IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M88 of 2016 and No. M89 of 2016

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant

and

ACN 005 057 349 PTY LTD
Respondent

APPELLANT'S REPLY

I. CERTIFICATION AS TO INTERNET PUBLICATION

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

II. SUBMISSIONS IN REPLY

Section 90AA

2. In the mandamus claim, the respondent seeks to avoid the operation of s 90AA on the basis that the making of amended assessments would mean that its demand for a refund is not in respect of tax paid under or purportedly under the Act.[1] In the restitution claim, the respondent contends s 90AA does not apply because the tax: was paid under mistake; was therefore not tax paid or purportedly paid; and is refundable even without an amended assessment.[2] This was the approach taken by the Court of Appeal.[3]

3. It is convenient to start with the terms of s 90AA. Section 90AA does a number of things, it: obliges the Commissioner to refund or apply an amount that has been overpaid by the taxpayer (s 90AA(6)); appropriates the amount necessary to make the refund from the Consolidated Fund (s 90AA(7)); conditions the circumstances in which the obligation on the part of the Commissioner arises in that there must be a claim to be entitled to refund or recover tax paid or purportedly paid under the Act and the claim must be made in the prescribed form and within 3 years after the payment was made (s 90AA(6)(a) by reference to 90AA(2)); provides that, in the event the Commissioner fails to refund or apply the amount of overpayment within 3 months, the taxpayer may bring proceedings for the recovery of the amount (s 90AA(3)); and provides that, apart from the proceeding authorised by s 90AA(3), proceedings for the refund or recovery of tax paid or purportedly paid must not be brought (s 90AA(1) and (8)). Section 90AA is broadly expressed to cover both tax paid and tax purportedly paid under the Act. It

1 Respondent's submissions at [39].
2 Respondent's submissions at [84].
3 Appeal Reasons at [212] **[AB462]**.

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also gives a broad definition of "proceedings", which includes a claim for mandamus (s 90AA(8)).

4. The Court of Appeal held that s 90AA did not apply because "the operative mistake" deprived the Commissioner of the authority to take and retain "the excess amount" and that this amount was not tax paid under or purportedly under the Act. The Court of Appeal appears to have concluded that the payments of tax changed their character once the Commissioner became aware that the tax was excessive or were never "tax". That approach should be rejected because there was no attack on the validity of the assessments and it was not in dispute that the amounts were paid in answer to each assessment. On the making of the assessment the amount assessed was payable as tax and was a debt due to Her Majesty. Even if excessive, an assessment issued must be paid[4] and the amount of the excess demanded is still "tax"[5] (or in the language of s 90AA, "tax paid under, or purportedly paid under" the Act). The legal effect of an assessment does not change according to the state of mind of the Commissioner after he has issued the assessment. Nor can payment in answer to an assessment constitute a mistake for the purposes of restitution.[6]

5. Similarly, the making of amended assessments restating the taxpayer's liability in a lower amount would not, as the respondent now contends, result in the excess amounts paid and sought to be recovered somehow *losing* their character as tax paid under the original assessments. Amended assessments do not operate retrospectively; s 90AA focuses on the character of the payment and necessarily addresses itself to when it was made. At the time of payment, the amounts were paid as tax in answer to the liability that the assessment imposed. The respondent seeks to receive a refund or to recover tax paid and in doing so falls intractably within the language of s 90AA.

6. The predicate for the operation of s 90AA is that there has been tax paid or purportedly paid under the Act but there has been an overpayment. For so long as there is a valid assessment and the amount paid corresponds to the amount assessed there can be no overpayment and no obligation to refund. Necessarily, for there to be a refund, there must have been an amount paid in excess of the amount of the assessment subsisting at the time the refund is sought. If, as the respondent would have it, once amended assessments are issued such overpayments are not "tax paid or purportedly paid", s 90AA would never apply to refunds. It is a corollary of the restriction on recovery that, when the time period expires, the Commissioner will lawfully retain the amount of overpayment and may rely on the limitation period to resist recovery. A limitation period does not render the tax incontestable.

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4 See ss 38(1) and 39 of the Act. On the nature of an assessment as the expression of the Commissioner's ascertainment of the amount of tax chargeable see *Ex parte Hooper* (1926) 37 CLR 368 at 373 (Isaacs J) and *Taylor v DCT* (1987) 616 FCR 212 at 218-219 (Woodward and Nortrhrop JJ).

5 Cf Appeal Reasons [197] **[AB457-8]**, [212] **[AB462]** where the Court of Appeal held that the existence of a tax debt depends on the amount demanded by the assessment being correct.

6 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376, 379-380, 392, 405. Note also *Lamesa Holding BV v Commissioner or Taxation* [1999] FCA 612 at [104].

7. To deny the application of s 90AA on the basis that any amount that exceeds liability is not tax paid or purportedly paid under the Act would leave s 90AA with no work to do. Put another way, there is nothing unique in overpayments established by the issue of amended assessments, as compared with other payments (eg which arise from administrative error on the part of the taxpayer) nor, given the language of s 90AA, can it be limited to such accounting or administrative errors. For a start, such payments would not be payments purporting to be tax and there would be no occasion for the exclusion in s 90AA(5) in relation to invalid provisions.

8. The respondent's argument that s 90AA does not apply also proceeds on the assumption that amended assessments have been issued (and so, the respondent would have it, the amounts paid in excess of the amended assessments are not "tax paid" etc). However, the respondent's approach overlooks that its very application for mandamus[7] sought to compel the issue of amended assessments and obtain a refund of amounts paid under the original assessments which were, when paid, payments of the amounts assessed as tax under the Act.

Section 19

9. On the Court of Appeal's construction of s 19, the only criterion for the appellant to come under a duty to amend an assessment is that he knows the original assessment was incorrect.[8] On that construction, it matters not how the error came to be known, or even whether the taxpayer also knew of the error (and knew within sufficient time to lodge an objection). If, as the Court of Appeal held, knowledge on the part of the appellant is the sole criterion, the duty to amend under s 19 will exist and benefit taxpayers who have sat on their rights to object just as much as taxpayers who were not aware of the error. As such, knowledge presents an unstable criterion for the imposition of a duty and also exposes the manner in which characterising s 19 as a means to obtain refunds outside of the legislated time limits serves to undermine the statutory regime, which supports a legislated policy of finality in taxation affairs.

10. The respondent seeks to support the imposition of a duty to amend on the basis that the error was "not discoverable and was otherwise incontestable by the Respondent".[9] On the Court of Appeal's construction, knowledge – not "discoverability" – of the error was the sole criterion for the imposition of a duty to amend. In any event, the respondent overstates the position so far as the discoverability of the error was concerned. The Court of Appeal's finding went no higher than that the error was not apparent on the face of the assessments and, on that basis, attracted the deferral of the limitations period in s 27 of the *Limitation of Actions Act 1958* (Vic).[10] (Likewise, the respondent

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7 Amended Originating Motion in proceeding S CI 2013 1395 at para A **[AB4]** and 22 **[AB7]**.

8 Appeal Reasons at [139] **[AB423]**, where the Court of Appeal concluded that the duty was enlivened *"once the Commissioner has knowledge that an assessment is inaccurate"*. See also the Respondent's submissions at [48].

9 Respondent's submissions at [52].

10 Appeal Reasons [238] **[AB472]**; cf the trial judge's detailed analysis leading to a finding that, in light of the paucity of the evidence, the respondent had not discharged its onus of establishing that the error could

mischaracterises the facts in suggesting that[11] the appellant "caused" the error or delayed in revealing it: there was no evidence to that effect, nor were there any findings below to that effect.)

11. By fixing on the concept of an amended assessment establishing that the appellant has received an amount he is not authorised to "retain"[12], the respondent fastens on an irrelevant construct.[13] When an assessment is amended and states the taxpayer's liability in an amount that is lower[14] than the amount already paid on the original assessment, the rights of the taxpayer and the obligations of the Commissioner are not determined by that fact alone, but must be found in the Act (by express or implied provision) or the common law (restitution). To say that an amended assessment creates new rights and obligations simply begs the question what those rights and obligations are.[15]

12. Where an assessment is altered following a successful objection, case stated or appeal, the Act specifically provides for "amounts paid in excess" to be refunded (s 38(2)). Where an assessment is amended downwards pursuant to s 19, the Act is not silent, but permits a taxpayer to seek a refund in accordance with s 90AA to reclaim the overpayment. Contrary to the respondent's submissions, ss 19 and 90AA form part of a cohesive legislative regime and are not "directed to different issues and subject matters"[16]. In short, there is no legislative gap by reference to which a power to refund may be implied into s 19 or a strained construction be put on s 4 to supply a power to refund which is otherwise wanting.[17] Moreover, in circumstances where statutory authorisation is required to appropriate from the Consolidated Fund in order to make refunds[18], it cannot credibly be suggested[19] that Parliament merely assumed the appellant would take a "high position" and make refunds absent statutory authorisation. Having sought to avoid the strictures on the s 90AA refund powers, the respondent cannot explain away the absence of a refund power to support amended assessments

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not reasonably have been discovered until it was notified of the error in 2012: Trial Reasons [145]-[151] **[AB310]-[AB312]**. For an example of an assessment describing the two land holdings, see **[AB64]**.

11 Respondent's submissions at [52]. There was no evidence, for example, that the error was caused by the appellant and not the Stonnington Council's valuer, or that the appellant knew of the error but failed to reveal it.

12 Respondent's submissions eg at [14], [35], [41], [48].

13 *Commissioner of State Revenue (Vic) v Royal Insurance Ltd* (1994) 182 CLR 51 does not support the respondent's contention that the appellant had no "authority to retain" the overpayments: eg respondent's submissions at [41], fn 89. As set out in the appellant's principal submissions (at [45]ff), both Mason CJ and Brennan J identified the need to identify a positive source of an obligation to make a payment and did so in construing and applying an express refund provision, and not a power to amend an assessment.

14 Contrary to the respondent's assertion (respondent's submissions at [30]) the appellant does not contend that s 19 is confined to amendments which increase a taxpayer's liability.

15 Respondent's submissions at [6] and [14].

16 Respondent's submissions at [39]. Note that, when the Act was first enacted, it included s 19 in the same form, and also included a refund regime in s 90 (the predecessor to the present regime) permitting refund applications within three years of overpayment or three months of the decision on an objection.

17 Cf Respondent's submissions at [4] and [45]-[46].

18 Amounts collected for land tax are paid into the Consolidated Fund (s 6 of the Act). Legislative authority is required to appropriate from the Consolidated Fund: s 92 of the *Constitution Act 1975* (Vic). Parliament made such authorisation by s 38(2) and s 90AA but not elsewhere in the Act.

19 As the Respondent submits at [45].

issued under s 19 on the basis that such a power is unnecessary. Nor can the respondent fill the vacuum it has artificially created by suggesting that s 19 contains an implied power or that the s 4 general administration power serves the purpose.

13. Contrary to the respondent's submission,[20] the decision in *The Trustees, Executors and Agency Company Ltd v Commissioner of Land Tax*[21] does not assist in the analysis. All that case establishes is that the Commissioner of Land Tax's power to amend an assessment under s 20 of the *Land Tax Assessment Act 1910-1912* to increase the taxpayer's liability was not precluded by previous recourse to ss 59 and 60 of that Act.[22] *Trustees* also demonstrated that the s 20 power to amend assessments operated *with* the ss 59 and 60 refund regime, to which the taxpayer in that case had recourse in obtaining a refund of an amount determined by previous amendments to have been an overpayment. Moreover, the Chief Justice considered that refunds following amended assessments were subject to application of the time limits stated in s 60.[23] In any event, ss 59 and 60 are in different terms to s 90AA.

14. Finally, the circumstances in which refunds were made under the *Tax Administration Act 1997* (Vic) (**TAA**) do not support the respondent's submission that s 90AA is irrelevant to the 1990-2002 assessments.[24] Not only does s 90AA anticipate that an application will be made for a refund (which may be acceded to without litigation if lodged within time[25]) but, so far as the 2006 and 2007 assessments were concerned, the refunds made by the appellant for 2006 and 2007 were made under the TAA and did not involve any implied refund power.[26]

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20 Cf respondent's submissions at [40].

21 (1915) 20 CLR 21 (***Trustees***).

22 See the terms in which Griffiths CJ framed the issue in terms of whether the s 20 power was limited by ss 59 and 60 in respect of which his Honour concluded that the s 20 power was not '*cut down or qualified by secs. 59 and 60*': *Trustees* at 32.9 - 33.2 and 35.5 (Griffiths CJ). See also at 44.1 (Higgins J).

23 *Trustees at* 35.9-36.1 (Griffiths CJ). Contra the respondent's submissions at [40].

24 Respondent's submissions at [23] and [47].

25 So the making of refunds in respect of the later years without litigation is of no significance.

26 The time for objection was extended under s 100 of the TAA, and the refunds and interest were paid under ss 115 and 116 of that Act.