

**THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v BARGWANNA & BARGWANNA (AS TRUSTEES OF THE KALOS METRON CHARITABLE TRUST) (S284/2011)**

Court appealed from: Full Court of the Federal Court of Australia  
[2010] FCAFC 126

Dates of judgment: 8 October 2010 & 17 February 2011

Date of grant of special leave: 12 August 2011

Mr & Mrs Bargwananna ("the Bargwannas") are trustees of a fund ("the Fund") established in 1997 for a charitable purpose. Mrs Bargwananna's father ("the father"), an accountant, administered the Fund's accounts and he also provided it with advice. In 1997 Mrs Bagwananna made a contribution to the Fund of approximately \$10,000 and her father also gave it \$160,000 in 2002. In June 2002 the trust entered into an agreement with an airline to provide it with accounting services, services which the father was to provide. The fees derived from those services were reported as Fund income and they were also its major source of assets growth. Over time, funds were applied to the acquisition of shares, interest free loans and a payment of a large sum into a mortgage offset account. They were also used for donations to HELP International and to various churches.

In 2004 the trust applied for endorsement as an income tax exempt entity pursuant to section 50-105 of the *Income Tax Assessment Act 1997* (Cth) ("the Act"). The Appellant ("the Commissioner") refused that application and the Bargwannas successfully appealed that decision to the AAT. The Commissioner's further appeal to the Federal Court was however allowed by Justice Edmonds. His Honour held that the intention of a fund's trustees was irrelevant, when the purposes for which an application (for the whole or part of the fund) was in question. The Bargwannas then appealed to the Full Federal Court. The main question for the Full Federal Court was whether the Fund was "applied for the purposes for which it was established. . ." within the meaning of section 50-60 of the Act.

On 8 October 2010 the Full Federal Court (Dowsett, Kenny & Middleton JJ) unanimously allowed the Bargwannas' appeal. Their Honours held that while the primary judge's ultimate conclusion was correct, his Honour had erred in the reasons he gave. They then remitted the matter to the AAT for re-determination in accordance with their reasons. The Full Federal Court found that there was reason to suspect that section 50-60 of the Act had not in fact been satisfied and that the conduct of the Fund called for a more detailed explanation. Their Honours held however that the entire Fund (not just isolated transactions) should be examined to determine whether it is being applied to the relevant charitable purposes. Ultimately this would depend on the Fund's particular circumstances.

The grounds of appeal include:

- The Full Court erred in holding that the application of part of the fund of the Kalos Metron Charitable Trust for purposes other than public charitable purposes did not result in the criteria in section 50-60 of the Act not being satisfied.

- The Full Court erred in holding that the relevant inquiry is not as to individual transactions but as to the application of the fund as a whole.

On 31 August 2011 the Respondents filed a notice of cross-appeal, the ground of which is:

- The Full Court erred in finding that there appeared to be no point at which the AAT addressed all of the evidence to determine whether or not the Fund, as a whole, was being applied to the relevant charitable purpose.