

COMMISSIONER OF STATE REVENUE v ACN 005 057 349 PTY LTD
(M88/2016 & M89/2016)

Court appealed from: Supreme Court of Victoria Court of Appeal
[2015] VSCA 332

Date of judgment: 8 December 2015

Date special leave granted: 17 June 2016

The respondent ('ACN') was from 1988–2007 the registered proprietor of two adjacent properties in Toorak. For each tax year from 1990 to 2002, and from 2003 to 2007, ACN paid amounts to the appellant (the Commissioner) in response to assessments of land tax with respect to the two properties that were described as 2 Ottawa Road, Toorak, and 65 Albany Road, Toorak. For the 2008–2011 tax years, Streetriver Pty Ltd ('Streetriver') (a related company to ACN), the then registered proprietor of the two properties, was assessed for land tax for them. On 23 March 2012, the Commissioner informed ACN, that in calculating the land tax liability for '2 Ottawa Road', an erroneous valuation had been applied, as the valuation for '2 Ottawa Road' had included both the landholding of '2 Ottawa Road' and the landholding of '65 Albany Road', in addition to the separate valuation for '65 Albany Road'. The Commissioner reimbursed Streetriver the amount of \$300,238.75.

ACN lodged Notices of Objection against the 1990–2005 land tax assessments, claiming that an excessive amount of land tax had been assessed and paid by reason of the duplication error. The Commissioner claimed that he did not have the discretion to accept the objection because it was out of time. ACN filed a writ in the Supreme Court of Victoria, seeking restitution at common law for the overpayments. It also filed an originating motion seeking an order for mandamus or other orders on judicial review directing the Commissioner to issue amended assessments for each of the 1990 to 2002 land tax years and to refund the overpaid land tax. Sloss J dismissed both proceedings.

ACN's appeal to the Court of Appeal (Hansen & Tate JJA, & Robson AJA) was upheld. The Court noted that the sole question for determination was whether the Commissioner was bound to exercise the discretion he had to amend the assessments and whether, if he had a duty to do so, ACN was entitled to mandamus to compel him to do so. The Court held that given the nature of the power under s 19 of the *Land Tax Act* 1958 (Vic), and the circumstances of the case, the power could be exercised lawfully only in one way, namely, to amend the assessments for the 1990–2002 land tax years and to give effect to those amendments by making a refund; the Commissioner was under a duty to so act. Their Honours noted that this Court in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 recognised that an assessment is susceptible to judicial review where there has been conscious maladministration. In the present case the Commissioner had refused to perform his duty without good reason or justification; in the circumstances of the case he had acted with conscious maladministration. ACN was therefore entitled to an order for mandamus compelling the Commissioner to perform his duty to exercise the

power under s 19 to amend and to give effect to the amendments by making a refund.

The availability of the s 19 power to provide a remedy did not circumvent the objection and refund regimes because, by contrast to those regimes, the s 19 power was enlivened only when the Commissioner knew that an assessment was incomplete and inaccurate. The power conferred by s 19 functioned as a mechanism to ensure the integrity of the system of tax collection under the Act, namely, that the Commissioner collected the correct amount of tax. ACN could not with reasonable diligence have discovered its mistake before the Commissioner's express admission of the duplication error on 23 March 2012, so any relevant limitation period was thereby postponed.

The grounds of appeal include:

- The Court of Appeal erred in concluding that, under the provisions of the *Land Tax Act 1958 (Vic)*, the issuing of the assessment did not create a statutory tax debt.
- The Court of Appeal erred in concluding that payments made by the taxpayer were made under a mistaken belief which was operative and enduring.
- The *Land Tax Act* contained provisions whereby taxpayers were able to object to assessments and seek refunds within periods of time stipulated and subject to certain other conditions. In holding that, independently of the statutory objection and refund regimes, there arose, either at general law or under s 19, a duty to refund payments made of amounts assessed, the Court of Appeal erred.