


## Decision impact statement

# The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)

<b>Court citation:</b>	[2021] FCA 1363
<b>Venue:</b>	Federal Court of Australia
<b>Venue reference no:</b>	WAD 118 of 2020
<b>Judge name:</b>	McKerracher J
<b>Judgment date:</b>	4 November 2021
<b>Appeals on foot:</b>	No
<b>Decision outcome:</b>	Partly favourable to the Commissioner

## Impacted advice

 The ATO is reviewing the impact of this decision on related advice and guidance products.

- Taxation Ruling TR 2013/2 *Income tax: school or college building funds*

## Summary

This Decision impact statement outlines the ATO's response to this case, which concerns the Commissioner's decision to revoke the endorsement of the Buddhist Society of Western Australia (Inc) (BSWA) as a deductible gift recipient.

All legislative references in this Decision impact statement are to the *Taxation Administration Act* 1953, unless otherwise indicated.

## Brief summary of facts

BSWA was endorsed as a deductible gift recipient for the operation of the Dhammaloka Buddhist Centre Building Fund (Fund) under Subdivision 30-BA of the *Income Tax Assessment Act* 1997 (ITAA 1997).

On 4 October 2019, the Commissioner revoked the endorsement of BSWA as a deductible gift recipient because the Fund did not satisfy the requirements of table item 2.1.10 of subsection 30-25(1) of the ITAA 1997. In particular, the Commissioner did not consider that the relevant buildings at the Dhammaloka Buddhist Centre were used as a school or college, for the purposes of table item 2.1.10, applying the views expressed in Taxation Ruling TR 2013/2 *Income tax: school or college building funds*.

BSWA objected to the revocation decision and the Commissioner disallowed the objection, prompting BSWA to commence its appeal in the Federal Court by relying on 2 sources of jurisdiction:

1. An appeal against the objection decision under Pt IVC (Part IVC Appeal).
2. Alternatively, an application for review of the objection decision under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.

## Issues decided by the Court

### Part IVC appeal

The Commissioner raised a threshold issue of whether the BSWA failed to discharge the burden of proof under paragraph 14ZZO(b)(ii) which provides that the appellant has the burden of proving that the taxation decision should not have been made or should have been made differently.

BSWA argued that it had discharged this evidentiary burden by proving that the revocation decision was incorrect based on the facts established by the information and documents provided to the Commissioner. To this end, BSWA tendered, at the hearing, documents purporting to be those documents and information that was before the Commissioner. No one gave evidence as to the authenticity of the documents.

BSWA contended that paragraph 14ZZO(b)(ii) should be read in conjunction with subsection 426-40(1) of Schedule 1 which empowers the Commissioner to seek information or a document from an entity for the purpose of checking their entitlement to the relevant endorsement, and paragraph 426-55(1)(b) of Schedule 1 which provides for the Commissioner to revoke an endorsement where information has not been provided pursuant to section 426-40. In that regard, BSWA submitted that the Commissioner was bound by the 'facts' established in the information and documents obtained for the purpose of the making of the revocation decision as the Commissioner did not notify BSWA that any of the facts were rejected or disputed.

In accepting the Commissioner's submission that BSWA had not discharged its evidentiary onus, McKerracher J stated<sup>1</sup> by reference to the Full Court's reasoning in *Bosanac v Commissioner of Taxation* [2019] FCAFC 116:

... There is no warrant to read the language of s 14ZZO(b)(ii) as conferring a different form of appeal right to that contained in s 14ZZO(b)(i) as explained by the Full Court in *Bosanac*. The Appeal is a fresh hearing in the Court's original jurisdiction in which evidence is received according to usual procedures. Importantly, additional evidence may also be received, provided that such evidence does not address matters additional to the grounds stated in the taxation objection.

The Part IVC appeal was dismissed<sup>2</sup> as BSWA failed to discharge its burden under section 14ZZO because the mere tender of the materials to the Commissioner was insufficient to discharge the burden of proof.

### Application for judicial review

At issue was whether the objection decision was attended by an error of law as to the ordinary meaning of 'school'.

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<sup>1</sup> *The Buddhist Society of Western Australia Inc v Commissioner of Taxation (No 2)* [2021] FCA 1363 (BSWA) at [47].

<sup>2</sup> BSWA at [50].

In the objection decision, the Commissioner concluded that the Dhammaloka Buddhist Centre was not a building used as a school because:

- it was not a 'school' within the ordinary usage of that word, as it was not a place with the primary function of providing regular, ongoing and systematic instruction in a course of non-recreational education, and
- any school use was not substantial – other uses of the building precluded the conclusion that it had the character of a school building.

The Commissioner also relied on the following factors, as expressed in paragraph 18 of TR 2013/2, to indicate that an organisation is providing instruction as a school:

- a set curriculum, instruction or training provided by suitably qualified persons
- the enrolment of students
- some form of assessment and correction, and
- the creation of a qualification or status that is recognised outside of the organisation.

In the Federal Court, BSWA agreed that the relevant authorities for the purpose of construing the ordinary meaning of 'school' are *Cromer Golf Club Ltd v Downs* (1973) 47 ALJR 219 (*Cromer*), *Commissioner of Taxation of the Commonwealth of Australia v The Leeuwin Sail Training Foundation Ltd* [1996] FCA 626 and *The Commissioner of Taxation of the Commonwealth of Australia v Australian Airlines Ltd* [1996] FCA 935. BSWA contested the Commissioner's interpretation of these authorities and whether various parts of TR 2013/2, which imposed additional conditions, were consistent with the ordinary meaning of school expressed in the authorities.

McKerracher J found<sup>3</sup> that the Commissioner had proceeded on a misunderstanding of the law as to the 'ordinary meaning' of 'school' and accordingly made an error of law in the objection decision.

In that regard, McKerracher J referred<sup>4</sup> to the statement of Barwick CJ in *Cromer*:

... that a school is 'a place where people, whether young, adolescent or adult, assemble for the purpose of being instructed in some area of knowledge or of activity'  
... [A] school is 'an institution in which instruction of any kind is given'.

His Honour observed<sup>5</sup> that the High Court in *Cromer* (and subsequent cases) applied a very broad ordinary meaning 'of the term 'school' and 'have avoided any gloss on the dictionary definition' or 'superimposing additional requirements such as appear in TR 2013/2'.

His Honour also noted<sup>6</sup> that while 'regular, ongoing and systematic instruction' may be provided by a school, the presence of these factors is not essential to satisfy the ordinary meaning of school. Furthermore, the absence of regular, ongoing and systematic instruction does not confirm that an entity is not operating as a school.<sup>7</sup>

His Honour stated that the factors expressed in paragraph 18 of TR 2013/2 do not form part of the ordinary meaning of 'school'.<sup>8</sup> While it was appropriate for the Commissioner to have regard to those factors in applying the ordinary meaning test,

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<sup>3</sup> BSWA at [96].

<sup>4</sup> BSWA at [94].

<sup>5</sup> BSWA at [94].

<sup>6</sup> BSWA at [96].

<sup>7</sup> BSWA at [98].

<sup>8</sup> BSWA at [98].

they should not be taken to form part of the test themselves. While they may indicate the existence of a school, they do not form part of a test to deny that a school exists.

His Honour further observed<sup>9</sup> that the ordinary meaning of school does not require the course of education to be vocational as opposed to recreational. Consideration of whether a course of instruction is recreational or vocational misdirects attention to the intention and subjective state of mind of the student, rather than the instruction given at the purported school in an activity or area of knowledge.

In considering whether a building is ‘used, or to be used as a school’, his Honour found<sup>10</sup> that it is necessary to consider the overall purpose (or purposes) for which the building is established and maintained. The importance of each of the activities carried out in the building as they relate to the purpose of the building as a school must be considered. It is also important to consider any connection that non-school activities conducted in the building may have to school activities, and the extent to which both pursuits support the purpose of the building as a school. The Commissioner was therefore wrong to simply compare the total number of hours of operation the building was put to school and non-school use and then ascribe a percentage value to school activities.

The decision was remitted to the Commissioner for further consideration and determination in light of the reasons of the Federal Court decision and according to law.

His Honour rejected BSWA’s contentions<sup>11</sup> as to the objection decision being legally unreasonable and he declined to consider<sup>12</sup> whether estoppel applied against the Commissioner.

## **ATO view of decision**

Following the Federal Court decision, the Commissioner accepts that the views expressed in TR 2013/2 do not reflect the ordinary meaning of the term ‘school’.

The Commissioner agrees with His Honour’s views that the ordinary meaning of school does not require a course of education to be ‘vocational as opposed to recreational’. Therefore, the focus will be the activities carried out to determine if instruction is being given in an activity or area of knowledge.

In determining whether a building is ‘used, or to be used as a school’, the Commissioner will give consideration to the overall purpose (or purposes) for which the building was ‘established and maintained’ and the activities which support its purpose. Where the ‘activities’ include a mixture of school and non-school activities, the Commissioner will have regard to the connection of the activities and the extent to which both activities contribute to the purpose (or purposes) for which the building was ‘established and maintained’.

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

The Commissioner will review and update TR 2013/2 and relevant website guidance to reflect the decision of the Federal Court. The Commissioner will give consideration of *Cromer* to future applications and relevant applications that have been refused. Requests for review of previous decisions should be directed by email to [ATOEndorsements@ato.gov.au](mailto:ATOEndorsements@ato.gov.au)

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<sup>9</sup> BSWA at [99].

<sup>10</sup> BSWA at [104].

<sup>11</sup> BSWA at [108].

<sup>12</sup> BSWA at [109].

## 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:** 18 May 2023

**Due date:** 16 June 2023

Contact officer details have been removed as the comments period has expired.

### Legislative references

ADJR 1977

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ITAA 1997

30-BA

30-25(1)

TAA 1953

14ZZO

14ZZO(b)(ii)

426-40 of Schedule 1

426-40(1) of Schedule 1

426-55(1)(b) of Schedule 1

Pt IVC

### Case references

*Bosanac v Commissioner of Taxation* [2019] FCAFC 116; 267 FCR 169

*The Commissioner of Taxation of the Commonwealth of Australia v Australian Airlines Ltd* [1996] FCA 935; 71 FCR 446; 34 ATR 310

*Commissioner of Taxation of the Commonwealth of Australia v The Leeuwin Sail Training Foundation Ltd* [1996] FCA 626; 68 FCR 197; 96 ATC 4721; 33 ATR 241

*Cromer Golf Club Ltd v Downs* (1973) 47 ALJR 219; [1972-73] ALR 1295

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ATO references

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