Commissioner of Taxation v Racing Queensland Board -

Decision impact statement

Commissioner of Taxation v Racing Queensland Board

Court citation(s):	[2019] FCAFC 224
Venue:	Full Federal Court: 21 November 2019 High Court – special leave application (dismissed): 3 July 2020
Venue reference no:	QUD 275 of 2019 (Full Federal Court); B5/2020 (High Court – special leave application)
Judge names:	Griffiths, Derrington and Steward JJ
Judgment date:	Full Federal Court: 16 December 2019 High Court – special leave application: 3 July 2020
Appeals on foot:	No
Decision outcome:	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 whether, for the purposes of subsection 12(8) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA), the Racing Queensland Board (the Board) was liable to pay riding fees to jockeys engaged to ride in races and barrier trials during the relevant period.

Brief summary of facts

From 1 July 2009 to 30 September 2014 (inclusive), the Board paid riding fees to jockeys in respect of riding in horse races and barrier trials conducted in Queensland.

The Board is the Principal Racing Authority (PRA) for that State in accordance with the *Australian Rules of Racing* and the *Racing Queensland Local Rules (Thoroughbred Racing)*.

Note: References to 'the Board' throughout this Decision impact statement include references to the preceding PRAs responsible for the general administration of the thoroughbred racing industry in Queensland.

In response to the introduction of the goods and services tax (GST), and to minimise related administrative requirements on other industry participants, the Board adopted a centralised prizemoney system in Queensland after an industry recommendation to do so.

The result was that the Board took on the role of paying prizemoney, riding fees and the GST, with the intention of reducing the documentation and record-keeping requirements which might otherwise have rested with individual race clubs, owners, trainers and jockeys.

Section 12 of the SGAA has regard to the terms 'employer' and 'employee' for the purposes of that Act.

While subsection 12(1) of the SGAA confirms that each of those terms have their ordinary meaning, the remaining subsections of section 12 expand and clarify the meaning of those terms.

Relevantly, subsection 12(8) of the SGAA provides (emphasis added):

> The following are employees for the purposes of this Act:
>
> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills **is an employee of the person liable to make the payment**

As a result, the Commissioner of Taxation formed the view that under subsection 12(8) of the SGAA, the Board was the employer of jockeys to whom it had paid riding fees.

Note: The Commissioner did not form the view that the Board was the 'employer' of jockeys per the ordinary meaning of that term, or for any effect other than under the superannuation guarantee (SG) legislation.

In relation to the quarters in which there were SG shortfalls, the Commissioner issued superannuation guarantee charge (SGC) assessments to the Board.

The Board put forward the view that although it happened to pay riding fees to jockeys, it was not *liable* to make such payments – and only did so on behalf of the owners and trainers of the horses being ridden, due to historical administrative practices.

Issues decided by the Court

This case involved an appeal by the Commissioner to the Full Federal Court from a decision by the Federal Court which found in favour of the Board.

In a unanimous decision, the Full Federal Court allowed the Commissioner's appeal, finding that the Board was the entity liable to make payment of riding fees to jockeys.

In a joint judgment, Griffiths and Derrington JJ noted that a critical aspect of the case was whether or not the Board satisfied the onus of demonstrating that the assessments of SGC were excessive, per section 14ZZO of the *Taxation Administration Act 1953*. To be able to do so, the Board needed to establish that it was not liable to pay riding fees to jockeys.

Of the several grounds of appeal relied upon by the Commissioner, their Honours discussed three grounds from which the remaining were also effectively addressed.

Ground one – liability to pay riding fees

Their Honours concluded that the primary judge erred in failing to ascertain if, during the relevant periods, the obligation to pay the riding fees rested with the Board.

The documentation from earlier in 2000, upon which the primary judge based his conclusion that the Board was not liable to pay riding fees, was inconsistent with the evidence presented on behalf of the Board in relation to establishing who was liable to make the payments during the relevant periods.

Ground two – whether the Board agreed to pay riding fees on behalf of the owners or trainers

The Board's contention that there was no contractual relationship between the Board and the jockeys was not accepted. In contrast to the conclusion of the primary judge, their Honours found:

> The agreement in relation to riding fees was that [the Board] agreed to pay the riding fee if the jockey participated in a regulated race, and the acceptance of that offer occurred when the jockey fulfilled that condition.
>
> … It also means that the Commissioner's conclusion that [the Board] was liable to pay riding fees to jockeys was correct.

Ground three – no entitlement of the Board to seek contribution from owners or trainers for unpaid riding fees

Their Honours found that there was not sufficient evidence to allow a conclusion that the Board was not obliged to pay the riding fees which it paid in practice, further stating:

> It cannot be accepted that the trainers or owners would have some right of indemnity or contribution against [the Board] were it to happen that the latter did not pay riding fees.

Overall, their Honours determined that the Board had not discharged its onus of proving that the assessments of SGC were excessive, having been unable to establish that it was not liable to pay riding fees to jockeys.

Steward J agreed with the joint judgment of their Honours and added an observation about the statutory construction of paragraph 12(8)(a) of the SGAA. His Honour noted that the paragraph, much like the other expansive subsections within section 12 of the SGAA, identifies who an 'employee' is, but does not identify an 'employer' on a literal reading. Identification of the employer is crucial, as it is with them that any liability to pay an SGC rests.

His Honour however went on to form the view that:

> a necessary implication to be deduced from the terms of the Act is that the person who, for the purposes of s 12(8)(a) is liable to make the payment, should be deemed to be an "employer".

ATO view of decision

The decision of the Full Federal Court is consistent with the Commissioner's interpretation of subsection 12(8) of the of the SGAA.

Other PRAs which have had arrangements in place substantively similar to those involving the Racing Queensland Board (or its relevant PRA predecessor) as discussed above should review their arrangements and lodge SGC statements for any quarters in which they have an SG shortfall.

The Commissioner may also raise SGC assessments against those PRAs where SG shortfalls exist, and such shortfalls are brought to the Commissioner's attention.

PRAs with SG shortfalls for the quarters between 1 July 1992 and 31 March 2018 may be eligible for the SG amnesty. The SG amnesty closes on 7 September 2020.

Where PRAs still have the above arrangements in place, they may also be required under subsection 389-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (regarding Single Touch Payroll reporting) to report to the Commissioner the riding fees they pay to jockeys.

Based on previous advice provided to the Commissioner, the PRAs most likely to be directly affected by the above approach are those based in the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia.

Implications for impacted advice or guidance

None.

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:	7 August 2020
Due date:	4 September 2020
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Superannuation Guarantee (Administration) Act 1992
12
12(1)
12(8)
12(8)(a)

Taxation Administration Act 1953
14ZZO
Sch 1 389-5(1)

Case references

Racing Queensland Board v Commissioner of Taxation [2019] FCA 509; 2019 ATC 20-692; 371 ALR 358

Other references

Australian Rules of Racing
Racing Queensland Local Rules (Thoroughbred Racing)

Siebel no. 1-MKSXBWQ