



## HIGH COURT OF AUSTRALIA

Public Information Officer

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DEPUTY COMMISSIONER OF TAXATION v BROADBEACH PROPERTIES PTY LTD  
DEPUTY COMMISSIONER OF TAXATION v M.A. HOWARD RACING PTY LTD  
DEPUTY COMMISSIONER OF TAXATION v NEUTRAL BAY PTY LTD

The High Court of Australia today upheld statutory demands for tax debts against three related property development companies, holding that pending challenges to their tax assessments were not a proper basis to set aside the demands.

The three corporations, controlled by Mark Howard, were involved in construction and sale of residential apartments. Howard Racing and Neutral Bay failed to pay \$6,389,785.75 and \$8,433,350.79 respectively for goods and services tax (GST), interest and penalties. On 24 April 2006 a Deputy Tax Commissioner issued them with statutory demands for the debts pursuant to section 459E of the *Corporations Act*. A similar demand was issued to Broadbeach Properties on 17 May 2006 for \$1,679,920.24, its liability under a default assessment of income tax for 2003-04 plus interest for late payment. The tax liability of Howard Racing and Neutral Bay included GST for sales of apartments between the companies. Only new homes never before sold attracted GST. Ordinarily a supply within a group registered for GST did not attract GST. Neutral Bay and Neutral Bay Sales were registered as a group for GST purposes and Howard Racing and Broadbeach were registered as another. The representative companies within each group – Neutral Bay and Howard Racing – claimed sales to Neutral Bay Sales and Broadbeach were not taxable because they were within a group. Because the “first sales” had been sales within the group, they then said that subsequent sales of the same properties to the public did not attract GST. After the Commissioner disallowed objections by the three companies against their assessments and GST declarations, they began Administrative Appeals Tribunal review proceedings in accordance with Part IVC of the *Taxation Administration Act*. Those proceedings are still pending.

The companies also applied pursuant to section 459G of the *Corporations Act* to the Queensland Supreme Court for orders to set aside the statutory demands pursuant to sections 459H and 459J. Section 459H provided for the setting aside of a statutory demand where there is a “genuine dispute” about the existence or amount of a debt to which the demand related. Section 459J provided that a court may set aside a statutory demand if satisfied that substantial injustice would otherwise occur because the demand is defective or there is “some other reason” to set it aside. Justice Philip McMurdo ordered that the statutory demands be set aside. The Court of Appeal dismissed appeals by the Commissioner, holding that there was a genuine dispute in relation to all three debts. It held that, where the tax liability was challenged by the taxpayer in Part IVC proceedings, a court was not obliged to conclude that there was no genuine dispute as to the existence of the debt. The Commissioner then appealed to the High Court, arguing that Part IVC proceedings neither gave rise to a “genuine dispute” as to the existence or amount of a debt, nor were a proper basis for setting aside a statutory demand for “some other reason” under section 459J. The matters are test cases funded by the Commissioner in all three courts. The Commissioner conceded that a court might have regard to the existence of “reasonably arguable” Part IVC proceedings at a later stage of an application to wind up a company.

The High Court unanimously allowed the appeals. It held that the Court of Appeal failed to recognise distinctions between the existence of a debt which was due and payable and the issues and outcome of a Part IVC proceeding. The taxation legislation provided for the tax debts to be due and payable and for the Commissioner to proceed with their recovery notwithstanding the pending review proceedings under Part IVC. Use by the Commissioner of the statutory demand procedure to recover the tax debts was a permissible avenue of recovery. The legislation provided that, except in the Part IVC proceedings, production by the Commissioner of notices of assessment and GST declarations conclusively demonstrated that the amounts and particulars in the assessments and declarations were correct. The operation of tax laws creating the debts and providing for their recovery by the Commissioner could not be avoided by an application under section 459G to set aside a statutory demand issued by the Commissioner. The Court further held that the exercise of discretion by Justice McMurdo relating to “some other reason” under section 459J miscarried and the Court of Appeal erred in upholding and supplementing it, because the taxation legislation permitted the recovery of tax debts, notwithstanding the pending Part IVC proceedings.

- This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.