Federal Court of Australia

Hyder v Commissioner of Taxation [2023] FCAFC 29

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| Appeal from: | *Hyder v Commissioner of Taxation (No 2)* [2022] FCA 421 |
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| File number: | QUD 172 of 2022 |
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| Judgment of: | **LOGAN, BROMWICH AND HESPE JJ** |
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| Date of judgment: | 8 March 2023 |
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| Catchwords: | **TAXATION** – declarations and writ of prohibition sought against the **Commissioner** of Taxation pursuant to s 39B of the *Judiciary Act 1903* (Cth) – Commissioner’s power to issue assessments to more than one taxpayer in respect of income from the same source – accrual of general interest charge (**GIC**) – whether Commissioner required to give credit for tax paid by different taxpayer when calculating GIC – whether due date for payment ought to be deferred – Commissioner’s power of recovery – where undertaking given not to commence recovery proceedings |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13  *Income Tax Assessment Act 1936* (Cth) ss 97, 177F  *Income Tax Assessment Act 1997* (Cth) s 5-15  *Judiciary Act 1903* (Cth) s 39B  *Taxation Administration Act 1953* (Cth) ss 255-5, 255-10, 350-10, 350-12 |
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| Cases cited: | *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146  *Commonwealth Agricultural Service Engineers Ltd (in liq) v Commissioner of Taxes (SA)* [1926] HCA 30; (1926) 38 CLR 289  *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55  *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [1995] HCA 23; (1995) 183 CLR 168  *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* [1928] HCA 49;(1928) 42 CLR 39  *Federal Commissioner of Taxation v Stokes* (1996) 72 FCR 160  *Richardson v Federal Commissioner of Taxation* [1932] HCA 67; (1932) 48 CLR 192 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 86 |
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| Date of hearing: | 24–25 November 2022 |
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| Counsel for the Appellants: | Mr M Robertson KC with Mr P G Bickford |
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| Solicitor for the Appellants: | Small Myers Hughes |
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| Counsel for the Respondent: | Ms M Brennan KC with Ms F Chen |
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| Solicitor for the Respondent: | McInnes Wilson Lawyers |

ORDERS

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|  | | QUD 172 of 2022 |
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| BETWEEN: | ELTON MATTHEW HYDER IV  First Appellant  EMH IV PTY LTD AS TRUSTEE FOR THE EMH IV FAMILY TRUST  Second Appellant  ACN 603 939 939 PTY LTD (ACN 603 939 939)  Third Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

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| order made by: | LOGAN, BROMWICH AND HESPE JJ |
| DATE OF ORDER: | 8 MARCH 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellants pay the Respondent’s costs of the appeal, as agreed or taxed.

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

REASONS FOR JUDGMENT

# THE COURT:

1. This appeal challenges a refusal in the original jurisdiction of declaratory and other relief claimed by the Appellants under the ***Judiciary Act*** *1903* (Cth). The underlying issue concerns the ability of the **Commissioner** of Taxation to recover tax, penalties and general interest charge (**GIC**) in respect of liabilities arising under assessments issued to different taxpayers, as further to or as alternative assessments in respect of amounts sourced in the net income of a particular trust for a particular income year. In this case, the relevant assessments were issued to three taxpayers:
2. Mr Hyder, the First Appellant;
3. EMH IV Pty Ltd (the trustee of the EMH IV Family Trust) (**Trustee**), the Second Appellant; and
4. Screaming Eagle Pty Ltd (**SEPL**), the Third Appellant (the company name having since been changed).
5. The gravamen of the Appellants’ complaint is that the Commissioner should be precluded from collecting income tax, penalties or GIC from Mr Hyder or the Trustee in circumstances in which SEPL has been assessed and paid tax on amounts referable to the net income of the EMH IV Family Trust and has not objected to the assessments issued to it.
6. At first instance, the primary judge, perhaps not surprisingly, construed the Appellants’ contentions as a challenge to the validity of the assessments issued to the Trustee and to Mr Hyder. The Appellants were understood by the primary judge to be challenging the Commissioner’s exercise of his power to issue the amended assessments to the Trustee and Mr Hyder.
7. His Honour held that, having regard to the decision of the High Court in *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146, those amended assessments, being neither tentative nor issued otherwise than in good faith, were valid. However, to the extent that the Commissioner had acknowledged those assessments to be alternative assessments, his Honour was concerned by the Commissioner’s attempt to recover on all of the assessments. It appears that, in the course of the hearing before the primary judge, the Commissioner had also formed the view that his conduct in seeking to recover against all of the assessments was not a proper exercise of power and provided an undertaking that he would not seek to recover on any of the assessments issued to the Trustee or the amended assessments issued to Mr Hyder until the respective challenges to objection decisions in respect of those assessments under Pt IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**) had been determined and the correct taxpayer or taxpayers and correct basis for assessment had been determined.
8. Having regard to the undertaking provided by the Commissioner, the primary judge declined to issue a writ of prohibition in the exercise of his discretion, but declared that the conduct of the Commissioner prior to the giving of that undertaking had been unlawful.
9. Before this Court, the Appellants contend that further relief ought to have been issued in the form of further declarations and a writ of prohibition.

# FACTS

1. The facts were set out by the primary judge at PJ [12]–[133]. No issue was taken with how his Honour recited those facts. For present purposes, they may be summarised as follows.
2. The “Screaming Eagle Partnership” was established by an agreement executed on 29 January 2015 between Mr Hyder (as the “Principal”) and SEPL (as the “Ordinary Partner”). Mr Hyder was to contribute 1% of the capital and be entitled to 1% of the profits of the partnership; SEPL was to contribute 99% of the capital and be entitled to 99% of the profits.
3. On 29 June 2015, the Trustee distributed particular amounts of the net income of the EMH IV Family Trust for the year ended 30 June 2015 to six beneficiaries, with the balance of $18,028,722 distributed to the Screaming Eagle Partnership. This distribution was disclosed in the tax return of the EMH IV Family Trust for the 2015 income year as including net capital gains of $2,359,204 and other income of $15,669,518.
4. The tax return for the Screaming Eagle Partnership for the year ended 30 June 2015 disclosed total net partnership income of $15,678,015, including a distribution of the net income of the EMH IV Family Trust in the amount of $15,669,518; that Mr Hyder’s share of partnership income was $156,780; and that the balance of $15,521,235 was SEPL’s share. SEPL’s income tax return for the year ended 30 June 2015 included its share of the net income of the Screaming Eagle Partnership and 99% of the net capital gain distributed by the EMH IV Family Trust to the Screaming Eagle Partnership.
5. SEPL failed to pay the tax assessed on the basis of its return for the year ended 30 June 2015 by the due date for payment, being 16 May 2016. On 28 October 2016, SEPL was placed into voluntary liquidation and the Commissioner lodged a proof of debt for the tax due. On 3 October 2019, SEPL was reinstated by order of Supreme Court of Queensland. The orders included an order that SEPL pay the sum of $5,577,228.08 to the Commissioner, equal to the sum of the tax due to the Commissioner plus GIC. This sum was paid by SEPL on 7 November 2019.
6. In his tax return for the year ended 30 June 2015, Mr Hyder included a share of the net income of the Screaming Eagle Partnership of $156,780 and a capital gain of $23,592, said to represent Mr Hyder’s 1% share of the net capital gain distributed by the Trustee to the Screaming Eagle Partnership.
7. Following an audit of the tax affairs of the Screaming Eagle Partnership, in May 2020 the Commissioner issued Mr Hyder with:
8. a notice of amended assessment for the 2015 year for tax payable in the amount of $6,486,122.46;
9. a notice of liability to pay shortfall interest charge in respect of the 2015 year in the amount of $1,340,494.60;
10. a notice of amended assessment for the 2016 year for tax payable in the amount of $2,262,660.45; and
11. a notice of liability to pay shortfall interest charge in respect of the 2016 year in the amount of $331,428.50.
12. The increase in tax payable was the result of the Commissioner including in Mr Hyder’s assessable income amounts representing withdrawals made by Mr Hyder from the bank account in the name of the Screaming Eagle Partnership which Mr Hyder applied to his own personal use. The Appellants submitted to the Commissioner that the withdrawals made by Mr Hyder were amounts of net income of the EMH IV Family Trust that had been distributed to the Screaming Eagle Partnership and that Mr Hyder was required to account to the partnership for the amounts advanced to him.
13. During the audit, the Commissioner did not accept that the Screaming Eagle Partnership was a bona fide partnership. As an alternative to the amended assessments issued to Mr Hyder, the Commissioner issued an assessment for the year ended 30 June 2015 to the Trustee for tax payable in the amount of $8,833,943.65 (inclusive of Medicare levy), on the basis that there was net income of the EMH IV Family Trust to which no beneficiary had been made presently entitled.
14. Based on the above, it is apparent that the assessment issued to the Trustee is an alternative to the assessment issued to SEPL. It is not possible for both SEPL and the Trustee to be liable to tax on amounts referable to the net income of the EMH IV Family Trust. The amended assessments issued to Mr Hyder are in a different position. If the amounts have been included in Mr Hyder’s assessable income on the basis that they are distributions to him of net income of the EMH IV Family Trust, then the amended assessments are alternatives to the Trustee assessments and the SEPL assessments. If the amounts have been included in Mr Hyder’s assessable income on the basis that they are distributions made to him by SEPL or at SEPL’s direction (and are, therefore, assessable to Mr Hyder pursuant to Div 7A of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 36**)), then Mr Hyder’s amended assessments are not alternative assessments to those issued to SEPL.
15. Following the issue of the assessments and amended assessments, the Appellants requested that the Commissioner exercise his discretion under s 255-10(1) of Sch 1 to the TAA to defer the due date for payment of the assessments issued to the Trustee and the amended assessments issued to Mr Hyder (essentially until the expiration of 14 days after the exhaustion of each taxpayer’s appeal rights). The request was refused.
16. The Appellants were requested by an officer of the Australian Taxation Office to provide financial information in order for the Commissioner to be satisfied that it was appropriate to enter into a 50-50 payment arrangement pursuant to which Mr Hyder and the Trustee would pay 50% of the amounts due to the Commissioner with the balance to be paid by instalments or to be the subject of security. The liabilities to be the subject of the 50-50 payment arrangement included Mr Hyder’s liability under his 2015 amended assessment and the Trustee’s liability under its 2015 assessments, without any credit to be given for the tax paid by SEPL on in its 2015 assessment (which had included the distribution to SEPL in 2015 of 99% of the net income of the Screaming Eagle Partnership and where the net income of the Screaming Eagle Partnership included the distribution of the net income of the EMH IV Family Trust for the year ended 30 June 2015).
17. On 17 July 2020, objections were lodged to the amended assessments issued to Mr Hyder and to the assessments issued to the Trustee.
18. By letter dated 21 July 2020, the Appellants were advised by a Deputy Commissioner of Taxation that both (a) the request to defer the due date for payment of the amended assessments issued to Mr Hyder and for payment of the assessments issued to the Trustee; and (b) the request to defer recovery action in respect of those amended assessments and assessments, had been refused.
19. On 7 September 2020, the following notices of assessment for a shortfall penalty were issued:

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| **Taxpayer** | **Income Year** | **Amount** | **Due Date** |
| Mr Hyder | 2015 | $3,243,061.20 | 29 September 2020 |
| Mr Hyder | 2016 | $1,357,596.20 | 29 September 2020 |
| The Trustee | 2015 | $4,416,971.80 | 29 September 2020 |

1. As at 29 September 2020, Mr Hyder’s tax-related liabilities under the amended assessments and related notices of penalty and shortfall interest amounted to $15,021,359.41. The Trustee’s tax‑related liabilities under the assessments and related notices of penalty and shortfall interest amounted to $13,250,915.45. These amounts were in addition to the tax and shortfall interest paid by SEPL.
2. By letter dated 15 September 2020, the legal representative for Mr Hyder and the Trustee was provided with a Statement of Reasons under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) for the Commissioner’s decision to refuse to defer the due date for payment of the amended assessments issued to Mr Hyder and of the assessments issued to the Trustee. That letter stated, in part:

As per [the Deputy Commissioner’s letter of 21 July 2012], the payment made by [SEPL] after it was re‐instated is not a payment that can be attributed as 50% payment against the taxpayers’ liabilities as it is a separate entity. Any payments made by [SEPL] towards its tax do not have any bearing to the taxpayers’ current outstanding liabilities unless a determination has been made under objection, review of appeal to state otherwise.

Until the dispute in relation to the characteristics of the income and attribution is determined, the issue of notices of assessment and amended assessment are conclusive evidence of the due making of an assessment. The assessments are valid, and the amount and particulars of the assessments are correct hence collectable until the disputes are determined.

1. The letter also noted that “GIC [was] accruing in the amount of approximately $1.9M per month”.
2. On 1 October 2020, Mr Hyder and the Trustee lodged objections to the penalty assessments.
3. By letter dated 8 October 2020, the legal representative for Mr Hyder and the Trustee requested that the Commissioner reconsider the decision refusing to defer (a) recovery action and (b) the due date for payment of the tax‑related liabilities (noting that the deferral of the due date for payment would result in GIC not accruing in respect of those liabilities).
4. On 9 October 2020, Mr Hyder and the Trustee commenced the judicial review proceedings that came to be determined by the primary judge, seeking review of the Commissioner’s decision of 21 July 2020 to refuse the deferrals sought.
5. On 8 February 2021, Mr Hyder’s objections to his amended assessments, notices of shortfall interest and penalty assessments were disallowed. In the process of deciding the objection, a determination was made under s 177F of the ITAA 36 including the amount of $13.250m in Mr Hyder’s assessable income for the year ended 30 June 2015 and that the amount be taken to be included by virtue of s 97 of the ITAA 36. On that same date, the Trustee’s objections were also disallowed.
6. On 18 February 2021, Mr Hyder and the Trustee each filed a notice of appeal in the Federal Court against the objection decisions. The Commissioner’s primary contention in relation to Mr Hyder appears to be that Div 7A of the ITAA 36 applies with the consequence that the withdrawals from the bank account held in the name of the Screaming Eagle Partnership by Mr Hyder were payments from SEPL to Mr Hyder and are assessable to him as unfranked dividends. If this contention is correct, the Commissioner could recover tax from Mr Hyder (on the unfranked dividends from SEPL) and retain the tax paid by SEPL on the amount of the EMH IV Family Trust distribution that was received by SEPL. The Pt IVA determination appears to be relied upon in the alternative.
7. By letter dated 26 February 2021, the legal representative for Mr Hyder and the Trustee was advised that the October 2020 request to defer the due date for payment of each of the tax‑related liabilities had been refused. The legal representative was also provided with a Statement of Reasons. In those reasons, the decision-maker expressed the view that:

Although alternative assessments have been issued to [the Trustee], I do not consider that of itself to be a ground to defer the time by which the tax liability becomes payable. In any event, the amended assessments issued to Mr Hyder and [the Trustee] are not alternative assessments to [SEPL] as the taxpayers have stated. As per Division 7A of the ITAA 1936, income assessed is not frankable even though it is paid out of SEPL’s profits.

1. In the Statement of Reasons, it was also said:

Whilst it is acknowledged that the tax payable is being disputed as evidenced by the objections that have been disallowed in full and the subsequent Federal Court lodgement of the appeal against the objection decision, generally, the Commissioner expects that all debts, including disputed debts will be paid on time. As we have informed the taxpayers previously, the legislative framework which underpins the Commissioner’s policy in the collection and recovery of disputed debt is designed to ensure that taxation debts are due and payable even though the underlying liability is being disputed by the taxpayers.

1. By letter dated 13 April 2021 to the Commissioner’s solicitors, the legal representative for Mr Hyder and the Trustee foreshadowed that leave would be sought to amend the originating application originally filed in October 2020 to seek review of the Commissioner’s decision of 26 February 2021 as well.
2. By email sent on 27 July 2021 to the legal representative for Mr Hyder and the Trustee, the solicitors for the Commissioner expressed the following position:

Consistent with PSLA 2006/7 and *Richardson v Federal Commissioner of Taxation* (1932) 48 CLR 192; (1932) 2 ATD the Commissioner will not and cannot recover against both Mr Hyder and the [Trustee] in the 2015 income year. Subject to the outcome of the Federal Court proceedings, the Commissioner is only seeking to recover against Mr Hyder in the 2015 and 2016 income years.

1. No suggestion was made of the Commissioner taking into account, in any manner, SEPL’s payment of $5.354m on account of the assessment that had been issued to it.
2. On 15 September 2021, certificates signed by a Deputy Commissioner were issued pursuant to ss 350-10(3) and 350-12(2) of Sch 1 to the TAA certifying that, as at that date, an amount of $16,306,288.39 (inclusive of GIC) was payable by Mr Hyder and that an amount of $18,403,117.55 (inclusive of GIC) was payable by the Trustee.
3. In the course of the hearing before the primary judge, the Commissioner gave an undertaking that he was seeking only to recover tax as assessed to Mr Hyder and that no recovery action was proposed to be taken against Mr Hyder or the Trustee prior to the conclusion of the Pt IVC proceedings.

# DECISION OF THE PRIMARY JUDGE

1. The applications before the primary judge were:
2. An application pursuant to s 39B of the *Judiciary Act* for declaratory relief and writs of prohibition.
3. An application for review under the ADJR Act of the decision by an officer authorised by the Respondent, refusing to defer the due date for payment of the assessments issued to the Trustee and the amended assessments issued to Mr Hyder.
4. In relation to the application pursuant to s 39B of the *Judiciary Act*, the primary judge considered the issues before him to be:
5. The lawfulness or validity of the Commissioner’s conduct in issuing the amended assessments to Mr Hyder and the assessments to the Trustee.
6. The lawfulness of the Commissioner’s conduct in the period between the date of issue of the assessments to the Trustee and the amended assessments to Mr Hyder, and 27 July 2021 (when the Commissioner acknowledged that he would not and could not recover against both the Trustee and Mr Hyder in the 2015 year, and that he would only seek to recover against Mr Hyder).
7. The primary judge concluded that:
8. The Commissioner’s conduct in issuing the amended assessments to Mr Hyder and the assessments to the Trustee, whilst at the same retaining the tax paid by SEPL on the assessment issued to SEPL, did not render the amended assessments or assessments invalid.
9. From 28 May 2021 to 27 July 2021, the Commissioner engaged in oppressive and, therefore, unlawful conduct in seeking to enforce payment of the full amount due by both Mr Hyder and the Trustee in circumstances in which the Commissioner had issued assessments on alternative bases to different taxpayers in respect of the same income. The amended assessments issued to Mr Hyder and the assessments issued to the Trustee were alternative assessments, and the Commissioner could not seek to recover before the final resolution of the correct position. The Commissioner could only ever be successful against one of Mr Hyder or the Trustee, but not both.
10. Given that the Commissioner was no longer pressing for payment of both Mr Hyder’s amended assessments and the Trustee’s assessments, and had given an undertaking to the Court not to commence recovery proceedings, the primary judge considered that there was no basis for the grant of an injunction or writ of prohibition. His Honour did, however, consider it appropriate to make declarations as to the oppressive character of the Commissioner’s conduct until 27 July 2021.
11. In relation to the application for review under the ADJR Act in respect of the decision to refuse to defer the due date for payment of the amended assessments to Mr Hyder and the assessments issued to the Trustee, the primary judge was of the view that the decision-maker had fallen into error by failing to take into account relevant considerations. Accordingly, the primary judge made orders setting that decision aside and remitting the matter back to the decision-maker for reconsideration.

# THE APPEAL

1. The Commissioner did not appeal against any of the primary judge’s orders. The correctness of the primary judge’s decision in relation to the ADJR Act is not before this Court.
2. The Appellants appealed against the primary judge’s refusal to grant relief in the form they had sought under s 39B of the *Judiciary Act*. They contend that further relief ought to have been issued in the form of further declarations and a writ of prohibition.
3. Although the notice of appeal was somewhat confusing in its drafting, it became apparent at the hearing of the appeal that, contrary to the understanding of the primary judge, the Appellants were not seeking to challenge the validity of the amended assessment issued to Mr Hyder for the year ended 30 June 2015 or the validity of the assessment issued to the Trustee for that year. Rather, on their contention, it was unlawful for the Commissioner to rely upon those assessments because of the payment by SEPL on an assessment to which no objection had been taken.
4. As their grounds of appeal were developed in their oral and written submissions, the Appellants advanced the following propositions:
5. The scheme of the income tax legislation was that the Commissioner could not lawfully assess and collect income tax from more than one taxpayer on income from the same source.
6. SEPL had been assessed to income tax on 99% of the 2015 net income of the EMH IV Family Trust. The notice of assessment issued to SEPL was conclusive evidence of its correctness. SEPL had paid that assessment and was not challenging it. Nor had the Commissioner expressed doubt about the correctness of the SEPL assessment in any correspondence or in the objection decisions issued in relation to Mr Hyder’s 2015 amended assessment or the Trustee’s 2015 assessment.
7. By issuing the amended assessment to Mr Hyder for the year ended 30 June 2015 and by issuing the assessment to the Trustee for the 2015 income year, the Commissioner was unlawfully seeking to assess and collect income tax on the 2015 net income of the EMH IV Family Trust from more than one taxpayer.
8. Because the correctness of the SEPL assessment was not in contest and had been paid, the Commissioner had collected tax on the 2015 net income of the EMH IV Family Trust and he was therefore under a duty to withdraw the amended assessment to Mr Hyder and the assessment to the Trustee for the 2015 income year.
9. The Commissioner was acting unlawfully in continuing to assert a right to seek payment of the alternative assessments and in failing to give any credit or allowance for the tax paid by SEPL.
10. Accordingly, the Appellants contended that the primary judge erred in not issuing writs of prohibition or not issuing permanent injunctions restraining the Commissioner from ever taking any action to recover income tax under the amended assessment issued to Mr Hyder for the 2015 year or the assessment issued to the Trustee for that year. The primary judge was also said to have erred in not ordering a permanent stay of the appeal proceedings brought by the Appellants relating to Mr Hyder’s 2015 amended assessment and the Trustee’s assessment. Those proceedings, it was said, did not attract the judicial power of the Commonwealth and/or were futile because the Commonwealth had been paid and retained the income tax on the 2015 net income of the EMH IV Family Trust properly assessed to SEPL.
11. At the hearing, the Appellants also sought leave to amend the notice of appeal to seek orders:
12. requiring compliance with the orders made by the primary judge on 21 April 2022 “to make lawful decisions pursuant to s 255-10” of Sch 1 to the TAA and “directing the Commissioner to recognise the lack of legal power to require payment to him of income tax on the same source of income twice over”;
13. requiring the Commissioner to defer the due dates for payment of the amended assessment issued to Mr Hyder and the assessment issued to the Trustee until the earlier of:
    1. the date that the Commissioner refunds the tax paid by SEPL; or
    2. the date that each assessment is amended to reduce the taxable income assessed by the amount of the EMH IV Family Trust distribution assessed to SEPL; and
14. setting aside the decision made by the Commissioner on 9 September 2022 to refuse to defer the due date for payment of the amended assessment issued to Mr Hyder and the assessment issued to the Trustee, and remitting the matter to a new decision‑maker for lawful determination.
15. At the hearing, leave to amend was refused. The amendments sought to be made to the notice of appeal relate to a decision made on 9 September 2022. That decision was not the subject of the application to the primary judge and thus does not engage the appellate jurisdiction of this Court, as invoked by the Appellants. If a challenge is sought to be made to the decision made on 9 September 2022, it would have to be the subject of a separate application for judicial review in the Court’s original jurisdiction. The decision of 9 September 2022 forms no part of the appeal.
16. In addition to the propositions set out at [45] above, it became apparent during the course of oral submissions that a significant part of the Appellants’ concern related to the accrual of GIC. The essence of the Appellants’ contention was that GIC should not be taken to be accruing on the sum of Mr Hyder’s amended assessments or the Trustee’s assessments for the 2015 year with no regard to the tax that had been paid by SEPL. They contend that the total sum did not represent a tax‑related liability that was properly due and payable, and therefore was not a sum on which GIC ought to accrue.

# CONSIDERATION

## Scope of decision in *Richardson*

1. The central tenet of the Appellants’ case is based on the following sentence from Evatt J’s reasons in ***Richardson*** *v Federal Commissioner of Taxation* [1932] HCA 67; (1932) 48 CLR 192 at 212, taken out of context: “‘One income, one taxpayer, one tax’ is the general scheme of the Act”. That sentence needs to be read in the context in which it was made.
2. *Richardson* concerned a taxpayer, Mr Richardson, who had failed to include in his returns assessable income from operations by a person who was found to be a nominee of that taxpayer. The nominee had returned that income as his own and tax had been paid on that income, albeit at a rate much lower than if that income had been assessed to Mr Richardson. The Commissioner issued amended assessments to Mr Richardson and had neither cancelled nor amended the assessment issued to the nominee. Nor had the Commissioner refunded the tax paid on the nominee’s assessment. The Commissioner did not take into account any of the payments made to him in respect of the nominee’s assessment in calculating the taxable income of the taxpayer, or in determining the amount of tax to be paid by the taxpayer, or in determining the amount of additional tax (now called administrative penalty), or otherwise reducing the total amount payable by the taxpayer.
3. At first instance, Starke J ordered a reduction in the total amount of each assessment by a sum equal to the tax already paid by the nominee on the ground that, having treated the person conducting the operations from which the income arose as a mere nominee or dummy for the taxpayer, the Commissioner was bound to act consistently and treat all of the nominee’s acts on the same basis. These acts included the payment of tax (which, as it happened, had been found on the facts to be payments funded by Mr Richardson). The consequence was that, on Starke J’s reasoning, in determining the amount due to be paid by Mr Richardson, credit was to be given for the amount paid by his nominee. In the course of his reasons, Starke J stated (as reproduced in *Richardson* at 201) that “[t]he *Income Tax Acts* do not authorize the Commissioner to take income tax twice over in respect of the same source for the same period of time”.
4. On appeal to the Full High Court, the taxpayer contended that Starke J had given credit for the tax paid by Mr Richardson’s nominee at the wrong stage of computation — the credit should have been given in the process of calculating Mr Richardson’s income tax shortfall, with the consequence that the amount on which additional tax was payable should have been lower, rather than taking the payment into account in determining the total balance owing to the Commissioner. On appeal, the taxpayer also contended that the assessment to him was not authorised by the *Income Tax Assessment Acts* *1922–1930* (Cth) because the assessments against the nominee assessing the profits of the operations stood unamended.
5. In addressing the taxpayer’s contention that the assessment was not authorised, Evatt J said (at 211) (emphasis added):

[It] is based upon the general principle that the Act does not intend the same income to be assessed and taxed more than once, and that [the nominee]’s amended assessment is incontrovertible evidence of an intention to reach both him and Richardson in respect of Richardson’s profits from the hotel. But we are not concerned with [the nominee]’s rights, if any, against the Commissioner, and it would be curious if, despite Richardson’s “fraud upon the revenue” (as *Starke* J. calls it), he could establish the invalidity of the assessment upon him by production of the assessment arrived at in error through his own misrepresentation.

The general principle invoked need not be questioned. **But it cannot be stated, without qualification, that the administration of the Act must be such that tax can never be leviable against two separate individuals in respect of the same income.** “One income, one taxpayer, one tax” is the general scheme of the Act. But where A, acting in collusion with B, has returned part of B’s income as his own and has been enabled by B to pay the tax assessed in respect of such income, with the result that B is successful in a fraud, I think that it is hopeless for B to claim that he is exempted from his liabilities under the Act unless and until A’s assessment is altered and a refund made. Whatever rights A may have to obtain his refund, B cannot say, either that an altered assessment upon him in respect of what is admittedly his own income is unlawful, or that the liability [to additional tax] under sec. 67, which springs from his own default, is somehow suspended.

1. In separate reasons, Dixon J (at 206) considered the general rule to be that:

[N]o person may, after obtaining an advantage by the assertion of rights in relation to another and while retaining it, set up and rely upon other rights against the same person, inconsistent with the existence of those already asserted.

1. Dixon J concluded that the Commissioner could include the income that had been returned by the nominee in the assessments of Mr Richardson without first altering the assessment of the nominee. Dixon J said (at 207) (emphasis added):

Upon the state of facts which must be taken to be true the taxpayer alone was exposed to tax in respect of the income in question. The nominee’s liability arose only upon a false state of facts. No doubt, when and if the Commissioner arrived at the clear conclusion that to ensure the completeness and accuracy of the nominee’s assessments the exclusion of the income he returned was requisite, it became his duty to exercise his power under sec. 37. **But it was not unnatural that he should delay relieving one of two persons whom he considered culpable until the liability of the other was established.** The questions which may arise out of such situations are no doubt attended with difficulty. For this reason it is not desirable to enter upon them more at large than is necessary for the decision of this appeal. **It is enough to say that there is nothing in the character of the power given in sec. 37 or in the nature of the power of assessment which requires the formal alteration of the nominee’s assessments before the alteration of the assessment of the taxpayer.**

1. The third member of the Court, McTiernan J, stated that he agreed that the appeal and cross‑appeal should be dismissed (at 215). Inferentially, his Honour agreed with the reasons given by each of Dixon J and Evatt J.
2. Against this background, the following observations may be made:
3. The statement that income tax legislation does not intend the same income to be assessed and taxed more than once is not to be accepted without qualification. There is no blanket rule that more than one taxpayer cannot be assessed to tax upon the same income. Two persons can, in this way, have included in their individual assessments the same income for the same year. This proposition was affirmed in *Deputy Commissioner of Taxation v* ***Richard Walter*** *Pty Ltd* [1995] HCA 23; (1995) 183 CLR 168 per Mason CJ at 188, Brennan J at 200–2, Deane and Gaudron JJ at 214, Dawson J at 216–‍7, Toohey J at 228–9 and McHugh J at 237–8. To the extent that the Appellants’ case is premised on the existence of such a rule, their contention is inconsistent with authority.
4. The reference to the “same income” needs to be understood in the context of the facts before the Court. *Richardson* concerned a situation in which assessments were issued to two persons in respect of income that had been found to be the income of one person, Mr Richardson. The tax paid by the nominee was tax paid by Mr Richardson. Mr Richardson’s income could not be assessed both to Mr Richardson and to his nominee.
5. It is well-established that the Commissioner may issue alternative assessments to different taxpayers in respect of the same amount. The position was accurately encapsulated by the Full Court in *Federal Commissioner of Taxation v Stokes* (1996) 72 FCR 160, in which it was held that the mere existence of two assessments issued against different taxpayers, by which the same amount was included in the assessable income of each, did not compel the conclusion that the assessments were tentative (in the sense used by the High Court in *Federal Commissioner of Taxation v S Hoffnung & Co Ltd* [1928] HCA 49; (1928) 42 CLR 39) and thus incapable of constituting valid assessments.
6. Even in a case where the income derived by one person has been included in assessments issued to another, the power of the Commissioner to issue an assessment to the person who in fact derived the income is not predicated on the Commissioner first refunding or reducing the assessments issued to the other.
7. Income from the “same source” can sometimes be assessed to more than one taxpayer. The obvious example is profits generated by operations conducted by a company. Those profits are taxable to the company and, absent imputation, taxable again upon distribution to a shareholder. To the extent that the assessments to Mr Hyder are supported by an application of Div 7A, those assessments are not alternatives to or inconsistent with the assessments issued to SEPL.
8. Although accepting that the Commissioner had power to issue alternative assessments, the Appellants contended in their written submissions that it was a “disputed but undecided” fact as to whether SEPL’s assessment was truly an “alternative assessment” in the sense of being an assessment that the Commissioner was bona fide uncertain was correct. The Appellants relied upon statements in the ATO position paper, correspondence from the ATO debt collection officers, correspondence from the ATO officers dealing with the Appellants’ objections and the Statements of Reasons in relation to the decisions not to defer collection or defer the due date for payment. However, by the conclusion of the hearing, the Appellants had withdrawn that submission.
9. The withdrawal was correctly made. The contention that the Commissioner was not bona fideuncertain as to the correctness of the SEPL assessment is contrary to the findings of the primary judge concerning the Commissioner’s position in the Pt IVC proceedings. It is apparent from that summary that the primary judge accepted that the SEPL assessment was an alternative to the assessment issued to the Trustee (PJ at [139]–[144]). So much was also stated by the Commissioner at para 18 of his decision on the Trustee’s objection to its 2015 assessment. There is no basis for suggesting that the contentions put by the Commissioner in the Pt IVC proceedings were not bona fide. Furthermore, the Appellants by their own contentions, accepted that the assessments issued to the Trustee and Mr Hyder were valid and accordingly must be taken to have accepted that those assessments were issued bona fide.
10. For the above reasons, to the extent that the Appellants contend that the scheme of the income tax legislation is that the Commissioner cannot lawfully issue assessments to more than one taxpayer in respect of income from the same source, that contention is rejected. So too is the contention that the Commissioner was precluded from issuing assessments to Mr Hyder or the Trustee without first withdrawing the assessment issued to SEPL.

## Accrual of GIC

1. Before this Court, the Appellants were adamant that they were not seeking to challenge the validity of the assessments issued by the Commissioner. Rather, their contention appeared to be that, although the assessments could be validly issued, they did not evidence a liability which could be recovered or used as a basis for calculating administrative penalties, or on which GIC accrued. Nor, so it was contended, were the appeals against those assessments of any utility because the assessments could never be relied upon. So understood, the contention appeared to be that, although valid, the assessments had, in some way, been rendered sterile.
2. By the conclusion of oral submissions, it appeared that part of the declaratory relief sought by the Appellants before this Court was to restrain the Commissioner from asserting a right to payment of GIC on the amounts assessed to the Trustee and Mr Hyder whilst the Commissioner retained the tax paid by SEPL. The contention appeared to be that the Commissioner was required to make an allowance for the tax paid by SEPL in calculating the amount of tax the taxpayer was liable to pay, including for the purposes of determining any amount of GIC accruing. That contention was based on the Appellants’ construction of the intent of the statutory scheme and what they termed “fundamental principle”.
3. Section 5-15 of the *Income Tax Assessment Act 1997* (Cth) provides:

If an amount of income tax or \*shortfall interest charge that you are liable to pay remains unpaid after the time by which it is due to be paid, you are liable to pay the \*general interest charge on the unpaid amount for each day in the period that:

(a) starts at the beginning of the day on which the amount was due to be paid; and

(b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:

(i) the income tax or shortfall interest charge;

(ii) general interest charge on any of the income tax or shortfall interest charge.

Note 1: The general interest charge is worked out under Part IIA of the Taxation Administration Act 1953.

Note 2: Shortfall interest charge is worked out under Division 280 in Schedule 1 to that Act.

1. The Appellants’ reasoning appeared to be that, because SEPL had paid the assessments issued to it in respect of 99% of the EMH IV Family Trust income, no other taxpayer could be taken to have a liability to pay income tax in respect of that Trust income without credit being given for the tax paid by SEPL. It followed that, in so far as SEPL had paid tax on its share of the net income of the EMH IV Family Trust, there was no liability for income tax which “remained unpaid” and no GIC could accrue in respect of the tax payable which the Commissioner asserted was payable by that other taxpayer in respect of that Trust income, at least without the Commissioner taking into account the payment of tax by SEPL. Because the Commissioner was asserting that there was unpaid tax in the amounts assessed on which GIC was being calculated, the Commissioner had engaged in unlawful conduct.
2. There are a number of difficulties with the Appellants’ contention.
3. First, the Appellants’ contention does not appear to be related to any of its stated grounds of appeal. Nor does the contention clearly relate to the form of the declarations sought in the Appellants’ originating application (as amended). In particular, the Appellants did not seek relief before the primary judge in relation to the construction of s 5-15 or the meaning of the phrase “an amount of income tax that you are liable to pay that remains unpaid”. The proper construction of s 5-15 is not a matter before this Court. Nor is there any constitutional issue concerning the validity of s 5-15, or the imposition of GIC more generally, raised for consideration by this Court.
4. Second, it is not the assertion by the Commissioner which results in the accrual of GIC but the operation of the legislation. Whether there remains unpaid an amount of income tax that a taxpayer is liable to pay after the time by which it is due to be paid on which GIC accrues is a function of the operation of the statute. Restraining the Commissioner from asserting a right (whether by writ of prohibition or otherwise) does not and cannot restrain the operation of the statute.
5. Third, and by way of observation, the Appellants’ contention is not supported by *Richardson*. In that case, Evatt J responded to a contention by Mr Richardson that the amount on which additional tax was imposed ought to be the sum of which the revenue was deprived in respect of the relevant income year, taking into account the amount returned by Mr Richardson’s nominee and on which tax had been paid. By this contention, “the tax properly payable” was not the tax assessed to Mr Richardson but was a sum determined after deducting the tax already paid by Mr Richardson’s nominee. In respect of that contention, Evatt J held (at 213) that “‘the tax properly payable’ means the tax payable by the taxpayer if he had included the omitted income in his return”. Dixon J adopted the same construction of the phrase (at 209), concluding that “tax properly payable” was a reference to the tax which ought to have been paid *by the taxpayer* and is not a reference to the loss suffered by the revenue.
6. In *Richardson*, however, Evatt J left open to determination by the Commissioner the question of whether the fact that the nominee had paid tax ought to result in the Commissioner exercising his power of remission. So too here, it would be open to the Commissioner to have regard to the payment of tax by SEPL in considering whether any GIC ought to be remitted.
7. The Appellants’ contentions on the appeal seem to distil to the following complaint. It is unfair (and therefore oppressive) for GIC to continue to accrue on amounts assessed under alternative assessments in circumstances where tax has been paid by another taxpayer and therefore the Commissioner should be compelled to relieve this unfairness by being directed by the Court to defer the due date for payment. However, the form of the relief sought before the primary judge was writs of prohibition and injunction seeking to restrain the Commissioner from seeking to *recover* income tax and penalties. Those writs would not and could not affect the accrual of GIC by operation of the statute.

## Commissioner’s power of recovery

1. The Commissioner’s power of recovery stands in a different position to his power to issue alternative assessments or the statutory obligation to pay GIC. Although the Commissioner may issue alternative assessments to different taxpayers in respect of the same income for the same income year, he may not be able to recover in full under all of the alternative assessments, depending on the circumstances. The Commissioner cannot exercise his power to institute recovery proceedings in a manner which is oppressive. As the High Court said in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55 at 67:

There will inevitably be cases in which it would be oppressive for the Commissioner to seek to enforce payment of the full amount due under a notice of assessment or by way of additional tax before the final resolution of a genuine dispute about the correctness of the assessment (cf. *Deputy Federal Commissioner of Taxation v. Australian Machinery and Investment Company Pty. Ltd*. (1945) 8 ATD 133; *Marina Estates Pty. Ltd. v. Deputy Commissioner of Taxation* (1974) 48 ALJR 219). A case in which the Commissioner issues a number of assessments on an alternative basis to different taxpayers in respect of the same income provides an obvious example.

See also *Richard Walter* at 201–2 per Brennan J and at 214 per Deane and Gaudron JJ.

1. In the present case, because the Trustee has been assessed on the basis that no beneficiary is presently entitled, that assessment must be an alternative to the assessment issued to SEPL, pursuant to which SEPL is assessed on a share of net income to which it was either directly or indirectly (via its interest in the Screaming Eagle Partnership) presently entitled. The assessments to the Trustee and the assessment to SEPL are alternative assessments. The Trustee assessment is also an alternative to the amended assessment issued to Mr Hyder, which assessed Mr Hyder either on the basis that the EMH IV Family Trust distribution to SEPL should, by reason of Pt IVA, be included in Mr Hyder’s assessable income or because he received deemed dividends from SEPL, sourced from SEPL’s receipt of a Trust distribution. Neither of those bases are consistent with the proposition that no beneficiary was presently entitled to the net income of the EMH IV Family Trust. To seek to recover in full the amount assessed to the Trustee whilst also retaining the amount assessed to SEPL and seeking recovery of the assessment issued to Mr Hyder would be to engage in oppressive, and therefore unlawful, conduct.
2. Although in past correspondence with the Appellants the Commissioner asserted otherwise, by his undertaking to the Court, the Commissioner has agreed not to pursue recovery of either the assessments issued to the Trustee or the amended assessments issued to Mr Hyder until the resolution of the Pt IVC proceedings to determine the correctness of those assessments. By that undertaking, the Commissioner has undertaken to the Court not to engage in oppressive conduct. It was the oppressive consequence which made it unlawful for the Commissioner to seek to recover on more than one alternative assessment. Having received that undertaking, there was no error by the primary judge in refusing further declaratory or injunctive relief.
3. The Appellants contended that the primary judge erred in accepting that undertaking because the Commissioner had no power to give it. The Appellants’ submitted that the Commissioner had no power to refrain from commencing recovery proceedings. At the same time, the Appellants accepted that “of course [the Commissioner] has the power to give an undertaking to the Court”. The Appellants further contended that, by collecting tax from SEPL but agreeing (by the terms of the undertaking) to refrain from collecting tax from the Trustee until the resolution of the Pt IVC proceedings, the Commissioner is engaging in unlawful discrimination.
4. The Appellants referred to the decision of the High Court in *Commonwealth* ***Agricultural Service Engineers*** *Ltd (in liq) v Commissioner of Taxes (SA)* [1926] HCA 30; (1926) 38 CLR 289, where Isaacs J stated (at 294):

The rights of the parties are fixed otherwise. It is intended that [the Commissioner] shall take a high position in this matter and shall not claim for the Crown more than he sees the Crown is entitled to, and he is not to allow any taxpayer to escape payment of any amount which the law intends him to be liable to pay.

1. Based on that statement, the Appellants contended that the Commissioner, having issued an assessment which fixes a date for payment, cannot allow a taxpayer to *escape payment of tax*.
2. The statement by Isaacs J was made in relation to the construction of s 70 of the *Taxation Acts 1915–1918* (SA). That section provided:

It shall be lawful for the Commissioner in any case, whether notice of appeal given or not, to alter or reduce any assessment … and to order a refund of any excess of tax that has been paid in respect thereof.

1. Isaacs J held that the section imposed no duty on the Commissioner “to hear every taxpayer who, having been assessed, claims a reduction, and to listen to the evidence which might be adduced in order to inform his mind” as to whether to exercise the power conferred on him by s 70, irrespective of whether the taxpayer made an appeal or objection: at 294. By corollary, the section conferred no right on a taxpayer to so be heard. Isaacs J made his observation in the context of construing that section. It was not an observation made in respect of the Commissioner’s right *to defer* commencing recovery proceedings, pending the resolution of review or appeal proceedings.
2. In the present case, SEPL had agreed to pay the tax assessed to it. The fact that SEPL came to be the person who paid the tax is the result of SEPL’s own actions and not the result of some arbitrary decision by the Commissioner. By his undertaking, the Commissioner here has agreed to delay recovery against Mr Hyder or the Trustee pending judicial determination of the correct taxpayer. That is a matter clearly within the scope of the Commissioner’s power of general administration and is incidental to his power under s 255-5(2) of Sch 1 of the TAA to sue to recover an unpaid tax‐related liability. A different observation made by Isaacs J in *Agricultural Service Engineers* at 293 remains apt: “The Commissioner is a trusted officer appointed by the Government to put the Act into practical operation”. The contention that the Commissioner was not empowered to give the undertaking to defer collection, or has acted in an unlawful, discriminatory manner, is rejected.
3. The Appellants claim that, because SEPL is not objecting to its assessment, and is not seeking a refund of the tax it paid, the Commissioner can never lawfully institute recovery proceedings against either the Trustee or Mr Hyder. Accordingly, they contend, any Pt IVC appeal by Mr Hyder or the Trustee is of no utility and the Pt IVC proceedings should be permanently stayed.
4. Aside from the incongruity of a party seeking a permanent stay of proceedings which they instituted, the Appellants’ contention suffers from three difficulties:
5. First, the utility of the Pt IVC proceedings lies in the judicial determination of the correct taxpayer, thereby removing the difficulties of the co-existence of tax liabilities in more than one taxpayer. Once it is recognised that the Commissioner may issue alternative assessments to different taxpayers, the correctness of the assessments and the resolution of the Commissioner’s doubts about which taxpayer is properly liable is a matter for resolution within Pt IVC proceedings. As Mason CJ said in *Richard Walter* (at 187),the “central element of the legislative regime is the making of an assessment by the Commissioner which ascertains the taxpayer’s lability to tax and the reference to the tribunal or the appeal to the Federal Court, in which the taxpayer is entitled to dispute his or her substantive liability to tax” (see also Brennan J at 201). The role of Pt IVC is in ascertaining a particular taxpayer’s substantive liability to tax. It is not an adjudication on the exercise of the Commissioner’s power of recovery of the tax so assessed.
6. Second, as explained above, the assessment to Mr Hyder is not an alternative to the assessment issued to SEPL. Even on the Appellants’ own reasoning, there is no basis for a stay relating to the review of Mr Hyder’s amended assessment. This appears to be accepted, at least in part, by Mr Hyder, given that the form of the relief he seeks is to permanently stay only part of his Pt IVC proceeding.
7. Third, the contention conflates the Commissioner’s rights vis-à-vis the Trustee and the Commissioner’s rights and obligations vis-à-vis SEPL. If it is judicially determined that the Trustee is liable to tax because no beneficiary was presently entitled to the income of the EMH IV Family Trust, there is nothing in the Act which precludes the Commissioner from collecting the tax assessed to the Trustee. As Dixon J said in *Richardson* at 206 (emphasis added):

[I]t is clear that if the Commissioner reduced [the nominee’s] assessments by excluding the income now ascribed to the taxpayer, he would be bound to refund the overpayments of tax to the nominee, not to the taxpayer. It may be true that the nominee is, saving all questions of illegality of object, accountable to the taxpayer for the repayments he would so receive. **But the Commissioner would not be accountable to the taxpayer.** The order of *Starke* J., by crediting the nominee’s payments of tax to the taxpayer, accomplishes the very object which would be effected if a refund of the tax was made to the nominee and he accounted to the taxpayer for the refund.

Whether the Commissioner is liable to refund or compensate SEPL for tax overpaid by it is not a matter that affects the Commissioner’s rights against the Trustee or the obligations of the Trustee to the Commissioner, following the judicial determination of the correctness of the alternative assessment issued to the Trustee. It would, for example, remain open to SEPL to lodge an objection and it would be for the Commissioner to consider the exercise of his discretion to accept the objection out of time, in light of the judicial determination of who is correctly liable to tax on the EMH IV Family Trust income. Alternatively, if the Trustee is found to be assessable to tax by reason of s 100A of the ITAA 36, it is possible that it may be open to the Commissioner to amend SEPL’s assessment (pursuant to s 170(10)) or, should it be found that Mr Hyder is assessable on the net income of the Trust by reason of Pt IVA, it may be open to the Commissioner to amend SEPL’s assessment (pursuant to s 177G) to give effect to a compensating adjustment made pursuant to s 177F(3) of the ITAA 36.

1. The Appellants’ contention that the Pt IVC proceedings should be permanently stayed because they lack utility is rejected.

# CONCLUSION

1. It is well-established that the Commissioner can issue alternative assessments to different taxpayers when uncertain as to who is correctly to be assessed. The Commissioner cannot act oppressively by seeking to recover the full amount owed under each and every alternative assessment, although what amounts to oppressive conduct will necessarily depend on the circumstances of a given case. The Commissioner has given an undertaking not to seek to recover under the alternative assessments until their correctness has been judicially determined. He has thereby agreed not to engage in oppressive conduct.
2. The Appellants’ case was dependent upon the proposition that, unless SEPL asks for a refund of the tax it paid, or the Commissioner refunds the tax paid by SEPL, the Commissioner must be permanently restrained from collecting on any alternative assessment even if those alternatives are judicially determined to be correct. The Appellants further contend that there can be no judicial determination of the correctness of those alternative assessments unless SEPL is refunded tax paid in respect of assessments which SEPL does not challenge. In effect, SEPL seeks to preclude the Commissioner from *effectively* exercising his power to assess alternative taxpayers by selectively paying and not challenging the preferred alternative assessment. Taxpayers by their own actions cannot render a valid assessment sterile in this way.
3. The appeal should be dismissed with costs.

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| I certify that the preceding eighty-six (86) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Bromwich and Hespe. |

Associate:

Dated: 8 March 2023