

COMMISSIONER OF TAXATION v JAYASINGHE (S275/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2016] FCAFC 79

Date of judgment: 9 June 2016

Special leave granted: 16 November 2016

Mr Kamal Jayasinghe (“the Respondent”) is a civil engineer who was engaged by the United Nations Office of Project Services (“UNOPS”) to work in Sudan as a project manager during the income years ending in June 2010 and June 2011. In September 2013 the Commissioner of Taxation (“the Appellant”) assessed the Respondent for taxation based on his earnings during that period. The Respondent objected to that assessment, contending that his earnings were exempt from taxation pursuant to:

- (a) the *International Organisations (Privileges and Immunities) Act 1963* (Cth) (“the IOPI Act”); and/or
- (b) Taxation Determination TD92/153 (“TD92/153”).

The combined effect of section 6(1)(d) of the IOPI Act and reg 10(1) of the *United Nations (Privileges and Immunities) Regulations 1986* (Cth) (“the Regulations”) is that if “a person holds an office in the UN” then that person is exempt from taxation. At issue therefore was whether the Respondent was such a person.

The Appellant rejected the Respondent’s objections and the Respondent subsequently applied to the Administrative Appeals Tribunal (“AAT”) for a review of that decision. On 29 June 2013 the AAT found that the Respondent both “held an office in the UN” *and* that he was a UN employee. He was therefore exempt from tax for the relevant income years.

On 6 June 2016 the Full Federal Court (Pagone & Davies JJ; Allsop CJ dissenting) dismissed the Appellant’s appeal. The majority held that the AAT was correct to find that the Respondent held “an office” in the UN within the meaning of s 6 of the IOPI Act and reg 10(1) of the Regulations. In doing so their Honours endorsed the AAT’s analysis of the nature of the Respondent’s position. They found that whether a person “holds an office in” the UN within the meaning of the statute was a matter of applying that statute to the facts. It was not a matter of the contractual agreement as between the parties themselves.

Justices Pagone and Davies further found that the Respondent was also an employee of the UN. As such he was covered by TD92/153 and thereby exempted from paying Australian tax. Their Honours noted that the contractual terms as between the Respondent and UNOPS may be such to prevent him from claiming to be an employee as against UNOPS. They did not however preclude the Respondent from relying upon the fact, that for Australia taxation purposes, he also worked as an employee of UNOPS.

Chief Justice Allsop however would have allowed the Appellant's appeal. His Honour held that, according to the UN's own rules and agreements, the Respondent neither held an office in the UN, nor was he a member of staff. He was also neither an official of, nor an officer of the UN. His Honour therefore found that the AAT had failed to approach the matter with a proper perspective on the construction of s 6(1)(d) and Regulations 10 and 11.

With respect to TD92/153, Chief Justice Allsop noted that the terms of the Respondent's engagement included the provision that, as an international individual contractor, he was considered "an expert on mission for the UN" within the terms of s 22 Article VI of the Convention on the Privileges and Immunities of the United Nations 1946. The Respondent's engagement as an expert on mission (and not as a staff member) therefore took him outside the terms of TD 92/153.

The grounds of appeal include:

- The Full Federal Court erred in failing to find that the AAT erred in finding that the Respondent held an office in UNOPS within the meaning of s 6(1)(d)(i) of the IOPI Act and reg 10(1) of the Regulations.
- The Court should have construed the expressions:
 - a) "a person who holds an office in an international organisation" within s 6(1)(d)(i) of the IOPI Act; and
 - b) "a person who holds an office in the UN" within reg 10(1) of the Regulations,

as referring to a person who holds a position within the UN which the UN itself has established and designated as an office.