

COURT OF APPEAL

**FRASER JA
HENRY J
BURNS J**

**Appeal No 6216 of 2015
QCAT No 371 of 2014**

**COMMERCIAL PROPERTY MANAGEMENT PTY LTD
ACN 100 484 679**

**SLUSH PUPPIE PTY LTD
ACN 010 422 894**

**SPA PROPERTY AND INVESTMENT CO PTY LTD
ACN 010 236 254**

Applicants

v

COMMISSIONER OF STATE REVENUE

Respondent

BRISBANE

THURSDAY, 29 OCTOBER 2015

JUDGMENT

FRASER JA: On 30 August 2013, the respondent commissioner issued default assessments of payroll tax for the applicants. The applicants objected to those assessments on 30 October 2013. On 28 February 2014, the respondent, acting under s 34 of the *Taxation Administration Act* 2001 (Qld), which I will refer to as “the Act”, approved an application by the applicants for an interim repayment arrangement to repay their tax debts totalling in excess of \$360,000 by way

of a \$20,000 immediate payment and subsequent \$5,000 monthly payments thereafter, on conditions.

Section 34(1) empowers the respondent, if satisfied that payment of a taxpayer's taxable liability would cause the taxpayer significant hardship, to extend the time for paying an amount under a tax law upon the taxpayer's written application. Under s 34(2) the respondent may approve an arrangement for paying the amount by way of instalments. Section 34(4) provides that the respondent may at any time terminate the arrangement by written notice to the taxpayer. In that event amounts outstanding under the arrangement are immediately payable by the taxpayer to the commissioner. That tax payment arrangement remains in force and the applicants had not at any relevant time defaulted under it.

On 21 March 2014, the respondent disallowed the applicants' objections to the default assessments. The applicants applied in the Queensland Civil and Administrative Tribunal, "QCAT", to review that decision. QCAT acceded to an application by the respondent to strike out that proceeding for want of jurisdiction, pursuant to s 69 of the Act. Section 69(2) confers on the taxpayer, within 60 days after notice is given to the taxpayer of the respondent's decision on an objection, the right to appeal to the Supreme Court or to apply, as provided under the QCAT Act, to QCAT for a review of the respondent's decision.

The provision in issue in this application is s 69(1)(b). Section 69(1) provides that s 69 applies to a taxpayer if:

- “(a) the taxpayer is dissatisfied with the commissioner's decision on the taxpayer's objection; and
- (b) the taxpayer has paid the whole of the amount of the tax and late payment interest payable under the assessment to which the decision relates.”

Upon application by the respondent, the QCAT member at first instance held that the applicants' right to apply for a review was conferred subject to payment of the whole amount of tax outstanding under the assessment. Because that had not been paid the applicants had no

right to apply for review and QCAT had no jurisdiction. The application for review was dismissed.

The applicants appealed against that decision to the QCAT appeal tribunal. The appeal tribunal held that the member had made an error of law by failing to afford the applicants an oral hearing, which they had sought, and failing to give reasons for not affording such a hearing. For that reason the appeal tribunal allowed the appeal and considered the substantive issue afresh.

The appeal tribunal did not accept the applicants' contention that upon entry into the payment arrangement no amount remained payable under the assessment, so that entry into the arrangement equated to payment of the tax. The appeal tribunal construed the word "payable" in s 69(1)(b) as meaning "yet to be paid". Accordingly, the appeal tribunal decided that QCAT did not have jurisdiction to hear the application for review.

The applicants now apply under s 153(b) of the QCAT Act for leave to appeal against the appeal tribunal's decision. The applicants frame the main issue in the appeal as being whether the part of an assessment which is subject to an extended payment regime under s 34 of the Act is payable in terms of s 69(1)(b) when the amount has not been paid and a date for payment has not arrived. They submit that the word "payable" unambiguously applies only where both the liability to pay has arisen and the date for payment has arrived with payment not having been made. The result is said to be that the approval of a payment arrangement under s 34 of the Act is equivalent to actual payment for the purposes of s 69(1)(b).

Whilst the word "payable" may in some contexts refer to a liability to pay which has matured by the date for payment having arrived without payment having been made, that construction is not open in the context of the Act. The requirement of s 69(1)(b) is that:

"The taxpayer has paid the whole of the amount of the tax and late payment interest payable under the assessment to which the decision relates."

The task is not to construe the word "payable" in isolation, but to construe it in the context of a reference to "payable under the assessment". There is no ambiguity about what is payable

under an assessment. The amount of the assessment is an amount payable under the tax law which is required to be paid to the commissioner – see ss 29 and 45 of the Act.

The definition of “assessment” in the schedule reveals that it is a determination of a taxpayer’s liability for tax for which the assessment notice is given. The scheme of these provisions is that until the amount of an assessment is paid, the amount of the assessment remains an amount payable under the assessment. The phrase “payable under the assessment” can refer only to the amount which the taxpayer is liable to pay pursuant to that assessment.

We have been taken to many provisions of the Act, with competing submissions about their consequences. It’s not necessary to refer to them all. Section 32(1), for example, provides that it applies if:

“an amount, other than tax or late payment interest is payable under a tax law; and no time for payment is otherwise stated in the tax law.”

The expression “payable under a tax law” is quite capable of bearing the meaning which I have attributed to the expression “payable” in the context of “payable under the assessment” in s 69. Section 32 itself draws a distinction between the amount payable and the time for payment. Similar statements could be made about the provisions in s 33 and s 45.

Section 45, for example, provides in subsection (1) that:

“An amount payable under a tax law must be paid to the commissioner.”

Section 45(2) provides that:

“If the whole or part of an amount payable under a tax law is not paid as required the unpaid amount is a debt payable to the State; and the commissioner may recover the unpaid amount for the State in a court of competent jurisdiction.”

Again s 45 draws a distinction between what is payable and what is paid – or in this case not paid – as required. The words “as required” apparently refer to the time and mode of payment. By contrast s 69 refers only to what is payable under the assessment, which is a reference to the liability created by the assessment.

Notwithstanding submissions by the applicants to the contrary, it seems to me quite plain that the purpose of s 69(1)(b) is the same purpose as is revealed by the different provisions for the protection of the revenue in the *Taxation Administration Act 1953* (Cth). It is, as I have indicated, to protect the revenue.

The applicants pointed out that whether or not the respondent approves a payment arrangement under s 34 is entirely a matter for the respondent, so that the respondent, by exercising that power, is in a position to protect the revenue. However the purpose of s 34 appears clearly enough from the terms of s 34(1). It is to allow an indulgence in a case in which a taxpayer's tax law liability would cause the taxpayer significant financial hardship. There is no indication that it is a purpose of s 34 to relieve taxpayers from the obligation imposed by s 69(1) to pay, as a condition of a right of appeal or review, the whole amount of the tax payable on an assessment.

It is not necessary to refer to the other provisions to which we were taken. I have seen nothing in them which indicates that any other construction of s 69(1)(b) is available upon the terms of that section, having regard to the purpose of the Act.

It is in favour of a grant of leave to appeal in this case that the appeal tribunal found that the applicants had been denied procedural fairness at first instance QCAT. That distinguishes this case from the more usual case, in which an applicant for leave has had the benefit of two entirely regular decisions on the merits and seeks leave to appeal, notwithstanding that both decisions are adverse to the applicant. I would also accept that it is in favour of the grant of leave to appeal that the construction of s 69 is of some general importance.

On the other hand, in my respectful opinion the arguments propounded in support of the applicants' construction of s 69, although propounded with care and in detail, are very weak. For that reason I would refuse leave to appeal. In my opinion, the appropriate order is that leave to appeal be refused. I would hear submissions about costs.

BURNS J: I agree.

HENRY J: I agree.

FRASER JA: Costs, Mr Hinson?

MR HINSON: Your Honour, I ask for costs. They ought follow the event, in my submission.

MR GRIFFIN: Yeah. We can't say anything contrary to that, your Honour.

FRASER JA: The order of the court is that leave to appeal is refused, with costs. Adjourn the court.