



Civil and Administrative Tribunal  
New South Wales

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Case Name: Zhang v Chief Commissioner of State Revenue

Medium Neutral Citation: [2023] NSWCATAP 283

Hearing Date(s): 13 October 2023

Date of Orders: 20 October 2023

Decision Date: 20 October 2023

Jurisdiction: Appeal Panel

Before: A Balla ADCJ, Principal Member  
Dr Dubler SC, Senior Member

Decision: Appeal dismissed

Catchwords: TAXES AND DUTIES — surcharge land tax – liability

Legislation Cited: Administrative Decisions Review Act 1997  
Civil and Administrative Tribunal Act 2013 (NSW)  
Duties Act 1997  
Foreign Acquisitions and Takeovers Act 1975 (Cth)  
Land Tax Act 1956  
State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022  
State Revenue Legislation Amendment (Budget Measures) Act 2016

Cases Cited: BHP Billiton Ltd v Dunning [2013] NSWCA 421  
Collins v Urban [2014] NSWCATAP 17  
Prendergast v Western Murray Irrigation Limited [2014] NSWCATAP 69  
Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39

Texts Cited: None

Category: Principal judgment

Parties: Xiumin Zhang and Zhenzhi Wei (Appellants)  
Chief Commissioner of State Revenue (Respondent)

Representation: N Wei (Agent) (First and Second Appellants)  
Counsel:  
O Berkmann (Respondent)  
Solicitors:  
Crown Solicitor (Respondent)

File Number(s): 2023/00227186

Publication Restriction: None

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Administrative and Equal Opportunity Division

Citation: [2023] NSWCATAD 161

Date of Decision: 21 June 2023

Before: AR Boxall, Senior Member

File Number(s): 2023/00093694

## REASONS FOR DECISION

- 1 The two appellants own a property in Paddington.
- 2 On 11 May 2022, the respondent assessed each of them as liable to pay surcharge land tax levied under s 5A of the *Land Tax Act 1956* (the LTA) in respect of the property for each of the land tax years 2018, 2019, 2020, 2021 and 2022.
- 3 Their daughter lodged on their behalf an objection to the assessments on 2 June 2022.
- 4 The respondent reviewed the matter and dismissed the objection by letter dated 15 July 2022.
- 5 In November 2022 the appellants applied to the Hardship Review Board for a waiver of surcharge land tax in relation to the property. This application was refused on 21 February 2023.

- 6 On 22 March 2023, the appellants lodged with this Tribunal an Administrative Review Application, seeking a review of the decision made on 15 July 2022.
- 7 The application was heard by the Tribunal on 15 May 2023. It was its role under s 63(1) of the *Administrative Decisions Review Act 1997* (the ADRA), “.. to decide what the correct and preferable decision is having regard to the material then before it, including the following:
- (1) any relevant factual material,
  - (2) any applicable written or unwritten law”.
- 8 On 21 June 2023 the Tribunal confirmed the decision made by the respondent on 15 July 2022.
- 9 The Appeal was listed for hearing before us on 13 October 2023.

### **The facts**

- 10 The Tribunal decision below notes that the following facts are not in issue:
- (1) At all relevant times the appellants were citizens of the Peoples’ Republic of China and were entitled to permanent residence in Australia, as holders of a sub-class 155 visa.
  - (2) In April 2015 the appellants purchased the property and subsequently undertook significant building work to renovate it. This took much longer than expected and was not completed until mid 2017.
  - (3) The appellants left Australia for China in April 2017, less than 200 days after the start of that year and did not return to Australia until the first half of 2023. Initially, they departed for on what was intended to be a relatively brief absence to care for elderly and unwell relatives. However, the care demands were more intense and longer lasting than they had expected. Then one appellant became ill and the Covid pandemic intervened which caused governmental prohibitions on travel between China and Australia. As a result the appellants remained in China, either voluntarily, to satisfy their familial duties to care for family members, or involuntarily, as the result of government action, from April 2017 until the first half of 2023.
  - (4) During most of that period, the property was leased to a succession of tenants. It was first placed on the rental market in April 2017, and the first tenancy commenced on 16 November 2017. Between 16 November 2017 and 15 May 2023 it had been untenanted for only brief periods with the then current lease having commenced on 3 December 2022 for a term of 14 months, expiring on 2 February 2024. However the appellants have, since that hearing, gained occupation of the property.

- (5) The property was also assessed to ordinary land tax for the 2018 to 2022 land tax years. The liability for this tax was not in dispute.

### **The legislation**

- 11 Surcharge land tax is a yearly tax that is imposed on foreign citizens who continue to own property in NSW and may be imposed on foreign citizens who also hold a permanent residency visa in Australia. The regulatory framework is complex.
- 12 The *State Revenue Legislation Amendment (Budget Measures) Act 2016* introduced surcharge land tax into the LTA.
- 13 Sections 5A and 5B [other than subss (2A) and (2B)] apply to the 2018 and subsequent land tax years. Sections 5B (2A) and (2B) took effect from 19 May 2022.
- 14 Section 5A relevantly provided:
- (1) Land tax is payable under this section in respect of residential land owned by a foreign person.
  - (2) In respect of the taxable value of all the residential land owned by the foreign person at midnight on 31 December in any year (commencing with 2016), surcharge land tax is to be charged, levied, collected and paid under the provisions of the Principal Act and in the manner prescribed under that Act for the period of 12 months commencing on 1 January in the next succeeding year at the rate of -
    - (a) in the case of all residential land owned by the foreign person at midnight on 31 December 2016 - 0.75% of that taxable value as assessed under the Principal Act, and
    - (b) in the case of all residential land owned by the foreign person at midnight on 31 December in the years 2017–2021 - 2% of that taxable value as assessed under the Principal Act, and
    - (c) in the case of all residential land owned by the foreign person at midnight on 31 December in any other year, commencing with

2022 - 4% of that taxable value as assessed under the Principal Act.

(3) Surcharge land tax is payable in addition to any land tax payable in respect of the residential land under the other provisions of this Act, and is so payable even if no land tax is payable under those other provisions.

15 Section 5B of the LTA provides:

(1) A person is eligible for an exemption from liability to pay surcharge land tax in respect of residential land for a land tax year because the land is the principal place of residence of the person only if -

(a) the person is a permanent resident at midnight on 31 December of the previous year, and

(b) the Chief Commissioner is satisfied that, during the land tax year, the person intends to use and occupy the land as the principal place of residence of the person in accordance with the residence requirement, and

(c) the person lodges a declaration with a land tax return required to be furnished ... for the land tax year to the effect that the person has that intention.

(2) The person must use and occupy the land as the person's principal place of residence for a continuous period of 200 days in the land tax year. This requirement is referred to as ***the residence requirement***.

(2A) A person does not use and occupy land as the person's principal place of residence during a period of the person's physical absence from Australia.

(2B) The Chief Commissioner may, in exceptional circumstances, waive the requirement in subsection (2A) in relation to a person's brief physical absence from Australia.

(3) If the residence requirement is not complied with by the person, surcharge land tax liability is to be assessed or reassessed as if the

person's exemption from liability to pay surcharge land tax for the land tax year had never applied.

(4) The failure of the person to comply with the residence requirement is taken to be a tax default for the purposes of Part 5 of the *Taxation Administration Act 1996*.

(5) Any interest that is payable on the tax default in accordance with Part 5 of the *Taxation Administration Act 1996* accrues on the amount of surcharge land tax assessable to the person for the period commencing on the last day allowed for furnishing the land tax return for the land tax year and ending on the day when the assessment or reassessment referred to in subsection (3) is made.

16 Section 104I of the *Duties Act 1997* relevantly defines "*residential land*".

***residential land*** means any of the following and does not include any land used for primary production—

a parcel of land on which there are one or more dwellings .....

17 Section 104J of the *Duties Act 1997* defines a *foreign person* as meaning:

a person who is a foreign person within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* of the Commonwealth

subject to certain modifications which are not relevant as they only apply to Australian citizens and certain categories of New Zealand citizen.

18 Section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) defines a foreign person relevantly as follows:

"foreign person" means:

(a) an individual not ordinarily resident in Australia ...,

19 Section 5 of that Act provides:

(1) An individual who is not an Australian citizen is ***ordinarily resident*** in Australia at a particular time if and only if:

(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

- (b) at that time:
  - (i) the individual is in Australia and the individual's continued presence in Australia is not subject to any limitation as to time imposed by law; or
  - (ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.
- (2) Without limiting paragraph (1)(b), an individual's continued presence in Australia is subject to a limitation as to time imposed by law if the individual is an unlawful non-citizen within the meaning of the *Migration Act 1958*.

### **The Tribunal's decision**

20 The Tribunal held:

- (1) The property was *residential property* for purposes of s 5A of the LTA at all material times [at para 25].
- (2) The appellants were resident in China and not in Australia from, at the latest, April 2017 until May 2023 and were at all material times citizens of the Peoples Republic of China only. Accordingly they were, in relation to all relevant land tax years *foreign persons* for purposes of s 5A of the LTA [at para 25].
- (3) It follows that subject to any exemption the appellants were liable to surcharge land tax under s 5A of the LTA in respect of each of the 2018, 2019, 2020, 2021 and 2022 land tax years [at para 26].
- (4) The exemption in s 5B of the LTA does not apply, since the respondent could not be satisfied that either appellant in relation to any of the 2018, 2019, 2020, 2021 or 2022 land tax years had the intention specified in s 5B(1)(b) of the LTA "*to use and occupy the land as the principal place of residence of the person in accordance with the residence requirement*", since the property was made available for rental from April 2017, and was tenanted almost without a break between 16 November 2017 and 15 May 2023.
- (5) The appellants were in China and not in Australia from, at the latest, April 2017 until May 2023. They could not therefore have satisfied the residence requirement in s 5B (2) of the LTA, of occupying the property for a continuous period of 200 days in each relevant land tax year. The reasons for their absence are irrelevant: *Gao v Chief Commissioner of State Revenue* [2020] NSWCATAD 216 at [59], *Barsoun v Chief Commissioner of State Revenue* [2020] NSWCATAD 282 at [78]. The respondent has no statutory basis on which to exempt a taxpayer from that statutory requirement: *Chu v Chief Commissioner of State Revenue* [2021] NSWCATAD 238 at [30].  
[at para 27].

- (6) Sections 5B (2A) and (2B) of the LTA, which confer a limited discretion to waive non-occupancy of premises due to absence from Australia were not included in the LTA until 19 May 2022. It thus does not apply to the appellants' liability to surcharge land tax for the 2022 (or any earlier) land tax year. Section 5A (2) of the LTA defines the calculation of surcharge land tax by reference to landholdings as at 31 December in a year, in respect of the calendar year beginning on the immediately following 1 January which is the relevant land tax year. Amendments made during that calendar year, in the absence of express provision to the contrary, can only operate prospectively since the liability to surcharge land tax in the land tax year which corresponds to that calendar year has already been determined as at the 31 December immediately preceding the start of the relevant land tax year. The *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* confers no such retrospectivity on subss 5B(2A) and (2B). [at para 28]
- (7) Schedule 1A of the *Land Tax Management Act 1956* (LTMA) is not relevant to the imposition of, or the availability of exemptions from, surcharge land tax. Section 5B (1) of the LTA provides that exemption from surcharge land tax is available "only if" the requirements of that section are met. There is thus no room for Schedule 1A to operate in relation to surcharge land tax [at para 29].
- (8) Neither the respondent nor the Tribunal had any discretion to waive, or to grant a "one off" exemption from, surcharge land tax for which a taxpayer is liable even if the imposition of the tax may visit hardship or unfairness on the taxpayer or result from circumstances (such as family responsibilities or travel restrictions) that deprived the taxpayer of effective moral or legal choice in relation to his or her absence from Australia (*Sjarifudin v Chief Commissioner of State Revenue* [2021] NSWCATAD 347 at [45] to [48], *Chu v Chief Commissioner of State Revenue* [2021] NSWCATAD 238 at [32] to [34], *Lawrence v Chief Commissioner of State Revenue* [2022] NSWCATAD 266 at [38] and *Du v Chief Commissioner of State Revenue* [2022] NSWCATAD 329, at [39] to [47]). These decisions in turn rely, at least in dismissing the proposition that general notions of fairness or justice should allow the adjustment of tax liabilities, on the High Court of Australia's unambiguous rejection of such a proposition in *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109, at 123 [at para 30].

### **The appeal**

- 21 An appeal to the Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]. To succeed in an appeal, the appellants must demonstrate either an error on a question of law, which, except in an appeal from an interlocutory decision, may be argued as of

right; or that permission (that is, “leave”) to appeal should be granted to bring the appeal: *Civil and Administrative Tribunal Act 2013* (NCAT Act), s 80.

- 22 The appellants are self-represented. In those circumstances, it is apposite for us to approach the issue by looking at the grounds of appeal generally and determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise to the respondent: see *Prendergast v Western Murray Irrigation Limited* [2014] NSWCATAP 69 at [12].
- 23 The appellants are appealing both on the basis that the appeal raises a question of law and also seek leave to appeal.
- 24 They contend that leave ought to be granted to extend the appeal on a ground other than on a question of law on the basis that:

"The decisions made by the Chief Commissioner of State Revenue and confirmed by Senior Member has bias as it ignored the indisputable fact of Pandemic. It failed to address the root causes of this problem.

Further than that, potentially it is putting vulnerable people into debt and criminalize them.

Mr Wei & Mrs Zhang do deserve exemption on these land tax surcharges particular for the tax years from 2020 till 2022 while Covid-19 affecting people on a worldwide scale. This pandemic is out of control and no one should be accountable for it.

We are seeking for internal appeal on this decision. A separate sheet to support our point."

- 25 Leave to appeal is usually only granted in limited circumstances. In *Collins v Urban* [2014] NSWCATAP 17 at [84], the general principles were summarised as follows:
- (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];
  - (2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

- (a) issues of principle;
  - (b) questions of public importance or matters of administration or policy which might have general application; or
  - (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
  - (d) a factual error that was unreasonably arrived at and clearly mistaken; or
  - (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.
- (3) In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [21] and the authorities cited there.

26 In these proceedings, the appellants limited the appeal to the land tax years 2020 -2022 when their ability to travel was restricted by the COVID pandemic.

### **The Grounds of Appeal**

#### *Ground One (1)*

27 In para 27 the Tribunal held that that the exemption in s 5B (1) of the LTA did not apply because the respondent could not be satisfied that either appellant had the intention to occupy the land as their principal place of residence in accordance with the residence requirement, because the property was tenanted almost without a break between 16 November 2017 and 15 May 2023.

28 The appellants say that their stay overseas was initially temporary for family commitments and then caused by COVID even though they strongly desired to come back to Australia. They ask – how could it be possible for them to use and occupy the property when there were travel restrictions?

#### *Consideration*

29 These matters were before the Tribunal member. He referred to the appellant's family commitments and the travel restrictions caused by COVID in para 12 (3),

noted that this was one of the appellant's arguments in para 20 (4) and held at para 27 (2) that the reason for their absence was irrelevant.

- 30 Other than repeating the submissions they made to the Tribunal member, the appellants have not explained how they consider that the Tribunal made an error.
- 31 We accept the submission made by the respondent. No error has been shown in the Tribunal finding that the appellants lacked the necessary intention when they were physically absent from Australia and the property was leased in circumstances where, as a matter of law, the reasons concerning their absence are irrelevant.

#### *Ground One (2)*

- 32 The appellants say that, while they were trapped overseas the property remained their principal place of residence even if it had to be leased to cover maintenance costs and bills.
- 33 The appellants rely on other legislation, including the LTMA, which provide that a property will continue to be treated as the principal place of residence for six years after the owner uses it for other purposes. The appellants submit that the definition of principal place of residence should be consistent with this other legislation and applied on a state-wide basis. If the LTA is different, it was submitted, the rules are vague and not enough to be convincing.

#### *Consideration*

- 34 The same submission was made before the Tribunal. In para 20 (3) the Tribunal noted that the appellants had submitted that an absence of less than 6 years from a principal place of residence is recognised widely, for example by the Australian Taxation Office and by Schedule 1A of the LTMA, as not impairing the availability of relevant favourable tax treatment of the principal place of residence.
- 35 In para 29 the Tribunal member held that the provisions of Schedule 1A of the LTMA (which applies to ordinary land tax) are of no relevance to the imposition of, or the availability of exemptions from, surcharge land tax.
- 36 We do not consider that the finding of the Tribunal is erroneous.

37 As submitted by the respondent, an exemption to surcharge land tax is available “*only if*” the requirements in s 5B of the LTA are met, being the expression used in 5B (1) of the LTA.

*Ground One (3)*

38 The appellants say that they only own this property and their daughter has been living in Sydney for nearly 20 years. If they did not intend to live in their own house and stay close to their only daughter, where could they go? It was not their intention to live apart but COVID forced them to live apart. The fact that they returned to Sydney and moved in on 16 May 2023 despite this causing drama with the tenant, shows how determined they are to use the property as their principal place of residence.

*Consideration*

39 We accept the submission of the respondent. The Tribunal did consider whether the appellants had the necessary 'intention' in accordance with s.5B(l)(b) of the LTA (at para 27). The effects of the Covid-19 pandemic were further considered at paras 12(3) and 20(4), with the Tribunal concluding at [28] and [30] that no discretion to waive or to grant an exemption from surcharge land tax can arise where the statutory criteria pursuant to s.5B of the LTA has not been met.

40 We cannot identify any error in the approach by the Tribunal to this issue.

*Ground 2 (1) and (3)*

41 These submissions relate to ss 5B (2A) and (2B) of the LTA.

42 As we have said, those sections took effect from 19 May 2022. The Tribunal held that this meant it did not apply to the appellants' liability to surcharge land tax for the 2022 (or any earlier) land tax year. We do not accept that, after this finding, the Tribunal should have then considered what would have been the position if those sections did apply to the appellants' assessments.

43 The appellants rely on the *State Revenue and Fines Legislation Amendment (Miscellaneous) Act 2022* which inserted s 5C (6A) into the LTA. Section 5C (6A) provides that “*For the purposes of the Taxation Administration Act 1996, section 9(3)(c), a reassessment under this section is authorised to be made*

*more than 5 years after the initial assessment.*” The appellants say that this means ss 5B(2A) and (2B) of the LTA have retrospective operation.

- 44 We do not accept this submission. Section 5C applies to an Australian corporation. It does not apply to the appellants as they are not a corporation (or related body corporate) within the meaning of 5C of the LTA.

#### *Ground 2 (2)*

- 45 The appellants rely on a decision made this year by Revenue NSW to exempt citizens of named countries from surcharge land tax as the tax is inconsistent with international treaties. A refund mechanism has been implemented.
- 46 It is common ground that the Peoples’ Republic of China is not one of the named countries.
- 47 The appellants say it should apply to them because State law should apply on a State basis.

#### *Consideration*

- 48 We decline to find that the decision made by Revenue NSW applies to the appellants as they are not citizens of one of the affected countries.

#### *Other matters*

- 49 In their submissions dated 9 October 2023 the appellants quoted the following passage from page 19 of the transcript which, they said, brings up a valuable point:

"SENIOR MEMBER BOXALL: I have one question for you, and I think - I think the answer is implicit in everything you've said and the various provisions you have taken me to. But there was during the COVID period quite a lot of short-term legislation that was 30 entered into to ease the - ease issues. I mean, there was all that legislation about leases, about how to apportion the loss due to COVID and in relation to commercial leases. There are a whole lot of provisions of deep obscurity about the witnessing of wills and witnessing of deeds when people weren't in the same room or couldn't physically put their signature on documents because of COVID. There - I'm inferring from everything you've said there 35 was no COVID-specific provision in relation to surcharge land tax dealing with the sort of circumstances that our applicants here found themselves in.

MR BERKMANN: Yes, senior member. None that we were aware of. No, senior member, there weren't any."

50 The appellants said that the omission of this issue from the decision was very important.

51 We do not agree. The Tribunal was simply checking that there was no other relevant legislation. The Tribunal was told there was no other relevant legislation. There was no reason to include this in the decision.

### **Decision**

52 We decline to find that the Tribunal made any error on a question of law.

53 With respect to the application for leave to appeal on other grounds, we decline to find that the appellants have shown something more than that the Tribunal was arguably wrong in any conclusion it arrived at, nor is there any question of public importance or an injustice which is reasonably clear. We accordingly refuse the application for leave.

54 The appeal is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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