CITATION: *ROMBOLA HOLDINGS PTY LTD v COMMISSIONER OF TERRITORY REVENUE [2019] NTLC 019*

PARTIES:	ROMBOLA HOLDINGS PTY LTD V COMMISSIONER OF TERRITORY REVENUE
TITLE OF COURT:	TAXATION AND ROYALTY APPEALS TRIBUNAL
JURISDICTION:	CIVIL
FILE NO:	21931222
DELIVERED ON:	12 DECEMBER 2019
DELIVERED AT:	DARWIN
HEARING DATE:	DECISION ON THE PAPERS
DECISION OF:	JUDGE JOHN NEILL

CATCHWORDS:

meaning of "dutiable value of dutiable property"; inclusion of GST "payable" in unencumbered value of property

Stamp Duty Act 1978 subsections 4A(1), 4AB(1) and 5(1)

Taxation Administration Act 2007 sections 115, 116, 117(1), 118(2)(d), 122, 131(2) and 132(1) and (2)

Interpretation Act subsection 28(2)

Chief Commissioner of State Revenue (New South Wales) v Dick Smith Electronics Holdings Pty Ltd [2005] 221 CLR 496

Commissioner of State Revenue (Victoria) v Lend Lease Development Pty Ltd and

Commissioner of State Revenue (Victoria) v Lend Lease IMT 2 (HP) Pty Ltd and

Commissioner of State Revenue (Victoria) v Lend Lease Real Estate Investments Ltd

[2014] 254 CLR 142

REPRESENTATION:

Solicitors:

	Appellant:	Ward Keller
	Respondent:	Solicitor for the Northern Territory
Judgment category classification:	B	
Judgment ID number:	019	
Number of paragraphs:	54	

TAXATION AND ROYALTY
APPEALS TRIBUNAL

No. 21931222

BETWEEN

ROMBOLA HOLDINGS PTY LTD

Appellant

AND

COMMISSIONER OF TERRITORY REVENUE

Respondent

REASONS FOR DECISION

(Delivered 12 December 2019)

JUDGE: JOHN NEILL

Introduction

1. Rombola Holdings Pty Ltd ("the Appellant") objected to a stamp duty assessment made by the Commissioner of Territory Revenue ("the Respondent"). That objection was disallowed by the Respondent in a letter dated 19 June 2019 which was emailed to Ward Keller the lawyers for the Appellant, apparently on that date. The Appellant has appealed to this Tribunal by a Notice of Appeal filed on 19 August 2019.

2. This appeal is brought pursuant to section 115 of the *Taxation Administration Act 2007* ("the Act"). Subsection 117(1) of the Act provides that the appeal must be commenced within 60 days "…*after the date of notice of the decision subject to the appeal*". Those 60 days elapsed on 18 August, the day before the appeal was filed. However, 18 August 2019 was a Sunday and therefore the last day for filing

the appeal was Monday 19 August 2019 – see subsection 28(2) of the *Interpretation Act*.

3. The Notice of Appeal is required by subsection 118(2)(d) of the Act "…*to state fully and in detail the grounds of appeal*". The Appellant has complied with this requirement and its Notice of Appeal in addition to being a formal notice of appeal is also in effect the Appellant's written submissions in these proceedings.

4. Pursuant to section 116 of the Act the onus is on the Appellant to show that the decision of the Respondent is wrong. Pursuant to section 122 of the Act:

> *"In determining the appeal, the Tribunal may:*
> *(a) confirm the decision subject to the appeal; or*
> *(b) vary the decision subject to the appeal; or*
> *(c) substitute another decision that would have been available to the decision maker".*

5. The Notice of Appeal was not accompanied by any further material and the appeal has proceeded on the basis of the materials before the Respondent when it considered the Appellant's objection.

6. The Respondent filed its *Written Submissions of the Commissioner of Territory Reven*ue on 25 September 2019. This was accompanied by a volume of documents entitled *Records Relevant to the Appea*l which were the materials before the Respondent when it considered the Appellant's objection. There are 25 separately numbered documents in the volume. This volume of documents constitutes the evidence for my consideration in determining this appeal.

7. The Appellant replied by filing its *Response to Submissions* on 16 October 2019.

8. Pursuant to subsection 131(2) of the Act the Tribunal must determine the appeal "…*on the basis of the written material submitted by the parties unless satisfied that it is necessary to conduct a hearing in view of the nature and circumstances of the appeal*". There was nothing filed or submitted to satisfy the Tribunal that it might be necessary to conduct a hearing. The matter was listed before me on 25 October 2019 to give the parties the opportunity to make any oral submissions in addition to their written submissions. However by email on 22 October the parties indicated their willingness to have the Tribunal determine the matter solely on the

basis of the evidence in the volume of documents and the written submissions, and that listing was vacated.

The Background

9. The Appellant and another entity Ittelocin Pty Ltd entered into an arrangement to purchase two lots of agricultural land and associated assets from two Vendors. The arrangement was evidenced by five separate instruments, being an overarching agreement described as an "Umbrella Deed"; an agreement by Ittelocin Pty Ltd for the purchase of NT Land Portion 6266; an agreement by the Appellant for the purchase of plant, equipment and crop in respect of Land Portion 6266; an agreement by Ittelocin Pty Ltd for the purchase of NT Land Portion 6280; and an agreement by the Appellant for the purchase of plant, equipment and crop in respect of Land Portion 6280.

10. The two instruments reflecting the two Agreements for the purchase by the Appellant of plant, equipment and crop identified a specific purchase price for the subject matter of each agreement. However, clause 7 in each of those instruments provided for an adjustment to each purchase price whereby certain identified expenses and income associated with the crop not yet incurred or earned by the Appellant as Purchaser were to be "*adjusted by way of an allowance on*" the balance of each purchase price owing after payment of the relevant deposit.

11. Under clause 2.1 in each of the two instruments involving the agreements with the Appellant, the Appellant was purchasing the "Assets". "Assets" was defined in each instrument to mean the plant and equipment and the crop. "Crop" was defined to mean the unharvested watermelon crop on each of the two Portions of land at Completion. Under the instruments, Completion was subject to the sale of the land on which the crops were grown to a third party, namely Ittelocin Pty Ltd. As the date for Completion was dependent on external factors, and it was not known whether the unharvested watermelon crop would be harvested before Completion, the parties regulated the transitional period between the execution of the instruments and Completion, by requiring the Appellant as Purchaser to pay for the crop expenses. Because the Appellant was purchasing the crops under the instruments, the Appellant would get the benefit of the sale of the crops. This was dealt with in clause 7 in each of the two instruments as follows:

"7.1 Purchaser to Bear Crop Expenses and Receive Crop Income

(a) The Purchaser must, upon and as a condition of Completion, pay to the Vendor in the same manner as the Balance, the Crop Expenses.

(b) Provided the Purchaser has paid the Crop Expenses to the Vendor the Purchaser shall be entitled to all income from the Crop and all management fees in respect of the Mango Crop (but not income from the Mango Crop, which belongs to the Lessee) and the Vendor shall account to the Purchaser for all and any income from the Crop and/or management fees in respect of the Mango Crop received by the Vendor prior to Completion

(c) Unless agreed otherwise between the parties, the Crop Expenses and any income from the Crop will be adjusted by way of an allowance on the Balance at Completion and the Vendor must provide the Purchaser with reasonable particulars and any evidence reasonably available to it in respect of the Crop Expenses and income from the Crop.

(d) The Vendor agrees to:

(i) continue to run the farming enterprise and manage the Assets to the best of its ability and in accordance with industry practice, and in substantially the same manner and in the ordinary course, from the Contract Date until Completion; and

(ii) to make its best endeavours to seek and receive fair market value for any of the Crop sold by the Vendor or between the Contract Date and Completion".

12. This meant that at Completion, "*unless otherwise agreed between the parties*", the Appellant would have to pay to each Vendor the balance of each purchase price in addition to the deposit already paid, plus the crop expenses and less the income from the sale of the crop relevant to each Portion of land.

13. At Completion, the balances owing under each instrument to the Vendors by the Appellant as Purchaser were in fact adjusted downwards to allow for the value of the crops which exceeded the crop expenses in each transaction – see the Plant and Equipment Settlement Statements being documents 16 and 17 in the volume of documents.

The Issues

14. The assessment of stamp duty in the Northern Territory is determined by the *Stamp Duty Act 1978* ("the Stamp Duty Act").

15. Subsection 5(1) of the Stamp Duty Act provides:

> "*Stamp duty is imposed, in accordance with this Act:*
>
> *(a) on dutiable instruments; and*
>
> *(b) in respect of dutiable transactions".*

16. Subsection 4AB(1) of the Stamp Duty Act provides:

> *"The dutiable value of dutiable property is:*
>
> *(a) if consideration is, or is to be, given for the property – the amount or value of the consideration or the unencumbered value of the property (whichever is the greater); or*
>
> *(b) if no consideration is given for the property – the unencumbered value of the property"*.

17. Subsection 4A(1) of the Stamp Duty Act provides:

> *"The unencumbered value of property is the full value of the property free from encumbrances (including any GST payable on the supply of the property)".*

18. It is not in dispute in this matter that the two instruments whereby the Appellant purchased property, being the plant, equipment and crops, involved a supply of that property and therefore GST was payable. It is not in dispute that GST should be included with the consideration for the plant, equipment and crops as together constituting the dutiable value of that property for stamp duty purposes.

19. The Respondent has determined that the consideration on which stamp duty was payable was the total of the unadjusted Purchase Prices together with the GST calculated on those amounts. The Respondent's approach resulted in a total assessment of stamp duty in the sum of **$256,623.50** – see the Notice of Assessment of Stamp Duty being part of document 20 in the volume of documents.

20. The Appellant has objected to this approach. The Appellant says rather that the consideration on which stamp duty should be assessed was what was actually paid overall at Completion in each case – namely the difference between the Purchase Prices and the nett incomes from the sale of the crops after deducting the crop expenses - together with the GST calculated on those reduced amounts.

21. The Appellant says it in fact paid GST at completion calculated only on these reduced amounts, and that this calculation and payment of GST has not been challenged by the Australian Taxation Office - see page 4 of the letter dated 29 January 2019 from Ward Keller for the Appellant addressed to the Respondent being document 22 in the volume of documents.

22. The Appellant calculates its approach would lead to a total assessment of stamp duty in the sum of **$190,586.77** – see document 22 at page 5.

23. The difference between the two approaches is **$66,036.73**.

The Law

24. Both parties relied upon the same two High Court authorities in support of their positions. These were *Chief Commissioner of State Revenue (New South Wales) v Dick Smith Electronics Holdings Pty Ltd* ("*Dick Smith*") [2005] 221 CLR 496 and *Commissioner of State Revenue (Victoria) v Lend Lease Development Pty Ltd* ("*Lend Lease*") and two other related actions heard at the same time involving the same appellant against two other Lend Lease entities, all reported at [2014] 254 CLR 142.

25. These Decisions involved two very different and quite complex factual circumstances. However, they both adopted the same approach. This was that to determine the consideration for a dutiable transaction to determine its dutiable value, it was necessary to look to "*what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement*" – *Dick Smith* at 519 [75]. This approach was adopted by the later High Court in *Lend Lease* in paragraph 51 on page 160. The High Court in *Lend Lease* placed particular emphasis on the words "*as stipulated in the Agreement".*

26. In short, it is always necessary to identify the substance rather than the form of the transaction under consideration. Words such as "purchase price" and "consideration" in an agreement are not necessarily determinative. The question is, what is it that a vendor received overall to induce it to move a transfer of property to a purchaser?

Analysis of the Agreements

27. Pursuant to the two Agreements the Appellant was always going to pay to each of the Vendors the agreed purchase price for the assets identified in each Agreement and in return the Appellant was always going to receive the benefit of the assets. The two Agreements appear respectively as documents 2 and 4 in the volume of documents.

28. Clause 2.1 in each Agreement is in identical terms and provides as follows:

> "S*ale and Purchase*
> *The Vendor agrees to sell and the Purchaser agrees to buy, free from Encumbrances, the Assets for the Purchase Price*".

29. The subject matter of each Agreement was the assets. "Assets" in each Agreement was defined in identical terms as *"(a) Plant and Equipment; and (b) the Crop*".

30. "Crop" was defined in the Agreement concerning Land Portion 6266 as *"…the unharvested watermelon crop on the Land at Completion, and does not include the Mango Crop*". It was defined in the Agreement concerning Land Portion 6280 simply as *"…the unharvested watermelon crop on the Land at Completion*".

31. I am satisfied and I find that in each Agreement the unharvested watermelon crop formed part of the consideration provided by each Vendor to the Appellant as Purchaser in return for each Purchase Price.

32. The Umbrella Deed appears as document 1 in the volume of documents. The Vendors and Purchasers of the two Portions of land and the Vendors and Purchaser (the Appellant) of the assets associated with each of the Portions of land were all parties to the Umbrella Deed. The Recitals in the Umbrella Deed provide:

> *"A. The parties have entered into the Contracts contemporaneously with the execution of this Deed.*
>
> *B. Subject to the terms of this Deed, Completion of each Contract is conditional on Completion of every other Contract.*
>
> *C. This Deed contains provisions which, unless specifically indicated otherwise, apply to each Contract".*

33. Accordingly, the Umbrella Deed and the four associated Contracts were interdependent and the Completion of each one was a condition precedent to the Completion of every other one, and I so find.

34. The practical effect of this was that the Vendors and the Appellant as Purchaser in drafting each Agreement for the sale and purchase of the assets had to agree and specify how to manage the unharvested watermelon crops up to and possibly beyond the harvest and sale of these crops pending Completion, because Completion might be delayed. That agreement and specification appears as clause 7 in each Agreement.

35. If the date of Completion had in fact been close to the date of entering into the two Agreements then the Appellant would have taken possession of and responsibility for the unharvested watermelon crops. The Appellant would then have borne the ongoing crop expenses, including the expenses of the subsequent harvest, and the Appellant would have benefited in due course from the income from the sale of the harvested crops. The Appellant would have paid, and each Vendor would have received, the unadjusted balance of the Purchase Price at Completion in each case.

36. Clause 7 in the Agreements did not change this underlying arrangement. Clause 7 merely recognised that in the event of a delayed Completion each Vendor would accept the responsibility of being caretaker for each watermelon crop on the basis the Purchaser would reimburse all associated expenses at Completion. Each Vendor's receipt of the sale price of each subsequently harvested crop and the accounting for that to the Purchaser was a practical means of dealing with a delayed Completion. It did not change the fundamental nature of the transactions for the sale and purchase of the assets.

37. The reimbursement of pre-harvest crop expenses by the Appellant to the Vendors and the accounting by the Vendors to the Appellant for the proceeds of the sale of the harvested watermelon crops was a zero-sum game. Once the reimbursement and the accounting were concluded they cancelled each other out, leaving simply the payment of the balances of the two Purchase Price in return for the assets. The value of the watermelon crops was always part of the assets included in the Purchase Prices.

38. The parties could in the alternative have reimbursed the crop expenses and accounted for the sale of the watermelon crops by separate payments between them, not involving any adjustment of the balances of the Purchase Prices. It was simpler and more convenient to adopt the adjustment method at Completion rather than making these separate payments backwards and forth, but that choice of payment method did not change the fundamental nature of the transactions.

39. I note that in any event, clause 7 of the Agreements provided for this adjustment method "*unless otherwise agreed between the parties*". That is, this method of adjustment of payments was neither a fixed nor a fundamental term of the Agreements.

40. In any sale of property, particularly of real estate, there are likely to be adjustments at settlement of outgoings relating to a period from before to beyond the settlement date. The adjustments at Completion in this case although more complex are nevertheless analogous to the adjustments at settlement of the sale of real estate for such matters as Council rates and water rates. Such adjustments do not affect the nature of the overall transaction or its dutiable value for stamp duty purposes.

41. The correct approach to the dutiable value of the two instruments in this matter is to identify "*what was received by the Vendors so as to move the transfers to the Purchaser as stipulated in the Agreement"* – see paragraph 25 above. I am satisfied and I rule that in the case of each Agreement for the sale and purchase of the assets in this case, that was the unadjusted purchase price in each instrument.

GST

42. Subsection 4A(1) of the *Stamp Duty Act* provides:

> "*The unencumbered value of property is the full value of the property free from any encumbrances (including any GST payable on the supply of the property)".*

43. The "GST" referred to here is defined in the *Stamp Duty Act* to have the same meaning as in the Commonwealth *A New Tax System (Goods and Services Tax) Act 1999.* That is, it means the tax imposed on the supply of goods and services throughout Australia.

44. The language of Subsection 4A(1) of the *Stamp Duty Act* requires a consideration of what was "payable" by way of GST, not of what the Appellant has in fact paid by way of GST.

45. The evidence before me is that the Appellant has paid GST on the two transactions involving the supply of goods in this matter, calculated on the adjusted Purchase Prices rather than on the full Purchase Prices, at the rate of 10%, and that payment of GST calculated on this basis has not been questioned by the Australian Taxation Office ("the ATO").

46. The additional evidence before me is that the Respondent has calculated the stamp duty payable by the Appellant by including GST calculated on the unadjusted Purchase Prices, also at the rate of 10%.

47. I am aware and I take judicial notice of the fact that GST in Australia is calculated at the rate of 10%. I am not however aware whether there are accepted different ways to approach the identification and/or the valuation of the goods or services in any individual case for the purpose of applying that 10% impost.

48. No submissions have been made in this appeal concerning how to calculate the payment of GST generally by reference to the Commonwealth Act. The Respondent made submissions that GST is to be assessed on the Purchase Prices – paragraphs 37 to 40 of its Submissions - but the Appellant responded that this was not correct and that GST was to be calculated on the adjusted Purchase Prices and referred to the settlement statements for each transaction – paragraph 40 of the Response.

49. I was not provided with any evidence such as a document from the ATO assessing or confirming the amount of GST payable in respect of these transactions.

50. The onus is on the Appellant to prove the Respondent's approach to the calculation of GST as part of its assessment of stamp duty, was incorrect – see section 116 of the Act. I am not prepared to infer simply from the ATO's reported silence in response to the Appellant's calculation and payment of GST in this matter that the GST paid was in fact the GST payable in the circumstances.

51. The Appellant has failed to discharge its onus with respect to the Respondent's approach to the question of the GST component of the dutiable value of the dutiable property in this matter.

Costs

52. Subsection 132(1) of the Act provides that the parties to an appeal must bear their own costs. Subsection 132(2) provides for some exceptions to this position, generally speaking involving some wrongdoing by a party.

53. There is no such evidence before me in this matter and neither party has made any submissions in respect of costs.

Orders

54. I confirm the decision of the Respondent which is the subject of this appeal.

55. I make no order as to costs.

Dated this Twelfth day of December 2018

JOHN NEILL
LOCAL COURT JUDGE