SUPREME COURT OF QUEENSLAND

CITATION:	*Feez Ruthning(A Firm) v Commissioner of Pay-Roll Tax* [2002] QCA 396
PARTIES:	**FEEZ RUTHNING (A FIRM)** (appellant/respondent) **v** **COMMISSIONER OF PAY-ROLL TAX** (respondent/appellant)
FILE NO/S:	Appeal No 8354 of 2001 Appeal No 10064 of 2001 SC No 2104 of 1998 SC No 2124 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 June 2002
JUDGES:	McPherson and Williams JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In Appeal No 8354 of 2001: Appeal dismissed with costs to be assessed on the standard basis.** **2. In Appeal No 10064 of 2001: Appeal dismissed with costs to be assessed on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – IN GENERAL AND RIGHT OF APPEAL – NATURE OF RIGHT – APPEALS STRICTO SENSU AND APPEALS BY WAY OF REHEARING – where taxpayer law firm appealed to Supreme Court against Commissioner's assessment of its pay-roll tax liability – whether Court had power to receive further evidence on appeal – whether decision appealed against was an appeal against the application of statutory criteria to the facts or an appeal against the exercise of a discretion *Income Tax Assessment Act* 1936 (Cth), s 190 *Pay-Roll Tax Act* 1971 (Qld), s 7, s 8, s 13, s 15, s 16, s 18, s 32, s 33, s 46(2) *Supreme Court of Queensland Act* 1991 (Qld), s 55(2)

Attorney-General v Kehoe [2000] QCA 222; [2001] 1 Qd R 350, referred to
Aldrich v Ross [2001] 2 Qd R 235, referred to
Avon Downs Pty Ltd v FCT (1949) 78 CLR 353, referred to
Ballarat Brewing Company Limited v Commissioner of Pay-Roll Tax (Victoria) (1979) 79 ATC 4,452, distinguished
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616, referred to
Cannan & Peterson v Commissioner of Pay-Roll Tax [1975] Qd R 177, considered
Clerk, Walker & Stops and Clerestory Pty Ltd v Commissioner of Pay-Roll Tax (Tasmania) (1983) 83 ATC 4,594, considered
Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194, referred to
Commissioner of Stamps v Garrett F Hunter Pty Ltd (1997) 69 SASR 275, distinguished
Commissioner of Stamps (SA) v Rivington Farms Pty Ltd (1981) 28 SASR 169, distinguished
Commissioner of Taxation v Finn (1960) 103 CLR 165, considered
Crusher Holdings Pty Ltd v Commissioner of Taxes (NT) (1994) 117 FLR 485, distinguished
Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462, referred to
Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd (1972) 128 CLR 28, referred to
Henderson v Federal Commissioner of Taxation (1970) 119 CLR 612, considered
Insomnia (No 2) Pty Ltd & Anor v Commissioner of Taxation (Cth) (1986) 17 ATR 386, referred to
John French Pty Ltd v Commissioner of Pay-Roll Tax [1984] 1 Qd R 125, considered
Kolotex Hosiery (Australia) Pty Ltd v Federeal Commissioner of Taxation (1975) 132 CLR 535, referred to
Logan v Woongarra Shire Council [1983] 2 Qd R 689, referred to
Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner of Taxes (No 1) (2000) 155 FLR 146, distinguished
Public Service Board of NSW v Osmond (1986) 159 CLR 656, referred to
R v O'Donnell; ex parte Builders' Registration Board of Queensland [1983] 1 Qd R 417, referred to
Re Coldham and others; ex parte Brideson (No 2) (1990) 170 CLR 267, referred to

COUNSEL: G J Gibson QC, with F W Redmond, for the appellant
E M O'Reilly SC, with D Marks, for the respondent

SOLICITORS: Crown Solicitor for the appellant
Allens Arthur Robinson for the respondent

[1] **McPHERSON JA:** In my opinion the appeals should be dismissed with costs. I do not think it necessary to discuss the authorities individually, which are fully considered in the reasons of Wilson J, with which I agree.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by Wilson J and I agree with all that she has said therein. Her reasoning, and that of the Chief Justice (the judge at first instance), clearly demonstrates that on an appeal under s 33 of the *Payroll Tax Act* 1971 the taxpayer may adduce evidence in addition to that which was before the Commissioner.

[3] In reaching that conclusion I have been influenced by the reasoning of Fullagar J in *Commissioner of Taxation v Finn* (1960) 103 CLR 165 at 166-7, of Windeyer J in *Henderson v Federal Commissioner of Taxation* (1970) 119 CLR 612 at 618-9, and of Mason J (with whom Barwick CJ and Stephen J agreed) in *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-2. Though each of those cases was concerned with different legislation to that in issue here, that reasoning establishes an approach which should be adopted when considering the issue which arises for determination in this case.

[4] In the circumstances of this case there are fundamental issues of fact which must be determined before the assessment can be made. The making of the assessment is not a mere exercise in arithmetic. Finding the necessary facts is an essential part of the assessment process and in order to establish that the assessment objected to is excessive the taxpayer must prove certain relevant facts. The onus of proof is on the objector and that in itself indicates that evidence may be adduced in support of the contentions raised in the appeal.

[5] I agree with the orders proposed.

[6] **WILSON J:** This is an appeal against interlocutory orders of de Jersey CJ in appeals under s 33 of the *Pay-Roll Tax Act 1971* ("the Act"). The Commissioner of Pay-Roll Tax ("the Commissioner") is the appellant before this Court and the respondent to the substantive appeals. Feez Ruthning ("the taxpayer") is the respondent before this Court and the appellant in the substantive appeals.

[7] The taxpayer was a firm of solicitors having equity partners and salaried partners. The issue in the substantive appeals is whether the remuneration of the salaried partners was "taxable wages" within the meaning of the Act. The issue on the interlocutory applications and on the appeals to this Court is whether on the hearing of the appeals the taxpayer may adduce evidence in addition to that which was before the Commissioner.

[8] By s 7 of the Act pay-roll tax is imposed on taxable wages, and by s 8 such tax is to be paid by the employer by whom the taxable wages are paid or payable. The employer is obliged to furnish a monthly return to the Commissioner (s 13). The Commissioner may call for a further return (s 15), and he may require any employer or person to furnish him with such information as he requires or to attend and give evidence or produce books, etc (s 16). Section 18 provides -

"**Assessments**

18.(1) Where the commissioner finds in any case that pay-roll tax or further tax is payable by any employer, the commissioner may—

(a) assess the amount of taxable wages or, where relevant, interstate wages paid or payable by the employer; and

(b) calculate the pay-roll tax or further tax payable by the employer.

(2) Where—

(a) any employer fails or neglects duly to furnish any return as and when required by this Act or by the commissioner; or

(b) the commissioner is not satisfied with the return made by any employer; or

(c) the commissioner has reason to believe or suspect that any employer (though the employer may not have furnished any return) is liable to pay pay-roll tax;

the commissioner may cause an assessment to be made of the amount upon which, in the commissioner's judgment, pay-roll tax or further tax ought to be levied and that person shall be liable to pay pay-roll tax or further tax thereon, except in so far as the person establishes, on objection or appeal, that the assessment is excessive.

(3) Subsection (2) does not operate so as to authorise the commissioner to cause an assessment to be made as referred to in that subsection by reason that any deduction made from the wages included in any return is not correctly made if the deduction is made in accordance with this Act.

(4) Where the commissioner makes a determination in respect of a return period ending before the determination is made as to the deduction that may be made from the taxable wages included or required to be included in returns made or required to be made under this Act, the commissioner may cause an assessment to be made of the further tax that would have been payable by the employer concerned had the deduction been made from the wages included in the return for that month or period at the rate specified in the determination, and that employer shall be liable to pay that further tax, except in so far as the employer establishes, on objection or appeal, that the amount determined by the commissioner is too little.

> **(5)** Any employer who becomes liable to pay pay-roll tax or further tax by virtue of an assessment made under subsection (2) shall also be liable to pay, by way of additional tax, double the amount of that pay-roll tax or further tax (reduced by the amount of any additional tax for which that employer became liable by reason of the employer being an employer to whom section 36(1) applied and which the employer has paid in respect of the taxable wages in respect of which the pay-roll tax or further tax was assessed) or the amount of $2, whichever is the greater, but the commissioner may, in any particular case, for reasons which the commissioner thinks sufficient, remit the additional tax or any part thereof.
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> **(6)** As soon as conveniently may be after an assessment is made under this section, the commissioner shall cause notice in writing of the assessment and of the pay-roll tax, further tax or additional tax to be served on the employer liable to pay it.
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> **(7)** The amount of pay-roll tax, further tax or additional tax specified in the notice shall be payable on or before the date specified in the notice together with any other amount which may be payable in accordance with any other provision of this Act.
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> **(8)** The omission to give any such notice shall not invalidate the assessment and calculation made by the commissioner."

[9] On 25 June 1993 the Commissioner issued amended assessments of pay-roll tax payable by the taxpayer as follows -

Year ended	Assessment No
30 June 1987	93 - 003491
30 June 1988	93 - 003492
30 June 1989	93 - 003493
30 June 1990	93 - 003494
30 June 1991	93 - 003495
30 June 1992	93 - 003496.

Those assessments included additional tax. They were the subject of appeal (SC No 2124 of 1998; Appeal No 10067 of 2001).[1]

[1] The Commissioner also issued an amended assessment to FR & Co Pty Ltd for the year ended 30 June 1991 - assessment no 93-003497. Although that assessment was referred to in the appeal under s 33, it was acknowledged before this Court that there was no appeal against it.

[10] On 23 September 1993 the Commissioner issued an amended assessment of the pay-roll tax payable by the taxpayer in the year ended 30 June 1993 – assessment no 93 – 005917. It was the subject of appeal (SC No 2104 of 1998; Appeal No 8354 of 2001).

[11] The taxpayer lodged notices of objection against the assessments pursuant to s 32(1) of the Act which provides –

> **"Objections**
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> **32.(1)** A person who is dissatisfied with any decision, determination or assessment made by the commissioner under this Act, by which the person's liability to pay tax is affected, may, within 60 days after service of notice of the decision, determination or assessment, as the case may be, post to, or lodge with, the commissioner an objection in writing stating fully and in detail the grounds on which the person relies."

The notices contained a series of numbered paragraphs in which the grounds of the objections were set out.

[12] The Commissioner disallowed the objection to assessment no 93 - 005917, and allowed the objections to the other assessments only to the extent of remitting the additional tax by a further 50%. He gave written notice and reasons for his decisions.

[13] Dissatisfied with the Commissioner's decisions, the taxpayer requested him to treat its objections as appeals and to forward them to the Supreme Court pursuant to s 33(1). The appeals are to be heard in the Trial Division of the Supreme Court.[2]

[14] It is necessary to examine the Act as a whole, including the appeal provisions, in order to understand the nature of the appeal it allows.[3]

[15] The Commissioner performs administrative functions in the assessment and recovery of pay-roll tax, and in determining objections against his assessments. In some cases (including the present) the assessment involves the application to the facts of objectively stated statutory criteria, while in other cases (such as the application of the Grouping Provisions in Part 4A of the Act) it depends upon the Commissioner's reaching a particular degree of satisfaction or exercising some particular discretion.

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[2] *Supreme Court of Queensland Act* 1991 s 55(2).

[3] *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621 - 622*; Re Coldham and others; ex parte Brideson (No 2)* (1990) 170 CLR 267 at 273 - 274; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 202-203; *R v O'Donnell; ex parte Builders' Registration Board of Queensland* [1983] 1 Qd R 417 at 420 - 421; *Aldrich v Ross* [2001] 2 Qd R 235.

[16] By s 32 an employer must state fully and in detail the "grounds" of its objection, ie the ultimate facts and arguments on which it relies (as in a pleading), but there is no provision for it to place evidence before the Commissioner. There is no express provision for the Commissioner to conduct any sort of "hearing" before determining an objection, and, in practice, hearings do not take place. The Commissioner is obliged to give written notice of his decision on the objection[4], but there is no express requirement for him to give reasons for his decision[5].

[17] By s 33(2) and (3)-

> **"(2)** Any appeal made in accordance with subsection (1) shall be forwarded to, and shall be heard and determined by, the Supreme Court in accordance with rules of court.
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> **(3)** On appeal −
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> (a) the objector shall be limited to the grounds stated in the objector's objection; and
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> (b) the burden of proving that any assessment objected to is excessive lies on the objector."

There are no relevant rules of court.

[18] The taxpayer bears "the burden of proving" that the assessment is excessive. That is a concept redolent of the leading of evidence. It had no right to do so, indeed no right to a hearing, at the objection stage. By s 46(2), on an appeal, the production of a document under the hand of the Commissioner specifying a liability of the taxpayer or notifying any determination of the Commissioner is only prima facie evidence of the correctness of the any calculations upon which the liability is ascertained or on which the determination is based. Clearly, the Legislature intended that the taxpayer not be restricted to the materials that were before the Commissioner.

[19] I am satisfied that the Court has power to receive further evidence on appeal. Whether it should do so depends on whether it is an appeal against the application of statutory criteria to the facts or an appeal against what is really the exercise of a discretion.

[20] In general, where an appeal is from the exercise of a discretion, it is usually necessary first to determine, on the material before the original decision maker, whether there was some error of principle; if there was, there will then be a question of whether the Court can and should re-exercise the discretion, or whether the matter should be sent back to the original decision maker for reconsideration according to law. If the Court is empowered to re-exercise the discretion, that will

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[4] *Pay-Roll Tax Act* s 32(6).

[5] In the present case, reasons were in fact given, and on the hearing of the appeals to this Court counsel did not address the question whether under the general law there may nevertheless be an obligation to give reasons: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; but see *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462 at 475-476; *Attorney-General v Kehoe* [2000] QCA 222; [2001] 2 Qd R 350.

be an indication that it is then to proceed by way of rehearing, either de novo or on the material below together with such further evidence as it decides to allow[6]. On the other hand, where an appeal is from the application of the law to objective conclusions of fact, and the Court has power to receive further evidence, the appeal will be by way of rehearing and such judgment may be given as ought to have been given if the matter were initially heard at the date of the hearing of the appeal[7].

[21] I respectfully agree with de Jersey CJ that the present appeals are from decisions of the latter category. His Honour said -

> "[20] The assessments subject to these appeals were reassessments under s 18. Some of the words and phrases included in s 18 which might perhaps be suggested as obliging the Commissioner to reach a particular level of satisfaction, although Mr Gibson did not actively urge this view, are "finds", "is not satisfied", and "in his judgment". I do not however consider those words and phrases to carry that connotation. They go more towards identifying a stage in the process of assessment. They are not used in the sense in the Commissioner's relevantly forming a belief or opinion or reaching a particular state of satisfaction, and Mr Gibson acknowledged as much. The word "may", furthermore, is used in the sense of "is authorised to".
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> [21] The natural interpretation of s 18 is to my mind clear. If payroll tax "is payable", then actual payment will so far as possible be secured through the implementation of the prescribed administrative arrangements. Whether the tax "is payable" depends upon the applicability of other statutory criteria, criteria which are not dependent on any individual satisfaction or exercise of discretion on the part of the Commissioner. The law upon such fundamental issues of course desirably should not depend on any individual officer's point of view: so far as possible, the liability should be fixed, certain, independently ascertainable. The relevant criteria being so established, the Commissioner proceeds to assess the consequent liability to tax.
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> [22] In this case, the question whether the appellants were liable to payroll tax was to be determined by applying, to the facts of the case, the objectively stated statutory criteria. This important determination was, as a matter of convenience, reserved to the Commissioner, as an appropriate administrative agency, but nevertheless with a right of appeal to the Supreme Court, exercising what Fullagar J in *Finn*[8] styled as "original jurisdiction".

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[6] *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 38-39 and *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535.

[7] *Logan v Woongarra Shire Council* [1983] 2 Qd R 689 at 691.

[8] *Commissioner of Taxation v Finn* (1960) 103 CLR 165.

[22] There are two reported decisions in which s 33 was considered. Neither is determinative of the issue presently before this Court. The nature of the decision appealed against in the first, *Cannan & Peterson v Commissioner of Pay-Roll Tax*[9], is not clear. It could not have been a decision under the Grouping Provisions as it was decided before they came into operation. At any rate, the reported decision of Andrews J is concerned with whether discovery of documents was available, His Honour proceeding on the basis that substantial matters of fact are involved in pay-roll tax appeals and considering that evidence should be given orally. The second case, *John French Pty Ltd v Commissioner of Pay-Roll Tax*[10] must be regarded as decided on its own facts. It involved an appeal against the exercise of discretion under the Grouping Provisions. The judge who heard the appeal at first instance allowed further evidence, and the propriety of his having done so was canvassed in the judgments of the Full Court. McPherson J, with whom Campbell CJ agreed, said that when the reasons of the Commissioner were before the Court and they demonstrated an error, it then became appropriate to permit further evidence to be adduced[11]. Matthews J disagreed[12].

[23] The legislation has a federal genesis. Before 1971, pay-roll tax was levied by the Commonwealth. When the States assumed this role in 1971, they passed largely common legislation containing appeal provisions such as s 33 of the Queensland Act, which were modelled on s 190 of the *Income Tax Assessment Act 1936* (Cth). Various authorities on the meaning of s 190 and cognate provisions in other jurisdictions were referred to on the hearing of the present appeals.

[24] It is well settled that an appeal to a Court under s 190 of the *Income Tax Assessment Act 1936* against an assessment of income tax is an appeal to the Court in its original jurisdiction, and that the Court should proceed by way of rehearing de novo[13], although there, too, if the appeal is against the exercise of a discretion, the Court should not allow further evidence unless first satisfied that the exercise of discretion miscarried in principle[14].

[25] In *Ballarat Brewing Company Limited v Commissioner of Pay-Roll Tax (Victoria)*[15] Gray J was of the opinion that the appeal allowed by s 33 of the Victorian Act should be regarded as an appeal in the strict sense requiring the appellant to establish that the decision appealed against was wrong at time it was made, upon the material before the original decision maker. However, at the time of that decision, the Victorian legislation did not provide for any burden of proof on the taxpayer. Accordingly I do not regard His Honour's decision as really germane to the present appeals.

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[9] [1975] Qd R 177.

[10] [1984] 1 Qd R 125.

[11] 1984] 1 Qd R 125 at 139.

[12] [1984] 1 Qd R 125 at 129 and 130.

[13] *Commissioner of Taxation v Finn* (1960) 103 CLR 165 at 167.

[14] *Insomnia (No 2) Pty Ltd & anor v Commissioner of Taxation (Cth)* (1986) 17 ATR 386.

[15] (1979) 79 ATC 4,452.

[26] The Northern Territory legislation is for present purposes similar to Queensland's. It was considered by Martin CJ in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)*[16] and by Riley J in *Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner of Taxes (No 1)*[17]. The first of those cases involved an appeal against a decision of the Commissioner in relation to exclusion from the Grouping Provisions; it was in the nature of an appeal against the exercise of a discretion. His Honour held that the taxpayer was restricted to the materials before the Commissioner not only on the question of whether the discretion miscarried, but if it did, also on the Court's re-exercise of the discretion. At 494 he said –

> "There is no authority binding on this Court regarding the receipt of evidence on this type of appeal, other than that prescribed by the Rules. It is upon the basis of the material before the Commissioner alone that the Court is to determine whether or not the Commissioner erred in such a manner as to enable the Court to set his decision aside and determine the question for itself. There is no warrant for receiving evidence beyond that. It is up to the taxpayer to satisfy the Commissioner on the material available to the Commissioner, and, in the event that an error is found in his reasons, giving rise to a review of the material by the Court, that should be no opportunity to enhance the submission or introduce any new basis for it. Taxpayers ought to be bound by their submissions to the Commissioner. After all, the taxpayer is in possession of all the relevant facts. There is nothing to prohibit successive applications for exclusion, even in relation to the same period of time if it was thought that there was material omitted from a submission which on reflection should have been included, or omitted by oversight. Accordingly, if the Court finds a relevant error on the part of the Commissioner, it will review the original material for itself and determine the question upon that material alone."

Although His Honour made passing reference to the NT provisions equivalent to s 33(3) of the Queensland Act, he did not accord them any significance in his analysis. With respect, I consider that they are very significant. At any rate, the present case does not involve an appeal from an exercise of discretion, and His Honour's conclusion, although expressed in wide terms, is not directly applicable. Riley J followed *Crusher* in the case before him out of concern for judicial comity, but recognised that there were competing views.

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[16] (1994) 117 FLR 485.

[17] (2000) 155 FLR 146.

[27] In *Clerk, Walker & Stops and Clerestory Pty Ltd v Commissioner of Pay-Roll Tax (Tasmania)*[18] Cosgrove J dealt with an appeal against a decision under the Grouping Provisions. He tended to the view that the appeal provisions favoured a rehearing, and noted that although one aspect of the case dealt with the "satisfaction" of the Commissioner (ie it was akin to the exercise of a discretion), other aspects dealt with pure questions of fact. However, he did not have to determine the question of the nature of the appeal because the parties placed before him an agreed bundle of documents, an agreed statement of facts, and made joint concessions during the course of the hearing. No attempt was made to call fresh evidence, and no objection was taken to the statement of facts made to the Court by counsel for the taxpayer.

[28] The South Australian decisions of *Commissioner of Stamps (SA) v Rivington Farms Pty Ltd*[19] and *Commissioner of Stamps v Garrett F Hunter Pty Ltd*[20] were made under a different legislative scheme which gave a dissatisfied taxpayer two options, namely, to lodge an objection with a tribunal which would conduct a formal hearing or to appeal to the Court. In *Rivington Farms* Mitchell J held that an appeal from the tribunal to the Court was an appeal in the strict sense on which no further evidence could be called. Her Honour's decision was accepted as correct in *Garrett F Hunter*. Those decisions are not helpful in considering the nature of an appeal under the Queensland legislation.

[29] In my respectful opinion de Jersey CJ was correct in his characterisation of the decisions under appeal, and in ruling that the taxpayer may adduce further evidence on the hearing of the appeals. The appeals to this Court against His Honour's interlocutory decisions should be dismissed.

[30] I would order that the appeals to this Court be dismissed with costs to be assessed on the standard basis.

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[18] (1983) 83 ATC 4,594.

[19] (1981) 28 SASR 169.

[20] (1997) 69 SASR 275.