SUPREME COURT OF QUEENSLAND

CITATION:	*Neutral Bay Pty Ltd v Deputy Commissioner of Taxation; MA Howard Racing Pty Ltd v Deputy Commissioner of Taxation; Neutral Bay (Sales) Pty Ltd v Deputy Commissioner of Taxation; Broadbeach Properties Pty Ltd v Deputy Commissioner of Taxation* [2006] QSC 394
PARTIES:	**NEUTRAL BAY PTY LTD** **(ACN 086 100 432)** (applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent) **MA HOWARD RACING PTY LTD** **(ACN 092 182 048)** (applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent) **NEUTRAL BAY (SALES) PTY LTD** **(ACN 096 678 867)** (applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent) **BROADBEACH PROPERTIES PTY LTD** **(ACN 100 178 943)** **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent)
FILE NO/S:	BS 4143 of 2006 BS 4144 of 2006 BS 4145 of 2006 BS 4715 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	21 & 22 September 2006
JUDGE:	Philip McMurdo J

ORDER: **In each application the statutory demand is set aside.**

CATCHWORDS: CORPORATIONS – WINDING UP – WINDING UP BY A COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – GENUINE DISPUTE AS TO INDEBTEDNESS – four applications to set aside statutory demands – statutory demands served by the respondent – each of the debts which are demanded is challenged by the applicants in proceedings in the Administrative Appeals Tribunal under Pt IVC of the *Taxation and Administration Act* 1953 (Cth) or is subject to an outstanding objection – whether the statutory demands should be set aside pursuant to s 459H of the *Corporations Act* 2001 (Cth)

CORPORATIONS – WINDING UP – WINDING UP BY A COURT – GROUNDS FOR WINDING UP – INSOLVENCY – STATUTORY DEMAND – APPLICATION TO SET ASIDE DEMAND – FOR SOME OTHER REASON – whether the statutory demands should be set aside pursuant to s 459J of the *Corporations Act* 2001 (Cth)

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 17-5, s 33-5, s 40-75, s 165-40, s 165-50
Corporations Act 2001 (Cth), s 459H, s 459H(1)(a), s 459J, s 459J(1)(b), s 459S
Income Tax Assessment Act 1936 (Cth), s 177, s 204(1), s 208(1)
Taxation and Administration Act 1953 (Cth), s 2(1), s 8AAZA, s 8AAZF(1), s 8AAZF(2), s 8AAZI, s 14ZZM, s 14ZZR, s 16-30, s 24(1), s 105-100, s 255-45, s 255-50, s 284-75, s 284-90

Arcade Badge Embroidery Co Pty Ltd v DCT (2005) 157 ACTR 22, cited
DCT v Richard Walter Pty Ltd (1995) 183 CLR 168, considered
H'Var Steel Services Pty Ltd v Deputy Commissioner of Taxation [2005] WASCA 71, considered
Hoare Bros Pty Ltd v Commissioner of Taxation (1996) 62 FCR 302, discussed
Kalis Nominees Pty Ltd v DCT (1995) 31 ATR 188, considered
KW & KM Quinn Investments Pty Ltd v DCT (2003) 202 ALR 335, cited
Maddison Resort Pty Ltd v DCT [2006] QSC 485, cited
Mibor Investments Pty Ltd v Commonwealth Bank of Australia (1993) 11 ACSR 362, discussed
Moutere Pty Ltd v DCT (2000) 34 ACSR 533, discussed
Ozone Manufacturing Pty Ltd v DCT (2006) 94 SASR 269, considered

Platypus Leasing Inc v FCT (No 3) [2005] NSWSC 388, cited
R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598, cited
Re Softex Industries Pty Ltd (2001) 187 ALR 448, discussed
Rocket Transport Services Pty Ltd v DCT [2006] WASC 234, cited
Willemse Family Co Pty Ltd v DCT [2003] 2 Qd R 334, discussed

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M Aldridge SC with PA Looney for the respondent

SOLICITORS: Deacon & Milani for the applicants
Australian Taxation Office for the respondent

[1] **PHILIP MCMURDO J**: There are four applications to set aside statutory demands served by the respondent Deputy Commissioner of Taxation. The applications are made pursuant to s 459H(1)(a) and s 459J(1)(b) of the *Corporations Act* 2001 (Cth).

[2] Each of the debts which are demanded is challenged by the applicants in proceedings under Pt IVC of the *Taxation and Administration Act* 1953 (Cth) ("TAA") or is subject to an outstanding objection. For present purposes the respondent concedes that each applicant has an arguable case in its challenge in every respect. But the respondent says that the debts claimed can be challenged only within those Pt IVC proceedings, and that the present existence of the debts cannot be disputed here so as to ground an order under s 459H. And the respondent argues that s 459J does not provide a basis for setting aside the demands, because in this context it is argued that an applicant must show more than the existence of Pt IVC proceedings which have arguable merits. Before going to those questions I will summarise the claims within each statutory demand.

[3] The applicants are companies controlled by Mr Mark Howard. With the exception of the demand addressed to Broadbeach Properties Pty Ltd, each of the demands claims payment of the balance of a Running Balance Account. Under the TAA, the Commissioner may establish one or more systems of accounts for primary tax debts of a taxpayer, each account to be known as Running Balance Account or RBA. A primary tax debt is defined to mean any amount due to the Commonwealth directly under a taxation law,[1] and the TAA is itself a taxation law.[2] An RBA deficit debt is defined to mean, in relation to an RBA of an entity, a balance in favour of the Commissioner which is based on primary tax debts allocated to the RBA which are currently payable, payments made in respect of current or anticipated primary tax debts of the entity and credits to which the entity is entitled under a taxation law which have been allocated to the RBA.[3] If there is an RBA deficit debt at the end of any day, then a general interest charge is payable on that RBA debt for that day and the balance of the RBA is altered accordingly.[4] By TAA s 8AAZH(1), the tax debtor is liable to pay the amount of the debt which is due and payable at the end of that day.

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1 TAA, s 8AAZA
2 TAA, s 2(1)
3 TAA, s 8AAZA
4 TAA, s 8AAZF (1), (2)

[4] The following table describes the components of the relevant RBAs the subject of the statutory demands:

Description	Neutral Bay	Howard Racing	Neutral Bay Sales
Assessed/declared net amounts	$ 4,291,567.00	$ 3,187,743.00	
"Failure to withhold" penalties	$ 75,177.90	$ 9,031.50	$ 13,095.00
Tax shortfall penalties	$ 2,426,963.00	$ 1,773,546.00	
Administrative overpayments	$ 150,255.00	$ 209,091.00	
General interest charge	$ 1,610,847.89	$ 1,229,397.25	$ 3,713.34
Other	-$ 121,460.00	-$ 19,023.00	
Total	$ 8,433,350.79	$ 6,389,785.75	$ 16,808.34

[5] These companies are involved in property development and specifically the construction of residential apartments. Some apartments were constructed by Neutral Bay Pty Ltd on land which it owned after which it sold the apartments to Neutral Bay (Sales) Pty Ltd which sold them to members of the public. Similarly, apartments were constructed by MA Howard Racing Pty Ltd on land which it owned after which the apartments were onsold to Broadbeach Properties Pty Ltd which sold them to members of the public.

[6] Sales of residential premises do not attract GST except where they are new residential premises, which means premises which have not previously been sold as residential premises.[5] Ordinarily a supply within a group registered as such for GST purposes does not attract GST. Neutral Bay Pty Ltd and Neutral Bay (Sales) Pty Ltd became registered as a group for GST purposes, the nominated group representative being Neutral Bay Pty Ltd. MA Howard Racing Pty Ltd and Broadbeach Properties Pty Ltd were registered as another group, the representative being MA Howard Racing Pty Ltd. A representative member is liable to pay GST on any taxable supply by a member of the group. The applicants say that the sales to Neutral Bay (Sales) Pty Ltd and Broadbeach Properties Pty Ltd were not taxable because they were within a group, and that the sales by those companies to the public were not the first sales, because the first sales were the sales to them. The respondent says that *A New Tax System (Goods and Services Tax) Act* 1999 (the GST Act) upon its proper interpretation, means that the first sale cannot be constituted by a sale within a group, so the sales to the public are subject to GST, and the representative members are liable. This is but one of the issues for determination in the Part IVC proceedings.

[7] In the case of Neutral Bay Pty Ltd, the assessed/declared net amounts, totalling $4,291,567, are assessments of GST or alternatively amounts claimed by the respondent by way of a declaration under the anti-avoidance provisions of the GST Act. The same applies to the component of $3,187,743 in the demand upon MA Howard Racing Pty Ltd.

[5] *A New Tax System (Goods and Services Tax) Act* 1999, s 40-75

[8] The "tax shortfall penalties", totalling $2,426,963 for Neutral Bay Pty Ltd and $1,773,546 for MA Howard Racing Pty Ltd, are penalties imposed for the non-payment in each case of the company's GST debt.

[9] The so called administrative overpayments, $150,255 for Neutral Bay Pty Ltd and $209,091 for MA Howard Racing Pty Ltd, again relate to GST. They are amounts which the respondent says were overpayments in that the company concerned was given higher input tax credits than it should have been allowed.

[10] The "failure to withhold" penalties, being $75,177.90 for Neutral Bay Pty Ltd, $9,031.50 for MA Howard Racing Pty Ltd and $13,095 for Neutral Bay (Sales) Pty Ltd, represent penalties assessed by the respondent for the alleged failure by the company to withhold amounts from contractors who had not quoted an ABN.

[11] The remaining component is for interest which is a function of the other components.

[12] The statutory demand addressed to Broadbeach Properties Pty Ltd is for the sum of $1,679,920.24. It differs from the others in that it is not a demand for a RBA deficit and it does not relate to GST. It demands income tax for the year ended 30 June 2004, according to a notice of assessment issued on 18 April 2006, together with interest on that sum.

Neutral Bay Pty Ltd, MA Howard Racing Pty Ltd and Neutral Bay (Sales) Pty Ltd: s459H issues.

[13] Each of these three applicants is challenging each component of the debt demanded from it by proceedings duly brought under Pt IVC in the Administrative Appeals Tribunal. The respondent concedes for the purposes of the present applications that the company in each case and in every respect has an arguable case.

[14] Accordingly, there is a dispute between each of these three companies and the respondent which is to be determined by the AAT and which is effectively conceded to be a genuine dispute. In each case, the applicant has an arguable case for an outcome under which none of the amount demanded would be owing. Nevertheless, the respondent says that there is no genuine dispute as to the existence of the debt. That argument is made in reliance upon what is now s 105-100 of Sch 1 of the TAA (formerly s 59 of that Act).

[15] Section 105-100 provides as follows:

> "**105-100 Production of assessment or declaration is conclusive evidence**
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> The production of:
> (a) a notice of assessment under this Part: or
> (b) a declaration under:
> (i) section 165-40 or subsection 165-45(3) of the *GST Act; or
> (ii) section 75-40 or subsection 75-45(3) of the *Fuel Tax Act 2006;*
>
> is conclusive evidence:
> (c) that the assessment or declaration was properly made; and

> (d) except in proceedings under Part IVC of this Act on a review or appeal relating to the assessment or declaration – that the amounts and particulars in the assessment or declaration are correct."

[16] The respondent argues that this section puts paid to any challenge in the present proceedings to the components of a demand which are the assessed/declared net amounts, the failure to withhold penalties and the tax shortfall penalties. In turn much of the general interest charge is said to be immune from a challenge in the present proceedings, because it is interest imposed on those components.

[17] The applicants advance several arguments for why s 105-100 does not have that effect. First it is argued that s 105-100 does not apply to a case where the Commissioner seeks to recover an RBA deficit debt. They argue that the respondent had something of an election: she could seek payment of the debts as primary tax debts, or she could seek to recover the balance of an RBA. The applicants do not argue that the debts, if any, which constituted the primary tax debts merged within the liability for an RBA deficit debt. Rather, they argue that the TAA has evidentiary provisions which avail the Commissioner in relation to an RBA deficit debt, and a distinct provision, which is s 105-100, which avails in the collection of primary tax debts. They say that if a Commissioner seeks to pursue an amount as an RBA deficit debt, then as a matter of construction of the TAA, s 105-100 does not apply.

[18] In *H'Var Steel Services Pty Ltd v Deputy Commissioner of Taxation* [2005] WASCA 71, the appellant challenged a statutory demand which claimed an RBA deficit but upon an argument which is not made in this case. The argument was that s 8AAZH of the TAA, which provides that the tax debtor is liable to pay the amount of an RBA deficit debt as a debt then due and payable, created a debt distinct from the primary tax debts of the taxpayer and was therefore unconstitutional according to s 55 of the *Constitution*. It was argued that because the TAA also dealt with other matters, but was said to impose a tax by s 8AAZH, that provision was invalid and so was the statutory demand. The Court of Appeal rejected that argument. The principal judgment was given by Wheeler JA, who described the connection between an RBA deficit debt and the primary tax debts from which it is derived, in these terms which I respectfully adopt:[6]

> "[13] There are a number of aspects of the RBA deficit debt which, in my view, lead to the conclusion that it is no more than an auxiliary obligation created to facilitate collection of the variety of taxes with which the TAA is concerned. Importantly, there is an identity of amount between it and the primary tax debt which exists in respect of taxes and penalties thereon already imposed by other legislation. It is only when the primary tax debt has been quantified that an amount can be allocated to an RBA. While a primary tax debt is defined to mean any amount due to the Commonwealth directly under a taxation law and to include amounts not yet payable, the RBA deficit debt includes only primary tax debts which have been allocated to the RBA and are currently payable (offset by any payments made or credits allocated to the account) (s 8AAZA). …

[6] (2005) 59 ATR 5, 8-9

> [17] However, in my view this circumstance merely emphasises the fact that the RBA is designed as a way of facilitating the collection of a variety of different types of taxes which owe their existence to a variety of other pieces of tax legislation. What is important is that both RBA and non-RBA primary tax debts would be extinguished, in an equal amount, by payment under a judgment, wherever a primary tax debt has been allocated to an RBA. The fact that the TAA is ancillary to the administration of a number of other pieces of tax legislation does not make it any the less an ancillary and administrative piece of legislation."

[19] Accordingly, the applicants are right in not arguing that any liability for a primary tax debt merges in an obligation to pay an RBA deficit debt. The taxpayer remains liable to pay the primary tax debts, and the RBA provisions facilitate the collection and recovery of those debts. In an action to recover an RBA deficit debt, the Commissioner can rely upon TAA s 255-45 and s 255-50 to adduce prima facie evidence by a certificate statement or averment in the proof of that debt. More specifically, the Commissioner can tender a statement under TAA s 8AAZI as prima facie evidence that the RBA was duly kept and that the amounts and particulars in the statement are correct. In each case, the relevant document would be prima facie evidence only, and subject to the operation of s 105-100, the taxpayer could defend the claim by disputing its obligations for the primary tax debts constituting the RBA deficits. On the applicants' argument, the Commissioner cannot at the same time rely upon s 105-100, although the Commissioner could do so in a suit claiming the same amount as the total of the primary tax debts rather than as an RBA deficit debt.

[20] The applicants rely upon the judgment of the Full Court of the Supreme Court of South Australia in *Ozone Manufacturing Pty Ltd v DCT* (2006) 94 SASR 269. That involved a challenge to a statutory demand for an RBA deficit in relation to GST, but at least by the time of the appeal, the company was arguing that it had an offsetting claim rather than a genuine dispute as to the debt. The Deputy Commissioner argued that the taxpayer's challenge was precluded by the reasoning of the Full Federal Court in *Hoare Bros Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 302. The Deputy Commissioner did not argue, as the present respondent does, that the challenge was precluded by what was then TAA s 59, now TAA s 105-100. The Full Court held that an offsetting claim could be raised as a ground for setting aside that statutory demand. In the principal judgment, which was given by Debelle J, it was also said that a statutory demand for an RBA deficit debt could be challenged on the basis of a genuine dispute as to liability for the debt, for which he cited *Cadura Investments v Rototek Pty Ltd* (2004) 58 ATR 88.[7] *Ozone Manufacturing* is authority for a proposition, which is not disputed here, that an offsetting claim and a genuine dispute as to the debt can be raised as grounds for setting aside the statutory demand on an RBA deficit debt, notwithstanding s 14ZZM, 14ZZR, 255-45 and s 255-50 of the TAA. It is not authority for the applicants' proposition that s 105-100 is inapplicable.

[21] In my conclusion, this first argument should be rejected. It is difficult to see a reason in policy for excluding the operation of s 105-100 where the Commissioner seeks to collect tax as an RBA deficit. Once it is understood that the taxpayer's obligation to pay the primary tax debt does not merge in an obligation to pay the

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[7] (2006) 94 SASR 269, 291

RBA deficit debt, there is no reason for reading down the terms of s 105-100 as the applicants contend.

[22] Next, the applicants argue that s 105-100 does not operate in these cases, because there was no bona fide attempt to determine the amount of the taxpayer's liability. It argues for the application of the so called *Hickman* principle,[8] so that s 105-100 does not operate where the purported assessment was not a genuine assessment because the decision maker held no genuine belief that there was a real possibility that the assessment was correct.[9]

[23] The applicant advances this argument on the basis of two points. The first is that the assessments of GST (against Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd) are inconsistent with the declarations for the same amounts. Those declarations were purportedly made under Div 165 of the GST Act, the anti-avoidance provisions. Under s 165-40, the Commissioner may make a declaration, which, amongst other things, negates the benefit from the avoidance of GST by requiring payment of the amount of GST which had been avoided. The argument is that such a declaration could be made only upon the premise that there was otherwise no liability for GST, whereas in these cases, the respondent has also assessed that the GST *was* payable. The argument is then that these are not genuine decisions by the respondent or her delegate and that they represent merely tentative and not concluded views.

[24] This is the same argument which was advanced unsuccessfully at first instance in *Platypus Leasing Inc v FCT (No 3)* [2005] NSWSC 388 and on appeal at (2005) 61 ATR 239. I respectfully adopt the reasoning in those judgments for rejecting it. The Commissioner is able to make assessments in the alternative, as was held on *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168, where Brennan J said:[10]

> "It must be remembered that the Commissioner's function is administrative, not judicial. The power to assess is … not limited to cases where the Commissioner has enough information on which to make a positive finding of fact. The Commissioner is not required to determine on the balance of probabilities that one person rather than the other is the person subject to the tax liability in respect of the particular income. Where the facts known to the Commissioner are such that he is unable to determine which of two or more persons is liable to tax on the same item of income in the same year, he may adopt the view in the case of any or all of those persons that there is a substantial possibility that the item of income is assessable income of that person. If that view is adopted in respect of two or more of those persons, he may validly assess each of them to tax. The making of an assessment on that view of the facts, provided it is not for the purpose of double recovery of the tax imposed by the relevant Taxing Act, is in my opinion a bona fide attempt to exercise the power to assess …"

[25] The other argument for the application of the *Hickman* principle is that the person who decided that these assessments and declarations should issue did not form a genuine belief as to their possible correctness, but instead acted according to the

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[8] *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598
[9] *Punin v DCT* (2000) 44 ATR 233; [2000] FCA 568
[10] (1995) 183 CLR 168, 200-201

views of others within the ATO. This is based upon what appears in statements of reasons given to Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd following audits by the ATO late last year. In several places within those statements, it is said that the decision maker applied "the current ATO view". The applicants argue that it cannot be concluded that the author held a genuine belief as to the possible correctness of the assessments and declarations, because no personal belief is expressed. I do not read the statements of reasons in that way. It is one thing to say that the author has acted by reference to the views of others within the ATO; it is another to say that the author had no view about that matter and, in turn, no belief as to the correctness of the assessment or declaration. It is legitimate for such decisions to be made by reference to the approach of the ATO in what are considered to be analogous cases. The adoption of that ATO view does not demonstrate that the author had no belief of his or her own on the matter. Rather, the inherent likelihood is that the author believed that the so called ATO view was correct because others within the ATO had spent some time in forming it. At present, it is not matter of inquiring whether the author should have assumed the correctness of the ATO view without making up his or her own mind on the point. If it cannot be shown that the author lacked any belief as to the correctness of the assessment or declaration, then the *Hickman* principle does not operate as the applicants suggest. In my conclusion, this argument also fails.

[26] Next, the applicants argue that s 105-100 simply does not allow the respondent to deny that there is a genuine dispute as to the existence of the debt. As this argument was advanced, it effectively challenged the correctness of the decision in *Hoare Bros*. The argument emphasises that the issue in the present proceedings is not (apart from the *Hickman* argument) whether the assessments or declarations were properly made or the amounts and particulars of them are correct: it is whether there is a genuine dispute about the existence or amount of the debts, and the fact that the dispute can be resolved only within Pt IVC proceedings does not mean that there is no dispute.

[27] The Full Court's decision in *Hoare Bros*, in relation to the present point involving s 459H, has been consistently followed in judgments of Supreme Courts: see eg *Moutere Pty Ltd v DCT* [2000] NSWSC 379; (2000) 34 ACSR 533; *Re Softex Industries Pty Ltd* [2001] QSC 377; (2001) 187 ALR 448; *Willemse Family Co Pty Ltd v DCT* [2003] 2 Qd R 334; *Maddison Resort Pty Ltd v DCT* [2006] QSC 485; *KW & KM Quinn Investments Pty Ltd v DCT* [2003] QSC 336; (2003) 202 ALR 335; *Rocket Transport Services Pty Ltd v DCT* [2006] WASC 234. However, *Hoare Bros* was a case dealing with provisions relevant to income tax, and its relevance to other taxes and different statutory provisions must be considered.

[28] In *Hoare Bros*, the relevant provisions were s 204(1) and s 208(1) of the *Income Assessment Act* 1936 (Cth) and s 14ZZM and s 14ZZR of the TAA. Section 204(1) provides that any income tax assessed is due and payable on the dates specified in the notice of assessment (or absent such a date 30 days after service of the notice). Section 208(1) then provided that "income tax when it becomes due and payable shall be a debt due to the Commonwealth, and payable to the Commissioner in the manner and at the time prescribed." Notices of assessment had been issued and served and the period for payment had expired.[11] Sections 14ZZM and 14ZZR provide that the fact that a review or appeal is pending in relation to a taxation decision does not in the meantime interfere with or affect the decision and that any

[11] (1996) 62 FCR 302, 311

tax, additional tax or other amount may be recovered as if no review or appeal were pending. In *Hoare Bros*, the Commissioner did not rely on the conclusive evidence provisions of s 177 of the *Income Tax Assessment Act*, which is relevantly equivalent to TAA s 105-100.

[29] The Full Court described the operation of the relevant parts of the *Income Tax Assessment Act* in this way:[12]

> " The effect of s 204 of the ITAA is that income tax assessed is due and payable by the person liable to pay the tax on the date specified in the notice or, if no date is specified, 30 days after service. Section 208 specifically provides that income tax, when it becomes due and payable, is a debt due to the Commonwealth and payable to the Commissioner. The Commissioner may sue for and recover unpaid tax in any court of competent jurisdiction (s 209) and the Commissioner is entitled to sue for the recovery of any tax immediately after the expiry of the time when it became due and payable: s 207. Section 175 provides that the validity of any assessment is not affected by reason that any of the provisions of the Act have not been complied with.
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> The structure of the ITAA strongly suggests a legislative intent that the issue and service of a notice of assessment (after expiry of the appropriate period) creates a debt that is immediately due and payable, and that the assessment can be challenged only in the manner provided for by the TAA, Pt IVC. Thus, unless there is some genuine dispute about the validity of a notice which has been duly served, there can be no genuine dispute about the existence or amount of the debt specified in the notice (assuming the requisite period has elapsed since service of the notice). A company, or other taxpayer, served with a notice of assessment, is entitled to challenge the assessment through the procedures laid down in the TAA, Pt IVC. In the meantime, however, the tax must be paid. This, indeed, has been the approach taken by the High Court to the construction of the taxation legislation."

The Court then discussed the particular effect of a notice of assessment under that Act, citing this passage from the judgment of Brennan J in *Richard Walter:*[13]

> "The notice of assessment, reflecting the antecedent calculation of the taxpayer's taxable income fixes the amount of the taxpayer's tax liability and it either fixes the date or its service determines the date on which the tax is due and payable. Absent the service of a valid notice of assessment, a taxpayer's liability to pay the tax imposed by the relevant Taxing Act is not fixed nor is there a due date for payment. But, on service of a valid notice of assessment on a taxpayer, s 204 imposes on the taxpayer a liability to pay tax in the amount and on the date specified in the notice or, if no date is specified, on the 30th day after service."

[30] The debt claimed in *Hoare Bros* was therefore one which was fixed and became payable by the issue and service of a notice of assessment. Unless and until that

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[12] (1996) 62 FCR 302, 311
[13] (1995) 183 CLR 168, 195

assessment was successfully challenged, the debt which arose by reason of the notice of assessment existed. Accordingly, at the time of the company's challenge to the statutory demand, there was then a debt the existence of which could not be disputed. That debt might be extinguished by the outcome of proceedings under Pt IVC, but that would result from amendment to the assessment in accordance with the decision of the AAT or the Federal Court (1996) 62 FCR 302, 307. So whilst the company was able to challenge the assessment (by Pt IVC proceedings) it could not deny that until the assessment was amended, the debt was due.

[31] In the cases of Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd, the assessed tax is GST, not income tax. As Gzell J noted in *Platypus Leasing*,[14] the GST Act is "self-executing" and does not depend on the issue of a notice of assessment. The existence of a debt due and payable for GST, is because of the occurrence of facts and circumstances as set out the GST Act, and in particular the making of a taxable supply. A notice of assessment for GST has effect, for example, in the operation of Pt IVC, and it engages s 105-100. But it does not of itself create a debt due and owing. Section 24(1) of the TAA provides that a liability to pay indirect tax (which includes GST) and the time by which an amount of indirect tax must be paid, do not depend on and are not in any way affected by the making of an assessment of that tax.

[32] Accordingly, if these companies succeed in challenging the assessments of GST, that will involve a determination by the AAT that the GST has not at any time been payable. The result will not be to set aside a debt which had been payable, but to resolve that the debt has not been owed. In this way, an assessment of GST is different from the assessment of income tax considered in *Hoare Bros*.

[33] In the present cases then, there is a dispute as to whether there is presently a debt for GST. Especially because the respondent concedes that the applicants have arguable bases for challenging the assessments (within the Pt IVC proceedings) that is a genuine dispute. The fact of that genuine dispute is not affected by s 105-100. It is an evidentiary position which would be critical to the outcome of any proceeding, apart from a Pt IVC proceeding, in which an issue for determination was whether the company did owe the GST as assessed. That is why the taxpayer in *Platypus Leasing Inc* was unsuccessful in seeking a declaration that it did not owe the GST: once the Commissioner tendered copies of the relevant notices of assessment and the declaration, they were conclusive evidence of the correctness of the amounts in proceedings in which the Court was asked to declare them to be incorrect. But in the present proceedings, the merits of the assessments, and of the dispute, are not to be determined.

[34] To establish the ground under s 459H, a company must establish only that it disputes the debt. In *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993) 11 ACSR 362, Hayne J (sitting in the Supreme Court of Victoria) said that at least in most cases, a court in these applications will not attempt to weigh the merits of the dispute and in most cases at least will not embark upon any extended inquiry in order to determine whether there is a genuine dispute.[15] Similarly, in *JJMMR Pty Ltd v LG International Corp* [2003] QCA 519, in relation to an offsetting claim, de Jersey CJ noted that the relevant inquiry was not of what amount was owing to the company, but whether there was a genuine offsetting claim as would warrant

[14] [2005] NSWSC 388 at [34]
[15] (1993) 11 ACSR 362, 366-367

subsequent adjudication.[16] In *John Holland Construction and Engineering Pty Ltd v Kilpatrick Green Pty Ltd* (1994) 14 ACSR 250 at 253, Young J said that although something more than mere assertion by the company is required, because otherwise "anyone could merely say it did not owe a debt", "on the other hand, if proof of a claim was required then one would be doing the very thing that one is not to do, and that is to try this sort of dispute in the Companies Court."

[35] It follows that as far as the assessments of GST are concerned, the existence of debts for the amounts claimed is genuinely disputed by Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd. What must now be considered is the impact of s 105-100 upon other components of the RBAs.

[36] The first of those is the amount claimed pursuant to a declaration made under s 165. Section 165-40 empowers the Commissioner to make a declaration which states, amongst other things, "the amount that is (and has been at all times) the avoider's net amount for a specified tax period that has ended". The term "net amount" is the amount of GST for which an entity is liable less the amount of input tax credits to which it is entitled attributable to the same tax period.[17] Section 165-50 provides that "a statement in a declaration under this Sub-Division has effect according to its terms, for the purposes of Division 33 (about payments of GST) … despite the provisions of this Act outside of those Divisions and this Division." Section 33-5 provides that if the net amount for a tax period (other than a quarterly tax period) is greater than zero, the net amount must be paid by the twenty-first day of the month following the end of that tax period.

[37] The declaration in relation to Neutral Bay Pty Ltd declares that its net amounts for certain tax periods are amounts totalling $4,039,786. The tax periods are the calendar months commencing November 2003 and ending March 2005. The declaration is dated 22 December 2005. The declaration in the case of MA Howard Racing Pty Ltd has the same date and declares net amounts for the calendar months from August 2003 to May 2004, totalling $3,187,743.

[38] Once these declarations were made and for as long as they stand, they have a deeming effect which is to treat the declared net amounts as amounts of GST payable to the Commissioner. The applicants are entitled to challenge, as they do, those declarations within Pt IVC proceedings. But the position is different from that already discussed in relation to whether there was truly GST which was payable. In the case of the declarations, the relevant debt exists because of the declaration itself. Unless that declaration can be impugned (according to the *Hickman* principle) its effect is that at present there is indisputably a debt owing. In relevant respects, the position is the same as that of the income tax demanded in *Hoare Bros*. The question then is whether I should decline to follow the reasoning in that decision.

[39] I should do that only if I think that the decision is clearly wrong. In my respectful opinion that is not so. It has been consistently followed. It is consistent with the terms of s 459H(1)(a), because that section refers to a dispute about the *existence* of a debt.

[40] In the absence of authority, and having regard to the general law background to s 459H (see *Mibor Investments Pty Ltd v Commonwealth Bank of Australia* (1993)

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[16] [2003] QCA 519 at [4]
[17] GST Act s, 17-5

11 ACSR 362, 365-366) a wider view of s 459H(1)(a) might be open, by which a demand could be set aside where the debt is challenged either as to its present existence or as to its continuing existence. It might be thought that where the company was agitating for the debt to no longer exist, it was in one sense disputing its existence. However, there is the authority of *Hoare Bros* and the many cases which have followed it. And there is also a line of authority, in relation to the analogous position of a judgment debt which is challenged by an appeal, which holds that unless and until the judgment is set aside on the appeal, the present existence of the debt cannot be disputed. In that context, it has been held that the relevant ground for setting aside a demand is not the that under s 459H but in an appropriate case could be that under s 459J(1)(b): see *Barclays Australia (Finance) Ltd v Mike Gaffikin Marine Pty Ltd* (1996) 21 ACSR 235; *Eumina Investments Pty Ltd v Westpac Banking Corporation* (1998) 84 FCR 454; *Meehan v Glazier Holdings Pty Ltd* [2005] NSWCA 24.

[41] I am not persuaded to depart from the reasoning in *Hoare Bros.* The result is that the debts which exist by reason of the declarations have a (present) existence which cannot be genuinely disputed, so that s 459H does not apply to them. However, the narrowness of that operation of s 459H is relevant in the consideration of the discretion under s 459J(1)(b), to which I will return.

[42] It is convenient to discuss next the tax shortfall penalties within the demands upon Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd. These are penalties for which the companies are said to be liable by the operation of Sub-Division 284-B of the TAA. Under those provisions, a taxpayer is liable to an administrative penalty if the taxpayer or its agent makes a statement to the Commissioner which is false or misleading in a material particular and there is a shortfall amount as a result of the statement: s 284-75. In the present cases, there are said to be shortfall amounts because in effect the GST payable was understated. Section 284-90 provides for the quantification of what is called a base penalty amount, which varies according to the degree of culpability involved in the taxpayer's misstatement. In these cases, the respondent says that the base penalty according to s 284-90 is 50 per cent of the shortfall amount, ie the amount by which the GST which was understated. That is on the basis that there was recklessness as that term is used in the table in s 284-90(1).

[43] The applicants say that there was no recklessness, and in any case there was no shortfall, because there was no misstatement and there was no underpayment of GST.

[44] The applicants further argue that s 105-100 has no operation on these penalties because it should be inferred that the assessing officer knew the assessment was wrong. It is argued that the officer knew that the taxpayer had taken detailed taxation advice from senior counsel and had acted upon it, so that that the officer could not have held a genuine belief that the applicants had been reckless. The purported reasoning of the assessing officer is set out in the statements of reasons given last December, and it is not compelling. But, the author made lengthy reference to counsel's opinion (which had been copied to the Commissioner), and extensive reasons (however valid) were given for the view that there had been a reckless misstatement. I am not persuaded that the assessing officer acted in bad faith, and did not make a genuine assessment of recklessness and of the penalty payable.

[45] The liability for tax shortfall penalties under Sub-Division 284-B of the TAA depends upon the existence of a shortfall amount, ie it depends upon these companies being truly liable for the GST. There is a distinct penalty which may be imposed in relation to the respondent's s 165 declarations which is under Sub-Division 284-C of the TAA. But the respondent has tendered copies of notices of assessment of penalties under sub division 284-B, but not under Sub-Division 284-C.

[46] Just as the applicants genuinely dispute their liability for GST as assessed so do they genuinely dispute their liability for the alleged shortfall penalties. Section 105-100 does not assist the respondent in relation to these components, for the same reasons that it does not assist her in denying the existence of a genuine dispute in relation to the assessments of GST. Accordingly, Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd have established a ground for setting aside their statutory demands at least in relation to these components, $2,426,963 in the case of Neutral Bay Pty Ltd and $1,773,546 in the case of MA Howard Racing Pty Ltd.

[47] The respondent also relies upon s 105-100 in relation to the "failure to withhold" penalties. By s 16-30 of the TAA an entity which fails to withhold an amount as required is liable to pay to the Commissioner a penalty equal to that amount. Each applicant's case is that the penalty should have been remitted. The Commissioner decided to remit part of the penalties but also to increase them for certain reasons. Those decisions are challenged by Neutral Bay Pty Ltd, MA Howard Racing and Neutral (Sales) Pty Ltd, and they are matters for determination under their Pt IVC proceedings. That challenge seeks to overturn an administrative decision. It does not involve a case that at present the penalties are not payable. Accordingly, there can be no genuine dispute as to the debt in so far as "failure to withhold" penalties are concerned.

[48] The next component, in the demands to Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd, is for what are described as administrative overpayments. The respondent claims to have overpaid these applicants for input tax credits. Section 105-100 does not avail the respondent here. But she argues that because the amounts shown as administrative overpayments are the subject of certificates pursuant to s 255-45 of Sch 1 of TAA, the amounts cannot be said to be genuinely in dispute. That provision, unlike s 105-100, does not provide that the certificate is conclusive evidence. The applicants challenge these administrative overpayments, by arguments which they will put to the AAT and also by an argument that amounts of this kind cannot be allocated to an RBA. That last argument does not represent a genuine dispute as to the debt, but the arguments to be put to the AAT do. Again, it is conceded that each challenge in the AAT is arguable. And again this is not the context in which to assess the merits of that challenge, assisted or otherwise by the prima facie evidence which is provided by the certificates given pursuant to s 255-45. Accordingly, there is a genuine dispute in the sense required for s 459H.

[49] That leaves the amounts for interest. Because the tax shortfall penalties and administrative penalties are genuinely disputed, there is a genuine dispute as to the interest on those amounts.

[50] The result is that for the purposes of s 459H, Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd have demonstrated a genuine dispute as to part of the amount demanded and Neutral Bay (Sales) Pty Ltd has not. Neutral Bay Pty Ltd shows a dispute as to $2,577,218 and the interest referrable to that, and MA Howard Racing

Pty Ltd a dispute as to $1,982,637 and interest. Accordingly, consideration must be given in each of these three cases to s 459J. Before going to that, I will discuss the demand against Broadbeach Properties Pty Ltd in so far as s 459H is concerned.

Broadbeach Properties Pty Ltd: s 459H

[51] The demand here is for income tax including penalties and a general interest charge for the 2004 year of income The tax is the subject of a default assessment. At first, the applicant argued that this assessment was displaced by a subsequent assessment which was said to be deemed to have been made on the applicant's lodging the required return. But this point was abandoned.

[52] The remaining challenge to this default assessment is that the respondent failed to allow deductions for interest paid to related companies. The applicant has objected to the assessment upon this basis and as at the time of the hearing, the respondent had not decided the objection. Nevertheless, the respondent has seen fit to issue the statutory demand.

[53] The applicant argues that there is a genuine dispute as to the debt under s 459H. It is said that *Hoare Bros* is distinguishable because in the present case the dispute is still at the stage of an objection and there is no provision which expressly authorises the Commissioner to commence recovery proceedings at this stage. It is said that s 14ZZM and s 14ZZR of the TAA formed the basis for the decision in *Hoare Bros* and that they apply only after Pt IVC proceedings are underway. And it is said that this limitation on the application of *Hoare Bros* was recently demonstrated in *Ozone Manufacturing*. As already mentioned, the demand in *Ozone Manufacturing* was set aside upon the basis of an offsetting claim, rather than a genuine dispute as to the debt. As the Full Court there held, *Hoare Bros* was of limited relevance to that ground (an offsetting claim). The judgments in *Ozone Manufacturing* did not explore the proposition now advanced, which is that an income tax debt can be genuinely disputed whilst the Commissioner is or should be considering an objection to it. But as already discussed, there is a debt which indisputably has a present existence from the fact of the assessment. And this assessment is not attacked upon a *Hickman* basis.

[54] It follows that Broadbeach Properties Pty Ltd has not made out the ground under s 459H.

Section 459 J(1)(b)

[55] The Court may set aside a demand if satisfied "that there is some other reason why the demand should be set aside". In *Hoare Bros,* the Full Federal Court accepted that in some cases a statutory demand for unpaid income tax could be set aside under this provision. There has been considerable discussion as to the effect of the Full Court's judgment in this respect. Therefore, I will set out the critical passage:[18]

> "It would be unwise to attempt to mark out the limits of the discretion conferred by s 459J(1)(b). Paragraph 687 of the Explanatory Memorandum provides illustrations of circumstances that might constitute appropriate reasons for setting aside the demand. Another illustration, which was given by the Australian Law Reform Commission in a discussion paper (*General Insolvency*

[18] (1996) 62 FCR 302, 317-318

> *Inquiry* (DP 32, 1987), par 114), is the situation in which a creditor unreasonably refuses the Company's offer to meet the debt. The circumstances of *Norper* may well afford a further illustration. In the present case, Olney J implied that he would have been prepared to exercise the discretion in the Company's favour, had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice.
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> Mr Searle's attack on Olney J's refusal to exercise his discretion in favour of the Company was based on only one ground. The contention was that, since the Company had lodged objections and was pursuing an application to the AAT, and since there was a genuine dispute between the parties as to the subject matter of the objections, Olney J was bound to exercise his discretion in favour of the Company. We have already said that we do not read Olney J's judgment as incorporating an affirmative finding that the Company's objections raise a genuine dispute as to its underlying liability to income tax. But even if his Honour intended to make such a finding, it cannot be said that his Honour was compelled to exercise his discretion in the Company's favour. It was, at the least, open to his Honour to consider the circumstances of the case to determine whether it was appropriate to make an order to set aside the demand. In fact, his Honour did take into account the circumstances of the case, including the Company's failure to object to the 1990 assessment until after the statutory notice was served, and the fact that the company's claim to a net refund was dependent upon it being entirely successful in its objections. In our view, Mr Searle has not established any error in the exercise of his Honour's discretion under s 459J(1)(b)."

[56] According to that passage, a court is not obliged to set aside the demand in every case where there is what was described as a genuine dispute as to the underlying tax liability, which the company was pursuing by an objection or by Pt IVC proceedings. But nor did the Full Court say that in a particular case those circumstances could not be sufficient to set aside the demand. The Court refused to interfere with Olney J's discretionary refusal to set aside the demand because that discretion did not have to be exercised in the company's favour in those circumstances. It referred to Olney J's indication that he would have been prepared to set aside the demand had it been shown that the Commissioner's conduct was unconscionable, was an abuse of process, or had given rise to substantial injustice. But I do not read the Full Court's judgment as suggesting that it is only where the Commissioner's conduct had that character or effect that the demand could be set aside. Instead, the Full Court recognised a broader discretion under s 459J(1)(b), and said that it would be unwise to attempt to mark out its limits.

[57] This is not inconsistent with the judgment of Austin J in *Moutere Pty Ltd v DCT* (2000) 34 ACSR 533, who said that where the assessment was the subject of a due objection, and the Court forms the view that the Commissioner has acted oppressively or unfairly by issuing a statutory demand rather than awaiting the

outcome of the objection, or taking proceedings for the recovery of the debt, the appropriate course is to set aside the demand.[19] Austin J there said:[20]

> "[54] Subparagraph (b) nevertheless has an important role to play in circumstances such as the present, as the Full court's remarks in the *Hoare Bros* case (at 4174) indicate. The policy underlying s 459H is that the statutory demand procedure should not be used to coerce a person to pay a disputed amount. A statutory demand is not an instrument of debt collection. By analogy, the commissioner should not use the statutory demand procedure to apply coercive pressure to a taxpayer who genuinely objects to the commissioner's decision. To do so would be to take unfair advantage of those provisions of the taxation legislation (such as ss 14ZZM and 14ZZR of the TAA) which say that an amount owing in consequence of the commissioner's decision is recoverable, notwithstanding that an objection has been lodged against the decision.
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> [55] If the commissioner decides not to await the outcome of the objection, the proper course will often be for him to take proceedings for recovery of the debt rather than to summon up the spectre of liquidation by issuing a statutory demand. If the court forms the view that the commissioner has acted oppressively or unfairly by issuing a statutory demand in such circumstances, the appropriate course is for the court to set the demand aside under s 459J(1)(b). By doing so the court does not deny that the debt is recoverable although an objection has been made, but it thereby insists that the statutory demand procedure should not be used to apply pressure for payment of an amount which might ultimately be found not to be payable."

On the facts of that case, Austin J concluded that it was not unconscionable, unfair or an abuse of process for the Commissioner to issue a statutory demand, when the company had not lodged an objection against the relevant decision and it appeared that the Commissioner had issued the demand only after certain information promised by the company had not been provided. But Austin J's judgment clearly indicates that it will be open to set aside a demand for tax under s 459J where the underlying tax liability is genuinely disputed and has been duly challenged.

[58] Mullins J cited *Moutere* with approval in *Softex Industries Pty Ltd v C of T* (2001) 187 ALR 448; [2001] QSC 377, in setting aside a statutory demand for income tax. In circumstances where the debt was disputed in proceedings in the AAT, and the Tribunal's determination had been reserved for some months, her Honour said that it was oppressive for the demand to be served which incorporated the disputed sum and that on that basis alone, the demand should be set aside.[21]

[59] In *Willemse Family Company Pty Ltd v DCT* [2003] 2 Qd R 334, Holmes J (as her Honour then was) followed *Moutere* and *Softex* in setting aside a demand for

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19 (2000) 34 ACSR 533, 543
20 (2000) 34 ACSR 533, 543
21 [2001] QSC 377 at [72]

income tax. The Deputy Commissioner had obtained a judgment for that tax and a further application was for a stay of its enforcement. Holmes J refused to stay the judgment but she set aside the statutory demand. The Commissioner's submissions in that case, like those in this case, challenged the correctness of *Softex* and in particular Mullins J's description of the Commissioner's conduct as oppressive. As to that submission, and the breadth of the discretion under s 459J, Holmes J said[22]:

> " [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.
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> [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."

[60] I followed *Softex* and *Willemse* in setting aside the demand in *KW & KM Quinn Investments Pty Ltd v DCT* (2003) 202 ALR 335; [2003] QSC 336. I held that there is discretion to set aside the demand under s 459J where the circumstances include the existence of a genuine dispute as to the correctness of the tax assessment and the taking of appropriate steps by processes of objection or appeal to set it aside. In that case, the company had been tardy in its challenge to the assessment. But the correctness of the assessment was likely to be determined by proceedings involving other taxpayers which were well advanced in the AAT. So in those circumstances, there was an unfairness in serving the demand which would have prejudiced the company's proposed challenge to its assessment. That decision was upheld on appeal at [2004] QCA 91, where Davies JA (with whom Fryberg and Philippides JJ agreed) said:

> "In my opinion, for two reasons in combination, it was open to his Honour to be so satisfied. The first is that there was no suggestion that the respondent was unable to pay its debts as they fell due including these assessments, other than I should add in fairness to Mr Hack, than that these assessments were not paid. The winding up provisions of the Corporations Act were being used merely as a debt recovery procedure. And secondly there was the fact that there was some likelihood that the decision presently reserved by the Administrative Appeals Tribunal would resolve not only the liability of the taxpayers in the matters before the Tribunal, but also the liability of the respondent under each of these assessments."

[61] The respondent argues that the reasoning in each of these cases, perhaps with the exception of *Hoare Bros,* is wrong and ought not to be followed. The respondent

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[22] [2003] 2 Qd R 334 at 344-345

submits that the proper approach is that expressed by Olney J in *Kalis Nominees Pty Ltd v DCT* (1995) 31 ATR 188 at 193:

> "The legislative policy of the tax law is clear enough. Once tax is due and payable it may be recovered from the taxpayer notwithstanding that the taxpayer has sought to exercise his rights or review of appeal under Pt IVC of the *Taxation Administration Act*. The policy of the law would be defeated if a demand were set aside under s 459J(1)(b) simply because a review of an objection decision is pending. A taxpayer must, in the context of a case of this nature, demonstrate more than the fact that he disputes his liability for the tax as assessed and that he is actively pursuing his remedies. It is both unnecessary and undesirable to endeavour to list the circumstances which would justify the exercise of the discretion under s 459J(1)(b) except to say that in a case in which the Commissioner is not shown to have acted oppressively or to have treated the applicant in a manner different from other taxpayers in a similar position, it is not appropriate that the discretion to set aside the demand should be exercised. Section 459J(1)(b) does not provide an occasion for the court to express its view on the reasonableness or otherwise of the taxation legislation."

[62] The respondent also relies upon this statement by the Court of Appeal of the Supreme Court of the Australian Capital Territory in *Arcade Badge Embroidery Co Pty Ltd v DCT* (2005) 157 ACTR 22 at [27]:

> "What is contemplated by s 459J(1)(b) is a discretion of broad compass which extends to conduct that may be described as unconscionable, an abuse of process, or which gives rise to substantial injustice: *Hoare Bros Pty Ltd v Cmr of Taxation* (1996) 62 FCR 302 at 317-318; 135 ALR 677 at 691-2."

I have set out that passage from *Hoare Bros*. Contrary to the respondent's submission, the Full Federal Court did not hold that the demand could be set aside only where the conduct could be so described, although in *Arcade Badge Embroidery*, the demand was set aside where the conduct did bear that description.

[63] The respondent argues that judgments such as *Willemse* and *KW & KM Quinn Investments* have wrongly shifted the proper focus from the conduct of the Commissioner to the effect on the taxpayer. But those two matters are obviously related. The Commissioner's conduct in a particular case could be criticised only by reference to its effect on the taxpayer. The submission does not provide a persuasive basis for limiting the power under s 459J to instances of unconscionability or abuse of process. And the Full Court in *Hoare Bros* instanced another circumstance as being that of "substantial injustice", which undoubtedly focuses upon the effect on the taxpayer.

[64] Another of the respondent's submissions proceeded in this way: the respective powers under s 459H and s 459J cannot be exercised for the same circumstances; where a debt is disputed, the only available power is under s 459H; s 459J cannot be invoked on the basis of a disputed debt; therefore, a dispute as to the underlying tax debt cannot found an order under s 459J. The effect of this argument is that although the present existence of the debt cannot be disputed under s 459H, nevertheless because in a broader sense, there is a dispute as to the debt, s 459J has

no operation. The logical difficulty in that argument and the likely unfairness from its application make it particularly unpersuasive.

[65] Next, it was strongly argued that it is wrong to set aside a statutory demand in these circumstances because the proper occasion in which to consider the dispute as to the underlying tax liability is on the hearing of the winding up application. It is said that there is no unfairness to the company from postponing the argument to that hearing because the effect of the statutory demand is to create a presumption of insolvency, but a rebuttable one. A solvent company then has nothing to fear because it can simply prove its solvency in the winding up proceeding. There are several difficulties with that argument.

[66] The first is that it asserts there could be no prejudice to a solvent company by the reversal of the onus of proof that results from an unsatisfied statutory demand. Clearly, there will be cases where that shift in the onus of proof could be important. Secondly, it ignores the consequences in many cases of the existence of an application for the winding up of the company. The potential detriment from the existence of winding up proceedings has long been recognised in the grant of injunctive relief in appropriate cases to restrain the commencement of such proceedings. Thirdly, it is an argument which has a tension with s 459S of the *Corporations Act* which provides as follows:

> " (1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground:
>
> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
>
> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
>
> (2) The Court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

Assuming that the power under s 459J is limited to a case of unconscionable conduct by the Commissioner, one relevant circumstance would still be that there is a genuine dispute as to the underlying tax liability. So if that circumstance, the genuine dispute as to the tax liability, is relied upon in an application which fails under s 459J because unconscionability is not established, what is the effect of s 459S upon the company's right to rely upon that same matter on the hearing of the winding up application? And if the company had not relied upon that dispute, as one of the circumstances warranting the setting aside of the statutory demand, could it be relied upon at the winding-up hearing (at least without leave) having regard to s 459S?

[67] Fourthly, to say that in circumstances such as these a company could prove its solvency on the winding-up hearing is to ignore the question of whether a genuine dispute as to the underlying tax liability should result in that liability being included or excluded in an assessment of solvency. In many cases, the company will be unable to pay its debts as they fall due upon the premise that the tax debt is

included, but be able to pay its other debts. In such a case, the Commissioner would no doubt argue that the company cannot prove its solvency.

[68] The respondent's submission, that this matter should be left to a winding up application, would simply postpone the fundamental issue to a later hearing. That issue is as to how the balance is to be struck between the Commissioner's right to pursue payment of a debt whose present existence is indisputable, and the taxpayer's statutory right to challenge its underlying tax liability, in this particular context of company liquidation. Clearly, the policy of provisions such as s 105-100 is to require the tax to be paid notwithstanding a dispute as to its assessment. A taxpayer which pays the tax pending a challenge to its assessment, and who succeeds in that challenge, can be repaid. But the winding up of the taxpayer involves further considerations. A taxpayer which is a company ordered to be wound up cannot be so easily restored to its former position. The respondent's submissions did not attempt to explain how it could be. In my respectful opinion, the approach of Olney J in *Kalis Nominees* gives insufficient recognition to another element of the tax laws, which is the taxpayer's statutory right to challenge its liability, and to the practical consequences for a taxpayer which may be entitled to succeed in that challenge but which, in the meantime, has been put into liquidation. I do not agree that the policy of provisions such as s 105-100 would be defeated if a statutory demand could be set aside because of a timely and arguable challenge to the assessment. Section 105-100 would still have an extensive operation in facilitating the collection of tax without its being used to deny the court's long established discretionary powers in relation to a winding up.

[69] In bankruptcy proceedings, where the petitioning creditor is the Commissioner who has obtained a judgment for tax, the assessment of which has been duly challenged, it has been held that in the interests of justice it may be necessary to adjourn the petition whilst that challenge is pursued: *Ahern v DCT* (1987) 76 ALR 137. That approach is just as apt in the winding up of companies.

[70] As already mentioned, s 459J has been employed to set aside a statutory demand where the debt is a judgment debt, although the question of whether the existence of an appeal is of itself a sufficient reason for setting aside the demand under s 459J has been the subject of differing judicial opinion: see eg the different views in *Barclays Australia v Mike Gaffikin Marine Pty Ltd* and *Eumina Investments Pty Ltd v Westpac Banking Corporation.* The context is analogous to this one, because it involves a debt the present existence of which cannot be disputed but which is susceptible to extinguishment by further proceedings. Yet the present context, at least in one sense, provides a stronger basis for intervention under s 459J, because here the existing indebtedness has not resulted from a judicial determination of the merits, but from the exercise of an administrative discretion by the creditor.

[71] In summary the respondent's submissions do not demonstrate a reason for departing from the line of authority I have described, in particular from *Moutere, Softex* and *Willemse*. The discretion is a broad one, and not confined to cases where the Commissioner's conduct bears the description of unconscionability. The question then is whether in the circumstances of this case, the discretion should be exercised in favour of these applicants.

[72] Each has a genuine dispute as to its underlying tax liability. The respondent concedes that in each and every respect, the applicants have an arguable case in its Pt IVC proceedings. The applicants have not been slow to object or commence

those proceedings. In the case of Broadbeach Properties Pty Ltd, the matter was still at the stage of the respondent's required consideration of the applicants' objection at the time of the hearing of its application. In the cases of Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd, the statutory demands would be substantially varied under s 459H and further, the amounts for "assessed/declared net amounts" can be disputed for the purposes of s 459H in so far as they are assessments of GST, but cannot be disputed under that section in so far as they result from the respondent's alternative declarations under the anti-avoidance provisions. Where both bases relied upon by the Commissioner for these particular debts are challenged in the AAT, each upon an arguable basis, it would seem curious that the two bases should have different consequences for the statutory demand. Be that as it may, the applicants have in each case established that there is good reason for setting aside these demands under s 459J, in so far as they are not already to be varied under s 459H. There is an unfairness in the use of the statutory demand procedure in these cases because of its likely impact upon the taxpayer's objection or challenge to what the respondent has decided it should pay. There is evidence tendered by two applicants, Neutral Bay Pty Ltd and MA Howard Racing Pty Ltd, that because of legal advice which they had received, they were not 'prepared' for the respondent's decisions, and "are unable to pay immediately". On the other hand, the respondent does not point to any particular circumstance which in this case warrants the winding up procedure going forward, notwithstanding the currency and arguable bases of these objections and challenges.

Orders

[73] In each of these applications, it will be ordered that the statutory demand be set aside. I shall hear the parties as to costs.