HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND GORDON JJ

COMMISSIONER OF STATE REVENUE APPELLANT

AND

ACN 005 057 349 PTY LTD RESPONDENT

Commissioner of State Revenue v ACN 005 057 349 Pty Ltd
[2017] HCA 6
8 February 2017
M88/2016 & M89/2016

ORDER

Matter No M88/2016

1. *Appeal allowed.*

2. *Set aside pars 2 to 7 of the order of the Court of Appeal of the Supreme Court of Victoria made on 8 December 2015, and in their place order that the appeal to that Court is dismissed with costs.*

3. *The amended assessments issued by the appellant in compliance with par 3(a) of the order of the Court of Appeal of 8 December 2015 be set aside.*

4. *The respondent repay to the appellant $1,248,753.38, together with interest pursuant to s 58 of the* Supreme Court Act *1986 (Vic) on and from the date of payment of that amount by the appellant to the respondent.*

5. *The respondent pay the appellant's costs of the appeal to this Court.*

Matter No M89/2016

1. *Appeal allowed.*

2. *Set aside pars 2 to 5 of the order of the Court of Appeal of the Supreme Court of Victoria made on 8 December 2015, and in their place order that the appeal to that Court is dismissed with costs.*

3. *The respondent pay the appellant's costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

R M Niall QC, Solicitor-General for the State of Victoria with C G Button and N A Kotros for the appellant (instructed by Solicitor for the Commissioner of State Revenue)

N J Young QC with T M Grace and C van Proctor for the respondent (instructed by Daniel Allison & Associates)

CATCHWORDS

Commissioner of State Revenue v ACN 005 057 349 Pty Ltd

Taxation – Land tax – Where land tax assessments were paid – Where Commissioner did not amend assessments after error detected – Whether Commissioner under duty compellable by mandamus to amend and refund excess land tax – Whether Commissioner's refusal to amend amounted to conscious maladministration – Whether amended assessment had effect that excess tax was never land tax – Whether proceedings were barred under *Land Tax Act* 1958 (Vic).

Words and phrases – "amended assessment", "charged, levied and collected", "completeness and accuracy", "conscious maladministration", "land tax", "tax paid under, or purportedly paid under".

Land Tax Act 1958 (Vic), ss 19, 90AA, 92A.

1 KIEFEL AND KEANE JJ. We agree that the appeals should be allowed for the reasons given by Bell and Gordon JJ. There are two aspects of the decision of the Court of Appeal upon which we wish to add some further observations.

Conscious maladministration

2 The Court of Appeal concluded[1] that the Commissioner:

> "refused to perform his duty [under s 19] without good reason or justification; in the circumstances of the case he has acted with conscious maladministration."

3 Even if, as the Court of Appeal concluded, the Commissioner erred in his understanding of the effect of s 90AA of the *Land Tax Act* 1958 (Vic) ("the Land Tax Act") upon the proper exercise of the discretion conferred on him by s 19, that misunderstanding, without more, did not justify the Court of Appeal's view that there had been a conscious maladministration of the Land Tax Act by the Commissioner.

4 There was no suggestion, nor any factual basis for a suggestion, that the Commissioner acted otherwise than in good faith in the exercise of his powers. It needs to be borne in mind, in this regard, that the respondent only became aware of the duplication error when it was drawn to its attention by the Commissioner; and that the Commissioner made refunds of tax incorrectly collected to the extent consistent with his view of the limits of the statutory appropriation of moneys for that purpose from the public funds of the State.

5 There was no reason to regard the Commissioner's refusal to exercise his discretion under s 19 in the respondent's favour as other than the conscientious exercise of his powers in good faith. It should not have been characterised as conscious maladministration. To apply that description to the Commissioner's conduct is unfair to the Commissioner. And to apply the concept of conscious maladministration to an honest mistake would drain it of its content[2]. In any event, as it happens, the Commissioner was not mistaken in his understanding of the considerations bearing upon the exercise of the discretion conferred on him by s 19.

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1 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4(9)].

2 Cf *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 153-154 [11]-[15]; [2008] HCA 32.

The scope of s 19

6 The Court of Appeal concluded that the Commissioner was obliged to "exercise the power under s 19 to amend and to give effect to the amendments by making a refund."[3]

7 In this regard, the Court of Appeal erred in failing to appreciate, as the primary judge rightly held[4], that the statutory regime of objections[5] and appeals[6] set out in the Land Tax Act, together with the process for claiming a refund set out in s 90AA, manifests an unmistakable legislative intention that the only scope for the Commissioner to refund money overpaid under an assessment is afforded by s 90AA(2) and (3) of the Land Tax Act. Section 92A is express confirmation of this legislative intention.

8 The expenditure of the public funds of the State of Victoria is not within the province of the judiciary; it is within the exclusive control of the legislature[7]. The Court of Appeal failed to appreciate that the scope of the Commissioner's authority to make a refund was both provided by, and at the same time confined to, s 90AA(6) of the Land Tax Act. The absence of any other statutory authority to make a refund from public funds meant that a refund to the respondent would have been unlawful[8].

9 While it may be said of s 19 that it functioned "as a mechanism to ensure the integrity of the system of tax collection under the [Land Tax Act], namely,

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3 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4(10)].

4 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [106].

5 Land Tax Act, s 24A.

6 Land Tax Act, s 25.

7 *Dietrich v The Queen* (1992) 177 CLR 292 at 323; [1992] HCA 57. See also at 303, 311, 330, 342-343, 349-350.

8 *Auckland Harbour Board v The King* [1924] AC 318 at 327. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111], 73 [178], 113 [320], 210-211 [601]; [2009] HCA 23; *Williams v The Commonwealth* (2012) 248 CLR 156 at 179-180 [4], 216-217 [83], 233 [138], 281 [289]-[290], 359 [548], 374 [597]; [2012] HCA 23; *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at 455 [25]; [2014] HCA 23.

that the Commissioner collects the correct amount of tax"[9], that mechanism could operate only within the context of the Land Tax Act considered as a whole. In that context, the effluxion of a fixed period of time required that the prospect of recovering tax incorrectly collected must be brought to an end. The legislation thus gives effect to a policy choice to secure the certainty of the revenue after a reasonable opportunity to dispute the propriety of an exaction had been afforded to the taxpayer. That policy choice was lawfully available to the legislature.

10 The circumstance that the duplication error was an obvious error in the assessment process – once it was discovered – does not give rise to an occasion to limit the effect of the legislature's choice. Provisions such as s 90AA, which impose a time limit upon the recovery of tax incorrectly assessed, are familiar and readily intelligible legislative measures designed to protect the revenue. There is no good reason to strain against the ordinary and natural meaning of the language of s 90AA as giving effect to the policy choice made by the legislature. That policy choice is plainly intended to be effective even in cases where it is clear that the assessments which led to the claimed overpayments were excessive.

11 Accordingly, the circumstance that the Commissioner knew at the time of exercising the discretion conferred by s 19 that his earlier assessments were excessive was not a sufficient basis for him to disregard the terms of s 90AA. Neither the Commissioner, nor a court, is at liberty to disregard the express provisions of s 90AA and s 92A, and the absence of statutory authority to make a payment of a refund out of public funds.

12 Given that recovery by the respondent of excess land tax would have been contrary to s 90AA, and that the payment of a refund by the Commissioner was not otherwise authorised by any statutory provision permitting the Commissioner to expend public funds for that purpose, the Commissioner was right to recognise that his want of authority lawfully to make a refund from the public funds of the State was a sufficient reason to conclude that there was no utility in amending his earlier assessments.

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9 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4(14)].

13 BELL AND GORDON JJ. The respondent in each appeal, an owner of two adjoining properties ("the taxpayer"), was assessed for land tax under the *Land Tax Act* 1958 (Vic) ("the LTA")[10]. Each assessment for the years 1990 to 2002, with which these appeals are concerned, listed those two adjoining properties at the relevant date: one described as "2 Ottawa Rd, Toorak, 3142" and the other as "65 Albany Rd, Toorak, 3142"[11]. Each assessment was paid. In December 2007, the adjoining properties were transferred to a related company, Streetriver Pty Ltd. Streetriver was assessed for land tax for the years 2008 to 2011.

14 On 23 March 2012, a senior revenue officer of the appellant, the Commissioner of State Revenue ("the Commissioner"), informed Streetriver that an error had been detected in the 2008 to 2011 assessments. The error was that the valuation that was applied for land tax purposes to 2 Ottawa Road encompassed both 2 Ottawa Road and 65 Albany Road. The property listed in the 2008 to 2011 assessments as "65 Albany Rd, Toorak, 3142" had been the subject of land tax twice – it was a "duplicate property". The Commissioner issued a refund cheque in favour of Streetriver for excess land tax paid for the years 2008 to 2011.

15 The taxpayer subsequently formed the view that the 1990 to 2002 assessments, issued to it before it transferred the properties to Streetriver, contained the same duplication error. The taxpayer sought to lodge objections to those assessments under s 24A of the LTA. By that time, the time limit for making those objections under the LTA had expired. The Commissioner refused to consider the objections. The taxpayer requested that the Commissioner issue amended assessments for those years pursuant to s 19 of the LTA. That request was refused by the Commissioner. A delegate of the Commissioner wrote to the taxpayer on 15 August 2013 in the following terms:

> "The decision of the Commissioner is not to make any amendment to the assessments.
>
> The discretion conferred by section 19 must be exercised having regard to [the] subject matter, scope and purpose of the [LTA] as a whole.

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10 The LTA was repealed by the *Land Tax Act* 2005 (Vic), which came into operation on 1 January 2006: see ss 2 and 116 of the *Land Tax Act* 2005 (Vic). The provisions of the LTA continue to apply in these appeals: see cl 6(2) of Sched 3 to the *Land Tax Act* 2005 (Vic), which provides that the LTA "continues to apply to land tax for or in any tax year prior to 2006".

11 Assessments for the years 1990 to 2001 were not in evidence. For those years, only reports containing the information used to raise the assessments were available.

> The primary reason for the Commissioner's decision is that, whether or not each of the assessments were now amended as requested, and even putting to one side the fact that no objection was lodged in accordance with section 24A, [the taxpayer] would not be entitled to the consequential relief sought; that is, pursuant to section 90AA of the [LTA], [the taxpayer] would still not be entitled to the refund it seeks."

16 Section 90AA of the LTA relevantly provided that proceedings "for the refund or recovery of tax paid under, or purportedly paid under," the LTA (including proceedings seeking relief in the nature of mandamus) must not be brought against the Commissioner, or otherwise, unless an application for refund of the payment was lodged with the Commissioner within three years of the payment being made.

17 In 2013, the taxpayer commenced two proceedings against the Commissioner in the Supreme Court of Victoria – the first by an originating motion seeking mandamus "on judicial review" directing the Commissioner to issue amended assessments and to refund to the taxpayer the land tax overpaid for the years 1990 to 2002, being $363,680 ("the excess amount"), with interest, and the second by a writ indorsed with a statement of claim seeking restitution of the excess amount with interest.

18 The primary judge (Sloss J) dismissed the proceeding commenced by originating motion and, in relation to the proceeding commenced by writ, entered judgment for the Commissioner and otherwise dismissed the proceeding[12]. The taxpayer sought leave to appeal in both proceedings to the Court of Appeal of the Supreme Court of Victoria.

19 The Court of Appeal (Hansen and Tate JJA and Robson AJA) granted leave and allowed each appeal. The Court of Appeal's reasoning was to the effect that:

> (1) The Commissioner's duplication error for the years 1990 to 2002 deprived the Commissioner of any authority to retain the excess amount of land tax, with the result that the excess amount was not land tax within the meaning of the LTA[13].
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> (2) Despite the discretionary terms of the Commissioner's power under s 19 of the LTA to amend an assessment, the Commissioner knew

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12 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76.

13 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [195]-[197].

that alterations to the 1990 to 2002 assessments were necessary to ensure their completeness and accuracy, and that knowledge enlivened his statutory duty to exercise the power under s 19[14]. When enlivened, the statutory duty could only be exercised one way – to amend the assessments and to give effect to the amendments by way of refund[15].

(3) Section 90AA of the LTA did not limit or affect the Commissioner's power under s 19 to amend an assessment or give effect to an amended assessment by refunding an amount that the Commissioner has declared by the amended assessment not to be land tax, as s 19 of the LTA was an "integrity mechanism" integral to the statutory scheme of the LTA[16], which did not circumvent the objection and refund regime of the LTA[17].

(4) The Commissioner's refusal to issue amended assessments to the taxpayer in respect of the 1990 to 2002 years, in circumstances where he knew they were inaccurate, amounted to conscious maladministration by the Commissioner, as it constituted a "wilful refusal" to perform his "duty" under s 19 "without good reason or justification"[18]. That manifested a jurisdictional error, for which relief in the nature of mandamus was available[19].

20 Despite the express terms of s 90AA, the Court of Appeal held that the taxpayer was entitled not only to bring the two proceedings but also to an order in the first proceeding in the nature of mandamus directing the Commissioner to

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14 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [123]-[124].

15 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [139]-[143].

16 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [123], [139]-[143], [160].

17 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [123]-[124].

18 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [159]; see also at [4], [155].

19 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [4], [155], [159], [162].

issue amended assessments to the taxpayer for the years 1990 to 2002 and to repay the excess amount to the taxpayer. The Court of Appeal also ordered interest under s 58 of the *Supreme Court Act* 1986 (Vic) on the excess amount from the date of each payment comprising the excess amount and compound interest on the excess amount from 15 August 2013, as well as costs.

21 The Commissioner appeals to this Court against the orders in both proceedings. The Commissioner's appeals should be allowed with costs.

22 The Court of Appeal's analysis was contrary to the text, context and purpose of the LTA. In particular, both proceedings were precluded by the express terms of s 90AA of the LTA. Further, as these reasons will demonstrate, the amendment power given to the Commissioner in s 19 of the LTA is discretionary; it is not a power that, upon satisfaction of certain conditions, must be exercised[20]. What the Court of Appeal identified as the purpose of that power – "completeness and accuracy" of assessment to ensure the integrity of the system of collection of land tax – is properly to be determined by reference to the operation of all of the provisions of the LTA.

23 Questions of conscious maladministration did not arise in this case. There was no basis for finding that there had been conscious maladministration.

Legislative framework of the LTA

24 These appeals concern the imposition of land tax under the LTA. As this Court has said many times, the starting point in construing a statute is the statutory text[21]; no less is that so for the LTA.

25 The LTA was an Act "to consolidate the Law" providing for a tax on land and for assessment of land[22]. Land tax was "assessed charged levied and

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20 cf *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135; [1971] HCA 12.

21 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55.

22 Long title of the LTA.

collected" by the Commissioner each year on the total unimproved value of all land owned by a land owner[23].

26 The structure of the LTA was not unlike other taxing statutes. It provided for both the imposition of tax on a taxpayer (here, an owner of land)[24] and the assessment of that tax, it set out procedures for a taxpayer to object to an assessment and to seek review of the Commissioner's decision on that objection[25], and it contained provisions for the Commissioner to recover the land tax assessed and payable irrespective of those procedures of objection and review[26].

27 The Commissioner's powers to assess both the land tax on land owned by a land owner and the land tax payable by that land owner were addressed in ss 17 to 19 of the LTA. Section 17 provided the Commissioner's general assessing power – the power to cause an assessment to be made of the taxable value of land owned by any taxpayer and of the land tax payable. Section 18, which is not relevant to these appeals, provided that the Commissioner had the power to make a "default assessment" of land tax in certain circumstances.

28 Section 19, which is central to the taxpayer's contentions, dealt with the Commissioner's power to issue amended assessments and provided:

> "The Commissioner may from time to time amend an assessment by making such alterations or additions to it as he thinks necessary to ensure its completeness and accuracy, and shall notify to the taxpayer affected every alteration or addition which has the effect of imposing any fresh liability or increasing any existing liability and unless made with the consent of the taxpayer every such alteration or addition shall be subject to objection in the same manner and to the same extent as the original assessment but the validity of an assessment shall not be affected by reason only that any of the provisions of [the LTA] have not been complied with."

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23 s 8(1) of the LTA, subject to some exceptions that are not presently relevant. See also s 6 of the LTA.

24 Pt II of the LTA; see especially s 8.

25 Pt III of the LTA.

26 Pts IV and V of the LTA; see especially ss 39 and 57; see also s 38.

29 It will be necessary to return to consider this section in greater detail later in these reasons. Before doing so, it is necessary to complete the review of the scheme of the LTA.

30 Section 20(1) was a conclusive evidence provision, similar to those in federal income tax legislation[27]. It relevantly provided that production of an assessment was "conclusive evidence of the due making of the assessment" and, except in proceedings on review or appeal against the assessment, "conclusive evidence that the amount and all the particulars of the assessment are correct".

31 Once an assessment was made, s 21(1) provided that the Commissioner was required to serve "notice in writing of the assessment" on the taxpayer.

32 A taxpayer who was dissatisfied with an assessment of land tax "charged, levied *and collected*"[28] under the LTA had up to 60 days after service of the notice of assessment to lodge a written objection with the Commissioner that stated "fully and in detail the grounds on which [the taxpayer] relies"[29] (emphasis added). The Commissioner was required to give the taxpayer written notice of his decision on that objection[30].

33 If the taxpayer was dissatisfied with the Commissioner's decision on that objection, s 25(1) provided that the taxpayer could, within 60 days after being given notice of the objection decision, request the Commissioner either to refer the decision to the Victorian Civil and Administrative Tribunal for review, or to treat the taxpayer's objection as an appeal and have it set down for hearing in the Supreme Court of Victoria. The procedures to be adopted in proceedings on references and appeals were then set out in ss 26 to 29 of the LTA.

34 Land tax for each year was due and payable on the date stated in the notice of assessment[31]. Once assessed, every sum payable for tax was deemed to be a debt due to Her Majesty by the land owner and was required to be paid to

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27 See, eg, Item 2 of the table in s 350-10(1) of Sched 1 to the *Taxation Administration Act* 1953 (Cth). See also s 177 of the *Income Tax Assessment Act* 1936 (Cth) in force immediately before 1 July 2015.

28 See also ss 6 and 8 of the LTA.

29 s 24A(1) of the LTA.

30 s 24A(4) of the LTA.

31 s 57 of the LTA.

the Commissioner[32]. The tax was recoverable by the Commissioner on behalf of the Crown in right of Victoria[33] regardless of whether the taxpayer had lodged an objection or had exercised its rights of review or appeal[34]. If an assessment was subsequently altered on objection or because of a review or appeal, an assessment was to be made, excess amounts refunded and amounts short-paid recovered as arrears[35]. No statute of limitations barred or affected any action or remedy for recovery of tax[36].

35 It is apparent from these provisions that the scheme of the LTA was to raise revenue and to provide certainty of that revenue to the State of Victoria. Other provisions of the LTA reinforced that scheme[37]. In particular, s 90AA, headed "Refund of tax", prescribed a three year time limit on taxpayers seeking a refund of, or to recover, land tax paid. It provided:

> "(1) *Proceedings for the refund or recovery of tax paid under, or purportedly paid under, [the LTA] … must not be brought, whether against the Commissioner or otherwise, except as provided in this section.*
>
> (2) If a person claims to be entitled to receive a refund of or to recover tax paid under, or purportedly paid under, [the LTA], the person *must* lodge with the Commissioner *within 3 years after the payment was made an application in the prescribed form for the refund of the payment*.
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> (3) If—
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> (a) a person has lodged an application for the refund of an amount in accordance with sub-section (2); and

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32 s 39 of the LTA.

33 s 59 of the LTA. See also *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 108 [7]; [2005] HCA 53.

34 s 38(1) of the LTA.

35 s 38(2) of the LTA.

36 s 67 of the LTA.

37 See, eg, ss 64 (procedure for assessing "the owner" when the name of the land owner cannot be ascertained) and 66 (land tax to be a first charge on land) of the LTA.

(b) the Commissioner has not, within the period of 3 months after the application was lodged—

(i) refunded the amount; or

(ii) applied the amount in accordance with sub-section (6)(d); or

(iii) refunded part of the amount and applied the remainder in accordance with sub-section (6)(d)—

or has, in writing given to the person within that period, refused to make a refund, the person may, within 3 months after the end of that period or after that refusal, whichever first occurs, bring proceedings for the recovery of the amount, or, if the Commissioner has refunded or applied part, the remainder of the amount.

(4) Sub-section (3) applies whether or not the period for bringing proceedings for the refund or recovery of the amount prescribed by section 20A(1) of the **Limitation of Actions Act 1958** has expired.

(5) Sub-sections (1) and (2) do not apply to a person if the person claims to be entitled to receive a refund or to recover tax paid under, or purportedly paid under, [the LTA] by reason of the invalidity of a provision of [the LTA].

(6) If—

(a) an application for a refund is lodged with the Commissioner in accordance with sub-section (2); and

(b) the Commissioner finds that an amount has been overpaid by the applicant—

the Commissioner—

(c) must refund the overpaid amount; or

(d) must—

(i) apply the overpaid amount against any liability of the applicant to the State, being a liability arising under, or by reason of, an Act of which the Commissioner has the general administration; and

(ii) refund any part of the overpayment that is not so applied.

(7) If, under this section, the Commissioner determines to refund an amount, the amount is payable from the Consolidated Fund which is to the necessary extent appropriated accordingly.

(8) In this section, '**proceedings**' includes—

(a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction; or

(b) seeking any order under the **Administrative Law Act 1978**." (emphasis in italics added)

36 Some particular aspects of s 90AA should be noted at the outset. The three year time limit on taxpayers seeking the refund or recovery of land tax included any such proceeding seeking "relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injunction" or orders under the *Administrative Law Act* 1978 (Vic)[38]. That s 90AA was intended to operate in that manner is apparent from s 92A of the LTA, which expressly acknowledged that s 90AA limited the jurisdiction of the Supreme Court of Victoria by providing that "[i]t is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to prevent the Supreme Court entertaining proceedings of a kind to which section 90AA(1) applies, except as provided in that section".

37 Next, the three year time limit on taxpayers seeking the refund or recovery of land tax was in respect of not only land tax "paid under" the LTA[39] but also land tax "purportedly paid under" the LTA[40]. However, as s 90AA(5) provided, the time limit did not apply if a person claimed to be entitled to receive a refund or to recover tax paid under, or purportedly paid under, the LTA by reason of the invalidity of a provision of the LTA. That carve out is significant. The legislature explicitly set out limited circumstances in which the time limit would not apply.

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38 s 90AA(8) of the LTA.

39 See ss 38, 39, 57 and 59 of the LTA.

40 cf *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 151 [2], 157 [25], 162-163 [49]; [2008] HCA 32.

38 Finally, s 90AA(7) provided that "[i]f, *under this section*, the Commissioner determines to refund an amount, the amount is payable from the Consolidated Fund which is to the necessary extent appropriated accordingly" (emphasis added). That was the only appropriation in the LTA.

Relevant legislative history of s 90AA

39 That s 90AA operated to impose a time limit on taxpayers seeking the refund or recovery of land tax and to otherwise limit the jurisdiction of the Supreme Court of Victoria with respect to those claims, and was intended to do so, is also apparent from its legislative history. The LTA contained provisions similar to s 90AA when it was enacted as a consolidating Act in 1958. At that time, s 90(3) required applications for refunds to be made within three years from the date of the overpayment, or within three months of a decision in respect of an objection.

40 In 1974, s 90(3) – and sub-ss (2) and (4) – were repealed and replaced by a new s 90(2), which had the effect of removing any time limit by which applications or proceedings needed to be lodged or commenced respectively, and instead allowed the Commissioner to refund tax where he found "in any case that tax has been overpaid"[41]. In the Second Reading Speech for the amending Bill, the then Premier and Treasurer stated that "[t]he time limit has on occasions led to the unfortunate situation in which a taxpayer had overpaid land tax, not discovered the overpayment until some time afterwards, and been subsequently debarred by sub-section (3) of section 90 from obtaining a refund"[42].

41 In 1992, however, a new s 90(2) was substituted to re-impose a three year time limit, beginning from the date of overpayment, within which an application for a refund was to be lodged[43]. That amendment was made in response to the decision of the Full Court of the Supreme Court of Victoria in *Royal Insurance*

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41 s 2 of the *Land Tax (Amendment) Act* 1974 (Vic).

42 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 March 1974 at 3743-3744.

43 s 16 of the *State Taxation (Amendment) Act* 1992 (Vic).

Australia Ltd v Comptroller of Stamps (Vic)[44]. In the Second Reading Speech for the amending Bill, the then Treasurer stated that[45]:

> "The Full Court of the Supreme Court of Victoria has recently decided that a refund provision in the Stamps Act places an obligation on the commissioner to refund overpaid duty in all circumstances. The commissioner is seeking special leave to appeal the decision to the High Court. If special leave is denied or if the appeal is eventually dismissed by the High Court, under existing refund provisions the commissioner will be obliged to refund amounts overpaid no matter how long ago the overpayment occurred.
>
> The government considers that taxpayers who have overpaid tax or duty are entitled to a refund of that tax or duty. However, there must be a point in time in which taxation matters are finalised. The amendments proposed by the Bill ensure that taxpayers are entitled to refunds of tax or duty overpaid up to three years before the date the application for a refund is lodged with the State Revenue Office."

42 Then, in 1993, s 90(2) was repealed and ss 90AA and 92A were inserted[46]. The Second Reading Speech for that amending Bill recorded that the sections were inserted to address claims by members of the legal community that taxpayers could "take action outside the statutory refund scheme to recover overpaid taxes dating back more than three years, under the common law"[47]. The then Treasurer stated that the concern was that if that "argument were accepted by the courts the intention of the 1992 legislation would be frustrated"[48]. The amendments were therefore intended to "apply to proceedings which seek to

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44 (1992) 23 ATR 528. The decision was upheld in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51; [1994] HCA 61.

45 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 1992 at 566.

46 ss 21, 22, 25 of the *State Taxation (Further Amendment) Act* 1993 (Vic). Sections 90AA and 92A stayed in that form until the LTA was repealed.

47 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254.

48 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254.

use administrative law procedures to require things to be done which may result in a refund, as well as to proceedings which seek a refund directly"[49].

43 In the same Second Reading Speech, the then Treasurer also stated that, by inserting s 92A, the Parliament intended to alter the *Constitution Act* 1975 (Vic) to limit the jurisdiction of the Supreme Court of Victoria so that[50]:

> "refunds of overpaid ... land tax ... – other than refunds claimed on the grounds of invalidity of provisions in [the LTA] – are only to be made where the person seeking the refund has lodged an application for the refund with the Commissioner of State Revenue within three years of the date of the overpayment. The purposes of [provisions of the Bill that, amongst other things, inserted s 90AA] would not be achieved if the Supreme Court could entertain an action seeking such a refund notwithstanding that no application for a refund had been lodged with the commissioner within three years of the overpayment."

44 At the same time, the *Limitation of Actions Act* 1958 (Vic) ("the Limitation Act") was amended[51] to make clear that the one year limitation period for the commencement of proceedings seeking a refund of a tax payment in that Act, which had existed for many years, continued to apply unless another Act (such as the LTA) specifically provided for a longer period within which proceedings may be commenced[52]. At that point, the limitation period prescribed in the LTA for the commencement of proceedings seeking a refund was three years from the date of payment[53].

45 The legislative history reveals that, over the lifespan of the LTA, the legislature balanced the interests of taxpayers and the Commissioner in different ways at different points in time. But there is no doubt that the 1992 and 1993 amendments were intended to provide certainty to the revenue. To reiterate

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49 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254.

50 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254.

51 s 4 of the *Limitation of Actions (Amendment) Act* 1993 (Vic), which substituted a new s 20A of the *Limitation of Actions Act* 1958 (Vic).

52 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254; see also at 1207.

53 s 90AA(2) of the LTA.

what the then Treasurer said in 1992: "there must be a point in time in which taxation matters are finalised"[54].

Conclusion as to the LTA scheme

46 The scheme of the LTA was that, once an assessment was made by the Commissioner, the amount specified in that assessment would become a debt, payable as land tax on the date specified in the assessment for payment. That amount remained payable for land tax on the date specified in the assessment even if the assessment was challenged by a taxpayer who was dissatisfied with an assessment and who served an objection on the Commissioner in accordance with the LTA. The fact that an objection was pending did not affect the assessment, and the tax assessed could be recovered by the Commissioner as if no objection had been served by the taxpayer. The provisions of the LTA that dealt with collection and recovery of land tax constituted a scheme that covered the field[55] and "implement[ed] a long-standing legislative policy to protect the interests of the revenue"[56], the operation of which may, in some cases, be harsh.

Issues

47 It is against that legislative framework that the decision of the Court of Appeal, sought to be upheld by the taxpayer, is to be considered.

48 It is appropriate to consider the reasoning of the Court of Appeal by assessing the four propositions set out above[57]. That involves considering four issues – whether the excess amount was "tax paid" under the LTA; the proper construction of s 19 of the LTA; whether s 90AA applied to preclude the taxpayer bringing either of the proceedings; and the finding of conscious maladministration. Finally, it will be necessary to consider the appropriate relief, if any, that ought to have been granted to the taxpayer.

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54 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 November 1992 at 566.

55 cf *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 66; [1988] HCA 29.

56 cf *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 492 [44]; see also at 491-493 [40]-[45]; [2008] HCA 41.

57 See [19] above.

The excess amount was "tax paid" under the LTA

49 For each year from 1990 to 2002, the Commissioner "assessed charged levied and collected" land tax on the properties that the taxpayer owned[58]. Each assessment of land tax was made by the Commissioner under s 17 of the LTA. Each amount assessed was a "sum payable" for land tax by the taxpayer under s 39 of the LTA. Every sum payable for land tax, when it fell due, was a debt due to Her Majesty and that debt was payable to and recoverable by the Commissioner, whether or not the taxpayer had made an objection on the grounds that the amount assessed was excessive or the amount in fact exceeded the value of the land upon which the assessment was based[59]. An amount paid in answer to an assessment – and there is no dispute in these appeals that the taxpayer paid the amount assessed in answer to each assessment for the years 1990 to 2002 – was "tax paid under, or purportedly paid under," the LTA.

50 What then were the bases for the Court of Appeal's finding[60], which the taxpayer sought to uphold on appeal to this Court, that *part* of the amounts the taxpayer paid in answer to each of the 1990 to 2002 assessments – the excess amount – was not tax paid under the LTA?

51 The Court of Appeal held that the excess amount was not tax paid because it was "wrongly collected"[61], as there was "no authority" to demand or retain payment and therefore no tax debt, for two reasons. First, s 19 of the LTA imposed a statutory duty on the Commissioner to amend a land tax assessment once he knew that the assessment was incomplete or inaccurate, and to give effect to the amendment by refund[62]. Second, because the excess amount paid to the Commissioner was not land tax under the LTA, the Commissioner did not have authority to demand or retain the excess amount[63]. As the Commissioner

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58 s 8 of the LTA.

59 See ss 24A, 38, 39, 57, 59.

60 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [195]-[197], [212].

61 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [158].

62 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [124], [139]-[143].

63 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [196]-[197].

submitted on appeal to this Court, that construction of the LTA should be rejected.

52 As explained above, that second reason is wrong. In these appeals, the taxpayer paid the amount assessed in answer to each assessment for the years 1990 to 2002 and that was "tax paid under, or purportedly paid under," the LTA.

53 Before turning to consider the Court of Appeal's construction of the LTA, it should be noted that it was not until a decade after the tax recorded in the 1990 to 2002 assessments was paid by the taxpayer that the duplication error in the 2008 to 2011 assessments was identified. Further, no amended assessments to correct the duplication error in the 1990 to 2002 assessments[64] were issued to the taxpayer for the years 1990 to 2002 – the Commissioner refused to do so.

54 So, did s 19 of the LTA compel the Commissioner to issue amended assessments and refund the excess amount, and, if so, was the excess amount paid to the Commissioner therefore not land tax within the meaning of the LTA? The answer to both questions is "no".

The Court of Appeal erred in its construction of s 19

No duty to exercise power under s 19

55 The Court of Appeal held that the statutory power conferred on the Commissioner by s 19 was such "that once the Commissioner has knowledge that an assessment is inaccurate, and that an amended assessment is necessary to ensure the accurate assessment of land tax, … the Commissioner has a duty to exercise [the] power under s 19"[65].

56 That conclusion is contrary to the whole of the text of s 19, as well as its context and its purpose, and is not supported by authority.

57 In its terms, s 19 was discretionary. It provided that the Commissioner "*may* from time to time amend *an assessment*" (emphasis added). Section 19 went only as far as "an assessment". As seen earlier, an assessment relating to

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64 The Court of Appeal found that the 1990 to 2002 assessments contained the duplication error: see *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [158]. That finding was not challenged by the Commissioner on appeal to this Court.

65 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [139]; see also at [124].

land tax "charged, levied and collected" could only be challenged by way of objection, within prescribed time limits[66].

58 Section 19 then provided that in respect of an amended assessment that had the effect of imposing any fresh liability or increasing any existing liability, every alteration or addition not made with the consent of the taxpayer "shall be subject to objection in the same manner and to the same extent as the original assessment". When read as a whole, the purpose of s 19 was twofold: first, to ensure that the Commissioner had the power to increase an assessment or impose fresh liabilities; and, second, to ensure that where a fresh liability or increased existing liability was imposed, the tax was contestable[67].

59 Of course, if the power in s 19 was exercised to *reduce* the amount of an assessment, what then was to occur was to be found in the balance of the LTA. There was no express reference to a power of refund or to an appropriation in s 19. In other words, s 19 was to be read with, and as part of, the legislative scheme of the LTA. It is relevant to consider not only Pt III of the LTA, which provided for returns by taxpayers, as well as valuations and assessments of land tax, but also Pt VI, which provided for (including in s 90AA) the refund or recovery of tax paid under, or purportedly paid under, the LTA. If the amount assessed had been paid and the taxpayer had sought a refund or recovery of tax paid, then the LTA provided the taxpayer with such a right in s 90AA, but only if the conditions in that section, including the time limit, were satisfied. These provisions must and do inform the exercise of the power in s 19[68].

60 The scheme of the LTA provided the Commissioner with an express power of refund and made a consequential appropriation of the Consolidated Fund, both in s 90AA. If the Court of Appeal's construction of s 19 was correct (and it is not), a power of refund and appropriation would need to be implied into s 19[69], obviating the need for s 90AA. That construction should be rejected.

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66 s 24A of the LTA.

67 See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 465-468; [1995] HCA 44. cf *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-641; [1984] HCA 20.

68 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 496, 505; [1947] HCA 21; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; [1989] HCA 61; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [22], 84 [31]; [1998] HCA 11; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 591 [34]; [2015] HCA 41.

69 cf *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [141].

The objection and refund regime of the LTA was a "code" that did not admit of a construction of s 19 that elevated it to a source of refund or recovery, independent of that regime[70]. The objection and refund "code" was not one option among many, but was rather the *only* means by which a taxpayer could object to an assessment under which land tax had been "charged, levied and collected" or seek recovery or a refund of tax paid or purportedly paid under the LTA.

61 Further, contrary to the submissions of the taxpayer, the construction adopted by the Court of Appeal is not supported by authority. Contrary to the conclusion reached by the Court of Appeal[71], *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*[72] does not support the conclusion that the power to amend in s 19 was a statutory duty that the Commissioner was compelled to exercise. Powers granted by facultative language *may* impose a duty to exercise those powers[73] where, as a matter of statutory construction, the legislation imposes a duty on the holder of the power to exercise the power when prescribed pre-conditions are met[74]. As seen earlier, having regard to the discretionary text of s 19 and its role and position in the broader statutory context of the LTA, s 19 was not one of those powers.

62 The taxpayer also contended that the decision of this Court in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[75] was authority for the propositions that once an overpayment had been found, the discretion in s 19 had to be exercised by making a refund, and that the amounts refunded therefore were never land tax paid under the LTA. That decision does not assist the taxpayer.

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70 cf *Deputy Federal Commissioner of Taxation v Brown* (1958) 100 CLR 32 at 49; [1958] HCA 2; *Moorebank* (1988) 165 CLR 55 at 66.

71 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [128]-[130], [139].

72 (1971) 127 CLR 106.

73 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223; *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131; [1931] HCA 36; *Leach v The Queen* (2007) 230 CLR 1 at 17-18 [38]; [2007] HCA 3.

74 See, eg, *Finance Facilities* (1971) 127 CLR 106 at 134-135; cf s 45 of the *Interpretation of Legislation Act* 1984 (Vic).

75 (1994) 182 CLR 51.

63 *Royal Insurance* considered an express statutory power to refund overpayments of stamp duty expressed in facultative terms and using the word "may"[76] in circumstances where stamp duty had been paid by the taxpayer in ignorance of certain retrospective amendments to the taxing Act that exempted the taxpayer from stamp duty. Mason CJ held that the power to refund, in circumstances where the Commissioner found there to be an overpayment, should be exercised in a manner consistent with the taxpayer's common law rights and that the facultative nature of the power should not be treated as giving rise to a discretion that would defeat a common law claim[77]. That is not these appeals. As Mason CJ recognised, notwithstanding knowledge of the overpayment, the discretionary power may be treated as a source of authority for the Commissioner to retain the overpaid amounts where there are "circumstances disentitling the payer from recovery"[78]. Those circumstances included where the taxpayer did not have a common law right to recover, or where the right was time-barred (as here)[79]. In those circumstances, the discretion to refund should not be construed as giving rise to a duty because the exercise of discretion to refuse a refund would be justified[80]. Brennan J, with whom Toohey and McHugh JJ agreed, also found that the power was discretionary and emphasised that the Commissioner was "under no duty to make a refund unless there be an antecedent liability to do so"[81].

64 In these appeals, as will be explained below, the Commissioner was under no such antecedent liability to amend the assessments or to make a refund because s 90AA applied to bar the taxpayer's attempts to establish such a liability.

Effect of an amended assessment

65 For the reasons stated earlier, the excess amount was land tax paid under the LTA[82].

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76 s 111(1) of the *Stamps Act* 1958 (Vic).

77 *Royal Insurance* (1994) 182 CLR 51 at 64-65.

78 *Royal Insurance* (1994) 182 CLR 51 at 64.

79 *Royal Insurance* (1994) 182 CLR 51 at 65.

80 *Royal Insurance* (1994) 182 CLR 51 at 65.

81 *Royal Insurance* (1994) 182 CLR 51 at 87; see also at 86, 89.

82 See [49] above.

66 On appeal to this Court, the taxpayer further contended that if an amended assessment issued under s 19 of the LTA reduced a tax debt, the excess amount paid was never land tax paid under the LTA and that amount recovered by the Commissioner was not land tax under the LTA. That contention should be rejected. It is again contrary to the scheme of the LTA[83] and contrary to authority.

67 Every assessment issued by the Commissioner under s 17 of the LTA could, at some point, be amended by the Commissioner under s 19[84]. The amended assessment, which could show a different amount, was conclusive that the amount it showed *at that time* was the true amount of tax payable. That was the aim of s 19[85]. The power in s 19 to amend an assessment did not involve the re-exercise of the s 17 assessment power or the substitution of an assessment in place of the original assessment. The amended assessment operated on and from the date that it was issued[86]. The amended assessment did not have the effect that the original assessment that "charged, levied and collected" land tax under the LTA was somehow altered so that that land tax subsequently ceased to be land tax within the meaning of the LTA. As Isaacs J said in *Federal Commissioner of Taxation v Hoffnung & Co Ltd*, when an alteration or addition is made to an assessment, the assessment "**henceforth** exists *as altered* or *added to*, and not as previously existing plus independent alteration or addition"[87] (emphasis in bold added).

68 That result is not surprising. It must be recalled that the production of an assessment was conclusive evidence both of the due making of the assessment and that the amount and all the particulars of the assessment were correct, except in proceedings on review or appeal against the assessment[88]. When an assessment was served, amounts of land tax payable were fixed and were to be taken as fixed for all purposes, except those of review or appeal under Pt III of

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83 See [46] above.

84 cf *Trustees, Executors and Agency Co Ltd v Commissioner of Land Tax* (1915) 20 CLR 21 at 35-36, 40, 43; [1915] HCA 35.

85 cf *Trustees* (1915) 20 CLR 21 at 41.

86 cf *Trustees* (1915) 20 CLR 21 at 41.

87 (1928) 42 CLR 39 at 54; [1928] HCA 49.

88 s 20 of the LTA.

the LTA[89]. The power of amendment "pre-supposes that an assessment is something creating a legal obligation"[90]. And that logic underpinned the structure of s 19. It provided that every such alteration or addition that had the effect of imposing any fresh liability or increasing any existing liability "shall be subject to objection in the same manner and to the same extent as the original assessment".

69 As Latham CJ said in *Trautwein v Federal Commissioner of Taxation*[91], in relation to an analogous provision in the *Income Tax Assessment Act* 1922 (Cth), "[a]n amended assessment is not an entirely new assessment substituted for its predecessor so as to open up again full rights of appeal". For example, if an amendment of an assessment increases a liability or has the effect of imposing a fresh liability, the original assessment otherwise stands and the amended assessment is open to objection only by reference to the items or elements introduced or affected by the amendment[92]. The effect of an amended assessment on an original assessment is not altered because the amendment reduces or removes a liability imposed under the original assessment. Indeed, if a contrary conclusion were adopted, then a taxpayer would arguably not have paid an amount of "relevant tax" to the Commissioner under the *Taxation (Interest on Overpayments) Act* 1986 (Vic) and would not be entitled to interest on that overpayment under that Act.

Section 90AA applied to the taxpayer's claims

70 Section 90AA applied to, and barred, the taxpayer's claims to a refund. Section 90AA(1) provided that "[p]roceedings for the refund or recovery of tax paid under, or purportedly paid under, [the LTA] … must not be brought, whether against the Commissioner or otherwise, except as provided in this section".

71 Under s 90AA(2), an application for refund of the payment had to be lodged with the Commissioner within three years of the payment being made. Proceedings could have been brought by a taxpayer where, within three months after the application for refund of the payment was lodged, the Commissioner had not refunded the overpaid amount (or not applied it against another liability

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89 cf *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 253; [1963] HCA 51.

90 cf *Batagol* (1963) 109 CLR 243 at 253.

91 (1936) 56 CLR 63 at 94; see also at 102, 107-108; [1936] HCA 77.

92 cf *Trautwein* (1936) 56 CLR 63 at 109.

the taxpayer has to the State) or had refused to make a refund, whichever occurred first[93]. "Proceedings" was defined in s 90AA(8) to include proceedings seeking the grant of relief or remedy in the nature of mandamus.

72 Each proceeding commenced by the taxpayer – the first by originating motion seeking mandamus "on judicial review" directing the Commissioner to issue amended land tax assessments and to refund to the taxpayer the excess amount, and the second by writ indorsed with a statement of claim seeking restitution of the excess amount – was a claim to a refund of "tax paid under, or purportedly paid under," the LTA and was barred. No application for refund had been lodged with the Commissioner within three years of the land tax being paid.

73 As seen earlier[94], the duplication error in the 1990 to 2002 assessments did not deprive the excess amount "charged, levied and collected" of the nature of being tax "paid under, or purportedly paid under, [the LTA]", and a limitation period does not render the tax incontestable.

74 Moreover, even if the failure of the Commissioner to amend the assessments constituted a failure to exercise jurisdiction (and it did not), s 90AA was a bar to the proceedings. That conclusion is compelled not only by the express terms of s 90AA (the extended definition of "proceedings" in s 90AA(8)) but also by the scheme of the LTA.

75 The taxpayer's contention that, in the event s 90AA applied to both proceedings (which it did), s 27 of the Limitation Act – which operates to postpone limitation periods in certain circumstances – meant that the limitation period in s 90AA commenced from the time that the taxpayer discovered the duplication error or from when such error was reasonably discoverable, should also be rejected. However, s 27 of the Limitation Act only applies in relation to a period of limitation prescribed by the Limitation Act – here, relevantly, s 20A(1) of the Limitation Act. Section 20A(1) did not apply to these appeals because s 90AA(4) expressly excluded its operation. Any other construction of s 90AA(4) would be contrary to its express terms and would be contrary to the scheme of the LTA, and circumvent the objection and refund regime. Moreover, it will be recalled that the amending Bills inserting both s 20A of the Limitation Act and s 90AA of the LTA were introduced by the government at the same time. Section 20A was intended to preserve the operation of the long-existing

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93 s 90AA(3) of the LTA.

94 See [49] above.

one year limitation period for the recovery of tax in certain circumstances[95], not to undercut the specific limit imposed by s 90AA.

76 The taxpayer sought to advance a contention in this Court that the decision in *Trustees, Executors and Agency Co Ltd v Commissioner of Land Tax*[96] was authority for the proposition that s 90AA was limited in its operation to matters of "account and payment" or that it did not limit or affect proceedings being brought to compel performance of a duty under s 19 of the LTA. That decision does not support the taxpayer's contentions and is distinguishable. *Trustees* dealt with the *Land Tax Assessment Act* 1910 (Cth). What was in issue in that case was whether the power in s 20 of that Act to alter or to add to an assessment could be exercised more than once[97].

77 In general terms, the facts were as follows[98]. The Commissioner of Land Tax assessed on one basis, and land tax stated in that assessment was subsequently paid. Less than two years later, the Commissioner issued amended assessments and refunded the excess amount that had been paid. Then, shortly after the expiration of two years from the original payment, the Commissioner further amended the assessment on the basis that the original assessment was correct. The taxpayer contended that the power to amend in s 20 was limited by ss 59 and 60 of that Act (the latter imposing a three year limitation on the power of the Commissioner to make refunds) either alone or in conjunction with the doctrine that money paid under a mistake of law cannot be recovered back[99].

78 The taxpayer's contentions were rejected. Griffith CJ stated[100]:

> "The amount of land tax payable is determined by the existing assessment, which may, subject to the limitations of sec 21, be altered from time to time, either by way of increase or diminution. Whatever amount appears by an existing assessment to be the land tax payable is, until paid, a debt due by the taxpayer to the Crown. If he has not paid so much, he is bound

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95 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1207, 1254.

96 (1915) 20 CLR 21.

97 *Trustees* (1915) 20 CLR 21 at 32-33.

98 See *Trustees* (1915) 20 CLR 21 at 30-32.

99 *Trustees* (1915) 20 CLR 21 at 33.

100 *Trustees* (1915) 20 CLR 21 at 35-36; see also at 37, 40-41, 43-44.

to pay the deficiency; if he has paid more, he is entitled to a refundment of the excess (subject to the limitation, if any, imposed by sec 60), and so on".

79 *Trustees* is not authority for the proposition that the taxpayer sought to advance here. The contention is contrary to the legislative history and the scheme of the LTA – a scheme that covers the field. Moreover, the contention would render the objection and refund regime, including s 90AA, otiose.

No conscious maladministration

80 "Allegations that statutory powers have been exercised corruptly or with deliberate disregard to the scope of those powers are not lightly to be made or upheld"[101]. A finding of maladministration, let alone conscious maladministration, is not to be made unless plainly alleged and clearly proved.

81 The Court of Appeal found that the Commissioner's "actual refusal" in August 2013 to amend the 1990 to 2002 assessments was "conscious maladministration" of the LTA[102]; a "wilful refusal of the Commissioner to perform his duty without good reason or justification"[103]. No finding of that kind had been sought by the taxpayer in its pleadings and the argument was first raised in oral submissions before the primary judge[104]. There was no basis for making it.

82 In 2012, a decade after the last of the assessments were issued for the years 1990 to 2002, the taxpayer formed the view that there had been a duplication error in those assessments. The taxpayer made no challenge to the validity of those assessments[105]. The taxpayer requested that the Commissioner amend the assessments under s 19 of the LTA. As seen earlier,

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101 *Futuris* (2008) 237 CLR 146 at 165 [60].

102 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [155].

103 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [159].

104 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [165], [167], [195].

105 cf *Futuris* (2008) 237 CLR 146.

the Commissioner was not under any duty to amend the assessments or refund the excess amount, contrary to the finding of the Court of Appeal[106].

83 It was not contended, and there was no basis to find, that the refusal by the Commissioner to amend the assessments was not bona fide, being based on a construction of the LTA that not only was open and accepted by the primary judge[107], but, as established above, also was correct.

84 As there was no duty to amend, there was no basis to conclude, as the Court of Appeal did, that the Commissioner wilfully refused to amend, knowing that he was legally obliged to make the amendment.

85 Moreover, as the Commissioner contended, even if the failure of the Commissioner to amend the assessments constituted a failure to exercise jurisdiction (and it did not), that failure would have been based on an erroneous construction of the LTA. Such a failure, by itself, would not have provided a basis to conclude that the Commissioner refused to amend the assessments *knowing* that he was *legally obliged* to make the amendment. In short, even taking the taxpayer's case at its highest, conscious maladministration would not be established.

86 In the circumstances, the Court of Appeal should not have ordered relief in the nature of mandamus directing the Commissioner to issue amended assessments to the taxpayer for the years 1990 to 2002, and to repay the excess amount to the taxpayer. Nor should the Court of Appeal have ordered interest under the *Supreme Court Act* 1986 (Vic) on the excess amount from the date of each of the payments making up the excess amount, compound interest on the excess amount from 15 August 2013 or costs.

No restitution and no entitlement to interest

87 Each of the 1990 to 2002 assessments issued to the taxpayer created a debt when the amounts fell due that was discharged by payment. In that circumstance, there can be no restitution. Payment, including payment of the excess amount, was made in discharge of a legally enforceable obligation to

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106 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSCA 332 at [143].

107 *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [199].

pay[108]. The taxpayer's contention that the Commissioner was unjustly enriched should be rejected.

88 Both the proceeding commenced by originating motion and the proceeding commenced by writ indorsed with a statement of claim were "[p]roceedings for the refund or recovery of tax paid under, or purportedly paid under," the LTA within the meaning of s 90AA of the LTA. The applications were filed more than three years after payment was made. The Supreme Court was prevented from entertaining both proceedings. The taxpayer was not entitled to any payment, such that any entitlement to interest under the *Supreme Court Act* 1986 (Vic), or to compound interest, did not arise.

Orders

89 Each appeal should be allowed with costs. The orders of the Court of Appeal of 8 December 2015 made in both proceedings should be set aside, save for par 1 of both orders, and, in their place, it should be ordered that the appeal be dismissed and the taxpayer pay the Commissioner's costs of the proceedings in that Court.

90 For the avoidance of doubt, the amended assessments issued by the Commissioner in compliance with par 3(a) of the Order of the Court of Appeal of 8 December 2015, made in proceeding S APCI 2015 0029, should be set aside.

91 The taxpayer should repay to the Commissioner $1,248,753.38 paid by the Commissioner to the taxpayer, together with interest pursuant to s 58 of the *Supreme Court Act* 1986 (Vic)[109] on and from the date of payment of that amount by the Commissioner to the taxpayer.

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108 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 392, 405; [1992] HCA 48.

109 Such an order being made pursuant to s 37 of the *Judiciary Act* 1903 (Cth). See *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590 at 594; [1982] HCA 59; *Nicol v Allyacht Spars Pty Ltd [No 2]* (1988) 165 CLR 306 at 312; [1988] HCA 48.

92 GAGELER J. For the reasons given by Bell and Gordon JJ, and for the additional reasons given by Kiefel and Keane JJ, I would allow each appeal with costs and make the consequential orders proposed by Bell and Gordon JJ. I add my own response to the argument of the taxpayer on the central issue of the relationship between ss 19 and 90AA of the Land Tax Act.

93 Section 90AA was explained by the Victorian Treasurer at the time of its introduction in 1993 to be one of a number of similarly worded provisions in State taxation legislation designed to provide certainty and finality to Victoria's revenue collections by providing that, except in the case of a claim for a refund based on an argument that a statutory provision is invalid, proceedings for a refund cannot be brought unless an application for the refund has first been made to the Commissioner within three years of the payment in question[110]. Axiomatically, a construction that would give effect to that legislative design is to be preferred to a construction that would not[111].

94 Section 90AA(1) is expressed to prohibit "[p]roceedings for the refund or recovery of tax paid under, or purportedly paid under", the Land Tax Act. Section 92A spells out that the prohibition prevents the Supreme Court of Victoria entertaining proceedings of the kind to which s 90AA(1) refers.

95 By defining "proceedings" to include seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or *quo warranto,* or the grant of a declaration of right or an injunction, as well as to include seeking any order under the *Administrative Law Act* 1978 (Vic), s 90AA(8) makes clear that proceedings prohibited by s 90AA(1) are not confined to proceedings in which the refund or recovery of tax paid is part of the relief claimed. The prohibition extends to encompass any proceeding seeking judicial review of any administrative action or inaction on the part of the Commissioner where the object of the proceeding is to obtain a refund or recovery of tax paid under, or purportedly paid under, the Land Tax Act.

96 The comprehensiveness of the prohibition imposed by s 90AA(1) on proceedings whose object is the refund or recovery of tax paid under, or purportedly paid under, the Land Tax Act is given emphasis by the exceptions from it, which are limited to those for which the remainder of s 90AA goes on to provide. Section 90AA(3) creates the principal exception, for proceedings commenced within three months after refusal by the Commissioner to allow under s 90AA(6) a refund claimed under s 90AA(2) within three years after payment. Section 90AA(5) creates the only other exception: for proceedings

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110 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1993 at 1254.

111 Section 35(a) of the *Interpretation of Legislation Act* 1984 (Vic).

based on a claim of invalidity of a provision of the Land Tax Act, which by force of s 20A of the *Limitation of Actions Act* 1958 (Vic) must be commenced within one year of the date of payment.

97 Section 19, empowering the Commissioner to "amend an assessment by making such alterations or additions to it as he thinks necessary to ensure its completeness and accuracy", forms part of the administrative machinery of the Land Tax Act which the prohibition in s 90AA(1) overlays. A proceeding which seeks judicial review of action or inaction on the part of the Commissioner under s 19 is a proceeding which falls within the scope of the prohibition in s 90AA(1) if the object of the proceeding is the refund or recovery of tax paid under, or purportedly paid under, the Land Tax Act.

98 The gist of the taxpayer's argument is that a proceeding which seeks mandamus to compel the Commissioner to amend an assessment under s 19 as a step in recovering an amount paid in response to an inaccurate original assessment is not within the scope of the prohibition in s 90AA(1) for the reason that the object of the proceeding cannot be characterised as the refund or recovery of "tax" paid under, or purportedly paid under, the Land Tax Act. The amount paid in response to the inaccurate original assessment cannot be characterised as "tax" within the context of such a proceeding, it is said, because correction of the assessment pursuant to the order of mandamus will operate to establish "*ab initio*" that the amount assessed and paid was not the amount that was required to be assessed and paid under that Act.

99 The taxpayer borrows the expression "*ab initio*" from the reasons for judgment of Isaacs J in *Trustees, Executors and Agency Co Ltd v Commissioner of Land Tax*[112]. Explaining the effect of amendment of an assessment under a provision of the *Land Tax Assessment Act* 1910 (Cth), expressed in terms materially identical to s 19 of the Land Tax Act, Isaacs J stated that "[t]here is at any given moment but one assessment by the Commissioner, and that is conclusive ... as to amount, except on appeals"[113]. "It is subject to correction by the Commissioner", his Honour continued, "and when altered or added to … it operates *ab initio* as to the amount of the debt payable" with the result that "[t]he assessment when amended is conclusive that the amount it shows at a given moment was the true amount as at the taxable date"[114].

100 The taxpayer's argument seeks in that way to equate the effect for the purposes of s 90AA(1) of an assessment that is amended under s 19 of the Land

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112 (1915) 20 CLR 21; [1915] HCA 35.

113 (1915) 20 CLR 21 at 41.

114 (1915) 20 CLR 21 at 41.

Tax Act with the effect for the purposes of s 20A of the *Limitation of Actions Act*, as it then stood, of the amendment to the *Stamps Act* 1958 (Vic) considered in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd*[115]. The amendment operated retrospectively to abrogate liability to pay stamp duty. Amounts paid as stamp duty during the period of that retrospective operation were held in consequence of the amendment not to answer the description of amounts "paid under the authority or purported authority of any Act"[116].

101 The flaw in the argument is that it overstates the legal effect of the exercise of the power conferred by s 19, and in so doing understates the comprehensiveness of the prohibition imposed by s 90AA.

102 Amendment of an assessment under s 19 has no greater effect than the Land Tax Act gives to the assessment as amended. Nothing in the reasoning of Isaacs J in *Trustees* suggests to the contrary.

103 An assessment as amended operates by force of s 20(1)(b) as conclusive evidence that the amount and all particulars of the amended assessment are correct. To the extent that the amount or particulars of the amended assessment differ from the amount or particulars of the original assessment, the assessment as amended is conclusive evidence that the amount or particulars of the original assessment were incorrect.

104 Amendment of an assessment does not, however, operate to change the historical fact of the original assessment having been issued. Most importantly, amendment of the assessment does not operate to alter the historical legal consequences of the original assessment having been issued. The analogy to the retrospective amendment considered in *Royal Insurance* is for that reason incomplete.

105 The reference in s 90AA(1) to "tax paid under, or purportedly paid under", the Land Tax Act is to payment as an historical event. Within the meaning of s 90AA(1), tax paid under the Land Tax Act is tax that was paid in discharge of the liability imposed on a taxpayer through the operation of ss 38, 39 and 57 of the Land Tax Act operating on an original assessment. The tax historically so paid remains tax paid under the Land Tax Act even after amendment of the assessment.

106 Where an amendment decreases the amount of tax from that originally assessed, such entitlement as the taxpayer might have to get back an amount previously overpaid is limited to such entitlement as is conferred by s 90AA(2),

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115 (1994) 182 CLR 51; [1994] HCA 61.

116 (1994) 182 CLR 51 at 80.

(3) and (6) operating in light of the assessment as amended. Tax paid in discharge of the liability imposed on the taxpayer through the operation of ss 38, 39 and 57 on the original assessment was and remains tax paid under the Land Tax Act within the meaning of s 90AA(2) in the same way as it remains tax paid under the Land Tax Act within the meaning of s 90AA(1). An amount of tax so paid that is shown by an amended assessment to have been overpaid is claimable under s 90AA(2) within three years after payment. Where claimable and claimed under s 90AA(2), the amount is refundable under s 90AA(6), in default of which the amount is recoverable as permitted by s 90AA(3). Not otherwise.

107 The proceeding for mandamus which the taxpayer commenced in the Supreme Court of Victoria was for the refund or recovery of tax paid under, or purportedly paid under, the Land Tax Act within the meaning of s 90AA(1). The Supreme Court of Victoria was prevented by that provision from entertaining the proceeding.