SUPREME COURT OF QUEENSLAND

CITATION:	*CPT Manager Ltd & Anor v Commissioner of State Revenue* [2004] QSC 424
PARTIES:	**CPT MANAGER LIMITED** ACN 054 494 307 (first applicant) **CENTRO PROPERTIES LIMITED** ACN 006 378 365 (second applicant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	SC No 6563 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2004
JUDGE:	Holmes J
ORDER:	**The cross-application for dismissal of the application for review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – JURISDICTION AND GENERALLY – "DECISION" WITHIN ACT'S APPLICATION – EXCLUDED DECISIONS – DECISIONS IN MATTERS RELATING TO TAXES AND DUTIES - where the applicants seek the review of a ruling made by the Commissioner of State Revenue, the respondent, under s 71 of the *Duties Act* 2001 – where the respondent seeks the summary dismissal of the judicial review application on the grounds that no decision amenable to review under the *Judicial Review Act* 1991 was made; that any decision was excluded from review by s 77 of the *Tax Administration Act* 2001; and that the application is an abuse of process or that it would be inappropriate for the proceedings to continue pursuant to s 48 of the *Judicial Review Act* – whether the Commissioner's decision under s 71(1) of the *Duties Act* is reviewable *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Schedule 1 (e) *Duties Act* 2001 (Qld), s 49, s 68, s 70, s 71, s 410 *Judicial Review Act* 1991 (Qld), s 48

Stamp Act 1894 (Qld), s 56B
Tax Administration Act 2001 (Qld), s 9, s 63, s 76, s 77, s 105AA, Schedule 2

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited
Deputy Commissioner of Taxation v Clarke and Kann (1984) 1 FCR 322, considered
Intervest Corporation Pty Ltd v Commissioner of Taxation (Cth) (1984) 3 FCR 591, considered
Meredith v Commissioner of Taxation (2002) 125 FCR 308, considered
Minister for Industry and Commerce v Tooheys Ltd (1982) 42 ALR 260, cited
Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties [2001] 2 Qd R 67, considered
Tooheys Ltd v Minister for Business & Consumer Affairs (1981) 36 ALR 64, considered

COUNSEL: Mr Dorney QC for the first and second applicants
Mr Logan SC for the respondent

SOLICITORS: MF Lyons & Associates for the first and second applicants
C W Lohe, Crown Solicitor for the respondent

Background

[1] The first applicant, CPT Manager Limited, is trustee of and a unit holder in the Centro MCS 33 Trust 1 ("the Trust"), a registered managed investment scheme with interests in shopping centres, including two in Queensland. The second applicant is a member of a group which controls the first applicant, and was a party to the deed establishing the Trust. It was proposed that a syndicate managed by the first applicant would offer to the public units, consisting of a unit in the Trust stapled to a unit in a second trust with similar property interests. In May 2004, the solicitors for the applicants requested the respondent Commissioner of State Revenue to exercise his discretion under s 71(2) of the *Duties Act* 2001 to treat the Trust as a "widely held unit trust for the start-up period", the effect of which would be to preserve the issue of the units from liability to duty under Part 8 of Chapter 2 of the *Duties Act*. (For simplicity's sake, I will continue to refer to the first and second applicants in the substantive application as "the applicants", and will refer to the respondent as "the Commissioner".) The Commissioner declined to treat the Trust as a widely held unit trust for the start-up period. The applicants sought an order for statutory review of three findings, the effect of which was that the Commissioner was not satisfied of the matters requisite for an exercise of a discretion, and of the Commissioner's consequent refusal of a favourable exercise of discretion.

[2] The Commissioner made a cross-application to dismiss the application for review on the grounds that he had made no decision amenable to review under the *Judicial Review Act* 1991, or that if any decision had been made, it was one leading up to the making of an assessment and thus was excluded from review by s 77 of the *Tax Administration Act* 2001. Alternatively, it was said, the court should dismiss the application pursuant to s 48 of the *Judicial Review Act*, on the alternative bases that it was an abuse of process, and that it would be inappropriate for the proceedings to be continued, or the application granted.

The relevant Duties Act Provisions

[3] Part 8 of Chapter 2 of the *Duties Act* deals with dutiable transactions relating to trusts; s 49(1) applies that part to all expressly or intentionally created trusts. However, s 49(2) makes Part 8 inapplicable to, *inter alia,* an acquisition of a trust interest in a public unit trust (a "trust acquisition"). Section 68 defines "public unit trust"; that definition includes a widely held unit trust. Sub-section 70(1) of the *Duties Act* sets out what amounts to a widely held unit trust:

> "(1) A ***widely held unit trust*** is a unit trust, other than a listed unit trust, that is a registered managed investment scheme for which—
>
> (a) units in the trust have been issued to the public; and
> (b) 50 or more persons are beneficially entitled to the units in the trust; and
> (c) more than 20 persons are beneficially entitled to at least 75% of the total units in the trust."

That definition is qualified in the next sub-section:

> (2) However, for a trust acquisition or trust surrender of a trust interest in a trust, a unit trust is not a widely held unit trust if subsection (1)(b) and (c) is not satisfied before and after the trust acquisition or trust surrender.

[4] The relevant parts of s 71, which confers the discretion on the Commissioner to treat the trust as a widely held unit trust, are as follows:

> "(1) This section applies if the commissioner is satisfied –
>
> (a) units in a unit trust (the **start up units**) will be issued to the public to an extent and with the entitlements mentioned in section 70(1) within 1 year after the first issue of units to the public; and
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> (b) the start up units are the only units in the unit trust to be issued from and including the first issue to the public until the unit trust becomes a widely held unit trust (the **start-up period**).
>
> (2) The commissioner may treat the unit trust as a widely held unit trust for the start-up period."

Subsection 3 deals with what happens if things go awry:

> "However, if the start-up units are not issued in the way mentioned in subsection (1)(a) or are not the only units issued in the unit trust in the start-up period (the ***disqualifying circumstances***)—
>
> (a) the trustee must, within 28 days after the disqualifying circumstances happen, give the commissioner notice about the disqualifying circumstances; and

> (b) the unit trust is taken not to have been a widely held unit trust in the start-up period; and
>
> (c) the commissioner must make an assessment for transfer duty for each trust acquisition or trust surrender in the start-up period as if the trust were not a widely held unit trust in the period; and
>
> (d) the start date for the Administration Act, section 54(4), is 61 days after the relevant trust acquisition or trust surrender."

The effect of the Commissioner's ruling

[5] The Commissioner's refusal of the request that the trust be held as a widely held unit trust was in these terms:

> "**Private Ruling Determination**
> In relation to the proposed issue of units in the Centro MCS Syndicate to the public, the Commissioner will not treat Cento [sic] Trust 1 is [sic] a widely held unit trust for the start-up period."

The letter conveying that determination referred to the applicants' request for a private ruling, although they had in fact made no mention of a ruling in their letter. Instead they had described the proposed offer of units to the public and asked in direct terms that the Commissioner exercise his discretion under s 71(2) to treat the Trust as a widely held unit trust for the start-up period. The Commissioner's letter went on to explain that the "private ruling" might cease to apply if affected by amendments to the legislation or a decision of a court of competent jurisdiction.

[6] There is no provision in the *Duties Act* 2001 for the issue of private rulings, apart from s 410, which permits a company to apply for a ruling on whether a proposed transaction or acquisition will be exempt from duty under Part 1 of Chapter 10 of the *Duties Act*; that part deals with exemptions from duty in the case of corporate reconstructions. The Commissioner has issued a revenue ruling explaining his private ruling system. In its preamble, it says that a private ruling may be requested as to the dutiability of a proposed instrument or transaction. It goes on to set out the circumstances in which a private ruling will be provided - they include "matters pertaining to dutiable transactions relating to public unit trusts" - and those in which an application for a private ruling may be refused. The Commissioner, it says, will be bound by any private ruling, provided that there is no change in material facts or relevant documentation, unless any subsequent court decision, legislative amendment, practice direction or revenue ruling requires a different result.

[7] Mr Logan SC, for the Commissioner, submitted that it was open to the Commissioner to give private rulings under the general administrative powers given to him by s 9 of the *Taxation Administration Act*, which include "the power to do all things necessary or convenient to be done for performing the commissioner's functions". The ruling system, he argued, should be regarded as an informal means by which the Commissioner could communicate how his discretion might be exercised. It was to be contrasted with his express power under s 410 of the *Duties Act* to give a ruling on whether a proposed transaction would be exempt from duty; once he did so, that section required him, except in certain specified circumstances, to make an assessment of nil duty in respect of the transaction. Here, the

Commissioner had had merely given an informative advice as to how he might be expected to proceed under s 71(2).

[8] There seems to me no particular significance in the fact that the Commissioner's advice came in the shape of a ruling. The ruling, such as it was, had no statutory basis; it was nothing more than the form in which the Commissioner chose to convey his answer to the applicants' request. Consistent with the Commissioner's revenue ruling, there was nothing provisional in the way it was expressed, apart from the caveats as to changes of the law. It purported to convey the Commissioner's decisions that he was not satisfied for the purposes of s 71(1), and hence would not exercise his discretion under s71(2) in the applicants' favour. The real issue is whether those questions of the Commissioner's satisfaction and exercise of discretion can be resolved in advance of the issue of any units, and whether, if so, those resolutions amount to decisions which are "final or operative and determinative … of the issue of fact falling for consideration"[1] so as to amount to reviewable decisions under the *Duties Act*.

Operative and determinative decision

[9] For the Commissioner, it was argued that s 71 was to be read against the background of the regime of the *Duties Act* and the *Taxation Administration Act.* Under that regime, decisions concerning liability to duty were made by assessment in respect of completed transactions or agreement, not proposed transactions. A conclusion that a trust was to be taken under s 71 to be a widely held unit trust could only be drawn in relation to an existing transaction as part of an assessing process; it was not to be regarded as an independent and discrete decision. The earliest time at which the Commissioner could have made a determination under s 71 was upon the first issue of units.

[10] The applicants, on the other hand, contended that the ruling amounted to a decision under an enactment, not merely an opinion, or a decision taken as a step along the way in the course of reasoning. It must be possible under s 71 to obtain a decision in advance of the issue of any units. If that did not occur, but the Commissioner reached a state of satisfaction for the purposes of the section after the issue of some units, the anomalous situation would arise in which transactions in respect of those units already issued would be dutiable but the issue of later units would not. Sub-sections 71(1) and (2) required satisfaction (or a determination that satisfaction had not been achieved) on the part of the Commissioner about the likely existence of prospective facts. If in fact the Commissioner's satisfaction proved to be unwarranted, he could still raise assessments; that, it was pointed out, was the effect of s 71(3).

[11] *Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties*[2] was a decision of the Court of Appeal dealing with s 56B of the *Stamp Act* 1894. Section 56B(4) made instruments effecting the disposition of units in unit trust schemes chargeable with duty. But that liability to duty did not extend to a public unit trust scheme, defined as including a unit trust scheme whose units were listed on a stock exchange or a unit trust scheme in respect of which there was an approved deed under the Corporations Law. Excepted from the latter class were schemes under which: no units had been issued to the public; or fewer than 50 persons were beneficially entitled to the units; or 20 or fewer persons were beneficially entitled to 75 per cent

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1 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337.

2 [2001] 2 Qd R 67.

or more of the issued units (the converse, in effect, of s 70). Sub-section 56B(1A) (the equivalent of s 71(1)) provided:

> "where the commissioner is satisfied that, within 12 months of the date of the approval of a deed, units will be issued to the public to an extent and with such entitlements as are within the scope of [the definition of public unit trust scheme], the unit trust scheme shall be deemed to be a public unit trust scheme for the purposes of that definition."

The obvious difference between s 56B and the present s 71 is that under the former, the 12 month period to which the Commissioner's satisfaction was relevant began with the approval of a deed by the Australian Securities Commission; whereas under s 71 it is the first issue of units which effectively starts the 12 month period.

[12] In *Thakral*, the Commissioner, upon being provided with a copy of the relevant trust deed and details of the proposed unit issues, expressed herself satisfied in terms of s 56B(1)(a), but subsequently had a change of heart, taking the view instead that the subsection did not permit formation of the required state of satisfaction unless there was already in existence an approved trust deed. At first instance that view was upheld. On appeal, however, the Court of Appeal concluded that both the learned primary judge and the Commissioner were wrong in their view of the section. It is clear from their judgments that both McPherson JA and Pincus JA considered the exercise under s 56B(1A) to involve the formation of a state of satisfaction as to future events. The sub-section was intended to be read, McPherson JA said, as meaning that "the Commissioner is entitled to be satisfied that, although no units have been issued to the public, units nevertheless will, within 12 months of approval of the deed, be issued ... etc. Section 56B(1A) is expressed not in the present but the future tense ('within 12 months ... units will be issued')."[3] That consideration of future events encompassed both the issue of units and the approval of the deed. Pincus JA observed that, although it might seem odd that the Commissioner was invited to form an opinion as to the likelihood of a deed being approved by another authority, "that would not necessarily be any more difficult than deciding whether a planned issue of units would eventuate".[4] Plainly enough, the latter decision was, in his view, part of the Commissioner's task.

[13] The Commissioner sought to distinguish *Thakral* on the basis that there was now a different statutory regime which operated on existing, dutiable transactions. There have been, it is true, some changes in the structure of the relevant legislation. The *Duties Act* sets up the concept of dutiable transactions in s 8, which forms Part 1 of Chapter 2. Parts 2 – 6 of the Chapter deal with various aspects of dutiability, while succeeding parts descend to detail, dealing with the types of transaction subject to duty and exceptions to them. The *Stamp Act* was comparatively chaotic, with different types of transactions chargeable with duty distinguished by increasing numbers of capital letters behind section numbers, rather than orderly arrangement by parts. But I do not think that the effect of ss 70 and 71 is significantly different from that of s 56B, or that the reasoning in *Thakral* is any the less applicable to the new provisions.

[14] Section 70(1) defines what a widely held unit trust is, and subsection (2) makes it clear that the state of beneficial entitlement referred to in subsection (1) must exist both before and after a unit is acquired. Section 71, in contrast, does not deal with widely held unit trusts, but rather with unit trusts which are to be treated as – in

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3 At p 77.

4 At p 85.

effect, deemed to be - widely held unit trusts, whether or not that proves to be the case. The Commissioner has open to him a discretion to deem a unit trust to be a widely held unit trust upon reaching the state of satisfaction described in s 71(1); that is, that the requirements of 70(1) will be met. That state of satisfaction is as to future events; but if it is achieved it justifies a present deeming, which will, if all goes well, continue until the actuality of a widely held unit trust is reached.

[15] The "start up period", it is clear from s 71(1)(b), is the period "from and including" the first issue of units to the public up until the point when the circumstances prescribed by s 70 come into existence, so as to render the unit trust a widely held unit trust. For that start up period the Commissioner has a discretion to treat the unit trust as a widely held unit trust; that is to say, "from and including the first issue to the public". It is apparent from that terminology that a favourable exercise of discretion can encompass all issues of units including the very first; so that, it follows, it must be open to the Commissioner to reach a state of satisfaction before the first issue to the public. That is borne out by the use of the future tense in s 71(1), which refers to units which "will be" issued, those units being the only units "to be issued" within the start up period. Certainly, there is nothing in the section which would warrant the withholding of a conclusion until the first issue of units. The Commissioner's ability to achieve the requisite state of satisfaction may recede in correspondence with the length of time likely to elapse before the first issue of units; but that is not to say that the satisfaction cannot be achieved, and the discretion exercised, before that first issue.

[16] It may be, as events unfold, that the Commissioner's expectations are not met, and the disqualifying circumstances described in subsection (3) arise, so that the trust acquisitions become assessable to duty. In that sense, the treating of the unit trust as a widely held unit trust for the start up period is a provisional status; but nonetheless it is a status which can be conferred only by a decision of the Commissioner upon his having reached the required state of satisfaction as to the matters in s 71(1), and choosing to exercise the discretion conferred on him by s 71(2). The Commissioner's decisions as to satisfaction and exercise of discretion are properly described as determinative of the issues which fall for consideration under s 71, and, accordingly, of whether the provisional status to which I have referred will be conferred. They are not merely a step along the way but resolve the status of the scheme for the start up period.

Decision leading up to the process of making of an assessment

[17] But, the Commissioner contended, even if what was communicated to the applicants was correctly characterised as a decision under s 71 of the *Duties Act*, it was a decision leading up to the making of an assessment. (Even a favourable decision could result in a nil assessment.) As such, it would be protected by s 77(b) of the *Taxation Administration Act* from review under the *Judicial Review Act*. Section 77 excludes from the application of parts 3 and 5 of the *Judicial Review Act*:

> "(a) an assessment; or
> (b) a decision or conduct leading up to or forming part of the process of making an assessment; or
> (c) a decision disallowing, in whole or in part, an objection against an assessment."

[18] The applicants argued that 77(b) did not apply: the decision involved characterisation of the public unit trust, not identification of any particular dutiable

transaction, nor of any particular taxpayer whose liability might be determined. If a favourable determination were made under s 71(2), or, alternatively, if there were an unfavourable decision and the applicant for the determination thought better of the scheme, there would never be any assessment.

[19] Sub-sections 77 (a) and (b) of the *Taxation Administration Act* mirror paragraph (e) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) which removes from the ambit of judicial review, *inter alia*, "decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty". In *Deputy Commissioner of Taxation (Qld) v Clarke and Kann*[5] the Full Court of the Federal Court said of those categories that

> "[e]ach ... provides for some extension of the former, but the overall effect is to emphasise the essential need for a connection between the decision and an assessment ... a decision does not lead to the making of assessment merely because it precedes the making of an assessment or because its purpose is to enable or facilitate the making of any assessment which may be made. A decision is not a decision leading up to the making of an assessment unless the making of an assessment has followed or will follow from the decision."[6]

[20] In *Intervest Corporation Pty Ltd v Commissioner of Taxation (Cth)*[7] Smithers J was reviewing the Commissioner of Taxation's refusal of a request under s 105AA of the *Income Tax Assessment Act* 1936 (Cth) to allow a further period during which the applicant could seek to make a sufficient distribution of dividends for the purposes of the Act. The refusal of such a request was not, Smithers J concluded, a decision leading up to the making of an assessment or calculation of tax. In his analysis, he drew a distinction between the Commissioner of Taxation's administrative and assessment functions, a distinction observed in a number of subsequent cases and referred to with approval by the Full Court of the Federal Court in *Meredith v Commissioner of Taxation*[8]. In order to apply the distinction it was, the Full Court said,

> "necessary …. to properly characterise the decision in question in terms of the Act under which it was made".[9]

[21] The Federal Court has also, in considering the effect of paragraph (e), drawn a distinction between decisions affecting liability to tax on the one hand, and decisions dealing with the calculation or assessment of that liability on the other. In *Tooheys Ltd v Minister for Business & Consumer Affairs*[10] Ellicott J, in a passage later approved by the Full Court[11], explained this distinction with reference to the *Income Tax Assessment Act* 1936 (Cth). That Act contained provisions which defined assessable income and specified allowable deductions; they prescribed circumstances in which liability to income tax could arise. In contrast, other sections providing for the lodging of income tax returns, the making of assessments, the service of notices of assessment, objections to assessments, disallowance of

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5 (1984) 1 FCR 322.
6 At p 325.
7 (1984) 3 FCR 591.
8 (2002) 125 FCR 308.
9 At p 319.
10 (1981) 36 ALR 64.
11 *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260 at p 270.

objections and the lodging of appeals were provisions dealing with the calculation or assessment of income tax.[12]

[22] *Tooheys* itself concerned not a decision under the *Income Tax Assessment Act* but a refusal of the relevant Minister to make a determination under s 273 of the *Customs Act* 1901 (Cth) that a particular item of the customs tariff applied to certain goods, with the result that a higher rate of duty was payable. That was, Ellicott J held, a decision affecting liability, not a decision which was part of the process of calculating duty.[13] In another statement approved by the Full Court[14], he said this:

> "The words "leading up to the making" are intended to point to decisions which have to be made, or, in the circumstances, it is appropriate to make, before the actual process of assessment or calculation can begin."[15]

[23] But the distinction between decisions affecting liability and decisions which are part of the process of assessment may not assist in relation to the regime under the *Duties Act* and the *Taxation Administration Act*, since the focus must be on the expression "leading up to … the process of making an assessment", and on characterising any decision in those terms. What is actually comprised in an assessment varies as between different pieces of legislation. Under the *Income Tax Assessment Act* "assessment" means the ascertainment of the amount of taxable income, or in the case of certain trusts, net income, and of the tax payable on that taxable income or net income. The net cast by the term as it is defined and used in the *Taxation Administration Act* may be broader.

[24] In Schedule 2 (the dictionary) of the *Taxation Administration Act*, "assessment" is defined as meaning

> "a determination, under Part 3, of a taxpayer's liability for tax for which an assessment notice is given, and includes a reassessment."

Part 3 deals with assessments of tax. Section 11(1) requires the Commissioner to make an assessment if he is satisfied that a tax payer has a liability for tax and is not in a self assessment situation. (The Commissioner may make an assessment in the case of self-assessment, and may also make an assessment even if the taxpayer has a nil liability.) Since the requirement that the Commissioner make an assessment is, under s 11 (1), dependent on his satisfaction that a taxpayer has a liability to tax, it may well be, although it is not necessary to decide the point here, that decisions under the *Duties Act* affecting a given taxpayer's liability to tax are properly described as "leading up to … the process of making an assessment".

[25] Under the regime of the *Taxation Administration Act* and the *Duties Act* there are three types of decisions: those which are declared "non-reviewable" (in respect of which s 76 of the *Taxation Administration Act* ousts all forms of challenge, review or appeal); those with which s 77 deals, concerning the assessment process and disallowance of objections; and those not the subject of either section, which remain amenable to judicial review. The explanatory notes to the *Taxation Administration*

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12 (1981) 36 ALR 64 at p 77.
13 At p 78.
14 (1982) 42 ALR 260 at p 271.
15 (1981) 36 ALR 64 at p 78.

Bill 2001 confirm that these three categories are intended to cover the field:

> "Decisions that are not either [sic] assessment decisions, non-reviewable decisions or decisions disallowing in whole or in part an objection, will continue to be subject to review under the *Judicial Review Act 1991*".

[26] For the middle group, those which s 77 excludes from review under the *Judicial Review Act*, recourse is to be found in the objection and appeal provisions in Part 6 of the *Taxation Administration Act.* Sub-section 63(1) confers a right to object on a taxpayer who is dissatisfied with an original assessment. Sub-section 63(4), which complements s 77 in dealing with decisions "leading up to … the process of making an assessment" permits objection to such a decision "only as part of an objection to the assessment". It is implicit in that limitation that s63(4), and by inference s77, contemplate a taxpayer affected by a decision so closely connected with an assessment that the remedy available in respect of it is deferred until the assessment process is complete. Fundamental, of course, to the assessment is the existence of a taxpayer whose liability can be determined.

[27] But here, there is no taxpayer. Under s 71(2) of the *Duties Act*, the Commissioner can only, as the applicants point out, make a characterisation of the unit trust as a whole. He is not engaged in considering individual transactions, much less the liability of individual taxpayers. His decision may be made before the assessment of any particular taxpayer comes into prospect. It is not one which has to be made or is "in the circumstances … appropriate to make before the actual process of assessment … can begin", because there is no actual process of assessment in contemplation. It cannot be said that the decision will lead to the making of any assessment, because none may follow. In the absence of any taxpayer, dutiable transaction or close connection between the determinations and a prospective assessment, I do not consider that the Commissioner's decisions as to satisfaction and exercise of discretion under s 71(1) and (2) of the *Duties Act* fall within the reach of s 77(b) of the *Tax Administration Act.*

Dismissal under s 48

[28] The Commissioner's remaining argument, that even if there were a decision amenable to review, the application should be dismissed under s 48, is largely disposed of by the conclusions I have already reached. It was said that the determinations could not bind the Commissioner in any assessment; and that whether the relevant transactions would be dutiable was more appropriately determined on actual, not assumed, facts under the assessment, objection and appeal regime of the *Taxation Administration Act*. I have concluded that there are discrete determinations of which review is available, and there is no reason to deny that review to the applicants. It was also pointed out that since neither applicant was a party to any dutiable transaction, the Commissioner's advice could not adversely affect any interest of either of them, because it did not expose either of them to liability, so that the application should be regarded as an abuse of process. As to that, the applicants pointed out that they were respectively a prospective unit holder and an existing unit holder; the trust was preparing for a public subscription; the imposition of duty would have a material effect on investors' acquisition costs, so that the decision would inevitably affect adversely the Trust's commercial attractiveness as an investment vehicle. It seems to me that their interests are sufficiently affected to give them standing.

Conclusion

[29] For the reasons I have given, I consider that the Commissioner's decisions under sub-sections 71(1) and (2), conveyed in the ruling, are reviewable. The cross-application for dismissal of the application for review is dismissed. Subject to contrary submission the respondent Commissioner should pay the applicants' costs of the cross-application.