



HIGH COURT OF AUSTRALIA

1 December 2010

COMMISSIONER OF STATE TAXATION v CYRIL HENSCHKE PTY LTD & ORS
[2010] HCA 43

Today the High Court held that a deed of retirement ("the Deed") giving effect to the retirement of one partner from a partnership that carried on a business, which was to be carried on by the other partners after her retirement, attracted stamp duty under the *Stamp Duties Act 1923* (SA) ("the Act").

A winemaking business trading as CA Henschke & Co was conducted, prior to execution of the Deed, as a partnership ("the Partnership") comprising four partners. The Deed provided for the retirement of one partner from the Partnership, and stated that the remaining partners "shall continue the Partnership under the Partnership Agreement (without purchasing [the retiring partner's] interest in the Partnership and without the Partnership being dissolved)". It provided for a payment to the retiring partner "in full satisfaction of all claims she has against the Partnership", and a release and indemnity by the remaining partners in favour of the retiring partner. The Deed purported to reallocate the interests in the Partnership to the remaining partners.

Under the Act, stamp duty is charged on a conveyance or transfer on sale of any property. A conveyance is defined to include every instrument "by which or by virtue of which or by the operation of which ... any ... personal property or any estate or interest in any such property is assured to, or vested in, any person".

The Treasurer of South Australia upheld an assessment of stamp duty on the Deed made by the Commissioner of State Taxation, which had determined that the Deed conveyed the retiring partner's interest in the partnership property to the remaining partners. In the South Australian Supreme Court, the trial judge upheld the Commissioner's assessment, but this was reversed on appeal to the Full Court of the Supreme Court. The Full Court considered that the effect of the Deed was not to convey the retiring partner's interest but rather to convert her existing partnership interest (an equitable chose in action) into an entitlement to payment of a specific amount. It held that as her interest was not transferred, the transaction was not, and did not effect, a conveyance on sale.

The High Court unanimously held that the Deed had the legal effect of dissolving the Partnership, and constituting a new partnership between the remaining partners. The Court accepted that a partner's interest in partnership assets is an equitable chose in action. The Deed extinguished the retiring partner's existing equitable chose in action against the remaining partners, and created a new partnership through which equitable choses in action representing the remaining partners' "reallocated" partnership interests were vested. On this basis, the Deed was a conveyance and attracted stamp duty under the Act.

The respondents were ordered to pay the Commissioner's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*