IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720 of 1988

FULL COURT

BEFORE:

Mr. Justice Kneipp

Mr. Justice Thomas

Mr. Justice Derrington

BRISBANE, 17 NOVEMBER 1988

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. Appellant

-and-

THE COMMISSIONER OF STAMP DUTIES Respondent

ORDER

MR. JUSTICE THOMAS: In this matter the court consisted of Mr. Justice Kneipp, my brother Derrington and me.

I am authorised by my brother Kneipp to publish his reasons in this matter and to say that His Honour agrees with the orders to be proposed by my brother Derrington and by me.

I publish my reasons.

I invite my brother Derrington to announce the order of the court.

MR. JUSTICE DERRINGTON: As to question (a) the answer is “No”.

As to question (b) the answer is “Yes.”

As to question (c) the answer is “Not applicable.”

As to question (d) the answer is “No.”

As to question (e) the answer is “Yes. $4 in respect of each instrument”.

As to question (f) the answer is “By the respondent”.

MR. JUSTICE THOMAS: The order of the court will be in the terms indicated by my brother. Those terms cover the question of costs.

MR. JUSTICE DERRINGTON: I agree and I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720 of 1988

FULL COURT

IN THE MATTER of the Stamp Act 1894-1984

- and -

IN THE MATTER of an Appeal by J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. Appellant

LTD.

AND:

THE COMMISSIONER FOR STAMP DUTIES Respondent

KNEIPP J.

THOMAS J.

DERRINGTON J.

Reasons for Judgment delivered on the 17th November, 1988
by Kneipp J., Thomas J. and Derrington J.

All concurring.

"AS TO QUESTION (A) ANSWER IS 'NO'

(B) ANSWER IS 'YES'

(C) ANSWER IS 'NOT APPLICABLE'

(D) ANSWER IS 'NO'

(E) ANSWER IS 'YES $4 IN RESPECT OF EACH INSTRUMENT'

(F) ANSWER IS BY THE RESPONDENT"

IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720 of 1988

FULL COURT

Before the Full Court

Mr. Justice Kneipp

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IN THE MATTER of the Stamp Act 1894-1984

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IN THE MATTER of an Appeal by J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES Respondent

JUDGMENT: KNEIPP J.

Delivered the 17th day of November, 1988.

CATCHWORDS:

Stamp Duties - exemption in favour of transfer from retiring trustee to new trustee

Stamp Act Schedule 1 - “Conveyance or Transfer”

Counsel: P.A. Keane for Appellant
R.I. Hanger Q.C. and J.S. Douglas for Respondent
Solicitors: Hopgood and Ganim for Appellant
Crown Solicitor for Respondent
Hearing date: 18th October, 1988
IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720 of 1988

FULL COURT

IN THE MATTER of the Stamp Act 1894-1984

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IN THE MATTER of an Appeal by J.A.W. & S PROPERTY MANAGEMENT NOMINEES PTY. LTD. against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. — Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES — Respondent

JUDGMENT - KNEIPP J.

Delivered the 17th day of November, 1988.

I have had the advantage of reading the judgment of Derrington J., and I agree with the results which he proposes. I agree with his reasoning in relation to the argument based on sub-div. 4(b)(v)(aa) of the heading “Conveyance or Transfer”.

The argument as to subdiv. 4(b)(v)(a) appears to be based wholly on the fact that the present holders of units in the trust are not qualified, according to the terms of the trust, to be beneficiaries in the trust. This does not really seem to be relevant in relation to the first requirement, which is that the trustee is to hold upon the same trusts as those on which he had held “theretofore”. The trusts must have been the same immediately before and immediately after the transfer. Plainly they were: there was no change in the actual terms of the trust document, and there was no change in the identity of the beneficiaries.

The second requirement is that it is not intended to alter the terms of those trusts at any future time. The sole argument advanced is that the holding of units in the trusts by the unqualified beneficiaries is unlawful and that it should be assumed that the terms of the trust will be regularised to rectify this state of affairs. I do not know what meaning is to be given to the word unlawful in this context. A breach of trust, like a tort or a breach of contract, is not necessarily unlawful. The two beneficiaries here are under the same control and are the only beneficiaries. There are not any qualified beneficiaries to complain of what they do. They may do what they like with the trust and the trust property. There does not appear to be any legal or equitable impediment to their leaving the trust in place and enjoying the rights of beneficiaries. Why in these circumstances should it be thought that there will be any alteration of the trusts (an alteration being effective only on approval of 75 per cent in value of unit holders (Trust Deed, cl. 18))?

In my view there is not any good reason for thinking that the trusts will be varied. That being so, the view should be taken that there is not any intention of altering them, and there is no basis for the Commissioner being satisfied otherwise.

IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720/88

FULL COURT

Before the Full Court

Mr. Justice Kneipp

Mr. Justice Thomas

Mr. Justice Derrington

IN THE MATTER of the Stamp Act 1894-1984

- and -

IN THE MATTER of an Appeal by J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY LTD against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986.

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES Respondent

JUDGMENT - THOMAS J.

Delivered the 17th day of November, 1988.

CATCHWORDS:

Stamp duties - exemption in favour of transfers from retiring trustee to new trustee - Examinability of Commissioner's “satisfaction” on factual issues - Duty of Commissioner to expose basis of his satisfaction, or lack of it, if requested by taxpayer - Avon Downs Pty. Ltd. v. F.C.T. (1949) 78 C.L.R. 353 applied.

Stamp Act - Schedule 1 - “Conveyance or transfer” exemptions, cll. (a) to (e) considered.

Counsel: P.A. Keane for Appellant
R.I. Hanger Q.C. & J.A.S. Douglas for Commissioner
Solicitors: Hopgood and Ganim for Appellant
Hearing date: 18th October, 1988.

IN THE SUPREME COURT OF QUEENSLAND Misc. No. 720/88

FULL COURT

IN THE MATTER of the Stamp Act 1894-1984

- and -

IN THE MATTER of an Appeal by J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY LTD against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986.

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES Respondent

JUDGMENT - THOMAS J.

Delivered the 17th day of November, 1988.

This is an appeal under s. 24 of the Stamp Acts 1894-1987 upon a case stated by the Commissioner.

The instruments said to attract ad valorem duty are four memoranda of transfer of real property (in Form W under the Real Property Acts). In each instance the transfer is from a retiring trustee to a new trustee. Full ad valorem duty was paid when the properties were acquired on behalf of the trust. The facts show quite clearly that the documents came into existence simply to vest the property in a new trustee in place of the previous one. There was no relevant change at material times in the beneficial ownership, and the essence of the transaction is a change of trustee. Not so long ago it would have been surprising if ad valorem stamp duty were exigible. However the law is no longer as simple as it was when by s. 57 “a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than $1.00”. That simple position was replaced by a complex series of provisions under the heading “conveyance or transfer”. It is of interest to note that

upon its introduction in 1981, the amendment was said to be intended "in the case of the appointment of new trustees ... to continue to impose nominal duty ... with certain qualifications, to ensure that the change of trustees which attracts nominal duty is not for avoidance purposes" (Q.P.D. 14th May, 1981, 1346). That statement is certainly easier to understand than the amendment, but of course it is to the words of the latter that attention must be paid. A close examination of the relevant part of Schedule 1 of the Stamp Act is now necessary.

Duty is payable on any "conveyance or transfer" at prescribed ad valorem rates unless the documents fall within the following proviso:—

> "Provided that the duty payable in respect of conveyances or transfers made for the sole purpose of ... effecting the retirement of a trustee or the appointment of a new or additional trustee where the Commissioner is satisfied -
>
> (a) that the trustee or remaining trustee is to hold upon the same trusts as the property had theretofore been held and that it is not intended to alter the terms of those trusts at any future time; and
>
> (aa) that there has been no change of beneficial interest from the time of appointment of the retiring or continuing trustee (or both) in respect of which ad valorem duty chargeable under the Sch 1 headings relating to settlements, declaration of trusts or conveyances has not been paid on an instrument relating to the particular property and particular transaction; and
>
> (b) that it is not part of a scheme whereby any benefit actual or potential may be conferred upon the new, additional or remaining trustee, or any other person, whether by operation of law or otherwise; and
>
> (c) where the trustee or remaining trustee is trustee for a trust or unit trust, that it is not intended to make any alteration to the beneficial ownership of the trust property (whether by sale, issue, transfer or redemption of units or in any other manner); and

(d) where the trustee or remaining trustee is a corporation, that it is not intended to make any alteration to the ownership of the stock or shares in such corporation;

...

shall be $4.00."

The trust property consists of units in a unit trust registered in Victoria, under the Victorian Companies Act of 1961. Transfers of these units occurred prior to the change of trustee. In 1984 and 1986 these transfers of units had been duly stamped in Victoria, but of course Queensland ad valorem duty had not been paid under any of the relevant categories specified in sub-para. (aa) above. As already mentioned, ad valorem duty had been paid on the acquisition by the trustee of the relevant properties that are now sought to be vested in the new trustee.

The principal point concerns, the proper construction of sub-para. (aa). Whilst it is quite true that there has been a change of beneficial interest since appointment of the retiring trustee, and that ad valorem duty of the prescribed kinds has not been paid, it also happens to be the case that ad valorem duty was not "chargeable" under any of those categories. The short question therefore is whether duty chargeable under those prescribed categories has not been paid. The Commissioner says it does not matter whether duty is chargeable or not, it simply has not been paid and that is enough. The appellant says that there has been no chargeable duty which has not been paid and that the sub-paragraph is satisfied. In short the Commissioner's submission is that the right to exemption depends upon the fact of payment whilst the appellant contends that it is lost only if chargeable duty has not been paid.

The main difficulty facing the Commissioner's argument is that on his submission the word "chargeable" is superfluous. Furthermore, earlier in the same proviso (sub-cl. iii) the requirement that duty be paid is clearly expressed, in contrast to the present provision. In my view

the correct construction of sub-para. (aa) is that if there are changes of beneficial interest at a relevant time, the sub-paragraph is satisfied if all ad valorem duty chargeable under the prescribed headings has been paid, and that it is equally satisfied if there is no such duty to pay. In the context of Queensland Stamp Duty law, it is common ground that no such duty was chargeable in Queensland in this matter.

The other point of substance in this case concerns the question of the Commissioner's alleged failure to be satisfied under sub-paras. (a) and (c) that the trustee will continue to hold upon the same trusts as before, and that it is not intended to make any alteration to the beneficial ownership of the trust property. Before looking at the question of “Commissioner's satisfaction” it is desirable to look at the facts disclosed in the case.

Prior to the change of trustee the units were acquired by a company ineligible to carry out the trust in the terms of the Trust Deed, inasmuch as the units could not be authorised investments of a bona fide superannuation fund. Accompanying documents state the intention that the trust will continue but not as a public unit trustee. A statutory declaration by a director of the appellant (which is uncontradicted) asserts the intention of the company to hold the property on the same trust as it had been held prior to the change in trustee and that it was not intended to alter the terms of those trusts at any future time, that it is not intended to make any alteration to the beneficial ownership of the trust property and that the retirement of Union-Fidelity and the appointment of the appellant was not part of a scheme whereby any benefit actual or potential might be conferred upon the appellant. It may be noted that the requirement in sub-para. (a) of the schedule is not a guarantee of the future but is rather a statement of present intention. The issue is not what might or might not happen at some remote time in the future; it is the present intention of the appellant. It is difficult to find any basis for satisfaction that there is any present intention

to alter the terms of the trusts. Certainly no moves have been initiated to do so, and it is difficult to go behind the sworn statement of the director in relation to intention in the present case.

Similar observations may be made in relation to sub-para. (c) of the schedule insofar as the absence of intention to make any alteration to the beneficial ownership of the trust is concerned.

It is curious that in the present case there is no statement by the Commissioner of any satisfaction or lack of satisfaction on his part. The case stated simply asserts that “in arriving at his assessment ... the Commissioner has purported to apply s. 4 of the said Act and also part of the first Schedule to the said Act under the heading ‘Conveyance or Transfer’”. It is simply not known whether the Commissioner was unsatisfied as to all or any of the requirements of sub-paras. (a), (b), (c) or (d). He may well have been satisfied of them all but have been unsatisfied as to sub-para. (aa) because of an erroneous interpretation of it. However, for the purposes of argument let it be assumed that the Commissioner failed to satisfy himself that sub-paras. (a) and (c) were made out. These were the only additional grounds that his counsel sought to raise.

It was submitted that the Commissioner was entitled to be sceptical of the appellant's statements in view of the irregularities that had been permitted to occur in relation to the conduct of the trust as a superannuation fund. However the change of trusteeship appears to be unrelated to that irregularity, and the pressure upon the appellant to regularise the situation is no greater after the change of trustee than it was before. I do not suggest for a moment that the Commissioner is always bound to accept the contents of statutory declarations or other documents provided to him, but I would think his entitlement to be sceptical would be considerably greater when there is

reason to suspect a scheme to avoid tax or duty. No such suggestion was made or could be made in the present case.

On the footing that this is an issue to be determined according to the "satisfaction" of the Commissioner rather than upon the Court's own view of the circumstances, the leading authority is still the judgment of Dixon J. in Avon Downs Pty. Ltd. v. F.C.T. (1949) 78 C.L.R. 353, 360, subject to further considerations in the context of the Income Tax Assessment Act in F.C.T. v. Brian Hatch Timber Co. (Sales) Pty. Ltd. (1972) 128 C.L.R. 28, 46, 53, 57-58, 59, 62, and Kolotex Hosiery (Australia) Pty. Ltd. v. F.C.T. (1975) 132 C.L.R. 535, 568, 578-579. Review of a Commissioner's satisfaction is different from review on appeal of a discretion entrusted to a Commissioner and the reference by the Privy Council in Commissioner of Stamp Duties (N.S.W) v. Pearse (1953) 89 C.L.R. 51, 61 to "complete judicial review" is not apposite. In the Avon Downs case (above) Dixon J. said -

> "His decision, it is true, is 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."

A similar provision has been considered in Western Australia in Commissioner of State Taxation (W.A.) v. Cameron (1981) 81 A.T.C. 4576. Burt C.J. observed that it had been conceded that if the factors mentioned in the Avon Downs case where present the decision could be examined by the Court and that if it then appeared that the decision had been affected by error then the Court should reach its own conclusion as to whether the Commissioner ought to have been satisfied (ibid p. 4578). This latter concession is consistent with the view of the majority in the Kolotex Hosiery case (above), pp. 568 and 576, and is plainly right.

> "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." (Per Gibbs J. at 568; cf. University of Western Australia v. Commissioner of State Taxation (W.A.) (1988) 88 A.T.C. 4020).

The question then is whether error should be inferred in the apparent failure of the Commissioner to be satisfied of the particular matters in the five sub-paragraphs in the Schedule. It is simply not known whether his lack, of satisfaction was under, sub-para. (aa), (a), (c) or any other. It is perhaps unfortunate that the appellant did not seek a statement by the Commissioner of the basis of his decision. It is well established that where a Commissioner is entrusted with the power to express a satisfaction, he must expose to the taxpayer, if so requested, both his state of mind at the relevant time and its basis (Giris Pty. Ltd. v. F.C.T. (1969) 119 C.L.R. 365, 375; Kolotex Hosiery case (above) at 541; cf. John French Pty. Ltd. v. Commissioner of Pay-Roll Tax (1984) 1 Qd.R. 125, 139).

In the end I do not think that this case turns upon onus of proof or upon the fact that the Commissioner was not asked to nominate the sub-paragraphs of which he was not satisfied or to state the basis of his non-satisfaction. Perhaps the Commissioner was entirely satisfied, on the material before him, that it was not intended to alter the terms of the trusts or to make any alteration to the beneficial ownership of the trust property. It is enough to say that if the Commissioner was not so satisfied on the material before him, his lack of satisfaction must have resulted from a failure properly to examine or understand the evidence, and that it must have been reached either upon extraneous considerations or by failing to consider a relevant factor. A fine line separates cases where the Commissioner could fail to be satisfied and those where the inference of error must be drawn from his stated lack of satisfaction but the present is one where such an inference should be drawn.

This decision is not intended to discourage the Commissioner from healthy scepticism in appropriate cases, but the present case does not appear to be one of them. The unfortunately complex series of tests necessary to be examined in order to avoid ad valorem duty upon a change of trusteeship places both the taxpayer under potential disadvantage and the Commissioner under considerable difficulty. The observation of the author of Tolhurst & Wallace "Stamp Duties" Vol. 1, para. 8.312 upon the relevant amendments is worthy of mention.

> "It is difficult to know how the Commissioner can be expected to be satisfied about the matters referred to in the above paragraph. Those matters relate to intention as to future events or plans. It is not clear how the Commissioner can be expected to do more than rely on answers to requisitions or statutory declarations required to be made as to the matters in the paragraphs, beyond relating back any subsequent alterations in beneficial interests which may come to his notice, to prior conveyances, upon the appointment or retirement of trustees."

In a case such as the present where there is no ground for suspicion of avoidance, and where the assertions are credible, it is difficult to see why a statutory declaration ought to be disbelieved or why the vesting property upon what is essentially a simple change of trustee ought to attract ad valorem duty.

In my view the appeal ought to be allowed and the questions answered as follows:

1. No.

2. Yes.

3. Not Applicable.

4. No.

FULL COURT

Before the Full Court

Mr. Justice Kneipp

Mr. Justice Thomas

Mr. Justice Derrington

IN THE MATTER of the Stamp Act 1894-1984

- and -

IN THE MATTER of an Appeal by J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. against an assessment of Stamp Duty by the Commissioner for Stamp Duties on three instruments dated 16th May, 1986

BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. — Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES — Respondent

JUDGMENT: DERRINGTON J.

Delivered the 17th day of November, 1988.

CATCHWORDS:

Stamp Duties - memorandum of transfer from retiring trustee to new trustee - exemption from ad valorem duty if (a) it not be intended to alter the terms of the trust and (b) if duty “chargeable” under certain headings in respect of transactions of beneficial interests since retiring trustee's appointment have been paid - whether total holding of beneficial interest by disqualified beneficiary holding before change of trustees implies necessity of

intention to alter trust - whether duties be actually chargeable or merely whether duties have been paid -Stamp Act (Q.) 1894-1987 “conveyance or transfer” subdiv. 4(b)(v)(a) and (aa)

Counsel: P.A. Keane for Appellant
R.I. Hanger Q.C. and J.S. Douglas for Respondent
Solicitors: Hopgood and Ganim for Appellant
Crown Solicitor for Respondent
Hearing date: 18th October, 1988

IN THE SUPREME COURT OF QUEENSLAND No. 720 of 1988

FULL COURT

IN THE MATTER of the Stamp Act 1894-1984

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BETWEEN:

J.A.W. & S. PROPERTY MANAGEMENT NOMINEES PTY. LTD. Appellant

AND:

THE COMMISSIONER FOR STAMP DUTIES Respondent

JUDGMENT - DERRINGTON J.

Delivered the 17th day of November, 1988.

On 19th September, 1970 a trust deed was executed in the State of Victoria setting up a unit trust entitled Superannuation Property Partnership Trust and appointing the Union Fidelity Trustee Company of Australia Limited as trustee. In the course of time the trust deed became an

approved deed for the purposes of Part IV of Division 6 of the Companies (Victoria) Code and consequently would be regarded as a approved deed under the provisions of s. 165 of the Companies (Queensland) Code.

Under the terms of the trust deed, a management company was appointed to be the manager of the business affairs of the trust. The trustee was obliged to concur in any proposal for investment and other business activity of the trust by the management company unless the proposal were inconsistent with the provisions of the deed. The management company also had the power and duty of selling units in the trust but its power was circumscribed by a provision that no person should become a unit holder unless it be a bona fide superannuation fund as defined in the deed or a trustee of or nominee for such a fund. This provision will prove to be quite important in the discussion which follows. There is a further provision in the deed in the event of a unit holder's ceasing to be a bona fide superannuation fund or a trustee or a nominee for such a fund. In those circumstances the management company could require certain dealings with the units held by that holder. However, that term relates only to the case where the unit holder was a superannuation fund at the time of acquisition of its units but it seems to imply a discretion in the management company at its discretion to permit, of the holding of units by a holder which was not a superannuation fund. This implication could not extend to such a person who was unqualified at the time of acquisition of units.

In 1982 and 1984, the trustee acquired certain freehold property in Queensland and duty was paid on the relevant instruments. In the course of time and as the result of the transactions mentioned below, the Union Fidelity Trustee Company Limited retired as trustee in favour of the appellant J.A.W. & S. Property Management Nominees Pty. Ltd. and has executed suitable memoranda of transfer over the Queensland real property pursuant to that change of trusteeship. The Commissioner for Stamp Duties

has assessed ad valorem duty upon these instruments and it is in respect of that assessment that this appeal is brought. However it is necessary to complete the narrative of events antecedent to this change of trustees.

On 7th April, 1986, of 1,224 units in the trust then issued, the management company acquired 27 units and Winstonridge Pty. Ltd. ("Winstonridge") acquired the remaining 1197 units. Winstonridge had also acquired control of the management company and the composition of the board of directors thereof. Neither the management company nor Winstonridge was a superannuation fund nor a trustee or nominee for one within the meaning of the deed and was therefore not qualified to be a unit holder. Nevertheless they were registered as unit holders in the trust register and remain so. This was then followed by the change of trustees and the execution of the consequential memoranda of transfer to which this appeal relates.

The First Schedule to the Stamp Act 1894-1988 sets out the duty payable in respect of various classes of transaction. The relevant instruments come within the general description "Conveyance or Transfer", and within part of subdiv. (4) of that classification the following are the relevant parts which have given rise to the issues in this appeal:—

> "(4) Of any property (except stock or marketable security or right in respect of shares) -
>
> ...
>
> (b) In any other case to which paras. (1) and (2) do not apply ... (Duty calculated on the full unencumbered value of the property ...)
>
> Provided that the duty payable in respect of conveyances or transfers made for the sole purpose of -
>
> (v) effecting the retirement of a trustee or the appointment of a new or additional trustee where the Commissioner is satisfied -

(a) that the trustee or remaining trustee is to hold upon the same trusts as the property had theretofore been held and that it is not intended to alter the terms of those trusts at any future time; and

(aa) that there has been no change of beneficial interest from the time of appointment of the retiring or continuing trustee (or both) in respect of which ad valorem duty chargeable under the heading 'SETTLEMENT, DEED OF GIFT OR VOLUNTARY CONVEYANCE', the heading 'DECLARATION OF TRUST' or the heading 'CONVEYANCE OR TRANSFER' in this Schedule has not been paid on an instrument relating to the particular property and particular transaction;

shall be ... $4.00."

If the instruments do not meet these criteria set out in paras. (a) and (aa), then duty is exigible ad valorem. Although nominal duty is payable on such instruments as those in this case if there is nothing more than the simple consequences of a change of trustees, the structure of this framework is designed to prevent the use of a change of trustees as a vehicle of avoidance or evasion of duty by the shuffling of beneficial interests in the trust, a scheme which was in fashion before the introduction of these provisions.

The onus of proving that an instrument which falls within the general terms of a head of charge is within an exemption from that head lies upon the person claiming the exemption: Yelland v. Winter (1885) 50 J.B. 38; Holmleigh (Holdings) Ltd. v. I.R.C. (1958) 37 A.T.C. 406 at p. 408; Scoigne Properties Ltd. v. I.R. Commrs. (1958) A.C. 549 at p. 564; Littlewoods Mail Order Stores Ltd. v. I.R. Commrs. (1963) A.C. 135 at p. 150; Halsbury 4 ed. vol. 44 para. 710. Whilst the rule as to construction of ambiguous words in the principal provision might favour the taxpayer, the same does, not apply to ambiguities in the wording of an exemption. Liftman v. Barron (1951) Ch. 993 at p. 1003; affd. (1953) A.C. 96. Halsbury op. cit. These principles apply in the present case because the relevant provisions are part of the proviso whereby there is exemption from the

higher rate of duty and from any duty above the sum of $4.00.

There is no difficulty associated with the need for the Commissioner's satisfaction. As the Commissioner has set out in the case stated those facts presented to him by the appellant of which he is satisfied, this Court takes those facts and decides the matter to its own satisfaction, with which in the circumstances of this case the Commissioner's satisfaction should accord; Central and District Properties Ltd. v. I.R. Commrs. (1966) 1 W.L.R. 1015 at p. 1024; Leigh Spinners Ltd. v. I.R. Commrs. (1956) 16 P.C. 425 at pp. 433-434; K.L.D.E. Pty. Ltd. (In liq.) v. Commr. of Stamp Duties (Qld.) 84 A.T.C. 4119 at p. 4130. It is clear that, as presently advised, the implication of the assessment is that he does not experience the necessary satisfaction, and his learned counsel has informed us of the specific impediments to satisfaction upon which he relies. Despite the futurity of the relevant intention and the difficulties relating to its impalpable nature, the Commissioner's satisfaction can be determined one way or the other by a variety of means. One way may be his acceptance of a statutory declaration, but of course he is not obliged to accept it if there are objective indications to the contrary such as might leave him without the appropriate satisfaction. He might also continue to scrutinise the matter in the future to see whether the later conduct of the parties might throw light on their present intent such as to alter his satisfaction and leading to a reassessment of duties. It is essential to note that the subject of that satisfaction is not whether the appellant is seeking to avoid duty. It would be artificial to expect him to have insight into the purpose behind every change of interest in or term of the trust. The ways of tax avoiders are sometimes devious, ingenious and difficult to anticipate; and so the point to which the satisfaction or otherwise it directed is simply whether there is any alteration to the trust which is intended. If the transaction is free from this problem, it should be possible to effect any change before or as part of the

transaction. The legislature accordingly made the intention to alter the terms of the trust the point of departure from exemption without regard to the purpose behind the alteration. With this in mind, it is necessary to turn to the precise-construction of the relevant exemption provisions, paras. (a) and (aa), and to relate them to the circumstances of the present case.

The first requires that, before the exemption above $4.00 applies, the Commissioner must be satisfied that the new trustee is to hold “upon the same trusts as the property had theretofore been held and that it is not intended to alter the terms of those trusts at any future time”. The argument advanced by the Commissioner is simply that, as the management company and Winstonridge are not entitled to be registered as unit holders, the trust must be amended to accommodate them or they must be replaced by qualified unit holders in order to conform with the law; and so an intention to vary the trust from that formerly operating must be imputed. This, he says, leads to a reasonable lack of satisfaction that the terms of the trust are intended to be altered if only to regularise the situation, and it is a sufficient factor to have that effect despite the declaration by the appellant, by its director, to the contrary. It must be noted that the Commissioner's doubts are directed, not to any change in beneficial holding under the trust, but” to the terms of the trusts, and particularly the term relating to “the qualifications of unit holders.

The word “theretofore” in this context means immediately preceding the change of trustees: R. v. Great Western Railway 28 L.J.M.C. 246; Portsmouth v. Smith 13 Q.B.D. 184; 10 App. Ca. 364; R. v. Cotham (1898) 1 Q.B. 802. Therefore, it is necessary to look to the time immediately before the change of trustees in order to determine whether the Commissioner should be satisfied that there was then no intention to alter the terms of the trust at a future time. The difficulty with the Commissioner's proposition is that position after the change of trustees

is exactly identical with that existing immediately before it. Any technical alteration to the terms of the trust in order to regularise the position in law was required immediately before the change of trustees as well as after, so that this position has not changed and there is no suggestion that it is intended to be changed in substance. As it has been observed the Commissioner does not suggest that for the future the beneficial entitlement under the trust is intended to be altered but rather the terms of the trust which affect qualifications. However it must be remembered that the terms of a trust relate to an arrangement in equity and that the beneficial interest, with its incidents, under a trust is an interest in equity. That interest with its incidents was established in equity once and for all at the time of the substantive transaction which by its operation necessarily modified the terms of the trust immediately. In this respect the terms of the written deed of trust were of no importance in substance and were displaced in operation by the course of events. Consequently, there was thereafter no reason and no intention to alter the terms of the trust. Similarly, because the position as to beneficial entitlement and its terms are to remain the same as before, the new trustee will be holding the property “on the same trusts as theretofore”, which matches the first part of the formula in the paragraph. The later formal regularisation of a defect which also existed theretofore can hardly be described as an alteration of the terms of the trust in this context.

It might well be different if it were intended to change the substantive rights of the beneficiaries or any of them or their respective relationships inter se by reason of the validation of the holding of some unqualified unit holders as against that of others who already validly held their holdings, for in that case the regularisation of the position of the invalid holders would then effect a change. In the present case however, the only unit holders, the management company and Winstonridge, are both

incompetent to hold their units, but there are no other persons whose rights would be affected by such action.

For these reasons, it cannot in these circumstances be said that any future intention to regularise the position of the unit holders should be found to be an intention to alter the terms of the trusts within the meaning of this paragraph.

All of this assumes that it will be possible to effect an alteration in the trust deed which would cure the difficulty caused by the unit holder's present disqualification. It is not necessary here to decide precisely what the final result of the transaction in law and equity will be, providing that the position is not intended to be changed; and that is the case here whatever that result may be. Alternatively, the Commissioner's proposition assumes that there is an intention to effect a regularisation of the trust, but in the absence of any such move to that end to the present time, such an assumption is of very doubtful validity. In any event, in view of the operation of equity upon the terms of the trust, it has not been demonstrated to us that any further action is at all necessary. In the result there is nothing which should have excited a doubt in the Commissioner's satisfaction in respect of para. (a) of this part of the schedule to the Act.

The second issue relates to the reference in para. (aa) whereby the exemption above $4.00 is applicable providing that the Commissioner is satisfied that in respect of any change of beneficial interest since the time of appointment of the retiring trustee, ad valorem duty “chargeable” under the respective headings in the Schedule has been paid on the relevant instrument in that transaction. There have certainly been changes in the holding of the beneficial interest of the unit holders since the appointment of the retiring trustee, but because the unit register is in Victoria, no duty has been paid in Queensland on the transactions. Although duty may well have

been paid in Victoria, it is common ground that this reference to payment of duty refers to payment of duty in Queensland.

The competing arguments are simple enough. The Commissioner argues that unless there has been a payment of a duty chargeable in Queensland, then the term has not been fulfilled and the exemption does not apply; and if there has been no duty chargeable and so none paid, then the appellant cannot say that there has been a payment of duty chargeable in Queensland. Put another way the Commissioner's argument is that where there have been such transactions as described then ‘duty will be payable upon the instruments relating to the change of trusteeship unless the Commissioner has in fact received a payment of duties in respect of those earlier transactions; and the duties referred to are those which are chargeable under those headings although they may not have been actually chargeable in respect of those specific transactions. If he has not received such duties, then the exemption does not apply. The appellant's argument is that the paragraph refers only to the payment of duty which is actually chargeable in Queensland, so that, because the transactions took place in Victoria and are therefore not chargeable with duty in Queensland, there are no transactions which are chargeable with duty which has not been paid.

The Commissioner's proposition requires that the reference to the instruments' being “chargeable” under the respective headings in the Schedule to the Queensland Act is merely a descriptive means of identifying the duty for which there is to be payment as required by the expression, rather than requiring that duty should be actually exigible in the particular case.

In support of this, it is further argued that the purpose behind the provision is to ensure that duties are to be collected upon this transaction unless duties have otherwise been received so that duties will be received one way or the other. However, when construing the provisions

of a revenue statute, it is necessary to look for what is said rather than for any intendment. There is no presumption as to a tax and nothing is to be implied. It is necessary only to look fairly at the language used: Cape Brandy Syndicate v. I.R.C. (1921) 1 K.B. 64 at p. 71; Commissioner of Taxation v. Westraders Pty. Ltd. (1981) 54 A.L.J.R. 460 at p. 461; Commissioner of Taxation v. Mullins (1981) Qd. R. 302 at p. 310. In any case, upon the reasonable presumption that duties were paid in Victoria in respect of the assignment of these marketable securities to the present unit holders, as they would in Queensland, it is consistent with the general policy observable in the Queensland Act that further duty should not be exigible in Queensland where duty has been paid in another State. However, it is necessary to consider the meaning of the words themselves rather than to rely upon any suggested policy.

While it is true that it is fundamental to these principles that duties are levied on instruments rather than on the underlying transaction, (cf. D.K.L.R. Holding Co. (No. 2) Pty. Ltd. v. Commr. of Stamp Duties (1982) 149 C.L.R. 431, 449) this does not assist where the relevant passage refers essentially to another feature in respect of which that principle is not germane, particularly where the provision also recognises elsewhere the exigibility of the instrument rather than the transaction. Accordingly, reference to that principle is not helpful here in either direction.

The result promoted by the Commissioner suffers from the principle of construction that relegates one meaning below an alternative reasonable meaning where the former has the result of rendering unnecessary words which are contained in the passage under construction. East London Ry. Co. v. Whitechurch (1874) L.R. 7 H.L. 81, 89, 93; Leon Fink Holdings Pty. Ltd. v. Australian Film Commission (1979) 53 A.L.J.R. 522, 524. In the present case, under the meaning proposed by the Commissioner the reference to the word “chargeable” is quite redundant. It would have been

simple enough to have said that the exemption applies only if duties have been paid on the relevant instruments.

It may be possible to respond that it was necessary to specify their being chargeable under the headings prescribed because it was intended that duty should be paid on a transaction such as that presently under review unless the duties were paid in respect of certain categories which would assure to the Commissioner a certain rate of taxation. This is not altogether convincing. That result could have been achieved by appropriate specification in a separate expression.

Of the two competing constructions, the nature of the expression used tends to support that which requires that the duty be actually chargeable in order that it be regarded for the purpose of this provision, so that if no duty is chargeable then there is none which has not been paid. The mode of expression used is an acceptable form if it is intended to have this meaning. The meaning proposed by the Commissioner would not be so favourably served. In the result, the former is to be preferred.

It follows from the foregoing reasoning that the two issues upon which the Commissioner sought to exclude the exemption have failed and that he should have been satisfied that the exemption applies. Accordingly, the questions put in the case stated should be answered as follows:—

Answer to para. 22(a):—

Question:— Are the memoranda of transfer, being the instruments referred to in paragraphs 9(a), 9(b), 9(c) and 13 hereof liable to be charged with such ad valorem duty as is specified in the First Schedule to the said Act under paragraph 4 of the heading “Conveyance or Transfer”, as assessed by the Commissioner of Stamp Duties?

Answer:— No.

Answer to para. 22(b):—

Question:— If “no” to (a) are the said memoranda of transfer liable to be charged in some other amount under the said heading in the said Schedule?

Answer:— Yes.

Answer to para. 22(c):—

Question:— If “no” to (a) and (b) are the said memoranda of transfer liable to be charged with duty in some other amount specified under any other heading in the said Schedule or under any other and if so, which provision of the said Act;

Answer:— Not applicable.

Answer to para. 22(d):—

Question:— Is the duty payable on the said memoranda of transfer NINETY-FIVE THOUSAND, THREE HUNDRED AND TWENTY-FIVE DOLLARS ($95,325.00)?

Answer:— No.

Answer to para. 22(e):—

Question:— If “no” to (d) is any other amount, and if so what amount, payable as duty on the said memoranda of transfer?

Answer:— Yes. Four dollars in respect of each instrument.

Answer to para. 22(f):—

Question:— How should the costs of and incidental to the stating of this case and of the appeal be borne and paid?

Answer:— By the respondent.