Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Burns and Commissioner of Taxation (Taxation) [2020] AATA 671 (25 March 2020)

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2017/1647, 2017/1648, 2017/1649, 2017/1663**

Re: **Peter Burns**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **The Honourable Justice J A Logan RFD, Deputy President**

Date: **25 March 2020**

Place: **Brisbane**

The Tribunal decides:

1. The respondent's objection decision of 16 March 2017 be set aside.
2. In lieu thereof, the applicant's objection be allowed on the basis that:
   (a) each of the payments of invalidity pension under the *Military Superannuation and Benefits Act 1991* (Cth) (**MSB Act**), received by him in the 2014, 2015 and 2016 income years was a "superannuation benefit", a "superannuation lump sum" and a "disability superannuation benefit" and was required to be treated in accordance with s 307-145 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**);
   (b) the respondent's private ruling in respect of the 2017 income year was incorrect and should have been that each of the payments of invalidity pension under the MSB Act, received or to be received by Mr. Burns in that income year was, or will be, a "superannuation benefit", a "superannuation

lump sum" and a "disability superannuation benefit" and is required to be treated in accordance with s 307-145 of the ITAA97.

3. The matter be remitted to the respondent for implementation of the Tribunal's decision, once it becomes final, in accordance with s 14ZZL of the *Taxation Administration Act 1953* (Cth).

.....[SGD].....

The Honourable Justice J A Logan RFD, Deputy President

CATCHWORDS

TAXATION – INCOME TAX *– where applicant was medically discharged from the Army – where applicant was classified under the Military Benefits and Superannuation Act 1991 (Cth) (**MSB Act**) as having a Class A invalidity – whether the invalidity pension payments under the MSB Act for the income years ended 30 June 2014, 2015, 2016 and 2017 (**relevant income years**) should be treated in the manner prescribed in s 307-145(1) of the Income Tax Assessment Act 1997 (Cth) (**ITAA97**) – where the Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth) (**amending regulations**) were made during the course of the review proceedings – where at the times of assessment and when the applicant exercised statutory rights of objection against the assessments and private ruling, at the time when the objection decision was made, at the time when the right of review was exercised in respect of that objection decision and the private ruling there was no specification in the Income Tax Assessment Regulations 1997 (Cth) of any "superannuation benefit" for the purposes of s 307-70(1) of the ITAA97 – whether s 7 of the Acts Interpretation Act 1901 (Cth) and s 12 of the Legislation Act 2003 (Cth) apply so as to require review to be conducted unaffected by the amending regulations*

LEGISLATION

Acts Interpretation Act 1901 (Cth) ss 7, 15AB, 19A

Administrative Appeals Tribunal Act 1975 (Cth) ss 25, 43

Defence Force Retirement and Death Benefits Act 1973 (Cth)

Income Tax Assessment Act 1997 (Cth) ss 55-5, 307-65, 307-70, 307-145

Legislation Act 2003 (Cth) s 12

Military Superannuation and Benefits Act 1991 (Cth) ss 6, 9, 10, 15

Superannuation Industry (Supervision) Act 1993 (Cth) s 10

Taxation Administration Act 1953 (Cth) ss 14ZZ, 14ZZK, 14ZZL, 357-60, 359-5

Veterans' Entitlements Act 1986 (Cth) s 120A

Income Tax Assessment Regulations 1997 (Cth) reg 995-1.01

Superannuation Industry (Supervision) Regulations 1994 (Cth) reg 1.06

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth)

CASES

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981)147 CLR 297

Douglas v Commissioner of Taxation [2020] AATA 494

Esber v Commonwealth of Australia (1992) 174 CLR 108

IOOF Holdings Limited v Federal Commissioner of Taxation (2014) 224 FCR 535

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Repatriation Commission v Keeley (2000) 98 FCR 108

Skidmore v. Swift & Co., 323 U.S. 134 (1944)

Shell Company of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530

Interpreting Executive Power, J Boughey and L Crawford, Editors, The Federation Press 2020

REASONS FOR DECISION

The Honourable Justice J A Logan RFD, Deputy President

25 March 2020

Things are not always what they seem; the first appearance deceives many; the intelligence of a few perceives what has been carefully hidden[1]

1. Mr Burns is an ex-serviceman. He is also a recipient of invalidity benefits, including an invalidity pension, pursuant to the *Military Superannuation and Benefits Act 1991* (Cth) (**MSB Act**).

2. The circumstances of Mr Burns' military service and of his entitlement from time to time to benefits under the MSB Act are not controversial in these review proceedings. What is controversial is the interplay between his receipt of his invalidity pension under the MSB Act and income tax law.

3. The review proceedings were heard in conjunction with others that, collectively, constitute test cases concerning the interplay between income tax law and the legislative provision made by Parliament from time to time for the payment of retirement, death and invalidity benefits to former members of the Australian Defence Force (**ADF**) or their dependents. I have already decided one such review. That concerned benefits paid under a different example of such legislative provision, the *Defence Force Retirement and Death Benefits*

[1] Phaedrus, Roman fabulist, 1st Century, AD, *The Fables of Phaedrus*, Book IV, Fable II, The Weasel and The Mice.

Act 1973 (Cth) (**DFRDB Act**): *Douglas v Commissioner of Taxation* [2020] AATA 494 (***Douglas***).

4. While I adhere to the conclusions that I reached in *Douglas* as to the meaning and effect of the legislation and regulations discussed in that case, there are a number of reasons why the outcome in *Douglas* does not necessarily dictate the outcome in the present review. The DFRDB Act and the MSB Act are applicable to different cohorts of members and former members of the ADF. The legislative schemes in each of these Acts, while having certain similarities, are by no means identical. Further, Mr Burns' individual circumstances differ from those of Mr Douglas.

5. The subject of the present review is an objection decision made by the Commissioner on 16 March 2017 in respect of an objection by Mr Burns against the Commissioner's assessments of his income tax for the years ended 30 June 2014 to 30 June 2016 and a private ruling dated 25 October 2016 in respect of the year ended 30 June 2017.

6. The overarching issue in the present review proceedings, insofar as they entail assessments, is whether Mr Burns has proved the assessments to be excessive: s 14ZZK(b)(i), *Taxation Administration Act 1953* (Cth) (**TAA**). Insofar as they concern the private ruling, the overarching issue is whether Mr Burns has proved that the private ruling should not have been made or should have been made differently: s 14ZZK(b)(ii), TAA. More particularly, in each instance, having regard to his grounds of objection and the position of the parties as to what, consequentially, was controversial between them in matters of law and fact, the following questions must be answered:

   (a) Is Mr Burns' invalidity pension under the MSB Act a "superannuation income stream" such that each payment of that pension is a "superannuation income stream benefit" pursuant to s 307-70 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**) (and, if not, is it a superannuation lump sum pursuant to s 307-65 of the ITAA97)?

(b) What is the effect, if any, of the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth) (**the 2018 Amendment Regulations**) on the present review proceedings?

7. These questions assume, and Mr Burns made no submission to the contrary, that the assessments and the private ruling are otherwise correct. As with a payment under the DFRDB Act, s 55-5(1) of the ITAA97 assumes that a payment under the MSB Act is not exempt income. I outlined in *Douglas* how a payment of invalidity pay under the DFRDB Act might form part of assessable income. That outline is applicable by analogy to a payment of an invalidity pension under the MSB Act. In the absence of controversy between the parties, I do not explore that subject further. Instead, I assume that the assessments and the private ruling are otherwise correct.

8. As to the assessment-based aspect of the proceedings, having regard to the material before the Tribunal and the absence of underlying factual controversy evident from the submissions, I make the following findings of fact, based on the material before the Tribunal. These findings draw upon a summary of that material offered in Mr Burns' submissions. There is no material difference between the facts so related and the basis upon which the Commissioner was asked to make his private ruling.

9. The arm of the ADF in which Mr Burns served was the Australian Army. He enlisted in the Army at age 16 on 12 January 1988. He was trained as a diesel mechanic and allotted to the Royal Australian Corps of Electrical and Mechanical Engineers (**RAEME**). While serving with RAEME, Mr Burns had the misfortune to injure his back. A sequel to this injury was that he was discharged from the Army on medical grounds on 12 December 1994. He was then 23 years of age.

10. In its terminology, the MSB Act mimics the law of trusts. Thus, it provides, by s 4, for a "Trust Deed" (**MSB Deed**) in the form specified in the schedule to that Act. Under the MSB Deed, the administration of a **fund** (termed, "Military Superannuation and Benefits Fund No. 1" – cl. 2, MSB Deed refers) is consigned to a Board (and since 2011 to the Commonwealth Superannuation Corporation – **CSC** – s 18 refers), with provision made for the payment of benefits to members. Those who are members are specified in s 6 of

the MSB Act. At all material times, Mr Burns was a member for the purposes of the MSB Act and the MSB Deed.

11. More detailed provision for the administration of the fund and in relation to benefits and eligibility for benefits is made by Rules (**MSB Rules**) set out in the schedule to the MSB Deed.

12. The MSB Act provides for the making of contributions to the fund both by members (s 9) and "the Department" (s 10). The latter is a reference to the Department administered by the Minister responsible for the administration of that section: see s 19A, *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**). Payment of benefits is regulated by the MSB Act (Part 5), the MSB Deed and the MSB Rules. Though payments to members are made from the fund, s 15 of the MSB Act provides for payment from or to the Consolidated Revenue Fund (**Consolidated Revenue**) of the Commonwealth to or, as the case may be, by the CSC on the reclassification of an invalidity pensioner.

13. The MSB Act therefore differs from the DFRDB Act in that benefits under the MSB Act are not directly paid from funds appropriated from Consolidated Revenue. Instead, benefits are paid from the fund established under the MSB Deed. Payments to the fund are sourced from a combination of member contributions and contributions by the Commonwealth, appropriated from Consolidated Revenue. Materially, the contributions to the fund from Consolidated Revenue are twofold - those made by "the Department" as "employer" and those made under s 15 of the MSB Act.

14. In relation to members, two broad categories of alternative benefits are prescribed in Part 3 of the MSB Rules – retirement benefits (Division 1 of Part 3) and invalidity benefits (Division 2 of Part 3). In relation to invalidity benefits, Rule 26 of the MSB Rules provides that, "A person who is classified as Class A or Class B under rule 22 (whether on his or her retirement or by reason of his or her having been reclassified under rule 23) is entitled to invalidity benefits in accordance with this Division".

15. For those classified as having either a Class A or a Class B invalidity, invalidity benefits include but are not limited to an entitlement to be paid a pension. No pension entitlement

attends a person classified as having a Class C invalidity. The relevant Rules within the MSB Rules are Rules 27, 28, 29 and 31, which provide:

> ***Invalidity benefits for person classified as Class A***
>
> ***27.(1)*** *Where a person who is entitled to invalidity benefits is classified as Class A:*
>
> *(a) his or her member benefit is payable to him or her as a lump sum; and*
>
> *(b) his or her employer benefit is converted into a pension payable to him or her.*
>
> ***(2)*** *A person who is entitled to be paid a member benefit under subrule (1) may elect that, instead of that benefit being paid to him or her, there be applicable to him or her a preserved benefit of the amount of the benefit and if he or she so elects:*
>
> *(a) the member benefit is not payable to him or her as a lump sum; and*
>
> *(b) there is applicable to him or her a preserved benefit of that amount.*
>
> ***Invalidity benefits for person classified as Class B***
>
> ***28.(1)*** *Where a person who is entitled to invalidity benefits is classified as Class B:*
>
> *(a) his or her member benefit is payable to him or her as a lump sum; and*
>
> *(b) a pension is payable to him or her at an annual rate equal to:*
>
> *(i) half the rate of the pension which would have been payable to him or her if he or she had been classified as Class A; or*
>
> *(ii) the rate of the pension which would have been payable to him or her if he or she:*
>
> *(A) had been retired otherwise than on the ground of invalidity; and*
>
> *(B) were entitled to elect to convert his or her employer benefit into a pension and had elected to do so;*

whichever is the greater.

(2) *A person who is entitled to be paid a member benefit under subrule (1) may elect that, instead of that benefit being paid to him or her, there be applicable to him or her a preserved benefit of the amount of the benefit and if he or she so elects:*

(a) the member benefit is not payable to him or her as a lump sum; and

(b) there is applicable to him or her a preserved benefit of that amount.

Effect of change of invalidity classification on pension and preserved benefit

29.(1) *Where a person who is classified as Class A or Class B is reclassified as Class C:*

(a) the pension payable to him or her under rule 27 or 28 is cancelled; and

(b) there is applicable to him or her a preserved benefit of the amount of his or her employer benefit.

(2) *If a person referred to in subrule (1) is subsequently reclassified as Class A or Class B:*

(a) the preserved benefit referred to in that subrule ceases to be applicable to him or her; and

(b) a pension is payable to him or her in accordance with rule 27 or 28, as the case may be, from the date specified under rule 23 by CSC or the Committee, as the case may be, as the date from which the reclassification has effect.

…

Person classified as Class C

31. *A person who is classified as Class C is not entitled to invalidity benefits under this Division.*

16. A consequence of Mr Burns' being medically discharged from the Army was that the CSC (or its classification committee) was obliged by Rule 22 within Division 2 of Part 3 of the

MSB Rules to determine his percentage of incapacity in relation to civil employment in accordance with the percentage table set out in that rule. Initially, on 13 December 1994, he was classified as having a Class A invalidity.

17. Rule 23 of the MSB Rules provides for reclassification in respect of incapacity at any time. This provision is augmented by Rule 25 of the MSB Rules, which confers on the CSC a power to compel a person in receipt of an invalidity pension to medical examination. In turn, the examination notification power is augmented by a power granted to the CSC to suspend payment of an invalid pension if satisfied that there has been non-compliance without reasonable excuse with a notice to attend for medical examination: Rule 25(3) of the MSB Rules.

18. Since the initial classification determination, Mr. Burns has been the subject of a classification review nine times. Not all of these have resulted in his invalidity classification being changed. However, the reviews conducted from time to time have seen him re-classified as follows:

(a) from 5 July 1996, classified as Class B;

(b) from 13 December 2002, classified as Class C;

(c) from 14 October 2003, classified as Class B; and

(d) on 11 August 2008, classified as Class A.

A "superannuation income stream benefit" or a superannuation lump sum?

19. Mr Burns contends, and the Commissioner disputes, that his invalidity pension should be characterised as a "superannuation lump sum" for the purposes of the tax concession found in s 307-145 of the ITAA97. That section provides:

> **307-145 Modification for disability benefits**
>
> *(1) Work out the **tax free component** of the *superannuation benefit under subsection (2) if the benefit is a *superannuation lump sum and a *disability superannuation benefit.*

***Note**: This section does not apply to an unclaimed money payment.*

*(2) The **tax free component** is the sum of:*

*(a) the *tax free component of the benefit worked out apart from this section; and*

(b) the amount worked out under subsection (3).

However, the tax free component cannot exceed the amount of the benefit.

(3) Work out the amount by applying the following formula:

$$\text{Amount of Benefit} \times \frac{\text{Days to retirement}}{\text{Service days and days to retirement}}$$

where:

***days to retirement** is the number of days from the day on which the person stopped being capable of being *gainfully employed to his or her *last retirement day.*

***service days** is the number of days in the *service period for the lump sum.*

*(4) The balance of the *superannuation benefit is the **taxable component** of the benefit.*

20. As is apparent from s 307-145(1), to engage s 307-145 three cumulative, constituent elements, each entailing a defined term, must be satisfied. Expressed as questions and in the current factual context, those elements are whether, the invalidity pension payments received by Mr Burns in the income years ended 30 June 2014, 2015, 2016 and 2017 were:

(a) a "superannuation benefit";

(b) a "disability superannuation benefit"; and

(c) a "superannuation lump sum"?

21. If each of these questions is answered in the affirmative, Mr Burns will have established both that the assessments were excessive and that the private ruling application was erroneously answered. It is common ground that questions (a) and (b) should be answered in Mr Burns' favour.

22. As I explained in *Douglas*, where parties have reached a common position in relation to the application of the law to the facts and that position is at least arguably correct, the Tribunal should not, in my view, seek to create controversy where none exists. In relation to whether the payments were a "superannuation benefit" and a "disability superannuation benefit", as defined, I am quite satisfied, having regard to the submissions of the parties and the material before me, that their common position is, at the very least, arguably correct. I set out the pertinent provisions in *Douglas*. Further, in terms of the definition of "disability superannuation benefit", it is common ground that there are the requisite certifications from two legally qualified medical practitioners as to the unlikelihood of Mr Burns being able to work.

23. The differences between the DFRDB Act and the MSB Act in relation to the payment of what the DFRDB Act terms "invalidity pay" are not such as to render the reasoning in *Douglas* inapplicable by analogy both with respect to a "superannuation benefit" and a "disability superannuation benefit". I therefore do not further consider these two elements. Instead, I proceed on the basis that each of them is satisfied.

24. Intuitively, a lump sum and an "income stream" are different concepts. More particularly, while one might allow that whether the receipt of a given lump sum is income under ordinary concepts or a capital gain will depend on the circumstances attending its receipt, intuitively, a lump sum is a discrete payment whereas an "income stream" is a series of payments of an income character. Thus, uninformed by a statutory definition, it seems odd to regard periodic, invalidity pension instalments as a "lump sum" of any sort. That, however, is before one is required to venture into the interplay between the provision by Parliament, via the MSB Act, of various entitlements for particular members of the ADF who suffer injury or disease in the course of military service resulting in their medical discharge and income tax law.

25. To examine that interplay is to be provoked to recollect the observation attributed to the Roman fabulist, Phaedrus that prefixes these reasons and to lament that one is not one of the intelligent few with the gift of perception. The labours of the few with that gift have commended themselves to Parliament and left us of the many with the task of finding meaning in the results, however counterintuitive they might be.

26. In this case, the results are found in the first instance in the definition in s 307-65 of the ITAA97, which provides:

> ***307-65 Meaning of superannuation lump sum***
>
> *(1) A **superannuation lump sum** is a *superannuation benefit that is not a *superannuation income stream benefit (see section 307-70).*
>
> *(2) Treat a lump sum payment arising from a partial commutation of a *superannuation income stream as a **superannuation lump sum** for the purposes of this Act (other than Subdivision 295-F).*

27. Subsection 307-65(1) makes it clear that any "superannuation benefit" which is not a "superannuation income stream benefit", as defined by s 307-70, is a "superannuation lump sum". At first blush, this looks in keeping with the intuitive reaction mentioned. But that is to read s 307-65(1) of the ITAA97 in isolation. Venturing further into what is truly a definitional maze, one encounters the possibility, counterintuitive for one not blessed with the gift of perception, that, even if a particular superannuation benefit might otherwise never sensibly be characterised as a lump sum, nonetheless it will be a "superannuation lump sum" if it falls outside the definition of "superannuation income stream benefit". "Things are not always what they seem". That is the true nature of the definitional dichotomy created by s 307-65(1) of the ITAA97, when read in its wider statutory context.

28. The definition of "superannuation income stream benefit" in s 307-70 of the ITAA97 is as follows:

> ***307-70 Meaning of superannuation income stream and superannuation income stream benefit***

> (1) A ***superannuation income stream benefit*** is a *superannuation benefit specified in the regulations that is paid from a *superannuation income stream.
>
> (2) A ***superannuation income stream*** has the meaning given by the regulations.

29. The "regulations" to which reference is made in s 307-70(1) are the *Income Tax Assessment Regulations 1997* (Cth) (**ITAR**).

30. As with Mr Douglas, Mr Burns' primary submission was that, subject to any effect of the 2018 Amendment Regulations, there was no specification of an invalidity pension paid under the MSB Act in the ITAR in any of the 2014 to 2017 income years inclusive. The Commissioner made a like response to this submission to that which he had advanced in *Douglas*. I discuss the effect, if any, of the 2018 Amendment Regulations below.

31. For like reasons to those that I gave in *Douglas*, I conclude that there was no specification in the ITAR in respect of invalidity pension payments made under the MSB Act. There certainly was no such specification at the times when Mr Burns was assessed, when the private ruling was made, when Mr Burns lodged his objection (and when any related extension was granted by the Commissioner), when the Commissioner decided his objection or when he exercised the right of review of the objection decision conferred by s 14ZZ(1)(a)(i) of the TAA.

32. As to the absence of specification in the ITAR, there is no relevant distinction to be drawn between invalidity pay under the DFRDB Act and invalidity pension under the MSB Act. Contrary to the Commissioner's submission but taking up that of Mr Burns, I emphasise that there is no absurdity of the kind discussed in *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 present. The text of s 307-65 and in turn s 307-70, read in context, is clear, as is the purpose. Parliament has consigned to the Executive a power of specification by regulation. Whether and what superannuation benefits to specify is a matter left to the value judgment of the Executive. Unless, until and to the extent that there is specification, all that occurs is fulfilment of a textually expressed intention that a "superannuation benefit" is, by definition, a "superannuation lump sum".

33. Since delivering my reasons in *Douglas*, an illuminating discussion, "The Case for 'Deference' to (Some) Executive Interpretations of Law" by Dr Janina Boughey of the University of New South Wales Law School in the very recently published, "Interpreting Executive Power"[2] has come to my attention. Dr Boughey advances a case for the adoption of an approach to statutory construction by the judiciary that acknowledges and has regard to the view of the Executive. That type of "deference" is, as she notes, sometimes termed "epistemic" or, in the United States, "Skidmore"[3] deference.

34. Whatever place this type of deference may have in Australia, occasion to look to it would, necessarily, be predicated by the existence of a constructional choice. One does not start with any assumption that there is such a choice. Instead, primacy must be given to the text of the statute or regulation, read in context and having regard to the evident purpose: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] – [70]. That may or may not yield a constructional choice.

35. Here, adopting that approach, there is no constructional choice. Even if there were such a choice, there are considerations peculiar to the jurisdiction exercised by the Tribunal, which would mitigate against an uncritical adoption of any such "deference" in the resolution of any such choice. The nature of the jurisdiction exercised by the Tribunal on a review such as the present is to sit in place of the Commissioner in deciding the objection. This is apparent from s 25 and s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), as modified by Division 4 of Part IVC of the TAA and from s 14ZZ(1)(a) and s 14ZZK(b) of the TAA. The present provision in the TAA for Tribunal review exemplifies a model the constitutional propriety of which was affirmed by the Judicial Committee in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530. In undertaking a review, the Tribunal, like the Commissioner, exercises executive, not judicial, power. However, to defer to the views of the Commissioner in the event of a constructional choice would be antithetical to the very nature of the jurisdiction conferred on the Tribunal with its expectation of independence from the Commissioner and sitting in his place. The views of the Executive, as represented by the Minister of State responsible for the introduction of

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2 Interpreting Executive Power, J Boughey and L Crawford, Editors, The Federation Press 2020, Chapter 4.

3 Derived from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

the legislative or subordinate legislative provision in question, can, on questions of construction and via s 15AB of the Acts Interpretation Act, permissibly, be taken into account, insofar as these may be apparent from an explanatory memorandum or explanatory statement or a Ministerial Second Reading Speech. However, none of these is a substitute for the text of the legislation or subordinate legislation concerned.

36. As with *Douglas*, and subject to any effect of the 2018 Amendment Regulations, the absence of specification is reason enough to conclude that the invalidity pension payments were each, by definition, a "superannuation lump sum". On this basis, it would follow that those payments ought to have been treated in accordance with s 307-145 of the ITAA97. They were not so treated in the assessments. It would also therefore follow that each of the assessments was excessive and that the understanding that they were not to be so treated that informed the Commissioner's private ruling was incorrect.

37. Also as in *Douglas*, Mr Burns did not rest his grounds of objection solely on an absence of specification by regulation. His further or alternative submission proceeded from s 307-70(2) of the ITAA97 and thence to the definition of "superannuation income stream" in reg 995-1.01 of the ITAR.

38. So far as presently relevant, reg 995-1.01 of the ITAR defines "superannuation income stream" as follows:

> ***Superannuation income stream*** *means:*
>
> *(a) an income stream that is taken to be:*
>
> *(i) an annuity for the purpose of the SIS Act in accordance with subregulation 1.05(1) of the SIS Regulations; or*
>
> *(ii) a pension for the purposes of the SIS Act in accordance with subregulation 1.06(1) of the SIS Regulations; or*
>
> *(iii) a pension for the purposes of the RSA Act in accordance with regulation 1.07 of the RSA Regulations;*
>
> *(b) an income stream that:*

(i) *is an annuity or pension within the meaning of the SIS Act; and*

(ii) *commenced before 20 September 2007.*

39. The "**SIS Act**" referred to in this definition is the *Superannuation Industry (Supervision) Act 1993* (Cth). The "**SIS Regulations**" regulations referred to in paragraph (a)(ii) of the definition are the *Superannuation Industry (Supervision) Regulations 1994* (Cth).

40. "Income stream" is not itself a defined term. However, the parties are agreed that an "income stream" is a continuous series of payments. To this I would add that, by virtue of the adjectival qualification of "stream", the payments must nonetheless be in the nature of income. Instalments of capital would not be an "income stream". Neither party put in issue that the invalidity pension payments were otherwise than in the nature of income.

41. Insofar as guidance may be obtained from dictionaries, the meaning promoted by the parties is evident, as a matter of ordinary English usage, from the meaning given to the term "income stream" in the online edition of the Cambridge Dictionary, "a regular supply of money that comes from something such as an investment or business". Similar English usage is evident in the definition offered in the online edition of the Collins Dictionary, "a flow of money into a business". Dictionary meanings are not to be applied uncritically in the construction of a statute or regulation. However, reading the text of reg 995-1.01 of the ITAR in context, I regard the meaning promoted by the parties, subject to the qualification that I have mentioned, as entirely in conformity with a meaning one might give the term "income stream" as a matter of ordinary English usage and as evident in the dictionaries just mentioned. Necessarily therefore, it also accords with the intuitive understanding of the meaning of "income stream" to which I have earlier referred. I therefore adopt that meaning.

42. In submitting that the invalidity pension payments were not an "income stream", Mr Burns submitted that, "a stream presupposes an indefeasible right to the maintenance of the payments, that is, that the stream is not capable of being interrupted". He then instanced the provision in the MSB Rules for reclassification on review and, in particular, the potential, realised as it happened for a period with Mr Burns after reclassification, for entitlement to any invalidity pension either not to exist or, as the case may be, to cease if

originally classified or reclassified as having a Class C invalidity. Mr Burns submitted that it was the potentiality of cessation, not the actuality in a given case, which was relevant. That potentiality, he submitted, meant that the invalidity pension payments could not be characterised as an "income stream".

43. The Commissioner contended that an invalidity pension is an "income stream" in accordance with the ordinary meaning of that term. However, the focus of his submissions then moved from this to further and alternative contentions as to why an invalidity pension under the MSB Act and MSB Deed was a pension of one or the other of the kinds mentioned in that part of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR excerpted above.

44. I agree with the Commissioner's submission that, for the purposes of giving meaning to s 307-70 of the ITAA97 and, via that section, to the definition of "superannuation income stream" in reg 995-1.01 of the ITAR, one must look to the characteristics, including members' rights, of the superannuation scheme in question, as disclosed by its governing provisions. Only in the application of that section and definition does one then look to the experience of a particular member taxpayer. I understood, from his reference to "the nature of the payments … by reference to their statutory source", that Mr Burns was of a like view.

45. Adopting this approach, the effect of the MSB Rules is to create a scheme of member entitlements to distinct invalidity benefits, or none at all, dependent upon a particular classification or, as the case may be, reclassification decision. This is evident from Rules 26, 29 and 31 of the MSB Rules. A Class A invalidity pension is a one of the particular invalidity benefits for which Rule 27 provides, entitlement to which is dependent upon being classified as having, and retaining, a Class A invalidity. In turn, a Class B invalidity pension is one of the separate, particular invalidity benefits for which Rule 28 provides, entitlement to which is dependent upon being classified as having, and retaining, a Class B invalidity. However, Class A invalidity benefit entitlements and Class B invalidity benefit entitlements each have their origin in a distinct classification or reclassification decision made under Rule 22 or, as the case may be, Rule 23 of the MSB Rules. Before attaining 55 years of age (qv Rule 23(2)), no such classification decision gives rise to an

indefeasible entitlement to any invalidity benefit, including any invalidity pension. Instead, the effect of the MSB Rules is that entitlements already accrued and paid as a result of a classification decision are retained but reclassification may result in a cessation of their continuance.

46. In the context of s 307-70(1) of the ITAA97 and as I explained in *Douglas*, a "superannuation income stream" is a source of a payment, not the particular payment itself. Hence, "income stream" is used in the sense of a stream from which water (relevantly, each invalidity pension payment under particular consideration) is periodically drawn.

47. So understood, and on the view which I have taken of the effect of the MSB Rules, an "income stream" represented by a series of Class A invalidity pension payments commences upon being classified as having a Class A invalidity but that particular "income stream" ceases if the member is reclassified as either Class B or Class C. If reclassified as Class B, the Class A invalidity pension ceases and a fresh "income stream" represented by a series of Class B invalidity pension payments sourced in, and dating from, the fresh classification decision commences. If reclassified as Class C, the "income stream" ceases altogether. By parity of reasoning, if a member is originally classified as Class B but is reclassified as Class A, the "income stream" represented by the Class B invalidity pension and sourced in the original classification decision ceases and is wholly replaced by a distinct "income stream" represented by the Class A invalidity pension and sourced in the reclassification decision.

48. To the extent that one of the Commissioner's submissions proceeded upon the basis that there was but one entitlement under the MSB Rules, variable in nature and extent, it necessarily follows that I reject that submission. Equally though, I do not accept that indefeasibility of entitlement is a feature of the meaning of "income stream". It is not an explicit qualification in the term as read in context. Neither is it implicit in that term as a matter of ordinary English nor does context suggest otherwise. However, as I explained in *Douglas* and also discuss below, the prospect of cessation on review of a particular "income stream" does have other relevance.

49. In the context of the period covered by the present case, Mr Burns has had throughout an "income stream" represented by the Class A invalidity pension, one of his Class A invalidity benefit entitlements, which is sourced in the incapacity reclassification decision that he had a Class A invalidity on and from 11 August 2008. The series of invalidity pension payments that commenced then and continued throughout the 2014 to 2017 income years was an "income stream". The potential for that "income stream" to cease, to "dry up", upon reclassification and consequential cancellation (or for a different, Class B invalidity pension "income stream" to commence) does not, in my view, mean that an "income stream" was not created upon the making of the 11 August 2008 incapacity reclassification decision.

50. I do not, for these reasons, accept Mr Burns' submission that there is no "income stream" present in the circumstances of this case.

51. However, the existence of an "income stream" is but a means to a "superannuation income stream" definitional end, not an end in itself.

52. One consequence of my conclusion that Mr Burns' Class A invalidity pension constituted an "income stream" which commenced on the making of the reclassification decision on 11 August 2008 is that paragraph (b)(ii) of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR cannot be applicable. That is because the "income stream" represented by Mr Burns' Class A invalidity pension did not commence before 20 September 2007.

53. Because, flowing from the presence of the conjunctive, "and", the requirements of paragraph (b)(ii) of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR are cumulative, that means that, for this reason alone, this paragraph of the definition is inapplicable. Nonetheless, because the point was addressed in submissions, it is desirable also to consider whether the requirement in paragraph (b)(i), "an annuity or pension within the meaning of the SIS Act" is met.

54. By s 10, and subject to an exception not presently relevant, the SIS Act defines "pension" in an inclusory way and by reference to the SIS Regulations:

> ***pension*** *… includes a benefit provided by a fund, if the benefit is taken, under the [SIS Regulations], to be a pension for the purposes of this Act.*

55. Thus, aside from what one might regard as a "pension" as a matter of ordinary English, one must look to what is taken by the SIS Regulations to be a "pension" for the purposes of the SIS Act.

56. Much attention was devoted to these regulations, reg 1.06 in particular, by the Commissioner in submissions to the end of demonstrating that the invalidity pension received over the income years in question was taken to be a pension. This was doubtless because, unlike paragraph (b) of the definition of "superannuation income stream" in the ITAR, paragraph (a)(ii) of that definition is not subject to temporal qualification. As he had to, Mr Burns engaged with these submissions.

57. So far as paragraph (b)(i) of the definition is concerned, it is enough to consider the ordinary meaning of the word, "pension". I adhere to the view that I expressed in *Douglas* about the ordinary meaning of that word. Adopting that meaning, the series of periodic payments made from the fund to Mr Burns following his Class A invalidity classification are aptly described as a "pension" within the ordinary meaning of that word. Put another way, the description of them in the MSB Rules as an invalidity pension entails an entirely orthodox use of the word, "pension".

58. The SIS Regulations and materially, reg 1.06 provides:

> *(1) A benefit is taken to be a pension for the purposes of the Act if:*
>
> *(a) it is provided under rules of a superannuation fund that:*
>
> *(i) meet the standards of subregulation (9A)…*
>
> *(ii) do not permit the capital supporting the pension to be added to by way of contribution after the pension has commenced; and*
>
> *(b) in the case of rules to which paragraph (9A)(a) applies and that meet the standards of subregulation (9A) - the rules also meet the standards of regulation 1.07D; and*

(c) *in the case of rules to which paragraph (9A)(b) applies and that meet the standards of subregulation (9A) – the rules also meet the standards of regulation 1.07B.*

(2) Rules meet the standards of this subregulation if they ensure that:

(a) the pension is paid at least annually throughout the life of the primary beneficiary in accordance with paragraphs (b) and (c)…

…

(c) … [the amount payable is no less than the previous year's amount (except to the extent of a reduction in CPI)]…

(9A) Rules for the provision of a benefit (the pension) meet the standards of this subregulation if the rules ensure that the payment is made at least annually, and also ensure that:

(a) for a pension in relation to which there is an account balance attributable to the beneficiary -the total of payments in any year (excluding payments by way of commutation but including payments under a payment split) is at least the amount calculated under clause 1 of Schedule 7; and

(b) for a pension that is not described in paragraph (a):

(i) both of the following apply:

(A) the rules do not provide for a residual capital value, commutation value or withdrawal benefit greater than 100% of the purchase price of the pension;

(B) the total of payments in any year (including under a payment split but excluding amounts rolled over) is at least the amount calculated under clause 2 of Schedule 7; or

(ii) each of the following applies:

(A) the pension is payable throughout the life of the beneficiary

(B) no greater than the difference between the primary beneficiary's age on the commencement day and age 100;

(B) *there is no arrangement for an amount (or a percentage of the purchase price) prescribed by the rules to be returned to the recipient when the pension ends;*

(C) *the total of payments from the pension in the first year (including under a payment split but excluding amounts rolled over) is at least the amount calculated under clause 2 of Schedule 7;*

(D) *the total of payments from the pension in a subsequent year cannot vary from the total of payments in the previous year unless the variation is as a result of an indexation arrangement or the transfer of the pension to another person;*

(E) *if the pension is commuted, the commutation amount cannot exceed the benefit that was payable immediately before the commutation; or*

(iii) *the standards of subregulation (2) are met; or*

(iv) *for rules in existence at the date of registration of the Superannuation Industry (Supervision) Amendment Regulations 2007 (No. 3), the standards of subregulation (2) would be met, except for the circumstances in which those rules allow for either or both of the following:*

(A) *the pension to be commuted;*

(B) *the variation or cessation of pension payments in respect of a child of the deceased; and*

(c) *the pension is transferable to another person only on the death of the beneficiary (primary or reversionary, as the case may be); and*

(d) *the capital value of the pension and the income from it cannot be used as a security for a borrowing.*

59. As was the case in *Douglas*, in relation to the scheme for invalidity pay under the DFRDB Act, the scheme for which the MSB Act provides does not, for reasons given in the above analysis of the MSB Rules, ensure that any type of invalidity pension, be it Class A or Class B, is paid at least annually. Under the MSB Rules, an invalidity pension might be paid periodically for, for example, 11 months after a classification decision as a Class A

invalidity pension. However, the entitlement to continue to be paid that pension might cease altogether if, upon the making of a review decision at the end of the 11th month, a member is reclassified as Class C. Even if a member were reclassified at that time as having a Class B invalidity, payment of the Class A invalidity pension would cease and payment of a different invalidity pension, a Class B invalidity pension, would commence. Mr Burns' submission that reg 1.06(9A) of the SIS Regulations cannot, for this reason, be satisfied is correct.

60. More fundamentally, and as Mr Burns correctly submitted, there is an over-arching difficulty in the Commissioner's submissions as to why an invalidity pension paid under the statutory scheme established by and under the MSB Act can fall within the confines of what reg 1.06 of the SIS Regulations takes to be a "pension" for the purposes of the SIS Act. That is that, on analysis of the requirements found in reg 1.06, they are directed to, as Mr Burns put it, "the ordinary indicia of a conventional pension or superannuation entitlement", not to the provisions of a unique statutory scheme.

61. The reasons why this is so are many. They were accurately detailed in a meticulous and, for the Commissioner's submissions, devastating critique offered by Mr Burns in his submissions. I assume that the Commissioner persisted, in the face of this critique, with reliance on reg 1.06 of the SIS Regulations because the present is a test case. Even so, that reliance has added, significantly, to the already myriad of novel and difficult issues that require resolution in this review proceeding. Because I agree with this critique both in substance and in its manner of expression, I draw extensively upon it in the paragraphs that immediately follow.

62. The Commissioner accepted that the term "residual capital value" in reg 1.06(9A)(b)(i)(A) of the SIS Regulations was not defined either in those regulations or in the SIS Act. The use of that term exemplifies the difficulty of fitting a statutory entitlement into a provision apparently directed to conventional superannuation or pension schemes where the entitlement of the superannuant or pensioner is immutable. The Commissioner sought to avoid this difficulty by submitting that the term should refer to a "capital lump sum" payable upon termination of the pension, ascertainable at the commencement of the pension. I do not accept this submission.

63. The MSB Rules provide for two types of invalidity benefits, Class A and Class B, of which the respective invalidity pensions form part, each premised on a determination as to the degree of incapacity of a member, or benefits, other than invalidity benefits, provided for by Part 3, Division 1 of the MSB Rules. As Mr Burns correctly submitted, "There is simply no correlation between the invalidity pension and the contributions made by a member that, in the ordinary course, a member would otherwise be entitled to".

64. As Mr Burns further submitted, reg 1.06(9A)(b)(i)(B) of the SIS Regulations requires a consideration of the formula at clause 2 of Schedule 7. The Commissioner submitted that the purchase price would be zero "as no amount is paid as consideration to purchase any of the invalidity benefits". I reject that submission for the reason given by Mr Burns. It is inconsistent with Mr Burns' membership of a statutory superannuation scheme that requires the payment of contributions. Under the MSB Rules, those contributions, and the employer benefit, comprise the residual benefit that a member is able to access upon attaining 55 years of age.

65. The Commissioner submitted that reg 1.06(9A)(b)(iii) of the SIS Regulations provided a further basis on which the benefits provided to Mr Burns ought to be considered a "pension" for the purposes of the SIS Act. That regulation requires consideration of reg 1.06(2) of the SIS Regulations.

66. Sub-regulation 1.06(2) requires that, in order for a benefit to be a pension, it must be provided under the rules of a superannuation fund which ensure that the benefit is "payable at least annually throughout the life of the primary beneficiary". For reasons already given, the MSB Rules do not ensure the payment of an invalidity pension either on an annual basis or at all. The classification of a member as Class C will result in the entitlement to the invalidity pension being cancelled pursuant to Rule 29 (with entitlement to invalidity benefits ceasing altogether, pursuant to Rule 31).

67. Further, the sub-regulation requires that a reversionary beneficiary be paid the pension throughout the reversionary beneficiary's life. It is enough for the purposes of considering the operation of the MSB Rules to consider the position of a member's spouse.

68. The MSB Rules provide for the payment of a member's benefits upon the death of the member in Part 4, which provides via Rules 39 and 40 that the benefit be paid as a lump sum. Should a spouse seek to have the benefit paid as a pension, then pursuant to the "notional invalidity pension" provided at Rule 40(5), it will be paid at the rate provided by the table in Schedule 4. On either basis, the MSB Rules do not ensure that the reversionary beneficiary is the recipient of the pension.

69. Similarly, reg 1.06(2)(b) requires the size of payments of benefits in a year to be fixed, allowing for variation only as specified in the governing rules, or to allow commutation or fees paid in relation to the payment split. The satisfaction of this sub-regulation would therefore require the adoption of a construction that the "cancelling" of an invalidity benefit, or the commencement of an entitlement to a different invalidity benefit because of reclassification, can be considered a "variation". However, Mr Burns' submission that the use of the term "variation" requires that some portion of the benefit remains is correct; the effect of cancelling the benefit cannot satisfy such a requirement. No provision is made for either the commutation of the invalidity benefits or, in the absence of a splitting agreement or order under Part VIIIB of the *Family Law Act 1975* (Cth), their splitting. This sub-regulation is not satisfied.

70. The Commissioner summarised the operation of reg 1.06(2)(c) to the effect that the payment received must be an amount no less than the previous year's amount except to the extent of a reduction for CPI. Mr Burns adopted this summary and repeated his submission, accepted above by me, that the power to cancel the payment of the benefit is inconsistent with the obligation of the superannuation fund rules to "ensure" its payment.

71. In short, the Commissioner's submission that the invalidity pension is taken to be a pension for the purposes of the SIS Act by reg 1.06 of the SIS Regulations should, for multiple causes, be rejected. It necessarily follows that paragraph (a)(ii) of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR is inapplicable.

72. For these reasons, I conclude that Mr Burns' Class A invalidity pension payments were not paid from a "superannuation income stream". Given the definitional requirement in s 307 - 70(1) of the ITAA97, it necessarily follows that none of the payments of this

invalidity pension in the 2014 to 2017 income years was a "superannuation income stream benefit". In turn, that means, in light of s 307-65 of the ITAA97, that each of these payments was a "superannuation lump sum". That means that they should have been treated for assessing purposes in accordance with s 307-145 of the ITAA97. As they were not, each of the assessments is excessive to that extent. Further, as to the 2017 income year, the Commissioner's private ruling is incorrect.

73. These conclusions must, however, be reviewed in light of the 2018 Amendment Regulations. I now turn to a consideration of what effect, if any, those regulations have in relation to the present review.

The 2018 Amendment Regulations

74. I set out the relevant provisions of the 2018 Amendment Regulations in *Douglas*. Mr Burns adopted the submissions made by Mr Douglas in that case as to the meaning and effect of those regulations, having regard to s 7 of the Acts Interpretation Act and s 12 of the *Legislation Act 2003* (Cth). The Commissioner adopted the submissions that he had made in response in that case.

75. As in *Douglas*, each of the assessments gave rise to a liability to which Mr Burns was subject before the making and commencement of the 2018 Amendment Regulations.

76. The private ruling was also made before then. That private ruling was a written expression of the Commissioner's opinion about the way in which, in effect and materially, s 307-145 of the ITAA97 did not apply or would not apply to Mr Burns in the circumstances which he posited (the scheme) in his application for that ruling: s 359-5 of Schedule 1 to the TAA. That private ruling bound the Commissioner in relation to any reliance upon it by Mr Burns: s 357-60(1) of Schedule 1 to the TAA. The Commissioner became obliged not to apply the provision covered by the private ruling in a way that was inconsistent with the private ruling to Mr Burns' detriment. The only exception to that obligation was if the scheme was not implemented in the way set out in the private ruling, or material facts were omitted from the private ruling application, or misleadingly or inaccurately stated. In relation to its private ruling aspect, these features the distinguish the present case from

IOOF Holdings Limited v Federal Commissioner of Taxation (2014) 224 FCR 535, where no ruling had been issued prior to the contentious legislative amendment.

77. Mr Burns had, and exercised, statutory rights of objection against both the assessments and that private ruling. These, too, were exercised before the 2018 Amendment Regulations were made and commenced. The objection decision was made before then. And so, too, was the right of review in respect of that objection decision, conferred by Part IVC of the TAA.

78. The conclusion reached in *Douglas* in relation to the meaning and effect of s 7(2) of the Acts Interpretation Act is also supported by the reasoning and outcome in *Repatriation Commission v Keeley* (2000) 98 FCR 108 (***Keeley***).

79. In *Keeley*, a veteran's widow applied for a war-widow's pension under the *Veterans' Entitlements Act 1986* (Cth) (**VEA**). She lodged this application in December 1994. In January 1995, the Repatriation Medical Authority (**RMA**) issued a Statement of Principles (**SoP**) in relation to the condition from which the veteran had died. The Repatriation Commission refused the application in May 1995. In April 1996, an application for review by the Veterans' Review Board was unsuccessful. The widow then sought the further review of the Commission's decision by the Tribunal. In the meantime, in September 1996, the RMA revoked and replaced the 1995 SoP with a new and different SoP. That new SoP, unlike the earlier one, did not cover her late husband's experiences during his military service. The Tribunal's decision was set aside on appeal to the Federal Court of Australia. That outcome was then challenged in the Full Court.

80. On appeal to the Full Court, the question was whether the widow had any accrued right of the kind described in *Esber v Commonwealth of Australia* (1992) 174 CLR 108 (***Esber***). The Commission's appeal was dismissed. In their joint judgment, Lee and Cooper JJ found that such an accrued right did exist, notwithstanding that the VEA itself had not been amended: [40] - [46]. This was because s 120A of the VEA, at the time, provided that the reasonableness of a hypothesis for the purposes of assessing a veteran's entitlements was to be assessed in accordance with a SoP. In particular, at [40] and [46], Lee and Cooper JJ stated:

> 40 *The question is whether a determination made by the Authority under s 196B "affects" any right that has accrued under the Act. It may be accepted that a provision which, for example, does no more than alter the provisions relating to evidence in a proceeding may not "affect" a right to have a matter determined to which the proceeding relates but that will always be a question of degree and be subject to no injustice resulting therefrom: (See: Maxwell v Murphy (1957) 96 CLR 261 per Dixon CJ at 267.) If the right being prosecuted, and the facts upon which determination of the right is to be made, remain unaffected, it may be said that the statutory provision is procedural and to be construed as being of retrospective effect. An analysis of the provisions of ss 120A and 196B, however, shows that those provisions involve more than alterations of a procedural character in that they purport to define the scope of liability of the Commonwealth under the Act by, in effect, confining the claim a claimant may present: (See: Kraljevich v Lake View and Star Limited (1945) 70 CLR 647 per Dixon J at 652.)*
>
> …
>
> 46 *Unless a contrary intention is clearly disclosed, it is to be presumed that accrued rights are determined under the law as it stood when the right accrued. With regard to beneficial legislation such as the Act, it may be assumed that a construction of substantive provisions least likely to work or cause unfairness in result is to be preferred. It may be concluded that Parliament intended that the review of a decision on a claim made pursuant to a Statement more beneficial to a claimant than the terms of a Statement that replaced the former Statement after the decision had been made, is to be conducted as if the former Statement had not been revoked. Unless the Act provided otherwise, a proceeding initiated under the Act to review a decision made by the Commission was to be carried out by determining if the respondent's claim to a pension had been wrongly refused, the decision of the Commission to be replaced by the decision that should have been made by the Commission had it properly applied the law as it stood (see: Esber per Mason CJ, Deane, Toohey, Gaudron JJ at 440 – 441.)*

In her separate, concurring judgment Kiefel J (as her Honour then was) stated, at [76]:

> *In my view, the Statements of Principles operate generally as a bar or threshold test. The bar or limitation operates on the right to a pension itself because the Statements of Principles determine the connection between death and service as a minimum, in each case: see Maxwell v Murphy at 278. It cannot therefore be described as relating only to procedure: see Pedersen v Young (1964) 110 CLR 162 at 169. The introduction of the second SoP affected the right to pension under s 13, as the first had.*

81. The amendments made by the 2018 Amendment Regulations were not in any way procedural. Like the new SoP in *Keeley*, they sought to affect liabilities and rights already

accrued. Subsection 307-70(1) of the ITAA97, like s 120A of the VEA in relation to a SoP, looks to subordinate legislation for particularity of application at a given time to given facts. The applicant was, by assessment, subject to then existing liabilities as the law then applied (or was assessed by the Commissioner to apply) at a given time to given facts; the private ruling also had particular statutory consequences in respect of the application of the law at a given time to given facts. Those liabilities and consequences had been confirmed by the Commissioner's objection decision, also before the 2018 Regulations were made. The Tribunal sits in place of the objection decision-maker in order to determine whether the liabilities as assessed were excessive or the ruling should have been made differently. In each case, it is obliged to do so by reference to the taxable facts and to the law, at least as it stood at the time when the assessment or ruling was made, as applied to those facts. It is not necessary, in order to resolve this case, to consider whether the position would have been any different if, after the end of the income years but before any assessment the 2018 Amendment Regulations had been made.

82. It follows that there is no relevant distinction to be drawn between the present case and *Douglas*. For the reasons which I gave in that case, Mr Burns is entitled to have the review determined unaffected by the 2018 Amendment Regulations.

Disposition

83. It follows that the Commissioner's objection decision must be set aside.

84. In lieu of that objection decision, Mr Burns' objection must be allowed on the basis that:

(a) each of the payments of invalidity pension under the MSB Act, received by Mr Burns in the 2014, 2015 and 2016 income years was a "superannuation benefit", a "superannuation lump sum" and a "disability superannuation benefit" and was required to be treated in accordance with s 307-145 of the ITAA97;

(b) the private ruling in respect of the 2017 income year was incorrect and should have been that each of the payments of invalidity pension under the MSB Act, received or to be received by Mr Burns in that income year was, or will be, a "superannuation

benefit", a "superannuation lump sum" and a "disability superannuation benefit" and is required to be treated in accordance with s 307-145 of the ITAA97.

85. The matter should be remitted to the Commissioner for implementation of the Tribunal's decision, once it becomes final, in accordance with s 14ZZL of the TAA.

86. As with *Douglas*, it would do less than justice not to acknowledge the considerable assistance provided by counsel, both for Mr Burns and for the Commissioner, by submissions, oral and in writing, in relation to the issues in this review as they have "evolved".

I certify that the preceding 86 (eighty six) paragraphs are a true copy of the reasons for the decision herein of The Honourable Justice J A Logan RFD, Deputy President.

.....[SGD].....

Associate

Dated: 25 March 2020

Dates of hearing:	**28 May 2018** **12 December 2018**
Date of final submissions received on behalf of the Applicant:	**15 March 2019**
Date final submissions received on behalf of the Respondent:	**5 April 2019**

28 May 2018

Counsel for the Applicant:	**The Applicant appeared in person**
Counsel for the Respondent:	**Mr P Looney QC with Ms A Wheatley**
Solicitor for the Respondent:	**Australian Government Solicitor**

12 December 2018

Counsel for the Applicant:	**Mr P Hack QC with Mr J Ward**
Counsel for the Respondent:	**Mr P Looney QC with Ms A Wheatley**
Solicitors for the Respondent:	**Australian Government Solicitor**