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FEDERAL COURT OF AUSTRALIA

The Buddhist Society of Western Australia Inc v Commissioner of Taxation

[2020] FCA 1126

File number:	WAD 118 of 2020
Judge:	**MCKERRACHER J**
Date of judgment:	6 August 2020
Catchwords:	**TAXATION** – appeal of an objection decision under Pt IVC of the *Taxation Administration Act 1953* (Cth) – where originating application also seeks judicial review of the same decision under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – where the decision is not captured by Sch 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) – whether the Court's statutory jurisdiction to review the decision under both Acts can be invoked in a single proceeding – whether originating application should be set aside or amended – case management considerations
Legislation:	*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3(1), 5, 5(1), 10(2)(b), Sch 1 *Federal Court of Australia Act 1976* (Cth) ss 22, 37M, 53A *Income Tax Assessment Act 1997* (Cth) s 30-25(1) *Judiciary Act 1903* (Cth) s 39B *Taxation Administration Act 1953* (Cth) ss 14ZL, 14ZY, 426-55, 426-55(1)(a), 426-60, 14ZZ, 14ZZ(1), 14ZZO(a), Pt IVC, Sch 1 *Federal Court Rules 2011* (Cth) rr 28.21, 31.01, 33, 33.03, Pt 28
Cases cited:	*Bosanac v Federal Commissioner of Taxation* [2019] FCAFC 116; (2019) 267 FCR 169 *CBS Productions Pty Ltd v O'Neill* [1985] 1 NSWLR 601 *Chandra v Webber* [2010] FCA 705; (2010) 187 FCR 31 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 *CSL Australia Pty Ltd v Minister for Infrastructure and Transport* [2013] FCA 152 *CSL Australia Pty Limited v Minister for Infrastructure and Transport* [2014] FCAFC 10 *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home*

	Affairs [2012] FCA 1192; (2012) 243 FCR 176 *Duncan v Secretary, Department of Family and Community Services* [2007] FCA 507; (2007) 99 ALD 241 *Du Pont (Aust) v Comptroller-General of Customs* (1993) 30 ALD 829 *Gashi v Federal Commissioner of Taxation* [2013] FCAFC 30; (2013) 209 FCR 301 *Kajewski v Commissioner of Taxation* [2003] FCA 258; (2003) 52 ATR 455 *McGlinn v Federal Commissioner of Taxation* [2018] FCA 1275; (2018) 361 ALR 312 *Tepko v Water Board* (2001) 206 CLR 1
Date of hearing:	18 June 2020 and determined on the papers
Date of last submissions:	29 June 2020
Registry:	Western Australia
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	37
Counsel for the Applicant:	Mr DH Solomon
Solicitor for the Applicant:	Solomon Brothers
Counsel for the Respondent:	Mr JE Scovell
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

WAD 118 of 2020

BETWEEN:	**THE BUDDHIST SOCIETY OF WESTERN AUSTRALIA INC** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **MCKERRACHER J**

DATE OF ORDER: **6 AUGUST 2020**

THE COURT ORDERS THAT:

1. Within 28 days of the date of this order, the respondent do file and serve:

   (a) either:

      (i) a statement (the **Statement**) that outlines the respondent's contentions, and the facts and issues in the matter as the respondent perceives them; or

      (ii) an affidavit briefly stating the grounds for seeking an order dispensing with filing the Statement, and the facts and issues as the respondent perceives them; and

      (iii) a copy of the applicant's objection dated 1 November 2019, including a copy of the applicant's letter dated 11 July 2018 (together, the **Objection**);

   (b) an electronic booklet comprising copies of the following documents referred to in the Objection together with such other documents :

      (i) the decision dated 4 October 2019, with reference 1-CZSP87E, made by a deputy commissioner of taxation;

      (ii) the respondent's letter dated 22 June 2018, and the position paper attached to it;

      (iii) the applicant's application dated 15 February 1983 concerning Perth Meditation Building Fund (**PMBF**);

      (iv) the applicant's letter dated 19 April 1983 concerning PMBF;

(v) the respondent's letter sent in 1983 concerning PMBF;

(vi) the respondent's letter dated 21 January 1986 concerning PMBF;

(vii) the respondent's letter dated 16 November 1990 concerning PMBF;

(viii) the respondent's letter dated 20 May 1994 concerning PMBF;

(ix) the notice of endorsement of PMBF dated 29 September 2000;

(x) the notice of purported endorsement of PMBF dated 22 June 2007, and its attached covering letter of the same date;

(xi) the notice of endorsement of Forest Monastery Building Fund (**FMBF**) dated 29 September 2000;

(xii) the application dated 15 November 1995 concerning Nuns Monastery Building Fund (**NMBF**);

(xiii) the respondent's letter dated 6 December 1995 concerning NMBF;

(xiv) the notice of endorsement of NMBF dated 8 June 2000;

(xv) the notice of purported endorsement of NMBF dated 22 June 2007;

(xvi) the notice of endorsement of Jhana Grove Meditation Retreat Centre Building Fund (**JGMRCBF**) dated 6 February 2009;

(xvii) the applicant's application dated 25 November 2008 concerning JGMRCBF; and

(xviii) the respondent's letter dated 28 November 2008 concerning JGMRCBF;

(c) a copy of the respondent's letter dated 17 November 2017;

(d) a copy of the applicant's letter dated 16 January 2018, and copies of all of the attachments to that letter;

(e) a copy of the email sent by the representative of the respondent on 9 October 2018;

(f) a copy of the paper provided by the applicant to the respondent on or about 7 December 2018;

(g) a copy of the respondent's letter dated 7 January 2020;

(h) a copy of the applicant's letter dated 30 January 2020;

(i) a copy of taxation ruling TR 2013/2;

(j) any other document in the respondent's possession, or under the respondent's control, to which the matter the subject of the originating application relates that is relevant to the hearing of the matter; and

(k) a list of all documents filed, in chronological sequence.

Mediation

2. Pursuant to s 53A of the *Federal Court of Australia Act 1976* (Cth), the proceedings shall be referred to a mediator for a mediation in accordance with Pt 28 of the *Federal Court Rules 2011* (Cth) (the **Rules**).

3. The mediation shall be listed on a date not earlier than 28 days after the date of this order.

4. Within 7 days of the date of this order, the parties are to provide the Court with their unavailable dates for the purpose of listing the mediation referred to in the preceding paragraph.

5. Pursuant to r 28.21 of the Rules, as soon as is practicable, a Registrar shall:

(a) nominate a Registrar or some other person as the mediator; and

(b) give the parties written notice of:

(i) the name and address of the mediator;

(ii) the time, date and place of mediation; and

(iii) any further documents that any of the parties must give to the mediator for the purposes of mediation.

6. The following people must attend the mediation in person:

(a) Representatives of both parties who are authorised or will be authorised promptly by telephone to make high level decisions on behalf of the party relevant to this matter; and/or

(b) the solicitor(s) or counsel, if any, representing each party.

Case management hearing

7. The matter be fixed for a case management hearing on a date convenient to the Court, but not before the mediation referred to in order 3.

Costs

8. Costs be in the cause.

9. Pursuant to s 17(2), s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011* (Cth), these orders and reasons for judgment in support of these orders are made and published from chambers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

THE ISSUE

1 The applicant (the **Society**) by **originating application** dated 8 May 2020 seeks to invoke in a single proceeding:

(1) The statutory jurisdiction of the Court in an appeal against a reviewable objection decision under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**); and/or

(2) The statutory jurisdiction of the Court to review the same objection decision under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).

2 The objection decision challenged under each Act is a decision of 6 April 2020 to affirm the respondent's (the **Commissioner**'s) decision of 4 October 2019 to revoke the Society's endorsement as a deductible gift recipient under s 426-55 of Sch 1 to the TAA on the basis that the Society was not entitled to deductible gift recipient endorsement for a school building fund under item 2.1.10 of the table in s 30-25(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).

3 The Commissioner contends that the Court should strike out or dismiss that part of the originating application which seeks to advance a claim for relief under the ADJR Act in exercise of the discretion under s 10(b)(ii) of that Act. In the alternative, it says that the Society should be ordered to amend the originating application to separately identify the causes of action and relief claimed under each of Pt IVC of the TAA and the ADJR Act.

4 For the following reasons, while accepting the principles on which the Commissioner relies in relation to Pt IVC appeals, as a matter of case management in this instance, I do not consider it is necessary or expedient to take these courses at this early stage in the proceeding. I am also of the view that there is some weight in the Society's characterisation of judicial review under the ADJR Act which will no doubt be more fulsomely expressed once this matter proceeds to a clear statement of the issues.

THE COMMISSIONER'S COMPLAINT

5 The Commissioner asserts there is a fundamental inconsistency between the separate claims the Society is seeking to advance in the same proceeding under Pt IVC of the TAA and the ADJR Act. Under the ADJR Act, the Society appears to be challenging the validity of the

objection decision of 6 April 2020 on the basis that it was not properly made and should be set aside. In contrast, it is said, the Court's jurisdiction under Pt IVC of the TAA is founded upon the existence of a valid objection decision.

6 It is said that whilst it is permissible for an applicant to invoke by separate proceedings the different jurisdictions of the Court under each of Pt IVC of the TAA and the ADJR Act, and for those separate proceedings to be heard by the Court at the same time if appropriate, the raising of mutually inconsistent claims under separate statutory jurisdictions in the same proceeding is not. If the Society's claim under the ADJR Act that no valid objection decision has been made is correct, the Commissioner says the Court would have no jurisdiction to entertain the Pt IVC appeal in the same proceeding.

7 The Commissioner relies upon the Full Court decision in ***Gashi*** *v Federal Commissioner of Taxation* (2013) 209 FCR 301 per Bennett, Edmonds and Gordon JJ (at [42]-[43]) where it was said:

> 42 The jurisprudential basis that precludes consideration of jurisdictional errors in Pt IVC proceedings is well established: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 187; *Futuris* at [24]-[25]; *FJ Bloemen Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 360 at 376-378. Put simply, the subject matter of a tax appeal under Pt IVC of the TAA is a valid assessment. Section 175A(1) of the 1936 Act entitles a taxpayer to object against an "assessment" in the manner set out in Pt IVC of the TAA. Section 14ZW of the TAA requires a taxpayer to lodge a "taxation objection" under s 175A of the 1936 Act within a specified time in response to the assessment. Upon receipt of a "taxation objection", the Commissioner must then give an "objection decision": s 14ZY of the TAA. If the taxpayer is dissatisfied with that "objection decision", the taxpayer may then apply to the Administrative Appeals Tribunal for review of that decision or appeal to the Federal Court against that decision: s 14ZZ of the TAA. At the hearing of the review or the appeal under s 14ZZ, upon the production of a document matching the description of a notice of assessment, ss 175(1) and 177 of the 1936 Act preclude any argument about the "due making" or actual making of the assessment: *FJ Bloemen* at 376-378.
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> 43 If the decision to issue the assessments was infected with jurisdictional error, those questions (and orders seeking to address those questions) may not be pursued under Pt IVC of the TAA. They may not be pursued under Pt IVC because the subject matter of an appeal under Pt IVC is absent — an assessment. A purported assessment that is "tentative", "provisional" or made in bad faith or conscious maladministration is not an assessment: *Federal Commissioner of Taxation v Hoffnung & Company Ltd* (1928) 42 CLR 39 at 54 and *Richard Walter* at 237. The appropriate challenge to a purported assessment is by way of constitutional writs or associated relief under s 39B of the *Judiciary Act*: *Mount Pritchard & District Community Club Ltd v Federal Commissioner of Taxation* (2011) 196 FCR 549 at [2]; *Kennedy v Administrative Appeals Tribunal* (2008) 168 FCR 566 at [11]-[13] and [22]-[26].

8 In *Gashi*, the Full Court was dealing with an objection decision relating to assessments, but the Commissioner says that the same reasoning followed by the Court applies to an objection decision relating to a taxation decision other than an assessment, as is the case here. In each case the Court's jurisdiction to hear an appeal from an objection decision under Pt IVC of the TAA is dependent upon the existence of a valid reviewable objection decision under s 14ZZ of the TAA. The fact that the decision in the present matter was not an assessment but rather an objection from a decision to revoke an endorsement is crucial however, because in the present case relief is available under the ADJR Act. I will address this issue in more detail below. The Full Court's reasons in ***Bosanac*** *v Federal Commissioner of Taxation* (2019) 267 FCR 169 also provide a comprehensive discussion of the nature of a Pt IVC appeal at [27]-[48]) and their Honours summarise the position (at [47]) as follows:

> **Having regard to the issues raised in the present appeal, we would summarise the nature of an appeal under s 14ZZ in the following terms. Although s 14ZZ provides for an "appeal", it confers an original jurisdiction to determine a review claim "against the decision" by the Commissioner on an objection. The Court is to determine the claim on the evidence presented to it in accordance with its usual practice and procedure for applications in its original jurisdiction. The onus is on the appellant to prove that the assessment the subject of the objection decision was excessive or otherwise incorrect and what the assessment should have been**. As stated by Dowsett J in *Weyers v Federal Commissioner of Taxation* (2006) 63 ATR 268 at [146], "[t]he Commissioner need not justify the decision, save in response to an appropriate attack upon it". The grounds that may be relied upon are confined to those raised before the Commissioner in the objection, unless the court otherwise orders. So, the evidence that may be led to discharge the onus is likewise confined. It is a matter for the parties whether they stipulate the correctness of factual matters before the Commissioner. However, in the absence of such matters being agreed or such matters being presented as evidence of the truth of those matters without objection, it is for the appellant to provide the necessary evidence on the hearing before the court on the "appeal". **The court does not simply receive the record before the Commissioner on the objection and make its decision on that basis. Nor does it consider whether there has been error demonstrated in the decision by the Commissioner. Even less so does it consider whether an amended assessment issued after the objection decision is correct**. Therefore, as noted by Greenwood J in *Aurora Developments Pty Ltd v Federal Commissioner of Taxation (No 2)* (2011) 196 FCR 457 at [32], "an appeal under s 14ZZ(c) bears some of the characteristics of an appeal by way of a hearing de novo in that the taxpayer has an extensive, though not unqualified, right to put additional evidence before the Court".
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> (Emphasis added, citations omitted.)

9 For practical purposes it is also helpful to consider the discussion as to the 'nature' of an appeal under Pt IVC of the TAA by Drummond J in ***Kajewski*** *v Commissioner of Taxation* (2003) 52 ATR 455 (at [5]–[9]) where his Honour said:

> 5 **Section 14ZZ(c) the *TAA* does not in terms limit a taxpayer dissatisfied**

with the Commissioner's appealable objection decision to judicial review of that decision on administrative law grounds, such as those set out in s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth): it gives the taxpayer a right to "appeal to the Federal Court against the decision". The scope of the review opened up by the institution of such an appeal is a wide one. In *FCT v Australia and New Zealand Savings Bank Limited* (1994) 181 CLR 466; 29 ATR 11; ; 94 ATC 4844, it was said at CLR 476 ; ATR 17; ATC 4848 that upon institution of such an appeal, the court becomes "seized of the [Commissioner's] decision in its entirety", even though the taxpayer may seek to challenge only a part of that decision. Subject only to s 14ZZO(a) of the *TAA*, the court has power to dispose of the appeal by making such order as it thinks fit under s 14ZZP, a power that is "expressed in the widest terms": ibid. In exercising this right of "appeal", where, as here, the Commissioner's decision rejects a challenge to an assessment, it is implicit in s 177(1) of the *ITAA 1936* that the taxpayer is entitled to challenge the correctness of both the amount of the assessment and any of the particulars of the assessment. Further, s 14ZZO(b) of the *TAA* imposes on a taxpayer, in proceedings on an appeal to the Federal Court under s 14ZZ against an appealable objection decision, the "burden of proving", that "the assessment is excessive" **and the burden of proving that, where appropriate, "the taxation decision should not have been made or should have been made differently".** As Brennan J observed, in reliance on s 14ZZO(b)(i), in *DCT v Richard Walter Pty Limited* (1995) 183 CLR 168 at 198; 29 ATR 644 at 661; 95 ATC 4067 at 4081:

> "The procedures in Pt IVC of the *TAA* expose an assessment to correction if the application of the general provisions of the Act to the facts as found establishes that the assessment was excessive."

6 See also per Dawson J at CLR 221; ATR 677-78; ATC 4094 and Toohey J at CLR 227 ; ATR 682; ATC 4097. In order to discharge the burden of proof cast on the taxpayer by s 14ZZO(b) of the *TAA* and its statutory precursors, it has long been accepted that it is necessary for the taxpayer to prove, by proper evidence put before the appeal court, what is the correct amount of the taxpayer's taxable income in respect of which the Commissioner should have made his assessment: see *Trautwein v FCT* (1936) 56 CLR 63 at 87-88; 4 ATD 48 at 62-63; *Danmark Pty Ltd v FCT* (1944) 7 ATD 333 at 336 and *McCormack v FCT* (1979) 143 CLR 284 at 303; 9 ATR 610 at 622; 79 ATC 4111 at 4121. Subject only to s 14ZZO(a), the taxpayer is, in general, entitled to put before the appeal court evidence that may not have been before the Commissioner and to seek the court's decision on whether, on all the evidence before it on the appeal, an assessment different in amount from that issued by the Commissioner should issue. Cf *Re Coldham* at 274.

7 Each of the present appeals is against the Commissioner's objection decisions to disallow the objections of all applicants to all his amended assessments. Institution of each appeal refers to this court the particular objection decision in its entirety and the court's wide power under s 14ZZP is thereupon enlivened. **The issues which a taxpayer appealing under s 14ZZ(c) in respect of an assessment is entitled to raise show that the appeal is an avenue available to a taxpayer for showing that the assessment in question was wrongly made.** As such, it can involve questions of both fact and law: *Kolotex Hosiery (Australia) Pty Ltd v FCT* (1975) 132 CLR 535; 5 ATR 206; 75 ATC 4028. The right of appeal given by s 14ZZ(c) is of the same nature as the right of appeal given by s 14V against a departure prohibition order made by the Commissioner, which

> "may involve questions of fact or law or both": *Poletti* at CLR 161 ; ATR 117; ATC 4645. The taxpayer is thus entitled to challenge the entire factual and legal basis upon which the amended assessment was issued, subject only to s 14ZZO(a).
>
> 8 Because the taxpayer is entitled, on such an appeal, to lead evidence relevant to the issues for determination that was not before the Commissioner, an appeal under s 14ZZ(c) has some of the characteristics of an appeal by way of a hearing de novo. But s 14ZZO(a) shows that the taxpayer does not have an unqualified right to put before the appeal court all the material which it might contend is relevant to determining the correct amount of the assessment that should be made. Section 14ZZO(b) is also inconsistent with the appeal being by way of hearing de novo, for the reasons referred to in *Poletti* at CLR 160 ; ATR 116; ATC 4644. That the appeal cannot be characterised as an appeal by way of hearing de novo is not inconsistent with a proceeding under s 14ZZ(c) still being an appeal against the factual and legal determinations made by the Commissioner in issuing the particular assessment in which the taxpayer has an extensive right to put additional evidence before the court. Cf *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 and 628-629. **The considerations referred to and s 14ZZO(a) and (b) show that the right of appeal under s 14ZZ is not in the nature of a rehearing de novo or of a right to judicial review of the kind provided for by the *Administrative Decisions (Judicial Review) Act 1977* (Cth), even though the sole avenue available to a taxpayer for challenging an appealable objection decision is by appeal under s 14ZZ(c).** *Poletti* at CLR 159-162; ATR 116-18; ATC 4643-45 supports this view of the nature of this appeal.
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> 9 The applicants' right of appeal under s 14ZZ(c) against the appealable objection decisions here in question is a right of appeal against the factual and legal determinations made by the Commissioner in deciding to issue the amended assessments, including his determination on issues raised by s 170(2)(a) of the *ITAA 1936* in the course of arriving at his decision, and in fixing the amount of those amended assessments.
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> (Emphasis added.)

10 Each of *Gashi*, *Bosanac* and *Kajewski* concerned the making of an assessment where the substance of a Pt IVC appeal is whether the assessment was 'excessive or otherwise incorrect': s 14ZZO(b)(i) of the TAA. In the present case, the Pt IVC appeal is concerned with whether the decision 'should not have been made or should have been made differently': s 14ZZO(b)(ii) of the TAA. Nonetheless there seems no reason that the above outline from *Kajewski* of the features of a Pt IVC appeal, would not usually apply generally to any Pt IVC appeal from an objection decision in relation to a taxation decision other than an assessment. One exception would be the limited class of decisions of the kind discussed in *McGlinn v Federal Commissioner of Taxation* [2018] FCA 1275 per Steward J (at [15]-[25]) where the provision under which the taxation decision is made involves the Commissioner's state of mind. That is not so here.

11 In summary and relevantly the Commissioner asserts (in my view correctly):

(a) a taxpayer in a Pt IVC tax appeal is not limited to judicial review of the objection decision on administrative law grounds: *Kajewski* (at [5]);

(b) a Pt IVC appeal may involve questions of fact or law or both: *Kajewski* (at [7]); and

(c) a Pt IVC appeal is against the Commissioner's objection decision, it is not an appeal, as such, against the Commissioner's Reasons for Decision: *Kajewski* (at [14]–[15]).

12 The present case is also distinguishable by the fact that judicial review under the ADJR Act of the making of an *assessment* is precluded by Sch 1 to the ADJR Act whilst judicial review under the ADJR Act of the making of a *decision to revoke* the endorsement of an entity as a deductible gift recipient is *not* precluded. The Commissioner says this is not relevant to his complaint. As the Full Court recognised in *Gashi*, judicial review of the making of an assessment was separately available, in any event, under s 39B of the ***Judiciary Act*** *1903* (Cth). But there is nothing in the Full Court's reasoning in *Gashi*, or the other relevant authorities, which suggests that the Court's jurisdiction under s 39B of the *Judiciary Act* could have been invoked in the same proceeding as the proceeding brought under Pt IVC. But I would observe, that equally, there is nothing suggesting to the contrary as that question did not arise. Nor did the question of relief under the ADJR Act arise which differs in important respects from review proceedings under s 39B of the *Judiciary Act*.

13 The real question is whether it is permissible to include the two claims, albeit in the alternative, given that one claim asserts a valid but incorrect decision and the other asserts a legal error, though not necessarily a jurisdictional error, in how the decision was made.

14 The Society disputes the Commissioner's claim that there is no relevant distinction between an assessment decision, for which review under the ADJR Act is precluded by Sch 1, and the present decision to revoke an endorsement which is not precluded. It says that, in relying on authorities concerning assessment decisions where the only avenue for judicial review is under s 39B of the *Judiciary Act*, the Commissioner has misunderstood the nature of a review under the ADJR Act. It relies on the majority's reasoning in *Commissioner of Taxation v* ***Futuris Corporation*** *Ltd* (2008) 237 CLR 146 for the proposition that review under the ADJR Act is not preconditioned on the existence of a jurisdictional error such that the original decision is invalid. The majority in *Futuris Corporation* said (at [45]-[46]):

> 45. In the process of the making of the second amended assessment errors by the Commissioner of this nature (if indeed there were errors) fell within the scope of s 175 as explained earlier in these reasons. They could not found a complaint of jurisdictional error attracting the exercise of jurisdiction to issue constitutional writs which is conferred by s 75(v) of the Constitution on this Court and by s 39B of the Judiciary Act upon the Federal Court. If there were errors they occurred within, not beyond, the exercise of the powers of assessment given by the Act to the Commissioner and would be for consideration in the Pt IVC proceedings.
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> 46. Several further points should be made here**. The first is to contrast the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act). That statute is so drawn as to define most of its grounds without direct reference to principles of jurisdictional error, and, in particular, allows review for non-jurisdictional error of law**. However, Sch 1 to the AD(JR) Act lists (para (e)) among classes of decisions to which that statute does not apply decisions in administration of assessment provisions of revenue laws, including the Act.
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> (Emphasis added.)
>
> (see also: Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) (at [3.350]).)

15 On this basis, the Society contends that both avenues of relief can be entertained in a single proceeding.

16 The Society also relies on s 22 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**), to support its position that both avenues of relief can and should be heard together. Section 22 of the FCA provides:

> **22 Determination of matter completely and finally**
>
> The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

17 The Commissioner asserts that s 22 does not confer jurisdiction on the Court. It empowers the Court to grant all necessary remedies in respect of the legal matter which is before it, but the Court's jurisdiction and the remedies available to the Court in exercising that jurisdiction are conditioned by the terms of the relevant statute.

18 Alternatively, the Commissioner argues, the Court should strike out or dismiss that part of the originating application seeking relief under the ADJR Act in exercise of the discretion under s 10(2)(b)(ii) of the ADJR Act to refuse to grant an application in respect of an application under s 5 of the that Act. It is said this course is appropriate in circumstances where adequate

provision for review of the decision is made by Pt IVC of the TAA and that the discretion should therefore be invoked to deny relief as a preliminary question: ***Duncan*** *v Secretary, Department of Family and Community Services* [2007] FCA 507 per French J (at [27]); ***Dalian Steelforce*** *Hi-Tech Co Ltd v Minister for Home Affairs* (2012) 243 FCR 176 per Nicholas J (at [6] and generally) and ***CSL Australia*** *Pty Ltd v Minister for Infrastructure and Transport* [2013] FCA 152 per Katzmann J (at [26]-[34]).

19 The Commissioner raises a number of further concerns given that the scope of a Pt IVC appeal from an objection decision is necessarily broader than the scope of an application for judicial review of that decision under the ADJR Act. It is said that the applicant is able to challenge the merits of the taxation decision the subject of the objection decision – whether the applicant is entitled to deductible gift recipient endorsement for a school building fund under item 2.1.10 of the table in s 30-25(1) of the ITAA 1997 – by reference to matters of both facts and law. The Court in turn will determine whether the applicant remained entitled to that endorsement by application of the law to the facts as found by the Court on the evidence before it. It is not relevant to the Court's consideration how the Commissioner reached the decision which he did in the objection decision.

20 Further, it is well established that the important restrictions that apply to the leading of additional evidence in judicial review applications (see *Chandra v Webber* (2010) 187 FCR 31 per Bromberg J (at [40]–[45])) do not apply in Pt IVC appeal proceedings. This is so because the latter involves a review of the merits of the taxation decision to which the objection decision relates, not the manner in which the objection decision was made by the Commissioner.

21 Similarly, the relief potentially available to the Society in the Pt IVC appeal will also be broader than in the ADJR Act application. This is particularly so as the focus of the Pt IVC appeal is the taxation decision itself, whereas the ADJR Act application seeks judicial review only of the objection decision. If the Court determines in the Pt IVC appeal, having regard to all the relevant matters, that the Society is entitled to endorsement as a deductible gift recipient under the relevant section, appropriate orders to set aside the revocation decision can be made. On the other hand, the consequence of a finding by the Court on judicial review under the ADJR Act that the Commissioner had not made a valid objection decision would be orders quashing the objection decision of 6 April 2020 and requiring the Commissioner to

make a fresh objection decision. It would not, in the usual course, result in the Court setting aside the underlying decision the subject of the objection.

22 Alternatively, the Commissioner independently asserts that:

(a) even if the Court is not prepared to strike out the ADJR Act part of the originating application for the reasons advanced above, the Society should be ordered to amend the originating application to separately identify the causes of action and the relief claimed under each of the statutory jurisdictions invoked under Pt IVC of the TAA and the ADJR Act;

(b) the originating application in its current form does not do so. It wholly adopts the form of an application under the ADJR Act, raising grounds and seeking relief only under that Act. Whilst the opening words make reference to seeking review under s 14ZZ(1) of the TAA, the originating application thereafter includes nothing relating to that separate claim; and

(c) each of those applications should be individually set out in the originating application so that the Commissioner is clearly able to identify and respond to the claims being made in respect of each. The Commissioner says he is not able to do so with the current document.

CONSIDERATION

23 This proceeding arises from a taxation objection, as that term is defined in s 14ZL of the TAA. The objection was made under s 426-60 of Sch 1 of the TAA against revocation of endorsement of the Society's status as a deductible gift recipient that was made by the Commissioner pursuant to s 426-55(1)(a) of Sch 1 of the TAA.

24 Section 426-55(1)(a) of Sch 1 of the TAA relevantly provides:

> **426-55 Revoking endorsement**
>
> (1) The Commissioner may revoke the endorsement of an entity if:
>
> (a) at any time after the date of effect of the endorsement, the entity is not, or was not, entitled to be endorsed; …

25 As outlined above, the originating application refers to both sources of statutory jurisdiction. The *Federal Court* ***Rules*** *2011* (Cth) do not provide a form to cover an originating application made under both the TAA and the ADJR Act. The Society's originating application is based on Form 66, which is the form prescribed by r 31.1 of the Rules, within

the division applicable to applications made under the ADJR Act. However, the originating application does make it clear that both sources of statutory jurisdiction are being relied on and that is now abundantly clear following this debate.

26 Section 22 of the FCA, in my view, is relevant in emphasising the need for finality. As noted, it provides that the Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, *all remedies* to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

27 That said, the requirement under s 22 could also be satisfied by hearing the two forms of 'appeal' or review together.

28 The Society argues that the modified Form 66 in this matter is appropriate to invoke the jurisdiction of the Court under s 22 of the FCA and to enable the Court to resolve all matters in controversy between the Society and the Commissioner in this proceeding. It also argues that the cases cited above concerning applicants seeking constitutional or other prerogative writs for jurisdictional errors of law, in circumstances where there was not any right of judicial review under the ADJR Act are of limited assistance to the current debate. When (as here) no assessment is involved, the nature of the appeal under s 14ZZ of the TAA is materially different. This is because s 14ZZO(a) of the TAA provides that, in proceedings on an appeal under s 14ZZ of the TAA to a court against an objection decision, the appellant is, unless the Court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates. If (which is not apparent or at least articulated by the Commissioner) the Society's grounds go beyond the objection, the question of leave to do so is a matter to be separately determined, preferably before the final hearing, but it does not justify setting aside the originating application.

29 The Commissioner stresses that the judicial review grounds set out by the Society in its ADJR Act claim in the originating application are, in effect, merits review grounds of a kind which are available under a Pt IVC tax appeal. That is, the heart of the Society's complaint is that the Commissioner has wrongly applied the law to the relevant facts. It is said that these grounds raise mixed questions of law and facts which are clearly able to be dealt with in the Pt IVC appeal, but, properly analysed, may not be proper grounds for judicial review.

30 The Commissioner says the Society would suffer no disadvantage were the Court to exercise the discretion to refuse the application under the ADJR Act now as a preliminary question. He points to *Du Pont (Aust) v Comptroller-General of Customs* (1993) 30 ALD 829 (at 831-832), where Heerey J in exercising the discretion under s 10(2)(b)(ii) to refuse an application under the ADJR Act because of the existence of adequate provision for review elsewhere, listed the following matters to which regard should be had:

(a) whether the Court's decision on the ADJR application would be conclusive of the essential question;

(b) whether the issues involved were mixed questions of facts and law; and

(c) whether there would be any hardship if the ADJR Act application was refused.

31 The Commissioner argues that each of those factors is relevant here and supports the exercise of the discretion in s 10(2)(b)(ii) to refuse the ADJR Act application.

32 Although no formal application has been made for the trial of a separate question, the Commissioner in his submissions seeks the exercise of the discretion under s 10(2)(b)(ii) now, in advance of any hearing in this matter. In considering a similar application to exercise the discretion under s 10(2)(b)(ii) of the ADJR Act in advance of a hearing, Katzmann J in *CSL Australia* referred to a number of authorities concerning the consideration of preliminary questions generally (at [26]-[34]). As noted above (at [17]), a similar approach to the discretion under s 10(2)(b) was taken in *Duncan* by French J and in *Dalian Steelforce* by Nicholas J. However, as was noted in *CSL Australia* (at [28]), in ***Tepko*** *v Water Board* (2001) 206 CLR 1 (at [168]-[170]), Kirby and Callinan JJ warned against the consideration of separate issues as preliminary questions except in circumstances 'when their utility, economy, and fairness is beyond dispute.' It was further noted by Katzmann J in *CSL Australia* (at [32] citing *CBS Productions Pty Ltd v O'Neill* [1985] 1 NSWLR 601 (at 606)) that a matter is 'ripe' for preliminary determination where it is a 'central issue' that 'will either obviate the need for litigation altogether or substantially narrow the scope of the dispute'. Referring to *Tepko,* her Honour noted that the situation was very different where the issues overlapped.

33 It should be noted also that the Commissioner relies on the decision in *CSL Australia* to support the exercise of the discretion to refuse relief under the ADJR Act. Although relief was refused in that decision under s 10(2)(b)(ii), this was reversed on appeal to the Full Court

in *CSL Australia Pty Limited v Minister for Infrastructure and Transport* [2014] FCAFC 10 (at [237]).

34 For these reasons, I am not satisfied that it would be appropriate to exercise the discretion to refuse relief under s 10(2)(b)(ii) of the ADJR Act at this early stage of the proceedings. It is also not presently possible to be sure that the Society would suffer no disadvantage if ADJR Act relief is refused now as the Commissioner suggests.

35 Additionally, I am not persuaded that amendment of the originating application is presently necessary having regard to s 37M of the FCA. As was submitted by counsel for the Society in oral submissions, it would be preferable to proceed with statements of issues and submissions if the matter is not settled at mediation, as proposed by the Society in its minute.

36 It will be essential, as the experienced counsel for the Society undoubtedly recognises, especially following this argument, that the proposed statement of issues and written submissions in any hearing (if the matter cannot be resolved), should identify with distinct clarity precisely which of the Society's contentions are relevant to each of the statutory remedies on which it relies. But such an approach is a relatively conventional litigation approach, although perhaps less so in most tax matters. Multiple causes of action claiming different remedies for different reasons but referable to the same 'matter' are not uncommon. It is not possible in those circumstances to detect any prejudice to the Commissioner simply because a taxpayer has exercised both of its statutory entitlements in one proceeding rather than two. There is no reason why the Commissioner should not clearly understand the issues raised by the Society. Any ongoing uncertainty as to the issues can, and should, be resolved by a statement of issues if the matter cannot be resolved at mediation, not by an application to set aside the originating application.

37 Consistently with s 37M of the FCA, orders will be made broadly in terms of the Society's minute of proposed orders, which provide for the Commissioner to file and serve all necessary documents, and for the proceedings to be referred to mediation.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher.

Associate:

Dated: 6 August 2020