Ngurratjuta Pmara/Ntjarra Aboriginal Corporation v Commissioner for Taxes [2000] NTSC 25

PARTIES:	NGURRATJUTA PMARA/NTJARRA 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 May 2000
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	C. McDonald QC
Respondent:	G Hiley QC and 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

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No 9901699 (02/1999)

BETWEEN:

NGURRATJUTA PMARA/NTJARRA ABORIGINAL CORPORATION
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 3 May 2000)

The Appellant

[1] The appellant is an Aboriginal Corporation that was incorporated pursuant to the provisions of the *Aboriginal Councils and Associations Act (Cth)* in August 1985. It is an association of all communities and outstations deemed to be "affected" by the oil and gas mining operations at Mereenie and Palm Valley in the Northern Territory. The appellant receives the statutory royalties payable to affected communities and groups under the *Aboriginal Land Rights (Northern Territory) Act.* It is principally a "royalty

association" representing the interests of about 70 member communities in the western region of Central Australia.

[2] The mission statement of the appellant expresses its vision as being: "to achieve for its member communities a real and lasting measure of economic security and general well-being and its 'mission' is to undertake sound investment activity and to provide satisfaction to Aboriginal people through the provision of reliable and efficient support services."

[3] The constitution of the appellant specifies that its function is to relieve the economic and social disadvantage of its members. All income, from whatever source, is to be directed to this end.

[4] The appellant has broadened the scope of its activities over a period of time to provide a range of specialist support services. It lists amongst its activities the following:

(1) royalty trust account management;

(2) the development and management of an investment portfolio;

(3) tourism project support services;

(4) accounting services for Aboriginal client communities and organisations; and

(5) outstation resource centre services.

[5] At an early time the appellant resolved that it would adopt a policy that 50 percent of all royalty income would be put towards long term investment while the remaining funds were to be paid on a per capita basis into community trust accounts held by the appellant. The monies paid into the trust accounts are held for each community and outstation and those monies must be used for community purposes. Payments to individuals are specifically prohibited.

[6] Investment decisions are made by the management committee with the assistance of advice from staff and are designed to establish a balanced portfolio. A long-term investment objective of the appellant is to provide economic security for its members by ensuring that if and when mining royalty income ceases there will remain a revenue stream from investments.

[7] A consideration of the financial statements of the appellant indicates that it has various sources of income. Those sources include grants through ATSIC and from government departments, royalty payments in relation to the operations at Mereenie and Palm Valley, investment income and funds obtained from the provision of accounting services.

[8] Pursuant to the investment strategy developed by the management committee the appellant has invested in the Glen Helen Lodge, the Kings Canyon Tourist Resort, some residential and commercial properties in Alice Springs, art works (principally works of Albert Namatjira), a small airline

(Ngurratjuta Air Pty Ltd) and a helicopter scenic flight company (Yarringka Air Pty Ltd).

[9] It was submitted by the respondent that there were, in the relevant period, two broad categories of employees of the appellant namely:

(a) employees in the accounting and management area who, inter alia, manage the royalty trust account, control the record keeping and accounting records of the institution, develop and manage the investment portfolio and provide accounting services for client communities and organisations (the "accounts and management" area); and

(b) employees in the Outstation Resource Centre Services Area who are responsible "for tasks which are in the nature of direct provision of public benevolence" (the "grants" area).

The Application for Exemption

[10] The respondent conducted an audit of the appellant and advised that it proposed to assess the appellant for pay-roll tax under s 6 of the *Pay-roll Tax Act*. The appellant then sought from the respondent exemption from liability for the pay-roll tax assessed as payable. That request was made pursuant to the provisions of s 9(a) of the Act. The sub-section is in the following terms:

"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; …"

[11] The parties agree that in order to obtain an exemption under s 9(a) of the Act the appellant must meet the requirements of the subsection being:

(1) that it has the status of a public benevolent institution; and

(2) that the person in relation to whom wages are paid or payable is a person who is "exclusively engaged in the … work of a public benevolent nature."

[12] There is no dispute as between the parties that the appellant was, during the relevant period, a public benevolent institution for the purposes of the *Pay-roll Tax Act*. That was conceded by the respondent before me and was an accepted fact for the purposes of the decision making process undertaken by the respondent.

[13] The respondent made a decision as to the application for exemption and, consistent with that decision, notices of assessment were issued against the appellant for pay-roll tax for the period 1 July 1993 to 30 June 1996. The appellant objected to those assessments and made detailed submissions in support of its objection. By letter dated 24 December 1998 the Commissioner provided his further decision in relation to the matters raised

in the objection. He declared himself satisfied that wages paid to persons in the "grants" area should be exempt. No further issue arises in relation to that aspect of the matter. However the Commissioner was not so satisfied in relation to persons employed in the area identified as "accounts and management". The conclusion of the respondent in that regard was that the "grounds of the objection have been disallowed".

[14] In so deciding the focus of attention was upon the second limb of s 9(a). The Commissioner ruled that employees of the appellant within the "accounts and management" area of the appellant's operations were engaged in commercial activities that did not satisfy the second limb of s 9(a) of the Act. Therefore he decided the exemption sought was not available for the wages paid for the work performed by those persons. The conclusion of the respondent was in the following terms:

> "The employees in the accounting and management areas are engaged in activities that raise money for the purposes of Ngurratjuta. These activities are collateral to the work of a public benevolent nature carried out by Ngurratjuta. As such, the wages paid in respect of the accounting and management areas fail to satisfy the second limb of sub-section 9(a), and as a result, the first ground of objection is disallowed."

The Appeal

[15] The appellant has appealed to this Court from that decision. The appeal is made pursuant to Part VI of the *Pay-roll Tax Act*. I have, in a preliminary ruling, discussed the nature of an appeal under that Part. In that regard I followed the decision of Martin CJ in *Crusher Holdings Pty Ltd v*

Commissioner of Taxes (NT) (1993) 117 FLR 485. In particular I ruled 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, I would review the original material for myself and determine the question upon that material alone.

[16] The grounds of appeal are set out in the notice of appeal dated 22 January 1999 and are as follows:

> "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 *Pay-roll 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.
>
> 3. The Commissioner of Taxes erred in assessing and imposing pay-roll tax in the sum of $61,596.80 upon the appellant.
>
> 4. The Commissioner of Taxes erred in imposing and refusing to remit or reduce a penalty tax as imposed upon the appellant in relation to an assessed amount of $105,741.05."

[17] Ground 4 of the notice of appeal was abandoned when the parties were able to agree that the penalties complained of would not be imposed upon the appellant.

[18] Given that there is no dispute that the appellant is a public benevolent institution for the purposes of the *Pay-roll Tax Act* the appeal focused upon the issue of whether the Commissioner should have been satisfied that the employees of the appellant engaged in the accounts and management area of the operations were "exclusively engaged in the …work of a public benevolent nature" and therefore entitled to be exempt from the application of s 6 of the *Pay-roll Tax Act*.

The Submissions of the Appellant

[19] It was the submission of the appellant that once it is accepted that the appellant is a public benevolent institution and that the persons concerned were employees of the appellant then one "does not need to look beyond the question of whether the work undertaken by the appellant's employees is exclusively within the range (or basket) of activities which the institution actually undertakes". When one considers whether a person is engaged in "work of a public benevolent nature" it is not necessary to limit that investigation to persons involved in "activities involving merely the handing out of benevolence at the coal face, or in a direct or 'hands on' fashion. Such work can have a very broad range and must be seen in the contemporary context of operating a public benevolent institution." The accounts staff and those involved in the provision of accounting services to Aboriginal communities were said to fall squarely within the modern notion of benevolence and work of a benevolent nature. In order to satisfy the

requirements of s 9(a), and in particular the second limb thereof, it was necessary to satisfy the Commissioner that the person concerned was "exclusively engaged in the bona fide benevolent work of *the institution* during the relevant period".

[20] It was the submission of the appellant that once it is ascertained by the respondent that all the work of all of the employees in question is exclusively for the public benevolent objects of the appellant, then the enquiry should go no further. Once this is ascertained the acceptance of the appellant as a public benevolent institution and the intention that such institutions be exempt should be given effect.

[21] Having urged this interpretation the appellant was asked to identify the utility of the second limb of s 9(a). The appellant identified the functions of the second limb as:

(a) denying the availability of the exemption in circumstances where there was a "hiring out" of an institution's "employees" for a purpose which had nothing to do with the bona fide activities of the organisation itself; and

(b) preventing the possibility that employees of an institution could divide their time and efforts between the bona fide benevolent work of the institution and work for an external commercial business operating in the private sector.

[22] In relation to the first of those functions it should be noted that, arguably, such an arrangement may amount to a fraud on the Commissioner and be caught in any event without need to resort to the second limb of s 9(a).

[23] In the case of employees working part time for another employer such employees would create no entitlement to exemption insofar as they worked for that other employer.

[24] In its submission the appellant said that provided the employee is working exclusively for the public benevolent objects of the appellant then no further enquiry is required. But that does not address the question of what is the effect of the second limb of s 9(a). Nor does it assist in determining what work is to be characterised as being "exclusively for the public benevolent objects of the appellant".

The Submissions of the Respondent

[25] The respondent adopted an entirely different approach to s 9(a) of the *Pay-roll Tax Act* from that adopted by the appellant. The respondent said that s 9(a) does not exempt all wages paid by public benevolent institutions and that is obvious because of the requirement that the second limb also be satisfied. That limb was added to s 9(a) by the *Pay-roll Tax Amendment Act (No.2)* 1980 and was plainly intended to limit the exemption from pay-roll tax which public benevolent institutions previously enjoyed.

[26] It was the submission of the respondent that the second limb focuses on the nature of the work done by an employee during a period of time and will only be satisfied when the employee is "exclusively engaged" in work of a public benevolent nature. It does not, as the appellant suggests, focus upon the work of the institution but rather on the nature of the work of the individual. As a matter of grammar this would appear to be so.

[27] The respondent submits that the section contemplates that some activities of a public benevolent institution may not be of a public benevolent nature and s 9(a) of the Act circumscribes the exemption of wages paid to employees of the institution by excluding from the exemption wages payable to those persons who are carrying out activities that are not of a public benevolent nature. The second limb of the subsection directs attention to the nature of the work of the employee rather than to the use of the income produced by that employee for public benevolent purposes. It was submitted that the fact that the whole of the revenue from the commercial activities of a public benevolent institution are available for public benevolent purposes does not change the nature of the employees' activities from non-benevolent to benevolent. The fact that all funds of a public benevolent institution are utilised in fulfilling the objectives of the institution does not mean that all of the wages paid to its employees, regardless of any activities performed by them, are exempt from pay-roll tax. Such a proposition would be to render nugatory the second limb of s 9(a) according to the submission of the respondent.

Section 9 of the Act

[28] 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 … ".

[29] 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.

[30] The section as amended requires a consideration of the work of the individual whose wages are the subject of the application for exemption. If the Commissioner is satisfied that the person is exclusively engaged in work of a public benevolent nature then an exemption is allowed. The question that then arises is – when is a person to be regarded as being exclusively

engaged in work of a public benevolent nature? Put another way, when are persons employed by a public benevolent institution to be regarded as not exclusively engaged in work of a public benevolent nature?

[31] In my opinion a line must be drawn between the activities of an employee which are of a public benevolent nature and those that are not. The words "exclusively engaged" in the second limb are intended to exclude from the pay-roll tax exemption wages paid to employees who are engaged in activities which are not of a public benevolent nature during any particular period of time. The second limb directs attention to the nature of the work of the employee, not to the nature of the work of the institution, or to the fact that the revenue flowing from that work is used for public benevolent purposes.

[32] In this regard it was the submission of the appellant that the work of the employees of the appellant in fund raising and looking after the funds raised is an essential part of the benevolent work of the appellant. It was therefore work of a public benevolent nature.

[33] The Respondent submitted that if a wage is paid in respect of work performed in an ordinary area of commerce it could not be benevolent work for the purposes of the section. The fact that the whole of the net revenue from the "commercial" activities of employees is available for public benevolent purposes does not change the "nature" of the employees' activities from non-benevolent to benevolent.

[34] In my opinion 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 purposes of such an institution. Such an interpretation would render the second limb of s 9(a) nugatory.

[35] Whether particular work is or is not work of a public benevolent kind will always be a matter of fact and degree. In each case the nature of the work must be considered. Is it benevolent by virtue of its own characteristics? Does it have a sufficiently close connection to the benevolent works of the institution to be, itself, classed as benevolent? In my opinion it would be placing too restrictive an interpretation on the requirement to insist that the work be benevolent when considered in isolation. The work must be considered in its context. The context may be sufficient to give the work its benevolent character. A person cleaning rooms in a private hotel will not normally be performing a benevolent activity. The same person doing the same work in an establishment classified as a public benevolent institution and providing assistance to the sick and needy will be performing a benevolent activity. That work is a necessary part of fulfilling the objectives of the institution.

[36] Likewise, in my opinion, the person managing the funds of a public benevolent institution including its investment funds is performing work of a benevolent nature where, as here, those funds are to be used for the public benevolent purposes of the institution. That is an essential part of the

operations of a public benevolent institution in the present day. The maintenance of proper accounting records and management procedures is a necessary part of receiving government and other grants. There will be statutory and regulatory obligations to be undertaken. The capacity of the institution to perform its benevolent work is dependent upon the proper management of the funds. To adopt the expressions used by Gibbs ACJ in a different setting in *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 (at 643) that work is "wholly ancillary to" and "directly facilitates" the institution carrying out its benevolent activities. Those employees, along with the employees who work at the "coal face", are the instruments by which the public benevolent institution carries out and is able to carry out its benevolent functions. It would be surprising if the work was not characterised as benevolent.

[37] On the other hand the mere fact that a person is employed by a public benevolent institution does not mean the wages of that person are to be exempt under the legislation. For example the provision of services to others for reward, where the services provided are not benevolent activities of the kind provided by the institution is not work of a public benevolent nature. The work itself is not benevolent, it is not part of or directly involved with the benevolent functions of the institution and it is work that is of a commercial rather than a benevolent kind. It is work done in "an ordinary area of commerce": *Glebe Administration Board v Commissioner of Pay-Roll Tax* (1987) 10 NSWLR 352at 370. It is collateral or additional to

the benevolent activities of the institution. This remains so even if the proceeds of that work go to the operation of a public benevolent institution.

[38] In *Tangentyere Council Inc v Commission of Taxes (NT)* (1990) 2 ATC 4352 Angel J considered whether the Tangentyere Council Inc was a public benevolent institution for the purposes of s 9(a) of the *Pay-roll Tax Act*. In the course of deciding in favour of the Council he said (4360):

> "The appellant's employees were all engaged in its principal activities or work incidental thereto or work directed to both achieving a measure of self support and lightening the load on the public purse. They were thus engaged in public benevolent work for the purposes of s 9(c) of the *Pay-roll Tax Act (NT)*".

Conclusions

[39] In the circumstances of this matter those who manage the appellant, including its investment portfolio, and those who control the necessary record keeping and accounting records relating to the appellant are, to my mind, employees engaged in the principal activities of the appellant or, at least, work sufficiently incidental thereto and directed to achieving the goals of the appellant to be regarded as falling within the class of employees to whom an exemption should apply. Subject to considering whether there was some work of those engaged in "accounts and management" that may not fit within that description the respondent ought to have been so satisfied.

[40] However, a person providing services to persons or entities external to the appellant in areas which are not directly or incidentally related to the

objects of the appellant but, rather, are exercises undertaken to create funds for the use of the appellant by providing commercial services for reward is not a person who is exclusively engaged in work of a public benevolent nature. This is so even if those services are provided at a fee less than that charged by commercial competitors. This is not a situation where the services for which a charge is rendered are otherwise benevolent activities of the institution as was the case in *The Commissioner of Pay-roll Tax v Cairnmillar* (1992) 2 VR 706. However, in this regard, the respondent ought to have considered whether the "commercial" services, or any of them, may have been in themselves benevolent or part of the benevolent activities of the appellant in the sense discussed above. He did not do so.

[41] In reaching my conclusions I have not found it necessary to have resort to the extrinsic material referred to by Mr McDonald QC. Had I done so I would not have found the material to be of assistance in resolving the issues raised with me.

Satisfaction of the Respondent

[42] The submission of the respondent was that s 9(a) places an onus upon the appellant to satisfy the respondent that the work in which its relevant employees were exclusively engaged was of a public benevolent nature if it wished to obtain the benefit of the exemption. That is correct. The respondent points out that notwithstanding requests made to the appellant to provide further information regarding the work of its employees in relation

to accounting services, investments and other businesses, the appellant failed to take the opportunity to do so. What must be considered is the material before the respondent and given that failure it was not possible for the respondent to be satisfied that the employees of the appellant who were engaged in activities relating to accounts and management were exclusively engaged in works of a public benevolent nature. It is therefore submitted that no error on the part of the respondent can be demonstrated.

[43] However, it follows from what I have said above that, in my view, the respondent adopted an incorrect approach to the matter before him. He determined that the employees in the accounting and management areas were "engaged in activities that raise money" for the appellant and he therefore concluded their activities were "collateral" to the work of a public benevolent nature and failed to satisfy the second limb of s 9(a). In that regard he has not considered the matter according to law.

[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.

[45] I allow the appeal and set aside the decision of the Commissioner of 24 December 1998.

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