


# ***Macoun v Commissioner of Taxation -***

# Decision impact statement

## Macoun v Commissioner of Taxation

<b>Court Citation:</b>	[2015] HCA 44
<b>Venue:</b>	High Court
<b>Venue Reference No:</b>	S100/2015
<b>Judges Name(s):</b>	French CJ, Bell, Gageler, Nettle and Gordon JJ
<b>Judgment date:</b>	2 December 2015
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Favourable to the Commissioner

### Impacted advice

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

TR 92/14 *Income tax: taxation privileges and immunities of prescribed International Organisations and their staff*

TD 92/153 *Income tax: who is a 'person who holds an office' as specified in various regulations made under the International Organisations (Privileges and Immunities) Act 1963?*

### Précis

Outlines the ATO's response to this case which concerns whether pension payments were exempt under subsection 6-20(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) by reason of the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act) and the *Specialized Agencies (Privileges and Immunities) Regulations 1986* (SAPI Regulations).

### Brief summary of facts

The taxpayer was employed by the International Bank for Reconstruction and Development (IBRD) between 1992 and 2007. He retired from the IBRD in 2007.

In the 2009 and 2010 income years, the taxpayer received monthly pension payments from a retirement fund established under the IBRD's Staff Retirement Plan.

The taxpayer argued that the pension payments were exempt from tax under subsection 6-20(1) of the ITAA 1997 by reason of a provision of a Commonwealth law, namely subparagraph 6(1)(d)(i) of the IOPI Act and subregulation 8(1) of the SAPI Regulations.

Paragraph 6(1)(d) of the IOPI Act contains the mechanism by which privileges may be conferred on officers of international organisations. It provides:

Subject to this section, *the regulations may*, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

...

(d) *confer:*

- (i) *upon a person who holds an office* in an international organisation to which this Act applies (not being an office prescribed by the regulations to be a high office) all or any of the privileges and immunities specified in Part I of the Fourth Schedule; and
- (ii) *upon a person who has ceased to hold such an office* the immunities specified in Part II of the Fourth Schedule. (emphasis added)

Regulation 8 of the SAPI Regulations provides:

- (1) Subject to subregulation (2), *a person who holds an office in a Specialized Agency*, other than a person who holds, or is performing the duties of, an office specified in Column 3 of an item in the Schedule, has the *privileges and immunities* specified in Part I of the Fourth Schedule to the [IOPI] Act.

...

- (3) *A person who has ceased to hold an office in a Specialized Agency*, other than an office specified in Column 3 of an item in the Schedule, has the *immunities* specified in Part II of the Fourth Schedule to the [IOPI] Act. (emphasis added)

Item 2 of Part I of the Fourth Schedule to the IOPI Act confers upon a person who holds an office in an international organisation to which the IOPI Act applies an exemption from taxation on salaries and emoluments received from the organisation. There is no taxation exemption in Part II of the Fourth Schedule.

The IBRD is an 'international organisation' to which the IOPI Act applies and a 'specialised agency' for the purposes of the SAPI Regulations.

## Issues decided by the court

The High Court held unanimously that the taxpayer's monthly pension payments were not exempt from tax because:

- the taxpayer had ceased to hold an office in the IBRD when he received them [at 50] (although the court observed, without deciding the question, that if salary or emoluments were both due and payable while an officer continued to hold office, it may be that they should be regarded as 'received' during office even though not in fact paid until after the officer ceased to hold office)
- the payments were not received from the IBRD but from the retirement fund established under the Staff Retirement Plan [at 50], and
- the taxpayer's pension payments fell outside the phrase 'salaries and emoluments received from the organisation' in Item 2 of Pt I of the Fourth Schedule to the IOPI Act. The phrase is subject to the conditions that the emolument must be received whilst the person is an officer of a Specialized Agency and the emolument must be received from the Specialized Agency. A monthly pension payment does not, and cannot, satisfy those conditions nor can it be characterised as the advantage in money or money's worth which

flows from occupation of an office or the like. A pension payment flows only on and from cessation of that office. [at 65]

The Court observed that this construction of the taxation exemption privilege is consistent with the statutory purposes of the IOPI Act which is to assist identified organisations in the performance of their functions; not to benefit persons connected with those organisations. The privilege of exemption from taxation is designed to ensure that the international organisation secures the services of an officer who remains independent by reason of not having to submit to the taxation jurisdiction of a Convention State (whether the State of his or her nationality or residence, or a State in which he or she is located whilst working for the organisation). The interest of the international organisation disappears when the officer ceases to hold the office. [at 54]

It being common ground that the Court should, where possible, construe the IOPI Act in a manner which accords to Australia's international obligations, the Court also concluded that the Agencies Convention, properly construed, does not require Australia not to tax a pension received by a former officer of a specialized agency. That construction is consistent with both the preparatory works to the Agencies Convention and State practice. [at 75] In relation to State practice, the Court noted that there is no generally accepted State practice with regard to the exemption of retirement pensions from taxation. [at 82]

## **ATO view of decision**

The decision of the High Court is consistent with the Commissioner's view.

## **Implications for impacted advice or guidance**

The ATO has issued Taxation Ruling [TR 2019/D1](#) *Income tax: income of international organisations and persons connected with them that is exempt from income tax* to reflect the decision in this case and the case of *Commissioner of Taxation v Jayasinghe* [2017] HCA 26; and the views previously expressed in TD 92/153 and Taxation Ruling TR 92/14.

TR 92/14 and TD 92/153 have been withdrawn as a consequence.

## **Legislative references**

*Income Tax Assessment Act 1997*

6-20(1)

*International Organisations (Privileges and Immunities) Act 1963*

6(1)(d)(i)

Fourth Sch Pt I

Specialized Agencies (Privileges and Immunities) Regulations 1986

8

8(1)

8(1)(d)

## **Case references**

*Case M90 80* ATC 648; 24 CTBR(NS) 585

*Federal Commissioner of Taxation v Jayasinghe* [2017] HCA 26; (2017) 260 CLR 400; (2017) 106 ATR 274

*Macoun v Commissioner of Taxation* [2015] HCA 44, (2015) 257 CLR 519, (2015) ATC 20-543 (2015) 102 ATR 263

*Nette v Howarth* [1935] HCA 22; (1935) 53 CLR 55

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