PARTIES:	CRUSHER HOLDINGS PTY LTD
	v
	COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPELLATE
FILE NO:	179 of 1991
DELIVERED:	5 September 1994
HEARING DATES:	25 - 26 May 1994
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Pay-roll Tax - Objections and appeals - appeal from decision of Commissioner of Taxes - Nature of the appeal

Pay-Roll Tax Act (NT), s35
Supreme Court Rules, O.83

Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 at 621, applied.
Ex parte Australian Sporting Club Ltd; Re Dash (1947) 47 SR (NSW) 283, applied.
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, applied.
Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd (1972) 128 CLR 28, distinguished.
Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation (1975) 132 CLR 535, applied.
Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation (1975) 130 CLR 64 at 84, referred to.
MacCormick v Federal Commissioner of Taxation (1945) 71 CLR 283, referred to.
Commissioner of Stamp Duties (Q) v Beak (1931) 46 CLR 585, distinguished.
Mead Packaging (Aust) Pty Ltd v Commissioner of Pay-roll Tax (NSW) (1978) 78 ATC 4164, considered.
Ballarat Brewing Co Limited v Commissioner of Pay-roll Tax (Victoria) (1979) 10 ATR 228, considered.
John French Pty Ltd v Commissioner of Pay-roll Tax [1984] 1 Qd R 125, distinguished.
Cannon and Peterson v Commissioner of Pay-roll Tax [1975]

Qd R 177, referred to.

Pay-roll Tax - Liability to taxation - Nature and degree of ownership or control of the businesses -

Pay-Roll Tax Act, s17H(1),
"substantially independently of"
"substantially connected with"

Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union (1979) 42 FLR 331 at 348, applied.

REPRESENTATION:

Counsel:

Appellant: Mr Close
Respondent: Mr Spargo

Solicitors:

Appellant: Close & Carter
Respondent: Solicitor for the Northern Territory

Judgment category classification: **GENERAL DISTRIBUTION**

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mar94012

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 179 of 1991

BETWEEN:

CRUSHER HOLDINGS PTY LTD
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 September 1994)

Background

The appellant is dissatisfied with a decision of the Commissioner of Taxes on an objection made by the appellant to his not ordering that the appellant be excluded from its grouping with another company for the purposes of the grouping provisions contained in Part IVA of the *Pay-roll Tax Act*. The Commissioner disallowed the objection. The appellant appeals.

It is common ground that the appellant and S G Kennon & Co Pty Ltd constitute a group for the purposes of the grouping provisions which, in broad terms, have the effect of aggregating the wages paid by each member of the group for the purposes of assessment of pay-roll tax under the *Act*. Without such provisions it would be open to employers to so arrange a business or businesses conducted by the employer through separate companies, and thus avoid or minimise liability to taxation under the *Act*. The grouping provisions may, however, produce unjust results, and thus, notwithstanding that a group may be constituted under the *Act*, if 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 (s17H(1)). The Commissioner's refusal to exercise that discretion in its favour forms the grounds of appeal brought pursuant to s35. By subs(2) of that section the objector is limited to the grounds stated in his objection upon the appeal, and the burden of proving that any assessment objected to is excessive lies on the objector. Additional questions have been raised in the context of this appeal, in particular, whether or not it was open to the objector to call evidence before the Court on the appeal which was not before the

Commissioner when he disallowed the objection, and, if so, the procedure that should be adopted in that regard.

The appellant claims exclusion from the group for the period 1981 to 1987, being the period covered by default assessments issued on 20 September 1989. The assessments to pay-roll tax were made in respect of both the appellant and S G Kennon & Co Pty Ltd. Prior to that time there had been some investigation of the affairs of the two companies by the Commissioner, and notice had been given of the Commissioner's intention to assess pay-roll tax. The response from the appellant was a letter of 10 February 1989 from its solicitor. In that letter, the solicitor first set out details of the directorship and shareholding of each of the companies. Mr S G Kennon held nearly all of the issued shares in, and controlled more than 50% of the voting power at a shareholdings meeting of Crusher Holdings Pty Ltd. The other shareholder was Mr P S Kennon, his son. As to S G Kennon & Co Pty Ltd, the directors were, again, Mr S G Kennon together with his wife, Mrs A A Kennon. Mr Kennon owned one hundred shares out of the total number of shares issued of 550, however, one of those shares was a life governor's share. Pursuant to the Articles of Association of the company, that life governor's share carries with it 76% of the total of votes cast at a general meeting. It was rightly conceded that Mr Kennon, therefore, alone controlled more than 50% of the voting power at a shareholders meeting of S G Kennon & Co Pty Ltd, and it was acknowledged that because of that mutuality of control, the two

companies may be grouped by operation of s17D(2) and 17D(3)(b) of the *Act*.

The representation then proceeded to draw attention to the provisions of s17H, and it was contended that the businesses carried on by the two companies were sufficiently different in character and were carried on substantially independently of each other, such that the Commissioner should be satisfied to make an order that the appellant be excluded from the group. Details were provided as to the separate arrangements made for the keeping of the books of account of the two companies. It was pointed out that the appellant carried on the business of a crushing plant at Mount Bundy (some distance from Darwin) and that the day to day running of that company was the responsibility of Mr S G Kennon. As to the company S G Kennon & Co Pty Ltd, its businesses were carried on in Darwin, and the day to day running was said to be in the hands of family members other than Mr S G Kennon. The businesses operated by it comprised property management under the control of Mrs A Kennon, a retail section which was said to be by far the largest part of the operations of that company which was under the control of Mr Robert Kennon, and the engineering/welding workshop of which Mr S G Kennon was the foreman. It was said that Mr Kennon had never made use of his life governor's share at any meeting in order to outvote the other shareholders. There were approximately 14 employees (other than family) employed by S K Kennon & Co Pty Ltd and there were 5 to 10 employees working for Crusher Holdings Pty Ltd.

They were employed solely to do work for the respective employer and were paid their wages by the employing company. Apart from Mr S G Kennon, there were two members of the Kennon family who did work for both companies. One of them was employed by the appellant, but did clerical work for S G Kennon & Co Pty Ltd and another worked for S G Kennon & Co Pty Ltd, and his wages were paid by that company, but he undertook bookkeeping for the appellant.

Some months later the Commissioner for Taxes sought considerable information in detail from each of the companies for the period from 1 July 1981 to the date of the request, September 1989, and a response was made in mid-October. On 16 July 1990, the Commissioner informed the appellant that he had determined that an order for exclusion from grouping would not be granted and in a contemporaneous document appearing on the Commissioner's file appears the following:

> "Having considered the nature and degree of ownership, or control of the businesses, the nature of the businesses and other relevant matters, I am not satisfied that the business of S G Kennon & Co Pty Ltd is or was carried on substantially independently of, and is or was not substantially connected with the carrying on of, business carried on by Crusher Holdings Pty Ltd. I therefore make no order to exclude S G Kennon & Co Pty Ltd from the group."

(There does not appear to be any similar document regarding the appellant).

The Objection

The appellant forwarded a Notice of Objection to the Commissioner's determination within the time limited by the *Act*, the relevant grounds being:

> "1. That the Commissioner should have exercised his discretion pursuant to S.17H of the Act to exclude the company from the grouping provisions in that the company's business is substantially independent of and not substantially connected with the carrying on of the business carried on by S.G. Kennon & Co. Pty. Limited.
>
> 2. That the Commissioner should have been satisfied with the information and matters supplied to him by the Company in its application being the letter of David de Winter dated 10 February 1989, and the letter and enclosure from the company dated 13 October 1989, that the business carried on by the company is substantially independent of and not substantially connected with the carrying on of the business carried on by S.G. Kennon & Co. Pty. Limited."

It will be noted that in that Notice of Objection there was incorporated by reference the letter from the solicitor, Mr de Winter of February 1989, and the response made by the company to the Commissioner's enquiries in October: "That the business carried on by the company is substantially independent of and not substantially connected with the carrying on of the business carried on by S. G. Kennon & Co Pty. Limited." The emphasis draws attention to a distinction which may be important. The *Act* does not speak of "the" business, it refers to "a" business, recognising that an employer may

carry on more than one business.

The Commissioner disallowed the objection in due course (s34(3)), and the appellant instituted this appeal, the grounds for which are in identical terms to that contained in the Objection set out above, as required.

The Disallowance

The Commissioner's formal letter to the appellant disallowing its objection did not contain any reasons, but an internal memorandum signed by the Commissioner asserts, as would appear to be the case, that the objection to the Commissioner's decision not to make an order under s17H was not supported with any material other than that which had been put forward in support of the application for that order. Under the heading "Reasons for Disallowance" appears the following:

> "The evidence shows that during the relevant period the taxpayer was, within the meaning of the Act, carrying on business which was substantially connected and was not substantially independent of the business carried on by S G Kennon and Co. Pty Ltd.
>
> The objection submission discloses no adequate reasons for reversing the decision not to exclude the company from the group.
>
> As to the matters raised by the taxpayer in the application for exclusion, these were properly and fully considered in determining the application.
>
> In particular, the information provided relating to the nature of the ownership of the companies, the nature and degree of control and the commercial and administrative links between the companies,

> disclosed a substantial relationship in respect of the carrying on of business by the companies.
>
> On the basis of the above I am satisfied that the decision not to exclude the taxpayer from the group was properly made. For the above reasons Grounds 1 and 2 fail."

The first paragraph simply asserts a conclusion both as to fact and law, but it shows that the Commissioner was directing himself generally to the proper question to be asked in the case. (Although he has reversed the criteria by which he ought to be satisfied or not from that set out in subs(1) of s17H, and the distinction between "the" and "a" was not observed). As to the second paragraph, it is not a reason to say that a submission on an objection to a decision "discloses no adequate reasons for reversing the decision ...", nor does it advance the Commissioner's position for him to assert, as he does in the third paragraph, that as to the matters raised by the taxpayer in the application for exclusion "these were properly and fully considered in determining the application". What the Commissioner was bound to do was to consider the material before him in the face of an objection to his decision to refuse the application to exclude the appellant from the group. In any event, it is a self-serving statement and this Court is not to be bound by the Commissioner's assertion that he had done his job properly. Although he does not disclose details of the information upon which he based his decision, he has in the fourth paragraph found in general terms, by reference to the information previously provided to him by the appellant, a failure to disclose "a substantial relationship in respect of the carrying on of business by the companies".

There are two problems with that. The first is that the question is not whether there is a substantial relationship in respect of the carrying on of the business by the companies, the question is whether a business carried on by the appellant is carried on substantially independently of, and is not substantially connected with the carrying on of, a business carried on by S G Kennon & Co Pty Ltd. The second point, and it is probably just an extension of the first, is that nowhere in his reference to matters considered does the Commissioner advert to what has been the basis of the appellant's representations, that is, that the businesses carried on by the two companies are different in character and are carried on substantially independently of each other so as to entitle the appellant to be excluded from the grouping provisions of the *Act* (see the letter of 10 February 1989 from the appellant's solicitor to the Commissioner and the details there provided as to the distinction between businesses carried on by each company). Section 17H specifically requires the Commissioner to have regard to the nature of the businesses, inter alia, and it is not apparent, and cannot be implied from all that the Commissioner said in his ruling on the objection, that regard was had to that factor.

The Nature of the Appeal

There is nothing in the *Act* which helps the Court determine the nature of the appeal referred to in s35 nor the procedure by which it should be conducted beyond s35 itself.

The provisions of O.83 of the *Supreme Court Rules,* in particular, Part II, apply. Amongst other things, it is provided in r83.18 that upon being served with a Notice of Appeal the Tribunal (which includes a person whose decision is under appeal) shall produce to the Registrar the record relevant to the appeal, including the reasons for the decision. It is also provided in r83.20(2) that where an appeal is by way of rehearing, either party may call new evidence at the hearing. In this matter, there had been a directions hearing pursuant to r83.13 when the Master made orders, by consent, extending the time for the respondent to produce the records required under the *Rules*, and as to the filing and serving of affidavits between the parties. At the commencement of the hearing of the appeal, the further issue arose. That is, what was the nature of the appeal and how should it be conducted? In particular, was the appeal to be determined upon the material before the Commissioner at the time he made his decision or could the Court receive additional evidence? In that regard, Mr and Mrs Kennon had each sworn and filed affidavits containing some material in addition to that before the Commissioner, and counsel for the appellant indicated that they might also wish to give oral evidence. The questions being novel, at least in so far as this Court was concerned, it was agreed that argument would first be directed to the grounds of appeal upon the material before the Commissioner when he made his decision, the affidavit and oral evidence which the appellant wished to place before the Court would then be brought forward, and if it was appropriate for the Court to take that new material into account, it would

do so, but if not, it would be ignored. The matter proceeded in that way. (The respondent did not seek to put any information before the Court other than that which had been brought in pursuant to the *Rules*, and verified on the Commissioner's affidavit).

The right of appeal is from a decision of an administrative or executive authority and in the words of Mason J. in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621:

> "There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo [.....] The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo."

In so saying, his Honour paid regard to what had been said by Jordan CJ. in *Ex parte Australian Sporting Club Limited; Re Dash and Anor* (1947) 47 SR (NSW) 283, in that the word "appeal" "may refer to an appeal from an executive authority to some other executive authority or to a Court. If such an

appeal is to a Court, the jurisdiction which it exercises is not appellate, but original" (ibid) but, as Mason J. pointed out, that is not an absolute rule and in the end result it all depends upon the intention of the legislature to be gleaned from the legislation.

In *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, Dixon J. was entertaining an appeal under the *Income Tax Assessment Tax* of 1936. Division 2 providing for reviews and appeals established a system not unlike that to be found in the *Pay-roll Tax Assessment Act.* Section 187(b) provided for an appeal to the High Court from a decision of the Commissioner of Taxation upon an objection made by a taxpayer. It was further provided, in s190, that upon such an appeal a taxpayer shall be limited to the grounds stated in his objection, and the burden of proving the assessment excessive would lie upon the taxpayer. As to those provisions, Dixon J. at 360, said that the Commissioner's decision was not unexaminable:

> "If he 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."

At the conclusion of his judgment, at p365, his Honour held that for reasons connected with the transaction in question and "because no ground has been shown for interfering with the Commissioner's judgment", the appeal would be dismissed. But what of the proposition that once such an error is found on the part of the Commissioner, then the Court should decide the matter for itself upon the basis of the material considered by the Commissioner plus any further evidence which either of the parties may care to place before it on appeal. This is not a case such as *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 where the above statement of Dixon J. was accepted, but the examination of that question was complicated because little evidence was before Walsh J., who heard the appeal at first instance, to show what was the material before the Commissioner when he made his decision. It was in those circumstances that his Honour allowed evidence to be given concerning the facts surrounding the relevant transaction. In *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation* (1975) 132 CLR 535 at 568 Gibbs J. said:

> "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 before the Commissioner even though further material is before the court - *Federal Commissioner of Taxation v. Brian Hatch Timber Co. (Sales) Pty. Ltd.* [supra]. 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. Both parties in the present case put their submissions on the footing that once this Court decided that the Commissioner had been in error the appeal should be decided by reference to all the material before the Court."

And Stephen J. at 578-579:

> "Consideration is, in the first instance, to be confined to material which was before the Commissioner when he made his assessment, as is made plain by the judgments in this latter case; 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 [.....] 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."

It appears from the earlier judgment of Mason J., in *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* (1975) 130 CLR 64 at 84, that oral evidence was put before him.

Both Stephen J. (supra at 578) and Mason J. (supra at 85) referred to *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (supra). Rath J. was not called upon to decide the issue in *Mead Packaging (Aust) Pty Ltd v Commissioner of Payroll Tax (NSW)* 78 ATC 4164. His Honour discusses the cases at 4170 to 4171, but said it was not necessary to express any opinion on the jurisdiction of a court

to review the Commissioner's findings. In the course of his review of the cases, his Honour referred to *MacCormick v Federal Commissioner of Taxation* (1945) 71 CLR 283. In that case, Latham CJ., (at 299) referred to the series of cases involving the interpretation of taxation statutes where it had been held that where matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him upon an appeal, the court cannot substitute the discretion or opinion of the court for that of the Commissioner:

> "[b]ut in those cases the court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law" (ibid).

Dixon J., (at 307) with whom McTiernan J. agreed, said much the same thing, but said that the law had been developed by pursuing a course "which derives more support from usage than from logic". His Honour there referred to *Commissioner of Stamp Duties (Q.) v Beak* (1931) 46 CLR 585, where in the judgment of the Full Court, of which he was a member, it was open to the Judge of the Supreme Court of Queensland on appeal at first instance to substitute his finding as to the value of certain shares which, in the opinion of the Commissioner, were worth somewhat more, for the purposes of succession duty assessment. His Honour had not gone beyond

his jurisdictional powers in making his own assessment of the value of the shares, but it is not clear whether the Court took into account material additional to that before the Commissioner.

These various authorities were brought together and discussed in *Ballarat Brewing Co Limited v Commissioner of Pay-roll Tax (Victoria)* (1979) 10 ATR 228 by Gray J., who was of the opinion that the right of appeal given by the Victorian equivalent to s35 of the Territory *Act* should be regarded as bestowing a right of appeal in the strict sense requiring the appellant to establish that the decision appealed against was wrong at the time it was given upon the material before the Commissioner. His Honour spoke of the prospect of the matter being sent back to the Commissioner with any fresh evidence (at 235). He was satisfied that in order to attack the Commissioner's "'satisfaction'.... no fresh evidence can be looked at until it is shown by the appellant that the Commissioner's judgment miscarried in one of the ways stated by Dixon J. in the *Avon Downs* case" (at 236). It was not necessary in that case for his Honour to decide whether evidence led upon the appeal could be looked at because he could detect no error in the Commissioner's finding. Clearly, his Honour was doubtful as to whether evidence led upon appeal could be looked at at all (ibid). There was a difference in the Full Court of the Supreme Court of Queensland when the matter came before it in *John French Pty Ltd v The Commissioner of Pay-roll Tax* [1984] 1 Qd R 125. McPherson J., with whom Campbell CJ.

agreed, said at p139 that when the reasons for the decision of the Commissioner are before the Court of Appeal and an error is demonstrated "it no doubt then becomes appropriate to permit evidence to be adduced [....]". Matthews J. disagreed at pp129 and 130. McPherson J. relied to some extent upon *Cannan and Peterson v Commissioner of Pay-roll Tax* [1975] Qd R 177. That was an application before Andrews J. for directions as to procedure in an appeal against the Commissioner's decision on an objection to an assessment under the *Pay-roll Tax Act*. Amongst the specific directions sought, was one as to the manner in which evidence was to be given upon the appeal, but no where is the nature of the appeal discussed nor the nature of the evidence it was proposed to adduce. No reference was made to whether or not evidence, other than that before the Commissioner at the time he made his determination, was sought to be put before the court on appeal. As his Honour pointed out at 182, the application before him was "of the nature a test case", suggesting that the matter had been brought on not long after the amendment giving the right of appeal. In any event, the position in *John French Pty Ltd v Commissioner of Pay-roll Tax* (supra), as demonstrated by McPherson J. at 139, may best be regarded as having been decided on its own facts. Here, all the material before the Commissioner and the reasons for his decision are before this Court by operation of the *Rules*.

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.

Did the Commissioner err?

In the words of Rath J. in *Mead Packaging (Aust) Pty Ltd v Commissioner of Pay-roll Tax* (supra) at 4172, s17H(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."

As s17H(1) itself shows, the carrying on of substantially independent businesses is not established merely because the nature of the business of each company is different. However, in this case, that issue was at the forefront of the appellant's submissions and ought to have been specifically adverted to and dealt with by the Commissioner. It may not have been quite as dramatic as the ice cream parlour in Brisbane and the prawn processing plant in Karumba referred to in *John French Pty Ltd v Commissioner of Pay-roll Tax* (supra at 137 - 138), but nevertheless it was a matter calling for careful consideration. He has patently excluded from his consideration a factor which should have been taken into account.

The Commissioner's reasons show that he erred in his statutory duty, and it is therefore necessary that this Court examine the evidence before him and consider the issue for itself.

Should the appellant have been excluded from the group?

The thrust of the appellant's case is that it should

be excluded from the group because the nature of the business conducted by it is so different from that conducted by S G Kennon & Co Pty Ltd. It emphasises as well Mr Kennon's control over the whole of its business and that he is at the crushing plant, 100km from Darwin for much of his time attending exclusively to that business. Whilst in Darwin at the premises of S G Kennon & Co Pty Ltd he is active as the foreman of part of its business only and the other businesses are under the management of others. He does not in fact exercise the powers of control he has in relation to the affairs of that company.

It is the Commissioner's contention that all the evidence shows that the involvement of Mr S G Kennon in the businesses carried on by the appellant and S G Kennon & Co Pty Ltd precludes any finding that the appellant should have been excluded from the group. In particular, it is Mr Kennon's position as director and principal shareholder of both companies and his involvement in the day to day running of the businesses which leads to this conclusion. Further, the position and involvement of other personnel, particularly members of the Kennon family, support the conclusion.

It is convenient to approach the task by taking the matters referred to in 17H and considering them separately.

The nature and degree of ownership or control of the businesses

The businesses being conducted by corporations, this

issue is best considered in the light of the shareholding and directorship of the two companies. They are referred to above. Mr Kennon holds nearly all of the issued shares and certainly controls more than 50% of the voting power in the appellant and is one of the directors of it along with Mr Paul Kennon.

As to S G Kennon & Co Pty Ltd, Mr Kennon is a director along with Mrs Kennon, and Mr Kennon owns 100 of the 550 allotted shares, but including a life governor share which entitles him to cast 76% of all the votes. The other shares are held by Mrs Kennon and Mr Paul Kennon. In so far as the life governor share is concerned, it was put to the Commissioner, and does not seem to be disputed, that it was issued to him "in the early days of the company when his skill and knowledge were required to guide the younger members of the family. Mr Kennon had never made use of the life governor share at any meeting in order to outvote the other shareholders", see the letter from the appellant's solicitor of 10 February 1989. He may be entitled to exercise a high degree of cntrol, but he has not done so. There is nothing to suggest that Mr Kennon exercises any greater degree of control over the businesses conducted by S G Kennon & Co Pty Ltd than does anyone else involved. As to day to day conduct of the businesses, Mrs Kennon manages the properties, Mr Robert Kennon manages the retail business, the larger section of the business, and Mr Kennon is the foreman of the engineering/welding workshop, which infers that he manages that aspect of the business. Those contentions put on behalf of the appellant are not in dispute. The uncontroverted

facts put before the respondent are that the day to day running of the appellant's business is the responsibility of Mr Kennon and he controls it. Apart from the assertion that the retail section of S G Kennon & Co Pty Ltd is the largest section of the businesses conducted by that company, there is nothing to indicate the relative size of the three undertakings in monetary or other terms .

There is no mutuality of directorship of the two companies, other than through Mr Kennon. Although the question of control loomed large in relation to the grouping of the businesses (and it is conceded that the two companies here in question are grouped by operation of those provisions) it is not the only factor to be taken into account when considering exclusion of one of the companies from the group in accordance with s17H.

The nature of the businesses

This has already been described. There is no similarity between the businesses conducted by each of the companies, except that they both sell things as part of that separate undertaking.

Other relevant matters

To be relevant, the matters to be taken into consideration must go to the issue of whether a business carried on by the appellant is carried on substantially independently

of and is not substantially connected with the carrying on of a business carried on by S G Kennon & Co Pty Ltd. For the exclusion to be available, the appellant must demonstrate both criteria, substantial independence and lack of substantial connection in the carrying on of a business. Information on these issues were put broadly in the solicitor's letter of February 1989, but in more detail in answer to the Commissioner's queries in October of that year. There is a difficulty with that material, because it does not focus upon events which may have occurred during the period under investigation, and it may be that closer examination would reveal that the independence and connection between the businesses conducted by the two companies has varied from time to time. But that is the way the case has been presented and the Court must do the best it can on the material before it.

There are dealings between the two companies. Total sales by S G Kennon & Co Pty Ltd to the appellant amount to 1.25% of all sales of S G Kennon & Co Pty Ltd. That is made up in the sale of hardware items, and of a slightly lesser value, the provisions of engineering services. It is not possible to determine what the proportion of the purchases by the appellant from S G kennon & Co Pty Ltd, either as to hardware or engineering services, is to its total purchases. There are no sales by the appellant to the other company. S G Kennon & Co Pty Ltd provides some storage facilities for the aggregate produced by the appellant at its premises in Darwin, but for the two years prior to the submission to the Commissioner, the

approximate percentage of the total sales of the appellant of materials stored at the S G Kennon & Co premises was 0.95%. The accounts and wages records for the appellant are kept in the S G Kennon & Co Ltd office, and when he is not at the crushing plant at Mount Bundy, Mr Kennon works from an office in the S G Kennon & Co premises in Darwin. As noted above, there is a degree of sharing of services of family members between the two companies. The telephone for the appellant is unlisted, though regular customers know the number, but new or prospective customers telephone S G Kennon & Co. The two companies share a post office box, but each has its own stationary. Apart from a motor vehicle used by Mr Kennon to drive to the crushing plant at Mount Bundy, which is also used on S G Kennon & Co business in Darwin, there is no sharing of plant, equipment and motor vehicles between the two companies. The same accountant provides accounting services to each company, but they have separate legal advisers. Their banking and financial facilities are separate, but the services provided to each company by members of the Kennon family are noted above, and they appear to be paid their respective wages by each company for the separate services rendered. Mr Kennon receives but a small proportion of his income from S G Kennon & Co, the bulk of it derived from the appellant; Mrs Kennon receives nothing from the appellant. Mr Kennon is fully responsible for the day to day operations and management of the appellant, but he and Mrs Kennon and other members of their family are each partly responsible for the conduct of the business of S G Kennon & Co. The directors of the two companies

meet together once a year for formal meetings. There are several informal meetings of directors of S G Kennon & Co, but such meetings are not held in relation to the affairs of the appellant, Mr Kennon having complete control of its business. He spends about half of his time in the day to day management of the appellant at its plant in Mount Bundy and the other half in relation to the engineering and welding part of the business of S G Kennon & Co Pty Ltd. Mrs Kennon, apart from the bookkeeping services referred to, has nothing to do with the appellant's day to day business affairs, although, along with Mr S G Kennon and Mr Paul Kennon and Mr Paul Kennon she is one of the signatories to its bank account. As at 30 June 1988 the appellant owned S G Kennon & Co Pty Ltd approximately $750,000, which balance is said to have been in existence prior to July 1981. Its balance sheet for taxation purposes shows a substantial amount of liability in excess of the value of its assets. It does not appear that it could pay the debt to S G Kennon & Co Pty Ltd if called upon to do so. There is a common piece of property, described as "Title 74 Folio 121" which has been used by each of the companies as security for loans. There are some customers who are common to each of the companies.

Conclusion

The word "substantial", or, as here, "substantially", is not only susceptible to ambiguity, it is a word calculated to conceal a lack of precision (per Deane J. *Tillmans Butcheries Pty Ltd v Australasian Meat Industry*

Employees' Union (1980) 42 FLR 331 at 348). It calls for the exercise of judgment.

The defacto control of the whole of the business of the appellant by Mr Kennon sets it apart from S G Kennon & Co Pty Ltd, as does the nature of the business it conducts. The sharing of the services of some family members for bookkeeping and the like does not significantly impact upon that. S G Kennon & Co Pty Ltd stores and sells on behalf of the appellant a minimal quantity of its output. These factors count in favour of a finding that the appellant has established that it should have been excluded from the group.

The debt owed by the appellant to the other company, is of considerable importance. Although said to be historical, it is nevertheless a debt which if called in would, on the material available, put the appellant into financial difficulty. It is not shown that its existence as a business enterprise is not dependent upon the continuing goodwill of S G Kennon & Co Pty Ltd. Further, should the occasion arise, it would be open to Mr Kennon to exercise his powers as a life governor of that company to inhibit its demand upon the appellant. There is also the question of the engineering work undertaken by S G Kennon & Co Pty Ltd for the appellant. The appellant has not shown the extent to which its repair and maintenance requirements are carried out by the other company in comparison with what is done for it in the same field by others. Nor is it possible to determine what the proportion

of the whole of the appellant's work bears to the whole of the engineering/welding work of S G Kennon & Co Pty Ltd. Mr Kennon's involvement as foreman of that part of the latter company's business must also be taken into account. There is no satisfactory evidence to indicate that the business conducted by the appellant is not carried on substantially independently of the engineering/welding business of S G Kennon & Co Pty Ltd. That would be enough to tell against the appellant on that account, but it has also failed to show that there is no substantial connection between those two businesses. Mr Kennon runs both of them.

The appeal is dismissed.