

20/91

SUPREME COURT OF VICTORIA

DEPUTY COMMISSIONER of TAXATION v HOMEWOOD

Southwell J

21 March 1991 — (1991) 21 ATR 1426; 91 ATC 4,633

DEBT – AMOUNT DUE FOR INCOME TAX – APPLICATION FOR PAYMENT BY INSTALMENTS – WHETHER VICTORIAN ACT APPLIES TO COMMONWEALTH DEBT: JUDGMENT DEBT RECOVERY ACT 1984.

The provisions of the *Judgment Debt Recovery Act 1984* (Vic.) do not apply to a debt which arises out of a liability for income tax.

Re Mazuran [1990] FCA 330; (1990) 97 ALR 391; 21 ATR 758; (1990) ATC 4,814; [Noted 20 AT Rev (No. 1) 14], applied.

SOUTHWELL J: [1] This is an appeal from an order of the Magistrates' Court at Dandenong on 19 October 1990 upon the hearing of a summons whereby the Deputy Commissioner of Taxation ("the appellant") claimed against the defendant the sum of \$5,201.82, alleged to be due for income tax. The point in issue in the present proceedings is whether the *Judgment Debt Recovery Act 1984* (Victoria), (which I shall call "the Recovery Act") insofar as it authorises a court to make an order for the payment of a judgment debt by instalments, applies to a judgment debt of the nature here under consideration.

The matter comes before the Court by way of appeal pursuant to s109 of the *Magistrates' Court Act 1989*, upon an order made by Master Wheeler on 14 November 1990, pursuant to Rule 58.09, where certain questions of law were set down for decision, the more important one being Question 3(b): "Is it open to a magistrate to make an order that a taxation debt due to the Commonwealth be paid by instalments?"

In the proceedings before the Magistrates' Court, the appellant was represented by a solicitor and the defendant represented himself. The defendant at that court conceded that the debt was due, but informed the magistrate that he was interested in obtaining some order for the payment of the debt by instalments and, so it appears, he told the magistrate something of the negotiations which had taken place between the department, or officers of the department and the defendant, and informed the magistrate that he had made an offer to the department for payment by instalments, which offer had not been accepted. [2] At the conclusion of the defendant's statement, the solicitor for the appellant submitted to the Court that it did not have power to make an instalment order, and she referred the Court to the decision of Jenkinson J of the Federal Court in *Re Mazuran* (which was then unreported but has subsequently been reported at [1990] FCA 330; (1990) 97 ALR 391; 21 ATR 758; (1990) ATC 4,814; [Noted 20 AT Rev (No. 1) 14]) His Honour was there called upon to deal with the question whether the Recovery Act can apply to a case where the debt arose out of liability for income tax, although the matter before His Honour was the hearing of a bankruptcy petition. His Honour, after analysing the problem, said at p395 that in his view the proper construction of the Act was:

"That it does not purport to apply to the Crown in right of the Commonwealth as a judgment creditor and it would, in my opinion, follow that the Act does not purport to apply to a person answering the description of judgment creditor who had brought the action on behalf of the Commonwealth in pursuance of authority conferred on him by the Commonwealth."

His Honour then went on to deal with the constitutional question, lest it thereafter be thought that he was wrong on the question of construction. His Honour later expressed satisfaction that the State Attorney-General had been served with notice of the proceedings pursuant to s78B(1) of the *Judiciary Act 1903*, (from an abundance of caution in the proceedings now before this court, notices have been given in case I were of the view that I ought not to follow the decision of Jenkinson J and was of the views that constitutional questions arose. No Attorney-General has sought to appear in this proceeding.)

The affidavit relating to the proceedings in the court below – and this part of it is not put in issue in the [3] answering affidavit of Mr Homewood – suggests that the magistrate, when shown a copy of Jenkinson J's reasons for judgment in *Mazuran* [1990] FCA 330; (1990) 97 ALR 391; 21 ATR 758; (1990) ATC 4,814; [Noted 20 AT Rev (No. 1) 14], looked briefly at them but did not appear to read them in detail, and then said words to this effect.

"You are bringing these proceedings in a State Court. You are within State jurisdiction. That case does not apply."

In these proceedings, Mr Homewood, who appears in person, has in effect made the same submission; that the Commonwealth took proceedings in the Magistrates' Court. It thereby submitted to the jurisdiction of the State Court and the State Court was free to exercise the jurisdiction granted to it by the Recovery Act. As it appears to me, Mr Homewood shares with the magistrate a misconception of the question which fell for decision, and that is whether, on its proper construction, the *Judgment Debt Recovery Act* could be applied in proceedings where the Commonwealth was claiming a debt arising from liability for income tax.

For the reasons given by Jenkinson J, I am satisfied that the Recovery Act cannot be so applied. The magistrate was, of course, exercising Federal jurisdiction, and I agree with Jenkinson J that there is nothing in the terminology of the *Recovery Act* to suggest that it purports to bind the Commonwealth and, accordingly, it is unnecessary to go on to any further constitutional problems. In those circumstances, it is a pity that the magistrate did not take time to read that decision thoroughly, even if he was not persuaded that that decision was binding upon him (which I think it was while he was [4] exercising Federal jurisdiction) he would have seen a reference in it to the decision of O'Bryan J in *Deputy Commissioner of Taxation v Zarzycki* ((1990) 21 ATR 575; 90 ATC 4,707; 96 ALR 146; Noted 20 AT Rev (No.1) 14) 12 July 1990, where, by a somewhat different line of reasoning, O'Bryan J reached the same conclusion, a decision which was followed by Jenkinson J in *Re Mazuran*.

The magistrate had no jurisdiction to make an order under the Recovery Act. Accordingly, the Court must set aside that part of the order which deals with the making of an instalment order. The appeal is allowed. That part of the order of the Magistrates' Court dealing with the payment of judgment by instalments will be set aside.

APPEARANCES: For the appellant DCT: Mr R Huttner, counsel. Australian Government Solicitor. The defendant Homewood appeared on his own behalf.
