

TASTY CHICKS PTY LIMITED & ORS v CHIEF COMMISSIONER OF STATE REVENUE (S218/2011)

Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 326

Date of judgment: 4 January 2011

Date of grant of special leave: 10 June 2011

The issue in this case is the proper characterisation of the Supreme Court's role in reviewing the decisions of the Chief Commissioner of State Revenue ("the Commissioner") concerning the de-grouping of companies for payroll tax purposes, pursuant to ss 97 and 101 of the *Taxation Administration Act 1966* (NSW) ("the Administration Act"). Is it an appeal in "the right and proper sense", or is it a hearing de novo?

The Appellants run a diverse array of businesses which involve; chicken meat processing, administrative services, transportation and the leasing of premises. Between 2002 and 2007 the Commissioner issued a series of assessments that grouped them together under s 16C of the Administration Act. The Appellants subsequently challenged the decision not to de-group them for any of the assessment periods.

On 1 October 2009 the Appellants' review was allowed by Justice Gzell, who held that he was entitled to re-exercise the Commissioner's discretion concerning the de-grouping.

On 4 January 2010 the Court of Appeal (Giles, Macfarlan JJA and Handley AJA) allowed the Commissioner's appeal. Their Honours held that an appeal under s 97 of the Administration Act (in respect of a decision not to de-group) is an appeal in "the right and proper sense". Accordingly, the Court must not consider the matter by way of a hearing de novo.

The grounds of appeal include:

- The Court of Appeal erred when it overruled the decision of the primary judge in *Affinity Health Limited v Chief Commissioner of State Revenue (NSW)* (2005) NSWSC 663, insofar as that decision held that the Supreme Court had, first, the power to undertake a full review on the merits of all of the decisions of the Commissioner under s 97 of the Administration Act, and secondly, the power under s 101(1) of the Administration Act to re-exercise those statutory discretions of the Commissioner which depend on his state of mind.
- The Court of Appeal erred in failing to consider whether the principles enunciated in *House v The King* (1926) 55 CLR 499 at 504-505 apply in an appeal from proceedings under section 97 of the Administration Act involving the review by the Supreme Court of a discretionary determination by the Commissioner.