



Précis Paper

Directors' Liabilities for Tax Withholdings

An interesting discussion about a recent case that considered issues relating to directors' duties, evidence and statutory interpretation.

Discussion Includes

- Appeals from evidentiary rulings
- Admissibility of ASIC decisions as business records
- Retrospectivity of legislation
- Practitioners' obligations when conducting appeals in the NSW Court of Appeal
- ASIC Registers as prima facie and "proven fact" evidence

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Directors' Liabilities for Tax Withholdings

1. In this edition of BenchTV, James Mitchell (Barrister, Third Floor Wentworth Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly and Company) discuss the recent decision of *Panayi v Deputy Commissioner of Taxation* [2017] NSWCA 93.

Background and Material Facts

2. Under Schedule 1 to the *Taxation Administration Act 1953* (Cth), a company is required to withhold amounts from the wages it pays employees and to pay those withheld amounts to the Commissioner. The Act also imposes obligations on the directors from time to time of the withholding company. Those directors must cause the company to comply with its obligation to pay moneys which have been withheld. They continue to be subject to that obligation until the company makes that payment or an administrator is appointed to the company or the company begins to be wound up.
3. The Commissioner brought penalty proceedings in the District Court against Mr Panayi as a director of AAMAC Transport (NSW) Pty Ltd. Mr Panayi defended the proceedings on three bases: first, he denied that he had been appointed or acted as a director of the company at any relevant time; second, he claimed that an illness had rendered him unable to take part in the management of the company; and third, he maintained that his penalty liability had been remitted when the members of the company resolved that it be wound up voluntarily.
4. The Commissioner led evidence indicating that Mr Panayi had conducted himself as a director and had held himself out to third parties as being a director. The evidence as to Mr Panayi's claimed illness was found to be unsubstantial. The trial judge therefore found against Mr Panayi at first instance.
5. Mr Panayi appealed on a number of bases, including on evidentiary grounds and on the basis of an argument related to retrospectivity of the relevant legislation.

The Evidentiary Arguments

6. On appeal, Mr Panayi argued that the trial judge erred in admitting into evidence an ASIC report made on 23 November 2005. He submitted that the evidence should have been excluded under s 91 of the *Evidence Act 1995* (NSW), which excludes evidence of judgment or convictions from Australian or overseas proceedings. The evidence was a decision of ASIC banning Mr Panayi from being a director for a period of four years. The ASIC decision

was to ban Mr Panayi as a director and was largely based on liquidators reports from a number of companies of which Mr Panayi had been a director.

7. The Court found that s 91 plainly did not apply to the ASIC decision as s 91 applies to court proceedings, and ASIC is not constituted as a court.
8. Mr Panayi also submitted that the ASIC report was hearsay and should have been subject to exclusion under s 59 of the *Evidence Act*. The report had been relied upon to show that Mr Panayi had considerable experience as a director and in dealing with creditors and liquidators, contrary to his argument that he was a simple truck mechanic and had been caught unawares by being appointed on the ASIC register as a director. However, as no objection was taken at first instance, this ground of appeal also failed. Moreover, the Court held that, even if the evidence was hearsay, it would have fallen within the business records exception as a business record of ASIC.

Statutory Interpretation

9. The *Taxation Administration Act* formerly gave directors an opportunity, after they had been served with a director penalty notice, to put the company into voluntary administration or wind the company up within 21 days of receiving the notice. Should this occur, their liability would be remitted.
10. This provision was amended and the exception was altered where the winding up or administration commenced after 30 June 2012. Under the new provisions, a director had three months from the first due date of the remittal of withholdings, but did not have any grace period after receiving the penalty notice.
11. In this case, Mr Panayi sought to rely on the old provisions. He had put the company into administration 21 days after the penalty notice. However, this was at least 7 months after the due date of the remittal of withholdings. Mr Panayi argued that this amendment had a retrospective effect on the constitution of the debt and therefore should not apply to him.
12. The Court of Appeal rejected this submission, finding (at [55]):

At the date of the amendment, the only relevant "right or liability" of the appellant defined by reference to past events was his liability to pay the penalty. If the amendment had increased the quantum of that penalty, the common law presumption [against retrospectivity] may have had some application. But, as it happened, all that the amendment altered was the appellant's opportunity to have his liability remitted by initiating the voluntary administration

or winding up of the Company. The amendment did not in that respect affect his liability, which had not been remitted prior to 30 June 2012.

13. In essence, there were two provisions in the Act: one which dealt with the liability for the penalty, and one which dealt with remission of the penalty. The former, the provision that dealt with the constitution of the debt, was not subject to any amendment. Only the remission provision had been amended, and so the presumption against retrospectivity did not apply.

General Lessons From the Case

14. Mr Mitchell referred to two lessons to be learnt from the case. First, Meagher JA cautioned practitioners against raising oral arguments on appeal that have not been put in written submissions. A party has an obligation of procedural fairness to allow the other side to present their case. Moreover, the Court benefits from adversaries narrowing the issues and hearing properly formed submissions on the critical issues in the case.
15. Second, the case reminds viewers that the ASIC register is prima facie proof of the facts on the register, as determined in *Kocic v Deputy Commissioner of Taxation* [2011] NSWCA 322. This suggests that companies may have difficulties in disproving the prima facie effect of the register if they have not kept contemporaneous business records.

BIOGRAPHY

James Mitchell

Barrister, Third Floor Wentworth Chambers, Sydney

James Mitchell was admitted as a solicitor in 1998 and called to the NSW Bar in 2004. He previously worked as a solicitor with Ashurst and Telstra Corporation Limited. His areas of expertise include revenue, commercial law, insurance, fraud, trusts and partnerships, and estate law. James regularly conducts investigations for the ATO and ASIC and advises private clients on private investigations by the ATO and ASIC and public investigations by ICAC. He has been an associate to a Federal Court judge and taught contract law and income tax to Masters students at the University of Sydney.

Ian Benson

Solicitor, AR Conolly and Company

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in Law.

BIBLIOGRAPHY

Focus Case

Panayi v Deputy Commissioner of Taxation [2017] NSWCA 93

Benchmark Link

https://benchmarkinc.com.au/benchmark/insurance/benchmark_11-05-2017_insurance.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5910f455e4b058596cba6612>

Cases

Kocic v Deputy Commissioner of Taxation [2011] NSWCA 322

Legislation

Taxation Administration Act 1953 (Cth)

Evidence Act 1995 (NSW)