HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
KIRBY, HEYDON, CRENNAN AND KIEFEL JJ

Matter No B10/2008

DEPUTY COMMISSIONER OF TAXATION — APPELLANT

AND

BROADBEACH PROPERTIES PTY LTD — RESPONDENT

Matter No B11/2008

DEPUTY COMMISSIONER OF TAXATION — APPELLANT

AND

MA HOWARD RACING PTY LTD — RESPONDENT

Matter No B12/2008

DEPUTY COMMISSIONER OF TAXATION — APPELLANT

AND

NEUTRAL BAY PTY LTD — RESPONDENT

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd
Deputy Commissioner of Taxation v MA Howard Racing Pty Ltd
Deputy Commissioner of Taxation v Neutral Bay Pty Ltd
[2008] HCA 41
3 September 2008
B10/2008, B11/2008 & B12/2008

ORDER

Matter No B10/2008

1. *Appeal allowed.*

2. *Set aside order 1 of the Court of Appeal of the Supreme Court of Queensland made on 28 September 2007, and in place thereof order:*

   (a) appeal to that Court allowed; and

   (b) set aside order 1 of the Supreme Court of Queensland made on 14 December 2006 and in place thereof order that the application to set aside the statutory demand filed on 6 June 2006 be dismissed.

3. *Appellant to pay the respondent's costs in this Court.*

Matter No B11/2008

1. *Appeal allowed.*

2. *Set aside order 1 of the Court of Appeal of the Supreme Court of Queensland made on 28 September 2007, and in place thereof order:*

   (a) appeal to that Court allowed;

   (b) set aside order 1 of the Supreme Court of Queensland made on 14 December 2006; and

   (c) remit the matter to a Judge of the Supreme Court of Queensland for determination of the appropriate variation of the statutory demand.

3. *Appellant to pay the respondent's costs in this Court.*

Matter No B12/2008

1. *Appeal allowed.*

2. *Set aside order 1 of the Court of Appeal of the Supreme Court of Queensland made on 28 September 2007, and in place thereof order:*

   (a) appeal to that Court allowed;

   (b) set aside order 1 of the Supreme Court of Queensland made on 14 December 2006; and

   (c) remit the matter to a Judge of the Supreme Court of Queensland for determination of the appropriate variation of the statutory demand.

3. Appellant to pay the respondent's costs in this Court.

On appeal from the Supreme Court of Queensland

Representation

N J Williams SC with G R Kennett and P A Looney for the appellant in each appeal (instructed by Australian Government Solicitor)

F L Harrison QC with M L Robertson for the respondent in each appeal (instructed by Deacon & Milani Solicitors)

CATCHWORDS

Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd
Deputy Commissioner of Taxation v MA Howard Racing Pty Ltd
Deputy Commissioner of Taxation v Neutral Bay Pty Ltd

Corporations law – Winding up in insolvency – Statutory demand – *Corporations Act* 2001 (Cth) ("Corporations Act"), s 459H(1) provided for setting aside of statutory demand where genuine dispute about existence or amount of debt – Deputy Commissioner of Taxation served statutory demands on respondent taxpayers in respect of debts – Debts were due and payable for assessments and declarations of goods and services tax, income tax, interest and penalties – Taxpayers instituted review proceedings under *Taxation Administration Act* 1953 (Cth) ("Administration Act"), Pt IVC and applied to Supreme Court under Corporations Act, s 459G to set aside statutory demands – Whether pending Pt IVC proceedings constituted "genuine dispute … about the existence or amount of a debt" within meaning of s 459H(1)(a) – Whether primary judge erred in setting aside statutory demands.

Corporations law – Winding up in insolvency – Statutory demand – Discretion to set aside statutory demand for "some other reason" in Corporations Act, s 459J(1)(b) – Scope of discretion – Whether pendency of Pt IVC proceedings proper basis for exercise of discretion – Whether disruption to taxpayers, creditors and contributories proper basis for exercise of discretion – Relevance of provision in Administration Act for recovery of tax while Pt IVC proceedings pending.

Taxation – Recovery of tax – Scope of application of Corporations Act, Pt 5.4 to recovery of tax "debt" – Special character of tax "debts" as creatures of statute – Effect of conclusive evidence provisions in Administration Act, Sched 1, ss 105-100 and 298-30 and *Income Tax Assessment Act* 1936 (Cth), s 177(1) – Whether position different for "full self-assessment taxpayer" – Concession of Deputy Commissioner that pendency of Pt IVC proceedings relevant to hearing of winding up application.

Words and phrases – "assessment", "debt", "full self-assessment taxpayer", "genuine dispute … about the existence or amount of a debt", "some other reason", "tax debt", "tax-related liability".

Corporations Act 2001 (Cth), Pt 5.4, ss 459G, 459H, 459J, 459S.
Taxation Administration Act 1953 (Cth), ss 14ZZM, 14ZZR, Sched 1 ss 105-100, 255-5, 298-30.
Income Tax Assessment Act 1936 (Cth), ss 177(1), 208, 209.

1 GUMMOW ACJ, HEYDON, CRENNAN AND KIEFEL JJ. These appeals from the Court of Appeal of the Supreme Court of Queensland (Keane, Holmes and Muir JJA)[1] were heard together. Holmes and Muir JJA agreed with the reasons of Keane JA. In reaching its decision the Court of Appeal upheld the decision of the primary judge in the Supreme Court (Philip McMurdo J)[2] but differed from the reasoning of the Full Court of the Federal Court (Black CJ, Einfeld and Sackville JJ) in *Hoare Bros Pty Ltd v Commissioner of Taxation*[3].

2 The three respondents are related corporations and are controlled by Mr Mark Howard. They are involved in construction and sale of residential apartments and are part of what is known as the Howard Group[4]. Advice with respect to the business structure of the Howard Group was provided by Deacon and Milani, solicitors.

3 The issues in the litigation with the appellant ("the Commissioner") which have reached this Court concern the interaction between two statutory regimes established by federal law. The first is that for the winding up of companies in insolvency which is found in Pt 5.4 (ss 459A-459T) of the *Corporations Act* 2001 (Cth) ("the Corporations Act") and includes provisions for the service of statutory demands on companies for payment of debts.

4 The second regime is established by the provisions for the assessment and collection of income tax and the goods and services tax ("the GST"). The relevant provisions appear primarily in the *Income Tax Assessment Act* 1936 (Cth) ("the Assessment Act"), the *Income Tax Assessment Act* 1997 (Cth) ("the 1997 Act"), the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act"), the *Taxation Administration Act* 1953 (Cth) ("the Administration Act") and the *Taxation (Interest on Overpayments and Early Payments) Act* 1983 (Cth) ("the Overpayments Act").

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1 *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* (2007) 25 ACLC 1341.

2 *Neutral Bay Pty Ltd v Commissioner of Taxation* (2006) 205 FLR 470; 65 ATR 270.

3 (1996) 62 FCR 302.

4 A fourth member of the Howard Group, Neutral Bay (Sales) Pty Ltd ("Neutral Bay Sales"), was a party to proceedings at an earlier stage, but its dispute with the appellant was settled.

5 It should be added that, with respect both to income tax and to the GST, the Parliament has followed the "tried and venerated procedure"[5] of framing those tax regimes so as to separate out taxing statutes dealing specifically with the imposition of liability[6] ("the Imposition Acts"). Nothing for the purposes of these appeals immediately turns upon the distinction and the focus will be upon the assessment and supporting legislation listed above rather than upon the Imposition Acts.

The course of the proceedings

6 The respondents in the second ("Howard Racing") and third ("Neutral Bay") appeals failed to pay amounts claimed for GST, interest and penalties. On 8 February 2006, Deacon and Milani wrote to the Commissioner indicating that their clients had ordered their affairs in accordance with expert legal advice and added:

> "You will appreciate that our clients were not prepared to receive any assessments contrary to the advice they had received, let alone the huge penalty and interest imposts, and are unable to pay immediately. Moreover, it is uncommercial for our clients to attempt to source funding from related parties, who could not be adequately compensated even if our clients are successful in their objections."

7 On 24 April 2006 a Deputy Commissioner issued to Howard Racing a statutory demand within the meaning of s 459E of the Corporations Act. This stated that Howard Racing owed a Running Balance Account ("RBA") deficit debt of $6,389,785.75, principally for GST, interest and penalties owing under taxation laws. On the same day a statutory demand was also issued to Neutral Bay for a RBA deficit debt in the sum of $8,433,350.79, again principally for GST, interest and penalties.

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5 *Moore v The Commonwealth* (1951) 82 CLR 547 at 569; [1951] HCA 10. See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 407-412 [38]-[50]; [2004] HCA 53.

6 See, eg, *Income Tax Rates Act* 1986 (Cth); *A New Tax System (Goods and Services Tax Imposition – General) Act* 1999 (Cth); *A New Tax System (Goods and Services Tax Imposition – Customs) Act* 1999 (Cth); *A New Tax System (Goods and Services Tax Imposition – Excise) Act* 1999 (Cth).

8 On 17 May 2006 a Deputy Commissioner issued a statutory demand to the respondent in the first appeal ("Broadbeach"). This was in the sum of $1,679,920.24, being the liability of Broadbeach under a default assessment (made under s 167 of the Assessment Act and issued on 18 April 2006) of income tax for the year ended 30 June 2004, together with a general interest charge for late payment. The default assessment was issued whilst, on the affidavit evidence filed on behalf of Broadbeach in the Supreme Court, the lodgement of a return had been deferred on professional advice.

9 After the disallowance of the objections made by Neutral Bay and Howard Racing, they commenced on 18 May 2006 review proceedings in the Administrative Appeals Tribunal ("the AAT") under Pt IVC of the Administration Act. These proceedings are still pending. Review proceedings under Pt IVC with respect to the disallowance of the objection by Broadbeach also are pending.

10 One significant issue in the pending proceedings in the AAT is a contention by Howard Racing and Neutral Bay respecting the incidence of GST with respect to the first sales of certain residential apartments. The primary judge explained that (i) some apartments were constructed by Neutral Bay on land it owned, then sold by it to Neutral Bay Sales which sold them to the public and (ii) other apartments were constructed by Howard Racing on land it owned, sold by it to Broadbeach and then sold to the public, and his Honour continued[7]:

> "Sales of residential premises do not attract GST except where they are new residential premises, which means premises which have not previously been sold as residential premises[8]. Ordinarily a supply within a group registered as such for GST purposes does not attract GST. [Neutral Bay] and [Neutral Bay Sales] became registered as a group for GST purposes, the nominated group representative being [Neutral Bay]. [Howard Racing] and [Broadbeach] were registered as another group, the representative being [Howard Racing]. A representative member is liable to pay GST on any taxable supply by a member of the group. The [respondents] say that the sales to [Neutral Bay Sales] and [Broadbeach] were not taxable because they were within a group, and that the sales by those companies to the public were not the first sales, because the first sales were the sales to them."

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7 (2006) 205 FLR 470 at 473; 65 ATR 270 at 274.

8 [The GST Act], s 40-75.

11 The respondents applied to the Supreme Court of Queensland for orders that the statutory demands be set aside pursuant to the power to do so conferred by s 459G of the Corporations Act. The applications by Howard Racing and Neutral Bay were filed on 18 May 2006 and by Broadbeach on 6 June 2006. On 14 December 2006, the primary judge delivered detailed reasons for judgment and ordered that the statutory demands be set aside. The Court of Appeal dismissed appeals by the Commissioner and the appeals to this Court are brought against those orders. The appeals are brought under the Commissioner's test case programme and, even if successful, the Commissioner submits to an order that the respondents have their costs in this Court and that they retain the costs orders in their favour made by the primary judge and by the Court of Appeal.

12 For the reasons which follow, the appeals to this Court should be allowed. The sequel will be that if there are failures to comply with the then outstanding statutory demands[9], on timely applications by the Commissioner to wind up the respondents in insolvency the court hearing those applications must presume that the respondents are insolvent (s 459C(2)(a)).

The position of the Commissioner

13 Notwithstanding the presumption of insolvency that would apply under s 459C(2)(a), in written and oral submissions to this Court the Commissioner made an important concession. This was that upon the hearing of such winding up applications the court might properly have regard to whether the taxpayer had a "reasonably arguable" case in proceedings under Pt IVC of the Administration Act, if those proceedings then still be on foot; questions of the kind canvassed in *General Steel Industries Inc v Commissioner for Railways (NSW)*[10] might arise.

14 The proposition which the Commissioner seeks to have this Court uphold concerns the earlier stage of litigation under the Corporations Act. It is that in the proceedings by the taxpayers to set aside the statutory demands, those proceedings not being Pt IVC proceedings, the taxation legislation has the effect that the amounts and all the particulars of the assessments or declarations leading to the debts stated in those demands are correct. (That formulation allows for the proposition affirmed in *Commissioner of Taxation v Futuris Corporation Ltd*[11]

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9 The time for compliance ends seven days after the s 459G applications are "finally determined or otherwise disposed of": s 459F(2)(a)(ii).

10 (1964) 112 CLR 125; [1964] HCA 69.

11 [2008] HCA 32.

that, in a court exercising jurisdiction derived from s 75(v) of the Constitution, jurisdictional error of the nature identified in *Futuris* may attract a remedy against the Commissioner.)

The statutory demand provisions

15 The antecedents and the scheme of Pt 5.4 of the Corporations Act were considered recently in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd*[12] where Gleeson CJ, Hayne, Crennan and Kiefel JJ remarked:

> "The evident purposes of Pt 5.4 of the [Corporations] Act include speedy resolution of applications to wind up companies in insolvency. One particular feature of the way in which that purpose is carried into effect is to focus principal attention at the hearing of the winding up application upon whether a company is insolvent rather than upon defects in the procedures that precede the institution of the application for winding up."

After referring to various provisions in Pt 5.4 their Honours continued[13]:

> "The emphasis which these provisions give to the speedy resolution of an application to wind up in insolvency is coupled with provisions which seek to focus attention at the hearing of an application to wind up in insolvency upon whether the company is insolvent rather than upon the formal adequacy of steps which have preceded the institution of the application to wind up. Chief among the provisions intended to focus attention upon solvency is s 459S. That section limits the grounds on which a company may oppose a winding up application which is founded on failure to comply with a statutory demand."

16 Section 459S is in these terms:

> "**Company may not oppose application on certain grounds**
>
> (1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:

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12 (2008) 232 CLR 314 at 323 [14]; [2008] HCA 9.

13 (2008) 232 CLR 314 at 324-325 [18].

(a) that the company relied on for the purposes of an application by it for the demand to be set aside; or

(b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).

(2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."[14]

17 The reference in s 459S to the grounds that a company relied upon or could have relied upon in an application made by it to set aside a statutory demand is to be read with ss 459E, 459G, 459H and 459J.

18 Section 459E provides for the service on a company of a statutory demand for payment of debts in excess of the statutory minimum. The company may apply for a court order setting aside the statutory demand (s 459G(1)). In so far as relevant s 459H states:

"(1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:

(a) that there is *a genuine dispute* between the company and the respondent *about the existence or amount of a debt* to which the demand relates;

(b) that the company has an offsetting claim.

...

(3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand.

...

(6) This section has effect subject to section 459J." (emphasis added)

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14 The term "Court" is defined in s 58AA of the Corporations Act in terms which include the Federal Court, the State and Territory Supreme Courts and the Family Court of Australia.

19 The relationship between s 459H and s 459J is indicated by the chapeau to s 459J. This states: "Setting aside demand on other grounds". Section 459J states:

> "(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
>
> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
>
> (b) *there is some other reason why the demand should be set aside*.
>
> (2) Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect." (emphasis added)

The Court of Appeal decision

20 In *Hoare*, the Full Court dismissed an appeal by the taxpayer against the refusal by Olney J of an order under s 459G setting aside a statutory demand by the Commissioner[15]. In deciding not to follow the reasoning of the Full Court in *Hoare*, the Court of Appeal, after citation of *Australian Securities Commission v Marlborough Gold Mines Ltd*[16], said[17]:

> "To the extent that the reasoning in [*Hoare*] depends upon treating a dispute about whether an assessment has correctly fixed the taxpayer's liability to tax as preventing a court recognising the existence of a dispute about the existence or the amount of the debt for the purposes of s 459H(1), it cannot be justified, either by the language of the taxation legislation, or the language of s 459H(1) of the [Corporations Act]."

21 The Court of Appeal further, and in the alternative, held that the primary judge had been correct in concluding that par (b) of s 459J(1) supported the setting aside of the statutory demands. The Court of Appeal concluded that the existence of a "genuine dispute" as to the underlying tax liability may be taken into account as one factor in exercising the discretionary power to set aside a

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15 The decision of Olney J is reported: (1995) 30 ATR 220.

16 (1993) 177 CLR 485 at 492; [1993] HCA 15.

17 (2007) 25 ACLC 1341 at 1359.

demand under par (b) of s 459J(1). The Court of Appeal also concluded, without deciding whether the circumstances involved unconscionable conduct or unfairness on the part of the Commissioner, that it was open to the court hearing the application to add as a factor the disruption to the taxpayer and its creditors and contributors which would be involved in a winding up in the absence of any suggestion that the Commissioner would suffer actual prejudice if left to remedies other than a winding up.

The Commissioner's submissions

22 In this Court the Commissioner advances two principal grounds in support of the appeals. The first is that, for the purposes of par (a) of s 459H(1), the existence of a proceeding for review by the AAT or an "appeal" to the Federal Court under Pt IVC of the Administration Act respecting the disallowance of an objection, even one in which the taxpayer has a reasonably arguable case, does not give rise to a "genuine dispute" as to the existence or amount of a debt, the subject of a statutory demand, where a notice attracting the conclusive evidence provisions of the taxation legislation is tendered by the Commissioner in the s 459G proceeding to set aside the statutory demand.

23 The second ground is that the existence of such a Pt IVC proceeding, even if reasonably arguable for the taxpayer, is not a proper basis (or alternatively, not a sufficient basis) for the exercise of the power to set aside a statutory demand under par (b) of s 459J(1) for "some other reason".

24 In particular, the Commissioner submits that there was no scope in the applications made under s 459G of the Corporations Act before Philip McMurdo J to consider the existence of a "genuine dispute ... about the existence or amount" of the debts specified in the statutory demands, within the meaning of par (a) of s 459H(1). Nor was there any scope to set aside the statutory demands under par (b) of s 459J(1) of the Corporations Act. This provision, set out earlier, authorises the Court to set aside a statutory demand if it "should be set aside" for "some other reason" than that provided in par (a) of s 459J(1), namely apprehended substantial injustice because of a defect in the demand.

The taxation legislation

25 A number of the principal provisions of the Assessment Act and the Administration Act are set out in the joint reasons in *Futuris*[18] and what follows

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18 [2008] HCA 32 at [16]-[22].

should be read with both *Futuris* and *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation*[19].

26 With respect to income tax, the production of a notice of assessment shall be conclusive evidence of the due making of the assessment and, except in Pt IVC proceedings, shall be conclusive evidence "that the amount and all the particulars of the assessment are correct" (Assessment Act, s 177(1)). The income tax to which Broadbeach was assessed under the default assessment issued on 18 April 2006 became due to the Commonwealth and payable to the Commissioner and might be sued for and recovered in any court of competent jurisdiction.

27 The familiar provisions in the Assessment Act which produced results as described in the last sentence, namely s 208 and s 209, were displaced, with respect to income tax deemed payable after 1 July 2000, by amendments made in 1999[20].

28 Sections 208 and 209 then were wholly repealed in 2006[21]. Like provisions now are made as follows in the Administration Act, Sched 1. An amount of a "tax-related liability" that is due and payable as indicated by the tables in s 250-10, is a debt due to the Commonwealth and payable to the Commissioner (s 255-5(1)), and may be sued for recovery in a court of competent jurisdiction (s 255-5(2)). The phrase "tax-related liability" means a pecuniary liability to the Commonwealth "arising directly" under a statute of which the Commissioner has the general administration (s 2(1) of the Administration Act and s 5-1 in Sched 1 of that statute; s 995-1 of the 1997 Act). The consequence is that liabilities for income tax and GST are within the scope of these provisions.

29 The pendency of the AAT proceedings under Pt IVC of the Administration Act does not impede recovery in the meantime. Section 14ZZM of the Administration Act provides:

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19 [2008] HCA 33.

20 *A New Tax System (Tax Administration) Act* 1999 (Cth), Sched 2, Pt 2, Items 25 and 26.

21 By the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act* 2006 (Cth), Sched 1, Item 160.

> "The fact that a review [by the AAT] is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending."

A "taxation decision" is "the assessment, determination, notice or decision against which a taxation objection may be, or has been, made" (s 14ZQ). Section 14ZZR is a provision with corresponding operation with respect to pending Federal Court "appeals". It will be necessary later in these reasons to say something further as to what litigious activity is encompassed by the phrase in these sections "may be recovered".

30 With respect to GST, further relevant provisions were made in the Administration Act by Pt VI (ss 19-70). Part VI was repealed in 2006[22] and replaced by provisions in Sched 1 to the Administration Act. At any time the Commissioner may make an assessment of the "net amount" in respect of a taxpayer for a tax period (s 22, now s 105-5 in Sched 1)[23]. Notice of the assessment must be given (s 25, s 105-20).

31 Further, the GST Act empowers the Commissioner to negate GST schemes by declarations stating an amount as the "net amount" for a specific tax period (s 165-40(a)).

32 Assessments and declarations in respect of the GST were made in respect of Neutral Bay and Howard Racing. The Administration Act (Sched 1, s 105-40, formerly s 62) provides for objections in the manner set out in Pt IVC.

33 Section 105-100 of the Administration Act, Sched 1 (formerly s 59) is a "conclusive evidence" provision which applies both to GST assessments and declarations. It is relevantly indistinguishable from s 177(1) of the Assessment Act. Section 14ZZM of the Administration Act applies to the Pt IVC proceedings in the AAT respecting the GST liabilities of Neutral Bay and Howard Racing.

34 With respect to Neutral Bay and Howard Racing, the components of the RBA deficit debts specified in the statutory demands, in addition to the liabilities

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22 By the *Fuel Tax (Consequential and Transitional Provisions) Act* 2006 (Cth).

23 In general terms, the "net amount" for a tax period is derived from the formula "GST - input tax credits": GST Act, s 17-5.

flowing from the GST assessments and declarations, included amounts for (i) "failure to withhold" penalties, (ii) "tax shortfall" penalties, (iii) "administrative overpayments", and (iv) "general interest charges".

35 As to (i), these were penalties for failures to withhold amounts from contractors who had not quoted Australian Business Numbers; the penalties are in amounts equal to the amounts not withheld[24]. The Commissioner partly remitted the penalties[25] but the decision to make only that limited remission is challenged in the review proceedings in the AAT under Pt IVC.

36 As to (ii), the "tax shortfall penalties" were assessed under Subdiv 284-B of the Administration Act, Sched 1. With respect to these penalties, s 298-30 states:

> "(1) The Commissioner must make an assessment of the amount of an administrative penalty under Division 284.
>
> (2) An entity that is dissatisfied with such an assessment made about the entity may object against it in the manner set out in Part IVC of [the Administration Act].
>
> (3) The production of a notice of such an assessment, or of a copy of it certified by or on behalf of the Commissioner, is conclusive evidence of the making of the assessment and of the particulars in it.
>
> (4) Subsection (3) does not apply to proceedings under Part IVC of [the Administration Act] on a review or appeal relating to the assessment."

These penalties are challenged in the review proceedings in the AAT.

37 As to (iii), the administrative overpayments represent amounts paid by the Commissioner to Neutral Bay and Howard Racing as input tax credits. The Commissioner treats as debts due by the taxpayers and payable under the Administration Act moneys being in respect of amounts paid by the

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24 Administration Act, Sched 1, s 16-30.

25 Administration Act, Sched 1, s 16-45. This provision has since been repealed by the *Tax Laws Amendment (2006 Measures No 2) Act* 2006 (Cth).

Commissioner by mistake (s 8AAZN(3)). The mistaken nature of the payments depends upon the correctness of the GST assessments and declarations.

38 The remaining amounts, the "general interest charges", are provided for in the Administration Act[26], principally as charges for failing to meet various payment obligations. The charges are "tax-related liabilities"[27] and are due to the Commonwealth and payable to the Commissioner under s 255-5 of the Administration Act, Sched 1, to which reference has been made above. They are the product of the other amounts included in the RBA deficit debts of Neutral Bay and Howard Racing which are challenged in the review proceedings in the AAT. The certificates issued by the Commissioner under s 255-45 of the Administration Act, Sched 1, as to the amounts of administrative overpayments and general interest charges are prima facie evidence thereof in recovery proceedings (s 255-45(1)).

39 In the Court of Appeal, the Commissioner accepted that the application of the general interest charges to certain administrative overpayments was open to genuine dispute and that the statutory demands ought to be varied to that extent. This state of affairs will be reflected in the orders to be made in this Court on the Neutral Bay and Howard Racing appeals.

The significance of the taxation legislation

40 As indicated above, the familiar "conclusive evidence" provision of s 177(1) of the Assessment Act, significant for Broadbeach, is reflected in the terms of s 105-100 in Sched 1 to the Administration Act (with respect to GST notices of assessment and declarations) and s 298-30 in Sched 1 (with respect to administrative penalties including tax shortfall penalties), which are significant for Neutral Bay and Howard Racing.

41 The apparent asperity with which s 177(1) operates and its impact upon what otherwise may be avenues open to taxpayers when defending recovery proceedings has attracted comment in various decisions, including those of this Court. Section 177 is found in Pt IV of the Assessment Act but was linked to ss 208 and 209 which appeared in Pt VI. In *F J Bloemen Pty Ltd v Federal Commissioner of Taxation*[28], Mason and Wilson JJ remarked:

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26 Pt IIA, Div 1 (ss 8AAA-8AAH).

27 Administration Act, Sched 1, s 250-10(2), Item 70.

28 (1981) 147 CLR 360 at 375; [1981] HCA 27.

> "[The appellants] point to the fact that notwithstanding that the assessment may be under review or appeal … the tax assessed is payable and the Commissioner has access to the extensive powers prescribed in Pt VI ... It is true that Pt VI contains large powers to enable the recovery of tax; powers the exercise of which may make life uncomfortable both for the taxpayer and perhaps others who owe money to the taxpayer. So much may be conceded, but [the Assessment Act] does not proceed upon the hypothesis that the Commissioner will be motivated in the exercise of his powers by improper or collateral purposes."

42 The reference by Mason and Wilson JJ to the position of taxpayers may be thought to extend particularly to the position of directors of a corporate taxpayer which is a trading corporation.

43 At a time when the provision for objections and appeals was found in Pt V of the Assessment Act, Mason ACJ said in *Clyne v Deputy Commissioner of Taxation*[29]:

> "I was informed that it is a somewhat unusual course for the Deputy Commissioner to commence proceedings for recovery in a court relying on a notice of assessment which is under challenge in proceedings under [the Assessment Act]. It is to be hoped that this is so. The institution of proceedings for recovery on a notice of assessment which is challenged in proceedings under [the Assessment Act] may operate oppressively and unfairly to a taxpayer ...
>
> In the ultimate analysis the Deputy Commissioner's charter to commence recovery proceedings, notwithstanding a challenge … to the correctness of the assessment, is to be found in s 201 of [the Assessment Act]. It provides:
>
> > 'The fact that an appeal or reference is pending shall not in the meantime interfere with or affect the assessment the subject of the appeal or reference; and income tax may be recovered on the assessment as if no appeal or reference were pending.'
>
> It is a provision which has been stringently criticized. However, it appears to be impervious to criticism for Parliament has not seen fit to amend it."

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29 (1982) 56 ALJR 857 at 858-859; 43 ALR 342 at 344.

44 But harsh though the operation of these provisions may be, they implement a long-standing legislative policy to protect the interests of the revenue. In *Deputy Commissioner of Taxation v Niblett*[30], Asprey J struck out pleas of non-liability to a recovery action instituted by the Deputy Commissioner in the Supreme Court of New South Wales while objections were pending under what was then s 185 of the Assessment Act. His Honour observed:

> "It may be thought to be a hardship that a taxpayer should have to pay the tax assessed when an objection to the assessment has not been decided upon but there are obvious financial considerations of high policy that must be weighed in the balance against cases of individual hardship with which the Commissioner through the appropriate use of his powers under [the Assessment Act] can cope ... Where the meaning of the words of a statute is clear 'it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like' – *Attorney-General v Carlton Bank*[31]."

45 Thereafter, Bowen CJ in Eq, when dealing with resistance by the taxpayer to the making of a winding up order, said in *Deputy Federal Commissioner of Taxation v Roma Industries Pty Ltd*[32]:

> "The next question which arises is whether the amount claimed by the Commissioner should be treated as a disputed claim, and an order be refused on this ground. In one sense, of course, the Commissioner's claim is disputed, because appeals to the Board of Review have been lodged. *However, the provisions of s 201 of [the Assessment Act] require me to treat the debt as in effect undisputed*. Such a statutory provision may in some cases lead to hardship on a taxpayer, particularly where he has paid the amount of tax assessed and later wins his appeal, whereupon the money is repaid to him without interest. This led Higgins J in *Hickman v Federal Commissioner of Taxation*[33] to describe it as 'unjust and even

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30 (1965) 83 WN (Pt 1) (NSW) 405 at 411.

31 [1899] 2 QB 158 at 164.

32 (1976) 6 ATR 54 at 57.

33 (1922) 31 CLR 232 at 245; [1922] HCA 58.

> baneful', but it remains in the [Assessment Act][34]. *It must be appreciated that from the point of view of the revenue it is a protection against that class of taxpayer who might withhold payment and use the money as the sinews of war to conduct appeals against the Commissioner and who, being finally unsuccessful, was found to be unable to meet his tax liability, having spent his money on the litigation*." (emphasis added)

46 With regard to the reasons of Bowen CJ in Eq in *Roma Industries* (given in 1976) three points should now be made. The first is that the reference to repayment without interest must be treated as displaced by the enactment in 1983 of the Overpayments Act. Part III of that statute provides an interest entitlement where an amount of "relevant tax" (as defined in s 3C) is found to have been overpaid as a result of a decision to which the Overpayments Act applies (as explained in s 3(1))[35]. This includes successful AAT reviews and Federal Court "appeals" under Pt IVC of the Administration Act.

47 The second point is that s 201 of the Assessment Act was repealed by the *Taxation Laws Amendment Act (No 3)* 1991 (Cth)[36], which inserted the relevantly identical provisions of s 14ZZM and s 14ZZR in the Administration Act by way of replacement.

48 The third point respecting *Roma Industries* is that the treatment there of disputed claims by the Commissioner indicates the appropriate path to be followed in reading the provisions for the setting aside of statutory demands now found in the Corporations Act.

49 It is true that s 459G provides for curial decisions to set aside statutory demands and that grants of jurisdiction to superior courts such as the Federal Court and the Supreme Courts are not to be construed with limitations without sufficient reason to do so. The many authorities to this effect were collected by Kirby J in *Aussie Vic Plant Hire*[37]. But the provisions of the taxation legislation,

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34 The comments of Higgins J were made with reference to the absence of any provision in the *War-time Profits Tax Assessment Act* 1917-1918 (Cth) for repayment of interest.

35 However, it follows from the definition of "relevant tax" that there is presently no interest entitlement in respect of certain penalties, such as tax shortfall penalties payable under Pt 4-25 in Sched 1 to the Administration Act.

36 Sched 4.

37 (2008) 232 CLR 314 at 331 [41].

with an eye to which the statutory demand provisions clearly were drawn[38], and, in particular, the antecedents in what was s 201 of the Assessment Act and now s 14ZZM (as to pending AAT reviews) and s 14ZZR (as to pending Federal Court "appeals"), supply sufficient reason for construing the statutory demand provisions as the Commissioner contends.

50 Something should be said here respecting a particular aspect of the approach taken in the reasoning of the Court of Appeal. This to a degree turned upon the characterisation of the RBA deficit debts as "tax debts" which were "disputed" by the companies in question.

"Tax debts" which are "disputed"

51 Undoubtedly the tax legislation by force of its provisions creates what it identifies as debts due to the Commonwealth and provides for their recovery by action. But some care is called for here. The legislature may create a duty or obligation to pay money, in particular liquidated amounts, and an action in debt is then the appropriate remedy for which the general law provides[39]. But in creating such a duty or obligation, the legislature may attach special incidents or characteristics which do not pertain to debts owed by one citizen to another within the sense of the general law. The true construction of the statute determines the degree of the analogy. The point is illustrated by decisions of this Court construing the use in particular statutory regimes of the terms "charge"[40], "trust", "lease" and "licence"[41], "indemnity"[42] and "lease in perpetuity"[43].

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38 See s 459E(5) which refers to demands relating to income tax liability.

39 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 312-313 [64]-[65]; [1998] HCA 20.

40 *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 445-446; [1995] HCA 28.

41 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 197; [1996] HCA 40.

42 *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 528-529 [15]-[16], 545 [66]; [2001] HCA 53.

43 *Wilson v Anderson* (2002) 213 CLR 401 at 422 [21], 434-435 [59]-[61]; [2002] HCA 29.

52 Where statute creates a "debt" special provisions may make inapplicable, for example, pleas that might otherwise tender an issue for trial of an action to recover the debt. The situation may be demonstrated by the decision of Asprey J in *Niblett*[44], to which reference has been made earlier in these reasons. To a recovery action by the Commissioner the taxpayer pleaded (i) "[n]ever indebted as alleged", (ii) a traverse of the allegation in the Commissioner's declaration that the money sued for was due and payable by the taxpayer, (iii) a traverse based upon the pendency of an objection to the assessment lodged with the Commissioner under s 185 of the Assessment Act, and (iv) a traverse with respect to additional tax imposed for late payment to the effect that no primary tax was due and payable. These pleas were struck out, a result which Asprey J saw as required by the provisions of the Assessment Act including ss 177, 201, 208 and 209.

The Court of Appeal reasons

53 It is with the above considerations in mind that the Commissioner makes various criticisms of the reasoning of the Court of Appeal. That reasoning is indicated by the following passages in the judgment of Keane JA[45]:

> "[T]here is no other indication in [the Assessment Act] or [the Administration Act] that a *statutorily permitted challenge to the debt* which has been made in conformity with this exception [in Pt IVC] must be ignored for all purposes in all proceedings which arise under all other laws.
>
> It is clearly a strong thing to say that when a court is made aware that the lawful processes *whereby a tax debt may be disputed* have been engaged, and it is accepted that there is an arguable basis for that challenge, nevertheless, for the purposes of s 459H of [the Corporations Act], the court cannot regard the debt as being subject to a genuine dispute, and is obliged to conclude, *contrary to the evident truth of the matter*, that there is not a genuine dispute *as to the existence of the debt.* If an intention to bring about such a *fictional state of affairs* is to be attributed to the legislature, that intention would need to be expressed clearly. There are good reasons to conclude that the legislature has not sought to make the court a slave to such a fiction.

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44 (1965) 83 WN (Pt 1) (NSW) 405 at 411.

45 (2007) 25 ACLC 1341 at 1358-1359.

...

> In summary, the [Commissioner's] submission requires the Court to *ignore the reality* that the existence of the debt is being disputed, on a genuine basis, in a forum which is competent *to set the assessment, and hence the debt, aside*. This requirement is not apparent in the language of the tax legislation or [the Corporations Act]." (emphasis added)

54 There is in these passages, the Commissioner correctly submits, a failure to recognise distinctions, clearly drawn in the legislative scheme, between, on the one hand, the existence of a debt which is due and payable and, on the other, the issues in and outcome of a Pt IVC proceeding. As well, incorrect distinctions also are drawn between the "setting aside" of an assessment and hence the existence of a debt and the denial in a s 459G application of competence to give effect to an "evident truth".

55 The Commissioner's submissions involve no suppression of "truth" or requirement to observe a fictional state of affairs. First, as was explained in *Futuris*[46], the source of the debt is to be located in the statutory consequences given to an assessment (and a GST declaration) formerly by ss 208 and 209 of the Assessment Act, now by s 255-5 in Sched 1 to the Administration Act. Neither the AAT nor the Federal Court is empowered by Pt IVC to vary assessments. That is for the Commissioner who is charged by s 14ZZL and s 14ZZQ respectively to amend assessments (and determinations) to give effect to decisions of the AAT and the Federal Court.

56 Secondly, the relevant "truth" or "reality" is that disclosed by the operation of the taxation laws with respect to the "tax debts". It is the special character thus given to these "debts" to which the statutory demand provisions of the Corporations Act then speak.

57 Nothing turns upon the attribution to a s 459G application of the character of a proceeding in which, as Keane JA said, a tax debt may be disputed by the applicant taxpayer. Section 459G applications by taxpayers are not Pt IVC proceedings and production by the Commissioner of the notices of assessment and of the GST declarations conclusively demonstrates that the amounts and particulars in the assessments and declarations are correct[47]. That being so, the operation of the provisions in the taxation laws creating the debts and providing

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46 [2008] HCA 32 at [20].

47 Administration Act, Sched 1, s 105-100; Assessment Act, s 177(1).

for their recovery by the Commissioner cannot be sidestepped in an application by a taxpayer under s 459G of the Corporations Act to set aside a statutory demand by the Commissioner.

58 The matter was explained, with respect correctly, by Williams J in *Bluehaven Transport Pty Ltd v Commissioner of Taxation*[48]. The use by the Commissioner of the statutory demand procedure in aid of a winding up application is in the course of recovery of the relevant indebtedness to the Commonwealth by a permissible legal avenue. The phrase "may be recovered" in ss 14ZZM and 14ZZR of the Administration Act applies to the statutory demand procedure. That state of affairs places the existence and amounts of the "tax debts" outside the area for a "genuine dispute" for the purposes of s 459H(1) of the Corporations Act.

Section 459J of the Corporations Act

59 Something should be added respecting the additional alternative ground found in par (b) of s 459J(1) of the Corporations Act. That was that the statutory demands were to be set aside because the Court of Appeal and the primary judge were "satisfied" that, although there were no defects in the demands, there was "some other reason" to set them aside.

60 It first should be observed that the hypothesis in the present appeals must be, in accordance with what has been said above, that there is no "genuine dispute" within the meaning of s 459H(1). Both the primary judge and the Court of Appeal emphasised the importance of the disruption to the taxpayers, their other creditors and contributories that would ensue from a winding up, together with the absence of any suggestion that the revenue would suffer actual prejudice if the Commissioner were left to other remedies to recover the tax debts. But these considerations are ordinary incidents of reliance by the Commissioner upon the statutory demand system.

61 Keane JA, expressing disapproval of what had been said to the opposite effect by Olney J in *Kalis Nominees Pty Ltd v Deputy Commissioner of Taxation*[49], held that the scope of the discretion conferred by par (b) of s 459J(1) should be determined by the subject matter and purposes of the Corporations Act,

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48 (2000) 157 FLR 26 at 32.

49 (1995) 31 ATR 188 at 193.

to the exclusion of "the tax law"[50]. But, as remarked earlier in these reasons, Pt 5.4 contemplates that the "debts" in respect of which statutory demands may issue will include "tax debts" in the sense given to that expression in these reasons. The "material considerations"[51] which are to be taken into account, on an application to set aside a statutory demand, when determining the existence of the necessary satisfaction for par (b) of s 459J(1) must include the legislative policy, manifested in s 14ZZM and s 14ZZR of the Administration Act, respecting the recovery of tax debts notwithstanding the pendency of Pt IVC proceedings.

62 The result is that the exercise of discretion by the primary judge under s 459J(1)(b) miscarried, and the Court of Appeal erred in upholding and supplementing it. Against the possibility of this Court so concluding, the respondents submitted that the matter should be remitted to the Supreme Court for re-exercise of the discretion under that provision. However, no fresh ground upon which the respondents might then succeed was suggested beyond reference to the time which has elapsed and the progression of the Pt IVC proceedings towards determination. But such a consideration, if it were supported by evidence of the state of progression of the Pt IVC proceedings, would be relevant in the operation of Pt 5.4 of the Corporations Act, if at all, at the later stage of the hearing of any winding up application. There should be no re-exercise of the discretion conferred by s 459J(1)(b).

A remaining point

63 The respondents fixed upon the apparent importance given in the scheme of the taxation legislation to the consequences of assessments (and GST declarations), which is indicated by s 177(1) of the Assessment Act and by s 105-100 in Sched 1 to the Administration Act. Reference was then made to the position of Broadbeach as a "full self-assessment taxpayer" to whom s 204(1A) of the Assessment Act applied[52].

64 This provision makes special temporal provision for the tax payable by such taxpayers which, at first blush, does not depend upon the giving of a notice

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50 (2007) 25 ACLC 1341 at 1361.

51 See *House v The King* (1936) 55 CLR 499 at 505; [1936] HCA 40.

52 Section 204(1A) was inserted by the *A New Tax System (Tax Administration) Act* 1999 (Cth), Sched 16, Item 14.

of assessment. That may be thought to depart from the scheme of s 204. But s 166A(3) of the Assessment Act deems an assessment to have been made by the Commissioner on the day the return by the self-assessed taxpayer is lodged and the return is then taken to be the notice of assessment. No relevant consequence follows in these appeals from the status of Broadbeach as a full self-assessment taxpayer.

Orders

65 The appeals should be allowed. Order 1 of the orders made in each appeal to the Court of Appeal should be set aside.

66 With respect to the Broadbeach appeal, in place of order 1 made by the Court of Appeal, the appeal to that Court should be allowed and order 1 made by the primary judge on the s 459G application filed on 6 June 2006 should be set aside and replaced with an order dismissing that application.

67 With respect to the Neutral Bay and Howard Racing appeals, and as indicated earlier in these reasons[53], in place of order 1 made by the Court of Appeal, in each proceeding the appeal to that Court should be allowed, order 1 made by the primary judge on the s 459G application filed on 18 May 2006 should be set aside and the matter remitted to a Judge of the Supreme Court for determination of the appropriate variation of the statutory demand.

68 As already noted, the Commissioner submits to the making of an order in each proceeding for payment of the costs of each respondent in this Court.

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53 At [39].

69 KIRBY J. The facts, legislation and issues in these appeals are explained in the reasons of Gummow ACJ, Heydon, Crennan and Kiefel JJ ("the joint reasons"). As there stated, the resolution of the appeals is to be reached bearing in mind the recent decisions of this Court in *Commissioner of Taxation v Futuris Corporation Ltd*[54] and *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation*[55]. Moreover, the approach to be taken to the issues arising under the *Corporations Act* 2001 (Cth) must conform to the views adopted by the majority of this Court in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd*[56].

70 I dissented in *Aussie Vic*. However, I accept that I must now follow the approach adopted in the joint reasons in that decision. I was party to the joint reasons in *Carpenter* and, in *Futuris*, I reached the same orders as the other members of the Court but by a different route, avoiding consideration of the operation (and constitutional validity) of s 177(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the Assessment Act"). Section 177 is specifically relied on by the Deputy Commissioner in these appeals[57].

71 As in *Futuris*, no argument was advanced by the present respondents challenging the constitutional validity of s 177(1) of the Assessment Act. Nor, in these appeals, was there any separate argument based on the discretionary character of the provision of relief because of the availability to the respondents of the proceedings under Pt IVC of the *Taxation Administration Act* 1953 (Cth).

72 In these circumstances, it is appropriate for me to deal with these appeals within the framework of the arguments advanced by the parties. The heroic task of considering and deciding issues which those parties have elected not to argue is beyond my present inclination (even if, on the record, it would be proper for me to venture upon it)[58].

73 Approaching the issues in the appeals in the ways advanced by the parties, as explained in the joint reasons, and applying the relevant intersecting

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54 [2008] HCA 32.

55 [2008] HCA 33.

56 (2008) 232 CLR 314 at 322-325 [11]-[18]; [2008] HCA 9.

57 [2008] HCATrans 244 at lines 1653-1655.

58 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1 at 13 [2] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 52 [118], 56 [135] of my own reasons, 62 [154] per Callinan J; [2007] HCA 38.

legislation at face value, I am brought to the same conclusion as in the joint reasons, generally for the same reasons.

74 I therefore agree in the orders proposed in the joint reasons.