SUPREME COURT OF QUEENSLAND APN No 342 of 1993

CIVIL JURISDICTION

WILLIAMS J

STATE BANK OF NEW SOUTH WALES LIMITED Applicant

and

COMMISSIONER OF STAMP DUTIES Respondent

BRISBANE

..DATE 16/11/93

JUDGMENT

HIS HONOUR: In this matter I have prepared reasons for judgment which I publish. For those reasons the application will be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND APN No. 342 of 1993

Brisbane

Before Mr. Justice Williams

[State Bank of NSW & Commissioner Stamp Duties]

BETWEEN

STATE BANK OF NEW SOUTH WALES LIMITED Applicant

and

COMMISSIONER OF STAMP DUTIES Respondent

JUDGMENT - WILLIAMS J.

Judgment delivered 16th November, 1993

CATCHWORDS:

Stamp Duty - acquisition of business - meaning of acquisition - power of Commissioner to amend assessment - sections 54A and 80 of Stamp Act considered.

Judicial Review - sections 4 and 21 of Judicial Review Act considered - held court had jurisdiction to review decision of Commissioner not to amend assessment.

Counsel: Russell Q.C. and Alexander for applicant.
Dorney Q.C. and Flanagan for respondent.
Solicitors: Clayton Utz for applicant.
Crown Solicitor for respondent.
Hearing Date: 7th October, 1993

IN THE SUPREME COURT OF QUEENSLAND APN No. 342 of 1993

BETWEEN

STATE BANK OF NEW SOUTH WALES LIMITED Applicant

and

COMMISSIONER OF STAMP DUTIES Respondent

JUDGMENT - WILLIAMS J.

Delivered the 16th day of November, 1993

This is an application pursuant to s. 20(1) of the Judicial Review Act 1991 for the review of a decision made by the respondent, Commissioner of Stamp Duties, on or about 23rd February 1993 not to amend his assessment made on 24th April 1991 whereby the applicant, State Bank of New South Wales Limited, was obliged to pay Queensland stamp duty amounting to $164,538.75 on the vesting in it of

certain assets situated in Queensland. That assessment was made pursuant to s. 54A of the Stamp Act 1894. The applicant had sought review of the original assessment pursuant to s. 80 of the Stamp Act.

The applicant did not pursue before me that part of the application concerned with the giving of a Statement of Reasons.

In canvassing the relevant background it is necessary to refer to certain New South Wales legislation. By the State Owned Corporations Act 1989 the New South Wales parliament legislated to provide that a company limited by shares should become a State owned corporation upon its name being inserted in Schedule 1 to that Act. Relevantly s. 7 then provided:—

> "(1) Assets and liabilities of ... an authority of the State . . . may be transferred to a State owned corporation ...
>
> (2) The regulations under this Act may make provision for or with respect to the transfer of any such assets or liabilities to a State owned corporation . . .
>
> ...
>
> (4) This section does not apply to assets and liabilities of a statutory corporation unless:
>
> (a) The assets and liabilities can be transferred to a State owned corporation apart from this section ..."

Subsequently the New South Wales parliament passed the State Bank (Corporatisation) Act 1989. Prior to that date the State Bank of New South Wales, (hereinafter referred to as the State Bank) constituted under the State Bank Act 1981, had carried on banking business. Section 4 of the State Bank (Corporatisation) Act provided that the words "State Bank of New South Wales Limited" should be inserted

in Schedule 1 of the State Owned Corporations Act 1989. Section 5(1) of the State Bank (Corporatisation) Act provided that the State Bank of New South Wales Limited (therein and herein referred to as the Corporation) should be "constituted by this Act as a bank". Then Section 9 of that Act made detailed provision for the transfer of assets, rights and liabilities of the State Bank to the Corporation. The relevant provisions of s. 9 are the following:—

> "(1) The Minister may, by order in writing, direct that the business undertaking of the State Bank be transferred to the Corporation upon such consideration as is specified in the order.
>
> (2) The transfer of assets, rights and liabilities under this section is to take place at a value or values specified in the order.
>
> (3) On the commencement of the order the following provisions have effect (subject to the order):
>
> (a) The assets of the State Bank comprised in its business undertaking vest in the Corporation by virtue of this section and without the need for any conveyance, transfer, assignment or assurance;
>
> (b) The rights and liabilities of the State Bank comprised in its business undertaking become by virtue of this section the rights and liabilities of the Corporation;
>
> ..."

The only other provision of that Act that need be mentioned is s. 11(1) which provided that the "State Bank is dissolved"; that means dissolved on and from the date on which the Act was proclaimed to commence.

As is evidenced by its Certificate of Incorporation the Corporation was incorporated on 29th March 1990. Then

on 14th May 1990 the State Bank (Corporatisation) Act was proclaimed.

The ministerial order, pursuant to s. 9 of the State Bank (Corporatisation) Act was made on 8th May 1990 and it had effect on and from 14th May 1990. The relevant paragraphs of that order for present purposes are the following:—

> "(a) the business undertaking of the State Bank, namely all assets, rights and liabilities thereof, be transferred to the Corporation, being the universal successor of the State Bank, upon the commencement of this Order;
>
> (b) the value of each asset, right or liability comprised in the business undertaking so transferred is to be the value attributed to such asset, right or liability in the Financial Statements of the State Bank prepared as at 31 March 1990 in accordance with accounting principles applicable to a commercial bank and certified by the Auditor-General.

On 18th May 1990 the applicant's then solicitors wrote to the respondent raising a number of queries consequent upon the dissolution of the State Bank and the incorporation of the applicant. It was implicit in that letter that the former State Bank carried on banking business in Queensland, and had assets in Queensland, and that the Corporation would succeed to those assets and that business. One of the questions raised therein was as to: "any liability which you consider may arise as a result of the passing of the business undertaking to" the applicant. The letter went on to assert that "a liability to stamp duty in Queensland should not arise" and indicated a willingness to discuss that particular issue.

The reply of the respondent dated 14th June 1990, so far as is relevant, was as follows:—

> “It is considered that upon commencement of the order given by the Minister pursuant to section 9 of the State Bank (Corporatisation) Act 1989 the business previously conducted by the State Bank of New South Wales has been acquired by the State Bank of New South Wales Limited and-stamp duty under section 54A of the Stamp Act will be payable on the value of the assets taken over.
>
> You are therefore required to furnish a copy of the ministerial order showing the date of commencement, any other documents executed, closing Balance Sheet of the bank, duly completed form S(a) and evidence of value of assets, including goodwill, where applicable.”

The applicant's solicitors replied by letter of 17th July 1990, contending that there had been no “acquisition of a business” and therefore no liability for stamp duty pursuant to s. 54A. The letter also contended that there was “no change of ownership in relation to the business”. The latter statement was made because the “Bank in effect is an alter ego of the State of New South Wales and there is nothing akin to a transfer of assets in terms of a vendor/purchaser situation.”

The respondent did not agree with those contentions and said so in a letter of 8th August 1990. In part it said: “The assets of the bank, previously owned by the State or an authority of the State are now the property of the Corporation, a separate legal entity under the control of a board of directors and the voting shareholders.”

There followed some discussions between officers of the parties but they were concluded by the respondent's letter of 2nd April 1991 which required the lodging of a “Form S(a) without further delay”. That form was lodged by the applicant's solicitors under cover of a letter dated 15th April 1991. A copy of that form is amongst the exhibits. Some amendments were made to the standard form used, and the material parts of that document as lodged are the following:—

“1. That on the 14th day of May 1990 State Bank of New South Wales Limited acquired or agreed to acquire an

interest in a business conducted in New South Wales and elsewhere in Australia and overseas described as State Bank of New South Wales.

2. That the attached statement truly sets out full details of all assets including leases, tenancies and licences appertaining to, or in any way connected with the business which were acquired or agreed to be acquired from the owner whether the same were included in the transaction whereby the business was acquired or agreed to be acquired or were the subject of a separate transaction or several separate transactions ...

3. That the apportionment set out in the attached statement is the true value of each item ...

5. ... Both vendor and purchaser are one hundred per cent owned by the State of New South Wales.

6. That no agreement in writing has been entered into in relation to the acquisition of the business. Transfer was effected pursuant to State Bank (Corporatisation) Act, 1989."

Attached to that was the statement giving values of the assets in question. Again one finds the expression "acquiring the business" (or a variant thereof) used throughout. The following statement was inserted into the standard form document:—

> "All assets and liabilities were acquired by virtue of State Bank (Corporatisation) Act 1989."

There were then set out details of assets in Queensland and their value; it need only be said that the total value of the "interest acquired" was said to be $4,461,686.

On the basis of that Form S(a) the respondent assessed duty on 24th April 1991 in the sum of $164,538.75. That

appears from ex. 2, which also shows that duty was paid on 7th May 1991.

An amendment was made to the State Bank (Corporatisation) Act 1989 by Act No. 34 of 1992, assented to on 18th May 1992. By that amending Act s. 11A was inserted into the principal Act; it provided:—

> "On and from the dissolution of the State Bank, the Corporation is for all purposes a continuation of and the same legal entity as the State Bank."

As the Explanatory Note to that section indicates, the amendment was designed to make it clear that the applicant was the "universal successor of the former State Bank of New South Wales for all purposes."

The next material step was the letter of 1st December 1992 from the applicant's solicitors to the respondent. It referred to the assessment of 24th April 1991 and payment thereof on 7th May 1991. So far as is relevant that letter stated:—

> "The assessment arose as a result of the corporatisation of the Bank pursuant to Section 9(3) of the State Bank (Corporatisation) Act ("the Act"). The Act was a mechanism by which the corporatised Bank was empowered to fulfil the functions of and assume the assets and liabilities of the former agency of the State Government.
>
> Although at the time, our client held doubts as to basis for the assessment, the Bank was concerned to ensure compliance with all relevant Queensland legislation to achieve a successful corporatisation of the Bank. This was demonstrated by the Bank's instructions to us within days of the promulgation of the Act to consult you in relation to your requirements. Notwithstanding our client's doubts as to your interpretation of the effect of the Act, we were instructed to provide you with all information requested by you including the Statement pursuant to Section 54A(2).
>
> On 19 May 1992 the New South Wales Parliament amended the Act. . . . The Section 11A amendment is declaratory in

its effect and deems the corporatised Bank to be a continuation of and the same legal entity as the Bank.

We now invite you to revisit your assessment having regard to one or both of the following submissions:

...

In summary, we submit that the assessment pursuant to Section 54A is erroneous in law having regard to the following:—

(a) There is no identifiable acquisition given that the corporatised Bank is simply a continuation of the former State agency;

(b) Any purported acquisition would be a nullity and not dutiable . . .

(c) Even if it could be said that the Act results in an acquisition, it would not be an acquisition dutiable under the Stamp Act on the authority of the Westpac case.

Accordingly, we request that the assessment be amended with the result that no duty is payable and that the duty already paid be refunded in full. ...”

The reference” therein is to Westpac Banking Corporation v. Commissioner of Stamp Duties (Old) (1992) ATC 4571.

The respondent replied by letter dated 23rd February 1993 stating, so far as is relevant:—

“Your conclusion that the assessment pursuant to Section 54A is erroneous at law based upon submissions (a)(b) and (c) is not accepted and my assessment dated 24 April 1991 will stand.

Notwithstanding the non-acceptance of your submissions it is pointed out that no competent appeal was lodged against the assessment and the Commissioner has no power to make any reassessment of the duty on the Form S(a) under Section 80 of the Stamp Act.”

The relevant provisions of s. 54A of the Stamp Act are as follows:—

> "(1) An acquisition or agreement to acquire a business shall, for the purposes of this section, be deemed to include all goods . . . and other movable chattels, and all leases, tenancies and licences, and the goodwill appertaining to the business, which are acquired or agreed to be acquired from the owner of the business whether the same are included in the transaction by which the business is acquired or agreed to be acquired or are the subject of another transaction or other transactions.
>
> (2) Every person who acquires or agrees to acquire a business that exists in Queensland shall, within one month after he does so, deliver to the Commissioner a statement in duplicate in the prescribed form verified in the prescribed manner and showing the prescribed information.
>
> ...
>
> (5) A statement under subsection (2) . . . . shall be charged with duty under this Act as if it were a conveyance or transfer of the property to which the statement relates for a consideration equal to the full unencumbered valued of such property and the person delivering that statement shall be liable accordingly.
>
> ...
>
> (7) ... For the purposes of this section the expression 'acquisition of a business' and 'agreement to acquire a business' include any transaction or transactions by which, although the whole of the assets of a business are not acquired or agreed to be acquired, sufficient of those assets are acquired or agreed to be acquired to enable the person acquiring the same to carry on the business."

Section 49C of the Act grants relief from payment of duty under the heading “Conveyance of Transfer” consequent upon a company reconstruction or amalgamation which is covered by the requirements of that section. That provision does not avail the applicant here. Also the exclusion of the situations defined in paras (v) to (viii) from the payment of duty under the heading “Conveyance or Transfer” as provided for by s. 49(1) might not prevent the respondent from assessing duty in those situations under s. 54A. That is not strictly relevant for present purposes, and it may be no more than another illustration of incompetent drafting which pervades this particular legislation (cf. Carnation Australia Pty. Ltd. v. Commissioner of Stamp Duties (1993) 93 ATC 4486, especially per Davies J.A. at 4500).

Finally the relevant provisions of s. 80 should be noted:—

> “(1) The Commissioner may, subject to this section, at any time amend any assessment by making such alterations or additions thereto as he considers appropriate, notwithstanding that duty may have been paid in respect of the assessment.
>
> ...
>
> (3) No amendment to an assessment effecting a reduction in the amount of duty assessed on any instrument or statement shall be made except to correct an arithmetic error in the calculation of an assessment or to correct an assessment made under a mistake of fact; and no such amendment shall be made after the expiration of two years from the date upon which the duty under the assessment made in the arithmetic error or under mistake of fact became due and payable.
>
> ...

(5) Subject to subsection (6) nothing in this section shall prevent the Commissioner in his absolute discretion from amending, by a reduction in duty, an assessment within two years of the date upon which the assessment was made where he is satisfied that the assessment was not made in accordance with the interpretation which he determines was his consistent interpretation of the application of the Act to instruments of that particular kind at the time at which the assessment was made.

...

(7) The Commissioner shall refund any duty paid on the assessment in excess of the amount of the reassessment as amended pursuant to this section."

The form referred to in s. 54A(2) is, on the respondent's case, the Form S(a) to which reference has already been made. If that is so then, as subsection (5) makes clear, the duty is assessed on that statement (Carnation Australia Pty Limited v. Commissioner of Stamp Duties). But counsel for the applicant has contended that Form S(a) is not the "prescribed form" for purposes of s. 54A(2). His submission is that when the legislation, including the Regulations and Forms, is considered carefully there is no "prescribed form" and in consequence the document in fact lodged by the applicant here was not exigible to duty under s. 54A(5). The argument is based on regulation 14A which is in the following terms:—

> "The statement to be delivered in duplicate to the Commissioner by a person who purchases or agrees to purchase any business pursuant to the provisions of sub-section (2) of Section 54A of the Act shall be in the form of Form S(a) of the Schedule hereto."

It is said (and this can be accepted for purposes of the argument) that the term "purchase" is considerably narrower than the word "acquire" and that in the circumstances of this case there was neither a purchase nor an agreement to

purchase. If regulation 14A was the only relevant provision then there may be some basis to the argument. But in my view the submission entirely overlooks the most critical regulation, namely regulation 4, which provides: “All applications for stamps shall be made on the prescribed forms of requisition (as shown in the Schedule hereto), which may be obtained at any Stamp Duties Office.” That is the regulation which actually prescribes forms; there is no prescription in regulation 14A. Form S(a) is found in the Schedule specified in regulation 4. Importantly that form is headed “Statement and Verifying Affidavit Pursuant to Section 54A(2) relating to the Acquisition of a Business”. It is by operation of regulation 4 and the form itself, that Form S(a) is identified as the prescribed form for purposes of s. 54A(2). If regulation 14A adds anything, it is only by way of making it abundantly clear that where there is a purchase or agreement to purchase any business then that is the form that must be used.

For those reasons I reject that argument of the applicant. It is not entirely clear what would be the present consequences of the court now upholding the applicant's argument, but there is no need to embark upon a consideration of the problems which might be raised. Assuming s. 54A(2) applied to the transaction the applicant was obliged to submit the prescribed form, namely Form S(a).

It now seems clear that the decisions of the respondent of 14th June 1990 and 2nd April 1991 requiring the applicant to lodge a Form S(a) would have been reviewable under the Judicial Review Act if it had then been in force. (See Westpac Banking Corporation v. Commissioner of Stamp Duties (1993) 93 A.T.C. 4317 per Ryan J.; and Court of Appeal, (1993) 93 A.T.C. 4335). But all that in fact happened was that the applicant lodged the prescribed form and the respondent assessed duty on it. There was then no appeal from the assessment and the duty was paid within the month.

The critical question is whether the assessment should have been amended by the respondent pursuant to s. 80. This is not a case where the respondent was asked to correct an arithmetic error in calculation, and the applicant, in order to bring itself within the terms of s. 80(3), must show that the assessment was “made under a mistake of fact”. Payment of the duty assessed on 24th April 1991 had to be made within 1 month [s. 26(3)(f)] and in consequence the request for amendment made by the letter of 1st December 1992 was within the time limit prescribed in s. 80(3).

As noted above the respondent's decision on that application for amendment of the assessment was contained in the letter of 23rd February 1993. In summary the respondent decided that the applicant had not established that the original assessment was “erroneous at law” and further that the respondent had “no power to make any reassessment of the duty on the Form S(a) under s. 80 of the Stamp Act”. The applicant contends that was a “decision of an administrative character made .... under an enactment” for purposes of ss. 4 and 20(1) of the Judicial Review Act. Certainly the “decision” was one for which provision was made by the Stamp Act. Further, it was a “decision” which was final and determinative, in a practical sense, of the issue falling for consideration. Finally, it was clearly a substantive (as opposed to procedural) determination. It therefore meets the criteria referred to by Mason CJ in Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321 at 337. I cannot accept the respondent's contention that there was no decision, but merely an expression of opinion. The Stamp Act does not provide any procedure for the review of a decision refusing to amend an assessment pursuant to s. 80, and in consequence ss. 12(b) and 13(b) of the Judicial Review Act would not require this court to dismiss the application for statutory review on the grounds therein provided. I am therefore prepared to hold that the decision of the respondent refusing to amend an assessment pursuant to s.

80, where that section is called into play, is reviewable under the Judicial Review Act.

The applicant contends that it has established “mistake of fact” for purposes of the provision. Essentially it submits that the material establishes the following mistakes of fact:

(a) at all times for purposes of the transaction the applicant and the State Bank were a single entity and the respondent acted on the mistaken fact that two separate entities were involved;

(b) the failure of the respondent to recognise that only one entity was involved in the transaction meant that he acted under a mistake of fact in making the assessment;

(c) in any event the transaction did not constitute the acquisition of a business and there was a mistake of fact on the respondent's behalf in holding to the contrary;

(d) even if there was the acquisition of a business the respondent erred in fact in determining it was an acquisition which attracted duty;

(e) the operation of New South Wales law in Queensland, being the operation of foreign law, is a question of fact, and the respondent made errors of fact in determining the scope of operation and/or the meaning of the relevant New South Wales legislation.

By the respondent's decision of 23rd February 1993, he concluded that no “mistake of fact” had been established; effectively that is what was meant by the statement that “submissions (a), (b) and (c)” were “not accepted”.

Two questions now fall for consideration. Firstly, is the application to this court for review based on one or more of the grounds set out in s. 20(2) of the Judicial

Review Act, and secondly, if the application is so based whether the decision was incorrect and should be set aside.

I have come to the conclusion that the decision is reviewable because in essence the applicant's case is that the respondent erred in law in holding as a fact that two entities were involved in the transaction, whereas (on the applicant's approach) there was only one. That appears to be at the heart of the application, and it is that point which must be addressed.

Much time in argument was spent with a consideration of how the respondent and this court should apply the applicable New South Wales legislation. Reference was made to principles of private international law and to s. 118 of the Commonwealth Constitution. In the end result I do not find it necessary to consider those arguments in detail. The critical provision is s. 11A of the 1992 Amendment Act. The relevant date was 14th May 1990. It will be remembered that the applicant was incorporated on 29th March 1990, and so when the ministerial order was made on 8th May 1990 there were certainly two separate entities then in existence. That order had effect on and from the 14th May, the date on which the State Bank was dissolved. Nothing in s. 11A detracts from the use in s. 7 of the State Owned Corporations Act, in s. 9 of the State Bank (Corporatisation) Act, and in the ministerial order of 8th May 1990, of the term “transfer” (or one of its derivities) in describing the process whereby the applicant succeeded to the assets of the State Bank. It is important to note that s. 11A says nothing about the vesting of assets at all. That is expressly provided for in s. 9 of the State Bank (Corporatisation) Act, and that is not amended by anything in the 1992 Act. The new s. 11A can be read with all of the provisions of the principal Act without making any modification to the vesting provisions provided therein.

What s. 11A makes clear is that once the State Bank has been dissolved, and all its property has vested in the

Corporation, then for all future legal and business considerations the Corporation is to be regarded as the same legal entity as the State Bank. In other words when dealing with matters and events which occurred prior to 14th May 1990 there was no legal or commercial necessity to refer to the earlier State Bank by name. Once the vesting of property had occurred then for legal purposes it was sufficient to refer to the Corporation alone as it if had been at all material times the only entity.

But that does not mean that there was not a transaction involving two entities and the acquisition of a business involving, the passing of property from one to the other for purposes of Queensland stamp duty law.

As I have already said the New South Wales legislation and the ministerial order consistently refer to the applicant acquiring the property of the State Bank by way of transfer. The language of the sections to which I have referred, and the ministerial order, indicate that there were two parties to the transaction. Further, and this is important because it is on the document that duty is assessed, the Form S(a) lodged by the applicant used express language admitting the existence of two separate entities and a transfer of assets. The expression “acquiring the business” (or a similar expression) was used on one or more occasion. But true it is that the document also stated that the “transfer” was effected pursuant to the State Bank (Corporatisation) Act and that all “assets and liabilities were acquired by virtue of” that Act. In those circumstances counsel for the applicant submitted that in fact there was no acquisition of a business for purposes of s. 54A. His main contention was the s. 54A required a voluntary act by the acquirer; the section would not apply to an involuntary acquisition. Another variation of that submission was the proposition that the section required “a mutual dealing transaction” before there could be an acquisition. Counsel for the respondent argued to the contrary; an acquisition could be a “purely passive matter”.

A similar problem came before the Full Court of the Federal Court in Allina Pty. Ltd. v. Commission of Taxation (1991) 28 F.C.R. 203. The taxpayer held shares in a company which, as part of the restructuring of its business, created a subsidiary. The subsidiary issued renouncible rights in shares to shareholders of the parent company. The taxpayer sold its rights. The question in issue was whether or not the taxpayer had obtained a capital gain which was taxable. The Commissioner submitted that this was not a case where the taxpayer had "acquired the asset from another person" so as to render it, in all the circumstances, non-taxable. The court (Lockhart, Burchett and Gummow J.J.) considered at some length the concept of acquisition of an asset; the following extracts from the judgment are of relevance:—

> "It was argued on behalf of the Commissioner ... that it is incorrect to speak of acquiring shares or rights 'from' the company that issues them; the rights were not previously in existence and could not been said to have been acquired from BHP Gold... His Honour accepted the argument advanced on behalf of the Commissioner, the essential element in his reasoning being that upon the proper construction of s. 160ZH(9)(a) a taxpayer cannot be regarded as having acquired an asset from another person unless there is a corresponding disposal of that asset by the other person to the taxpayer . . .
>
> The verb 'to acquire', according to its ordinary and natural meaning denotes in our view to obtain, gain or get something. The first meaning given in the Oxford English Dictionary (2nd ed.), is:—
>
> 1. To gain, obtain or get as one's own, to gain the ownership of (by one's own exertions or qualities).'
>
> The second meaning is:—
>
> "2. To receive, or get as one's own (without reference to the manner), to come into possession of.'
>
> The Macquarie dictionary gives a similar definition. There must be something in existence that can be obtained or gained; but the word is apt to encompass the case where one person creates an asset which at the same time

> comes into the possession of or is obtained by another person. Some examples are helpful. Where an owner of property grants an option to a person to purchase it the owner does not own the option before he creates it, it is created by the owner and at the very same time it is acquired by the grantee. Yet, according to the ordinary meaning of the word ‘acquire’ it is clear that the option was acquired by the grantee from the owner of the property . . .
>
> But, as has already been shown, property can be acquired by one person without there being any disposition of that property by another person. The allotment of shares is an act of the company, the capital of which is the source of the allotment. The allottee in ordinary parlance acquires the shares from the company. The transaction falls within the first meaning of the word ‘acquire’ in the Oxford English Dictionary of gaining, obtaining or getting as one's own or gaining the ownership of. Also, as was observed by Cohen L.J. who delivered the judgment of the Court of Appeal of England in Congreve v. Inland Revenue Commissioners (1947) 1 All E.R. 168, 173; affirmed (1948) 1 All E.R. 948:—’
>
> ‘... as used by lawyers the word ‘acquired’ has long covered transactions of a purely passive nature and means little more than receiving. Indeed, that is the second ordinary meaning given in the Shorter Oxford Dictionary’.” (207-211)

In consequence the court held that the rights had been acquired, even though there had not been a disposition of them by the issuing company. (As to the meaning of “acquired” see also the general observations of Winn L.J. in Kingsley v. Stirling Industries Securities Ltd. (1967) 2 Q.B. 474 at 785).

In my opinion that approach should be applied to the word “acquisition” in s. 54A. What is required is that an entity obtains or gets something (which here can be classified as a “business”) and it is not to the point to consider whether or not that entity played an active or passive role in getting the property.

In this particular case in the light of the totality of the New South Wales legislation, and on the face of the Form S(a), there was a transfer of property on 14th May 1990. Prior to that date the applicant had no relevant property; after that date it had property which was relevant for stamp duty purposes. I am satisfied that the respondent did not act under any mistake of fact in concluding that what occurred on that date constituted an acquisition of property. It was not seriously argued in this court that if there was an "acquisition" it was not an "acquisition of a business" for purposes of s. 54A; in any event the respondent was entitled to act upon the statement to that effect in para. 1 of the Form S(a) lodged by the applicant.

The next submission advanced on behalf of the applicant was that the imposition of duty constituted an enactment of tax upon a statute of another Australian State. The Court of Appeal had to deal with such a problem in the Westpac case: (1992) 92 A.T.C. 4571. That decision arose out of a privatisation agreement between the Commonwealth and Westpac to enable the latter to take over the assets and assume the liabilities of the Defence Service Homes Corporation, a government agency. The implementation of the agreement was subject to and conditional upon the passage of the Defence Service Homes Amendment Act 1988 (Cth). The agreement had provided that the assets were to vest in Westpac by operation of the Act. It is not necessary to refer to the reasoning of the Court of Appeal in detail. The judgments stressed the fact that it was the Act that vested the property in Westpac; nothing else was done or needed to be done in order to achieve that result. There the Commissioner sought to treat the transaction as a conveyance or transfer of property. Those expressions, by definition, included "every instrument and every decree or order of a court . . . whereby property is vested, without an instrument of conveyance, transfer or assignment, in any person." The term "instrument" included a "written document". Pincus J.A. and Demack J. at 4578 observed that the language was "wide enough to include a

statute of the Commonwealth Parliament". But they went on to say:—

> "It is, however, an improbable intention to attribute to a State Parliament that it professes to exact tax on written documents being statutes of another Australian Parliament. It is difficult to suppose that the Queensland Parliament intended to exact conveyance duty, where such a statute vests property, on the statute itself. Leaving aside any question of constitutional power, one would need more explicit words to justify a conclusion that the Queensland Parliament imposed a tax on the legislative activities of the Commonwealth".

Arguing from that counsel for the applicant submitted that here s. 54A should not be construed as empowering the respondent to impose tax on the legislative activities of the New South Wales Parliament.

Counsel for the respondent, correctly in my view, submitted that the reasoning in the Westpac case can be distinguished. There is no question here of the imposition of duty on all or any of the New South Wales statutes. Consequent upon the passing of those statutes events occurred in Queensland which entitled the respondent to call upon the applicant to lodge a Form S(a). The applicant in fact did so, and the duty was assessed on that document. In those circumstances it is not to the point, in my view, to say that the transaction in Queensland was consequential upon or derivative from New South Wales legislation. Section 54A enabled the respondent to exact stamp duty upon the happening in Queensland of a transaction of a particular type. When such a transaction takes place the parties thereto must lodge a Form S(a) and the duty is then assessed on that form.

The operation and construction of the statute law of another State in Queensland is not a question of fact. Section 118 of the Constitution abrogates this common law rule that the operation and effect of foreign law is a question of fact. (See, for example, Nygh: Conflict of Laws in Australia (5th ed.) 239 and Sykes and Pryles: Australian

Private International Law (3rd ed.) 275). It follows that there was no mistake of fact made by the respondent in considering the operation and effect of the relevant New South Wales statutes; if he made any mistake with respect thereto it was a mistake of law.

Having considered the arguments I am not persuaded that the applicant erred in law in holding that in the making the original assessment there was no operative mistake of fact. It follows that the original assessment was correct.

It was not made entirely clear in the course of argument what was intended by the respondent in saying in his letter of 23rd February 1993: “the Commissioner has no power to make any reassessment of the duty on the Form S(a) under s. 80”. It seems, for the reasons I have given above, that he would have had the power to reassess if the applicant had established the necessary condition precedent, namely that the original assessment had been made under a mistake of fact. The argument of counsel for the respondent tended to suggest that by virtue of s. 24 and s. 78A(1) the original assessment was conclusive. But those provisions could not, in my opinion, override s. 80(3); if the necessary conditions precedent were established the respondent would have power to make a reassessment. In the circumstances it is not necessary to take that issue any further.

The applicant submitted that the application for the statutory order of review was brought within the time fixed by s. 26(1) & (2). But there was an argument to the contrary and out of an abundance of caution the applicant asked for an extension of time within which to make the application. In the circumstances it is not necessary to give detailed consideration to the submissions made in relation thereto; suffice it to say that if I had been of the view that the respondent had made an error of law in arriving at his decision of 23rd February 1993, I would have been prepared in the exercise of my discretion to

extend the time, if necessary, to enable the application to be heard.

The application should be dismissed with costs.