PARTIES:	NGURRATJUTA PMARA/NTJARRA ABORIGINAL CORPORATION v COMMISSIONER OF TAXES
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	COURT OF APPEAL OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	AP 7 of 2000 (9901699)
DELIVERED:	31 May 2001
HEARING DATES:	22 March 2001
JUDGMENT OF:	MARTIN CJ, ANGEL & THOMAS JJ

CATCHWORDS:

APPEAL – STATUTES – CONSTRUCTION

Determination of Commissioner of Taxes – set aside by Trial Judge – matter permitted to go back to the Commissioner - meaning of s 9(a) of *Pay-roll Tax Act 1978* (NT) – exclusively engaged in work of a public benevolent nature – exempt from pay-roll tax – statutory construction – whether necessary to refer to extrinsic material – Second Reading Speech – appeal dismissed

Pay-roll Tax Act 1978 (NT), s 9(a); *Pay-roll Tax Amendment Act (No.2) 1980* (NT)*; Interpretation Act 1978* (NT), s 62B

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; *Newcastle City Council v GIO General Ltd (t/a GIO Australia)* (1997) 191 CLR 85; *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1994) 117 FLR 485, cited

REPRESENTATION:

Counsel:

Appellant:	CR McDonald QC and CH Goodall
Respondent:	JW Durack SC and GJ Stirk

Solicitors:

Appellant:	Bowden Collier and Deane
Respondent:	Povey Stirk

Judgment category classification:	A
Judgment ID Number:	tho200109
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ngurratjuta Pmara/Ntjarra Aboriginal Corp v Commissioner of Taxes
[2001] NTCA 4 No. 7 of 2000 (9901699)

BETWEEN:

NGURRATJUTA PMARA/NTJARRA ABORIGINAL CORPORATION
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MARTIN CJ, ANGEL & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 31 May 2001)

MARTIN CJ:

[1] I have had the benefit of a draft of the reasons for decision of Thomas J. I am in general agreement with them and agree that the appeal must be dismissed.

[2] However, I wish to add a little to the issue surrounding the disposition of the appeal by his Honour Justice Riley.

[3] The grounds of appeal are as set out at par 7 of her Honour's reasons. At 2.6 it is said that his Honour erred "in referring the matter back to the

respondent for further consideration according to law". In my view his Honour did not refer the matter back as suggested.

[4] Having found that the respondent erred in law in his approach to the objections made by the appellant to the respondent, his Honour had disposed of the substantial grounds of appeal and could go no further than to set aside the decision of the Commissioner and, as he said, "permit the matter to go back to him for consideration accordingly to law".

[5] The Act and Rules of Court are silent as to the procedures to be adopted in the conduct and disposition of an appeal such as this. The Court must therefore devise that for itself (see generally *Williams Civil Procedure in Victoria*, par 61.01.60).

[6] In the circumstances of this case his Honour's discretion did not miscarry.

ANGEL J

[7] I agree that this appeal should be dismissed.

[8] I agree with Riley J and the reasons of Thomas J for dismissing the appeal.

THOMAS J:

[9] This is an appeal by the appellant from a decision of the Trial Judge who allowed an appeal and set aside the decision of the Commissioner for Taxes made on 24 December 1998.

[10] On 24 December 1998 the Commissioner of Taxes issued a determination that employees of the appellant corporation 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 Pay-roll Tax Act 1978 (NT) ("the Act").

[11] The appellant appealed to a single judge of the Supreme Court on the grounds that the Commissioner of Taxes had erred in determining that employees who were engaged in commercial activities designed to generate funds to further the object of the appellant did not thereby exclusively engage in work of a public benevolent nature.

[12] A further ground of appeal was that the Commissioner of Taxes had erred in assessing and imposing pay-roll tax in the sum of $105,741.05 upon the appellant.

[13] The appeal to a single judge of the Supreme Court sought, inter alia orders that:

1) The appeal be allowed.

2) A declaration that the Notices of Assessment dated 4 December 1997 and any penalty tax imposed in conjunction therewith are of no legal force or effect.

3) A declaration that between 1 July 1993 and 30 June 1996 all employees of the appellant were exclusively engaged in work of a

public benevolent nature and are exempt from pay-roll tax under s 9(a) of the Act.

[14] At the conclusion of his Reasons for Decision delivered on 3 May 2000, the learned Trial Judge stated at para 44:

> "I have been told that all of the information that was before the respondent is not before me. This was the result of practical considerations designed to keep the information to a manageable level. Whilst each party placed before me all of the material upon which that party wished to rely, I note that no effort has been made to address the functions of individual staff members in the accounts and management areas in respect of relevant periods of time, nor the evidence that might provide clarification of the work then and there undertaken. The nature of the external recipients of the benefits of the "commercial" services was not considered. In my opinion those matters should be addressed. That being so it seems to me that I should set aside the decision of the Commissioner. That will permit the matter to go back to him for consideration according to law."

The learned Trial Judge then formally allowed the appeal and set aside the decision of the Commissioner of 24 December 1998.

[15] The Notice of Appeal by the appellant in this matter sets out the following grounds:

> "The learned Judge:-
>
> 2.1 Erred in finding that even where the public benevolent status of an institution is admitted, Section 9(a) of the Pay-roll Tax Act requires:-
>
> (a) a consideration of the nature of the work undertaken by each and every individual whose wages are the subject of the application for exemption; and
>
> (b) that a line must be drawn between the activities of those employees which are of a public benevolent nature, and those that are not.

2.2 Ought to have found, on a proper construction of Section 9(a), that the exemption is available where the employees in question are exclusively engaged in the bona fide work of the relevant public benevolent institution.

2.3 Erred in adopting a strictly grammatical or literal interpretation of Section 9(a), and in doing so:-

(a) failed to have any or any adequate regard to the purposive approach to statutory construction;

(b) failed to have any regard to the mischief intended to be addressed by an amendment to Section 9(a) passed in 1980 ("the amendment");

(c) failed to consider relevant extrinsic materials which cast light upon the intended purpose, scope and effect of the amendment.

2.4 Ought to have found that all employees of the appellant who were involved in work directed toward achieving a measure of self support, or lightening the load on the public purse, were undertaking work of a public benevolent nature.

2.5 Erred in not finding that each one of the employees of the appellant, for the relevant period, were exempt from pay-roll tax.

2.6 Erred in referring the matter back to the respondent for further consideration according to law.

2.7 Erred in his preliminary ruling that no further evidence could be received or tendered even if an error of law by the respondent had been demonstrated."

[16] The appellant sought the following orders from this Court:

"3.1. That the appeal be allowed.

3.2 A declaration that all employees of the appellant were, for the relevant periods, exempt from pay-roll tax under Section 9(a) of the Act.

3.3 An order for repayment of all sums wrongly paid to the respondent in respect of pay-roll tax and penalties.

3.4 Costs."

[17] The substantial argument put forward by Mr McDonald QC, counsel for the appellant, was that the learned Trial Judge had failed to embrace the

purposive approach to statutory construction: in particular by failing to identify or appreciate the mischief being addressed by the 1980 amendment to s 9(a) of the Pay-roll Tax Act 1978 (NT) ("the amended section"). In doing so the appellant asserts the learned Trial Judge fell into error. It was argued that the learned Trial Judge failed to give a construction which promoted the purpose and object of the amended section when read in its full legal and historical context.

[18] In essence, Mr McDonald's submission was that the reasons for the amendment to s 9(a) of the Pay-roll Tax Act 1978 (NT) in the Northern Territory was a response to similar amendments made in a number of states of Australia to close a loophole exposed by a particular fraud on the system. It was Mr McDonald's submission, that seen in that historical context the amendment did not mean there could be any suggestion that the persons to whom wages were paid by the appellant corporation were not exclusively engaged in work of a public benevolent nature.

[19] There is no issue with the fact that the appellant corporation is a public benevolent institution.

[20] Section 9(a) of the Pay-roll Tax 1978 (NT) provides as follows:

> "**9. Exemption from tax**
>
> Section 6 does not apply to wages paid or payable -
>
> (a) by a religious or public benevolent institution, or by a public hospital, to a person during a period in respect of which the institution or hospital, as the case may be, satisfies the Commissioner that the person is exclusively engaged in the

> religious work, work of a public benevolent nature or work of the hospital of a kind ordinarily performed in connection with the conduct of public hospitals, as the case may be;"

[21] The learned Trial Judge stated at paragraphs 28 and 29 of his Reasons for Decision:

> "Section 9 of the *Pay-roll Tax Act* was amended by *Pay-roll Tax Amendment Act (No.2)* 1980. Prior to the amendment s 9 of the Act provided for the exemption from tax under s 6 of the Act of 'wages paid or payable …by a … public benevolent institution' without further qualification. Following the amendment effected by *Pay-roll Tax Amendment Act (No.2)* 1980 that exemption was qualified by the addition of the second limb which added the requirement that wages also had to be paid or payable 'to a person during a period in respect of which the institution … satisfies the Commissioner that the person is exclusively engaged in the … work of a public benevolent nature … .'
>
> It follows from this brief legislative history that, after the amendment, it was not intended by the legislature that it should be sufficient for an institution to be a public benevolent institution in order to obtain exemption. Something more was required and that is that, during the relevant period, the person concerned be exclusively engaged in work of a public benevolent nature."

[22] His Honour then went on to state that if the Commissioner is satisfied a person is exclusively engaged in work of a public benevolent nature then an exemption is allowed and raised the question of "when are persons employed by a public benevolent institution to be regarded as not exclusively engaged in work of a public benevolent nature?"

[23] His Honour, in paragraph 34 of his Reasons for Decision, said that "the nature" of the work of an employee is not to be characterised as "benevolent" merely because that person works for a public benevolent institution or merely because the revenue produced by that person is used

solely for the purpose of such an institution. Such an interpretation would render the second limb of s 9(a) nugatory. With respect, I agree with his Honour's interpretation of s 9(a).

[24] I do not agree with the argument advanced on behalf of the appellant that it is either necessary or appropriate to refer to any extrinsic material including the Second Reading Speech.

[25] In support of the submission that this Court should refer to extrinsic material and in material the Second Reading Speech Mr McDonald QC seeks to rely on, amongst other authorities, the following passage from *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408:

> "It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act* 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA point out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

and the relevant passages from *Newcastle City Council v GIO General Ltd (t/a GIO Australia)* (1997) 191 CLR 85 at 93 – 94 per Brennan CJ, 99 per Toohey, Gaudron and Gummow JJ and 112 per McHugh J.

[26] I note also the provisions of s 62B of the Interpretation Act 1978 (NT).

[27] I am not persuaded that the authorities on which Mr McDonald QC relies make it imperative to refer to such extrinsic material in respect of a provision such as s 9(a) of the Pay-roll Tax Act 1978 (NT). Section 9(a) of the Pay-roll Tax Act is clear in its meaning and discloses the mischief that was addressed by the amendment on its face in the obvious context of a limitation to a provision for exemption from tax. Without reference to any other material it is possible to read and interpret s 9(a) (as amended) in its legal and historical context.

[28] The appellant maintains that the learned Trial Judge erred in concluding that it was necessary "to draw a line" between the activities of an employee which are of a public benevolent nature, and those that are not.

[29] With respect I do not consider the learned Trial Judge erred in so determining.

[30] In a preliminary ruling, his Honour had determined that "the appeal would proceed on the basis of the information and materials before the Commissioner and, in the event that a relevant error on the part of the Commissioner was identified that he would review the original material for

himself and determine the question on that material alone." In making this ruling his Honour relied on the decision of Martin CJ in *Crusher Holdings Pty Ltd v Commissioner of Taxes (NT)* (1994) 117 FLR 485. There was no challenge to this latter decision before this Court.

[31] His Honour noted that it would be necessary to address the functions of individual staff members in the accounts and management area in respect of the relevant periods of time, the evidence that might provide clarification of the work then and there undertaken and the nature of the external recipient of the benefits of the "commercial services". He further indicated that not all of the information that was before the respondent was before him.

[32] Mr McDonald QC submitted that there was no need for the learned Trial Judge to refer these matters back to the Commissioner that this assessment could be made by the judge from a perusal of the documents in Exhibit 1. Mr McDonald referred in particular to the invoices, documents 31 to 44 inclusive. These invoices in the main contain simply the words "Consultancy Fees for the Resource Centre" and state an amount.

[33] I do not agree that a perusal of these invoices would enable the learned Trial Judge to determine the function of individual staff members in the accounts and management area such as to enable an assessment to be made as to whether this fell within the exemption provided in s 9(a).

[34] The Commissioner of Taxes has previously sought further information from the appellant by letter dated 4 April 1997 (document 54 in Exhibit 1). In particular, question 2 which requests as follows:

> "2. Whether any of the accounting and management staff been employed to conduct administrative or accounting services for any of the commercial operations of the association? If so, please advise how these activities would be considered as providing exclusive, direct, public benevolent aid to the members of your association."

[35] Mr McDonald QC, argues that to require the appellant to provide such information places a great inconvenience and unnecessary administrative burden upon the appellant. I do not accept this argument is a valid reason not to comply with the Commissioner's requirements. The invoices on the face of them do not adequately explain what work was actually done. Any enterprise rendering such an account for monies payable could be expected to provide more details of the work done to justify the amount charged.

[36] Whilst the request from the Commissioner of Taxes is for a different purpose a refusal to answer cannot be justified on the basis of inconvenience or administrative burden.

[37] I agree with the decision reached by his Honour that the decision of the Commissioner be set aside and that this will permit the matter to go back to him for consideration according to law.

[38] I would dismiss the appeal.

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