

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Crocker ATF Crocker Family Super Fund v Commissioner of State Revenue* [2020] QCAT

PARTIES: **NOEL CROCKER AS TRUSTEE FOR THE CROCKER FAMILY SUPER FUND**
(applicant)

v

COMMISSIONER OF STATE REVENUE
(respondent)

APPLICATION NO/S: GAR313-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 2 September 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Cranwell

ORDERS: **The decision under review is confirmed.**

CATCHWORDS: TAXES AND DUTIES – LAND TAX – LIABILITY FOR LAND TAX – where property owned by five or more co-owners – where some co-owners were trustees – where property used for commercial purposes – whether there is a discretion to issue a single assessment – whether discretion should be exercised to issue single assessment

Land Tax Act 1915 (Qld), s 25
Land Tax Act 2010 (Qld), s 20, s 22, schedule 4

Diebold No 5 Pty Ltd v The Commission of Land Tax
[2000] QLC 3
SK Property Syndication Ltd v The Commissioner of Land Tax (1997-98) 17 QLCR 148

REPRESENTATION:

Applicant: Self-represented

Respondent: J Sproule of Counsel

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*

REASONS FOR DECISION

- [1] On 6 June 2019, the Commissioner of State Revenue ('the Commissioner') decided to disallow an objection by Mr Crocker to a land tax assessment. Relevantly, the land tax assessment applied s 22(4) of the *Land Tax Act 2010* (Qld) ('the Act') to a property at 53 Wills Street, Townsville ('the Property').
- [2] On 5 August 2019, Mr Crocker filed an application for review of this decision with the Tribunal.
- [3] It is common ground that the Property was owned as tenants-in-common in equal shares as at midnight on 30 June 2018 by:
- (a) Stanton Holdings Pty Ltd as trustee for the Pack Family Superannuation Fund;
 - (b) Harvey Alan Walters;
 - (c) Pennik Pty Ltd as trustee for the Pennell Superannuation Fund;
 - (d) Michael Frances Reynolds;
 - (e) Viviana Patricia Keegan and Noel Anthony Crocker as trustee for the Crocker Family Super Fund; and
 - (f) Fellows Pty Ltd as trustee for the Fellows Super Fund.
- [4] It is also common ground that the Property was used for investment or commercial purposes, namely a barristers' chambers.
- [5] Section 22 of the Act relevantly provides:
- (1) A co-owner of land—
 - (a) is taken to own part of the land in proportion to the co-owner's interest in the land; and
 - (b) subject to section 19, must be severally assessed.
 - ...
 - (4) Despite subsection (1), the commissioner may make 1 assessment as if the land were owned by 1 co-owner as the trustee of the other co-owners.
 - (5) The commissioner may make an assessment mentioned in subsection (4) only if—
 - (a) there are at least 5 co-owners of the land; and
 - (b) the commissioner considers the land is used for investment or commercial purposes.
- [6] 'Co-owners' are defined in schedule 4 of the Act to mean 'persons who own land jointly or in common, whether as partners or otherwise'.
- [7] It is clear that the Property had six co-owners at the relevant time, and was used for investment or commercial purposes. The question which arises is whether the Commissioner's power under s 22(4) is discretionary.
- [8] The Commissioner's position is that when the pre-conditions in s 22(5) are met, the Commissioner must make a single assessment under s 22(4). The Commissioner has attempted to distinguish *SK Property Syndication Ltd v The Commissioner of Land Tax* (1997-98) 17 QLCR 148 and *Diebold No 5 Pty Ltd v The Commission of Land*

Tax [2000] QLC 3, on the basis that those cases concerned s 25(2A) of the *Land Tax Act* 1915 (Qld), which provided:

However, where the jointly owned land is of unimproved value of \$50,000 or upwards, or where there are 5 or more joint owners of land, the commissioner may, *if the commissioner considers it advisable to do so*, make 1 assessment as if the land were owned by 1 person, but in such cases the proportional assessment on the shares in the land shall not be added to the individual assessments of the joint owners.

[emphasis added]

- [9] The Commissioner relies on the omission of the words ‘if the commissioner considers it advisable to do so’ in s 22(4) of the Act in support of the submission that the power is mandatory.
- [10] In my view, the inclusion of those words to denote the existence of a discretion ceased to be necessary following the enactment of s 32CA of the *Acts Interpretation Act* 1954 (Qld), which provides as follows:

(1) In an Act, the word *may*, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

(2) In an Act, the word *must*, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.

(3) To remove any doubt, it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation.

- [11] As the Act was passed after 1 January 1992, it appears to me that s 32CA of the *Acts Interpretation Act* requires me to interpret the word ‘may’ appearing in s 22(4) of the Act as conferring a discretion on the Commissioner. This leads to an approach which is consistent with the authorities applying s 25(2A) of the *Land Tax Act* 1915 referred to above.
- [12] Having decided that the Commissioner’s power is discretionary, I will now turn to whether the discretion should be exercised in the circumstances of the present case. Mr Crocker has submitted:

It is traditional for barristers to group together and work side by side in chambers which amongst other things allows resources to be pooled and costs to be shared. The barristers each operate their own separate business. The use of the land falls within commercial purposes, however, the owners are not a property syndication and comparably are few in number, the purpose of ownership is not as a property investment, and ownership has not been structured in any way to effect potential land tax obligations.

- [13] Mr Crocker referred to a passage of the decision Mr Neate in *SK Property Syndication Ltd v The Commissioner of Land Tax* (1997-98) 17 QLCR 148 at 158-9, in which the member stated:

[T]he subsection is designed to ensure that the revenue base is not in any way diminished by people arranging their affairs to that the property is held by a large number of owners who place themselves under the threshold in relation to their individual ownership. In such circumstances, the Commissioner may exercise the discretionary power conferred by s 25(2A) [of the *Land Tax Act* 1915 (Qld)].

[14] With respect to Mr Crocker, Mr Neate went on to state at 161 that:

I am not convinced, however, that s 25(2A) should be read in the narrow way suggested by the appellant. The section must be allowed to operate in its own terms. The Commissioner may not exercise the power unless either of the minimum criteria are satisfied. When such a precondition exists there is a discretionary element in the exercise of the power. The Commissioner must consider it advisable to act in that way. In the absence of any other statutory guidelines, it can only be said that the Commissioner is not obliged to act in every case where one of the criteria is satisfied, and that, in exercising the discretion, the Commissioner must not act arbitrarily, capriciously, unreasonably or unjustly.

[15] There is no suggestion by the Commissioner that the ownership structure of the Property is set up in any way to avoid land tax obligations. However, as Mr Neate noted, s 22(4) of the Act is not limited to those circumstances.

[16] I do not consider that the mere fact that the commercial purpose happens to be use as a barristers' chambers amounts to a cogent basis for the Commissioner not to exercise the discretion to make a single assessment. I am not persuaded that a barristers' chambers should be treated any differently to any other commercial purpose, and in particular no explanation was provided as to why barristers should be distinguished from other professional groupings, such as doctors. In these circumstances, I am satisfied that it is reasonable for the Tribunal, standing in the shoes of the Commissioner, to exercise the discretion under s 22(4) to make a single assessment of the Property. I exercise the discretion accordingly.

[17] I note in passing that Mr Crocker has made reference to s 20 of the Act, which provides as follows:

(1) The liability for land tax of a taxpayer who is a trustee of a trust must be separately assessed on the taxable land that is subject to the trust, as if that land were the only land owned by the taxpayer as a trustee.

(2) However, subsection (1) does not apply if—

(a) the taxpayer is trustee of more than 1 trust; and

(b) the interests of the beneficiaries of 2 or more of the trusts are, when the taxpayer's liability for land tax arises, the same.

(3) If subsection (1) does not apply, the taxpayer's liability for land tax as trustee of the trusts mentioned in subsection (2)(b) must be assessed on the total taxable value of all taxable land that is subject to those trusts.

[18] The effect of s 20(1) is that a trustee is assessed on land held as trustee separately to land owned by the taxpayer in his or her own right. This says nothing about land owned by multiple co-owners, some or all of whom may be trustees, which is the subject matter of s 22.

[19] Mr Crocker has also made reference to Public Ruling LTA020.1.2: ASSESSMENT OF TRUSTEES UNDER SECTIONS 20 AND 22A OF THE LAND TAX ACT 2010, issued by the Commissioner on 21 June 2017. Paragraph 16 of the ruling states as follows:

16. Where a parcel of land is held by more than one trustee and each trustee's interest is subject to a separate trust for a different group of beneficiaries, separate assessments are made in relation to each trust.

Example 9

The registered owners of a parcel of land are A as trustee for the 123 Trust, B as trustee for the 456 Trust and C as trustee for the 789 Trust (one-third share each as tenants in common). Each trust has a different set of beneficiaries. A, B and C are each liable for land tax as trustees under s.20 of the Land Tax Act. Three separate assessments are issued to A, B and C under the Administration Act.

[20] In my view, this ruling does not advance Mr Crocker's argument any further. The footnote to Example 9 specifically states that '[t]he joint ownership provisions in s.22 of the Land Tax Act also apply', and I note that there are less than five owners of the property referred to in the example in any event.

[21] The decision under review is confirmed.