

Decision impact statement

MJ and IT Holdings Pty Ltd and Commissioner of Taxation

Court citation(s):	[2021] AATA 3250
Venue:	Melbourne
Venue reference no:	2020/6929
AAT member name:	Senior Member James
Judgment date:	8 September 2021
Appeals on foot:	No
Decision outcome:	Favourable

Impacted advice



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

Précis

This Decision impact statement outlines the ATO's response to this case, which concerns the 'payment and withholding requirement' under subparagraph 5(1)(a)(i) and the 'integrity rule' under paragraph 5(1)(g) of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (BCF Act), which denies an entity the cash flow boost (CFB) where those requirements (among others) have not been satisfied.

Brief summary of facts

To be entitled to the first CFB, an entity needs to satisfy the requirements outlined in section 5 of the BCF Act. Relevant to the matter before the Administrative Appeals Tribunal (the Tribunal), two of those requirements are:

- the entity makes a payment in the relevant period and must withhold an amount from the payment under Subdivisions 12-B, 12-C or 12-D in Schedule 1 to the *Taxation Administration Act 1953* (TAA), and
- neither the entity nor any associate or agent of the entity entered into or carried out a scheme or part of a scheme for the sole or dominant purpose of gaining entitlement to the CFB or increasing the amount of CFB to which the entity is entitled.

The dispute centred on the claim by the taxpayer to have made a \$25,000 payment, being a director's fee and expensed by way of a journal entry in the accounting records of the taxpayer, between 29 and 31 March 2020. This was after the CFB announcement on 12 March 2020.

The taxpayer contended that, though no money had changed hands at the time, there was a constructive payment by way of offset of the director's fee against the director's loan account, evidenced by the accounting records.

The Commissioner contended that there was, in fact, no payment made by the taxpayer to the director. The Commissioner additionally contended that the taxpayer had entered into a scheme to increase their CFB entitlement by inflating their withholding amount for the month of March 2020.

The Commissioner determined the taxpayer was not entitled to the amount of CFB sought and the taxpayer objected to the decision reducing the amount of CFB under Part IVC of the TAA. The taxpayer's objection was disallowed.

Issues decided by the Tribunal

The issues considered by the Tribunal can be summarised as:

- whether the taxpayer paid wages subject to withholding to the director in the relevant period (the 'payment and constructive payment issue'), and
- whether the taxpayer, or their associate or agent, entered into a scheme for the sole or dominant purpose of increasing their entitlement to the CFB (the 'scheme issue').

The payment issues

The Tribunal decided (at [31–33]) that, notwithstanding the accounting records provided (which were clearly described in the accounts as a director's loan account and which did not establish the existence of offsetting liabilities), it was the intention of the parties that the director's fee be offset against amounts the taxpayer considered it had advanced to the director over the course of the year. The fact that the director's loan account was in credit and that there were no advanced amounts against which to offset the director's fee was considered by the Tribunal to be a mistake on the part of the taxpayer's accountant from which no adverse conclusions could be inferred (at [40]). In this context, the Tribunal noted that the taxpayer had changed their accounting software in March 2017 (at [37]) and the taxpayer's accountant had misunderstood the software and instructions (at [40]).

The Tribunal found that the actions taken by the taxpayer to implement this intention to offset, being:

- the making of accounting records
- the issuing of payslips, and
- the lodging of a business activity statements (BAS) recording amounts withheld,

were sufficient evidence to establish that payment had been made constructively per the requirements of section 11-5 of Schedule 1 to the TAA (at [31–33]).

The Tribunal concluded that the taxpayer had made a payment of \$25,000 to the director in the month of March 2020 and was required to withhold from that payment under Subdivision 12-B of Schedule 1 to the TAA (at [32–33]).

Scheme issue

The Tribunal considered that the decision to make payment of a director's fee in March 2020 (contrary to the taxpayer's prior business practice of remunerating their director at the end of the financial year) and to withhold from the payment at a rate higher than would ordinarily be expected for a payment that was intended to encompass nine months of service were some of the actions taken as part of a scheme (at [66]).

The Tribunal concluded that the actions of the taxpayer, their director, their associate and their tax agent (both objectively and subjectively) displayed a dominant, if not sole purpose, of increasing the March 2020 CFB entitlement for the purposes of applying paragraph 5(1)(g) of the BCF Act (at [71–74]). The taxpayer was therefore ineligible to receive a CFB for the March 2020 period.

ATO view of decision

Scheme issue

This decision accords with the Commissioner's interpretation and application of the 'integrity rule' in paragraph 5(1)(g) of the BCF Act.

The Commissioner notes that the Tribunal's view provides support for the scheme provision to be interpreted broadly.

The payment issues

The Tribunal's decision that the taxpayer made a constructive payment of \$25,000 to the director in the month of March 2020 is fundamentally a finding of fact particular to the evidence in this specific case, including the Tribunal's reasoning that the taxpayer had erroneously recorded the transaction in their accounts in the context of a change in accounting software. The Commissioner considers that this aspect of the decision may have limited application beyond the scope of this decision due to the specific factual situation considered by the Tribunal.

There appears to be some inconsistency in the Tribunal's statement of the authority of *Temples Wholesale Flower Supplies Pty Ltd v Federal Commissioner of Taxation of the Commonwealth of Australia* [1991] FCA 185 (*Temples Wholesale Flower Supplies*) (at [25]) and its subsequent application to the facts of the case (at [31]). Reading paragraphs 25 and 31 in context, we understand the reasoning of the Tribunal to be that the *Temple Wholesale Flower Supplies* decision provides that mere accounting entries by themselves do not constitute sufficient proof of the existence of a payment to a director, but that the taxpayer had provided sufficient additional evidence to distinguish the present case from that decision (at [31]).

We also consider that the lodgment of a business activity statement advising of a pay as you go (PAYG) withholding liability is not (in and of itself) sufficient evidence to conclude that a payment subject to PAYG withholding has been made. An entity cannot withhold an amount from a payment that has not been paid. We do not consider that the Full Federal Court decision of *Commissioner of Taxation v Cassaniti* [2018] FCAFC 212 suggests otherwise.

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:	20 January 2022
Due date:	18 February 2022
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

BCF Act 2020 5

BCF Act 2020 5(1)(a)(i)

BCF Act 2020 5(1)(g)

TAA 1953 Pt IVC

TAA 1953 Sch 1 11-5

TAA 1953 Sch 1 Subdiv 12-B

TAA 1953 Sch 1 Subdiv 12-C

TAA 1953 Sc 1 Subdiv 12-D

Case references

Commissioner of Taxation v Cassaniti [2018] FCAFC 212; 266 FCR 385

Temples Wholesale Flower Supplies Pty Ltd v Federal Commissioner of Taxation of the Commonwealth of Australia [1991] FCA 185; 29 FCR 93; 21 ATR 1606; 99 ALR 479

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).