

Commissioner of Taxation v Apted -

Decision impact statement

Commissioner of Taxation v Apted

Court citation(s):	[2021] FCAFC 45 [2020] AATA 5139
Venue:	Federal Court of Australia
Venue reference no:	QUD 11 of 2021
Judge names:	Allsop CJ, Logan and Thawley JJ
Judgment date:	24 March 2021
Appeals on foot:	No
Decision outcome:	Partly favourable to the Commissioner

Impacted advice

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

Précis

This Decision impact statement outlines the ATO's response to this case, which concerns the requirement for an entity to have an Australian business number (an ABN) on 12 March 2020 (or a later time allowed by the Commissioner) as per subsection 11(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the CERP Rules). The Decision also considers if the Commissioner's discretion to allow a later time for an entity to have an ABN forms part of a reviewable objection decision that is reviewable by the Administrative Appeals Tribunal (the Tribunal) and whether the discretion should be exercised in the circumstances of the respondent.

Brief summary of facts

A number of criteria must be satisfied in order to establish entitlement to JobKeeper payments for an eligible business participant. This includes a requirement in subsection 11(6) of the CERP Rules that an entity must have '... had an ABN on 12 March 2020 (or a later time allowed by the Commissioner) ...'.

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

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

The respondent applied for JobKeeper payments but was found to be ineligible because he did not have an ABN on 12 March 2020. The Commissioner also declined to exercise his discretion in subsection 11(6) of the CERP Rules to allow the respondent a later time to hold an ABN. The respondent then telephoned a representative of the Registrar of the ABR; to request that the reactivation of his ABN be amended, so that the ABN was effective from 1 July 2019. As a result, in

accordance with the *A New Tax System (Australian Business Number) Act 1999*, the Registrar of the ABR adjusted the date of effect of the respondent's ABN to 1 July 2019.

The respondent objected under Part IVC of the *Taxation Administration Act 1953* (the TAA) to the Commissioner's decision finding him ineligible for JobKeeper payments. The respondent's objection was disallowed on the basis that the respondent 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 TAA, the Commissioner considered the application of the discretion to the respondent's circumstances but declined to grant it.

Issues decided by the Court

The case on appeal from the Tribunal considered three issues:

- whether the respondent 'had an ABN on 12 March 2020' within the meaning of subsection 11(6) of the CERP Rules, where the respondent reactivated his ABN after 12 March 2020 but with a date of effect on or before 12 March 2020
- whether the Commissioner's decision not to exercise the discretion in subsection 11(6) of the CERP Rules to allow a later time for the respondent to have an ABN was reviewable by the Tribunal, and
- whether the Tribunal erred in exercising the discretion to allow the respondent a later time to hold an ABN.

The meaning of 'had an ABN on 12 March 2020'

The Court accepted the Commissioner's argument that the provision sets up a 'point-in-time test'. The question of whether a person 'had an ABN on 12 March 2020' within the meaning of subsection 11(6) of the CERP Rules is resolved by reference to whether or not, if the ABR had been examined that day, it would have shown that the relevant entity had an ABN (at [84], per Thawley J). It is focused solely on the temporal date of 12 March 2020, not a date of effect an ABN may have (at [10], per Logan J).

The Court said this construction was in line with an ordinary reading of the text, its context and purpose. The CERP Rules '... were intended to provide a quick and easy mechanism to determine...' eligibility (at [84], per Thawley J) and the discretion for the Commissioner to allow a later time to have an ABN ensures that entities intended to benefit from the measure are not excluded simply because they do not meet the point-in-time test (at [11], per Logan J).

Whether the decision not to exercise the discretion was reviewable

The Court found that the Commissioner's decision not to exercise the discretion in subsection 11(6) of the CERP Rules formed part of the reviewable decision in respect of entitlement to JobKeeper payments under section 11 of the CERP Rules. The Court noted that:

- the context and purpose of the provision of quick economic relief would not be consistent with requiring entities to pursue costly and difficult judicial review proceedings or having to unnecessarily enter two separate venues being the Tribunal and Federal Court in parallel (at [95], per Thawley J)

- the discretion was not contained in a separate provision and was not expressed in the statute to indicate an intention that there were in fact two quite distinct decisions (at [96], per Thawley J)
- in deciding whether an entity was entitled to JobKeeper payments under section 11 of the CERP Rules, the Commissioner was obliged to determine whether or not the entitlement criteria specified in that section were met. One of those criteria was the ‘integrity rule’ in subsection 11(6) of the CERP Rules, which permitted the Commissioner, in the ordinary course of determining payment eligibility, to exercise a discretion to allow a later time (at [18], per Logan J). The construction of the text, and the inclusion of ‘unless’ in the phrase ‘... unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner) ...’ means that (at [96], per Thawley J):

... it is only once both of the possibilities have been answered that “a decision [has been made] that the entity is not entitled to a Coronavirus economic response payment for a period” within the meaning of s13(2)(a) of the CERP Act.

The Court also decided that even if the Commissioner’s decision not to exercise the discretion in subsection 11(6) of the CERP Rules was not a decision which could be objected to under section 13(2)(a) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the CERP Act), the Tribunal could exercise the discretion under section 43(1) of the *Administrative Appeals Tribunal Act 1975* because that exercise would be ‘for the purpose of reviewing a decision’, being the Commissioner’s decision that the respondent was not entitled to a Coronavirus economic response payment for a period (at [89–92], per Thawley J).

Tribunal’s exercise of discretion in the respondent’s circumstance

The Court found that the Tribunal did not err in exercising the discretion to allow the respondent a later time to have an ABN. The Court said that the Commissioner’s argument that the discretion could only be exercised in limited circumstances did not give primary effect to the statutory language read in context; it was an error to look to the extrinsic material and presume that to have been the intended meaning of the statutory text (at [108], per Thawley J).

The Court concluded that the discretion furnishes a broad discretion according to its terms, confined only by statutory purpose and context (at [109], per Thawley J). The Tribunal had taken into account a range of factors in making its decision, including that:

- the respondent’s failure to reactivate his ABN was due to ‘oversight’
- the respondent ‘is the kind of person who was intended to benefit from the JobKeeper scheme’, and
- ‘there is nothing to be achieved by denying him access to the payments in order to make a point about the desirability of obtaining an ABN’.

The Court considered that each of these matters was relevant in considering the discretion (at [111–112], per Thawley J).

ATO view of decision

The decision confirms that the requirement to hold an ABN on 12 March 2020 under subsection 11(6) of the CERP Rules is not satisfied where an ABN that is reactivated or applied for after 12 March 2020 is given a retrospective date of effect by the Registrar of the ABR that is on or before 12 March 2020.

The Commissioner accepts the Court's views regarding the ability for the discretion to allow a later time for having an ABN under subsection 11(6) of the CERP Rules to be reviewed as part of a review of a decision on entitlement to JobKeeper payments, under Part IVC of the TAA.

The Commissioner accepts the Court's view that the discretion under subsection 11(6) of the CERP Rules to allow a later time to have an ABN is not restricted to the limited circumstances envisaged in the extrinsic material to the CERP Act and CERP Rules. The discretion allows for the consideration of a broad range of circumstances, and the approach must be guided by the purposes of the CERP Act and the CERP Rules and having regard to the integrity rules in their context. The Commissioner considers that this approach also applies to the discretions to allow a later time to provide notice of assessable business income/taxable supplies contained in subsections 11(7) and (8) of the CERP Rules.

The Commissioner's view is that the approach to the exercise of the discretion is informed by the role of the 'integrity rule' contained in subsection 11(6) of the CERP Rules, which requires not only the holding of an ABN at 12 March 2020, but also that income associated with the entity carrying on a business and/or making supplies was reported to the Commissioner by 12 March 2020 – the date that certain stimulus measures were announced.

Consistent with the Court's decision in this case, it is relevant to the exercise of the discretion under subsection 11(6) of the CERP Rules whether the Commissioner has been provided with evidence that an active business was being carried on prior to 12 March 2020. However, it is notable that the CERP Rules separately require that the entity was carrying on a business on 1 March 2020. For that reason, the Commissioner considers that it is not the intention of subsection 11(6) of the CERP Rules that the discretion is to be exercised in every case in which there was business activity prior to 12 March 2020: the discretion will be exercised on a case-by-case basis.

The holding of an ABN as at 12 March 2020 supports transparency that a business existed at 12 March 2020. The reporting of supplies or income to the Commissioner is concerned with engagement with the Commissioner prior to 12 March 2020 concerning the business in operation. The inclusion of those three elements in the integrity rule in the CERP Rules indicates that the JobKeeper payments for eligible business participants are in the ordinary case to be directed to businesses that are operating actively and doing so in view of the Commissioner as at 12 March 2020.¹

Having regard to that context, if the business is operating without visibility to the Commissioner as at 12 March 2020 (deliberately or otherwise), that would weigh against the exercise of discretion. Of course, in such cases it would also be relevant to understand the reasons why the business did not hold an ABN or had not reported supplies or income to the Commissioner by 12 March 2020. Where there is a reasonable explanation, in most cases the discretion would be exercised.

The Commissioner considers that the Court's decision and the Commissioner's view of the decision will apply equally to the identical requirements in sections 5 and 6 of the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package)*

¹ See also *Slatter Building Group Pty Ltd and Commissioner of Taxation* [2021] AATA 456 at [49].

Act) 2020, having regard to the purpose and context of those rules. Similarly, the Commissioner accepts that those discretions can be reviewed, as part of a review of a decision on entitlement to cash flow boost payments, under Part IVC of the TAA.

The Commissioner considers the Court's decision applies to discretions contained in the integrity rules in the cash flow boost and JobKeeper legislation. It does not affect any other discretions that the Commissioner may exercise, including those relevant to determining ABN eligibility at a point in time, or deferral of lodgment due dates for tax returns or business activity statements.

Implications for impacted advice or guidance

The ATO has updated Law Administration Practice Statement PS LA 2020/1 *Commissioner's discretion to allow further time for an entity to hold an ABN or provide notice to the Commissioner of assessable income or supplies* in response to the Court's decision.

The Commissioner acknowledges that there are entities who might be impacted by the decision and is committed to addressing any such cases as a matter of priority. Further information about the steps being taken by the Commissioner and what you need to do if you think you or your entity is impacted can be found [here](#).

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:	29 April 2021
Due date:	28 May 2021
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Legislative references

Administrative Appeals Tribunal Act 1975 43(1)

Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 5, 6

Coronavirus Economic Response Package (Payments and Benefits) Act 2020 13(2)(a)

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 11, 11(6), 11(7), 11(8)

Taxation Administration Act 1953 Part IVC

Case references

Commissioner of Taxation v Apted [2021] FCAFC 45

Apted and Commissioner of Taxation [2020] AATA 5139

Slatter Building Group Pty Ltd and Commissioner of Taxation [2021] AATA 456

Other references

PS LA 2020/1