BLANK v COMMISSIONER OF TAXATION (S144/2016)

Court appealed from: Full Court of the Federal Court of Australia
[2015] FCAFC 154

Date of judgment: 29 October 2015

Special leave granted: 16 May 2016

This matter principally concerns the correct characterisation, for tax purposes, of payments in excess of US$160 million ("the Amount") made by Glencore International ("GI") to the Appellant in the 2007 to 2010 income years. These payments were made following the Appellant's resignation on 31 December 2006 from Glencore Australia Pty Limited, a wholly owned subsidiary of GI.

The Amount was calculated pursuant to the Appellant's participation in a series of profit sharing arrangements made during the course of his employment with the Glencore Group of companies. At issue is whether the Amount is to be assessable as ordinary income pursuant to s 6-5 of the *Income Tax Assessment Act* 1997 (Cth) ("ITAA 1997") or s 26(e) of the *Income Tax Assessment Act* 1936 ("ITAA 1936"). Alternatively, is it to be characterised as a capital gain following the execution of a Declaration of Assignment and General Release by the Appellant on 15 March 2007?

The primary judge, Justice Edmonds, held that the payments made to the Appellant in the income years 2007 to 2010 were assessable as ordinary income. His Honour also dismissed the Appellant's application to reopen his case to argue that s 23AG of the ITAA 1936 applied to exempt part of the Amount from tax.

Upon appeal, the Appellant's main challenge was to Justice Edmonds' finding that the payments made by GI were assessable as ordinary income as a reward for services derived when received. He further disputed his Honour's decision that s 23AG of the ITAA 1936 could not apply. In addition the Appellant contended that leave should have been granted to him to re-open his case, with the result being that a substantial part of the payments (if otherwise assessable) should have been held to be exempt from tax under s 23AG(1). For its part, the Respondent filed both a notice of cross appeal and a notice of contention.

On 29 October 2015 a majority of the Full Federal Court (Kenny & Robertson JJ, Pagone J dissenting) agreed with Justice Edmonds' finding that the payments made by GI to the Appellant were assessable as ordinary income. Having come to this conclusion, the majority then dismissed the Respondent's notices of cross appeal and contention. Justice Pagone however held that the instalments were not assessable as ordinary income, and that the Appellant was instead assessable for a capital gain.

The grounds of appeal include:

- The [Full] Court erred in holding that the payments made by GI to the Appellant were assessable as ordinary income as a reward for services and were derived when received by the Appellant.

On 6 June 2016 the Respondent filed a notice of cross-appeal, the grounds of which include:

- The Full Court erred in concluding that there was no derivation by the Appellant of payments by GI in the 2007 income year pursuant to s 6-5(4) of the ITAA 1997: see [2015] FCAFC 154 at [95] per Kenny and Robinson JJ and paragraph [146] per Pagone J.

On 6 June 2016 the Respondent also filed a notice of contention, the grounds of which include:

- That the payments from GI received by the Appellant, or dealt with at his direction, were income according to ordinary concepts pursuant to s 6-5 of the ITAA 1997 in accordance with the principles described in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1986-1987) 163 CLR 199.