

VNBM and Commissioner of Taxation -

Decision impact statement

VNBM and Commissioner of Taxation

Court citation(s):	[2021] AATA 1626
Venue:	Administrative Appeals Tribunal
Venue reference no:	2020/7690
AAT member name(s):	Olding R, Senior Member
Judgment date:	7 June 2021
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

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 application of the 'integrity rule' under paragraph 5(1)(g) and the 'payment and withholding requirement' under subparagraph 5(1)(a)(i) 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 (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*, 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, or increasing the amount of, the CFB to which the entity is entitled.

Section 6 of the BCF Act contains the requirements an entity must satisfy to receive the second CFB, which similarly requires that an entity must not have entered into or carried out a scheme.

The Applicant provides services to an accounting firm. Its director is a registered tax agent and chartered accountant. The Applicant did not have its own bank account, but rather the business income it received was deposited into the joint personal bank account of the Director and the Director's spouse.

For over five years, the Applicant consistently reported wages of \$1,300 per quarter to the Director, as well as much larger amounts as dividends paid to a discretionary trust, of which the Director was a beneficiary.

Following the announcement of the CFB on 12 March 2020, the Applicant reported a wage of \$108,700 to the Director in its business activity statement for the March 2020 quarter. This amount purportedly comprised of 12 weekly payments of \$100 and one weekly payment of \$107,500. The corresponding withholding amount reported by the Applicant for this quarter was \$50,009. The Applicant argued that the change in the pattern of wages was for the purpose of enhancing the Director's ability to refinance and consolidate certain loans. The higher wages would have increased the Applicant's CFB eligibility from the minimum (\$10,000) to the maximum (\$50,000) amount of CFB for the first boost.

The Commissioner determined the Applicant was not entitled to the CFB and the Applicant objected to that decision under Part IVC of the *Taxation Administration Act 1953*. The Applicant's objection was disallowed on the basis that it had entered into a scheme or part of a scheme for the sole or dominant purpose of increasing the amount of the CFB to which it is entitled. In the alternative, it was ineligible to the CFB as it did not establish it met the 'payment and withholding' requirement.

Issues decided by the Tribunal

The Tribunal considered two separate issues:

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

Scheme issue

In determining this issue, the Tribunal considered the similarities and differences between paragraph 5(1)(g) of the BCF Act, Part IVA of the *Income Tax Assessment Act 1936* and Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999*.

The Tribunal considered that in applying the integrity rule, evidence as to actual (subjective) intention is relevant in inquiring whether the entity, or any associate or agent of the entity, entered into or carried out a scheme for the sole or dominant purpose of making the entity entitled to the CFB or increasing its entitlement. Objective circumstances, such as timing and other surrounding circumstances, are also highly relevant and may assist in determining purpose.

The Applicant's evidence included that the Director was advised over the phone by one of his lenders that his and his wife's capacity to service a loan would be enhanced if he were paid a higher level of wages, in the order of \$100,000. The Director also stated that he was told wages were looked upon more favourably for loan-serviceability purposes than dividends. The Applicant provided an email from one of the lender's employees which did not support the advice purportedly received over the phone.

The Tribunal concluded that the Director did enter into a scheme and did not accept that the evidence the Director relied on provided a reasonable or credible explanation for the change.

Payment issue

The Tribunal held that there was a lack of contemporaneous evidence showing that the Applicant paid the amount of wages reported in the relevant period. The Applicant relied on its business activity statement and the Director's personal tax returns as evidence of payment. However, the Tribunal concluded at [77] that it did not regard the inclusion of wages in these reporting documents as '... strong evidence of what actually occurred'.

The Tribunal concluded that the Applicant's assertions and evidence were not sufficient to discharge its burden of proving that the increased amount of wages was paid.

ATO view of decision

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 the Tribunal's view that the definition of 'scheme' is very broad and the scope of paragraph 5(1)(g) of the BCF Act is further expanded by the inclusion of the phrase 'or part of a scheme'.

The Tribunal's decision confirms the importance of considering all of the surrounding circumstances (including objective factors) when determining whether the requisite 'sole or dominant purpose' has been satisfied, rather than merely having regard to an applicant's stated intention.

The Tribunal's decision also confirms that where an entity does not satisfy the integrity rule, it is not entitled to any CFB and there is no ability to allow a lower amount of CFB on the basis of what would have been payable had the scheme not been entered into.

The Tribunal's decision regarding the 'payment issue' accords with the Commissioner's interpretation and application of the 'payment and withholding requirement' in subparagraph 5(1)(a)(i) of the BCF Act. The Applicant must discharge its burden of proving that wages were paid in the relevant period.

The Commissioner notes that the Tribunal's focus on contemporaneous documentary evidence and the need for the Applicant to prove that a wage was actually paid. Self-serving statements and assertions not supported by documentary evidence are open to being scrutinised.

The Commissioner will continue to review entities whose eligibility for CFB was impacted by significant changes in their reporting of withholding amounts and will closely monitor and examine claims that do not appear to reflect the true nature of transactions or events. Entities who engaged in contrived arrangements should expect to be reviewed.

Legislative references

A New Tax System (Goods and Services Tax) Act 1999
Div 165

Boosting Cash Flow for Employers (Coronavirus Economic Response Package)
Act 2020

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5(1)(a)(i)

5(1)(g)

Income Tax Assessment Act 1936
Pt IVA

Taxation Administration Act 1953

Pt IVC

Sch 1 Subdiv 12-B

Sch 1 Subdiv 12-C

Sch 1 Subdiv 12-D

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