

# Decision impact statement

## Wainwright and Commissioner of Taxation

<b>Court citation:</b>	[2019] AATA 333
<b>Venue:</b>	Administrative Appeals Tribunal
<b>Venue reference no:</b>	2016/5850-5851; 2017/1561
<b>AAT member name:</b>	R I Hanger QC, Deputy President
<b>Judgment date:</b>	5 March 2019
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Partly favourable to the Commissioner

### Impacted advice



This decision has no impact on any related advice or guidance.

### Précis

At issue in this decision was whether amounts were to be included in the taxpayers' assessable income under Division 304 of the *Income Tax Assessment Act 1997* (ITAA 1997) with respect to superannuation benefits paid otherwise than in accordance with the payment standards prescribed under the *Superannuation Industry (Supervision) Regulations 1994* (SISR).

### Brief summary of facts

Mr and Mrs Wainwright (the taxpayers) were trustees of a self-managed super fund (the Fund). The taxpayers purchased a property (Property 1) in their own names for \$700,000 on 28 September 2007. The taxpayers used cash from the Fund's bank account to pay for the property including an additional amount of \$24,995.00 to pay the stamp duty for the transaction.

As trustees of the Fund, the taxpayers entered into a contract on 28 September 2007 to acquire a farming property from Mr Wainwright for \$1.1 million (Property 2). The \$700,000 used to acquire Property 1 was treated by the parties as the payment of the Fund's deposit for purchasing Property 2. The taxpayers were not able to complete the contract concerning Property 2 on 31 January 2009 and the \$700,000 deposit was not repaid to the Fund.

The taxpayers experienced a decline in their newsagency business. In or around June 2009 they returned to dairy farming, which coincided with a drought. The drought was broken by flash flooding in January 2011 and the dairy market began to decline in January 2011. The taxpayers were forced to sell their dairy herd, and were required to sell their properties to pay their debts.

The taxpayers did not declare the superannuation benefits received from the Fund in their assessable incomes for the 2008 and 2009 income years. The Commissioner

issued amended income tax assessments, including the following amounts as assessable income:

**2008 income year**

Mr and Mrs Wainwright: \$12,497 each, representing the amount accessed to pay the stamp duty in relation to Property 1.

**2009 income year**

Mr Wainwright: \$700,000, representing the benefit of not seeking to recover the deposit paid by the Fund in relation to Property 2.

Administrative penalties for recklessness and shortfall interest charges were imposed.

Mr and Mrs Wainwright were disqualified from being trustees of the Fund under section 126A of the *Superannuation Industry (Supervision) Act 1993* (SISA).

## **Issues decided by the Tribunal**

**2008 income year**

The Tribunal affirmed the amended assessments for the 2008 income year. The Tribunal decided at [74] that the payment withdrawn from the Fund's bank account (\$24,995) to pay for the stamp duty on the acquisition of Property 1 was a superannuation benefit for the purposes of subsection 304-10(1) of the ITAA 1997. Further, the Tribunal also decided at [74] that the taxpayers had not met any applicable condition of release prescribed by the SISR prior to receipt of the payment and that the Fund had not been maintained for the sole purpose of providing benefits to the taxpayers upon retirement pursuant to section 62 of the SISA.

The Tribunal upheld the Commissioner's opinion that the taxpayers' actions resulted in 'evasion' for the purposes of amending the taxpayers' assessments for the 2007 income year (at [73]). The Tribunal also affirmed the Commissioner's decisions concerning the imposition of penalties and interest (at [95] to [96]).

**2009 income year**

The Tribunal set aside the Commissioner's decision with respect to the 2009 income year and decided that the Commissioner should have exercised his discretion under subsection 304-10(4) of the ITAA 1997 to exclude the amount of \$700,000 from Mr Wainwright's assessable income.

The Tribunal confirmed at [53] to [55] that the decision by the taxpayers as trustees of the Fund not to take any action against Mr Wainwright to recover the \$700,000 paid as a deposit gave rise to a superannuation benefit to Mr Wainwright pursuant to subsection 304-10(1) of the ITAA.

However, having regard to the evidence, the Tribunal decided that the Commissioner should have exercised the discretion under subsection 304-10(4) of the ITAA 1997 to decide that it was unreasonable to include the \$700,000 in Mr Wainwright's assessable income for the following reasons as set out at [87]:

- (a) the transaction involved was a legitimate arm's length, documented transaction

- (b) the taxpayer had no intention of deceiving, evading or cheating, and the transaction was entered after receiving professional advice
- (c) the taxpayer became unable at the relevant time to complete the contract he had undertaken through no fault of his own
- (d) the benefit he received in 2009 resulted from facts that arose after he had entered into a legitimate transaction and resulted from events principally beyond his control. It is easy to assert that being unable to complete the contract to transfer [Property 2] he should have refunded the money to the Fund, but he didn't have it. There was nothing both proper and practical that he could do. The taxpayer fell on hard times because of drought, floods, the global financial crisis and a decline in the dairy industry
- (e) impecuniosity took over and he became unable to obtain wise professional advice and the financial advice he received was less than optimal
- (f) there were other consequences flowing from his conduct in that he and his wife were disqualified from being trustees of the Fund.

## **ATO view of decision**

The ATO observes that this case is highly factual. The decision of the Tribunal concerning the exercise of the Commissioner's discretion under subsection 304-10(4) of the ITAA 1997 was open to it on the facts and evidence before it. In making this decision, the Tribunal identified a series of factors, including some events which occurred after the relevant superannuation benefit was provided by the Fund. In considering these factors, the Tribunal did not refer to the weight or degree of relevance it had given or applied, to events that had occurred after the superannuation benefits were provided by the Fund. The Commissioner considers that little weight should be given to events that occur after superannuation benefits have been provided when deciding whether to exercise the discretion.

The Commissioner will develop a Law Administration Practice Statement to provide further clarity on the exercise of the discretion set out in subsection 304-10(4) of the ITAA 1997.

## **Implications for impacted advice or guidance**

None

## **Comments**

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

<b>Date issued:</b>	25 July 2019
<b>Due date:</b>	23 August 2019
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## **Legislative references**

Income Tax Assessment Act 1997

304-10

304-10(4)

304-10(5)

Income tax Assessment Act 1936

170(1)

Superannuation (Industry) Supervision Act 1993

62

126A

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