



HIGH COURT OF AUSTRALIA

29 March 2012

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA v
GRAHAM BARGWANNA & MELINDA BARGWANNA AS TRUSTEES OF THE KALOS
METRON CHARITABLE TRUST

[2012] HCA 11

Today the High Court allowed an appeal from the Full Court of the Federal Court of Australia. The High Court held that the respondents' administration of the Kalos Metron Charitable Trust ("the Trust") had not complied with the requirement for tax exemption under s 50-60 of the *Income Tax Assessment Act 1997* (Cth) ("the Act") because the fund was not "applied for the purposes for which it was established".

The respondents, Mr and Mrs Bargwanna, were at all material times the trustees of the Trust. Between 2003 and 2007 they distributed a total of \$293,914.55 to numerous charitable causes. Mr Craik is a chartered accountant and the father of Mrs Bargwanna. Mr Craik advised the respondents concerning the affairs of the Trust, performed administrative functions in that regard, and was the principal benefactor of the Trust.

In 2004 the respondents applied for an endorsement by the appellant ("the Commissioner") of the Trust with effect from 1 July 2000 as "a fund established in Australia for public charitable purposes by ... instrument of trust". The endorsement would qualify the Trust as an entity exempt from income tax, within the operation of Div 50 of Pt 2-15 of the Act, but the exemption would only apply if "the fund is applied for the purposes for which it was established" in accordance with s 50-60. The Commissioner refused the endorsement application in January 2005. The respondents sought review of this decision, but in April 2005 the Commissioner confirmed the decision to refuse the endorsement application. The respondents' objection to the Commissioner's decision was disallowed in September 2005, and the respondents applied to the Administrative Appeals Tribunal ("the AAT") for review of that decision.

Before the AAT, the Commissioner contended, among other things, that there had been various acts of maladministration of the Trust between 2002 and 2007. In particular, over this period Trust moneys were paid into Mr Craik's Trust Account where, in breach of trust, they were mixed with moneys held by him on behalf of others. Moreover, instead of being credited to clients, the interest generated by this mixed account was credited to a separate bank account which provided Mr Craik with a means of defraying the costs of maintaining his trust account and its related requirements. Additionally, in 2004 the respondents transferred a sum representing almost half the assets of the Trust into a non-interest bearing account in consideration for a housing loan which the respondents obtained from bank in their personal capacities. Although the respondents made payments into this account from other sources, these were exceeded by the sums withdrawn, with the excess representing assets of the Trust.

The AAT set aside the disallowance decision of the Commissioner and substituted a determination that, as at 9 September 2005, the Trust was entitled to endorsement as exempt from income tax with effect from 1 July 2000. The Commissioner brought a successful "appeal" under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) to the Federal Court, which reinstated the Commissioner's decision rejecting the endorsement application. The respondents then appealed to the Full Court of the Federal Court. The Full Court held that the primary judge had erred in finding non-compliance with s 50-60 without treating the explanations of the trustees as relevant and "without regard to the administration of the fund as a whole", and remitted the proceedings to the AAT for determination of such further facts as it deemed necessary.

The Commissioner was granted special leave to appeal to the High Court. The primary issue on appeal was the construction and operation of Div 50 of Pt 2-15 of the Act, and in particular the meaning of "the fund is applied for the purposes for which it was established" in s 50-60. The High Court unanimously allowed the appeal. The Court considered that the relevant provisions of the Act direct attention to the terms of the instrument of trust by which the fund is established in Australia for public charitable purposes. Section 50-60 requires that the fund be "applied" for those purposes, and is not to be understood as requiring only that the fund be "substantially" or "on the whole" applied for those purposes. In the present case, the acts of maladministration relied upon by the Commissioner were not referable to the carrying out of the charitable purposes for which the Deed provided, and the Commissioner was correct to refuse the respondents' application.

- *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.*