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SUPREME COURT OF VICTORIA

COMMISSIONER of BUSINESS FRANCHISES v CHOKR

Smith J

24-26 October, 28 November 1990

DISCOVERY OF DOCUMENTS – NOTICES OF ASSESSMENT – WHETHER NOTICES CONCLUSIVE – WHETHER ISSUES ABOUT THE ASSESSMENT CAN BE CHALLENGED IN COURT – WHETHER "MATTERS IN DISPUTE" – WHETHER ORDER FOR DISCOVERY APPROPRIATE: *MAGISTRATES' COURTS RULES* 1986, R108; *BUSINESS FRANCHISE (TOBACCO) ACT* 1974, S19A.

A Notice of Discovery concerns documents which relate to "matters in dispute". The due making of an assessment under the *Business Franchise (Tobacco)* Act 1974 together with the amount and all of the particulars of the assessment are conclusively established on production of the notices of assessment. Such notices cannot be challenged in a Magistrates' Court therefore, they are not "matters in dispute" and are not within the scope of discovery.

SMITH J: **[1]** This is the return of an order nisi granted 22nd June 1990. The order, the subject of the order nisi, was an order made on the 1st May 1990 in the Magistrates' Court at Melbourne that the applicant file and serve a sworn affidavit of documents within twenty one days and pay the respondent's costs of $289.00. That order was made at the hearing of an application by the respondent that the action be struck out on the ground that the applicant had failed to give discovery within the prescribed time.

The grounds on which the order nisi was made were as follows:

(a) The Magistrate was in error in making an order that the applicant make discovery of documents as, for the purpose of Rule 108 of the *Magistrates' Courts Rules* 1986, there were no matters in dispute to which discovery of documents could relate.

(b) The Magistrate was in error in making an order that the applicant make discovery of documents as the only matter to which any discovery of documents could properly relate was that of the identity of the defendant with that of the person named in the assessment and that matter was not in dispute.

(c) If the matter referred to in paragraph (b) was a matter in dispute, the Magistrate was in error in not limiting the operation of the order made to discovery relating to that matter.

[2] The order requiring an affidavit of documents was made in a recovery action brought by the Commissioner of Business Franchises against Kassem Chokr. The particulars of demand in the proceedings in the Magistrates' Court alleged that the defendant was carrying on tobacco wholesaling within the meaning of the *Business Franchise (Tobacco) Act* 1974 ("the BFT Act") without being the holder of a wholesale tobacco merchant's licence or a group wholesale tobacco merchant's licence. The particulars alleged that pursuant to s19A of the Act (in the form as it existed between July 1985 and November 1988) the Commissioner assessed the defendant in the amount that in her judgment should have been paid had the defendant applied for an appropriate licence during that period. The Commissioner alleged that she issued 41 Notices of Assessment in respect of each of the months during that period. Section 19A(1) provided that, *inter alia*, the person assessed is liable to pay the amount of the assessment

"except in so far as he establishes on objection or appeal that the assessment is excessive."

The particulars of demand went on to allege that pursuant to s19A(2) of the Act, the defendant was also liable to pay penalties in an amount equal to the amount payable under the assessment. The Commissioner alleged that those amounts were also included in each of the Notices of Assessment to which I have referred. **[3]** Section 19AA(1) required the Notices of Assessment to

be served on the person liable to pay the amount and in sub-section (2) provided that any amount required to be paid by a person as a result of an assessment "shall be due and payable on or before the date specified in the notice". In the particulars of demand, the Commissioner alleged that the Notices of Assessment were dated the 17th April 1989 and specified the duty and penalty to be due and payable on or before the 1st of May 1989. It was alleged that each Notice of Assessment was served on the 17th April 1989 on the defendant. After alleging a refusal to pay the relevant amounts, the pleadings sought payment of the full amount totalling $2,939,217.44.

It should be noted at this point that the defendant did lodge an objection to the assessments and those objections were not allowed. He did not then take the next step provided under the legislation that would have enabled him to review the assessment before the Administrative Appeals Tribunal or the Supreme Court. By this defence, so far as relevant, the defendant denied the allegation that he had been carrying on tobacco wholesaling within the relevant period without being the holder of a relevant licence. He pleaded that he had no obligation to apply for a tobacco merchant's licence and apart from that did not admit that he had not applied for such a licence during the months in question. He then did not admit the assessments or the issuing of Notices of Assessment. He **[4]** denied that he was liable to pay amounts by way of penalty. He did not admit that the penalty amounts were included in the Notices of Assessment, that the Notices were dated the 17th April 1989 or that each specified liability and payment on or before the 1st May 1989. He did not admit that each Notice of Assessment referred to in the pleadings was served on him on the 17th April 1989. He did not admit a refusal or neglect to pay and he denied the final claim for the full amount.

It is to be noted that at no time did the defendant plead that he was not the person who had been assessed for licence fees. In the absence of such a pleading, a fair reading of the pleadings indicates that the defendant was denying liability on the basis that he was not carrying on a tobacco wholesaling business during the whole or part of the period in question and was not denying liability on the ground that he was not the person who had been assessed. His counsel conceded that this was the case. Notwithstanding some statements possibly to the contrary in the course of argument before her, the Magistrate in her reasons appears to have taken a similar approach. Thus a basis for the third ground of the order nisi does not arise.

It is not disputed that the summons issued in the Magistrates' Court to recover the fees and penalties is subject to the rules of that Court and therefore the Commissioner cannot object to the application for discovery on the basis that the rules are not applicable. The Commissioner, however, takes the **[5]** position that the Magistrate was in error because there were no matters in dispute in fact to which discovery could relate or if discovery could relate to the question of the identity of the defendant with that of the person named in the assessment, that matter was not in dispute in the proceedings. The Commissioner argued an additional ground before me, namely, that the Commissioner was not obliged to give discovery because she enjoys the Crown's immunity from discovery. The immunity of the Crown, however, can be waived (*Janson v Attorney-General for Victoria* [1982] VicRp 23; [1982] VR 263, 266). The argument was not put to the Magistrate or the Master, on the application for an order nisi, and was not included as one of the grounds for reviewing the decision. It is therefore, not an issue that can be raised before me.

The application must proceed on the basis that under the rules applicable to the proceeding, the Commissioner was obliged, within twenty-one days after service of the Notice of Discovery, to answer on affidavit stating what documents she had "in her possession or power relating to the matters in dispute" or what she "knows as to the custody they or any of them are or have been in, and specifying which (if any) of the said documents she objected to produce and on what grounds" (*Magistrates' Court Rules* – Rule 108). The debate, therefore, appears to turn on the question of what issues if any were in dispute.

The pleadings, such as they are, put in issue questions such as whether the assessments were made, **[6]** whether they were issued, the validity of those assessments and notices, the amounts of penalty to which the defendant was liable and the dates on which the Notices of Assessment were issued and served and the date of liability flowing from those Notices.

It is not easy to follow the reasons of the Magistrate as recounted in the affidavit in support of the application. Certain points, however, can be made. Firstly, the Magistrate noted that

under s19E(2) of the BFT Act production of a Notice of Assessment was conclusive evidence that the amount and all particulars of the assessment are correct. She did not in those remarks, as recounted in the affidavit, (and not disputed by the respondent to the application) state that the production of the notice would also be conclusive evidence of the due making of the assessment. This may be of significance in explaining the way the decision was reached. For the Magistrate then placed considerable weight on the case of *DFCT v Baranow* (1988) ATC 4767 and a statement in the reported judgment of that case that once an assessment had been made (of Sales Tax in that instance) the Commissioner will succeed by proof of the assessment unless it can be shown that his opinion was not properly formed. The affidavit then states that the Magistrate said:-

> "Unless it can be shown that the Commissioner's opinion was not properly formed the assessment would stand. She referred then to the defendant's defence, she said the defence was not in relation to the assessment or particulars of assessment but rather to *whether* the opinion of **[7]** Commissioner was properly formed as to whether the defendant was the appropriate defendant in this case."

After referring again to *Baranow's case* and commenting that under both the Sales Tax legislation and the BFT provisions the Commissioner had to form an opinion before making the assessment, the Magistrate went on to say:

> "the Commissioner must have reason to believe that the defendant was tobacco wholesaling, and once she had this reason to believe the onus was on the Commissioner to prove every aspect of her claim. The Commissioner must satisfy the Court of every particular in view of the defence which raises the question of whether the Commissioner's opinion was properly formed."

Later the affidavit records:

> "She continued to say the defendant has given notice that he is not the appropriate defendant (i.e.) the Commissioner did not have reason to believe that the defendant carried on tobacco wholesaling."

It is not readily apparent to me why the onus should be on the Commissioner to prove every aspect of her claim once she has reason to believe that the defendant was tobacco wholesaling. It is unclear whether the Magistrate held that all issues were in dispute. It is reasonably clear, however, that her decision to order discovery was based, at least in part, on the conclusion that the Commissioner's opinion about whether the defendant was carrying on tobacco wholesaling was a matter in issue in the proceedings and a matter in respect of which discovery, therefore, should be given. **[8]** She appears to have been encouraged to reach this conclusion by her reliance on the passage from *Baranow's case* to which I have referred. Regrettably, she was not referred to the Sales Tax legislation. It differs materially from the BFT Act and the *Income Tax Assessment Act*. I note also that the statement in *Baranow's case* is *obiter dicta*. I have also come to the conclusion that the Magistrate erred in holding that there was an issue in the proceeding about the opinion of the commissioner as to whether the defendant was carrying on tobacco wholesaling.

A tribunal faced with a claim for discovery, as in this case, must consider the realities. They are, in this case, that to succeed in the proceedings in the Magistrates' Court it would be necessary for the Commissioner to produce the Notices of Assessment and prove them using, no doubt, the provision of s19E(2):-

> "The production of a Notice of Assessment, or a document under the hand of the Commissioner purporting to be a copy of a Notice of Assessment is conclusive evidence of the due making of the assessment and (except on proceedings on Appeal against or review of the Assessment) that the amount and all particulars of the assessment are correct."

and, also, sub-section (3) which provides:

> "The production of a document under the hand of the Commissioner purporting to be a copy of a document issued by the Commissioner is conclusive evidence that the document was so issued."

(Note also s19E(4) and 19E(1)(a)(b)(c) and (d)).

[9] In other words, it should be assumed that the Commissioner would rely upon the Notices of Assessment or copies of such notices under the hand of the Commissioner. The effect of production of the Notices of Assessment at the hearing would be that the "due making of the assessment" could not be challenged nor could "the amount" or "all particulars of the assessment".

The section closely follows the terminology of s177 *Income Tax Assessment Act*. In *George v FCT* [1952] HCA 21; (1952) 86 CLR 183 at 207; [1952] ALR 961; (1952) 10 ATD 65 the High Court held that the words "due making" in s177 of the *Income Tax Assessment Act* were intended to cover all procedural steps other than those, if any, going to substantive liability and so contributing to the excessiveness of the assessment. From the discussion in that case, it is clear that the High Court regarded matters such as whether the correct officer was satisfied as required by the legislation and had formed the judgment as to the amount of income to be taxed as forming part of the "due making" of the assessment.

The existence of conditions, on which the assessment power depends, may also come within the expression "amount" if they have an effect on the amount of the tax liability (*McAndrew v FCT* [1956] HCA 62; (1956) 98 CLR 263 at 271; [1956] ALR 1008; 11 ATD 131; 30 ALJR 464). The summons in the Magistrates' Court, being a recovery action and not an appeal, all matters – the due making, the amount and the particulars of the assessment – are to be regarded as conclusively established on production of **[10]** the Notices of Assessment at any hearing of the summons. That, in my view, would include the formation of the Commissioner's opinion that he had reason to believe that the defendant had been carrying on the business of tobacco wholesaler during the relevant period without having made an application for an appropriate licence (s19A(1)). The reality is, therefore, that at the hearing of the summons no issues about the assessment will be disputable once the Notices of Assessment are produced.

The relevant provisions and scheme of the BFT Act are similar to the *Income Tax Assessment Act*. As to the latter, it has long been held that the policy of the legislation is:

> "to give to the taxpayer the full opportunity of objection to his assessment of contesting his liability in every respect before a court or before a Board of Review but on the other hand to require that in proceedings for the recovery of the tax the taxpayer will be concluded by the assessment and will not be entitled to go behind it for any process."

(*McAndrew* above, at 270 and see 281, see also *FJ Bloemen Pty Ltd v FCT* [1981] HCA 27; (1981) 147 CLR 360 at p376; 35 ALR 104; 55 ALJR 451; 11 ATR 914 and *George v FCT* [1952] HCA 21; (1952) 86 CLR 183 at 207; [1952] ALR 961; (1952) 10 ATD 65; *Viney v George's Jet Gas Pty Ltd* [1986] VicRp 16; [1986] VR 141 at 144.) As a result, requests for particulars relating to the making of the assessment have been refused, recognising the inevitability of the production of the Notices of Assessment and the resulting closing of issues. Like the Income Tax legislation, the BFT Act now provides a similar scheme and enunciates a similar policy – (c.f. **[11]** *Viney*, above on the situation before the enactment of s19E BFT Act.)

The result is that the Magistrate erred in holding that there was an issue about the Commissioner's opinion that the defendant was a tobacco wholesaler. In reality, the Notices of Assessment would be conclusive on that question. Counsel for the respondent sought to uphold the magistrate's decision on two bases. The first was that at the time of the application before her, no Notice of Assessment was produced and the points at issue in the summons were to be determined on the pleadings.

If this argument is correct, then the Commissioner would be required to give discovery of all documents relating to the assessment but at the hearing, on production of the Notices of Assessment, all issues to which they relate would be foreclosed and none of those documents could be referred to the court. This again would ignore reality. The Magistrate must consider what in substance is in dispute and determine the scope of discovery accordingly. I conclude that the decision of the Magistrate cannot be supported on the first basis.

The remaining basis on which counsel sought to support the decision was that there is still the issue of the existence and service of the 41 Notices of Assessment and the issue of their contents and that an order for discovery could properly be made even if the discovery given was limited to those documents. **[12]** I accept this argument. The Commissioner should swear an affidavit of documents referring to the 41 Notices of Assessment. It is not a technical argument. The documents are the crucial documents in the case. The argument was not relied upon by the Magistrate but it is open to support the decision of the Magistrate on any ground that was open to her at the time the order was made (see for example *Preston Ice and Cool Stores v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371). Thus the decision made to order discovery

was open to the Magistrate on that basis although not, in my view, on the basis upon which she apparently acted. The affidavit of documents, however, need refer only to the Notices of Assessment and documents relating to service of the Notices of Assessment, the Court documents and documents passing between the parties. Accordingly I propose to discharge the order nisi. I will hear argument on the question of costs.

APPEARANCES: For the applicant Commissioner for Business Franchises: Mrs A Richards, counsel. Mr DC White (Comptroller of Stamps). For the respondent Chokr: Mr A Green, counsel. Nicholas O'Donoghue & Co, solicitors.
