[2015] AATA 456

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| Division | **TAXATION APPEALS DIVISION** |
| File Number(s) | 2013/6832, 2013/6833 |
| Re | Kamal Jayasinghe |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **The Hon. Brian Tamberlin QC, Deputy President** |
| Date | **29 June 2015** |
| Place | **Sydney** |

The decision under review is set aside and there is substituted a decision that the foreign source income of the Applicant for the tax years ending 30 June 2010 and 30 June 2011 is exempt under the Act and Regulations.

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**The Hon. Brian Tamberlin QC, Deputy President**

# Catchwords

TAXATION – income tax – whether foreign income exempt – whether Applicant engaged by the UNOPS as an employee – whether Applicant held an office while engaged with UNOPS – decision under review set aside

# Legislation

International Organisations (Privileges and Immunities) Act 1963 s 6(1)(d)

Taxation Administration Act 1953, s 14ZZK

United Nations (Privileges and Immunities) Regulations 1986, regulations 3, 10

# Cases

Commissioner of Taxation v Macoun [2014] FCAFC 162

Commissioner of Taxation v White (1985) 7 FCR 566

Edwards v Clinch (1982) AC 845

Grealy v Commissioner of Taxation [1989] FCA 28

Great Western Railway Co. v Bater (1920) 3 KB 266

Hollis v Vabu Pty Ltd [2001] HCA 44

Radaich v Smith (1959) 101 CLR 209

Roy Morgan Research Pty Ltd v Commissioner of Taxation (2010) 184 FCR 448

Case P44 (1982) 82 ATC 210

# Secondary Materials

Convention on the Privileges and Immunities of the United Nations 1949, ss 17, 18

Charter of the United Nations 1945, Articles 97, 101

Macquarie Dictionary

Taxation Determination. TD 92/153

# REASONS FOR DECISION

**The Hon. Brian Tamberlin QC, Deputy President**

**29 June 2015**

1. This is an application for the review of an objection decision of the Respondent refusing the Applicant’s objection to Notices of Amended Assessment for the income years ended 30 June 2010 and 30 June 2011.
2. The decision was that the Applicant’s foreign source income earned in these years was not exempt from income tax.
3. The question for consideration is whether the Applicant is exempt from tax in the above years under the *International Organisations (Privileges and Immunities) Act 1963* (the Act).
4. Section 6(1)(d) of the Act relevantly provides:

(1) Subject to this section, the **regulations** may, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

(d) confer:

(i) upon a **person who holds an office in an international organisation** to which this Act applies or any of the privileges and immunities specified in Part I of the Fourth Schedule…” (emphasis added)

1. Part I of the Fourth Schedule referred to in the above section concerns the privileges and immunities of officers of international organisations. Clause 2 of the Schedule provides for exemption from taxation on salaries and emoluments received from the organisation.
2. The Applicant contends that the foreign source income payments he received in the relevant years are exempt from taxation as being salaries or emolument received by him as the “holder of an office” in an international organisation.
3. The Respondent’s case is that the exemption does not apply because in respect of the foreign source income, as the Applicant was not a person who held *an office* in an international organisation during the relevant period.
4. The issue therefore is whether the Applicant can prove that the income was a salary or emolument earned by him as the “holder of an office” in a relevant international organisation. Pursuant to s 14ZZK of the *Taxation Administration Act 1953*, the Applicant bears the onus of proving that the decision under review should have been made differently.

# Background

1. The Applicant was a resident of Australia in the relevant years and is a qualified civil engineer. For parts of the relevant years, he was engaged by the United Nations Office for Project Services (UNOPS) to perform work in Sudan as a Project Manager.
2. UNOPS is an operational arm of the United Nations that provides project management, procurement and infrastructure services to governments and international organisations.
3. The Applicant worked in Southern Sudan, from 2009 to 9 July 2011, while it was a special territory of the Republic of Sudan. It is an underdeveloped country and one in which during the period there were major problems in respect to security, health and general underdevelopment. It could properly be described as a “hardship posting”.
4. The Applicant served two relevant periods, namely; from approximately 13 October 2009 until 31 December 2010, which was the first period of 14 months, and again from 28June 2011 until 31 December 2011 which was the second period of about 5 months. Of the second period only 3 days, 28 to 30 June 2011, are within the two income years in question.
5. During the first period, the applicant was engaged under what was entitled an “Individual Contractor Agreement” which operated 13 October 2009 to 12 October 2010. This contract was extended to cover the period to 10 January 2011.
6. The Applicant initially left Australia to travel to Sudan in September 2009 and returned to work for the Roads and Traffic Authority (NSW) from January 2011 to May 2011 and he again left Australia on 2 June 2011.
7. In respect of the second period, the Applicant was employed under a similar Individual Contractor Agreement.

# legal context

1. The Act and its corresponding regulations, *United Nations (Privileges and Immunities) Regulations 1968* (the Regulations) incorporates as part of Australian domestic law the international law obligations assumed by Australia under international conventions including the *Convention on the Privileges and Immunities of the United Nations 1949* (the Convention).
2. The previously mentioned Fourth Schedule is given operative effect in relation to the Applicant by force of regulation 10 of the Regulations.
3. The Act applies to international organisations that are declared by the regulations to be one to which the Act applies. Regulation 3 names the United Nations as an International Organisation to which the Act applies. Accordingly, as an operational arm of the United Nations the Act also applies to UNOPS.
4. The Act and Regulations confer privileges and immunities only if the person “holds an office in the United Nations” at the relevant time, pursuant to s 6(1)(d) of the Act.
5. The expression “office” or the phrase “holds an office” is not defined in any relevant legislation. However, the settled law is that the construction of the Act (which is Australian domestic legislation) is to be interpreted consistently with Australia’s international law obligations: See *Commissioner of Taxation v Macoun* [2014] FCAFC 162 at [48]. This is because the Act and Regulations made under the Act are directed to implementation of the Convention.
6. Article V of the *Convention* in Section 17 provides that the Secretary-General will specify categories of “officials” to which the exemption applies and must submit those categories to the General Assembly, and the names of officials must then be made known to Government of all Members. Section 18 which is also part of Article V provide that “officials” of the United Nations are exempt from taxation on salaries and emoluments paid to them by the United Nations.
7. Article IV confers other privileges and immunities on ‘representatives’ of members.
8. The Respondent submits on the basis of these Articles, that there is a distinction drawn between “officials” and “representatives” of the United Nations and notes the specific requirements in relation to the categorisation of officials and the communication of identities of officials to government members.
9. The expression “representatives” is defined in s 16 to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.
10. The Respondent says that for the *Convention* and the *Act* to operate consistently, the expression “holds an office” in the Australian legislation must be construed as referring to requires that a person must be is specified by the Secretary-General to be an official for the purposes of the *Convention* and the *United Nations Charter*.
11. The 1945 *Charter of the United Nations* in Article 97 provides that the Secretariat of the UN shall comprise a Secretary-General and such ‘staff’ as the Organisation may require. In Article 101, the staff of the United Nations are to be appointed by the Secretary-General under regulations established by the General Assembly and they form part of the Secretariat of the United Nations.

# the agreements

1. The contractual documents in relation to the engagement of the Applicant are two Agreements signed by the Applicant on taking up his engagement must be taken into consideration. These agreements are referred to as “Individual Contractor Agreements” (ICAs), they cover specified periods and provide that they shall expire without prior notice on satisfactory completion of the services. The Applicant is described as an ‘individual contractor’ engaged to provide special services to the duty station at Juba, Sudan, with the Functional Title of Project Manager. The project was the construction of a specific roadwork project. The Applicant was to be paid an amount of approximately $14,500 USD per month as consideration for the services performed on the condition that the services were successfully performed. The Applicant received no other remuneration, but was entitled to a daily subsistence allowance. He was eligible for annual leave but not paternity leave or overtime. He was not eligible for payment for illness under the contract but the Applicant gave sworn evidence, which I accept, that he was in fact at times paid while he was sick. He was not required to work on weekends or on UN holidays. He was covered under a group insurance policy in the event of “service incurred illness injury or death”, and under a Malicious Acts insurance policy, but was otherwise responsible for obtaining adequate health insurance for the entire duration of his service.
2. The ICAs incorporated the “General Terms and Conditions of Individual Contractor Agreements” as set out in Annexure A to the ICA and also incorporated on the Terms of Reference in Annexure B and the “ICA Policy”.
3. Under the incorporated conditions in Annexure A, is a provision concerning the legal status of an individual contractor, which states that an individual contractor shall have the legal status of an “independent contractor” in relation to UNOPS. They shall not be regarded for any purposes, as being either a “staff member” or an “official” of the United Nations under the Staff Regulations of UNOPS for the purposes of the Convention. In relation to taxation, Annexure A which forms part of the ICAs provides that the individual contractor is responsible for paying any tax levied by his or her government their earnings from UNOPS, and UNOPS is not to be liable in any way to reimburse any such taxes.
4. The ICAs were subject to termination on notice at any time for cause or convenience, on giving the other party a notice in writing of intention to do so.
5. The Respondent referred to provisions of the *ICA Policy* incorporated into the agreements which include provisions to the effect that the ICA is distinct from a “staff letter of appointment” and is not governed by national legislation in the countries where UNOPS operates. It provides that the individual contractors will have the legal status of an individual contractor and not be regarded, for any purpose, as a staff member or as an officer.
6. The Respondent relies on these documents to support the proposition that the contractual documents, policies and terms of conditions of the United Nations make it clear that the Applicant was not considered by UNOPS or the UN to be an employee or official of the UN.

# consideration and reasoning

1. Since the term “holds an office” is not relevantly defined, it is necessary to consider the ordinary English meaning and the relevant case law.
2. In the Macquarie dictionary, the expression “hold office” is defined as “to be incumbent in a particular *positon* or *role*”. (Emphasis added). In the present case the Applicant occupied a “position”, namely that of Project Manager.
3. The expression “holds office” was considered in *Commissioner of Taxation v White* (1985) 7 FCR 566, Lockhart J with whom the other members of the full court agreed, considered that the term “office” was used in the sense of a positon with some degree of *permanence* and *continuity*, and accepted the proposition of Rowlatt J in *Great Western Railway Co. v Bater* (1920) 3 KB 266 who said that an “office” was something:

… which was a subsisting, permanent, substantive positon, which had an existence independent of the person who filled it, and which went on and could be filled in succession by successive holders.

1. The authorities indicate that the meaning of the expression “office” in any particular case will depend on the context. Lord Wilberforce, in *Edwards v Clinch* (1982) AC 845, accepted that the word “office” is a word of ordinary English meaning which has acquired a signification covered over the years by legal construction in a technical context.
2. In *Grealy v Commissioner of Taxation* [1989] FCA 28, the Full Federal Court, with reference to *Great Western Railway Co. v Bater* (1920) 3 KB 266 noted that theterm “office” has been said to have indicated a position of defined authority in an organisation such as director of a company or tertiary education body or president or a person with statutory power but that it was not limited to such positions. The Court did not consider for example that a lecturer at a tertiary institution working on a short-fixed term schedule would properly be described as holding an office.
3. In deciding whether the Applicant held an office at the relevant times, it is important to look at the substance of the duties, tasks and functions which was he was engaged to perform and the way in which those tasks were supervised and implemented in practice.
4. The Terms of Reference incorporated in the ICAs in relation to the Applicant give him the title of Project Manager. This is described as a “functional title”. These Terms are important because they spell out the functions, duties and obligations of the Applicant. He was stationed in Sudan in the management section or unit where the Supervisor was the Head of the Programme**.** In this case the head was Mr McMurdo. The purpose and scope of the assignment require the Project Manager to work under the *direct supervision* of the Head of Programme. The Project Manager was responsible for establishing and maintaining effective project structures and processes for delivery of the project and its implementation plan, and managing the time and contributions of experts in the project, together with planning, technical and managerial functions, monitoring, supervision, assessment, review and liaison with community leadership and sister agencies. He was also charged with organising workshop training, writing, training and technology transfer to national staff and regularly reporting and monitoring.
5. The “Final Product” of the project was the completion of the road in accordance with the UNOPS procedures on time and under budget. There were qualification requirements for appointment to take up the position as to education, work experience and key competencies including management experience, strategic planning experience and the ability to carry out networking, team building and skilled communication.
6. The Terms of Reference estimated the duration of the Project to be from 13 October 2009 through to 12 October 2010. In fact it was carried out over a longer period.
7. When the Applicant was first approached to work on the project, Mr McMurdo, in an email to the Applicant of 21 September 2009, specified the overall project as the building of a 190 kilometre gravel road with two contractors. There were to be two 85 kilometre packages together with the construction of three buildings which were then estimated to be finished by June 2010 followed by a close-out period with a budget of approximately $38 million.
8. The email referred to a previous Project Manager having left the project at the end of July 2009 and the need for a new Project Manager.
9. This evidence indicates that the position of Project Manager for the Project was for a substantial period, which took many months. The evidence also indicates that after the Applicant left the positon of Project Manager, another person was appointed to act in the position. The position was to this extent independent of the identity of the individual incumbent. It existed before his service and continued after his service.
10. The Terms of Reference show that the duties to be performed as set out in the attachment to the position involved far more than “expertise” or “specialist consultation” and advice because they included extensive practical administration, management and negotiation and supervision over a substantial period of time. It is therefore not correct to characterise the engagement was only being that as an “expert” or “consultant”.
11. In addition, there is in evidence a UN Identification Card issued by UNOPS with a photo of the Applicant issued on 18 October 2009 and expiring 10 October 2010 describing him as “Project Manager”, and on which there is a notation in both English and Arabic which reads:

“The **United Nations** in Sudan **requests** **all those whom it may** concern **to extend to** the **bearer** the courtesies, facilities, **privileges and immunities** which **pertain to his/her office,** and to facilitate, by all suitable means the journeys and missions on which he (or she) is engaged. If found, please return to the UN Security Office…” (Emphasis added)

1. The Applicant in his Affidavit gives evidence that he was issued a UN Identity Card in respect of similar work carried out later in Afghanistan in relation to his work there, as Project Manager. He says the nature of his work had not changed and that he continued to be engaged by UNOPS as Level 3 ICA. The later UN Identity Card, refers to his “status”, with a similar endorsement to the earlier one. It also designates him as a “UN STAFF” and holds him out as a representative of UNOPS when carrying out his duties of liaising with government ministers and donor agencies for the purposes of his UN work. The Applicant also referred to the UN identity card of another holder which, in contrast to the card issued to him refers to the holder as a “National Contractor” as opposed to “UN staff”. These documents reinforce the conclusion that the Applicant was held out or represented by UNOPS as the holder of an office and an emanation of UNOPS.

# CASE LAW

1. The Applicant refers to a line of cases to the effect that parties to a contract cannot deem a relationship between themselves to be something that, objectively and properly determined according to law, is a different relationship. For example if the underlying reality of the relationship having regard to the duties and implementation of the arrangement is one of employment, the parties cannot alter that character by having the contract state that the worker’s status is that of an independent contractor and that the person’s position is not that of an employee: See *Hollis v Vabu Pty Ltd* [2001] HCA 44 at [58]; *Radaich v Smith* (1959) 101 CLR 209. The legal character of a relationship must be determined by the rights and obligations which the contract creates and not by the label that the parties put on it. It is the substance of the relationship that is critical. See *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448 at 37-39*.*
2. The Applicant submits that notwithstanding the statements in the contractual arrangements and the United Nations Policy, if one looks at the substance of the relationship between the Applicant and UNOPS in the documentation and in practice with the duties and obligations and the holding out of the Applicant, the appropriate characterisation of his role is that the position of Project Manager occupied by the Applicant in the relevant years was an “office” held by him. There is over a significant period of time, the necessary degree of permanence in the office in so far as it has been occupied by several persons. It is an identifiable position with specific duties and obligations attaching to it independent of the incumbent holder, and it is not merely a “functional title” or description. The Applicant served in that office as Project Manager during a total period of approximately 19 months during two separate periods.
3. The Identity card granted to him by UNOPS identifies him as an officer of the United Nations for the purposes of the performance of the works attaching to the position. His duties of negotiating and dealing with governmental and other bodies in his role identify him as a UNOPS officer with a close association with that body and not simply as independent operator.
4. A correct analysis of the Terms of Reference and the duties created by the contract and the way they are performed, it indicates that the Applicant is subject to supervision in the way in which he performs his tasks and, that he must make regular satisfactory reports in relation to progress of the project. He was paid not by way of a lump sum but by way of regular instalments analogous to payment of salary and was granted leave on a specific basis. He was also covered by UNOPS insurance policies in respect to his work on the project. These are not the hallmarks of an independent contractor as contended by the Respondent.
5. Having regard to the substance of the relationship and the obligations created and implemented in carrying out the Project I conclude that the Applicant, during the relevant periods, was the holder of an “office” under UNOPS within the meaning of the Act.

# taxation determination 92/153

1. This ruling is in the following terms:

The Department of Foreign Affairs and Trade, who administer the Act and regulations, take the view that the phrase ‘**person who holds an office’ in relation to a prescribed international organisation covers those people who work as employees** for that organisation. **They do not accept**, however, that the phrase includes either:

* Persons who are locally engaged by the organisation and paid at an hourly rate; or
* Persons engaged by the organisation as experts or consultants.

**We agree** with those views. (Emphasis added)

1. In my view the Applicant was a person who worked *as* an employee. That is to say in the same way “as an employee” of the organisation. He was not engaged as an expert or consultant. He therefore comes within the ruling. My reasons for this conclusion are as follows.
2. The Respondent, relying on the exception, says that ruling does assist to the Applicant because he was not an employee of UNOPS and was engaged as an expert.
3. The fact that the Applicant was required to have professional qualifications and experience to occupy the positon of project manager for the construction of the road does not mean that he was engaged in his capacity only *as* an expert or consultant with a university degree or some years of experience.
4. In my view, the exception does not apply because although there were certain qualifications and experience required for the position of Project Manager it is clear that the rights and obligations attaching to performance of the duties of the position involved far more than engagement as an expert or consultant. The role of Project Manager includes managerial, administrative, negotiation, supervision and numerous other activities. I conclude that the role “expert or consultant” in the present task is to a role involving a duty to advise or give opinions from time to time as to the implementation, design or progress of the work.
5. The use of the term “*as*” within the Taxation Determination indicates that the engagement as an expert or consultant, which is the subject of the exception would not include is not one which extends beyond the role of specialist advisor and the far-ranging management duties of project manager as set out particularly in the Terms of Reference document.
6. Strong indicia of the Applicant’s “employment” relationship are that he did not use his own equipment property or plant in the work on the project. He was not in any sense carrying on his own independent business. He did not employ or pay his own staff or workers to carry out the project. He was subject to direct supervision. He did not have any independent goodwill. He was engaged *as* an individual and not as a business enterprise. He was engaged to carry out work. He did not engage in other work whilst in Sudan. See: *Roy Morgan Research Pty Ltd v Commissioner of Taxation (2010) 184 FCR 448*
7. For the reasons given above, and also here in relation to my conclusion as to the term “office”, I am satisfied, in addition, that the relationship between the Applicant and UNOPS at relevant times constituted a relationship of employer-employee having regard to the rights and obligations of the Applicant, and that he “worked as an employee”. Therefore, being an “employee” and not a person engaged by UNOPS as an expert or consultant, the Applicant is entitled to the benefit of the Taxation Determination.

# Case P44

1. The Respondent relies on a decision of the Taxation Board of Review in *Case P44* (1982) 82 ATC 210 which concerned a “scientist of high repute” who carried out some work with UNESCO who claimed that his salary was exempt as being salary of an official of a prescribed organisation. The claim was disallowed and disallowance was upheld by the Board of Review.
2. That case is not relevant to the present circumstances. It was decided on different facts 33 years ago. It involved a scientist expressly engaged as a “consultant” with limited duties quite different from those of the Applicant in this case. He was appointed for only two months which would certainly not satisfy the “permanency” criterion of office. The Board did not consider in that case that anything turned on the terms of engagement or his remuneration. Perhaps not surprisingly, the Board found that he was not an “office holder”. Moreover, the Taxation Determination referred to above was not in force in 1982.
3. The Board considered that the status of the taxpayer on his two month trip was that of an “expert” performing a mission for a specialised agency. The Board also considered the taxpayer had to show that he had been nominated as an official and that his name was communicated to the United Nations General Assembly. There was an opinion from a “legal expert” from the Department of Foreign Affairs and conceivable reliance was placed on those views. There was no analysis or outline of the precise duties of the expert on his “trip”. This decision is not in any way applicable in the present circumstances of this case.

# CONCLUSION

1. For the reasons given above, the Applicant whilst acting as Project Manager in Sudan in the relevant period was the “holder of an office” in an international organisation within the meaning of the Act and the Regulations. In addition he was a person who worked as an employee that comes within the meaning of Taxation Determination TD 92/153.

# DECISION

1. The decision under review is set aside and there is substituted a decision that the foreign source income of the Applicant for the tax years ending 30 June 2010 and 30 June 2011 is exempt under the Act and Regulations.

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| I certify that the preceding 65 (sixty -five) paragraphs are a true copy of the reasons for the decision herein of The Hon. Brian Tamberlin QC, Deputy President |

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Dated

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| Date(s) of hearing | **26 March 2015, 28-29 April 2015** |
| Date final submissions received | **11 June 2015** |
| Counsel for the Applicant | **Ms L McBride** |
| Counsel for the Respondent | **Ms T Phillips** |
| Solicitors for the Respondent | **Australian Government Solicitor** |