HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, CRENNAN, KIEFEL AND BELL JJ

TASTY CHICKS PTY LIMITED & ORS APPELLANTS

AND

CHIEF COMMISSIONER OF STATE REVENUE RESPONDENT

Tasty Chicks Pty Limited v Chief Commissioner of State Revenue
[2011] HCA 41
5 October 2011
S218/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales dated 4 January 2011.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of New South Wales for further hearing in accordance with the reasons for judgment of this Court.*

4. *The costs to date in the Court of Appeal of the Supreme Court of New South Wales be determined by that Court on its final disposition of the appeal.*

5. *The respondent pay the appellants' costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

C J Bevan with A Tsekouras for the appellants (instructed by Legal Ease Lawyers)

G C Lindsay SC with I C Latham for the respondent (instructed by Crown Solicitor (NSW))

CATCHWORDS

Tasty Chicks Pty Limited v Chief Commissioner of State Revenue

State taxation – Pay-roll tax – Taxpayer dissatisfied with Chief Commissioner's determination of objection to assessments may apply to Supreme Court for "review" pursuant to *Taxation Administration Act* 1996 (NSW), s 97.

Administrative law – Courts – Original jurisdiction upon statutory "appeal" and "review" in respect of administrative decision – Nature, power and duties of court in exercise of that jurisdiction.

Words and phrases – "appeal", "review".

Taxation Administration Act 1996 (NSW), ss 97, 101.
Pay-roll Tax Act 1971 (NSW), Pt 4A.

1 FRENCH CJ, GUMMOW, CRENNAN, KIEFEL AND BELL JJ. This appeal from the Court of Appeal of the Supreme Court of New South Wales (Giles and Macfarlan JJA and Handley AJA)[1] arises from a dispute concerning assessments of the liability of the appellants to pay-roll tax, but turns upon the construction of the statutory provisions governing objections to assessments, and "review" thereof by the Supreme Court.

2 The central provisions are found in Pt 10 of the *Taxation Administration Act* 1996 (NSW) ("the Administration Act"). Division 1 (ss 86-95) of Pt 10 is headed "Objections" and Div 2 (ss 96-103A) is headed "Reviews". Except as provided by Div 2 of Pt 10, no court or tribunal or other body or person has "jurisdiction or power" to consider any question concerning the determination of any objection under Div 1 of Pt 10 (s 103A(1)).

3 Section 97 provides that a taxpayer may apply to the Supreme Court of New South Wales for a "review" if dissatisfied with the determination by the respondent, the Chief Commissioner of State Revenue ("the Chief Commissioner") of an objection by the taxpayer under Div 1. A taxpayer may also apply under s 96 to the Administrative Decisions Tribunal ("the ADT") for a "review" in respect of a decision of the Chief Commissioner. The ADT is established by s 11 of the *Administrative Decisions Tribunal Act* 1997 (NSW) ("the ADT Act"). However, if the taxpayer applies to the ADT pursuant to s 96 of the Administration Act, the taxpayer cannot apply to the Supreme Court in respect of the same decision (s 97(2)). It will be apparent that in Pt 10 Div 2 the term "review" is used with respect to proceedings both in the ADT and in the Supreme Court.

4 The office of the Chief Commissioner is created by s 60 of the Administration Act; s 61 gives to that officer the general administration of the State taxation laws identified in s 4.

5 An "appeal" from an administrative decision to a court is the creature of statute and it confers original, not appellate, jurisdiction[2]. Further, where a jurisdiction called an "appeal" is enlivened, it is essential to identify its nature

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1 *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* [2010] NSWCA 326.

2 *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 331-332 [18]; [2010] HCA 24.

and the duties and power of the court in the exercise of that jurisdiction[3]. The term "review" presents similar considerations. It takes its meaning from the context in which it appears[4]. It may be used by the statute in question to empower decision-making by an administrative body, or to confer a species of original jurisdiction on a court[5]. If the latter, again it will be necessary to identify the nature of the "review" and the duties and powers of the court in the exercise of that jurisdiction.

6 These distinctions are essential to the resolution of the issues presented on this appeal.

7 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 Chief Commissioner "grouped" the appellants for the purposes of the *Pay-roll Tax Act* 1971 (NSW) ("the Pay-roll Tax Act")[6] and the Administration Act. Mr and Mrs Souris have not challenged the "grouping" of the Firm and Souris Holdings under Pt 4A of the Pay-roll Tax Act and have not sought their "de-grouping" for pay-roll tax purposes. What has been challenged is the refusal by the Chief Commissioner to "de-group" Tasty Chicks, Angelo Transport and the Firm.

8 In the Equity Division of the Supreme Court, Gzell J[7] set aside the disallowance by the Chief Commissioner of objections made by the appellants against assessments under the Pay-roll Tax Act and the Administration Act for six years, being the years ending 30 June 2002 to 30 June 2007 inclusive. The

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3 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 399-400 [27]; [2010] HCA 32.

4 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261; [1995] HCA 10.

5 See *Pasini v United Mexican States* (2002) 209 CLR 246 at 253-254 [11]-[13]; [2002] HCA 3.

6 Since repealed with effect 1 July 2007 by s 104 of the *Payroll Tax Act* 2007 (NSW).

7 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue* (2009) 77 ATR 394.

Chief Commissioner had applied the "grouping" provisions in Pt 4A of the Pay-roll Tax Act and had refused to apply the "de-grouping" provisions. Prima facie each taxpayer had the benefit of a pay-roll tax threshold of $600,000 which applied in each of the relevant years. The "grouping" provisions were designed to counter tax avoidance through the splitting of business activities by the use of additional entities, each attracting a threshold. The "de-grouping" provisions were available for application by the Chief Commissioner upon determination, in broad terms, that it would be unreasonable to apply the "grouping" provisions.

9 The assessments fell within three periods, and the terms of Pt 4A varied between the first period and the other two periods. With respect to the first period, ending 30 June 2003, the primary judge held that the Chief Commissioner had not been entitled to apply the "grouping" provisions to the Firm, Tasty Chicks and Angelo Transport and so did not need to consider whether the "de-grouping" provisions should have been applied to all or any of these appellants. With regard to the second and third periods, ending respectively 30 June 2005 and 30 June 2007, no complaint was made of the "grouping" of these appellants. Rather, the proceedings before the primary judge turned upon the application of the "de-grouping" provisions to Tasty Chicks and Angelo Transport. His Honour held that he was entitled to re-exercise the powers of the Chief Commissioner under those provisions and, in doing so, replaced the decision of the Chief Commissioner with a decision that on and after 1 July 2003 Tasty Chicks and Angelo Transport were not members of a group with the Firm.

10 The Court of Appeal allowed the appeal by the Chief Commissioner and set aside the judgment and orders of Gzell J.

11 In delivering the leading judgment, Handley AJA indicated that it was necessary for the Court of Appeal to determine at the outset the nature of the proceeding in the Supreme Court under s 97 of the Administration Act. However, with reference to s 97, his Honour used the term "appeal" rather than "review". His Honour concluded that to this "appeal" there applied the analysis by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[8]. Handley AJA added[9]:

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8 (1949) 78 CLR 353; [1949] HCA 26.

9 [2010] NSWCA 326 at [33].

> "On such an appeal [under s 97] the [Supreme] Court must consider whether the appellant has established that the Commissioner erred on the materials that were before him. Where, as in this case, the [Pay-roll Tax Act] makes the taxpayer's liability depend on the Commissioner being 'satisfied' that a fact exists, the question for the Court on appeal is whether the Commissioner's decision to the contrary was vitiated by error of the kinds referred to by Dixon J."

In *Avon Downs*[10], Dixon J had said:

> "[The decision of the Federal Commissioner of Taxation], 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. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law."

12 For the reasons which follow, the analysis in the Court of Appeal was faulty and the appeal to this Court should be allowed. The consequence is that the appeal to the Court of Appeal will require reconsideration in the light of the determination by this Court of the nature of the "review" upon which Gzell J was engaged under s 97 of the Administration Act.

13 Upon an application for review under Pt 10 Div 2 of the Administration Act, the cases of the applicant and respondent "are not limited to the grounds of

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10 (1949) 78 CLR 353 at 360.

the objections" before the Chief Commissioner (s 100(2)). The powers of the Supreme Court and the ADT are spelled out in s 101(1). This provides:

> "The court or tribunal dealing with the application for review may do any one or more of the following:
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> (a) confirm or revoke the assessment or other decision to which the application relates,
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> (b) make an assessment or other decision in place of the assessment or other decision to which the application relates,
>
> (c) make an order for payment to the Chief Commissioner of any amount of tax that is assessed as being payable but has not been paid,
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> (d) remit the matter to the Chief Commissioner for determination in accordance with its finding or decision,
>
> (e) make any further order as to costs or otherwise as it thinks fit."

The importance of par (b) of s 101(1) is emphasised by the definition of "assessment" in s 3(1). This includes not only an assessment of tax liability by the Chief Commissioner, but also an assessment by the Supreme Court or ADT on an application for review.

14 Section 100(2) of the Administration Act confirms that the powers given to the ADT by s 101(1) of that Act are supplemented by the provision in s 63(1) of the ADT Act that the ADT decide "the correct and preferable decision ... having regard to the material then before it", and that in s 63(2) to the effect that the ADT may exercise all the functions conferred on the Chief Commissioner.

15 Section 19(2) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") renders proceedings in the Supreme Court under s 97 of the Administration Act an "appeal" for the purposes of the Supreme Court Act if so described in the Administration Act. Section 97(4) of the Administration Act then engages s 19(2) of the Supreme Court Act by stating:

> "A review by the Supreme Court is 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."

16 Part 7 (ss 101-110) of the Supreme Court Act deals with "appeals" from the Supreme Court itself and is not picked up by operation of s 97(4) of the Administration Act. However, s 75A of the Supreme Court Act applies to "appeals" from administrative bodies[11]. Section 75A is "picked up" by dint of s 97(4) of the Administration Act, along with relevant regulations and rules made under the Supreme Court Act.

17 The qualification in s 75A(4) of the Supreme Court Act that s 75A "has effect subject to any Act" directs attention to the particular provisions of s 100 and s 101 of the Administration Act to which reference has been made above. These are supplemented by s 75A(7) (the Supreme Court may receive further evidence) and s 75A(10) (the Supreme Court may make any assessment which ought to have been made).

18 When all these provisions are read together it becomes readily apparent that Gzell J correctly proceeded on the basis that the Supreme Court was empowered to set aside the disallowance by the Chief Commissioner of the objection by the appellants, allow the appellants' objection, set aside the determination of the Chief Commissioner not to exercise his "de-grouping" discretion, revoke the assessments, and require reassessments by the Chief Commissioner.

19 Reliance for the contrary result in the Court of Appeal upon *Avon Downs* is misplaced. In that case, the taxpayer was dissatisfied with the disallowance of a deduction which would have been allowable but for the operation of s 80(5) of the *Income Tax Assessment Act* 1936 (Cth) ("the Income Tax Act") as it then stood. The sub-section turned upon the taxpayer satisfying the Commissioner of the existence of a certain state of affairs. There was no requirement that the Commissioner give reasons, and his decision presented an inscrutable face[12]. On the other hand, s 93 of the Administration Act required that the Chief Commissioner give, in the notice of determination of an objection, reasons for the disallowance of the objection or its partial allowance. The dissatisfied taxpayer in *Avon Downs* had utilised the avenue provided by s 187(b) of the Income Tax Act by requesting that the Commissioner treat its objection "as an appeal" and forward it to the High Court; upon that "appeal" the taxpayer was

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11 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at 399 [27].

12 See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 623 [34], 639 [104]-[105]; [2010] HCA 16.

limited to the grounds stated in the objection. By way of contrast, where the taxpayer pursued the avenue leading to a Board of Review, the Board had all the powers and functions of the Commissioner and its decisions upon review were deemed to be assessments, determinations or decisions of the Commissioner (s 193(1)).

20 Against that background, Gzell J observed[13]:

> "The powers in the [Administration Act], s 101 are quite different from the powers of a court on appeal under the [Income Tax Act]. They are specific and include the power to make an assessment or other decision in place of the assessment or decision the subject of the review. And any dichotomy between the powers of the Supreme Court and the powers of the [ADT] has been abrogated."

His Honour added that the powers on review are the same for the Supreme Court and the ADT. That requires qualification to allow for the supplementation of the Supreme Court's powers by s 75A of the Supreme Court Act, but otherwise is correct.

21 It should be added that Pt 10 of the Administration Act took the form described in these reasons after substantial amendments made by the *Administrative Decisions Tribunal Legislation Amendment (Revenue) Act* 2000 (NSW)[14]. In his second reading speech in the Legislative Council on the Bill for that Act, the Treasurer had explained as follows the reasons for the provision of concurrent "jurisdiction" in the ADT and the Supreme Court[15]:

> "It is anticipated that, by conferring concurrent jurisdiction on the [ADT] and the Supreme Court, taxpayers who are presently deterred from pursuing a review of the Chief Commissioner's decision past the objection stage because of the complexity, expense and delay associated with Supreme Court proceedings will take advantage of access to the cheap and flexible review mechanisms offered by the [ADT]. Conversely, those

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13 (2009) 77 ATR 394 at 413 [165].

14 Section 97(4) was added thereafter by the *State Revenue Legislation Amendment Act* 2001 (NSW), Sched 4, cl 5.

15 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 11 October 2000 at 8935.

taxpayers who wish to access the judicial expertise of the Supreme Court because their particular matter involves highly technical and difficult legal issues or because the amount of tax in issue is substantial can do so."

22 The Court of Appeal should not have allowed the Chief Commissioner's appeal by proceeding on the basis that the jurisdiction and powers conferred upon the Supreme Court were such that before Gzell J it had been for the taxpayers to show that the Chief Commissioner had erred on the materials before the Chief Commissioner and to show that the exercise of discretion by the Chief Commissioner was vitiated by error of a kind referred to in *Avon Downs*. The appeal to this Court should be allowed with costs, the orders of the Court of Appeal dated 4 January 2011 set aside, and the matter be remitted to that Court for further hearing. The costs to date in the Court of Appeal will be for the determination of the Court of Appeal on its final disposition of the appeal.