



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: S25/2021  
File Title: Addy v. Commissioner of Taxation  
Registry: Brisbane  
Document filed: Form 27F - Outline of oral argument  
Filing party: Respondent  
Date filed: 24 Jun 2021

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IN THE HIGH COURT OF AUSTRALIA

S25/2021

BRISBANE REGISTRY

BETWEEN:

**CATHERINE VICTORIA ADDY**

Appellant

and

**COMMISSIONER OF TAXATION**

Respondent

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**RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS****Part I: Internet Publication**

1. This outline of oral submissions is in a form suitable for publication on the internet.

**Part II: Outline of Oral Propositions****(a) Construction of Article 25**

- 20 2. As a matter of ordinary language, Article 25(1) requires a comparison between a foreign taxpayer and an Australia national who is otherwise 'in the same circumstances', meaning circumstances relevant to the burden of tax.
3. If that comparison shows that the tax burden is higher for the foreign national by reason of the difference in nationality, Article 25(1) prevents the excess taxation.
4. Because Article 25(1) operates in this way, it can be fairly described as preventing discrimination solely on the basis of nationality (**RS** [24]).
5. This construction of Article 25(1) is confirmed by the words 'in particular with respect to residence', as well as the explanatory memorandum to the *International Tax Agreements Bill 2003* (Cth), and the OECD Commentary (**RS** [25]-[27], [36]-[37]).
- 30 6. It is also consistent with the views of all the judges below (**RS** [28]).
7. Contrary to the appellant's submissions, the respondent's construction is not an unwarranted gloss on the terms of Article 25(1) and it would not entail that the only foreign taxpayers to whom Article 25(1) can apply are illegal immigrants. Nor would

it have the consequence that by simply making the discrimination based on two criteria, nationality and something else, the operation of the Article is defeated (**RS** [34], [40], [55]; *cf AS* [43]-[45], [61]).

**(b) Application of the comparison**

8. The words ‘in the same circumstances’ in Article 25(1) mean identical as regards all matters (except nationality) that are relevant from a taxation point of view: *Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555 at 566; also 561, 572-573.

9. The application of Article 25(1) in this case turns on two inquiries:

10 (a) whether an Australian national can earn working holiday income; and

(a) if not, whether the impossibility of making a comparison prevents Article 25(1) from being engaged.

10. As to inquiry (a), the judgments below proceeded on the basis that the answer was ‘no’.

11. As to inquiry (b), if no comparison is possible, the taxpayer cannot show that the tax to which he or she is subjected is more burdensome than for a national in the same circumstances: *Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555 at 566, 573.

12. This proposition, however, is subject to the qualification that if the *discrimen* is a proxy for nationality, it will be ignored in the comparison (**RS** [52]; FFC at [223] (AB 126)).

**(c) Discrimen is not a proxy for nationality**

13. The appellant’s case is essentially that because Australian nationals cannot have working holiday visas, holding those visas must be seen as a proxy for nationality.

14. A working holiday visa cannot properly be characterised as a proxy for nationality because, among other things:

(a) the legislation that introduced the working holiday maker tax rates was intended to benefit the class of people who wished to have a working holiday in Australia (**RS** [9]-[12]; FFC at [350] (AB 166));

30 (b) a person only has a working holiday visa because they chose to apply for it;

- (c) a working holiday visa is not something that a British national is required to hold or is deemed to hold under Australian law (FFC at [223] (AB 126));
- (d) a person who came to Australia on a working holiday visa can change the visa while here, and thus no longer earn the working holiday taxable income, even though they remain a national of the UK (**RS** [43]-[44]); and
- (e) many eligibility criteria for a working holiday visa are completely unrelated to nationality: item 417.211 of Migration Regulations (Tab 9 Authorities).

Dated: 24 June 2021

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Stephen Lloyd SC  
6 Selborne Wentworth Chambers  
02 9235 3753  
stephen.lloyd@sixthfloor.com.au



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Gim del Villar QC  
Murray Gleeson Chambers  
07 3175 4650  
gdelvillar@qldbar.asn.au