

THIESS v. COLLECTOR OF CUSTOMS & ORS (B57/2013)

Court appealed from: Supreme Court of Queensland, Court of Appeal [2013] QCA 54

Date of judgment: 22 March 2013

Date of grant of special leave: 11 October 2013

The appellant taxpayer imported a yacht in 2004 for "home consumption" within the meaning of the *Customs Act 1901* (Cth) ("the Act"). By reason of the Act import duty payable on goods for home consumption had to be paid at the time of the entry of the goods. Upon importation, his customs broker, the third respondent, mistakenly entered the "gross construction tons" of the yacht as 108 rather than 160. This meant the taxpayer was liable to pay a total amount of \$543,918.91 (consisting of \$494,471.74 of import duty and \$49,447.17 of GST) instead of a nil amount.

The taxpayer paid the amount and only became aware of the overpayment of duty in 2006 after the statutory timeframe for refunds had expired. He then sought an "act of grace" refund of the customs duty and GST. No refund was made and the appellant commenced proceedings in the Trial Division of the Supreme Court of Queensland. The proceedings were referred to the Court of Appeal.

The Court of Appeal (de Jersey CJ, Fraser and Muir JJA) held that the appellant's claim for recovery of customs duty was barred by s 167(4) of the Act. The Court also held that the appellant was not entitled to a refund or credit of the GST amount because he had not notified the Commissioner of Taxation within four years after the importation of the yacht that he believed he was entitled to a refund (s 36 of the *Taxation Administration Act 1953* (Cth)).

The grounds of appeal include:

- The Court of Appeal erred in holding, as a matter of law, that the Appellant's claim for recovery of customs duty was barred by section 167(4) of the Act where (on the undisputed facts):
 - The payment was made under mistake;
 - The Appellant was under no lawful obligation to make the payment;
 - The payment was not made pursuant to any demand by the First Respondent or the Second Respondent;
 - The Appellant accordingly had no occasion to make the payment under protest.

The first and second respondents seek an extension of time to file a notice of contention. This notice contends that the decision of the Court of Appeal should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: "To the extent not otherwise encompassed in the reasons of the Court below section 163 of the Act and regulations 126 to 128A of the *Customs Regulations 1926* (Cth):

- Excludes any common law rights of action to recover an amount mistakenly paid as customs duty; and
- Replaces those rights with an entitlement to a refund in specified circumstances.