Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application) [2024] FCA 1262

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The decision of Perram J in *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application)* [2024] FCA 1262 has drawn interest and comment (see "Putting royalties on the map: Oracle denied stay of domestic tax proceedings" 2024 WTB 45 [823] and "PepsiCo and Oracle cases: reassessing royalties in Australian tax" 2024 WTB 47 [851])

Perram J's recitation of the evidence in the case exposes the little-seen world of tax diplomacy.

We see the arc of Oracle's attempts to invoke the mutual agreement procedure (***MAP***) under Australian-Irish double tax agreement (***DTA***).

In the broader context of whether the payments were royalties, we see correspondence from the US Treasury to Australian Treasury concerning "strong concerns" about Australia's approach to software distribution evidenced by a draft ruling, TR 2021/D4.

There is also evidence from a Deputy Commissioner of Taxation that "approximately 15" other entities have distribution of software or related arrangements requiring consideration of the definition of "royalty" under Australian tax law.

There has been interest in the position taken by ATO in Oracle's dispute resolution pathways. There has been speculation about what this might mean in future for the Mutual Agreement Procedure (or MAP) and consequent arbitration.

These are legitimate issues. But I am interested in whether we will get anything meaningful from a Full Court appeal. This turns on the critical point of whether Perram J's order dismissing the application for a stay is vulnerable to challenge in the Full Federal Court.

Leave to appeal

One powerful consideration was the level of dispute on this issue, beyond this particular case. The evidence showed diplomatic disagreement between Australia and the USA about our treatment of "royalties". And it showed there were about 15 taxpayers whose cases might depend in some way on the meaning of "royalty".

In refusing Oracle's application to stay its own tax appeal, Perram J says:

> *83 … This larger consideration speaks powerfully to the need for there to be a final appellate judicial determination of the issue. Such a determination will provide guidance to the various competent authorities, to the other taxpayers, to arbitrators and to any other trading partners with whom the Commonwealth is presently in dispute about the nature of a royalty. This consideration strongly suggests that one case should proceed to final appellate determination for the guidance of all.*

Much attention has been focussed on what his Honour did then.

Perram J concludes:

> *88 The conclusion that the stay should be refused has a significant impact on the taxpayers and on the administration of the tax system. It is appropriate to grant the taxpayers leave to appeal so that its correctness can be tested before the Full Court.*

What is his Honour doing?

The Federal Court has an "internal" appellate jurisdiction. A Full Court hears appeals from judgments of the court constituted by a single judge in original jurisdiction: s 24(1)(a) of the *Federal Court of Australia Act 1976*.

An appeal must not be brought from an "interlocutory" judgment unless the court (or a judge) gives leave to appeal: s 24(1A).

Here, Oracle sought a stay of its own application under Pt IVC of the *Taxation Administration Act.* It did so because the Commissioner had used a power under the DTA to suspend the MAP because of the existence of the Pt IVC proceeding.

Despite all this jockeying, we are still just dealing with a stay application.

An order refusing a stay of a proceeding is classically an interlocutory judgment. So leave to appeal was required.

Perram J granted leave, and thus the parties do not have to make a separate application for leave, cutting out a step.

Test on such an appeal

The next question though is the test that the appellate court applies when considering an appeal from an interlocutory order involving the exercise of a discretion, as here.

Volume 55 of the *Commonwealth Law Reports,* on my shelf, opens readily to the decision of the High Court of Australia in *House v The King* (1936) 55 CLR 499. Some previous owner of volume 55 has taken the time to mark in red two segments of the joint judgment of Dixon, Evatt and McTiernan JJ, page 505:

> *It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.*

But there is also this warning at pages 504-505:

> *It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion.*

The grant of leave to appeal by Perram J does not change any of this.

The reason why leave is required in such cases is that case management decisions often involve some measure of discretion where there is not a single correct answer. Value-judgments and matters of impression should not be second-guessed, delaying the actual final hearing of a matter.

Also the requirement of leave, at one level, operates as a filter to prevent the litigation process being diverted by the party with "deeper pockets" appealing each and every interlocutory decision. (It is competent to appeal an interlocutory decision after final judgment at trial.)

What is interesting here?

It is significant that Perram J gave leave, and particularly the language that his Honour used.

Nevertheless, there must be demonstrated error in terms of *House v The King* (above).

We then turn to his Honour's decision, and we find a carefully worked consideration of each and every point that must have been raised.

Given the statutory (including treaty) context, there are doubtless arguments that can be run on an appeal. But it is not as easy as one might think to attack refusal of a stay, in a case management context.

One oddity caught my attention in this matter. The competent authorities of Australia and Ireland have a separate way of reaching a measure of certainty about royalties under the DTA, by a differently constituted mutual agreement procedure.

The simplest way to get an idea of what can occur is to look at Article 16(3) of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*. We do not need to look at how that is implemented in this DTA. But there is a facility for the competent authorities to "endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application" of a DTA.

Evidently there are difficulties and doubts.

Perhaps Article 16(3) MAP is inappropriate, for example because the circumstances of the "software as a service or SAS" for each provider are subtly different.

But if that is the case, one wonders what precedential value a final decision in *Oracle* might have.

And that was a key public policy consideration that persuaded Perram J not to stay the Part IVC proceedings.

Unfortunately, a taxpayer will not know what other cases the Revenue Authority has before it. And the Revenue Authority may not be able to go into detail about how similar other cases are. Inherently, it is of little use simply to say that there are, say, another 15 or so cases also being considered, if the Court will be unable to judge whether a court decision in one case will assist in quelling the wider dispute.

This oddity will remain unresolved. Perram J does not refer to evidence as to why that alternative MAP procedure was not being used. And Perram J does not refer to evidence about whether the other outstanding "royalty" cases were on facts which would make the decision of a court useful to State parties to various double tax agreements, and to arbitrators acting under such double tax agreements.