

STAMP DUTY ON MINING INFORMATION: COMMISSIONER OF STATE TAXATION v. NISCHU PTY LTD

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The exploration of a mining tenement is largely a process of obtaining sufficient reliable information about that tenement to determine whether it can be profitably mined and then to use that information to mine it. In most cases, the only assets of mining exploration will be mining tenements, mining information about those tenements and cash to carry on operations. The information is won at considerable expense. The information is uniquely relevant to the particular tenement and is determinative of the value of the tenement. What then is the legal relationship between the information and the tenements to which it relates? How can the separate value of mining information and tenements be determined?

For stamp duties purposes, these questions arise in two contexts:

- sale of tenements about which the mining information has been acquired; and
- sale of a company which holds tenements about which mining information has been acquired.

The status of mining information was recently considered in the second context by the Full Court of the Supreme Court of Western Australia in *Commissioner of State Taxation v. Nischu Pty Ltd*¹ affirming the decision of Mr. Commissioner Zelestis QC at first instance. The case dealt with the sale of a company which held an interest in an advanced Joint Venture and with the land holding corporation provisions of the Stamp Act, 1921 (WA). Similar provisions exist in New South Wales, Victoria and Queensland.

THE FACTS

Nischu Pty Ltd ('Nischu') purchased the whole of the share capital of Murchison Zinc Company Pty Ltd ('Murchison') for \$24,000,000 on 30 June 1987. This date was in fact the day on which the land holding provisions of the Stamp Act came into effect. The primary question for determination was whether Murchison Zinc was a 'land holder' within the meaning of s. 76AI(2) of the Act. The definition of land in the Stamp Act includes mining tenements. If Murchison Zinc was a land holder, then stamp duty was payable at the rate applicable to a transfer of land. If Murchison was not a 'land holder', duty was payable at the rate of 0.6% of the consideration, or \$144,000. The Commissioner assessed duty on the basis that Murchison was a land holder and levied duty of \$1,015,525.

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1. Unreported, Supreme Court of Western Australia, 10 April 1991.

The effect of s. 76AI(2) is that a company will be deemed to be a land holding corporation if:

- The unencumbered value of the land to which it is entitled exceeds \$1,000,000; and
- The value of that land was 80% or more of the value of all the relevant property to which it was entitled.

The only relevant asset of Murchison Zinc was its interest in the Golden Grove Joint Venture which Joint Venture gave Murchison Zinc an undivided 33 $\frac{1}{6}$ % interest, as tenant in common, in the assets of the Joint Venture. The assets of the Joint Venture comprised:

- Certain tenements; and
- Mining information contained in various records and objects.

The amount of information which had been gathered was substantial. It was described by one of the witnesses as 'some 80 boxes of material stored away as well as what would be the equivalent of a room full of plans and maps and sections in their offices here in Perth.'² Evidence was led, which was accepted at first instance, that the quantity of information was such that it could not be effectively utilised without access to the objects and records containing it. The Joint Venture also had compiled a substantial core library. The information had been gathered as a result of the expenditure of some \$19,000,000 over more than a decade.

The mining information had two important qualities:

- A substantial part of the information could not be reproduced from publicly available records or from the records of the Department of Mines. The Mining Regulations, 1981 (WA) require the holder of a mining tenement to lodge an annual report on exploration and mining activity. Geological reports relating to the tenements must be lodged as part of that obligation. The Department of Mines has a policy of allowing the holder of a tenement access to all records filed at the Department of Mines by previous holders of the tenements. In the present case, however, a substantial part of the information held by the Joint Venture was not required to be filed at the Department of Mines. Nor had it been. Expert witnesses estimated that it would cost approximately \$10 million and take 1 or 2 years to duplicate the information which could not be obtained from the Department of Mines.
- The information, or that part of it which was not publicly available, was necessary to carry out mining operations on the tenements.

The Full Court concluded that the value of the 'land' of Murchison was less than 80% of the value of all the property to which Murchison Zinc was entitled. It was held that Murchison Zinc was not a land holder within the meaning of s. 76AI(ii) and accordingly the Court upheld the decision of Mr Commissioner Zelestis QC at the first instance and dismissed the appeal.

The principal issue for determination in the *Nischu* case was the value of MZC's land. The question was, therefore, different from that determined by the Queensland Supreme Court in *Pancontinental Mining Limited v. Commissioner of Stamp Duties*.³ The *Pancontinental* case had

2. See reasons for judgment of Wallace J at 17.

3. [1989] 1 Qd R 310; noted in (1988) 7 *AMPLA Bulletin* 137.

held that 'information', as such, is not 'property' for the purpose of the Stamp Act upon which conveyance duty was payable. Although there have been recent decisions which have held that information is 'property'⁴, in *Nischu*, the *Pancontinental* decision was not challenged by either party. The Commissioner of State Taxation sought to subvert the decision in *Pancontinental* by arguing that the mining information has no separate existence or no separate value apart from the tenement to which it relates.

The value of property is determined by considering the price at which a willing but not anxious hypothetical vendor would sell the property in question to a willing but not anxious hypothetical purchaser.⁵ Isaacs J, in a well known and often cited passage in *Spencer's* case said of the hypothetical parties to such a transaction:

We must further suppose both [the purchaser and vendor] to be perfectly acquainted with the land, and to be cognisant of all circumstances which might affect its value either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable for forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

This approach to valuation gives rise to particular difficulties where the value of the property in question is dependent upon the existence of information relating to the property and also upon the realisation, in some sense, of the 'potential' of the property. Thus, it might be said that if a purchaser is indeed 'perfectly acquainted' with the tenements, he would 'have' all the mining information. The information would, therefore, no longer have any value.

The Full Court drew a distinction between 'an opportunity by inspection of the documents and things to become fully acquainted with the mining information and the right of ownership of those documents and things so as to acquire a right of permanent access to the information.'⁶ Malcolm CJ, with whom Pidgeon J agreed, said:

Spencer's case requires that the purchaser should be fully acquainted with all relevant information regarding the land. This would include the mining information. It would not include any permanent right of access to that information. That right would have to be acquired by obtaining ownership or possession of the chattels containing the information or obtaining the information by supplementing what was not available from public sources by redoing whatever work was necessary to duplicate the information previously obtained.⁷

Given the nature of the information in question, it is clear that this approach accords with reality. Where a purchase of a tenement is to be made by negotiation in respect of which substantial information exists, an opportunity is given to the purchaser to examine the information and for the purchaser to determine the price he or she is prepared to pay. This sort of acquaintance would not suffice to subsequently enable the purchaser to proceed to exploit the tenements.

4. See e.g. *Smith Kline and French Laboratories (Aust.) Ltd v. Secretary, Department of Community Services and Health* (1990) 22 FCR 74, 119-122 per Gummow J.

5. *Spencer v. Commonwealth* (1907) 5 CLR 419.

6. See reasons for judgment of Malcolm, CJ at 17.

7. *Ibid.*, 18.

The Chief Justice also said:

While the information as such is not property it has value. Ownership of the mining tenements does not include a right of access to the information. Ownership or possession of the documents and things which contain the information must be acquired in order to gain permanent access to the information. It follows, in my view, that any relevant value must be reflected in the value of the chattels rather than the value of the mining tenements.⁸

The effect of this reasoning is to attribute a substantial value to the chattels which contained the information and which had to be acquired to utilise the information. These chattels were, of course, property of Murchison Zinc other than land, for the purpose of a comparison of values under s. 76AI(2).

Having determined that it was possible for information to have value, and that it did not form part of the tenements to which it related but part of the chattels containing the information, it was necessary to determine the 'residual' value of the tenements. At first instance, Mr Commissioner Zelestis QC valued the tenements by deducting from the value of 'all the property to which the company was entitled' the value of non-land assets. A similar approach was adopted by Malcolm CJ.⁹ For the purposes of valuing the tenements alone, regard was had not only to the cost of reproducing the information, but also to the effect which the need to reproduce the information would have on the production schedule of the mine. At the time of the sale, it was anticipated that the Golden Grove Joint Venture would be in production in a couple of years. (This has subsequently proved to be the case.) The need to regenerate the information which would not be acquired on the sale of the tenements alone, would result in additional expenditure of \$10,000,000 and a delay in start up of 2 years. The combined effect on the value of the Joint Venture would be to reduce it by approximately 60%. Thus the value of the land was held to be only approximately 40% of the value of all the property to which the company was entitled.

Significance of the Decision

The most direct importance of the decision concerns the transfer of mining tenements and mining corporations. It has been suggested that the decision in *Pancontinental* did not adequately address the status of the mining information transferred by the agreement considered in that case, or deal adequately with the allocation of the purchase price. The *Nischu* case provides a sound justification for the allocation of a substantial value to 'information rich chattels', in appropriate cases.

It must be remembered, however, that the information in this case was both essential to mining operations and could not be obtained other than from the records of the Joint Venture. Where tenements are less advanced, loss of information may not be so crucial. If, for example, substantial drilling had been done which proved to be completely unprospective, there is no reason to reproduce that work. The purchaser may be content merely to know that certain drilling was unproductive.

8. *Ibid.*, 17.

9. *Ibid.*, 22-23.

Apart from its significance in the field of stamp duty, the *Nischu* decision also illustrates the difficulty of valuing 'composite assets' and mining tenements in particular. Tenements in an advance stage of development are valued primarily with a view to the profits which can be derived from them. They are potential businesses, rather than pieces of real estate in the ordinary sense. The business is comprised of two elements: the tenements themselves and the information which enables those tenements to be exploited. It may be conceded that both the tenements and the information, apart from each other, are worth less than the combination of the two. The statutory requirements that the land (alone) be valued, may cause any 'synergistic' value resulting from the combination of the two being excluded from the value of the land, and the value of the land to fall below the 80% threshold for that reason.

The analysis of the Court in *Nischu* may also be generally applicable to the sale of composite assets other than mining tenements. Where information is essential to the exploitation of an asset, for example, the development of land or the carrying on of a business, it may be reasonable to attribute a substantial portion of the value of the business to the information.