



HIGH COURT OF AUSTRALIA

5 October 2011

TASTY CHICKS PTY LIMITED & ORS v CHIEF COMMISSIONER OF STATE REVENUE

[2011] HCA 41

Today the High Court held that a review by a judge of the Supreme Court of New South Wales from a decision of the Chief Commissioner of State Revenue ("the Commissioner") disallowing an objection to an assessment for pay-roll tax, was not limited to considering whether the Commissioner had erred on the materials before him and failed to make the objection decision according to law. The High Court allowed an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales, which had held that the right of review was so limited.

The fourth and fifth appellants, Mr and Mrs Souris, conducted in partnership a chicken meat processing business ("the Firm"). The third appellant ("Souris Holdings") owned premises, portions of which were separately let to the Firm, the first appellant ("Tasty Chicks") and the second appellant ("Angelo Transport").

The *Pay-roll Tax Act* 1971 (NSW) ("the Pay-roll Tax Act ") and the *Taxation Administration Act* 1996 (NSW) ("the Administration Act") contain "grouping" provisions. These are designed to counter tax avoidance effected by using additional entities to split business activities so that each entity attracts the benefit of pay-roll tax thresholds. The grouping provisions allow the Commissioner to treat separate entities as a single entity for pay-roll tax purposes. The "de-grouping" provisions could be applied by the Commissioner if it were unreasonable to apply the "grouping" provisions. The appellants objected to assessments under the Pay-roll Tax Act and the Administration Act which related to three periods: 1 July 2001 – 30 June 2003 ("the first period"); 1 July 2003 – 30 June 2005 ("the second period"); and 1 July 2005 – 30 June 2007 ("the third period"). The assessments were based upon the Commissioner's grouping of the appellants. In effect, the appellants challenged the Commissioner's refusal to "de-group" Tasty Chicks, Angelo Transport and the Firm.

Section 97 of the Administration Act provided that a taxpayer could apply to the Supreme Court of New South Wales for a "review" if dissatisfied with the Commissioner's determination of an objection made under Div 1 of Pt 10.

Section 100(2) of the Administration Act provided that, on an application for review before the Supreme Court, "the applicant's and respondent's cases ... are not limited to the grounds of the objection" that were before the Commissioner. Section 101(1)(b) of the Administration Act relevantly provided that the court or tribunal dealing with the application for review could make an assessment or other decision in place of the assessment or other decision to which the application related.

Section 19(2) of the *Supreme Court Act* 1970 (NSW) had the effect that proceedings in the Supreme Court under s 97 of the Administration Act were an "appeal" for the purposes of the

Supreme Court Act if so described in the Administration Act. Section 97(4) of the Administration Act provided that a review by the Supreme Court was taken to be an appeal for the purposes of the Supreme Court Act and the regulations and rules made under that Act, except as otherwise provided by that Act or those regulations or rules.

The primary judge set aside the Commissioner's disallowance of the appellants' objections. The primary judge held that the Commissioner was not entitled to apply the "grouping" provisions in relation to the first period. In relation to the second and third periods, the primary judge applied the de-grouping provisions. In applying the de-grouping provisions, the primary judge held that the Court was entitled to re-exercise the Commissioner's powers. The Court of Appeal allowed the Commissioner's appeal, holding that an applicant for review of a decision not to de-group had to establish that the Commissioner erred on the materials before him.

The High Court unanimously held that, when all the above provisions were read together, the primary judge's view of the Supreme Court's jurisdiction and powers was correct. The High Court held that the Court of Appeal erred in considering that the jurisdiction and powers conferred upon the Supreme Court required the taxpayers to show that the Commissioner had erred on the materials before him and that the exercise of discretion by the Commissioner was vitiated by error.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*