

COMMISSIONER OF INLAND REVENUE

v

WESTERN SAMOA HANDICRAFTS INDUSTRY DEVELOPMENT CORPORATION

Supreme Court Apia
25 July, 3 August 1977
Nicholson CJ

ADMINISTRATIVE LAW (Statutory corporations) - Whether immune from taxation - Same considerations applicable to immunity from taxation as to other Government immunities and privileges - Whether or not activities of statutory corporation for public benefit or private profit not the deciding factor: Renmark Hotel Inc v Federal Commissioner of Taxation, Australian and New Zealand Income Tax Reports, Vol 4, 157, per Rich J referred to - Structure of organisation, its general purposes, the purposes of the enabling legislation, and express language as to immunities also to be considered - Normal Government immunity from taxation inapplicable to an independent corporation created by statute to promote an activity not within the province of the Executive Government: British Broadcasting Corporation v Johns [1964] 1 All ER 923 considered and applied - Express terms necessary to constitute statutory corporation "an instrument of the Executive Government" and ergo a "public authority" immune from taxation pursuant to s 47 of the Income Tax Ordinance 1955: Commissioner of Labour v Electric Power Corporation, ante p. 130 followed.

Held, in the absence of express language in the Handicrafts Industry Act 1965 the Corporation had no immunity from income tax and it was not a "public authority" within the meaning of s 47 of the Income Tax Ordinance 1955.

APPEAL by way of case stated against a decision in the Magistrate's Court dismissing eleven charges against the respondent for failing to furnish returns of income for tax purposes.
Appeal allowed.

Barlow for appellant.
Enari for respondent.

Cur adv vult

NICHOLSON CJ. This is an appeal by way of case stated from a decision of the Magistrate's Court sitting at Apia dismissing eleven informations against the respondent on charges of failing to furnish returns of income for tax purposes.

The case as stated by the learned Magistrate poses two issues but counsel directed their submissions to the first question only and apparently do not require me to furnish an answer to the second question at this stage.

The point for decision on the first question is whether the respondent is exempt from the requirements of the Income Tax Ordinance 1955, the learned Magistrate having determined in a brief oral judgment that by virtue of the terms of section 47(1)(a) of the Income Tax Ordinance 1955 the respondent was a public authority in terms of section 2

of the Ordinance and its income was therefore exempt from taxation.
The relevant portion of section 47 reads as follows:-

- (1) The following incomes shall be exempt from taxation:-
- (a) The income, other than income received in trust, of a local authority, or of any public authority;

Section 2 of the Ordinance provides that, "'Public authority' means the Public Trustee, and every other Department or instrument of the Executive Government of Western Samoa;"

The respondent came into existence as the Handicrafts Industry Development Corporation by virtue of the Handicrafts Industry Act 1965, Section 4(2) of which provides for the Corporation to have perpetual succession and a common seal, the capability of acquiring, holding and disposing of real and personal property, of suing and being sued and of doing and suffering all such other acts and things as bodies corporate may lawfully do and suffer. Section 5(1) of the Act provides for the Corporation's membership to consist of a mixture of Government officials and lay persons nominated by the Prime Minister and appointed by the Head of State. Section 5(2) provides that the members shall not be deemed to be in the "Public Service" or in the "Service of Western Samoa" within the meaning of Articles 83 and 111 of the Constitution only by reason of their membership in the Corporation. Section 14 sets out in some detail the functions of the Corporation in promoting the interests of Western Samoa's handicraft industry, and Section 15 contains the powers of the Corporation, which are extensive, although in some instances subject to Cabinet control. In particular, Section 15(2)(f) provides, "To use such sum or sums from the Corporation's profits for any year as the Corporation deems necessary or expedient to offset past losses or for the expansion or development or replacement of its business or assets or to create or increase reserves:" Section 16 requires the Corporation to have regard to Cabinet policy. Section 26 requires the Corporation, "having set aside such sum or sums from its profits for any year as the Corporation deems necessary or expedient to offset past losses, for the expansion or development or replacement of its business assets, or to create or increase reserves," to transfer the balance of its profits to Treasury. Sections 27 and 28 provide for Government audit of accounts and presentation of an annual report to the Legislative Assembly. Section 30(1) entitles the Government to sell all or part of its interest in the Corporation to any company promoted by the Corporation, or to any person. The Act is silent as to whether the Corporation is liable for income tax or other tax. Generally, the tenor of the legislation is to promote the industry for the benefit of Western Samoa and its people, and its assets are dealt with in trust for the people of Western Samoa (Section 14(h)).

Counsel for the appellant in written submissions reviews the Act's provisions and submits that there is a clear picture of an entirely separate trading entity of a similar nature to a number of semi-governmental organisations in New Zealand which are liable to tax, except where there is express legislative exemption for them. At this point I should mention that both the learned Magistrate's case and the submissions of counsel for the appellant make reference to opinions obtained on the law from various individuals. I accept that it is proper to present published authors' expressions of opinion on the law, in submissions to the Court, but I doubt the propriety of presenting privately obtained opinions to the Court, as having some force of their own. I am prepared to consider these expressed views only as arguments presented by counsel for the appellant himself.

Mr Barlow for the appellant referred to British Broadcasting Corporation v. Johns [1964] 1 All E.R. 923, where the English Court of Appeal was concerned with the question of the B.B.C.'s alleged immunity from the requirements of tax legislation. It was there held that the Crown's normal exemption from taxation could not apply to the Corporation since broadcasting was not a province of Government and the Corporation was an independent body corporate which was not exercising functions required and created by Government.

Mr Enari for the respondent seeks to distinguish the line of New Zealand cases culminating in Smith and Smith, Ltd v. Smith, State Advances Corporation et al [1939] N.Z.L.R. 589, which dealt with the general question of privileges and immunities of the Crown, and which generally held that words like those used in Section 4(2) of the Act in legislation setting up Education Boards and the State Advances Corporation are inconsistent with such bodies having Crown immunities and privileges. Mr Enari submits that the question of tax immunity is a much more precise one than the general question of Crown immunity and that these authorities are therefore not relevant to the question of whether the respondent is an instrument of Government for taxation purposes. He applies the same reasoning to the English decision of Tamlin v. Hannaford [1949] 2 All E.R. 327, relied upon by the appellant for the proposition that express words are required in empowering legislation to enable a statutory corporation to claim it is acting on behalf of government. He submits that the Corporation is an "instrument of the Executive Government of Western Samoa." Counsel for the respondent submitted that the decision of Rich J. in the Australian case of Renmark Hotel Inc. v. Federal Commissioner of Taxation reported in Australia and New Zealand Income Tax Reports, Volume 4, p. 157 is the appropriate authority to apply here. The ratio of that case he submits is that the test of whether an organisation is a public authority for the purposes of a taxation statute is whether it exists for public benefit or private profit. Rich J. apparently relied upon the reasoning of Porter L.J. in Griffiths v. Smith [1941] A.C. 170 in arriving at his conclusion. Unfortunately, neither of these reports are available to me, but I accept counsel's summation of their effect. I have had recent occasion to consider a somewhat similar issue in the Electric Power Corporation of Western Samoa v. The Commissioner of Labour, a decision delivered by me on 25th July, 1977 in which I concluded that for the purposes of the Labour and Employment Act 1972 the Corporation could not be deemed to be in the service in any capacity of Western Samoa and was therefore subject to the requirements of that Act. I concluded that the authorities in England, Australia, and New Zealand show a line of reasoning that words such as those used in Section 4(2) of the Handicrafts Industry Act 1965 were inconsistent with the corporations set up by such words having governmental privilege or immunity, and that more express language would need to be used in the legislation creating such corporations if they are to be considered arms of government and thus entitled to governmental privilege.

In spite of Mr Enari's argument that the present issue can be distinguished from the general question of government privilege, I am satisfied that the general approach spelled out by the authorities I reviewed in the Electric Power Corporation decision is the appropriate one here. I would agree that the criterion relied upon by Rich T. in the Renmark Hotel case is a relevant factor to be considered, but I cannot accept that it is the only one, even in the precise issue of taxation. The whole structure of the organisation, its general purposes, the purposes of the legislation, the express language as to immunities used in the enabling statute, all these factors have to be considered. In any event, application of the criterion used in the Renmark case carries with it the seeds of destruction of Mr Enari's argument, for Section 30(1) of the Act enables the Government to dispose of all or part of its interest in the Corporation to "any person." I have no doubt that the Legislature never intended that a private person could acquire the business of the Corporation complete with tax immunity and conduct it for private profit.

To provide a corporation with the sweeping and highly profitable immunity from tax requirements, I think it is incumbent upon the Legislature to say so in clear and unequivocal terms as it has done in Western Samoa in the Electric Power Corporation Act 1972 (Section 20), the Development Bank Act 1974 (Section 30) and the Special Projects Development Corporation Act 1972 (Section 20). The Legislature has given no such expression here but has created a semi-governmental organisation designed to function separately from Government for profit, and with the power in its discretion to deal with its gross profits in the same way as any private company for its development, save only that its net profits are paid to Treasury.

Turning to the precise definition with which I am concerned, viz., "an instrument of the Executive Government of Western Samoa", again I think it must be scrutinised in the light of the general purpose of the legislation. One can readily visualise "instruments of executive government" such as armed forces which are strictly within the province of government. I cannot accept that the promotion of handicrafts is in the same category. I regard the Act as an expression by Government of promotion of a desirable activity, but such activity is not the stuff that the business of executive government is made of, any more than broadcasting was found to be in the B.B.C. case.

I find the Western Samoa Handicrafts Development Corporation is not an instrument of the Executive Government of Western Samoa, nor a public authority within the meaning of the Income Tax Ordinance 1955.

The appeal is therefore allowed on the first issue for determination. I reserve the second issue for argument, if necessary, together with the question of costs.