IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M88 of 2016 and No. M89 of 2016

BETWEEN:

COMMISSIONER OF STATE REVENUE
Appellant

and

10 **ACN 005 057 349 PTY LTD**
Respondent

APPELLANT'S SUBMISSIONS

Date of document: 22 July 2016
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I. CERTIFICATION AS TO INTERNET PUBLICATION

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

II. CONCISE STATEMENT OF ISSUES

2. The broad issue raised by these two appeals is whether a taxpayer can, by an action for mandamus or restitution under the tax statute or the common law, obtain a refund of assessments paid 10–22 years ago. Specifically, the appeals present three main issues:

(1) *Section 19 and the objection and refund regimes.*[1] The *Land Tax Act 1958* (Vic) (**'the Act'**) prescribes procedures for taxpayers seeking to controvert assessments and obtain refunds. Those procedures contain time limits and other constraints. Can a taxpayer, instead, require a refund by other means? In particular, does s 19 of the Act, which says that '[t]he Commissioner may from time to time amend an assessment', create free-standing refund and appropriation powers which are coupled with a duty to exercise them?

(2) *Tax debt.*[2] Under federal tax legislation, this Court has held that the issue of an assessment, *whether or not excessive*, creates a tax debt in the sum assessed and does so by force of the special consequences given to the assessment by the legislation. Is the Act any different in this respect? That is, under the Act, did not the issue of each of the 1990–2002 land tax assessments, whether or not excessive, create a tax debt in the sum assessed?

(3) *Section 90AA(1).*[3] Section 90AA(1) of the Act states that, except in accordance with that section, proceedings for the refund or recovery of 'tax paid under, or purportedly paid under, this Act' must not be brought. The

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1 Ground 3 in each notice of appeal and ground 4 in the notice of appeal for the mandamus case (M88 of 2016).

2 Ground 1 in each notice of appeal.

3 Ground 5 in the notice of appeal for the mandamus case (M88 of 2016) and ground 4 in the notice of appeal for the restitution case (M89 of 2016).

respondent's proceedings, brought outside of s 90AA, were brought to recover sums paid pursuant to land tax assessments. Were these proceedings not barred?

III. CERTIFICATION AS TO SECTION 78B OF THE *JUDICIARY ACT*

3. The appellant certifies that he does not consider that any notice need be given under s 78B of the *Judiciary Act 1903* (Cth).

IV. REPORTS OF DECISIONS BELOW

4. The decisions below are at present not reported. The medium neutral citations are [2015] VSCA 332 (Court of Appeal) and [2015] VSC 76 (Trial Division).

V. NARRATIVE STATEMENT OF FACTS

5. Between relevantly 1990 and 2007, the respondent was the owner of two adjacent properties carrying the street address 2 Ottawa Road, Toorak: certificates of title volume 8055 folio 686 (Lot 1 on Lodge Plan 27424) and volume 4567 folio 364 (Lot 1 on Title Plan 598039).[4] In and for each of those years, the Commissioner assessed the respondent for land tax.[5]

6. For the years 2008–2011, a related company, Streetriver Pty Ltd, was assessed for land tax, after the respondent had transferred the properties to it in 2007.[6]

7. Each of the 1990–2011 assessments described the properties assessed as '2 Ottawa Rd, Toorak' and '65 Albany Rd, Toorak', each with a stated value and title 'Reference'.[7] Copies and reprints of the assessments for the years 2002–2011 were in evidence, but neither party was able to locate the assessments for 1990–

4 [2015] VSC 76 at [8]; [2015] VSCA 332 at [6].
5 [2015] VSC 76 at [9]; [2015] VSCA 332 at [7]–[9].
6 [2015] VSC 76 at [10]–[11]; [2015] VSCA 332 at [10].
7 [2015] VSC 76 at [9]–[11]; [2015] VSCA 332 at [7]–[10].

2001 (there being available for those years only the Commissioner's records of the assessments).[8]

8. Each of the land tax assessments for the years 1990–2011 was paid.[9] The respondent paid the 1990–2002 assessments (with which these appeals are concerned) apparently holding a belief that the land holdings listed in the assessments were accurate.[10]

9. On 23 March 2012, the Commissioner informed Streetriver Pty Ltd that he had detected an error in the 2008–2011 assessments; the error being that 'the valuation applied to 2 Ottawa Rd encompasses both Lot 1 Lodge Plan 27424 and Lot 1 Title Plan 598039', such that '65 Albany Rd has been determined to be a duplicate property'.[11]

10. Later, following objections by the respondent to the 2006 and 2007 assessments (permitted to be lodged out of time, pursuant to s 100 of the *Taxation Administration Act 1997* (Vic) (**'TAA Vic'**)), those assessments were found also to be erroneous, and reassessments were made and refunds given – to the respondent for 2006–2007 and to Streetriver Pty Ltd for 2008–2011 – under the TAA Vic and *Land Tax Act 2005* (Vic).[12]

11. In respect of the 1990–2005 assessments, which were governed instead by the Act, the respondent formed the view that those assessments contained the same duplication error as the 2006–2011 assessments. The respondent sought to lodge objections to the assessments (under s 24A(1)), sought to apply for refunds of tax paid (under s 90AA(2)), and sought that the assessments be amended (under

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8 [2015] VSC 76 at [12], [14], [69]–[70]; [2015] VSCA 332 at [15]–[16] – contrast [2015] VSCA 332 at [61], [86], [196], stating, erroneously, that no assessment for 2002 had been produced. For the other years, 1990–2001, the fact that no copy assessments were available so as to attract the 'conclusive evidence' provision in s 20(1) of the Act made no difference, for the reasons that follow.

9 [2015] VSC 76 at [9]–[11]; [2015] VSCA 332 at [7]–[10].

10 [2015] VSCA 332 at [46]–[48]; contrast [2015] VSC 76 at [150]. For the purposes of his appeals, the appellant is content to take this finding of the Court of Appeal to be correct.

11 [2015] VSC 76 at [11]; [2015] VSCA 332 at [10]–[11].

12 [2015] VSC 76 at [11], [20(b)], [20(d)(i)], [20(h)–(i)]; [2015] VSCA 332 at [10]–[12], [35]–[40] – contrast [2015] VSCA 332 at [142]–[143], stating, erroneously, that refunds had been given for 2006–2011 under s 19 of the Act. The Act was in fact repealed by the *Land Tax Act 2005* (Vic) (read together with the TAA Vic) effective from the 2006 land tax year onwards (see clause 6, Schedule 3, transitional provisions, *Land Tax Act 2005* (Vic)).

s 19).[13] The Commissioner decided that the time limit for objection and for refund had expired and could not be extended, and decided not to amend the assessments.[14] However, for 2003–2005, relief was given by the Treasurer *ex gratia*.[15]

12. The 1990–2002 assessments (and 2003–2005 assessments) were found by the Court of Appeal to contain the same 'duplication error' as the 2006–2011 assessments (viz. the inclusion of '65 Albany Rd' as a separate land holding when it was already included as part of '2 Ottawa Rd').[16] That duplication error, in the Court of Appeal's view, overturning the primary judge, was not disclosed on the face of the 1990–2002 assessments and could not 'with reasonable diligence' have been discovered by the taxpayer at the time (1990–2002 *vs.* 2012).[17] The Court of Appeal found that, at the time of deciding not to amend the 1990–2002 assessments (15 August 2013), the Commissioner knew that they contained 'the duplication error'.[18]

VI. ARGUMENT

The statute

13. The starting point is a careful examination of the statute. The Act followed a pattern familiar among taxing statutes, centred on the assessment of tax by the Commissioner. In particular, the Act had three inter-related components: assessment, fixing a liability to pay an amount of tax as assessed; an objection regime, to permit a challenge to the tax assessed; and refund provisions. These three elements must be read together to ensure a coherent and harmonious whole.

14. As to the first element, the Act imposed an annual tax on land (s 6). Taxpayers were required to furnish returns containing particulars of their land holdings (ss 14, 15). From those returns (or otherwise), the Commissioner was required to

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13 [2015] VSC 76 at [20(c)], [20(e)–(f)]; [2015] VSCA 332 at [35], [41]–[42].

14 [2015] VSC 76 at [20(d)(ii)], [20(j)], [22]; [2015] VSCA 332 at [35], [49].

15 [2015] VSC 76 at [20(j)–(k)]; [2015] VSCA 332 at [43].

16 [2015] VSCA 332 at [28]–[31].

17 [2015] VSCA 332 at [232], [238]; cf the trial judge, [2015] VSC 76 at [148]–[151].

18 [2015] VSCA 332 at [155]–[158], [161].

assess the land tax payable (ss 17, 18). The Commissioner could amend his assessment, but an assessment was not invalidated simply by reason of non-compliance with the Act (s 19). Land tax assessed was a debt due to Her Majesty and payable to the Commissioner (s 39) by the date specified in the notice of assessment (s 57), failing which recovery action could be taken (ss 59–69). The Commissioner's recovery task was aided by a 'conclusive evidence' provision (s 20). Interest, termed 'additional tax', accrued on unpaid assessments (s 58), including where the assessment was amended (s 58A).

15. As to the second element, a detailed regime for challenging an assessment was prescribed (ss 24A–38). In summary: a taxpayer could, within 60 days of service of the assessment, lodge an objection to the assessment (s 24A(1)); if dissatisfied with the Commissioner's decision on the objection, the taxpayer could within 60 days request a tribunal review or court appeal (s 25); a pending objection, review or appeal did not in the meantime affect the assessment or recovery of the assessed debt (s 38(1)); but, as a result of an objection, the assessment could be amended and amounts paid in excess refunded or in short recovered (ss 24A(3), 29(1), 38(2)). The time limit for objection was not extendable.[19]

16. Finally, a detailed refund regime was also prescribed (ss 90AA, 90A, 90B, 92A).[20] Refunds were enabled upon application made within three years of payment (s 90AA(2)). If, upon such application, the Commissioner refused to refund, proceedings could be brought within three months (s 90AA(3)), regardless of s 20A of the *Limitation of Actions Act 1958* (Vic) (s 90AA(4)). A refund could be set off against another tax liability (s 90AA(6)(d)). The 'Consolidated Fund', established by s 9 of the *Financial Management Act 1994* (Vic), was to the necessary extent appropriated (s 90AA(7)). A refund had to be refused if it would result in the applicant getting a windfall (ss 90A, 90B).

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19 Contrast s 100 of the TAA Vic.

20 It is unnecessary for the purposes of these appeals to consider the inter-relationship between this refund regime and the objection regime – for example, whether a taxpayer is permitted to bring a claim under the refund regime that it could have brought, but did not bring, under the objection regime. A similar question was noticed but not decided in *R v Commissioner of Taxes (SA); Ex parte Commonwealth Agricultural Service Engineers Ltd* [1926] SASR 168 at 172.

The legislative history as to ss 90AA, 90A, 90B, 92A

17. When the Act was enacted in 1958, it provided (by ss 90(2)–(4)) for mandatory refunds of overpayments upon application brought within three years after the payment (or within three months of objection).[21]

18. Incidentally, s 19 (in its form relevant to the present case) was among a group of sections substituted by the *Land Tax Act 1968* (Vic), largely as a restatement of existing sections.[22] At this time, the refund provision, s 90, was not amended and continued to restrict the making of refunds to refunds applied for within three years of payment.

10 19. In 1974, s 90(2)–(4) were replaced with a new s 90(2), which empowered refunds of land tax overpaid without any time limit.[23]

20. Then, in 1992, s 90(2) was substituted with a new s 90(2) which prescribed mandatory refunds of 'overpaid tax' upon application made within three years.[24] Section 90A was also inserted (dealing with windfalls). These amendments were made by way of legislative response to *Royal Insurance Australia Ltd v Comptroller of Stamps (Vic)* (***Royal Insurance***).[25]

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21 See [2015] VSC 76 at [39]–[40]. Section 90 of the Act at this time may be compared with the *Land Tax Assessment Act 1910* (Cth) considered in *Trustees, Executors & Agency Co Ltd v Commissioner of Land Tax* (1915) 20 CLR 21.

22 See [2015] VSC 776 at [190]. In his second reading speech as Premier and Treasurer on 19 November 1968, Sir Henry Bolte stated: 'The new sections 16 to 21, which deal with assessments, are very largely a restatement of the existing sections 20 to 24 of the Land Tax Act, which deal with the same matters but with some changes.': *Parliamentary Debates*, Legislative Assembly, 19 November 1968 at p 1807.

23 See [2015] VSC 76 at [41], detailing the amendment made to s 90 of the Act by the *Land Tax (Amendment) Act 1974* (Vic) (s 2). The Treasurer described it as 'unfortunate' that the previous s 90(3) 'debarred' refunds if the mistake was discovered only after the expiry of the time limit, and described the amendment as 'enabl[ing] the commissioner to refund tax overpaid without time limit' (*Parliamentary Debates*, Legislative Assembly, 6 March 1974, at 3743–4).

24 See [2015] VSC 76 at [42]–[44], detailing the amendments made, effective 15 August 1992, by the *State Taxation (Amendment) Act 1992* (Vic) (ss 16, 17). The Treasurer explained that taxpayers who had overpaid tax were entitled to a refund; 'However, there must be a point in time in which taxation matters are finalised' (*Parliamentary Debates*, Legislative Assembly, 6 November 1992, at 566).

25 (1992) 23 ATR 528. That decision was delivered on 6 August 1992, followed nine days later by the announcement to amend (which became the effective date of the 1992 amendments). After the 1992 and 1993 amendments, on 7 December 1994, that decision was upheld by this Court in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51. [2015] VSCA 332 at footnote 270 misses the point.

21. Finally, in 1993, further amendments were made – including the repeal of s 90(2) and the insertion of ss 90AA and 92A – following claims that the 1992 amendments were ineffective to bar refunds after three years.[26] The 1993 amendments were also intended to ensure (also in response to *Royal Insurance*) that the bar on refunds after three years would extend to administrative law remedies.[27]

22. At all times, the Act has contained an objection/appeals regime permitting review of the amount of tax assessed by the Commissioner, subject to time limits.

Section 19 and the objection and refund regimes

10 23. The starting point must be the text read in its broader context, including surrounding provisions and purpose.[28] Section 19 empowers the Commissioner to amend an assessment. The premise for its operation is that the Commissioner has issued a valid assessment of tax under s 17 or s 18 of the Act and a legal obligation to pay the tax assessed has arisen. The place that assessments of tax play in the statutory scheme is central to the operation, and correct construction, of s 19.

24. An assessment is, by its very nature, of 'the land tax payable' (ss 17, 18).[29] The assessment itself, as s 19 reflects, 'has the effect of imposing... liability'.[30] That liability is, as has been noted, payable by the date specified in the assessment

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26 See [2015] VSC 76 at [45]–[47], detailing the amendments made, effective 15 October 1993, by the *State Taxation (Further Amendment) Act 1993* (Vic) (ss 20–26). The Treasurer explained that the purpose of the three-year time limit on land tax refunds was 'to provide certainty and finality to Victoria's revenue collections' (*Parliamentary Debates*, Legislative Assembly, 21 October 1993, at 1254). A claim that the 1992 amendments were ineffective was, in the event, rejected in *Common Equity Housing Ltd v Commissioner of State Revenue (Vic)* (1996) 33 ATR 77; [1996] VicSC 295 – *a fortiori* the 1993 amendments, in our submission.

27 The Treasurer described s 90AA(8) of the Act as ensuring that the bar 'appl[ies] to proceedings which seek to 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' (*Parliamentary Debates*, Legislative Assembly, 21 October 1993, at 1254 – and see at 1207 regarding the contemporaneously-inserted s 20A(5) of the *Limitations of Actions Act 1958* (Vic)).

28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]–[71].

29 See similarly ss 166–169A of the *Income Tax Assessment Act 1936* (Cth) (**'1936 Cth Act'**).

30 The same point was made in *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 251–2 (Kitto J) by reference to the analogous s 170 of the 1936 Cth Act; and see *Gashi v Commissioner of Taxation* (2013) 209 FCR 301 at 311 [44].

(ss 39, 57),[31] even if an objection has been lodged (s 38), failing which recovery action may be taken (ss 59–69).[32]

25. That the assessment may not comply with the statute does not affect its validity (s 19) and does not prevent the amount of the assessment being payable.[33] A 'duplication' or other error made in an assessment 'do[es] not go to jurisdiction'.[34]

26. The land tax assessed remains 'the land tax payable', as emphasised by s 18, unless the assessment is varied in accordance with the Act.[35] As already noted, an assessment may be amended by the Commissioner of his own accord (s 19)[36] or as a result of an objection by the taxpayer;[37] but a pending objection does not
10 postpone the taxpayer's liability to pay the assessment (s 38(1)).[38] There is no provision that the amendment of an assessment operates retrospectively in the sense of deeming there to have been never/always tax owing.[39]

27. In these respects, as identified, precise analogies are to be found in federal tax legislation. This Court has emphasised[40] the distinction between a taxpayer's underlying or 'substantive'[41] liability to tax, which is a question for the objection process, and the tax debt that is created when the assessment is issued, which may be recovered notwithstanding any pursuit of the objection process and which derives from the special consequences given by the legislation to the making of an

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31 See similarly ss 255-5 and 250-10 of Sch 1 of the *Taxation Administration Act 1953* (Cth) (**'Cth TAA'**); formerly ss 204 and 208, 1936 Cth Act. Section 255-5(1) refers to 'a tax-related liability that is due and payable'.

32 See similarly Ch 4, Sch 1, Cth TAA.

33 See similarly s 175 of the 1936 Cth Act.

34 As the Court of Appeal acknowledged: [2015] VSCA 332 at [151].

35 Under ss 24A(3), 29(1), 38(2).

36 See similarly s 170 of the 1936 Cth Act.

37 See similarly Pt IVC, Cth TAA.

38 See similarly ss 14ZZM, 14ZZR of the Cth TAA; formerly s 201 of the 1936 Cth Act.

39 See *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at 232 [91], 234-236 [100]–[107].

40 *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 484-485 [14], 488-489 [26]–[29], 491-496 [43]–[58] (endorsing *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 311 and to be read with *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146). See also *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 251–2; *F J Bloemen Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 360 at 372–4; *Trautwein v Commissioner of Taxation* (1936) 56 CLR 63 at 89, 92, 94–95.

41 The word used in *F J Bloemen Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 360 at 375.

assessment.[42]

The Court of Appeal's approach to s 19

28. In finding for the respondent on its mandamus case, the Court of Appeal reasoned as follows: (1) the purpose of s 19 was to ensure that the Commissioner collected only 'the correct amount of tax' and 'not a penny more, not a penny less';[43] (2) once the Commissioner had knowledge that an assessment is inaccurate, he had 'a duty to exercise his power under s 19';[44] (3) in respect of the 1990–2002 assessments, the Commissioner had such knowledge and so had a duty to amend those assessments;[45] (4) the Commissioner had an implied 'incidental' power to refund and appropriate from the Consolidated Fund on the basis that the amendment of the assessments would otherwise be 'ineffective';[46] and (5) accordingly, 'in the circumstances of the case', the Commissioner's power to amend under s 19 was 'coupled' with 'a duty to amend' and also with 'a duty to refund' and 'the necessary power of appropriation'.[47]

29. The Court of Appeal considered that its reasoning was supported by 'the *Finance Facilities* principle'.[48] The Court of Appeal said that construing s 19 in the

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42 The same consequence attaches to the making of an assessment under the current Victorian legislation, the TAA Vic, as held by a differently constituted Court of Appeal: *Commissioner of State Revenue (Vic) v Gas Ban Pty Ltd (in liq)* (2011) 31 VR 397 at 408 [48], 409-410 [54]–[56], 415 [82]. The other states and the territories have in this respect apparently analogous taxing regimes: see the *Taxation Administration Act 1996* (NSW); *Taxation Administration Act 2001* (Qld); *Taxation Administration Act 2003* (WA); *Taxation Administration Act 1996* (SA); *Taxation Administration Act 1997* (Tas); *Taxation Administration Act 1999* (ACT); *Taxation Administration Act* (NT).

43 [2015] VSCA 332 at [123], referring to Mildren J in *Commissioner of Taxes (NT) v Tourism Holdings Ltd* (2002) 12 NTLR 48 (***Tourism Holdings***) at 51-52 [4], citing *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148 at 155. It should be noted that the provision considered in *Tourism Holdings* (s 97(1) of the *Taxation (Administration) Act 1978* (NT)) empowered the amendment of an assessment, and a refund, *within three years*.

44 [2015] VSCA 332 at [139].

45 [2015] VSCA 332 at [140].

46 [2015] VSCA 332 at [141].

47 [2015] VSCA 332 at [143].

48 [2015] VSCA 332 at [126]–[132], referring to a line of authority including *Finance Facilities Pty Ltd v Commissioner of Taxation* (1971) 127 CLR 106 (***Finance Facilities***) at 134, 138–9. That line of authority included also, contrary to the Court of Appeal's approach in the passages identified and as explained further below, *Commonwealth Agricultural Service Engineers Ltd (in liq) v Commissioner of Taxes (SA)* (1926) 38 CLR 289 and *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 63–66, 84–88.

manner that it did '[did] not circumvent the objection and refund regimes because, by contrast to those regimes, the s 19 power is only enlivened when the Commissioner knows that an assessment is incomplete and inaccurate'.[49] The Court of Appeal thus characterised s 19 as 'a measure to ensure the integrity of the system of tax collection under the Act'.[50]

30. In so holding, the Court of Appeal erred, in three respects.

31. ***First,*** the Court of Appeal erred in identifying the purpose of s 19 and then treated that purpose as controlling, focussing narrowly on the first part of s 19[51] and ascribing an over-riding purpose to s 19 which is at odds with the rest of the section, the scheme of the Act as a whole and the legislative history that has been outlined. The Court of Appeal, fixing on the notion that it was the duty of the Commissioner to collect 'the correct amount of tax', proceeded to construe s 19 as conferring statutory powers in service of that sole objective.

32. The focus on this purpose led the Court of Appeal to ignore that s 19 is directed only to the making of an assessment. An amended assessment, no less than an original assessment, can only be made if the conditions for its making are satisfied, and once made, must fit within, and have the consequences ascribed by, the scheme, both as to liability for payment and entitlement to refund. It is impermissible to start with an *a priori* conclusion as to purpose, ignoring the place of assessments in the Act as a whole. When s 19 is read as a whole, it is apparent that Parliament's primary concern was ensuring that the Commissioner had the power to *increase* assessments or impose 'fresh' liabilities. Where such a fresh or augmented liability was imposed, a liability to pay the amount so assessed arises and Parliament intended (and provided for) taxpayers to have access to the objection regime.

33. If the power in s 19 is exercised to *reduce* the amount of an assessment, any consequences that follow are also to be found in the express provisions of the Act.

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49 [2015] VSCA 332 at [124].

50 [2015] VSCA 332 at [124].

51 [2015] VSCA 332 at [123]–[124], [138]–[139]. The first part of s 19 provides: '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…'.

Those provisions must inform the exercise of the power. If the amount originally assessed has been paid, the taxpayer has access to s 90AA, but only if the conditions it prescribes, including as to time, are satisfied.

34. The time limits in s 90AA necessarily entail that a person may not be permitted to recover an amount of tax that was payable under an assessment and which has been paid but which should not have been brought to tax. In that way, it is a clear and obvious departure from any principle that the Commissioner is only able to retain 'the correct amount' of 'substantive' land tax. As reflected in the legislative history recited above, Parliament has made deliberate, policy-driven choices in respect of the imposition of time limits on refunds. In 1974, Parliament deliberately withdrew the three year time limit on refunds, only to deliberately and expressly reinstate it in 1992 in the interests of 'finality' in taxation affairs.[52]

35. The scheme of the Act has at all times balanced the individual taxpayer's interests with those of taxpayers at large, particularly the public interest in 'certainty and finality'.[53] Statements of *a priori* purpose concerning the collection of 'the correct amount of tax' – measured independently of the liability fixed definitively by an existing assessment (subject to any objection) – cannot be elevated to the point where they set aside the balance enacted by Parliament. Nor can recourse to such extra-legislative statements be relied upon to identify a purpose for s 19 which Parliament did not have.

36. In circumstances where the Act provides expressly for refunds and appropriations in specified circumstances (as identified above), the implication of unconstrained refund and appropriation powers into s 19 based on legislative purpose was unjustified.

37. ***Secondly***, the Court of Appeal implied, as an adjunct to an express assessment power (s 19), the altogether different powers of refund and appropriation on the basis that they were necessary for the effective exercise of the assessing power. However, the problem with that approach is that it entirely bypasses the

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52 See paragraph [20] above and footnote 24.

53 See above footnote 26.

procedures and limitations prescribed in the Act in relation to assessments, objections and recovery. The principle in *D'Emden v Pedder*[54] could not be called in aid, as it was by the Court of Appeal, to obliterate the statutory distinction between assessment and refund that is found in the Act.[55] Further, the refunds for 2006 and following on which the Court of Appeal placed weight as evidence of the power in s 19 were made under different legislation.[56]

38. The objection and refund provisions of the Act were not only highly relevant to purpose but in fact constitute a 'code' which does not admit of any construction by which s 19 can stand as an independent source of refunds, or would prevail over the general discretion in s 19 on the principles enunciated in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*.[57]

39. In that regard the trial judge conducted[58] a thorough analysis of the statute and the approach taken in other cases. That analysis is absent from the reasons of the Court of Appeal. The trial judge's approach was correct. The objection and refund regimes (where they apply) are not merely optional remedies but constitute the *only* means by which taxpayers can controvert and recover assessed sums. The exclusivity of the objection and refund regime is well supported by judicial reasoning on analogous taxing statutes,[59] beginning with *R v Commissioner of*

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54 (1904) 1 CLR 91 at 110.

55 [2015] VSCA 332 at [141].

56 [2015] VSCA 332 at [142]–[143]. See above footnote 12.

57 (1932) 47 CLR 1 at 7 (specific overrides general).

58 See [2015] VSC 76 at [193], summing up the analysis beginning at [169].

59 See *R v Commissioner of Taxes (SA); Ex parte Commonwealth Agricultural Service Engineers Ltd* [1926] SASR 168 (endorsed in both result and reasoning by this Court on appeal, *Commonwealth Agricultural Service Engineers Ltd (in liq) v Commissioner of Taxes (SA)* (1926) 38 CLR 289); *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 484-485 [14], 488-489 [26]–[29], 491-496 [43]–[58] (read with *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 154-157 [16]–[24], 161-162 [45], 166 [62]); *Batagol v Commissioner of Taxation* (1963) 109 CLR 243 at 251–2; *F J Bloemen Pty Ltd v Commissioner of Taxation* (1980) 147 CLR 360 at 376; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 187, 199, 240; *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at 234-236 [100]–[107]; *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 at 348–9, 353, 357–9, 367; *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302 at 311; *Commissioner of State Taxation (WA) v Bayswater Hire Cars Pty Ltd* (1989) 20 ATR 1606 at 1608, 1610; *Cuming Campbell Investments Pty Ltd v Collector of Imposts (Vic)* (1938) 60 CLR 741 at 749–751.

Taxes (SA); Ex parte Commonwealth Agricultural Service Engineers Ltd.[60] The later cases cited are of a similar tenor, and illustrate the importance of construing the statute in question as a coherent whole. That s 19 is predicated on the knowledge of the Commissioner does not remove the tension with the limitations in the objection and refund provisions.[61]

40. ***Thirdly***, the Court of Appeal erred[62] in its application of the *Finance Facilities*[63] line of cases. Properly applied, that line of cases does not support the conclusion that the power to amend conferred by s 19 is coupled with any duty.

41. It has long been accepted[64] that powers granted by the use of facultative language may nonetheless impose on their holders a duty to exercise those powers. This may occur where, as a matter of statutory construction, the legislation imposes a duty on its holder to exercise the power when the prescribed preconditions for its exercise are fulfilled.[65] A power may also be coupled with a duty in the circumstances of a particular case, even if the power is not invariably coupled with a duty to exercise the power.

42. Having (wrongly, it is submitted) ascribed to s 19 the sole purpose of ensuring that the revenue collects only 'the correct amount of tax', the Court of Appeal construed s 19 as imposing on the Commissioner a duty to exercise his power to amend the relevant assessments.[66]

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60 *R v Commissioner of Taxes (SA); Ex parte Commonwealth Agricultural Service Engineers Ltd* [1926] SASR 168; *Commonwealth Agricultural Service Engineers Ltd (in liq) v Commissioner of Taxes (SA)* (1926) 38 CLR 289. The Commissioner there 'knew' the assessment to be excessive, yet declined, lawfully, to amend or refund, outside of the time-limited appeal and refund regimes. That decision is difficult if not impossible to reconcile with the decision under appeal.

61 Cf [2015] VSCA 332 at [124].

62 [2015] VSCA 332 at [139]. While the Court of Appeal made reference to some decisions of this Court concerning the circumstances in which a power may be coupled with a duty, its conclusion that s 19 was a power coupled with a duty ultimately rested on the 'extrapolation' of an observation of Hunt J sitting as a single judge of the Supreme Court of New South Wales in *Boyded Industries Pty Ltd v Commissioner of Taxation* (1985) 81 FLR 293 at 297.

63 *Finance Facilities Pty Ltd v Commissioner of Taxation* (1971) 127 CLR 106.

64 Since at least *Julius v Lord Bishop of Oxford* (1880) 5 AC 214 at 222–223.

65 This Court's construction of s 46(3) of the 1936 Cth Act in *Finance Facilities* is an example of powers of this kind: *Finance Facilities Pty Ltd v Commissioner of Taxation* (1971) 127 CLR 106 at 136 (Windeyer J). See also *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 373 [121].

66 [2015] VSCA 332 at [139].

43. However, once the purpose of s 19 is correctly identified by construing s 19 in its historical context and in the context of the Act as a whole, it does not admit of a conclusion that Parliament intended that a taxpayer have a right, enforceable by mandamus at any time, to compel the Commissioner to amend an assessment found or otherwise known to be incorrect, irrespective of whether the taxpayer had had recourse to the statutory objection and refund regimes and irrespective of the amount of time that had passed since the assessed debts were discharged. Either an amended assessment was futile and refusable on that basis, or, alternatively, delay, certainty of the revenue and the statutory limitations were considerations that could justify refusing any belated amendment. It follows that amendment was not the only lawful option open.

44. Not only would the prescribed regimes be circumvented if s 19 were construed in that manner, the common law would also effectively be circumvented. For the reasons given below, and also because of the prescribed regimes, the respondent has no common law right to a refund.

45. In that regard, the Court of Appeal misconceived the gravamen of *Royal Insurance* and its significance for the present case. *Royal Insurance* concerned an express power to refund overpayments of duty (cf s 19, which is a power to amend assessments). Chief Justice Mason held that the power to refund should be exercised in a manner consistent with the taxpayer's common law rights and that the conferring of the power in facultative terms ('may refund') should not be treated as giving rise to a discretion which would defeat a common law right.[67] In other words, if the taxpayer had a common law restitutionary right to a refund, it should not be deprived of that right by the adverse exercise of a discretionary power. However, Mason CJ also held that, where the taxpayer did *not* have a common law right to recover, or where the right was time-barred, the discretion to refund should not be construed as giving rise to a duty because it would not be an erroneous exercise of discretion to refuse a refund.[68]

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67 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 64-65.

68 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 65.

46. Like Mason CJ, in *Royal Insurance*, Brennan J (with whom Toohey and McHugh JJ agreed) was likewise concerned to ensure that a statutory power to refund did not give rise to a duty to refund absent the identification of an *aliunde* liability.[69]

47. In characterising the Commissioner's refusal to exercise a power under s 19 as 'unlawful' by reference to Mason CJ's approach in *Royal Insurance*, the Court of Appeal acknowledged that Mason CJ's judgment was driven by the availability of restitution in that case.[70] Their Honours also acknowledged that Brennan J's finding that there was a duty to exercise the power to refund depended on the finding that there was an *aliunde* liability constituted by the restitutionary claim.[71] Accordingly, once it is appreciated that the respondent in the present case had no right to restitution (as is explained below), *Royal Insurance* in fact supports the contention that no duty arose under s 19, precisely because there was no restitutionary right (or the claim for a refund was statute-barred).

48. The Court of Appeal sought to distinguish *Royal Insurance* on the basis that the s 19 power was 'very different' from the refund power in *Royal Insurance*.[72] While it may be accepted that the powers were different – for one thing, the power at issue in *Royal Insurance* was a power to refund, not a power to amend an assessment – the differences between the powers do not support the contention that the respondent should (unlike the taxpayer in *Royal Insurance*) be able to obtain a refund in the absence of a valid restitutionary claim, or in circumstances where that claim is barred.

Section 90AA(1)

49. As submitted above, the Court of Appeal failed to have regard to the scheme as a whole, including s 90AA, when it discerned the purpose of s 19. Then, when the Court came to apply s 90AA(1), it erred in concluding that it did not apply.

50. Section 90AA(1) was fatal to the respondent's claim to a refund either under the

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69 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 86–87 and 89.

70 [2015] VSCA 332 at [170]–[171].

71 [2015] VSCA 332 at [178].

72 [2015] VSCA 332 at [183].

Act or by way of restitutionary principle. The text of s 90AA(1) is 'emphatic':[73] 'Proceedings for the refund or recovery of tax paid under, or purportedly paid under this Act... must not be brought ... except as provided in this section.' The term 'proceedings' expressly includes mandamus (s 90AA(8)).[74] The respondent's two proceedings – one of which was for mandamus – were proceedings to recover 'tax paid under, or purportedly paid under' the Act, as they sought the recovery of amounts paid pursuant to the 1990–2002 assessments issued by the Commissioner under the Act. As the proceedings were not brought in accordance with s 90AA, they were, as the trial judge correctly held,[75] barred by s 90AA(1).

10 51. The Court of Appeal appears to have concluded that s 90AA(1) did not apply on two bases: there was no tax paid under the Act; and s 90AA had been impliedly repealed.

Tax debt

52. The Court of Appeal appears to have accepted[76] an argument of the respondent, invoking certain passages in *Royal Insurance*,[77] that the 'duplication error' found in the 1990–2002 assessments 'deprived' the relevant amounts of the character of 'tax paid under, or purportedly paid under, this Act'. In that regard the Court of Appeal reasoned that:[78] (1) the creation of a tax debt depended not upon the issue of an assessment but upon the assessed sum being properly characterised as 'a
20 sum payable for tax' within the meaning of s 39 of the Act; (2) the assessed sums here were 'deprived' of that character ('tax'), by and to the extent of 'the duplication error'; (3) accordingly, these 'excess amounts' were never owing, since they were never 'tax'.

53. In so reasoning, their Honours erred. As explained above,[79] even if excessive, an

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73 [2015] VSC 76 at [46], adopting the term used by this Court to describe a similar provision in *Thiess v Collector of Customs* (2014) 250 CLR 664 at 217 [24].

74 The Court of Appeal accepted that s 90AA(1) extended to proceedings seeking mandamus: [2015] VSCA 332 at [212], [240]. See also footnote 27 above.

75 [2015] VSC 76 at [120]–[124], [209]–[211]; contrary to [2015] VSCA 332 at [212]–[225].

76 [2015] VSCA 332 at [212], [213], [216], [225].

77 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 80, 91–2.

78 [2015] VSCA 332 at [196]–[197]; contrary to the trial judge, [2015] VSC 76 at [78] and following.

79 See paragraphs 24–27.

assessment necessarily creates a liability to the Crown for 'tax' in the sum assessed. That is the orthodox position under tax legislation, as considered by this Court on numerous occasions. Their Honours did not distinguish the Act from the legislation considered by this Court.

54. Each of the assessments, by force of the statute, required payment of a particular sum of land tax, whether or not that sum had been quantified correctly by the Commissioner.

Implied repeal

55. The Court of Appeal appears to have concluded[80] that 's 90AA' was 'impliedly repeal[ed]' by ss 5(1)(d) or 20A(1) of the *Limitation of Actions Act 1958* (Vic), the general limitations statute. That conclusion is not maintainable in the face of s 92A of the Act. The express barring effected by s 90AA cannot sensibly be said to be the subject of any implied repeal. In order for there to be an implied repeal, it is necessary that there be an irreconcilable inconsistency[81] between the former legislation being amended, and the new legislation said to effect the implied repeal. There is no such irreconcilable inconsistency in the circumstances of this case between the Act and the general limitations statute. On the contrary, s 90AA contains its *own* limitations regime which operated according to its terms. Moreover, by s 90AA(4), Parliament prescribed the manner in which the two limitation regimes were to interact and expressed an unequivocal intention that the limits prescribed in s 90AA(3) (which impose, as a criterion, application for a refund within three years of payment) would apply, and not time limits specified by s 20A of the *Limitation of Actions Act 1958* (Vic).

Restitution[82]

56. It is settled Australian general law doctrine that a payment made in discharge of a legal obligation to pay cannot be recovered by restitution.[83]

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80 [2015] VSCA 332 at [218].

81 See *Goodwin v Phillips* (1908) 7 CLR 1 at 7, 10, 14; *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 275–6, 290.

82 Ground 2 in each notice of appeal.

83 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376, 379–380, 392, 405.

57. For the reasons given, each of the 1990–2002 assessments created a debt in the sum assessed. Each debt was discharged by payment. Therefore, there can be no restitution. In other words, the existence of tax debts, for the whole amounts assessed, is determinative against the taxpayer's restitution claim – as the payment of those amounts discharged debts.[84]

58. It matters not, in this case, whether the point is framed in terms of there being no operative mistake and no *prima facie* restitutionary obligation, or there being a restitutionary 'defence'. Further, the respondent pleaded a mistaken belief that the assessment proceeded on a correct factual footing and that it had an obligation to pay. However, the second was not a mistake but a correct reflection of the Act and the first was irrelevant.

59. The Court of Appeal concluded[85] that the restitution doctrine identified was not engaged on the basis of its earlier conclusion that the 1990–2002 assessments, insofar as they included what the Court called 'the excess amounts', did not create tax debts. As explained, that earlier conclusion was wrong. Therefore, the Court's ultimate conclusion cannot stand.

'Conscious maladministration'[86]

60. Their Honours found that the Commissioner was guilty of 'conscious maladministration' of the Act by declining in 2013 to amend the 1990–2002 assessments.[87] That finding was unwarranted. The refusal to amend the assessments was made bona fide and based on a construction of the Act that was open and accepted by the primary judge. No challenge to the validity of any assessment was made and the reference to *Commissioner of Taxation v Futuris Corporation Ltd*[88] was misplaced. Even if the failure to amend constituted a constructive failure to exercise jurisdiction[89], which for the reasons advanced and

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84 The mandamus claim, which seeks to ignore the lack of a general law restitutionary right, is considered next.

85 [2015] VSCA 332 at [190]–[199]; contrary to the trial judge, [2015] VSC 76 at [113].

86 [2015] VSCA 332 at [144]–[162]; contrary to [2015] VSC 76 at [85], [195]–[202].

87 [2015] VSCA 332 at [155].

88 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, relied on by the Court of Appeal at [150]–[162].

89 This appears to underlie the reasons of the Court of Appeal at [159].

accepted by the trial judge it did not, it was based on an erroneous construction of the Act; there was no basis to conclude that the Commissioner refused, knowing that he was legally obliged to make the amendment.

Conclusion

61. For the Court of Appeal, the critical matter was the mistake found in the assessments; the statutory objection and refund regimes, and the time gone by, were beside that point. For the trial judge, a thorough examination of the statute and similar cases led to the conclusion that the matter was in effect 'closed'.[90] The trial judge's approach is to be preferred, as it is faithful to the statute as a whole. In particular, it does not circumvent the objection and refund regimes, or the common law, by re-casting an amendment power as an independent refund power capable of being enforced by mandamus at any time.

A further matter: interest[91]

62. The reasons their Honours gave for their orders for the payment of interest, including compound interest, were brief.[92] First, s 58 of the *Supreme Court Act 1986* (Vic) did not authorise the award of interest from the date of the taxpayer's payments in 1990–2002, as opposed to 'from the time when the demand was made', which was 2012.

63. The finding of 'conscious maladministration' – which in any event should not have been made – did not supply any proper basis for the award of compound interest. Section 19 of the Act was not said by the Court of Appeal to empower the Commissioner to pay interest (compound or otherwise) such that any power existed which was capable of enforcement by mandamus. The *Taxation (Interest on Overpayments) Act 1986* (Vic) did provide for the payment of interest out of the Consolidated Fund, but only where an overpayment of land tax (relevantly) had been established by a successful objection – and then only simple not

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90 [2015] VSC 76 at [188], citing *Commissioner of Taxes (NT) v Tourism Holdings Ltd* (2002) 12 NTLR 48 at 57-58 [16].

91 Ground 6 in the notice of appeal in the mandamus case. If the primary issues raised by the appellant are decided in his favour, the appeals must succeed and the question of interest is not reached

92 [2015] VSCA 332 at [239]–[242]; compare [2015] VSC 76 at [214]–[245].

compound interest. Nor did their Honours consider the submission[93] that it would be anomalous if the respondent taxpayer were entitled to interest on a more beneficial basis (compound interest) than a taxpayer who successfully pursued an objection (simple interest, as prescribed by the *Taxation (Interest on Overpayments) Act 1986* (Vic)).

VII. APPLICABLE STATUTORY PROVISIONS

64. Extracted in Annexure B are the applicable and other relevant statutory provisions.

VIII. ORDERS SOUGHT

10 65. The appellant seeks the orders that are set out in his notices of appeal, which are extracted in Annexure A.

IX. ORAL ARGUMENT TIME ESTIMATE

66. The appellant will need two hours to present his oral argument.

Dated: 22 July 2016

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93 See [2015] VSC 76 at [222], [244], citing *Qantas Airways Ltd v Commissioner of Taxation* (2001) 115 FCR 288 at 304 [78]–[82].

ANNEXURE A
ORDERS SOUGHT

M88 of 2016

1. The appeal be allowed.

2. The orders made by the Court of Appeal of the Supreme Court of Victoria on 8 December 2015 be set aside, and in lieu thereof it be ordered that:

   (1) the application for leave to appeal be refused; or alternatively, the application for leave to appeal be granted and the appeal be dismissed;

   (2) ACN 005 057 349 Pty Ltd pay the Commissioner's costs of the proceeding, including any reserved costs.

3. ACN 005 057 349 Pty Ltd repay to the Commissioner the sum paid by the Commissioner (namely $1,248,753.38), together with interest at a rate to be determined by the Court.

4. The respondent pay the Commissioner's costs of the appeal in this Court.

M89 of 2016

1. The appeal be allowed.

2. The orders made by the Court of Appeal of the Supreme Court of Victoria on 8 December 2015 be set aside, and in lieu thereof it be ordered that:

   (1) the application for leave to appeal be refused; or alternatively, the application for leave to appeal be granted and the appeal be dismissed;

   (2) ACN 005 057 349 Pty Ltd pay the Commissioner's costs of the proceeding, including any reserved costs.

3. The respondent pay the Commissioner's costs of the appeal in this Court.

ANNEXURE B
LEGISLATIVE PROVISIONS

EXTRACTS FROM THE *LAND TAX ACT 1958* (VIC)
(as in force from 1990 until 2006, except where noted)

Note: The provisions hereunder are those that, except where noted, were in force at all times from 1990 until the repeal of the Act on 1 January 2006. On that day, the Act was repealed and replaced by the Land Tax Act 2005 (Vic) (read together with the Taxation Administration Act 1997 (Vic)). The new legislation applies in respect of the 2006 land tax year onwards, whereas the Act continues to apply in respect of prior years (see clause 6, schedule 3, transitional provisions, Land Tax Act 2005).

PART III – RETURNS BY TAXPAYERS, VALUATIONS AND ASSESSMENTS

14. Taxpayers to furnish returns

For the purposes of the assessment and levy of taxation every taxpayer shall as hereinafter provided furnish to the Commissioner returns setting forth a full and complete statement of his land with such other particulars as are prescribed.

15. Form and time of making of returns of land

(1) Subject to the provisions of this Act, every taxpayer shall be liable for the making of returns of land and for the payment of the whole amount of tax (if any) assessed thereon respectively; …

17. Assessments to be made by Commissioner

The Commissioner shall from the returns and from any other information in his possession or from one of those sources and whether any return has been furnished or not cause an assessment to be made of the taxable value of the land owned by any taxpayer and of the land tax payable thereon.

18. Default assessments

If—

(a) a taxpayer makes default in furnishing a return;

(b) the Commissioner is not satisfied with the return made by any taxpayer; or

(c) the Commissioner has reason to believe that any person (though he may not have furnished a return) is a taxpayer—

the Commissioner may make an assessment of the amount which, in his judgment, is the taxable value of the land owned by the taxpayer and of the land tax payable thereon, and the land tax so assessed shall be the land tax payable by that taxpayer unless the assessment is varied in accordance with the provisions of this Act.

19. Amended assessments

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 this Act have not been complied with.

20. Evidentiary provisions

(1) The production of an assessment or of a document under the hand of the Commissioner purporting to be a copy of an assessment shall—

(a) be conclusive evidence of the due making of the assessment; and

(b) be conclusive evidence that the amount and all the particulars of the assessment are correct, except in proceedings on review or appeal against the assessment, when it shall be prima facie evidence only.

(2) The production of any document under the hand of the Commissioner purporting to be an extract from any return or assessment shall in relation to any matter other than a matter referred to in sub-section (1) be prima facie evidence of the matter therein set forth.

24A. Objections

(1) Any person who is dissatisfied with the assessment of the Commissioner[94] may give to the Commissioner within 60 days after service of the notice of the assessment an objection in writing against the assessment stating fully and in detail the grounds on which he relies but the Commissioner must not entertain any objection relating to the unimproved value of land where the assessment is based on a valuation made under the *Valuation of Land Act 1960.*

...

(2) The Commissioner shall consider every written objection made by a taxpayer and may make such inquiries thereon or relating thereto as he thinks fit.

(3) If the Commissioner considers that any objection should be allowed either wholly or in part he may alter or amend the assessment accordingly.

...

(4) The Commissioner shall give the taxpayer written notice of his decision on the objection.

25. Reviews

(1) If the taxpayer is dissatisfied with the decision of the Commissioner on the objection he may within 60 days after notice of the Commissioner's decision has been given to him (except in the case of an objection relating to the amount at which the unimproved value of any land has been assessed by a rating authority within the meaning of the *Valuation of*

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94 The following words were inserted here by the *Land Tax (Amendment) Act 2004* (Vic) (s 9(1), commencing 28 April 2004): 'relating to a duty of land tax charged, levied and collected under this Act other than Part IIB,' (part IIB dealing with 'transmission easements').

Land Act 1960 not being the Commissioner)—

(a) in writing request the Commissioner to refer the decision to the Victorian Civil and Administrative Tribunal for review; or[95]

(b) in writing request the Commissioner to treat his objection as an appeal and to cause it to be set down for hearing at the next sittings of the Supreme Court.

(2) If within 30 days the Commissioner does not refer the decision or cause the objection to be set down for hearing (as the case may be) the person making the request may at any time thereafter give him notice in writing to do so, and the Commissioner shall within 30 days after receiving the notice refer the decision or cause the objection to be set down for hearing accordingly.

(3) Notwithstanding the provisions of sub-section (2), the Commissioner may within 30 days after receiving a request to refer a decision for review or treat an objection as an appeal require the taxpayer by notice in writing to give further and better particulars of his objection and if, within 30 days after the giving of the notice—

(a) particulars are given, the Commissioner shall not be bound to refer the decision or cause the objection to be set down for hearing until 30 days after the Commissioner has received full details of the objection; or

(b) particulars are not given, the Commissioner shall not refer the decision or cause the objection to be set down for hearing.

26. Proceedings on references and appeals

(1) Upon any review or appeal under this Act—

(a) unless the Court or the Tribunal otherwise orders, the taxpayer shall be limited to the grounds stated in his objection and the Commissioner shall be limited to the grounds upon which he has disallowed the objection; and[96]

(b) the burden of proving that the assessment is excessive shall lie upon the taxpayer.

(2) If the assessment has been reduced by the Commissioner after considering the objection, the reduced assessment shall be the assessment to be dealt with on the review or appeal.

38. Valuation may be acted on while objection or appeal is pending subject to adjustment

(1) The fact that in respect of any assessment or any valuation upon which an assessment has been made an objection has been received by the Commissioner or by any rating authority or an appeal has been made to the Supreme Court or the Tribunal or that a case has been stated for the determination of the Supreme Court and is pending shall not in the meantime interfere with or affect the assessment and tax may be made, levied and recovered on the assessment in like manner as if no objection had been received and no appeal or case stated were pending.[97]

(2) In the event of the assessment being altered on objection or case stated or appeal, a due

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95 Sections 25(1)(a), 26(1)(a) and 38(1) are extracted in their form after the amendments made to them by the *Valuation of Land (Amendment) Act 1994* (Vic) (s 26, commencing 23 January 1995) and by the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic) (s 311 (sch 1, item 48), commencing 1 July 1998), which amendments concerned the identity of the reviewing tribunal.

96 Ibid.

97 Ibid.

adjustment shall be made, for which purpose amounts paid in excess shall be refunded, and amounts short-paid shall be recoverable as arrears.

PART IV – LIABILITY FOR LAND TAX

39. Land tax a debt due to Her Majesty

Every sum payable for tax shall when the same falls due be deemed a debt due to Her Majesty by the owner of any land who shall forthwith pay the same to the Commissioner.

PART V – PAYMENT AND ENFORCEMENT OF TAX

57. Dates for payment of tax to be stated in notice of assessment

Land[98] tax for each year shall be due and payable on a date stated in the notice of assessment to be the due date which date shall not be less than fourteen days after the service of such notice.

58. Where tax unpaid fourteen days after due date

(1) If any tax remains unpaid at the expiration of fourteen days after the due date thereof twenty per centum per annum from the due date to the date of payment on the amount of the tax unpaid shall be and be deemed to be added thereto by way of additional tax and shall be payable accordingly. ...

58A. Additional tax where assessment amended

(1) If an assessment is amended, additional tax is payable...[99]

59. Tax to be recovered by Commissioner

(1) The tax together with any additional tax, whatever may be the amount thereof, shall be recoverable in the county court or the Magistrates' Court by the Commissioner on behalf of the Crown by proceeding in his own name.

(2) With respect to proceedings in the county court for the recovery of any amount due in respect of tax, such proceeding shall for all purposes be deemed within the meaning of the *County Court Act 1958* to be a proceeding brought to recover a debt or liquidated demand only, and the provisions of such Act and the rules thereunder applicable to such a debt or liquidated demand only, and the provisions of such Act and the rules thereunder applicable to such a debt or demand shall apply accordingly.

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98 For 'Land' the words 'Subject to this Act, land' were substituted by the *Land Tax (Amendment) Act 2004* (s 11, commencing 28 April 2004).

99 Section 58A was inserted by the *Land Tax (Revision) Act 1991* (Vic) (s 17, commencing 1 January 1992). It was amended by the *State Taxation (Further Amendment) Act 1995* (Vic) (s 32, commencing 5 December 1995) and again by the *Statute Law Revision Act 2005* (Vic) (s 3 (Sch 1, item 12), commencing 28 April 2005).

PART VI—GENERAL

90AA. Refund of tax[100]

(1) Proceedings for the refund or recovery of tax paid under, or purportedly paid under, this Act, whether before or after the commencement of section 22 of the *State Taxation (Further Amendment) Act 1993*, 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, this Act, 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.

(3) If—

(a) a person has lodged an application for the refund of an amount in accordance with subsection (2); and

(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 subsection (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, this Act by reason of the invalidity of a provision of this Act.

(6) If—

(a) an application for a refund is lodged with the Commissioner in accordance with subsection (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.

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[100] This section was inserted by the *State Taxation (Further Amendment) Act 1993* (Vic) (s 22, commencing 15 October 1993).

(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*.

90A. Refunds to be paid to person entitled[101]

(1) The Commissioner must not make a refund of tax unless satisfied that the taxpayer to whom the refund is payable (in this section called "the applicant")—

(a) has not charged to, or recovered from, and will not charge to, or recover from, any other person any amount in respect of the whole or any part of that tax; or

(b) if the applicant has so charged or recovered any such amount, will reimburse, or will take all reasonable steps to reimburse, each other person for the amount charged or recovered.

(2) If a refund is made to an applicant to whom subsection (1)(b) applies—

(a) the applicant must—

(i) not later than 90 days after receiving the refund, reimburse each other person for the amount charged to or recovered from that person; and

(ii) notify the Commissioner in writing not later than 7 days after that period of 90 days that all amounts charged or recovered have been reimbursed; or

(b) if any such amount is not reimbursed within that period of 90 days, the applicant must not later than 7 days after that period of 90 days—

(i) notify the Commissioner in writing of the amounts not reimbursed; and

(ii) pay those amounts to the Commissioner, together with interest at the specified rate from the date the refund was made to the date of payment.

Penalty: 50 penalty units.

(3) An amount payable under sub-section (2)(b)(ii) is a debt due from the applicant to the Crown.

(4) In this section, *"specified rate"* means the percentage, not exceeding 20 per centum per annum, that the Commissioner specifies when the refund is made.

(5) In this section, *"charge"* includes pass on.

90B. Application of section 90A to proceedings[102]

Section 90A applies in respect of proceedings (within the meaning of section 90AA) for the refund or recovery of tax paid under, or purportedly made under, this Act as if—

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101 This section was inserted by the *State Taxation (Amendment) Act 1992* (Vic) (s 17, commencing 15 August 1992); except that sub-section (5) was added by the *State Taxation (Further Amendment) Act 1993* (Vic) (s 23, commencing 15 October 1993).

102 This section was inserted by the *State Taxation (Further Amendment) Act 1993* (Vic) (s 24, commencing 15 October 1993).

(a) a reference in section 90A to the Commissioner (except in sub-section (2)(b)(ii)) were a reference to the court; and

(b) a reference in section 90A to the making of a refund were a reference to the making of an order or decision that a refund be made.

92A. Supreme Court – limitation of jurisdiction[103]

It 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.

10

EXTRACTS FROM THE *LAND TAX ACT 1958* (VIC)

(as enacted)

22.

...

(2) The Commissioner may at any time make all such alterations in or additions to the assessment roll as he thinks necessary in order to insure full and accurate assessments notwithstanding that tax has been paid in respect of any assessment so altered or added to.
20 Every such alteration or addition which has the effect of imposing any fresh liability or increasing any existing liability shall be notified to the taxpayer affected and unless made with his consent shall be subject to objection.

(3) The Commissioner may at any time in respect of the assessment roll place thereon or remove therefrom the name of any taxpayer or the particulars or value or amount of any land or of any deduction relating thereto; or increase or reduce the value or amount of any land.

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

30 **24.**

...

(3) If any person thinks himself aggrieved on the ground of any unfairness or incorrectness in any assessment he may at any time within one month after such notice is given give to the Commissioner a written objection thereto.

(4) The Commissioner shall consider ever written objection made by any taxpayer and may make such inquiries thereon or relating thereto as he thinks fit.

(5) If the Commissioner considers that any objection should be allowed either wholly or in part he may alter or amend the assessment accordingly.

(6) The Commissioner shall as soon as practicable forward every objection not wholly
40 allowed or withdrawn or such part of any objection as is not allowed or withdrawn to the Assessment Court for the district in order that such objection or part may be so heard and

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103 This section was inserted by the *State Taxation (Further Amendment) Act 1993* (Vic) (s 25, commencing 15 October 1993).

determined and every objection or part shall be heard an determined as hereinafter provided.

90.

(1) Where after any tax has been paid it is discovered that too little in amount has been paid the taxpayer liable for the tax shall forthwith pay the deficiency.

(2) Where after any tax has been paid it is discovered that too much in amount has been paid whether by reason of duplicate taxation or otherwise the Commissioner upon being satisfied thereof shall order the excess to be returned to the taxpayer entitled thereto and give a certificate accordingly.

(3) No application for a refund of an overpayment shall be entertained by the Commissioner unless made within three years after such overpayment was made, or if there has been an objection then within three months after the date of the decision on such objection.

(4) Every certificate for a refund of moneys paid as tax moneys pursuant to any provision of this Act shall state the person to whom such refund is to be made and the amount of every such refund certificate shall be paid by the Treasurer out of the Consolidated Revenue.

EXTRACTS FROM THE *LAND TAX ACT 1958* (VIC)

(as amended by the *Land Tax (Amendment) Act 1974 (Vic)*)

90.

(1) Where after any tax has been paid it is discovered that too little in amount has been paid the taxpayer liable for the tax shall forthwith pay the deficiency.

(2) Where the Commissioner finds in any case that tax has been overpaid he may refund to the taxpayer who paid the tax the amount of tax found to be overpaid.

EXTRACTS FROM THE *LAND TAX ACT 1958* (VIC)

(as amended by the *State Taxation (Amendment) Act 1992 (Vic)*)

90.

(1) Where after any tax has been paid it is discovered that too little in amount has been paid the taxpayer liable for the tax shall forthwith pay the deficiency.

(2)[104] If the Commissioner—

(a) receives an application for a refund of overpaid tax not more than 3 years after the overpayment; and

(b) finds that the tax has been overpaid by the applicant—

the Commissioner must—

(c) refund the amount of overpaid tax; or

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[104] This sub-section was repealed by the *State Taxation (Further Amendment) Act 1993* (Vic).

(d) apply the amount of the overpaid tax against any liability of the applicant to the Crown, being a liability arising under, or by virtue of, an Act of which the Commissioner has the general administration, and refund any part of the amount that is not so applied.

EXTRACTS FROM THE *LIMITATION OF ACTIONS ACT 1958* (VIC)

(as at 1 July 2012, version no. 095)

5 Contracts and torts

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—

(a) Subject to subsections (1AAA), (1AA) and (1A), actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty

...

(d) Actions to recover any sum recoverable by virtue of enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

20A Limitation on proceeding for recovery of tax [6]

(1) Subject to subsection (2), a proceeding for the recovery of money paid by way of tax or purported tax or by way of an amount that is attributable to tax or purported tax under a mistake (either of law or of fact) or under colour of authority must be commenced—

(a) within 12 months after the date of payment; or

(b) in the case of a proceeding in accordance with another Act that provides for the refund or recovery of the money within a longer period, within that longer period.

(2) Despite anything to the contrary in any other Act, if money paid by way of tax or purported tax or by way of an amount that is attributable to tax or purported tax is recoverable because of the invalidity of a law or provision of a law, a proceeding for the recovery of that money must (whether the payment was made voluntarily or under compulsion) be commenced within 12 months after the date of payment.

(2A) Subsections (1) and (2) apply to a proceeding between parties of any kind.

(3) Subsection (2) does not apply to a proceeding for the recovery of money that, assuming that the law or provision of a law imposing or purporting to impose the tax had been valid, would nevertheless have represented an overpayment of tax or of an amount that is attributable to tax, if that law provides for the refund or recovery of the money within a period longer than 12 months after the date of the payment.

(4) An order may not be made under this or any other Act enabling or permitting a proceeding to which subsection (2) applies to be commenced after the expiration of the period referred to in that subsection.

(5) In this section—

...

"proceeding" 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*;

"tax" includes fee, charge or other impost.

[6 **Explanatory note**] S. 20A: Section 6 of the *Limitation of Actions (Amendment) Act 1993*, No. 102/1993 reads as follows:

6 Transitional provision

Section 20A of the Principal Act, as substituted by this Act, applies to payments made before, on or after the commencement of this section, other than payments in respect of which proceedings have been brought before that commencement.

27 Postponement of limitation periods in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act—...

(c) the action is for relief from the consequences of a mistake—

the period of limitation shall not begin to run until the plaintiff has discovered... the mistake... or could with reasonable diligence have discovered it: