Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2016] AATA 754

Division	TAXATION & COMMERCIAL DIVISION
File Number	**2015/0165**
Re	**Peter Landy**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal	**F D O'Loughlin, Senior Member**
Date	**28 September 2016**
Place	**Melbourne**

The Tribunal affirms the decision under review

[sgd].....

F D O'Loughlin, Senior Member

INCOME TAX

- whether applicant a resident of Australia – whether applicant had Australian domicile – whether applicant had permanent place of abode outside Australia
- whether applicant was taxed overseas in respect of foreign earning
- deductions for meals and incidental expenses – whether expenses incurred, whether expenses private in nature,

MEDICARE LEVY - No basis for reducing Medicare Levy

SHORTFALL INTEREST CHARGE - No basis for reducing charge

Cases

Commissioner of Taxation v Cooper (1991) 29 FCR 177

Commissioner of Taxation v Miller (1946) 73 CLR 93

Dempsey and Commissioner of Taxation [2014] AATA 335

Federal Commissioner of Taxation v Applegate (1979) 27 ALR 114

Gregory v Deputy Federal Commissioner of Taxation (W.A.) (1937) 57 CLR 774

Hafza v Director-General of Social Security (1985) 6 FCR 444

Koitaki Para Rubber Estates Limited v *The Federal Commissioner of Taxation* (1941) 64 CLR 241

Levene v *Commissioners of Inland Revenue* [1928] AC 217

The Engineering Manager and Commissioner of Taxation [2014] AATA 969

Legislation

Domicile Act 1982 (Cth), s 3
Evidence Act 1995 (Cth), s 174
Income Tax Assessment Act 1936 (Cth), ss 6(1) & 23GA
Income Tax Assessment Act 1997 (Cth), s 8-1

REASONS FOR DECISION

F D O'Loughlin, Senior Member

THE APPLICATION

1. On 29 December 2007 the applicant signed an employment agreement requiring him to provide services at a worksite at Mukhaizna in Oman. On 4 January 2008 the applicant left Australia to take up the new employment role which ended in September 2009, when he returned to Australia. During the 2009 year[1] the applicant: spent the majority of his time outside Australia; had food and accommodation facilities provided to him by his employer at both the Mukhaizna worksite and in Muscat; arranged some rest period accommodation with six other work colleagues in Thailand; used the Thai accommodation for two short periods; had family in Australia; visited family in Australia; supported his wife in Australia; had two motor vehicles in Australia; and had a home available to him in Australia.

2. The respondent Commissioner[2] considered the applicant to be a resident[3] for the purposes of the 1936 and 1997 Assessment Acts[4] and assessed him in respect of his income earned in Oman. The applicant disputes the assessment, contending that he was not a resident, or, if he was a resident the income was exempt by reason of s 23AG of the 1936 Assessment Act. It is not apparent that the original objection filed canvassed the s 23AG ground, however the Commissioner was content to embrace it and accordingly the grounds of the applicant's objection are expanded to include this ground.

3. In the alternative, the applicant contends that if he is liable to be assessed, he is entitled to deductions pursuant to s 8-1 of the 1997 Assessment Act for meals and incidental expenses of $79,920, and to a reduced Medicare levy and Shortfall Interest Charge on account of the deduction entitlement.

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1 The financial year ended 30 June 2009.

2 Commissioner of Taxation of the Commonwealth of Australia.

3 A *resident or resident of Australia* within the meaning of that term in s 6(1) of the 1936 Assessment Act.

4 The *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth) respectively.

WAS THE APPLICANT A RESIDENT?

4. In so far as it concerns an individual or natural person, the definition of resident or resident of Australia in s 6(1) of the 1936 Assessment Act is in the following terms:

> ***"resident** or **resident of Australia"** means:*
>
> *(a) a person, other than a company, who resides in Australia and includes a person:*
>
> *(i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia;*
>
> *(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or*
>
> *(iii) who is:*
>
> *(A) a member of the superannuation scheme established by deed under the Superannuation Act 1990 ; or*
>
> *(B) an eligible employee for the purposes of the Superannuation Act 1976 ; or*
>
> *(C) the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B); and*
>
> *….*

5. Paragraphs (a)(ii) and (iii) are not presently relevant. This application concerns whether the applicant was a resident because he resided in Australia, or because his domicile was in Australia and the tribunal is not satisfied that he had a permanent place of abode outside Australia.

Did the applicant reside in Australia?

6. Whether an individual is a resident is a question that has frequently been before the courts.

7. The process of determining the place of residence of an individual was described by Williams J in *Koitaki Para Rubber Estates Limited v The Federal Commissioner of Taxation*[5] in the following terms:

> *The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situate, but he may also reside where habitually lives even if this is in hotels or on a yacht or some other abode.*[6]

8. A person can continue to be resident in a place notwithstanding current absence from that place[7] if he or she has maintained a sufficient continuity of association with that place.[8]

9. A number of relevant principles to be applied in determining a person's place of residence emerge from the authorities. They include:

   (a) a person can have two residences, and therefore places of residence in two places, concurrently and thereby attain the character of a resident of both places;[9]

   (b) events occurring both before and after the period under examination *may be considered as throwing light on and disclosing the significance of habits and conduct within the period* under examination;[10] and

   (c) whether a person is a resident is a question of degree, and therefore one of fact.[11]

Facts

10. These principles need to be applied to the applicant's personal circumstances. They are as follows.

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5 (1941) 64 CLR 241.

6 At (1941) 64 CLR 249.

7 *Hafza v Director-General of Social Security* (1985) 6 FCR 444 at 449, Wilcox J.

8 *Hafza v Director-General of Social Security* (1985) 6 FCR 444 at 449, Wilcox J and the reference there to *Levene* v *Commissioners of Inland Revenue* [1928] AC 217 *at 225*.

9 *Gregory v Deputy Federal Commissioner of Taxation (W.A.)* (1937) 57 CLR 774 at 777 – 778 Dixon J.

10 *Gregory v Deputy Federal Commissioner of Taxation (W.A.)* (1937) 57 CLR 774 at 777 – 778 Dixon J.

11 *Commissioner of Taxation v Miller* (1946) 73 CLR 93 at 101 Rich J.

(a) For a period of time leading up to January 2008, the applicant worked in several jobs to obtain skills and experience to allow him to secure a worksite superintendent or equivalent job abroad.

(b) On 29 December 2007 the applicant entered into an employment agreement with STC[12] to work as a site general superintendent at the Mukhaizna oilfield in Oman. The terms of the employment agreement included:

(i) a three month probation period;

(ii) a one year term which could be renewed. The entitlement to renew was not stipulated. The applicant did not have an option to renew. Accordingly any extension or renewal of the contract would require agreement of both the applicant and his employer, effectively an new agreement;

(iii) a base salary entitlement plus paid rotational leave of 14 days for every 28 days of work with business class airfares to the *nearest hometown airport*. The *nearest hometown airport* was not specified as such, although *Melbourne Australia* was specified as the *Air Passage / Sector*. The applicant did not always use these entitlements to return to Australia. From time to time he applied these entitlements to take the opportunity to see the world. He travelled to a European destination at least once, Vietnam at least once, Thailand at least twice and Australia three times;

(iv) STC provided single room bachelor accommodation at the Mukhaizna worksite and fully furnished bachelor accommodation for periods spent in Muscat; and

(v) free of charge senior messing while at the Mukhaizna worksite and reimbursement for food expenses while in Muscat including the period prior to first mobilisation to the Mukhaizna worksite;

(vi) after hours use of an STC owned pool vehicle; and

(vii) termination of employment on one month's notice.

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[12] Special Technical Services LLC.

(c) The applicant departed Australia on 4 January 2008 and commenced work at the Mukhaizna worksite shortly after.

(d) Before he left Australia the applicant:

(i) lived with his wife in a home owned by her in Mt Martha, Victoria;

(ii) in August 2006, sold a property in Rye, Victoria in which he had lived; and

(iii) in December 2007 sold an investment property in Queensland.

(e) The Applicant also contends that he cancelled his Medicare, notified his private health insurance fund and requested his name be removed from the electoral roll. Documentary evidence of these contentions has been sought but is not available. These assertions can be accepted.

(f) On departing Australia, the applicant completed and signed an outgoing passenger card indicating that he was an Australian resident departing Australia permanently.

(g) The applicant's wife did not accompany him to Oman, however she met him overseas several times.

(h) While working in Oman the applicant:

(i) stayed in basic single room accommodation at the Mukhaizna worksite where he purchased a microwave oven, toaster, coffee machine, bedding and personal items. The room was for his use and he could lock it while away;

(ii) during his rest periods, stayed in hotel accommodation in Oman or in other countries including Europe, Asia and Australia. As noted above, the applicant travelled to a European destination at least once, Vietnam at least once, Thailand at least twice and Australia three times. The three return trips to Australia occurred between 11 June 2008 and 25 May 2009 when the applicant visited his wife, sons and grandchildren for a total of 43 days. While in Australia the applicant stayed at the Mt Martha home owned by his wife, with his sons or in hotels;

(iii) together with work colleagues, rented an apartment in Thailand for six months from 26 May 2009 to 26 November 2009. The apartment was fully furnished with all fixtures and fittings being rented and the applicant kept personal belongings including clothes, equipment and toiletries there. The applicant stayed in the Thailand apartment from 24 June 2009 to 7 July 2009 and from 4 August 2009 to 17 August 2009. These were rest periods;

(iv) maintained two collector motor vehicles in Australia which were garaged at the Mt Martha home owned by his wife;

(v) maintained his bank account in Australia as it was a joint account with his wife;

(vi) maintained his offices of director and secretary of, and his shareholding in, Bayview Engineering Pty Ltd. The applicant's wife was the other director and shareholder in this company during the 2009 year. The address of the Mt Martha home owned by the applicant's wife was recorded with ASIC[13] as the company's principal place of business from 23 June 2009. It is likely that the 22 June 2009 start date is the result of a late notification to ASIC as the previous principal place of business address recorded was the Rye property that was sold in August 2006;

(vii) only owned a joint bank account with his wife and the two motor vehicles and the share in Bayview Engineering Pty Ltd in Australia;

(viii) owned a bank account in Oman into which his wages were paid;

(ix) obtained a ten year drivers licence in Oman;

(x) sent money to Australia to help pay his wife's living expenses, mortgage liabilities, and travel expenses so she could visit him; and

(xi) became a 'resident' of Oman for Oman migration purposes, as this was necessary in order to work there and could only stay in Oman while working there.

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[13] The Australian Securities and Investments Commission.

(i) The applicant's employment in Oman was terminated after 21 months which was earlier than expected. The applicant expected additional work from STC, but that work did not eventuate.

(j) The applicant returned to Australia permanently on 14 September 2009. When he returned he resumed living with his wife at the Mt Martha home she owned.

(k) Neither the applicant nor his wife are members of a Commonwealth superannuation fund.

Was the applicant a resident of Australia as ordinarily understood?

11. Having regard to the applicant's circumstances, there was presence on Oman for work but few other connections with Oman. His work contract was for one year with renewal or extension arrangements. There was bachelor styled accommodation with messing facilities provided and paid accommodation provided in Muscat when he went there. The applicant did not secure any lasting accommodation facilities for himself. His presence in Oman was linked to his employment. The applicant took opportunities when he could to travel to other places during rest periods from work and, in conjunction with work colleagues, secured temporary facilities in Thailand that were used during rest periods. The applicant's family remained in Australia and he returned to Australia to visit them. On at least one return visit the applicant stayed in the Mt Martha home owned by his wife.

12. There does not appear to have been any enduring association or connection with Oman beyond working there. Further, the applicant has maintained a continued and significant connection with Australia: family, a home to come back to on visits and to which the applicant returned when his employment ceased, two cars, a bank account, offices with an Australian company and transmission of money to his wife to assist with mortgage commitments. The sale of two properties before his departure to Oman were not sales of his home at the time of departure. The information supplied on the departure documentation when leaving Australia and other terminations are reflections of the applicant's subjective views of his position which are not determinative.

13. The lack of severance of connections with Australia, and the lack of establishment of enduring and lasting living ties with Oman require a conclusion that the applicant had not ceased to be a resident of Australia as ordinarily understood.

14. There is insufficient connection with Thailand to regard that as a place of the applicant's residence or place of abode.

Did the applicant have an Australian domicile and if so did he have a permanent place of abode outside Australia?

15. A person's domicile is determined by common law rules as modified by the Domicile Act.[14] Section 3 of that Act explains that it was enacted to abolish particular presumptions and to make other reforms. One of the common law presumptions that continues is that one's domicile of origin continues until by choice it is changed.

16. Section 10 of the Domicile Act is in the following terms:

> *SECT 10 Intention for domicile of choice*
>
> *The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his or her home indefinitely in that country.*

17. To fall outside the definition of resident, Australian domiciled people who live abroad do not need to intend never to return to Australia. The phrase "permanent place of abode outside Australia" is to be read as something less than a permanent place of abode in which the taxpayer intends to live forever or for the rest of his or her life.[15] The place where a person intends to live forever is his or her permanent home, and a place of abode can be permanent place of abode without being a permanent home.[16]

18. An individual's intentions are relevant to both whether a new domicile has been chosen and whether an individual's permanent place of abode is outside Australia. To the extent the decisions in *Applegate* suggest that intention to return to Australia is relevant to whether a new domicile has been chosen,[17] those suggestions need to be viewed in the context of the pre Domicile Act law. Post the Domicile Act, attention needs to be directed to intentions concerning making a home indefinitely in a country. Accordingly, the effect of s 10 of the Domicile Act is that a person who has changed domicile and has a place of abode in that place will have a permanent place of abode there.

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14 *Domicile Act 1982* (Cth).

15 *Federal Commissioner of Taxation v Applegate* (1979)27 ALR 114 at 117 Franki J.

16 *Applegate* at (1979) 27 ALR 128 Fisher J.

17 E.g. (1979) 27 ALR 114 at 128 Fisher J.

19. Whether the applicant established a permanent place of abode in Oman requires the same or substantially the same analysis as required to determine whether he resided in Oman under ordinary principles.

20. Intentions concerning duration of stay abroad and its permanence are relevant factors in determining whether a person has a permanent place of abode outside Australia,[18] but intentions etc. are not critical factors.[19]

21. To determine whether a place of abode is a permanent place of abode it is necessary to have *regard to the nature and quality of the use made* of that place, *the continuity or otherwise of the [person's] presence, the duration of [his/her] presence and the durability of [his/her] association with the particular place*.[20] Greater weight should be given to these factors than to that than to a person's stated intentions. This is an objective analysis.[21] A permanent place of above is a fixed and habitual place of abode without needing to be a permanent home.

22. A permanent place of abode outside Australia is not the same as a temporary or transitory place of abode outside Australia.[22]

23. Having regard to the applicant's circumstances set out above, and the conclusions noted at [11] to [14] above, the necessary conclusions are that the applicant had retained his Australian domicile and did not have a permanent place of abode in Oman or anywhere else.

Do the decisions in *Dempsey*[23] and *The Engineering Manager*[24] mandate a finding that the applicant was not a resident?

24. As noted above, whether a person is a resident is a fact driven analysis. Each case turns on its own facts. The relevant facts in *Dempsey* and *The Engineering Manager* were such

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18 *Applegate* at (1979) 27 ALR 117 Franki J, 128 Fisher J.

19 *Applegate* at (1979) 27 ALR 117 Franki J.

20 *Applegate* at (1979) 27 ALR 128 Fisher J.

21 *Applegate* at (1979) 27 ALR 126 & 128 Fisher J.

22 *Applegate* at (1979) 27 ALR 123 Northrop J.

23 *Dempsey and Commissioner of Taxation* [2014] AATA 335.

24 *The Engineering Manager and Commissioner of Taxation* [2014] AATA 969.

that the taxpayers in those cases had developed a more enduring connection with their foreign places of residence and maintained less connection with Australia. As previously discussed, the same conclusions cannot be reached in this case.

Resident conclusion

25. For the foregoing reasons, the applicant was a resident within the meaning of s 6(1) of the 1936 Assessment Act for the 2009 year, either by reason of being a resident in accordance with the ordinary meaning of the word or by reason of having an Australian domicile and no permanent place of abode outside Australia.

26. This conclusion may appear to be a rejection of the applicant's personal evidence that he intended to leave Australia indefinitely with a view to exploiting opportunities overseas. It should not be so seen. As observed by Fisher J in *Applegate*:

> *The [definition of resident] is difficult to apply particularly if the emphasis is on subjective intention. It is made doubly difficult by the indiscriminate use of the differing concepts of domicile, residence, permanent place of abode and usual place of abode. Moreover, the concept of permanence is used in a context in which it does not, and could not, bear its primary meaning of "everlasting". It would amount to a contradiction in terms to suggest that an independent person could be domiciled in Australia but with his permanent residence outside Australia, if permanent bears its ordinary meaning.*[25]

27. The primacy of objective assessments of observable factors noted above weighs against the conclusions that the applicant resided abroad, had changed his domicile and/or had a permanent place of abode in Oman. It is those assessments that inform the conclusion in the present matter.

SECTION 23AG

28. The applicant contends that if he was a resident, his income earned in Oman was exempt by reason of s 23AG of the 1936 Assessment Act. In so far as it could affect the applicant in the 2009 year, s 23AG was in the following terms:

Sect 23 AG Exemption of income earned in overseas employment

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[25] *Applegate* at (1979) 27 ALR 127 Fisher J. See also (1979) 27 ALR 117 Franki J.

(1) Where a resident, being a natural person, has been engaged in foreign service for a continuous period of not less than 91 days, any foreign earnings derived by that person from that foreign service is exempt from tax.

(2) An amount of foreign earnings derived in a foreign country is not exempt from tax under this section if the amount is exempt from income tax in the foreign country only because of any of the following:

(a) a law of the foreign country giving effect to a double tax agreement;

(b) a double tax agreement;

(c) provisions of a law of the foreign country under which income covered by any of the following categories is generally exempt from income tax:

(i) income derived in the capacity of an employee;

(ii) income from personal services;

(iii) similar income;

(d) the law of the foreign country does not provide for the imposition of income tax on one or more of the categories of income mentioned in paragraph (c);

(e) a law of the foreign country corresponding to the International Organisations (Privileges and Immunities) Act 1963 or to the regulations under that Act;

(f) an international agreement to which Australia is a party and that deals with:

(i) diplomatic or consular privileges and immunities; or

(ii) privileges and immunities in relation to persons connected with international organisations;

(g) a law of the foreign country giving effect to an agreement covered by paragraph (f).

29. Until the hearing the matter had proceeded on the basis that:

(a) no personal income tax is imposed on income derived by employees in Oman;

(b) subject to some exceptions, income tax is imposed on companies under Royal Decree no. 77/89; and

(c) no income tax was imposed on the income derived by the applicant in Oman.

30. At, and after, the hearing, the applicant sought to demonstrate that his earnings in Oman were subject to taxation by production of copies of various Royal Decrees.

31. Following the hearing the Commissioner made further submissions to the effect that the Royal Decrees produced were not complete, were not operative during the 2009 year and that the applicant was not liable to taxation in Oman.

32. There was no evidence led that tax liabilities in Oman were assessed and/or paid.

33. Notwithstanding s 174 of the Evidence Act[26] and the ability to lead evidence of a foreign law in a particular way, producing copies of Royal Decrees as the parties have done in the present matter, and accompanying the tender with what can only be regarded as a lay interpretation of the operation of those decrees, does not provide a sufficient foundation to decide whether the applicant's income derived in Oman was exempt. To demonstrate whether the applicant was affected by the Royal Decrees produced would require an opinion from a person with expertise through relevant training or experience as to whether, and if so how, the Royal Decrees affected the applicant's earnings for the 2009 year.

34. As the matter stands, the applicant has not established that the conditions in s 23AG(2) do not apply to him, has not led any evidence that tax was imposed on his earnings from Oman and has failed to discharge the onus on him to show that s 23AG(1) applies to him to exempt his earnings from Oman from Australian income tax liability for the 2009 year.

MEALS AND INCIDENTAL EXPENSES DEDUCTION

35. The $79,920 deduction claimed for meals and incidental expenses has been calculated using what are said to be the Commissioner's reasonable allowances of $240 per day for the time spent in Oman. There is no evidence that the applicant actually incurred these expenses. The applicant was not paid a travel allowance as part of his employment.

36. The $79,920 is claimed under s 8-1 of the 1997 Assessment Act which is in the following terms:

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[26] *Evidence Act 1995* (Cth).

(1) You can deduct from your assessable income any loss or outgoing to the extent that:

(a) it is incurred in gaining or producing your assessable income; or

*(b) it is necessarily incurred in carrying on a * business for the purpose of gaining or producing your assessable income.*

(2) However, you cannot deduct a loss or outgoing under this section to the extent that:

(a) it is a loss or outgoing of capital, or of a capital nature; or

(b) it is a loss or outgoing of a private or domestic nature; or

(c) it is incurred in relation to gaining or producing your exempt income; or

(d) a provision of this Act prevents you from deducting it.

37. The threshold condition required for any deduction for meals and incidental expenses is that they be incurred. In the present circumstances there is no evidence that the claimed expenses were incurred. While it is reasonable to infer that the applicant would have consumed food and incidental items, in circumstances where the applicant's contract provided for free of charge senior messing while at the Mukhaizna worksite and reimbursement for food expenses while in Muscat, including the period prior to first mobilisation to the Mukhaizna worksite, it cannot be inferred that the applicant incurred any losses or outgoings in relation to these matters. Accordingly, on this basis alone, the applicant has not demonstrated any entitlement to the deduction claimed.

38. Further, s 8-1 does not permit deductions for expenditures that lack sufficient nexus with income producing activities, or for private or domestic expenditures. Of the wealth of authority concerning s 8-1, *Commissioner of Taxation v Cooper*[27] is particularly relevant as it directly addressed expenditure on food, meals and beer which had been suggested to a professional rugby league player by a club official. The conclusions reached in *Cooper* were that, ordinarily, expenditure on food lacks sufficient nexus with income earning activities to be deductible,[28] and/or was expenditure of a private nature,[29] but the occasion for the expenditure and the nature of the income earning activities, for example

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27 (1991) 29 FCR 177. Lockhart and Hill JJ, Wilcox J dissenting.

28 Cooper at (1991) 29 FCR 183-184 & and 185 Lockhart J, and 201 Hill J.

29 Cooper at (1991) 29 FCR 185 Lockhart J, and 201 Hill J.

expenditure on food while travelling away from an employee's regular place of work, may alter that conclusion.[30] The reference to away from home by Hill J can be taken to mean away from an employee's usual place of work.

39. In the present circumstances, the Mukhaizna worksite was the applicant's usual place of work. As a consequence even if it could be established that the amounts claimed as meals and incidental expenses were incurred, lacking sufficient nexus with income producing activities and/or being of a private nature, these expenses would not be deductible.

MEDICARE LEVY AND SHORTFALL INTEREST CHARGE REDUCTIONS ON ACCOUNT OF THE MEALS AND INCIDENTAL EXPENSES DEDUCTION

40. The foregoing conclusion necessitates a conclusion that there is no reduction in the Medicare Levy or Shortfall Interest Charge.

CONCLUSION

41. For the above reasons, the Tribunal affirms the decision under review.

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[30] Cooper at (1991) 29 FCR 184 Lockhart J, and 201 Hill J.

I certify that the preceding 41 (forty-one) paragraphs are a true copy of the reasons for the decision herein of:
Senior Member F D O'Loughlin

[sgd].....

Associate

Dated 28 September 2016

Date of hearing	**11 September 2015**
Date of final submissions	**1 October 2015**
Advocate for the applicant	**Mr B Hydon**
Solicitors for the respondent	**Ms Z Harwood - Australian Tax Office Dispute Resolution**
Counsel for the respondent	**Ms E Grant**