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SUPREME COURT OF VICTORIA — APPEAL DIVISION

McDONALD v COMMISSIONER of BUSINESS FRANCHISES

Murphy, Fullagar and O'Bryan JJ

8, 9 May, 27 August 1991 — [1992] VicRp 42; [1992] 1 VR 611

DEBT RECOVERY – PENALTIES FOR TOBACCO WHOLESALING – NOTICES OF ASSESSMENT ISSUED BY COMMISSIONER – PRODUCED TO COURT IN RECOVERY PROCEEDINGS – EFFECT OF SUCH PRODUCTION – WHETHER VALIDITY OF ASSESSMENT OPEN TO CHALLENGE – WHETHER NOTICES OF ASSESSMENT CONCLUSIVE: *BUSINESS FRANCHISE (TOBACCO) ACT* 1974, SS19A, 19E(2).

The effect of s19E(2) of the *Business Franchise (Tobacco) Act* 1974 is that once a document fitting the description in the sub-section is produced, the due making of the assessment cannot be challenged and subject to a rare exception (such as fraud on the part of the Commissioner) the document precludes any investigation by a Magistrates' Court into the validity of the making of the assessment.

***FJ Bloemen Pty Ltd v The Commissioner of Taxation* [1981] HCA 27; (1981) 147 CLR 360; 35 ALR 104; 55 ALJR 451; 11 ATR 914, applied.**

FULLAGAR J: (with whom Murphy and O'Bryan JJ agreed) [*after setting out the facts and part of the Act (above) continued*] ... **[5]** The answer of the Commissioner here and below to this contention is reliance upon the provisions of s19E(2) of the Act, viz -

> "(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 in proceedings on appeal against or review of the assessment) that the amount and all particulars of the assessment are correct."

[6] It is quite plain that the language of s19E(2) was taken from that which has appeared in s177(1) of the *Income Tax Assessment Acts* (Commonwealth) since the enactment of Act No. 27 of 1936 and right up to the present day, viz -

> "177.(1) The production of a notice of assessment, or of a document under the hand of the Commissioner, Second Commissioner or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct."

There is in my opinion no material distinction between the operation of s177(1) above and the operation of s19E(2) of the *Business Franchise Tobacco Act*, being a section added immediately after the delivery by Tadgell J of his August 1985 decision against the Commissioner of Business Franchises in her eponymous appeal in *Viney v George's Jet Gas Pty Ltd* [1986] VicRp 16; (1986) VR 141. In *McAndrew v FCT* [1956] HCA 62; (1956) 98 CLR 263; [1956] ALR 1008; 11 ATD 131; 30 ALJR 464, Dixon CJ, McTiernan and Webb JJ at CLR p271 referred the reference to "proceedings on appeal" in s177(1) of *Income Tax Assessment Act* and added "An appeal, however is a proceeding given by statute to a taxpayer for the purpose of impugning an assessment otherwise conclusively imposing liability upon him."

The *Business Franchise Acts*, like the *Income Assessment Act*, contain special "appeal" provisions under which objections and appeals from objections may be made. *Prima facie*, at least, each tendered document in the present case was "a document under the hand of the Commissioner purporting to be a copy of the notice of assessment", by which I mean that the notice appears to be of **[7]** an application by the Commissioner, to facts found by her, of her view of the law as laid down by the *Franchise Act*. It seems to me to follow that, upon production to the Magistrate, each document constituted conclusive evidence "of the due making of the assessment" which is constituted by it or referred to in it, with the result that in recovery proceedings the due making cannot be challenged. But the reply of the appellant here and below has been that it appears on

the face of each notice that the assessment was made at a time when the only source of power which could conceivably have been relied upon to make it had been by the legislature abrogated. It will be seen that this reply necessarily involves a view of the law which is different from the view of the law applied by the Commissioner in making each assessment.

As has already been observed, the date of making of the assessment does not appear as such on the face of the notice of assessment, but the appellant's final response is that the assessment is made only by issue of the document which is dated 11th September 1989, or certainly no earlier, and points out also that it is shown by the pleadings that the date of each assessment was after the statutory destruction of all power to make it. It is not necessary at present to decide whether there is any effective assessment prior to notice of it being served, although I would have thought that there is not. Service was not admitted on the pleadings but the point appears from the material before this Court to have been impliedly abandoned below. In any event the point is not open on the order to review. However, in my opinion the final response of the appellant founders on the **[8]** rock of s19E(2), because this final response attacks "the due making" of the assessment within the meaning of those quoted words from the sub-section, and because the appellant cannot show that the assessments are on their face other than assessments made by the Commissioner applying her genuine view of the reach of the *Franchise Act*.

In my opinion the effect of s19E(2) is that, once a document fitting the description in the sub-section is produced, the document concludes all investigation by the Court seized of recovery proceedings ("the recovery Court") into the validity of the making of the assessment referred to in the document, subject possibly to some very rare exceptions, e.g. in the case of fraud by the Commissioner. This is made clear by the reasoning of the majority of the High Court in *FJ Bloemen Pty Ltd v The Commissioner of Taxation* [1981] HCA 27; (1981) 147 CLR 360; 35 ALR 104; 55 ALJR 451; 11 ATR 914 in relation to s177(1) of the *Income Tax Assessment Act* 1936 of the Commonwealth. It may be otherwise, of course, if the document produced appears on its face to be something other than a notice of an assessment made in reliance upon the *Business Franchise (Tobacco) Act* 1974. And the argument for the appellant ultimately resolved itself into an argument that the documents in the present case were bad upon their face although each refers to the Act and uses words taken from s19A(2)(d) as constituted at the time to which the notice of assessment relates.

In *FCT v Hoffnung & Co Ltd* [1928] HCA 46; (1928) 42 CLR 39; 34 ALR 329; (1928) 1 ATD 310, "the assessments were expressed to have been made 'tentatively' or 'subject to revision' or 'to be finalized'. Accordingly it was held that they were not assessments within the meaning of **[9]** the ... Act" – *FJ Bloemen* 147 CLR at p372 per Mason and Wilson JJ. They were so "expressed" because the expression occurred in documents with which the assessments were incorporated. In *Bloemen's Case* it was held that "a notice in proper form of an assessment necessarily compels the conclusion that there was an assessment made in fact", even though this means that the Commissioner must have applied his findings of fact to his construction of the statute – see per Mason and Wilson JJ, 147 CLR at p378. Upon the same page their Honours added –

> "In a given case a question may arise as to whether the notice of assessment, e.g. a notice expressed to relate to a definitive assessment as distinct from a provisional or tentative assessment. Unless it can be characterized as a notice of assessment, (the sub-section) will have no operation."

At p382 Aickin J said of the document in question in *FJ Bloemen*, "There is in my opinion no basis for regarding the notice of assessment as being other than what it appears on its face to be." It was persistently argued for the appellant before this Court that, because in the appellant's contention the surviving text of the *Franchise Act* as at 11th September 1989 conferred no power to assess by default a tobacco wholesaler, each notice of assessment in the present case had the same effect as it would have had if it had expressly referred to assessment by default under the *Franchise Act* of a person who had carried on the activity of a tobacco smoker, or – at the very height of counsel's fancy – as if it had expressly referred to assessment by default under the *Franchise Act* of a brothel proprietor. The High Court and this Court have repeatedly warned against the putting up in argument of **[10]** examples which are excessively unlikely ever to occur in practice, that is to say, have warned that such a practice rarely assists in the construction of a statute, or even of a Constitution: see e.g. *R v Bonollo* [1981] VicRp 63; [1981] VR 633 at p636 per Young CJ; (1980) 2 A Crim R 431.

In the present case, however, it may be useful if I state my opinion that, in each of the extremely unlikely examples given, each notice of assessment would be bad on its face, for each would show at a glance, as it were, that in making the purported assessment the Commissioner must have applied to believed facts a view of the law that is so plainly untenable that credence cannot be accorded to the proposition that there has been a *bona fide* application of believed law to believed fact. It would appear on the face of each notice of assessment that, in supposedly applying believed law to believed fact so as to make an assessment, the Commissioner had applied some view of the law which was so plainly untenable that credence could not be attached to the contention that the Commissioner genuinely applied her view of the effect of the *Franchise Act*. In other words in the event of these extremely hypothetical examples the assessments would appear on their face to be not assessments under the *Franchise Act*.

However, this is not the position with each assessment of the present case which relates to alleged tobacco wholesaling in a period of time in which tobacco wholesaling was, under the *Franchise Acts*, taxable. What has been overlooked in the argument for the appellant is the true effect upon the taxing statute itself (the *Franchise Act*) of s14(2)(e) of the *Interpretation Act* upon the not untenable **[11]** or absurd assumption that it applies. It is at the very least arguable, and certainly not untenable or absurd, that s14(2)(e) provides in substance, in the events which are believed by the Commissioner and asserted to have happened, that the repeal or amendment here in question shall not affect the liability or the rights created by the operation upon those events of the repealed or unamended provisions.

The view is not blatantly absurd and perverse that any actual carrying on of the business of tobacco wholesaling under the unamended *Franchise Act* – a genuine belief in which by the Commissioner must be conclusively presumed – created a "liability" in the wholesaler to pay the tax in the form of licence fees, a liability which attached immediately upon the completion of the first transaction of tobacco wholesaling that placed the actor in the position of carrying on the business of tobacco wholesaling. It can be said that the first carrying on (unassailably believed) of the business of tobacco wholesaling also had the effect of creating corresponding "rights" in the Crown, including the right of the Crown by its officer the Commissioner to quantify the liability by assessment. By s19A(1)(d) of the *Franchise Act* the Commissioner may assess as soon as she has reason to believe the past existence of facts which, if they occurred, made the liability attach. The relevant proposition (by no means so absurd that belief in it cannot be believed) is that, having regard to the effect of s14(2)(e) of the *Interpretation Act* upon the relevant history of the *Franchise Act*, s19A(1)(d) must be read in the present case at the date of assessment as if it contained *inter alia* the following words –

> **[12]** "If—
> (d) the Commissioner before or after 1st December 1988 has reason to believe that a person has prior to 1st December 1988 carried on a business of tobacco wholesaling without having made an application for the appropriate licence under the *Business Franchise Acts* or ..."

To be more precise, the period prior to 1st December 1988 would have to be accurately expressed (notionally, of course) in terms of its end and beginning, and I think the beginning was 1st January 1975, but the foregoing should make clear enough my view of the arguable effect of s14(2)(e) upon the critical section of the *Franchise Act*. The relevant view is that the *Franchise Act* to which one goes, in order to test the question whether the notice of assessment is on its face an assessment under that Act, is the Act containing the notional s19A(1)(d) which I have just illustrated, because it is by no means unthinkable or absurd that the Commissioner might have believed that the *Interpretation Act* requires the *Franchise Act* to be so interpreted after the relevant amendments.

That the "text of the *Franchise Act*" is, so far as relevant, the "text" as modified notionally by the *Interpretation Act*, is not so absurd that no Commissioner should be credited with having believed it at the time of purported assessment. Under the *Franchise Act* the Commissioner has the duty of forming a relevant belief as to the facts, and then of applying to the believed facts the law (or her *bona fide* view of it) as laid down in the *Franchise Act* interpreted in accordance with any applicable provisions of the *Interpretation Act*. Once it is appreciated that the section of the *Franchise Act* may not unreasonably be interpreted as **[13]** above, it cannot be said that the assessments appear on their face to be other than an application by the Commissioner of her belief as to the effect of the *Franchise Act* to her belief as to the facts.

In my opinion mere absence of power appearing after the recovery court's perusal of the statute relied upon is not enough to show that the assessments are bad upon their face. To do that, the view of the law which must be attributed to the Commissioner to bring the assessments within power, or the view of the facts which must be taken in order to bring the assessments within power, must be so untenable or absurd that it simply could not have been taken by an honest Commissioner. In that way only could the argument for the appellant in a real case of assessment as a tobacco smoker or as a brothel proprietor succeed in the recovery court. It certainly cannot succeed in the present case, because the assessments are not, on their face, other than assessments under the *Franchise Act*, and accordingly the conclusiveness provision makes it impossible to challenge in the recovery court the due making of the assessments. As the next case before us (*Alibrandi v The Commissioner*) shows, in most disputed cases the Commissioner will succeed in the recovery courts even without the aid of the conclusiveness provisions.

[*His Honour held that the assessments did not show on their face that they were something other than bona fide assessments and accordingly, discharged the order nisi.*]

Solicitors for the applicant: Abercrombie and Associates.
Solicitors for the respondent: DC White, acting solicitor to Comptroller of Stamps and Commissioner of Business Franchises.
