IN THE SUPREME COURT OF QUEENSLAND Appeal No. 56 of 1980

CIVIL JURISDICTION

BEFORE MR. JUSTICE THOMAS

BRISBANE, 16 APRIL 1982

IN THE MATTER OF the Pay-Roll Tax Act 1971-1979

-and-

IN THE MATTER OF an appeal thereunder against a decision of the Commissioner of Pay-Roll Tax

BETWEEN:

JOHN FRENCH PTY. LTD. and MARIE THELMA FRENCH trading as LUTWYCHE STAR SERVICE STATION, JOHN FRENCH PTY. LTD., JOHN CLYDE FRENCH, MARIE THELMA FRENCH, JOHN CLYDE FRENCH and JOHN FRENCH PTY. LTD. trading as ALPHA CENTRE — Appellants

-and-

THE COMMISSIONER OF PAY-ROLL TAX — Respondent

JUDGMENT

HIS HONOUR: I publish my reasons and they are available to you. The appeal in the end got down to a question under Section 16H and I came to the conclusion that there is not a sufficient linking between the relevant employers to justify the continuation of their grouping, and accordingly the appeal is allowed on that basis.

MR. SYMONS: I would formerly ask for costs.

HIS HONOUR: The appeal is an appeal at large entered in the Supreme Court and the general nature of it has been considered in the Cannan and Peterson case. I consider that the ordinary rule should apply in relation to costs. You do not urge otherwise?

MR. DRAYDON: No.

HIS HONOUR: The order will be that the appeal is allowed and the respondent is to pay the appellants' taxed costs of the appeal.

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JUDGMENT - THOMAS J.

This appeal relates to assessment of pay-roll tax made against the six appellants in respect of the period 1st January, 1976 to 30th June, 1977. Each appellant was a

registered employer for pay-roll tax purposes, each being designated by registered number 415, 416, 417, 418, 419 and 420 respectively. The natural persons involved in the relevant businesses were John Clyde French and his wife Marie Thelma French. They were the members and directors of a family company, John French Proprietary Limited ("the company"). At material times a number of businesses were run by one or more of Mr and Mrs French and their company.

In the present case it is useful to set out a short summary of the operation of the Pay-Roll Tax Act 1971-1976, before dealing with the facts. Ignoring matters that are immaterial for the purpose of the present litigation, the scheme of the legislation can be seen from the following extracts and paraphrases.

> Section 6. Wages that are paid or payable by an employer are liable to pay-roll tax.
>
> Section 7. Pay-roll tax shall be charged (subject to other provisions of the Act) on all taxable wages at the rate of 5 percent.
>
> Section 8. Pay-roll tax shall be paid by the employer by whom the taxable wages are paid or payable.
>
> Section 9. A formula is prescribed so that "taxable wages" are less than the full amount paid. In short, there is a tax-free level, which I was told comprised about $400 per week at the material time.
>
> Section 12. An employer shall apply for registration as an employer.
>
> Section 13. A registered employer shall within prescribed time furnish monthly returns to the Commissioner specifying the taxable wages paid by him.
>
> Sections 16A to 16L. Certain related employers and businesses are grouped. These provisions will be considered later.
>
> Section 17. Tax is payable within the time by which an employer is required to lodge the return of wages.

Section 18. The Commissioner also has power to assess.

Until 1st January, 1976, large scale but lawful avoidance of pay-roll tax was commonly effected by the device of using multiple employers. A large scale business would organise itself so that staff was nominally (and legally) employed by a variety of separate legal persons. In the result, each employer would be paying wages less than the taxable amount. Alternatively, the benefit of multiple deductions would be obtained. In 1976, such tax avoidance was effectively stopped by the grouping provisions inserted in the 1975 amending act.

In the present case, prior to 1976 Mr. French, his wife and the company, or combinations of them, had a number of businesses on different sites. Although they all had some connection with the car industry, they could be identified as different businesses. However, as well as employing their own staff in the conduct of those businesses, some additional "registrations of employer" were effected by the appellants to minimise pay-roll tax. All such registrations were effected in 1973 or 1974. The appellants concede that after 1st January 1976, registrations 416 and 417 can validly be regarded as a group employer of the staff of a single business, namely that of the company at Woolloongabba where the business of selling new cars was conducted. Similarly it is conceded that registrations 418 and 419 were a device to enable three employers to exist for single business (that known as Clive Nolan Motors), and that the same may be validly grouped as from 1st January, 1976.

The "grouping provisions" came into operation on 1st January 1976, through Act No. 80 of 1975. It inserted a new part, Part IV A. That part recites a variety of situations in which multiple employers are to be deemed to constitute a group. Such situations include those where one person's employees are used in another business, where one person has a controlling interest in two or more businesses, any situation where two corporations are deemed to be related to each other under s. 6(5) of the Companies Act 1961 as

amended, and other combinations that need not be here enumerated. Sections 16A to 16G set out objective criteria which will brand multiple employers as comprising a group. However s. 16H is a beneficial section in that the Commissioner, even if satisfied that a group exists, may exclude a business carried on by a member of the group if satisfied that it is carried on substantially independently of and is not substantially connected with the carrying on of a business of any other member of that group.

One would expect the Act to declare what the consequences are when a group is constituted, but it is strangely silent. It is only by implication that I can deduce that after a "designated group employer" is designated by the Commissioner, such designated group employer is obliged to submit returns, and that the members of the group (other than the "designated group employer") are to lose the benefit of the prescribed deductions. I have been asked to assume that such implications exist for the purposes of the present appeal. I do so, but cannot understand why the legislature failed to say so expressly.

It is to be noted that the Act does not tax a group as such. The intended effect of grouping seems to be to strip particular employers of deductions which they would otherwise obtain.

I now turn to the facts.

I was impressed with Mr. French who gave evidence and I consider that he did so with complete candour. Similarly I have no reservations in accepting the evidence of his accountant, Mr. Galligan.

Mrs. Marie French was previously married to a Mr. Nolan. He died and his service station business passed into his widow's hands. She has thereafter retained that business as her own business, even after her subsequent marriage to Mr. French. Originally John French Proprietary Limited ("the company") had a business of selling new cars at Ann Street the Valley. Mrs. Nolan's business at Annerley

Road included the repair and servicing of motor vehicles. In 1970 the present premises were built at 80 Annerley Road comprising two substantial and distinct premises, in which separate businesses are conducted in separate tenancy areas. The show-room (where the company's car sale business is conducted) is walled off from the service business which is run by Olive Nolan Motors. No doubt reasonable co-operation occurs, but the evidence is that Mrs. French retains substantial control of Olive Nolan Motors, that it runs a different that type of business to that of the company, and that the businesses are quite legally separate. I do not propose to state the evidence at length. I am well satisfied that these two businesses are carried on substantially independently of each other and that they are not substantially connected with the carrying on of each other.

Similarly, there was at material times a business known as Alpha City. It is a showroom which Mr. French took over in 1974. Employees were already there. He moved it to the north side adjacent to his Caltex Service Station known as the Lutwyche Star service station. He was the proprietor of both businesses, but they were distinct and traded quite separately. Alpha City has since closed down as a result of quotas imposed by the Federal Government, which made the showroom unprofitable. I regard the co-operation that did exist between the two businesses as being insufficient to compromise their substantial independence.

Similarly, a car sale yard which was run for a time at Ipswich Road, Moorooka was a distinct and separate business.

Mr Morley submitted that there were seven relevant “businesses” as that term is defined by s. 16 A. They were as follows:

1. The company's car sale business at its Annerley showroom.

2. The joint activity of Mr French and the company in employing staff in the company's business at 80 Annerley Road (vide letter of 4th October 1977), and also in Mr French's business at Alpha City (vide Ex. 8).

3. Clive Nolan Motors, owned and conducted by Mrs French.

4. The activity of Mr French and Mrs French in employing workers in Clive Nolan Motors business.

5. Mr French's Lutwyche Star service station business.

6. The activity of Mrs French and the company providing employees in Mr French's Lutwyche Star service station business.

7. Mr French's Alpha City business.

I accept that submission. It will be seen at once that the genuine commercial businesses are numbers 1, 3, 5 and 7. The "businesses" numbered 2, 4 and 6 are simply the activity of named persons providing employees for one or more of the substantial businesses. Such activities were a carry-over from the pre-1976 system, After 1976, they no longer served any significant financial or commercial purpose. Broadly speaking, the service charges that were paid for the provision of employees were a reimbursement, although in some cases there may have been a small margin. The nature of the margin was not pursued in evidence, and the effect of the evidence is that there was no significant financial effect from the making of such arrangements.

Although the appellants were slow to abandon the pre-1976 arrangements, ultimately the system was changed, and the separate businesses now employ their own staff. Hence the present case relates to the limited period which has been described as the "hangover from the pre-1976 arrangement". The question will be whether such artificial arrangements, which were a positive advantage to the

appellants before 1976, became a positive disadvantage to them during the period when they were legally maintained after 1976.

Mr Morley's ultimate submission, for the purposes of s. 16 H, was that the provision of labour by one business for another business constitutes a substantial connection between them. But it is appropriate that this submission should be the last one to be considered.

After the amendments came into force, the appellants in due course conceded that it was appropriate that employers 416 and 417 be treated as a group, and that employers 418 and 419 be treated as a group. Liability on that footing was not contested, and no issue arose before me on that score. The issue in the present appeals arose when, after a good deal of correspondence, the Commissioner made a decision (in his letter of 25th May 1978) stating that "all six employers are considered to constitute one group". Such a decision necessarily denied deductions to the six appellants unless they furnished a form of "designation of group employer" in respect of all members of the group. A notice of objection (in the form of an accountant's letter) followed on 4th July 1978. After further submissions, amplifying the objection, the Commissioner disallowed the objection by letter of 19th October 1978, It was in the following terms:—

> " I refer to your letter of 19th September 1978 and also to your letter of 4th July 1978 objecting to the decision conveyed in my letter of 25th May 1978 that all of the above six employers constituted one group under the Act. You are advised that your objection has been considered and is wholly disallowed. You will be furnished with separate advice of the tax liability of the above employers."

Six assessments followed. Only one (that applicable to the company) allowed a deduction. The total amount in issue (as pay-roll tax) is $7,512.09.

Notwithstanding the wording of the above decisions, Mr Morley Q.C. who appeared on behalf of the Commissioner submitted that on a correct analysis of the facts and law, there were only three relevant employers, namely Mr French, Mrs French and the company. This approach constitutes a departure from the Commissioner's decision. It is true that the quantum of pay-roll tax would not ultimately be affected if this submission is correct, in-as-much as the total of the I wages paid to the employees of the various businesses would be the same; and if the relevant employers (whether they be three or six) were correctly grouped, then the total tax will still be the same; and so will the single exemption which has been allowed to the designated employer company. But the Commissioner's original decision effects a grouping of six, whereas counsel's justification is of a grouping of three. The present appeals are not against assessments. They are against a decision that six specified employers should be grouped. If the correct decision should have been that three specified employers should be grouped, then the appeal should be allowed with such a direction, even if the eventual consequences may appear to be academic. The members of a group, although closely related to each other would be entitled to have an accurate decision on the question of grouping, so that the legal incidence of the resulting assessments will fall upon the correct legal persons, and so that proper accounting procedures may be followed by all members of the group.

However for reasons that appear later, I think that the relevant employers for the purposes of this case are the six registered employers.

Although Mr Heyworth-Smith initially argued that the Commissioner was not entitled to group those six registered employers, he eventually conceded that the Commissioner was entitled to do so by using s. 16 E. This means that the appeals ultimately get down to the question whether the Commissioner should have been satisfied on the matters set out in s. 16 H of the Act in consequence of which he should have excluded some or all of such members from the group.

Whilst it will not now be necessary for me to examine arguments as to the right of the Commissioner to group employers (or businesses) under s. 16 C, 16 D and 16 E, I think it is necessary that I attempt some analysis of the position as a necessary background to embarking upon s. 16 he it is with this exercise in mind that I now turn to Mr Morley's first submission that there were only three employers.

The term "employer" is defined in s. 3 to mean "any person who pays or is liable to pay any wages.....The term "person" includes company; and the term "company" includes partnership. Prima facie, then, the term "employer" includes a partnership. But Mr Morley submitted that despite those definitions, "the context or subject matter otherwise indicates or requires", within the introductory words in the definition section. His submission was that whilst "employer" can mean natural person and can mean a company, it cannot mean a partnership. He submitted that where persons are employed by a partnership, the employer should be taken to be a member of that partnership. He conceded that s. 12 of the Partnership Act creates a joint (as distinct from a several) liability for obligations of the firm (including that to pay wages). But he submitted that s. 54 of the Property Law Act 1975 would prevent a partner from obtaining a discharge from his joint liability and hence an individual partner would remain "liable to pay" a partnership employee within those words in the definition of "employer" in the Pay-roll Tax Act. The argument is tortuous and I can see no reason why the Act requires partnerships to be excluded from the category of employers.

There is nothing unusual in the concept of a partnership being an employer. The practice of the commercial community in relation to group certificates, workers' compensation, and other incidents of employment, not to mention the Commissioner's own practice in registering partnerships as employers under s. 12, amply demonstrates this. It would be confusing if an "employer"

for the purposes of registration meant something different from "employer" generally. Having regard to the scheme and purposes of the Act, it seems appropriate that where persons are employed by a partnership, the partnership should be the appropriate registrant. I do not say that an individual member of a partnership could never be considered an employer for the purposes of the Act. But where a partnership is an employer, it should be considered as the primary employer for the purposes of the Act.

Accordingly, applying the ordinary words of the definitions in s. 3, I consider that partnerships are capable of being employers for the purpose of the Act, and are primarily to be so regarded.

For the purposes of grouping under ss. 16 A to 16 G, it seems to me that employers may be grouped with persons who are not employers. This may allow the Commissioner greater versatility in using s. 16 E. But ultimately, the only persons who may be assessed are employers. That is not to say that the Commissioner cannot group non-employers with employers. In particular, he can group businesses with employers. Applying the principles I have expressed, the appropriate starting point is that there were six employers, namely those that were registered under the ascribed numbers 415 to 420. It may be noted that this was the basis upon which the Commissioner made his decision and levied his assessments. I further hold that under ss. 16 C to 16 E those six employers constituted a group for the purposes of Part IV A of the Act, and so did the seven "businesses" that I have earlier mentioned.

I now come to the critical question - the application of s. 16 H(1). That sub-section states.—

> "16H. Exclusion of persons from groups. (1) Where the Commissioner is satisfied, having regard to the nature and degree of ownership or control of the businesses, the nature of the businesses and any other matters 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 firstmentioned member, exclude him from that group."

Mr Morley, whilst pointing out that this is a "Commissioner's satisfaction" section, conceded that the Commissioner was bound to make a determination as to whether he was satisfied or not, and that s. 32(1) allows appeals against such a determination by the Commissioner. It was expressly conceded that a determination by the Commissioner that he is not satisfied under s. 16 H is an appealable matter under s. 32, and that it is open to the appellants to show that the Commissioner ought to have been satisfied of the matters contained in that section.

The appeal is normally an appeal in which substantial matters of fact can be canvassed. (Cannan and Peterson v. Commissioner of Pay-roll Tax (1975) Qd.R. 177, 182) An appeal under s. 16 H may be more limited then other appeals, in that error on the Commissioner's part in failing to be satisfied is the focal point. In the present case, the materials before the Commissioner were expanded by oral evidence, without departure from the basic case originally submitted to the Commissioner. There was no objection to this course, and in my opinion it was a proper course.

In the course of the proceedings I ruled that the notice of objection fairly raised the application of s. 16 H and the question whether the Commissioner should have been satisfied of the matters contained in that section.

I have previously indicated that the seven "businesses" listed by Mr Morley are all "businesses" within the extended definition provided by s. 16A. That extended meaning must also be given to the term "business" as it is used in s. 16 H. Therefore all seven "businesses" and their relationships one to another must be considered. But in my opinion it is the substance of those relationships that must be considered for the purposes of

s. 16 H. Although they are all businesses in the defined sense, it is the nature and extent of their contracts and dealings inter se which will determine whether there is substantial independence and a lack of substantial connection.

I have already indicated that the commercial businesses run by the appellants were separate and distinct. I think that they, inter se, were businesses carried on substantially independently and were not substantially connected with the carrying on of each other.

The point which remains is Mr Morley's submission that the provision of labour by one “business” for another constitutes a substantial connection. But the provision of such labour in the present circumstances was always devoid of any real commercial significance. During the relevant period, 1st January 1976 to 30th June 1977, the continuation of the old tax-minimisation arrangements was quite purposeless and was also devoid of any true commercial significance. The only connecting factor was the legal arrangement for provision of employees, and reimbursement for such provision. The independence of the relevant parties was not threatened. Nor did relatively pointless contracts such as these establish substantial connections with the carrying on of the respective businesses. I therefore consider that this factor does not provide a sufficient link to justify the Commissioner in refusing to exclude the various members of the group from each other for pay-roll tax purposes.

I allow the appeal on this basis.