SUPREME COURT OF QUEENSLAND

CITATION:	*Willemse Family Company Pty Ltd v Deputy Commissioner of Taxation* [2002] QSC 292
PARTIES:	**WILLEMSE FAMILY COMPANY PTY LTD ACN 010 949 292** (applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	S 7064 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application for stay of enforcement of judgment Application to set aside order for statutory demand
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	19 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGE:	Holmes J
ORDER:	**1. Notice of Statutory Demand served upon the applicant by the respondent on 15 July 2002 be set aside.** **2. Application for stay of enforcement of judgment dismissed.**
CATCHWORDS:	INCOME TAX – ASSESSMENT OF DEDUCTIONS – COLLECTION AND RECOVERY – PROCEEDINGS FOR RECOVERY – OBJECTIONS AND APPEALS Respondent obtained default judgment against applicant in amount comprising applicant's liability to income tax for year ended 30 June 1990 – respondent served notice of statutory demand requiring payment of debt – applicant seeks stay of enforcement of judgment and setting aside of statutory demand – whether say of enforcement available – whether fact of pending appeal in Federal Court to be considered in decision to grant stay – whether applicant's financial circumstances to be considered in decision to grant stay – whether employee retention scheme characterised as a "contrivance" – whether financial circumstances of applicant constitute "extreme personal hardship" – whether notice of statutory demand should be set aside – whether applicant's appeal to Federal Court constitutes an "off-setting claim" within the meaning of s459H(1)(b) *Corporations Act* – whether there exists "some other reason why demand should

be set aside" under s459J *Corporations Act*.

Corporations Act 2001, s 459E, s 459H(1)(b), s 459J(1)(b)
Income Tax Assessment Act 1936, s 201
Supreme Court Rules, r 78
Taxation Administration Act 1953, ss 14ZZM, 14 ZZR
Uniform Civil Procedure Rules, r 800

Alexander v Cambridge Credit (1985) 2 NSWLR 685, applied
Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA (1994) 13 ACSR 263, considered
Commissioner of Taxation v Myer Emporium No. 1 (1986) 160 CLR 220, considered
Croney v Nand [1999] 2 Qd R 342, applied
Deputy Commissioner of Taxation v Gafford Pty Ltd, unreported S445 of 2001, 27 August 2001, followed
Deputy Commissioner of Taxation v Mackey (1982) 45 ALR 284, followed
Deputy Federal Commissioner of Taxation v Stjepovic (1991) ATC 4715, considered
Deputy Federal Commissioner of Taxation (WA) v Australian Machinery and Investment Co. Pty Ltd (1945) 28 ALJR 326, followed
Federal Commissioner of Taxation v Mackey (1982) 45 FLR 284, applied
Fortuna Holdings v Deputy Commissioner of Taxation (1978) VR 102, distinguished
Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302, considered
Moutere v Deputy Commissioner of Taxation (2000) 84 ACSR 533, considered
Re: A Bankruptcy Notice [1934] Ch. 431, considered
Re Judd; Ex parte Pike (1924) 24 SR (NSW) 537, considered
Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119, considered
Softex Industries v Federal Commissioner of Taxation (2001) 48 ATR 239, followed
Williams v Chesterman, unreported Appeal No. 74 of 1992, 23 June 1992, applied

COUNSEL: Mr Andrews SC for the applicant
Mr Hack SC for the respondent

SOLICITORS: Tucker & Cowen for the applicant
Australian Government Solicitor for the respondent

[1] The applicant has brought two applications, the first for a stay of enforcement of a judgment and the second for an order setting aside a statutory demand under the *Corporations Act* 2001.

[2] In November 2001 the respondent Deputy Commissioner of Taxation obtained default judgment in an amount of $1,380,679.99 against the applicant. That amount comprised $1,200,404.72, being the applicant's liability to income tax for the year ended 30 June 1990, a general interest charge of $181,402.46, and costs of $175.35.

[3] On 15 July 2002, the respondent served a creditor's statutory demand under s 459E of the *Corporations Act* on the applicant, requiring payment of a debt of $1,642,366.82. That amount was made up of the applicant's income tax liability for the year ended 30 June 1990, together with a general interest charge bringing that portion of the demand up to $1,544,674.82; an interest charge on liability for the year ended 30 June 2000 of $28,000.76; and an increase in income tax liability for the year ended 30 June 1991 in an amount of $64,700.82, together with a general interest charge, bringing the figure up to $69,691.24. The applicant conceded here that the charges in respect of the 1991 and 2000 years could not be resisted.

The applicant's claim for a deduction

[4] The amended assessment of tax payable for the 1990 year arises from the disallowance of a deduction claimed in respect of a deposit to an employee retention plan. In that year the applicant was a beneficiary in the Willemse Family Trust, the trustee of which was Queensland Mushrooms Pty Ltd. As trustee, that company also ran the business which employed a number of members of the Willemse family. Mr Petrus Willemse, a director of the applicant, gives as his understanding that what was entailed in the employee retention plan was putting money into an investment to be held for a number of years, at the end of which the funds would be available for distribution to the beneficiaries provided that they were still employees at the relevant time. This was an incentive to them to remain employed by Queensland Mushrooms Pty Ltd.

[5] Queensland Mushrooms Pty Ltd submitted a return for the Willemse Family Trust for the 1990 year claiming a deduction of $1,250,000 as expenditure in respect of the employee retention plan. An amount of $1,059,000 was claimed as paid to a staff benefit trust under the employee retention plan. $459,000 of that sum was borrowed from Chase AMP Bank Ltd, but appears in fact to have been lent to Hartcorp Fidelity Ltd, the trustee of the staff benefit trust, rather than Queensland Mushrooms. Another $540,000 was documented as borrowed from Mevton Pty Ltd, but the Australian Taxation Office was subsequently advised that Grade Enterprises, a Vanuatu company, was the lender. Two policies issued: an insurance policy on the life of one of the Willemse family, a director of the applicant; and another on the lives of three members of the Willemse family. In each case the policy issued provided security for the loan.

The disallowing of the deduction and consequent proceedings

[6] The deduction claimed for the monies deposited to the employee retention plan was disallowed on the bases that the taxpayer had not incurred the expenditure, or, at any rate, not in the relevant financial year; that if incurred, the expenditure was of a capital nature; and that it was not incurred for the purpose of deriving assessable income or carrying on a business for that purpose.

[7] On 25 May 2000, a notice of amended assessment was issued, disallowing the deduction. The applicant objected to the assessment. That objection in turn was disallowed.

[8] On 23 February 2001 the applicant appealed against the objection decision. On 5 July 2001 the respondent filed and served its claim and statement of claim seeking the amount of the applicant's income tax liability for the 1990 financial year and general interest charge, and on 9 November 2001 it obtained default judgment. It is in respect of that judgment that the stay is now sought.

[9] On 12 July 2002 the respondent issued and served its statutory demand under s 459E. The applicant seeks to set that demand aside on the basis that it has an off-setting claim within the meaning of s 459H(1)(b) of the *Corporations Act* or, alternatively, that there is "some other reason" for setting the demand aside under s 459J(1)(b).

Stay of enforcement of judgment

[10] The power to stay enforcement of a judgment arises under r 800 of the *Uniform Civil Procedure Rules,* which provides:

> "**[r 800] Stay of enforcement**"
> **800** (1) A court may, on application by an enforcement debtor-
> (a) stay the enforcement of all or part of a money order, including because of facts arising or discovered after the order was made: and
> (b) making the orders it considers appropriate, including an order for payment by instalments."

[11] The forerunner of r 800 was r 78 of the *Supreme Court Rules* which provided that an order granting a stay "may be made upon such terms as the [court] granting the stay may think fit". In *Croney v Nand*[1] the Court of Appeal observed that the discretion under the earlier rule was unfettered:

> "Over time various epithets, such as 'special' or 'exceptional', have been used to describe the circumstances which call for the exercise of discretion. This court has accepted as correct the test that the applicant bears the onus of showing that it is an 'appropriate' case for a stay to be granted."

While the judgment refers to *Williams v Chesterman*[2], as precedent for the application of such a test, it is also consistent with the approach of the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corp Ltd*[3], discussed in *Croney v Nand* in respect of other issues.

[12] Mr Hack SC, for the respondent, contended that any consideration of a stay of enforcement in this case should commence with the seven propositions elicited from the authorities by French J in *Snow v Deputy Commissioner of Taxation*[4]:

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1 [1999] 2 Qd R 342 at 348.
2 Unreported, Appeal No. 74 of 1992, 23 June 1992.
3 (1985) 2 NSWLR 685 at 694.
4 (1987) 14 FCR 119 at 139.

> "1. The policy of the ITAA as reflected in its provisions 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.
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> 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).
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> 4. Irrespective of the legal 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.
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> 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.
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> 6. The mere imposition of the obligation to pay does not constitute hardship.
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> 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."

The applicant's appeal

[13] The applicant has on foot an appeal to the Federal Court against the respondent's decision on its objection to the amended assessment. In seeking a stay of enforcement of judgment, heavy reliance was placed on the fact that an appeal by taxpayers named Kajewski, which also concerned the employment retention plan scheme connected with Mevton, has been heard by Drummond J in the Federal Court, and judgment reserved. Among the exhibits was a transcript of a mention before the Federal Court in which it was accepted by the respondent here that the Kajewski decision was likely to be decisive in a group of employee retention plan cases involving financing by Mevton, and at least influential in cases involving Chase AMP arrangements. As a result, that group of cases was adjourned for a period of 18 months.

[14] As French J observed in the passage quoted from *Snow*, not all courts have taken the view that the merits of the appeal are appropriately considered on application for a stay. In *Deputy Commissioner of Taxation v Gafford Pty Ltd*[5] the Chief Justice specifically declined to enter into any consideration of the merits of an applicant taxpayer's appeal. In the present case, Mr Hack very properly conceded that the reserving of the *Kajewski* decision in the Federal Court implied that there was at least an arguable case for the applicant on appeal.

[15] In *Deputy Commissioner of Taxation v Gafford Pty Ltd*[6] the Chief Justice granted a stay of enforcement of a judgment in another case which similarly depended on the

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5 Unreported S445 of 2001, 27 August 2001.

6 Unreported S445 of 2001, 27 August 2001.

outcome of the Kajewski appeal. He identified as "exceptional features" of the case the fact that the Kajewski appeal had substantially progressed and that its resolution was likely to resolve the question of liability in the case before him; the preparedness of the Commissioner of Taxation to adjourn the appeal of the applicant in that case for 18 months; the likelihood that the applicant would fall into liquidation if judgment were enforced with a possible loss of employment in a rural region; and the possibly short duration of any stay because of the imminent determination of the Kajewski appeal. Mr Andrews SC, for the applicant, submitted that a like approach should be adopted here.

The legislative policy in favour of enforcement by the Commissioner

[16] In exercising the discretion to grant a stay, weight must be given to the policy embodied by ss 14 ZZM and 14 ZZR of the *Taxation Administration Act* 1953 which provide, respectively, that the fact that review by the Administrative Appeals Tribunal (s 14 ZZM) or an appeal to the Federal Court (s 14 ZZR) 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 (or reference) were pending."

[17] The predecessor of those sections was s 201 of the Income Tax Assessment Act 1936. The significance of the provisions is made clear in *Deputy Federal Commissioner of Taxation (WA) v Australian Machinery and Investment Co. Pty Ltd*[7] and *Deputy Commissioner of Taxation v Mackey*[8], decisions respectively of the High Court and New South Wales Court of Appeal, both of which refer to the "great weight" to be given to (in those cases) s 201.

[18] Mr Andrews SC for the applicant, on the other hand relied on the decision of Phillips J in *Deputy Commissioner of Taxation v Stjepovic*[9] in which his Honour considered the effect of s 43 of the *Sales Tax Assessment Act (No. 1)*, an equivalent provision to ss 14 ZZM and 14 ZZR and 201. Referring to *Held v Deputy Federal Commissioner of Taxation* his Honour placed particular emphasis on this statement by the Victorian Full Court:

> "It must never be forgotten that the power to grant a stay is a discretionary power which cannot be circumscribed by hard and fast rules"[10].

Contrivance

[19] The reference to "contrivance" in *Snow* has its source in *Deputy Commissioner of Taxation v Mackey*[11]. That case concerned a prepaid interest scheme involving a round-robin of payments. Moffitt P in the New South Wales Court of Appeal expressed the view that the court should not intervene to stay execution so as to prevent the operation of s 201 where a taxpayer had been a party to such a contrivance except in "quite exceptional circumstances"[12]. Hutley JA identified the

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7 (1945) 28 ALJR 326.
8 (1982) 45 ALR 284.
9 (1991) ATC 4715.
10 (1998) 88 ATC 4315 at 4321.
11 (1982) 45 ALR 284.
12 (1982) 45 ALR 284 at 287.

only two cases in which he considered it clear that the court should exercise its discretion so as to override the effect of s 201. Those were, where there was abuse by the Commissioner of his position, or where there was "extreme personal hardship to a taxpayer called upon to pay"[13].

Financial circumstances

[20] Having pointed out that one must approach with caution results in other cases involving different facts and circumstances, Phillips J in *Deputy Commissioner of Taxation v Stjepovic* went on to consider what constituted "extreme personal hardship", observing:

> "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."[14]

He referred to the decision of Dawson J in *Commissioner of Taxation v Myer Emporium (No. 1)*[15] in which the latter considered the granting of a stay on the premise that special circumstances were required to justify it.

> "Special circumstances justifying a stay will exist where it is necessary to prevent the appeal if successful from being nugatory. Generally that will occur when because of the respondent's financial state, there is no reasonable prospect of recovering monies paid pursuant to the judgment at first instance. However special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed." (references omitted).

It is to be noted however, that no policy issue by virtue of s 201 or like provisions arose in that case; the Commissioner, not the taxpayer, sought the stay.

The applicant's financial circumstances

[21] In his affidavits Mr Willemse explains that the applicant conducts a real estate and investment business. It holds shares in three wholly owned subsidiaries: Port Markets Shopping Centre Pty Ltd, Tekabu Pty Ltd and Primrose Bay Pty Ltd. The directors and shareholders of the applicant are he, his brother John and his sister Maria. Similarly they are the directors of Port Market Shopping Centre Pty Ltd and Tekabu Pty Ltd. Port Market Shopping Centre Pty Ltd owns a shopping centre at Port Market in Port Adelaide. The shopping centre consists of 11 shops, of which eight are tenanted. Most of those tenancies will expire by the end of 2003. Mr Willemse says that the directors intend to redevelop the shopping centre in late 2003, and thus to increase its value by some $500,000. He considers

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13 (1982) 45 ALR 284 at 289.
14 (1991) ATC 4715 at 4728.
15 (1986) 160 CLR 220.

that if the shopping centre were to be sold in the near future, before the expiration of the existing tenancies, it would return less than would be the case if a sale were to take place after new tenancy agreements were entered.

[22] Tekabu Pty Ltd owns a commercial building tenanted by Centrelink at Enfield in Adelaide. Presently there are negotiations underway between that company and Centrelink as to whether Centrelink will exercise an option which it has to enter into a lease. If the Port Market Shopping Centre and the commercial building owned by Tekabu Pty Ltd were to be sold, costs associated with sale – advertising costs, agent's commission and legal costs - would amount to some $50,000. If the applicant were ultimately to succeed in its Federal Court appeal, it would incur additional costs in purchasing similar investment properties including legal costs, registration fees and stamp duty which could be as high as $100,000.

[23] The applicant also according to Mr Willemse, holds a 5/19 interest in a partnership known as Jindalee Shopping Centre, which, through an investment vehicle Radmont Pty Ltd, owned "Jindalee AllSports Shopping Village" at Jindalee. If an external administrator were appointed to the applicant, it was unlikely that the applicant's interest as a limited partner could be sold, and a sale of the shopping centre would be necessary instead, with, presumably, a dissolution of the partnership.

[24] Mr Willemse concluded his first affidavit by saying that the company did not have sufficient current assets to pay the amount claimed in the notice of statutory demand. It did, however, have a surplus of assets over liabilities. The applicant was given leave to file an affidavit by its solicitor, Mr Cowen, annexing a draft balance sheet. It shows current assets at $660,159. However, Mr Cowen says, one of those assets is a loan to the three directors of the company which they have no present capacity to repay, but may be able to pay "over time". The non-current assets shown in the statement includes something described as "the Cosmos Centre Trust" which has a value of $1,189,641, but is not explained in any of the affidavit material. Tekabu Pty Ltd (or, one presumes, the applicant's interest in it) is given a value of $300,000. There is no entry which on its face can be related to the Port Market interest. The non-current assets have attributed to them a value of $2,066,900.23.

[25] Against those assets are shown current liabilities of $54,000.96 and non-current liabilities of $2,563,394. One of those liabilities is a National Bank guarantee in an amount of $200,000 in respect of the Jindalee Shopping Centre. There are also shown secured liabilities to Queensland Mushrooms Marketing Pty Ltd, of $2,146,299, and Queensland Mushrooms (Rosewater Trust Units), of $163,000. The mortgage debenture deed which secures the debt to Queensland Mushrooms Marketing Pty Ltd was an exhibit. Mr Andrews pointed out that if winding up proceedings were commenced, under an acceleration clause in the deed, an obligation to repay a $3,000,000 debt not otherwise payable until November 2009 would become repayable. After deduction of the figures a net asset figure of $4,901,200.38 is left.

The competing considerations

[26] In the applicant's favour on the stay argument is the fact that having to meet the judgment will undoubtedly cause it some financial difficulty, although not, so far as

I can see, extending to "extreme personal hardship". And a stay would be for a relatively short time; one would anticipate, in the usual run of things, probably only a matter of a couple of months. But the applicant must start from the difficult position that the policy of the *Tax Administration Act* militates against any stay. I accept Mr Andrews' submission that the test under r 800 is whether the case is an appropriate one for a stay. Nonetheless, having regard to the Commissioner's statutory entitlement to recover regardless of appeal, it does seem to me that something out of the ordinary would be required to make a stay appropriate.

[27] While I would hesitate on the information before me to characterise the employment retention scheme as a "contrivance", given Mr Willemse's claimed understanding that it was in truth designed as an incentive to employees, nevertheless there is an air of artificiality about the loan arrangements which underlay it. There has, also as Mr Hack points out, been delay in bringing this application, given that the default judgment was entered in November 2001.

[28] The material before the court as to the company's financial circumstances is far from exhaustive. It is impossible to tell what equity the company actually has in any given asset, and there is nothing to say that it could not borrow against its assets to meet its liability to the Commissioner. I must say, too, that the material leaves some unanswered questions about the company's major liability, the debenture held by Queensland Mushrooms Marketing Pty Ltd, given the common directorship of that company (now under external administration) and the applicant. Certainly the nature of the liability secured is nowhere explained in the affidavits. As a whole, the material is not sufficiently extensive or specific to convince me that enforcement of the judgment would be ruinous to the applicant.

Stay refused

[29] Starting from the premise that the Commissioner of Taxation should ordinarily be permitted to enforce the judgments he obtains, and having regard to the competing considerations, the balance comes down against the applicant. I conclude it is not an appropriate case in which to grant a stay.

Notice of statutory demand

[30] Mr Andrews' first contention was that the applicant's appeal to the Federal Court was an "off-setting claim" within the meaning of s 459H(1)(b) of the *Corporations Act*. He relied firstly on the decision of McGarvie J. in *Fortuna Holdings v Deputy Commissioner of Taxation*[16] in which his Honour held that plaintiffs who had applied to a board of review to set aside assessments were to be regarded as having cross-claims against the Deputy Commissioner of Taxation. That characterisation of a challenge to an assessment was referred to with approval by Phillips J in *Stjepovic*[17]. But in those cases, as Mr Hack pointed out, there existed no statutory definition. In *Stjepovic*, the applicant sought a stay of judgment pending resolution of a challenge to an assessment. *Fortuna* involved consideration of whether an interlocutory injunction should be granted to restrain presentation of a winding up petition by the Deputy Commissioner of Taxation because of the existence of a genuine cross-claim.

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16 [1978] VR 102.

17 (1991) ATC 4715 at 4728.

[31] "Off setting claim" is defined in s 459H(5) of the *Corporations Act* as meaning:

> "a genuine claim that the company has against the respondent by way of counter-claim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)".

[32] While it is clear enough what is referred to by "counter-claim" and "set-off", what is covered by the term "cross-demand" is less easily delineated. In *Re Judd, ex parte Pike*[18] Maughan AJ was considering the words "counter-claim, set-off or cross-demand" used in the *Bankruptcy Act*:

> "The … term "cross-demand", however, is not a technical term and must in my opinion refer to claims other than those which would be comprised in the two expressions "counter-claim" and "set-off"."

He considered "cross-demand" to be wide enough to include a claim for unliquidated damages for a tort. He referred to some English cases which he said were "in favour of an unrestricted meaning being given to the word", and went on to observe:

> "The object of the legislature in providing machinery for the setting aside of a bankruptcy notice where a judgment debtor has a cross-demand is obviously to prevent a judgment creditor from pursuing bankruptcy proceedings when as between himself and the judgment debtor, the balance of account is in favour of the judgment debtor."

A similar rationale can be ascribed to s 459H(1)(b) of the *Corporations Act*.

[33] In *In re a Bankruptcy Notice*[19] Lord Hanworth MR said this:

> "If a cross-demand is only to be interpreted as meaning something which could have been introduced into the action by way of counter-claim, it adds nothing to the word "counter-claim". "Cross-demand" seems to me to be a word introduced in order to give a wider ambit of the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counter-claim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt."[20]

Maugham LJ in the same case made the point that

> "the debtor must satisfy the court that he *has* a counter-claim, set-off or demand which equals or exceeds the amount of the judgment debt. There this court has no difficulty, because the Court of Appeal in *In Re:* G.E.B.[21] came to the conclusion that the section means a counter-claim, set-off or cross-demand which is effective at the time of the hearing of the application to set aside the bankruptcy notice."[22].

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18 (1924) 24SR (NSW) 537.at 539-40.
19 [1934] Ch. 431.
20 [1934] Ch. 431 at 438.
21 [1903] 2 KB 340
22 [1934] 1 Ch. 431at 440-441

[34] The term "cross-demand" as it appears in s 459H(1)(b) was considered in *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA*[23]. Young J, observing that the authorities in the bankruptcy context gave guidance, expressed his view that the word was to be given a wide significance. He went on to point out that in defining "off-setting total" in s 459H(2):

> "The law speaks in terms of an off-setting claim and the amount of that claim which seems to suggest that the court does not value the claim but rather if it finds that there is a genuine claim, off-sets the total amount of that claim."

[35] There lies, I think, the difficulty in treating the appeal to the Federal Court in the present case as an off-setting claim. Sections 459H(2)-(5) contemplate that the off-setting claim is capable of quantification. But an appeal against an objection decision under s 14 ZZ does not involve a claim for an amount, but rather seeks to have the decision in question varied or quashed. The taxpayer may seek that the assessment be varied by a certain amount so as to reduce his liability accordingly; but it does not follow that he has a claim against the Commissioner for that amount.

[36] If the court makes an order in relation to the Commissioner's decision he must, under s 14 ZZQ

> "take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision."

[37] Thus an appeal may result in a nil assessment or an assessment in a lesser amount, and the amended assessment in turn may result in the taxpayer, if it has already paid the tax disputed, and subject to any other outstanding taxation liability, being entitled to a refund; or if the previous assessment has not been met, subject to a reduced liability. But there is no specific amount which can be claimed from the Commissioner, let alone awarded, on an appeal. I agree therefore, with Mr Hack's submission that there is at best a contingent claim for a refund. There is no present monetary claim by the applicant which can amount to an off-setting claim for the purposes of s 459H(1)(b).

[38] I have, however, concluded that the applicant should succeed in respect of its argument under s 459J(1)(b). Section 459J(1) is in these terms:

> "**459J Setting aside demand on other grounds**
>
> (1) On an application under section 459G, the Court may by order set aside the demand if it is satisfied that:
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> (a) because of a defect in the demand, substantial injustice will be caused unless the demand is set aside; or
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> (b) there is some other reason why the demand should be set aside.

[39] In *Hoare Bros Pty Ltd v Deputy Commissioner of Taxation*[24] the full Federal Court emphasised the unwisdom of attempting to set boundaries to the discretion

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23 (1994) 13 ACSR 263 at 269.

24 (1996) 62 FCR 302 at 317.

conferred by the subsection. In that case the judge at first instance had, in considering the existence of "some other reason", implied that he would have been prepared to exercise the discretion in favour of the applicant if it had been shown that "the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice".

[40] Austin J, in *Moutere v Deputy Commmissioner of Taxation*[25] expressed the view that the Commissioner should not take unfair advantage of provisions such as s 14 ZZR by using the statutory demand procedure against a taxpayer genuinely objecting to his decision. In such circumstances the appropriate course might be to set the demand aside under s 459J(1)(b). In *Softex Industries v Federal Commissioner of Taxation*[26] Mullins J, in this court, referring with approval to that approach, set aside a statutory demand which included an amount of disputed income tax the subject of an application for review in the Administrative Appeals Tribunal. She concluded that it was oppressive for the Commissioner to serve a statutory demand incorporating the disputed sum.

[41] Mr Hack submitted that *Softex* was wrongly decided, arguing that conduct authorised by statute could not be unconscionable, abuse of process or productive of substantial injustice. I do not think that submission is correct, particularly as to the last. It seems to me entirely possible that action entirely within the Commissioner's statutory powers may nonetheless produce an injustice in the result.

[42] The instances of unconscionability, abuse of process and production of substantial injustice referred to in *Hoare* are no more than examples of matters which may impel an exercise of discretion in favour of an applicant; but the discretion is by no means confined to those particular circumstances. But in the present case, where the applicant has on foot an appeal which is at least arguable and which would, if successful, have the consequence that the bulk of the amount in respect of which the statutory demand is made would not be payable, it does seem to me that there is an injustice in permitting the statutory demand procedure to go forward.

[43] Accordingly I conclude that there is "some other reason why the demand should be set aside". Given the clear language of s 459J, there exists no power to vary the demand so as to require payments of those amounts which it is conceded cannot be resisted. Correspondingly, I agree with the view taken by Mullins J in *Softex Industries* that it is not possible to set aside the demand to the extent of the disputed debt.

Orders

[44] The application for a stay of enforcement of judgment is dismissed. I order that the notice of statutory demand served on the applicant by the respondent on 15 July 2002 is set aside. I will hear the parties as to costs.

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25 (2000) 84 ACSR 533 at 543.

26 (2001) 48 ATR 239