

21/91

SUPREME COURT OF VICTORIA

DEPUTY COMMISSIONER of TAXATION v ZARZYCKI

O'Bryan J

26 June, 12 July 1990

(1990) 21 ATR 575; 90 ATC 4,707; (1990) 96 ALR 146; Noted 20 AT Rev (No.1) 14

DEBT – JUDGMENT ENTERED FOR INCOME TAX – ORDER FOR PAYMENT BY INSTALMENTS – WHETHER POWER TO MAKE ORDER – WHETHER ON ITS MERITS ORDER SHOULD BE MADE: INCOME TAX ASSESSMENT ACT 1936, PART VI; JUDGMENT DEBT RECOVERY ACT 1984, S6.

1. The general scheme of the *Income Tax Assessment Act 1936* (Cth.) providing for the collection and recovery of tax covers the field and leaves no room for the importation of State limitation provisions such as the recovery of judgment debts by instalments pursuant to the *Judgment Debt Recovery Act 1984* ('Act'). Accordingly, where a judgment was entered in favour of the Deputy Commissioner of Taxation in respect of unpaid tax, there was no power under the Act to make an instalment order in favour of the judgment debtor.

DCT v Moorebank Pty Ltd [1988] HCA 29; (1988) 165 CLR 55; 78 ALR 641; 62 ALJR 372; (1988) 19 ATR 1156, applied.

2. Observations as to relevant considerations when determining an application for an instalment order.

O'BRYAN J: [After referring to the scheme of the Act, the nature of the judgment debt and the terms of the order to pay the debt by instalments, His Honour continued] ... [4] I turn now to a threshold point going to jurisdiction. Mr Fajgenbaum submitted that as the *Judgment Debt Recovery Act 1984* ('Act') does not expressly bind the Crown in the right of the Commonwealth, only s64 of the *Judiciary Act* can require the Act to bind the Crown. It cannot be doubted, I consider, that the Act binds the Crown in the right of the State of Victoria by virtue of the *Crown Proceedings Act 1958*, s22. However, the Crown in right of the Commonwealth cannot be bound by the test of "necessary implication". The rule is explained [5] in *Province of Bombay v Municipal Corporation of Bombay* (1947) AC 58 at 61. Cf. *Bropho v State of Western Australia* [1990] HCA 24; (1990) 171 CLR 1; (1990) 64 ALJR 374 (HC); (1990) 93 ALR 207. Section 64 of the *Judiciary Act* provides:

"In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

The proceeding by the Commonwealth Deputy Commissioner of Taxation in this case is a "suit to which the Commonwealth ... is a party" and s64 requires that "the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject." The Act is binding on the Commonwealth Deputy Commissioner by virtue of s64 unless the Act is inconsistent with Commonwealth legislation. In *Dao v Australian Postal Commission* [1987] HCA 13; (1987) 162 CLR 317; (1987) 70 ALR 449; (1987) 61 ALJR 229; [1987] EOC 92-193 the High Court held that the provisions of s64 cannot properly be construed as intended indirectly to apply the provisions of a State law to circumstances where the direct application of a State law would be invalidated by operation of s109 of the Constitution by reason of inconsistency with applicable provisions of a law of the Commonwealth.

In *DCT v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55; 78 ALR 641; (1988) 19 ATR 1156; 62 ALJR 372 the High Court held that the general scheme of the *Income Tax Assessment Act 1936* (C'wealth) providing for collection and recovery of tax covered the field and left no room for the importation of State limitation provisions. Mr Fajgenbaum submitted that the *Income Tax Assessment Act*, in particular Part VI, left no room for the [6] importation of State moratorium provisions found in the Act. The Act, in providing for the recovery of judgment debts by instalments is moratorium legislation in that a debt recovery procedure is prescribed. The Act provides a legal

authorisation to pay a judgment debt by instalments over a period of time. Accordingly, from the time of service of an application for an instalment order, the application operates as a stay of enforcement or execution of the judgment in respect of which the application is made. While an instalment order made by the proper officer of the court is in force and is being complied with, the instalment order shall operate as a stay of enforcement or execution of the judgment in respect of which the instalment order is made (s9). Before the application was filed pursuant to the Act on 13th October the Deputy Commissioner of Taxation could recover this judgment debt by execution or by sequestration or by agreement, as he saw fit. The *Income Tax Assessment Act* confers upon the Deputy Commissioner wide discretion in relation to the recovery of tax (e.g. ss206, 207 and 209).

In *Re Michael Francis Faulkner ex parte Deputy Commissioner of Taxation* Ryan J in the Federal Court of Australia, held in an unreported decision delivered on 1st February 1989, that the Deputy Commissioner, as petitioning creditor for a sequestration order pursuant to the *Bankruptcy Act* in respect of a judgment for a tax debt, was precluded from proceeding with the hearing of the petition until an application by the judgment debtor pursuant to the Act was determined. [7] The reasoning behind the decision was that the petitioning creditor was unable to prove that a debt was owing at the date of the hearing of the petition because by operation of s6(8) of the Act the debt was not then "payable immediately or at a certain future time" for the purposes of s52 of the *Bankruptcy Act* 1966. When the instalment order was made by the Senior Master in the present case the judgment debt was converted from a debt immediately payable into a debt payable in future by monthly instalments. Cf. *Re Agrillo; ex parte the Bankrupt* (1977) 29 FLR 484 at 487; (1977) 13 ALR 635; 29 ALT 107 and the cases cited; *Re Padagos; ex parte Carrier Air Conditioning Pty Ltd* [1977] FCA 12; (1977) 16 ALR 475; (1977) 30 FLR 170 at 172.

When the judgment debtor made an application pursuant to the Act the sequestration proceeding in the Federal Court could not proceed further until the proper officer of this Court or the court determined not to make an instalment order. The question arises whether Part VI of the *Income Tax Assessment Act* and, in particular, ss206, 207 and 209 has effectively covered the field and left no room for the intrusion of State moratorium legislation to delay the recovery of tax. Unlike State limitation legislation, the subject matter of the *Moorebank* decision, the Act does not extinguish the right of the Deputy Commissioner to sue for and recover any unpaid tax, including penalty tax. The essential provisions of the *Income Tax Assessment Act* for the purposes of this submission are set out in the joint judgment of Mason CJ, Brennan, Deane, Dawson and Gaudron JJ in *Moorebank* at 65. It is unnecessary to repeat them.

[8] The question raised here is whether the scheme for collection and recovery of tax contained in Part VI of the *Income Tax Act* is significantly undermined by the Act. In the joint judgment in *Moorebank* is the following passage:

"Thus, e.g., s206 of the Assessment Act authorizes the Commissioner 'in any case [to] grant such extension of time for payment ... as he considers the circumstances warrant' and provides that 'in such case the tax shall be due and payable accordingly'. That power to grant an extension of time 'in any case' plainly extends to the case where tax has already become due and payable with the result that the right of action to recover the tax has already arisen or accrued. The intrusion of a State Limitation Act provision which, according to its terms, barred recovery after the expiry of a specified time from the date on which the cause of action 'arose' or 'accrued': see, e.g. the *Queensland Act*, s10(1)(d) and (5) or 'first accrues': see, e.g. *Limitation Act* 1969 (NSW), ss14(1) and 18 would be incompatible with the existence of such a broad discretionary power. If, in such a case, the Commissioner granted an extension of time until after the expiry of the relevant limitation period from the date on which the right of action for recovery of the tax 'arose' or 'accrued' or 'first accrues', the application of a State Limitation Act provision to bar recovery in accordance with extension of time would be inconsistent with the provisions of the Assessment Act to the effect that the tax should be then due and payable (s206) and that any tax unpaid may be sued for and recovered in any court of competent jurisdiction: s209. If the application of the State limitation provision was not excluded, the result would be that the general discretion conferred upon the Commissioner was effectively confined to preclude the grant of any extension of time beyond the limitation of action period since, if an extension of time beyond that period were granted, the tax would be irrecoverable at the time when it became due and payable in accordance with the extension."

This passage is equally applicable, I consider, to the Act. Discretionary powers conferred upon the Deputy Commissioner and exercisable pursuant to s206 and possibly, s209 are

diminished or curtailed by the [9] operation of the Act where tax has become due and payable pursuant to judgment in a court of competent jurisdiction. The intrusion of a State moratorium legislation is incompatible with the discretionary powers of the *Income Tax Act* to which reference has been made. The Act, when invoked by a judgment debtor, effectively precludes the Deputy Commissioner, as judgment creditor, from proceeding to execution or sequestration after judgment for the time limited by an instalment order. An instalment order in favour of a judgment debtor extending the time of recovery of tax diminishes and curtails the discretionary powers of the Deputy Commissioner.

I have reached the conclusion that the Act cannot operate consistently with Part VI of the *Income Tax Assessment Act*. The consequence is that the Act is not applicable to the judgment debt by virtue of the operation of s64 of the *Judiciary Act*. This Court is precluded from making an "instalment order" in favour of the judgment debtor and the order of the Senior Master will be cancelled. Should this view of the law later be held erroneous I propose to embark upon the merits of the application.

In an affidavit made on 23 April the judgment debtor deposed that she entered into the Terms of Settlement because she was fearful that if she did not do so a sequestration order would be made against her with the consequence that a family business Odra Travel Service which is supported by guarantees would collapse. The fact is that the judgment debtor had legal advisers when the [10] Terms of Settlement were negotiated and signed. Whatever reasons motivated the judgment debtor to authorise her legal advisers to enter into the Terms of Settlement on her behalf, the agreement constituted by the document is binding and enforceable on its face, subject only to the order made subsequently by Senior Master Mahony. The Terms of Settlement demonstrate an ability to satisfy the judgment debt within a period of eight months, a significantly shorter period than the period of twenty-one months fixed by the order.

The material now before the Court suggests strongly that the judgment debtor understated her financial situation in October last year. In particular, material relied upon by the judgment creditor shows that the judgment debtor is the registered proprietor of unencumbered land at Jan Juc in the State of Victoria (Certificate of Title Vol. 8411 Fol. 448), which was not disclosed by the judgment debtor in her affidavit of financial situation. Her explanation for this omission is not credible. In March 1987, when the judgment debtor, together with her son and daughter, applied to Geelong Building Society for finance to purchase four residential blocks of land, the land at Jan Juc was valued at \$36,000. The judgment debtor represented to the Building Society that she had a surplus of assets over liabilities of \$983,000.

In my opinion, the judgment debtor has not demonstrated on the material that an instalment order should be made. I take into account the nature of the debt, the Terms of Settlement and lack of frankness on the [11] part of the judgment debtor in disclosing her financial situation. These matters outweigh the matters relied upon by the judgment debtor in her affidavits. A further relevant consideration is the lateness of the application. At the last moment, no doubt to forestall an imminent sequestration order in the Federal Court, an application was made pursuant to the Act. Delay in making an application may go to the *bona fides* of the judgment debtor. All the matters to which I have referred, require me to refuse the application.

The parties voluntarily entered into Terms of Settlement in February and the judgment creditor is still prepared to abide the agreement, provided the judgment debtor brings her payments up to date. This is not a matter about which I am required to comment. It is a matter for the parties to abide the Terms of Settlement or to proceed to the Federal Court. In my opinion, the order of the Senior Master should be cancelled. I shall give the parties an opportunity to speak as to the contents of the order and whether any and what order should be made as to costs.

APPEARANCES: For the judgment creditor DCT: Mr Fajgenbaum QC with Mr North, counsel. Australian Government Solicitor. For the judgment debtor Zarzycki: Mr Searle, counsel. W Carew Tucker Pietryak, solicitors.