# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

GWENDA BLANCHE RYAN RESPONDENT

*Commissioner of Taxation v Ryan* [2000] HCA 4
*3 February 2000*
M126/1998

**ORDER**

1. *Appeal allowed.*

2. *Set aside par 1 of the order of the Full Court of the Federal Court of Australia entered on 30 April 1999 and in lieu order:*

   *(a) appeal allowed;*

   *(b) set aside pars 1, 2 and 3 of the order of Spender J entered on 15 September 1997 and in lieu order that the appeal is dismissed.*

On appeal from the Federal Court of Australia

**Representation:**

G A A Nettle QC with T P Murphy for the appellant (instructed by Australian Government Solicitor)

D G Russell QC with J J Batrouney for the respondent (instructed by Hall & Wilcox)

## CATCHWORDS

### Commissioner of Taxation v Ryan

Income tax – Assessment – Notice stating no tax payable – Subsequent assessment showing assessable income and tax payable thereon – Whether initial notice an "assessment" for the purposes of s 170(3) of the *Income Tax Assessment Act* 1936 (Cth) – Whether subsequent assessment therefore unauthorised – Whether any tax became "due and payable" upon issue of initial notice.

Words and phrases – "assessment" – "due and payable".

*Income Tax Assessment Act* 1936 (Cth), ss 6(1), 166, 170, 171, 204.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. The respondent ("the taxpayer") lodged a return of her income for the year ending 30 June 1987 in which she stated her taxable income for the year to be $4,470, an amount below the threshold at which income tax was levied. On 11 December 1987, the appellant ("the Commissioner") issued to the taxpayer a document entitled "Refund Notice", which stated that the tax on her taxable income was "$0.00" and that the "Amount of Refund" was $3,653.40. (It is convenient to refer to this notice as the "1987 notice".)

2 More than six years later, on 11 February 1994, the Commissioner issued to the taxpayer a Notice of Assessment for the year ended 30 June 1987 stating that her taxable income had been assessed to be $14,470 and that tax, Medicare levy and additional tax in stated amounts were payable. (It is convenient to refer to this assessment as the "1994 assessment".) An adjustment sheet accompanying the 1994 assessment said that a deduction of $10,000 claimed by the taxpayer in her 1987 return had been disallowed.

3 The taxpayer objected to the 1994 assessment. She contended that she had made a full and true disclosure to the Commissioner of all the material facts necessary for the Commissioner's assessment, that the 1987 notice was an assessment made after that disclosure, and that it followed that the Commissioner was not authorised to issue the 1994 assessment. The objection was disallowed by the Commissioner and then, at the request of the taxpayer, the Commissioner's decision was referred to the Administrative Appeals Tribunal[1]. The Tribunal affirmed the Commissioner's decision to disallow the objection. The taxpayer then appealed to the Federal Court of Australia.

4 The taxpayer's contention that the Commissioner was not authorised to issue the 1994 assessment was upheld by the Federal Court both at first instance[2] and on appeal to the Full Court[3]. By special leave, the Commissioner appeals to this Court. It was accepted that the taxpayer had made a full and true disclosure of all the material facts. The sole issue debated on the hearing of the appeal to this Court was whether, given that disclosure, the Commissioner had power to issue the 1994 assessment.

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**1** *Income Tax Assessment Act* 1936 (Cth), s 187.

**2** *Ryan v Federal Commissioner of Taxation* (1997) 148 ALR 88.

**3** *Commissioner of Taxation v Ryan* (1998) 82 FCR 345.

The statutory provisions

5 Section 166 of the *Income Tax Assessment Act* 1936 (Cth) ("the Act") provided (at the time relevant to the issues in this appeal) that:

> "From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon."

It will be noted that this section contains no reference to any time within which the Commissioner must complete the task of making an assessment of a taxpayer's taxable income and of the tax payable thereon.

6 "Assessment" is defined by s 6(1) of the Act as meaning (unless the contrary intention appears):

> "(a) the ascertainment of the amount of taxable income and of the tax payable thereon; or
>
> (b) the ascertainment of the amount of additional tax payable under a provision of Part VII".

It will be noted that par (a) of this definition refers to the ascertainment of two amounts: the amount of taxable income and the amount of the tax payable thereon. There is an evident parallel between this provision and the reference in s 166 to "an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon".

7 Section 170(3) of the Act was central to the taxpayer's contentions. It provided (at the relevant time) that:

> "Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made after the expiration of 3 years from the date upon which the tax became due and payable under that assessment."

The taxpayer's contentions

8 In this Court the taxpayer maintained the contentions that she had made below. In particular, she submitted that in 1987 the Commissioner had made an assessment of her taxable income for the year ending 30 June 1987 and of the

amount of tax payable thereon. It being accepted that she had made a full and true disclosure of all the material facts, she submitted that s 170(3) precluded the Commissioner from amending that assessment in 1994. The taxpayer submitted that the period identified in s 170(3) had elapsed three years from the date which was the thirtieth day after the 1987 notice was served. The 30 day period was said to be fixed by s 204(1) of the Act. That sub-section (contained in Pt VI of the Act) provided that:

> "Subject to the provisions of this Part, any income tax assessed shall be due and payable by the person liable to pay the tax on the date specified in the notice as the date upon which tax is due and payable, not being less than 30 days after the service of the notice, or, if no date is so specified, on the thirtieth day after the service of the notice."

The decisions below

9 The primary judge, Spender J, described the issue for his decision as being whether the 1987 notice was an assessment under s 166 of the Act "with the consequence that the time limits under s 170 commence to run from the prescribed period after service of the notice"[4]. Little, if any, attention appears to have been directed to the operation of the time limit prescribed by s 170(3). Rather, it seems that the argument before the primary judge focused on two questions – how the 1987 notice was to be characterised, and whether that notice was an assessment of "the amount … of the tax payable" on the taxable income of the taxpayer. As to the first of these questions, the primary judge noted that the 1987 notice used the word "assessment" or the expression "your assessment" many times. But the issue that appears to have been treated as determinative was the second issue we have noted - whether the Commissioner had ascertained "the amount … of the tax payable" by the taxpayer. On that issue, the primary judge concluded that[5]:

> "[T]o require 'the ascertainment of the tax payable' to be a positive number is an impermissible gloss on the definition of assessment in s 6(1) of [the Act]. The ascertainment of the tax payable as zero is no less an ascertainment within the definition as is the ascertainment of the tax as a non-zero number.

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**4** (1997) 148 ALR 88 at 92.

**5** (1997) 148 ALR 88 at 98.

The number zero is the beginning of and hence the first number of, and included in, the domain of natural numbers.

…

In the domain of the integers, the number line unarguably contains zero. That is, zero is a number, sum or amount, and an assessment of zero dollars is an assessment of a sum or amount of tax."

10 In the Full Court, Merkel J (with whose reasons Burchett and French JJ agreed) said[6] that the question raised by the Commissioner's appeal was whether "a document issued by [the Commissioner] which gives notice of an assessment, but under which no tax is assessed or is ascertained to be payable by the taxpayer, is an assessment for the purposes of [the Act] and in particular s 170(3) of the Act". His Honour examined (as had Spender J) earlier decisions that were said to bear upon the question (including, in particular, the decision of this Court in *Batagol v Federal Commissioner of Taxation*[7]) but decided that *Batagol* (and other cases to which he referred[8]) did not conclude the issue. It will be necessary to return to *Batagol*. It is, however, important to note two other features of the reasons of Merkel J.

11 First, his Honour considered that the legislative policy behind s 170 of the Act was one of giving taxpayers certainty and finality. It followed, in his opinion, that[9]:

"Once it is accepted that, in general, an 'assessment' for the purposes of the Act fixes the taxpayer's liability to tax there is no reason why the statutory policy of certainty and finality should not apply to it irrespective of the quantum (if any) of the liability."

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**6** (1998) 82 FCR 345 at 346.

**7** (1963) 109 CLR 243.

**8** *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360; *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1; *Prestige Motors Pty Ltd v Commissioner of Taxation* (1993) 47 FCR 138; *Webb v Commissioner of Taxation (No 2)* (1993) 47 FCR 394; *Stuart (No 2) v Federal Commissioner of Taxation* (1996) 96 ATC 4942; 34 ATR 31; *Deputy Federal Commissioner of Taxation v Sheehan* (1986) 86 ATC 4718; 18 ATR 194.

**9** (1998) 82 FCR 345 at 371.

12 Secondly, Merkel J noted[10] that s 170(3) "certainly assumes that the assessment with which it is concerned is one under which an amount of tax 'became due and payable'". He considered that the words "became due and payable" were derived from s 204(1) of the Act and its provision that if no date was specified in an assessment, the tax assessed became due and payable on the thirtieth day after the service of the notice. Having regard to what had been said in the Second Reading Speech for the Bill by which provision was made for the case in which an assessment specified no date for payment[11], Merkel J concluded that this provision operated so that[12] "an assessment by a notice of assessment, under which no tax is assessed or payable on the taxable income, [has] the notional date for payment provided for in the second limb of s 204 for the purposes of s 170 and in particular s 170(3)".

The statutory power to issue the assessment

13 Framing the issue for consideration as whether a "nil assessment" is an assessment of the tax payable on the taxable income of the taxpayer, or as whether zero is a number, sum or amount, distracts attention from the real issue. Similarly, to speak in terms of a "notional date" for payment may obscure more than it illuminates. The central question is whether the Commissioner's power under s 166 to make an assessment of the amount of taxable income of the taxpayer, and of the tax payable thereon, is restricted. The only restriction which was said to be relevant was that provided by s 170(3).

14 Section 170(3) contained several elements. There must have been a full and true disclosure by the taxpayer and there must have been "an assessment … made after that disclosure". But what is important for present purposes is that, after the expiration of the specified period, s 170(3) precluded any amendment of the assessment which increased the taxpayer's liability. The question in the present appeal becomes, therefore, whether the time fixed by s 170(3) had run. Had "3 years from the date upon which the tax became due and payable under that assessment" elapsed?

15 At the very least, language is strained by saying that tax becomes "due and payable" on a particular date in circumstances where the Commissioner has

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**10** (1998) 82 FCR 345 at 370.

**11** The Bill became the *Income Tax and Social Services Contribution Assessment Act* 1954 (Cth).

**12** (1998) 82 FCR 345 at 371.

issued a document informing the taxpayer that the Commissioner has determined that the taxpayer owes no amount for tax. No amount of teasing of the words of s 170(3), or of the words of s 204, can reduce, let alone eliminate, that strain. Whatever may be the elasticity of the expression "the date upon which the tax became due and payable", it does not, and cannot, accommodate the case where no tax is due and payable. Nor do the words of s 204, when read and understood in their context, enable any such accommodation.

16 Section 204 is one of the group of provisions in Pt VI of the Act which is directed to making the amount which a taxpayer owes for tax a debt which can be recovered by the ordinary legal processes for recovery of debts. Although the time determined in accordance with s 204 is used as a point of reference in s 170(3), it is important to keep well in mind that the subject-matter dealt with by s 204, and the sections to which it is most immediately related, is the recovery of debts. To speak of a "notional" date being fixed by s 204 for the purposes of s 170(3) is to misunderstand the purpose of s 204. Its purpose is to fix a time in particular circumstances and for a particular reason. The circumstances in contemplation are that the Commissioner has determined that a taxpayer owes an amount for tax and the reason for fixing a time is to identify when that amount must be paid and, if not paid, can be sued for. Once that is understood, it can be seen that s 204 is not apt to fix a date (even a "notional" date) from which the time prescribed by s 170(3) can begin to run unless the Commissioner has determined that the taxpayer owes some amount for tax. If the Commissioner has determined that no tax is owed, time does not begin to run under s 170(3).

17 The taxpayer submitted that there were two considerations (both identified and relied on by Merkel J) which should lead the Court to reject this construction of s 170(3). The first was said to be the need for, and what was said to be the evident legislative policy of, certainty and finality. The second was the legislative history of s 204. We deal with each in turn.

Certainty and finality

18 Although put in various ways, the taxpayer's contention was that it was "unjust" or "incongruous" or "absurd" if a taxpayer assessed to $1 tax could not be reassessed after the expiration of three years from the date on which the tax was due and payable, but a taxpayer who had been told by the Commissioner that nothing was owed, "remained at risk" without any limit of time.

19 There are several features of this contention that should be noted. First, it assumes that the Act adopts as a general policy or overall intention that "certainty and finality" be reached after a time. But the question for decision is what are the circumstances in which an amended assessment may lawfully be issued? That question is not answered by asserting the existence of any "policy" or "general

intention" unless that policy or intention is to be found reflected in the provisions of the Act. Appeals to general notions of "fairness" or "justice" do no more than attempt to mask the absence of any foundation in the legislation for the conclusion which is asserted.

20 Further, since *Batagol* was decided, there have been committees of inquiry into taxation law which considered (among many other things) whether there should be a change in the law established in that case[13]. Given that the recommendations of those committees about this matter were not implemented, it may be very much doubted that the Act, in the form in which it stood at the times relevant to this case, can be said to reflect some general policy in favour of certainty and finality.

21 In addition, any search for some unifying policy in the Act favouring certainty and finality must seek to accommodate the decision of this Court in *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[14]. There the Court held that the provisions of the Act dealing with collection and recovery of taxation constitute a scheme that covers the field, contains no limitation provision, and does not leave room for the importation of State limitation provisions.

22 Secondly, it is important to recall the "risk" to which it is said that a taxpayer is exposed if s 170(3) is not construed as the taxpayer contended it should be. The risk is that taxpayers will be called on to pay amounts that are lawfully due under the statute. In those circumstances, applying the word "risk" may be seen to carry with it some unwarranted pejorative connotation. Nevertheless, it must be recognised that the call may be made well after the year of income concerned. This may well cause hardship, or at least inconvenience, to a taxpayer who has ordered his or her affairs on the basis of the Commissioner's earlier statement that nothing was owed. But hardship or inconvenience is seldom, if ever, sufficient reason for not complying with a statutory obligation. Further, insofar as the argument seeks to suggest that the Commissioner should be precluded from assessing what is due, it is a proposition that encounters the

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**13** Report of the Committee on Taxation (the Ligertwood Report), June 1961 at pars 591-595; Report of the Taxation Review Committee (the Asprey Report) 1975 at pars 22.76-22.78.

**14** (1988) 165 CLR 55.

serious difficulties that lie in the way of applying doctrines of estoppel in circumstances of this kind[15].

23 Thirdly, any desire of the taxpayer to bring matters to a conclusion could have been met by resort to s 171 of the Act. As Merkel J noted[16]:

> "Section 171(1) provided for a taxpayer to request the Commissioner to make an assessment if the taxpayer has duly furnished a return in respect of a year of income and no notice of assessment has been served within 12 months thereafter. If the Commissioner fails to comply with the request within three months, s 171(2) provides that any assessment issued thereafter in respect of the year of income is deemed to be an amended assessment issued on the last day of the three month period. As an amended assessment, the assessment must be authorised by s 170. The section enables a taxpayer who has furnished a return to take steps which would lead to time running for the purposes of s 170."

24 It was suggested in argument that taxpayers have chosen not to use this provision. Even so, it does not mean that no significance is to be attached to s 171. A taxpayer who was told by the Commissioner that no tax was due could, by this section, obtain the certainty and finality which this branch of the taxpayer's argument contended must be found in the Act. That being so, it is unnecessary to strain the words of ss 170(3) and 204 to achieve the result which it was asserted that the legislature must be taken to have intended. Section 171 is a sufficient answer to the taxpayer's arguments based on fairness and the need for certainty and finality.

Legislative history

25 The taxpayer submitted that an explanatory note appended to the Bill which introduced what became s 171 proceeded from an assumption that assessments were always issued in respect of what were referred to as "non-taxable returns". The note read[17]:

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**15** *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 510 per Deane, Toohey and Gaudron JJ; *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 at 117 per Kitto J; *Maritime Electric Co v General Dairies Ltd* [1937] AC 610.

**16** (1998) 82 FCR 345 at 351.

**17** Note to Income Tax Assessment Bill 1935 (Cth), cl 172.

> "In practice, the Department concentrates on the examination and assessment of returns which disclose a taxable income, and the revision of non-taxable returns is, in many cases, deferred. *As a result, assessments are at times issued in respect of these returns at a much later date.* The final examination of all non-taxable returns concurrently with taxable returns would result in a considerable increase in departmental expenditure. Clause 172 will, however, cover special cases, and will permit of the fixing of a time limit for the issue of any assessment after the date of the taxpayer's request." (Emphasis added)

It is enough to say that the note does not assume that assessments issued in respect of all non-taxable returns. Rather, it addresses the consequence of issuing, "at a much later date", an assessment in respect of a return which on its face was non-taxable but on examination was found to warrant a positive assessment. The note to the Bill does not assist the taxpayer's contentions.

26 Section 204 of the Act was amended, in 1954, by adding to it the words which dealt with the case where a notice of assessment stated no date as the date on which tax was due and payable. But, importantly, the effect of this amendment was that the Commissioner was no longer obliged to specify in every assessment a due date for payment.

27 The Treasurer, Sir Arthur Fadden, explained the need for the amendment in the following terms[18]:

> "The only other provision that it is necessary to mention is a proposed amendment to section 204 of the principal act. As now enacted, that section provides that income tax assessed shall be due and payable on a date specified in the notice of assessment, but not less than 30 days after service of that notice. By reason of credits for provisional tax paid or for tax instalments deducted from earnings, many notices of assessment show, instead of an amount payable by the taxpayer, a refund due to him. As it is inappropriate in such instances to specify in the notice a due date for payment, the proposed amendment will authorise the omission of this particular from the notice. However, the omission would affect the operation of those provisions of the principal act that authorise the amendment of assessments within three years – or, in some instances, six years – from the date on which the tax became due and payable under the assessment. I refer to both amendments that have the effect of increasing

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**18** Second Reading Speech of the Treasurer: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 September 1954 at 885-886.

> the tax in the original assessment, and those that have the effect of reducing that tax. If no date were specified in the notice of assessment, there would be no commencing point for the period within which the assessment might be amended. It is proposed, therefore, that, where no date is specified in the notice of assessment, the thirtieth day after service of the notice shall be a notional due date for payment, from which the period for amendment of the assessment may be reckoned. This amendment will effect a saving in administration without inconvenience or detriment to taxpayers."

The Treasurer mentioned two kinds of case: where credits for provisional tax paid, or tax instalments deducted, exceeded the amount of tax assessed. It was in this context that reference was made to "a notional due date for payment, from which the period for amendment of the assessment may be reckoned". But in both the cases mentioned by the Treasurer, the Commissioner had assessed an amount of tax as due in respect of the year of income in question. That amount of tax was satisfied by the application of money already received by the Commissioner and thus, at the time the assessment issued, there was an application of those credits in satisfaction of the amount which the Commissioner claimed to be due. But the application of credits in this way must not be permitted to obscure that there had been an assessment by the Commissioner that a sum for tax was due and payable.

28 The taxpayer sought to extrapolate from the Second Reading Speech a general proposition about the applicability of a "notional" date for payment to *all* cases in which no sum must be outlaid in response to a notice that the Commissioner has determined the sum of tax (if any) attracted by a taxpayer's assessed income. Such a general proposition pays insufficient regard to the differences between cases where tax has been assessed to be payable and those where it has not.

29 The construction of the Act for which the appellant contends strains the words of s 170(3) (and s 204) beyond any reasonable degree of elasticity that they might be said to have. If no tax is payable in respect of a year of income it cannot be said that there is a date (even a "notional" date) by which it is due and payable.

30 For the reasons that we have given it follows that s 170(3) did not apply to bar the Commissioner from issuing the 1994 assessment. Moreover, that this was so was clearly established by earlier authority including, in particular, this Court's decision in *Batagol*, a decision which the Federal Court was bound to apply.

*Batagol*

31 Until the present case, the understanding of the operation of the Act which the Commissioner contended *Batagol* revealed, had generally been accepted and acted upon both in this Court and in other Australian courts[19]. That is not surprising when regard is had to what issues were considered and determined by this Court in *Batagol*. The Full Court in *Batagol* dealt with a case stated by a single justice pursuant to s 18 of the *Judiciary Act* 1903 (Cth). The facts stated in the case related to three years of income - the years ended 30 June 1952, 1953 and 1954. The taxpayer lodged returns of income for each of those years. The case stated revealed that officers of the Commissioner had examined each of the taxpayer's returns and, in respect of each year, formed the opinion that, by reason of accrued losses carried forward, the taxpayer was not assessable to tax upon the return, although it disclosed what would otherwise be a taxable income. That is, in each of the three years in question the Commissioner ascertained the taxpayer's taxable income and ascertained that no tax was payable on it. Each return was noted accordingly but no notice of this conclusion was given to the taxpayer in respect of either the 1952 or 1953 tax years.

32 In April 1955, the Commissioner sent to the taxpayer a "refund advice" and a cheque for an amount equal to the instalments of tax that had been deducted from sums earned by the taxpayer during the 1954 tax year and remitted to the Commissioner. The refund notice "contained the statement that no tax was payable on the income shown in the return"[20].

33 In June 1955, the Commissioner issued notices of assessment to the taxpayer. Each notice stated an amount of tax payable in respect of the taxpayer's taxable income in each of the three years. The questions stated for the opinion of the Full Court included whether, prior to the assessments the subject of the June 1955 notices, "the Commissioner [had] made an assessment within

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**19** *Commissioner of Taxation (Cth) v Maurice (Dec'd)* (1977) 52 ALJR 1; 17 ALR 193; *F J Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360; *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1; *Prestige Motors Pty Ltd v Commissioner of Taxation* (1993) 47 FCR 138; *Webb v Commissioner of Taxation (No 2)* (1993) 47 FCR 394; *Stuart (No 2) v Federal Commissioner of Taxation* (1996) 96 ATC 4942; 34 ATR 31; *Deputy Federal Commissioner of Taxation v Sheehan* (1986) 86 ATC 4718; 18 ATR 194.

**20** *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 254 per Owen J.

the meaning of the Act in respect of the taxpayer" for any of the three years[21] and whether the Commissioner had power to make the assessment the subject of the notice in respect of each of the three years[22]. The Court answered the former question "no" in respect of each year and the latter question "yes" in respect of each year. That is, the Court decided that the preparation and issue of the refund advice sent to the taxpayer in April 1955, a refund statement which said that no tax was payable, was not the making of an assessment within the meaning of the Act.

34 In the face of that decision, and in the face of the reasoning that led the Court in *Batagol* to its conclusion, it was not open to the Federal Court to reach a contrary view, no matter how narrow a view is taken of the doctrine of precedent. It is, therefore, not necessary now to consider any wider question about the operation of that doctrine.

Overseas decisions

35 Some reference was made to decisions on analogous, but not identical, provisions in the taxation legislation of Canada[23] and New Zealand[24]. Lord Jauncey of Tullichettle said, in delivering the advice of the Privy Council in *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue*[25], that the wording of the relevant New Zealand statute was significantly different from that considered in *Batagol*, and that accordingly, *Batagol* was not of assistance in resolving the question presented in the *Lloyds Bank* case. For the same reason the decisions concerning the Canadian and New Zealand legislation are of no assistance in resolving the issues in this case. Those issues are resolved by resort to the terms of the Act construed as it was in *Batagol*.

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**21** (1963) 109 CLR 243 at 248. Case stated question 2.

**22** (1963) 109 CLR 243 at 248. Case stated question 3.

**23** *Okalta Oils Ltd v Minister of National Revenue* (1955) 55 DTC 1176; *Anjulin Farms Ltd v Minister of National Revenue* (1961) 61 DTC 1182; *Scott v Minister of National Revenue* [1961] Ex CR 120; *The Queen v Gary Bowl Ltd* (1974) 74 DTC 6401.

**24** *Commissioner of Inland Revenue v V H Farnsworth Ltd* [1984] 1 NZLR 428; *Commissioner of Inland Revenue v Lloyds Bank Export Finance Ltd* [1990] 2 NZLR 154; *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue* [1991] 2 AC 427.

**25** [1991] 2 AC 427 at 437.

36 The Commissioner's appeal to this Court should be allowed. In accordance with what we were told was the agreement between the parties, there should be no order for costs in this Court and the orders for costs below should not be disturbed. Paragraph 1 of the order of the Full Court of the Federal Court of Australia entered on 30 April 1999 should be set aside and in lieu it be ordered as follows:

(a) appeal allowed;

(b) set aside pars 1, 2 and 3 of the order of Spender J entered on 15 September 1997 and in lieu order that the appeal is dismissed.

37 KIRBY J. This appeal[26] raises two points. The first concerns the binding authority controlling decision-makers, administrative and judicial, who determined the controversy between the parties before it reached this Court. The second, which arises if the matter is not governed by binding authority, concerns an issue of statutory construction. The statute in question is the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). If the second point is reached, the appeal neatly illustrates the choice, hitherto recognised in the decisions of this Court, between the literalist approach to statutory construction favoured forty years ago and the purposive approach now generally followed by the courts of the common law, including this Court.

Facts, common ground and issues

38 The facts giving rise to the problem before the Court and the applicable statutory provisions are stated in the reasons of Gleeson CJ, Gummow and Hayne JJ ("the joint reasons"). I shall not repeat them unnecessarily.

39 It was common ground that the respondent, Mrs Gwenda Ryan ("the taxpayer"), when she lodged her return of income for the year ending 30 June 1987, made a full and true disclosure to the Commissioner of all material facts necessary for the Commissioner's ascertainment of the amount of taxable income and of the tax payable thereon under the Act[27]. It was undisputed that, following such disclosure by the taxpayer, the Commissioner, by an appropriate officer, proceeded to calculate the taxpayer's taxable income for the year in question. It was also undisputed that, following this calculation, on 11 December 1987 a notice titled "Refund Notice" was issued to the taxpayer accompanied by a cheque for $3,653.40. This was the refund of income tax to which the taxpayer was entitled under the Commissioner's calculation. The form of notice set out what were described as "[d]etails of your assessment". On the reverse side of the document were printed explanatory notes said to "help to explain your assessment". The document refers fourteen times to the product of the Commissioner's calculation as "your … assessment", "an … assessment", "the … assessment" or "this … assessment"[28].

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**26** From the Full Court of the Federal Court of Australia: *Commissioner of Taxation v Ryan* (1998) 82 FCR 345.

**27** *Commissioner of Taxation v Ryan* (1998) 82 FCR 345 at 349. See the Act, s 6(1): definition of "assessment".

**28** cf the Act, s 177(1).

40 In these circumstances, not only would the taxpayer be entitled (as Callinan J observes[29]) to be surprised if she were told that she had not complied with the requirements for an "assessment" and fully acquitted her liability for tax under the Act in respect of the year in question. She would, I think, have been astonished to be told that her "assessment" was not an "assessment" at all. And that the protective provision of the Act (s 170(3) which prevents the Commissioner from amending an "assessment" in certain circumstances should the latter assessment increase the taxpayer's liability) did not apply in her case. This was supposedly so, despite its apparent purposes, self-description and repeated assertions, because the purported "assessment" issued by the Commissioner was nothing of the sort. Were this the law, a more misleading form must never have been devised in the history of federal administration in Australia. One would hesitate to commence the analysis of this case with such a presupposition.

41 Nevertheless, the Commissioner, who succeeded before the Administrative Appeals Tribunal[30] but lost at first instance[31] and in the Full Court[32] of the Federal Court of Australia, contended that as a matter of established legal authority and proper analysis of the Act, the judges of the Federal Court had erred in upholding the taxpayer's contentions and in concluding that, in the events which had occurred, he was debarred from reassessment.

The holding in *Batagol* does not defeat the taxpayer

42 The foundation for the primary argument of the Commissioner was the decision of this Court in *Batagol v Federal Commissioner of Taxation*[33]. Once special leave is granted to permit an appeal to this Court which raises the previous authority of the Court, it is open to the Court to reconsider the correctness of such authority. In appropriate circumstances this Court may overrule holdings established in earlier cases. Or it may clarify, confine or refine such holdings in the light of further argument and analysis, developments in other courts or fresh approaches to the issue in hand[34]. Nevertheless, if the

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**29** Reasons of Callinan J at [88].

**30** *Ryan v Commissioner for Taxation* unreported, Administrative Appeals Tribunal, 13 May 1996 (G L McDonald DP).

**31** *Ryan v Federal Commissioner of Taxation* (1997) 148 ALR 88.

**32** *Commissioner of Taxation v Ryan* (1998) 82 FCR 345.

**33** (1963) 109 CLR 243.

**34** A recent example is *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67 where the Court overruled *Grant v Downs* (1976) 135 CLR 674.

(Footnote continues on next page)

reasons of this Court are necessary to the holding which sustains the orders of the Court and no other relevant change has occurred, those reasons – and the holding which they establish – are binding on other Australian courts until reversed or modified by this Court or, where applicable, by valid legislation.

43 The importance of faithful observance of this measure of obedience does not have to be emphasised[35]. It is, and should be, instinctive to every judicial officer in the Australian courts hierarchy. However, the rule is, as it must be, a limited measure of control. Its scope is to be ascertained by the application of settled principles. Having recently reviewed the limited rule which the law establishes[36], I will not repeat the steps necessary to ascertain that part of this Court's reasons that binds courts below it as a matter of precedential authority. It is enough to say that the scope is limited to the essential reasoning of the judges who form the majority that agrees in the holding that sustains the orders of the Court. Other remarks in the course of this Court's reasoning will be entitled to attention and respect. But such remarks are not, as a matter of law, binding. Given the rapidly changing social conditions in which the law – of the Constitution, of statutes and the common law – must operate, it is wholly undesirable to expand beyond the foregoing the measure of this Court's controlling authority. It would introduce an unnecessary and undesirable restraint upon judicial officers, many of them with specialist experience, to hold them to obedience to remarks inessential to the decisions made by the members of this Court.

44 The taxpayer did not seek an overruling of the holding of this Court in *Batagol*. In the Federal Court and in this Court she argued that, properly analysed, the holding in that case did not oblige the conclusion that, in default of an assessment of a specified amount of tax liability, the purported "assessment" notified to her in 1987 was not an assessment of the amount of tax payable on her taxable income. Therefore, *Batagol* did not require the conclusion that the protection of s 170(3) of the Act should not be afforded to her in the present case.

45 Because it is suggested that in the holding in *Batagol*, and the reasoning that led the Court to its conclusion in that case, meant that it was not open to the

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In constitutional cases see eg *Cole v Whitfield* (1988) 165 CLR 360; *Ha v New South Wales* (1997) 189 CLR 465. In income tax see eg *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 overruling *Curran v Federal Commissioner of Taxation* (1974) 131 CLR 409.

**35** cf *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672; 152 ALR 416 at 416; *Akins v Abigroup Ltd* (1998) 43 NSWLR 539 at 548.

**36** *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-421.

Federal Court to reach a contrary view[37], it is proper to point out that both the judge at first instance (Spender J) and the judge who gave the reasons of the Full Court (Merkel J) recognised this threshold question and took pains to address themselves to it. For his part, Merkel J stated that "whether a nil assessment can be made under the Act is an open question"[38]. If error there is, it is therefore an error of analysis. It is not a challenge to authority.

46 In *Batagol* this Court was constituted by Kitto, Menzies and Owen JJ. The Court was unanimous in the answers which it gave to the questions asked in a case stated[39]. Accordingly, the reasons of each participating judge must be considered in order to discover the essential reasoning of the Court sustaining those answers. Kitto J and Owen J wrote separate reasons. A close analysis of each reveals certain differences. Menzies J, in addition to adding an observation immaterial for present purposes, contented himself with saying that he agreed with both Kitto J and Owen J "that the assessments in question are original and not amended assessments"[40]. From this remark Menzies J proceeded to agree in the Court's orders.

47 It should be said at once that some of the remarks of Kitto J and of Owen J, in the course of their reasons, lend support to the understanding of that decision urged for the Commissioner. Thus, throughout his reasons, Kitto J referred to the "ascertainment" of taxable income and of the tax payable thereon as a procedure producing an amount that is "fixed", "a specified amount of money", something "definitive of the amount of the taxpayer's liability"[41], a "fixed and certain sum", and the "precise indebtedness of the taxpayer"[42]. His Honour stated that "[t]hroughout the section an assessment is referred to as a specific, identifiable thing, which … will stand as decisive of liability"[43]. Similarly, Owen J commented that an assessment must "create a liability to pay … tax"[44]. Taken

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**37** Joint reasons at [34].

**38** (1998) 82 FCR 345 at 364.

**39** Pursuant to *Judiciary Act* 1903 (Cth), s 18.

**40** (1963) 109 CLR 243 at 254.

**41** (1963) 109 CLR 243 at 251-252.

**42** (1963) 109 CLR 243 at 252 citing Isaacs J in *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39 at 55.

**43** (1963) 109 CLR 243 at 253.

**44** (1963) 109 CLR 243 at 256.

out of the context with which the Court was there concerned, it is therefore unsurprising that importance should have been attached by later courts to the apparent assumption of the judges in *Batagol*. However, as Spender J explained[45], it is not provided in any of the judgments in *Batagol* that a determination that no tax is payable precludes the document from amounting to an "assessment".

48 Furthermore, as was also pointed out in the Federal Court[46], the facts in *Batagol* were quite different from the facts in the instant case. There, the taxpayer had made a full and true disclosure of all the material facts necessary for the assessment of his income in respect of three years of income ending 1952, 1953 and 1954. The Commissioner originally decided that, as a result of accrued losses which were carried forward by the taxpayer, there was no taxable income for the three years in question. The taxpayer was therefore not liable to tax on the income stated in his returns. In respect of the first two years, after the assessor responsible had noted on the taxpayer's file that there was no liability to tax on the income stated in the return, the return was marked as having been dealt with. Nothing that would answer to the description of an "assessment" was communicated to the taxpayer. In respect of the 1954 year of income, the same procedure was followed. However because a refund of tax was payable in that particular year, the file was forwarded to the issue section of the Commissioner's office and a refund advice and cheque were sent to the taxpayer with an explanation of the basis on which the assessor had acted. The summary of argument of counsel for the Commissioner in *Batagol*[47], shows that the refund advice did not indicate that an assessment had been made.

49 It was when an undoubted notice of assessment was issued to the taxpayer in June 1955, based on disallowance of the losses previously mistakenly allowed to be carried forward and purporting to assess the taxpayer as liable to tax, that the question arose as to whether s 170(3) of the Act authorised an "amended assessment". Whether the earlier notations on the files for the years ended 1952 and 1953 or the advice sent to the taxpayer for the year ended 1954 amounted to "assessments" was the essential legal issue that fell to be determined.

50 *Batagol* holds that for the purposes of s 170(3) of the Act an "assessment" is not made (and the taxpayer is not liable to pay tax) unless and until the Commissioner has calculated the taxable income, calculated the tax payable

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**45** (1997) 148 ALR 88 at 97.

**46** *Ryan v Federal Commissioner of Taxation* (1997) 148 ALR 88 at 94-97; *Commissioner of Taxation v Ryan* (1998) 82 FCR 345 at 354-355.

**47** (1963) 109 CLR 243 at 249.

thereon and served a written notice of assessment on the taxpayer. These three steps had not been completed in *Batagol*. In respect of the first two years of income, the Commissioner had not served a notice at all, merely noting his file, as a matter of internal procedure. For the third year of income, the taxpayer received a cheque and a "refund advice" (which contained a statement that no tax was payable on the income shown in the return) on 6 April 1955 followed by a notice of assessment in June 1955[48].

51 It is unsurprising that the internal notation in respect of the first two years of income should have been held in *Batagol* not to have been an "assessment". In respect of the third year, it was similarly so classified because the "refund advice" merely explained why it was that the whole of the tax deductions made during the year were being refunded. So analysed, *Batagol* was not a case in which it was essential to decide that a nil assessment of income was a legal impossibility so that, of itself and without more, it took the recipient taxpayer outside the protection of s 170(3).

52 This understanding of what *Batagol* decided, and all that it decided, is confirmed by what was said by this Court in *F J Bloemen Pty Ltd v Federal Commissioner of Taxation*[49]. In that case, describing *Batagol*, Mason and Wilson JJ (with whom Aickin J agreed) remarked[50]:

> "The word 'assessment' is defined in s 6 to mean, unless the contrary intention appears, the ascertainment of the amount of taxable income and of the tax payable thereon. In *Batagol v Federal Commissioner of Taxation*, the Court considered the meaning of 'assessment' in the context of s 170 and the group of sections with which it is associated. Kitto J observed: 'Assessment in the sense of mere calculation produces no legal effect. No step that the Commissioner may take, even to the point of satisfying himself of the amount of the taxable income and of the tax thereon, has under the Act any legal significance', until he serves a notice of assessment. Then and then only has an 'ascertainment' been made. The amounts of taxable income and tax are then rendered certain. In this context, according to his Honour 'assessment' means 'the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified

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**48** (1963) 109 CLR 243 at 244-245.

**49** (1981) 147 CLR 360.

**50** (1981) 147 CLR 360 at 371-372. (Footnotes deleted; emphasis added); cf *Federal Commissioner of Taxation v Prestige Motors Pty Ltd* (1994) 181 CLR 1 at 13 per Mason CJ, Brennan, Deane, Gaudron and McHugh JJ.

> amount of money will become due and payable as the proper tax in that case'. Owen J reached a similar conclusion. Menzies J agreed with both Kitto and Owen JJ. *It was held that nothing done in the Commissioner's office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by service of a notice of assessment*."

53 It is worth recording that in *Re Beavis Bros Construction Pty Ltd (In Liq)*[51] the Commissioner is noted as submitting that "*Batagol's* case established that where the Commissioner forms the view that no tax is payable and says so in a letter, the letter is not an assessment; Kitto J's observations were directed to the question whether or not the letter could be described as an assessment …". In my view this was a correct description of the essential concerns with which this Court was dealing in *Batagol.* Those concerns should not be needlessly extended to confine decision-makers considering the meaning and application of s 170(3) of the Act to the conclusion advocated by the Commissioner.

54 If, contrary to my opinion, a fine analysis of the questions posed in *Batagol* in respect of the three different financial years produces a narrow view that, in respect of the third year of income, a decision of the Court exists consistent with the Commissioner's contentions, I would confine the holding in the case. As the facts disclose, the primary focus of attention was not the same as that presented in this appeal. It related primarily to the internal practices of the Commissioner and whether they could amount to the making of an "assessment" although not notified to the taxpayer in that case. Therefore, if there is any doubt, I would limit the holding in *Batagol* to that point. Upon that point (given the scheme of the Act) the decision was clearly right. It remains applicable.

55 In the result, the Commissioner may be entitled to succeed on the true construction of the sub-section. But he is not entitled to succeed on the basis that the point is foreclosed by binding decisional authority.

Commissioner's argument for non-application of s 170(3) protection

56 *Statutory language:* Whatever else was uncertain in this case, there was no default in the service on the taxpayer of the notification of the Commissioner's calculation in her case. This was performed in the form which repeatedly described what was being done as an "assessment". Although that description is not conclusive it is not irrelevant to characterising the form's nature and

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**51** (1987) 10 NSWLR 1 at 8.

purpose[52]. Therefore, the central question decided in *Batagol* had no possible application to the facts of this case.

57 Nevertheless, the Commissioner contended that a number of arguments supported his construction of the Act. The first of these was the language of the Act. The Act imposes on the Commissioner a general duty to administer the Act[53]. That duty includes the making of an assessment of the amount of tax liable to be paid by any person under the Act[54]. Where, therefore, a taxpayer is in receipt of assessable income, the prima facie duty of the Commissioner is to make an assessment in order to recover the tax due. There are only a limited number of exceptions. So far as the exception in s 170(3) is concerned, it is confined to cases where there has been an "assessment" as defined in s 6(1) of the Act and where (the preconditions to s 170(3) being fulfilled) three years has expired "from the date upon which the tax became due and payable under that assessment". The Commissioner submitted that the taxpayer's case foundered on each of these preconditions. To be an "assessment" a positive amount of tax must be payable. This was because "assessment" was defined at the relevant time to involve "the ascertainment of the amount of taxable income and of the tax payable thereon". The argument ran that, if there was no "tax payable thereon", any notification to the taxpayer could not, by definition, amount to an "assessment" for these purposes, whatever might be the meaning of the word in other contexts. The Commissioner further submitted that this view of the meaning of "assessment" in this context was confirmed by the very language of s 170(3). Unless a positive amount of tax was identified as payable in the assessment, it would be impossible to fix "the date upon which the tax became due and payable under that assessment".

58 *Course of authority:* Even if it were assumed (contrary to the Commissioner's primary argument) that the meaning of "assessment" and the operation of s 170(3) in the context were not strictly decided by the authority of *Batagol*, it was submitted that a long line of authority in this

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**52** *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39 at 54-55.

**53** The Act, s 8.

**54** The Act, s 169. See *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 659.

Court[55], in the Federal Court[56] and in other Australian courts[57] had accepted the construction of the Act for which the Commissioner contended. In the words of Northrop J in *Stuart (No 2) v Federal Commissioner of Taxation*[58]: "The law on this issue is clear. A nil assessment is an impossibility." In light of such judicial remarks, assumptions and holdings to that effect, taxation practice had developed in Australia, so it was put, which must now be regarded as settled[59]. Any change was the proper province of the Parliament and not of the courts.

59 *Legislative confirmation:* In elaboration of this last submission, it was pointed out that the possible unfairness to a particular taxpayer of depriving him or her of the protection afforded by s 170(3) in the case of a nil assessment had been called to notice in at least two of the committees of inquiry which had examined the Act with a view to its reform[60]. However, the proposals that the Act should be changed were not adopted by the Parliament. On the contrary, amendments to the Act enacted by the Parliament accepted that a

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**55** eg *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 at 107; *Batagol* (1963) 109 CLR 243 at 252, 256; *Albion Hotel Pty Ltd v Federal Commissioner of Taxation* (1965) 115 CLR 78 at 81; *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 658, 666.

**56** *Commissioner of Taxation v Swan Brewery Co Ltd* (1991) 30 FCR 553 at 558; *Prestige Motors Pty Ltd v Commissioner of Taxation* (1993) 47 FCR 138 at 142-143; *Webb v Commissioner of Taxation (No 2)* (1993) 47 FCR 394 at 399-400; *Stuart (No 2) v Federal Commissioner of Taxation* (1996) 96 ATC 4942 at 4945-4946; 34 ATR 31 at 34-35.

**57** *Deputy Federal Commissioner of Taxation v Sheehan* (1986) 86 ATC 4718 at 4723-4724; 18 ATR 194 at 200-201.

**58** (1996) 96 ATC 4942 at 4945; 34 ATR 31 at 34.

**59** Burges, "The Rights of Taxpayers and their Agents", (1974) 9 *Taxation in Australia* 8 at 12. But see Pagone, "The Significance of Assessments", (1990) 19 *Australian Tax Review* 88; Barkoczy, "The Nature of an Income Tax Assessment", (1999) *Journal of Australian Taxation* 36 at 45; Barkoczy, "FC of T v Ryan: the Full Federal Court's View on 'nil assessments'", (1998) 20 *CCH Tax Week* ¶278.

**60** The first is the Report of the Committee on Taxation (Ligertwood Report) (1961) pars 591-595. The Committee considered the question of whether the law should be changed to treat a nil determination as an assessment shortly after *Batagol* was decided by the Tax Board of Review and before the appeal to this Court was heard. The second is the Taxation Review Committee (Asprey) Report (1975) pars 22.76-22.78 which was conducted 15 years later.

"nil assessment" was a legal impossibility. Thus, in the context of the payment of interest by a taxpayer[61] provision was made to overcome the conclusion which would arguably not have been necessary if an assessment that no tax was due and payable would amount to an "assessment" for the purposes of the Act.

60 *Judicial restraint:* Against the background of the foregoing arguments, the Commissioner urged adherence to the longstanding assumptions about the meaning of "assessment", the operation of s 170(3) and about his own continuing duties under the Act to recover tax on taxable income. I was reminded of my own remarks (concededly in another context) that where detailed legislative rules would be required, it was preferable to leave the matter to the Parliament rather than to look to the judiciary to repair any problem that Parliament was thought to have overlooked or omitted[62].

The taxpayer's construction is to be preferred

61 *Contrary arguments answered:* None of the foregoing arguments persuades me to accept the Commissioner's contentions. So far as the legislation is concerned, I will shortly demonstrate that there is an alternative construction of the relevant provisions of the Act. That construction is to be preferred because it promotes the purpose for which the Parliament enacted s 170(3). It avoids the bizarre and clearly unjust consequences which would flow from the construction urged for the Commissioner. Whilst it is true that several courts (and perhaps individual Justices in this Court) have made assumptions about the nature of an "assessment" under the Act and the operation of s 170(3) based on those assumptions, these cannot control this Court's determination of those questions when that issue is directly tendered for decision, as it is now. It is often the case that words uttered by distinguished judges addressing a slightly different question have come to influence later judicial decisions beyond the necessities of binding authority. However, when the magnifying glass is applied to legislation and past presuppositions are examined afresh, this Court is not hostage to such judicial assumptions. Unless it accepts that it is bound by them and must reject contrary arguments, notions of rationality, logic and coherence will ultimately carry the day.

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**61** The Act, s 170AA(6).

**62** *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 888-889; 163 ALR 270 at 338-339. This was a comment on the fact that cross-vesting legislation was a preferable foundation for jurisdictional assignment than the problematic expansion of the scope of the constitutional concept of "matter" in Ch III of the Australian Constitution. See also *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 386; *Lipohar v The Queen* [1999] HCA 65 at [199].

62 As to legislative amendments made on the assumption of the correctness of the contention that a "nil assessment" is a legal impossibility for the purposes of s 170(3) of the Act, there are several answers. Courts nowadays are less willing than in the past to indulge in the fiction that a later legislative amendment is always designed to give effect to the presuppositions inherent in earlier judicial decisions[63]. Especially in legislation as complex as the Act under consideration here, that would be a very bold assumption to make. For example, the Parliament may have enacted a provision such as s 170AA(6) in the terms adopted, for no reason other than an abundance of caution[64]. In any case, several other sections are consistent with a view of the meaning of s 170(3) for which the taxpayer argued[65].

63 As to the failure to implement reform proposals, this may evidence Parliamentary attitudes falling far short of rejection of such proposals. On some occasions it could equally be argued that the Parliament has assumed that its original purpose was clear enough and that eventually the courts would correct earlier erroneous misapprehensions about it. A member of the Parliament, like the taxpayer in this case, could certainly be forgiven for reading s 170(3) of the Act, concluding that there was no need for amendment and that it was self-evident that the protection to be afforded to the taxpayer was no less applicable where, in the particular case, the "assessment" of the tax due and payable was nil as where it was, say, five dollars.

64 As to judicial restraint, I agree that those who walk into the minefield of the Act must show particular caution. This is not only because of the importance of its provisions both to the revenue and to taxpayers but also because of the great complexity of the Act and the occasional absence of a reflection of the fairness and rationality that may more easily be imputed to the Parliament in other statutes. Nevertheless, if a court concludes that previous judicial observations about the Act are incorrect, have taken a wrong turning or have resulted in outcomes that are absurd, the judicial duty will be to express the true meaning of the Act. If the language of the statute permits of this Court the restoration of the Parliament's apparent policy in a provision such as s 170(3), in the face of some judicial conclusions which have frustrated the attainment of that policy, this is

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**63** *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 351.

**64** cf *In Re Samuel* [1913] AC 514 at 526.

**65** The Act, ss 221H(2), 221YE (which imply that an assessment is made where no tax is payable, but rather a refund is due); cf s 221YA(3) which specifies that the ascertainment of provisional tax is not an assessment.

not excessive activism. It is always the judicial duty in statutory construction to state, and give effect to, the meaning of the statute ascertained from its language.

65 *Avoidance of bizarre results:* On the face of things, the purposes of s 170(3) of the Act include (1) the encouragement to a taxpayer to make a full and true disclosure to the Commissioner; (2) the provision to the Commissioner of an initial time for his assessment of tax payable on the basis of all of the material facts disclosed; (3) the allowance of a further period of three years after the date upon which the tax became due and payable under such assessment; and (4) thereupon the provision to the taxpayer of protection against any increase in liability to tax grounded in a reassessment by the Commissioner. In current conditions – where the importance of self-assessment of income tax has greatly increased since s 170(3) was enacted – the fulfilment of the policy of the sub-section to promote "full and true" disclosure by taxpayers, and to limit what the Commissioner can do thereafter, is of enhanced significance.

66 The absurdity of the Commissioner's submission that an "assessment" of its nature and definition requires that a definite sum of tax must be found payable is illustrated by the judgment of the Privy Council in *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue*[66]. That was a New Zealand appeal. Section 19 of the *Income Tax Act* 1976 (NZ) provided that the Commissioner should, in and for each year and from returns made and other information in his possession, make assessments in respect of each taxpayer of the income on which tax was payable and of the amount of that tax. Section 25(1) of that Act, intended to have consequences similar to those in s 170(3) of the Australian Act, enacted that when any person who had made a return and had been assessed for income tax for any year, it was not lawful for the Commissioner to alter the "assessment" so as to increase the amount after the expiration of four years from the end of the year in which the "assessment" was made. The taxpayer's returns for the years 1976 and 1977 showed small profits. However, because of accumulated losses in previous years which could be carried forward and set off, the Commissioner made determinations that no tax was payable. More than four years later, the Commissioner purported to assess the taxpayer to income tax for the years 1976 and 1977. The taxpayer challenged the Commissioner's right to do so.

67 In the High Court of New Zealand, Tompkins J rejected the contention that the nil assessment previously made was not relevantly an "assessment" at all[67].

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**66** [1991] 2 AC 427.

**67** *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue* (1988) 11 TRNZ 733.

This decision was reversed by the New Zealand Court of Appeal[68]. However, it was restored by the Privy Council. Their Lordships found *Batagol*, to which they were referred, unhelpful. They suggested that there were significant but unspecified differences between the New Zealand and Australian legislation[69]. However, there are, in fact, sufficient similarities between the two Acts to make some of their Lordships' remarks, delivered by Lord Jauncey of Tullichettle, pertinent[70]:

> "Their Lordships have no doubt that the arguments for the taxpayer are to be preferred and that the commissioner's statutory duties under section 19 in relation to a taxpayer's return extend not only to the production of a result which produces taxable income but also to results which produce a nil return or a loss. Any other construction would produce the anomalies and illogicalities already referred to. … Their Lordships cannot do better than quote the following passage from the judgment of Tompkins J.:
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> > '… I find nothing in the section, nor in the statutory scheme to justify a conclusion that the commissioner only makes an assessment where he determines that there is tax payable. A conclusion that there is no amount on which tax is payable and that as a consequence there is no tax payable involves making an assessment from the returns and other information in his possession just as much as if the result of the assessment were to find that there was an amount on which tax was payable and consequently there was tax payable.'"

68 The logic that appealed to Tompkins J and to the Privy Council in *Lloyds Bank* appeals to me. It would be absurd if, under the Australian Act, the taxpayer acquired the protection of s 170(3) in a case where he or she was assessed to tax due and payable in the sum of five dollars but no protection at all where the assessment was nil. The extent of the absurdity can be tested thus. On the Commissioner's proposition, although his actions in accordance with the Act were precisely the same, and the same forms and notifications were duly sent to a taxpayer, it would remain open (in the event of a nil assessment) to subject a taxpayer to a fresh assessment of tax five, ten or 30 years later. This construction

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**68** *Commissioner of Inland Revenue v Lloyds Bank Export Finance Ltd* [1990] 2 NZLR 154.

**69** [1991] 2 AC 427 at 437.

**70** [1991] 2 AC 427 at 437-438.

should not be imposed on the Act unless the words are intractable and do not permit of a more rational operation[71].

69 One of the major purposes that obviously lay behind the enactment of s 170(3) of the Act was to afford taxpayers, who honestly provided to the Commissioner full and true disclosure of all material facts a complete protection, after the stated interval, from later reopening of their taxation obligations for the year in question. This is no small thing. There is a trade-off between the obligation on the part of the taxpayer to be honest and fulsome in his or her disclosures and the obligation of the Commissioner, within a limited time, to perform his functions with accuracy and completeness. The construction urged by the Commissioner completely destroys this equilibrium. The Parliament has recognised that taxpayers are entitled to order their affairs upon the basis that if they are wholly honest and make full and true disclosure to the Commissioner, they will not be liable to reassessment after the stated interval. This Court should not undermine this policy[72]. As the Privy Council remarked in *Lloyds Bank*, the prospect that, for a nil return, the Commissioner could "reopen his determination at any time in the future" appears "contrary to the spirit" of the protective section[73].

70 *Assessment as a process:* A further way of testing the Commissioner's proposition is to see how it operates within the context of the duties imposed upon the Commissioner by the Act. By s 166, the Commissioner is obliged ("shall") to "make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon". There is obviously no presupposition in that obligation that the Commissioner must find a particular or specific amount

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**71** cf *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 73 ALJR 823 at 836-837; 162 ALR 441 at 458-460.

**72** cf Australia, Royal Commission on Taxation, First Report (1921) pars 967-968: "When a taxpayer has fully and openly disclosed the facts relating to his income … he does seem to be morally entitled to consider the transaction closed, even although a subsequent judicial decision shows that a mistaken principle of law has been applied to his case. … [U]navoidable hardships which must in some cases result from the operation of the taxation laws [are] aggravated by a new element of uncertainty due to a widespread unsettling of past transactions whether in favour of the Department or of the taxpayer. It is very important in the public interest to reach finality in such matters, and we do not think that the advantages to be gained by the hopeless striving after ideal exactitude balance the evils that result from the unnecessary disturbance of things once settled."

**73** [1991] 2 AC 427 at 438 citing *Commissioner of Inland Revenue v V H Farnsworth Ltd* [1984] 1 NZLR 428 at 430.

of "tax payable". What is required is that the Commissioner should engage in the process of "assessment". By s 6(1) of the Act it means, relevantly, "the ascertainment of the amount of taxable income and of the tax payable thereon". Dictionary definitions make it clear that all that is involved in "ascertainment" is the finding out of something by trial, examination or experiment so as to come to know of something "as certain" which otherwise is not[74]. The ascertainment of a taxable income which yields no tax is just as much the application of the Act and the reduction of the taxpayer's liability to certainty as is the ascertainment of a taxable income which yields an obligation to pay, say, five dollars tax. In each case the Commissioner performs his statutory obligation as required. The taxpayer is informed of his or her obligation as the Act mandates.

71 In terms of s 166 of the Act, the exercise which the Commissioner is obliged to carry out is capable of producing at least five results, namely that the taxpayer had (1) a taxable income; (2) no taxable income; (3) a loss which could be carried forward in terms of s 80(2) of the Act offsetting the taxpayer's income so that the tax payable thereon is zero; (4) a taxable income below the threshold amount so that the tax payable thereon is zero; and (5) a taxable income the tax on which is fully offset by rebates or credits allowable to the taxpayer otherwise than in respect of amounts previously paid by or on behalf of the taxpayer to the Commissioner. If the Commissioner's argument were correct, it would mean that the finality and certainty for which s 170(3) provides in apparently general terms would be secured only in case (1). In each of the other cases (2)-(5), it would be possible for the Commissioner to reopen his determination at any time in the future[75].

72 This approach also contradicts the statutory scheme which requires the Commissioner to embark upon and complete his assessment for each year of income in respect of the taxpayer's return. The proposition that a "nil assessment" leaves it open to "complete the process" at some indefinite time in the future until a specific amount of tax is assessable therefore sits uneasily with the scheme of the Act and the duties which it imposes on the Commissioner. It exposes the Commissioner to the question which Merkel J asked, following Lord Jauncey of Tullichettle in *Lloyds Bank*[76]: "[W]hat has the Commissioner

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**74** *The Macquarie Dictionary*, 2nd ed (1991) at 95.

**75** cf *Webb v Commissioner of Taxation (No 2)* (1993) 47 FCR 394 at 399-400 per Hill J.

**76** [1991] 2 AC 427.

been doing if not *assessing* and what is the source of his statutory authority if it is not for *assessing*?"[77] (Emphasis in original)

73 An "assessment" which, by the proper application of the Act, results in an obligation to pay no tax is just as true an "assessment" for the purposes of the Act, and specifically of s 170(3). I agree with Spender J at first instance that a nil assessment is not a legal impossibility, as has sometimes been claimed. As his Honour correctly put it[78], "zero is a number, sum or amount, and an assessment of zero dollars is an assessment of a sum or amount of tax".

74 *Ascertainment of a notional date:* Yet the stumbling block which the Commissioner trailed in the path of the taxpayer was said to be the intractable requirement of s 170(3) itself that amendment of an assessment was only forbidden at the expiration of three years from a date fixed by reference to the "date upon which the tax became due and payable" under the original assessment. How, it was asked, could that date be ascertained if no tax was due and payable?

75 The answer to this question is readily afforded by s 204 of the Act. In 1954 that section was amended to add to the words then appearing, which were designed to fix the date upon which tax is "due and payable", the words "or, if no date is so specified, on the thirtieth day after the service of the notice"[79]. In the Second Reading Speech introducing this amendment[80] the Treasurer acknowledged that, by reason of credits for provisional tax paid, or for tax instalments deducted from earnings, many notices of assessment, instead of showing an amount payable by the taxpayer, showed a refund due. The Parliament was invited by the Treasurer to add the words indicated to s 204(1) of the Act. A "notional due date for payment" would then be introduced "from which the period for amendment of the assessment may be reckoned". This, it was explained, was required for good administration of the Commissioner's office as well as to protect taxpayers from detriment or inconvenience.

76 Although the words of s 204(1), as amended, sufficiently speak for themselves, the Treasurer's speech removes any doubt. Where, by reason of a

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**77** *Commissioner of Taxation v Ryan* (1998) 82 FCR 345 at 367.

**78** *Ryan v Federal Commissioner of Taxation* (1997) 148 ALR 88 at 98; cf Berstein, *Against the Gods: The Remarkable Story of Risk*, (1996) at XXXII-XXXIII.

**79** cf *Thai v Commissioner of Taxation* (1994) 53 FCR 252.

**80** Income Tax and Social Services Contribution Assessment Bill 1954 (Cth): Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 September 1954 at 885-886.

notice, showing in the particular financial year that no income tax was assessed as due and payable, a notional date was specified. This was 30 days after the notice. This provision is a further indication of the will of the Parliament that the protection and requirements of s 170(3) of the Act should be upheld in a case such as the present. Reading together ss 170(3) and 204(1) presents no great difficulty. Whatever problems might have been occasioned to the ascertainment of the commencement date of the protection afforded by s 170(3) before the amendment in 1954, they were removed once the notional date was introduced.

77 *Other jurisdictions:* Although in taxation law there are dangers in paying undue regard to the practice of other jurisdictions where the statute may contain different language justifying different approaches, it is worth noting that it is not only the New Zealand position that is consistent with that urged by the taxpayer. In Canada too the courts have construed s 46(4) of the *Income Tax Act*, RSC 1952 (which was the equivalent of s 170(3) of the Act) in a like way. In *Anjulin Farms Ltd v Minister of National Revenue*[81] it was necessary to give meaning to a provision permitting reassessment by the tax authority in cases where the taxpayer had made misrepresentation or committed fraud or, as presently relevant, "within 4 years from the day of an original assessment in any other case". The argument mounted by the Commissioner in this appeal was ventured in Canada. It was suggested that a nil assessment was an impossibility and amounted to no "assessment" at all. This argument was rejected. The Court concluded "that in construing section 46(4) as it was in 1959, the word 'assessment' therein includes an assessment at 'nil' dollars …". The legislation upon which this comment was made has since been amended. However, no later authority casts doubt on the correctness of the general principle expounded.

78 *Resort to s 171:* The Commissioner's final argument that the taxpayer's desire for certainty could be requited by resort to the provisions of s 171 of the Act, is not convincing. That is a wholly exceptional provision that obliges the taxpayer to seek a ruling. When it happens, it is an extraordinary occurrence. It might occur to those well-advised taxpayers with large complex tax arrangements. Apparently, few do. It is most unlikely to occur to ordinary taxpayers who, like the respondent, are pensioners or small wage earners and who receive a form describing itself as an "assessment", such as that issued here[82]. In any case, the logic of the Commissioner's argument is that, until a positive amount of tax becomes due and payable, s 171 itself might not be of help to a taxpayer receiving a nil assessment. Section 171 might deem an

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**81** (1961) 61 DTC 1182; cf Saltman, "Nil Assessments and the 1976-77 Amendments to the Income Tax Act", (1977) 25 *Canadian Tax Journal* 646.

**82** cf Barkoczy, "FC of T v Ryan: the Full Federal Court's View on "Nil Assessments", (1998) 20 *CCH Tax Week* ¶278.

assessment to have been made (even where no tax is payable) yet the time limit specified in s 170(3) will remain resolutely unaffected by any such deemed assessment.

Literal and purposive construction of statutes

79 In his reasons in *Batagol*, Kitto J acknowledged that the construction of s 170(3) which he preferred followed from "according to the literal meaning of its terms [an assumption] that an assessment is something that imposes a liability upon the taxpayer"[83]. Literalism was the common approach to statutory construction observed by courts of the common law, including this Court, in 1963 when *Batagol* was decided. However, two developments in the past forty years have modified this approach[84].

80 The first development is the adoption of various legislative injunctions to use extrinsic materials[85], just as this Court did without hesitation in the present case. In the time of *Batagol*, it would have been unthinkable for the parties to have referred to, let alone relied on, the Ligertwood Committee's report which interposed itself between the date of the decision of the Taxation Board of Review and the decision of this Court. Receiving the Second Reading Speech of the Treasurer in 1954 to help understand the purpose of the amendment to s 204 of the Act would have been rejected out of hand. Yet nowadays courts, including this Court, regularly accept and consider such materials. That action has legislative endorsement. So does the reaffirmation of the obligation of courts in construing federal legislation in the terms of the *Acts Interpretation Act* 1901 (Cth), s 15AA(1). That provision requires that:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object."

81 The Act under present scrutiny is large, complex and very important. Yet in legal terms it is no more than another statute of the Federal Parliament[86]. By

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**83** (1963) 109 CLR 243 at 251.

**84** *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 35-36; 158 ALR 333 at 366. See also Bennion, *Statutory Interpretation*, 3rd ed (1997) at 343-344 cited *Project Blue Sky v ABA* (1998) 194 CLR 355 at 384.

**85** *Acts Interpretation Act* 1901 (Cth), s 15AB; cf *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 111-113 per McHugh J.

**86** cf *Steele v Deputy Commissioner of Taxation* (1999) 73 ALJR 437 at 446-447; 161 ALR 201 at 214.

force of a provision of general application, this Court has been enjoined to give the Act a construction which promotes the purpose or object revealed in its provisions. The foundation for the judicial task remains the language of the Act and not extrinsic materials[87]. Acts of Parliament can still misfire[88]. However, the legislative injunctions to which I have referred were designed to promote a slightly different approach by courts to the task of statutory construction. It is an approach proper, in my respectful view, to the relationship between modern democratically elected legislatures and the independent courts. The price that will be exacted for spurning the legislative instruction to give effect to the purpose of legislation is increasingly complex and detailed statutory provisions, difficult for citizens to understand and for courts to construe.

82 Secondly, and parallel to the legislative changes just described, have been moves of the common law itself to adopt a more purposive approach to the task of statutory construction. The turning point in this regard may have been *Fothergill v Monarch Airlines Ltd*[89]. In Australia, an important exposition of the new approach for the courts was given by McHugh JA in *Kingston v Keprose Pty Ltd*[90]. Although dissenting as to the result, his Honour's treatment of the judicial function in statutory construction has proved most influential. It has been approved in this Court in *Bropho v Western Australia*[91]. In the last decade, there have been numerous cases in which members of this Court, referring to the statutory and common law developments, have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature, to the full extent permitted by the language which the Parliament has chosen[92]. Even to the point of reading words into legislation in proper cases, courts will now endeavour, more wholeheartedly than in the past, to carry into effect an apparent legislative

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**87** *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

**88** *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1307; 164 ALR 520 at 542.

**89** [1981] AC 251. See also *Jones v Wrotham Park Estates* [1980] AC 74 at 105 per Lord Diplock.

**90** (1987) 11 NSWLR 404 at 423-426.

**91** (1990) 171 CLR 1 at 20.

**92** See eg *Mills v Meeking* (1990) 169 CLR 214 at 233, 242-243; *Saraswati v The Queen* (1991) 172 CLR 1 at 21-23; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 345-348; *Parramore v Duggan* (1995) 183 CLR 633 at 651; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Pyramid Building Society (In liq) v Terry* (1997) 189 CLR 176 at 195; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 111-113.

purpose. Examples of this approach abound in Australia, England[93] and elsewhere. This Court should not return to the dark days of literalism.

83 When this changed approach is applied to the provisions of s 170(3) of the Act it yields a judicial endeavour to give effect to the reciprocal entitlement of the taxpayer to protection from reassessment if his or her return to the Commissioner has been full and honest, as Mrs Ryan's was conceded to have been. Of course the word "assessment" *could* carry the meaning "assessment in a specific sum of tax". But that construction, although literally available, has capricious and even absurd results which suggest the need to look for another. That other fits comfortably with the language of the Act. It gives effect to the apparent policy of the Act to promote certainty and finality. It acknowledges statutory amendments specifically adopted to overcome verbal problems in the closing words of s 170(3). It is in line with the construction of overseas statutes sufficiently similar to our own to warrant comparison.

84 The purposive approach is in my view applicable to s 170(3). It is hubris on the part of specialised lawyers to consider that "their Act" is special and distinct from general movements in statutory construction which have been such a marked feature of our legal system in recent decades. The Act in question here is not different in this respect. It should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament. The taxpayer's construction, which is available, does this. The Commissioner's does not. The former should therefore be preferred.

Order

85 The appeal should be dismissed with costs.

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**93** A recent illustration is the holding by the House of Lords that a same-sex partner was a member of a deceased protected tenant's "family" at the time of his death and thus entitled to succeed to protections under the *Increase of Rent and Mortgage Interest (Restrictions) Act* 1920 (UK), ss 5(1) and 12(1)(f) and (g). See *Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113; [1999] 4 All ER 705.

86 CALLINAN J. I agree with the reasons and conclusion of Gleeson CJ, Gummow and Hayne JJ and would join in the orders proposed. I would however add these observations.

87 Spender J was correct to hold that the "number zero is the beginning of and hence the first number of, and included in, the domain of natural numbers … In the domain of the integers, the number line unarguably contains zero. That is, zero is a number, sum or amount"[94].

88 In the face of that, the repeated use of the word "assessment"[95] in the document entitled "Refund Notice" which was sent to the respondent on 11 December 1987, the interval of more than six years that elapsed before a Notice of Assessment issued in respect of the year ending 1987, and the familiar, indeed almost invariable contemporary practice of large corporations of issuing invoices and statements of account generated by electronic devices, and often indicating a nil or negative liability or balance, it is not at all surprising that the respondent (as would most people unacquainted with *Batagol's Case*[96]) would regard herself as having complied with the requirements of an assessment and as having fully acquitted her liability for tax. But the Act[97] is concerned with the statutory imposition of taxation and its collection. That it is so concerned should not however preclude the appellant from making it unmistakably clear on relevant documents what is, and what is not an assessment or a Notice thereof.

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**94** *Ryan v Federal Commissioner of Taxation* (1997) 148 ALR 88 at 98.

**95** eg "Details of your assessment"; "Dissatisfied with your assessment. If you are not satisfied that your assessment is correct … you can object to your assessment".

**96** *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243.

**97** *Income Tax Assessment Act* 1936 (Cth).