

Schweitzer and Commissioner of Taxation -


Decision impact statement

Schweitzer and Commissioner of Taxation

Court citation:	[2019] AATA 1100
Venue:	Administrative Appeals Tribunal
Venue reference no:	2017/0583
Judge/AAT member name:	Deputy President S A Forgie
Judgment date:	29 May 2019
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

None

 The ATO has reviewed the impact of this decision on related advice and guidance products.

Précis

At issue before the Tribunal was whether the Commissioner had the power to release the Applicant from a variety of tax-related liabilities (including liabilities subject to judgment) and, if so, whether the power to release should be exercised in the Applicant's favour.

Brief summary of facts

The Applicant sought release from:

- tax-related liabilities in respect of the years of income ending 30 June 1991 to 30 June 1999 (inclusive), which were the subject of a judgment obtained by the Commissioner on 10 December 2003, and
- consequential interest on the judgment debt.

Issues decided by the Tribunal

The Tribunal held that:

1. The Commissioner has the power to release a taxpayer's liability to income tax imposed in respect of income years both before and after that ending on 30 June 1998.
2. The Commissioner does not have the power to release a taxpayer's liability to interest imposed under former section 170AA of the *Income Tax Assessment Act (1936)* (ITAA 1936).
3. The obtaining of judgment against a taxpayer for a sum that reflects the amount of the taxpayer's tax-related liability causes the tax-related liability to cease to exist. The Commissioner does not have the power to release a taxpayer's judgment debt nor does he have the power to

release the tax-related liability the subject of the judgment, as that tax-related liability ceased to exist upon judgment having being obtained.

4. The Applicant did not establish that she would suffer serious hardship even if required to satisfy all the tax-related liabilities from which she sought release.
5. Even if the Applicant were to suffer financial hardship, taking into account the Applicant's facts and circumstances, the discretion to release should not be exercised.

Commissioner's power under Division 340 to release a taxpayer's income tax liabilities

Division 340 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) concerns the Commissioner's powers in cases of hardship. Subsection 340-5(1) makes provision for an individual to apply to the Commissioner to release them from a liability in whole or in part, with the Commissioner empowered to grant the release if the individual would suffer serious hardship if they were required to satisfy the liability. However for the rules in Division 340 to be engaged, section 340-10 must apply to the liability. Subsection 340-10(1) specifies five kinds of liabilities to which the section applies and subsection 340-10(2) in the form of a table specifies other liabilities to which the section also applies. Table item 6 identifies liability to 'tax' (a term defined to include income tax) arising under, among other provisions, section 4-1 of the *Income Tax Assessment Act 1997* (ITAA 1997). The Commissioner submitted two alternative constructions of that item for the Tribunal's consideration. The first construction was based on the text of table item 6 when read with section 4-1 of the ITAA 1997. For present purposes, section 4-1 of the ITAA 1997 provides that income tax is payable by each individual. However that section is limited to assessments for the 1997-98 year of income and later years of income by virtue of section 4-1 of the *Income Tax (Transitional Provisions) Act 1997*.

The second construction gave effect to the intention of section 340-10 of Schedule 1 to the TAA to include, within the scope of Division 340, income tax liabilities arising before the 1997-98 year of income.

The Tribunal accepted the second construction and found that the Commissioner, and subsequently a Tribunal upon review, had the power under Division 340 of Schedule 1 to the TAA to release an income tax liability that was imposed under the *Income Tax Act 1986* and assessed under either the ITAA 1936 or the ITAA 1997.

Commissioner's power under Division 340 to release a taxpayer's liability to interest imposed under former section 170AA of the ITAA 1936

The Applicant submitted to the Tribunal that the reference to 'general interest charge' (GIC) in table item 3 of subsection 340-10(2) in Schedule 1 to the TAA included a liability for 'interest' imposed under former section 170AA of the ITAA 1936.

The Tribunal rejected the Applicant's submission and found that the liability specified in table item 3 is GIC which is only able to be imposed in relation to periods commencing on or after 1 July 1999. Further, the Tribunal also found that there was nothing in the *Taxation Laws Amendment Act (No. 3) 1999* that deemed interest incurred under former section 170AA up to the year of income ending 30 June 1998 to be GIC.

Accordingly, the Tribunal considered that there was no basis upon which the reference to a liability to GIC in table item 3 could be read to include interest imposed under former section 170AA.

Consequently, the Tribunal concluded that the Commissioner, and subsequently a Tribunal upon review, did not have the power under Division 340 of Schedule 1 to the TAA to release a taxpayer's liability to interest imposed under former section 170AA.

Release of liabilities the subject of a judgment for recovery

Contrary to the submissions of both parties, the Tribunal found that the obtaining of judgment against a taxpayer for a sum that reflects the amount of the taxpayer's tax-related liability causes the tax-related liability to cease to exist. This finding has the consequence that, according to the Tribunal, the Commissioner does not have the power to release a taxpayer's judgment debt nor the power to release a tax-related liability the subject of a judgment obtained by the Commissioner, as that tax-related liability ceased to exist upon judgment having been obtained.

In reaching this view the Tribunal relied on the principles set out in *Chamberlain v Deputy Commissioner of Taxation* [1988] HCA 21 (*Chamberlain*) and also followed DP Block's decision in *Rollason and Commissioner of Taxation* [2006] AATA 962 (*Rollason*) which itself was based on a reading of *Chamberlain* as standing for the proposition that when a tax debt is merged into a judgment debt it is the latter which is the relevant debt.

In *Chamberlain*, the Deputy Commissioner of Taxation had obtained judgment for the amount of \$25,557.92 for the 1975–1982 years of income despite issuing a writ for an amount of \$255,579.20 for those years. Having obtained judgment for the amount of \$25,557.92, the Deputy Commissioner of Taxation issued a further writ for the amount of \$230,021.28 in respect of the same assessments. The High Court found that as the Deputy Commissioner of Taxation had not had the previous judgment set aside, he was for all practical purposes suing again in respect of the same cause of action and that the principle of *res judicata* precluded him from doing so.

The decision in *Chamberlain* was also considered by the Full Federal Court in *Chemical Trustee Limited v Deputy Commissioner of Taxation* [2014] FCAFC 27 (*Chemical Trustee*), where the appellant sought to prevent the Deputy Commissioner of Taxation from pursuing a recovery proceeding for income tax in relation to an amended notice of assessment issued in respect of the same year of income as a previous notice of assessment in respect to which a judgment for recovery had been obtained. The Court unanimously found that the appropriate application of the decision in *Chamberlain* was that the right of action in respect of the relevant notice of assessment was merged into the judgment, not the underlying tax liability itself. In coming to this conclusion the Full Federal Court noted that if a judgment for recovery subsumed the underlying tax-related liability it could potentially thwart the operation of Part IVC of the TAA (providing taxpayers with a statutory mechanism for challenging their assessed liability to tax).

Despite the Full Federal Court's decision in *Chemical Trustee*, the Tribunal followed the decision in *Rollason* and held that the component of the Applicant's tax-related liabilities that were the subject of the judgment obtained by the Commissioner could not be released by the Commissioner or, by extension, the Tribunal upon review.

Serious hardship and the exercise of discretion

The Tribunal found that the applicant had not discharged the onus of establishing that satisfying the relevant tax-related liabilities would cause her to suffer serious hardship.

Notwithstanding this finding, the Tribunal also proceeded to conclude that, had it been established that serious hardship would be suffered, the discretion to release the Applicant's tax-related liabilities should not be exercised given the relevant facts and circumstances in this particular case.

ATO view of decision

Release of income tax liabilities

The Commissioner considers that the Tribunal's decision, that the Commissioner has the power to release a taxpayer's liability to income tax imposed in respect of income years both before and after that ending on 30 June 1998, gives effect to the intent and policy of the release provisions contained in Division 340 of Schedule 1 to the TAA. As mentioned, this was one of two alternative constructions submitted by the Commissioner for the Tribunal's consideration.

Release of interest liabilities

The Commissioner considers that the Tribunal's decision, that the Commissioner does not have the power to release a taxpayer's liability to interest imposed under former section 170AA of the ITAA 1936, is a construction reasonably open on the words of the statute.

This aspect of the decision is nonetheless likely to have minimal future impact as it only excludes from release interest imposed under former section 170AA of the ITAA 1936 prior to 1 July 1999.

Release of liabilities subject to judgment for recovery

As submitted to the Tribunal in this case, the Commissioner considers that the decision of the Tribunal in *Rollason* cannot stand with that of the later decision of the Full Federal Court in *Chemical Trustee* and the latter authority is binding.

To be clear, the Commissioner considers that an underlying tax-related liability does not cease to exist upon the entry of judgment against the taxpayer for that tax-related liability.

This interpretation allows for taxpayers to seek review of the underlying tax-related liability pursuant to Part IVC of the TAA even where judgment has been obtained for recovery of the tax debt. It also allows the Commissioner to consider and exercise various discretionary powers in relation to tax-related liabilities although judgment has been obtained for recovery of the tax debt. For example, the power to permit payment by instalments under section 255-15 in Schedule 1 of the TAA or the release provisions pursuant to Division 340 of that same Schedule.

The continued existence of the underlying liability as a tax-related liability even after judgment has been obtained also accords with other decisions including *Deputy Commissioner of Taxation (Cth) v Moorebank Pty Ltd* [1988] HCA 29; *Pollack, P.J. v Deputy Commissioner of Taxation* [1991] FCA 651; *Deputy Commissioner of Taxation (Commonwealth) v Zarzycki, Vera* [1990] VicSC 311; and *Mazuran, R.M. v*

Deputy Commissioner of Taxation of the Commonwealth of Australia [1990] FCA 462.

Although the Commissioner disagrees with the Tribunal's decision in respect of this issue, as the Tribunal's overall decision was in the Commissioner's favour and as the Applicant chose not to appeal to the Federal Court from the Tribunal's decision, the Commissioner was unable to challenge the Tribunal's conclusions on this issue.

Serious hardship and the exercise of discretion

The Tribunal's reasoning and conclusion are consistent with the position taken by the Commissioner in this matter.

Implications for impacted advice or guidance

Not applicable.

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.

Date issued:	4 October 2019
Due date:	1 November 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Income Tax Act 1986
ITAA 1936 former 170AA
ITAA 1997 4-1
IT(TP)A 1997 4-1
TAA 1953 Pt IVC
TAA 1953 Sch 1 255-15
TAA 1953 Sch 1 Div 340
TAA 1953 Sch 1 340-5(1)
TAA 1953 Sch 1 340-5(2)
TAA 1953 Sch 1 340-10
TAA 1953 Sch 1 340-10(2)
Taxation Laws Amendment (No. 3) Act 1999

Case references

Chamberlain v Deputy Commissioner of Taxation [1988] HCA 21; (1988) 164 CLR 502; 88 ATC 4323; 19 ATR 1060; 78 ALR 271

Chemical Trustee Limited v Deputy Commissioner of Taxation [2014] FCAFC 27;
(2014) 96 ATR 32; (2014) 308 ALR 366
Deputy Commissioner of Taxation (Cth) v Moorebank Pty Ltd [1988] HCA 29; (1988)
165 CLR 55; 88 ATC 4443; 19 ATR 1156; 78 ALR 641
Deputy Commissioner of Taxation (Commonwealth) v Zarzycki, Vera [1990] VicSC
311; (1990) 21 ATR 575; 96 ALR 146; 90 ATC 4707
Pollack, P.J. v Deputy Commissioner of Taxation [1991] FCA 651; (1991) 32 FCR 40;
103 ALR 133; 91 ATC 4925; 22 ATR 670
*Mazuran, R.M. v Deputy Commissioner of Taxation of the Commonwealth of
Australia* [1990] FCA 462; 90 ATC 4814; (1990) 21 ATR 758
Rollason and Commissioner of Taxation [2006] AATA 962; 2006 ATC 2529; (2006)
64 ATR 1210

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