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POSSIBLE REMEDIES AGAINST THE COMMISSIONER IN THE ABSENCE OF STATUTORY ENTITLEMENT – ESTOPPEL/FAIRNESS/LEGITIMATE EXPECTATION ETC.

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2 October, 2002

The purpose of this paper is to explore what avenues taxpayers may have for curial or other redress when they do not have the benefit of the law as expressed in a relevant provision of a revenue statute i.e., where the law is against them, or where no provision relevant to their situation exists. The former cases, on which this paper will concentrate, involve substantive provisions adverse to a taxpayer e.g., the former sec 54 of the ITAA for a taxpayer who is not the “owner” of plant attempting to claim depreciation; the latter cases will usually arise in relation to matters of administration or procedure where there simply is no relevant substantive provision e.g., as to how an audit should be conducted, so that there is no reviewable decision “made under an enactment” for the purposes of the Administrative Decisions (Judicial Review) Act.¹

It might perhaps be assumed that no exploration is required of prospective curial

¹Many decisions which *would* be “made under an enactment” are, of course, excluded from review under the ADJR Act as decisions “making or forming part of the process of making, or leading up to the making, of” assessments or “disallowing objections to assessments” – paragraph (e) of Schedule I of the ADJR Act – but a decision in exercise of the general administrative power under sec 8 of the ITAA is not a “decision made under an enactment” – *Robinswood Pty Ltd v F C of T* (1998) 39 ATR 305; *Hutchins v D C of T* (1996) 32 ATR 620 and *Knuckey v F C of T* (1988) 40 ATR 117 cf., for example, the decision to issue a sec 264 notice – *McCormack & Ors v F C of T* 2001 ATC 4740 – which is

redress in circumstances where the relevant statute is adverse and that in such circumstances a taxpayer is without any such redress no matter what actions of the Commissioner may have led to the taxpayer being so exposed or how other taxpayers are treated. After all, it is well known that, as a matter of general principle, estoppel will not prevent the exercise of a statutory obligation² and that “no conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.”³ Any remaining doubts, it might be suggested, were put at rest by the introduction of the Rulings system in Part IVAAA of the Taxation Administration Act in relation to which the Full Federal Court has said that “the scheme of Part IVAAA leaves no room for the operation of any doctrine of estoppel or the re-introduction of that doctrine through administrative law remedy.”⁴ It is suggested, however, that there remain some real issues in this area, issues which are worth examining and opening up for debate and which raise questions which are both important and topical.

The Rulings System

Part IVAAA, dealing with public rulings and Part IVAA, dealing with private rulings were inserted in the Administration Act by legislation which became effective on 30 June 1992. So far as public rulings are concerned, sec 14ZAAE gave the Commissioner power to make a ruling “on the way in which, in the Commissioner’s opinion, a tax law or tax laws would apply to any person in relation to a class of arrangements.” The word “arrangement,” obviously critical to the rulings system, was widely defined and the ruling could apply to a class of arrangements as well as to a

²See cases discussed in *Minister for Immigration & Ethnic Affairs v Polat* (1995) 37 ALD 394 at 399-401

³*F C of T v Wade* (1951) 84 CLR 105 Kitto J at 117; also see *Commissioner of I.R. v Lemmington Holding Ltd* (1982) 1 NZLR 517 Woodhouse P and Richards J at p523

⁴*Bellinz Pty Ltd & Ors v F C of T* 98 ATC 4634 at 4646.

class of persons in relation to those arrangements. Provision was made for the withdrawal of public rulings although the withdrawn ruling was to continue to apply to arrangements carried out before the withdrawal. The Commissioner is bound by sec 170BA(3) to assess tax in accordance with the ruling even where the tax law might otherwise have resulted in more tax being payable. However, the Full Federal Court has held that “the binding quality which the legislation gives to the public ruling applies to the tax consequences of the arrangement or class of arrangements to which the ruling relates and not ... to the underlying philosophy behind the ruling.”⁵ In other words, the Commissioner is not bound to treat arrangements not actually covered by a public ruling in a manner which is consistent with the reasoning or approach adopted in the public ruling.

Part IVAA, dealing with private rulings, provides that a person may apply for a ruling on the way in which a tax law would apply to the person in relation to an “arrangement,” as defined in Part IVAAA. The Commissioner is not required to comply with an application for a private ruling in a variety of circumstances, can ask for further information and can, if he considers the correctness of the ruling would depend on what assumptions are made about “a future event or other matter” (sec 14ZAQ), decline to make the ruling or make such of the assumptions as he considers are most appropriate for the purpose of making the ruling. Notice of a private ruling must set out the matter ruled on and identify the person, tax law, year of income and “arrangement” to which the ruling relates, including in the “arrangement” any assumption which has been made for the purpose.⁶ Rather than being set out in the ruling, the arrangement can be identified by reference to another document (14ZAS(3)) but it is, of course, essential that the arrangement be precisely set out somewhere. This will usually be in the application for ruling itself. A private ruling

⁵Ibid at 4646

⁶Requirements more often observed in the breach

can be withdrawn with the consent of the rulee or without the rulee's consent if the arrangement has not begun to be carried out⁷ or the disadvantage to another person would be greater than the disadvantage to the rulee flowing from the withdrawal. Section 170BB(3) provides that the tax payable by a rulee cannot exceed what it would have been if the law applied in the way specified in the ruling.

It has been said that “the private ruling system rests on the premise that the taxpayer will not abuse the system and will genuinely seek to obtain rulings in relation to anticipated facts or facts which are in fact known, albeit that no relevant assessments have issued, so that the taxpayer's affairs may be ordered accordingly.”⁸ This comment has echoes of remarks made in an English court in relation to approaches to the revenue for its agreement to forego tax which might arguably be payable on a proper construction of the relevant legislation i.e., approaches for the benefit of effectively extra-statutory concessions. There it was said that “it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given.”⁹

Significantly, in a later decision in the House of Lords it was said that it did not necessarily follow “that full disclosure had been made because sufficient information was disclosed to enable inferences to be drawn therefrom.”¹⁰ It was also said that it was “important that when clearance is sought for such schemes [a reference to “large

⁷Refer *Carey v Field* [2002] FCA 1173 Merkel J 20 September 2002

⁸*F C of T v McMahon & Anor* 97 ATC 4990

⁹*Regina v IRC, ex parte MFK Underwriting Agents Limited Ltd* [1990] 1 WLR 1545 Bingham J at p1569.

¹⁰*Regina v IRC, ex parte Matrix Limited* [1994] 1 WLR 334, Lord Jouncey at p354

numbers of financial and insurance schemes which are promoted”] the revenue should not be put under undue pressure to give an answer by return ... the revenue when asked for clearances or other views should never feel pressurised by importunate taxpayers or their prestigious advisors. Rather should they take such time as is reasonably necessary for them to give full consideration to the problems placed before them. Taxpayers and their advisers should appreciate this when asking the revenue for their view.”¹¹

Later in the same case the following warning was given:

“... a failure by the taxpayer to make full disclosure of the material circumstances is not the only case in which, notwithstanding that the revenue has given an assurance, it will be no *abuse of power* for the revenue to go back on the assurance given. Many of the transactions on which advance clearance is sought are extremely complex, both factually and legally. If the revenue has made it known that in particular categories of transactions advance clearance can only be given effectively at a particular level and clearance is not obtained from that level, there is ... no *abuse of power* if the revenue seeks to extract tax on a basis different from that contained in the assurance. If the taxpayer either knows or (by reason of revenue circulars) ought to have known that a binding clearance can only be obtained in a particular way and a purported clearance has been obtained in a different way there is nothing unfair if the revenue says that the purported clearance (being to the knowledge of the taxpayer given without authority) is of no effect and does not bind it.”¹² (My emphasis)

While absorbing that warning it is also worth noting that going back on an assurance given by the revenue is spoken of, absent the relevant excuse, as involving an “abuse of power,” a notion that will require consideration, in due course, of the tort of misfeasance in a public office.

¹¹Ibid at p355

¹²Ibid Lord Browne-Wilkinson at p356-7

Once the private ruling is made the Commissioner is bound by it, apart from an appeal or review, so that the Commissioner, when he issues an assessment, must do so on the basis that the “arrangement” as identified in his ruling has the tax consequences indicated in the ruling. It is important, particularly in light of the comments in the English authorities about putting all the “cards face upwards on the table,” to note that “when the actual facts as ascertained by the Commissioner form the basis of an assessment by the Commissioner, it is those facts which will govern the assessment, not the facts as identified in the form of an arrangement by the Commissioner in his private ruling, unless the two correspond.”¹³ It is because the Commissioner, when making a private ruling, does not make findings of fact but merely identifies facts and relevant assumptions and then states his opinion about the way in which the relevant tax laws apply that, if a taxpayer seeks a review of the private ruling, then the subject matter of that review is the arrangement as identified by the Commissioner in his private ruling. The review is not a review in the usual sense i.e., of dealing with actual facts, and it is for this reason that a review tribunal “is limited to the facts that constitute the arrangement as identified by the Commissioner in his own ruling” and cannot “travel beyond those facts.”¹⁴ This is why it is so important for taxpayers to ensure that the “arrangement” upon which they obtain the relevant ruling will in fact correspond to the facts, including *all* the relevant facts, which will ultimately be the basis of the assessment. It is also largely for this reason that the system of objection and review of private rulings provided for by sec 14ZAZA has proved so unsatisfactory.

The problems with the system of objecting to private rulings were first identified in 1994¹⁵ and since then no taxpayer appears to have succeeded on any appeal to a

¹³*F C of T v McMahon & Anor* 97 ATC 4986 at 4990

¹⁴*Ibid* at p4990

¹⁵*Payne v F C of T* 94 ATC 4191

court or tribunal against the disallowance of an objection to a private ruling. The following is a short summary of the cases in which taxpayers have sought to appeal in such matters:

Payne v F C of T 94 ATC 4191 Hill J – Frequent flyer ruling objected to. Matter remitted to Commissioner for further enquiry because insufficient facts in ruling to decide the objection. (Note that in *Payne v F C of T* 96 ATC 4407 the taxpayer succeeded on an objection to an assessment on the value of frequent flyer tickets).

CTC Resources v F C of T 94 ATC 4072 Full Court of the Federal Court – Objection to first ruling disallowed on grounds arrangement not entered into before relevant year ended; second matter remitted to Commissioner to enquire further into facts.

First Provincial Building Society Ltd v F C of T 95 ATC 4145 Full Court of the Federal Court – Commissioner’s ruling that building society’s receipts from consolidated revenue were assessable supported on basis that receipts were a “bounty” under sec 26(g) although not income under sec 25.

United Energy Ltd v F C of T 97 ATC 4796 Full Court of the Federal Court – Commissioner’s ruling that “franchise fees” paid by electricity distributor were non deductible supported on grounds that fees paid were a “monopoly rent.”

F C of T v McMahon 97 ATC 4986 Full Court of the Federal Court – Commissioner’s appeal from AAT upheld on grounds that AAT had attempted to go beyond facts in Commissioner’s ruling.

National Speakers Association of Australia Inc v F C of T 97 ATC 5131 Emmett

J – Taxpayer’s appeal from disallowance of objection against “private ruling” remitted to the Commissioner on the basis that, the Commissioner not having identified any “arrangement,” no valid private ruling had been made.

Pierce v F C of T 98 ATC 2240 AAT Mr McMahon – Commissioner’s “ruling” in relation to reimbursement of motor vehicle expenses found to be fatally flawed by, inter alia, “inherent obscurity” so that the Tribunal was not empowered to adjudicate on the issue.

McMahon v F C of T 99 ATC 2025 AAT Mr Block – Commissioner’s ruling that payment to a rugby manager coach was an ETP upheld.

Bellinz Pty Ltd v F C of T 98 ATC 4634 Full Court of the Federal Court – Commissioner’s ruling to the effect that depreciation would not be allowed to lessors in a leveraged lease partnership upheld.

In five of the above cases (*Payne*, *CTC Resources*, *McMahon*, *National Speakers Association* and *Pierce*) the taxpayers failed, effectively because of what were described in the High Court as “serious practical difficulties in the working of the scheme for private rulings.”¹⁶ These practical difficulties arise primarily because of the essentially hypothetical nature of the “arrangement” in respect of which the ruling is given, hypothetical in the sense that the arrangement may not necessarily precisely accord with the actual facts. The difficulties are compounded by the fact, counter intuitive though some may regard it, that it is only the details of the arrangement as described in the Commissioner’s ruling itself to which the Tribunal can have regard.¹⁷

¹⁶*CTC Resources v F C of T* 94 ATC 4234 Mason CJ on hearing of Special Leave Application

¹⁷*F C of T v McMahon* 97 ATC 4986 Lockhart J at 4990;
United Energy Ltd v F C of T 97 ATC 4796 at 4797 and 4806;
Bellinz Pty Ltd v F C of T 98 ATC 4634 at 4639

This means it would be unwise for a taxpayer to object to a ruling which did not set out every single fact upon which the taxpayer might wish to rely, either expressly or by adoption of some other document, or if there was a possibility that the facts as set out in the ruling, including any relevant assumptions, might not accord precisely with the actual facts upon which an assessment would be based. Similar problems exist for taxpayers seeking to rely upon public rulings, where the arrangement described in the public ruling must also exhibit all the features of the particular arrangement in which the taxpayer is involved. This was the essential condition which the taxpayer's failure to satisfy was considered fatal in *Bellinz*.¹⁸

Circumstances in which Taxpayers may be misled by the Commissioner's statements or actions

The foregoing review of the system of public and private rulings has been undertaken to show how easily a taxpayer could fail to obtain the protection intended to be afforded by the rulings provisions. They were, after all, intended to provide such protection and assurance to taxpayers. The private rulings system in particular was "introduced to assist taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed and who wished to obtain a ruling from the Commissioner on this question before the assessment process is complete" thereby enabling "taxpayers to order their affairs with a degree of certainty about their tax implications before they embark or whilst they are embarking, upon courses of conduct, the tax implications of which may not be known for a considerable time."¹⁹

¹⁸For a detailed discussion of the problems of the rulings system and its subversion by the ATO's approach, see Professor G S Cooper's paper "Rulings" given to the Taxation Institute of Australia 1999 Tax Retreat

¹⁹*F C of T v McMahon* 97 ATC 4986 at 4989

Whilst the restrictions on the protection afforded by the rulings system are understandable enough, it is commonplace for taxpayers and their advisers to unintentionally fail, in their applications for ruling, to properly describe the “arrangement” in respect of which the ruling is sought and certainly commonplace for such applications not to display the rigour which is necessary for a taxpayer to be able, subsequently, to rely on the provisions of sec 170BB of the ITAA. It is also commonplace for the actual facts of an arrangement previously described to the Commissioner in an application for ruling at a time when the arrangement is only in prospect, to differ in respects the materiality of which ought not, in terms of interpretation philosophy, to have any effect on the favourable ruling which had been obtained but which means, nevertheless, that it is not **the** “arrangement” in relation to which the private ruling was given. Taxpayers in this position would appear not to have the benefit of any “underlying philosophy behind the ruling” of the kind referred to in *Bellinz*.²⁰

The latter circumstance is only one example of how a taxpayer may be deprived of the benefit of the provisions of sec 170BB (or, in relation to public rulings, sec 170BA). Other circumstances will include those where, as for example in the case of attempted transfers of losses between group companies, the transferee company does not have the benefit of the ruling. They may also include circumstances where, in the ruling application, the taxpayer has failed to refer to a section e.g., sec 51AD of the ITAA which, had it been referred to, and the Commissioner’s attention drawn to it, might have rendered unavailable a deduction otherwise available under sec 8-1 ITAA 1997 or 51(1) ITAA 1936. Section 51AD(10) provides that where the section has applied to property the taxpayer will be deemed not to have occupied or used the property for the purpose of producing assessable income or in carrying on a business for that purpose. If, for example, the only question asked in the application for ruling is

²⁰98 ATC 4634 at 4646

whether the relevant property is “plant” or “owned” by the taxpayer, then the ruling will not protect the taxpayer against the subsequent reliance by the Commissioner on sec 51AD, however much the taxpayer may have been misled by the Commissioner’s willingness to rule favourably on what the taxpayer may have perceived to be the main issue.

Even if the Commissioner’s ruling has simply stated, for example, that a deduction will be allowable under sec 51(1) or sec 54, it may be arguable that there is only “a private ruling on the way in which an income tax law applies to a person,” within sec 170BB(3)(a) in respect of the application of sec 51(1) (or sec 54), in effect without a full consideration of other relevant provisions. In other words it may be arguable that the Commissioner has not given a ruling on the way in which an income tax law applies if he has failed to make reference to a provision, like sec 51AD, relevant to the ultimate availability of a deduction. This is certainly the view which it is understood is taken by the Commissioner and used to justify his stance in denying a deduction to the transferee of company losses where the transferee does not have the benefit of a ruling. It is a view for which the Commissioner may find some support in the comments from the English cases which were quoted earlier.

Taxpayers may therefore find themselves in the position where they have been effectively misled by the Commissioner’s willingness to provide a favourable ruling but one which overlooks a relevant provision or is given to a different taxpayer or on an arrangement different in no relevant respect from the arrangement which is ultimately implemented, but for which they cannot claim the benefit of the ruling. The Commissioner’s behaviour may also lead to taxpayers being disadvantaged in a variety of other situations. They include situations where:

- like the taxpayers in *Bellinz* and in *David Jones Finance v F C of T*,²¹ they have been lulled into a false sense of security by an administrative practice, adopted for years;²²
- like the directors of the company in *F C of T v Winters & Anor*,²³ they have been led to believe the Commissioner would accept that something had occurred, in that case that the time for compliance with a penalty notice would be extended, thereby inducing them not to appoint an administrator during the fourteen day statutory period;
- like the taxpayers in *Carey v Field*²⁴ they had been assured they would be afforded an opportunity to present their case, prior to any contemplated withdrawal of a product ruling;
- taxpayers are prejudiced by the delay in the handling of their objections²⁵; or
- there are delays or other prejudicial conduct in the handling of an audit or the commencement of proceedings for recovery.

²¹90 ATC 4730 O’Loughlin J and 91 ATC 4315 Full Court of the Federal Court

²²Refer also to *Cromellin v D F C of T* (1998) 39 ATR 377 and *Mercantile Mutual Insurance v F C of T* (1998) 39 ATR 467 in both of which counsel for the ATO stated that relevant non-binding public rulings under the former system did not correctly state the legal principles notwithstanding the Commissioner’s preamble to all Taxation Rulings to the effect that the old non-binding rulings remain “administratively binding”

²³97 ATC 4967

²⁴[2002] FCA 1173

²⁵As the taxpayer complained in *F C of T v Cainero* 88 ATC 4427, see Foster J at p4436 and in *Galea v F C of T* 90 ATC 5060

Possible Remedies

It is in relation to taxpayers placed in a position of prejudice by circumstances of the kind considered above, and particularly those circumstances where there is a relevant provision in the tax law but it is adverse to the taxpayer, that it is proposed to consider the possible remedies which might be available.

The first area in which a remedy might be sought is the area of estoppel. The object of an estoppel is to “prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other’s detriment.”²⁶ Estoppel is thus no more than a term used to describe what happens when a person seeks to behave unfairly by reneging on previous representations. An obligation of fairness is therefore fundamental to the principle of estoppel. Estoppel, if available, would found remedies by way of the prerogative writs of mandamus, prohibition and certiorari, and by way of injunction, damages and even, where the decision was not an excluded one, under the Administrative Decisions (Judicial Review) Act.

The answer which has traditionally been given to arguments based on estoppel is that notwithstanding what is now recognised as the Commissioner’s obligation of fairness to taxpayers²⁷ the Commissioner cannot be estopped by past conduct from performing his statutory obligations. As noted earlier, the authority usually cited for this proposition is the High Court decision in *Wade’s case*. The comments of Kitto J in that case were directed to an argument that the Commissioner, not having referred to the inclusion in the taxpayer’s assessable income of an amount under

²⁶*Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 458 and see *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 501

²⁷First recognised in *Small Businesses* [1982] AC 617 at 651 and accepted in *R v I.R. Commissioners; ex parte Preston* (1995) 1 AC 835 Lord Scarman at p851

former sec 26(j) of the ITAA, could not subsequently rely on the section as justifying his action in treating the amount as assessable income. All that Kitto J in fact did was say that if the sum in fact formed part of the taxpayer's assessable income by reason of the section, as he thought it did, then:

“... its inclusion in his assessable income in the course of making the assessment was right, whether or not the Commissioner referred to sec 26(j), and even though he described the amount inaccurately. No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act.”²⁸

The cases to which Kitto J referred in support of this finding are, however, consistent with the proposition that estoppel is not available to release a party from an obligation to obey a statute or from a statutory obligation to pay tax at particular rates.

In *Remuneration Planning Corporation Pty Ltd v F C of T*²⁹ a declaration was sought that a taxation ruling on a fringe benefits tax liability did not apply to arrangements in respect of which taxpayers had obtained certain “advance opinions” and that the Commissioner was bound by those advance opinions. The claim for the first declaration was summarily dismissed but Gyles J declined to summarily dismiss the claim for the second declaration. His Honour mentioned the various cases concerning the difficulty of establishing estoppel against an obligation imposed by the Act but concluded by saying:

“In none of the cases referred to did the point of law here arise directly for decision in circumstances like those alleged in this case. The more recent expressions of the principle in the High Court have been somewhat guarded (see the passage from *Ryan*). Counsel for the applicant submits that the

²⁸*F C of T v Wade* 84 CLR at p117

²⁹2001 ATC 4130

authorities on estoppel have come a long way since 1951 when Kitto J spoke. Success (particularly in the High Court) cannot be ruled out. The decision of Burchett J in *One.Tel Ltd & Ors v D F C of T* 2000 ATC 4229 (at 4244-4246) ... as to legitimate expectation indicates that the administration of the Commissioner is not free from curial intervention. However it seems to me to be that there is a strong probability that both the first instance judge and a Full Court will apply the ‘accepted’ view and dismiss any claim made for estoppel regardless of the particular facts that are proved. It is therefore arguably a waste of time and resources to hear a case on the off chance that the High Court might take a different view of the law.”³⁰

Nevertheless, his Honour declined to strike out the claim. Plainly he thought there might be something in the argument that estoppel runs against the Commissioner, at least in limited circumstances, even if no court below the level of the High Court might be expected to be courageous enough to recognise its availability. As to availability, it might be suggested that the courts well recognised jurisdiction to grant stays of execution for taxation debts, which rests on no legislative basis, is an instance where the courts will intervene notwithstanding that the Commissioner’s statutory rights are plain. *David Jones Finance* also involved recognition of the court’s power to intervene where an assessment, although in accordance with the law had, arguably, been issued in bad faith. However, even if estoppel is available, the fact that remedies by way of the prerogative writs are discretionary may limit the way in which it can be relied upon especially if it is considered that there is an alternative remedy available or that the taxpayer’s conduct is in some respect disentitling.³¹

³⁰Ibid at p4136; cf *Ellison v DCT* unreported decision of the Court of Appeal of the Supreme Court of WA, 6 May 1999 where the court simply found that the elements of estoppel were not made out and did not discuss the *Wade’s case* problem.

³¹Unpublished paper given by Alan Robertson SC to the Administrative Law Section of the NSW Bar Association on “Remedies – Some Discretionary Considerations” of which the availability of an alternative remedy in the form of merits review is almost always fatal to an application and indeed, is spelt out in sec 10(2)(b)(ii) of the ADJR Act and see comments in *Preston* (1985) AC 835 at 852 as to the unavailability of judicial review in such circumstances.

There would appear to be a tension between the notion that estoppel cannot be available against the operation of an Act and the idea, recognised since the House of Lord's decision in the *Small Businesses case*, that there is a "legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure there are no favourites and no sacrificial victims."³² In *Bellinz* at first instance it was said by Merkel J, after his Honour referred to the acceptance of the principle in *Preston's Case*, that:

"The cases in which this issue has been raised usually relate to procedural or machinery matters (*Preston, Unilever*) or the exercise of discretionary powers (*Pickering*). There may be some doubt as to how the principle would be applied to decisions on substantive matters (such as the operation of sec 54(1)) although such matters were accepted in *David Jones* 'arguably' to fall within the principle."³³

In the Full Court it was said of the passage from *Preston* that "it may be repeated that the application of sec 54 in the present tax situation involves no question of the exercise of discretionary power."³⁴ In the *David Jones Finance case* it was argued that the Commissioner's discretion in relation to the administration of the Act under sec 8 of the ITAA extended to a discretion, in particular circumstances, to ignore the operation of the Act as made plain by judicial decision.³⁵ The availability of such a discretion was supported by the House of Lord's decision in *I.R. Commissioners v*

³²*R v Inland Revenue Commissioners Ex Parte National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 at 651

³³*Bellinz Pty Ltd v F C of T* (1998) 38 ATR 350 Merkel J at p371

³⁴*Bellinz Pty Ltd v F C of T* 98 ATC 4634 at 4644

³⁵*David Jones Finance & Investment Pty Ltd v F C of T* 90 ATC 4730 at 4735, the decision which made the operation of the Act plain being the decision in *F C of T v Patcorp Investments Ltd* 76 ATC 4225.

*National Federation of Self Employed and Small Business Ltd*³⁶. If, as suggested by the *Small Business Case*, there may be circumstances in which the Commissioner’s general powers of administration of the tax legislation extend to a discretion not to apply it in its full rigour in particular circumstances, then the Full Court’s comment in *Bellinz* would be misconceived. Certainly, as Simon Brown LJ said in the *Unilever Case*³⁷ at p196:

“Any unfairness challenge must inevitably turn on its own individual facts. True, as Lord Templeman made clear in *Preston*, it can only ever succeed in ‘exceptional circumstances.’ True, too, the court must always guard against straying into the field of public administration and substituting its own view for that of the administrator. In these circumstances I am very ready to accept that rare indeed will be the case when a fairness challenge will succeed outside the *MFK* parameters. It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the revenue will properly be stigmatised as having acted so unfairly as to have abused their powers – here their power to accept late claims.”

The *MFK* parameters above referred to would appear to be the strictures laid down by Bingham LJ in the Queen’s Bench Division in *MFK*³⁸ where it was held that while it was within the managerial discretion of the revenue to give assurances, albeit that they might involve foregoing tax to which the revenue was entitled, judicial review would be available in the event of a breach of such assurance but only if the assurance was given in response to full disclosure of the specific transaction, of the fact that a considered ruling was being sought and of the use to be made of it and that such a ruling should be clear, unambiguous and devoid of relevant qualification.

³⁶[1982] AC 617; although cf *Queensland Trustees Ltd v Fowles* (1910) 12 CLR 111 O’Connor J at p122 “Treasurer ... bound to see that duty is collected according to law” and *Lighthouse Philatelics Pty Ltd v F C of T* 91 AT 4944 at 4948 – Commissioner’s “task is to ensure that the correct amount of tax is paid.”

³⁷*R v IRC; ex parte Unilever Plc* [1996] BTC 183

³⁸*Regina v IRC ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545

After commenting on the alleged absence of anything discretionary about the application of sec 54, the Full Court went on to say in *Bellinz*³⁹ that:

“There is little difficulty in accepting that, where a decision-maker, including the Commissioner of Taxation, has a discretion, a principle of fairness will require that that discretion be exercised in a way that does not discriminate against taxpayers: ... the same principle may be said to permit judicial review in *matters of administration or procedure* where a decision maker acts unfairly by discriminating between different categories of persons. But where the question arises as to the inclusion of an amount in assessable income or the allowance of an amount as a deduction, where no question of discretion arises and where the Commissioner is charged to administer the law (cf sec 8 of the Act) and one might say bound so to do in accordance with the language used in the statute as passed by Parliament, it is difficult to see how the Commissioner can properly be said to have acted unfairly, even if there is an element of discrimination, where he has acted in accordance with the law itself. Different considerations arise in other circumstances.” (My emphasis)

Whether the Full Court in *Bellinz* would have been inclined to give its reasons in precisely these terms if the original non-binding rulings upon which the taxpayer sought to rely had extended to the precise situation in relation to which the private ruling in *Bellinz* was sought, is a matter about which it is only possible to speculate. However, it was certainly the Full Court’s view that none of the rulings relied upon extended to the particular situation with which the court was concerned and it was for that reason that the court ultimately concluded that:

“It suffices to say that the principle of unfairness to which *Preston* refers has no application to the present case which falls outside the area of the ‘rare cases’ to which that principle relates.”⁴⁰

In the discussion of what was described as “the general principle ... that no estoppel will prevent the exercise of a statutory duty” which appears in the joint decision of

³⁹98 ATC at 4645

⁴⁰Ibid at p4645

Davies and Branson JJ in *MIEA v Polat*,⁴¹ and after reviewing the various cases in which that principle has been expressed, their Honours note that there are few cases in which the courts had relaxed the approach and that the exceptions appeared only to involve decisions taken by officers having ostensible though not lawful authority to make the decision and cases where technical procedural requirements had been waived or overlooked. They also noted that in *Brookes and Burton Ltd v Secretary of State for the Environment*,⁴² the English Court of Appeal had “deprecated attempts to expand the exceptions beyond these two categories” and went on to comment that:

“Of course, there will always be occasional cases where the hardship of the case persuades the court to make an order in reliance upon the principle of estoppel. Wade on ‘Administrative Law,’ 6th Ed. at 381-5 mentions some such cases and, at 382, states, ‘In endeavouring to protect the citizen against such hardships the courts have strained the law and given doubtful decisions.’ At 385-6, Wade suggests that the remedy for misleading advice should be compensation, not estoppel.”

Later in their decision their Honours noted, in relation to a reference to the decision in *Beaudesert Shire Council v Smith*⁴³ where damages were awarded in respect of what were held to be “the deliberate, unlawful and positive acts” of the Shire Council, that in the proceedings before them “damages are not sought.” This might suggest that in an appropriate situation, and other remedies being so problematic, a taxpayer might claim damages, if only as a set off against an amount being sought in recovery proceedings. This is the same or a similar technique to that which the writer has previously suggested might be employed in a case where a taxpayer’s prejudice arose from the Commissioner’s delays.

There are difficulties in establishing the basis of a claim for damages since damages

⁴¹*Minister for Immigration and Ethnic Affairs v Polat* (1995) 37 ALD 394

⁴²[1978] 1 All ER 733

⁴³(1966) 120 CLR 145

will ordinarily only be available as a remedy for the commission of a tort. However, when the Commissioner seeks to behave unfairly by reneging on previous assurances or adopting a course of conduct inconsistent with previous indications, it seems, from what was said in *Ex parte Matrix*,⁴⁴ that the revenue may be involved in an abuse of power. If so, it will be arguable that the tort of misfeasance in a public office has been committed. This is a tort unique to the conduct of public officers and can lead to personal liability being imposed on them. However, the authorities have limited the scope of the tort to situations where a deliberate or intentional act of misconduct causing damage can be shown. In the recent decision in *Northern Territory v Mengel*,⁴⁵ (where the decision in *Beaudesert Shire Council v Smith* was overruled), the High Court indicated that this extends to reckless behaviour but otherwise confirmed the restricted circumstances in which the tort will be established. Exemplary or aggravated damages will be available⁴⁶ but the availability of **any** damages will depend upon establishing that the public officer has maliciously or knowingly shown an intention to injure the plaintiff. The fact that the tort of misfeasance in a public office depends upon proof of an improper motive or “targeted malice”⁴⁷ has led to it being described as “the ‘token’ tort as while its existence is acknowledged, an action in misfeasance seldom succeeds.”⁴⁸ The availability of damages in most circumstances must therefore be accepted as questionable.

⁴⁴*Regina v IRC, Ex Parte Matrix Ltd* [1994] 1 WLR 334 Lord Browne-Wilkinson at p356-7

⁴⁵(1995) 185 CLR 307

⁴⁶The Australian approach had been established for some time as one approach inconsistent with that taken in England but the House of Lords recently decided in *Kuddus v Chief Constable* [2002] 2 AC 122 that exemplary damages will be allowed there also.

⁴⁷*Bourgoin SA v Ministry of Agriculture* [1986] 1 QB 716 at 776

⁴⁸“Tort Liability of Public Authorities” by Susan Kneebone, LBC Information Services 1998 where the subject is illuminatingly discussed at p167-192

However, it is important to remember the court's power to control abuses of its own process and to do so by granting stays, including permanent stays of proceedings. It seems that such a power could be invoked only when the Commissioner seeks to make some use of court process e.g., in recovery proceeding, but it is possible that a taxpayer could maintain, even where the taxpayer was moving the court for relief, that the Commissioner's stance in relying upon an assessment, or a particular substantive provision was, in the circumstances, an abuse of process. What is comprehended by the notion of "abuse of process" is identified by Lord Diplock in remarks which prefaced his decision in *Hunter v Chief Constable of the West Midlands Police & Ors*⁴⁹ –

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are varied ... It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

Although Lord Diplock was speaking of a court's "inherent power" most rules of court codify certain aspects of the power. However, because of the importance which the courts have ascribed to their powers to ensure that their own processes are not abused, such rules by no means define the limits of the jurisdiction. The Full Court of the Supreme Court of New South Wales said of the power to prevent abuse of process that:

"... it is a power which is exercisable in any situation where the requirements of justice demand it ... there can be no doubt that this Court has an inherent jurisdiction to endeavour to ensure that the pursuit of its ordinary procedures

⁴⁹[1982] AC 529 at 536.2

by litigants does not lead to injustice and for this purpose to grant in the exercise of its discretion a stay of proceedings, whether permanent or temporary, upon such conditions or terms (if any) as may seem appropriate in the particular circumstances and that this is a jurisdiction which may be exercised at any stage of the proceedings where it appears to be demanded by the justice of the case.”⁵⁰

It might perhaps be assumed that an attack on proceedings brought by the Commissioner based upon an assessment rendered conclusive by sec 177 of the Act (and not vitiated by its issue mala fides) would be met by the objection that for a court to entertain the attack would be to allow the undermining of the legislative policy exhibited by sec 177 and 201. However, as it has been accurately observed:

“There are numerous utterances to the effect that the inherent jurisdiction may be curtailed by statutory provisions, but it is very rare to find instances where a judge who may be otherwise willing to exercise a power to check ‘abuses’ or issue one of the other remedies discussed in this article declining to do so because of a statutory imperative.”⁵¹

In *Barton v The Queen*,⁵² and while recognising that the presentation of ex officio indictments by the Attorney General was non reviewable, the High Court nevertheless considered that committal proceedings could be ordered if the interests of justice required them because the courts will never be “powerless to prevent an abuse of process.”⁵³

It follows that while the Commissioner may point to sec 177 and 201 and claim that the conclusivity of his assessment may not be impugned otherwise than in Administration Act proceedings, this will not necessarily prevent a court from

⁵⁰*Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 S.R. (NSW) 335 at 344

⁵¹Keith Mason QC “The Inherent Jurisdiction of the Court” 57 ALJ 449

⁵²(1981) 55 ALJR 31

⁵³Ibid Gibbs & Mason JJ ibid at p36

ensuring that its process is not abused in a way which leads to unfairness. It follows that neither sec 177 nor sec 201 will necessarily provide the Commissioner with a shield to deflect attacks based upon the “abuse of process” concept. The question then will be not whether an assessment is valid or invalid, but whether to proceed upon it or possibly even to seek to maintain it would, in the circumstances of the case, be unfair. The counter argument, of course, will be that, absent any suggestion of mala fides,⁵⁴ the production of an assessment upon which collection proceedings are based will necessarily exclude any suggestion of an abuse of process and especially so if it is acknowledged that the assessment has been made in accordance with the law. The circumstances in which a court might be persuaded not to accept this counter-argument would therefore have to be extreme but the opportunity to argue abuse of process in appropriate circumstances should not be entirely discounted.

It is also relevant to note that the courts have recognised an obligation by the Commonwealth and its agencies to act as model litigants.⁵⁵ Being a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act with complete propriety and fairness. The obligation may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations although it does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not preclude, for example, all legitimate steps being taken to pursue claims made by the Commonwealth and its agencies and testing or defending claims against them. However, the Attorney General directs the Commonwealth and its agencies, in accordance with his

⁵⁴And it is clear that the Courts are wearying of allegation of mala fides where there is little evidence to support them – *Daihatsu Australia Ltd v F C of T* 2001 aT 4268 at 4279; *San Remo Macaroni Company Pty Ltd v F C of T* 99 ATC 5138

⁵⁵*Melbourne Steamship Limited v Moorehead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155

perception of the obligation, inter alia, as follows:

- to act consistently in the handling of claims and litigation;
- to keep the cost of litigation to a minimum by not requiring the proof of matters which the Commonwealth or agency knows to be true;
- not to take advantage of a claimant who lacks the resources to litigate a legitimate claim;
- not to rely on technical defences unless the Commonwealth or the Agency's interests would be prejudiced;
- to apologise where the Commonwealth or Agency is aware that it or its lawyers have acted wrongfully or improperly!

It also appears that in cases involving mere matters of procedure there will be an opportunity to rely on the doctrine of legitimate expectation which has been developed in the administrative law area.⁵⁶ In *Haoucher v Minister of State for Immigration and Ethnic Affairs*⁵⁷ Deane J said that:

“The notion of a ‘legitimate expectation’ which gives rise to a prima facie entitlement to procedural fairness or natural justice in the exercise of statutory power or authority is well established in the law of this country.”

It relates, however, to a want of procedural fairness only and will not be likely to lead to a remedy of a substantive kind. In other words it will lead only to curing the want of procedural fairness, although there may be occasions when this will be sufficient to provide the necessary breathing space or even to obtain the desired result.⁵⁸ A line

⁵⁶*One.Tel Ltd & Ors v F C of T* 2000 ATC 4229 at 4244-6

⁵⁷(1990) 169 CLR 648

⁵⁸See, for example, *Carey v Field* [2002] FCA 1173

of authority also exists indicating that the ATO is bound, as a matter of law, and apart from any question of fairness or expectation, to honour agreements it has reached if they are necessary for fair and reasonable administration.⁵⁹

Review Forums

In light of the comments made in some of the above cases, particularly *Bellinz*, it might be concluded that in a case involving what is effectively an argument for estoppel against the application of a substantive provision, a remedy is unlikely to be obtained at any level below that of the High Court. Certainly the State Supreme Courts, following the Administrative Decisions (Judicial Review) Act, no longer have the appropriate jurisdiction. Whether, notwithstanding the decision on appeal in *David Jones Finance & Investment v F C of T*⁶⁰ it would be wise to commence proceedings in the Federal Court would be a matter for further consideration.⁶¹ The particular kind of remedy which might be sought would also be a matter demanding careful thought. The High Court has original jurisdiction under sec 75 of the Constitution in all matters "... (v) in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth ...". Section 39B of the Judiciary Act has invested this jurisdiction in the Federal Court but there are procedural traps for the unwary. Mandamus goes to direct the making of a decision and prohibition to prohibit further proceedings. The High Court has not been specifically invested with the power to grant certiorari or a declaration. Certiorari lies to quash a decision if an error of law appears on the face of the record and in *Re Cook*;

⁵⁹See cases mentioned in *Precision Pools Pty Ltd & Anor v F C of T* 24 ATR 43 and particularly the comments at p54 relied upon as the basis for the ATO's own Settlement Guidelines at ¶3.1.1

⁶⁰91 ATC 4315

⁶¹Refer *D C T v Richard Walter Pty Ltd* (1945) 183 CLR 168 and note that sec 39B(1A) of the Judiciary Act was introduced in 1997, after that decision and *ASIC v Edenson Nominees Pty Ltd* [2001] HCA 1

*ex parte Twigg*⁶² the High Court held that notwithstanding the absence of a specific power to issue a writ of certiorari in respect of a “matter,” certiorari could validly be granted as an adjunct to an order for prohibition so as to make the latter order fully effective and more complete and the same reasoning allows a remedy by way of declaration in similar circumstances.

The Administrative Decisions (Judicial Review) Act has invested the Federal Court of Australia with jurisdiction to grant relief in respect of certain administrative decisions on somewhat the same grounds as those upon which the prerogative writs and the remedies of injunction and declaration are available at common law. Subject to some extensions, secs 5, 6 and 7 of that Act in effect contain a codification of the grounds upon which the judicial review of administrative action was, and remains, open to a court at common law. However, complex technical principles accompany the writs of mandamus, prohibition and certiorari as well as the remedies of injunction and declaration and the ADJR Act reduces some of the expenses and injustices which have been the result of such complex technical principles.⁶³ Of course, the ADJR Act provides only limited remedies because of the significant exclusions from the purview of the Act.

Other possible avenues for redress would include reliance upon the Ombudsman Act, 1976. Under that Act the Ombudsman is directed to investigate action that relates to a matter of administration taken by a Commonwealth department. If the Ombudsman finds evidence of defective administration he reports to the department

⁶²(1980) ALJR 515

⁶³J H Momsen “Administrative and Judicial Review of Administrative Decisions of the Commissioner under the Income Tax Assessment Act – Notes for Workshop Session” paper presented to State Convention of NSW Division of Taxation Institute of Australia 3-5 April 1981 and see also *Central Queensland Land Council Aboriginal Corporation v AG (Cth) and State of Queensland* (2002) FCA 58 for a discussion of the differences between proceedings under the ADJR Act and sec 39B of the Judiciary Act.

or agency concerned and to the responsible Minister. Ordinarily the Ombudsman would make recommendations that action be taken to remedy the defective administration. If such recommendations are not acted upon the Ombudsman can inform the Prime Minister and, ultimately, report to Parliament but the Ombudsman has no coercive power and cannot overturn a decision complained about even if he thinks it should be overturned. It was apparently said in Parliament recently that one of the tasks of the new Inspector-General of Taxation will be to report on the rulings system, particularly in the case of taxpayers who have been “misled by rulings.”

Finally, there will be appeals to the Commissioner and ultimately to the court of public opinion based upon the provisions of the Taxpayer’s Charter, particularly the statement which it contains that taxpayers can expect the ATO to treat them fairly and reasonably, offer professional service and assistance to help them understand and meet their tax obligations and, in particular, to give advice and information which they can rely upon.

In one way or another it is thought that most taxpayers unable to bring themselves within the protective provisions of a relevant statute will be able to obtain redress, somehow or other, in cases of patent unfairness. However, in light of all the obvious difficulties facing a taxpayer who does not have the benefit of a substantive provision, it is plain that evidence of unfairness will have to be strong and that there must be no discrediting conduct of the taxpayer concerned. There will be a premium on disclosure and, moreover, disclosure to ATO officers with appropriate levels of experience and expertise, as well as a premium on “co-operative” and “non-obstructive” behaviour. In this regard appeals to fairness are likely to be treated like those of claimants for the special remedies provided by the courts of Equity where the overriding requirement is that one “who comes to equity must come with clean hands.”

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