Water West Pty Ltd and Commissioner of Taxation -

Decision impact statement

Water West Pty Ltd and Commissioner of Taxation

Court citations:	[2022] AATA 427
Venue:	Administrative Appeals Tribunal
Venue reference no:	2021/4194
AAT member name:	Deputy President McCabe
Judgment date:	8 March 2022
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 entitlement to the cash flow boost (CFB) and specifically whether there was a reasonable basis upon which the Applicant was a small business entity or a medium business entity for the relevant income year.

All legislative references in this Decision impact statement are to the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*, unless otherwise indicated.

Brief summary of facts

To be entitled to the first CFB, an entity needs to satisfy the requirements outlined in section 5. One of the requirements is whether the Commissioner is satisfied on a reasonable basis that the entity is a small or medium business entity for the income year in which the period starts under subparagraph 5(1)(d)(ii).

The Applicant was incorporated in October 2013 and was a subsidiary of a significant global entity and part of a group of companies (the BPIH group) with high aggregated turnover.

In September 2014, the Applicant applied to change its accounting period to a substituted accounting period (SAP) to synchronise with its parent company. The Commissioner agreed to the SAP. The substitution occurred and the Applicant was given a transitional period and subsequently accounted at the end of the calendar year like the other companies in the BPIH group.

In December 2019, the Applicant's parent transferred all of its shares in the Applicant to 3 other entities who, at all relevant times, had an aggregated turnover of less than $10 million.

In March 2020, following another change in ownership, the Applicant applied to change its SAP, asking to revert to a 30 June balance date. The Commissioner agreed to this request in April 2020, confirming that, for the 2019–20 income year, the Applicant would be required to lodge a tax return covering the transitional period of 1 January 2019 to 30 June 2020.

In March 2021, the Applicant applied for a new SAP, requesting an early balance date of 31 December 2019. The Commissioner declined the request due to insufficient reasons justifying the new SAP.

The Applicant lodged its activity statements declaring pay as you go withholding amounts for the monthly periods commencing 1 March, 1 April, 1 May and 1 June 2020. These were the periods relevant in determining the income year under subparagraph 5(1)(d)(ii).

The Commissioner determined that 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 the Applicant was not a small or medium business entity at the time when eligibility for CFB was assessed.

Issues decided by the Tribunal

The Tribunal firstly considered the issue of what was 'the income year in which the period starts' under subparagraph 5(1)(d)(ii), referring to the definition of 'income year' in the *Income Tax Assessment Act 1997* (ITAA 1997) as provided for in subsection 4(1).[1] The Tribunal noted that the provisions of the ITAA 1997 assume that the income year is the financial year unless an exception applies, including where the Commissioner has allowed a SAP.[2]

In the Applicant's case, the Tribunal concluded that the income year in which the period starts (that is, each monthly period commencing 1 March, 1 April, 1 May and 1 June 2020) was the income year commencing 1 January 2019 and ending 30 June 2020.[3]

The Tribunal then considered whether the Applicant met the definition of a 'small business entity' under subsection 328-110(1) of the ITAA 1997, specifically having regard to its aggregated turnover. Essentially, an entity's aggregated turnover includes the turnover of connected entities and affiliates.

The first limb under paragraph 328-110(1)(b) of the ITAA 1997 focuses on whether the entity's aggregated turnover for the previous year was less than the statutory threshold of $10 million (for medium business entities, the threshold is $50 million). The second limb focuses on whether the entity's aggregated turnover for the current year is likely to be less than $10 million (for medium business entities, the threshold is $50 million).

The Tribunal found that the Applicant failed the first limb because its aggregated turnover for the previous year (1 January 2018 to 31 December 2018) was over $10 million (and indeed over $50 million).[4] This was because the Applicant was part of the BPIH group for the entire previous year.

---

[1] *Water West Pty Ltd and Commissioner of Taxation* [2022] AATA 427 (*Water West*) at [23].
[2] *Water West* at [23].
[3] *Water West* at [23].
[4] *Water West* at [26].

The Tribunal also found that the Applicant failed the second limb because its current income year commenced on 1 January 2019 and ended on 30 June 2020.[5] The turnover of the BPIH group was relevant since the Applicant was part of the BPIH group for almost two-thirds of that year.[6]

The Tribunal also found that there was no reasonable basis upon which to conclude that the Applicant was a small or medium business entity despite it failing to satisfy the definition in subsection 328-110(1) of the ITAA 1997.[7] The Tribunal found that the power to make a determination on a 'reasonable basis' is only available where the Commissioner does not have access to all the information they would ordinarily consider when making an assessment of likely turnover.[8]

ATO view of decision

Despite the Tribunal's decision, the Commissioner considers that the relevant income year when applying section 328-110 of the ITAA 1997 is to a 12-month period. The Commissioner will seek to clarify this position at the next available opportunity before the Tribunal or Courts.

Subsection 995-1(1) of the ITAA 1997 (read with subsections 4-10(2) and 9-5(2) of the ITAA 1997) provides that an income year is generally a period of 12 months beginning on 1 July, unless the Commissioner has agreed for an entity to adopt a SAP (which is a period of 12 months that ends on a date other than 30 June). Section 18 of the *Income Tax Assessment Act 1936* (ITAA 1936) expresses an intention that an entity's annual accounting period is ordinarily to be the 12-month period ending on 30 June.

Further, the Commissioner considers that a transitional period, which facilitates an entity's changeover from one balance date to another (and is necessarily a period other than 12 months) does not constitute an income year. The Commissioner may require a tax return under section 162 of the ITAA 1936 or make an assessment of income for a transitional period under section 168 of the ITAA 1936 when an entity's balancing date changes.[9]

Accordingly, the Commissioner maintains the view that an income year cannot be a period of more than 12 months under the provisions of the ITAA 1997 and ITAA 1936. We note that the adoption of this position would not have impacted the outcome of the matter before the Tribunal as the Applicant was part of the BPIH group for the relevant periods.

The Commissioner also maintains the view that when working out aggregated turnover under section 328-115 of the ITAA 1997, an entity calculates the annual turnovers of entities connected with it and entities that are its affiliates for the relevant period that aligns with the entity's income year, even if those entities have a different accounting period to it.[10] An entity is required to calculate its aggregated turnover based on its income year, whether that ends on 30 June or some other date; for example, where an approved SAP is in place.[11]

[5] *Water West* at [27].
[6] *Water West* at [27].
[7] *Water West* at [31].
[8] *Water West* at [31].
[9] Law Administration Practice Statement PS LA 2007/21 *Substituted Accounting Periods (SAPs)*.
[10] Taxation Determination TD 2021/7 *Income tax: aggregated turnover – calculating the annual turnover of a connected entity or affiliate with a different accounting period to you.*
[11] TD 2021/7.

An entity's aggregated turnover includes its own annual turnover, as well as the annual turnover of any entity (including any foreign resident) that it is connected with, or are its affiliates, at any time during its income year.[12]

Implications for impacted advice or guidance

Nil.

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: 18 November 2022

Contact officer details have been removed as the comments period has expired.

[12] Section 328-115 of the ITAA 1997.

Legislative references

Boosting Case Flow Employers (Coronavirus Economic Response Package) Act 2020
4(1)
5(1)(d)(ii)

Income Tax Assessment Act 1936
18
162
168

Income Tax Assessment Act 1997
4-10(2)
9-5(2)
328-110(1)
328-110(1)(b)
328-115
995-1(1)

Taxation Administration Act 1953
Pt IVC

Other references

TD 2021/7; PS LA 2007/21

ATO references
NO: 1-PU6JMYD
ISSN: 2653-5424
