HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Catherine Victoria Addy**
Appellant

and

Commissioner of Taxation
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues on Appeal

2. This appeal concerns the construction of a non-discrimination clause in one of Australia's tax treaties, and the application of that non-discrimination clause to the tax colloquially known as the 'Backpacker Tax'. The following issues arise:

   (i) Is there a rule of the type proposed by the Full Court, which limits the non-discrimination clause so it can only apply to taxes that discriminate on the sole basis of nationality?

   (ii) If there is a rule of the type proposed, did it preclude the Appellant from obtaining relief in the present case?

   (iii) As a tax resident of Australia, was the Appellant entitled to be taxed at the same rates as an Australian national who was also a tax resident?

Part III: Section 78B Notice

3. Notice under s.78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Citations of the decisions below

4. The decision of the primary judge is *Addy v Commissioner of Taxation* [2019] 110 ATR 839.

5. The decision of the Full Federal Court is *Commissioner of Taxation v Addy* (2020) 382 ALR 68.

Part V: Relevant facts

6. Catherine Addy is the taxpayer (hereafter '**Catherine Addy**' or '**the Appellant**') and the Commissioner of Taxation is the Respondent ('**the Commissioner**').

7. Catherine Addy is a citizen of the United Kingdom. She lived in Australia from August 2015 – May 2017, except for several weeks when she was in Asia on holiday. She then returned to the United Kingdom. During this time Ms Addy held a 'Subclass 417' visa.

8. During the 2017 tax year Catherine Addy earned income in Australia as a waitress and had a taxable income of $26,576. She turned twenty-five years' old in 2017.

9. Australia offers two types of visa styled as a Working Holiday Visa, each of which is available to citizens of certain foreign countries who are between the ages of 18 – 30 years.

10. During 2016 the Commonwealth Parliament enacted the *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (hereafter, '**the Backpacker Tax**'). It took effect from 1 January 2017.

11. The Backpacker Tax applies to persons ('**Working Holiday Makers**') who earn income with an Australian source while holding either a 'Subclass 417' or 'Subclass 462' visa (hereafter – a '**Working Holiday Visa**'). An Australian citizen is not capable of obtaining a Working Holiday Visa, or any other visa that is available under the *Migration Act 1958*.

12. The Backpacker Tax introduced a new set of tax rates in Part III of Schedule 7 to the *Income Tax Rates Act 1986*. Prima facie the tax rates in Part III apply to

Australian-source income earned after 1 January 2017 by persons who hold a Working Holiday Visa, including later tax years.

13. The tax rates in Part III that apply to the 2017 year include a flat 15% rate that applies to the first $37,000 of income of each Working Holiday Maker.

14. The rates of tax in Part III can only apply to foreigners from the countries whose citizens are eligible to apply for a Working Holiday Visa. The rates are incapable of applying to Australian citizens, even as a theoretical possibility, because Australians cannot obtain visas.

15. The tax rates in Part III contrast with the rates that apply to natural person taxpayers who do not hold a Working Holiday Visa. These other tax rates are contained in Part I and Part II of Schedule 7 to the *Income Tax Rates Act 1986*. The tax rates in Part I apply to taxpayers who are Australian tax residents and provide that the first $18,200 of income is not liable for tax. Part II applies to taxpayers who are foreign tax residents.

16. Both Australian nationals and foreign nationals can be tax residents of Australia under s.6 of the *Income Tax Assessment Act 1936*. Equally, it is possible for an Australian or a foreign national to be a non-resident of Australia for tax purposes.

17. In a year such as 2018, where the Backpacker Tax applies to the entire twelve months rather than part of the year, a person like Catherine Addy with a taxable income of $26,576 would pay tax of $3,986. An Australian who was also a tax resident of Australia would pay tax of $1,591.

18. Australia has a treaty with the United Kingdom that, in the interests of brevity, is referred to in this submission as the 'Double Tax Agreement' ('**Double Tax Agreement**').[1] The treaty contains a non-discrimination clause, Article 25 of the Double Tax Agreement, which purports to prevent more burdensome taxation of nationals of the United Kingdom.

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[1] The full name of the treaty is the '*Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*'.

19. Article 25 is similar to non-discrimination clauses in tax treaties Australia has entered with other countries. It is patterned on the OECD Model Tax Convention.

20. In 2018 Catherine Addy was selected as a test-case for issues connected to the Backpacker Tax. In February 2018 Catherine Addy commenced a proceeding in the Federal Court under Part IVC of the *Taxation Administration Act 1953* in which she challenged her 2017 tax liability and, in particular, the application of the Part III tax rates to her income.

21. The primary judge concluded that, during Catherine Addy's period of physical presence in Australia, Catherine Addy was a tax resident of Australia within the meaning of s.6 of the *Income Tax Assessment Act 1936*. This finding of Australian tax residency was affirmed by the Full Federal Court, although on different grounds to the primary judge: [1], [129] and [290]. If Catherine Addy were an Australian this would cause her to be taxed at the rates in Part I.

22. The primary judge found Ms Addy was entitled to invoke the non-discrimination clause in respect of the applicable tax rates. In the Full Federal Court, Derrington and Steward JJ concluded Ms Addy could not invoke the non-discrimination clause, and allowed the appeal. Davies J dissented.

Part VI: Argument

Overview of dispute

23. The question in this appeal is whether Catherine Addy should only be liable to pay tax at the same rates as an Australian national who was tax resident of Australia in the 2017 year. The rates that apply to an Australian are in Part I of Schedule 7 of the *Income Tax Rates Act 1986*. The Appellant contends she should only be liable for tax at these rates because the non-discrimination clause applies to the treatment that Part III purports to impose on the Appellant.

24. The provision in dispute is Article 25 of the Double Tax Agreement. Sections 4 and 5 of the *International Tax Agreements Act 1953* have the effect of giving the Double Tax Agreement the force of law in Australia and causing the Double Tax Agreement to override the provisions of Commonwealth tax legislation to the extent of any inconsistency.

25. The authorities say Australia's international tax treaties, where they have been given domestic effect by the *International Tax Agreements Act 1953*, should be construed by reference to the rules set out in the *Vienna Convention on the Law of Treaties* in Articles 31 and 32 ('**Vienna Convention**').[2] The authorities also say the Commentary on the OECD Model Tax Convention can be used as an interpretive tool pursuant to Article 32 of the Vienna Convention.[3]

26. In the interests of brevity this submission sets out Article 31(1)-(2) and 32 of the Vienna Convention but not Articles 31(3)-(4). Article 31(1) is as follows:

> ***Article 31***
>
> ***General rule of interpretation***
>
> **1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.**
>
> **2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:**
>
> **(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;**
>
> **(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**

27. Article 32 is as follows:

> ***Article 32***
>
> ***Supplementary means of interpretation***
>
> **Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:**
>
> **(a) leaves the meaning ambiguous or obscure; or**

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[2] *Macoun v Commissioner of Taxation* (2015) 257 CLR 519; [2015] HCA 44 at [66], *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134; [2005] FCAFC 67 at [37], *Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149; [2011] FCAFC 74 at [113].

[3] *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338, 344; [1990] HCA 37 at [8] (per Dawson J), *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597 at 604, *Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149; [2011] FCAFC 74 at [113].

(b) leads to a result which is manifestly absurd or unreasonable.

28. Article 25(1) of the Double Tax Agreement is as follows:

> **Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.**

29. In the present case it is citizens of the United Kingdom who are the *'Nationals of a Contracting State'* in terms of the non-discrimination clause and it is Australians who are *'nationals of that other State'*.

30. On an ordinary reading of Article 25, when a foreign national seeks relief the court is required to compare the circumstances of the foreign national with the circumstances of a hypothetical Australian who receives more favourable tax treatment (**'the Australian comparator'**). If the court concludes the tax treatment of the foreign national is other or more burdensome, and further concludes the circumstances of the foreign national and the Australian comparator are sufficiently similar, then Article 25 adjusts the tax treatment of the foreign national to make it consistent with the tax treatment of the Australian comparator. The text of Article 25 singles out tax residency as a type of circumstance in which Article 25 will prevent foreign nationals from being taxed more harshly than their Australian equivalents.

31. In the lower courts it was not in dispute that the notional tax treatment of Catherine Addy was more burdensome than that of an Australian who was also a tax resident. The main point of contention between the parties was the construction of the phrase, *'in the same circumstances, in particular with respect to residence'*, and whether Addy was sufficiently in the same circumstances as an Australian who would be entitled to be taxed at the rates in Part I.

32. The Appellant, in arguing that Catherine Addy was sufficiently in the same circumstances, placed heavy reliance on Catherine Addy's Australian tax residency. Australian tax residence is the sole criterion which causes an Australian to be taxed under Part I. The Appellant proposed an Australian comparator who

was a tax resident of Australia during the 2017 year, who was doing the same work for the same remuneration, living in the same house, who had the same personal history, and who derived income in the same amounts from the same job.

33. The Commissioner argued this Australian comparator would not be in the same circumstances as Catherine Addy because the Australian would not possess a Working Holiday Visa and would not be eligible to apply for such a visa.

34. In the Full Court, Derrington and Steward JJ found for the Commissioner and allowed the appeal from the primary judge.

35. A noticeable feature of the reasoning of the Full Court majority is that it pays little attention to the phrase *'in the same circumstances, in particular with respect to residence'*. Both Derrington and Steward JJ said the key question was posed by a passage in the OECD Commentary, which says the non-discrimination clause seeks to prevent tax discrimination that is based solely on nationality. The quoted passage of the OECD Commentary is as follows:[4]

> **'In applying paragraph 1** [of the non-discrimination clause], **the underlying question is whether two persons who are residents of the same State are being treated differently solely by reason of having a different nationality.'**

36. On the strength of this passage the majority said the remedial effect of Article 25 is limited to taxes that impose harsher treatment on the sole basis of nationality or characteristics that are a close proxy for nationality. Derrington J said at [223] and [230] that Article 25 will only apply when *'the foundation for the imposition of tax is nationality or a proxy for nationality; being something that is necessarily bound to nationality'* and *'Art 25 is offended where the discrimination against the foreign national occurs solely by reason of having a different nationality. Whilst such discrimination may arise explicitly or covertly, it must nevertheless be discrimination which is singularly based on nationality.'*

37. Steward J's reasoning was to like effect. He said (at [247]) there were two essential reasons for finding against the Appellant: *'First, the O.E.C.D. Commentary, in the passage set out above, warns against "unduly" extending the reach of Art. 24 of*

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[4] Cited at [332].

the Model Tax Convention (here Art. 25 of the Treaty) to "cover so-called "indirect" discrimination." Secondly, care must be taken to ensure that it is a person's nationality which is the reason for differential treatment. For the reasons set out above, it was not the taxpayer's nationality that caused her to be taxed .'

38. The majority discussed a range of matters that were said to be relevant to the passage from the OECD Commentary, and to whether the Backpacker Tax is imposed on the sole basis of nationality. These included: (i) whether or not the impugned tax is triggered by some voluntary act (in this case the voluntary act of obtaining a Working Holiday Visa or the voluntary act of earning income in Australia): [225], [346]; (ii) whether or not the tax is imposed on all foreign nationals or just some of them: [230]; and (iii) whether the impugned tax constitutes 'indirect discrimination': [231], [347].

39. The majority concluded Article 25 should not apply because the Backpacker Tax is not imposed on the sole basis of nationality.

Issue (a) – Is there a rule that Article 25 only applies to taxes that impose harsher treatment on the sole basis of nationality?

40. The Appellant submits the Full Court majority made an error by moving away from the express criteria posed by the text of Article 25 and applying a rule of limitation that does not appear in the text.

41. The text of Article 25 outlines, in terms, the sort of taxes to which it applies. It applies to *'any taxation or any requirement connected therewith'* which is *'other or more burdensome'*. There is nothing in the text that directs attention to other characteristics of the tax such as whether it is based solely on nationality. There is no literal reading of Article 25 that gives the court a mandate to examine whether a tax is imposed on the sole basis of nationality, and withhold relief if the tax cannot be so described. The adoption of such a rule is a plain case of a court substituting

extrinsic materials for the text of the provision in question. This is an erroneous approach to statutory construction for reasons given on previous occasions.[5]

42. It is also erroneous in a case such as the present, where the task of construing Article 25 proceeds in accordance with Articles 31 and 32 of the Vienna Convention.[6] The text of those articles has been set out earlier in this submission. Article 31 and 32 are similar to Australia's domestic principles of statutory construction, at least for present purposes. This court's decision in *Maloney v The Queen* (2013) 252 CLR 168; [2013] HCA 28 at [22] - [23], [134], [175] and [235] illustrates the point. In construing an international agreement the text has primacy. The uses of extrinsic material are limited, and hardly ever permit an outright departure from the text.

43. What the Appellant says is the following:

(i) *First*, the meaning of Article 25 is not so ambiguous, obscure, unreasonable or absurd that Article 32 of the Vienna Convention permits recourse to the OECD Commentary for the purpose of departing from its ordinary meaning. The phrase '*in the same circumstances*' is a familiar one with a well-understood meaning. There may be room for debate about its application in a particular case, but everybody knows what it means. The Article 32 precondition simply is not met. A similar case was *Commonwealth Minister for Justice for Adamas* (2013) 253 CLR 43; [2013] HCA 59 where this court considered a treaty article that used the phrase *'unjust, oppressive or incompatible with humanitarian considerations'*. This court acknowledged at [34] – [45] the phrase required an evaluative judgment, but said the phrase was not so ambiguous that Article 32 permitted supplementary materials to displace its ordinary meaning. A similar conclusion is appropriate in the present case; and

(ii) *Second*, if it is permissible to have recourse to the OECD Commentary for the purpose of determining the meaning of Article 25 (rather than confirming its

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[5] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47], *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569; [2015] HCA 41 at [229], *Baini v The Queen* (2012) 246 CLR 469; [2012] HCA 59 at [14].

[6] See the authorities cited at Footnote 2.

meaning), the suggested limitation on the non-discrimination clause should not be adopted.

44. The effect of limiting Article 25 in the way suggested by the majority (and by implication, limiting the operation of other non-discrimination clauses contained in Australia's tax treaties) would be that Article 25 cannot apply in many circumstances that are within the letter of Article 25 and where, one would think, a non-discrimination provision has a role. Consider the example of a tax that imposes harsher treatment, not on the sole basis of nationality, but according to several cumulative criteria: nationality, ethnicity and religion. A foreign national who is liable for such a tax may be in the same circumstances as an Australian. It would be surprising if Article 25 did not prevent harsher tax treatment that applies to a UK national who has the additional characteristics of belonging to a particular ethnic and religious group. Nor is this an idle observation. At certain points in its history this country has imposed harsher taxes on the dual bases of foreign nationality and ethnicity,[7] and the dual bases of nationality and lineage.[8] If Article 25 is confined to taxes that are imposed on the sole basis of nationality it would not apply to taxes of this sort that are plainly discriminatory.

45. The majority's suggested rule is an unwarranted gloss on the text of Article 25 and should be rejected. The gloss is not a minor one. The majority used it to withhold relief from a foreigner who had Australian tax residency, even though Article 25 expressly identifies residency as a type of circumstance where Article 25 applies.

Issue (b) – If there is a rule of the type posited by the majority of the Full Court, should it have prevented the Appellant from obtaining relief?

46. The Appellant says there is no rule of the type proposed by the majority of the Full Court (hereafter '**the OECD Rule**'). However if the OECD Rule *does* exist the Appellant respectfully observes the majority erred in its application. The Backpacker Tax is harsher tax treatment imposed on the sole basis of nationality and the Appellant should still obtain relief under Article 25.

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[7] *An Act to Amend "The Gold Fields Act 1874" so far as relates to Asiatic and African Aliens and in other respects 1877* (Qld).
[8] *An Act to Regulate the Chinese Population in Victoria 1857* (Vic).

47. An inquiry into whether harsher tax treatment has been imposed on a foreigner solely by reason of that person's nationality (or a close proxy for nationality) requires an explanation for why the tax treatment applies, and why the same treatment does not apply to an Australian.

48. If an Australian citizen resided in the United Kingdom, as Catherine Addy did, and then moved to Australia and performed the same basic economic activity while living an essentially identical life, the Australian citizen would be liable for tax at a lower rate than Catherine Addy. The explanation for why a higher rate is imposed on Catherine Addy is that Catherine Addy had a Working Holiday Visa, which can only be held by foreign nationals and is incapable of being held by Australians. The necessity for a visa in order to perform the relevant activity (travelling to Australia, and earning income in Australia) is intrinsic to the foreign nationality of those who obtain visas so they can live and work in Australia. Davies J made this point at [13] of her reasons, and the Appellant respectfully says it is correct.

49. The error made by the Full Court majority in applying the OECD Rule was to focus on matters other than the explanation for why harsher tax treatment was imposed on Catherine Addy than a similar Australian. The matters to which their honours attributed weight were: (i) the fact the Backpacker Tax is not imposed on all foreign nationals, but only some of them; (ii) the fact Catherine Addy was in Australia voluntarily, (iii) Catherine Addy's theoretical ability to apply for some other type of visa, and (iv) the fact Catherine Addy would not have been liable to pay the Backpacker Tax if she had not earned any income.

50. None of these are the reason the relevant historical facts resulted in a heavier tax burden for Catherine Addy than would be imposed on an Australian citizen who did the same thing. They also involve a number of pure hypotheticals about actions Catherine Addy could theoretically have taken, when the Article 25 and the OECD Rule itself (as described in the OECD Commentary) look to what the circumstances of the foreign national were as a matter of historical fact. Only the Australian comparator is a hypothetical construct.

51. Dealing briefly with each of the four individual matters to which Derrington and Steward JJ attributed significance, and in the order they are listed above:

(i) It is correct that not all foreign nationals are liable to pay the Backpacker Tax. Catherine Addy was liable for the Backpacker Tax, however, and the OECD Rule looks to the explanation for why harsher tax treatment was imposed on Catherine Addy than on an equivalent Australian. The difference between the foreign national who is seeking treaty relief and other foreign nationals is immaterial to the OECD Rule.

(ii) Catherine Addy lived in Australia of her own free will. This might explain the different tax treatment as between Catherine Addy and people living in the United Kingdom; it is not the explanation for why Catherine Addy was liable to pay more tax than an Australian in the same circumstances as Ms Addy. An Australian in the same circumstances as Ms Addy would also be living in Australia of his or her own free will.

(iii) It is correct Catherine Addy could have applied for some other type of visa. This theoretical possibility does not explain why Catherine Addy was taxed more harshly than an Australian who took the same basic course of action as Catherine Addy by living and working in Australia.

(iv) It is correct that if Catherine Addy and thus the Australian comparator earned no income, neither would have had any tax to pay at all. This does not change what occurred in fact. Income was earned. Catherine Addy had to pay a larger percentage of it as tax than an equivalent Australian.

52. The above four matters do not explain why the harsher tax was imposed, so their only possible relevance to the OECD Rule is to whether a tax triggered by a foreigner's possession of a certain visa type can be accurately characterised as a tax based solely on nationality. The suggestion of the Full Court majority was that this tax is not based on nationality because not all foreign nationals are liable to pay it, and because the choice to apply for a Working Holiday Visa is a voluntary one, and because it is possible for a foreign national to take steps (such as abstaining from income-earning activity) that mean the tax will not apply. This view of what constitutes harsher tax treatment on the sole basis of nationality is unrealistic. It means that harsher treatment is only based on the sole basis of nationality if there is

no way a foreigner can avoid it, and there is no element of voluntariness about the actions that attract the harsher treatment.

53. It will be a rare case in which Australia imposes a tax solely on foreigners and the tax applies even if the foreigners are outside Australia and have not earned any income, and the foreigners can take no actions that will avoid the tax. Yet on the majority's view this is the only tax from which Article 25 can provide relief.

54. The text of Article 25 tells strongly against the view that Article 25 cannot offer relief in situations that foreigners enter voluntarily, or which foreigners have the theoretical ability to avoid. The language of Article 25 says foreign nationals shall not be subjected to harsher tax *'in the other Contracting State* (ie- in Australia)' where they are *'in the same circumstances'* as Australians. As a matter of ordinary language a prohibition on foreigners being subjected to harsher tax in Australia extends to foreign nationals who have made the choice to travel to Australia. The criterion that causes Article 25 to apply is *'same circumstances.'* A person's circumstances can be voluntarily adopted, and a person's circumstances may not be the same as the circumstances of others. Such circumstances are capable of being shared by an Australian. Article 25 should therefore extend to foreigners who have voluntarily travelled to Australia and chosen a particular type of visa to do so, and should extend to circumstances that are particular to some foreigners but not shared by all foreigners – provided the circumstances of the foreigner and the Australian national are the same.

Issue (c) Whether the Appellant should obtain relief

55. The Appellant's primary submission is that the OECD Rule applied by the Full Court majority is erroneous, and a distraction. The Appellant says the central question is whether Catherine Addy and an Australian comparator (an Australian liable to pay tax at the rates in Part I, rather than the rates in Part III) were *'in the same circumstances, in particular with respect to residence.'* This is a question about the characteristics a foreign national must possess for relief to lie.

56. The essential reason the Appellant should succeed is that she was an Australian tax resident and Article 25 singles out shared tax residence as a circumstance in which Article 25 prevents a foreigner from being taxed more harshly than an Australian.

The word '*residence*' in Article 25 means tax residence; this is plain from the definitions and other parts of the Double Tax Agreement where the words 'residence' or 'resident' are used.[9] One should therefore conclude that Catherine Addy and the Australian comparator were in the same circumstances in the necessary sense, not only because they shared a circumstance given particular prominence in the text, but also because this circumstance (Australian tax residency) is the thing that entitles an Australian citizen to be taxed under Part I. When a foreign taxpayer seeks a certain type of tax treatment, it is a strong indicator that the foreign taxpayer and Australian comparator are relevantly in the same circumstances if the foreign taxpayer has all the qualities and attributes that entitle an Australian to the desired tax treatment.

57. The Commissioner submits Catherine Addy does not qualify for relief under Article 25 because an Australian national is incapable of holding a Working Holiday Visa and accordingly Catherine Addy, as a person holding a visa, was not in the same circumstance*s* as an Australian who was a tax resident of Australia.

58. The Commissioner's argument should be rejected for reasons closely related to Article 25's identification of shared residence as a type of circumstance in which Article 25 prevents discriminatory tax treatment. As a rule, every foreigner who acquires tax residence in Australia does so by applying for, and holding, an Australian visa. A visa is what enables a foreigner to be physically present in Australia. Accordingly the language that says foreigners shall not be subjected to more burdensome tax treatment '*in the other Contracting State* (ie- Australia)' in the same circumstances *'in particular with respect to residence'* is a strong indication, derived exclusively from the text, that a foreigner's possession of a visa does not prevent a foreigner and an Australian national who are both tax residents of Australia from being in the same circumstances in the necessary sense.

59. An ordinary reading of Article 25 is consistent with this view. A requirement that two persons be in the same circumstances is an open-textured criterion; as a matter of ordinary language, two separate persons can be in the same circumstances even though they are, in one or two respects, different. There is no textual reason why

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[9] Article 3(3) and Article 4(1) of Double Tax Agreement. Also, Articles 6(1), 10, 11, 12, 13, 14, 20.

the circumstances of a foreign national and the Australian comparator must be absolutely and comprehensively identical, even to the point of possession of a visa, and to the point of defeating an express goal of Article 25.

60. When a provision is expressed to apply in an identified case (such as shared tax residence) any open-textured parts of the provision should be construed in a way that supports the provision's express goal rather than thwarting it. This means a provision that purports to prevent discrimination against foreign tax residents of Australia should not be closed to foreigners who hold an Australian visa – unless the language is so intractable as to require such an outcome, which in the present case it is not. For Article 25 to be construed so that possession of a visa disqualifies a foreign national from relief is analogous to a government literacy program being closed to people who have never had formal schooling, or a registration system for taxi drivers being closed to individuals who possess a driver's license. A person who drives a taxi always has a driver's license, just as a foreigner who acquires Australian tax residency always has a visa.

61. In the Full Court the Appellant made the point that, on the Commissioner's proposed construction of *'same circumstances'*, the only foreign nationals in Australia who would be able to claim consistent tax treatment under Article 25 are illegal immigrants, because every foreign national who is lawfully present in Australia has a visa. This point remains valid. The Commissioner's proposed construction would confine the practical application of Article 25 in a way that borders on absurdity.

62. The Full Court majority attempted to avoid the identified absurdity by drawing a distinction (per Derrington J at [222] – [223] and Steward J at [348]) between a harsher rate of tax that applies to all visa-holders and a harsher rate of tax that applies only to Working Holiday Makers, on the rationale that only the former is based solely on nationality. The reasons this distinction cannot be drawn have been canvassed elsewhere in this submission. *First*, there is no textual basis for this distinction; Article 25 is triggered by the circumstances of the foreign national that are shared with an Australian, not by whether the impugned tax applies broadly rather than narrowly. *Second*, the suggested distinction is not supported by the extrinsic materials invoked on its behalf. The relevant passage of the OECD

Commentary asks whether a foreigner has been treated more harshly than an Australians solely because of his or her nationality. When harsher tax treatment is imposed on a foreign national the explanation for the harsher tax treatment does not change depending on whether the harsher treatment happens to apply to all foreign nationals, or only some of them.

Miscellaneous

63. This section deals with a topic that is not essential to the Appellant's argument, but nevertheless has relevance.

64. A rule proposed in the Steward J reasons (at [348]), and the Derrington J reasons (at [226]), although in less emphatic terms, has it that Article 25 only applies where the characteristic that causes the tax to be imposed on a foreign taxpayer is a characteristic that is shared, or capable of being shared, by the Australian comparator. This was said to have the implication that, when a tax is imposed on foreigners who possess a Working Holiday Visa, Article 25 cannot apply because the Australian comparator must possess such a visa to be in the same circumstances as the foreigner. The majority said this was a further reason for allowing the Commissioner's appeal.

65. With respect, the proposed rule is not sound.

66. A tax that discriminates against foreigners, by its nature, must utilise taxing criteria that are specific to the group being discriminated against, and not shared by Australians. Consider the example of a tax that is imposed on 'foreign aliens.' This characteristic (being a foreign alien in respect of Australia) is incapable of being possessed by an Australian, just as an Australian is incapable of obtaining a Working Holiday Visa. If there is a rule that it is always necessary for the characteristics that attract a discriminatory tax to be shared by Australians (or capable of being shared) then Article 25 may never have practical effect.

67. The proposed rule also suffers all the same defects of the OECD Rule applied by the majority. It is a gloss, derived elsewhere than from than the text. Article 25 lacks sufficient ambiguity for it to be interpolated under the Vienna Convention, and the legal materials that are said to support its existence do not do so.

68. The proposed rule was said to be supported by the Explanatory Memorandum that accompanied the *International Tax Agreements Amendment Bill 2003* and also by the textbook, Vogel on Double Tax Conventions (Derrington J at [217] and Steward J at [332]). Properly viewed, these materials provide no support.

69. What Klaus Vogel said in his textbook was that, when ascertaining whether a foreigner and the comparator are in the same circumstances, *'The comparison must be based on the* ***actual circumstances which are decisive in connection with the taxation procedure.***'[10] In this sentence the learned author was not suggesting a rule that the comparator must share the very characteristics that make the foreigner liable to pay the discriminatory tax, or that in the absence of these characteristics the non-discrimination clause does not apply. Vogel was saying that a foreigner should share the attributes of the comparator that entitle the comparator to the tax treatment sought by the foreign national. For example, if a foreigner wants the same tax treatment as an Australian who is tax resident in Australia, the foreigner must be tax resident in Australia. If a foreigner wants to be taxed at the rate that applies to an Australian whose taxable income is $75,000, the foreigner must also have a taxable income of $75,000. The 'taxation procedure' to which Vogel was referring was not the discriminatory tax from which a foreigner seeks relief, but the general taxation principles that apply to those who are not liable for the discriminatory tax.

70. That this is the point Vogel was trying to make appears even more clearly in the Explanatory Memorandum to the *International Tax Agreements Amendment Bill 2003*. The Explanatory Memorandum says, at Paragraph [1.250]: *'The expression 'in the same circumstances' refers to persons who, from the point of the application of* ***the ordinary taxation laws and regulations****, are in substantially similar circumstances both in law and in fact'* (emphasis added). Here the Explanatory Memorandum was suggesting that tax-related characteristics of a general nature must be shared for the non-discrimination clause to apply. The textual requirement for a foreigner and an Australian to be in the same circumstances is designed to

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[10] This passage appears in the 1997 edition of Vogel. A different wording appears in more recent editions. The Appellant will make both available.

ensure that Article 25 does not prevent differential tax treatment on grounds such as: income, wealth, and type of economic activity.

71. Properly understood, the above passages from Vogel and the Explanatory Memorandum both support the Appellant's argument rather than the Commissioner. They indicate the circumstances and characteristics that must be possessed by a foreign national are only those which entitle an Australian citizen to the treatment the foreign national is seeking under the non-discrimination clause. In the present case, the circumstance that causes an Australian to be taxed under Part I is tax residence of Australia. That circumstance was shared by the Appellant.

10 **Part VII: Orders sought**

72. The orders sought by the Appellant are as follows:

(i) Appeal allowed.

(ii) Set aside Paragraphs [1] and [3] of the orders made by the Full Court on 6 August 2020 and in their place order the appeal be dismissed.

(iii) [Whether there should be an order as to costs depends on discussions between the parties that had not concluded as at the date of this submission].

Part VIII: Estimate of the hearing

73. The Appellant estimates that two hours will be required for the presentation of the appellant's oral argument in chief, and 20 minutes for reply.

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Dated: 15 April 2021

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **Catherine Victoria Addy**
Appellant

and

Commissioner of Taxation
Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS

Legislation

1. *An Act to Amend "The Gold Fields Act 1874" so far as relates to Asiatic and African Aliens and in other respects 1877* (Qld).
2. *An Act to Regulate the Chinese Population in Victoria 1857* (Vic).
3. *Income Tax Assessment Act 1936* (Cth) (Compilation No.149), s 6.
4. *International Tax Agreements Act 1953* (Cth) (Compilation No.35), ss 4 and 5.
5. *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth).
6. *Income Tax Rates Act 1986* (Cth) (Compilation No.49), Sch 7 Pts I, II and III.
7. *Judiciary Act 1903* (Cth) (Compilation No.47), s 79.
8. *Migration Act 1958* (Cth) (Compilation No.134).
9. *Taxation Administration Act 1953* (Cth) (Compilation No.177), Pt IVC.

Treaties

10. *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*, (21 August 2003) Arts 3(3), 4(1), 6(1), 10, 11, 12, 13, 14, 20, 25.
11. *Vienna Convention on the Law of Treaties* (23 May 1969) Arts 31 and 32.