Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Douglas and Commissioner of Taxation (Taxation) [2020] AATA 494 (13 March 2020)

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2016/6964**

2016/6965

Re: **Wayne Douglas**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

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

Date: **13 March 2020**

Place: **Brisbane**

The Tribunal decides:

1. The respondent's objection decision dated 2 November 2016 in respect of the applicant's objection to the assessment for the 2015 income year that issued on 8 October 2015 be set aside.
2. In lieu thereof, the applicant's objection be allowed on the basis that:
   (a) the amount of the arrears payment under the *Defence Force Retirement and Death Benefits Act 1973* (Cth) was $272,642.40, not $331,136.00;
   (b) the arrears payment must be treated in the manner prescribed in s 307-145(1) of the *Income Tax Assessment Act 1997* (Cth); and

(c) the $95,546.51 that was deducted from the arrears payable to the applicant must be excluded from his assessable income for the 2015 income year.

3. The matter be remitted to the respondent for implementation of the Tribunal's decision, pursuant to s 14ZZL of the *Taxation Administration Act 1953* (Cth), including by the making of the requisite amended assessment, once the Tribunal's decision becomes final.

.....[Sgd].....

The Honourable Justice J A Logan RFD, Deputy President

TAXATION – INCOME TAX – where applicant's application for amendment of his ground of discharge in 2002 from the Australian Defence Force to discharge on medical grounds was approved in 2014 – where applicant was consequentially determined in 2014 to be entitled to invalidity pay under the Defence Force Retirement and Death Benefits Act 1973 (Cth) on and from discharge date and paid a lump sum of arrears of invalidity pay in 2015 income year – whether the arrears payment 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 time when the applicant was assessed in respect of the 2015 income year, at the time of the objection decision in respect of his objection to the assessment and at the time when the applicant sought review of that objection decision by the Tribunal 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(2) of the Acts Interpretation Act and s 12 of the Legislation Act 2003 (Cth) applicable so as to require review to be conducted unaffected by the amending regulations.

LEGISLATION

Constitution s 81

Acts Interpretation Act 1901 (Cth) ss 2B, 7, 8, 46

Defence Force Retirement and Death Benefits Act 1973 (Cth) ss 30, 31, 34, 35, 125

Governance of Australian Government Superannuation Schemes Act 2011 (Cth)

Income Tax Assessment Act 1936 (Cth) ss 6, 175A, 204

Income Tax Assessment Act 1997 (Cth) ss 2-10, 5-5, 6-5, 6-10, 55-5, 301-225, 302-195, 307-5, 307-65, 307-70, 307-145, 995-1

Legislation Act 2003 (Cth) ss 12, 13

Legislation Amendment (Sunsetting Review and Other Measures) Act 2018 (Cth)

Migration Act 1958 (Cth) s 501

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

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

Taxation Administration Act 1953 (Cth) ss 12-85, 10-5, 14ZY, 14ZZ, 14ZZK, 14ZZL, 18-15

Veterans' Entitlements Act 1986 (Cth)

Income Tax Assessment Regulations 1997 (Cth) regs 291.25-01, 295.385.01, 301-225.01, 995-1, 995-1.01

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth) s 2, reg 910-1.10

CASES

Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1

Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq) (2015) 257 CLR 544

Commissioner of Taxation (Cth) v Inkster (1989) 24 FCR 53

DB Rreef Funds Management Ltd v Commissioner of Taxation (2005) 218 ALR 144

Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd (1934) 52 CLR 85

Egerton-Warburton v Deputy Commissioner of Taxation (1934) 51 CLR 568

Esber v The Commonwealth of Australia (1992) 174 CLR 430

George v Federal Commissioner of Taxation (1952) 86 CLR 183

Inland Revenue Commissioner v Europa Oil (NZ) Ltd [1971] AC 760

Jagroop v Minister for Immigration and Broder Protection (2016) 241 FCR 461

Kelly v R (2004) 218 CLR 216

Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd (2018) 54 WAR 89

Re Medonca; Ex parte Commissioner of Taxation (1969) 15 FLR 256

SAS Trustee Corporation v Miles (2018) 92 ALJR 1064

Tubemakers of Australia Ltd v Commissioner of Taxation (1993) 25 ATR 83

REASONS FOR DECISION

The Honourable Justice J A Logan RFD, Deputy President

13 March 2020

1. Until 1681, there was no provision at all by the Crown for aged or disabled soldiers. Their care, as with the aged and disabled in the population generally, was consigned to monastic charity, a much-diminished resource after King Henry VIII's dissolution of the monasteries in the 16th century. In 1681, reflecting his conviction that there was a need to care for such soldiers, King Charles II issued a Royal Warrant authorising the building of the Royal Hospital Chelsea in London to care for those "broken by age or war".[1] That establishment continues to exist to this day. In relation to the Armed Forces of the United Kingdom and those of British heritage like the Australian Defence Force (**ADF**),

[1] The Royal Hospital Chelsea, History and Heritage: https://www.chelsea-pensioners.co.uk/historyheritage : Accessed, 31 January 2020.

recognition that the Nation State has a responsibility to care for disabled members of the Armed Forces may be traced to this Royal Warrant.

2. Those British Army veterans who are residents of the Royal Hospital are known as "Chelsea Pensioners". The explanation for this designation is not without present relevance in terms of English language usage and meaning with respect to the word, "pension" and its derivatives. The explanation is found in the Royal Hospital's website:

> *From 1692 until 1955, all Army pensions were administered by and paid from the Royal Hospital Chelsea, which is why all Army pensioners were often referred to as Chelsea Pensioners.*
>
> *Those who lived 'Out', in the UK or abroad and received their pension in cash from agents around the country were known as Out-Pensioners. ...*
>
> *Over time, the term Out-Pensioner fell out of common usage and, in more recent times, it's only those Pensioners who retire to and live within the Royal Hospital who are now officially known as Chelsea Pensioners. These eligible veterans of the British Army surrendered their Army Pension and were admitted as residents of the Royal Hospital Chelsea.*[2]

There is thus a distinct, military-related application of the word, "pension", of long usage, referring to a periodic payment by the Nation State to a member of the Armed Forces disabled as a result of military service or whom "age has wearied and the years condemned".[3] Such periodic payments are not mere charity but form part of the bargain between the Nation State and an enlistee for the undertaking of military service and the assumption of the hazards that may thereby be entailed.

3. In some respects, particularly in relation to the indefinite accommodation and care of those severely and permanently affected by what has come to be termed post-traumatic stress disorder (**PTSD**), the network of Repatriation Hospitals established in the immediate aftermath of the First World War and, until the 1990's, operated by the Commonwealth might be regarded as an Australian analogue of the Royal Hospital Chelsea.

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2 The Royal Hospital Chelsea, What is a Chelsea Pensioner?: https://www.chelsea-pensioners.co.uk/what-chelsea-pensioner : Accessed, 31 January 2020.

3 Description derived from, "For the Fallen", a poem by Laurence Binyon [published in the Winnowing Fan: Poems on the Great War (1914).

4. Overwhelmingly in modern times however, the preference in Australia, as in the United Kingdom, in respect of disability arising out of, or in the course of, military service has been for the Nation State to provide, from funds appropriated for that purpose from Consolidated Revenue by statute, a range of monetary benefits in relation to medical treatment and loss of earning capacity, rather than just to provide for institutional accommodation and care. To adopt the terminology of yesteryear, the preference is for "Out Pensioners". In the present case, the relevant statutory provision by the Nation State is found in the *Defence Force Retirement and Death Benefits Act 1973* (Cth) (**DFRDB Act**).

5. The circumstances giving rise to the entitlement to benefits under the DFRDB Act of the applicant, Mr Wayne Douglas, are not controversial. The account below of those circumstances is therefore derived from the recitation of background facts in Mr Douglas' written submissions.

6. The arm of the ADF in which Mr Douglas served was the Australian Army. He had two periods of military service:

   (a) from 1 June 1976 until 31 May 1985; and

   (b) from 13 July 1990 until 1 September 2002.

7. At the time of his discharge from the ADF, Mr Douglas was almost 44 years old.

8. Mr Douglas' military service included deployment to Somalia. Later, and particularly relating to experiences during that deployment, Mr Douglas came to be diagnosed as suffering from PTSD. However, he was not, in September 2002, discharged from the ADF on medical grounds.

9. Following his discharge, but with effect from 2 September 2002, Mr Douglas received what s 23 of the DFRDB Act terms as "retirement pay". He elected to take a lump sum payment by way of an Eligible Termination Payment (**ETP**). This was calculated to be $95,546.51. From this lump sum, $8,346.66 was withheld on account of income tax. Thus, the net amount he received was $87,199.85. An amount of $21,005.10 was rolled over

into a superannuation fund. Thereafter, Mr Douglas received periodic payments of retirement pay under the DFRDB Act.

10. On 14 June 2012, Mr Douglas' treating psychiatrist diagnosed him as being unfit to work in the short and long term. On 3 October 2012. and for the purposes of the *Veterans' Entitlements Act 1986* (Cth), the Repatriation Commission decided that he was totally and permanently incapacitated with effect from 26 July 2012.

11. On 29 April 2013, a submission was made to the ADF on Mr Douglas' behalf by the Veterans' Support and Advocacy Service Inc. that he should have been discharged on medical grounds in September 2002.

12. This submission was treated by the Director-General Career Management – Army within the ADF as an application for review of his discharge ground for the purposes of s 37 of the DFRDB Act as it then stood. A delegate of the Chief of Army concluded that grounds did exist to support the claim that Mr Douglas ought to have been medically discharged from the ADF. As a result, Mr Douglas applied, on 26 November 2013, for an amendment of the ground of his discharge. On 16 June 2014, the application was approved by a delegate of the Chief of Army. Inferentially, the Chief of Army then informed the Commonwealth Superannuation Corporation (**CSC**), for the purposes of s 37 of the DFRDB Act, that "grounds existed on which he could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties". As a result of changes made by the *Governance of Australian Government Superannuation Schemes Act 2011* (Cth), the CSC had by then come to administer the DFRDB Act in succession to the Defence Force Retirement and Death Benefits Authority (**Authority**).

13. A sequel to this was that, on 10 September 2014, Mr Douglas was requested by the CSC to complete an application for "invalidity benefits", again a term used in the DFRDB Act. He completed the requisite application on 13 October 2014.

14. On 4 November 2014, Mr Douglas was classified by the CSC, for the purposes of the DFRDB Act, as having a 75% of incapacity in relation to civil employment and thus a Class A invalidity for the purposes of that Act. The CSC determined that the effective date of that classification was 2 September 2002.

15. One form of invalidity benefit for which the DFRDB Act makes provision in respect of those determined to have a Class A or a Class B invalidity is a periodic payment termed "invalidity pay". Invalidity pay is distinct from retirement pay and has different eligibility criteria.

16. On 10 November 2014, as a sequel to the classification and determination mentioned, the CSC calculated the amount of the invalidity pay, backdated to 2 September 2002, to which Mr Douglas had thereby become entitled. To ascertain that amount, the CSC calculated the amount which would have been paid to date had Mr Douglas been discharged on medical grounds and been classified as having Class A invalidity on 2 September 2002 and then deducted from that the amount of $95,546.51, being the lump sum retirement pay, earlier taken as an eligible termination payment.[4] I shall refer to the resultant figure as "**the arrears payment**". Income tax of $175,266.00 was withheld from the arrears payment.

17. A further consequence of the 2014 invalidity determination made by the CSC was that Mr Douglas became entitled to ongoing invalidity pay in the amount of $2,245.73 (indexed) with a tax-free component of $80.55 per fortnight.

18. On 26 June 2015, the CSC provided Mr Douglas with a PAYG payment summary for the year ended 30 June 2015. The amount of the arrears payment specified by the CSC in that PAYG payment summary was $331,136.00 (termed, a "lump sum in arrears – taxable component" on the PAYG payment summary; the terms "lump sum in arrears" or "LSIA" are elsewhere used in the material before the Tribunal). That summary also specified $175,266.00 as the amount of tax withheld from the arrears payment. Earlier that month, by a letter dated 16 June 2015, the CSC had advised how much of the arrears payment was attributable to each of the financial years from 2003 to 2015 (inclusive).

19. Very late in the course of proceedings, reason to doubt the correctness of the specification in the PAYG payment summary of $331,136.00 as the arrears payment emerged. I detail this development below. On any view though, Mr Douglas did receive a lump sum arrears payment in the 2015 income year. It is therefore sufficient if the

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[4] The uncontroversial explanation for this deduction is that the effect of the DFRDB Act was that Mr Douglas could not be entitled both to retirement pay and to invalidity pay.

discussion proceeds for the present just by using the generic term "arrears payment" to refer to the lump sum.

20. On 8 October 2015, the Commissioner issued to Mr Douglas a notice of assessment for the year ended 30 June 2015. That assessment treated the arrears payment to which Mr Douglas specified in the PAYG payment summary ($331,136.00) as assessable in that income year. The assessment also allowed Mr Douglas a credit against tax payable of the withholding by the CSC of $175,266.00 in respect of income tax from the amount of the arrears payment. It is not necessary to specify in full the details of how the Commissioner assessed Mr Douglas for the 2015 income year. Those details appear in the reasons which he gave for his objection decision.

21. Mr Douglas then objected to this assessment by notices of objection lodged on 19 January 2016 and 4 February 2016. By a decision dated 2 November 2016, the Commissioner disallowed the objections in part. Mr Douglas then applied to the Tribunal for the review of that objection decision.

22. The Commissioner with, with respect, masterly understatement, stated in his consolidated submissions that the issues that fell for determination in the review had "evolved".

23. Having embarked on the hearing of the review, it did not prove possible to complete the hearing of oral submissions within the originally allocated time. That was no reflection on counsel for either party but rather on the complexity of the applicable legislation and subordinate legislation and resultant issues of construction, some of which fully emerged only during the course of oral submissions on that initial hearing. The hearing therefore had to be adjourned. Over the adjournment period, it transpired that His Excellency the Governor-General in Council had been disposed to make the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth) (**the 2018 Amendment Regulations**). That development was not entirely a surprise, given the earlier course of submissions at the initial hearing.

24. The 2018 Amendment Regulations were made on 6 December 2018 and published on the Federal Register of Legislation on 7 December 2018. Division 1 of Part 3 of Schedule 1 to those regulations (comprising items 5 to 8) makes amendments to the *Income Tax Assessment Regulations 1997* (Cth) (**ITAR**). Section 2 of the 2018 Amendment

Regulations provides that this particular Part, the relevant Part for present purposes, is to commence (or is taken to have commenced) the day after the instrument is registered, thus 8 December 2018.

25. The making of the 2018 Amendment Regulations was certainly one event that caused the issues in the review to "evolve". A corollary was, necessarily, an elongation of the time within which the review could be determined. However, lest it be thought otherwise, I should state that, within the limits of subordinate legislative competence, it is within the remit of the Governor-General in Council, even during the course of a review by the Tribunal of an administrative decision, to make subordinate legislation which at least purports to touch on that decision for reasons such as those stated in the Explanatory Statement (quoted below). It is not for the Tribunal to impeach or question the political value judgement entailed in the tendering of advice to Federal Executive Council for the making of any regulations, only to construe their effect according to law. The merits of subordinate legislation are for a House of Parliament upon any motion for disallowance and, perhaps ultimately, for the electorate.

26. The issue on any review like the present is whether an applicant has proved the assessment in question to be excessive: s 14ZZK *Taxation Administration Act 1953* (Cth) (**TAA**). Usually, that will entail an applicant showing what ought to have been his taxable income and related tax payable thereon for the income year concerned.

27. Mr Douglas alleged that the assessment was excessive, because the arrears payment paid to him as a lump sum ought to have been treated in the manner prescribed in s 307-145(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**), which provides:

> *(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.*

28. In keeping with the drafting practice employed in the ITAA97, an asterix preceding a term indicates that it is elsewhere defined: s 2-10 of the ITAA97. Thus, Mr Douglas sought to prove that the arrears payment satisfied each of the defined elements of s 307-145(1) in that it was:

(a) a superannuation benefit;

(b) a superannuation lump sum; and

(c) a disability superannuation benefit.

29. If Mr Douglas is successful in this endeavour, the assessment will have been proved to be excessive.

30. At least until much later advice came from the CSC, Mr Douglas chose not otherwise to contest the Commissioner's assessing rationale in his primary case. As the objection decision reasons reveal, that rationale was that the arrears payment was income under ordinary concepts under s 6-5 of the ITAA97, because it was just the sum of what would otherwise have been periodic payments of income, had Mr Douglas been determined on 2 September 2002 under the DFRDB Act as having a Class A invalidity entitlement.

31. The correctness of the proposition that invalidity pay is income under ordinary concepts is not made controversial by a ground of objection. Its payment under s 31 of the DFRDB Act, as a consequence of a determination under s 30 of that Act of a percentage of incapacity in relation to civil employment, is usually periodic. Further, that Act does not constitute each payment as an instalment of a capital sum. By analogy with *Commissioner of Taxation (Cth) v Inkster* (1989) 24 FCR 53 and, earlier in time, *Egerton-Warburton v Deputy Commissioner of Taxation* (Cth) (1934) 51 CLR 568 at 572 – 573, it is at least arguable that such periodic payments in respect of a loss of earning capacity are assessable as income under ordinary concepts.

32. That conclusion is consistent with s 55-5 of the ITAA97 in Part 2-15 (Non-Assessable Income) of that Act, which provides:

> *(1) This Part does not exempt from income tax any amount or pension paid under the following provisions or Acts, or under schemes established under any of them:*
>
> *(a) Defence Force Retirement and Death Benefits Act 1973;*

Indeed, even if the arrears payment could not be said to be payment of a "pension", because it was paid as a lump sum (albeit calculated by reference to a pension which ought to have been paid) it was, on any view, an "amount" paid under the DFRDB Act for the purposes of s 55-5(1) of the ITAA97.

33. Consistent though it may be, s 55-5 of the ITAA97 is cast in the negative and focussed on Part 2-15 of that Act. It does not state that *any* amount or pension paid under the DFRDB Act *is* assessable income. So it does not necessarily preclude a conclusion that the arrears payment was income, much less that it should be treated in the manner prescribed in s 307-145(1) of the ITAA97.

34. Even though the arrears payment was paid as a lump sum, it would not necessarily follow that it was for that reason a receipt of capital. Its character in Mr Douglas' hands was nonetheless a reimbursement of amounts of invalidity pay that ought earlier to have been paid to him, reduced by the amount of retirement pay which, before the entitlement determination, had been paid to him (or withheld on account of income tax). So the proposition that the lump sum was income under ordinary concepts in the year received is likewise at least arguable.

35. In turn, that conclusion would mean that it was unnecessary to consider whether, even if the arrears payment were a receipt of capital, it was nonetheless brought to account as statutory income by s 6-10 of the ITAA97, because it was an assessable capital gain. That subject, too, I note, was canvassed in the Commissioner's objection decision but it is not raised for consideration by a ground of objection.

36. That a position as to the meaning and effect of a statute is common ground does not mean that the Tribunal is bound to adopt that position. However, if that position is at least arguable, the Tribunal ought not to make controversial that which the parties have chosen not to*: DB Rreef Funds Management Ltd v Commissioner of Taxation* (2005) 218 ALR 144, at [20] per Sackville J. For reasons just given, it is certainly at least arguable not only that periodic payments of invalidity pay are income under ordinary concepts but also that a lump sum payment of arrears of the same has that same character. In the circumstances, it is not for me to make that subject controversial when the parties have chosen not to.

37. So it is that a major question in the case becomes whether the arrears payment should be dealt with in accordance with s 307-145(1) of the ITAA97?

38. Answering that question requires, in relation to the constituent elements of s 307-145(1), a methodical progress through a dense thicket of legislation and subordinate legislation, as

well now as consideration of whether Mr Douglas has any right to have his review application determined by reference to the law as it stood prior to the commencement of the 2018 Amendment Regulations.

A "superannuation benefit"?

39. It is common ground that the arrears payment constituted a "superannuation benefit" as defined by s 307-5 (item 1 in the table to that section refers) of the ITAA97.

40. As it happens, I consider that the position of the parties on this point is not just arguable but correct for the reasons that they gave. These were as follows.

41. In terms of item 1 in the table to s 307-5, the arrears payment was a "superannuation fund payment". This was because it was a payment to Mr Douglas from a "superannuation fund", because Mr Douglas was a fund member. The term "superannuation fund" is defined by s 995-1 of the ITAA97 by reference to s 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**), which provides, materially, that a "superannuation fund" is:

> *a scheme for the payment of superannuation, retirement or death benefits, where the scheme is established:*
>
> *(a) by or under a law of the Commonwealth …*

The source of the arrears payment to Mr Douglas was the scheme established by the DFRDB Act, a law of the Commonwealth, with statutory authority for the making of that payment from Consolidated Revenue as a consequence of the Class A invalidity determination being provided by s 125 of that Act. Mr Douglas was, in terms of the DFRDB Act, an "eligible member of the Defence Force" and thus a member of the scheme established by that Act. It was in that capacity that he received the arrears payment. Each element of item 1 in the table to s 307-5 of the ITAA97 is therefore satisfied. In turn that means that the first element in s 307-145(1) of the ITAA97 is satisfied.

A "Disability Superannuation Benefit"?

42. Mr Douglas chose next in submissions to address the third element in s 307-145(1) of the ITAA97. It is convenient to adopt that same course in these reasons.

43. The term "disability superannuation benefit" is defined in s 995-1 of the ITAA97 in this way:

> ***disability superannuation benefit*** *means a *superannuation benefit if:*
>
> *(a) the benefit is paid to an individual because he or she suffers from ill-health (whether physical or mental); and*
>
> *(b) legally qualified medical practitioners have certified that, because of the ill-health, it is unlikely that the individual can ever be *gainfully employed in a capacity for which he or she is reasonably qualified because of education, experience or training.*

44. It is already established that the arrears payment was a "superannuation benefit". Given its foundation in the Class A invalidity determination, it was undoubtedly paid to Mr Douglas "because he or she suffers from ill-health (whether physical or mental)".

45. There is now evidence before the Tribunal, from two legally qualified medical practitioners[5], that establishes that the ill health from which Mr Douglas suffers is such that it is unlikely that he can ever be gainfully employed in a capacity for which he is reasonably qualified because of education, experience or training. That this fact is established is accepted by the Commissioner. I find accordingly. Thus, the third element in s 307-145(1) of the ITAA97 is also satisfied.

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[5] Certificates of Dr Anita Sharma dated 4 June 2018 and Dr Nyo Aung Naig Win dated 2 June 2018.

A "superannuation lump sum"?

46. Section 307-65 defines a "superannuation lump sum", as "a *superannuation benefit that is not a *superannuation income stream benefit". Mr Douglas submitted, correctly in my view, that the effect of this definition was to create a dichotomy. A "superannuation benefit" that is not a "superannuation income stream benefit" is, necessarily, a "superannuation lump sum". Thus, the controversial question becomes whether the arrears payment was a "superannuation income stream benefit"?

47. Once again, statutory definitions are relevant. By s 307-70 of the ITAA97, it is provided:

> *(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.*

48. As a matter of construction, it follows from s 307-70(1) that, even though the arrears payment is a "superannuation benefit", it will be a "superannuation income stream benefit" (and thus not a "superannuation lump sum") only if two elements are satisfied:

(a) it is a "superannuation benefit" "specified in the regulations" (s 307-70(1)); and

(b) it is paid from a "superannuation income stream" as that term is given meaning by "the regulations" (s 307-70(1) and s 307-70(2)).

The relevant regulations are the ITAR.

49. Mr Douglas submits that neither of these two further elements are satisfied. However, he also submits, correctly in my view as a matter of construction of s 307-70 of the ITAA97, that, if even one of these elements is not satisfied, the consequence will be that the arrears payment is not a "superannuation income stream benefit" and therefore, necessarily, that it is a "superannuation lump sum".

50. At the time when Mr Douglas received the arrears payment, at the close of the 2015 income year and, for that matter, at the time when the assessment was made, when he lodged his objection, when that objection was decided and when he applied to the

Tribunal for the review of the objection decision, there were no "superannuation benefits" specified in the ITAR.

51. In these circumstances, and given that the meaning and effect of the amendments made to the ITAR by the 2018 Amendment Regulations is controversial, it is both desirable and necessary to consider the effect of this then absence of specification.

52. There is nothing ambiguous about the text of the definition of "superannuation income stream benefit" in s 307-70(1) of the ITAA97, so no "constructional choice" (*SAS Trustee Corporation v Miles* (2018) 92 ALJR 1064, at [20], [41]) arises. But it is a definition. So it must not be construed in isolation but rather as "inserted into the fabric of the substantive enactment": *Kelly v R* (2004) 218 CLR 216 at [103]. Doing that discloses that it supplies a mechanism (regulatory specification) by which the Executive, with parliamentary authority, can exclude or "carve out" particular superannuation benefits from being treated in the manner prescribed in s 307-145(1) of the ITAA97.

53. There is no absurdity entailed in construing s 307-145(1) with its incorporated definitions such that, if there is no "carve out" by specification of a particular superannuation benefit, the treatment it sets out is applicable.

54. Contrary to the Commissioner's submission, the ITAR do not, via the definition of "superannuation income stream benefit" in reg 995-1.01(2) of ITAR97, specify any "superannuation benefit" for the purposes of s 307-70(1) of the ITAA97. The most obvious reason for that conclusion is that the text of that definition does not even purport to be a specification at all, let alone a specification of any "superannuation benefit". Next, and as Mr Douglas submitted, there is a pattern evident in the ITAR in relation to specification. The pattern is that the "specifying" regulation bears a number that coincides with the numbering in the ITAA97. For example, reg 301-225.01 specifies matters referred to in s 301-225(1)(d) of the ITAA97 and reg 302-195 specifies matters referred to in s 302-195(3) of the ITAA97. That makes it unlikely that the definition of "superannuation income stream benefit" in reg 995-1.01(2) has any work to do other than supply a definition for that term and then only for the purposes of the ITAR ("In these Regulations"). Its work in the ITAR is evident by reference to, for example, reg 291-25.01 and reg 295-385.01. Thus, one cannot conclude that, in the absence of any evident work, there is an obvious drafting error such that the definition of "superannuation income stream benefit" in reg 995-1.01(2)

should be regarded as, indirectly, amounting to a specification for the purposes of s 307-70(1) of the ITAA97.

55. It may readily be accepted, as the Commissioner submitted, that Part 3-30 of the ITAA97 is directed to the subject of specialist liability rules for superannuation and that, within that subject area, not only does Division 307 of the ITAA97 define concepts used in Divisions 301 to 306 of that Act but also that it is evident from Division 307 that it is intended to operate in conjunction with the ITAR. Indeed, s 307-70 of the ITAA97 exemplifies this. So, albeit though the reliance on regulations is not as stark as once it was with sales tax, this observation made by Dixon J in *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd* (1934) 52 CLR 85 at 89 in relation to the sales tax regime might, with some justification, be made in relation to Part 3-30 and Division 307 in particular:

> *Moreover, the legislation depends in a remarkable degree upon the regulations made under the power which it confers on the Executive. Without the regulations, not only is it unworkable, but the expression of legislative policy is so inadequate as almost to be unintelligible.*

While there is also a dependency on regulations evident in Part 3-30, a difference here is that the absence in the ITAR of specification of any "superannuation benefit" for the purposes of s 307-70(1) does not render Part 3-30 either unworkable or unintelligible. Nor is the qualification, "specified in the regulations" ambiguous.

56. Subject to whatever effect the 2018 Amendment Regulations may have, this means that, necessarily, the arrears payment is not a "superannuation income stream benefit" and is therefore a "superannuation lump sum".

57. It is as well also to consider Mr Douglas' further submission as to why the arrears payment is a "superannuation lump sum". He submits that the arrears payment was not "paid from a *superannuation income stream" within the meaning given by the ITAR. That meaning is supplied by reg 995-1.01(1), which provides:

> ***superannuation income stream*** *means:*
>
> *(a) an income stream that is taken to be:*
>
> *(i) an annuity for the purposes 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; or*
>
> *(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*
>
> …

58. "Income stream" is not defined in the ITAR. As a matter of first impression, it strikes me as incongruous to regard a lump sum for that is what the arrears payment was, as an "income stream". Mr Douglas submitted as much, putting that an "income stream" was a series of periodic payments. Extrapolating, one might add that the fact that the lump sum was economically equivalent to, indeed calculated by reference to, an "income stream", namely periodic payments of invalidity pay that ought to have been made on and from 2 September 2002, did not turn that lump sum into an "income stream". There is no question here of any tax avoidance or some special provision allowing taxing by economic substance. In these circumstances, that different taxation consequences might follow as between Mr Douglas' receipt of a lump sum and another who had received periodic payments of invalidity pay would be nothing to the point: *Inland Revenue Commissioner v Europa Oil (NZ) Ltd* [1971] AC 760, at 771.

59. However, the definition must be read as a whole and in the context of s 307-70.

60. Read in the context of s 307-70(1), a "superannuation income stream" is something from which a "superannuation benefit" (as specified) is paid, thereby becoming a "superannuation income stream benefit". In other words, it is a source in the sense of a stream from which one might draw water. Section 307-70(2) looks to the definition in the ITAR for the purpose of defining a source of payment. So "income stream" is a source of a payment, not a payment itself. The particular sources captured are as specified in the definition of "superannuation income stream" in the ITAR.

61. Of the items in this definition, the Commissioner submitted that the arrears payment was:

(a) in terms of paragraph (a)(ii) - an income stream that is taken to be a pension for the purposes of the SIS Act in accordance with subreg 1.06(1) of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**); or

(b) paragraph (b)(i) - an income stream that is … a pension within the meaning of the SIS Act and that commenced before 20 September 2007.

62. There was something of the notion of "income stream" as a source in the Commissioner's further submission that "the question is whether the relevant payment was made from an interest that supports an income stream" but that submission was made by reference to the definition of "superannuation income stream benefit" in the ITAR: see regs 995-1.01(1) and (2). The reference to the definition in the ITAR is flawed in that it supplies a definition only for the purposes of the ITAR. Subsection 307-70(1) supplies the definition of "superannuation income stream benefit" for the purposes of the ITAA97. It does not do so by reference to the definition of "superannuation income stream benefit" in the ITAR. However, the notion of "income stream" as a source, of a flow of funds, is present in the text of s 307-70(1).

63. In the items in the definition of "superannuation income stream" in the ITAR relied upon by the Commissioner is found the category of an income stream that is a "pension" for the purposes of the SIS Act (or something that is taken to be in that category by regulation). There is a definition of "pension" in the SIS Act (s 10) but it is of an inclusive type, leaving scope for the ordinary meaning of that word.

64. As to the ordinary meaning of the word "pension", in *Tubemakers of Australia Ltd v Commissioner of Taxation* (1993) 25 ATR 183, at 190, Hill J, having consulted meanings of the word found in the Macquarie and Oxford Dictionaries, concluded that, "the essential characteristic of a pension (which may of course be voluntary and need not be paid because of some legal obligation) is only that there be periodical payments and not a series of lump sum payments, albeit that those lump sum payments may be paid on a periodical basis". The dictionary definitions of "pension" contemplate that the source of a pension obligation might be age, past service, a loss sustained or injury.

65. This general understanding of what may constitute a "pension" certainly embraces an historic usage of that word as a sequel to the 17th century Royal Warrant and the description of recipients of related service disability or age payments from the Crown as "Out-Pensioners". It also embraces both "retirement pay" and "invalidity pay" paid under the DFRDB Act.

66. In my view, s 307-70(1) distinguishes between the particular payment received and its source. The payment received must be a "superannuation benefit" (as specified) but the requirement is that it be paid *from* a "superannuation income stream", not be one and the same as, that source. Put another way, in s 307-70(1), "superannuation income stream" is being used at a different, more general level of abstraction from the individual payment itself.

67. That a "superannuation income stream" is a source is in harmony with a further submission of the Commissioner, which was that it was descriptive of an entitlement to a series of periodic payments that answer the description of a "pension". But even if, as used in the context of s 307-70(1) of the ITAA97, "superannuation income stream" does not carry with it the notion of entitlement, the source of the arrears payment, lump sum though it was, was a flow of funds. The initial drawing on that flow was an aggregation of arrears in a series of periodic payments of invalidity pay, of a "pension". It just so happens that the first payment in that series, the arrears payment, had to be paid as a lump sum so as to "catch up" with what the effect of an entitlement determination which provided lawful authority for the payment of arrears of the "income stream" or pension". It does not follow that the lump sum was not part of an "income stream".

68. That conclusion satisfies only part of paragraph (b) in the definition in the ITAR of "superannuation income stream". There is a conjunctive in that paragraph – commencement before 20 September 2007.

69. As to the conjunctive, Mr Douglas submitted that it could not be satisfied on the facts, as there was neither payment nor even entitlement to payment prior to November 2014. Only then was the determination under the DFRDB Act that provided lawful authority for the payment made and the resultant payment received.

70. In response, the Commissioner submitted that if "superannuation income stream" is to be regarded as a source from which the payment is made (as I have come to conclude), the source commenced on 2 September 2002, which the November 2014 determination made the effective commencement date of the invalidity pay (of the "pension" or "income stream").

71. I agree that the November 2014 determination created an entitlement to an income stream, being a series of invalidity pay payments, taken, for the purposes of that determination and the DFRDB Act, to have commenced on 2 September 2002. The arrears payment was a sequel to that determination and paid from the "income stream" source thereby created. But in terms of paragraph (b) in the definition of "superannuation income stream" in the ITAR, the determination only had this effect when it was made. That was after 20 September 2007. I therefore conclude that the arrears payment does not fall within paragraph (b) in the definition of "superannuation income stream" in the ITAR.

72. As to paragraph (a)(ii) in the definition of "superannuation income stream" in the ITAR, reg 1.06 of the SIS Regulations provides, materially, that a benefit is taken to be a "pension" if it is provided under rules of a superannuation fund that meet the standards of subregulation (9A) in those regulations. The difficulty which bests the Commissioner's alternative reliance on paragraph (a)(ii) is exactly that identified by Mr Douglas in his submissions. It entails attempting to apply to a statutory entitlement paid by appropriation from Consolidated Revenue concepts that have application to superannuation or pension arrangements paid from a different source.

73. These difficulties of application come at many levels. To conceive of the Consolidated Revenue Fund mandated by s 81 of the *Constitution* as the "capital supporting the pension" is incongruous, a notion true only in the loosest sense and at the most general level of abstraction.

74. Another definitional requirement is that the "rules of a superannuation fund", "meet the standards of subregulation (9A)". Materially, rules for the provision of a benefit (the "pension") meet the standards of this subregulation if those rules ensure that payment of the pension is made at least annually and also ensure that …".

75. It is not necessary to consider the complex provisions in these cumulative requirements. Assuming in the Commissioner's favour that the provisions of the DFRDB Act can be characterised as the "rules of a superannuation fund", they do not ensure that the payment of an invalidity pension under that Act is paid at least annually. Invalidity pay is always subject to the contingency of reclassification pursuant to s 34 of the DFRDB Act. It is also subject to the contingency of suspension in the event of a failure by the recipient to comply with a requirement to submit to medical examination or to comply with a notice to provide information: s 35(3) of the DFRDB Act. In short, there is no vested entitlement to invalidity pay which ensures that it is paid at least annually. An entitlement determination provides lawful authority for its payment but that payment is always subject to the contingencies mentioned.

76. For these reasons, neither of the items in the definition of "superannuation income stream" in the ITAR relied upon by the Commissioner is applicable.

77. What follows is that, subject to the 2018 Amendment Regulations, the arrears payment was not a "superannuation income stream benefit" as defined by s 307-70(1) of the ITAA97. It was a therefore a "superannuation lump sum".

78. I turn then to the effect of the 2018 Amendment Regulation.

The 2018 Amendment Regulations

79. Item 5 of Division 1 of Part 3 of Schedule 1 of the 2018 Amendment Regulations, inserts the following provision into the ITAR:

> ***Subdivision 307-B—Superannuation lump sums and superannuation income stream benefits***
>
> ***307-70.01 Superannuation income stream benefits***
>
> *(1) For the purposes of subsection 307-70(1) of the Act (definition of **superannuation income stream benefit**), all superannuation benefits are specified, apart from a superannuation benefit covered by subregulation (2).*
>
> *(2) A superannuation benefit is covered by this subregulation if:*
>
> *(a) the superannuation benefit was paid:*

(i) on or after 1 July 2007; and

(ii) before 1 July 2017; and

(b) the superannuation benefit was paid from a superannuation interest that supported a superannuation income stream; and

(c) the superannuation income stream met the requirement in paragraph 995-1.03(a) (as in force before the commencement of Schedule 6 to the Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017) when the superannuation benefit was paid; and

(d) the person to whom the superannuation benefit was paid made an election in relation to that payment under paragraph 995-1.03(b) (as in force before the commencement of that Schedule).

80. Item 6 in those regulations inserts the following transitional provision into the ITAR:

910-1.10 Transitional arrangements arising out of the Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018

(1) The amendment made by item 5 of Schedule 1 to the Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 applies on and after 1 July 2007.

(2) …

81. The Explanatory Statement[6] relevantly provides:

The amendments in the Regulations correct technical and drafting defects, remove anomalies and inoperative provisions in the A New Tax System (Australian Business Number) Regulations 1999 (the ABN Regulations), the Competition and Consumer Regulations 2010 (the Competition Regulations), the Corporations Regulations 2001 (the Corporations Regulations), Income Tax Assessment Regulations 1997 (ITAR 1997) and the Superannuation Industry (Supervision) (Transitional Provisions) Regulations 1993. They also ensure that the law continues to operate as intended.

…

Schedule 1—Part 3: Amendments commencing the day after Registration

Superannuation income stream benefits

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6 Explanatory Statement to the Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 at page 1.

> *Items 5 to 8 of Schedule 1 to the Regulations amend the ITAR 1997 to confirm the meaning of superannuation income stream benefit for the purpose of section 307-70 of the ITA Act.*
>
> *Item 5 amends the ITAR 1997 so that all superannuation benefits are specified for the purposes of the ITA Act. Certain superannuation benefits paid in the period 1 July 2007 to 30 June 2017 are also specified for the purposes of the ITA Act.*
>
> *Items 7 and 8 amend the definition of superannuation income stream in subregulation 995-1.01 to clarify the meaning of this term for the purposes of subregulation 307-70(2) of the ITAR 1997 which provides that the meaning of the term superannuation income stream can be specified in the regulations. These amendments apply in relation to the 2012-13 income year and later income years.*
>
> *The amendments commence the day after the instrument is registered. However, item 6 provide that item 5 applies from 1 July 2007 and items 7 and 8 apply in relation to the 2012-13 income year and later income years.*
>
> *The retrospective nature of the application ensures that the meaning of superannuation income stream benefits operates as intended from 2007, when significant reforms to simplify the superannuation system commenced. The intention of the existing provisions is clear and taxpayers have been applying the provisions as intended.*
>
> *(emphasis added)*

82. Mr Douglas has not raised any issue as to the validity of the 2018 Amendment Regulations. It is thus not necessary to consider the extent to which, if at all, it is within the remit of the Tribunal, which exercises executive, not judicial, power to pronounce upon the validity of those regulations. It is though necessary for the Tribunal, in the exercise of its jurisdiction to review the objection decision, to consider whether, on their true construction, those regulations have any relevant application to the review.

83. The Commissioner submitted:

> *Section 307-70 permits the specification of a superannuation benefit that is paid from a superannuation income stream to be a superannuation income stream benefit. The 2018 Amendment Regulations in reg 307-70.01 clarify that position and specify that all superannuation benefits except those described in subreg (2), are so specified.*

84. Whatever "clarity" the 2018 Amendment Regulations introduce into the future assessment of individuals, the issue of present concern is the effect, if any, which they have on Mr Douglas, who has already been assessed in respect of the 2015 income year. As I

have already highlighted, at the time when he was assessed, there was no regulatory specification. This was the point made on behalf of Mr Douglas. He added in submissions, correctly, that this same position also obtained at the time of the objection decision in respect of his objection to that assessment and at the time when he sought the review of that objection decision by the Tribunal.

85. In considering the application, if any, of the specification made by the 2018 Amendment Regulations to the present review, it is not just desirable but necessary to consider the effect on Mr Douglas of the 2015 assessment.

86. The arrears payment was made in the 2015 income year. As mentioned already, it is common ground that the arrears payment was income. In terms of s 6-5(2) of the ITAA97, that income was "derived" on its receipt by Mr Douglas. It was "obtained, got or acquired" then, even though it was calculated on the basis that an entitlement to periodic invalidity pay was taken, for the purposes of the DFRDB Act, to have commenced in 2002 at the time when Mr Douglas was discharged from the ADF. Put another way, for the purposes of the ITAA97, there was no derivation prior to the 2015 income year even though, had the entitlement existed when Mr Douglas was discharged and periodic payments of invalidity pay under the DFRDB Act then commenced, each periodic payment thereafter would have been derived on receipt.

87. There was once a time when there was a school of thought in relation to when income tax is due and owing that, "tax is a debt due and owing, although not payable, notwithstanding that no assessment has been made": *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256, at 259 per Gibbs J (as his Honour then was). A different view, expressed by Mason J (as his Honour then was) in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1, at 16 (***Clyne***), was that "income tax is due when it is assessed and notice is served of that assessment and that the tax does not become payable before the date fixed by s 204 [of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**)]". That view, as Mason J noted in that case, accorded with the statement made by Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ in *George v Federal Commissioner of Taxation* (1952) 86 CLR 183, at 207 that, "tax is only due after it is 'assessed' (see, for example, s 204)".

88. The view expressed by Mason J in *Clyne* has come to be accepted as correct. As Gageler J observed in *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544, at [48], "The ordinary rule is that income tax is only 'due and payable' by an entity if the Commissioner makes an assessment of the income tax that is payable by that entity for a financial year". This "ordinary rule" is now given expression in s 5-5(2) of the ITAA97. It is not necessary for the purposes of this review to further consider the effect of s 5-5 of the ITAA97 in relation to when the assessed income tax became due and payable. Suffice it to say, it was due and payable before the commencement of the 2018 Amendment Regulations.

89. Thus, when the Commissioner made, issued and notified his assessment in respect of Mr Douglas' taxable income for the 2015 income year on 8 October 2015, Mr Douglas became indebted to the Commonwealth in respect of the assessed income tax liability.

90. Mr Douglas had a right to object against that assessment: s 175A of the ITAA36. He invoked that right. Upon that objection being lodged, the Commissioner's duty was to decide whether to allow it in whole or in part or to disallow it: s 14ZY(1) of the TAA. He discharged that duty on 2 November 2016 by disallowing Mr Douglas' objection. By s 14ZZ(1)(a)(i) of the TAA, Mr Douglas was given a right to apply to the Tribunal to review that objection decision. He invoked that right by the application which he lodged with the Tribunal on 22 December 2016.

91. Prior to the commencement of the 2018 Amendment Regulations, there was therefore an income tax liability which Mr Douglas had incurred as a sequel to the assessment. Further, he had also before then invoked a right of review in respect of the objection decision made concerning his invoked right of objection against that assessment.

92. The *Acts Interpretation Act 1901* (Cth) (**the Acts Interpretation Act**) makes particular provision in respect of the effect of amendments made by Acts or legislative instruments on existing liabilities or rights and legal proceedings concerning them. By s 7(2), that Act provides, materially:

> *(2) If an Act, or an instrument under an Act, repeals or amends an Act (the **affected Act**) or a part of an Act, then the repeal or amendment does not:*
>
> …

> *(b) affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or*
>
> *(c) affect any right … or liability acquired, accrued or incurred under the affected Act or part; or*
>
> *…*
>
> *(e) affect any … legal proceeding or remedy in respect of any such right, … liability … .*
>
> *Any such investigation, legal proceeding or remedy may be instituted, continued or enforced … as if the affected Act or part had not been repealed or amended.*

93. The provision made by s 7(2) of the Acts Interpretation Act is, by s 13(1) of the *Legislation Act 2003* (Cth) (**Legislation Act**) and s 46(1) of the Acts Interpretation Act, applicable to legislative instruments. The 2018 Amendment Regulations are a legislative instrument. However, s 7(2) is subject to any contrary intention in the amending Act or legislative instrument: s 2(2) of the Acts Interpretation Act.

93. For the purposes of s 7(2) of the Acts Interpretation Act, Mr Douglas' assessed income tax liability was, axiomatically, a liability acquired or incurred before the commencement of the 2018 Amendment Regulations. Further, the right of Tribunal review which he had invoked in respect of the objection decision concerning that assessment was a right which had accrued, or alternatively a remedy, and the consequential review hearing upon which the Tribunal had embarked was a legal proceeding for the purposes of s 7(2) of that Act: *Esber v The Commonwealth of Australia* (1992) 174 CLR 430, at 440-441 (***Esber***).

94. Subject to any contrary intention in the 2018 Amendment Regulations, the effect of s 7(2) of the Acts Interpretation Act was that Mr Douglas was, as he submitted, entitled to have his review conducted unaffected by the amendments made by those regulations. Even more fundamentally, the effect of that provision was that those amendments did not affect the liability to income tax to which he was subject in respect of the 2015 income year. Thus, if, as he contended and, for the reasons above, I have found, the arrears payment should have been treated in accordance with s 307-145(1) of the ITAA97, the amendments could not affect that position.

95. The present case is quite different to *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, a case relied upon by the Commissioner. In that case, the Tribunal's task was to exercise afresh the discretion conferred by s 501(2) of the *Migration Act 1958* (Cth) in relation to whether to cancel a particular visa. Following the institution of the review proceedings in the Tribunal the Minister's directions offering guidance as to the exercise of that discretion were revoked and a fresh direction offering different guidance was made. The Tribunal looked to the new guidelines in deciding to affirm the cancellation decision. The person affected contended in the Full Court of the Federal Court of Australia that the effect of s 7(2) of the Acts Interpretation Act was that the Tribunal ought to have looked to the earlier guidelines, because they were the source of an accrued right. This contention failed. In distinguishing *Esber*, Kenny and Mortimer JJ, with whom Dowsett J agreed observed, at [72], "unlike *Esber*, there is no underlying change in a vested, or certain, position". Here, where once there was no regulatory specification for the purposes of s 307-145(1) of the ITAA97, there now is following the commencement of the 2018 Amendment Regulations. The substantive law has been changed by amendment. That substantive law is not just the ITAR but also the application of s 307-145(1) of the ITAA97. In short, there is here an endeavour to change by amendment a vested or accrued position.

96. Also quite different to the present circumstances is another case relied upon by the Commissioner, *Presiding Member of the Southern Joint Development Assessment Panel v DCSC Pty Ltd* (2018) 54 WAR 89 (***Panel v DCSC***). In that case, the Court of Appeal distinguished *Esber* on the basis that in *Esber* both the operative provisions and the provision conferring a right of review in the legislation there being considered had been repealed (at [101]). In the context of the statutory scheme there under consideration, the court found that the relevant right was not a right to have the application for development approval determined by reference to the provisions of the scheme at the time the application was made, but rather to have the Tribunal consider whether a correct decision had been made having regard to the provisions of the scheme in force at the time of the Tribunal's decision (at [104]). Here, there is an accrued income tax liability as a sequel to an assessment with the question being whether the assessment concerned was excessive. The amendment made by the 2018 Amendment Regulations purports on its face to give a specification for the purposes of s 307-145(1) of the ITAA97 in circumstances where, at the time of derivation and assessment, none hitherto existed. This case concerns an accrued liability, which makes it very different to *Panel v DCSC*.

97. In summary, unless there is a contrary intention evident in the 2018 Amendment Regulations, Mr Douglas is entitled to have his review decided unaffected by those regulations for two reasons having their origin in s 7(2) of the Acts Interpretation Act. The first reason entails a proposition analogous to that which was asserted in the alternative (by reference to the then s 8 of the Acts Interpretation Act, now s 7) but was ultimately unnecessary to determine in *Esber*, namely, an entitlement unaffected by amendment. Here, it is not an accrued entitlement but an accrued liability, the assessed liability to income tax, which is present. The second reason is that the invoked right of review by the Tribunal is to be continued unaffected by the amendments. The 2018 Amendment Regulations do not evince an intention contrary to the operation of s 7(2) of the Acts Interpretation Act.

98. It is now necessary further or alternatively to consider s 12 of the Legislation Act. That section provides for the commencement of legislative instruments (and notifiable instruments). Prior to 24 August 2018, in relation to a legislative instrument, s 12 provided, materially:

> ***12 Commencement of legislative instruments and notifiable instruments***
>
> *When do legislative instruments and notifiable instruments commence?*
>
> *(1) A legislative instrument or a notifiable instrument commences:*
>
> *(a) at the start of the day after the day the instrument is registered; or*
>
> *(b) so far as the instrument provides otherwise—in accordance with such provision.*
>
> *Note: The instrument may provide for its commencement by enabling a commencement instrument to be made: see subsection (5).*
>
> *Retrospective application*
>
> *(2) A provision of a legislative instrument … does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) if the provision commences before the day the instrument is registered, to the extent that as a result:*
>
> *(a) the person's rights as at that day would be affected so as to disadvantage the person; or*

(b) liabilities would be imposed on the person in respect of anything done or omitted to be done before that day.

(3) However, subject to subsection (2), a legislative instrument … may provide that a provision of the instrument commences before the day the instrument is registered.

(4) The effect of subsection (2) or (3) in relation to an instrument is subject to any contrary provision in an Act.

…

[emphasis added]

99. On 25 August 2018, s 12 of the Legislation Act was amended by the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* (Cth) (**the Legislation Amendment Act**). As so amended, s 12 provides:

12 Commencement of legislative instruments and notifiable instruments

When do legislative instruments and notifiable instruments commence?

(1) A legislative instrument or a notifiable instrument commences:

(a) at the start of the day after the day the instrument is registered; or

(b) so far as the instrument provides otherwise—in accordance with such provision.

Note: The instrument may provide for its commencement by enabling a commencement instrument to be made: see subsection (5).

Retrospective commencement

(1A) Despite any principle or rule of common law, a legislative instrument or notifiable instrument may provide that the instrument, or a provision of the instrument, commences before the instrument is registered.

Note: The effect of this subsection is to allow legislative and notifiable instruments to commence retrospectively (subject to subsection (2)). This subsection is subject to a contrary provision (see subsection (4)).

Retrospective application

> (2) *However, if a legislative instrument or notifiable instrument, or a provision of such an instrument, commences before the instrument is registered, the instrument or provision does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) to the extent that as a result of that commencement:*
>
> (a) *the person's rights as at the time the instrument is registered would be affected so as to disadvantage the person; or*
>
> (b) *liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.*
>
> *Retrospective commencement or application subject to contrary provision*
>
> (4) *The effect of subsection (1A) or (2) in relation to an instrument is subject to any contrary provision in an Act.*
>
> *Commencement instrument*
>
> (5) *Without limiting paragraph (1)(b), for the purposes of that paragraph, a legislative instrument or notifiable instrument may authorise the making of a commencement instrument in relation to the legislative instrument or notifiable instrument.*
>
> *[emphasis added]*

100. By s 2B, the Acts Interpretation Act defines "commencement" to mean "the time at which the Act or provision comes into operation". The same meaning of commencement applies to legislative instruments.

101. The Commissioner submitted that no retrospective operation attended the 2018 Amendment Regulations. He submitted that all that these regulations did, materially, was to confirm a specification that was already present indirectly. For reasons given already, I do not accept that there was any such indirect specification beforehand.

102. The Commissioner also submitted that, "the addition of reg 910-1.10 by the 2018 Amendment Regulations only seeks to apply Item 5 (being reg 307-70.01) to situations from 1 July 2007" and thus does not seek to "commence" before those regulations were registered. I reject this. The whole purpose of the new reg 910-1.10 is that the new reg 307-70.01 come into operation before the date of registration. As Mr Douglas correctly submitted, "There seems to be no other sensible reading of Item 6, introducing reg 910-

1.10". The 2018 Amendment Regulations are a paradigm example of regulations that seek to have retrospective operation.

103. The Commissioner further submitted that, in any event, there was no right affected or anything done in terms of s 12(2)(a) or (b) of the Legislation Act. As will already be apparent from the discussion of s 7(2) of the Acts Interpretation Act, this submission also cannot be accepted. There were two acts done by the Commissioner himself prior to the registration of the 2018 Amendment Regulations. He made and notified an assessment of Mr Douglas' taxable income for the 2015 year, based on the law as it then stood. Further, by his objection decision, he confirmed that assessment, again on the law as it then stood. In response, Mr Douglas then exercised a right to seek the review by the Tribunal of that objection decision, thereby assuming the burden of proving the assessment to be excessive. On the Commissioner's promoted construction of the 2018 Amendment Regulations, Mr Douglas would have the disadvantage, not of discharging that burden by reference to the law as it stood at the time of derivation and assessment, but in light of those regulations. In the circumstances, the effect of s 12 of the Legislation Act is that is entitled to have his review determined unaffected by the 2018 Amendment Regulations.

What if reg 307-70.01 of the ITAR were applicable?

104. Mr Douglas made an alternative submission that, were the new reg 307-70.01 applicable, the arrears payment, though a "superannuation benefit", was nonetheless not paid from a "superannuation income stream" as that term is defined in reg 995- .01(1) of the ITAR97. For reasons given above, I consider that the arrears payment was paid from an "income stream" but not from a "superannuation income stream" as defined.

Some late developments, including whether Mr Douglas is at least entitled to a credit for tax withheld of $8,346.66 during the 2003 tax year?

105. Mr Douglas advanced a subsidiary ground of objection based on the fact that, in calculating the arrears payment to which he was entitled as a result of its 2014 Class A invalidity determination, the CSC had deducted the gross amount of the ETP (the commutated retirement pay), including the tax of $8,346.66 already paid. He submitted that if, which he denied, the Commissioner had correctly otherwise correctly assessed the arrears payment, the tax payable should nonetheless be reduced by the allowance of a

credit for the $8,346.66 in tax already paid. Otherwise, he submitted, he would have paid this amount of tax twice.

106. Strictly, given that I have concluded that the arrears payment should have been treated in the manner prescribed in s 307-145(1) of the ITAA97, this alternative ground does not now arise. However, upon reconsideration and following of an exchange of correspondence between the Commissioner (on behalf of both parties) and the CSC between August and October 2019 (included in supplementary "T Documents"), the Commissioner came to accept that, on any view, a tax credit of $8346.66 ought to have been allowed to Mr Douglas. Mr Douglas came to adopt as his alternative position that the objection decision should be set aside and the matter remitted with a direction that the $8,346.66 withheld be applied as a credit against his 2015 income year assessment.

107. In the 2003 income year, the Authority was obliged by s 12-85 of Schedule 1 to the TAA to, and did, withhold tax of $8,346.66 from Mr Douglas' ETP. The sum of $8,436.66 constituted a "withholding payment" (s 10-5, Item 8 of the table, of Schedule 1 to the TAA refers).

108. Because it was a withholding payment, the amount of $8,346.66 withheld by the Authority was a "tax credit": s18-15(1) of Schedule 1 to the TAA. The Commissioner was obliged to apply that tax credit in accordance with Division 3 of Part IIB of Schedule 1 to the TAA. In essence, he was obliged to apply that tax credit against any tax debt that Mr Douglas had or to refund it. There has been no refund. However and materially, the relevant particulars of the assessment which Mr Douglas must prove excessive are the taxable income and the tax payable on that taxable income (definition of "assessment" in s 6(1) of ITAA36 refers). The tax credit forms part of Mr Douglas' account with the Commissioner but allowing it does not alter the tax payable on his taxable income, only the net amount owed to the Commonwealth and payable to the Commissioner. I therefore accept the Commissioner's supplementary reply submission that no direction by the Tribunal is necessary in order to oblige the Commissioner to allow this credit (or to make a refund if there is no tax debt against which to apply it).

109. As mentioned above, the amount of the arrears payment that the Commissioner included in his assessment was (understandably on the view he took of the law) the amount shown in the PAYG payment summary given to Mr Douglas by the CSC. That was $331,136.00.

110. In responding on 16 August 2019 to a request made on behalf of the parties that it "clarify the basis of the calculations in the [PAYG payment summary]", the CSC provided the following summary of calculations more particularly detailed in tables in an appendix to its response:

> *After CSC approved Mr Douglas for retrospective invalidity retirement in 2014 with effect from 1 September 2002 (ie. when he discharged from the ADF), the amount of arrears of invalidity pension payable to Mr Douglas was calculated and balanced against amounts already paid, including the commutation lump sum received in 2002 that was no longer payable.*
>
> *Briefly, the amounts were as follows:*
>
> - *Retirement pay paid (after commutation election) - $240,644.19*
> - *Invalidity pay due to be paid - $608,835.80*
> - *Difference between Retirement Pay paid and Invalidity Pay due to be paid - $368,191.61*
> - *Less: Commutation debt - $95,546.51*
> - *Less: DVA claim amount – Nil - no claim by DVA [Department of Veterans' Affairs]*
> - *Sub-total: Remaining Arrears to be paid: $272,642.40*
> - *Less: Tax - $167,592.00*
> - *Final total: Net amount - $105,050.40*

111. Truly lamentably, nowhere in the body of the letter or in the appendix, does the figure of $331,136.00, which the CSC had specified in its PAYG payment summary as the amount of the arrears payment, appear. An explanation was offered, in Table D in the appendix, for how the sum of $167,592.00 mentioned above was to be reconciled with the specification by the CSC in its PAYG summary of $175,266.00 as the amount of tax withheld. In essence, the difference was referable to tax withheld from instalments of invalidity pay paid to Mr Douglas in the 2015 income year after the arrears payment. I therefore accept the explanation and find that the amount of tax withheld was correctly stated in the PAYG payment summary.

112. Accepting that $331,136.00 was the arrears payment is quite another matter. The position understandably and reasonably put to the CSC by the Australian Government Solicitor,

who acted for the Commissioner, in responding on 20 September 2019 to the CSC's letter of 16 August 2019, was, materially:

> *On this basis [i.e. the position summarised by the CSC in its letter], the Commissioner will need to:*
>
> - *re-apply the Lump Sum In Arrears (LSIA) provisions, utilising the new figure of $272,642.40 (being the total arrears actually received by Mr Douglas in the 2015 financial year); and*
>
> - *reduce Mr Douglas' assessable income for the 2015 year to exclude the$95,546.51 that was deducted from the arrears payable in 2015.*

113. The reply of the CSC of 4 October 2019 was, with all due respect, singularly unhelpful, offering no detail as to how it had come to specify $331,136.00 as the amount of the arrears payment. Instead, the CSC confirmed the correctness of the calculations it had made and detailed in its letter of 16 August 2019.

114. It is the CSC, not the Commissioner or the Tribunal in his place, which is charged with the calculation and administration of payments under the DFRDB Act to ex-servicemen and women such as Mr Douglas. Of course, the amount in the particular circumstances of a given member or ex-member of the ADF is a matter of law. But both the Commissioner, Mr Douglas and the Tribunal are entitled to look to the CSC for assistance. On the material before the Tribunal, the best assistance that the CSC has offered entails no explanation for how it came to specify $331,136.00 but an explanation that indicates that it should have specified $272,642.40. Neither party has sought to summons the author of the CSC letters for a further and better reconciliation. Further, there has been quite enough "evolving" of issues in this review as it is.

115. The best evidence before the Tribunal is that the amount of the arrears payment was $272,642.40. I find accordingly.

Disposal

116. For the reasons given above, Mr Douglas has proved that the assessment for the 2015 income year was excessive. The 2015 income year assessment will need to be amended on the footing that:

(a) the amount of the arrears payment was $272,642.40, not $331,136.00;

(b) the arrears payment must be treated in the manner prescribed in s 307-145(1) of the ITAA97); and

(c) the amount of $95,546.51 that was deducted from the arrears payable to Mr Douglas must be excluded from his assessable income for the 2015 income year.

117. It will be for the Commissioner to make an amended assessment under s 14ZZL of the TAA once the Tribunal's decision has become final.

118. It would do less than justice not to conclude these reasons firstly by recording my sincere appreciation in respect of the assistance provided by counsel for each of the parties to the review in their submissions both orally and in writing in respect of the issues as they "evolved". Secondly, if the encounter in this case is any guide, to the prospect of being "broken by age and war" there must now be added for members and former members of the ADF the prospect of encounter with how we as a Nation State have come to regulate and tax the bargain struck on enlistment.

I certify that the preceding 118 (one hundred and eighteen) 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: 13 March 2020

Dates of hearing:	**1 June 2018** **12 December 2018** **9 October 2019**
Date final submissions received:	**26 November 2019**
Counsel for the Applicant:	**Mr P Hack QC with Mr J Ward**
Solicitors for the Applicant:	**Cleary Hoare Solicitors**

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