CONSTITUTIONAL LAW

EXCISE AND RECEIPTS TAX

The most recent word from the High Court on the States' receipts taxes is the decision in *The State of Western Australia* v. *Chamberlain Industries Pty. Ltd.*[1] in which it was held, by a four to three majority, that one of the taxes which Western Australia had purported to levy as a receipts tax by its Stamp Act 1921-1969 was an excise duty and therefore *ultra vires* the Western Australian Parliament.

Chamberlain Industries Pty. Ltd. is a company which, among other things, manufactures and sells in Australia tractors and other agricultural implements. The company, relying on the decision in *The State of Western Australia* v. *Hamersley Iron Pty. Limited*[2] refused to pay the tax levied by the Western Australian Stamp Act, s.99 of which "requires a person who is paid any money under penalty of a fine to give or tender to the payee a duly stamped receipt, provided that if a receipt is not requested it will be sufficient compliance if a receipt is made out and stamped but in that event the receipt must be kept for at least two years"[3]. An alternative procedure is provided for under which the receiver of money is required to submit to the Commissioner returns of all moneys received in a certain period of time and a lump sum of duty is calculated and payable on each return[4].

For the month of October 1969 the company made a return to the Commissioner but refused to pay duty upon it. The action that ensued was removed to the High Court under s.40 of the Judiciary Act 1903-1966.

At the same time the High Court heard *The State of Victoria* v. *I.A.C. (Wholesale) Pty. Ltd.* which was a case stated pursuant to s.18 of the Judiciary Act in an action brought in the High Court by the State of Victoria against I.A.C. (Wholesale) Pty. Ltd. for a declaration that the provisions of the Stamps Act 1958 of the State of Victoria and in particular ss.53E and 53F thereof, validly applied to the receipt in Victoria by I.A.C. (Wholesale) Pty. Ltd. of sums of money in respect of the sale by it of new goods manufactured in Australia.

The majority of the Court (Barwick C.J., Menzies, Windeyer and Owen JJ.) all held that the duties sought to be imposed by the relevant sections were duties of excise. The kind of argument common to their judgments is that the duty is imposed on moneys received as payment for goods made in Australia, therefore affects the sale of those goods, and is therefore a duty on those goods.

Barwick C.J. commenced his judgment by saying, "Both in *The State of Western Australia* v. *Hamersley Iron Pty. Limited* (1969) 43 A.L.J.R. 351 and in *Associated Steamships Pty. Ltd.* v. *The State of Western Australia* (1969)

1. (1970) 44 A.L.J.R. 93. The decision was handed down in Sydney on Thursday, 19th February 1970.
2. (1969) 43 A.L.J.R. 351. Hereinafter referred to as the *Hamersley Case.*
3. (1970) 44 A.L.J.R 94 *per* Barwick C.J.
4. Ss.99A and 99B.

43 A.L.J.R. 379 I expressed the view that the duty sought to be imposed by the Western Australian Act upon a receipt or acknowledgment produced under compulsion of the statute or upon a return made in conformity with the statute could not properly be regarded as a stamp or instrument duty. Further reflection has confirmed that view: and indeed in neither of the present cases was any argument advanced in support of the view that the duty under either of the Acts was in those circumstances a stamp or instrument duty, though one party reserved the point"[5]. The *Hamersley Case* had been decided on this very point of the characterization of the tax as a tax on an instrument rather than a tax on a transaction, but here not even the minority relied on it, instead being content to hold that the tax was imposed on the act of receiving money, and not the act of selling goods.

The Chief Justice continued by remarking that the court has not taken the narrow view that to be an excise the tax must be laid directly on the process of manufacture or production. "In my view, it should be regarded now as acceptable doctrine that the tax will be a duty of excise if it is upon or in respect of goods at any point including the point of manufacture or production, as they pass to consumption . . . it is enough that the impost is upon or in respect of goods before they have actually reached the consumer"[5]. From this His Honour concluded that a tax anywhere along the line from manufacture to consumption is an excise. This much, he commented, was common to both parties.

The points in dispute were two; firstly, whether or not an Act could in some aspects impose a duty of excise and in those aspects be invalid, and yet in other aspects did not and be valid; and secondly, whether the operation of either of the Acts here in question was in any respect to impose a tax upon or in respect of a step in the movement of goods into consumption.

His Honour disposed of the first point quickly by citing Isaacs J. in *The Commonwealth and Another* v. *The State of South Australia and Another: The Commonwealth Oil Refineries Ltd.* v. *The State of South Australia and Another*[6] which held that the relevant consideration is whether the tax as it is imposes an excise, and not whether the Act as a whole imposes an excise.

On the second point His Honour argued, although the plaintiff had contended that the tax was imposed on an instrument and just happened to alight on an instrument acknowledging the receipt of money for the sale of locally manufactured goods, that the act which attracted the tax was the act of being paid money and that he had "no doubt that to tax the receipt of the purchase price or any part of the purchase price of goods is to tax a step in the movement of goods into consumption"[7]. This conclusion is based on the reasoning that the receipt of money is never colourless, and that to tax the receipt of money for the sale of goods is to tax the sale, which is an excise.

Windyer J. who concurred with the Chief Justice, began by examining the objects of the Federal Constitution, which were to create unity among the Australian States. His Honour then stated that he assumed that a sales tax is

5. (1970) 44 A.L.J.R. 95.
6. (1926) 38 C.L.R. 408, 423. Hereinafter referred to as the *C.O.R. Case*.
7. (1970) 44 A.L.J.R. 96.

an excise[8]. Although, in his opinion, not every levy which adds to the cost of the goods to the consumer is an excise, each case must be examined to see what happens "in truth". His Honour concluded that "in truth" the Act imposed a tax on the sale of goods in so far as it purported to tax the receipt of money for the sale of goods.

Owen J. held that " . . . a tax imposed upon the receipt of moneys which are paid in discharge of an obligation to pay for goods sold is a tax upon the sale of those goods, in other words, it is a sales tax"[9] and therefore a duty of excise.

Menzies J. was in the minority in the *Hamersley Case* but in the majority in this case. His Honour denied that he had changed his view, and instead distinguished the sections of the Act involved in the two cases. He had held in the *Hamersley Case* that the tax was on an instrument or document, but here he held that the tax was on the receipt of money, where the receipt that is required to be prepared is only machinery to facilitate a tax on the sale of goods, which is an excise.

His Honour also held that the Act only imposed an excise insofar as it purported to tax receipts of the price of new goods manufactured in Australia.

The minority judges were Kitto, McTiernan and Walsh JJ.

Kitto J. held that the court has always required that legislation imposing an excise tie the tax to goods, and to support this proposition he cited Dixon J. (as he then was) in *Matthews* v. *Chicory Marketing Board*[10]: "What is decided is that to be an excise the tax must be imposed in respect of commodities", and later "To be an excise the tax must be levied 'upon goods' ". To His Honour the tax must be imposed in respect of goods. The matter to be considered is the imposition of the tax, not the consequential effect of it in special circumstances. In His Honour's opinion the tax was on the receipt of money, and it mattered not that the receipt had anything to do with the sale of goods. The receipt was not taxed because it was the receipt of the price of goods sold, but rather because it was the receipt of money.

Finally, in agreement with Barwick C.J. he held that if part of a State Act imposes an excise, that part is invalid, but the rest of the Act remains valid.

McTiernan J. held that " a stamp duty is charged on the receipt, and nothing else, and this tax is payable by the person who is liable to give the receipt. The criterion for liability is solely that he has been paid or has received a sum of money. The liability arises in respect of the money; not in respect of the thing or the occasion on account of which the money is paid or received. The situation is not different if the money is received or paid for goods"[12].

His Honour held that *Anderson's Proprietary Limited* v. *The State of Victoria*[13] was a near parallel. In that case it was the extension of credit that

8. *Id.,* at 101.
9. *Id.,* at 102.
10. (1938) 60 C.L.R. 263, 300.
11. *Ibid.*, 304.
12. (1970) 44 A.L.J.R. 97.
13. (1969) 111 C.L.R. 353.

attracted the tax, and it was immaterial that the credit extended related to goods. Here the tax was imposed on the receipt of money, and, similarly, it mattered not that the receipt was in respect of goods.

Walsh J. gave a deeply considered judgment in which he adverted more clearly than any of his brethren to the difficulty experienced by the court in deciding the matter in dispute. He agreed that the tax could not be regarded as a tax on an instrument, but was rather a tax on the act of receiving money.

His Honour cited *Bolton* v. *Madsen*[14] and *Anderson's Proprietary Limited* v. *The State of Victoria*[15] to support the proposition that an excise must be a tax on goods before they reach the hands of the ultimate consumers. But this does not exclude a tax on the final step in distribution, by which the goods come into the hands of the consumer.

From this point His Honour reached the heart of the matter, on which the rest of the Court had been vague: "it may be said that the duty which the plaintiff in this case seeks to charge the defendant, in so far as it operates in relation to money received by the defendant as the price of goods sold, has the same practical effect upon the defendant and upon its business of selling its goods as would have been produced by the exaction of duty by an Act expressed in terms which made the act of selling goods the criterion of liability to the duty. But an assertion that this is a sufficient reason for assigning to the duty the character of a duty of excise would be, I think, inconsistent with the foregoing pronouncements[16], and also, with earlier pronouncements, such as that of Latham C.J. in *Attorney-General for New South Wales* v. *Homebush Flour Mills Limited* (1937) 56 C.L.R. 390 at p.398"[17].

The defendant contended in this case that the tax is, "in reality", an excise. His Honour perceived that it was in this phrase, "in reality", that the difficulty in this case lay. He held that if the phrase referred to the economic consequences of the tax, it was of no relevance in deciding the case. But if it referred to the actual operation and effect of the Act, it was relevant, but the tax was not a sales tax. To be, "in reality", a sales tax the duty must be imposed on the transaction of selling goods.

His Honour found that the question which he was required to answer was the same as that put by Kitto J. in the *Hamersley Case*[18]: "We have therefore to identify the criterion of liability under s.101A. Is it (if I may use further words from the judgment in *Bolton* v. *Madsen*) the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the consumer? Is the criterion such that the tax bears a 'close relation' to the production or manufacture or distribution of goods, affecting them as the subjects of manufacture or production or as articles of commerce?"[19].

14. (1963) 110 C.L.R. 264.
15. (1969) 111 C.L.R. 353.
16. From *Bolton* v. *Madsen* and *Anderson's Proprietary Limited* v. *The State of Victoria.*
17. (1970) 44 A.L.J.R. 105.
18. (1969) 43 A.L.J.R. 351, 358.
19. (1970) 44 A.L.J.R. 105.

His Honour held that the act which was made the criterion of liability was that of receiving money. In opposition to the view that the tax was an excise, he pointed out that goods of the same kind and value may attract different rates of tax, if, for example, a purchaser for some reason fails to pay or only pays in part. If some pay no duty, and others do pay, it is difficult to argue that the tax is on a step in distribution. Accordingly, His Honour answered the questions put by Kitto J. in the *Hamersley Case* in the negative, and concluded that the tax imposed was not an excise.

With respect, the reasoning of the minority seems more logical, and certainly tighter than that of the majority. The Chief Justice springs from the premises that an excise must be a tax on goods and that here the duty is levied on the receipt of money paid for the purchase of goods to the conclusion that the tax is upon goods. It is submitted that there seems to be a step omitted, without which it is impossible to follow the precise course of the argument.

Even in the *Hamersley Case*[20] Kitto J. held that the tax on the instrument had a logical connection with the sale of goods, but did not regard its connection to be so close as to impose an excise. In fact, in that case, His Honour adverted to the tax imposed by s.99B and held that it, like that imposed by s.101A (the section in dispute in the case) did not have a sufficiently close connection to impose an excise.

It is, of course, apparent that there is, on facts such as those presented by this case, a connection between the tax and the sale, and the dispute related to the closeness of the tax to the sale. The majority seemed to hold that there was sufficient closeness but without giving any reason. In this writer's opinion, the majority was interpreting the phase "in reality" in the light of its economic effect, as Walsh J. had put it. Were the Court to take a very legalistic view, this approach would be inappropriate, and this seems to be the feeling of the minority.

It is interesting that a tax on the receipt of payment for goods is a tax on the goods. It is now agreed that an excise is a tax on any step in production or distribution, till consumption, which, I submit, means till such time as the goods reach the consumer, not till such time as he has driven the tractor, or eaten the bread, or drunk the milk. This includes a tax on the final sale. Therefore, a tax on the possession of goods, for example, something similar to a fee for a licence to possess a firearm, is undoubtedly not an excise—because the goods have already been consumed. On this reasoning, I submit, although it may sound artificial, that if the vendor receives the purchase price after the purchaser has taken possession of the goods, and consequently his liability to tax does not arise until after the goods have reached the consumer, the receipt tax is not a tax on the final step in the distribution of the goods. It is rather a tax on an act subsequent to that step. It would, however, seem strange that whether the tax imposed in a particular case is an excise or not, should depend on the time of receipt of purchase price, which may relate to time of payment, but if my reasoning is correct, this would seem to be the result.

It may be that "consumption" occurs when property in the goods passes to the purchaser. After all, the passing of property is the essence of a contract

20. (1969) 43 A.L.J.R. 357.

for the sale of goods, and although the niceties of the law of contract do not seem prima facie relevant to a constitutional problem, the point in issue is whether a tax is on a sale or a step in production or distribution. However, in the writer's opinion, such an interpretation of "consumption" is unlikely, because the dicta have always referred to "a step in distribution" and it is submitted that distribution has not occurred until the goods are actually in the possession of the purchaser.

The early statements on the meaning of "excise" emphasized that the tax was to be passed down the line to the ultimate consumer and not borne by the person with the primary liability to pay it[21]. Barwick C.J. impliedly adverts to this when he says[22]: " . . . a tax upon goods at any stage of their distribution will, in general, and sooner or later, according to circumstances, bear on the rate or level at which they are manufactured or produced . . . ". This indicates that the Chief Justice, at least, assumes and recognizes that the receipts tax will in some way be passed on and will be reflected in the final cost to the purchaser of the goods. It is strange that more was not made of this point, because it is an accepted indication that a tax involved here is an excise.

It would seem that if there were any doubt about whether a sales tax is an excise, this is now dispelled. Even the minority seem to accept the proposition[23]. Windeyer J. assumes that this is the case without citing any authority in support of it[24]. It is implicit in the judgment of the Chief Justice, and His Honour also cites no authority[25]. Where authority is cited[26] the case relied on is *Bolton* v. *Madsen*[27]. In this writer's opinion, the *C.O.R. Case*[28], in which a tax on the first sale of petrol in South Australia was held to be an excise, had probably already established that a sales tax was an excise. And the proposition seems in accord with a comment of Kitto J. in *Anderson's Proprietary Limited* v. *The State of Victoria*[29]: " . . . this does not exclude a tax, as it is the duty now in question upon the final step in distribution, by which the goods reach the hands of the consumers".

A point which is left open by the Chief Justice which would otherwise probably have been regarded as settled is whether a tax on goods of other than local manufacture is an excise[30]. In the early cases, an excise was regarded as a tax on "home goods", and this is still the opinion of Menzies J., who referred to a tax on goods manufactured in Australia as an excise[31].

Whatever the economic justice or reasoning behind the High Court's decision may be, it is now established that the receipts tax imposed by Western

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21. For example, *Matthews* v. *The Chicory Marketing Board (Victoria) per* Latham C.J. (1938) 60 C.L.R. 263, 277.
22. (1970) 44 A.L.J.R. 95.
23. For example, it is implied in Walsh J.'s judgment at 105.
24. (1970) 44 A.L.J.R. 101.
25. *Id.,* at 96.
26. For example, Menzies J. at 100.
27. (1963) 110 C.L.R. 264.
28. (1926) 38 C.L.R. 408.
29. (1964) 111 C.L.R. 353, 373.
30. (1970) 44 A.L.J.R. 95 *per* Barwick C.J.
31. (1970) 44 A.L.J.R. 100.

Australia is invalid. This, of course, leaves open to challenge the tax imposed under the South Australian Stamp Duties Act 1923-68 as amended and, in particular, ss.84e and 84f of that Act. It is this writer's opinion that the South Australian Act would suffer the same fate as the Western Australian Act.

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