Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner for Taxes [2000] NTSC 17

PARTIES:	NGURRATJUTA PMARA NTJARA ABORIGINAL CORPORATION and COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS	9901699 (02/1999)
DELIVERED:	3 April 2000
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	C. McDonald QC
Respondent:	R. Webb

Solicitors:

Appellant:	Bowden Collier & Deane
Respondent:	Povey Stirk

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner for Taxes [2000] NTSC 17

No 9901699 (02/1999)

BETWEEN:

NGURRATJUTA PMARA NTJARA ABORIGINAL CORPORATION
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 3 April 2000)

[1] In this matter the appellant appeals from a decision of the Commissioner of Taxes made on 24 December 1998 whereby the Commissioner assessed and imposed payroll tax upon the appellant in the sum of $105,741.05. The grounds of appeal are set out in the Notice of Appeal dated 22 January 1999 and include the following principal grounds:

> "1. The Commissioner of Taxes erred in determining that employees of the appellant who were engaged in activities relating to "accounts and management"

were not (during the relevant period) exclusively engaged in works of a public benevolent nature within the meaning of s 9(a) of the *Payroll Tax Act.*

2. The Commissioner of Taxes erred in determining that employees who were engaged in commercial activities designed to generate funds to further the objects of the appellant did not thereby exclusively engage in work of a public benevolent nature."

[2] The right of appeal under the *Payroll Tax Act* is to be found in Part VI of the Act. Under the Act a matter such as this commences with a claim by a taxpayer to be treated in a certain way by the Commissioner, eg as a public benevolent institution, for the purposes of the Act. Section 34 then permits such a person, who is dissatisfied with any decision, determination or assessment made by the Commissioner, to lodge with the Commissioner an objection in writing "stating in detail" the grounds upon which he relies. The Commissioner is obliged to consider the objection and may either disallow it or allow it, wholly or in part. The Commissioner is required to serve on the objector written notice of his decision on the objection. Section 35 then allows a right of appeal from the decision of the Commissioner. That section is in the following terms:

> "(1) A person who is dissatisfied with a decision of the Commissioner on an objection made by that person may, within 30 days after service on him of notice of that decision or within such further time as the Commissioner may allow, appeal to the Supreme Court.

(2) On appeal –

(a) the objector shall be limited to the grounds stated in his objection; and

(b) the burden of proving that any assessment objected to is excessive lies on the objector.

(3) If the person's liability or assessment has been reduced on objection, the reduced liability or assessment shall be the liability or assessment appealed against."

[3] The nature of the appeal provided by s 35 and the question whether the Court should receive and consider evidence additional to that which was before the Commissioner at the time he made his decision, was discussed by Martin CJ in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1993) 117 FLR 485. His Honour made the following observations at p494:

> "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."

[4] Mr McDonald QC, who appears on behalf of the appellant, submits that *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (supra) was wrongly decided and that I ought not to follow it. He submitted that:

> (1) Section 35 of the Act permits the adduction of evidence provided such evidence is limited to the grounds relied upon before the respondent below;
>
> (2) Alternatively, once it is demonstrated that the Commissioner erred, the Court has the power to admit evidence limited to the grounds relied upon below.

[5] I deal with each of those submissions in turn. In concluding that the Court is to determine whether or not the Commissioner erred by reference only to the material before the Commissioner, Martin CJ made reference to *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 and in particular to the judgment of Mason J at 621. Martin CJ noted that, in determining the nature of an appeal, "in the end result it all depends upon the intention of the legislature to be gleaned from the legislation". This is clearly correct. He then reviewed the relevant authorities dealing with similar provisions in other jurisdictions. These authorities reveal a consistency of approach.

For example, reference was made to *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353. That case concerned an appeal from a decision of the Commissioner to a court under the *Income Tax Assessment Act.* In that case Dixon J made it clear (at p360) that the function of the court on appeal was to consider the conclusion of the Commissioner on the basis of "the material that was before him".

[6] In *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1974-1975) 132 CLR 535 Gibbs J said at 568:

> "It seems that a court in deciding whether some ground has appeared to justify a review of the Commissioner's conclusion that he is not satisfied should consider the question on the basis of the material which was then before the Commissioner even though further material is before the Court."

Stephen J expressed similar views at 578.

[7] See also *Ballarat Brewing Co Ltd v Commissioner of Payroll Tax (Vic)* (1979) 10 ATR 228 at 235; *John French Pty Ltd v Commissioner of Payroll Tax* (1984) 1 Qd R 125 at 128, 129 and 139; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1971-1972) 128 CLR 28 at 57 and 59.

[8] As to the intention of the legislature in relation to the *Payroll Tax Act* I note that it is for the taxpayer to "satisfy the Commissioner" that its employee is "exclusively engaged" in a

certain class of work if the taxpayer is to bring itself within the ambit of s 9(a) of the Act. If the decision of the Commissioner is to be disputed then the dissatisfied person is required to lodge an objection in writing "stating in detail the grounds on which he relies". If he remains dissatisfied with the manner in which the Commissioner has dealt with the objection then he has a right of appeal but that right of appeal is "limited to the grounds stated in his objection". The scheme of the Act is to require the taxpayer to place before the Commissioner all material upon which he seeks to rely in order "to satisfy the Commissioner" of a particular matter. If he is dissatisfied with the decision of the Commissioner he may object but he must clearly identify any basis of objection at that time and do so in detail. The Commissioner then considers those matters. Any further challenge is restricted to the grounds already raised. The right of appeal and the scope of appeal are intended to be narrowly focussed.

[9] It must be remembered that it is the Commissioner, not the Court, who must be satisfied that the requirements of s 9(a) have been met. It is the decision of the Commissioner that he is not satisfied that is examined on appeal. The Court does not substitute its view for that of the Commissioner. It will only interfere if the Commissioner errs in the sense discussed by

Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (supra at 360).

[10] I agree with Martin CJ that 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. That conclusion is consistent with the intention of the legislature as gleaned from the legislation and further is consistent with authority addressing similar provisions in other jurisdictions.

[11] Mr McDonald referred to the decisions of Muirhead AJ in *Meyering v Northern Territory of Australia* (1987) 47 NTR 21 and O'Leary J in *Rabuntja v Minister for Education* (1983) 19 NTR 5. Those cases are examples of the Court considering the intention of the legislature in relation to specific legislative schemes which were quite different from that applying in this case. In my opinion they do not detract from the observations I have made in relation to this Act.

[12] The second matter raised by Mr McDonald was the capacity of the Court to receive evidence once error on the part of the Commissioner had been demonstrated. As is conceded by Mr McDonald, such evidence would be restricted by s 35(2)(a) of

the Act to evidence which supports the grounds stated in the original objection.

[13] In his submissions Mr McDonald directed attention to areas of the judgement of Martin CJ in which he claimed his Honour erred, leading to the ultimate submission that I should not follow the decision.

[14] It was submitted that his Honour was incorrect in his observation that there is nothing in the Act to "prohibit successive applications for exclusion". Mr McDonald submitted that there was no mechanism whatsoever for further objections outside the 60-day limit established by s 34(1) of the Act. That submission is correct insofar as it goes. The right of a person to object to a decision, determination or assessment made by the Commissioner is to be exercised "within 60 days after service of notice of the decision, determination or assessment". The Act does not contain any other method by which the particular decision of the Commissioner may be challenged.

[15] However there is nothing to prevent the taxpayer from putting a fresh proposal to the Commissioner dealing with the same issues and providing such further information in relation thereto as the taxpayer desires, and thereby requiring the Commissioner to

make a further decision. The rights created by Part VI of the Act can then be pursued once more.

[16] Mr McDonald also submits that the decision of Martin CJ is inconsistent with a line of cases commencing with *Avon Downs Pty Ltd v Commissioner of Taxation* (supra). He says that the effect of these cases was to leave open the possibility of further evidence being considered on the appeal once an error of the kind referred to by Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation* (supra) had been demonstrated. He submits that, despite this, his Honour "closed the door entirely on the possibility of any new evidence on appeals under s 35". I will deal with each of the cases referred to by Mr McDonald.

[17] As I have already observed, his Honour adopted the approach of Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (supra) in relation to what is to be considered by the Court on appeal and agreed this was limited to the material that was before the Commissioner.

[18] In the *Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (supra) the Court considered fresh evidence but that occurred in special circumstances. In that case there was "very little evidence" placed before the Court to identify the material before the Commissioner when he made his decision. In

those circumstances evidence was admitted to permit the material to be identified. On appeal it was noted (per Windeyer J at 57-58) that "it is not easy to see how that could be established without evidence from the Commissioner himself of what material was before him or perhaps from someone of his officers who had advised him in the particular matter". That was a special case where it was necessary to get the basic information before the Court and evidence was allowed for that purpose. In the circumstances of the present matter and other appeals under the *Payroll Tax Act (NT),* such a concern does not arise because the material before the Commissioner and his reasons for decision do come before this Court in the appeal process by force of the *Supreme Court Rules.*

[19] In *Kolotex Hosiery Australia Pty Ltd v Federal Commissioner of Taxation* (supra) Gibbs J adopted the approach of Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (supra) and then went on to say (at 568):

> "However, it would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the Court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court, because if the matter were referred back to the Commissioner to reconsider the question he would obviously be entitled and bound to consider all the information then available."

[20] Similarly, Stephen J said (at 578):

> "... but once it is established that the Commissioner has, in this case through error of law, failed properly to perform his statutory function the Court will then determine what state of mind concerning the matters in s 80A(1) and s 80C(1) will amount to a discharge of that function and will do so having regard to the facts then before it, viewed in the light of what the Court regards as the true effect of the legislation."

[21] In that case both parties submitted that once an error had been found the appeal should be decided by reference to all the material before the Court. It seems the issue was not the subject of argument.

[22] In *Ballarat Brewing v Commissioner of Payroll Tax (Vic)* (supra) Gray J considered the Victorian equivalent of the Northern Territory legislation. His Honour held that the right of appeal in that case was an appeal in the strict sense and limited to a consideration of the material before the Commissioner. He went on to say (at 235):

> "It may be that in cases where error on the part of the Commissioner can be shown to have occurred, fresh evidence can be admitted so the Commissioner can deal with the matter upon amplified evidence when it is sent back to him. Problems of this sort may arise in cases where it is not clear upon what evidentiary material the Commissioner acted: see *Federal Commissioner of Taxation v Bryan Hatch Timber Co* or where it can be seen that, through error of law, the Commissioner has failed to perform his statutory function: see *Kolotex Hosiery (Aust) Pty Ltd v Federal Commissioner of Taxation*".

[23] He concluded (at 236) that:

> "I am of opinion that the evidence led upon this appeal can only be looked at (if at all) if it can be shown that the Commissioner's finding involves a miscarriage of judgment."

[24] The views expressed by Gray J are, at least, equivocal. His Honour was obviously in some doubt as to the position regarding evidence led on appeal but he did not have to address the issue as he was not satisfied that there was error in the Commissioner's findings.

[25] In *John French Proprietary Limited v Commissioner of Payroll Tax* (1984) 1 Qd R 125, a decision of a Full Court of the Supreme Court of Queensland, there was a difference of view expressed by the members of the Court. McPherson J, with whom Campbell CJ agreed, said (at 139):

> "Once the requisite error is by this means demonstrated or demonstrable it no doubt then becomes appropriate to permit evidence to be adduced, which on the authority of *Cannan & Peterson v Commissioner of Payroll Tax* (1975) Qd R 177 in Queensland may ordinarily include oral evidence."

[26] A reference to *Cannan & Peterson v Commissioner of Payroll Tax* reveals that Andrews J there discussed how evidence should be presented to the Court on appeal. He concluded that in the circumstances there applying this should be done orally. He did

not address the question of whether such evidence should be admitted. It seems the matter was not argued or considered.

[27] Having reviewed the cases relied upon by Mr McDonald I agree that their effect is to leave open the issue of the possibility of further evidence being considered on an appeal, once an error of the kind referred to by Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (supra) has been demonstrated. However it does not follow that Martin CJ was wrong in ruling that further evidence should not be received. Of the cases referred to the only case which specifically permitted the calling of fresh evidence in circumstances similar to those applicable in this case was *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (supra) and there the matter was not argued.

[28] Miss Webb for the respondent referred me to authorities dealing with judicial comity and in particular to *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204 per Burchett J; *Attorney-General v Wurrabadalumba* (1990) 74 NTR 5 at 8 per Asche CJ; and *Commonwealth v Skonis Housing and Development (NT)* (1993) NTSC 38 per Mildren J at para 7. It is clear that I should not depart from the decision in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (supra) unless I am convinced that the decision was clearly wrong.

[29] As Martin CJ observed the matter is not the subject of binding authority. The cases in which the issue has been addressed in other jurisdictions do not provide clear guidance. Whilst competing views may be open as to how a court should proceed after it has been demonstrated that the Commissioner has erred, the observations of Martin CJ have force in relation to the Northern Territory legislation. I am not satisfied the decision is wrong. In this matter I propose to proceed in a manner consistent with the rulings of Martin CJ in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (supra).

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