

Interim decision impact statement

Apted and Commissioner of Taxation (Taxation) [2020] AATA 5139

Court citation(s):	[2020] AATA 5139
Venue:	Administrative Appeals Tribunal (Small Business Taxation Division)
Venue reference no:	2020/4562
AAT member names:	The Hon Justice D G Thomas, President; and Deputy President Bernard J McCabe
Judgment date:	21 December 2020
Appeals on foot:	Yes
Decision outcome:	Unfavourable

Précis

This interim Decision impact statement outlines the ATO's response to this case which concerns the requirement for an entity to have an Australian Business Number (ABN) on 12 March 2020 as per subsection 11(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules). It also considers if the Commissioner's discretion to allow a later time for an entity to have an ABN is reviewable by the Tribunal and whether the discretion should be exercised in the circumstances of the applicant.

Background

To establish an entity's potential entitlement for JobKeeper payments as an eligible business participant, the integrity rules must be satisfied, which includes a requirement in subsection 11(6) of the Rules that an entity '... had an ABN on 12 March 2020 (or a later time allowed by the Commissioner) ...'.

The applicant is a registered valuer who first obtained an ABN as a sole trader in 2012. In 2018, the applicant decided to retire and cancelled his goods and services tax registration and ABN. In September 2019, the applicant was engaged to provide valuation services.

On 31 March 2020, the applicant made an application to the Registrar of the Australian Business Register (ABR), who reinstated the applicant's ABN with a date of effect of 31 March 2020.

The applicant applied for JobKeeper payments but was found to be ineligible as he did not have an ABN on 12 March 2020. The Commissioner also declined to exercise his discretion to allow the applicant later time to hold an ABN. The applicant then telephoned the ABR Registrar; as a result, the Registrar adjusted the date of effect of the applicant's ABN to 1 July 2019.

The applicant objected under Part IVC of the *Taxation Administration Act 1953* to the Commissioner's decision finding him ineligible for JobKeeper payments. The applicant's objection was disallowed on the basis that the applicant did not have an ABN on 12 March 2020. Further, while the Commissioner maintained his view that his discretion to allow a later time to hold an ABN is not reviewable under Part IVC of the *Taxation Administration Act 1953*, the Commissioner considered the application of his discretion to the applicant's circumstances but declined to grant it.

Decision

The Tribunal delivered its decision on 21 December 2020 and decided that:

- a) in circumstances where the applicant's ABN was reinstated effective from 1 July 2019, the applicant did have an ABN on 12 March 2020 for the purposes of the Rules (at [53])
- b) if the Tribunal was wrong about (a), the Commissioner's exercise of the discretion is in any event reviewable before the Tribunal (at [65]-[66]), and
- c) if the Tribunal was wrong about (a) and right about (b), the discretion to allow a later time for the applicant to hold an ABN should be exercised in the applicant's favour, making the applicant eligible for JobKeeper payments (at [73]).

ATO view of decision

The decision is inconsistent with the Commissioner's view in respect of all key issues considered by the Tribunal. In particular, the Commissioner considers that:

- Whether an entity had an ABN is to be determined by reference to whether an entity had an active ABN on 12 March 2020. That is, it is a point-in-time test and an ABN which has been backdated to have effect on or before 12 March 2020 will not meet the requirement to have had an ABN on 12 March 2020 for the purposes of the Rules.
- His discretion is not reviewable by the Tribunal, although review could be sought under the *Administrative Decisions (Judicial Review) Act 1977*. The Commissioner's administrative practice is to provide an internal review of his discretion decision when requested.
- A favourable exercise of the discretion is not appropriate based on the reasons given by the Tribunal. The Commissioner's view on when the discretion would be appropriately exercised is outlined in Law Administration Practice Statement PS LA 2020/1 *Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies*.

It is in the public interest to get clarity on the issues raised in this case to ensure efficient and proper administration of the JobKeeper rules. Accordingly, the Commissioner has filed an appeal in respect of the decision to the Full Federal Court of Australia and has also made application for an expedited hearing, in recognition of the importance of resolving the issues considered by the Tribunal as soon as possible.

Pending the conclusion of the Commissioner's appeal:

- Where an entity's eligibility can otherwise be resolved in a manner favourable to them, those decisions will continue to be made. For example, where an entity did not have an ABN on 12 March 2020 but

the Commissioner determines that the entity's circumstances fall within the approach contemplated in PS LA 2020/1.

- We will postpone finalising decisions regarding eligibility for JobKeeper payments in circumstances where we determine the entity does not satisfy the eligibility criteria but consider they might become eligible depending on the views of the Full Federal Court on the issues in this case. However, if the entity would like us to make a decision over this time, we will do so in line with the ATO view set out in PS LA 2020/1.

The Commissioner is aware that an identical requirement to have an ABN on 12 March 2020 (or a later time allowed by the Commissioner) appears in paragraph 5(1)(f)(ii) of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*. The Commissioner intends to apply the same approach to that provision as described above for subsection 11(6) of the Rules.

A final Decision impact statement will be published after the litigation in this matter is concluded.

Date issued: 18 January 2021

Legislative references

Administrative Decisions (Judicial Review) Act 1977

Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 5(1)(f)(ii)

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 11(6)

Taxation Administration Act 1953 Part IVC

Case references

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Other references

PS LA 2020/1

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