PARTIES:	PLUMMERS BORDER VALLEY ORCHARDS PTY LTD (ATF THE PLUMMERS BORDER VALLEY ORCHARD UNIT TRUST) v COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA3 of 2002 (20201485)
DELIVERED:	29 MAY 2002
HEARING DATES:	8 MAY 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Ms A Macdonald
Respondent:	Ms J Kelly

Solicitors:

Appellant:	Cridlands
Respondent:	Christopher Frey

Judgment category classification:	B
Judgment ID Number:	ril0214
Number of pages:	19

ril0214

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Plummers Border Valley Orchards v Commissioner of Taxes [2002] NTSC 33
No. LA3 of 2002

BETWEEN:

PLUMMERS BORDER VALLEY ORCHARDS PTY LTD (ATF THE PLUMMERS BORDER VALLEY ORCHARD UNIT TRUST)
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 29 May 2002)

[1] The appellant, Plummers Border Valley Orchards Pty Ltd ("Plummers Border") is the trustee for the Plummers Border Orchard Unit Trust which operates an apple orchard in Lenswood in South Australia and a stall at the Pooraka wholesale fruit and vegetable market in that State. The units in the Trust are held equally by trustees for four discretionary Trusts, namely: B A Plummer Nominees Pty Ltd as trustee for the Bruce Plummer Family Trust; J S Plummer Nominees Pty Ltd as trustee for the John Plummer Family Trust; I L Plummer Pty Ltd as trustee for the Ian Plummer Family Trust; and James Plummer Nominees Pty Ltd as trustee for the James

Plummer Family Trust. The directors of the trustee company Plummers Border, are Bruce Plummer, John Plummer, James Plummer and Ian Plummer.

[2] Prior to 1984, Tully Distributors Pty Ltd, inter alia, purchased produce from Plummers Border, transported it to Alice Springs and distributed the produce in the region. In 1984 the manager of Tully Distributors, Mr Stupple, and Plummers Border agreed to purchase the business of Tully Distributors. This was achieved by the establishment of the Stummer Unit Trust. The trustee of that Trust was Tully Distributors Pty Ltd and the holders of the units in the Trust were Stupple Nominees Pty Ltd as trustee for the Stupple Family Trust (50%) and BA Plummer Nominees, J S Plummer Nominees and I L Plummer Nominees (between them 50%). The Directors of Tully Distributors were John Plummer, Ian Plummer, William Stupple and his wife Ann Stupple. After the purchase Plummers Border continued to act as the South Australian purchasing agent of Tully Distributors.

[3] Around 1990 the Plummer family and Mr and Mrs Stupple agreed to establish a separate business, TD Produce, to undertake the buying of fruit and vegetables in South Australia and to transport those and other goods by road to Alice Springs. The TD Produce Unit Trust was established with TD Produce Pty Ltd as the trustee. The directors of the trustee company were Ann Stupple, William Stupple, John Plummer and Bruce Plummer. The unit holders in the Trust were B A Plummer Nominees Pty Ltd, J S Plummer Nominees Pty Ltd, I L Plummer Nominees Pty Ltd and James

Plummer Nominees Pty Ltd (as to 49.6%), Bruce Daw (0.4%) and Garden Grove Pty Ltd (50%). The directors and shareholders of Garden Grove Pty Ltd were Mr and Mrs Stupple. Mr Daw was an ex employee of Plummers Border.

[4] In the period between February 1995 and January 1998 TD Produce purchased less than 8% of its produce from Plummers Border. The major part of its produce was obtained from independent third parties. It also freighted goods other than fruit and vegetables to Alice Springs. The appellant described the business of TD Produce as a "stand alone" business. Tully Distributors made no purchases from Plummers Border during the period.

[5] During the period Plummers Border provided administrative services to TD Produce. It carried out bookkeeping, invoicing, accounts payable and pay-roll services. It did so at commercial rates and in circumstances that allowed it to use spare staff capacity. Plummers Border also shared space in a market stall at Pooraka with TD Produce. Again this was at commercial rates and allowed Plummers Border to make productive use of space excess to its requirements.

The Assessment

[6] The Commissioner of Taxes issued an assessment of pay-roll tax to Tully Distributors in respect of the period 1 February 1995 to 31 January 1998. In so doing the Commissioner determined that Plummers Border, Tully

Distributors, TD Produce, Stupple Nominees, Garden Grove and the Plummer Family Trustee Corporations constituted a Group for the purposes of the Act by virtue of the provisions of Part IVA of the Act. Plummers Border objected to the assessment pursuant to s 34 of the *Pay-roll Tax Act*. It was not, and is not, in issue that Plummers Border had the requisite standing to object. It challenged the decision that the identified corporate entities constituted a Group. Alternatively it contended that Plummers Border should have been excluded from the Group pursuant to s 17H of the Act.

[7] The objection was considered by the Commissioner and for reasons set out in detail in a letter dated 23 November 2001, he disallowed the objection. Plummers Border has now appealed to this Court pursuant to the provisions of s 35 of the *Pay-roll Tax Act*. There is no longer any challenge to the decision of the Commissioner that a Group existed. The appeal was limited to the failure of the Commissioner to exclude Plummers Border from the Group.

The Nature of the Appeal

[8] An appeal to the Supreme Court pursuant to s 35 of the *Pay-roll Tax Act* requires the appellant to show that the decision of the Commissioner was wrong at the time it was given upon the material then before the Commissioner. The appellant is limited to the grounds stated in its objection. 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: *Crusher Holdings Pty Ltd v Commissioner of Taxes* (NT) (1994) 94 ATC 4646 per Martin CJ at 4653; *Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner of Taxes (NT)* (2000) 155 FLR 146 at 148; *John French Pty Ltd v The Commissioner of Pay-roll Tax* (1984) 1 Qd R 125 at 129; *The Ballarat Brewing Company Ltd v Commissioner of Pay-roll Tax* (Vic) (1979) 79 ATC 4452 at 4459.

[9] In deciding whether the Commissioner was in error, guidance can be obtained from the observations of Dixon J in *Avon Downs Pty Ltd v The Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 where his Honour said:

> "If (the Commissioner) does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached, may on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception."

The Issue for Determination

[10] The Commissioner determined that Plummers Border was a member of the Group for the purposes of Part IVA of the *Pay-roll Tax Act*. On appeal there was no issue that such a Group existed by virtue of the common control provisions of the Act. However, Plummers Border sought to be

excluded from the Group pursuant to the provisions of s 17H of the Act which section was, at the relevant time, in the following terms:

> 17H. EXCLUSION OF PERSONS FROM GROUPS
>
> (1) Where the Commissioner is satisfied, having regard to the nature and degree of ownership or control of the businesses, the nature of the businesses and any other matters that he considers relevant, that a business carried on by a member of a group is carried on substantially independently of, and is not substantially connected with the carrying on of, a business carried on by any other member of that group, the Commissioner may, by order in writing served on that first-mentioned member, exclude him from that group.

[11] It was the submission of Plummers Border to the Commissioner that it ought be excluded from the Group because the business of Plummers Border was carried on substantially independently of other members of the Group and because it was not substantially connected with a business of any other member of the Group during the relevant period. The decision of the Commissioner not to exclude Plummers Border from the Group was expressed in the following terms:

> "Having regard to the nature and degree of ownership or control of the businesses carried on by Plummers Border and the other members of the disputed Group, the nature of the respective businesses carried on by the members of the disputed Group and the other relevant matters set out above, it is my view that the business carried on by Plummers Border:
>
> (i) was carried on substantially independently of the businesses carried on by the other corporate entities comprising the disputed Group during the relevant period of time;
>
> and

(ii) was substantially connected with the carrying on of the businesses carried on by the other corporate entities comprising the disputed Group during the relevant period of time.

In arriving at this conclusion, I have borne in mind that (i) above appears to relate to the independence of the businesses, and requires an examination of the connection between the business activities, and that (ii) above appears to relate to connection in management, notwithstanding the reservation of his Honour Justice McPherson in *John French Pty Ltd v The Commissioner of Pay-roll Tax* (supra) as to whether the distinction between (i) and (ii) was 'readily apparent'."

[12] It can be seen from the above reasons that the Commissioner accepted that the business carried on by Plummers Border was in fact carried on substantially independently of the businesses carried on by the other corporate entities comprising the disputed Group. The appellant does not contend that this conclusion was in error and, for present purposes, it need not be further considered. In the event that it be found that the Commissioner erred in making his decision, then it would be a matter for the Court to determine for itself whether or not the business was carried on substantially independently of the businesses carried on by the other corporate entities.

[13] For the moment it is only necessary to consider whether the Commissioner was in error in refusing to exercise his discretion to exclude Plummers Border from the Group because Plummers Border had not shown, on the balance of probabilities, that the business was not substantially connected

with the carrying on of a business carried on by the other corporate entities comprising the Group.

Section 17H *Pay-roll Tax Act*

[14] Section 17H of the *Pay-roll Tax Act* and its equivalent provisions in other jurisdictions have been the subject of judicial attention.

[15] The fact that ownership and control are among the factors which operate to produce a group for the purposes of the Act means such factors alone are not sufficient to prevent exclusion under s 17H: *John French Pty Ltd v The Commissioner of Pay-roll Tax* (1984) 1 Qd R 125 at 141; *Mead Packaging (Aust) Pty Ltd v Commissioner of Pay-roll Tax (NSW)* (1978) 78 ATC 4164 at 4173. However the extent of control may be a relevant factor in particular circumstances.

[16] In *Mead Packaging* (supra) Rath J said (at 4172):

> "Section 16H(1) requires two findings to be made, namely (1) that a business carried on by the plaintiff (as a member of a group) is carried on substantially independently of a business carried on by any other member of that group; and (2) that the business is not substantially connected with the carrying on of the business carried on by the other member of the group. The first limb appears to relate to the independence of the businesses, and requires an examination of the connection between the business activities. The second limb appears to relate to connection in management. At all events the composite expression used in the subsection requires a consideration of the businesses and their control, and a finding of substantial independence and substantial absence of connection."

[17] Those words have been adopted in a number of cases eg *Crusher Holdings Pty Ltd v Commissioner of Taxes* (supra); *Denham Constructions Pty Ltd & Anor v Chief Commissioner of State Revenue (NSW)* (1998) 99 ATC 4139 at 4146.

[18] The word "substantially" does not have a fixed meaning. What is required to demonstrate that a business is "not substantially connected" with another business is a matter of fact and degree to be considered in all of the circumstances. It calls for the exercise of judgment. The connection must be actual and of substance. It must not be minimal yet need not be total.

[19] It is to be noted that in the present matter the appellant did not argue that the Commissioner addressed the wrong question, but rather complained of the Commissioner's method of addressing the question.

The Submissions of the Appellant.

[20] It was the submission of the appellant that the Commissioner made several errors of law in refusing to exercise his discretion to exclude the plaintiff from the Group. It was submitted that the Commissioner erred in a number of identified ways. Those suggested errors were addressed in various documents provided by the appellant and respondent including statements of facts, issues and contentions filed by each and written outlines of submissions.

Substantial Control and/or Influence

[21] The appellant submitted that the Commissioner erred in finding that "not only were the ultimate owners of the disputed Group in a position to exercise substantial control and/or influence over the conduct of the businesses carried on by the members of the disputed Group, but that they did in fact do so". The appellant contended that the Commissioner erred in relying upon inference rather than what it described as "the actual facts involved".

[22] Reference to the reasons for decision provided by the Commissioner reveal that he considered this matter in some detail. He made reference to the shareholdings and directorships of the corporate entities that made up the Group. He noted there was a mutuality of directors and shareholders during the relevant period and he detailed the factual matters that supported that observation. There is no challenge to those findings and the evidence before the Commissioner supported his conclusions. The Commissioner noted in relation to the day to day management of the trading corporations that Bruce Plummer was the managing director of Plummers Border and he jointly managed TD Produce with William Stupple who was also responsible for the management of Tully Distributors. He then referred to the various shareholdings and directorships of members of the Group to reach the conclusion that the identified persons were in a position to exercise substantial control and/or influence over the conduct of the businesses carried on by members of the Group. As to his conclusion that they in fact

did so he identified the factors upon which he relied. These involved the obligations imposed upon directors of the corporate entities to remain informed about the respective corporate activities in order to participate in the overall management of the affairs of those corporations; the fact that the directors and shareholders were all "close members of either the Stupple or Plummer families"; and the fact that the directors and ultimate shareholders of the various corporate entities comprising the Group were ultimately and substantially the same. He drew what he described as "a logical inference" that the business operations of each member of the Group would be influenced by the shareholders and directors in such a way as to maximise any advantage to the businesses of other members of the Group. The fact that this occurred can be seen from the fact that each of Plummers Border and Tully Distributors shifted some of the functions of their existing business to the new company and, when that company was created, Plummers Border was able to increase its efficiency by providing benefits to TD Produce that made use of excess space and excess staff capacity within Plummers Border.

[23] The reasons for the Commissioner reaching his conclusion have been set out in detail by him. That conclusion was based upon, and available from, the evidence before him and, in my view, no error has been demonstrated.

Failure to Consider Relevant Matters

[24] It was the submission of the appellant that the Commissioner had taken into account irrelevant considerations and had failed to take into account relevant considerations. In considering this submission it must be borne in mind that the Commissioner was dealing with matters additional to the issue now before me. He also had before him the questions of whether the identified entities constituted a Group and whether the business carried on by Plummers Border was carried on substantially independently of the other businesses.

[25] The first matter raised by the appellant was the submission that the Commissioner, in the process of making his decision, erred in failing to consider that the family trustee companies, which were declared and accepted to be members of the Group, had no employees and no liability for pay-roll tax. They did not trade or carry on business themselves. In fact, in the course of his written reasons for decision, the Commissioner distinguished between the corporations that "carry on a business in the ordinary meaning of the word" and the family trustee companies which, he said, "carry on businesses of investment in units in the unit trusts under which the Plummers Border, Tully and TD Produce businesses are carried on." The Commissioner observed that the family trust companies carried on the business of investing in the trading corporations "and are complementary or ancillary to the latter businesses in that they operate as a method for the distribution of profits from the employer corporations

businesses". That was a matter he considered in obtaining "the overall picture from the accumulation of detail". I note that the inclusion of the family trusts in the Group is not subject to challenge in these proceedings and the only issue is whether Plummers Border should be excluded from that Group. There is no complaint that the Commissioner misdescribed the family trustee companies. He did not suggest that they had employees or liability for pay-roll tax. Their position within the Group was a relevant matter to be considered when determining whether Plummers Border was "substantially connected with the carrying on of a business carried on by any other member of that group" (s 17H(1)).

[26] The appellant further contended that the Commissioner should not have taken into account the fact that income from the family trust companies, which was in turn derived from the businesses carried on by Plummers Border, Tully Distributors and TD Produce, was distributed to Plummers Border .

[27] In considering whether or not a business is substantially connected with the carrying on of a business carried on by any other member of a group, it is, in my opinion, relevant to observe that part of the income from the profit of those businesses is received by the entity concerned. It is one matter to be taken into account in combination with many others in determining whether there is a substantial connection between the businesses.

[28] The appellant submitted that the Commissioner should not have taken into account the fact that Tully Distributors and TD Produce registered as a Group for the purposes of pay-roll tax in South Australia. This is also a matter which is relevant to a consideration of the issue of whether there is a substantial connection. The relationship between those two businesses is a matter of interest when looking at the position of Plummers Border.
TD Produce was managed by Bruce Plummer and William Stupple. Tully Distributors was managed by William Stupple and Plummers Border by its Managing Director, Bruce Plummer. As the appellant submitted the joint management of TD Produce reflected the fact that this business was in effect a joint venture between the Plummer and Stupple families.

[29] The close relationship between Tully Distributors and TD Produce as recognised by them registering as a Group in South Australia, is a matter the Commissioner was entitled to take into account when coming to the conclusion that "a logical inference can be drawn that the business operations of each member of the group would be influenced … in such a way as to maximise any advantage to the businesses of other members of the disputed Group."

[30] It is clear that the members of the Group worked together to maximise profits. An example of this is to be found in the decision of TD Produce to utilise and pay for the spare capacity of Plummers Border's staff for its essential administrative services instead of obtaining assistance in the market place. The closeness of the relationship between the three

companies was obviously important. Whilst the appellant pointed to the fact that there was no direct trade between Plummers Border and Tully Distributors the Commissioner was entitled to take into account that there were sales of produce from Plummers Border to TD Produce in circumstances where TD Produce was established to act as the purchasing agent for Tully. The closeness of the relationship between Tully Distributors and TD Produce was a legitimate factor to bear in mind when considering the whole of the relationship between the businesses of the three corporate entities and, further, whether Plummers Border should be excluded from the Group.

[31] The Commissioner correctly concluded that there was a "commonality in the nature of the businesses of the disputed Group". The "trading" businesses operated within the same industry and were each part of a chain of distribution of foodstuffs, especially fruit and vegetables. The family trustee entities were encompassed in that commonality by virtue of their interest in the various trading companies.

[32] The appellant further contended that the Commissioner ought not to have taken into account the fact that TD Produce was established to act as Tully Distributors' purchasing agent in South Australia and for it to undertake the transport of goods to Alice Springs, an operation previously undertaken by Tully Distributors. Again, these matters are relevant to the degree of connection and interdependency between the three businesses. The businesses were each links in the chain of growth and distribution of food

stuffs, especially fruit and vegetables. Each of Plummers Border and Tully Distributors benefited from the creation of TD Produce and each shifted some of the functions of their existing business to the new company. It must be assumed that this was for the overall benefit of the businesses within the Group. The positions occupied by the businesses in the chain of growth and distribution of produce is such as to avoid competition between them. The relationships enabled each member of the Group to maximise advantages available to the businesses of other members in the Group. The profits of those businesses flowed to the relevant family trusts. The arrangements for the management of the businesses enabled the businesses to be conducted efficiently for the benefit of the Group and to maximise the profitability for all members of the Group.

Inappropriate Weight

[33] The appellant complained that the Commissioner gave inappropriate weight to various factors. It was submitted that despite stating otherwise, the Commissioner failed to properly consider the balancing factors.

[34] In order to succeed on this ground the appellant must demonstrate that the approach of the Commissioner amounted to an error. It is difficult to see how that could be so. It is incumbent upon the Commissioner to consider all relevant matters, but when doing so it is a matter for the Commissioner to decide what weight is to be attached to the factors considered. As I

observed in *Ngurratjuta Pmara Ntjara Aboriginal Corporation v Commissioner of Taxes* (supra) at 149:

> "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* (Commonwealth) (at 360)."

[35] The same observation applies in this case. Provided the Commissioner takes into account the relevant considerations and does not take into account irrelevant matters, the weight that he accords to various factors is a matter for him. In those circumstances his decision would not be interfered with unless the result is so unreasonable as to demonstrate that he must have failed in the discharge of his function according to law. Whilst it may not appear how the Commissioner has reached the result embodied in his decision, if upon a consideration of the whole of the facts it is unreasonable or plainly unjust then this Court may infer that there has in some way been a failure properly to exercise the discretion: *Lovell v Lovell* (1950) 81 CLR 513 at 518-519; *House v The King* (1936) 55 CLR 499 at 504-505.

[36] In this matter the appellant has not identified the manner in which it is said that inappropriate weight was given to any particular factor. In my view it cannot be said that the decision of the Commissioner was unreasonable in the sense discussed above.

Legislative Purpose

[37] The appellant complained that the Commissioner failed to consider the anti-avoidance purpose of grouping entities and failed to properly consider the concessionary nature of the exclusion provided for in s 17H of the *Pay-roll Tax Act*. The effect of s 17H is to ameliorate any absurd or unjust operation of the grouping provisions of the Act and, it was submitted, should be approached accordingly. The section is "intended to provide a balance" against unintended groupings and "to prevent injustice from being done in particular cases": *Baxter & Anor v Chief Commissioner of Pay-roll Tax* (1986) 7 NSWLR 122 at 131.

[38] There was nothing identified by the appellant in the decision of the Commissioner that suggested that the Commissioner misdirected himself in this regard or misunderstood the nature of the task to be undertaken by him. Reference to the decision itself shows that the Commissioner applied the terms of s 17H and considered all relevant matters.

[39] The appellant submitted that the Commissioner failed to consider the relationship of each of the businesses of the members of the Group to Plummers Border. Reference to the reasons for decision demonstrates that this was not the case. The reasons for decision identified each of the businesses and their relationship to each other. This was done by reference to the nature of the businesses carried on rather than by reference to the individual members of the Group. I see no error in so proceeding.

[40] It was further submitted that the Commissioner inferred actual control from "pure ownership" of the various businesses. Again this proposition cannot be demonstrated by reference to his reasons. The Commissioner did take into account matters relating to ownership along with the identity of, and obligations accepted by, the directors. He also took into account the relationship of the directors to each other. In the matters placed before the Commissioner there was information regarding the management role of the directors and, in particular, Bruce Plummer and William Stupple. These were matters that he was entitled to take into account and did so. The Commissioner also looked at the voting power of the trustee companies and the identity of those who controlled the distribution of income being those persons who were the directors of the trustee companies. The directors and shareholders of the trustee corporations were the same people as the directors and shareholders of the trading companies. They were also the potential beneficiaries under the discretionary trusts. It is clear that the Commissioner took into account all relevant factors and then stood back and considered "the overall picture".

[41] In my opinion the appellant has not demonstrated that the Commissioner erred in reaching his decision. The appeal is dismissed.

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