

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY, AND CALLINAN JJ

COMMISSIONER OF TAXATION

APPELLANT

AND

COMMERCIAL NOMINEES OF AUSTRALIA
LIMITED

RESPONDENT

*Commissioner of Taxation v. Commercial Nominees
of Australia Limited*
[2001] HCA 33
31 May 2001
S150/2000

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

D H Bloom QC with J L B Allsop SC and J H Momsen for the appellant
(instructed by Australian Government Solicitor)

T M Jucovic QC with K J Burges for the respondent (instructed by Corrs
Chambers Westgarth)

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Commercial Nominees of Australia Limited

Taxation - Income tax - Superannuation funds - Whether trustee of superannuation fund was entitled to claim losses from previous years as allowable deductions - Trust deed had been amended between periods when losses incurred and year of income - Whether amendments amounted to re-settlement - Whether lack of continuity in fund between periods when losses incurred and year of income - Indicia of continuity for purposes of Pt IX of *Income Tax Assessment Act 1936* (Cth).

Income Tax Assessment Act 1936 (Cth), ss 79E, 80, 267, 272, 278.

Superannuation Industry (Supervision) Act 1993 (Cth), ss 10, 45.

1 GLEESON CJ, GAUDRON, McHUGH, KIRBY AND CALLINAN JJ. The issue in this appeal is whether, in the calculation of the taxable income of a superannuation fund for a certain year, the taxpayer's contention, that losses incurred in previous years and carried forward were allowable deductions, was defeated by reason of a lack of continuity in the fund between the periods when the losses were incurred and the year of income.

2 The year of income in question is the year ended 30 June 1995. During that year, the respondent was the trustee of the Miden Group Superannuation Fund. It will be necessary to examine the history and nature of that fund in some detail. For the present, it is sufficient to note that it is common ground that the fund was a complying superannuation fund for the purposes of Div 3 of Pt IX of the *Income Tax Assessment Act 1936* (Cth) ("the Assessment Act"), that (subject to the issue as to continuity) it was originally established by a deed of trust dated 11 March 1988, that in the years ended 30 June 1989 and 30 June 1990 it incurred substantial losses, and that it claimed to be entitled, pursuant to ss 79E and 80 of the Assessment Act, to treat some of the losses as allowable deductions in the year ended 30 June 1995. The appellant disputed that entitlement, contending that, by reason of the changes which will be described below, there was a break in continuity which had the result that the fund which incurred the losses was not the same as the fund that derived the assessable income. The appellant's contention was rejected by the Administrative Appeals Tribunal¹, and by the Full Court of the Federal Court².

3 Complying superannuation funds receive concessional taxation treatment under the Assessment Act. During the 1995 tax year, the incidence of tax in relation to such funds was governed by Pt IX of the Assessment Act, which operated in conjunction with the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the SIS Act"). Section 3 of the SIS Act stated that the object of the SIS Act was to make provision for the prudent management of certain superannuation funds and for their supervision by a Commissioner. It also stated that, in return for such regulation, the supervised funds may become eligible for concessional tax treatment. It is not in dispute that, both before and after the changes mentioned above, the fund presently in question enjoyed such eligibility.

1 Case 22/98, [1998] ATC 282.

2 *Federal Commissioner of Taxation v Commercial Nominees of Australia Ltd* (1999) 167 ALR 147.

Gleeson CJ
Gaudron J
McHugh J
Kirby J
Callinan J

2.

- 4 There is nothing in Pt IX of the Assessment Act, or elsewhere, comparable with the provisions as to continuity of ownership and business which, as amended from time to time, have governed the entitlement of companies to carry forward losses³. Nevertheless, the appellant contends that the scheme of the Assessment Act imports a requirement of continuity which, however imprecise, was not satisfied in the present case.

The legislation

- 5 The scheme of government regulation and concessional tax treatment of superannuation funds which applied to the fund, so far as is presently relevant, originated in 1987 with the *Occupational Superannuation Standards Act* 1987 (Cth) and the Superannuation Industry (Supervision) Regulations (Cth)⁴. Part IX of the Assessment Act, described in the Treasurer's Explanatory Memorandum as "an exclusive legislative regime for determining the taxable income of complying and non-complying superannuation funds", was introduced by the Taxation Laws Amendment Bill of 1988. The SIS Act of 1993, referred to earlier, altered the regulatory scheme, and governed that scheme during the year of income in question. The Occupational Superannuation Standards Regulations (Cth) remained in force, as modified by regulations made under the SIS Act.

- 6 The SIS Act dealt with various kinds of "superannuation entities" (s 5). The kind of entity here involved is a complying superannuation fund, which is potentially eligible for concessional taxation treatment. The "superannuation fund" was an "indefinitely continuing fund" (SIS Act, s 10). It is unnecessary to describe in detail the scheme of regulation which applied to such a fund. There is no dispute that the fund was a complying fund. The SIS Act also contained special provisions for regulatory supervision of the operations of public offer entities, which included public offer superannuation funds (SIS Act, s 10, and Pt 19).

- 7 Part IX of the Assessment Act dealt with the taxation of the income of superannuation funds. The scheme of the Part turned upon the concept of an "eligible entity", which was defined in s 267 to include a fund that was an "eligible superannuation fund" in relation to the year of income. An eligible

3 cf for example, ss 80-80G of the Assessment Act.

4 cf *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 100-103 [9]-[19], 115-119 [57]-[67].

3.

superannuation fund included a complying superannuation fund. Section 267 of the Assessment Act defined that term as having the meaning given to it by s 45 of the SIS Act. The relationship between the regulatory scheme of the SIS Act and the fiscal scheme embodied in Pt IX of the Assessment Act was reflected in a variety of ways. The concept of compliance, which was repeatedly referred to in Pt IX, meant compliance with the regulatory scheme.

8 In a manner similar to Div 6 of Pt III of the Assessment Act, which dealt with trust income, Pt IX operated, in certain circumstances, to impose tax liability upon a person, or persons, or a corporation, in a representative capacity.

9 Section 272 of the Assessment Act provided:

"272 The taxable income of an eligible entity shall be calculated as if the trustee were a taxpayer and:

- (a) if the eligible entity is a non-resident superannuation fund in relation to the year of income concerned – a non-resident; or
- (b) otherwise – a resident."

10 Section 278 relevantly provided:

"278(1) The trustee of a complying superannuation fund is liable to pay tax on the taxable income of the fund of the year of income."

11 It is par (b) of s 272 which, in conjunction with s 278, applies in this case. As Kitto J observed in relation to a corresponding provision in Pt III of the Assessment Act, in *Union-Fidelity Trustee Co of Australia Ltd v Federal Commissioner of Taxation*⁵, the expression "as if", in s 272, shows that the calculation of taxable income is upon a hypothetical basis. Taxable income is, relevantly, assessable income minus allowable deductions (Assessment Act, ss 6, 48). The hypothesis includes the concept that the trustee for the time being of an eligible entity, in this case a complying superannuation fund, derives income, and incurs allowable deductions, not in its own right, but in virtue of its office. Changes of trustee over time, of themselves, make no difference to the liability to pay tax on the taxable income of the eligible entity. If all that had occurred in the present case had been a change of trustee between the years of loss and the year

5 (1969) 119 CLR 177 at 187.

Gleeson CJ
Gaudron J
McHugh J
Kirby J
Callinan J

4.

of income, there would have been no doubt that the losses were allowable deductions. The appellant maintains that issues of continuity similar to those which arise in Pt IX also arise in relation to trusts generally under Div 6 of Pt III, but it is not suggested that such a problem arises simply because of a change of trustee.

12 Part IX is not completely self-contained. Other provisions of the Assessment Act are also material. Of particular present significance are those relating to the carrying forward of losses incurred in previous years as allowable deductions in later years. Sections 80, and 79E, relevantly provided:

"80(2) ... so much of the losses incurred by a taxpayer in any of the 7 years next preceding the year of income as has not been allowed as a deduction from his income of any of those years shall be allowable as a deduction in accordance with the following provisions:

(a) ... the deduction shall be made from the assessable income.

...

79E (3) ... so much of a taxpayer's losses incurred in any of the post-1989 years of income before a particular year of income as has not been allowed as a deduction from the taxpayer's income of any of those years is allowable as a deduction in accordance with the following provisions:

(a) ... the deduction is to be made from the taxpayer's assessable income of that year."

13 A taxpayer is defined as a person deriving income or profits or gains (Assessment Act s 6). Here, the respondent was a taxpayer, in its capacity as trustee of a superannuation fund which, during the year of income, was an eligible entity, the liability to tax being that imposed under the provisions of Pt IX of the Assessment Act. The term "person", when applied, through the definition of taxpayer, to ss 80 and 79E, must be understood in the light of the scheme of Pt IX. The appellant's contention is, not that the mere fact that there was a different trustee of the fund in the years of loss means that the losses cannot be carried forward to the year of income, but that, by reason of changes in the nature of the fund, the taxpayer in the earlier years was not the same taxpayer as in the year of income. That is the issue in the case.

14 Before examining the argument, it is convenient to look at the facts of the case, and the changes which are said to have had the effect of denying the allowability of the losses as deductions.

The changes in the fund

15 The superannuation fund was originally established for the benefit of the employees of a group of associated companies known, following an early name change, as the Miden Group. It started out, in 1988, as a defined benefits fund, the benefits being calculated chiefly with reference to salary and years of service. By 1993, the companies in the Miden Group were experiencing financial difficulties. Miden Pacific Pty Ltd ("Miden Pacific") went into receivership in 1993, and into liquidation in 1994.

16 In 1989 and 1990, an actuary certified that amounts that had previously been contributed were surplus to the fund's requirements. These amounts were returned to the employer companies, and that resulted in the creation of deductible losses in the fund. That is not a subject of dispute.

17 In 1993, substantial amendments were made to the trust deed governing the operations of the fund. Details of those will be set out below. The changes followed the failure of the business of the Miden Group, and a decision to promote the fund as one which would be available to other employers and their employees. The Administrative Appeals Tribunal summarised what was in contemplation as follows⁶:

"The amendments permitted the fund to be promoted as a public offer fund, to use the terminology of one witness. The benefits of a ready structure of trusteeship, management and administration could be offered to new participating employers as sponsors who could then ensure membership of the fund for their sponsored employees. Such an arrangement, it was said, offered financial advantages to an employer and members superior to those which the employer could obtain for itself and its employees by the establishment of a new fund. An added advantage would be the availability of past losses of the fund, if the [respondent] were successful in these proceedings."

18 Under the trust deed, in the form it took on 11 March 1988, it was recited that the Principal Employer, Control Data Australia Pty Ltd ("Control Data"), had decided to establish an indefinitely continuing superannuation fund for the benefit of its employees and employees of associated companies who became

6 Case 22/98, [1998] ATC 282 at 284 [12].

Gleeson CJ
Gaudron J
McHugh J
Kirby J
Callinan J

6.

members, and their dependants. The Principal Employer was the trustee of the fund. Control Data, in December 1989, changed its name to Miden Pacific Pty Ltd. The fund was to be known as the Miden Group Superannuation Fund. The operative provision of the trust deed provided that the fund "shall vest in and shall be controlled and administered by the Trustees upon the trusts of this Deed (which includes the Parts annexed hereto) and shall be indefinitely continuing".

19 Annexed to the trust deed were:

Part 1 – General Provisions

Part 2 – Contributions and Benefits of Category "A" Members

Part 3 – Contributions and Benefits of Category "B" Members.

20 Clause 1.14 of the deed provided for the trustee and the Principal Employer by agreement to include "associated employers" in the fund, whereupon, subject to the conditions of such agreement and of the deed, employees of an associated employer would be eligible to participate in the fund. There was no restriction upon who could become an associated employer. As the Full Court pointed out, it could be any employer, whether related or unrelated to the Principal Employer⁷.

21 The Administrative Appeals Tribunal commented that the machinery and administration clauses in the deed were not unusual and were what would be expected in a superannuation deed executed at that time, although some of the provisions "might be regarded in later years as harsh". Under the original deed, the category "B" members contemplated were those in respect of whom the employer contributed under the *Social Security Act* of the United States of America. Subject to that distinction, and subject to the possibility of admitting associated employers from outside the Miden Group, until the changes referred to below, the members of the fund were employees of the Miden Group.

22 The original trust deed contained a wide power of amendment. Clause 1.41.1 empowered the Principal Employer to:

"amend, add to, delete or replace all or any of the provisions of the Deed (including this clause) as the Principal Employer sees fit ... provided that no amendment, addition, deletion or replacement ... shall take effect in

7 (1999) 167 ALR 147 at 151 [21].

7.

respect of a member or beneficiary without that person's consent ...
unless:

- (a) the actuary (whose decision shall be final) determines that such amendment, addition, deletion or replacement will not substantially prejudice the accrued benefit value of such member or beneficiary and will not increase the member's liability to contribute to the fund."

23 After the failure of the business of the Miden Group, as was noted above, a decision was taken to offer participation and membership in the fund to the public by inviting employers outside the Miden Group, and their employees, to join. Extensive amendments were made to the terms of the trust deed.

24 On 1 November 1993, an amending deed was executed with effect from 1 July 1992. The respondent was appointed the new trustee, and the fund adopted a new set of rules. A professional management company was appointed administrator.

25 The Deed of Amendment of 1 November 1993 recited the power of amendment under cl 1.14.1 of the original trust deed and some matters of history, including the fact that the employers of the category "A" and "B" members as at 1 July 1993 had become overdue in the payment of their contributions and that the trustee had determined to pay 80 per cent of any benefit payable from the fund and the remaining 20 per cent when sufficient funds were available. The operative provisions of the Deed of Amendment included the following:

"2. The Trust Deed is amended by:

- (a) deleting Parts 1, 2 and 3 of the Trust Deed; and
- (b) inserting the rules attached to this deed ("Rules").

3. This deed includes the Rules and the Rules include Schedules 1, 2 and 3.

4. The Trustee must hold the assets of the Fund on trust to apply them in the manner set out in the Rules."

26 It is not disputed that the amendments effected by cl 2 were within the power of amendment given by the original deed. It may be doubted that cl 4 was strictly necessary. Its presence is understandable, but it was accepted in

Gleeson CJ
Gaudron J
McHugh J
Kirby J
Callinan J

8.

argument that cll 2 and 3, read with the operative provisions of the original deed, produced the same consequence.

27 The "A" and "B" categories of members, who were former employees of the Miden Group were retained, but a new category, "C", was introduced to cover the employees of new participating employers. Contributions in respect of category "A" and "B" members ceased. As at 30 June 1995, there were 28 members in category "A", 37 members in category "B", and 133 members in category "C".

28 There was a change in the nature of benefits, from defined benefits to accumulations. There was evidence that one reason for this was related to the complexities of administration of defined benefits funds and associated problems caused by the introduction of the superannuation guarantee charge from 1 July 1992.

The issue

29 The appellant argues, by analogy with the principles that have been applied in determining whether an exercise of trust powers constitutes a settlement, or resettlement, of trust property, that what occurred in the present case was a fundamental alteration in the trust relationship established by the original deed, such that it destroyed the necessary continuity of the "taxpayer" for the purposes of ss 80 and 79E of the Assessment Act. Reference was made to stamp duty cases such as *Davidson v Chirnside*⁸, *Wedge v Acting Comptroller of Stamps (Vict)*⁹ and *Commissioner of Stamp Duties (Q) v Hopkins*¹⁰. Reliance was placed upon the speech of Lord Wilberforce, in a different context, in *Roome v Edwards*¹¹, concerning the indicia and circumstances relevant to a judgment as to whether there has been a settlement or resettlement.

30 Whatever may be the position in relation to the continuity of trusts generally, in applying Pt IX of the Assessment Act, the legal and commercial

8 (1908) 7 CLR 324 at 340-341.

9 (1941) 64 CLR 75.

10 (1945) 71 CLR 351.

11 [1982] AC 279 at 292-293.

9.

incidents of superannuation funds, and the interrelationship between the Assessment Act and the SIS Act, must be taken into account.

31 The taxpayer, for the purposes of ss 80 and 79E, is identified by Pt IX, and, in particular, by ss 272 and 278, understood in the context of Pt IX. The taxable income, (assessable income minus allowable deductions), is that of an eligible entity, and it is the trustee for the time being of the eligible entity that is liable to pay tax on that taxable income as if the trustee were a resident taxpayer.

32 The nature of an eligible entity is such that changes in the incidents of the trust relationship established at its creation are not only possible, but in some respects probable. In the case of an indefinitely continuing superannuation fund, operating under the regulatory scheme in the SIS Act, the trustee might change from time to time. The trust property would almost certainly be in a constant state of change, as contributions were received and employee benefits were paid. The identity of the persons entitled to benefit under the trust would be likely to change over time, as new members came into the scheme and others left. The nature of the benefits provided by the scheme might alter over the years, in response to industrial or market pressures, or regulatory requirements. In the case of a public offer superannuation fund, there would be likely to be substantial changes of membership over time, as new participating employers brought their employees in.

33 The appellant, compelled to acknowledge the possibility, indeed, likelihood, of such changes in the incidents of a trust relationship involving a complying superannuation fund, argued, nevertheless, that there are degrees of change, and that, in the present case, the extent of the changes meant that, either the original eligible entity came to an end, or, alternatively, in the year ended 30 June 1995, there were two eligible entities, and only one of them was entitled to carry the earlier losses forward. On that approach, the termination of the former eligible entity, or the creation of the new eligible entity, occurred when the Deed of Amendment took effect. At that time, however, some of the former members of the fund remained, some of the trust property remained, and the regulatory authority continued to treat the fund as a single entity.

34 If the question whether the eligible entity in the year ended 30 June 1995 was the same as the eligible entity in the years of loss is a question of fact, then there are concurrent findings of fact adverse to the appellant. But there is a question of statutory construction involved. The appellant argues that the Administrative Appeals Tribunal and the Full Court of the Federal Court erred in their approach to the problem by not looking at the question as one of degree and by attaching controlling significance to the consideration that the trusts which

Gleeson CJ
Gaudron J
McHugh J
Kirby J
Callinan J

10.

governed the operation of the superannuation fund during the year ended 30 June 1995 were the trusts of the original deed as amended by the exercise of a power of variation given by the original deed.

35 The Full Court of the Federal Court considered what it described as the resettlement analysis¹² and concluded that, far from there having been a fundamental change in the nature and incidents of the trust relationship, a comparison of the old and new arrangements indicated that they were essentially the same. The fund continued to provide benefits for some employees or former employees of the Miden Group. The capacity to admit to participation in the fund employers of companies unrelated to the Miden Group had existed from the outset. The problem, however, is that a judgment as to what is "essential", in this context, largely turns upon the level of generality or particularity at which the changes are considered. At one level there was, at all material times, a complying superannuation fund, established to provide employee benefits, which were potentially available to employees or former employees of the Miden Group and others. At another level, what had originally been a defined benefit fund intended, for practical purposes, at least mainly for Miden Group employees, became a public offer fund providing accumulation benefits. There is nothing in Pt IX of the Assessment Act which provides a criterion by reference to which it is possible to decide whether such changes are essential or inessential, fundamental or immaterial.

36 As the Full Court¹³, and the Administrative Appeals Tribunal held, the question is one of continuity, to be considered in the context of a superannuation fund which, of its nature, may be expected to undergo change. The question is whether the eligible entity which derived the taxable income in the year ended 30 June 1995 is a different entity from the eligible entity that incurred losses in the earlier years. If, as the appellant contends, it is a different entity, there is a question as to what happened to the original entity. The three main indicia of continuity for the purposes of Pt IX are the constitution of the trusts under which the fund (if a trust fund) operated, the trust property, and membership. Changes in one or more of those matters must be such as to terminate the existence of the eligible entity, or to produce the result that it does not derive the income in question, to destroy the necessary continuity. The trusts under which the fund operated in 1994-1995 were constituted by the original trust deed in 1988 as

12 (1999) 167 ALR 147 at 155-156 [41]-[47].

13 (1999) 167 ALR 147 at 156-158 [48]-[57].

11.

varied by the exercise, in 1993, of a power of amendment. The property the subject of the trusts did not alter at the time the amendments took effect. Persons who were members of the fund before the amendments remained members of the fund after the amendments. The fund, both before and after the amendments, was administered as a single fund, and treated in that way by the regulatory authority.

37 The eligible entity established in 1988 did not come to an end in 1993, and it did not divide into two eligible entities. The conclusion of the Administrative Appeals Tribunal, and the Full Court, was correct.

Order

38 The appeal should be dismissed with costs.

