


***Commissioner of Taxation v Jayasinghe -***

# Decision impact statement

## Commissioner of Taxation v Jayasinghe

<b>Court citation:</b>	[2017] HCA 26
<b>Venue:</b>	High Court
<b>Venue reference no:</b>	S27/2016
<b>Judges name(s):</b>	Kiefer CJ, Gageler, Keane, Gordon and Edelman JJ
<b>Judgment date:</b>	9 August 2017
<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 a taxpayer held an office in an international organisation within the meaning of subparagraph 6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act) such that the taxpayer was entitled to an exemption from taxation on salaries and emoluments received from the international organisation under item 2 of Part 1 of the Fourth Schedule to the IOPI Act.

## Brief summary of facts

The taxpayer was engaged as a project manager by the United Nations Office for Project Services (UNOPS) during the 2010 and 2011 income years.

The taxpayer's engagement was set out in a number of agreements. The agreements treated the taxpayer as an independent contractor of UNOPS. The taxpayer was paid a monthly fee by UNOPS upon certification of his work.

The taxpayer argued that his earnings from UNOPS were exempt from taxation under item 2 of Part I of the Fourth Schedule to the IOPI Act as he was an officeholder within the meaning of subparagraph 6(1)(d)(i) of the IOPI Act. Further the taxpayer claimed that TD 92/153 applied to him as he was not an expert or consultant and the Commissioner was bound

under subsection 357-60(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) to treat him as a person who holds an office in an international organisation.

Regulation 3 of the *United Nations (Privileges and Immunities) Regulations 1986* identifies the UN as an international organisation to which the IOPI Act applies.

Paragraph 6(1)(d)(i) of the IOPI Act allows for privileges to be granted to office holders 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 11 of the Fourth Schedule; and

...

The Fourth Schedule to the IOPI Act contains a number of privileges and immunities granted to officers and former officers of international organisations. An exemption from taxation on salaries and emoluments received from international organisations is provided at item 2 of Part I of that Schedule.

Subsection 357-60(1) of Schedule 1 to the TAA 1953 states that:

- (1) Subject to subsection (5), a ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if:
  - (a) the ruling applies to you; and
  - (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling.

TD 92/153 provided at paragraph 2 that:

The Department of Foreign Affairs and Trade, who administer the IO(P+I)A and regulations, take the view that the phrase 'person who holds an office' in relation to a prescribed international organisation covers those people who work as employees for that organisation. They do not accept, however, that the phrase includes either:

- persons who are locally engaged by the organisation and paid at an hourly rate; or
- persons engaged by the organisation as experts or consultants.

We agree with those views.

## Issues decided by the court

The main issues before the High Court were whether:

1. the taxpayer held an office in an international organisation within the meaning of subparagraph 6(1)(d)(i) of the IOPI Act, and
2. TD 92/153 bound the Commissioner to exempt the taxpayer from taxation on the income he received from UNOPS by operation of subsection 357-60(1) of Schedule 1 to the TAA 1953.

The High Court unanimously held that the taxpayer did not hold an office in an international organisation and that the taxpayer was engaged as an expert by UNOPS for the purposes of TD 92/153. Accordingly the taxpayer was not exempt from taxation on the income he received from UNOPS.

On the first issue, the Court observed that the word 'office' must be read in its context. When read in context of subsection 6(1) of the IOPI Act, the word 'office' in the composite phrase 'holds an office in an international organisation' cannot be 'defined by reference to permanence or succession' as was the principle relied upon in *Great Western Railway Co v Bater* [1920] 3 KB 266 at 274 when determining the meaning of 'office' in a different statutory context. [at 31-34]

The Court stated that subparagraph 6(1)(d)(i) of the IOPI Act concerns the incidents of the relationship between a person and an international organisation. The inquiry as to whether a person 'holds an office' should thereby be directed to the 'substance of the terms upon which a person is engaged' and 'the relationship between that engagement and the organisation's performance of its functions'. [at 37]

The Court directed attention to the structure of the organisation and the place of the person within the structure as well as the duties and authority associated with the person's position. It explained that where a person's terms of engagement places them outside the organisational structure and does not provide them with any defined duties or authority in relation to the organisation and its functions, it would be difficult to conclude they held an office within the organisation. [at 38]

The Court explained that this construction of subparagraph 6(1)(d)(i) of the IOPI Act is consistent with the statutory purposes of the IOPI Act as per their decision in *Macoun v Commissioner of Taxation* [2015] HCA 44, paragraph 54. In particular it is consistent with the way the IOPI Act achieves its purposes by conferring its privileges and immunities not for the benefit of, or personal to, the persons connected with an international organisation, but rather to assist the international organisation in the 'performance of [its] functions'. [at 39]

In considering the incidents of the relationship between the taxpayer and UNOPS, the Court found that the terms of agreement under which the taxpayer was engaged by UNOPS as determinative of the conclusion that the taxpayer did not 'hold on an office' in the UN within the meaning of subparagraph 6(1)(d)(i) of the IOPI Act. [at 42]

On the second issue, the Court found that a natural construction of TD 92/153 precludes a person who is either locally engaged by the organisation and paid at an hourly rate or engaged by the organisation as an expert or consultant from being a 'person who holds an office'.

The Court rejected the Full Federal Court's approach in *Federal Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79 to TD 92/153 in *Jayasinghe and Commissioner of Taxation* [2015] AATA 456 of treating the question of whether a person was an employee as the sole criterion.

The Court held that whether the taxpayer was engaged as an expert within the meaning of TD 92/153 depended on the terms of his engagement. Consistent with the examination of the terms of his engagement agreement with UNOPS under the first issue, the Court found that the taxpayer was engaged as an expert. The fact the taxpayer was also engaged to perform the functional role of 'Project Manager' did not prevent such a conclusion. [at 57]

## 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 Draft Taxation Ruling TR 2019/D1 *Income tax: income of international organisations and persons connected with them that is exempt from income tax* to take into account the decisions in this case and *Macoun v Commissioner of Taxation* [2015] HCA 44 (also concerning exemption of income under the IOPI Act), and the views previously expressed in TD 92/153 and Taxation Ruling TR 92/14.

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

## Legislative references

*Taxation Administration Act 1953*

Sch 1 357-60

*International Organisations (Privileges and Immunities) Act 1963*

6(1)(d)(i)

Fourth Sch Pt I

*United Nations (Privileges and Immunities) Regulations 1986*

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## Case references

*Great Western Railway Company v Bater* [1920] 3 KB 266

*Federal Commissioner of Taxation v Jayasinghe* [2016] FCAFC 79

*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

## Other references

TD 92/153

TR 92/14

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