

The ATO is not a legal entity

The Principality of Range View

The following document from the purported High Court states that the ATO is not a legal entity.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B87 of 1999

BETWEEN: IVAN GORSHIKOV

Plaintiff

AND: STEPHEN CILAPMAN
Deputy Commission of Taxation

Defendant

DEFENCE

Delivered the 1st day of ^{March} February, 2000.

1. The Defendant admits the allegations made in paragraph 1 of the Statement of Claim.
2. As to paragraph 2 of the Statement of Claim, the Defendant:
 - a. admits that he is and has at all times material to this action been an officer of the Commonwealth namely, a Deputy Commissioner of Taxation;
 - b. says that he has, at all times material to this action, acted in that official capacity;
 - c. says, further that, pursuant to s.209 and like provisions in the *Income Tax Assessment Act* 1936 ("the ITAA"), he is able to sue for in his official name, in a court of competent jurisdiction, a debt due to the Commonwealth and payable to the Commissioner of Taxation arising by virtue of the operation of that Act;
 - d. admits that he is capable of being sued in his own name;

17. As to opening part of paragraph 8 of the Statement of Claim and as to sub-paragraphs (a), (b), (c) and (d) of what purport to be particulars thereunder:

(a) The notices referred to in paragraph 8 were issued, as the case may be, either on behalf of the Commonwealth of Australia by a Deputy Commissioner of Taxation by his solicitor, the AGS or by a Deputy Commissioner of Taxation directly.


(b) The Australian Taxation Office ("the ATO") is an administrative agency of the Executive Government of the Commonwealth of Australia under the supervision and control of the Commissioner of Taxation.

(c) The ATO is not a legal entity.


(d) The status of the ATO is not material:


(i) to any indebtedness of the company or the Plaintiff to the ~~corporate debt or pursuant to any debt of the company~~

20. Save as aforesaid the Defendant denies each and every material allegation in the Statement of Claim as if the same were set out herein and traversed seriatim.


 for Australian Government Solicitor
 Solicitor for the Defendant.

This pleading was settled by Mr Logan of Senior Counsel and Mr Coulsen of Counsel.


 J.A. Logan, SC


 C.D. Coulsen



Australian Taxation Office

2 Constitution Ave Civic ACT 2601
PO Box 990 Civic Square ACT 2608

Telephone: (02) 6216 1111
Facsimile: (02) 6216 2738

Our Reference: FOI/ADMIN
Contact Officer: A Wallace Extn: 62216
Your Reference:

27 April 1999

Mr Douglas J Cameron
104 Palmgrove Road
AVALON NSW 2107

Dear Mr Cameron

FREEDOM OF INFORMATION ACT 1982

I refer to your letter of 18 February 1999 seeking access under the *Freedom of Information Act 1982* (the "Act") to "...certified copies of the documents that evidence the term "Income" as defined in the *Income Tax Assessment Act 1936*, showing the date that its definition was gazetted as per the *Income Tax Assessment Act 1936* and the volume, page and clause number this information can be found." You also requested certified copies of the documents that establish the Australian Taxation Office.

The term "income" is not defined in the *Income Tax Assessment Act 1936*. However, included in section 6 are definitions of the terms "income from personal exertion" and "income from property." I have enclosed a copy of these definitions. A copy of the *Income Tax Assessment Act 1936* is available from the Commonwealth Government Bookshop at 32 York Street, Sydney.

With regards the creation of the Australian Taxation Office (ATO) I was able to ascertain that the ATO was created as a branch of the Commonwealth Public Service by an executive instrument in 1973. Officers of the Commonwealth Public Service are assigned to the ATO and the Commissioner of Taxation is put in charge of those officers by section 25(4) of the *Public Service Act 1922*.

An extensive search of the ATO library and records management system failed to identify any document relevant to this part of your request. Similarly, enquiries to the Commissioner's office, People and Structures Branch, the Delegations and Authorisations Officer and the Parliamentary Business Unit did not identify any document.

On the advice of the Australian Government Solicitor's Office I contacted the Office of the Official Secretary to the Governor-General in an attempt to identify, and obtain a copy of the executive instrument. This office referred me to the Federal Executive Council who then suggested I contact Australian Archives. A detailed search by all offices failed to locate the relevant document.

TAXES - Building a better Australia

The following letter from the illegal ATO to Mr Cameron states that certified documents establishing the ATO can not be found.

Accordingly, I am obliged in terms of section 24A of the Act to deny access to this part of your application on the grounds that I was not able to locate the requested document.

The decision to provide access on the above basis and to not impose further charges was made by Mr A.J. Wallace of the Freedom of Information Section, Australian Taxation Office, Canberra, who is authorised by the Australian Taxation Office Solicitor to make these decisions.

Should you be dissatisfied with this decision the Freedom of Information Act provides avenues for review of a decision not to grant access to documents in accordance with a request. These avenues are:

1. Internal Review

You may seek an internal review by making written application to the office where the decision was made within 30 days of being notified. An application fee of \$40 is payable in respect of such a request.

2. Administrative Appeals Tribunal

Application may be made to the Tribunal which has broad powers and may overturn a decision where appropriate.

Normally a review by the Tribunal is only possible after an internal review and your application must be submitted to the Tribunal within 60 days of being notified of the outcome of the internal review. An appeal to the Tribunal may also be made if you have not been informed of the outcome of the internal review within 30 days or have not received notice of a decision on the original request within 30 days. A fee of \$505 should accompany a request to the Tribunal to review a decision. The Tribunal may reduce or waive this fee in certain circumstances. If you wish the Tribunal to reduce or waive the application fee you should enclose with your application for review a statement setting out your reasons.

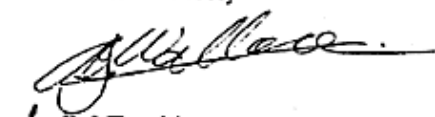
3. Ombudsman

You may lodge a complaint with the Commonwealth Ombudsman who has the power to investigate the Office's actions and may make recommendations to the Office where appropriate. It should be borne in mind, however, that the Ombudsman usually prefers applicants to seek an internal review before approaching him about a decision.

If you seek a review by the Ombudsman you must wait until the investigation has been completed before making application to the Tribunal.

In any application for Internal Review etc., you should quote the File Number as shown at the head of the letter of advice.

Yours sincerely


for R J Tomkins
Australian Taxation Office Solicitor



Australian Taxation Office

45 Francis Street, Northbridge WA 6003
PO Box 9935 in your Capital City

Telephone: 13 24 78
Facsimile: 1300 139 031

16 March 2001

Our Reference: GST Review & Litigation (WMS 195590)
Contact Officer: Derek Bazem
Contact Phone: (08) 6213 8670
Your Reference:

Mr Darryl O'Bryan
1 Lukes Place
GUYS HILL VIC 3807

Dear Mr O'Bryan,

I refer to your facsimile transmission received on 14 February 2001 in which you provided the Australian Tax Office (ATO) with a notice of termination of payment of GST & personal income tax.

As noted in the transcript of the case you refer to, *Moeliker v Chapman*, the ATO does not claim to be a 'legal entity'. The fact that the ATO is not a legal entity does not however invalidate any taxation legislation nor any legal notices issued under powers granted to the Commissioner by those taxation acts. As his Honour, Callinan J points out, at paragraph 490 on page 19 of the transcript, when referring to an affidavit signed by an employee of the ATO:

... "I am a debt collection officer, small business, in the Australian Taxation Office." But that is simply shorthand for saying "the office of the Commissioner"...

Further, in Callinan J's decision in *Dooney v Henry* 174 ALR 41 (incorporating the *Moeliker* matter) at page 44 he addressed the very allegation you refer to and said:

"This last allegation, and the misconceived claim for relief in respect of it (prayer 5), can be immediately disposed of. The Australian Taxation Office is not a legal personality, the applicant does not contend that it is, and whether the Australian Taxation Office is, or is not a legal personality, is not a matter of the slightest relevance to any issue or efficacious remedy that might be available to the respondent."

The various taxation laws give rise to obligations that are legally required to be met by certain entities. These obligations are generally to the Commissioner of Taxation. For instance, an entity's legal obligation to complete a Business Activity Statement (BAS) and remit the net amount of GST collected to the Commissioner can be found in Division 31 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).

TAXES - Building a better Australia

The following letter from the illegal ATO to Mr O'Bryan states that the ATO is not a legal entity.

Notwithstanding that the [63 & 64 VICT] Constitution of Australia [CH 12] Constitution Act is invalid, it can still be shown that the ATO (Australian Taxation Office) is not a legal entity.

The fact that the ATO is not a legal entity does not allow you to ignore your legal obligations to the Commissioner of Taxation.

Furthermore, the Commissioner is not required to communicate with you personally when issuing you with notices or requiring you to perform activities required by acts which he administers.

Section 8 of the *Taxation Administration Act 1953* (the TAA) gives the Commissioner the power to delegate any of his powers or functions. The Commissioner has delegated many of his powers and functions. Similarly subsection 8(2) of the TAA states that a power or function delegated in this manner shall be deemed to have been exercised or performed by the Commissioner.

You will also be aware that correspondence issued to you by the ATO is normally issued in the name of a Deputy Commissioner of Taxation. The legislative basis for the existence of the Deputy Commissioners can be found in section 7 of the TAA.

Section 4A of the TAA states that the staff necessary to assist the Commissioner are to be persons engaged under the *Public Service Act 1999*.

The statutory base upon which "delegations" occur is not the only method by which powers and functions given by the legislation to the Commissioner of Taxation may validly affect you through persons other than the Commissioner directly. The Commissioner may authorise people to act in his name.

Similarly an individual, such as a Deputy Commissioner of Taxation, may authorise a person to act in his or her name.

The power to "authorise" can be statute based but usually relies upon the Common Law. The prevailing law was set out quite clearly in the High Court of Australia in *O'Reilly v State Bank of Victoria (1982-1983) 153 CLR 1*. The principle of law is often referred to as the "Carltona" principle, a name derived from a case that was decided in England in 1943, namely *Carltona Ltd v Commissioner of Works (1943) 2 AER 560*.

Therefore correspondence issued to you and bearing a name other than that of the Commissioner of Taxation or a Deputy Commissioner of Taxation is valid when it is issued based upon the authority to act in the name of those persons.

Please be advised that the Commissioner has the authority to take legal action to recover outstanding amounts in relation to both the GST and your personal income tax. Additionally, interest may be accruing on any amounts currently overdue.

Yours faithfully,


(Derek Bagen)
for Rick Matthews
DEPUTY COMMISSIONER OF TAXATION
Goods and Services Tax