

INTERNATIONAL CASE NOTES

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Australia

1. The tax authority appealed against a decision of the Administrative Appeals Tribunal setting aside the Commissioner's revocation of the taxpayer's charitable status for income tax purposes (*Aid/Watch Incorporated v Commissioner of Taxation* [2008] AATA 52, 28 July 2008, reported in CL&PR [2008] Vol 11 No 1 at 64-65).

Held: (i) the activities of Aid/Watch were directed towards purposes which would fall within the category of relief of poverty; (ii) the activities had the necessary educational element for its purposes to be characterised as being for the advancement of education; (iii) since its efforts to persuade the Australian government to its point of view necessarily involved criticism of and an attempt to bring about change in government activity and in some cases government policy, this amounted to political activity in support of a political purpose that was not ancillary or incidental to its charitable purposes. The Tribunal's decision was set aside and the Commissioner's decision to revoke charitable status was affirmed.

(*Federal Commissioner of Taxation v Aid/Watch Incorporated* [2009] ATC 20-131, Full Federal Court, 23 September 2009)

2. Wycliffe Bible Translators (International), a charitable missionary organisation established to advance the Christian religion through literacy and translation work, set up a non-profit company limited by guarantee, Word Investments Limited, as a means of raising funds to support its work. The corporate objects of Word were expressed as the advancement of religion but its activities consisted solely of investments in commercial activities the profits of which were distributed mainly to Wycliffe and another religious body. The tax authority refused Word's application for endorsement as a charity exempt from income tax. Word appealed successfully to the Full Federal Court. The tax authority appealed that decision to the High Court.

Held (by a 4-1 majority, Kirby J dissenting): (i) by engaging in commercial activities Word was exercising its powers which it did only in furtherance of its charitable objects; (ii) the nature and probable consequence of Word's purposes and activities was that the profits would be applied in furtherance of charitable purposes, no distinction being made between a direct application to such purposes and an indirect application by means of a distribution to other organisations for them to spend on the purposes; (iii) it was sufficient that the recipient organisations had objects that comprised charitable purposes and had an obligation to apply the distributions received from Word for the intended purposes; (iv) Word had a physical presence in Australia and to that extent incurred its expenditure and pursued its objects in Australia, and accordingly it was capable of being subject to appropriate scrutiny and compliance action by the tax authority.

(Commissioner of Taxation v Word Investments Limited, [2008] HCA 55, High Court, 3 December 2008)

[Following this decision the Australian government announced its intention to amend the income tax legislation to ensure that parliament retains the ability to scrutinise fully organisations seeking to pass funds to overseas charities and other entities. The government intends to consider the appropriate tax treatment of commercial activities of charities in the light of the current Henry Review into Australia's future tax system.]

3. A number of public charities set up a company limited by guarantee, Social Ventures Australia Ltd (SVA), to improve the management of operational performance and to enhance the long-term financial viability of charitable organisations by providing educational, mentoring and support services to charitable organisations. SVA did not carry on any commercial activities and its beneficiaries were all public charities. SVA was granted exemption at the federal level from income tax and fringe benefit tax and deductible gift recipient status, but refused exemption from state payroll tax on the grounds that its activities were indirect and focused on promoting the wellbeing of the community and did not amount to charitable activities.

Held: The activities of SVA may not be seen in isolation to be charitable but when fully examined in the context of the various charitable ventures that it supported were charitable under the fourth head of charity being in furtherance of other purposes beneficial to the community.

(Social Ventures Australia Limited v Chief Commissioner of State Revenue, [2008] NSW ADT 331, Administrative Decisions Tribunal, 12 December 2008)

Canada

1. The taxpayer was established with two main objects:
 - a) to promote the education of all, but specially young people, by encouraging in them a greater knowledge, love and care of the countryside and an appreciation of the cultural values of towns and cities in all parts of the world, and as ancillary thereto to provide hostels or other accommodation in which there shall be no discrimination based on race nationality, religion, class, political opinion, sex or age, and thereby to develop a better understanding between persons - both home and abroad;
 - b) to promote the development, operation and use of hostels for recreational, cultural, and educational programmes, travel and exploration in co-operation with the Ontario Hostelling Association and the Canadian Hostelling Association.

Following an audit, the tax authority concluded that the taxpayer ceased to qualify as a registered charity on the grounds that the provision of accommodation in the context of youth hostels is not a charitable activity and gave notice of its intention to revoke charitable status.

Held: (i) the Minister's decision is a conclusion of mixed fact and law reviewable on a standard of reasonableness; (ii) simply providing an opportunity for people to educate themselves by making available tourist accommodation is insufficient for the activity to be regarded as promoting the advancement of education and therefore as charitable under the Income Tax Act (applying *Vancouver Society of Immigrant and Visible Minority Women v M.N.R.* [1998] 1 S.C.R. 10). Accordingly, the Minister's decision to revoke registration was reasonable.

(*Hostelling International Canada – Ontario East Region v Minister of National Revenue*), [2008] FCA 396, Federal Court of Appeal, 11 December 2008)

Ireland

1. The defendant was a registered charity established by Private Act of Parliament to provide cemeteries in the Dublin area. It operated private cemeteries providing burial space regardless of whether the family of the deceased has the means to pay for a grave, while charging interment fees and subscriptions to those who can afford them. The charity set up two wholly owned limited liability companies, one to carry on the business of

manufacturing and selling tombstones and monuments and the other to operate a crematorium at one of its cemeteries. The plaintiff was one of a number of private businesses in the Dublin area that engage in the design, manufacture and sale of headstones. The plaintiff complained to the Competition Authority that the defendant abused its dominant position in the market by restricting competing businesses from marketing and selling their services inside the cemeteries that it operated. The question arose whether the Dublin Cemeteries Committee Act 1970 gave the defendant a power to engage commercially in the production of headstones for sale and/or to establish subsidiary companies for this purpose. There was no provision in the Act specifically authorising the Committee to engage in commercial enterprises although there were two express powers to build, construct, improve and maintain headstones and to sell “all or any part of the undertaking property and rights of the Committee”. There was also a general power to do such things as are incidental to the attainment or advancement of any of the objects of the Committee.

Held: (i) it is a well established principle of construction of private Acts that their wording is to be treated as the language of their promoters and where there is any doubt the language is to be construed against them; (ii) it is impossible to construe the Act on any basis which divorces the powers from the objects of the Committee; (iii) were the Act a Memorandum of Association the powers could only be used to further the objects and any contracts outside the scope of the objects would be *ultra vires* the Committee and void; (iv) accordingly, the commercial manufacture and sale of headstones was outside the powers of the Committee.

(Pierce t/a Swords Memorial v The Dublin Cemeteries Committee, [2009] IESC 63, Supreme Court, 30 July 2009)

2. The taxpayer charity appealed against the rateable valuation of a purpose-built, stand alone, multi-storey car park which stood within the grounds of its hospital. The car park was owned by a wholly owned subsidiary of the charity but it was occupied by the charity under a full repairing and insuring lease. Its daily operation was managed for the charity by a third party contractor. The car park was used by staff, patients and visitors on payment of a periodic charge and was available to the general public whether visiting the hospital or not. The taxpayer claimed that the car park qualified for rating exemption under the Valuation Act 2001, being either any land, building or part of a building used by a body for the purposes of caring for sick persons being either a non-profit body or a body funded mainly by government (within heading 8 of Schedule 4) or any land, building or part of a building which is occupied by a body which is a charitable organisation that uses the land for charitable purposes (within heading 16 of Schedule 4).

The taxpayer appealed against the Valuation Tribunal's determination that the car park did not qualify for exemption.

Held: (i) the fact that a building is a separate structure does not prevent it from being regarded as a part of a hospital; (ii) the use of a building or part of a building does not cease to be a use for the charitable purposes of a hospital by reason only of the fact that its particular use, if treated in isolation, would not itself be regarded as involving a service of care for the sick or treatment of illnesses; (iii) it is not just the nature of the activity carried on in the building (the user) but also the reason or objective of the occupying body in engaging in that use which gives rise to the exemption; (iv) the Tribunal erred in law in applying the test that the user must be inextricably linked as a matter of necessity to the proper operative elements of the functioning of the hospital; (v) the fact that a charge is made for the use of a particular facility of the hospital and any surplus over cost accrues to the benefit of the hospital does not deprive the property of its entitlement to exemption under heading 8. The Tribunal erred in law in determining that the car park was not entitled to exemption.

(St Vincent's Healthcare Group Ltd v Commissioner of Valuation, [2009] IEHC 113, High Court, 26 February 2009)