

# FEDERAL FOI DECISIONS

## Administrative Appeals Tribunal

### ASSOCIATION OF MOUTH AND FOOT PAINTING ARTISTS PTY LTD and COMMISSIONER OF TAXATION

No. N86/342

**D cited:** 29 July 1987 by B.J. McMahon (Senior Member), C.J. Stevens and G.P. Nicholls (Members). *Request for access to documents relating to taxation investigations — claims for exemption under s.38 (on the basis of s.16 of the Income Tax Assessment Act 1936 and Article 21 of the UK Double Taxation Agreement) and ss.36 and 40.*

The applicant had requested access to all documents relating to an investigation into its affairs which were 'currently held in investigation' by a specified officer. A variety of these documents were claimed to be exempt under ss.36, 38 and 40.

At the commencement of the proceedings counsel for the respondent produced a document described as a conclusive certificate under s.33. The Tribunal was very critical of the fact that it had been quite unaware that such a certificate was in existence or was intended to be produced and that counsel for the applicant had been informed of its existence only a few minutes before the commencement of the hearing. It also stressed that it was not open to counsel for the respondent to complain that he was not prepared for an attack by the applicant on the validity of the certificate.

#### Validity of conclusive certificate

The Tribunal took the view that, although it was not constituted in accordance with s.58B, it did have the jurisdiction to decide whether or not the certificate was valid as the terms of s.58(4) required that a certificate be in force before the operation of s.58B was triggered. It concluded that, although it had been established that delegations might be made to the holder of an office for the time being (as opposed to a named individual), the Minister had not delegated, by the instrument of delegation which was relied upon by the respondent as authorising the signing of the certificate in question, all the powers necessary to bring into being a conclusive certificate with the effect set out in s.33(2). In its view the subsection contained two powers: it empowered the Minister to satisfy himself that disclosure of the

document would be contrary to the public interest for certain reasons and it empowered him to sign a certificate that he was so satisfied. On a literal reading of the instrument of delegation, it appeared to the Tribunal that the Treasurer had delegated merely the power to sign certificates. It commented in this regard that an informal delegation by a minister of a legislative power was not, generally speaking, a sufficient delegation and that it was not open to an inadequately armed delegate to pull himself up by his own boot straps by saying that he was satisfied of the necessary facts. It also took the view that it was not possible to regard the certificate as partially valid, and that, even if it were possible to argue that the certificate was valid in parts, both powers were required to be exercised and in fact only one appeared to have been so exercised. Accordingly, the Tribunal concluded that the certificate was a nullity which failed to establish conclusively that the documents covered by it were exempt.

#### Procedural matters

The Tribunal then proceeded to consider several applications by the applicant for access to the documents in question to be provided to its counsel and for access to several of the documents to be provided to a witness for the respondent in order to enable that witness to answer questions relating to them. These applications were rejected by the Tribunal on the basis that s.64 did not allow for the disclosure of a document which was claimed to be an exempt document except to the Tribunal and members of its staff and then only where it was not satisfied by the evidence that the document was an exempt document. It referred with approval to its earlier decisions in *Re Arnold Bloch Liebler and Company* (No. ) 6 ALD 62 and *Re Carver* (1987) 8 *Fol Review* 19.

The Tribunal also dealt with an application by the respondent for an order under s.35 of the *Administrative Appeals Tribunal Act* 1975 and s.63 of the *Fol Act* to enable the evidence of one witness to be taken in private hearing to the exclusion of the applicant and its legal advisers. It considered that it was precluded from accepting any undertaking by counsel for the applicant and that it was necessary to receive the evidence in the absence of the applicant and his

representatives in order to prevent disclosure to the applicant of matter or information of a kind referred to in s.63. It noted that the question of the giving and acceptance of undertakings by counsel had been considered by the Federal Court in *News Corporation Ltd v. NCSC* 57 ALR 550.

In view of a concession by the respondent, counsel for the applicant was ultimately permitted to cross-examine the witness, although he subsequently declined to continue with the cross-examination as a result of his dissatisfaction with various rulings on the admissibility of his questions. The Tribunal commented in this regard that the strict adversarial procedures which formed part of the common law tradition were clearly not appropriate for at least some of the questions that arose in the conduct of broad-ranging claims under the Act.

#### Section 38

The Tribunal followed the Federal Court's decision in *Federal Commissioner of Taxation v. Swiss Aluminium* 66 ALR 159 in upholding a claim for exemption under s.38 and s.16 of the *Income Tax Assessment Act* 1936.

It also upheld a claim for exemption under s.38 and Article 21 of an Australian-UK Agreement forming part of a schedule to the *Income Tax (International Agreements) Act* 1953 in respect of the majority of documents in issue.

#### Section 33

Although it did not see the documents in respect of which this claim was made, the Tribunal was satisfied that they would, if disclosed, have divulged material communicated in confidence by an authority of a foreign government. Having come to that conclusion, it felt that there was no scope for further consideration as to whether disclosure would, in any event, be contrary to the public interest. It referred to its earlier decision in *Re O'Donovan* 8 ALD 528, 533 where it had held that the words 'for the reason that' were synonymous with the word 'because'.

#### Section 36

A claim was made under s.36(1) in respect of various documents which discussed the applicability of certain sections of the tax law to arrangements established by the

applicant and which contained recommendations as to future action. The Tribunal felt that there could be no doubt that the documents fell within the deliberative processes definition in s.36(1)(a) and referred to its interpretation of 'deliberative processes' in *Re Waterford and Department of the Treasury (No. 2)* 5 ALD 588.

With regard to the question of public interest, the Tribunal referred to its earlier decision in *Re Murtagh* 54 ALR 313 and to the distinction it had drawn between documents relating to a purely routine assessment and those concerned with the investigation of tax evasion or like matter. It commented that the documents in question here dealt with a complicated investigation relating to the possible avoidance of large sums of taxation in various ways including international transfer pricing policy. It also accepted the validity of an argument to the effect that disclosure of the documents would reveal the approach adopted by the Commissioner in dealing with tax avoidance and might enable the respondent to take "countering measures". In view of this, the Tribunal was satisfied that the public interest in preserving the confidentiality of the documents clearly outweighed the general right of access conferred by s.11.

#### Section 37

The Tribunal was also prepared to uphold claims for exemption under ss.37(1)(a) and 37(1)(b) in respect of various documents which came into existence or were received by the respondent in the course of an investigation of the applicant's affairs. It was argued by the respondent that, if the information were disclosed, it could reasonably be expected that, if the applicant had engaged in an arrangement to avoid tax, it might frame responses to queries in accordance with the information known to be in the respondent's possession. It was also argued that disclosure might indicate to the applicant how much information the respondent had not yet acquired, thereby facilitating concealment of relevant facts and the implementation of counter measures.

The Tribunal rejected an argument by the applicant that the issuing of assessments for the years ended June 1980 to 1984 had undermined the basis for this claim. In its view, the fact that the assessments dealt only with some of the issues outstanding clearly demonstrated that investigations of these aspects of the applicant's returns had by no means

been concluded. In addition, it referred to a larger area of possible exposure to additional tax which was set out in 'Statement of Proposed Adjustments' and concluded that there was no doubt that an investigation of a possible breach of the law was in being.

With regard to the requirement of 'prejudice', the Tribunal referred to the Federal Court's decision in *News Corporation Ltd v. NCSC (No. 2)* 57 ALR 550. In its view, disclosure of the documents in question would have posed more than a possibility or small risk of impairment to the continuing investigation and that it would therefore certainly come within the terms of s.37(1)(a).

#### Section 40

Additional claims for exemption under ss.40(1)(c), (d) and (e) were also upheld in respect of parts of documents containing the names of officers of the respondent. Evidence was given that it was not the practice of the respondent to release the names of staff unless the person in question had contacted a taxpayer by personal interview or telephone or unless that person was acting in the exercise of a delegated power or held a position which required the signing of correspondence in his or her own name. There was also evidence that the disclosure of names in contravention of this practice might result in staff industrial action. The Tribunal referred with approval to its earlier decision in *Re Mann* 7 ALD 698 in which it had expressed the view that there would be very real dangers of misuse of the names of officers of the respondent, if disclosure was made.

#### Overlapping claims

In view of its conclusions as outlined above, it was not necessary for the Tribunal to consider overlapping claims under ss.41, 43 and 45. It commented that, in the case of the great majority of the documents, claims for exemption were made under multiple sections of the Act and that, although in some cases there could be doubt as to whether a claim under a particular section or sections should have been sustained, in the case of all of the documents there was at least one section under which the claim should succeed.

#### The decision

In the circumstances, the Tribunal considered that the respondent had made out a sufficient case to support all the claims for exemption dealt with above, and accordingly affirmed the decision under review.

#### GEARY and AUSTRALIAN WOOL CORPORATION (No. V86/575)

**Decided:** 16 October 1987 by R.A. Balmford (Senior Member), H.C. Trinick and J. Wilson (Members).

*Deemed refusal of request — application for further time to comply with request — claim for exemption under s.42.*

This was an application for review of two decisions by the respondent:

- a decision refusing access to a number of documents, which decision was deemed to have been made by virtue of ss.56(1) and 19(3)(b). It was common ground that the respondent still had in its possession documents falling within the terms of the applicant's request and it applied under s.56(b) to be allowed further time to deal with the requests;
- a decision that a number of documents falling within the applicant's request were exempt under s.42.

#### Extension of time

The respondent estimated the time which would be necessary to complete the processing of the applicant's requests as a year. The applicant did not oppose the application for further time as such but sought an order from the Tribunal which would expedite the process of bringing the matter to a close.

The Tribunal made a compromise order allowing for the staged release of the documents in question over some 9 months. It commented that, while it appreciated the difficulties faced by respondent in responding to the requests, it considered that to allow a further year for full compliance with requests made over two years ago would not be reasonable. It also noted that the respondent did not dispute the applicant's evidence that at an earlier stage, by seeking to rely on its partial exemption under s.7, the respondent had delayed the matter for one year.

#### Legal professional privilege

The Tribunal examined the documents in issue in the light of the definitions of legal professional privilege in *Grant v. Downs* (1976) 11 ALR 577 and *TPC v. Sterling* (1978) 36 FLR 244. It upheld the claim for exemption under s.42 in respect of all the material in question including correspondence to and from a salaried legal adviser of the respondent with the exception of two sentences which, in its view, were not sufficiently closely connected with the giving of legal advice as to be privileged.

One particular circumstance of concern to the applicant was the fact that some of the documents had been seen in the course of their duties, not only by officers of the respondent, but also by officers of other agencies. The Tribunal referred to its earlier decision

in *Re Dwyer* 8 ALD 474 in which it had upheld a claim for exemption under s.42 in respect of documents which had moved between the respondent and other persons on such a basis that their confidential nature would be maintained. It was satisfied in this

case that the documents had been seen by third parties only in the course of their professional duties and that they had not lost the confidentiality required for maintaining their privileged status.

## FEDERAL COURT

### **CORRS PAVEY WHITING & BYRNE v. COLLECTOR OF CUSTOMS FOR THE STATE OF VICTORIA and ALPHAPHARM PTY LTD (No. VG6/87)**

**Decided:** 13 August 1987 by Sweeney, Jenkinson and Gummow JJ.

*Documents sought to obtain evidence of an alleged infringement of patent — whether exempt under s.45.*

The appellant had sought documents relating to the importation of the substance Naproxen with a view to obtaining evidence of an alleged infringement of a patent of their client, Syntex, by Alphapharm. The respondent's decision to refuse access to these documents had been affirmed on appeal to the Tribunal which reached its decision solely upon s.45. However in the course of the hearing the applicant had argued that the expression 'lawful business . . . affairs' in s.43(i)(c) did not include past events because they were 'a matter of history'.

The Full Court dismissed the appeal with Gummow J dissenting.

#### **J nkinson J**

Jenkinson J, who delivered the leading majority judgment commenced it by stating that he would avoid a construction of s.45 which would include among the criteria of exempt status considerations such as 'just cause', 'clean hands', 'iniquity' and 'public interest'. In his view, those considerations with the possible exception of 'clean hands' were all directed to the definition of circumstances in which a court would abstain from providing relief in respect of the disclosure of information to particular persons, whether a restricted class or the whole community, to whom disclosure was considered justified notwithstanding that a breach of confidence was committed by the disclosure.

His Honour also pointed out that, when a disclosure was made of confidential information concerning a 'misdeed' to one who had a proper interest to receive it, the circumstances in which the disclosure was made would commonly result in the imposition on the recipient of an obligation to maintain the

confidentiality of the information, except in seeking appropriate redress or punishment in respect of the misdeed. In contrast, disclosure under the *FoI Act* was required to be made to 'any person' and, in his view, it was doubtful whether the communication of inherently confidential information in pursuance of the Act could, without more, result in the imposition on the recipient of an obligation of confidence. Furthermore, he pointed out that the *FoI Act* conferred no power to exact any undertaking, or to impose any condition, concerning the use to which a person granted access to a document under the Act could put the document or information contained in it; nor did it make any provision for giving the person who provided confidential information to an agency the opportunity to make submissions in support of the contention that a document was exempt under s.45. In view of this, he concluded that the circumstances prescribed for the making of administrative decisions concerning the granting of access to documents under the Act were so ill suited to the finding of the facts and the framing of orders based on public interest-type policy considerations that he was moved to adopt a construction of s.45 which would displace those considerations from its purview.

Jenkinson J specifically disagreed with comments by Gummow J that information 'as to the . . . real likelihood of commission . . . of a civil wrong of public importance' lacked the necessary quality of confidence so that it could not be the subject of a breach of confidence. Rather, he felt, it should be said that the disclosure of such information to persons having a proper interest in receiving it would be restrained by curial order, notwithstanding any breach of confidence by the disclosure. It therefore followed that the language of s.45(1) was not inapt to confer exempt status on a document which contained confidential information received under circumstances importing an obligation of confidence, without regard to those considerations of public policy to which courts had allowed an influence in determining whether to grant or withhold remedies

for 'breach of confidence' in the exercise of their equitable jurisdiction.

Finally, Jenkinson J concluded that the material before the Tribunal justified its conclusion that disclosure of the materials in issue would constitute a breach of confidence and he accordingly ordered that the appeal should be dismissed with costs.

#### **Gummow J: Conclusions as to s.45**

Gummow J considered that the Tribunal had erred in the approach it had taken to s.45 and that it ought to have evaluated the evidence before it on the footing that:

- (a) contrary to what was decided in *Withford's Case* (1983) 5 ALD 534, the term 'breach of confidence' is used in s.45 in its technical sense,
- (b) in a case such as the present where the confidence was not contractual, the question was whether disclosure sought by the appellant would be a breach of confidence liable to be enjoined in equity,
- (c) in reaching a decision upon (b), it was necessary to consider, not whether there would be any 'public interest defence' in the sense used in the modern English cases, but rather, whether
  - (i) there would be a defence of unclean hands where the subject matter of the suit was non-disclosure to Syntex of a real likelihood of importation by Alphapharm in infringement of Syntex's patent, and further, or alternatively
  - (ii) whether the information in question would not be protected in equity, because it did not have the necessary quality of confidence, being information as to commission or the real likelihood of commission by Alphapharm of a civil wrong of public importance, in the redressing of which Syntex had a real and direct interest.

#### **Section 43**

Although the Tribunal had not found it necessary to reach any conclusion in relation to a further claim for exemption under s.43, it had been argued before it in relation to the expression 'in respect of business