SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner of Taxation v Denlay & Anor* [2010] QCA 217
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (plaintiff/appellant) **v** **HELENA MIRJA DENLAY &** **KEVIN VINCENT DENLAY** (defendants/respondents)
FILE NO/S:	Appeal No 89 of 2010 Appeal No 88 of 2010 SC No 8594 of 2009 SC No 9119 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2010
JUDGES:	McMurdo P and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeals dismissed with costs**
CATCHWORDS:	TAXES AND DUTIES – INCOME TAX AND RELATED LEGISLATION – COLLECTION AND RECOVERY OF TAX – PROCEEDINGS FOR RECOVERY – WHERE APPEAL PENDING – STAY OF PROCEEDINGS OR EXECUTION – where primary judge gave summary judgment against respondents for amounts of income tax owed to appellant – where primary judge ordered the enforcement of judgments be stayed until the Federal Court determined the respondents' appeals against the tax assessments – where appellant appealed against the grant of the stays – whether primary judge failed to give sufficient weight to the Commissioner's right to recover judgment debts for unpaid tax – whether primary judge erred in finding it was "highly likely" the respondents would be adjudged bankrupt in the absence of a stay – whether primary judge erred in finding the appeals against the assessment would not proceed unless the stays were granted – whether primary judge's exercise of discretion to grant the stays was so unreasonable as to indicate error

Income Tax Assessment Act 1936 (Cth), s 175, s 177, s 201
Taxation Administration Act 1953 (Cth), s 14ZZM, s 14ZZR, Sch 1
Uniform Civil Procedure Rules 1999 (Qld), r 800

Australian Machinery & Investment Co Ltd v Deputy Federal Commissioner of Taxation (1945) 47 WALR 9; (1945) 8 ATD 133, cited
Clyne v Deputy Commissioner of Taxation (1983) 57 ALJR 673; 14 ATR 563, cited
Cywinski v Deputy Commissioner of Taxation [1990] VR 193; (1989) 20 ATR 672, cited
Deputy Commissioner of Taxation v Akers (1989) 89 ATC 4725, followed
Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd (2008) 237 CLR 473; [2008] HCA 41, cited
Deputy Commissioner of Taxation v Ho (1996) 32 ATR 269; (1996)131 FLR 188, considered
Deputy Commissioner of Taxation v Jennings [2005] QSC 312, followed
Deputy Commissioner of Taxation v Mackey (1982) 64 FLR 432; (1982) 13 ATR 547, followed
Deputy Commissioner of Taxation v Stjepovic (1991) 91 ATC 4715, followed
Deputy Commissioner of Taxation v Warrick (No 2) (2004) 56 ATR 371; [2004] FCA 918, cited
Deputy Federal Commissioner of Taxation v Roma Industries Pty Ltd (1976) 6 ATR 54, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119, applied

COUNSEL: P Looney for the appellant
G J Gibson QC, with P Roney, for the respondents

SOLICITORS: Australian Taxation Office Legal Services Branch for the appellant
Nyst Lawyers for the respondents

[1] **McMURDO P**: The appeals should each be dismissed with costs for the reasons given by Chesterman JA.

[2] **MUIR JA**: I agree that the appeals should be dismissed with costs for the reasons given by Chesterman JA.

[3] **CHESTERMAN JA**: On 9 December 2009 Ann Lyons J gave summary judgment for the appellant in two actions brought separately against the respondents. The judgment against Helena Denlay was for $2,024,412.32. That against Kevin Denlay was for $1,040,527.63. Each respondent was ordered to pay the appellant's costs of the action.

[4] The respondents did not oppose summary judgment but each sought a stay of execution. Her Honour ordered that the enforcement of the judgments be stayed for six months, or until another date fixed by further order.

[5] On 5 January 2010 the appellant filed notices of appeal against the orders staying execution of the judgments. The appeals had not come on for hearing by the time those orders expired. Therefore on 2 June 2010 the judge extended the orders for six months, or until the Court of Appeal allowed the Deputy Commissioner's appeals, or until the determination by the Federal Court of the respondents' appeals against the assessments to pay tax issued to them by the appellant.

[6] As may be gathered from the terms of the last order the appellant's claims against the respondents were for amounts of income tax, interest and penalties with respect to the financial years 2002 to 2007. The respondents have appealed against the assessments to the Federal Court. The hearing of their appeals had been set for four days, 13 to 16 September next. The purpose of the stays is self evident.

[7] The appellant was given leave to amend the notices of appeal so that the grounds of appeal are now:

> "(a) The learned Judge erred in granting a stay of enforcement of the judgment(s) … ;
>
> (b) In exercising her discretion to grant the stay, the learned Judge erred by failing to give sufficient weight to the operation of the legislative scheme for the recovery of tax debts reflected in section 14ZZR of the *Taxation Administration Act 1953* (Cth);
>
> (b)A The learned Judge erred in finding that, in the event that a stay of judgment was not granted, bankruptcy of the respondent(s) was 'highly likely';
>
> (b)B The learned Judge erred in finding that, in the event that a stay of judgment was not granted and bankruptcy followed, the pursuit of an appeal to the Federal Court of Australia by the respondent(s) … would not proceed;
>
> (c) In exercising her discretion to grant the said stay, the learned Judge erred by taking into account an irrelevant consideration, namely that the Respondent(s) would … have insufficient funds to properly prosecute … the Federal Court appeal.
>
> (c)A In the premises of the matters asserted in grounds (b), (b)A, (b)B and (c) herein or any one or more thereof, in exercising her discretion to grant the said stay, the discretion exercised by the learned Judge miscarried."

[8] In granting the stays the learned judge said:

> "… The (respondents) have applied, pursuant to section 244(7) of the Supreme Court Act or alternatively rule 16 of the UCPR, for a stay of the proceedings until a conclusion of the Federal Court Appeals or further order.
>
> Alternatively, they seek a stay upon the enforcement of any judgment obtained in a proceeding pursuant to rule 800 of the UCPR.

> Section 244 permits the Court to direct a stay of proceedings in any cause of matter if the Court sees fit and it is clear that is part of the Court's inherent jurisdiction. In fact, the (respondent) essentially seeks to rely on the application to stay the enforcement of any judgment … pursuant to rule 800.
>
> The relevant principles were set out by Justice P D McMurdo in the Deputy Commissioner of Taxation v Jennings [2005] QSC 312. It's clear that there is a broad discretion but the exercise of that discretion is informed by a substantial body of case law and particular considerations apply in relation to tax recovery proceedings because of the operations of the Taxation Administration Act, in particular sections 14ZZM and 14ZZR … .
>
> By section 14ZZM, the fact that a review of the assessment is pending does not affect the assessment and … tax may be recovered as if no review were pending but, as is common ground, the Court retains its power to stay a judgment in an appropriate case."

[9] Her Honour noted the institution of appeals against the tax assessments and described in brief terms the basis for the respondents' objections to the assessments, then observed the difference between a number of authorities at first instance as to whether a court considering staying a judgment given pursuant to an assessment could take into account the prospects of a successful appeal against them. Her Honour concluded that it was not appropriate to consider "the arguments involved in a pending review or appeal", save where it was clear that the appeal lacked merit. Her Honour concluded that there was "no evidence as to the demerit(s) of the appeal(s)", and that the appeals were proceedings with some celerity.

[10] The judge then reviewed the cases, particularly the judgment of French J (as the Chief Justice then was) in *Snow v Deputy Commissioner of Taxation* (1987) 14 FCR 119, and noted the principles it stated had been reaffirmed by French J in *Deputy Commissioner of Taxation v Warrick (No 2)* (2004) 56 ATR 371. Her Honour recorded the appellant's submission that judgment debts constituting the recovery of tax liability were "the subject of a legislative scheme which reflects a very clear policy in favour of the revenue against the taxpayer", confirmed by the High Court in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473. Her Honour then rehearsed the respondents' submissions which referred to *Deputy Commissioner of Taxation v Stjepovic* (1991) 91 ATC 4715 and observed that that authority supported a stay in cases where the enforcement of the judgment in favour of the Deputy Commissioner would result in "extreme personal hardship" and/or render nugatory an appeal against the assessments which had led to the judgment.

[11] The learned judge went on:

> "… (the respondents) swear that in the event … any judgment is enforceable against them they do not have sufficient resources to satisfy it. I consider that bankruptcy is highly likely, although there is clearly a discretion as to whether bankruptcy will follow and that will depend on the merits in many cases of any appeal. It would seem to me that a bankruptcy in the present case is highly likely … there is no suggestion by the (appellant) that bankruptcy proceedings would not be pursued if the judgments were not stayed.

> Each (respondent) swears that the real property … they have is incapable of being put to market to realise its equity because of the conduct of the (appellant). Even if … sold in a timely way, the value of the … property is substantially less than the amount (of the judgment). The (respondents) set out in their affidavit material that if … bankrupted they would not be capable of prosecuting the appeal. …
>
> Clearly, therefore, that fact of bankruptcy has the potential to defeat a meritorious appeal in the present case. …
>
> The total of the … real estate they hold … is ($1,000,000.00). There is an ability to draw from superannuation an amount of $500 per week. Clearly … neither (respondent) has the capacity to meet a judgment for the claimed amounts … .
>
> Mr Denlay has the capacity to work overseas, however, bankruptcy would impede him in that regard. Mrs Denlay is … unable to earn an income."

[12] The learned judge then referred to further authorities and concluded:

> "In the circumstances … I consider that … there will be extreme personal hardship given their personal circumstances and the fact that the pursuit of the proceedings in the Federal Court will not proceed if bankruptcy follows. Accordingly, there will be an order in terms of a stay."

[13] The appellant has three complaints about the judgment. The first is that the primary judge failed to give sufficient weight to what was described as the "legislative scheme", apparent from the terms of the *Income Tax Assessment Act* 1936 (the "*ITA Act*") and the *Taxation Administration Act* 1953 ("*TA Act*"), that judgment debts resulting from tax assessments may be recovered notwithstanding the pendency of appeals or reviews against the assessments, which may have good prospects of success, even though the recovery of the debt in those circumstances would operate harshly against the taxpayer. This consideration was said by the appellant to outweigh, if not overwhelm, all others and that her Honour did not give due consideration to it.

[14] The second complaint is that the judge found that without a stay it was "highly likely" that the respondents would be adjudged bankrupt. The argument is that if a bankruptcy notice was issued and the judgment debt was not satisfied, a Federal Magistrate or Federal Registrar may nevertheless refuse to make sequestration orders if satisfied that the respondents had arguable grounds for objecting to the assessments and that the other circumstances favoured a delay in sequestration until the appeals could be determined. It was, said the appellant, impossible for the Supreme Court on the present material to determine what prospect of success the appeals might have so that it was equally impossible to predict whether or not the sequestration orders would be made in advance of judgment in the appeals. The finding that bankruptcy was "highly likely" was not open.

[15] The third complaint is that the primary judge erred in finding that the appeals against the assessments would not proceed unless the stays were granted. The basis for the finding was the likelihood of bankruptcy. The likelihood not being established the fear that the appeals might not proceed was groundless. In any

event, the appellant argued, whether or not the respondents might be deprived of the means of prosecuting their appeals was irrelevant. The "legislative scheme" pre-empts such rights. The appellant's right to recover a judgment in respect of assessed tax could not be frustrated by any solicitude for a taxpayer's right of appeal which, if protected, might diminish the appellant's rights of recovery.

[16] Before dealing with the arguments in detail I should notice the statutory provisions which establish the "legislative scheme", and rehearse the principles relevant to a stay of execution of judgment debt for assessed income tax, as they emerge from the cases.

[17] Part IVC of the *TA Act* makes provision for challenges to taxation assessments. A taxpayer may seek a review of the assessment in the Administrative Appeals Tribunal, or appeal against them to the Federal Court. Section 14ZZR of the *TA Act* provides that:

> "The fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending."

Section 14ZZM is in the same terms, but refers to reviews.

[18] Section 175 of the *ITA Act* says:

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

Section 177 of the same Act provides:

> "(1) The production of a notice of assessment … under the hand of … a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the (*TA Act*) on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct."

[19] Section 298-30 of Schedule 1 of the *TA Act* provides:

> "(1) The Commissioner must make an assessment of the amount of an administrative penalty under Division 284.
>
> (2) An entity … dissatisfied with such an assessment … may object … in the manner set out in Part IVC of the (*TA Act*).
>
> (3) The production of a notice of such an assessment … is conclusive evidence of the making of the assessment and of the particulars in it.
>
> (4) Subsection (3) does not apply to proceedings under Part IVC of the (*TA Act*) on a review or appeal relating to the assessment."

[20] A convenient starting point in the consideration of authority is *Snow*, in which French J considered the authorities at some length and concluded (at 139):

> "… the power of State courts to stay recovery proceedings … is well established and … courts exercising it have regard to the following propositions:

> 1. The policy of the (*ITA Act*) … gives priority to recovery of the revenue against the determination of the taxpayer's appeal against his assessment.
>
> 2. The power to grant a stay is therefore exercised sparingly and the onus is on the taxpayer to justify it.
>
> 3. The merits of the taxpayer's appeal constitute a factor to be taken into account in the exercise of the discretion (although some judges have expressed different views on this point).
>
> 4. Irrespective of the … merits of the appeal a stay will not usually be granted where the taxpayer is party to a contrivance to avoid his liability to payment of the tax.
>
> 5. A stay may be granted in a case of abuse of office by the Commissioner or extreme personal hardship to the taxpayer called on to pay.
>
> 6. The mere imposition of the obligation to pay does not constitute hardship.
>
> 7. The existence of a request for reference of an objection for review where appeal is a factor relevant to the exercise of the discretion."

[21] The criteria were confirmed by his Honour as relevant to the exercise of the discretion to grant or refuse a stay of execution in *Warrick* at [105].

[22] The relevance of "extreme personal hardship" to the exercise of the discretion is well established. In *Deputy Commissioner of Taxation (NSW) v Mackey* (1982) 13 ATR 547 Hutley JA expressed the opinion that the power to stay should be exercised with great caution and only in special circumstances. Nevertheless his Honour said (551):

> "The Commissioner starts off with rights under s 201 and the taxpayer is seeking special bases to have a special discretion exercised in his favour. It is not possible to work out in advance all possible bases for the exercise of such a discretion and it would not be proper even to attempt to do so. It is an open-ended discretion.
>
> But there are only two cases where it is clear the court should exercise that discretion. First the comparatively rare case where the Commissioner abuses his position … . Second, in cases of extreme personal hardship to a taxpayer called upon to pay. The obligation to pay which has been cast upon him by law is not a hardship of itself … ."

The passage was quoted with apparent approval by Kaye J (with whom King and Gobbo JJ agreed) in *Cywinski v Deputy Commissioner of Taxation* [1990] VR 193 at 197.

The section referred to, s 201 of the *ITA Act*, was to the same effect as s 14ZZR of the *TA Act*, which replaced it.

[23] In *Stjepovic* JD Phillips J said (at 4728):

> "That one who does have the means to pay should be required to pay a debt which, upon review, may be effectively cancelled must at least be inconvenient for the taxpayer … and it has been said (and repeated) that the mere obligation to pay which is created by the legislation is not in itself hardship. But where the alleged taxpayer does not have the assets to meet the claim, or at least does not have the assets without the destruction of his business activities or, perhaps, without the sale of something irreplaceable like a long-established family home, it seems to me much more probable that extreme personal hardship can be demonstrated … ."

[24] In *Deputy Commissioner of Taxation v Jennings* [2005] QSC 312 Philip McMurdo J said:

> "The stay applications are made pursuant to r 800 of the Uniform Civil Procedure Rules. That rule provides a broad discretion but the exercise of that discretion in this context, … where judgment is given for unpaid tax the original liability for which is challenged in other proceedings, is informed by a substantial body of case law. Particular considerations apply in relation to tax recovery proceedings because of the operation of ss 14ZZM and 14ZZR of the (*TA Act*).
>
> … the fact that a review of the assessment is pending does not affect the assessment and any tax may be recovered as if no review were pending. But as is common ground, the Court retains its power to stay a judgment in an appropriate case and the respective submissions accept that the relevant considerations were summarised by French J in *Snow* … .
>
> In some cases it might plainly appear that a taxpayer lacks any merit, in which case the demerit of his or her case would be a very important consideration. Save for those cases however, there will not be a justification for a rehearsal of the arguments involved in a pending review or appeal … .
>
> …
>
> The defendants each swear … that if the judgments are not stayed and they are made bankrupt, one consequence will be that they will be unable to continue to prosecute their challenges to the assessments presently before the Administrative Appeals Tribunal. …
>
> There is no suggestion by the Deputy Commissioner of Taxation that bankruptcy proceedings would not be pursued if the judgments were not stayed and in particular will not be pursued ahead of what seems to be the imminent hearing of the cases in the … Tribunal. I am persuaded that there is at least a real prospect that if the judgments are not stayed the defendants would be bankrupted and would be unable to continue to conduct their businesses with the likely cessation of those businesses ahead of the hearing of their cases in the … Tribunal.
>
> In the circumstances … those events … constitute what French J described in *Snow's* case as an extreme personal hardship … ."

His Honour ordered a stay.

[25] The appellant's counsel relies particularly on two further authorities: *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 and *Deputy Commissioner of Taxation v Ho* (1996) 32 ATR 269.

[26] The first case is not directly relevant. It did not concern an application for a stay of execution of judgment pursuant to a tax assessment pending the hearing of an appeal against the assessment. Rather it was concerned with whether the court could set aside a statutory demand for payment pursuant to s 459G of the *Corporations Act* 2001 on the ground that the debt, outstanding tax, due upon an assessment, was disputed because of the existence of an appeal. Gummow ACJ, Heydon, Crennan and Kiefel JJ held that by virtue of the provisions of *ITA Act* and the *TA Act*, in particular s 14ZZR of the latter Act, the debts were not disputed. Their Honours expressly approved what Bowen CJ in equity had said in *Deputy Federal Commissioner of Taxation v Roma Industries Pty Ltd* (1976) 6 ATR 54 at 57:

> "The next question which arises is whether the amount claimed by the Commissioner should be treated as a disputed claim … . In one sense … the Commissioner's claim is disputed, because appeals ... have been lodged. However, the provisions of s 201 … require me to treat the debt as in effect undisputed. Such a statutory provision may in some cases lead to hardship on a taxpayer, particularly where he has paid the amount of tax assessed and later wins his appeal … . This led Higgins J in *Hickman v Federal Commissioner of Taxation* … to describe it as 'Unjust and even baneful', but it remains … . It must be appreciated that from the point of view of the revenue it is a protection against that class of taxpayer who might withhold payment and use the money as the sinews of war to conduct appeals … and who, being finally unsuccessful, was found to be unable to meet his tax liability, having spent his money on the litigation."

[27] Their Honours went on (at 493):

> "It is true that s 459G provides for curial decisions to set aside statutory demands … . But the provisions of the taxation legislation, with an eye to which the statutory demand provisions clearly were drawn … supply sufficient reason for construing the statutory demand provisions as the Commissioner contends."

[28] It is noteworthy that the court recorded the Commissioner's "important concession", that upon the hearing of a winding-up application following non-compliance with the statutory demand "the court might properly have regard to whether the taxpayer had a 'reasonably arguable' case in proceedings" to challenge the assessments. In other words, notwithstanding the deemed insolvency established by non-compliance, the court might not order a winding-up where there was a reasonable prospect that the debt may be reduced or erased in consequence of the objection to the assessment.

[29] The facts in *Ho* are substantially similar, though not identical, to the facts in the present appeal. Ho had not put in any tax returns for a number of years. He had not appealed the default assessments though he indicated an intention to do so. He had insufficient assets to pay the amount of the assessments. Ireland J said (271-5):

> "It is now well-settled that this court has jurisdiction to stay proceedings instituted by the Commissioner to recover unpaid tax

which is due and owing: *DCT (WA) v Australian Machinery and Investment Co Pty Ltd* (1945) 20 ALJR 326; *DCT v Mackey*.

This power to grant a stay of proceedings is discretionary and should be exercised with great caution and only in special or exceptional circumstances: *Mackey* …; *Held v DCT (Vic)* (1988) 19 ATR 1213.

In exercising this discretion, however, great weight must be given to the terms of and intention and policy embodied by ss 14ZZM and 14ZZR of the (*TA Act*) ... ." (32 ATR 271).

…

It is now beyond dispute that a court will stay proceedings for the recovery of unpaid taxation if to refuse to grant a stay would cause extreme personal hardship to the taxpayer: *Mackey*; *Held* at ATR 1215. See also *DCT (Vic) v Enal Pty Ltd* (1988) 19 ATR 23 at 24; *DCT (Vic) v Ewen* (1984) 15 ATR 818 at 820; *DCT v Manners* (1985) 16 ATR 726 at 73.

It is trite to say, however, that the mere obligation to pay income tax of itself does not impose extreme personal hardship: *Mackey* at ALR 289; *Akers* at ATC 4727; *Snow* at ALR 693. (32 ATR 273).

…

The possibility that the taxpayer may be bankrupted is not of itself an extreme personal hardship: *Akers* at ATC 4727. Counsel … submitted that the consequent deprivation of the night (sic) or ability to object to the notices of assessment and appeal against any disallowance was the relevant hardship. …

In my view, however, if bankruptcy of itself is not sufficient hardship, the normal consequences of bankruptcy cannot effect a different result.

…

Whilst in proceedings not involving ss 14ZZM and 14ZZR it has been said that the loss of the 'fruits of an appeal' is a sufficient special circumstance justifying a stay of execution … the effect of ss 14ZZM and 14ZZR … must be to prima facie preclude such a result … . It is the express policy of ss 14ZZM, and 14ZZR that the Commissioner has a right to the assessed tax irrespective of the pendency of an appeal. …

A court exercising bankruptcy jurisdiction will ordinarily not proceed to sequestrate the estate of a debtor where an appeal is pending against the judgment relied upon as the foundation of the bankruptcy proceedings where that appeal is based upon genuine and arguable grounds: *Re*: *Verma*; *Ex parte DCT (NSW)* (1984) 4 FCR 181 at 184; *Ahern v DCT (Qld)* (1987) 76 ALR 137 at 148; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 … . The court must be satisfied that the debt is in fact due and owing. Where there is such a genuine dispute as to liability it is open to the court to adjourn the bankruptcy petition …

> The appropriate forum for consideration of the prospects of the applicant on appeal is thus the court having jurisdiction in bankruptcy and not this court in these proceedings."

[30] The appellant's submissions as to the manner in which the primary judge should have exercised the discretion rely heavily upon the remarks of Ireland J in *Ho*. It is for that reason that I quoted from the judgment at such length. Mr Looney, who appeared for the appellant, submitted that, really as a matter of law, bankruptcy and the loss of a right of appeal against the assessments which might flow from it, is not extreme personal hardship justifying a stay. With due respect I do not think this can be right. If it were, it is hard to imagine a case which might qualify for the designation. Whether or not the particular circumstances advanced as the basis for a stay of execution amount to extreme personal hardship is a question of fact and judgment, not of law.

[31] Philip McMurdo J in *Jennings* took a different view to that expressed in *Ho*. JD Phillips J in *Stjepovic* was prepared to find extreme personal hardship in the loss of all of the taxpayer's assets without the further loss of the right to challenge the assessment.

[32] The decision in *Ho* cannot, I think, be criticised. The fact that Ho had not sought to challenge the assessments in the two and a half years since they were issued was itself enough to refuse a stay. It was not really a case in which bankruptcy would deprive the taxpayer of his right of challenge. The taxpayer had never sought to exercise that right. The remarks relied upon are, therefore, *obiter dicta*.

[33] Mr Gibson QC, who appeared with Mr Roney for the respondents, advanced another criticism of the judgment. He pointed out that Ireland J moved from the proposition that the possibility of bankruptcy is not by itself an extreme personal hardship, to the proposition that actual bankruptcy which did deprive a taxpayer of a right of appeal he had begun to exercise, was not extreme personal hardship. Mr Gibson QC submits that there is a substantial difference between the two positions and it is not right to elide them.

[34] *Deputy Commissioner of Taxation v Akers* (1989) 89 ATC 4725, which was referred to, does not support the elision. Nathan J said:

> "I simply do not have material as to why payment now would impose any hardship, extreme or otherwise, upon the taxpayer. He does indicate the possibility of bankruptcy, but I have no material as to whether he would continue in employment, or he would be forced to leave a family home, or have insufficient funds to properly maintain himself or his family."

The case is far removed from one in which the result of a judgment debt in a tax assessment can be seen to lead inevitably or probably to bankruptcy with a further attendant loss of rights of appeal.

[35] Nathan J helpfully distilled a number of principles from the authorities:

> "… the following general propositions emerge: (1). The Court's inherent jurisdiction to grant a stay is not vitiated by the terms of sec 201, but that discretion must be exercised in a way which gives the policy directions of the 'pay first, argue later,' provision effect. The discretion is dependent entirely upon the facts of a given

> situation, and they can never be defined. The discretion is circumscribed by sec 201. The onus is upon the applicant to establish the discretion should be exercised in his favour. (2). The Court should not go into the issues in dispute, but should apprise itself of such facts as will enable it to determine the nature of the dispute. It should not speculate upon the outcome. (3). The obligation to pay tax, does not of itself impose extreme personal hardship. (4). The possibility that the taxpayer may be bankrupted is not of itself an extreme personal hardship."

[36] In my respectful opinion this summary of the principles is both comprehensive and accurate and is likely to provide valuable assistance in the exercise of the discretion whether or not to grant a stay in this class of case. The principles do not support the remarks in *Ho*.

[37] It is to an extent unfair to subject that decision to such minute scrutiny and criticism. It was a decision at first instance about the grant or refusal of a stay of execution. It turned, as Ireland J recognised, on the facts of the case and well established principles. It has been necessary to discuss it at such length only because it is the cornerstone of the appellant's argument. What was said in the case probably went further than its facts necessitated.

[38] It is time now to return to the appellant's arguments. When considering them one must bear in mind that the appeals are brought against orders made by the primary judge pursuant to the power found in *UCPR* 800. That rule provides that a court may, on the application of a person required to pay money under an order, stay the enforcement of all or part of the order and make such order as the judge considers appropriate. The power therefore confers a wide discretion upon a judge. The appeals are therefore to be assessed by reference to the principles laid down in *House v The King* (1936) 55 CLR 499. Before an appellate court can interfere the primary judge must have acted on some wrong principle of law or on some mistaken view of the facts, whether by taking an irrelevant factor into account or ignoring a relevant one; or the existence of error may be inferred from the exercise of discretion which is in the circumstances unjust or unreasonable.

[39] The first part of the argument, as I mentioned, is the submission that the primary judge failed to afford sufficient weight to the policy of the *ITA Act* and *TA Act* that, in Nathan J's neat aphorism, the taxpayer should "pay now and argue later." The judgment is not amenable to that criticism. The primary judge clearly had regard to the principle. Her Honour expressly referred to it and noted that, as a consequence, stays of execution were to be given "sparingly".

[40] The appellant's complaint that the principle is given insufficient weight comes down to an assertion that the principle overwhelms all other considerations, or that, in the circumstances of this case, to grant the stay was an exercise of discretion so unreasonable as to indicate error.

[41] The first proposition cannot be accepted. There will be no occasion for the grant of a stay if the only consideration is the Commissioner's right to recover judgment debts for unpaid tax. Yet the authorities make it abundantly clear that there is a power, in appropriate circumstances, to stay the execution of a judgment notwithstanding the terms of s 14ZZR. See e.g. *Clyne v Deputy Commissioner of*

Taxation (1983) 57 ALJR 673 at 674 per Gibbs CJ and *Australian Machinery & Investment Co Ltd v Deputy Federal Commissioner of Taxation* (1945) 8 ATD 133 at 135 per Latham CJ. The existence of the power is expressly acknowledged in some of the other cases which I have quoted. The appellant's submissions seek to erase the power, and should not be accepted for that reason.

[42] The second proposition can await discussion until the other criticisms of the judgment have been discussed.

[43] The second complaint was that the primary judge wrongly concluded that bankruptcy was "highly likely" to follow the judgments, if no stay were granted. I have outlined earlier the basis for the criticism, which fails because the appellant misreads the judgment. Her Honour did not ignore the possibility that a federal judicial officer might refuse to sequestrate the respondents' estates because of the prospect that the appeals against the assessments might succeed. Her Honour expressly mentioned that possibility.

[44] When her Honour said:

> "I consider that bankruptcy is highly likely, although there is clearly a discretion as to whether bankruptcy will follow and that will depend on the merits in many cases of any appeal. It would seem to me that a bankruptcy in the present case is highly likely and, indeed, … there is no suggestion by the (appellant) that bankruptcy proceedings would not be pursued if the judgments were not stayed",

she was saying no more than bankruptcy proceedings were highly likely, though bankruptcy might not ensue, depending upon what a federal judicial officer thought of the prospects of the appeals' success. That assessment was entirely correct. To read the judgment otherwise is to make it self contradictory, and do less than justice to what her Honour said.

[45] It was, I think, common ground that the mere possibility of bankruptcy following a judgment would not amount to extreme personal hardship. Unless, therefore, there was evidence to support a finding that bankruptcy was highly likely, or probable, in the absence of a stay, it could not be said that the judgments would result in the requisite degree of hardship.

[46] In my opinion the evidence justified the finding. The appellant moved for judgment at a time when the respondents' appeals were progressing through the Federal Court. The appellant declined to offer any undertaking that he would not proceed to bankruptcy pending the hearing of those appeals. The inference that the appellant will commence bankruptcy proceedings is more than fairly raised.

[47] Next the appellant contends that the likelihood of bankruptcy was not sufficient to justify the stay. The submission was that the outcome of any bankruptcy proceedings would be determined by a federal court which might not order sequestration because of the pendency of the appeals. A court exercising federal jurisdiction, Mr Looney submitted, was the proper forum to determine whether the judgment should result in bankruptcy. It is the point made by Ireland J in *Ho*. The Supreme Court, it was urged, should not pre-empt that jurisdiction by granting a stay of execution because it could not in most cases, and should not in any event, embark upon an assessment of the merits of any appeal.

[48] I would reject the submission. It seeks to deprive the Supreme Court altogether of its power to stay execution in appropriate cases. The effect of the submission is that only a federal judicial officer can stand between a judgment debtor indebted to a Deputy Commissioner, and bankruptcy. But the Supreme Court's power to stay such judgments is undoubted. While the power should be exercised "sparingly" or "with great caution" it is a power that can be exercised in appropriate circumstances. It is not to be surrendered.

[49] It should not be overlooked that bankruptcy is not the only avenue open to the appellant to obtain satisfaction of the judgments. Absent the stays the appellant can enforce the judgments by any of the means of execution provided for by the *UCPR*. He has already exercised powers given him by the *ITA Act* and *TA Act* to recover money from the respondents. He has issued garnishee orders. There is no reason to suppose that the appellant is not aware of his rights, or is not prepared to exercise them. Although the primary judge's reasons referred only to the likelihood of bankruptcy, it is, I consider, equally likely that the appellant might move to satisfy the judgments by execution, in the absence of the stays.

[50] This leads to the appellant's third point, that the loss of their property and consequent inability to prosecute their appeals does not constitute extreme personal hardship. The point may be answered shortly. It is preposterous to contend that the loss of the respondents' entire estate, and with it any chance of demonstrating that the basis for the assessments was wrong so that they should not have lost their property, could not be a hardship rightly called extreme. It is not easy to imagine a greater hardship in this context. Certainly the primary judge cannot be criticised for so regarding it.

[51] The appellant's individual complaints are without substance. It has not demonstrated that the primary judge mistook the law or the facts. That leaves for consideration the contention that the exercise of discretion to grant the stays was so unreasonable as to indicate error, in particular failing to accord sufficient weight to the legislative scheme.

[52] The context in which the discretion was exercised was that:

(a) The appellant sought summary judgment a year after proceedings against the respondents were commenced.

(b) When the application for summary judgment was made the respondents' appeals in the Federal Court were progressing to a hearing.

(c) Should the appellant levy execution to satisfy the judgments, or proceed to bankrupt the respondents, they will lose their entire estates, including their home.

(d) In that event they will be unable to prosecute their appeals and forever lose any chance of demonstrating that the assessments were wrong.

(e) There was no evidence that the respondents' assets were in jeopardy or that the Commissioner could not liquidate them if the appeals fail.

(f) The appeals are to be heard in September, a fact I assume known to the primary judge when the order for the stay was extended last June.

[53] In these circumstances it cannot be said that the discretion miscarried, or that the weight to be given to the legislative scheme in the exercise of the discretion should have overwhelmed the other considerations. Respecting the proposition that stays in cases of this kind should be ordered rarely, it was a case which the primary judge could regard as appropriate for a stay.

[54] In my opinion the challenge to the primary judge's exercise of discretion fails. The appeals should be dismissed with costs.