HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND GLEESON JJ

CATHERINE VICTORIA ADDY APPELLANT

AND

COMMISSIONER OF TAXATION RESPONDENT

Addy v Commissioner of Taxation
[2021] HCA 34
Date of Hearing: 24 June 2021
Date of Judgment: 3 November 2021
S25/2021

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 and 3 of the orders of the Full Court of the Federal Court of Australia made on 6 August 2020 and, in their place, order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation

T H J Hyde Page for the appellant (instructed by Harmers Workplace Lawyers)

S B Lloyd SC with G J D del Villar QC for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Addy v Commissioner of Taxation

Income tax (Cth) – Where Art 25(1) of Convention between Australia and United Kingdom for Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains ("United Kingdom convention") provides United Kingdom nationals not be subjected in Australia to "other or more burdensome" taxation than imposed on Australian nationals "in the same circumstances, in particular with respect to residence" – Where Pt III of Sch 7 to *Income Tax Rates Act 1986* (Cth) applied new tax rate to persons holding Working Holiday (Temporary) (Class TZ) (Subclass 417) visa ("working holiday visa") – Where new tax rate imposed on working holiday visa holders more burdensome than tax rate imposed on Australian nationals deriving taxable income from same source during same period – Where new tax rate under Pt III of Sch 7 differentiates between Australian residents for tax purposes who hold working holiday visas and others who do not – Where Commissioner of Taxation assessed United Kingdom national who was Australian resident for tax purposes applying Pt III of Sch 7 – Whether application of Pt III of Sch 7 contravened Art 25(1) of United Kingdom convention.

Words and phrases – "Australian resident for taxation purposes", "bilateral agreements", "discrimination based on nationality", "discriminatory treatment", "double taxation treaties", "hypothetical comparator", "in the same circumstances", "non-discrimination clause", "non-resident taxpayer", "OECD Model Convention", "other or more burdensome", "resident taxpayer", "tax burden", "working holiday maker", "working holiday taxable income", "working holiday visa".

Income Tax Act 1986 (Cth), ss 4 and 5(1).
Income Tax Rates Act 1986 (Cth), Pts I and III of Sch 7.
International Tax Agreements Amendment Act 2003 (Cth), Sch 1.

1 KIEFEL CJ, GAGELER, GORDON, EDELMAN AND GLEESON JJ. The appellant, Ms Catherine Addy, is a national of the United Kingdom. On 3 July 2015, she applied for and was granted a Working Holiday (Temporary) (Class TZ) (Subclass 417) visa under the *Migration Act 1958* (Cth) (a "working holiday visa")[1]. Ms Addy travelled to Australia on her British passport and, on 20 August 2015, entered Australia on her working holiday visa. Between August 2015 and May 2017, Ms Addy primarily lived and worked in Australia while holding a working holiday visa. During the 2017 income year, Ms Addy derived taxable income of $26,576 working in casual employment as a food and beverage waiter in Sydney.

2 In December 2016, a new tax rate applicable to persons holding working holiday visas was enacted by inserting a new Pt III into Sch 7 to the *Income Tax Rates Act 1986* (Cth) ("the *Rates Act*"), to take effect in relation to assessable income derived on or after 1 January 2017[2]. Part III applied a flat rate of tax of 15 per cent to the first $37,000 of an individual's "working holiday taxable income"[3], a maximum tax liability of $5,550. Under Pt I of Sch 7 to the *Rates Act*, the tax burden for an Australian national deriving taxable income from the same source as an individual earning working holiday taxable income during the same period would be less; they were entitled to a tax-free threshold for the first $18,200 and were then taxed at 19 per cent up to $37,000[4], a maximum tax liability of $3,572.

3 Australia and the United Kingdom are signatories to the Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital

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1 The tax rates applicable to holders of working holiday visas under Pt III of Sch 7 to the *Income Tax Rates Act 1986* (Cth) also relevantly apply to holders of a Work and Holiday (Temporary) (Class US) (Subclass 462) visa: s 3A(1).

2 *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016* (Cth), s 2 and Sch 1, items 7 and 8.

3 *Rates Act*, Sch 7, Pt III, cl 1, table item 1.

4 *Rates Act*, Sch 7, Pt I, cl 1, table item 1 read with s 3(1) definition of "tax-free threshold".

Gains ("the United Kingdom convention")[5] made at Canberra in August 2003. The United Kingdom convention entered into force, and was incorporated into Australian domestic law, on 17 December 2003[6].

4 Article 25(1) of the United Kingdom convention relevantly provides that nationals of the United Kingdom shall not be subjected in Australia to "other or more burdensome" taxation than is imposed on Australian nationals "in the same circumstances, in particular with respect to residence". It prevails[7] over the *Income Tax Assessment Act 1936* (Cth) (other than Pt IVA) and the *Income Tax Assessment Act 1997* (Cth)[8] ("the Assessment Acts"), as well as a law imposing taxation, to the extent of any inconsistency.

5 On 20 December 2017, the Commissioner of Taxation ("the Commissioner") issued Ms Addy with an amended notice of assessment for the 2017 income year which applied Pt III of Sch 7 to Ms Addy's assessable income after 1 January 2017[9]. Ms Addy objected to the assessment on the relevant ground that the application of Pt III of Sch 7 to her assessable income contravened Art 25(1) of the United Kingdom convention. The Commissioner disallowed Ms Addy's objection. The Commissioner found that Ms Addy was "an Australian resident for taxation purposes during the 2017 [income] year" and a "working holiday maker" earning "working holiday taxable income" within the meaning of s 3A of the *Rates Act* and was, therefore, subject to the tax

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5 [2003] ATS 22.

6 *International Tax Agreements Act 1953* (Cth), ss 4 and 5(1) read with s 3AAA(1) definition of "United Kingdom convention"; *International Tax Agreements Amendment Act 2003* (Cth), Sch 1.

7 *International Tax Agreements Act*, ss 4 and 5(1). See *Commissioner of Taxation v Lamesa Holdings BV* (1997) 77 FCR 597 at 600; *Satyam Computer Services Ltd v Federal Commissioner of Taxation* (2018) 266 FCR 502 at 506-507 [16]-[17]; *Burton v Federal Commissioner of Taxation* (2019) 271 FCR 548 at 555 [42], 575-576 [113]. See also Australia, House of Representatives, *International Tax Agreements Amendment Bill 2003*, Explanatory Memorandum at 89 [1.327].

8 See *International Tax Agreements Act*, s 3(1) definition of "Assessment Act".

9 The Commissioner had issued Ms Addy with previous assessments in respect of the year ended 30 June 2017 which are not presently relevant.

rates in Pt III of Sch 7. But, the Commissioner did not accept Ms Addy's ground of objection based on Art 25(1) of the United Kingdom convention. Ms Addy commenced proceedings in the Federal Court of Australia appealing the objection decision. The Federal Court allowed the appeal and ordered that the matter be remitted to the Commissioner for the making of a consequential amended assessment. An appeal by the Commissioner to the Full Court of the Federal Court was allowed by majority. Ms Addy sought and was granted special leave to appeal to this Court. The sole ground of appeal was that the majority in the Full Court erred in holding that Ms Addy should not obtain relief under Art 25(1).

6 The principal question before this Court was whether, in contravention of Art 25(1) of the United Kingdom convention, Pt III of Sch 7 to the *Rates Act* imposed a more burdensome taxation requirement on Ms Addy, a national of the United Kingdom, than that imposed on an Australian national in the same circumstances. That question is ultimately a question of domestic law and, as with the application of any domestic taxing law, the question is specific to a taxpayer in a specific income year and the answer may vary within any income year[10]. That is, of course, not to deny that transposed text of Articles in the United Kingdom convention that are applied as domestic law "should bear the same meaning in the domestic statute as it bears in the treaty"[11].

7 There was no dispute in this Court that Ms Addy was a "national" of the United Kingdom as defined in Art 3(1) of the United Kingdom convention, that Ms Addy was an Australian "resident" for tax purposes during the 2017 income year[12] and that the rates in Pt III of Sch 7 to the *Rates Act* imposed taxation that was "other or more burdensome" than that which applied to resident Australian nationals.

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10 See, eg, Australia, House of Representatives, *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum at 4 [1.4].

11 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265. See also *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [25], 230 [128] and the authorities cited there; *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149 at 186 [119]-[120]; *Bywater Investments Ltd v Federal Commissioner of Taxation* (2016) 260 CLR 169 at 224 [147].

12 *Income Tax Assessment Act 1936*, s 6(1) definition of "resident" para (a)(ii).

8 The question is whether that more burdensome taxation was imposed on Ms Addy owing to her nationality. The short answer is "yes". When the position of Ms Addy is compared with that of an Australian national, as it must be, that is the only conclusion which may be drawn. Pt III of Sch 7 to the *Rates Act* was applied to Ms Addy, a national of the United Kingdom. Ms Addy's circumstances in the 2017 income year including that of her residency in Australia for taxation purposes were relevantly the same as an Australian national. She did the same kind of work and earned the same amount of income from the same source; yet an Australian national was required by Pt I of Sch 7 to the *Rates Act* to pay less tax. In contravention of Art 25(1) of the United Kingdom convention, the more burdensome taxation was imposed on Ms Addy owing to her nationality and, for that reason, the tax rates in Pt III of Sch 7 did not apply to Ms Addy in the 2017 income year. The appeal should be allowed.

Legislative framework

9 The *Income Tax Act 1986* (Cth) incorporates the Assessment Acts and imposes income tax at the rates declared by the *Rates Act*[13]. The Assessment Acts relevantly contain the ordinary taxing provisions for taxpayers. Income tax, payable by an individual in any income year[14], is worked out by reference to a taxpayer's taxable income[15] – all assessable income less any allowable deductions – multiplied by the applicable income tax rate or rates in the *Rates Act*, less any tax offsets[16].

10 Prior to the introduction of Pt III of Sch 7 in 2016, the *Rates Act* provided differential tax rates on the taxable income of a "resident taxpayer"[17] and a

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13 *Income Tax Act*, ss 4 and 5(1); *Income Tax Assessment Act 1936*, s 6(1) definition of "this Act".

14 *Income Tax Assessment Act 1997*, ss 3-5(1), 4-1, 4-10(1), 9-1.

15 *Income Tax Assessment Act 1997*, ss 4-10(2), 4-15(1), Div 8 of Pt 1-3.

16 *Income Tax Assessment Act 1997*, s 4-10(3).

17 *Rates Act*, s 12(1) and Sch 7, Pt I read with s 3(1) definition of "resident taxpayer" (as in force on 1 December 2016).

"non-resident taxpayer"[18]. For waiters working in Sydney who were residents of Australia for tax purposes in a year of income, the tax rate was the same regardless of nationality – they were entitled to a tax-free threshold for the first $18,200 and were then taxed at 19 per cent up to $37,000[19]. The tax rate applied to the taxable income of a taxpayer deriving income in Australia calculated under the Assessment Acts and imposed by the *Income Tax Act* depended on residency for Australian tax purposes, not nationality. It did not depend on whether the taxpayer held a working holiday visa[20].

Part III of Sch 7 to the Rates Act

11 Part III of Sch 7, however, applied a 15 per cent income tax rate to "working holiday taxable income"[21] derived by a "working holiday maker" on amounts up to $37,000, with ordinary income tax rates applying for income exceeding this amount[22]. An individual was a "working holiday maker" if the person relevantly held a working holiday visa, or a bridging visa granted in relation to a working holiday visa, under the *Migration Act*[23]. At the relevant times, to be eligible for a working holiday visa, a person had to be aged 18 to 30; be a citizen

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18 *Rates Act*, s 12(1) and Sch 7, Pt II read with s 3(1) definition of "non-resident taxpayer" (as in force on 1 December 2016).

19 *Rates Act*, Sch 7, Pt I, cl 1, table item 1 read with s 3(1) definition of "tax-free threshold" (as in force on 1 December 2016).

20 cf *Income Tax Rates Amendment (Working Holiday Maker Reform) Act*, Sch 1, item 7.

21 *Rates Act*, s 3A(2): "working holiday taxable income" was relevantly defined as an individual's assessable income for the year of income derived from sources in Australia while the individual was a working holiday maker, less related deductions. Section 3A(3) provided that the individual's working holiday taxable income does not include any superannuation remainder or employment termination remainder of the individual's taxable income for the year of income.

22 Australia, House of Representatives, *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum at 3-4 [1.3]-[1.4].

23 *Rates Act*, s 3A(1).

of, and hold a passport from, an eligible country; and apply for the visa from outside Australia if they had not previously held a working holiday visa[24]. The United Kingdom was an eligible country. Part III of Sch 7, which applied irrespective of whether a "working holiday maker" was a resident of Australia for tax purposes, was enacted to "increase Australia's attractiveness as a destination of choice for working holiday makers, whilst ensuring that they pay tax at a fair rate on their earnings in Australia"[25].

United Kingdom convention

12 The United Kingdom convention is one of a number of bilateral agreements, or treaties, concluded between Australia and other countries based upon the Model Tax Convention on Income and on Capital, which was published by the Organisation for Economic Co-operation and Development ("the OECD Model Convention")[26]. The bilateral agreements, or treaties, based on the OECD Model Convention allocate the taxing powers between the two Contracting States[27], in this case the United Kingdom and Australia.

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24 *Migration Regulations 1994* (Cth), Sch 1, item 1225(3A) and Sch 2, cl 417.211(1)-(2) read with cl 417.111 definition of "working holiday eligible passport"; *Arrangements for Work and Holiday and Working Holiday Visa Applications 2015* (IMMI 15/040); *Arrangements for Work and Holiday and Working Holiday Visa Applications 2016/056* (IMMI 16/056). It is unnecessary to address the other requirements.

25 Australia, House of Representatives, *Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016*, Explanatory Memorandum at 3 [1.2].

26 The OECD first published the OECD Model Convention in 1977, having previously published the Draft Double Taxation Convention on Income and Capital in 1963. In 1997, the OECD Council recommended that member countries conform to the OECD Model Convention when concluding and applying bilateral tax conventions on income and capital: see OECD, *Recommendation of the Council concerning the Model Tax Convention on Income and on Capital* (23 October 1997) at [I.2]-[I.3].

27 See, eg, *Chong v Commissioner of Taxation* (2000) 101 FCR 134 at 141-142 [26]; *GE Capital Finance Pty Ltd v Federal Commissioner of Taxation* (2007) 159 FCR 473 at 482 [36]; *Undershaft (No 1) Ltd v Federal Commissioner of Taxation* (2009) 175 FCR 150 at 161 [45]-[46]; *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation [No 4]* (2015) 102 ATR 13 at 40-44 [50]-[60];

13 One of the purposes of the United Kingdom convention was to "updat[e] all the Articles, having regard to Australian, United Kingdom and OECD tax treaty developments since the existing treaty was entered into and later revised in 1980[28]"[29]. Prior to 2003, Australia had only ever agreed to the inclusion of a non-discrimination clause in its double taxation treaty with the United States, which was not incorporated into Australian domestic law[30]. The inclusion of a *binding* non-discrimination clause in the United Kingdom convention followed, and was expressly introduced in response to, a recommendation made by the Review of Business Taxation identifying Australia as the only OECD country which did not include a non-discrimination clause in its double taxation treaties[31].

14 The United Kingdom convention, incorporated into Australian domestic law, applies, among other things, to "the income tax ... imposed under the federal

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Satyam Computer Services (2018) 266 FCR 502 at 509 [26]; *Burton* (2019) 271 FCR 548 at 575-576 [113].

28 Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains [1968] ATS 9 and the Protocol to that Agreement (see [1980] ATS 22).

29 Australia, House of Representatives, *International Tax Agreements Amendment Bill 2003*, Explanatory Memorandum at 17 [1.4].

30 Australia, House of Representatives, *International Tax Agreements Amendment Bill 2003*, Explanatory Memorandum at 73 [1.243].

31 Review of Business Taxation, *A Tax System Redesigned: More Certain, Equitable and Durable* (1999) at 678 [22.22]; Australia, House of Representatives, *International Tax Agreements Amendment Bill 2003*, Explanatory Memorandum at 73 [1.244]. Since entering into the United Kingdom convention, Australia has concluded binding agreements containing non-discrimination clauses based on the OECD Model Convention with 11 countries, all of which have been incorporated into Australian domestic law. The countries are Norway, Finland, Japan, South Africa, New Zealand, Chile, Turkey, India, Switzerland, Germany and Israel: see *International Tax Agreements Act*, ss 3AAA(1) and 5(1).

law of Australia"[32]. Article 14, headed "Income from employment", relevantly provides that salaries, wages and other, similar remuneration derived by a resident of a Contracting State in respect of employment shall be taxable only in that Contracting State. A person is a "resident" of Australia if they are a resident of Australia for the purposes of Australian tax[33]. As has been observed, Ms Addy was a resident of Australia for the purposes of Australian tax, she derived wages in Australia and her wages were taxed in Australia.

15 Article 25(1) of the United Kingdom convention, however, provides:

> "*Nationals* of a Contracting State [the United Kingdom] *shall not be subjected* in the other Contracting State [Australia] *to any taxation or any requirement connected therewith, which is other or more burdensome* than the taxation and connected requirements to which nationals of that other State [Australia] *in the same circumstances*, in particular with respect to residence, are or may be subjected." (emphasis added)

There was no dispute in this Court that, under the United Kingdom convention, Ms Addy was a "national" of the United Kingdom[34], being a British citizen who had the right of abode in the United Kingdom.

16 In its terms, Art 25(1) disapplies any domestic taxing provision which imposes different or more onerous tax treatment on nationals of the United Kingdom in Australia than that imposed on Australian nationals deriving the same income from the same source in the same circumstances. The authors of *Klaus Vogel on Double Taxation Conventions* explained the effect of non-discrimination clauses like Art 25(1) in these terms[35]:

> "All provisions of national law discriminating against certain categories of persons ... are overridden to the extent that one or more of the

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32 United Kingdom convention, Art 25(7) read with Art 2(1)(b).

33 United Kingdom convention, Art 4(1)(b).

34 "[N]ational", in relation to the United Kingdom, is relevantly defined to mean "any British citizen, or any British subject not possessing the citizenship of any other Commonwealth country or territory, provided that individual has the right of abode in the United Kingdom": United Kingdom convention, Art 3(1)(l)(i).

35 Reimer and Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 4th ed (2015), vol II at 1683 [2] (footnote omitted).

non-discrimination rules apply. *Instead of such discriminatory provisions, the more advantageous domestic rules laid down for a state's own nationals or residents, as the case may be, become applicable*." (emphasis added)

Issues

17 In this Court, it was common ground that Art 25(1) requires a comparison to be made between a national of the United Kingdom, Ms Addy, and a hypothetical taxpayer in the same circumstances and that if the comparison showed that the tax burden imposed by Pt III of Sch 7 to the *Rates Act* was higher for Ms Addy by reason of her nationality, then Art 25(1) prevented the imposition of the excess taxation. The dispute between the parties was the basis for, and content of, the comparator.

18 Ms Addy contended, first, that Art 25(1) is not confined to prohibiting discriminatory treatment based solely on nationality (such that the paragraph would also prohibit discriminatory tax treatment based on, for example, ethnicity). Second, Ms Addy contended that, in any event, contrary to Art 25(1), Pt III of Sch 7 *does* discriminate solely on the basis of nationality. The Commissioner, on the other hand, contended that Art 25(1) is concerned with differential taxation that is imposed solely by reason of nationality, but that here the differential rates were imposed because of Ms Addy's visa type and not her nationality. The Commissioner further submitted that the words "in the same circumstances" in Art 25(1) mean "identical in all matters relevant to the imposition of taxation except nationality" and that, because here "it was not possible for an Australian national to earn working holiday income while holding a working holiday visa", an Australian national could never be "in the same circumstances" as Ms Addy. Accordingly, the Commissioner submitted, Art 25(1) was not engaged.

Decisions below

19 The primary judge held that the rates of tax in Pt III of Sch 7 did discriminate against Ms Addy on the basis of her nationality in contravention of Art 25(1). The primary judge remitted the matter to the Commissioner for the making of an amended assessment on the footing that, until 1 May 2017 (when Ms Addy left Australia), Ms Addy was a "resident" as defined by s 6(1) of the *Income Tax Assessment Act 1936* and that the rates of tax specified in Pt III of Sch 7 to the *Rates Act* did not apply to her income from 1 January 2017.

20 The Commissioner's appeal to the Full Court of the Federal Court was allowed by majority. Derrington J held that Art 25(1) was not infringed because the holding of a particular type of visa was not necessarily bound to nationality,

such that there was no causal nexus between Ms Addy's nationality and her liability to pay tax at the rates imposed by Pt III of Sch 7. His Honour reasoned that although Ms Addy held a working holiday visa, she did not hold it because she was a British national: it was "not a necessary concomitant" of her nationality. His Honour further held that the comparison that was required to be made under Art 25(1) could not be undertaken because holding a working holiday visa was a distinguishing tax-related characteristic which could not be excluded when attempting to make the required comparison.

21 Steward J reasoned to a similar effect. His Honour held that Art 25(1) was not offended because it was "no part of the *discrimen*" for the application of the rates in Pt III of Sch 7 that a person bear any particular nationality. His Honour reached that conclusion on two primary bases: first, that s 3A of the *Rates Act* did "not refer at all to a person's nationality"; and second, that the circumstances of the hypothetical taxpayer that go to, or affect, tax liability had to be the "same" in order for Art 25(1) to be engaged and the circumstances therefore had to include the holding of the same visa.

22 In dissent, Davies J held that taxation at the rates in Pt III of Sch 7 infringed Art 25(1) because the designation of a person as a "working holiday maker" for tax purposes was based upon the taxpayer's foreign nationality and visa status and the requirement to hold a visa arose directly from, and could not "sensibly be divorced from", the person's nationality.

Construction of Art 25(1)

23 The principles of interpretation applicable to a tax treaty are well settled[36]. Although the text of the treaty is the starting point and has primacy in the interpretation process, it is mandatory "that courts look to the context, object and

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36 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349, 356; *Applicant A* (1997) 190 CLR 225 at 251-256; *Bywater Investments* (2016) 260 CLR 169 at 227-228 [165]-[167]. See also *Lamesa Holdings* (1997) 77 FCR 597 at 604-605; *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at 143 [37]-[38]; *SNF (Australia)* (2011) 193 FCR 149 at 184 [113], 186 [119]-[120]; *Resource Capital Fund III LP v Federal Commissioner of Taxation* (2013) 95 ATR 504 at 516-521 [46]-[53]; *Task Technology Pty Ltd v Federal Commissioner of Taxation* (2014) 224 FCR 355 at 358 [12]; *Tech Mahindra Ltd v Federal Commissioner of Taxation* (2015) 101 ATR 755 at 768-771 [51]-[61].

purpose of treaty provisions as well as the text ... consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation"[37].

24 Article 25(1), as a matter of ordinary language, requires a comparison between a national of the United Kingdom and an Australian national who is, otherwise than with respect to nationality, "in the same circumstances, in particular with respect to residence". In the present case, Ms Addy was, for the purposes of Art 25(1), a resident of Australia for Australian tax purposes[38]. The question presented by Art 25(1) was whether Pt III of Sch 7 to the *Rates Act* imposed more burdensome taxation on her than on an Australian national resident in Australia for Australian tax purposes "in the same circumstances".

25 This directs attention to what is meant by "in the same circumstances" in Art 25(1). Throughout these proceedings, the Commissioner submitted that the appropriate hypothetical comparator under Art 25(1) is a "notional Australian national" whose circumstances are "identical in all matters relevant to the imposition of taxation except nationality". The Commissioner contended that, because s 29 of the *Migration Act* ensures that an Australian national cannot hold a working holiday visa[39], no comparison of the kind required by Art 25(1) is possible, and Art 25(1) is not engaged.

26 In support of this submission, the Commissioner relied on the decision of the Court of Appeal of New Zealand in *Commissioner of Inland Revenue v United*

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37 *Applicant A* (1997) 190 CLR 225 at 255; see also 231, 240, 253-255. See also *Lamesa Holdings* (1997) 77 FCR 597 at 604-605; Vienna Convention on the Law of Treaties (1969), Art 31. The principles in the Vienna Convention apply even though that Convention has not been enacted as part of the law of Australia: see *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 15 [34].

38 *Income Tax Assessment Act 1936*, s 6(1) definition of "resident" para (a)(ii). See also United Kingdom convention, Art 4(1)(b).

39 Subject to some supposed exceptions identified by the Commissioner in oral argument which are referred to below.

Dominions Trust Ltd[40]. There, the Court observed that "in the same circumstances" for the purposes of a largely equivalent non-discrimination clause meant "in substantially identical circumstances in all areas except nationality", the word "same" being said to connote "uniformity, ... exactness in comparison"[41]. In that case, the taxpayer, a company incorporated in (and a national and resident of) the United Kingdom, had argued that more burdensome taxation imposed on companies that are nationals of the United Kingdom constituted discrimination based on nationality[42].

27 The Commissioner's reliance on *United Dominions Trust* is misplaced. The Court of Appeal held that the additional taxation imposed on the taxpayer was based on residence, not nationality, a permissible ground of differential treatment under the applicable double taxation agreement between the United Kingdom and New Zealand[43]. The same is true of the United Kingdom convention. Article 25(1), as well as Art 25(5), make explicit that foreign residency is a permissible basis for imposing other or more burdensome tax requirements on foreign nationals – accordingly, if Ms Addy were a non-resident "working holiday maker", Art 25(1) would offer no relief. But this is of no assistance in the present case: it is precisely because of the Commissioner's initial acceptance of Ms Addy's status as an Australian resident for tax purposes that Ms Addy's objection to her assessment was chosen by the parties as a "test case" to determine the effect of Art 25(1). With respect to tax residency during the relevant period, at least, there is no doubt that Ms Addy was "in the same circumstances" as an Australian national who was also a tax resident.

28 There is a further difficulty with the Commissioner's submission that no comparison is possible under Art 25(1). The difficulty is that, consistent with the text, context, object and purpose of Art 25(1), the relevant comparator is the hypothetical taxpayer in the same circumstances *apart from* the criterion on which the claim of discriminatory taxation is based[44]. The phrase "in the same

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40 [1973] 2 NZLR 555.

41 *United Dominions Trust* [1973] 2 NZLR 555 at 561; see also 566, 568, 575.

42 *United Dominions Trust* [1973] 2 NZLR 555 at 557.

43 *United Dominions Trust* [1973] 2 NZLR 555 at 562, 566, 574.

44 cf *Purvis v New South Wales* (2003) 217 CLR 92 at 131-133 [119]-[123] and authorities cited there, 160-161 [222]-[224]. See generally Avery Jones et al,

circumstances" means in the same circumstances apart from those circumstances attached to the prohibited basis for discriminatory taxation. Here, that is visa status, a characteristic which depends on nationality – a person not being an Australian national – the very attribute protected by Art 25(1).

29 The question presented by Art 25(1) is not assisted by asking whether the distinction that Pt III of Sch 7 draws between taxpayers is based on some "proxy for nationality" or depends "solely" or "only" on nationality. Rather, the inquiry about Art 25(1) in this case must begin by recognising that the *Rates Act* differentiates between Australian residents for tax purposes who hold certain forms of visa and others who do not hold a visa. The visas – working holiday visas – are sought by and issued to non-citizens of Australia. Hypothetical cases at the outer limits in which an Australian citizen *might* in the most strained and distorted circumstances hold a working holiday visa can be and should be put aside.

30 Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator[45]. In sum, the "same circumstances" that must be considered of the hypothetical comparator cannot include being or not being the holder of a working holiday visa just as they cannot include being or not being an Australian national. The Commissioner's contention that a comparison is not possible in the present case because an Australian national cannot hold a working holiday visa is rejected.

31 The question then is whether the more burdensome taxation imposed on those holding a working holiday visa, which depends upon being *not* an Australian national, contravenes Art 25(1). The short answer is "yes": applying the ordinary taxation laws to an Australian national in substantially similar circumstances deriving the same income from the same source (that is, "in the same circumstances" in all respects relevant to taxation excluding the protected

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"The Non-Discrimination Article in Tax Treaties – I" (1991) 10 *British Tax Review* 359 at 361-366.

45 *Purvis* (2003) 217 CLR 92 at 131 [119].

characteristic and consequences flowing from the protected characteristic), they would be taxed at the lower rates under Pt I of Sch 7[46].

32 That construction of Art 25(1) is consistent with the commentary that accompanied the OECD Model Convention at the time Australia and the United Kingdom made the United Kingdom convention. The OECD commentaries can be used in construing Art 25[47]. Article 25(1) is in largely the same terms as Art 24(1) of the OECD Model Convention. The commentary on Art 24 relevantly stated[48]:

> "1. This paragraph establishes the principle that for purposes of taxation discrimination on the grounds of nationality is forbidden, and that, subject to reciprocity, the nationals of a Contracting State may not be less favourably treated in the other Contracting State than nationals of the latter State in the same circumstances.
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> ...
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> 3. *The expression 'in the same circumstances' refers to taxpayers (individuals ...) placed, from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and in fact. ...*
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> 4. In applying paragraph 1, therefore, *the underlying question is whether two persons who are residents of the same State are being treated differently solely by reason of having a different nationality. ...*
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> ...
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> 9. Furthermore, paragraph 1 has been deliberately framed in a negative form. By providing that the nationals of a Contracting State may not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of the other Contracting

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46 See Reimer and Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 4th ed (2015), vol II at 1695 [35].

47 *Thiel* (1990) 171 CLR 338 at 344, 349-350, 356-357; *Bywater Investments* (2016) 260 CLR 169 at 228-229 [167]-[169]. See also fnn 36-37 above.

48 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 258-260.

State in the same circumstances are or may be subjected, *this paragraph has the same mandatory force as if it enjoined the Contracting States to accord the same treatment to their respective nationals*. But since the principal object of this clause is to forbid discrimination in one State against the nationals of the other, there is nothing to prevent the first State from granting to persons of foreign nationality, for special reasons of its own, or in order to comply with a special stipulation in a double taxation convention, ... certain concessions or facilities which are not available to its own nationals. As it is worded, paragraph 1 would not prohibit this.

10. Subject to the foregoing observation, the words '...shall not be subjected... to any taxation or any requirement connected therewith which is other or more burdensome...' mean that *when a tax is imposed on nationals and foreigners in the same circumstances, it must be in the same form as regards both the basis of charge and the method of assessment, its rate must be the same* and, finally, the formalities connected with the taxation (returns, payment, prescribed times, etc) must not be more onerous for foreigners than for nationals." (emphasis added)

33 Two aspects of that commentary reinforce the construction adopted. First, the "underlying question is whether two persons who are residents of the same State are being treated differently *solely* by reason of having a different nationality"[49] (emphasis added). Ms Addy's contention that Art 25(1) should be construed as providing relief from the imposition of a higher tax burden other than on the basis of nationality is contrary to the text, context, object and purpose of Art 25 read as a whole and as reinforced by the OECD commentary on Art 25(1). Second, the commentary recognises that the phrase "in the same circumstances" refers to taxpayers, "from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and in fact"[50] and that "when a tax is imposed on nationals and foreigners in the same circumstances, it must be in the same form as regards both the basis of charge

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49 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 259 [4].

50 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 258 [3].

and the method of assessment, *its rate must be the same*"[51] (emphasis added). Or, put in different terms, it *enjoins*[52] Australia to accord the same treatment to a national of the United Kingdom.

34 In the present case, the application of the ordinary taxation laws – the basis of the charge and the method of assessment in relation to the taxable income of Australian nationals and nationals of the United Kingdom in the same circumstances – was the same, but the tax rate was not. The tax rate was more onerous for Ms Addy, a national of the United Kingdom, than it was for an Australian national in the same circumstances – doing the same work, earning the same income, under the same ordinary taxation laws.

35 Since the making of the United Kingdom convention, the OECD has published further commentaries on the OECD Model Convention[53]. It is not necessary to decide if or on what basis the subsequent commentaries might be used[54]. It is sufficient to note that because Australia signed the United Kingdom convention in August 2003 and then incorporated it (including an amended version of Art 24 of the OECD Model Convention[55]) into Australian domestic law in December 2003[56], no question arises about Australia's recorded reservations to

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51 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 260 [10].

52 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 259 [9].

53 In 1991, the OECD Committee on Fiscal Affairs adopted the concept of "an ambulatory Model Convention providing periodic and more timely updates and amendments" to "ensure that the Model Convention continues to reflect accurately the views of Member countries at any point in time": OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 9 [9], [11]; see also 7 [3].

54 See *Federal Commissioner of Taxation v Pike* (2020) 280 FCR 429 at 445-446 [28]; cf *Burton* (2019) 271 FCR 548 at 579-580 [124].

55 See Australia, House of Representatives, *International Tax Agreements Amendment Bill 2003*, Explanatory Memorandum at 73 [1.245], 75 [1.255], [1.257], 77-79 [1.265]-[1.277].

56 *International Tax Agreements Amendment Act 2003*, Sch 1.

Art 24 in January 2003[57]. Moreover, the subsequent OECD commentaries support[58], or at least are not inconsistent with, the construction adopted.

Conclusion and orders

36 For those reasons, the appeal should be allowed with costs. Orders 1 and 3 of the orders made by the Full Court of the Federal Court on 6 August 2020 should be set aside and, in their place, it should be ordered that the appeal be dismissed.

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57 OECD, *Model Tax Convention on Income and on Capital (Condensed Version)* (2003) at 273 [64].

58 See, eg, OECD, *Model Tax Convention on Income and on Capital (Full Version)* (2017) at C(24)-1 [1]. See generally Reimer and Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 4th ed (2015), vol I at 49 [106].