



## HIGH COURT OF AUSTRALIA

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### COMMISSIONER OF TAXATION v FUTURIS CORPORATION LIMITED

The Commissioner of Taxation had not deliberately miscalculated Futuris's taxable income by "double counting" in contravention of his statutory powers, the High Court of Australia held today.

Futuris's 1998 tax return specified a taxable income of \$86,088,045 and tax payable of \$30,991,696.20. In 2002 the Commissioner served a notice of amended assessment which increased its taxable income for 1997-98 by \$19,950,088, making a total taxable income of \$106,038,133. The increase was attributed to an increase in capital gains tax on the disposal of shares in a subsidiary company following a corporate restructure. Futuris appealed to the Federal Court of Australia against the disallowance of its objection by the Commissioner. This proceeding, pursuant to Part IVC of the *Taxation Administration Act* (TAA), is still pending. Part IVC provides for the making of objections to the Commissioner, for review by the Administrative Appeals Tribunal and for appeals to the Federal Court.

In November 2004, the Commissioner gave Futuris a second amended assessment which increased its taxable income for 1997-98 by \$82,950,090. That amount was attributed to the application of *Income Tax Assessment Act* (ITAA) provisions dealing with schemes to reduce income tax to the disposal of the shares. Taxable income then totalled \$188,988,223 with tax payable of \$68,035,760.28. Futuris claimed there had been deliberate double counting of the \$19,950,088. The Commissioner disallowed an objection by Futuris, which again appealed on 1 June 2005 to the Federal Court under Part IVC of the TAA.

The litigation which reached the High Court began when Futuris then issued a third proceeding in the Federal Court. This proceeding was brought under section 39B of the *Judiciary Act*, which provides for writs of mandamus, prohibition or injunction to be sought against Commonwealth officers. The issue raised by section 39B was not merely whether there had been an error of fact or law by the Commissioner in giving the second amended assessment, but whether the Commissioner had acted outside the powers conferred by the ITAA so as to have committed "jurisdictional error". Justice Paul Finn dismissed Futuris's action, rejecting its contention that the Commissioner had deliberately overstated its taxable income by \$19,950,088.

The Full Court of the Federal Court allowed an appeal. It held that the second amended assessment was not protected by section 175 of the ITAA, which provided for the validity of any assessment not to be affected by reason that any ITAA provisions had not been complied with. The Full Court declared that the amended assessment was invalid under the ITAA, and ordered that it be quashed, holding that the Commissioner had relied on facts he knew were untrue, which was not a bone fide exercise of the power of assessment. The Commissioner appealed to the High Court.

The Court unanimously allowed the appeal and held that Justice Finn was correct to dismiss the section 39B application. It held that the Commissioner did not apply the ITAA to facts known to be untrue, there was no absence of bona fides regarding the second amended assessment, and there was no jurisdictional error vitiating that assessment. The Court rejected any conclusion that the Commissioner knowingly engaged in double counting. Australian Tax Office documents showed that the second amended assessment was issued on the footing that a compensatory adjustment could later be made, depending on the outcome of the Part IVC proceedings. The Court held that if errors in assessment occurred, they were within, not beyond, the exercise by the Commissioner of the powers of assessment given by the ITAA and would be considered in the pending Part IVC proceedings. Absent any deliberate maladministration by the Commissioner, sections 175, 175A and 177(1) of the ITAA together provided that the validity of an assessment was not affected by failure to comply with the ITAA. However, the dissatisfied taxpayer could (and Futuris did) object in the manner set out in Part IVC of the TAA. In the circumstances, the Court held that the pending Part IVC proceedings should have led the Full Court to refuse to make a declaration about the amended assessment.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*