novo. However, as Mason J observed, ultimately the issue must be determined upon a proper construction of the legislation (621):

> "But in the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi-judicial function, classifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing."

[8] The same general rule was confirmed by the High Court in *Re Coldham and Others Ex Parte Brideson [No 2]* (1990) 170 CLR 267. The Court was concerned with the nature of an appeal from the Registrar of the Australian Industrial Relations Commission to the Commission pursuant to s 88F of the Conciliation and Arbitration Act 1904 (Cth). Section 88F empowered the Commission to "make such order as it thinks fit" and to "take further evidence for the purposes of an appeal" under s 88F. The Court regarded those powers as "strong indications that the appeal given by s 88F was by way of rehearing." In the course of their joint judgment, Deane, Gaudron and McHugh JJ made the following observation (273):

> "… [I]t is well settled that, when the Legislature gives a court the power to review or hear an "appeal" against the decision of an

> administrative body, a presumption arises that the court is to exercise original jurisdiction and to determine the matter on the evidence and law applicable as at the date of the curial proceedings: see E*x Parte Australian Sporting Club Ltd*; re – [(1947) 47 SR (NSW) 283]. Nevertheless, whether the right of appeal against an administrative decision is given to a court or to an administrative body, the nature of the appeal must ultimately depend on the terms of the statute conferring the right: *Builders Licensing Board v Sperway Constructions …* "

[9] A consideration of authorities concerned with appeals from decisions of Commissioners of Taxes demonstrates the point that absent statutory direction to the contrary, these types of "appeals" are proceedings in the original jurisdiction of the court and are hearings de novo. I will refer to the respondent and other Commissioners of Taxes as "the Commissioner".

[10] In *Federal Commissioner of Taxation v Lewis Berger & Sons (Australia) Limited* (1927) 39 CLR 468, the appeal was from a decision of a Board of Review constituted under the Income Tax Assessment Act 1922 (Cth). The Board had varied an assessment of the Commissioner and the Commissioner appealed to the High Court. In the following passage Starke J explained that the proceeding in the High Court was in the original and not the appellate jurisdiction of the Court and that the parties were not limited to the material before the Board (469):

> "Under sec 51(6) of that Act the appeal may be brought from any decision of the Board which, in the opinion of this Court, involves a question of law. The Board, in its proceedings, did not exercise the judicial power of the Commonwealth, but an administrative function, namely, that of reviewing the Commissioner's assessments for the purpose of ascertaining the taxable income upon which tax should be levied. The appeal to this Court submits the ascertainment of the taxpayer's liability to judicial review and ascertainment, but the so-

> called appeal is a proceeding in the original, and not within the appellate jurisdiction of the Court. It follows, I think, that the parties on this appeal are not limited to the material that was before the Board of Review, but are entitled to adduce before this Court such evidence in support of, or in answer to, the appeal as is relevant to the matter. The material before the Board and its decision and reasons should be brought before this Court, and the parties may use this material if they so desire, but further or additional evidence may be adduced, or the appeal may be conducted as an original cause brought in this Court. A taxpayer, however, is limited by the Act, sec 51(2), in such proceedings, to the grounds stated in his objection to the assessment, and an appellant should be limited to the grounds of appeal stated in his initiating process in this Court, that is, his notice of appeal, unless he obtain leave to amend it."

[11] The same view was taken by Williams J in *Federal Commissioner of Taxation v Sagar* (1946) 71 CLR 421. On an appeal by the Commissioner from a decision of a Valuation Board valuing certain shares in a company, Williams J said (423):

> "The appeal is a proceeding in the original jurisdiction of the Court so that, unless the parties agree that the evidence given before the Board shall be used on the appeal, the evidence must be tendered again, and, as the appeal is a rehearing, further evidence can be called."

[12] The decisions of Starke and Williams JJ to which I have referred support the view that the appeal is a hearing de novo. Those decisions were applied with approval by Fullagar J in *Commissioner of Taxation v Finn* (1969) 103 CLR 165. A claim for a deduction had been disallowed by the Commissioner and an objection by the taxpayer had been allowed by the Board of Review. On the appeal from the decision of the Board of Review to the High Court, Fullagar J made the following observations (167):

> "The distinction between an appeal in the strict sense and an appeal by way of rehearing is explained in the judgment of *Dixon* J in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* [(1931) 46 CLR 73, at pp 106-110]. Appeals to this Court under s 73 of the Constitution are sometimes described as appeals by way of rehearing, because on such appeals questions of fact, as well as questions of law, are open. But such appeals are really appeals in the strict sense : they must be decided on the materials which were before the court from which the appeal comes, and no fresh evidence can be admitted. On the other hand, the so-called appeal from a board of review to this Court is clearly an appeal by way of rehearing. The jurisdiction exercised is in truth original jurisdiction, and not appellate jurisdiction."

[13] Mason and Aickin JJ each reached the same conclusion in *Commissioner of Taxation of the Commonwealth of Australia v Students World (Australia) Proprietary Limited* (1978) 138 CLR 251. The Commissioner had refused to allow deductions and his decision had been upheld by the Board of Review. The taxpayer appealed against the decision of the Board to the Supreme Court of New South Wales and a single Judge of that Court allowed the appeal. On appeal by the Commissioner to the High Court against the decision of the single Judge, Mason J observed (260):

> "There is an initial difficulty in dealing with this question which arises from the manner in which the proceedings were conducted in the Supreme Court and the approach taken by his Honour to the issues of fact. Although in form an appeal, the proceedings in the Supreme Court were an exercise of original jurisdiction in which it was for the judge to decide issues of fact, without being constrained to accept the findings made by the Board of Review – see *Federal Commissioner of Taxation v Finn* [(1960) 103 CLR 165] and the cases there cited. The issues of fact in this case evidently involved questions of credibility of witnesses, yet the parties contented themselves with presenting the transcript of evidence taken before the Board. No oral evidence was called, the case before his Honour being conducted exclusively by reference to the materials before the Board. How his Honour could adequately determine questions of credibility in these circumstances does not readily emerge. It is not

> surprising that the judge seems to have embraced the evaluation of the witnesses and the findings of fact made by Mr O'Neill in the Board of Review.
>
> I am not suggesting that on appeal from the Board the Supreme Court is not at liberty to conduct the case by reference to the materials before the Board. But where there is an issue of fact involving credibility it is desirable that the witnesses whose evidence is in question should be recalled – see, eg *Moruben Gardens Pty Ltd v Federal Commissioner of Taxation* [(1972) 46 ALJR 559, at pp 560] – so that the judge may evaluate the oral testimony and form his own impressions of what it is worth. If this course is not pursued the judge will be restricted in deciding whose evidence is to be accepted. Certainly it will not be easy for a party who seeks to show that findings of fact made by a Board of Review are erroneous."

[14] After recording his agreement with the view expressed by Mason J that the procedure adopted before the single Judge was unsatisfactory, Aickin J said (271):

> "It is perhaps not surprising that neither party wished to embark upon a repetition of the original hearing which had occupied some three days, notwithstanding that the so-called appeal from a Board of Review is a proceeding de novo in the original jurisdiction of this Court and of the Supreme Court of New South Wales. That situation does not appear to have been changed by the recent legislation which confines "appeals" from Boards of Review to the Supreme Courts of the States and Territories. It is open to those Courts to adopt their own procedure and, at least in cases where both parties agree, to treat the material placed before a Board of Review as if it were evidence given in the proceedings. Where no critical questions of credibility arise, and where the parties are content to accept the view adopted by a Board, or a majority of its members, on credibility, no serious difficulties are likely to arise. In the present case the whole of the oral evidence and all the documents before the Board were included in the material before Mahoney J and before this Court."

[15] The authority of *Moruben Gardens Pty Ltd* to which Mason J referred was the decision of his Honour on appeal from a Board of Review which confirmed an assessment of the Commissioner to which the taxpayer

objected. All the evidence given before the Board was tendered and Mason J heard further evidence from the principal witness for the taxpayer. His Honour reached a different view of the taxpayer's intention from that reached by the Board. In other words, Mason J reached his own conclusions of fact based on the evidence presented before the Board and supplemented by evidence before his Honour.

[16] The decision of De Jersey CJ in *Feez Ruthning v Commissioner of Pay-roll Tax* [2001] QSC 303 is instructive. The Commissioner had disallowed the appellant's objections to a re-assessment of payroll tax. The appellant appealed against that disallowance to the Supreme Court of Queensland. As a preliminary issue, the Chief Justice was required to determine the nature of the appeal and, in particular, whether the Court's consideration was confined to the materials which were before the Commissioner. Section 33 of the Queensland Pay-roll Tax Act which gave the appellant a right of appeal was in similar terms to the Northern Territory appeal provision. Neither s 33 nor the Rules of the Queensland Supreme Court assisted in determining the nature of the appeal. The Chief Justice regarded the language of the statutory provision as neutral on this aspect.

[17] De Jersey CJ cited the remarks of Fullagar J in *Finn* to which I have referred. The Chief Justice also cited the remarks of Cosgrove J in *Clerk, Walker and Stops v Commissioner of Payroll Tax (Tas)* (1983) 14 ATR 662 and Murphy J in *Insomnia (No 2) Pty Ltd v Federal Commissioner of Taxation* (1986) 17 ATR 386 in which their Honours held that appeals

against decisions of the Commissioner were proceedings in the original jurisdiction of the court and were, therefore, appeals by way of rehearing. The citations from those decision are found in paras [9] and [10] of the Chief Justice's reasons and it is unnecessary to repeat them. Having referred to those authorities, his Honour said [12]:

> "Those three decisions strongly support the conclusion that in the case of an appeal to the court from the determination of an administrative officer such as the respondent, absent contrary indications, it should be assumed that the Legislature has given the court full power to consider the merits of the decision which is challenged, and accordingly, to admit all relevant evidence, and in order to facilitate that, to allow reasonable disclosure of documents."

[18] Later in his judgment, De Jersey CJ added the following [22]:

> "In this case, the question whether the appellants were liable to payroll tax was to be determined by applying, to the facts of the case, the objectively stated statutory criteria. This important determination was, as a matter of convenience, reserved to the Commissioner, as an appropriate administrative agency, but nevertheless with a right of appeal to the Supreme Court, exercising what Fullagar J in *Finn* described as "original jurisdiction"".

[19] Numerous authorities in different contexts have applied the principles to which I have referred. In *Kaiser Aluminium & Chemical Corporation v The Reynolds Meat* Company (1969) 120 CLR 136, Kitto J heard an appeal under the Patents Act 1952 (Cth) against a decision of a Deputy Commissioner of Patents dismissing opposition to an application for a patent. His Honour applied *Finn* and held that the appeal was to be decided upon the evidence adduced before the High Court "even though that evidence presents on the question of interest a case completely different from the case which was

suggested before the Deputy Commissioner." Cox J provided a helpful review of authorities in *Wigg v Architects Board of South Australia* (1984) 36 SASR 111. A similarly helpful discussion of the authorities was undertaken by Muirhead AJ in *Meyerling v Northern Territory of Australia* (1987) 47 NTR 21. It is unnecessary to consider these authorities in detail or to canvas numerous other authorities in different contexts to the same effect. They all support the conclusion that the appeal from the Commissioner to the Supreme Court is an appeal de novo.

[20] In my opinion the proceedings before Riley J were proceedings in the original jurisdiction of the Supreme Court of the Northern Territory: s 14 of the Supreme Court Act. The appeal from the Commissioner exercising an administrative function to the Supreme Court is an appeal de novo. Subject to restrictions identified in the reasons that follow, on the hearing of such an appeal evidence additional to that placed before the Commissioner may be adduced.

Issues

[21] The Act provides that duty is payable on "dutiable property" as that expression is defined in s 4. Duty is payable only on the dutiable property situated in the Northern Territory or related to a business undertaking carried on in the Territory. At issue is whether the determination of the amount of dutiable property so situated in or related to the Territory is a

question of fact or is a question determined by the opinion of the Commissioner.

[22] Authorities to which I refer later in these reasons establish that if the appeal is against the decision of a Commissioner of Taxation ("the Commissioner") that the Commissioner is "satisfied" or has reached an "opinion" as to a certain state of affairs, the appeal is limited to the material before the Commissioner at the time the Commissioner reached the particular state of mind. The applicant submitted that those authorities are not applicable because the "taxable fact" under consideration is not the opinion of the Commissioner as to the location of the dutiable property, but is a state of fact, namely, the proportion of dutiable property situated in or related to a business undertaking carried on in the Territory. The appeal is, therefore, says the applicant, not limited to the material before the Commissioner.

[23] The answer to this question depends upon the proper construction of s 9BA of the Act which was, at the relevant time in the following terms:

> "9BA **Apportionment**
>
> Where in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory."

[24] In substance, the applicant submitted that the operation of s 9BA of the Act involves two stages. First, the Commissioner is required to form an opinion

as to whether dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory ("related to the Territory"). The second stage, which is only triggered by the formation of the opinion by the Commissioner at the first stage, involves an objective evaluation of that proportion of the dutiable property situated in the Territory or related to the Territory. In this instance, the second stage involves the objective evaluation of an asset, namely, that proportion of the goodwill which is situated in the Territory or related to the Territory.

[25] Riley J rejected the applicant's contentions. His Honour's view is found in the following passages in his reasons:

> "[18] The "opinion of the Commissioner" referred to in s 9BA of the Taxation (Administration) Act is not to be confined in the manner suggested by the appellant. The opinion extends to and includes the identification of "that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory."
>
> …
>
> [19] In my view the decision making process contemplated by s 9BA of the Act is not to be separated into its component parts as submitted by the appellant. The section provides for the assessment of stamp duty in relation to dutiable property. The assessment is dependent upon the Commissioner forming an opinion as to the presence of dutiable property within or related to the Territory and, where the property is partly situated in the Territory or partly related to a business undertaking carried on in the Territory, as to the proportion so situated or related. The issue of apportionment in such circumstances is a matter of opinion and, by virtue of the scheme, the relevant opinion is that of the Commissioner."

Authorities

[26] It is helpful to examine some of the numerous authorities which have considered the constraints on appeals which challenge a Commissioner's state of mind.

[27] In *Avon Downs Proprietary Limited v The Federal Commissioner of Taxation* (1949) 78 CLR 353, Dixon J heard an appeal against a decision of the Commissioner disallowing an objection to the Commissioner's assessment of taxation. A deduction which was disallowed depended upon the taxpayer establishing to the satisfaction of the Commissioner the existence of a certain state of voting power within the taxpayer. In dismissing the appeal, Dixon J explained the limited basis upon which the decision of the Commissioner could be examined (360):

> "But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

[28] The view of Dixon J has been consistently applied. An example is found in the decision of the High Court in *Kolotex Hosiery (Australia) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1975) 132 CLR 535. The Court was concerned with ss 80A and 80C of the Income Tax Assessment Act 1936 (Cth) which provided that a loss incurred by the taxpayer would not be taken into account for specified purposes unless the Commissioner was satisfied of matters identified in those sections. An appeal against a disallowance of losses by the Commissioner was dismissed by Mason J. On further appeal, all members of the Court approved the statement of Dixon J in *Avon Downs* as to the grounds on which the conclusion by the Commissioner that he was not satisfied of the specified matters could be examined. As to the material that the Court could examine in determining whether error by the Commissioner was established, Gibbs J observed (568):

> "It seems that a court in deciding whether some ground has appeared to justify a review of the Commissioner's conclusion that he is not satisfied should consider the question on the basis of the material which was before the Commissioner even though further material is before the court … ".

[29] Stephen J expressed the same view that in determining the question of error the Court was confined to the material which was before the Commissioner when the assessment was made.

[30] The nature of an appeal against a decision of the Commissioner under s 17H of the Pay-roll Tax Act 1978 (NT) was considered by Martin CJ in *Crusher*

Holdings Pty Ltd v Commissioner of Taxes (NT) (1994) 117 FLR 485. The Chief Justice was concerned with an appeal against a decision of the Commissioner not to order that the appellant be excluded from grouping with another company for the purposes of the grouping provisions of the Pay-roll Tax Act. The power of the Commissioner to exclude the business was found in s 17H(1) of that Act:

> "*Where the Commissioner is satisfied,* having regard to the nature and degree of ownership or control of the businesses, the nature of the businesses and any other matters that he considers relevant, that a business carried on by a member of a group is carried on substantially independently of, and is not substantially connected with the carrying on of, a business carried on by any other member of that group, *the Commissioner may,* by order in writing served on that first-mentioned member, exclude him from that group." (my emphasis).

[31] In the context of a decision by the Commissioner refusing to exercise the discretion to exclude the appellant from a group, Martin CJ considered the nature of the appeal and examined a number of authorities in some detail, including *Avon Downs* and *Kolotex.* His Honour reached the following conclusion (494):

> "There is no authority binding on this Court regarding the receipt of evidence on this type of appeal, other than that prescribed by the Rules. It is upon the basis of the material before the Commissioner alone that the Court is to determine whether or not the Commissioner erred in such a manner as to enable the Court to set his decision aside and determine the question for itself. There is no warrant for receiving evidence beyond that. It is up to the taxpayer to satisfy the Commissioner on the material available to the Commissioner, and, in the event that an error is found in his reasons, giving rise to a review of the material by the Court, that should be no opportunity to enhance the submission or introduce any new basis for it. Taxpayers ought to be bound by their submissions to the Commissioner. After

> all, the taxpayer is in possession of all the relevant facts. There is nothing to prohibit successive applications for exclusion, even in relation to the same period of time if it was thought that there was material omitted from a submission which on reflection should have been included, or omitted by oversight. Accordingly, if the Court finds a relevant error on the part of the Commissioner, it will review the original material for itself and determine the question upon that material alone."

[32] The applicant submitted that the authorities to which I have referred are readily distinguished on the basis of the relevant statutory provisions. In *Avon Downs*, the challenge was to the decision of the Commissioner that he was not satisfied of the relevant state of voting powers. The challenge in *Kolotex* was to the decision of the Commissioner that he was not satisfied of facts which would have entitled the taxpayer to a deduction based upon specified losses. In *Crusher Holdings* the challenge was directed at the refusal of the Commissioner to exercise a discretion which was based upon a failure of the Commissioner to be satisfied of matters set out in s 17H. The applicant contended that in contrast to those authorities, the challenge under consideration is not directed to the opinion of the Commissioner that dutiable property is situated in the Territory, but is directed to a factual assessment of the proportion of dutiable property situated in the Territory.

[33] *Crusher Holdings* was followed by Riley J in *Ngurratjuta Pmara/Ntjarra Aboriginal Corporation v Commissioner of Taxes [No 1]* (2000) 155 FLR 146. Pursuant to the provisions of the Pay-roll Tax Act 1978 (NT), in order for the taxpayer to bring itself within the ambit of certain provisions of that Act the taxpayer was required to "satisfy the Commissioner" that its

employee was “exclusively engaged” in a certain class of work. It was on that basis that Riley J held that a challenge on appeal to the decision of the Commissioner that he was not satisfied of that requirement was limited to the material that was before the Commissioner.

[34] On appeal in *Ngurratjuta Pmara/Ntjarra Aboriginal Corporation v Commissioner of Taxes [No 1]* [2001] NTCA 4, the decision of Riley J that the appeal should proceed on the basis of the materials before the Commissioner was not challenged.

[35] Riley J again applied the principles enunciated in *Crusher Holdings* in *Plummers Border Valley Orchards Pty Ltd v Commissioner of Taxes (NT)* (2002) ATC 4530. His Honour was concerned with the same section of the Pay-Roll Tax Act as that with which Martin CJ dealt in *Crusher Holdings*. That provision was centred on whether the Commissioner was satisfied of particular facts and provided that if the Commissioner was satisfied of such facts he could exclude a business from a group of businesses.

[36] The authorities of *Avon Downs* and *Kolotex* are binding on this Court. Notwithstanding that the appeal from the Commissioner to the Supreme Court is an appeal de novo, if the challenge on appeal is to the decision of the Commissioner that the Commissioner has or has not arrived at a state of satisfaction, initially the appeal is limited to determining whether the Commissioner erred in the way that error was defined by Dixon J in *Avon*

Downs. In making that determination, the Court is restricted to the material that was before the Commissioner.

[37] The critical question is whether Riley J was correct in his conclusion that, on a proper construction of s 9BA, the determination of the proportion of dutiable property situated in the Territory or related to the Territory is a matter for the opinion of the Commissioner. On that issue, in my view the authorities to which I have referred do not provide significant assistance. In each of those authorities the challenge on appeal was plainly directed to the state of mind of the Commissioner identified as either a state of satisfaction about specified matters or an opinion.

[38] I return to the decision of De Jersey CJ in *Feez Ruthning*. After discussing the nature of the jurisdiction invoked, the Chief Justice considered *Crusher Holdings, Avon Downs* and *Kolotex*. As to *Crusher Holdings* his Honour noted that the Commissioner's failure to order the de–grouping of associated businesses was a matter dependent upon the Commissioner's satisfaction as to specified facts. His Honour also noted that the decisions in *Avon Downs* and *Kolotex* involved taxing provisions which depended on the Commissioner being satisfied as to the existence of particular circumstances. On that basis, the Chief Justice held that those authorities did not apply to the appeal before him because the relevant taxing provision with which he was concerned "did not vest in the Commissioner, as if personae designatae, an obligation to reach some particular degree of satisfaction, or to exercise some particular discretion."

[39] The provisions with which De Jersey CJ was concerned were in the following terms:

> "Assessments 18(1) Where the commissioner finds in any case that pay-roll tax or further tax is payable by an employer, the commissioner may –
>
> (a) assess the amount of taxable wages or, where relevant, interstate wages paid or payable by the employer; and
>
> (b) calculate the pay-roll tax or further tax payable by the employer.
>
> (2) Where –
>
> (a) any employer fails or neglects duly to furnish any return as and when required by this Act or by the commissioner; or
>
> (b) the commissioner is not satisfied with the return made by any employer; and
>
> (c) the commissioner has reason to believe or suspect that any employer (though the employer may not have furnished any return) is liable to pay pay-roll tax;
>
> the commissioner may cause an assessment to be made of the amount upon which, in the commissioner's judgment, pay-roll tax or further tax ought to be levied and that person shall be liable to pay pay-roll tax or further tax thereon, except in so far as the person establishes, on objection or appeal, that the assessment is excessive.
>
> …
>
> (6) As soon as conveniently may be after an assessment is made under this section, the commissioner shall cause notice in writing of the assessment and of the pay-roll tax, further tax or additional tax to be served on the employer liable to pay it.

(7) The amount of pay-roll tax, further tax or additional tax specified in the notice shall be payable on or before the date specified in the notice together with any other amount which may be payable in accordance with any other provisions of this Act."

[40] De Jersey CJ found that as the court was exercising its original jurisdiction, and as the challenge was not directed to the Commissioner's state of mind, the appeal was not limited to the material before the Commissioner. The essential reasoning of his Honour is found in the following passages from his judgment [20–23]:

"[20] The assessments subject to these appeals were reassessments under s18. Some of the words and phrases included in s18 which might perhaps be suggested as obliging the Commissioner to reach a particular level of satisfaction, although Mr Gibson did not actively urge this view, are "finds", "is not satisfied", and "in his judgment". I do not however consider those words and phrases to carry that connotation. They go more towards identifying a stage in the process of assessment. They are not used in the sense in the Commissioner's relevantly forming a belief or opinion or reaching a particular state of satisfaction, and Mr Gibson acknowledged as much. The word "may", furthermore, is used in the sense of "is authorised to".

[21] The natural interpretation of s18 is to my mind clear. If payroll tax "is payable", then actual payment will so far as possible be secured through the implementation of the prescribed administrative arrangements. *Whether the tax "is payable" depends upon the applicability of other statutory criteria, criteria which are not dependent on any individual satisfaction or exercise of discretion on the part of the Commissioner. The law upon such fundamental issues of course desirably should not depend on any individual officer's point of view: so far as possible, the liability should be fixed, certain, independently ascertainable. The relevant criteria being so established, the Commissioner proceeds to assess the consequent liability to tax.*

[22] In this case, the question whether the appellants were liable to payroll tax was to be determined by applying, to the facts of the case, the objectively stated statutory criteria. This important determination was, as a matter of convenience, reserved to the Commissioner, as an

appropriate administrative agency, but nevertheless with a right of appeal to the Supreme Court, exercising what Fullagar J in Finn styled as "original jurisdiction".

[23] I adopt this concluding submission presented by Ms O'Reilly QC for the appellants:

> "The proceeding might be described as an appeal by way of rehearing. On an appeal by way of rehearing, further evidence relevant to the issues on the appeal is admissible.
>
> The most common restriction on adducing further evidence, in pay-roll tax appeals, is that evidence not before the Commissioner at the time the Commissioner achieved some necessary state of mind, is not admissible. The question there is whether the Commissioner ought to have achieved some state of satisfaction, or should have exercised some discretion.
>
> Where that restriction applies, it is because the Court does not immediately step into the Commissioner's shoes to re-exercise the discretion, or to determine whether the state of satisfaction ought to have been achieved. Instead, the Court examines whether there was error on the part of the Commissioner in relation to the attainment of satisfaction or exercise of discretion. Matters not before the Commissioner at the time that the state of mind is achieved are therefore irrelevant to the question of whether the Commissioner fell into error in reaching the decision.
>
> …
>
> There being no state of mind or discretion of the Commissioner under attack in these appeals, the evidence led is that relevant to determine the issues of fact related to whether the fixed draw partners were employees. That evidence may include matters not before the Commissioner when the assessments were raised and the objections determined." (my emphasis)

[41] I find the reasoning of De Jersey CJ persuasive. On that approach, once the Commissioner has arrived at the opinion that dutiable property is wholly or

partly situated in the Territory or is wholly or partly related to the Territory, the proportion of the dutiable property situated in the Territory or related to the Territory upon which stamp duty shall be assessed is a question of fact not dependent upon the opinion or satisfaction of the Commissioner nor upon the exercise of a discretion on the part of the Commissioner.

[42] As De Jersey CJ pointed out, and rightly in my respectful opinion, "the liability should be fixed, certain, independently ascertainable" and "should not depend on any individual officer's point of view." Those remarks echo the views of Lord Wilberforce in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 where, albeit in a different factual context, His Lordship said (1172):

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing act as a taxpayer and the amount of his liability is clearly defined.
>
> A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it."

Other Factors

[43] In rejecting the submission of the applicant, Riley J pointed out that if the applicant's contention is correct, strictly speaking there would be no occasion for the Commissioner to form an opinion as to the location of

dutiable property. The section could simply have provided for the assessment of stamp duty in respect of the proportion of the dutiable property situated in the Territory or related to the Territory. That much may be accepted. Strictly speaking, it is unnecessary to provide what the applicant described as the "trigger" in the form of the opinion of the Commissioner as to the location of the dutiable property. In my view, however, the existence of unnecessary words or an unnecessary step in the process is not an indication of an intention on the part of the Legislature that the plain words of the provision should be construed in a manner different from their ordinary and natural meaning. Section 9BA would not be the first statutory provision in which unnecessary words appear or by which an unnecessary step is created.

[44] Riley J considered that the direction that stamp duty be assessed in respect of "that" proportion of the dutiable property situated in or related to the Territory was a reference back to the opinion of the Commissioner. I am unable to agree. The opinion of the Commissioner identified in the first part of s 9BA is not an opinion as to the proportion of the dutiable property situated in the Territory or related to the Territory. It is simply an opinion as to whether the whole or some part of the dutiable property is so situated. I do not regard the use of the word "that" as of any assistance.

[45] Finally, recognising that the use of amendments to Acts to assist in the interpretation of provisions that existed before the amendment "is an exercise calling for circumspection and great care", Riley J addressed the

operation of s 9BB of the Act which was introduced in 2001 after the parties had entered into the relevant agreement. In his Honour's view, if the applicant's construction of s 9BA was accepted, there would be an inconsistency between s 9BA and s 9BB.

[46] In considering this issue, and generally in addressing the proper construction of s 9BA, it is appropriate to have regard to the history of the legislation. Section 9BA was introduced to the Act by the Taxation (Administration) Amendment Act (No 2) 1991 which came into operation on 1 January 1992.

[47] The Taxation (Administration) Act 1986 did not contain any reference to liability for duty in respect of instruments executed and held outside the Territory. Part III of the 1986 Act related generally to the requirements to pay duty and was headed "Liability to duty or tax". Section 9 was headed "When duty payable" and dealt with the timing requirements of stamping and payment of duty. Section 9A created an offence to enrol or register an instrument which was not duly stamped.

[48] Section 9B was inserted into Part III of the 1986 Act by the Taxation (Administration) Amendment Act 1987, which came into operation on 1 August 1987. Section 9B was enacted in its current terms to provide that the Act shall apply to an instrument relating to property in the Territory or to a matter or thing done or to be done in the Territory notwithstanding that the instrument is executed and held outside the Territory.

[49] The evident purpose of s 9B was to extend the reach of the Act in order to prevent avoidance of duty where the instrument by its content was relevantly connected to the Territory. Whether an instrument was relevantly connected was, and remains, a question of fact unrelated to any opinion held by the Commissioner.

[50] Until 1991 when s 9BA was enacted, the Act provided no assistance in determining whether, for the purposes of s 9B, the property to which an instrument related was property in the Territory or a matter or thing done or to be done in the Territory. The 1991 amendment which introduced s 9BA also introduced to s 4 the definition of "dutiable property". In this way the Legislature defined with a greater degree of precision the property that would be the subject of a duty. With very limited exception related to the opinion of the Commissioner as to whether a restraint of trade arrangement enhances the value of a business, the determination of whether property is "dutiable property" as defined by s 4 is a question of fact which is not determined by the opinion of the Commissioner.

[51] In my view, that legislative history and the context in which s 9BA operates tend to support the view that the determination of the proportion of dutiable property situated in the Territory or related to the Territory is a question of fact and is not to be determined by the opinion of the Commissioner. As I have said, by virtue of s 9B, whether an instrument is relevantly connected to the Territory is a question of fact in respect of which the opinion of the Commissioner has no role to play. With a limited exception, the

determination as to whether property is "dutiable property" for the purposes of the definition in s 4 is also a question of fact unrelated to the opinion of the Commissioner. In the absence of plain words evincing such an intention, there does not appear to be any reason why the court should infer that the Legislature intended to make the determination of the proportion of dutiable property situated in the Territory or related to the Territory a matter to be determined by the opinion of the Commissioner.

[52] Section 9BA does not state that duty shall be assessed in respect of that proportion, "which in the opinion of the Commissioner", is situated in the Territory or related to the Territory. The effect of the interpretation for which the Commissioner contends is to imply the existence of those words. Section 9BA relates to a question of fact, namely, that duty "shall be assessed in respect of that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory". The existence of that question of fact emanates from the ordinary and natural meaning of the words in their context.

[53] Section 9BB was enacted by the Taxation (Administration) Amendment Act 2001 and the relevant amending section came into operation on 1 July 2001. Section 9BB was in the following terms:

> "9BB. **Apportioning certain dutiable property where business in Territory and elsewhere**
>
> (1) For the purposes of section 9BA, where a business undertaking is carried on both in and outside the Territory, the

proportion of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory is to be determined in accordance with this section.

(2) Where the principal place of business of the business undertaking is in the Territory, the proportion of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory is calculated in accordance with the following formula:

$$V \times \frac{(TS - IS)}{TS}$$

where

V is the greater of the consideration for or the unencumbered value of all property conveyed to the conveyee that would have been dutiable property had that property been wholly situated in the Territory or wholly related to the business undertaking carried on in the Territory;

TS is the volume or gross value of goods supplied and services provided by the business undertaking to all its customers during the last 3 completed financial years; and

IS is the volume or gross value of goods supplied and services provided by the business undertaking to its interstate customers during the last 3 completed financial years.

(3) Where the principal place of business of the business undertaking is outside the Territory, the proportion of dutiable property situated in the Territory or related to the business undertaking carried on in the Territory is calculated in accordance with the following formula:

$$V \times \frac{NTS}{TS}$$

where –

V is the greater of the consideration for or the unencumbered value of all the property conveyed to the conveyee that would have been dutiable property had that property been wholly situated in the Territory or wholly related to the business undertaking carried on in the Territory;

NTS is the volume or gross value of goods supplied and services provided by the business undertaking to its Territory customers during the last 3 completed financial years; and

TS is the volume or gross value of goods supplied and services provided by the business undertaking to all its customers during the last 3 completed financial years.

(4) Despite subsections (2) and (3), the Commissioner may determine the proportion of dutiable property on another basis if satisfied that the other basis would be more appropriate in the particular circumstances.

(5) In this section –

‘dutiable property’ means the dutiable property referred to in paragraph (b), (c), (d), (e), (f) and (g) of the definition of ‘dutiable property’ in section 4(1);

‘interstate customer’ means a customer who takes delivery of the goods or receives the services provided elsewhere in Australia than the Territory;

‘principal place of business’, in relation to a business undertaking, means –

(a) the place where the head office of the business undertaking is located; or

(b) the place from which overall control or management emanates;

‘Territory customer’ means a customer who takes delivery of the goods or receives the services provided in the Territory.”

[54] It is correct, as Riley J pointed out, that s 9BB(4) provides the Commissioner with a discretion to determine the proportion of dutiable property on a basis different from the basis set out in the remainder of the section if satisfied that another basis would be more appropriate. In my view, however, it must be borne in mind that the primary thrust of s 9BB is to provide formulae for the determination of the proportion of dutiable property situated in the Territory or related to the Territory. Those formulae are not dependent upon the opinion or satisfaction of the Commissioner. The construction of s 9BA for which the applicant contends would be entirely consistent with the operation of the primary thrust found in subs (2) and (3) of s 9BB.

[55] I have also had regard to the Second Reading Speech upon the introduction of the 2001 amendment which enacted s 9BB. The report in Hansard is as follows:

> “The Bill provides a clear basis for calculating the proportion of property relating to a Territory business. This will provide greater certainty in determining the stamp duty payable when; for instance, a national business is sold. The proportion of industrial and intellectual property, such as goodwill, relating to the Territory business undertaking will be by way of formula.
>
> …

> The Bill also allows the Commissioner to determine the proportion of dutiable property on another basis if he is satisfied that it is more appropriate in the particular circumstances."

[56] In these circumstances, given the great care with which the Court must ordinarily approach the use of a subsequent amendment as an aid to interpretation of an existing provision, in my opinion the terms of s 9BB do not assist in the proper construction of s 9BA as it applies to the circumstances under consideration.

Conclusion

[57] As Angel J has observed, the Commissioner cannot tax assets that lack the necessary nexus with the Territory. There is considerable force in his Honour's concern that if the Commissioner's contentions are correct, the Commissioner can tax assets which, in his opinion, are situated in the Territory and the basis upon which that decision can be challenged will be limited to administrative law grounds. An intention on the part of the Legislature to bring about such a situation should not be inferred in the absence of plain wording evincing that intention.

[58] In summary, in my opinion the ordinary and natural meaning of the words in the context of both the provision as a whole and the Act in which it appears strongly favours the view that the assessment of the proportion of dutiable property situated in the Territory or related to the Territory is a matter of fact to be assessed in the context of the definition of "dutiable property" in s 4. This view is supported by the history of the relevant provisions. There

is no sound basis for a construction that defeats the ordinary and natural meaning of the words and that implies an intention that the assessment for these purposes will be determined by the opinion of an administrative officer. To adapt the words of De Jersey CJ, on this construction the proportion of dutiable property situated in the Territory or related to the Territory is capable of being independently ascertainable with certainty thereby leading to a determination of liability which does not depend upon any individual officer's point of view.

Natural Justice

[59] Regardless of the view taken as to the nature of the appeal before Riley J, in my opinion the application to this Court must be allowed. I agree with Mildren J that the Commissioner is bound by the rules of natural justice and, in the circumstances under consideration, the Commissioner failed to afford natural justice to the applicant. I agree with the reasons of Mildren J in this regard.

Error

[60] Although in my opinion the appeal before Riley J was not limited to the material before the Commissioner, it is appropriate that I express my view as to the consequences, on an appeal challenging the Commissioner's state of satisfaction, of establishing an error on the part of the Commissioner as that concept was explained by Dixon J in *Avon Downs*. Riley J determined that even if error by the Commissioner was established, his Honour would

not receive material additional to the material that had been before the Commissioner at the time the Commissioner made the relevant decision.

[61] Reference was made by Riley J to a decision of Angel J in *Nicholas Paspaley Properties Pty Ltd v Commissioner of Taxes* (1991) 103 FLR 305 in which Angel J had observed that "on error being shown, the appeal is thereafter to proceed de novo on the materials before the Court". Noting that the procedure had been agreed between the parties before Angel J and that no submissions had been directed to this particular point, Riley J declined to follow that decision. His Honour preferred the approach of Martin CJ in *Crusher Holdings* which is found in the following passage (494):

> "It is up to the taxpayer to satisfy the Commission on the material available to the Commissioner, and, *in the event that an error is found in his reasons, giving rise to a review of the material by the Court, there should be no opportunity to enhance the submission or introduce any new basis for it.*" (my emphasis).

[62] The view reached by Riley J was consistent with the view he expressed previously in *Ngurratjuta Pmara/Ntjarra* to which I have referred. On that occasion, notwithstanding the remarks of Gibbs and Stephen JJ in *Kolotex*, Riley J was not satisfied that the decision of Martin CJ in this respect was wrong. His Honour determined to proceed in a manner consistent with the rulings of the Chief Justice in *Crusher Holdings*. Having found error by the Commissioner, his Honour referred the matter back to the Commissioner for further consideration according to law. On appeal from that decision the

Court of Appeal declined to interfere and noted that there was no challenge on the appeal to *Crusher Holdings*.

[63] In *Kolotex*, Gibbs and Stephen JJ both held that once the Court has reached the conclusion that the decision of the Commissioner was tainted by relevant error, the Court should reach its own conclusion on the issue before the Commissioner based on the material before the Court. Gibbs J said (568):

> "It seems that a court in deciding whether some ground has appeared to justify a review of the Commissioner's conclusion that he is not satisfied should consider the question on the basis of the material which was before the Commissioner even though further material is before the court – *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* [1972] 128 CLR at pp 30-31, 57-58. *However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available*. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court." (my emphasis).

[64] After referring to the judgment of Dixon J in *Avon Downs*, Stephen J said (578):

> "Consideration is, in the first instance, to be confined to material which was before the Commissioner when he made his assessment, as is made plain by the judgments in this latter case; *but once it is established that the Commissioner has, in this case through error of law, failed properly to perform his statutory function the court will then determine what state of mind concerning the matters in s 80A(1) and s 80C(1) will amount to a discharge of that function and will do so having regard to the facts then before it, viewed in the light of*

> *what the court regards as the true effect of the legislation*." (my emphasis).

[65] The Queensland Full Court had occasion to consider the procedure once error by the Commissioner was established in *John French Pty Ltd v The Commissioner of Payroll Tax* [1984] 1 Qd R 125. McPherson J, with whom Campbell CJ agreed, said (139):

> "Once the requisite error is by this means demonstrated or demonstrable it no doubt then becomes appropriate to permit evidence to be adduced, which on the authority of *Cannon and Peterson v Commissioner of Pay-Roll Tax* [1975] Qd R 177 in Queensland may ordinarily include oral evidence."

[66] In *Crusher Holdings*, after examining a number of authorities, Martin CJ concluded that there was no authority binding on him regarding the receipt of evidence. In the passage already cited, his Honour determined that if the Court finds a relevant error on the part of the Commissioner, the Court "will review the original material for itself and determine the question upon that material alone." With respect, I disagree. On this aspect the decision of Martin CJ in *Crusher Holdings* should not be followed.

[67] The remarks of Gibbs and Stephen JJ in *Kolotex* are not ambiguous. Although it appears that the issue of the procedure following error was not argued in *Kolotex*, and it might be said that those observations were not necessary for the purposes of the decision in *Kolotex*, in my view this Court should not depart from the views expressed by Gibbs and Stephens JJ. As Gibbs J observed, if the matter was referred back to the Commissioner for

consideration according to law the Commissioner would be "entitled and bound to consider all the information then available."

[68] There is an additional reason why, once error by the Commissioner is established, evidence additional to that placed before the Commissioner is admissible before the Judge. As I have said, in my opinion the appeal from the Commissioner to the Supreme Court is a proceeding in the original jurisdiction of the Court and is an appeal de novo. Ordinarily, evidence relevant to the issues is admissible in such proceedings and the court arrives at its own decision. However, when the issue on appeal is a challenge to the Commissioner's state of mind at a particular time, evidence other than the evidence before the Commissioner at the time the state of mind was formed is irrelevant. Initially such evidence is, therefore, inadmissible on the appeal. However, once error has been demonstrated, the restriction on the proceedings in the original jurisdiction of a court is removed. The parties are entitled to consideration de novo by the court and to present evidence relevant to the issues.

[69] I would grant leave to appeal and allow the appeal. The orders of Riley J should be set aside. The matter should be remitted to Riley J to be dealt with by way of hearing de novo at which the parties are at liberty to call relevant evidence additional to the material that was before the Commissioner.

ANGEL J:

[70] This application for leave to appeal concerns the nature of the applicant's appeal to the Supreme Court pursuant to s 101 Taxation (Administration) Act (NT) and whether it is an appeal *de novo* or one confined to a determination upon the materials upon which the respondent based his assessment of stamp duty payable by the applicant.

[71] By an asset sale agreement dated 31 August 1999 the applicant acquired the assets of Britz Australia Rentals Pty Ltd and related group companies rental business. The vendors were international companies with extensive international marketing and goodwill located in a number of countries particularly in Europe. During the period 1996 to 1998 about 85 per cent of all customers of the rental business were overseas residents who made up some 90 per cent of the Australian business revenue. The Australian business was carried on from offices in Adelaide, Alice Springs, Brisbane, Broome, Cairns, Darwin, Hobart, Melbourne, Perth and Sydney. The head office operated from Victoria. The total consideration paid for the assets of the Australian business was a little more than $102.97 million of which about $46.47 million is attributed to goodwill.

[72] Goodwill of a business carried on in the Northern Territory or in the Northern Territory and elsewhere, in virtue of the definition of "dutiable property" in sub-s 4(1) of the Taxation (Administration) Act (NT), is dutiable property and 5.4 per cent stamp duty is payable pursuant to the

Stamp Duty Act (NT) on conveyances of such property. Section 9BA of the Taxation (Administration) Act (NT) relevantly provided

> "Where, in the opinion of the Commissioner dutiable property is wholly or partly situate in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that proportion of the dutiable property situate in the Territory or related to the business undertaking carried on in the Territory."

[73] The asset sale agreement, consistent with a methodology recommended in a report commissioned by the applicant, determined the situs of the goodwill in the various States and Territories of Australia and outside Australia and apportioned goodwill on the basis of where a customer made a booking rather than where a vehicle was collected. Goodwill in the Northern Territory was calculated accordingly to be $2.98 million which would give rise to a stamp duty liability of about $161,000.00.

[74] On 11 May 2000 the respondent Commissioner of Taxes assessed stamp duty on the asset sale agreement in the sum of $775,417.60. That assessment was based on an apportionment of good will on account of where the customer collected the vehicle rather than where the customer made a booking.

[75] The applicant objected to that assessment but the respondent declined to consider the objection. Legal proceedings ensued. On 30 October 2002 this Court allowed the applicant's cross–appeal and ordered the respondent Commissioner to exercise his discretion under s 97 Taxation

(Administration) Act (NT) by either amending or refusing to amend his stamp duty assessment.

[76] On 14 January 2003 the respondent obtained a report from the Office of State Revenue (Western Australia) in relation to the valuation of the applicant's goodwill. On 19 September 2003 the respondent amended his previous stamp duty assessment by deducting $2,042.00 therefrom. It was upon receipt of that reassessment that the applicant was first informed that the respondent had in part relied upon the Western Australian report. The applicant subsequently obtained a report from Price Waterhouse Coopers, Chartered Accountants. This was critical of the Western Australian report. The respondent Commissioner has declined to consider the Price Waterhouse Coopers report or to amend his assessment of stamp duty.

[77] There are two issues arising on the present application, first, as to the true construction of s 9BA Taxation (Administration) Act (NT), and secondly, as to the nature of an appeal under s 101 of that Act and in particular, whether it is open to the applicant to challenge the value of good will in the Northern Territory ascribed by the respondent in his assessment and whether the Court may rely at any stage of the appeal process on materials not before the Commissioner at the time of making his assessment or determining an objection thereto.

[78] In the court below the respondent Commissioner successfully submitted that the materials to be considered on the hearing of an appeal under s 101 of the

Taxation (Administration) Act (NT) are limited to the materials which were before the Commissioner at the time he made his decision and that the Court on appeal could not receive any further evidence. In this regard the Judge approved and followed *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1994) 117 FLR 485; *Ngurratjuta Pmara/Ntjara Aboriginal Corporation v Commissioner of Taxes* [No. 1] (2000) 155 FLR 146, on appeal [2001] NTCA 4 and *Plummers Border Valley Orchards Pty Ltd v Commissioner of Taxes (NT)* (2002) ATC 4530.

[79] In relation to s 9BA Taxation (Administration) Act (NT) the court below held that the issue of apportionment was a matter of opinion for the Commissioner and not a question of fact and that if the applicant wished to challenge the decision of the Commissioner it could only do so based on the material placed before the Commissioner at the time the Commissioner's decision was made. The court below expressly approved the decision of B F Martin CJ in *Crusher Holdings* (at 494) where it was said "Accordingly, if the Court finds a relevant error on the part of the Commissioner it will review the original material for itself and determine the question upon that material alone." The judge expressly disagreed with my observation in *Nicholas Paspaley Properties Pty Ltd v Commissioner of Taxes* (1991) 103 FLR 305 at 307:

> "Counsel before me were agreed as to the nature of this appeal … it is, as a first step, incumbent on the appellant to show that the Commissioner erred in some way in reaching his opinion on the material before him: and on error being shown the appeal is

thereafter to proceed *de novo* on the materials before the Court."

[80] The decision below has, as a consequence, a two–fold effect. First, the applicant tax payer is denied the opportunity to have before the Court the Price Waterhouse Coopers report criticizing the Western Australian report. Secondly, its challenge to the respondent's assessment is confined to that of administrative review.

[81] It is to be noticed that even if the challenge to the present assessment is limited to administrative law grounds the tax payer must succeed in relation to them. In determining the applicant's objection the respondent took into account the Western Australian report obtained by him after lodgement of the applicant's objection. The applicant was never afforded an opportunity to comment upon that report prior to the respondent's determination of the objection. Having power adversely to affect the tax payer applicant, the respondent was bound to afford the applicant an opportunity to be heard regarding the contents of the Western Australian report. The respondent was under a duty "to act fairly in the sense of according procedural fairness" in dealing with the applicant's objection. See generally *R v The City of Munno Para; ex parte John Weeks Pty Ltd* (1987) 46 SASR 400 at 405, per King CJ. In having failed to afford the applicant procedural fairness the respondent's decision was infected by jurisdictional error and must be set aside *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2, 195 ALR 24 at 45, par [76].

[82] It is also to be noticed that even if s 9BA Taxation (Administration) Act (NT) operates in the confined manner found by the Judge on appeal it does not necessarily follow from that that the material sought to be relied upon by the applicant is excluded from consideration. In that regard the decision in *Nicholas Paspaley Properties Pty Ltd* (supra) which accords with the conclusions reached by the majority in relation to similar provisions in *John French Pty Ltd v Commissioner of Pay–Roll Tax* [1984] 1 QdR 125 at 127, 139 is correct and *Crusher Holdings Pty Ltd v Commissioner of Taxes* (1994) 117 FLR 485, *Ngurratjuta Pmara/Ntjara Aboriginal Corporation v Commissioner of Taxes* [No. 1] (2000) 155 FLR 146 and other cases which followed *Crusher Holdings Pty Ltd* (supra) should be over ruled.

[83] I would confirm the correctness of *Nicholas Paspaley Properties Pty Ltd* and of the majority decision of the Full Court of the Supreme Court of Queensland in *John French Pty Ltd v Commissioner of Pay–Roll Tax* (supra).

[84] In my view, however, those cases are not determinative of the present application. The outcome of the present application in my opinion turns on the true construction of s 9BA Taxation (Administration) Act (NT). Under that section stamp duty is assessable "in respect of that proportion of the dutiable property situate in the Territory or related to the business undertaking carried on in the Territory". In my opinion, contrary to that of the judge under appeal, the taxable fact is the proportion of dutiable property situate in the Territory or related to the business undertaking

carried on in the Territory, not the proportion of the dutiable property which, in the opinion of the Commissioner, is situate in the Territory or related to the business undertaking carried on in the Territory. It is to be borne in mind that the Commissioner can not tax assets that lack the necessary nexus with the Territory: *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618. If the learned Judge's conclusion is correct, that is, that the respondent can tax assets which in his opinion are situate in the Territory, in the event his opinion is factually wrong, and his opinion is unassailable on administrative law grounds, the practical result is that the assessment is both unconstitutional and incontestable. That, with respect, can not be right.

[85] In the absence of a clear legislative statement, there is in my opinion no reason to countenance a construction of s 9BA Taxation (Administration) Act which renders as a taxable fact the respondent's opinion. The latter wording of the section is that stamp duty shall be assessed in respect of that proportion of the dutiable property which is situate in the Territory, not which in the opinion of the Commissioner is situate in the Territory. There is no reason why the words "which in the opinion of the Commissioner" should be read into the section and every reason why not: *Trenerry v Bradley* (1997) 6 NTLR 175 at 185, 186. The reasons given by the judge below in reaching an opposite conclusion are, with respect, uncompelling. Section 9BA requires an objective finding of a fact by way of the valuation of an asset, namely goodwill within the Territory. It is not, and not said to

be, subject to the opinion of the Commissioner. The relevant task is one of identification of the proportion of the goodwill within the Territory.

[86] Section 9BA requires stamp duty to be assessed in respect of identified dutiable property. The identity of that dutiable property is a question of fact. The appeal to the Supreme Court pursuant to s 101 Taxation (Administration) Act (NT) in the present case is an appeal against the decision of the Commissioner on the tax payers' objection, the objection relating to the extent of the dutiable property in question.

[87] In the course of his reasons the judge said:

> "[12] Section 101 of the Taxation (Administration) Act allows an appeal by an objector 'who is dissatisfied with a decision of the Commissioner'. The question in the present matter is whether there was one decision made by the Commissioner under s 9BA of the Act or whether there were two decisions resulting in rights of appeal with different characteristics. Was there one decision (as to whether there was dutiable property situated in or related to a business undertaking carried on in the Territory) where the parties are limited to the materials before the Commissioner, and then another decision (as to the proportion of the dutiable property so situated in or related to the Territory) where the parties may introduce further evidence on appeal? Alternatively was there simply one decision of the Commissioner?
>
> [13] The Commissioner submits that in a case such as this, where some of the Australian goodwill of the business may not be related to the carrying on of a business in the Territory, the Commissioner is to determine the proportion of the Australian goodwill that is dutiable within the Territory. The Commissioner forms his opinion on the basis of all the information provided to him including that provided by the appellant. It is artificial to suggest, as the appellant does, that the Commissioner must firstly determine that part of the goodwill is related to the undertaking of business in the Territory but to then refrain from identifying or forming any opinion as to what part. The fact that there is 'dutiable property' consisting of goodwill by

> definition demonstrates that there must be at least some such property situated in the Territory or related to a business undertaking carried on in the Territory. The opinion referred to in s 9BA is a single opinion which must relate to the issue of proportion, that is, whether the whole, or what part, is situated in or related to a business undertaking carried on in the Territory and therefore subject to assessment for stamp duty.
>
> [14] If the submission of the appellant be accepted, the words preceding the words 'stamp duty' in the section would be unnecessary. There would be no need for the Commissioner to form an opinion of the limited kind suggested by the appellant. Such an opinion would be nothing to the operation of the provision. The section would be more aptly worded:
>
> > 'Stamp duty shall be assessed in respect of the proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory.'
>
> The wording of s 9BA lends support to the interpretation of the section urged by the Commissioner. Section 9BA requires that stamp duty shall be assessed in respect of 'that' proportion of the dutiable property situated in or related to the Territory. This is a reference back to the opinion of the Commissioner as to the presence of the dutiable property so situated or related. If a different and separate decision was to be made as to the relevant proportion one would expect the section to provide that duty shall be assessed in respect of 'the' proportion of the dutiable property situated in or related to the Territory."

[88] With all due respect the decision in question under s 101 of the Act is the reassessment of tax consequent upon the applicant's objection, not any decision under s 9BA of the Act. One may readily agree with the learned judge that the latter section might "be more aptly worded". Unhappily that may be said of many a legislative provision. More to the point is the fact that the learned judge's construction of s 9BA requires, as I have already said, additional words to be added to or read into the section. In my opinion

the opening words of the section are merely preamble and scant reason for drastic qualification of the clear taxing words which follow.

[89] The respondent Commissioner's construction of that section, that is to say, that the taxable fact is the opinion of the Commissioner is a consequence that ought only to be arrived at by clear legislative statement, particularly given the Commissioner's inability to tax assets that lack the necessary nexus with the Territory. The provisions of s 9BA evince no such clear legislative statement.

[90] The Taxation (Administration) Act (NT) is silent as to the nature of an appeal under s 101. The function of the Commissioner and the manner in which he made the assessment challenged upon appeal indicate to me an intention on the part of the legislature to grant the taxpayer an appeal by way of rehearing before the Supreme Court.

[91] As Mason J said in *Builders' Licensing Board v Spurway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616 at 621:

> "There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch III of the Commonwealth Constitution. The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues arise may be non–justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be

> grounds for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo."

[92] In my opinion the applicant's appeal to the Supreme Court under s 101 Taxation (Administration) Act (NT) is an appeal by way of hearing *de novo* at which the parties are free to adduce evidence relevant to establishing the taxable fact, in this instance, the proportion of dutiable property of the applicant situate in the Territory or related to the business undertaking of the applicant carried on in the Territory.

[93] I would grant leave to appeal, allow the appeal, set aside the orders of the judge below and direct that the Supreme Court appeal pursuant to s 101 Taxation (Administration) Act (NT) proceed by way of hearing *de novo*.

Mildren J:

[94] This is an application for leave to appeal from a decision of a single judge that on the hearing of an appeal to the Supreme Court pursuant to s 101 of the Taxation (Administration) Act (NT) the matter will proceed on the basis of the materials before the Commissioner and that fresh evidence will not be received.

[95] Although the respondent's written submissions were to the contrary, on the hearing of the application no point was taken that this Court should first determine whether or not to grant leave. Quite properly, counsel for the respondent permitted the matter to proceed as if leave had been granted and in effect we heard the leave application and the appeal together.

Background Facts

[96] By an asset sale agreement dated 31 August 1999, the applicant acquired the assets of the Britz Australia Rentals Pty Ltd and related group companies' rental business.

[97] The applicant's case is based upon the factual matters which are set out in the paragraphs hereinafter following. I note that the respondent does not necessarily accept all of these factual matters, but for the purposes of this appeal I consider it appropriate to set out the background to the dispute by reference to the applicant's case.

[98] The vendors of the asset sales were international companies with extensive international marketing and goodwill located in a number of countries, particularly in Europe. Approximately 85 per cent of all customers of the rental business for the period 1996-1998 were overseas residents and these customers made up 90 per cent of the Australian business revenue. Of the pre-booked business, approximately 30-40 per cent was derived from two German wholesale companies who had a direct link to the applicant's computerised reservations system.

[99] The businesses were carried on from offices in Adelaide, Alice Springs, Brisbane, Broome, Cairns, Darwin, Hobart, Melbourne, Perth and Sydney. The head office and call centre operated from Victoria.

[100] The total consideration paid for the assets of the Australian business was $102,973,606 and of this sum $46,469,744 was attributed to goodwill.

[101] Under s 4(1) of the Taxation (Administration) Act, "dutiable property" is defined to mean under par (b) "the goodwill of a business undertaking carried on or to be carried on in the Territory, or in the Territory and elsewhere, including any restraint of trade arrangement which, in the opinion of the Commissioner, enhances or is likely to enhance the value of the business;…". Pursuant to the Stamp Duty Act 1978, stamp duty is payable at the rate of 5.4 per cent on the dutiable property. Section 9BA of the Taxation (Administration) Act provided at the relevant time that:

> Where, in the opinion of the Commissioner, dutiable property is wholly or partly situated in the Territory or is wholly or partly related to a business undertaking carried on in the Territory, stamp duty shall be assessed in respect of that proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory.

[102] By a letter dated 31 January 2000 the applicant's solicitors forwarded to the respondent a report to determine the situs of the goodwill in the various states and territories of Australia and outside Australia. That report apportioned goodwill on the basis of where the booking was made rather than where the vehicle was collected. Accordingly goodwill in the Northern Territory was calculated to be $2.98m (suggesting stamp duty of approximately $160,920).

[103] On 11 May 2000, the respondent issued a notice of assessment of stamp duty assessing goodwill in the Northern Territory to be $14.07m and the duty on the agreement to be $775,417.60. The respondent apportioned goodwill on

the basis of where the customer collected the vehicle rather than where the booking was made.

[104] The applicant objected to the respondent's assessment but the respondent declined to consider the objection. The applicant appealed against that decision to the Supreme Court pursuant to s 101 of the Taxation (Administration) Act and sought, in the alternative, orders requiring the respondent to consider the applicant's request. On further appeal to this Court, on 30 October 2002 this Court allowed the applicant's cross-appeal and required the respondent to exercise the discretion conferred upon him by s 97 of the Taxation (Administration) Act by either amending or refusing to amend the assessment.

[105] The respondent accordingly reconsidered the objection. On 14 January 2003 the respondent obtained a report from the Office of State Revenue (WA) in relation to the valuation of goodwill. This report is referred to as the "McKessar Tieleman Report".

[106] On 19 September 2003 the respondent exercised his discretion and amended the assessment down by an amount of $2,042 to the sum of $773,375.50. On that occasion it is alleged that the applicant was informed for the first time that the respondent had in part relied upon the McKessar Tieleman Report.

[107] In May 2004 the applicant obtained a report from PriceWaterhouseCoopers criticising the McKessar Tieleman Report, but the Commissioner has

declined to amend the assessment. The respondent has indicated that he will not amend the assessment because he finds that report unpersuasive.

[108] The applicant contends that the value of the property in the Northern Territory taken into account by the respondent in the assessment as now amended is excessive. The respondent maintains that the value taken into account by him is correct.

[109] On 13 November 2003 Bailey J made consent orders which included a requirement that the parties file an agreed statement of facts, or, failing agreement, affidavits, as to the relevant facts within an identified period. An order was also made that the applicant file a statement of expert evidence upon which it proposed to rely by a certain date. On 15 January 2004 I made a further consent order excusing the parties from compliance with those obligations.

[110] The preliminary issue which was to be resolved before another judge of the Court and which is the subject of the present application for leave to appeal relates to the nature of the hearing and in particular the evidence if any that is to be received in an appeal of this nature. It was the contention of the Commissioner that the materials to be considered on the hearing were limited to those materials which were before the respondent at the time the respondent made his decision and that the Court should not receive any further evidence. The applicant however contended that additional material may be received and relied upon. In particular the applicant contended that

the PriceWaterhouseCoopers Report should be received into evidence. The learned judge held that under s 9BA of the Taxation (Administration) Act the proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory was the subject of the Commissioner's opinion, and that as such, following a line of authorities established by the judgment of Martin CJ in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1994) 117 FLR 485, the appeal was limited to the establishment of error on the part of the Commissioner and that no further evidence was able to be admitted.

[111] The applicant's principal contentions are that his Honour misconstrued s 9BA of the Taxation (Administration) Act in holding that that section is solely concerned with the opinion of the Commissioner in relation to the dutiable proportion of goodwill in the Northern Territory and accordingly the applicant submits that the nature of the appeal should be held to be an appeal de novo. Alternatively, the applicant submitted that even if his Honour correctly construed s 9BA of the Taxation (Administration) Act, once error on the part of the Commissioner had been established on appeal the parties were entitled to put further evidence before his Honour, and to the extent that *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (supra), and other cases from this jurisdiction which follow it say otherwise, those decisions are wrong and should be overruled.

[112] The argument of the appellant is that the taxable part is the proportion of the dutiable property situated in the Northern Territory or related to the business

undertaking carried on in the Northern Territory. It is submitted that that taxable part is merely triggered by the opinion of the Commissioner as to whether or not property is in the Northern Territory or is wholly or partly related to a business undertaking carried on in the Northern Territory. In the applicant's submission therefore, the only part of the operation of s 9BA of the Taxation (Administration) Act which is dependent on the respondent's opinion is the conclusion by the respondent that a business is carried on both inside and outside of the Northern Territory or that there is dutiable property wholly or partly situated in the Northern Territory. Once that opinion is formed, so the argument went, the balance of the section prescribes the consequences of that opinion being formed.

[113] The argument of the respondent which was accepted by the learned judge depended upon a number of considerations. First it was put that the "opinion of the Commissioner" referred to in s 9BA of the Taxation (Administration) Act is not to be confined in the manner suggested by the applicants. It was submitted that the opinion extended to and included the identification of "that portion of the dutiable property situated in the Northern Territory or related to the business undertaking carried on in the Northern Territory". The respondent's submission went so far as to require the conclusion that it was the Commissioner's opinion not only that there was property partly situated in the Northern Territory or partly relating to a business undertaking carried on in the Northern Territory but also as to the proportion so situated or related.

[114] The learned Judge held that it is artificial to suggest, as the applicant does, that the Commissioner must first determine that part of the goodwill is related to the undertaking of business in the Northern Territory but to then refrain from identifying or forming any opinion as to what part. The learned Judge held that the fact that there is "dutiable property" consisting of goodwill, by definition demonstrates that there must be at least some such property situated in the Northern Territory or related to a business undertaking carried on in the Northern Territory. In his opinion, the opinion referred to in s 9BA is a single opinion which must relate to the issue of proportion, that is, whether the whole, or what part, is situated in or related to a business undertaking carried in the Northern Territory and therefore subject to assessment for stamp duty.

[115] In support of that opinion, his Honour noted that if the applicant's submission were to be accepted the words preceding the words "stamp duty" in the section would be unnecessary. There would be no need for the Commissioner to form an opinion of the limited kind suggested by the appellant and such an opinion would add nothing to the operation of the provision. The section would be more aptly worded:

> Stamp duty shall be assessed in respect of the proportion of the dutiable property situated in the Northern Territory or related to the business undertaking carried on in the Northern Territory.

[116] In arriving at this conclusion his Honour considered that the wording of s 9BA lent support to the interpretation of the section urged by the

Commissioner. Section 9BA requires that stamp duty shall be assessed in respect of "that" proportion of the dutiable property situated in or related to the business undertaking carried on in the Northern Territory, which is a reference back to the opinion of the Commissioner as to the presence of the dutiable property so situated or related. His Honour held that if a different and separate decision is to be made as to the relevant proportion one would expect the section to provide that duty shall be assessed in respect of "the" proportion of the dutiable property situated in or related to the Northern Territory.

[117] Further his Honour held that this view of the effect of the legislation is supported by the terms of s 9BB of the Act which commenced after the date of the agreement which is the subject of these proceedings. Section 9BB provides a formula for the apportioning of dutiable property in circumstances where a business is carried on in the Northern Territory and elsewhere. Section 9BB(4) permits the Commissioner to "determine the proportion of dutiable property on another basis if satisfied that the other basis would be more appropriate in the particular circumstances". His Honour held that this reflected an acknowledgment that the Commissioner has a discretion under s 9BB. His Honour recognised that the use of the amendments to Acts to assist in the interpretation of pre-amendment provisions is an exercise calling for circumspection and great care: see *Hepples v The Commissioner for Taxation of the Commonwealth of Australia* (1991-92) 173 CLR 492 at 539; *Grain Elevators Board (Vic) v President,*

Councillors and Ratepayers of the Shire of Dunmunkle (1946) 73 CLR 70 at 86; *Commissioner for State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 76 ALJR at 1534; and *Trust Company of Australia Ltd v Commissioner for State Revenue* [2003] HCA 23. His Honour held however that in the circumstances of the present case there would be an inconsistency between the operation of s 9BA as it is now and has been throughout, and the new s 9BB if the interpretation urged by the applicant were to be adopted.

[118] Before considering the matter further it is necessary to have regard to certain provisions in the Taxation (Administration) Act.

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

> 100. Objections to Assessments
>
> (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.
>
> (2) An objector shall, in an objection to an assessment, state fully and in detail the grounds on which he relies.
>
> (3) The Commissioner shall consider the objection, and may either disallow it, or allow it, either wholly or in part.
>
> (4) The Commissioner shall cause notice in writing of his decision on an objection to be served on the objector.
>
> (5) (Omitted)

(6) The objector has no further right of objection in relation to an amended assessment than he would have had if the amendment had not been made, except to the extent to which a fresh liability is imposed upon him or an existing liability is increased by reason of the amendment.

(7) 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.

101. Appeal to Supreme Court

(1) An objector who is dissatisfied with a decision of the Commissioner on his objection may, 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.

(2) On appeal –

(a) The appeal shall be limited to the grounds stated in the objection; and

(b) the burden of proving that any assessment objected to is excessive lies on the objector.

(3) If a person's liability of assessment has been reduced on an objection, the reduced liability or assessment shall be the liability or assessment appealed against.

102. (Not relevant)

103. (Repealed)

104. Adjustments of duty or tax after appeal

(1) If a matter is remitted to the Commissioner by the Supreme Court for reassessment, the Commissioner shall forthwith reassess the matter.

(2) If an assessment is varied on an appeal or by the Commissioner as the result of an appeal, the Commissioner shall –

(a) cause all necessary adjustments to be made; and

(b) cause notice in writing of the varied assessment to be given to the appellant.

(3) If an assessment is varied on an appeal or by the Commissioner as the result of an appeal –

(a) an amount of duty or tax not paid or underpaid is recoverable from the person liable under the assessment as varied to pay the duty or tax; and

(b) an amount of duty or tax overpaid shall be refunded.

105. Supreme Court Rules

(1) The Chief Judge may make rules prescribing the practice and procedure applicable to appeals under this Part and, pending the making of rules, a Judge of the Supreme Court may give such directions as to the practice and procedure applicable to the hearing of an appeal as he sees fit.

[120] So far as s 105 is concerned, there is now no such person as the "Chief Judge". There have never been any Rules made under s 105. Appeals to the Supreme Court are governed by order 83 of the Supreme Court Rules.

[121] Rule 83.18 provides as follows:

83.18 Tribunal to produce records

(1) On being served with, or on the filing of, a notice of appeal, the tribunal below shall, as soon as practicable, produce to the Registrar its records relevant to the appeal.

(2) Without limiting the generality of sub rule (1), the records relevant to an appeal shall include –

(a) the original of the transcript of evidence;

(b) the exhibits; and

(c) the reasons for the decision.

[122] Rule 83.20 provides:

83.20 Procedure at hearing

(1) Subject to Rule 83.13(3), the appellant shall be the party who begins at the hearing.

(2) Where an appeal is by way of rehearing, either party may call new evidence at the hearing.

[123] It is apparent from s 104 of the Act that the Supreme Court may remit the matter to the Commissioner for reassessment or may vary the assessment on appeal.

[124] The other observation that I would make is that there is no statutory obligation on the Commissioner to provide reasons for rejecting an objection although, in fact, it is the practice of the Commissioner to provide such reasons.

[125] Clearly the Commissioner is exercising an administrative function and not a judicial one. The procedure before the Commissioner, as set out by the Act, contemplates that the Commissioner will ordinarily act on the material furnished by the taxpayer although there is nothing to prevent the Commissioner from taking into account any other information he sees fit, subject, of course, to the rules of natural justice. In addition the Commissioner has statutory powers under s 86(2) to require any person capable of giving him relevant information to furnish him with such information in writing, to produce to him any relevant documents or to attend before him to answer questions and for that latter purpose the Commissioner may take evidence on oath or affirmation: see s 86(2) and s 86(3).

[126] In *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd and Anor* (1976) 135 CLR 616 at 619-620 Mason J said:

> An appeal is not a common law proceeding. It is a remedy given by statute (*Victorian Stevedoring and General Contracting Co Pty Ltd and Meaks v Dignan*; *Commissioner for Railways (NSW) v Cavanough*). Upon an appeal stricto sensu the question considered is whether the judgment complained of was right when given (*Ponnamma v Arumogam*), that is whether the order appealed from was right on the material which the lower court had before it.
>
> An appeal stricto sensu is to be distinguished from an appeal by way of rehearing… this appeal by way of rehearing involves rehearing of the cause at the date of the appeal, that is "by trial over again on the evidence used in the court below; but there is special power to receive further evidence" (in *Re Chennell*; *Jones v Chennell*). On such an appeal the rights of the parties must be determined by reference to the circumstances as they then exist and by reference to the law as it then exists; the appellate court may give such judgment

as ought to be given if the case at that time came before the court of first instance. But this appeal by way of rehearing did not call for a fresh hearing or hearing de novo; the court does not hear the witnesses again. See generally the *Victorian Stevedoring Case; DaCosta v Cockburn Salvage and Trading Pty Ltd*.

[127] At page 621 Mason J said:

> Where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect. Despite some suggestion and argument to the contrary, I do not read *Ex parte Australian Sporting Club Ltd; Re Dash* as enunciating such an absolute rule. There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Ch.III of the Commonwealth Constitution. The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be grounds for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.
>
> On the other hand the character of the function undertaken by the administrative authority in arriving at its decision may differ markedly from the instances already supposed. The authority may be required to determine justiciable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross examination, to keep a transcript record, to apply the rules of evidence, and to give reasons for its determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance.
>
> But in the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive

> or quasi judicial function, classifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent, a question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing.

[128] In the present case there is not even a Delphic utterance by the legislature as to the nature of the appeal.

[129] There is however guidance in the authorities, particularly those authorities dealing with appeals from a taxation commissioner where the statute provides for the commissioner to reach an opinion or for the commissioner to be satisfied. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, s 80(5) of the Income Tax Assessment Act 1936 as amended provided that no loss incurred by a private company in any year prior to the date of income shall be an allowable deduction unless the company establishes to the satisfaction of the Commissioner that, on the last day of the year of income shares of the company carrying not less than 25 per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 25 per cent of the voting power on the last day of the year in which the loss was incurred. Section 187(b) provided for an appeal to the High Court from a decision of the Commissioner of Taxation upon an objection made by a taxpayer. It was further provided, in s 190, that upon such an appeal a taxpayer shall be limited to the grounds stated in his objection, and the burden of proving the assessment excessive would lie on the taxpayer.

[130] At page 360, Dixon J said:

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

[131] In *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1974-75) 132 CLR 535, Gibbs J said at 567-568:

> The questions that then arise are whether the conclusion of the Commissioner is open to review and, if so, whether it should be held that he should reach the requisite satisfaction. The grounds on which the conclusion by the Commissioner that he is not satisfied may be examined by a court of appeal are those stated in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*; see also *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd*. A board of review may have wider powers – see per Owen J in *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd*. It seems that a court in deciding whether some ground has appeared to justify a review of the Commissioner's conclusion that he is not satisfied should consider the question on the basis of the material which was before the Commissioner even though further material is before the court – *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd*. However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the grounds that it was based on

> error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court.

[132] Stephen J said at page 578-579:

> Consideration is, in the first instance, to be confined to material which was before the Commissioner when he made his assessment, as is made plain by the judgments in this latter case; but once it is established that the Commissioner has, in this case through error of law, failed properly to perform his statutory function the court will then determine what state of mind concerning the matters in s 80A(1) and s 80C(1) will amount to a discharge of that function and will do so having regard to the facts then before it, viewed in the light of what the court regards as the true effect of the legislation.

[133] In *John French Pty Ltd v Commissioner for Payroll Tax* (1984) 1 Qd.R 125 the Full Court was considering an appeal involving the exercise of a discretion under s 16H of the Pay-roll Tax Act 1971-1980 (Qld). In that case McPherson J, with whom Campbell CJ agreed, held that once error had been demonstrated it then became appropriate for evidence to be adduced.

[134] In *Feez Ruthning v Commissioner of Pay-roll Tax* (BC200104859); [2001] QSC 303 De Jersey CJ considered an appeal against the disallowance of the appellant's objections to reassessments of payroll tax. In that case his Honour held that the appellant should not be confined to the materials before the Commissioner but may adduce evidence of any circumstances relevant to the issue arising out of the Act, subject to the appellant's being

limited to the grounds of objection. His Honour distinguished the decision of Martin CJ in *Crusher Holdings v The Commissioner of Taxes* (supra) and the decisions in *Avon Downs* and *Kolotex Hosiery* because "the presently relevant taxing provision did not vest in the Commissioner, as if *persona designata*, an obligation to reach some particular degree of satisfaction, or to exercise some particular discretion" : see par [18].

[135] All of these authorities, with the exception of *Feez Ruthning v The Commissioner for Pay-roll Tax* as well as others were carefully considered by Martin CJ in *Crusher Holdings v The Commissioner of Taxes*.

[136] I consider that the nature of the appeal in this case is to be determined by whether or not s 9BA of the Taxation (Administration) Act calls for the Commissioner to form an opinion as to what proportion of the dutiable property is situated in the Territory or related to the business undertaking carried on in the Territory. On this issue, I agree with the reasons advanced by Riley J in the court below, that on the true construction of s 9BA, that is precisely the Commissioner's function. As Riley J pointed out, if the appellant's contention were correct, the words "in the opinion of the Commissioner" in s 9BA would be otiose. It is a well established principle of construction that courts are not at liberty to consider any word or sentence in a statute as superfluous or insignificant unless it is impossible to give a full and accurate meaning to every word: see Pearce& Geddes, *Statutory Interpretation in Australia*, 5th ed, para 2.22 and cases therein cited; *Brisbane City Council v Attorney-General (Qld)* (1905) 5 CLR 695 at

720; *Secretary, Department of Social Security v Rurak* (1990) 99 ALR 127 at 28. Therefore, I consider that on the basis of the authorities cited in paragraphs [36] to [41] above the appeal must be determined in the first instance on the basis of the material which was before the Commissioner when he made his assessment. However, I consider that once error is shown to have occurred, for the reasons advanced in *Kolotex Hosiery* by Gibbs CJ and Stephen J, the Court is entitled to take into account any further material or receive any further evidence necessary to decide the appeal. In this respect I disagree with the decision of Martin CJ in *Crusher Holdings v The Commissioner of Taxes* and in my opinion, to that limited extent that decision should be overruled.

[137] There is one other matter which needs to be addressed and that is the question of whether or not the appellant can maintain in the appeal from the Commissioner as a ground of appeal that the Commissioner failed to exercise his powers in accordance with the rules of natural justice. I see no reason why such a ground may not be exercised when there is a right of appeal to this Court. Counsel for the Commissioner did not contend otherwise. Clearly the Commissioner is bound by the rules of natural justice. The applicant could seek to have the Commissioner's decision quashed by an application to this Court for an order in the nature of certiorari by way of originating motion. That would be an unnecessary duplication of the proceedings. The only apparent reason why such a ground may not be raised is that s 101(2) confines an appeal to the grounds stated in the objection.

However I consider that s 101(2) is directed towards ensuring that the taxpayer puts all of the material that he seeks to rely upon in the grounds for his objection to the Commissioner in the first place. That provision can obviously have no operation where the Commissioner fails to carry out his functions for reasons which may very well become apparent some time after the Commissioner has dealt with the objection. When such a ground is being put forward it may be appropriate to regard the ground as interrelated with an argument that the Commissioner failed to have regard to relevant considerations: see for instance *May v The Deputy Commissioner of Taxation* (1999) 163 ALR 357 at 364 par (20).

[138] In such a case the evidence is necessarily admissible in order to show error on the part of the Commissioner.

[139] In some cases it may be that the failure to afford natural justice is demonstrative of the error which is already the subject of one of the grounds stated in the objection. In other cases it may not be in which case there could be a problem for the objector because of the provisions of s 101(2)(a) which require that on an appeal the materials should be limited to the grounds stated in the objection. That provision was modelled on s 190(a) of the Income Tax Assessment Act 1936 (Cth) prior to its amendment by Act No 48 of 1986 when the words: "…unless the Tribunal or Court otherwise orders" were added. The history of that amendment is set out in the judgment of the Federal Court of Australia in *Lighthouse Philatelics Pty Ltd v Federal Commissioner of Taxation* (1991) 103 ALR 156 at 160-162. The

purpose of the 1986 amendment was to overcome injustice. The observations of the Full Federal Court to which I have referred are persuasive reasons why the Northern Territory Legislature should make a similar amendment to s 101(2)(a) of the Taxation (Administration) Act. Be that as it may, I see no reason why this court should now take an unduly restricted view of the role that s 101(b) has to play.

[140] Moreover, s 101(b) confirms that there is a burden on the taxpayer of proving that any assessment objected to is excessive. As has been pointed out by the High Court, notwithstanding that error is shown it is inappropriate for a court determining an appeal to make an order altering the tax liability assessed unless the court is satisfied that the amount to which it proposed to alter the assessment represents the true tax liability of the taxpayer. As Brennan J said in *Federal Commissioner of Taxation v Dalco* (1989-1990) 168 CLR 614 at 621:

> Although the grounds of objection limit the grounds of appeal, the ultimate question for the court hearing the appeal is not whether the grounds have been made out but whether the amount assessed as taxable income is wrong. The burden which rests on a taxpayer is to prove that the assessment is excessive and that burden is not necessarily discharged by showing an error by the Commissioner in forming a judgement as to the amount of the assessment.

[141] Those observations were approved by a majority of the High Court in *Federal Commissioner for Taxation v ANZ Savings Bank Limited* (1994) 181 CLR 466 at 478-479. Thus, in an appeal under s 101, mere proof of error by the Commissioner does not necessarily lead to the appeal being allowed.

[142] I would grant leave to appeal and allow the appeal. In lieu of the order made by Riley J, I would make the following orders:

1. The appellant may adduce fresh evidence in order to show that the Commissioner failed to accord natural justice to the appellant.

2. Subject to 1. above it is the material before the Commissioner at the time of forming his opinion as to the proportion of the dutiable property situated in the Territory or related to the business undertaking carried on in the Territory which is relevantly taken into account in determining whether that opinion was formed, or that state of mind reached, in accordance with law.

3. That if the Court determines that an opinion formed by or other state of mind of the Commissioner of Taxes is vitiated by legal error the Court should then proceed in the matter having regard to all the evidence before it, which may include material not before the Commissioner at the time of forming that opinion or attaining that state of mind.

4. The respondent should pay the appellant's costs of the appeal to be taxed.
