HIGH COURT OF AUSTRALIA

KIRBY J

RE MICHAEL CARMODY IN HIS CAPACITY
AS COMMISSIONER OF TAXATION FOR THE
COMMONWEALTH OF AUSTRALIA & ORS RESPONDENTS

EX PARTE MICHAEL JOHN GLENNAN APPLICANT

Re Carmody; Ex parte Glennan [2000] HCA 37
27 June 2000
S116/2000

ORDER

1. *Application for order nisi refused.*

2. *The applicant is to pay the respondents' costs.*

3. *Certify for the appearance of counsel in chambers.*

Representation:

D B McGovern for the first and second respondents (instructed by Australian Government Solicitor)

No appearance for the third respondent

Applicant appeared in person

CATCHWORDS

Re Carmody; Ex parte Glennan

Constitutional law (Cth) – "Matter" – Divisibility of – Appeal from Administrative Appeals Tribunal to Federal Court – Whether can be restricted to point of law – Whether Court has duty to determine entire matter.

Constitutional law (Cth) – Jurisdiction of Federal Court – Jurisdiction subject to exclusion by other Acts.

Income tax – Practice and procedure – Appeal to Full Court of Federal Court – Whether without jurisdiction – Alternative proceedings involving review by Administrative Appeals Tribunal and appeal to Federal Court – Applicable provisions governing Federal Court in each case.

Income tax – Public Tax Ruling – Duty imposed on Commissioner to abide by Ruling – Whether bound by duty where contradictory order of Federal Court – Whether mandamus available.

High Court – Constitutional writs – Applications for orders nisi for prohibition and mandamus and other relief – Test to be applied – Whether applicant has demonstrated reasonably arguable case.

Administrative law – Administrative Appeals Tribunal – Whether constitutionally permissible to restrict appeal to Federal Court to point of law.

Constitution, s 75(v).
Administrative Appeals Tribunal Act 1976 (Cth), ss 43, 44.
Federal Court of Australia Act 1976 (Cth), s 24.
Income Tax Assessment Act 1936 (Cth), ss 25(1), 25A(1), 170BA.
Taxation Administration Act 1953 (Cth), ss 14ZZ, 14ZZA, 14ZZL, 14ZZQ.
Federal Court Rules, O 52, r 15, O 52, r 10, O 53, r 2.
High Court Rules, O 55, r 2.

1 KIRBY J. I have before me an application for an order nisi for constitutional writs (prohibition and mandamus) and for the grant of ancillary relief (certiorari and an extension of time). The application is made by Mr Michael Glennan ("the applicant"). The respondents are the Commissioner and Deputy Commissioner of Taxation for the Commonwealth (who have appeared to contest the relief sought) and the Judges of the Federal Court of Australia (who have submitted to the orders of this Court).

Approach to the application

2 The approach to the application, which rests substantially upon s 75(v) of the Constitution, is not in doubt. That provision of the Constitution enacts that, in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth", the High Court shall have original jurisdiction. It is for the applicant to make out a case for the order he seeks. The nature of the case which he must make out has been variously described. In *Re Brennan; Ex parte Muldowney*[1], Mason CJ stated that the applicant had "failed to make out a prima facie or arguable case". In *Re Australian Nursing Federation; Ex parte State of Victoria*[2], McHugh J, granting relief, stated that the applicant had to "show that he or she has an arguable case".

3 In judging what is an "arguable case" in this context, certain considerations must be kept in mind. First, there is the importance of the constitutional provision itself[3]. It is of cardinal significance. By it, all officers of the Commonwealth (including federal judges[4]) are rendered accountable in this Court to the Constitution and the laws of the Commonwealth. Being the means by which the rule of law is upheld throughout the Commonwealth, the provision is not to be narrowly construed or the relief grudgingly provided.

4 Secondly, where this Court's original jurisdiction is invoked, by an application made pursuant to s 75(v), it is a jurisdiction which the Court is bound

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1 (1993) 67 ALJR 837 at 840; 116 ALR 619 at 624.

2 (1993) 67 ALJR 377 at 382; 112 ALR 177 at 183.

3 As to the history of s 75(v) of the Constitution, see *The Tramways Case [No 1]* (1914) 18 CLR 54 at 82; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 778-780.

4 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 65-66, 82-83, 86; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

to exercise according to law[5]. The rider imposes restraints, including the requirement, where challenged, for an applicant to demonstrate standing and to rebut a suggestion that the grant of an order nisi would, in the particular circumstances, be "premature"[6]. Such a case would arise where the applicant has other available remedies which, in the circumstances of the particular case, should be exhausted before the provision of constitutional relief is considered.

5 Thirdly, a practical consideration which restrains an unduly restrictive view of the provision of an order nisi for constitutional writs is that, were it to be refused in a demonstrably arguable case, the disaffected applicant might seek leave to appeal from the order of the Justice concerned or otherwise endeavour to overcome it[7]. Were a Full Court to consider that the order nisi ought to have been granted, it could so provide. In some cases, at least, the refusing Justice might then be disqualified from participating in the matter returned before the Full Court, although that matter concerns the Constitution or an important point of federal law upon which the Justice would ordinarily be expected to provide his or her opinion[8].

6 These considerations explain why, instead of refusing relief altogether, an order is sometimes made[9] directing the applicant to apply by notice of motion to a Full Court. In such a case the application before the single Justice is adjourned so that notice of the application to the Full Court may be given[10]. All of the foregoing considerations must be kept in mind.

7 However, as the contesting respondents disputed the provision of the relief sought by the applicant, and as their contentions have been fully argued over a day's hearing, it is my duty to decide whether the applicant has made out an "arguable" or "prima facie" case. In so far as there is a difference between these

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5 *Re Australian Nursing Federation; Ex parte State of Victoria* (1993) 67 ALJR 377 at 382 per McHugh J; 112 ALR 177 at 183; *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1997) 72 ALJR 574 at 577; 151 ALR 711 at 715.

6 *Re Griffin; Ex parte Professional Radio and Electronics Institute (Aust)* (1988) 167 CLR 37 at 41.

7 cf *Ha v New South Wales* (1996) 70 ALJR 611 at 614; 137 ALR 40 at 44.

8 See *Judiciary Act* 1903 (Cth), s 23(1).

9 Pursuant to High Court Rules, O 55, r 2.

10 This occurred in *Re Griffin; Ex parte Professional Radio and Electronics Institute (Aust)* (1988) 167 CLR 37 at 42.

two standards, I will apply the test of whether the applicant has shown a reasonably arguable case[11]. I shall approach the hurdle which he must overcome bearing in mind that its fundamental purpose is not to put applicants out of court but to ensure that the Full Court, and other parties, are not troubled by futile arguments that are not reasonably open or by arguments that are premature. In the nature of applications of this kind, the Justice determining them does not ordinarily hear all of the arguments that would be advanced on the return of the order nisi before a Full Court. But that does not mean that argument, even of an extensive kind, is not appropriate to reach the conclusion that the serious step should be taken of issuing the order nisi[12]. In the present application, I have had the benefit of detailed argument. Extensive written submissions were also received following the hearing.

The course of the proceedings

8 For some years, the applicant and the Commissioner of Taxation have been engaged in a dispute concerning an assessment of the applicant's assessable income for the year ended 30 June 1988. During that year, the applicant received payment of a lump sum of $1.365 million pursuant to the terms of settlement of proceedings in the Supreme Court of New South Wales between himself and a third party. The applicant asserts that the sum is of a capital nature[13]. The Commissioner contends that this sum is assessable as income. He included it in the applicant's Notice of Assessment dated 8 May 1995. The applicant objected to this decision on 19 July 1995. His objection was disallowed by the Deputy Commissioner on 29 January 1996. The applicant, being dissatisfied with this decision, applied to the Administrative Appeals Tribunal ("the Tribunal") for review of the decision[14]. The Tribunal, on 8 November 1996, determined that review adversely to the applicant and affirmed the decision of the Commissioner[15].

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11 cf *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142.

12 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130.

13 *McLaurin v Federal Commissioner of Taxation* (1961) 104 CLR 381; *Allsop v Federal Commissioner of Taxation* (1965) 113 CLR 341; *Federal Commissioner of Taxation v Spedley Securities Ltd* (1988) 88 ATC 4,126 at 4,130-4,131; 19 ATR 938 at 941-942.

14 *Taxation Administration Act* 1953 (Cth), s 14ZZ.

15 *Re The Taxpayer v The Commissioner of Taxation* unreported, Administrative Appeals Tribunal, 8 November 1996.

9 The applicant then "appealed" to the Federal Court. This "appeal" was heard by Foster J, then a judge of that Court[16]. His Honour delivered two decisions. The first was pronounced on 17 October 1997 and ordered that the decision of the Tribunal be set aside and that the matter be remitted to the Tribunal "for determination in accordance with these reasons"[17]. On 9 September 1998, Foster J acceded, in part, to an interlocutory motion which was brought on behalf of the applicant and which sought enlargement of the original orders. The motion also sought to advance a number of constitutional arguments. Although Foster J rejected the constitutional arguments, for reasons which he gave[18], his Honour was persuaded, on the merits, to vary the orders previously made. In consequence, he added to the orders which he had pronounced on 17 October 1997 a variation which provided a direction to the Tribunal to "find that the receipt in question was not taxable under ss 25(1) or 25A(1) of the *Income Tax Assessment Act* 1936 (Cth)".

10 Before the Tribunal could hear the remitted proceedings in accordance with the varied orders, two appeals to the Full Court of the Federal Court were lodged from those orders. The applicant lodged an appeal against the judgment of 9 September 1998 on 29 September 1998. The Commissioner lodged an appeal against both judgments on 30 September 1998.

11 In due course, the Full Court (Hill, Sackville and Hely JJ) heard and determined the appeals[19]. The Full Court granted an extension of time to the Commissioner to file a notice of appeal from the judgment of Foster J of 17 October 1997. It ordered that the Commissioner's appeals from both judgments be allowed and that the orders of Foster J be set aside. In lieu of the first orders, the Full Court substituted orders dismissing the appeal from the Tribunal and ordering the present applicant to pay the Commissioner's costs. It also dismissed, with costs, the applicant's appeal from the judgment of Foster J of 9 September 1998.

12 The applicant has applied for special leave to appeal to this Court from the foregoing orders of the Full Court of the Federal Court. His application has not yet been determined. On 26 May 2000, the application came on for hearing before this Court constituted by Gaudron J and myself. The applicant notified

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16 Foster J retired as a Judge of the Federal Court on 26 November 1998 after giving the second decision in this matter.

17 *AB v Commissioner of Taxation* unreported, Federal Court, 17 October 1997.

18 *AB v Commissioner of Taxation* unreported, Federal Court, 9 September 1998 at 2-5.

19 *Commissioner of Taxation v Glennan* (1999) 90 FCR 538 at 558-559.

the Court of the constitutional points which he wished to argue, the substance of most of which were included in his grounds of appeal and in the filed argument in support of the grant of special leave. The applicant expressed concern that some, at least, of the constitutional arguments raised by him might affect the jurisdiction which the Federal Court had to hear and determine the appeals purportedly brought to it. If this proved to be so, the constitutional grounds could, he feared, destroy the validity of his purported application and contemplated appeal to this Court. The applicant therefore informed the Court of this possible jurisdictional problem.

13 Where a court is aware of a possible problem affecting its jurisdiction, it is ordinarily necessary for that court to resolve the problem in order to determine the extent of its powers and jurisdiction to make orders disposing of the proceedings[20]. Being informed of the applicant's intention to prosecute the present application to bring the issues of jurisdiction to a head, the Court, constituted to hear the special leave application, adjourned that hearing. The purpose of such adjournment was to permit the application for an order nisi for constitutional writs and ancillary relief to be heard. It is in that way that the present application has now come before me.

Four issues

14 The applicant's draft order nisi was lengthy. To it was annexed a statement of grounds which was also very detailed, the whole document running to 39 pages. However, as clarified, the applicant sought the issue of an order nisi for constitutional and ancillary relief upon four grounds. He confirmed during the hearing that there were four essential matters which he wished to bring before the Full Court of this Court pursuant to this application. The four grounds were:

1. That the Full Court of the Federal Court had acted without jurisdiction in hearing and determining the purported appeals of the Commissioner against the orders of Foster J. According to the applicant, the Full Court's judgment was void for want of jurisdiction, or at least voidable. This was because the general jurisdiction conferred by the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") was limited by a qualification in the *Taxation Administration Act* 1953 (Cth) ("the Taxation Administration Act"). The applicant sought an order for prohibition (to prevent their enforcement) and of certiorari (to quash them on the ground of invalidity).

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20 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Residual Assco Group Ltd v Spalvins* [2000] HCA 33 at [68].

2. That the Commissioner and his officers had failed to comply with their legal duty to assess the applicant's income in accordance with a Public Tax Ruling concerned with the assessment of assessable income in cases such as that of the applicant. The ruling in question was Taxation Determination TD 93/58[21]. According to the applicant, by reason of this ruling (which, he argued, was legally binding on the Commissioner and his officers[22]), no part of the sum of $1.365 million in issue was assessable income. It followed that the assessment made by the Commissioner and the ultimate judgment of the Full Court of the Federal Court in the Commissioner's favour were flawed and contrary to law for having failed to conform to the applicable Ruling. According to the applicant, the Commissioner and his officers were duty bound, notwithstanding the Full Court's judgment, to comply with the Ruling.

3. That Foster J had acted beyond his jurisdiction as a judge of the Federal Court in purporting to remit to the Tribunal, by his judgment, including as varied, the determination of the income tax payable by the applicant. The applicant contended, in this respect, that it was the constitutional and legal duty of Foster J to decide the applicant's liability to tax and not, as it was put, to "delegate" the determination of that liability to an administrative body such as the Tribunal. The purported "delegation" reflected in the orders of Foster J amounted, so it was submitted, to an unconstitutional abdication of the powers and duties of the Federal Court and an impermissible sharing of those powers and duties with a body that was not a court within Ch III of the Constitution.

4. That the provision for appeals from the Tribunal to the Federal Court was exclusively contained in s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). The only way in which such an "appeal" might come to a Full Court of the Federal Court was in pursuance of s 44(3) of that Act. By that sub-section, special provision is made for the exercise of the Federal Court's original jurisdiction by a Full Court in certain limited circumstances[23]. As none of the instances stated were applicable in the

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21 Issued 1 April 1993.

22 *Income Tax Assessment Act* 1936 (Cth), s 170BA; *Taxation Laws Amendment (Self Assessment) Act* 1992 (Cth), s 12(1).

23 Such as the case where the Tribunal was constituted by a presidential member, or a Judge, and, after consulting the President of the Tribunal, the Chief Justice of the Federal Court considers it appropriate that the appeal should be heard and determined by a Court constituted as a Full Court: AAT Act, ss 44(3)(b)(i) and (ii) and 44(3)(c).

present case, the applicant argued that the Full Court had no jurisdiction or power to hear and determine an appeal from the judgments of Foster J. Such purported appeal, and the disposition of it, were made without jurisdiction, were beyond power, and the resulting judgment was thus void or at least voidable, inviting the provision of constitutional and ancillary relief.

15 It will be observed that the object of the applicant, in advancing the foregoing grounds, was to remove the unwelcome judgment of the Full Court of the Federal Court (which had been against him) and to return the matter, so far as he could, to the position in which it was left by the judgment of Foster J (which was in his favour). With the additional consideration of the Public Tax Ruling point, the matter could then be determined conclusively by a single judge of the Federal Court (not the Tribunal which had been against him) making orders binding on the parties, including the Commissioner.

The general jurisdiction of the Federal Court

16 The general provisions conferring jurisdiction on the Federal Court to hear an appeal from a judgment entered in the Court by a single judge appear in s 24 of the Federal Court Act. It will be necessary later, in considering the applicant's fourth ground, to return to the question of whether this section is applicable where the appeal has originated in the Tribunal. But it was this section upon which the Commissioner relied to found the jurisdiction of the Federal Court. Section 24 provides, relevantly:

> "(1) Subject to ... any other Act ... (including an Act by virtue of which any judgments referred to in this section are made final and conclusive ...), the Court has jurisdiction to hear and determine:
>
> (a) appeals from judgments of the Court constituted by a single Judge".

17 The applicant's argument, in support of his first ground for an order nisi, was that the apparently general conferral of jurisdiction contained in the foregoing sub-section was subject, in the present case, to an applicable qualification appearing in s 14ZZQ of the Taxation Administration Act. Relevantly, that section provides:

> "(1) When the order of the Federal Court in relation to the decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision.
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> (2) For the purposes of subsection (1):

(a) if the order is made by the Federal Court constituted by a single Judge and no appeal is lodged against the order within the period for lodging an appeal – the order becomes final at the end of the period".

18 The applicant's argument was therefore thus. The first judgment of Foster J was pronounced on 17 October 1997. The second judgment of his Honour was pronounced on 9 September 1998. Yet the purported appeal by the Commissioner against each of these judgments was not brought until 30 September 1998. The Federal Court Act does not provide, in terms, for a time limit for the bringing of appeals or applications for leave to appeal. However, s 59 of that Act does provide for the Federal Court to make Rules of Court. Rule 15 of O 52 of the Federal Court Rules provides, relevantly, in the case of appeals against orders other than interlocutory orders, as follows:

"(1) The notice of appeal shall be filed and served:

(a) within 21 days after:

(i) the date when the judgment appealed from was pronounced;

…

(b) within such further time as is allowed by the Court or a Judge upon application made by motion upon notice filed within the period of 21 days referred to in the last preceding paragraph.

(2) Notwithstanding anything in the preceding subrule, the Court or a Judge for special reasons may at any time give leave to file and serve a notice of appeal."

19 In the case of interlocutory judgments (such as, according to the applicant, the second judgment of Foster J on 9 September 1998) an application for leave to appeal must be brought within seven days[24]. Therefore, neither the appeal from the first judgment, nor the application for leave to appeal from the second judgment, were brought within the times from the pronouncement of the judgment in question required by the Federal Court Rules. Accordingly, so the applicant contended, upon the proper construction of s 14ZZQ(2) of the Taxation Administration Act, no appeal had been lodged against the order "within the period for lodging an appeal". Thus, the order had become "final at the end of the period".

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24 Federal Court Rules, O 52, r 10.

20 On this basis, each of the judgments of Foster J and the orders which his Honour had made were, according to the applicant, final[25]. Therefore, in terms of s 24(1) of the Federal Court Act (assuming it to apply), the Full Court had no jurisdiction to hear and determine the Commissioner's purported appeals from the judgments of Foster J[26]. The judgments of the Full Court in determining such purported appeals were accordingly made without jurisdiction. They were at least voidable. Being invalid orders made by officers of the Commonwealth, they were susceptible to the constitutional writs and also any ancillary relief required to make the issue of such writs effective. Accordingly, an order nisi for certiorari should be issued so that this Court could quash the Full Court's orders which were made without jurisdiction.

21 At first, I was inclined to consider that the foregoing arguments presented a fairly arguable case entitling the applicant to an order nisi for prohibition and certiorari. However, the Commissioner was given leave to reopen his argument to call attention to the suggested flaw in the applicant's submissions. In order to explain this flaw, it is necessary to return to the Taxation Administration Act. By s 14ZZ, that Act provides that, if a person is dissatisfied with the Commissioner's objection decision, which is the ruling upon a taxpayer's objection to the assessment of tax payable by him or her, the person concerned is given a choice. He or she may:

> "(a) if the decision is both a reviewable objection decision and an appealable objection decision – either:
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> (i) apply to the AAT for review of the decision; or
>
> (ii) appeal to the Federal Court against the decision".

22 The scheme for alternative relief in such a case, either before an administrative tribunal or a court, has a long history in Australian taxation law and practice[27]. That history is continued into the current law by s 14ZZ and the sections which follow. Those sections appear, relevantly, in the two succeeding Divisions of Pt IVC of the Taxation Administration Act, namely Div 4 (which

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25 cf CCH Australia Limited, *Australian Federal Tax Reporter*, ¶973-330 at 872,135 and 872,141.

26 cf *Patterson and James v Public Service Board of NSW* [1984] 1 NSWLR 237.

27 *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353; *Rowdell Pty Ltd v Federal Commissioner of Taxation* (1963) 111 CLR 106.

deals with "AAT review of objection decisions and extension of time refusal decisions") and Div 5 (which deals with "Federal Court appeals against objection decisions").

23 In the present case, it is common ground that the applicant exercised his privilege under s 14ZZ of the Taxation Administration Act to seek to apply to the Tribunal for review of the Commissioner's decision. He did not elect (as he might have done) to appeal directly to the Federal Court against the decision. Each of these avenues has advantages and disadvantages from the point of view of the taxpayer. For present purposes, the important point to note is that different provisions in the Taxation Administration Act govern the procedure, depending upon which avenue the taxpayer elects to pursue.

24 Where the taxpayer elects for a review of the decision by the Tribunal, the provisions in Div 4 apply, which are, in effect, a modified version of provisions contained in the AAT Act that outline the conduct of that review and its consequences. By s 14ZZA, it is provided that the AAT Act applies in relation to "the review of reviewable objection decisions" subject only to the modifications set out in Div 4. There is no relevant modification which limits or amends the general provisions of the AAT Act for "appeals" from that Tribunal to the Federal Court. Therefore, subject to the applicant's fourth ground, s 44 of the AAT Act would apply to such an appeal. Sub-section (1) of that section provides that:

> "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding."

25 It follows that this section governs appeals from the Tribunal to the Federal Court in a case in which the taxpayer has elected to apply to the Tribunal for review of the Commissioner's decision[28]. Such appeals are not governed by s 14ZZQ of the Taxation Administration Act, as contended by the applicant. That last-mentioned section appears not in Div 4 but in Div 5. It is part of the provisions controlling what happens if the taxpayer elects not to apply to the Tribunal but appeals directly to the Federal Court against the Commissioner's decision. As this is not the course which the applicant took, Div 5 has no application. Thus s 14ZZQ (and also s 14ZZP), upon which the applicant relied, have no relevant work to do in these proceedings.

26 It is true that by s 14ZZL(2) of the Taxation Administration Act, if no appeal is lodged against the Tribunal's decision within the period for lodging an appeal, the decision becomes "final at the end of the period". However, an

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28 Taxation Administration Act, s 14ZZ. See also Federal Court Rules, O 53, r 2.

appeal from the Tribunal to the Federal Court having followed the stream envisaged in Div 4, no other provisions were made by the Taxation Administration Act to govern the subsequent steps in the Federal Court. Those steps could not be taken to be at large. Necessarily, they were governed by the Federal Court Act and the Federal Court Rules. Ample provision is made under the Federal Court Rules[29] for extensions of time where an appeal (or application for leave to appeal) is brought out of time. In respect of the belated appeals to it, the Full Court considered whether such extensions of time should be granted to the Commissioner. It decided that they should. There is no principled basis upon which this Court could disturb such a decision. Specifically, no basis exists in the language and scheme of the Taxation Administration Act.

27 It necessarily follows that the suggested basis upon which the Full Court was deprived of jurisdiction to hear the Commissioner's appeals from the judgments of Foster J could not be established. Those appeals (subject to the fourth argument) fall within the jurisdiction of the Federal Court by virtue of s 24(1) of the Federal Court Act. They do so without any relevant qualifying provision in another Act to which the applicant could point. So far as he suggested that the Full Court's jurisdictional disqualification arose from s 14ZZQ of the Taxation Administration Act, I would reject that contention as unarguable. That section is inapplicable to his case. There is no precisely equivalent section in Div 4 of Pt IVC of the Taxation Administration Act. The first ground for the provision of an order nisi to the applicant is therefore unavailing. By the applicable test, that ground is not reasonably arguable. I would therefore refuse relief on that ground.

The Public Tax Ruling

28 Nor am I convinced that the applicant has made out a reasonably arguable case in relation to his claim for an order nisi for the constitutional writ of mandamus directed to the Commissioner and his officers to require them to perform their alleged duty to comply with the Public Tax Ruling upon which the applicant relies.

29 The fundamental flaw in the applicant's argument on this ground concerns whether the Commissioner and his officers could ever be subject to a lawful duty to perform their functions, as asserted by the applicant, in a way that would contradict their undoubted duty to comply with a judgment which has been formally entered by the Full Court of the Federal Court with respect to the same subject matter. Such a judgment, being a judgment of a court designated as a

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29 Order 3, r 3.

superior court of record[30], is, by our law, valid between the parties until it is lawfully set aside. It binds the parties to it, as well as their relevant employees and agents. Until it is set aside (as by the process of appeal which the applicant has sought to invoke in this Court) or quashed (as in the process now under consideration), that order must be obeyed, as much by the officers of the Commonwealth (such as the Commissioner and Deputy Commissioner) as by anyone else.

30 Accordingly, I do not consider that the second point advanced by the applicant is reasonably arguable. At the end of his oral submissions and in his later written submissions I did not take the applicant seriously to contest this conclusion. However, he did not formally abandon the submission. If, contrary to my analysis, either on the first or fourth grounds raised in these proceedings, the applicant were granted special leave and were able to persuade this Court that the Full Court of the Federal Court entered its judgments without jurisdiction or power to do so, such judgments would doubtless be set aside. It might then be open to the applicant to renew his application for relief in the nature of mandamus directed to the Commissioner and Deputy Commissioner to perform their "duty" under the Public Tax Ruling in question. But so long as the judgment of the Full Court of the Federal Court stands, the applicant's contention that he is entitled to a constitutional writ of mandamus is not made out. I would therefore refuse relief on the second ground.

The suggested invalid delegation

31 The third ground upon which the applicant argued that he was entitled to an order nisi arose from his contention that the orders which Foster J made amounted to an impermissible attempt to "delegate" the power and duty to make a decision which belongs to the Federal Court, to an administrative decision-maker (namely the Tribunal). The applicant suggested that any such purported delegation was contrary to the requirements of Ch III of the Constitution. The argument was put in a number of ways. Primarily it was contended that the orders which Foster J made, including as varied, purported to divide the constitutional "matter" and were therefore flawed. As the matter had been put before a Federal Court, that matter had to be disposed of in its entirety by that Court, and not divided and delegated in part to a body such as the Tribunal.

32 An argument along these lines was advanced at the second hearing before Foster J. It was dealt with in his Honour's reasons for judgment of 9 September

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30 Federal Court Act, s 5(2). See *Residual Assco Group Ltd v Spalvins* [2000] HCA 33 at [71]-[78].

1998[31]. The argument was not repeated before the Full Court, apparently being abandoned there by the applicant's then counsel. However, such abandonment does not foreclose the repetition of the argument if, in law, it be a good one.

33 The source of the argument was found in several decisions of the Federal Court to which Foster J referred in his reasons[32]. Most especially, the applicant relied on what Gummow J, then a judge of that Court, said in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*[33]:

> "[A]fter the exhaustion of the administrative processes before the tribunal, the parties may still be in controversy as to questions both of law and of fact. In such a case it might appear that the jurisdiction of this court was, on the face of s 44 [of the AAT Act], limited to less than the whole of the controversy and thus less than the whole of the matter arising under federal law. This would be because the effect of the law made by the Parliament would be to excise from the matter so much of the claims made therein as did not constitute questions of law. In such cases questions may arise as to the extent of the validity of s 44 of the AAT Act."

34 Resonances of this opinion may be found in the reasons of the minority of this Court in *Abebe v Commonwealth*[34]. In that matter, the Court was closely divided and the legislation under consideration in *Abebe* was different from that here in question. Essentially, the applicant contended that the provisions of the AAT Act confining appeals from the Tribunal to the Federal Court to appeals "on a question of law"[35] amounted to an impermissible endeavour to divide a constitutional "matter". Because that division had affected the judgments which Foster J had entered, they called for correction. The entitlement to have an entire legal controversy decided by a federal court whose jurisdiction had been invoked

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31 *AB v Commissioner of Taxation* unreported, Federal Court, 9 September 1998 at 2-5.

32 One of these was *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209; cf *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 185; *Abebe v Commonwealth* (1999) 73 ALJR 584 at 593-594, 638; 162 ALR 1 at 13, 74-75.

33 (1988) 82 ALR 175 at 181.

34 (1999) 73 ALJR 584 at 609-610, 612-613; cf at 594, 627, 638; 162 ALR 1 at 34-36, 38-40; cf at 14, 59-60, 74.

35 AAT Act, s 44(1).

was said to be an important right deriving from the Constitution[36]. At the least, the applicant submitted, the point was reasonably arguable and, for that reason, should be returned before a Full Court of the High Court by the issue of an order nisi.

35 I would not dispose of the applicant's third ground on the footing that it was not reasonably arguable. In the light of the division of opinion of this Court in *Abebe* and the express concerns referred to by Gummow J in *Skypak*, I do not believe that, in the present consideration of the point, that would be a reasonable conclusion. In the manner that the proceedings were conducted before Foster J, there are certain problems in the way of the applicant's demand for judgment to be entered in his favour. In accordance with the legislation, Foster J confined his examination strictly to the points of law raised and did not enter otherwise upon the facts.

36 However, the precise issues presented in the application on this point are already before a Full Court of this Court in the form of the applicant's application for special leave to appeal. Because I am not convinced that there is any arguable jurisdictional flaw in the judgments of the Full Court of the Federal Court which might undermine the validity of the applicant's application for special leave to appeal (and, if granted, appeal to this Court) the proper course is to permit the point to be argued in the context of the special leave application. That is the jurisdiction of the Court which the applicant has already lawfully invoked. The appellate jurisdiction of this Court has been regularly sought. There will be no delay in its determination. If the Court constituted to hear the special leave application considers that the point is reasonably arguable, it will grant special leave at least upon this ground. Because the point involves a question of constitutional interpretation, if it is reasonably arguable, it would normally attract a grant of special leave.

37 In that event, the additional provision of constitutional and ancillary writs would be unnecessary. Entire relief can be granted in the disposal of the appeal. Ordinarily, in my view, that is the appropriate way to proceed where the officer of the Commonwealth in question is a federal judge, and where an appeal has been sought and discretionary relief pursuant to s 75(v) of the Constitution is claimed from this Court at the same time. Whilst no hard and fast rule can be laid down, in the present case, where the application for special leave raising the identical point is pending, the issue of a constitutional writ would be premature.

38 On this basis, I would reject the applicant's third ground. In the event that the applicant is dissatisfied by the determination of the application for special

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36 cf *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 41, 52.

leave, it would remain open to him to reapply and to submit that, on the third ground, an order nisi should nonetheless issue.

The Federal Court appeal

39 The fourth and final ground upon which the applicant sought an order nisi rested on his contention that s 44 of the AAT Act stated the entire law by which proceedings which were before the Tribunal could get before a Full Court of the Federal Court on appeal. There are a number of flaws in this argument which are apparent when the provisions of the Federal Court Act and the AAT Act are considered side by side, and the scheme of the inter-relationship of the Tribunal and the Federal Court, as provided in those Acts, is understood.

40 Where a taxpayer has applied to the Tribunal for review of the Commissioner's objection decision[37], the AAT Act applies, subject to any modification set out in Div 4 of Pt IVC of the Taxation Administration Act which may limit its operation. There are no such relevant modifications in the Taxation Administration Act which diminish the provisions of s 44(1) of the AAT Act.

41 Therefore, a party to proceedings before the Tribunal for review of the Commissioner's decision may, if dissatisfied, appeal to the Federal Court on a question of law from any decision of the Tribunal in that proceeding. The width of the language should be noted. The provisions of s 44, in so far as they make special reference to the constitution of the Federal Court as a Full Court, do not, in my view, arguably, or at all, cut down the application of s 24(1) of the Federal Court Act which affords jurisdiction to a Full Court of that Court to hear and determine an appeal from a judgment of the Federal Court constituted by a single judge.

42 Once the Federal Court is engaged by that name pursuant to the provisions of s 44 of the AAT Act, necessarily the general statute governing its jurisdiction and powers is also engaged to the extent applicable. The special provisions relating to the constitution of a Full Court in respect of the exercise by the Federal Court of its original jurisdiction are obviously intended to observe considerations of hierarchy and courtesy that apply where, in the particular case, the Tribunal was constituted by a presidential member[38]. To suggest that such special provisions in relation to the exercise by the Federal Court of its original jurisdiction operate to oust the general provisions of the Federal Court Act in respect of appeals from a single judge of the Federal Court is most unconvincing.

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37 Taxation Administration Act, s 14ZZ.

38 AAT Act, s 44(3).

It would take very clear language in the applicable legislation to limit the general appellate powers of the Federal Court in such a way. This is so because such a construction would deprive litigants of an important right for which the Parliament has otherwise provided once a matter is in the Federal Court.

43 I see no reasonably arguable construction of the AAT Act, or of the Federal Court Act, which would lead to such an uncongenial conclusion. In my view, the applicant's argument that s 44 of the AAT Act is an entire code for the hearing by a Full Court of the Federal Court of proceedings from a decision of the Tribunal in that Court is not reasonably open. The application for an order nisi on the fourth ground is therefore refused.

Conclusion and orders

44 The result is that I would reject the first, second and fourth grounds (above) upon which the applicant sought the issue of an order nisi. None of them is reasonably arguable. I would reject the third ground without finally determining the reasonable arguability of the point. Even if it is reasonably arguable, that ground is premature given that the same issues will arise before this Court upon the hearing of the applicant's application for special leave to appeal. This separate application at this stage was unnecessary and made for reasons which I have rejected.

45 In the light of these conclusions, it is unnecessary to deal with the application for extension of time. No separate argument was addressed to that issue and it would have presented no obstacle to the applicant if he had otherwise presented an arguable case. The application for an order nisi, in the terms of the draft order presented to the Court, as it has been argued by the applicant, is refused. The applicant must pay the costs of the application. I certify for the appearance of counsel in chambers.