SUPREME COURT OF QUEENSLAND

CITATION:	*Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85
PARTIES:	**MARIA LOUISE WAKEFIELD; NIKITA JOY ANDERSON; PHILLIP WILLIAM ANDERSON; SHARON MAY DA SILVA AND DALLAS JOHN ANDERSON** (Appellants) **v** **COMMISSIONER OF STATE REVENUE** (Respondent)
FILE NO/S:	BS No 8420 of 2017
DIVISION:	Trial Division
PROCEEDING:	Appeal
DELIVERED ON:	4 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2019
JUDGE:	Bowskill J
ORDERS:	1. **The appeal is allowed.** 2. **The reassessments are disallowed, and the original assessments are restored.** 3. **The respondent refund the overpaid duty, penalties and interest to the appellants.** 4. **The respondent pay the appellants' costs of and incidental to this appeal.**
CATCHWORDS:	TAXES AND DUTIES – STAMP DUTIES – APPEAL, CASE STATED ETC – QUEENSLAND – where a registered owner subdivided land and transferred separate lots to each of the appellants – where the appellants self-assessed the transfer duty payable – where the respondent issued reassessments to the appellants on the basis that the transactions should be aggregated under s 30 of the *Duties Act* 2001 (Qld) – where the respondent disallowed the appellants' objections to the reassessment – where the appellants appeal the reassessments under s 69 of the *Taxation Administration Act* 2001 (Qld) – what is the nature of an appeal to the Supreme Court under s 69 of the *Taxation Administration Act* 2001

TAXES AND DUTIES – STAMP DUTIES – ASSESSMENT AND AMOUNT PAYABLE INCLUDING FINES – GENERALLY – QUEENSLAND – where the appellants were the transferor's four children and one of her grandchildren – where the transfers were by way of gift, contained in separate instruments and not conditional on each other – where the respondent aggregated transfer duty under s 30 of the *Duties Act* 2001 (Qld) – whether the transfers form, evidence, give effect to or arise from what is substantially one arrangement – whether the respondent erred in aggregating the transactions under s 30 of the *Duties Act* 2001 (Qld)

Duties Act 2001 (Qld) s 30
Taxation Administration Act 2001 (Qld) s 69, s 70, s 70A, s 70B, s 70C
Uniform Civil Procedure Rules 1999 (Qld) r 748, r 765, r 766, r 782, r 785

Allesch v Maunz (2000) 203 CLR 172
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616
Clancy & Ors v Commissioner of State Revenue (Vic) (1998) 40 ATR 1089
Feez Ruthning v Commissioner of Pay-roll Tax [2003] 2 Qd R 41
Jeffrey v Commissioner of Stamps (1980) 23 SASR 398
Logan v Woongarra Shire Council [1983] 2 Qd R 689
Newton v Federal Commissioner of Taxation (1958) 98 CLR 1
Old Reynella Village Pty Ltd v Commissioner of Stamps (SA) (1989) 51 SASR 378
Orica IC Assets Pty Ltd v Commissioner of State Revenue (2011) 82 ATR 18; [2011] QSC 001
Pryke v Commissioner of State Revenue [2006] ATC 4604; [2006] QSC 226
Quetel Pty Ltd v Commissioner of Stamp Duties [1993] 2 Qd R 57
Rawlings v Commissioner of State Revenue [2015] QCAT 10
Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2) (2005) 63 ATR 127
Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd (2004) 58 ATR 17
Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (2011) 245 CLR 446

The Attorney-General v Cohen [1937] 1 KB 487
Universal Supermodels Pty Ltd v Commissioner of State Revenue [2018] QSC 257

COUNSEL: F Jongkind (*sol*) for the appellants
S R Lumb for the respondent

SOLICITORS: Frank Jongkind & Co Solicitors for the appellants
McInnes Wilson Lawyers for the respondent

Introduction

[1] Mrs Merril Anderson owned a block of land near Charleville. She became the sole registered owner of the land in October 2012, following the death of her husband.[1] The land was a hobby farm.[2] On 7 March 2014 Mrs Anderson subdivided the land into seven lots (lots 2 to 7 and 58 on SP 258467).[3] On 26 March 2014, Mrs Anderson transferred five of the lots (lots 2, 3, 5, 6 and 7), separately, to each of her four children and one of her grandchildren, by way of a gift. The stated consideration for the transfers was "natural love and affection".[4] Mr Jongkind acted as the solicitor for Mrs Anderson in relation to the subdivision, and in relation to the transfers; and also executed the transfers on behalf of the appellants as transferees. The value of each of these lots was appraised by a local real estate agent as $105,000 for lot 2 (11 hectares) and $70,000 for each of lots 3, 5, 6 and 7 (3.5 hectares each).[5] It was not in dispute that the transfers were not conditional or dependent on each other, and that the blocks of land were never intended to be used together by Mrs Anderson's children and grandchild.

[2] It appears the remaining lots were transferred to persons (lot 58, on 5 May 2014) and a company (lot 4, on 5 August 2014) unrelated to Mrs Anderson or the appellants.[6]

[3] At the time of the transfers on 26 March 2014, transfer duty was assessed by the solicitor for Mrs Anderson, and was paid as follows: $2,100 for lot 2, and $975 for each of lots 3, 5, 6 and 7.[7]

[4] The Commissioner subsequently issued a reassessment notice, assessing transfer duty and unpaid tax interest as follows: for lot 2, transfer duty of $3,332.00 and unpaid tax interest of $353.32; and for each of lots 3, 5, 6 and 7, transfer duty of $2,142.00 and unpaid tax interest of $336.37.[8]

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1 AR 6 [1], 114.
2 AR 6 [3].
3 AR 114.
4 AR 29-43.
5 AR 28.
6 AR 115-116.
7 AR 44-58.
8 AR 59-73.

[5] The significant difference arises because the Commissioner determined that s 30 of the *Duties Act* 2001 (Qld) applied to the transfers to the children and grandchild, and consequently aggregated the dutiable values of the five transfers and assessed the duty payable accordingly. The appellants contend that s 30 does not apply. The appellants objected to the reassessment.[9] Their objections were disallowed, by decision made on 29 June 2017.[10] The appellants now appeal to this court under s 69 of the *Taxation Administration Act* 2001 (Qld). They have paid the contested amounts, as they are required to do before exercising their right of appeal.

[6] The issues in this appeal are:

1. What is the nature of an appeal under s 69 of the *Taxation Administration Act*?

2. What is the proper construction of s 30 of the *Duties Act*?

3. Was the Commissioner's decision as to the application of s 30 of the *Duties Act* in this case correct?

What is the nature of an appeal under s 69 of the *Taxation Administration Act*?

[7] For the Commissioner, it was submitted an appeal under s 69 of the *Taxation Administration Act* is an appeal by way of rehearing, as opposed to a hearing de novo. In terms of what is meant by "rehearing", the Commissioner referred to the distinction identified in *Allesch v Maunz* (2000) 203 CLR 172 at [23] between a rehearing, in which the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the court, the decision the subject of the appeal is the result of some legal, factual or discretionary error; and a hearing de novo, in which those powers may be exercised regardless of error.[11]

[8] For the appellants it was also submitted the nature of the appeal is a rehearing, but the solicitor for the appellants referred to a "rehearing" in the sense of a "new hearing on fresh materials" (by reference to *Universal Supermodels Pty Ltd v Commissioner of State Revenue* [2018] QSC 257, discussed below).

[9] These submissions reflect the fact that the words "appeal" and "rehearing" can carry different meanings in different statutory contexts.[12]

[10] Relevantly, the statutory context here begins with the *Taxation Administration Act*, the main purpose of which is to make general provision about the administration and

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9 AR 77-110.

10 AR 19-27.

11 See also *Lacey v Attorney-General* (2011) 242 CLR 573 at [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (where the different classes of appeal are described).

12 *Eastman v The Queen* (2000) 203 CLR 1 at [290] per Hayne J; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [57]; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA. See also *Fox v Percy* (2003) 214 CLR 118 at [20] per Gleeson CJ, Gummow and Kirby JJ and *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28 at [145]-[148] per Preston CJ of LEC, with whom Beazley P agreed.

enforcement of revenue laws (s 3(1)).[13] The Act provides for the appointment of the Commissioner of State Revenue, who is responsible for the administration and enforcement of the tax laws (s 8(1)).[14] The Commissioner is empowered to make an assessment of a taxpayer's liability for tax, including where tax payable is permitted to be self-assessed under a revenue law (s 11(2)). The Commissioner is also empowered to make a reassessment of a taxpayer's liability for tax (ss 17 and 18). The Commissioner makes an assessment "on the available information the commissioner considers relevant" (s 27). A taxpayer who is dissatisfied with an assessment, or a reassessment, may object to the assessment (s 63). The objection must be in writing, state the grounds of the objection, and be accompanied by copies of all material relevant to decide the objection (s 65). The objector has the onus of proving the objector's case (s 66). The Commissioner must allow the objection completely, or partly, or disallow it (s 67(1)), and then give written notice of the Commissioner's decision (s 68).

[11] Under s 69 of the *Taxation Administration Act*, a taxpayer who is dissatisfied with the Commissioner's decision on their objection (and who has paid the whole amount of tax and interest payable under the assessment) may:

(a) appeal to the Supreme Court; or

(b) apply, as provided under the QCAT Act, to QCAT for a review of the commissioner's decision (s 69(1) and (2)).

[12] The *Judicial Review Act* 1991 (Qld) does not apply to an assessment (s 77(a)).

[13] Relevantly, in relation to appeals to the Supreme Court, ss 70 to 70C provide as follows:

"**70 How to start appeal to the Supreme Court**

(1) An appeal to the Supreme Court is started by giving written notice of the appeal to the commissioner within 7 days after the notice of appeal is filed.

(2) The notice of appeal must be filed within 60 days after notice is given to the taxpayer of the commissioner's decision on the objection.

(3) The Supreme Court must not extend the time for filing the notice.

(4) The notice of appeal must state fully the grounds of the appeal and the facts relied on.

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[13] Revenue law means a law declared under s 6 to be a revenue law (schedule 2); the *Duties Act* 2001 is a revenue law.

[14] Tax law means a revenue law or the *Taxation Administration Act* (schedule 2).

(5) The grounds of an appeal to the Supreme Court are limited to the grounds of objection unless the court otherwise orders.

70A Onus on appeal

On the appeal, the appellant has the onus of proving the appellant's case.

70B Admissibility of new evidence

(1) Subsection (2) applies if –

(a) the Supreme Court is satisfied evidence material to the objection was not before the commissioner when the objection was decided; and

(b) subject to section 70(5), the court admits the evidence.

(2) The court must –

(a) adjourn the hearing of the appeal; and

(b) direct the commissioner to reconsider the objection having regard to the evidence and any other evidence obtained by the commissioner.

(3) However, subsection (2) does not apply if the commissioner asks the court to continue the hearing without the commissioner reconsidering the objection.

(4) For reconsidering the objection, the commissioner has all the powers conferred under this Act.

70C Deciding appeal

The Supreme Court must allow the appeal completely or partly or disallow it."

[14] The provision dealing with the alternative procedure, a review by QCAT, is worded differently. Once again, the grounds of review are limited to the grounds of the objection, unless QCAT otherwise orders (s 71(2)). But s 71(3) provides that:

"QCAT must –

(a) hear and decide the review of the decision by way of a reconsideration of the evidence before the commissioner when the decision was made, unless QCAT considers it necessary in the interests of justice to allow new evidence; and

(b) decide the review of the decision in accordance with the same law that applied to the making of the original decision."[15]

[15] The Commissioner also directs attention to the provisions of the *Uniform Civil Procedure Rules* 1999 (Qld), in relation to appeals to this court. Part 3 of chapter 18 of the UCPR applies to an appeal to a court other than the Court of Appeal (r 782), and so would apply to the present appeal. But r 782 expressly provides that this is "[s]ubject to any Act". Accordingly, the provisions of ss 70-70C of the *Taxation Administration Act* will prevail where there is inconsistency, for example, with UCPR r 748 (time for appealing) and r 766 (general powers), which are otherwise said to apply (r 785).

[16] UCPR r 765(1) (which is said to apply, by virtue of r 785) provides that an appeal is an appeal by way of rehearing. But that is not an answer in itself to the present question, because that rule is "subject to any Act" (relevantly here the *Taxation Administration Act*) and because "rehearing" means different things in different statutory contexts.

[17] In the present context, as can be seen from ss 65-68 of the *Taxation Administration Act*, the process adopted by the Commissioner in making a decision in relation to an objection by a taxpayer does not involve what would normally be described as a hearing (including, for example, hearing evidence and oral argument). This affects the meaning to be given to a "rehearing", where a right of appeal to a court is conferred.

[18] It is for that reason that it has been held that where a right of appeal is given to a court from a decision of an administrative authority, a provision that the appeal is to be by way of rehearing generally means that the court will undertake a hearing de novo, although there is no absolute rule to this effect.[16] Once again, it depends on the terms of the legislation.[17]

[19] This also reflects the broader principle that an "appeal" from an administrative decision to a court confers original, not appellate, jurisdiction.[18]

[20] In construing the current statutory provisions, it is useful to keep in mind, by way of contrast at least, the provisions that came before. Under s 24 of the *Stamp Act* 1894 (Qld) a taxpayer who was dissatisfied with the determination of an objection could appeal to the Supreme Court. This was done by serving notice of the appeal on the

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[15] See also s 19 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), which provides that in exercising its review jurisdiction QCAT "(a) must decide the review in accordance with this Act and the enabling Act under which the reviewable decision being reviewed was made; and (b) may perform the functions conferred on the tribunal by this Act or the enabling Act under which the reviewable decision being reviewed was made; and (c) has all the functions of the decision-maker for the reviewable decision being reviewed"; and s 20 which provides that "(1) The purpose of the review of a reviewable decision is to produce the correct and preferable decision" and "(2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits". See *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue* [2014] QCAT 258 at [8]-[9].

[16] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621, referring to *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR(NSW) 283.

[17] *Builders Licensing Board v Sperway Constructions* at 621-622; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-4.

[18] See, for example, *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2011) 245 CLR 446 at [5]; earlier, *Commissioner of Taxation v Finn* (1960) 103 CLR 165 at 167.

Commissioner, "require[ing] the commissioner to state and sign a case setting out the questions upon which the commissioner's opinion was required and the assessment made by the commissioner" (s 24(1B)). The case stated was set down for hearing by the court and, by s 24(3), "[u]pon the hearing of the case the court shall determine the questions submitted, and, if the instrument in question is in the opinion of the court chargeable with any duty, shall assess the duty with which it is chargeable". This procedure had its limitations and difficulties (including but not limited to the inability of the court to review the facts as stated by the Commissioner, which then lead to reviews under the *Judicial Review Act*) and was the subject of judicial criticism.[19]

[21] With the enactment of the *Taxation Administration Act*, a taxpayer has a right of appeal which is not constrained by a case stated by the Commissioner. It seems clear that the intention of the legislature was to broaden the scope of review which could be undertaken by the court (and streamline the process, by avoiding dual proceedings, by way of appeal and judicial review). This is confirmed in the explanatory notes to the Bill which became the Act which states, after referring to certain kinds of decisions for which there is no right of review (at pp 7-8):

> "Where a taxpayer is dissatisfied with the objection decision, there is a right to a full merits review by a single judge of the Supreme Court, subject to the satisfaction of certain conditions. The Supreme Court will, however, return the matter to the Commissioner for reconsideration of the objection where material new evidence is introduced, keeping costs to a minimum.
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> This approach clarifies, and achieves consistency between, taxpayers' rights of review across the revenue laws by ensuring that there are rights of objection and appeal regardless of whether tax has been assessed under the self assessment arrangements or otherwise. It also ensures that the time at which these rights arise, and the basis on which the review is undertaken, is clear.
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> With this expansion of taxpayers' rights of review under the *Taxation Administration Bill 2001*, judicial review rights will be limited so that, where there are rights of objection and appeal, whether or not they are exercised, there are no separate rights of review under the *Judicial Review Act 1991*."

And further (at p 18):

> "The *Taxation Administration Bill 2001* also precludes the application of the *Judicial Review Act 1991* for those decisions for which there is a right of review under the objection and appeal arrangements in Part 6. This approach reflects the fact that, subject to limited exceptions, appeals to the Supreme Court against decisions relating to an assessment are available.

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[19] See, for example, *Westpac Banking Corporation v Commissioner of Stamp Duties* [1994] 1 Qd R 99 and *EIE Ocean BV v Commissioner of Stamp Duties* [1998] 1 Qd R 36.

> This review is a full merits review, ensuring that matters of disputed liability for any amount included in an assessment, or for any decision leading up to or forming part of the making of an assessment, may be judicially reviewed. The availability of review rights under the *Judicial Review Act 1991* in these cases is therefore unnecessary. However, with the exception of non-reviewable decisions and objection decisions, the latter being subject to review under the appeal processes, other decisions under the tax laws may be subject to review under the *Judicial Review Act 1991*. This approach to judicial review rights accords with that taken for income tax purposes."[20]

[22] In *Feez Ruthning v Commissioner of Pay-roll Tax* [2003] 2 Qd R 41, the Court of Appeal considered the nature of an appeal under s 33 of the *Pay-roll Tax Act* 1971 (Qld), from a decision of the Commissioner of Pay-roll Tax on an objection. The relevant provision was slightly different to ss 69 and 70-70C, but nevertheless provided for an "appeal" to the Supreme Court, to be heard and determined by the court "in accordance with the rules of court". On the appeal the objector was limited to the grounds stated in their objection (as under s 70(5)) and bore the burden of proving any assessment objected to was excessive (as under s 70A). The particular issue was whether the court, on an appeal, had a power to receive further evidence (there being no express provision to that effect, in contrast to s 70B of the *Taxation Administration Act*). The Court of Appeal found that it did. Wilson J (with whom both McPherson JA and Williams JA agreed) explained the reasons for this at [18]:

> "The taxpayer bears 'the burden of proving' that the assessment is excessive. That is a concept redolent of the leading of evidence. It had no right to do so, indeed no right to a hearing, at the objection stage. By s 46(2), on an appeal, the production of a document under the hand of the Commissioner specifying a liability of the taxpayer or notifying any determination of the Commissioner is only prima facie evidence of the correctness of any calculations upon which the liability is ascertained or on which the determination is based.[21] Clearly, the Legislature intended that the taxpayer not be restricted to the materials that were before the Commissioner."

[23] Justice Wilson held, at [19], that the Court has power to receive further evidence on appeal but that "[w]hether it should do so depends on whether it is an appeal against the application of statutory criteria to the facts or an appeal against what is really the exercise of a discretion". In that regard, her Honour said at [20]:

> "In general, where an appeal is from the exercise of a discretion, it is usually necessary first to determine, on the material before the original decision maker, whether there was some error of principle; if there was, there will then be a question of whether the Court can and should re-exercise the

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[20] Underlining added.

[21] See now ss 131 and 132 of the *Taxation Administration Act.*

> discretion, or whether the matter should be sent back to the original decision maker for reconsideration according to law. If the Court is empowered to re-exercise the discretion, that will be an indication that it is then to proceed by way of rehearing, either de novo or on the material below together with such further evidence as it decides to allow.[22] On the other hand, where an appeal is from the application of the law to objective conclusions of fact, and the Court has power to receive further evidence, the appeal will be by way of rehearing and such judgment may be given as ought to have been given if the matter were initially heard at the date of the hearing of the appeal.[23]"[24]

[24] In *Logan v Woongarra Shire Council* [1983] 2 Qd R 689 at 691, cited by Wilson J at [20], GN Williams J said:

> "The essential distinguishing feature of an appeal by way of 'rehearing' is that the appellant is entitled 'to the independent judgment of the Court of Appeal' on the facts and also on the law as it then stands."

[25] The nature of an appeal under s 69 of the *Taxation Administration Act* has been the subject of passing reference, but not detailed consideration (because it was a matter of agreement between the parties) in three previous decisions of this Court.

[26] In *Orica IC Assets Pty Ltd v Commissioner of State Revenue* (2011) 82 ATR 18; [2011] QSC 001, it was common ground that the appeal should be conducted as a hearing de novo, and so it proceeded on that basis, without any specific analysis of the legislative provisions (at [10]).

[27] Likewise, in *Pryke v Commissioner of State Revenue* [2006] ATC 4604; [2006] QSC 226 the parties approached the appeal on the basis that it was a new hearing on materials not limited to those before the respondent commissioner (affidavits were filed, and two of the appellants were cross-examined). The court proceeded on the basis that this procedure was appropriate, without expressing any opinion as to what ss 69 and 70 mean by "appeal" (at [6]).

[28] More recently, in *Universal Supermodels Pty Ltd v Commissioner of State Revenue* [2018] QSC 257, the parties were "content to proceed on the basis the appeal is a new hearing on fresh materials" and the court accepted that as appropriate, it being unnecessary to finally determine the nature of the appeal in that case (at [133] and [134]).

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22 Referring, inter alia, to *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

23 Referring to *Logan v Woongarra Shire Council* [1983] 2 Qd R 689 at 691.

24 See also *Mould v Commissioner of State Revenue* [2014] VSC 268 at [29]-[49] (in respect of a decision falling into the latter category) and *Nationwide Towing & Transport Pty Ltd & Ors v Commissioner of State Revenue* [2018] VSC 262 at [19], [35]-[36] and [59] (in respect of a decision falling into the former category).

[29] In my respectful view, to describe the appeal as a "new hearing on fresh materials" does not accurately reflect the statutory provisions.

[30] The nature of an appeal to the Supreme Court under s 69 of the *Taxation Administration Act* is a rehearing (more aptly, a fresh hearing, as no hearing has previously taken place), conducted by the Supreme Court in its original jurisdiction, on the materials that were before the Commissioner, subject to the power of the Court to admit new evidence under s 70B(1).

[31] Where the Court is prepared to admit new evidence, it must first give the Commissioner the opportunity to reconsider the objection having regard to all of the evidence, including the new evidence (s 70B(2)). But the Court can proceed to hear the appeal, if the Commissioner declines that opportunity (s 70B(3)).

[32] The Supreme Court does not stand in the shoes of the Commissioner, but exercises its original jurisdiction to make such judgment as it considers ought to have been given, on the facts and the law, at the time of the hearing of the appeal. The appeal is in that sense a hearing de novo.

[33] The distinction identified by Wilson J in *Feez Ruthning v Commissioner of Pay-roll Tax* at [19] and [20] remains relevant in the context of the *Duties Act* 2001. As will be further discussed below, the present objection decision is one involving the application of law to objective conclusions of fact. However the *Duties Act* 2001 does make provision for decisions involving the exercise of discretion on the part of the Commissioner, in terms of whether the Commissioner is "satisfied" a particular state of affairs exists.[25] Accordingly, care will need to be taken, depending on the nature of the decision which is being appealed, to determine the scope of the Court's powers on the appeal.

[34] Where, as in this case, the appeal is from a decision involving the application of the law to objective conclusions of fact, which are not dependent upon the Commissioner's state of satisfaction, it is open for the Court to give such judgment on the appeal as it considers ought to have been given, on the law and facts as they are at the time of the hearing of the appeal. The exercise of the Court's powers in this regard are not dependent upon the demonstration of some legal, factual or discretionary error by the decision-maker.[26]

[35] However, where the decision appealed is one which depended upon the Commissioner being satisfied of a particular fact or matter, the appellant does need to demonstrate an error of principle in the Commissioner reaching, or not reaching, that state of satisfaction, before the Court would intervene.[27] As observed by Wilson J in the *Feez*

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[25] For just a few examples, see ss 22(3), 26(3), 27(3), 28(3), 32(1), 61(3) and 71(1) of the *Duties Act*.

[26] *Allesch v Maunz* (2000) 203 CLR 172 at [23].

[27] See generally *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[137] per Gummow J, referring, inter alia, to *Buck v Bavone* (1976) 135 CLR 110 at 118-119. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

Ruthning case, where that is shown, the next question would be whether the Court can or should re-exercise the discretion, or whether the matter should be sent back to the decision maker. I would not construe ss 69-70C of the *Taxation Administration Act* as conferring a power on the Supreme Court to stand in the shoes of the Commissioner, and re-exercise any discretionary power conferred on the Commissioner.[28] In that respect, the nature of an appeal to the Supreme Court may be distinguished from the alternative option which is available to a taxpayer, of seeking review of an objection decision by QCAT. A matter referred for review to QCAT invokes the powers and functions of QCAT under the *Queensland Civil and Administrative Tribunal Act*, including as that does the power to perform the functions of the decision maker (s 19), which effectively puts the Tribunal into the shoes of the Commissioner and, amongst other things, permits the Tribunal to re-exercise for itself any discretion which had otherwise been given to the Commissioner.[29] But as this is not an issue that arises for determination in this case, given the different nature of the decision the subject of the appeal, it is unnecessary to address this further.

[36] In this matter, the parties were content to proceed on the basis of the materials that were before the Commissioner, on the basis that uncontroversial factual matters accepted by the Commissioner, and identified as the basis on which the reassessment decision was made, were to be accepted as part of the factual basis on the appeal. This included that the individual transactions were not conditional or dependent on each other and that the transferred lots were not ever intended to be used together by the transferees.[30]

What is the proper construction of s 30 of the *Duties Act*?

[37] Chapter 2 of the *Duties Act* imposes an obligation to pay duty (transfer duty) on the dutiable value of a dutiable transaction (s 8).

[38] As defined in s 9 a "dutiable transaction" includes, among other things:

(a) a transfer of dutiable property; and

(b) an agreement for the transfer of dutiable property, whether conditional or not.

[39] It does not matter whether a dutiable transaction is effected by an instrument or another way; or whether it involves one or more parties (s 9(2)).

[40] Dutiable property includes, among other things, land in Queensland (s 10(1)(a)).

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[28] Cf *Tasty Chicks Pty Ltd v Commissioner of State Revenue* (2011) 245 CLR 446, in relation to an appeal to the Supreme Court of New South Wales under s 97 of the *Taxation Administration Act* 1996 (NSW), in respect of which the High Court found the powers of the Supreme Court on review were the same as the Administrative Decisions Tribunal (see at [13]-[18]).

[29] *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue* [2011] VSC 104 at [2] per Pagone J; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 and *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [134] per Kiefel J (as her Honour then was).

[30] T 1-7; Decision at AR 24 [31].

[41] The term "dutiable value" is defined in s 11. Relevantly for present purposes, the dutiable value of a dutiable transaction which is the transfer of dutiable property, or an agreement for the transfer of dutiable property is:

(a) the consideration[31] for the dutiable transaction; or

(b) the unencumbered value[32] of the dutiable property if there is no consideration for the transaction (s 11(7)).

[42] The liability to pay transfer duty on a dutiable transaction is on the parties to the transaction (s 17(2)).

[43] Part 5 of chapter 2 contains provisions dealing with some particular "dutiable transactions relating to dutiable property". This includes s 30, which provides:

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[31] As to which, see s 12.

[32] As to which, see ss 14 and 15.

"**30 Aggregation of dutiable transactions**

(1) This section applies to dutiable transactions that together form, evidence, give effect to or arise from what is, substantially 1 arrangement.

(2) For assessing transfer duty on each of the dutiable transactions, the transactions must be aggregated and treated as a single dutiable transaction.

Example for subsection (2)—

A conducts a business of manufacturing bullbars. A agrees to sell the business to B as a going concern for $50,000,000. The property included in the agreement comprises land, plant and equipment, goodwill and the business name.

The land is dutiable property being land in Queensland and each of the other assets are dutiable property being Queensland business assets.

The agreement, so far as it relates to the sale of the land, is a dutiable transaction being an agreement to transfer land in Queensland and, so far as it relates to the agreement to sell each of the business assets, is a dutiable transaction being an agreement to transfer dutiable property that is a Queensland business asset. Accordingly, there are 4 dutiable transactions under the agreement.

Because the dutiable transactions together form 1 arrangement, they must be aggregated under this section for imposing transfer duty.

(3) For subsection (1), all relevant circumstances relating to the dutiable transactions must be taken into account in deciding whether they together form, evidence, give effect to or arise from what is, substantially 1 arrangement.

(4) For subsection (3), relevant circumstances include the following—

(a) whether the transactions are contained in 1 instrument;

(b) whether any of the transactions are conditional on entry into, or completion of, any of the other transactions;

(c) whether the parties to any of the transactions are the same;

(d) whether any party to a transaction is a related person[33] of another party to any of the other transactions;

(e) the time over which the transactions take place;

(f) whether, before the transactions take place, the dutiable property the subject of the transactions was used together, or dependently with one another, by the transferor or transferors;

(g) whether, after the transactions take place, the dutiable property the subject of the transactions will be used together, or dependently with one another, by the transferee or transferees.

(5) Transfer duty imposed on the dutiable transaction aggregated under this section must—

(a) be assessed on the total of the dutiable values of the transactions when the liability for transfer duty for each of the transactions arose; and

(b) be apportioned between the transactions as decided by the commissioner.

Example for subsection (5) —

Under 4 agreements between a builder and a developer, the builder agrees to purchase 4 lots of land from the developer for $100,000 each. The lots are dutiable property being land in Queensland and each of the agreements is a dutiable transaction being an agreement to transfer land in Queensland.

Even though the sale of the 4 lots was negotiated at the same time, the agreements were signed on different dates over a 10 month period, had different settlement dates and were not conditional on each other.

Under section 24 (Rates of transfer duty) and schedule 3 (Rates of duty on dutiable transactions and relevant acquisitions for landholder and corporate trustee duty), the agreements for lots 1 to 3 have been separately stamped for $2350 transfer duty. When the agreement for lot 4 is lodged for stamping, the commissioner decides this section applies because the transactions together formed 1 arrangement.

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[33] In the case of individuals, a person is a "related person" of another person if they are members of the same family (s 61(1)(a)). "Member", of a person's family, is defined in schedule 6 to the Act, and includes parents or grandparents, brothers, sisters, nephew or niece, child or grandchild.

> Accordingly, the transactions must be aggregated under this section for imposing transfer duty and the duty apportioned between them.
>
> Under subsection (5)(a), the total of the dutiable values of the dutiable transactions on which transfer duty is imposed is $400,000, being the value of each of the lots when the liability for transfer duty arose for each of the transactions, regardless of a variation in the values since the liability arose.
>
> Under section 24 and schedule 3, transfer duty imposed on the aggregated transaction is $12,475.
>
> If the commissioner decides to apportion the transfer duty equally between the dutiable transactions, the amount of transfer duty payable is $3118.75 for each transaction.
>
> Under the Administration Act, part 3, the commissioner will make a reassessment for the transactions for lots 1 to 3. The assessment notice must state the matters mentioned in section 26(2) of that Act.

(6) Each party to each of the dutiable transactions must, when lodging the instrument, ELN transaction document or transfer duty statement relating to the transaction, give notice to the commissioner stating details known to the party about—

(a) all of the dutiable property included or to be included in the arrangement mentioned in subsection (1); and

(b) the dutiable value of each dutiable transaction.

Note —

> Under the Administration Act, the requirement under this subsection is a lodgement requirement for which a failure to comply is an offence under section 121 of that Act.

(7) This section does not apply to a dutiable transaction to the extent that it relates to an exchange of dutiable property."[34]

[44] Section 30(1) does not involve the exercise of a discretion by the Commissioner. The application of the section is not premised on the Commissioner being satisfied of particular circumstances. Section 30(1) identifies criteria, to be applied to the facts of a given case, in determining whether duty is to be assessed under s 30(2). This is a case of the application of the law (s 30(1), as properly construed) to the objective facts of the case.

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[34] Underlining added.

[45] The Commissioner has issued a Public Ruling (DA030.1.2) in relation to s 30, with effect from 1 July 2011. A Public Ruling is the published view of the Commissioner of State Revenue on the topic to which it relates.[35] It does not alter or affect, or operate as an estoppel against, the operation of the legislation.[36] Its purpose is simply to promote certainty and consistency in administrative decision making.

[46] The Ruling records the Commissioner's view (at paragraph 3) that:

> "Aggregation of dutiable transactions arising from one arrangement is a long standing principle which ensures that taxpayers in similar circumstances are treated consistently and equitably regardless of how transactions may be structured or documented or the number or type of properties involved."

And, further (at paragraphs 6 and 7) that:

> "Court cases have identified the principle that, dutiable transactions that arise from what is substantially one arrangement should show a unity of purpose in the business being transacted.[37] This may become apparent from the association between the parties or the level of integration between the transactions. In addition, 'arrangement' has a very wide meaning and can include unilateral acts.[38]
>
> To determine whether or not dutiable transactions must be aggregated, all relevant circumstances of the transactions must be taken into account. Some of these circumstances are set out in the Duties Act.[39] However, these factors are not exhaustive and each case must be considered on its own facts."[40]

[47] The objective of statutory construction is to give the words of a statutory provision the meaning which the legislature is taken to have intended them to have. The task begins and ends with the statutory text, construed in context, and within the framework of the rules of construction. The relevant context includes the statutory purpose, as the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[41]

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35 See generally s 20 of the *Tax Administration Act* 2001 and Public Ruling GEN001.5 (Public ruling system: explanation and status).

36 See *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 at 117 per Kitto J; *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154 at 165-168.

37 Referring to *The Attorney-General v Cohen* [1937] 1 KB 487, *Jeffrey v Commissioner of Stamps (SA)* (1980) 23 SASR 398, *Old Reynella Village Pty Ltd v Commissioner of Stamps (SA)* (1989) 51 SASR 378, *Clancy & Ors v Commissioner of State Revenue (Vic)* (1998) 40 ATR 1089.

38 Referring to *Re Steeds Will Trusts, Sanford v Stevenson* [1960] 1 All ER 487 (also reported in [1960] Ch 407), *Baker v Baker* [1961] ALR 972 (sic, 792) (also reported in [1961] QWN 29.

39 Referring to Section 30(4) of the Duties Act.

40 Underlining added.

41 See s 14A(1) of the *Acts Interpretation Act* 1954 (Qld).

[48] The appellants submit that s 30 is an anti-avoidance measure, and ought to be construed accordingly. They submit the purpose of the provision is to combat attempts to evade or minimise payment of duty by the structure, or timing, of what is really one transaction, as multiple transactions.[42] I accept that is a purpose of s 30. However, I also accept, as the Commissioner submitted, that the operation of s 30 is not limited to intentional avoidance measures; it is not necessary for there to be a tax avoidance purpose for an arrangement to be captured by the section; and the section is not limited to what might be called "transaction splitting".[43] The purpose of s 30 is also aptly described by the Commissioner in the Ruling as being to ensure that taxpayers in similar circumstances are treated consistently and equitably regardless of how transactions may be structured or documented or the number or type of properties involved.

[49] The purpose of s 30 is confirmed by the explanatory notes to the Bill which became the *Duties Act* 2001, where it was said:

> "*Clause 30* provides for the aggregation of dutiable transactions that form, evidence give effect to or arise from what is substantially the one arrangement for the purpose of assessing transfer duty. As transfer duty is imposed at ad valorem rates on the dutiable value of a dutiable transaction, the overall duty imposed can be affected if dutiable transactions are treated as separate and distinct even where they are part of the one agreement. Where dutiable transactions are part of the one transaction, the clause ensures that the appropriate amount of duty is imposed. Further, without such a clause it would also be possible to stage dutiable transactions over a period of time so that they appear unrelated, thereby reducing the overall amount of duty imposed.
>
> Clause 30(3) provides that all relevant circumstances are to be taken into account in deciding whether the dutiable transactions form, evidence give effect to or arise from what is substantially the one arrangement and clause 30(4) lists some of the circumstances that are relevant…"[44]

[50] There is no definition in the *Duties Act* (or in related legislation, such as the *Taxation Administration Act*) of the phrase "substantially 1 arrangement", or the word "arrangement".

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[42] Cf, by analogy, *Attorney-General v Cohen* [1937] 1 KB 478 at 482.

[43] See, by analogy, *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2)* (2005) 63 ATR 127 at [22]-[27]. It is to be noted also that in *Attorney-General v Cohen*, on which the appellants relied, the liability (to additional duty, on the basis of the aggregation provision) was limited to cases where there was an intent to defraud: [1937] 1 KB 478 at 480. The observations of Slesser LJ at 482 as to the "mischief" to which the provision was directed ought to be read in this context.

[44] Underlining added.

[51] The meaning to be given to the phrase "dutiable transactions that together form, evidence, give effect to or arise from what is, substantially 1 arrangement" is informed to some extent by decisions which have considered that phrase in equivalent legislation in other jurisdictions (accepting that a cautious approach is warranted, because of differences between the various legislative regimes).

[52] The wording of s 30 is quite different from its predecessor, s 53 of the *Stamp Act* 1894 (Qld).[45] But s 30 adopts a form of words which appears (or appeared) in s 25 of the *Duties Act* 1997 (NSW),[46] s 24 of the *Duties Act* 2000 (Vic)[47] and s 37(1) of the *Duties Act* 2008 (WA)[48] and is similar to a form of words which appeared in s 101 of the *Stamp Duties Act* 1923-1978 (SA) (where the word "transaction" is used rather than "arrangement").[49] It is appropriate to proceed on the basis that by using this form of words, the legislature objectively intended them to bear the meaning given to them in previously decided cases.[50] This appears to be the Commissioner's view, having regard to paragraph 6 of the Public Ruling.

[53] Having regard to words of s 30, in their context, and the various authorities, the relevant principles are as follows.

1. In order for s 30 to apply, there must be "some unifying factor" that brings the dutiable transactions within the section. That unifying factor may be the purpose or objective of either (or both) the transferor(s) or the transferee(s) (a unity of purpose) or it may be some other relationship, connection or interdependence between the transactions.[51]

   The words of s 30 support the need for a "unifying factor" to be shown, having regard to the use of the word "together" in s 30(1); the phrase "substantially 1 arrangement", emphasising the adjective "1"[52]; and the need to take into account "all relevant circumstances relating to the dutiable transactions", words which are apt, including having regard to the specific circumstances identified in s 30(4), to

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45 Section 53(2) referred to "2 or more instruments of conveyance, whether involving the same or different parties (a) that arise from a single agreement (whenever made) to convey property; or (b) that together form, or arise from, substantially one transaction or one series of transactions".

46 Considered in *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd* (2004) 58 ATR 17; and the later decision (a further appeal, following the remittal) *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2)* (2005) 63 ATR 127; and also in *Re Khoury and Chief Commissioner of State Revenue* (2010) 78 ATR 81.

47 Considered in *Re Brianco Nominees Pty Ltd and Commissioner of State Revenue* (2008) 73 ATR 67; [2008] VCAT 999. Previously, s 68 of the *Stamps Act* 1958 (Vic) (substantially one transaction), considered in *Re Clancy and Commissioner of State Revenue* (1998) 40 ATR 1089.

48 Considered in *Re 705-707 Hay Street Pty Ltd and Commissioner of State Revenue* [2016] WASAT 140.

49 Considered in *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398.

50 Cf *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue* [2014] QCAT 258 at [34]-[48].

51 *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398 at 405 per Jacobs J. See also *Quetel Pty Ltd v Commissioner of Stamp Duties* [1993] 2 Qd R 57 at 90 per Mackenzie J, accepting the importance of identification of a relationship between the transactions, in the context of considering whether agreements were in substance one transaction of sale.

52 As Jacobs J did in *Jeffrey* at 405.

invite consideration of circumstances which connect the dutiable transactions in some way.[53]

2. "Arrangement" is a word of wide, but not unlimited meaning. It was described, albeit in the context of a different provision of the previous *Stamp Act,* as "a comprehensive word which extends to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular result".[54] An arrangement is something less than a legally enforceable contract or agreement; it may be an understanding or a plan which is not enforceable.[55] It may be inferred from the circumstances. The arrangement need not be bilateral, as between the transferor(s) and the transferee(s), but may be unilateral, having regard to the objectives of the party(ies) on either side of the transactions.[56] But in either case, an arrangement, in its ordinary meaning, connotes a plan, with a purpose or objective, of some kind.

3. The use of the word "substantially", in the phrase "what is, substantially 1 arrangement", invites consideration of the substance of the dutiable transactions, looked at together, as opposed to the form, to determine whether the transactions, *together*, form etc what is, substantially (or really or essentially), one arrangement, although as a matter of form they may appear as separate transactions.[57]

4. The determination to be made under s 30(1) is a question of fact, involving matters of degree,[58] taking into account all relevant circumstances relating to the

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[53] Cf *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue* [2014] QCAT 258 at [47]-[49]. To the extent it was held in *Camp Seabee* that a "unifying factor", such as identified in *Jeffrey's* case, is not required (as opposed to a narrower conclusion, that a "unity of *purpose*" is not always required), I respectfully disagree.

[54] *Quetel Pty Ltd v Commissioner of Stamp Duties* [1993] 2 Qd R 57 at 80 per Mackenzie J (in relation to s 49C(2)(d) of the *Stamp Act* 1894).

[55] *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7-8.

[56] *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd* (2004) 58 ATR 17 at [34]; cf *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 140 CLR 434, for example at 443 per Gibbs and Mason JJ (construing the word "arrangement" where it was followed with the words "entered into", as referring to an arrangement which is bilateral or multilateral). See also *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd (No 2)* (2005) 63 ATR 127 at [17].

[57] *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398 at 406 per Jacobs J. Cf *Camp Seabee Properties Pty Ltd v Commissioner of State Revenue* [2014] QCAT 258 at [37]-[39], where it was said the word "substantially" broadens, enhances and extends the application of the section. To the extent that this is to say something different from what is set out above, I respectfully disagree with this analysis, preferring the construction given to the meaning of substantially in *Jeffrey*, reflecting as this does the ordinary meaning of the word, in its context.

[58] *Jeffrey v Commissioner of Stamps* (1980) 23 SASR 398 at 406 per Jacobs J, disagreeing in this respect with observations in *Attorney-General v Cohen* which suggested it was a question of law; see also *Old Reynella Village Pty Ltd v Commissioner of Stamps* (1989) 51 SASR 378 at 381 per Mohr J, agreeing with Jacobs J.

dutiable transactions (s 30(3)) including, but not limited to, the factors identified in s 30(4).[59]

The circumstances that are relevant will depend on the individual case, but the phrase "relating to" is broad enough to encompass circumstances surrounding the dutiable transactions, not merely the transactions themselves.

5. The objectives, actions and conduct of both the transferor(s) and transferee(s) are potentially relevant. Under the *Duties Act* the obligation to pay transfer duty falls on all parties to a dutiable transaction.[60] There is nothing in the words of s 30, particularly s 30(3) and (4), which supports a construction that the primary focus is on the objectives, actions or conduct of the transferee(s).[61]

Was the Commissioner's conclusion as to the application of s 30 correct?

The decision to disallow the appellants' objection

[54] In objecting to the Commissioner's reassessment, the appellants relied upon the following as demonstrating that s 30 should not apply:

> "30(4)(a) The transactions are not in one instrument. None of the transactions are conditional on each other.[62]
>
> 30(4)(c) The only party that is common to all transactions is the donor (transferor). Each donee receives a distinct and different property.
>
> 30(4)(d) Although the donees (transferees) are related to each other, each is being given a separate lot for their own benefit and use. It was not the intention of the donees or of the donor that the properties be utilised together.
>
> 30(4)(e) The transfers were contemporaneous.
>
> 30(4)(f) The property was a hobby farm before it was subdivided and (f) may apply

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[59] See also *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd* (2004) 58 ATR 17 at [39]-[46], endorsing the "multi-factored analysis" illustrated by Jacobs J's decision in *Jeffrey*.

[60] See s 17(2) of the *Duties Act;* cf the observations in *Re Chief Commissioner of State Revenue and Pacific General Securities Ltd and Finmore Holdings Pty Ltd* (2004) 58 ATR 17 at [46] and [47], that the factors to be considered may well involve, entirely, a consideration of the conduct of the purchasers and their beneficiaries, given that the liability to pay the duty was borne by the transferee.

[61] In this respect, I respectfully consider that the statement in *Rawlings v Commissioner of State Revenue* [2015] QCAT 10 at [12], that "the intention of the transferor or vendor is not relevant" is incorrect.

[62] As to this second sentence, see s 30(4)(b).

> 30(4)(g) The properties were never intended to be used together by the transferees nor were the transactions dependent on one or another."[63]

[55] The appellants also contended that the Public Ruling does not contain any examples that suggest transferees who have separate properties transferred to them by a single transferor should be subjected to aggregation of transfer duty.[64]

[56] In deciding to disallow the objections, finding that s 30 did apply to the transfers, the Commissioner's delegate took into account the following:[65]

1. The timing of the transactions – that the transfers were all entered into on the same day and settled on the same day. In this regard, the delegate said:

> "I consider the timing evidences that the transactions arose from a single familial arrangement whereby all parties were in agreement that the properties would be transferred in a particular manner at a particular time. By entering into the transfers under that arrangement there is unity of purpose that renders the whole of the dutiable transactions as substantially one arrangement, consistent with *Camp Seabee.* On balance I am satisfied that the timing of the transactions supports aggregation in accordance with s 30(4)(e) of the *Duties Act*." (paragraph 26)

2. The relationship between the parties, with the transactions involving the gifting of properties from a parent to five children (in fact, four children and one grandchild) (paragraph 27).

3. That the transactions were not arm's length transactions, as there were no contracts entered into by the parties; and no consideration passed (paragraph 30).

[57] As against those matters, in relation to the submission that the transferees received distinct and different properties which were never intended to be used together, the delegate accepted that supports that the transactions should not be aggregated, but placed "greater weight on this unity of purpose in the subject transactions" (paragraph 28). The delegate also accepted that the "individual transactions were not conditional or dependent on each other" (paragraph 31), but nevertheless found that "the transactions reflected in the contracts together form, evidence, give effect to or arise from what is, substantially one arrangement" (paragraph 32).

[58] In relation to the submissions regarding the examples given in the Public Ruling, the delegate said those are provided as a general guide only, and that in determining

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63 AR 82.
64 AR 82.
65 AR 23-24.

whether s 30 applies, "each case must be considered on its own individual circumstances" (paragraph 29).

Consideration

[59] I am persuaded, having regard to the proper construction of s 30 of the *Duties Act*, and the facts of this case, that s 30 does not apply to the dutiable transactions comprising the five transfers, by way of gift, of separate parcels of land from Mrs Anderson to her four children and one grandchild. I find the Commissioner, by his delegate, was in error in finding that it did.

[60] Taking the last point first, it should be accepted that each case turns on its own individual circumstances; the presence or absence of a similar example either in the Act, or in the Public Ruling, is not determinative one way or the other of whether the section applies.

[61] In terms of the matters of substance, firstly, I consider the Commissioner's delegate has erred in extrapolating from the *timing* of the transactions a factual finding of a "single familial arrangement whereby all parties were in agreement that the properties would be transferred in a particular manner at a particular time", and on that basis finding a "unity of purpose". The objective facts do not support such a finding. There is no evidence of any agreement involving the transferees. The delegate accepted that the individual transactions were not conditional or dependent on each other; and that the transferees received distinct and different properties, which were never intended to be used together. The transfers were in each case a gift from a mother to her children and one grandchild. There was no evidence that the mother needed the approval or consent of any individual transferee, in order to make the gifts to the other transferees; or that the gift to any one was conditional on the gifts to any others. In fact, the accepted factual basis was to the contrary.

[62] In opposing this appeal, the Commissioner also contended that the timing of the subdivision of the original land, being shortly prior to the transfers, as well as the fact that the same solicitor acted for the transferor and signed the transfers on behalf of the transferees, also supported aggregation (matters not referred to by the delegate in his decision). As to the former, in the circumstances of this case I do not consider that supports a finding that the transfers, to the children and grandchild, of five of the seven lots into which the mother's land was subdivided, relatively soon (about 18 months) after she became the sole owner after her husband's death, together form etc what is substantially one arrangement for the purposes of s 30. The simultaneous transfers to Mrs Anderson's children and grandchild may be inferred to be in the interests of family harmony. Nor does the fact that one solicitor acted for all parties. That was submitted for the appellants to be a matter of convenience and economy. Although the Commissioner protested that there was no evidence of that, it is a rational and

reasonable inference to draw from the facts, that Mrs Anderson was transferring, by way of gift, parts of her land to her children and grandchild.

[63] The fact that the transferor is the same in each transfer, and all the parties are related, are relevant circumstances (s 30(4)(c) and (d)). But this is not enough on its own to support a conclusion that the separate transfers are (form, evidence, give effect to or arise from what is) substantially (really) "1 arrangement". There needs to be something more; some relationship or connection or interdependence *between the transactions*; not merely a relationship between the parties.[66]

[64] The Commissioner's delegate considered the fact that the transactions were not "arm's length" transactions, as there were no contracts entered into, and that no consideration passed, as also supporting the finding, as a matter of substance, that the individual transfers were substantially "1 arrangement" and should be aggregated. Consistently with s 30(4)(c) and (d), it is a relevant consideration that the transactions were not at arm's length. However, in the circumstances of this case, for the reasons just given, that does not support the Commissioner's conclusion. Nor does the absence of consideration, which is, at best, a neutral factor.

[65] From the transferees' perspective, there is no "unifying factor" beyond the timing of the transfers and the relationship between the parties. There is no relationship, or connection, or interdependence between the dutiable transactions themselves. That is the relevant factor for the purposes of s 30(1) – whether there is a relationship or connection between the dutiable transactions, such that those transactions, *together,* form etc what is substantially 1 arrangement. That element of unity is missing here.

[66] From the transferor's perspective, there can be discerned an intention to divest herself of the property of which she became the sole owner after her husband's death, in part by gifting separate lots to her four children and one grandchild, and otherwise by transferring the remaining lots to the unrelated parties. Without something more (of which there is no evidence in this case) that is not an "arrangement" of the kind sought to be captured by s 30.

[67] If the transfers to the family members had instead been made to five strangers, on the same day, for valuable consideration (consistent with the appraisals as to value by the real estate agent) there would be no question of s 30 applying. Duty would

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[66] Compare *Jeffrey v Commissioner of Taxation* at 407-408. In this case, a mother and her son entered into contracts to purchase adjoining parcels of land from a common vendor; one of the particular features identified as pointing to the "essential unity" to the two transactions was the intention of one purchaser (the mother) to finance the other (son) in his purchase. Jacobs J said having regard to that, his conclusion would have been the same even if the purchasers were strangers, and that the additional fact of a close family relationship did no more than add some weight to the conclusion of essential unity. Compare also *Re Clancy and Commissioner of State Revenue* (1998) 40 ATR 1089. In this case, there were multiple transfers of property between a mother and her four daughters, of four properties owned by the mother, the purpose of which was to ensure that the mother's property went to her four daughters and not to her son. It was found there was a "family arrangement" designed to lock out the son; that it was "a composite exercise", "to achieve a common purpose" (at 1095).

appropriately be assessed on each transfer as a dutiable transaction. In the absence of any unifying factor between the dutiable transactions, there would be no basis to aggregate the value of those transactions for the assessment of duty. That begs the question, why is that appropriate where the transferees are family members, who receive the transfers by way of a gift, in the circumstances of this case? The purpose of s 30 is to ensure taxpayers in similar circumstances are treated consistently and equitably. The application of the section by the Commissioner in this case does not meet that purpose.

[68] Having regard to the relevant circumstances relating to the dutiable transactions, comprising the five individual transfers to the children and grandchildren of the transferor, including the matters referred to in s 30(4), the dutiable transactions do not, together, form, evidence, give effect to or arise from what is, substantially one arrangement. Accordingly, s 30 does not apply.

Orders

[69] It is appropriate to make the orders sought by the appellants, that:

1. The appeal is allowed.

2. The reassessments are disallowed, and the original assessments are restored.

3. The respondent refund the overpaid duty, penalties and interest to the appellants.

4. The respondent pay the appellants' costs of and incidental to this appeal.