

## **MACOUN v COMMISSIONER OF TAXATION** **(S100/2015)**

Court appealed from: Full Court of the Federal Court of Australia  
[2014] FCAFC 162

Date of judgment: 4 December 2014

Special leave granted: 15 May 2015

From 1992 to 2007 Mr Andrew Macoun was employed by the International Bank for Reconstruction and Development (“IBRD”), one of the organisations comprising the World Bank. During his employment with the IBRD, Mr Macoun made mandatory contributions from his salary to the World Bank’s Staff Retirement Plan (“SRP”), a defined benefits scheme. After taking early retirement from the IBRD at the age of 60, Mr Macoun received monthly pension payments under the SRP. He believed that those payments were exempt from income tax, as apparently provided by the *Convention on the Privileges and Immunities of the Specialized Agencies* (“the Convention”).

The *International Organisation (Privileges and Immunities) Act* 1963 (Cth) (“the Act”) implements the Convention in Australia. Section 6(1)(d)(i) of the Act provides that regulations may confer, upon a person holding an office with an international organisation, any of the privileges or immunities listed in Part 1 of the Fourth Schedule. Item 2 there listed (“Item 2”) is an exemption from taxation of salaries and emoluments received from international organisations. The *Specialized Agencies (Privileges and Immunities) Regulations* 1986 (Cth) (“the Regulations”) expressly apply to the IBRD. Regulation 8(1) of the Regulations provides that a person who holds an office in the IBRD has the privileges and immunities listed in Part 1 of the Fourth Schedule to the Act.

For the income years ended 30 June 2009 and 30 June 2010, the Respondent (“the Commissioner”) assessed Mr Macoun for income tax by including in his assessable income the total amounts he had received as SRP payments in those years (“the Payments”). Objections lodged by Mr Macoun were both disallowed (“the Commissioner’s decision”). Mr Macoun sought review of those disallowances in the Administrative Appeals Tribunal (“the Tribunal”).

On 20 March 2014 the Tribunal set aside the Commissioner’s decision. The Tribunal found that the Payments were exempt from tax on the basis that they were “emoluments” under Item 2, the entitlement to which arose during the course of Mr Macoun’s employment with the IBRD and continued after his retirement from it.

On 4 December 2014 the Full Court of the Federal Court (Edmonds, Perram & Nicholas JJ) unanimously allowed the Commissioner’s subsequent appeal and affirmed the Commissioner’s decision. Their Honours held that the Tribunal had erred by construing the Act by reference to the Regulations, rather than vice versa. The Full Federal Court found a clear dichotomy in s 6(1)(d) of the Act between a person holding office and a person who had ceased to hold office (the latter being entitled only to immunity from suit for acts done as an

officer). As Mr Macoun did not hold office in the IBRD at the time he received the Payments, he was not entitled to the privilege described in Item 2. Justice Perram however noted that, in this respect, the Act differed from the position under public international law where “emoluments” exempted from tax due to the Convention included pensions such as that paid to Mr Macoun under the SRP.

The grounds of appeal include:

- The Full Federal Court erred in holding that pension payments received by Mr Macoun from a Specialised Agency (in his case, the IBRD), despite being “emoluments” to which Mr Macoun became entitled while holding office in the IBRD, were not exempt from taxation because Mr Macoun no longer held office in the IBRD in the income years in which the payments were received so that the privilege conferred by Item 2 of Part 1 of the Fourth Schedule to the Act was not available to him.
- On 15 June 2015 the Commissioner filed a summons, seeking leave to file a proposed notice of contention out of time. The grounds of that proposed notice of contention include:
- The Full Federal Court ought to have decided that the Tribunal erred in law in finding that the periodical pension payments received by Mr Macoun, being payments in the nature of retirement benefits, were “emoluments received from the organisation” within the meaning of Item 2 of Part 1 of the Fourth Schedule to the Act.