HOARE BROS PTY LTD v DEPUTY COMMISSIONER OF TAXATION

5 FEDERAL COURT OF AUSTRALIA — GENERAL DIVISION

BLACK CJ, EINFELD and SACKVILLE JJ

9 October 1995, 13 February 1996 — Melbourne

10 **Taxation and revenue — Assessment of income — Objection and review or appeal — Effect of notice of assessment issued bona fide and fully served — Notice of assessment can be challenged only by objection and review or appeal — (CTH) Income Tax Assessment Act 1936 ss 175, 177(1), 204(1), 208(1) — (CTH) Taxation Administration Act 1953 ss 14ZZ, 14ZZM, 14ZZR.**

15 **Corporations — Debts — Statutory demand — Income tax debt due under notice of assessment — Assessment subject to review proceedings — Whether dispute as to taxation liability constituted grounds for setting aside statutory demand — Dispute as to taxation liability was not "genuine dispute . . . about the existence or amount of the debt to which the demand relates" — Whether there was "some other reason" for 20 which court may set aside demand in its discretion — No error in court's exercise of discretion — Corporations Law ss 459H, 459J(1)(b).**

The respondent served a statutory demand on the appellant under s 459E(1) of the Corporations Law (the Law) claiming that the appellant owed the respondent $1,452,917.42. The appellant disputed that part of the debt relating to assessments for the years ending 30 June 1990 and 30 June 1991, for which objections had been lodged. The 25 appellant claimed that if its objections succeeded, it would have paid to the respondent at least $70,121 in excess of its total liability, and would be entitled to a refund.

The appellant sought to set aside the statutory demand. The main ground argued on appeal was whether the trial judge erred in finding that there was no genuine dispute between the appellant and the respondent about the existence or amount of the debt to 30 which the demand related within the meaning of s 459H(1)(a) of the Law. If there was such a dispute, and the residual undisputed amount of the debt was less than the statutory minimum of $2000, the court would have been required to set aside the demand. The second ground of appeal was whether the trial judge had erred in the exercise of the discretion conferred by s 459J(1)(b) of the Law which permitted the court to set aside a demand if there was "some other reason" why that course should be followed. The 35 appellant contended that in a case where there is a genuine dispute as to the underlying tax liability, it was necessarily an erroneous exercise of discretion for the court to decline to set aside a demand.

A taxpayer who was dissatisfied with an assessment may object to it in the manner set out in Pt IVC of the Taxation Administration Act 1953 (Cth) (the TAA). Section 177(1) of 40 the Income Tax Assessment Act 1936 (Cth) (the ITAA) provided that the production of a notice of assessment of tax was conclusive evidence of the due making of the assessment, and that except in proceedings under Pt IVC of the TAA on review or appeal relating to the assessment, the amount of the assessment was correct. Where income tax became due and payable, it was a debt due to the Commonwealth: s 208(1) of the ITAA. Section 14ZZM of the TAA provided that the fact that a review was pending in relation to 45 a taxation decision did not in the meantime interfere with or affect the decision, and any tax could be recovered as if no review were pending.

Held, dismissing the appeal:

(i) The structure of the ITAA strongly suggested a legislative intent that the issue and service of a notice of assessment (after expiry of the appropriate period) created a debt that 50 was immediately due and payable, and that the assessment could be challenged only in the manner provided for by the TAA Pt IVC

FJ Bloemen Pty Ltd v FCT (1981) 147 CLR 360; 35 ALR 104; *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168; 127 ALR 21; *FCT v S Hoffnung & Co Ltd* (1928) 42 CLR 39, considered.

(ii) Thus, unless there was some genuine dispute about the validity of a notice which has been duly served, there could be no genuine dispute about the existence or amount of the debt specified in the notice (assuming the requisite period has elapsed since the service of the notice).

(iii) The mere fact that the appellant had objected to the assessments, or sought review of the Commissioner's decision before the Administrative Appeals Tribunal (AAT), did not establish that there was a genuine dispute as to the existence or amount of the relevant debt. Any such objections do not affect the character of the debt to which the statutory demand relates. However, if the appellant's objections or application for review succeed, the Commissioner will be required to issue an amended assessment and to refund any tax overpaid, or else apply the overpayment against other tax liability.

(iv) The construction of s 459H of the Law, as applied in the present circumstances, did not have the effect of creating an incontestable tax.

(v) Whatever view was to be taken of the relationship between s 459J(1)(a) and (b), the court had a discretion in a case which did not involve a defect in the demand to set aside the demand, if some appropriate reason was shown. The discretion in s 459(1)(b) of the Law could have been exercised in favour of the appellant without showing that substantial injustice would otherwise be caused.

(vi) The primary judge did not err in the exercise of the discretion under s 459J(1)(b). His Honour took into account the circumstances of the case, including the appellant's failure to object to the 1990 assessment until after the statutory notice was served, and the fact that the appellant's claim to a net refund was dependent upon it being entirely successful in its objections.

Applications

This was an appeal from a judgment of Olney J dismissing an application by the appellant for an order pursuant to s 459G(1) of the Corporations Law to set aside a statutory demand served by the respondent on the appellant under s 459E(1) of the Corporations Law.

P K Searle for the appellant.

G A A Nettle QC and *S Horovitz* for the respondent.

Black CJ, Einfeld and Sackville JJ.

Introduction

This is an appeal from a judgment of Olney J. His Honour dismissed an application by the present appellant (the company) for an order pursuant to s 459G(1) of the Corporations Law (the Law), setting aside a statutory demand served by the respondent (the Commissioner) on the company under s 459E(1) of the Law.

The main ground argued on the appeal was whether the trial judge erred in finding that there was no "genuine dispute between the [C]ompany and the [Commissioner] about the existence or amount of a debt to which the demand relates", within the meaning of s 459H(1)(a) of the Law. If there is such a dispute, and the residual undisputed amount of the debt is less than the "statutory minimum" ($2000), the court must set aside the statutory demand. A second issue raised by Mr Searle, who appeared for the company, was whether the trial judge

had erred in the exercise of the discretion conferred by s 459J(1)(b), which permits the court to set aside a demand if there is "some other reason" why this course should be followed.

5 *The Corporations Law*

On an application made pursuant to s 459P of the Law, the court has power to order an insolvent company to be wound up in insolvency: Law s 459A. For the purposes of such an application, the court must presume that the company is insolvent if, during or after the three months ending on the day when the 10 application was made, the company failed to comply with a statutory demand: Law s 459C(2)(a). The presumption only operates except in so far as the contrary is proved for the purposes of the application: Law s 459C(3).

A person may serve on a company a demand relating to one or more debts that the company owes to the person, if the debts are due and payable and are at least 15 equal to the statutory minimum: Law s 469E(1). The company may apply to the court for an order setting aside the statutory demand: Law s 459G(1). Section 459H applies to an application under s 459G if 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 20 the existence or amount of a debt to which the demand relates;
(b) that the company has an offsetting claim.

"Respondent" is defined to mean the person who served the demand on the company: Law s 459H(5).

If the "substantiated amount", as calculated in accordance with s 459H (2), is 25 less than the statutory minimum, the court must set aside the statutory demand: Law s 459H(3). If the substantiated amount is at least as great as the statutory minimum, the court may vary the demand and declare it to have had effect, as so varied, as from the time the demand was served on the company: Law s 459H(4). For the purposes of s 459H, the "substantiated amount" is the difference between 30 the "admitted total" and the "offsetting total": Law s 459H(2). The "admitted total" means the "admitted amount" of the debt or debts to which the demand relates, while "offsetting total" means the amount of any one or more offsetting claims: Law s 459H(2). The terms "admitted amount" and "offsetting claim" are defined in s 459H(5):

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"admitted amount", in relation to a debt, means:

(a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt — a nil amount; or
(b) if the Court is satisfied that there is a genuine dispute between the company and 40 the respondent about the amount of the debt — so much of that amount as the Court is satisfied is not the subject of such a dispute; or
(c) otherwise — the amount of the debt;

"offsetting claim" means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates).

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Section 459H has effect subject to s 459J: Law s 459H(6). Section 459J creates additional grounds for setting aside a demand:

(1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:

50 (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.

Section 459S of the Law limits the grounds on which a company, which has failed to comply with statutory demand, may oppose a winding-up application.

(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:

(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).

The taxation legislation

The provisions relevant to the case are found in the Income Tax Assessment Act 1936 (Cth) (ITAA) and the Taxation Administration Act 1953 (Cth) (TAA).

Section 166 of the ITAA requires the Commissioner, from the returns made by the taxpayer, or from any other information in his or her possession, to make an assessment of the amount of the taxable income of the taxpayer and of the tax payable thereon. The term "assessment" is defined by s 6(1) to mean:

(a) the ascertainment of:

(i) the amount of taxable income;

...

and of the tax payable on that taxable income ...

If a person makes default in furnishing a return, or the Commissioner is not satisfied with the return, or has reason to believe that a person who has not formulated a return has derived taxable income, the Commissioner may make an assessment of the person's taxable income for the purposes of s 166: ITAA s 167. More generally, where a person is liable to pay tax under the ITAA, the Commissioner may make an assessment of such tax: ITAA s 169. The Commissioner is empowered to amend an assessment by making such alterations, or additions thereto, as he or she thinks necessary, notwithstanding that tax may have been paid in respect of the assessment: ITAA s 170(1). Except as otherwise provided, every amended assessment is an assessment for the purposes of the ITAA: ITAA s 173. As soon as conveniently may be after the assessment is made, the Commissioner must serve notice thereof on the person liable to pay the tax: ITAA s 174. Where, by reason of an amendment of an assessment, a person's liability to tax is reduced, the Commissioner must refund the amount of any tax overpaid, or apply the amount of any tax overpaid against any tax liability of the person to the Commonwealth: ITAA s 172(1).

Section 175 of the ITAA is a key provision:

175 The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

A taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object to it in the manner set out in Pt IVC of the TAA: ITAA s 175A. Section 177(1) is also a critical section, since it states the effect of production of a notice of assessment:

(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be

a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

5 The legal consequences of service of a notice of assessment are specified in s 204(1) of the ITAA:

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

If any tax remains unpaid after the time when it became due and payable, additional tax, by way of penalty, is due and payable by the person liable to pay the tax: ITAA s 207(1). The Commissioner may sue for the recovery of any tax unpaid immediately after the expiry of the time when it became due and payable:
15 ITAA s 207(2). The point is reinforced by s 208(1) of the ITAA:

(1) Income tax when it becomes due and payable shall be a debt due to the Commonwealth, and payable to the Commissioner in the manner and at the place prescribed.

20 Any tax unpaid may be sued for and recovered in any court of competent jurisdiction by the Commissioner or Deputy Commissioner suing in his or her official name: ITAA s 209.

The relevant provisions of Pt IVC of the TAA, to which a dissatisfied taxpayer may have resort, are as follows. In general, a person dissatisfied with an
25 assessment under the ITAA must lodge a taxation objection with the Commissioner within 60 days after notice of the assessment has been served: TAA s 14ZW(1)(c). If the 60 day period has passed, the person may nevertheless lodge the objection with the Commissioner with a written request detailing the reasons for the lateness and asking the Commissioner to deal with it: TAA
30 s 14ZW(2), (3). After considering the request for an extension of time, the Commissioner must decide whether to agree to it or refuse it: TAA s 14ZX(1). If the Commissioner decides to agree to the request, the objection is taken to have been lodged within 60 days: TAA s 14ZX(3). If the Commissioner refuses the request, the person may apply to the Administrative Appeals Tribunal (AAT) for
35 review of the decision: TAA s 14ZX(4).

If a taxation objection has been lodged within the 60 day period, the Commissioner must decide whether to allow it, wholly or in part, or to disallow it: TAA s 14ZY(1). If a person is dissatisfied with the Commissioner's decision on the objection, the person may either apply to the AAT for review of the decision
40 or appeal to the Federal Court against the decision: TAA s 14ZZ. An applicant before the AAT has the burden of proving that its challenged assessment is excessive: TAA s 14ZZK(b). When the AAT's decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the
45 decision: TAA s 14ZZL(1).

Sections 14ZZM and 14ZZR deal, respectively, with the effect of a pending review or a pending appeal.

14ZZM The fact that a review is pending in relation to a taxation decision (other than a registration-type sales tax decision) does not in the meantime interfere with, or affect,
50 the decision and any tax, additional tax or other amount may be recovered as if no review were pending

Section 14ZZR makes equivalent provision in relation to appeals. (Sections 14ZZM and 14ZZR are substantially identical to the former s 201 of the ITAA, which was repealed by Act No 216 of 1991, s 113.)

Where a person has paid tax to the Commissioner and, as a result of a decision by the AAT, the Commissioner amends the assessment so as to reduce the taxpayer's liability to tax, or overpaid tax is applied against any liability of the taxpayer to the Commonwealth, interest is payable by the Commissioner to the taxpayer: Taxation (Interest on Overpayments) Act 1983 (Cth), s 9(1) and definition of "decision to which this Act applies" in s 3(1), para (ca). Section 16 of the TAA provides that, where the Commissioner is required or permitted to pay an amount to a person under a provision of a tax law, subject to certain irrelevant exceptions, the amount is payable out of the Consolidated Fund, which is appropriated for the purpose.

The factual background

The statutory demand served by the Commissioner asserted that the company owed the Commissioner the amount of $1,452,917.42, being the total of four sets of debts described in the schedule, respectively, as statements A, B, C and D. The company did not dispute that it was liable for the net amounts of tax and penalties, itemised in statements A, B and C. These totalled $177,050.05. However, the company disputed its liability in respect of the following items described in statement D:

Assessment for the year which ended on the 30th day of June 1990, which issued on 20 June 1994 and which was due for payment on 15 March 1991	$498,564.87
Amended assessment for the year of income which ended on the 30th day of June 1991, which issued on 17 May 1994 and which was due for payment on 20 June 1994	$666,072.28
Additional tax due and payable by the company pursuant to s 207 of the ITAA for late payment of income tax	$358,401.92

The company claimed that, if its objections succeeded, it would have paid to the Commissioner at least $70,121 in excess of its total liability. In those circumstances, it would be entitled to a refund of that amount.

The company lodged a notice of objection to the amended assessment for the year ending 30 June 1991. Although the objection was lodged out of time, the Commissioner had agreed to accept it and took the objection under consideration. The company also lodged an objection to the assessment for the year ending 30 June 1990. This was also lodged out of time, but the Commissioner declined to accept it. The company applied to the AAT to review the decision not to accept the objection. The company claimed that the amount of additional tax would be affected if either or both of the objections succeeded.

In these circumstances, the company maintained before the trial judge that there was a genuine dispute between it and the Commissioner relating to the existence and amount of the debt. Since the disputed amounts plus the payments already made exceeded the amounts about which there was no dispute, it followed that the "substantiated amount", for the purposes of s 459H of the Law, was less than the statutory minimum

The reasoning at first instance

The primary judge first addressed the question of whether there was "any other reason why the demand should be set aside", within the meaning of s 459J(1)(b) of the Law. His Honour pointed out that the company's claim that it was entitled to a refund depended upon its objections being entirely successful. He noted that no attempt had been made to object to the 1990 assessment until after the statutory demand had been served. His Honour expressed the view that the Commissioner's conduct had not been unconscionable, nor had it given rise to substantial injustice. There was nothing special about the circumstances of the case to warrant the court's intervention under s 459J(1)(b).

Olney J observed that the Commissioner had not produced in the proceedings a notice of assessment or a copy notice. There was, therefore, no occasion for the application of s 177(1) of the ITAA, since that subsection operates only where the appropriate document is produced. However, the material before the court justified a finding that the assessments had been issued and served and the time for payment had elapsed. Accordingly, his Honour found that, by reason of the issue and service of the various assessments, the net amount shown in the schedule was a debt presently due to the Commonwealth and payable to the Commissioner. The Commissioner was entitled to sue in a court of competent jurisdiction. The question to be decided was whether there could be a genuine dispute, within the meaning of s 459H, as to the existence of such a liability.

In his Honour's view, there could be a genuine dispute as to the existence or amount of the debt only if there was a dispute as to whether the Commissioner had assessed the company's taxable income, the notice of assessment had been served, or sufficient time had elapsed for the amount assessed to become due and payable. In a case where s 177(1) of the ITAA was not invoked by the Commissioner, it was open to a taxpayer to challenge an assessment on the ground that it had not been duly made. However, the company had not attempted to make out any such contention in the proceedings. Since there was no dispute as to these matters, the taxpayer had a statutory liability to the Commissioner, which was capable of being sued for and recovered. This was so, notwithstanding that the taxpayer had lodged an objection, or was pursuing an application for review in the AAT or, for that matter, an appeal to this court.

Olney J summarised the position as follows at 20:

> There is no reason to doubt that the dispute between the company and the Commissioner as to the deductibility of the amounts in question is a genuine dispute, nor that if the company is successful in its objections, either by persuading the Commissioner or if it fails to do that, upon review or appeal, the amounts of tax payable for the relevant years, and possibly the penalty tax are likely to be reduced. But the structure of the taxation legislation is such that the debt created after the service of an assessment remains recoverable as a debt unless and until it is replaced following objection, review or appeal by some other liability. A genuine dispute as to the process of assessment is not a dispute as to the existence or amount of the debt.

His Honour then considered a contention put by the company that, if it was held that there was no genuine dispute as to the debt, the consequence was that the "tax" imposed by the ITAA would be incontestable. The company submitted that, in these circumstances the tax would be invalid, because the power to make laws with respect to taxation, conferred by s 51(ii) of the Constitution, does not permit the imposition of an incontestable tax. His Honour rejected this argument. He pointed out that, in *MacCormick v FCT* (1984) 158 CLR 622 at 640, 52 ALR

53, the joint judgment of Gibbs CJ, Wilson, Deane and Dawson JJ had defined an "incontestable tax", in the constitutional sense, as an impost which is payable regardless of whether the circumstances of the case satisfy the criteria relied upon for characterisation of the law which imposes it as a law with respect to taxation. The joint judgment had specifically accepted at 642 that s 177(1) of the ITAA did not create an incontestable tax, since the subsection did not apply in proceedings on review or appeal against the assessment. It therefore provided no support for the company's argument.

The company's arguments

Mr Searle argued that the reference in s 459H(1)(a) of the Law to a "genuine dispute . . . about the existence or amount of a debt to which the demand relates" is, in a case involving an assessment of income tax payable by a company, a reference to the underlying liability of the company to the tax. He submitted that the contrary view would deprive a company which receives an assessment, but does not have the means to pay the tax assessed, of the full opportunity to object to the assessment and, if the objection is dismissed, to challenge the assessment. This follows because a statutory demand, if not complied with, creates a presumption that the company is insolvent: Law s 459C(2). Moreover, s 459S of the Law prevents the company opposing a winding-up application, except with the leave of the court, on a ground that could have been relied on for the purposes of an application to set aside the statutory demand.

It followed, so Mr Searle argued, that the legislative intent must have been to allow a company to raise the question of the underlying tax liability at the earlier stage of an application to set aside the demand. Unless this can be done, the effect of a statutory demand would be to render illusory the company's right to object and obtain review of, or appeal from, the assessment under Pt IVC of the TAA. Thus the notice of assessment, in effect, would impose an incontestable tax. As we understood his argument, Mr Searle did not contend that the provisions of the ITAA create an incontestable tax in the constitutional sense. Rather, he argued that, unless the construction he put forward was adopted, as a practical matter the tax would become incontestable. This was a result that parliament would not have intended. Mr Searle placed some reliance on what he described as Olney J's finding that there was a genuine dispute between the company and the taxpayer as to the deductibility of certain losses said to have been incurred in the 1990 and 1991 taxation years.

In his written submissions Mr Searle did not refer to s 459J(1)(b) of the Law, which permits the court to set aside the statutory demand if "there is some other reason why the demand should be set aside". It was suggested to Mr Searle in oral argument that the discretion conferred by s 459J(1)(b) of the Law is likely to permit the court to take into account the existence of a genuine dispute as to the underlying tax liability, as one factor in exercising the discretionary power to set aside the demand. If only for this reason, it was difficult to see how the tax could be regarded as incontestable in practical terms. In response to this proposition, Mr Searle submitted that the trial judge had erred in refusing to exercise his discretion under s 459J(1)(b) in favour of the company. Mr Searle contended that, in a case where there is a genuine dispute as to the underlying tax liability, it is necessarily an erroneous exercise of discretion for the court to decline to set aside the demand

Mr Searle did not submit that the company's objections to its assessments for the 1990 and 1991 taxation years could be regarded as "offsetting claims" for the purposes of s 459H of the Law.

5 *A genuine dispute?*

In assessing the company's argument, it is useful to commence with the terms of s 459H of the Law and of the relevant provisions of the ITAA. The "genuine dispute", to which s 459H(1) refers, is a dispute "about the existence or amount of a debt to which the demand relates". The demand served by the Commissioner
10 in the present case specified amounts due and payable by the company pursuant to notices of assessment made under the ITAA, together with interest on these amounts. As Olney J observed, the Commissioner did not rely on the conclusive evidence provisions of s 177 of the ITAA, since the notices of assessment were not produced. But his Honour found that the notices had been issued and served
15 and that the 30 day period referred to in s 209 had expired. No attack was made by the company on the validity of the notices served.

The effect of s 204 of the ITAA is that income tax assessed is due and payable by the person liable to pay the tax on the date specified in the notice or, if no date is specified, 30 days after service. Section 208 specifically provides that income
20 tax, when it becomes due and payable, is a debt due to the Commonwealth and payable to the Commissioner. The Commissioner may sue for and recover unpaid tax in any court of competent jurisdiction (s 209) and the Commissioner is entitled to sue for the recovery of any tax immediately after the expiry of the time when it became due and payable: s 207. Section 175 provides that the validity of
25 any assessment is not affected by reason that any of the provisions of the Act have not been complied with.

The structure of the ITAA strongly suggests a legislative intent that the issue and service of a notice of assessment (after expiry of the appropriate period) creates a debt that is immediately due and payable, and that the assessment can
30 be challenged only in the manner provided for by the TAA Pt IVC. Thus, unless there is some genuine dispute about the validity of a notice which has been duly served, there can be no genuine dispute about the existence or amount of the debt specified in the notice (assuming the requisite period has elapsed since service of the notice). A company, or other taxpayer, served with a notice of assessment, is
35 entitled to challenge the assessment through the procedures laid down in the TAA Pt IVC. In the meantime, however, the tax must be paid. This, indeed, has been the approach taken by the High Court to the construction of the taxation legislation.

The leading authorities have usually concentrated on the application of the
40 "conclusive evidence" provisions of s 177 of the ITAA. In *FJ Bloemen Pty Ltd v FCT* (1981) 147 CLR 360; 35 ALR 104, the question was whether, on a statutory appeal or in proceedings for declaratory relief, the court had jurisdiction to determine that an assessment served on the taxpayer was invalid. The ground of invalidity asserted was that the assessment was tentative or provisional, rather
45 than final. However, the notice of assessment was produced in the proceedings and the Commissioner therefore relied on s 177 to establish the conclusiveness of the notice. Since the notice was apparently regular on its face, the court was compelled to treat the notice as conclusive evidence that the Commissioner had made an assessment and that it had complied with the statutory formalities.
50 Mason CJ and Wilson J, with whom Stephen and Aickin JJ agreed, said this at CLR 376, ALR 113 14

> [T]he rights of review given to the taxpayer by Pt V [now Part IVC of the TAA] are comprehensive. Quite evidently it was contemplated that the Commissioner would in every case take advantage of s 177(1) and foreclose the exercise of jurisdiction to decide whether an assessment has been duly made. The general tenor of the statutory provisions suggests that a taxpayer wishing to challenge a notice of assessment served on him will be effectively confined to the Pt V procedures.

The High Court delivered judgment in *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168; 127 ALR 21, only 12 days before Olney J delivered judgment in the present case. The question in *Richard Walter* was whether, in view of s 177, production by the Commissioner of notices of assessment precluded the taxpayer from challenging or seeking review of the assessments in proceedings under s 39B of the Judiciary Act 1903 (Cth). The challenge to the notices of assessment was based primarily on the ground that the Commissioner had included the same amounts in the taxable income of more than one taxpayer. The answer given by the majority to the question asked was at CLR 188; ALR 32:

> No, but the challenge must fail or the review be refused . . .

As with *Bloemen*, the case turned on the construction and operation of s 177 of the ITAA, a section that, as we have observed, was not invoked by the Commissioner in the present case.

The judgments in *Richard Walter* addressed the objectives of the legislative scheme. Brennan J at CLR 195; ALR 38 identified the two principal features as follows:

> The first feature is the legislative intention to protect the validity of the notice of assessment as a central and critical link in the chain of imposing liability for income tax on and the recovery of tax from the taxpayer. The second feature is the full opportunity afforded to the taxpayer to object to the assessment and, in the event that the objection is dismissed, to challenge the assessment. The challenge may be made before either an administrative or a judicial tribunal (at the taxpayer's election) on any ground which affects the taxpayer's liability to tax or the quantum thereof including the Commissioner's power to make the assessment to which the taxpayer has objected.

His Honour then dealt with the function of the notice of assessment at CLR 195–6; ALR 38–9:

> The notice of assessment, reflecting the antecedent calculation of the taxpayer's taxable income, fixes the amount of the taxpayer's tax liability, and it either fixes the date or its service determines the date on which the tax is due and payable. Absent the service of a valid notice of assessment, a taxpayer's liability to pay the tax imposed by the relevant Taxing Act is not fixed nor is there a due date for payment. But, on service of a valid notice of assessment on a taxpayer, s 204 imposes on the taxpayer a liability to pay tax in the amount and on the date specified in the notice or, if no date is specified, on the thirtieth day after service.
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> . . .
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> The service of a notice of assessment would fail in its purpose if the assessment were open to challenge for non-compliance with the general and often complex provisions of the Act governing the calculation of taxable income and the liability to pay tax. The application of the general provisions to the particular facts of a taxpayer's case is and must be expected to be a matter of frequent controversy between the taxpayer and the Commissioner. Although the Commissioner's exercise of power to assess a taxpayer to tax is governed by provisions of the Act which prescribe the components of a taxpayer's taxable income and the manner in which those components and the taxable income are to be ascertained, it is inevitable that on occasions the process of assessment will fail to comply with those provisions However, if s 175 confers validity on assessments

> made in a bona fide attempt to exercise the power to make them, it authorises the Commissioner to determine in good faith, rightly or wrongly, the application of the general provisions of the Act to the facts of the particular case subject to correction by the objection, review and appeal procedures.

5 The judgments in *Richard Walter* also considered the circumstances in which a taxpayer, despite the language of s 175 of the ITAA, can challenge the validity of a notice of assessment. The issue had previously been addressed by Mason CJ and Wilson J in *FJ Bloemen*, where their Honours said this at CLR 371; ALR 110:

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> This section does not relieve the Commissioner from the necessity of performing his duty to make an assessment. The section protects the validity of an assessment, once made, from the consequences which might otherwise flow from the Commissioner's failure to comply with any provisions of the Act. But it does not, and cannot, create a valid assessment where no assessment has been made at all. The section requires an actual assessment as a condition of its operation.

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These observations reflect the holding in *FCT v S Hoffnung & Co Ltd* (1928) 42 CLR 39 at 55-6, that an assessment for the purposes of the ITAA is one that establishes that a fixed and certain sum is definitely due by the taxpayer. Accordingly, an assessment which, on its face, is made "tentatively" or "subject to revision" is not an "assessment" for the purposes of the ITAA. Similarly, an assessment for the purposes of the ITAA is not made until a notice of assessment is served upon a taxpayer: *Batagol v FCT* (1963) 109 CLR 243. As Kitto J said in *Batagol* at 252:

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> the definition of "assessment" means . . . the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case.

A process of calculation or assessment internal to the Commissioner's office therefore cannot constitute an assessment.

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In *Richard Walter*, Mason CJ at CLR 186 repeated the substance of the analysis that had been put forward in *FJ Bloemen*. Brennan J at CLR 197; ALR 39 considered that an assessment made in bad faith could be challenged, despite the terms of s 175:

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> It is conceivable that a purported assessment could be made in bad faith so as to forfeit the protection which s 175 would otherwise confer on the assessment. If such a case were to occur, neither s 175 nor s 177(1) would transform the purported but invalid assessment into a source of liability. The purported assessment would be a nullity. But an assessment which has been made in a bona fide attempt to exercise the power to make it is not invalid merely on account of a disconformity between the amounts assessed and the amounts properly assessable under the general provisions of the Act.

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Deane and Gaudron JJ at CLR 211; ALR 50 expressed the scope for challenge somewhat more broadly:

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> . . . s 175's protection from invalidity is applicable only if the purported "assessment" (i) is a "bona fide attempt" by the Commissioner or other authorised officer to exercise powers conferred by the Act; (ii) "relates to the subject matter" of the Act and (iii) "is reasonably capable of reference to" those powers. If a purported "assessment" does not satisfy those three requirements, the protection of s 175 will be unavailable and the purported "assessment" will be invalid [footnotes omitted].

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See also at CLR 222 3, per Dawson J, at CLR 233, per Toohey J

It follows from what has been said by the High Court in *Richard Walter*, that a genuine dispute may arise as to the existence or amount of a debt created by the service of a notice of assessment in circumstances somewhat broader than those contemplated by Olney J. If no reliance is placed on s 177 of the ITAA by the Commissioner, it may be open to the taxpayer to challenge the assessment on the grounds that the notice does not in truth constitute an assessment; that it was not issued as a bona fide attempt to exercise powers conferred by the Act or, possibly, that it does not relate to the subject matter of the Act. Where reliance is placed on s 177, other issues may arise. For example, it is not open to a taxpayer to contend that an assessment is in truth a tentative or provisional assessment if the notice, on its face, appears to be a final notice of assessment: *Bloemen* at CLR 377; *Richard Walter* at CLR 218, per Dawson J. However, there is no need to consider these matters further for the purposes of the present case. This is because there was no suggestion before Olney J that the notices of assessment served on the company were other than final assessments made in good faith for the purposes of the ITAA.

In our view, it is clear from the scheme of the ITAA that the company in the present case became indebted to the Commissioner in the amounts specified in the notices of assessment once they were served and the time referred to in s 204 had expired. There were a number of grounds that, if the supporting facts were available, might have been relied upon by the company to challenge the validity of the notices. None of these grounds was invoked. Had they been, depending upon the circumstances, there may have been a genuine dispute between the company and the Commissioner as to the existence or amount of the debt to which the demand related. But the mere fact that the company had objected to the assessments, or sought review of the Commissioner's decision before the AAT, did not establish that there was a genuine dispute as to the existence or amount of the relevant debt. That debt was not the subject of a genuine dispute.

The position is not altered by the fact (if it be such) that the company's objections to the notices of assessment, or its application to the AAT, raise genuinely arguable issues. Any such issues, or disputes, do not affect the character of the debt to which the statutory demand relates. Of course, if the company's objections or application for review succeed, the Commissioner will be required to issue an amended assessment and to refund any tax overpaid, or else apply the overpayment against any other tax liability: ITAA s 172(1); TAA s 14ZZL (1). But that does not alter the conclusion that there is no genuine dispute as to the existence or amount of the debt created by the issue and service of the notices of assessment. Whether it establishes an "offsetting claim", for the purposes of s 459H, was not raised by the company, and is a matter on which we express no view: compare *Fortuna Holdings Pty Ltd v DCT* [1978] VR 83 (SC(Vic), McGarvie J), at 102-3.

In this connection, it is perhaps appropriate to note that we do not read Olney J's judgment as incorporating an affirmative finding that the company's objections and applications to the AAT raised a genuine dispute as to the company's liability to income tax. Rather, his Honour was saying that, on the assumption that there was a genuine dispute as to the subject matter of the objection and review application, there was no genuine dispute as to the existence or amount of the relevant debt We agree

Some pre-Corporations Law authorities

Mr Searle contended that the authorities pre-dating the Law supported, or at least were consistent with, his submission that there was a genuine dispute about the existence or amount of the debt to which the Commissioner's demand related. In this connection, he referred specifically to two authorities: *Fortuna Holdings v DCT* and *Re Norper Investments Pty Ltd* (1977) 33 FLR 87 (SC(NSW), Needham J). In our view, the authorities cited do not support the company's case.

In *Norper*, Needham J dismissed a winding-up petition brought against a company by the Commissioner. His Honour did not decide that there was a genuine dispute about the debt created by the notice of assessment issued by the Commissioner. Rather, Needham J at 92 relied on the principle that the trial judge had a discretion to grant or refuse a stay of the winding-up proceedings where an appeal by the taxpayer was pending. His Honour held at 92 that, despite s 201 of the ITAA (now ss 14ZZM and 14ZZR of the TAA), the court had a discretion to grant a stay of the winding-up proceedings, if the company had a substantial argument that the assessment should be set aside entirely. In *Norper* itself, no appeal was under way, but this was because the Commissioner had "omitted to obey the clear direction of the statute which he administers", by failing to forward the company's objection to the court. Moreover, the then current state of the law, as applied by the Board of Review, meant that the assessment was "misconceived" and that the company was not liable to tax. For these reasons, Needham J exercised his discretion in favour of the company. The case was a special one, such as to lead Needham J to conclude that the petition was oppressive and the proceedings an abuse of process.

In *Fortuna Holdings*, McGarvie J declined to grant interlocutory injunctions in favour of eight related companies, which had sought to restrain the Deputy Commissioner from presenting a petition for the winding up of any of the companies. The companies claimed that the assessments served on them were erroneous and would be set aside on references to a Board of Review. His Honour specifically held at 102 that the "operation and policy" of ss 201 and 202 of the ITAA (which were then in force) led to the conclusion that non-payment of the demands made upon the companies by the Commissioner amounted to a "neglect to comply" with them, within the meaning of s 222(2)(a) of the Companies Act 1961 (Vic). His Honour said this at 102:

> In my view, it is still a neglect to comply, even though [the company] had genuine and substantial grounds for the objections now referred to a Board of Review. This is so, whether the demand for payment was made before or after the disallowance of the . . . company's objections.
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> . . .
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> The debts relied on by the Deputy Commissioner are not in themselves disputed debts in the sense that there is a genuine dispute on substantial grounds as to their existence. The provisions of the Income Tax Assessment Act put the existence of those debts beyond doubt or dispute.

McGarvie J accepted at 103 that he had power to restrain the presentation of a petition if satisfied, inter alia, that it was unlikely that a winding-up order would be made by a judge in the exercise of his or her discretion. In the result, however, his Honour declined to make orders in favour of any of the companies. Far from his Honour's reasoning supporting the company's contentions in the present case, the judgment is inconsistent with the proposition for which Mr Searle cited it

An incontestable tax?

Mr Searle also argued that the construction of s 459H of the Law which we have adopted is tantamount to creating an incontestable tax, at least where the Commissioner serves a statutory demand on a company in reliance on a notice of assessment and the company is unable to pay the amount demanded. Mr Searle accepted that, from a constitutional point of view, the tax is not incontestable, since the company could pursue its rights of objection and review or appeal under Pt IVC of the TAA. However, he contended that the practicalities were otherwise. He submitted that a company, faced with a statutory demand founded on a notice of assessment, realistically had no opportunity to challenge the demand. A construction of s 459H which avoided this state of affairs was to be preferred. Accordingly, s 459H should be construed, in a case where a company is served with a statutory demand founded on a notice of assessment, as permitting the company to rely on a genuine dispute as to its underlying tax liability. Such a dispute constitutes, so Mr Searle argued, a genuine dispute about the existence or amount of the debt to which the demand relates.

We should not be taken to accept that, even if the practicalities are as Mr Searle suggested, s 459H should be construed in the manner suggested by him. But there are several answers to the proposition that the service of the demand by the Commission creates, in practical terms, an incontestable tax:

- First, as has been explained, the company can challenge the validity of the notices of assessment on the grounds discussed in *FJ Bloemen* and *Richard Walter*. The extent to which a challenge is feasible will depend upon the circumstances of the case, including whether s 177 is invoked by reason of the production of the notices.
- Secondly, even if there is no genuine dispute as to the existence or amount of the debt, s 459J(1)(b) confers on the court a discretion to set aside the demand for "some other reason". As we shall explain shortly, s 459J(1)(b) permits the court to take into account the fact that the company is pursuing an objection, review application or appeal, if the circumstances make it appropriate to do so.
- Thirdly, even if the company were to be the subject of a winding-up order, the liquidator has power to pursue the objection or proceedings on behalf of the company and, if necessary, to compromise the dispute, subject to the approval of the court or the creditors: Law ss 477(1)(d), (2)(a), (2A).

Thus the factual foundation for Mr Searle's submission is wanting. We therefore reject the submission that the construction of s 459H that we consider to be correct, as applied in the present circumstances, has the effect of creating an incontestable tax.

Section 459J (1)(b) of the Law

We now turn to the contention that Olney J erred in the exercise of the discretion conferred by s 459J(1)(b) of the Law. The provisions of the Law relating to statutory demands and the grounds for setting them aside have their origins in the report of the Australian Law Reform Commission, General Insolvency Inquiry (Report No 45, 1988) (the Harmer Report) and the discussion papers preceding that report. The history is summarised by Lindgren J in *Chippendale Printing Co Pty Ltd v DCT* (1995) 15 ACSR 682 at 695 7 The

explanatory memorandum accompanying the Corporate Law Reform Bill 1992 (Cth) explained the provisions now contained in s 459J, as follows:

> 686 The Harmer Report proposed that a demand may be set aside if the court is satisfied that:
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> - there is a substantial dispute as to whether the debt is owing;
> - the company appears to have a counter-claim which may exceed the amount of the debt; or
> - the demand ought to be set aside on other grounds.
>
> 687 This last general power would enable the court to take account of matters such as improper or invalid service and mistakes or misstatements in the notice of demand, in circumstances where this would significantly prejudice any party.

The examples cited in para 687 were taken from the Harmer Report, para 150.

There has been some disagreement as to whether paras (a) and (b) of s 459J(1) are mutually exclusive. A number of cases have held, or have expressed the view, that the paragraphs are mutually exclusive, and that, therefore, s 459J(1)(b) relates only to circumstances where there is a reason for setting aside the demand *other than a defect in the demand*: *Kalamunda Meat Wholesalers Pty Ltd v Reg Russell & Sons Pty Ltd* (1994) 51 FCR 446; 128 ALR 149 (Fed C, Hill J); *Victor Tunevitsch Pty Ltd v Farrow Mortgage Services Pty Ltd (in liq)* (1994) 14 ACSR 565 (SC(Tas), Cox J); *Chains & Power (Aust) Pty Ltd v Commonwealth Bank of Australia* (1994) 15 ACSR 544 (Fed C, Sackville J). The conclusion reached in these cases is consistent with the recommendation made by the Commission that a demand should not be liable to be set aside because of a defect or irregularity, unless the court considers that substantial injustice would be caused if it were not set aside: Harmer Report, para 151. However, these authorities departed from the approach taken, at least implicitly, on this issue by Lockhart J in *Topfelt Pty Ltd v State Bank of New South Wales Ltd* (1993) 47 FCR 226; 120 ALR 155. Lockhart J's view has recently been preferred in a Victorian case: *Scandon Pty Ltd v Dome Supplies Pty Ltd* (1995) 17 ACSR 662 (SC(Vic), Senior Master Mahony).

It is not necessary to resolve this disagreement for the purposes of the present case. Whatever view is taken of the relationship between s 459J(1)(a) and (b), the court has a discretion in a case which does not involve a defect in the demand to set aside the demand, if some appropriate reason is shown. The discretion may be exercised in favour of a company, even without a showing that substantial injustice would otherwise be caused: *Chippendale* at 697.

It would be unwise to attempt to mark out the limits of the discretion conferred by s 459J(1)(b). Paragraph 687 of the explanatory memorandum provides illustrations of circumstances that might constitute appropriate reasons for setting aside the demand. Another illustration, which was given by the Australian Law Reform Commission in a discussion paper (General Insolvency Inquiry (DP 32, 1987), para 114), is the situation in which a creditor unreasonably refuses the company's offer to meet the debt. The circumstances of *Norper* may well afford a further illustration. In the present case, Olney J implied that he would have been prepared to exercise the discretion in the company's favour, had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice.

Mr Searle's attack on Olney J's refusal to exercise his discretion in favour of the company was based on only one ground. The contention was that, since the company had lodged objections and was pursuing an application to the AAT, and

since there was a genuine dispute between the parties as to the subject matter of the objections, Olney J was bound to exercise his discretion in favour of the company. We have already said that we do not read Olney J's judgment as incorporating an affirmative finding that the company's objections raise a genuine dispute as to its underlying liability to income tax. But even if his Honour intended to make such a finding, it cannot be said that his Honour was compelled to exercise his discretion in the company's favour. It was, at the least, open to his Honour to consider the circumstances of the case to determine whether it was appropriate to make an order to set aside the demand. In fact, his Honour did take into account the circumstances of the case, including the company's failure to object to the 1990 assessment until after the statutory notice was served, and the fact that the company's claim to a net refund was dependent upon it being entirely successful in its objections. In our view, Mr Searle has not established any error in the exercise of his Honour's discretion under s 459J(1)(b).

Conclusion

It follows that the appeal should be dismissed. The company must pay the Commissioner's costs.

Notice of motion

After the completion of argument on the appeal the respondent sought to raise, by notice of motion, a further issue concerning the operation of s 459G. The parties were ordered to file written submissions, from which it appeared that there was no disagreement between them on the main point sought to be raised. We understand that the parties no longer desire the court's determination of the issues raised by the notice of motion, except in relation to costs. In these circumstances, we shall treat the motions as having been abandoned and as requiring no order. We are not persuaded that we should make any order as to the costs of the notice of motion and there will be no such order.

Order

The court orders that the appeal be dismissed, with costs.

Solicitors for the appellant: *Gargan & Roache.*

Solicitor for the respondent: *Australian Government Solicitor.*

SONJA MARSIC
SOLICITOR