

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

ANDREW JOHN MACOUN
Appellant

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and

COMMISSIONER OF TAXATION
Respondent

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APPELLANT'S REPLY

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Part I: Publication

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Reply

The issues in the appeal (Respondent's Submissions (RS[2] and also RS[8(b)], RS[17]-[27])

2. The respondent, having filed a notice of contention out of time, requires the leave of the Court to raise two proposed additional questions.
3. Notice of Contention Ground 1 attempts to impermissibly raise a 'question of fact', that is, the ordinary meaning of the word "emoluments" (or, alternatively, a composite phrase of ordinary words in which that word is so contained) being a matter decided by the Tribunal at first instance¹, and which cannot properly be the subject of appeal under s 44(1) *Administrative Appeals Tribunal Act 1975* (Cth). The respondent attempted to raise that same issue in question 3 of its notice of appeal below and the plurality upheld the appellant's objection to that question agreeing that question 3 was "a question of fact or, at best, a question of mixed fact and law"². In doing so, the plurality applied long-standing authorities (FC [34]-[35] and cases there cited). Perram J also agreed that there was no reason why the word "emolument" would not include a pension (FC[52]).
4. Further and in any case, the respondent's submissions at RS[8(b)] and RS[17]-[27] on Notice of Contention Ground 1 fail to refer to the actual facts. Among them are the following: *First*, participation in the SRP was a "mandatory" condition of the appellant's employment with the IBRD – without such participation he would never have been able to assume his role [AAT[7]]. *Secondly*, the appellant was obliged to make regular contributions to the IBRD deducted from his salary [AAT[7]] - his pension contributions (US\$200,842) represented salary foregone by him which if received would have been exempt. *Thirdly*, the appellant's employer stated in the Handbook: "The Bank provides the SRP as an integral part of the total compensation and benefit package offered to staff. After salaries it is the most valuable element of that package"³ – clearly, the pension entitlements were part of the anticipated 'emoluments' arising from the employment. *Fourthly*, the IBRD contributed *annually* an amount necessary to fund the cost of liabilities in excess of those funded by the participant's contributions.⁴ At the moment of retirement, the funds to meet a participant's pension as actuarially assessed were in hand.⁵ *Fifthly*, employees were kept up to date each year, *during their term of office*, about their "Personal Statement of Benefits" under the SRP and programs were issued to them by the IBRD to enable them to estimate pension benefits payable⁶. *Sixthly*, and importantly, prior to the end of service, the appellant knew precisely his entitlements under the pension plan⁷ – he could have elected to take a lump sum withdrawal or commutation payable under the rules of the SRP two weeks after retirement⁸. The appellant's pension entitlements were far removed from the respondent's description (at RS[21(d)]).

Relevant facts stated by the Commissioner (RS[5]-[6])

5. As to RS[5] and also RS[59], the gross up provisions applied by the IBRD are *only* necessary because some States fail to exempt salaries and pension payments from income tax, whether by reason of Article VII, Section 9(b) of the articles of agreement for the IBRD (which explicitly excludes "local citizens, local subjects or other local nationals") or by reason of reservations made by States to the Convention. The IBRD's gross up mechanism reflected the view that pensions ought *not* be taxed by member States and the Bank is effectively compensating

¹ *Re Macoun v Federal Commissioner of Taxation* (2014) 63 AAR 200; [2014] AATA 155 (AAT) at [23] and [32].

² *FCT v Macoun* (2014) 227 FCR 265 at 273 [34].

³ *Ibid.*

⁴ AB74- SRP Handbook at III -3.4.

⁵ AB75- SRP Handbook at 3.5.

⁶ AB69- SRP Handbook at I – halfway down second column.

⁷ AB76- SRP Handbook at 4.4 and AB79 at 4.13 and AB81 at 5.4.

⁸ AB77- SRP Handbook at 4.7 and 4.10 and also AB82 at 5.7.

officers in case they were. That “compensation” mechanism is applied *during the period of office* to calculate annual pension contributions and payments on and from retirement.

6. As to RS[6], it is relevant to add that the appellant only amended his returns after learning another Australian taxpayer in identical circumstances, was exempted from income tax⁹.

The key differences contended between the decisions below and alleged errors of the AAT (RS[11]-[13])

- 10 7. As to RS[11(a)] and RS[13(a)], there is no debate in this case that regulations made under the IOPI Act confer privileges or immunities under Part I upon a person holding office in the IBRD. The appellant’s case is, in short, that the *person* who holds the office and upon whom privileges or immunities are conferred (by reason of s 6(1)(d) and reg 8) thereafter *has* them. Item 2 of Part I extends to anything subsequently and *whenever* received by that *person* from the organisation that is “salary and emoluments”. There is no express time limitation as to receipt, nor is it needed to give the words their ordinary and intended meaning.
8. As to RS[11(b)] and RS[13(b) and (c)], at the hearing before the Full Court (and indeed the AAT), the parliamentary debates referred to at AS[35]¹⁰ were not brought to the Court’s attention. The debate explains that the division into parts was nothing more than a drafting mechanism. The respondent’s reference to a “deliberate decision” to do so (RS[13(c)]) is not only not justified but also is somewhat displaced by that explanation.
- 20 9. Further, as to RS[11(b)] the determinative consideration is not receipt during the course of employment but the words of s 6(1)(d) which enable conferral of privileges and immunities whilst a person holds an office. No words limit receipt of salary or emoluments to the period of employment.

Text and Context (RS[18]-[20])

- 30 10. The observations made at RS[19(c)] appear to ignore that the purpose of the IOPI Act was to allow privileges and immunities to be conferred on organisations or persons who were officers consistently with the Specialized Agencies Convention but within the maximum limits set by the IOPI Act. Accordingly, it is unsurprising that the exemption does not specifically refer to the range of other “payments” suggested. Given the purpose of the IOPI Act was to set “maximum” limits for the immunities and privileges, it is of greater relevance to note that Parliament did not see fit to carve out from the exemption, payments that could constitute “salaries and emoluments” but that might of their very nature be received following cessation of office (e.g. deferred salary payments etc.).
- 40 11. Whether or not RS[19(d)] is correct, the word “emoluments” must not be construed in an impermissibly “narrow” sense or by reference to definitions or conditions that are not actually used or implicit or found to have support in the Act or regulations. The respondent’s suggested definition of “emolument” lacks any support either textual or documentary. The words “salary and emoluments” are ordinary non-technical words and should be given their ordinary meaning. If “emoluments” was used alone, it may cover salaries. When used in Item 2 of Part I with “salaries”, the word “salaries” should be given its ordinary meaning and together with “emoluments” should be so construed as a composite phrase, but in both instances the words should be given their ordinary meaning.

Characterisation and capacity (RS[21]-[27])

12. These submissions should be rejected. The answers to them are to be found already in the appellant’s submissions and also in other submissions made in this reply. They are supported by the following:
- a. Whatever relevance they have in other situations, these submissions completely ignore the facts and circumstances of this case. Those facts clearly establish that the membership of the SRP was mandatory and part of the total compensation and benefits package offered.

⁹ AB35 –see final paragraph of the taxpayer’s reasons for objection at section 12.

¹⁰ Official Hansard for the House of Representatives, No 34, Tuesday 20 August 1963 at p284.

b. The respondent cannot escape the Tribunal's finding of fact as to the meaning of emoluments. That conclusion is not on a question of law. It is part of the primary facts of the case. RS[27] is a transparently forensic attempt to overcome what the plurality concluded at FC[34] and [35].

13. Even if it was on a question of law, for reasons canvassed elsewhere emoluments are profits arising from an office or compensation for services rendered and describes the benefit which the SRP gave to the appellant as part of his package consistently with commercial practice.

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14. The respondent's submissions also completely ignore the obvious purpose of such payments and the conferring of such a privilege or immunity here to enhance the organisation's performance.

15. The emoluments are received by the appellant because he, at the time being an officer, had an exemption from tax on salary and emoluments conferred on him entitling him to the exemption whenever salary and emoluments were received. To require receipt in the capacity of a current officeholder would deprive him of it.

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16. RS[21(c)] is pure speculation and removed from the reality of this case. The payment of the pension was an entitlement that arose from the terms and conditions of his appointment to his office (see earlier at [5] and [13(b)]). It is a reward received for services rendered on cessation of services and it is not a payment for the period which follows services because it is part of a profit or compensation which arises from his having agreed to accept the office and serve in it. It is an entitlement which arose from the contract of service the benefit of which was a pension that of its very nature could only be enjoyed on retirement.

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17. At RS[22]-[27] the respondent attacks the AAT decision. That decision was, it is submitted, correct when the Tribunal found at [34] the pension payments were part of the appellant's remuneration entitlement which crystallised during the course of his employment meaning by "during" "over the course of his employment". "Crystallised" is defined in the Macquarie Dictionary as meaning "*give definite or concrete form to*". Here in the course of employment, contributions were deducted from salary and the other conditions of employment fulfilled. On retirement, the time for payment, the right to pension payments was given "concrete form" by his receiving those payments from the organisation. That right did not cease on cessation of employment. The respondent's submissions are an attempt, it is submitted unsuccessfully, to deny that which they seem to concede could happen (RS[21(e)]). The person during service has a contingent right (e.g. that service be given and contributions made) the reward for which is their absolute right to the pension.

18. In relation to RS[25], the clauses of the SRP (such as Handbook at AB 71-72 – sections 2.3-2.8) are designed to emphasise that the pension is a reward for service in the office and that employee contributions are a necessary condition of the payment of the pension. They deal with the changes that might occur which could cause participation in the SRP not to continue. It would be most unusual for an entitlement to a contributory pension fund not to be conditional on contribution and continued service or to provide for periods of broken service.

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19. As to RS[26], what is sought to be brought to tax are payments received under an anterior contingent right that arose during the course of employment and crystallised during the course thereof to the point of termination when that right, of its nature, could only then be actually received.

20. RS[21]-[26] are neither a logical nor realistic assessment of the effect in law of the facts of this case and are an unsuccessful attempt to use logic to create an intellectual cloud over and to dispel the force and clarity of the text and the beneficial purpose behind it.

21. RS[27] is clearly an attempt to overcome that below the question as to "emoluments" was one of fact (FC[34]-[35]). That finding became one of the primary facts in the case.

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Statutory purpose (RS[28]-[34])

22. As to RS[28]-[29], this ignores the later statement in the Second Reading Speech: “The schedules to the principal bill describe the privileges and immunities which may be conferred by the regulations...The provisions of the schedules follow very closely the international conventions on the subject to which I have just referred”. (underlining added)
23. Contrary to RS[30], Item 2 is designed to benefit the IBRD in the performance of its functions. It does so in two respects ignored by the respondent. *First*, it enables the IBRD to attract staff of high quality in competition with other employers who are vital to proper performance of its functions. Without them, the organisation would clearly be impaired in its performance. They only render services whilst in office. The attraction of Item 2 was to get them into that service. *Secondly*, another object of the exemption was also functional necessity – to avoid salary or emoluments emanating from the funds of an organisation contributed by its members finding their way by taxation into the revenue of some other member States (cf RS[32] and [67]). This is evident from the articles of agreement of the IBRD and both the UN and Specialized Agencies Conventions because they use the words “paid by the Bank” or “paid by the organisation” – it is the salary and emoluments *paid by* the IBRD or other international organisation from those funds that are to be exempt from taxation in the hands of the officer.
24. As to RS[33], the grossing up was a recognition of IBRD holding the view that the pension payments should not be taxed. Grossing up in calculating the pension may result in a higher pension but the principle it recognises of exemption from taxation by member States still remains.

The respondent’s explanation regarding “accidents of timing” (RS[35]-[37])

25. As to RS[36] it is important to note that in the IOPI Act, the word used is “received” not “paid”. The word “received” has a much wider connotation than the word “paid”. It would of course cover actual receipt which has a tax connotation. The Macquarie dictionary meaning is “*to take into one’s hand or possession something offered or delivered*”. The appellant submits its use here encompasses not only actual receipt but also the facts which cover the offer and acceptance of SRP membership as part of the contract of service which “crystallises” during employment to the point of termination (see too [17] above)¹¹. The receipt of the pension payments represents the accrual of unconditional and absolute entitlement up to the point of retirement (i.e. during the currency of his office)¹². It is akin to the well known principle *debitum in praesenti, solvendum in future* and the well known distinction between “tree” and “fruit”¹³.
26. As to RS[36], which seems to be agreeing with the appellant’s argument that on the respondent’s interpretation, any payments of salary and emoluments (such as overtime etc) not made while officers continue to hold office would be taxable. This provides little comfort to the vast number of Australian employees of international organisations where it is both reasonable and commercially inevitable that payments would be received by them following termination. It would be difficult to treat them as anything other than salary and emoluments “referable to the actual conduct of the office” yet the basis of their taxation position would change depending on whether received by chance or necessity immediately before or immediately after the date of cessation of office. There is no difference in the nature of the payment or the justification for tax exemption and such an interpretation of the IOPI Act ought to be rejected.

International law issues (RS[38]-[80])

27. The appellant in reply has only limited space and summarises below its submissions in response without elaboration:-

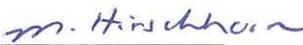
¹¹ It can encompass a situation where in effect a legal chose in action is offered which matures into pension payments: see *Commissioner for Railways (NSW) v Agalinos* (1955) 92 CLR 390 at 397 (per Dixon CJ) where receipt of compensation was construed as the acquisition of the right as distinct from actual receipt.

¹² Refer also paragraph [17] of these reply submissions.

¹³ See *Shepherd v Commissioner of Taxation* (1965) 113 CLR 385 at 396.7.

- a. The respondent has failed to properly acknowledge the most relevant travaux préparatoire prepared only 6 days before the Specialized Agencies Convention was adopted.¹⁴
- b. The legislative history (dealt with at RS[42]-[45]) is as set out by the appellant (see AS[51]-[73]) and s 23(y) should be interpreted as those submissions do. The respondent's attempt (at RS[47]) to use the reference in that provision to "official salary and emoluments of an official" to support its arguments regarding status and capacity are in part dealt with above at [12] to [21]. The word "emoluments" bears its ordinary meaning and covers the pension payments here without limitation as to time of receipt.
- 10 c. Article 4 of the VCLT provides that that Convention only applies to treaties which are concluded by States after entry into force of the VCLT with regard to the State. It entered into force in Australia on 27 January 1980. To the extent that article 31 reflects customary international law its terms could be applicable here. In any event, the tests in articles 31 and 32 are, in substance, broadly in line with principles adopted in our domestic law in emphasising the ordinary meaning of words. The appellant accordingly relies on his submissions in chief in this respect.
- d. The Spanish decisions¹⁵ are a clear endorsement of the appellant's interpretation of the Specialized Agencies and UN Conventions as also is the decision of the Indian High Court in Bombay¹⁶. They support the view that article VI section 19(b) of the Agencies Convention read with the UN Convention as required, means that "salaries and emoluments" whenever
20 received by persons to whom the privilege or immunity was given when an official are intended to be enjoyed by them. The benefits include pension payments which are provided as a reward for service.
- e. The State practice and jurisprudence relied upon (RS[64]-[78]) do not in effect support the respondent's construction of the IOPI Act. The French decisions¹⁷ are distinguishable. The facts before them were materially different. Membership of the fund was optional not mandatory. The definitions relied upon regarding "emoluments" are narrower than in English dictionaries and much of the findings are not supported by argument. The Netherlands decision¹⁸, it is submitted, is quite irrelevant.
- f. The State practice relied upon expresses the self-serving views of States that they do not
30 recognise the exemption. There are some, like Austria, which do consistently with Australia.
- g. The decision and reasoning in Case M90¹⁹ was wrong. The facts were also different. It also relies on medical examination as an important factor and did not consider the context.


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¹⁴ United Nations General Assembly: Sixth Committee – Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies – Final Report of Sub-Committee 1 of the Sixth Committee: Rapporteur: Mr WE Beckett (United Kingdom) – pages 8-9, paragraph [22].

¹⁵ Tribunal at [57], Full Court-Perram J at [48], [54]-[55]). *Minister for Immigration and Multicultural Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34]; Spanish cases (unrep): *Serafin and Yolanda* (478/2001, 17/1/03, Sup.Court Andalusia); *Enrique* (1227/2003, 28/3/07, Sup. Court Barcelona); *Arroyo* (736/2000, 12/3/03, Sup. Court Madrid).

¹⁶ *Commissioner of Income Tax v Kolhatkar* (1995) (2) MhLj74: 25/11/94, High Court Bombay.

¹⁷ Decision of the Administrative Appeals Court of Paris decision, 2nd Chamber, 7 November 2003, OIPAO4215 and Decision of "Arbitration Tribunal", 14 January 2003, United Nations Juridical Yearbook (2001), p421 at 433-434.

¹⁸ *X v State Secretary for Finance*, Supreme Court, 16 January 2009, LjN No. BF7264, BNB (2009), No 113 Netherlands Yearbook of International Law 2010 (2010), p394ff. This case involved the Statute of the International Court of Justice that does not contain the word "emoluments" in the tax exemption. A former registrar had unsuccessfully sought to argue that the term "salaries" included pension payments.

¹⁹ Case M90 (1980) 80 ATC 648 at [17].