

**ALH GROUP PROPERTY HOLDINGS PTY LIMITED v CHIEF COMMISSIONER OF STATE REVENUE (S285/2011)**

Court appealed from: New South Wales Court of Appeal  
[2011] NSWCA 32

Date of judgment: 3 March 2011

Date of grant of special leave: 12 August 2011

On 20 April 2010 Justice Gzell set aside the assessment of the Commissioner of State Revenue ("the Commissioner") of ad valorem duty on a Deed of Consent and Assignment ("the Deed") executed on 27 June 2008. His Honour also set aside the Commissioner's decision that section 50 of the *Duties Act 1997* (NSW) ("the Act") did not apply to that Deed and ordered a refund of the \$134,105.50 duty paid, plus interest.

The Deed itself dealt with rights created by a contract of sale dated 5 September 2003 ("the 2003 contract") between Oakland Glen Pty Ltd ("the vendor") and Permanent Trustee Co Ltd, as trustee of the ALE Direct Property Trust ("the purchaser"), for the sale of a hotel in French's Forest ("the Hotel") for \$6,386,611. The 2003 contract was subject to conditions relating to the development of other land owned by the vendor in the same title, and its subdivision. It was not chargeable with ad valorem duty because it was part of a corporate reconstruction exempted under section 281 of the Act.

The parties to the Deed were the vendor, the purchaser and ALH Group Property Holdings Pty Limited ("the taxpayer"). On 22 November 2008 the Commissioner assessed it to ad valorem duty under section 22(2) of the Act as a transfer of dutiable property. On 24 October 2008 however the vendor and the taxpayer entered into a Deed of Termination ("the Termination Deed") which rescinded both the Deed and the 2003 contract. They then entered into a new contract for the sale of the Hotel for \$6,386,611.00, on which ad valorem duty was paid.

The taxpayer claimed that the Termination Deed avoided the liability of the Deed for ad valorem duty. It further claimed that it had a right to a refund under section 50 of the Act. The Commissioner refused that refund because the Deed was a transfer of dutiable property and not an agreement for its transfer. It was this decision that Justice Gzell overturned on 20 April 2010.

Upon further appeal, the Court of Appeal (Allsop P, Tobias JA & Handley AJA) unanimously allowed the Commissioner's appeal. Their Honours held that the Deed was an assignment of the benefit of the 2003 agreement and not a novation of it. The Deed therefore was not an agreement for the transfer of dutiable property but a transfer of that property. Accordingly the termination of the Deed did not entitle the taxpayer to a refund of the duty paid. The Commissioner's assessment was therefore restored.

The grounds of appeal include:

- The Court of Appeal should have concluded that the Deed effected a novation of the 2003 contract, in consequence of which a new contract for the sale of the subject land came into existence between Oakland Glen (as vendor) and the taxpayer (as purchaser) on the terms and conditions of the 2003 contract as varied by the terms of the Deed.