Australian Government
Australian Taxation Office

Decision impact statement

Commissioner of Taxation v Cheung [2026] FCAFC 75

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Table of Contents **Paragraph**

Summary of decision	1
Overview of facts	6
Issues decided	12
Burden of proof	14
Appellate intervention justified	19
ATO view of this decision	22
Comments	24

Venue:	Full Court of the Federal Court of Australia
	Federal Court of Australia
Venue reference No:	QUD 30 of 2025
	QUD 367 of 2021
Judgment date:	28 May 2026 (Full Federal Court)
	29 November 2024 (Federal Court)

Summary of decision

1. This Decision impact statement outlines the ATO's response to this case which considered whether, on all the evidence before the Court, Mr Cheung (taxpayer) had shown default assessments to be excessive.

2. The Court found that the evidence did not prove the facts alleged by the taxpayer. Those facts included the allegation that amounts received by the taxpayer were in the nature of a gift from his sister. Therefore, on the appeal the Court held the taxpayer did not discharge the burden of proof arising under section 14ZZO of the *Taxation Administration Act 1953* (TAA).

3. The taxpayer applied for special leave to appeal the Full Federal Court's decision to the High Court, which was refused.[1]

4. All legislative references in this Decision impact statement are to the TAA, unless otherwise indicated.

5. All judgment references in this Decision impact statement are to the judgment of *Commissioner of Taxation v Cheung* [2026] FCAFC 75, unless otherwise indicated.

Overview of facts

6. In each of the 2005 to 2015 income years (relevant years), the taxpayer was an Australian resident but did not lodge tax returns.

7. The Commissioner made default assessments for each of those years, identifying the amount upon which income tax ought to be levied by reference to certain bank deposits and interest.

8. The taxpayer conceded that the interest, totalling approximately $1.9 million across the relevant years, was properly to be included in his assessable income.

9. The Commissioner identified as relevant: 99 deposits made into bank accounts held by the taxpayer or together with his wife, and 2 deposits made to third parties at the taxpayer's direction, totalling approximately $32.8 million (Deposits). Those amounts were sourced from, and represented one-third of, the profits of a Vanuatuan supermarket business, Au Bon Marche (ABM), during the relevant years.

10. The Deposits were to be included because they reflected either an interest of the taxpayer in the ABM business, or a reward for services the taxpayer had rendered to the ABM business.

11. The taxpayer contended that his sister was the sole owner of the ABM business and that the Deposits were instead gifts made by her out of a sense of familial obligation and consistent with cultural practice, to be invested for the benefit of the wider family.

Issues decided

12. The Court decided that, on a real review of the evidence, the primary judge erred in making its factual findings about the nature and extent of the taxpayer's association with the ABM business and the characterisation and use of the Deposits.

13. The Court held that the primary judge ought to have found the evidence did not prove the facts necessary to support the only narrative alleged by the taxpayer.

Burden of proof

14. Consistent with section 14ZZO and established authority, the Court held that it was for the taxpayer to prove, on the balance of probabilities, not only that the assessments were excessive, but also, what they ought to have been.

15. The Court at [20] applied the principles explained by Brennan J in *Federal Commissioner of Taxation v Dalco* [1990] HCA 3; 168 CLR 614 at [623–624] that:

- the manner in which a taxpayer can discharge the burden varies with the circumstances of the case

[1] See *Cheung v Commissioner of Taxation* [2026] HCADisp 257.

- the Commissioner and a taxpayer can agree to confine an appeal to a specific point of fact or law, and
- if a taxpayer does not prove the actual amount of taxable income is less than the assessed amount, the Court cannot find the amount assessed is wrong.

16. The Court rejected the taxpayer's submission 'that it was sufficient for Mr Cheung at first instance to point to some evidence that the Objection Decision was wrongly made, at which point the "evidentiary burden shifted" to the Commissioner to persuade the primary judge not to accept the evidence on which he relied, or to adduce contrary evidence of at least equal weight'.[2]

17. The Court rejected the taxpayer's submission that there can be a 'reversal' of the onus of proof, instead finding that[3]:

> … there was no obligation on the Commissioner to erect and prove an alternative factual scenario in competition to that posited by Mr Cheung to any forensic standard at all. … The Commissioner's task was not to defend the correctness of the Objection Decision or to prove any fact underpinning it.

18. As to the standard of proof, the Court adopted the proposition that[4]:

> … To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence. … the evidence must be enough to enable the court to feel actual persuasion that a particular fact is so …

Appellate intervention justified

19. On a proper application of the relevant principles, the primary judge ought to have concluded the taxpayer failed to discharge his onus of proof.[5] The primary judge erred by accepting the taxpayer's case 'without addressing the material revealing inconsistency, ambiguity and incoherence in the evidence put forward to support it'.[6]

20. The Court found the fact-finding function miscarried because the primary judge did not assess the honesty of the witnesses based on the evidence as a whole[7], including by failing to examine:

- evidence that contradicted the asserted narrative, and
- contradictory testimony and documentary records, including about any entitlement to a share of the profits of the ABM Business, and about the taxpayer being the 'business owner' and 'founder'.

21. Further, the Court found:

- the primary judge erred by not disclosing the basis by which he assessed the tenor or demeanour of the witness to reach the conclusion that the witness was honest

[2] At [173].
[3] At [25].
[4] At [26], the Court quoting the explanation of Campbell JA in *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431 at [52].
[5] At [44].
[6] At [172].
[7] At [45].

- the fact-finding process involved a misuse of the advantage of a trial judge and did not disclose an analysis of much of the evidence upon which the Commissioner relied, and
- the primary judge ought to have found the taxpayer's onus of proof was not discharged because the evidence was not sufficient to prove the only narrative asserted in the taxpayer's appeal statement.

ATO view of this decision

22. This decision makes clear that a taxpayer seeking to prove that amounts received have the character of a gift, needs to produce evidence that is coherent, consistent, corroborated and complete.

23. We consider the decision confirms and strengthens our existing view.

Comments

24. We invite you to advise us if you feel this decision has consequences we have not identified. Forward your comments to the contact officer.

Due date: 4 December 2026

Contact officer: Aaron Elbourne

Email: Aaron.Elbourne@ato.gov.au

Phone: **03 9285 1159**

Commissioner of Taxation
4 November 2026

References

Legislative references:

- TAA 1953 14ZZO

Case references:

Brown v New South Wales Trustee and Guardian [2012] NSWCA 431

Cheung v Commissioner of Taxation [2024] FCA 1370; 2024 ATC 20-935; 121 ATR 460

Cheung v Commissioner of Taxation [2026] HCADisp 257

Commissioner of Taxation v Cheung [2026] FCAFC 75; 2026 ATC 21-018

Federal Commissioner of Taxation v Dalco [1990] HCA 3; 168 CLR 614; 20 ATR 1370; 90 ATC 4088

ATO references

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