FEDERAL COURT OF AUSTRALIA

Addy v Commissioner of Taxation [2019] FCA 1768

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| File number: | QUD 108 of 2018 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 30 October 2019 |
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| Catchwords: | **TAXATION** – residency of taxpayer – where the applicant is a citizen of the United Kingdom – where the applicant came to Australia for a “working holiday” – where the applicant lived almost continuously in one house in Australia for nearly two years – definition of “resident” – whether the applicant was a resident of Australia as defined in s 6 of the *Income Tax Assessment Act 1936* (Cth) – ordinary meaning of “resident” – meaning of “usual place of abode” exception where a person present in Australia for more than half a year – *Income Tax Rates Act 1986* (Cth) s 18 - whether part-year residency periods applied to the applicant**INTERNATIONAL** **LAW** – **TAXATION** – interpretation of double taxation agreements – where Australia entered into a double taxation agreement with the United Kingdom – where Art 25 of the Double Taxation Agreement provides that party States shall not tax nationals of the other State in a more burdensome way than their own nationals in the same circumstances – application of the *Vienna Convention on the Law of Treaties* Art 31 and Art 32 – construction of “in the same circumstances”**TAXATION** – where Pt III of Sch 7 to the *Income Tax Rates Act 1986* (Cth) provides that a “working holiday maker” is taxed at a certain rate – where s 3A of the *Income Tax Rates Act 1986* (Cth) defines “working holiday maker” as a holder of a certain class of visa – where s 4 of the *International Tax Agreements Act 1953* (Cth) provides that the Australia-UK Double Taxation Agreement has paramountcy over inconsistent provisions imposing Australian tax – where Art 25 of the Double Taxation Agreement provides that there should not be taxation discrimination on the basis of a taxpayer’s nationality – where the applicant was taxed as a working holiday maker – where the applicant was an Australian tax resident – whether the applicant has been taxed in a way which is more burdensome than Australian nationals in the same circumstances would have been taxed – whether any taxation discrimination was on the basis of nationality  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 37M*Income Tax Act 1986* (Cth) s 5*Income Tax Assessment Act 1936* (Cth) ss 6, 175A *Income Tax Assessment Act 1997* (Cth) Subdiv 768-R*Income Tax Rates Act 1986* (Cth) ss 3A, 18*International Tax Agreements Act 1953* (Cth) ss 3, 3AAA, 4, 5*Migration Act 1958* (Cth) s 29*Taxation Administration Act 1953* (Cth) s 14ZV, 14ZVC, 14ZZO*Taxation Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth) |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175*Bosanac v Commissioner of Taxation* [2019] FCAFC 116*Bundesfinanzhof* (Federal Fiscal Court) IR 20/87, 14 March 1989, Bundessteuerblatt, 1989, 14, II, 649*Carr v Western Australia (*2007) 232 CLR 138*Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555*Commissioner of Taxation v Harding* [2019] HCA Trans 191*Commissioner of Taxation v Miller* (1946) 73 CLR 93*Cour Administrative d’Appel Marseille* (Administrative Court of Appeal Marseille), 98MA01682, 8 February 2000*Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774*Hafza v Director-General of Social Security* (1985) 6 FCR 444*Harding v Commissioner of Taxation* (2019) 365 ALR 286*Levene v Commissioners of Inland Revenue* [1928] AC 217*Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148*McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134*R v Inland Revenue Commissioners, ex parte Commerzbank A G* [1994] QB 219*Re Dempsey and Federal Commissioner of Taxation* (2014) 98 ATR 698*Stockton v Commissioner of Taxation* [2019] FCA 1679*Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment)* [1994] ICJ Rep 6*Thiel v Commissioner of Taxation* (1990) 171 CLR 338*Zappia v Commissioner of Taxation* (2017) 106 ATR 875 |
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| Date of hearing: | 3 and 4 December 2018 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 116 |
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| Counsel for the Applicant: | Mr J Hyde Page |
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| Solicitor for the Applicant: | Harmers Workplace Lawyers |
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| Counsel for the Respondent: | Mr S Lloyd SC with Mr G Del Villar |
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| Solicitor for the Respondent: | Australian Government Solicitor |

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| **Table of Corrections** |  |
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| 1 November 2019 | In paragraph 82, “is” has been inserted after “that she”.  |
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| 1 November 2019 | In paragraph 116, “taxpayers” has been replaced with “taxpayer”. |
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| 1 November 2019 | In paragraph 116, “were those in” has been inserted after the “rates of tax” and the word “the” has been removed.  |

ORDERS

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|  | QUD 108 of 2018 |
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| BETWEEN: | CATHERINE VICTORIA ADDYApplicant |
| AND: | COMMISSIONER OF TAXATIONRespondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 30 OCTOBER 2019 |

THE COURT ORDERS THAT:

1. The leave provisionally granted to the applicant on 3 December 2018 to amend her grounds of objection in accordance with those specified in the document which became Exhibit 2 be confirmed.
2. The appeal be allowed.
3. The respondent’s objection decision dated 26 February 2018 in respect of his amended assessment of the applicant dated 20 December 2017 for the income year ended 30 June 2017 be set aside.
4. In lieu thereof, it be ordered that the applicant’s objection to that amended assessment be allowed.
5. The matter be remitted to the respondent for the making of an amended assessment in accordance with the Court’s reasons for judgement and on the footing that, until 1 May 2017, the applicant was a “resident” as defined by s 6(1) of the *Income Tax Assessment Act 1936* (Cth) and that the rates of tax specified in Part III of Schedule 7 to the *Income Tax Rates Act 1986* (Cth) did not apply to her income from 1 January 2017.
6. Liberty to apply for further directions in respect of the basis upon which the amended assessment is to be made.
7. No order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1. Ms Catherine Addy is a British citizen, currently resident in the United Kingdom (**UK**). On 3 July 2015, when she was then 23 years old, she applied for, and obtained that day from Australia’s Department of Immigration and Border Protection, a visa known as a Working Holiday (Temporary) (class TZ) Working Holiday (subclass 417) visa (**working holiday visa**). That visa only permitted her to remain in Australia until July 2016 but in that month she was granted a further working holiday visa, which permitted her to remain in Australia until no later than 20 August 2017.
2. Ms Addy entered Australia pursuant to her working holiday visa on 20 August 2015, using her British passport for the purposes of travel. She had been to Australia twice before, in 2000 and 2014. From the time of her birth until her departure for Australia, Ms Addy had lived with her parents in the UK at the family home in Bexleyheath, Kent. It was to there that she returned when, on 1 May 2017, she left Australia for the last time while a holder of a working holiday visa.
3. In the interval between 20 August 2015 and 1 May 2017, Ms Addy remained in Australia, save for a period of about 2 months (2 January 2016 until 8 March 2016) which she spent on holiday, touring through several countries in South-East Asia. By no later than September 2015, Ms Addy was living in share house accommodation at Earlwood in Sydney. This was where she lived for most of the time she spent in Australia. She made a brief interstate visit to Western Australia from April to June 2016. There, she worked and lived on a horse farm. She did that because it was necessary, at least as she understood it, to undertake a period of rural work in order to obtain an extension of her working holiday visa. Ms Addy also made even more brief interstate visits - a trip to Cairns for two days in November 2015, a separate trip of less than a week to Brisbane, where she stayed with an uncle and aunt who were resident there, and two overnight trips to the Central Coast. On each of these occasions, she left from and returned to the Earlwood house.
4. During the 2017 income year Ms Addy engaged in casual employment as a food and beverage waitress in Sydney as follows:
	1. from 18 July 2016 to 23 October 2016, at the Menzies Hotel; and
	2. from 6 November 2016 until 30 April 2017, at the Novotel, Pyrmont.

Shortly after returning to the UK and during the 2017 income year, Ms Addy resumed some casual waitressing work which she had previously undertaken. She is presently pursuing drama studies at tertiary level in the UK, living on campus for that purpose.

1. On 20 July 2017, the Commissioner of Taxation (**Commissioner**) issued to Ms Addy a notice of assessment (**original assessment**) in respect of the year ended 30 June 2017. The particulars of that assessment were:
* Taxable income: $20,686.00
* Tax payable thereon: $5,777.95
* PAYG credits: $3,010.00
* Balance: Debit of $2,767.95, due on 21 March 2018
1. Under the heading, “Other information relevant to your assessment” and materially, the notice of assessment also stated:

The working holiday tax rate has been applied to the income you earned while you were on your working holiday.

Your return indicates that you were a non-resident of Australia for tax purposes. As a result we have deemed you a non-resident for income tax purposes. No tax free threshold is available to non-residents.

1. A notice of amended assessment for the 2017 income year was issued by the Commissioner on 13 September 2017 (**amended assessment**). Its particulars and additional annotations under the heading “Other information relevant to your assessment” were identical to those shown on the original assessment. The due date for payment remained as previously notified. It is not at all clear to me why the Commissioner issued the amended assessment. There is no change either to the taxable income or to the tax payable thereon. Further, he had already assessed Ms Addy on the footing that she was a non-resident in the 2017 income year.
2. Be this as it may, Ms Addy objected to the amended assessment. In the process of considering that objection, the Commissioner undertook a review of Ms Addy’s 2017 year income tax return. He also made inquiries of her employer at the Novotel, Pyrmont so as to resolve an interrogative note which had been sounded as a result of the lodgement of multiple PAYG payment summaries. The Commissioner also considered a submission advanced on behalf by her tax agent that she ought to be characterised as a “resident” for Australian income tax law purposes for the 2017 income year. It is not clear to me, because the notice of objection concerned is not in evidence, whether or not this submission took up a ground of objection.
3. In the result, the Commissioner ascertained from the employer that the PAYG payment summaries covered separate periods, with the relevant particulars being:
* 1 July 2016 to 31 December 2016 – Gross income: $5,153, tax withheld: $574; and
* 1 January 2017 to 30 June 2017 – Gross income: $11,159, tax withheld: $1,617.

The Commissioner also ascertained that a further PAYG payment summary had later issued, which disclosed further income of $129 with tax withheld of $20.

1. Apart from ascertaining the correct position in respect of gross income and tax withheld as revealed by the PAYG payment summaries, the Commissioner also stated to the tax agent that he agreed with the submission that Ms Addy “is a resident for tax purposes and that she is eligible for a tax free threshold of 11 months”.
2. Having completed his review, the Commissioner stated to the tax agent in an email of 11 December 2017 that Ms Addy “has been deemed a **resident for tax purposes**” (emphasis in original). He also advised that he had made adjustments as previously agreed (it is not necessary to detail these) and that the “outcome of the review is a credit of $249.75 which will issue to her nominated account in 14 to 21 days”. He further advised that a notice of assessment would issue within that time frame. The Commissioner asked the tax agent, “Please confirm you are satisfied with the outcome of this review and are prepared to withdraw the objection lodged”. In a reply sent by email to the Commissioner later that same day, the tax agent advised, “Yes we can confirm that we are satisfied with the outcome of this review and are prepared to withdraw the objection lodged.” The objection was later withdrawn accordingly.
3. On 20 December 2017, the Commissioner issued the foreshadowed further amended assessment (**further amended assessment**). That assessment disclosed these particulars:
* Previous taxable income: $20,686.00
* Amended taxable income: $26,576.00
* Tax on taxable income: $3,340.15
* Less non-refundable tax offsets: $445.00
* Amended assessed tax payable: $2,895.15
* Plus other liabilities: Medicare levy: $492.10
* Les tax offset refunds: $0.00
* Less Pay as you go (PAYG) credits and other entitlements $3,637.00
* Result of this notice: $249.75
* Result of previous notice for the period: $2,767.95DR
* Difference between this amended notice and your previous notice: $3,010.70CR
* Outcome of this notice: $3,010.70
1. The Commissioner appended some detailed information to the further amended assessment. Of this, it is only necessary to set out the following, which appeared under the heading, “Other information relevant to your assessment”:

The working holiday tax rate has been applied to the income you earned while you were on your working holiday.

Your tax free threshold has been adjusted as you either became or ceased to be a resident during the year.

1. Notwithstanding the satisfaction with the review earlier expressed by Ms Addy’s tax agent, she came to lodge with the Commissioner an objection against the further amended assessment on 14 February 2018. In that notice of objection, the grounds of the objection were expressed as follows:

The 20 December 2017 amended assessment is based on the application of a 15% tax rate to the taxable income earned by Catherine Addy during the period commencing 1 January 2017.

Catherine Addy is:

(i) A citizen of the United Kingdom; and

(ii) Before and during the period commencing 1 January 2017, held a Working Holiday Visa;

(iii) Was a tax resident of Australia during the period commencing 1 January 2017.

The 20 December 2017 amended assessment is excessive because Catherine Addy was entitled to the tax-free threshold in respect of the period commencing 1 January 2017, and was otherwise liable to pay tax on her income in accordance with the rates from Part 1 of Schedule 7 of the Income Tax Rates Act 1986.

The reason these tax rates apply is Article 25 of the Double Tax Agreement between Australia and the United Kingdom. The 15% rate that has been applied to Catherine Addy’s income is ‘other or more burdensome’ than the taxation that would be levied on a citizen of Australia who was also an Australian tax resident.

Catherine Addy should be taxed at the same rate as an Australian citizen who was an Australian tax resident in the period commencing 1 January 2017.

[sic]

1. By a letter dated 26 February 2018, the Commissioner advised Ms Addy that he had disallowed her objection to the further amended assessment in full. The Commissioner’s reasons for disallowing the objection were set out in that letter.
2. These reasons reveal that the Commissioner did not accept Ms Addy’s ground of objection based on an asserted meaning and application of Art 25 of the “Convention between the Government of Australia and the Government of the UK 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 gains” and the “exchange of notes relating to that convention”, each made on 21 August 2003 (Australian Treaty Series 2003 No. 22 – [2003] ATS 22) and which entered into force on 17 December 2003 (**Double Tax Agreement**).
3. The reasons further reveal that one of the facts found by the Commissioner for the purposes of deciding the objection was that “You were an Australian resident for taxation purposes during the 2017 financial year.” Given that the objection decision confirmed the further amended assessment and when taken in conjunction with the note on the further amended assessment, “Your tax free threshold has been adjusted as you either became or ceased to be a resident during the year”, this finding of fact in the objection decision might be thought at least ambiguous as to whether the Commissioner had concluded that Ms Addy was a resident for the whole, or only part, of the 2017 income year. It is noteworthy that, amongst his other references, the Commissioner stated in the objection decision reasons that he relied on s 6(1) of the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**) and thus, inferentially, on the definition of “resident” found there.
4. In fairness, and even though the Commissioner did not, in terms, in his reasons find that Ms Addy was a resident for but part of the 2017 income year, he did elsewhere state:

Between 1 January 2017 and 1 May 2017, you were working in Australia under [a working holiday visa]. You were therefore a ‘working holiday maker’ according to section 3A of the Act, and the income you earned in Australia during this period was your ‘working holiday taxable income’. Part III of Schedule 7 of the Act provides the tax rates which apply to all working holiday makers, regardless of nationality …

As a temporary resident of Australia, you were also exempt from paying income tax in Australia on any foreign-source income you received while a tax resident of Australia, other than earnings for personal services, pursuant to subdivision 768-R of the *Income Tax Assessment Act 1997* (Cth). However Australian tax residents who are nationals, including non-citizen permanent residents, are required to pay tax in Australia on their worldwide income.

The reference in this excerpt to “the Act” is a reference to the *Income Tax Rates Act 1986* (Cth) (**Rates Act**). The reference to the period in which Ms Addy was a “working holiday maker” might, perhaps, be thought to carry with it by necessary implication not just that Ms Addy ceased to have that status on 1 May 2017 but also that she ceased then to be a “resident” of Australia. The reference in the excerpt to her being a “temporary resident” picks up a status that is important for the purposes of the concessional treatment offered to those who have that status (as defined) by the provisions of Subdiv 768-R of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**).

1. Ms Addy has appealed against the objection decision to this Court. In this appeal, she “is, unless the court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates”: s 14ZZO(a), *Taxation Administration Act 1953* (Cth) (**TAA**).
2. The proceedings having progressed through case management to the commencement of the hearing of the appeal on the footing that the grounds of objection were as stated in the notice of objection, Ms Addy, by her counsel, applied at the hearing for leave to amend the grounds of objection. In essence, the amendment alleged that Ms Addy was a “resident” of Australia in terms of the definition in s 6(1) of the 1936 Act for the entirety of the 2017 income year. As developed in submissions made on her behalf, this was said to be because, if the “183 day test” for “resident” were satisfied, the person concerned was taken to be a “resident” for income tax purposes for the whole of the income year concerned.
3. So far as presently material, the definition in s 6(1) of the 1936 Act states:

***resident*** or ***resident of Australia*** means:

(a) a person, other than a company, who resides in Australia and includes a person:

…

(ii) who has actually been in Australia, continuously or intermittently, during more than one half of the year of income, unless the Commissioner is satisfied that the person’s usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; …

Ms Addy’s reference in submissions to the “183 day test” was a reference to the inclusive criterion for “resident” found in paragraph (a)(ii) of this definition.

1. For Ms Addy, it was contended that the amendment sought made more explicit an issue which was in any event raised in the existing grounds of objection. The Commissioner conceded that there was power to grant leave to amend but opposed the granting of leave. His grounds for so doing were that:
	1. the case had hitherto progressed on the basis that it was a test case concerning the impact, if any, of Art 25 of the Double Taxation Agreement on the working holiday visa tax regime;
	2. the difference of tax involved as between the application of Ms Addy’s alternative and that hitherto at large was only some $74.00; and
	3. the Commissioner had not had the opportunity to consider the 183 day test, including in that regard whether or not to be satisfied that Ms Addy’s “usual place of abode” was not in Australia.
2. The Commissioner did not, in the end, point to any evidentiary embarrassment in relation to the proposed amendment. His counsel did, however, with a persistence for which it would be churlish not to express my sincere appreciation, ensure that I was fully acquainted with why it was that, having regard to earlier exchanges of correspondence between Ms Addy’s solicitors and the Australian Government Solicitor, and submissions at the case management hearing (each found in annexures to an affidavit of Ms Lye), the objection to the granting of leave to amend had been made.
3. Given that arrangements were in place for the reception of oral evidence by Ms Addy by video link from the UK, the just and also expedient course during the hearing in relation to the proposed amendment seemed to me to be to grant leave to amend provisionally, that is subject to such just objection as the Commissioner had made or may make. The nominated bases of objection to the amendment, that notice of the proposed amendment had been given at the end of October and the absence of specified evidentiary embarrassment also persuaded me to refuse an application for an adjournment which the Commissioner made as a sequel to that provisional grant of leave.
4. Having regard to the interlocutory exchanges and submissions, I can well see how the Commissioner, quite reasonably, could have expected, until the end of October 2018, that the hearing fixed to commence on 3 December 2018 would be a test case, confined to the meaning and effect in the circumstances of Art 25 of the Double Taxation Agreement. I can also see how the unsettling of that expectation nonplussed the Commissioner.
5. Even so, looking at the notes to the original assessment, the amended assessment and the further amended assessment and to the exchange between the tax agent and the Commissioner which preceded that, I do not accept that the Commissioner never had an opportunity to consider the inclusive criterion for “resident” found in paragraph (a)(ii) of the definition of “resident” in s 6(1) of the 1936 Act, i.e. the so-called 183 day test.
6. By the time of the hearing of the taxation appeal, the Commissioner had, in fact and in law, had no less than four such opportunities – at the time he made the original assessment, at the time he made the amended assessment, at the time when he considered the objection to that assessment and made the further amended assessment and at the time when he determined the objection to the further amended assessment and, as a consequence, decided no amendment of that assessment was necessary.
7. As to the original and amended assessments, the Commissioner was not obliged to take at face value, much less to accept, any statement in Ms Addy’s income tax return that she was a non-resident. It was always open to him to reach a contrary conclusion. Given that Ms Addy was present in Australia during the 2017 income year for much more than 183 days, his annotation on these assessments, “we have deemed you a non-resident for income tax purposes”, carries with it conclusions by him both that she was not a resident within the ordinary meaning of that word and that none of the inclusory criteria in the s 6(1) definition of “resident”, materially paragraph (a)(ii) of that definition, were applicable. As to the latter paragraph and given that Ms Addy was present in Australia for more than half of the 2017 income year, the Commissioner must, necessarily, have been satisfied “that [Ms Addy’s] usual place of abode is outside Australia and that [she] does not intend to take up residence in Australia”. The Commissioner’s annotation to the further amended assessment necessarily carries with a conclusion not only that, on reflection, Ms Addy fell within the ordinary meaning of “resident” but also, given his earlier assessing conclusion that she was a non-resident, that he has revisited his earlier satisfaction and now was satisfied that there was no reason why paragraph (a)(ii) of the definition of “resident” did not in any event make her a “resident”.
8. As originally cast, the grounds of objection did state that Ms Addy “Was a tax resident of Australia during the period commencing 1 January 2017”, a point on which Ms Addy relied in support of a contention that residency for the whole year was at large on the existing grounds anyway. However, I accept that, viewed as a whole, the focus of the grounds of the objection was on the narrower question of the alleged impact of Art 25. But that did not remove entirely for consideration on objection whether and, if so, for how long, Ms Addy was a “resident”. And, as noted above, it is evident from the reasons he gave that the Commissioner did turn his mind to that subject when deciding the objection, albeit with a degree of ambiguity.
9. In respect of any assessment, original or amended, the right of objection is found not in the TAA but rather in s 175A of the 1936 Act, which provides:

**175A Objections against assessments**

(1) A taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*.

(2) A taxpayer cannot object under subsection (1) against an assessment ascertaining that:

(a) the taxpayer has no taxable income; or

(b) the taxpayer has an amount of taxable income and no tax is payable..

(3) Subsection (2) does not prevent the taxpayer from objecting against an assessment if the taxpayer is seeking an increase in:

(a) the taxpayer's liability; or

(b) the total of the taxpayer's tax offset refunds.

Viewed in isolation, it might be thought from the text of s 175A of the 1936 Act that the TAA is, materially, only concerned with the manner in which one may exercise the right of objection with the right itself being governed by s 175A. Regard to the TAA discloses that is not so. In respect of an amended assessment, the right to object is limited by14ZV of the TAA:

**14ZV Limited objection rights in the case of certain amended taxation decisions**

If the taxation objection is made against a taxation decision, being an assessment or determination that has been amended in any particular, then a person's right to object against the amended assessment or amended determination is limited to a right to object against alterations or additions in respect of, or matters relating to, that particular.

1. The further amended assessment amended the amended assessment in a number of particulars. Materially, Ms Addy’s taxable income was increased and the tax payable thereon was decreased. The Commissioner’s concession that the Court had power to grant leave to amend the grounds of objection in the terms sought was, with respect, sound, having regard to the application of s 14ZV of the TAA. That was because the proposed amendment at least went to the alteration of the amount of tax payable and to a matter relating to the amount of tax assessed. There was no submission made by the Commissioner that the proposed amendment was nonetheless precluded by s 14ZVC(3) of the TAA.
2. There was a time, now long ago, when a taxpayer was confined to the grounds stated in the notice of objection. The power to grant leave to amend grounds of objection was originally granted both to the Court and to the Administrative Appeals Tribunal by amendments made by the *Taxation Boards of Review (Transfer of Jurisdiction) Act 1986* (Cth) to the former s 190(a) of the 1936 Act. Whether or not to grant leave to amend depends on the same principles that attend the granting of leave to amend pleadings or other court process so as to raise a new issue. This, as well as the history attending the conferral of the power to grant leave to amend was made clear by the Full Court in *Lighthouse Philatelics Pty Ltd v Commissioner of Taxation* (1991) 32 FCR 148, at 156, where it was stated:

The decision whether to allow an amendment ought to be made on the same considerations of justice upon which such decisions are regularly made in litigation. It was in the past a reproach to the law that the real issues in taxation appeals could be refused a hearing for a defective objection, and Parliament has legislated to remove that reproach; an amendment under s 190 should not be considered with reluctance, but on its merits.

Since then, as *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 and s 37M of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) attest, case management considerations, including related directions, can yield considerations relevant to the exercise of a discretion as to whether to permit an amendment so as to raise a new issue, just as they can as to whether to allow an adjournment. That is the case here, given that the case was promoted as a test case on a particular issue with a hearing date and time fixed and related directions, including directions as to by when evidence and outlines were to be filed and served, made.

1. As it happened, the evidence which, by the time of hearing, had come to be filed traversed in detail facts going to whether Ms Addy was a “resident” according to the ordinary meaning of that word, as well as to what might be regarded as her “usual place of abode”. Ms Addy had already been required to attend for cross-examination on her affidavit evidence. It was unlikely that permitting the amendment, even if provisionally in the first instance, would take the hearing of the appeal beyond its allocated two days, and so it proved. Further, given the degree of notice, the Commissioner was able to, and did, address on the merits the point sought to be raised by the proposed amended ground to meet the contingency that leave might be granted. He also had, in my view, at least sufficient time to consider whether the proposed amendment might occasion him some evidentiary embarrassment. That the case had been promoted as a test case on a particular point is a factor telling against the granting of leave so as to raise an additional ground. However, as noted above, the Commissioner had multiple opportunities before the appeal was commenced to turn his mind to the exclusion found in paragraph (a)(ii) of the definition of “resident”. Moreover, given Ms Addy’s length of stay in Australia during the 2017 income year and his original assessing conclusion that she was a non-resident, those opportunities inferentially must have entailed forming and changing a view as to how to be “satisfied” for the purposes of paragraph (a)(ii) of that definition. It is true that the further amount of tax entailed by the proposed amendment is small, but then the overall amount of tax at issue in any event is small, relative to the cost of conducting a taxation appeal in this Court. Yet further, the point raised by the proposed amendment itself had a quality about it which was inherently unlikely to be peculiar just to the circumstances of the present case.
2. Taking all these considerations into account, the “just resolution”, to use the expression found in s 37M(1) of the FCA Act, is to decide the case also by reference to the amended ground of objection. So doing has, as a matter of prudence, required that delivery of judgement in this case be deferred until after the fate of the Commissioner’s application for special leave to appeal against the Full Court’s judgement in *Harding v Commissioner of Taxation* (2019) 365 ALR 286 (***Harding***) was known. Special leave to appeal was refused by the High Court on 13 September 2019: *Commissioner of Taxation v Harding* [2019] HCA Trans 191. The parties were offered, and took up, an opportunity to file supplementary submissions addressing issues concerning the meaning and application of the definition of “resident” arising from the Full Court’s judgement in *Harding*. I have considered these submissions in conjunction with the oral and other written submissions of the parties.
3. As in any taxation appeal in this Court’s original jurisdiction, it is the applicant, here Ms Addy, who has the burden of proving, by reference to the grounds of objection (now as amended), that the assessment concerned, here the further amended assessment, is excessive and what the assessment should have been: s 14ZZO(b)(i) of the TAA. What this entails is as stated by the Full Court in *Zappia v Commissioner of Taxation* (2017) 106 ATR 875, at [3], recently confirmed in *Bosanac v Commissioner of Taxation* [2019] FCAFC 116, at [48]. It entails “establishing the facts upon which the liability depends”, what are sometimes termed the “taxable facts”, and then establishing that, on the true meaning of the relevant taxation legislation, a resultant taxation liability which renders the assessment concerned excessive and shows what should have been the assessment. In a taxation appeal in this Court and in the absence of agreement between the parties as to facts (including documents), the facts must be proved by admissible evidence.
4. As it happens, there is no dispute as to the facts, only as to their taxation law consequences. Some of the pertinent facts I have already described above. Others, as set out below, also emerge from the affidavit and oral evidence and from documents otherwise introduced into evidence without objection.
5. During Ms Addy’s lengthy absence abroad, the room hitherto allocated by her parents for her occupancy at the family home in Bexleyheath, Kent was retained for her future occupancy. It was in the family home that Ms Addy left clothing and other possessions that she did not take with her to Australia. She did not return to the family home or even to the UK at all between when she left for Australia in 2015 and when she departed Australia for the UK on 1 May 2017.
6. Before her departure for Australia, Ms Addy had worked and also studied in the UK and paid British income tax on her earnings.
7. The arrangement under which Ms Addy lived in the share house at Earlwood was informal but it was an enduring one.
8. This was confirmed by evidence given by Ms Emma Eastwood. Ms Eastwood and Ms Addy each gave both affidavit and oral evidence. Each was, I thought, a transparently honest witness.
9. Ms Eastwood was, throughout the whole of the time when Ms Addy was in Australia, one of the lessees of the Earlwood house. She and Ms Addy had met during a trip to Europe by Ms Eastwood in 2010 and become friends. Ms Eastwood had travelled to the UK several times between 2010 and 2015, visiting Ms Addy on each occasion. On one of these occasions, she had stayed at Ms Addy’s family home in Kent. In between times, they kept in touch. By the time Ms Addy arrived in Australia in 2015, she and Ms Eastwood had become, and they remained thereafter, firm friends. The accommodation arrangement which they made between themselves was just as firm.
10. The enduring quality of the arrangement from Ms Eastwood’s point of view in her recounting was that, on one or two occasions, she had stated to Ms Addy:

‘Catherine, you can stay here as long as you want. It’s great having you around.’

That is how Ms Addy understood the arrangement, too. Inferentially, on the basis of her having specified the address of the Earlwood house on her incoming passenger card dated 20 August 2015, the arrangement was formed between them before Ms Addy entered Australia using her working holiday visa and she always intended that she would live at that address after her arrival.

1. Notably also, before Ms Eastwood ceased living at the Earlwood house in 2018 so as to move in to other accommodation with her boyfriend, Ms Addy made a relatively brief return visit to Australia during which she again stayed at the Earlwood house.
2. At the Earlwood house, Ms Addy and Ms Eastwood slept on separate mattresses in the same bedroom. Their arrangement was that Ms Addy made an agreed contribution to Ms Eastwood in respect of Ms Eastwood’s share of the rent of the house (including a share of related utility expenses). Ms Addy ceased making contributions (inferentially consensually) upon her departure from Australia on 1 May 2017.
3. Though the house already had some furnishings, Ms Addy contributed to the cost of additional furniture (an outdoor setting) over the period of her stay there. The Earlwood house was the base for Ms Addy’s social life, be that just with fellow housemates, with friends she invited over or from which she ventured out to socialise with friends at hotels and the like. When she did not eat out, the Earlwood house was where she ate. This regularly entailed shared meals either ordered in or cooked at the house. She also shared in various household domestic tasks.
4. The Earlwood house was Ms Addy’s postal address on and from the time she commenced living there and until she left Australia on 1 May 2017. Shortly after she arrived in Australia, Ms Addy registered her personal details at a medical centre in that same suburb and attended there on a couple of occasions over the period in which she lived at the Earlwood house.
5. When she came to Australia and throughout her time here, Ms Addy opened bank accounts with the Commonwealth Bank both for saving and general operating purposes. Her Australian wages were paid into these accounts. The address of the Earlwood house was the one which she nominated to the Commonwealth Bank as her contact address for bank statements and the like. Before coming to Australia, Ms Addy had an existing account with a UK financial institution. She retained this account while she was in Australia but kept only a minimal balance in it.
6. Ms Addy also used the address of the Earlwood house as her postal address for other purposes such as Medicare (she applied for and obtained a Medicare card shortly after her arrival) and government licensing (Responsible Service of Alcohol – “RSA” – card).
7. On coming to Australia, Ms Addy closed her UK mobile phone account. Shortly after arriving in Australia, she purchased and then maintained while in Australia a pre-paid mobile phone account with Optus.
8. On each of the incoming passenger cards which Ms Addy completed both on her initial entry into Australia in August 2015 and when she returned from her South-East Asian holiday in March 2016, she ticked the “visitor or temporary resident” box, rather than the “resident returning to Australia” box. She nominated “England” as her country of residence. On these same cards, she specified the Earlwood house address as the place where she intended to live in Australia. She also ticked the “Yes” box in response to the question, “Do you intend to live in Australia for the next twelve months?”
9. On the related (January 2016 and May 2017) outgoing passenger cards, Ms Addy described herself as a “Visitor or temporary entrant leaving”, respectively specifying the “UK” and England as her country of residence.
10. Aside from these statements on passenger cards submitted to the Australian Border Force on arrival and departure, Ms Addy gave the following account, which I unhesitatingly accept, as to her intentions in relation to the period which she spent in Australia from August 2015 to 1 May 2017:

26. At the time I travelled to Australia in August 2015, I expected I would be physically present in Australia for the next twelve (12) months until the expiration of my visa. I did not think I would return to the United Kingdom during this time; I had previously visited Australia and felt confident that I would enjoy living in Australia. I also expected that throughout the time I spent in Australia I would live at 21 Lovat Avenue in Earlwood. The basis for this expectation was conversations I had with my friend, Emma Eastwood … .

27. After I had been in Australia for several months I decided I wanted to stay in Australia for longer than twelve (12) months and that I would apply for an extension to my visa.

28. It was always my expectation that I would eventually return to the United Kingdom so that I could study acting in the United Kingdom. It was my expectation that when I returned to the United Kingdom I would live in my parents' house.

29. When I decided to return to the United Kingdom during the 2017 calendar year my understanding was that my visa still had a few months to run. The reason I returned to the United Kingdom at the time I did was I missed the United Kingdom and the people who I knew there.

Ms Addy’s reference to a previous visit to Australia is a reference to a short visit which she made here in 2014.

#### A “resident”?

1. Earlier this month, in *Stockton v Commissioner of Taxation* [2019] FCA 1679 (***Stockton***), with particular reference to *Levene v Commissioners of Inland Revenue* [1928] AC 217, *Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774, at 777 – 778, per Dixon J, *Commissioner of Taxation v Miller* (1946) 73 CLR 93, at 99 – 100, per Latham CJ and *Hafza v Director-General of Social Security* (1985) 6 FCR 444 and *Harding*, I set out, at [19] - [30], principles applicable to the determination of whether a person was a “resident” within the ordinary meaning of that term in s 6(1) of the 1936 Act. I adhere to the views I there expressed in *Stockton* and incorporate them by reference for present purposes. I likewise incorporate by reference the views which I expressed in *Stockton*, at [39] - [43], as to the meaning of paragraph (a)(ii) of the definition in s 6(1) of the 1936 Act.
2. With respect to the ordinary meaning of the term, I observed in *Stockton*, at [23], that “both the nature, duration and quality of physical presence in a particular place as well as intention are relevant to determining whether and where an individual is a ‘resident’”. In relation to Ms Addy and in respect of the 2017 income year, she was settled in Sydney at the Earlwood house. It was from there that she ventured to follow her chosen employment. It was her home base for employment, living and social purposes. All of this occurred as a matter of habit and intent. There was nothing itinerant about her life.
3. The statements which appear on Ms Addy’s passenger cards, incoming and outgoing, are relevant but far from determinative. If anything, there are self-contradictory qualities about the statements. On each occasion she came to Australia, Ms Addy’s statement was that her intention was to live in Australia for the next 12 months. That was, undoubtedly, honest and at the very least neutral as to whether or not she was, in terms of its ordinary meaning, a “resident” for the purposes s 6(1) of the 1936 Act. Further, the other questions and related answers on these cards as to residency status must, as always, be read in the context of the overall circumstances relating to a given individual and in the knowledge that the card offers no explanation as to in what circumstances a person might be regarded as a resident.
4. I cautioned in *Stockton*, at [26], about the risks of rehearsing numerous examples of outcomes on particular facts and comparing and contrasting them with the circumstances of the case to hand. I adhere to that view. That adherence notwithstanding, I feel constrained to make these observations in light of a suggestion in the submissions made on behalf of Ms Addy that, “the question of whether Working Holiday Makers, as a class, are s.6 Australian tax residents is important”.
5. Ms Addy and Ms Stockton might each be termed members of a class of persons holding a working holiday visa. Membership of that class is important in relation to the concessional treatment of “temporary residents” (as defined) for which Subdiv 768-R of the 1997 Act provides and for a particular rate of tax on “working holiday taxable income” for which the Rates Act provides. But for the purposes of the definition of “resident” in s 6(1) of the 1936 Act, there is no one outcome dictated by just by membership of such a “class”.
6. To approach the determination of whether an individual is a “resident” within the meaning of s 6(1) of the 1936 Act on the basis that there is some “class” answer is just as flawed as a “checklist” approach, against the uncritical adoption of which I counselled in *Harding*, at [7], as I had earlier, with Deputy President Hack SC and Senior Member Kenny in *Re Dempsey and Federal Commissioner of Taxation* (2014) 98 ATR 698; 2014 ATC 10-363, at [101]. Of course the type of visa and its duration are relevant, as is, for that matter, that there is a family home abroad where an individual once lived and where some of that individual’s possessions remain. But such considerations, as with others, are not determinative. They must always be considered in the context of the overall circumstances of a given individual. This case illustrates how, having regard to the ordinary meaning of the word “resident” and looking at these undoubtedly relevant considerations in a different overall context from *Stockton* yields a different conclusion. Ms Stockton was an opportunistic itinerant of no fixed place of abode or employment. Ms Addy’s circumstances were very different.
7. That Ms Addy sought an extension of her visa and went to the trouble of undertaking such rural work as she thought necessary for that purpose is eloquent as to an intention to live and work not just in Australia but to do so as much as was possible in Sydney, living at the Earlwood house. The short term rural work in Western Australia was the price she had to and did pay for this. Her residential intentions were confirmed by her actions. Ms Addy’s statements on her passenger cards as to her intention to live in Australia for the forthcoming 12 months were fulfilled in reality. Certainly by the 2017 income year, Australia and, in particular, the Earlwood house, had become Ms Addy’s usual place of abode. Ms Addy was not a lessor of the Earlwood house. But life’s ordinary experience instructs that her living arrangement was hardly idiosyncratic, even amongst younger adult Australians (of whom Ms Eastwood is an exemplar). The arrangement suited her and it suited her firm friend Ms Eastwood (and, inferentially also the other occupants of the share house, including those who were lessees). Self-evidently the arrangement allowed Ms Addy to live within her means here. The Earlwood house was her home, the settled centre of her life for work and social purposes. That is the pattern or habit revealed by the evidence. The family home in Kent in the UK had ceased to have any of these that qualities. Ms Addy’s parents had become what in contemporary idiom is sometimes termed “empty nesters”. They had an adult daughter (their only child) living and working abroad, just as ordinary experience of life instructs that many older generation Australians also have adult sons and daughters living and working either elsewhere in the same city or town, intrastate, interstate or abroad with some of their possessions still left with their parents. But that circumstance, coupled with past occupancy, does not *automatically* make the “empty nest” the adult son’s or daughter’s place of abode, any more does the contingency that this son or daughter may in the future return to the “nest” for a time.
8. Ms Addy was not a *permanent* resident of Australia, but that is not the term found in s 6(1) of the 1936 Act. Ms Addy was a “resident” of Australia during the 2017 income year according to the ordinary meaning of that word. At least within the ordinary meaning of the word, “resident”, though Ms Addy was a “resident” during that income year, the coincidence of her intention and departure on 1 May 2017 meant that she ceased to have that status on her departure.
9. As to paragraph (a)(ii) of the definition in s 6(1) of the 1936 Act, for reasons already given, the Commissioner must or must be taken to have reached and then revisited a conclusion as to the application of that paragraph, including by reference to its satisfaction based “carve out”: *Harding*, at [20]. It is not necessary in this case to reach any concluded view as to the extent of the Court’s jurisdiction on a taxation appeal in relation to satisfaction based provisions affecting a taxation liability, as it was not in *Harding*, although the subject was adverted to in both my and the joint judgement in that case. It is sufficient if one assumes, given that each of the assessments was made prior to the Full Court’s judgement in *Harding*, that it is inferentially likely that the Commissioner acted on his hitherto erroneous conception of what constituted a “place of abode” and that it is open to the Court to reach its own conclusion.
10. On this basis and on the whole of the evidence in this proceeding, the Commissioner should have been satisfied that, during the 2017 income year, Ms Addy’s “usual place of abode” was in Australia and that she did intend to take up residence here. For reasons already given above, not only had Australia and more particularly the Earlwood house become her usual place of abode during that income year bit also that is where she intended to take up residence.
11. As had Ms Stockton, Ms Addy submitted in support of the additional ground of objection and on the footing that she fell within the “183 day test” found in paragraph (a)(ii) of the definition of “resident” in s 6(1) of the 1936 Act that, notwithstanding s 18 of the Rates Act, she was a “resident” for the purposes of the 2017 income year for the whole of that income year, even though she had departed from Australia before its end. Section 18 of the Rates Act materially provides:

**Part-year residency period**

(1) Subject to subsection (2), the following periods are part-year residency periods in relation to a person in relation to a year of income:

…

(c) where the person commenced to be a resident during a month of the year of income and continued to be a resident until a time during a subsequent month of the year of income when the person ceased to be a resident - the period from the beginning of the first-mentioned month until the end of that subsequent month.

For the reasons which I gave in *Stockton*, at [49] - [52], there is no merit in the submission. In the 2017 income year, Ms Addy had a part year residency period which commenced on 1 July 2016 and concluded on 30 April 2017.

#### The contrast between the “Backpacker tax” and other rates of tax

1. The relevant, overarching, provision is s 5(1) of the *Income Tax Act 1986* (Cth). That provides for the imposition of tax in accordance with that Act at the rates declared by the Rates Act. There was no dispute between the parties as to the material, differing rates of tax.
2. For the ordinary taxable income of resident taxpayers, Pt I of Sch 7 to the Rates Actsets out the applicable rates of tax. These include a nil rate for income up to $18,200 (**the tax free threshold**).
3. For the ordinary taxable income of non-resident taxpayers, Pt II of Sch 7 to the Rates Act sets out the applicable rates of tax. For the tax year ending on 30 June 2017, the lowest rate of tax was 32.5% for income up to $87,000.
4. For the “working holiday taxable income” of a “working holiday maker” (each as defined by s 3A of the Rates Act), Pt III of Sch 7 to the Rates Act sets out the applicable rates of tax. These rates and the related, applicable liability criteria have been colloquially described as the “Backpacker tax”. The lowest rate, for working holiday taxable income up to $37,000, is 15%. As it applied during the 2017 income year, s 3A of the Rates Act provided:

**3A *Working holiday makers and working holiday taxable income***

(1) An individual is a ***working holiday maker*** at a particular time if the individual holds at that time:

(a) a Subclass 417 (Working Holiday) visa; or

(b) a Subclass 462 (Work and Holiday) visa; or

(c) a bridging visa permitting the individual to work in Australia if:

(i) the bridging visa was granted under the *Migration Act 1958* in relation to an application for a visa of a kind described in paragraph (a) or (b); and

(ii) the Minister administering that Act is still to make a decision in relation to the application; and

(iii) the most recent visa, other than a bridging visa, granted under that Act to the individual was a visa of a kind described in paragraph (a) or (b).

(2) An individual’s ***working holiday taxable income*** for a year of income is the individual’s assessable income for the year of income derived:

(a) from sources in Australia; and

(b) while the individual is a working holiday maker;

less so much of any amount the individual can deduct for the year of income as relates to that assessable income.

(3) However, 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.

1. One consequence of Pt III of Sch 7 to the Rates Act is that “working holiday makers” who are residents (for s 6(1), 1936 Act purposes) cannot claim the benefit of the tax-free threshold in respect of their working holiday taxable income. Another consequence is that working holiday makers who earn less than $37,000 after l January 2017 and who are non-residents (for s 6(1), 1936 Act purposes) pay tax at 15% on their working holiday taxable income.
2. The effect of the definition of “working holiday taxable income” is that the rates in Pt III of Sch 7 to the Rates Act do not apply to income from sources outside Australia. However, as the holder of a Subclass 417 (Working Holiday) visa (a “temporary visa” granted under the *Migration Act 1958* (Cth)), Ms Addy was a “temporary resident” for the purposes of Subdiv 768-R of the 1997 Act. As such, she was entitled under the provisions of that Subdivision to exemptions from income tax on overseas sourced ordinary and statutory income, as well as on certain capital gains where she had that status immediately before the relevant CGT event occurred.

#### The Double Taxation Agreement

1. Materially, Art 25 of the Double Tax Agreement states:

1 Nationals of a Contracting State shall 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 that other State in the same circumstances, in particular with respect to residence, are or may be subjected.

1. The Double Taxation Agreement, as with other specified such agreements, is given force and effect as part of Australia’s domestic law by the *International Tax Agreements Act 1953* (Cth) (**Agreements Act**). It is the “United Kingdom convention” as defined by 3AAA and thus an “agreement”, as defined by s 3 of the Agreements Act. Section 5(1) of the Agreements Act provides that, “Subject to this Act, on and after the date of entry into force of a provision of an agreement, the provision has the force of law according to its tenor”. The “United Kingdom convention” is one of the agreements specified in s 5 of the Agreements Act.
2. Subject to a presently immaterial exception, a provision in an agreement thus given domestic force and effect prevails over a provision in an “Assessment Act” or a law imposing taxation, to the extent of any inconsistency. This paramountcy is the result of s 4 of the Agreements Act, which provides:

**Incorporation of Assessment Act**

1. Subject to subsection (2), the Assessment Act is incorporated and shall be read as one with this Act.

Note: An effect of this provision is that people who acquire information under this Act are subject to the confidentiality obligations and exceptions in Division 355 in Schedule 1 to the *Taxation Administration Act 1953*.

(2) The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than Part IVA of the *Income Tax Assessment Act 1936*) or in an Act imposing Australian tax.

By s 3 of the Agreements Act, “Assessment Act” is defined to mean the 1936 Act or the 1997 Act.

1. By Art 3(1)(l) of the Double Taxation Agreement, the term “national” is defined as follows:

(l) the term “national” means:

(i) in relation to the United Kingdom, 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; and any company deriving its status as such from the law in force in the United Kingdom;

(ii) in relation to Australia, an Australian citizen or an individual not possessing citizenship who has been granted permanent residency status; and any company deriving its status as such from the law in force in Australia;

Ms Addy was, therefore, a “national” in relation to the UK but not a “national” in relation to Australia. Given her working holiday visas, she was also a “working holiday maker”, subject to income tax on her “working holiday taxable income” at the rates specified in Pt III of Sch 7 to the Rates Act, unless, in terms of Art 25(1) of the Double Taxation Agreement, as afforded paramountcy by the Agreements Act, those rates were “more burdensome” than the rate of tax to which a “national” (as defined) in the same circumstances would be subject.

1. There is no Australian authority concerning the meaning and effect either of Art 25 of the Double Taxation Agreement or a similar provision in a double taxation agreement to which Australia and another country are parties, also given domestic force by the Agreements Act.
2. The general approach to the interpretation of double taxation agreements incorporated into domestic law via the Agreements Act is settled. The relevant principles were summarised by the Full Court by reference to pertinent authority, notably including *Thiel v Commissioner of Taxation* (1990) 171 CLR 338 (***Thiel***), in *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 (***McDermott Industries***), at 143 [38]:

The application of the Convention has been discussed by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 and in *Thiel v Commissioner of Taxation* (1990) 171 CLR 338, the latter case being concerned with the interpretation of the double taxation agreement between Australia and Switzerland. The leading authority in this Court on interpretation of double taxation agreements is *Lamesa*. It is unnecessary here, to set out again what is there said. The following principles can be said to be applicable:

* Regard should be had to the “four corners of the actual text”. The text must be given primacy in the interpretation process. The ordinary meaning of the words used are presumed to be “the authentic representation of the parties’ intentions”: *Applicant A* at 252-253.
* The courts must, however, in addition to having regard to the text, have regard as well to the context, object and purpose of the treaty provisions. The approach to interpretation involves a holistic approach.
* International agreements should be interpreted “liberally”.
* Treaties often fail to demonstrate the precision of domestic legislation and should thus not be applied with “taut logical precision”.
1. The first two of these propositions accord with the general approach to the construction of treaties for which Art 31 of the Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, [1974] ATS 2 (entered into force on 27 January 1980) (the **Vienna Convention**) and in particular Art 31(1) of that Convention, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The second two recognise that the text of treaties often represents the language of compromise between State parties.
2. Also relevant in relation to the construction of a treaty is Art 32 of the Vienna Convention, which permits the use of certain extrinsic materials either to confirm the meaning apparent from the text or to address textual ambiguity or to avoid absurdity. It provides:

*Article 32*

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

* 1. leaves the meaning ambiguous or obscure; or
	2. leads to a result which is manifestly absurd or unreasonable.
1. In relation to double taxation agreements which, like the present, follow an Organisation for Economic Co-operation and Development (**OECD**) model, commentaries issued by the OECD in relation to the model agreement have been regarded as an appropriate supplementary means of interpretation in terms of, and for the purposes set out in, Art 32 of the Vienna Convention: *Thiel*, at 349 per Dawson J; at 356-357 per McHugh J. Articles 31 and 32 of the Vienna Convention are declaratory of the position under customary international law in relation to the interpretation of treaties: *Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgment)* [1994] ICJ Rep 6, at 19 [41].
2. It was submitted for Ms Addy that the imposed rate of tax for which Pt III of Sch 7 to the Rates Act provides and on the basis of which her tax liability was assessed in the further amended assessment are, in terms of Art 25 of the Double Taxation Agreement, “other or more burdensome” than the taxation and connected requirements to which Australian nationals of that other State in the same circumstances are or may be subjected. There being such an inconsistency, the further submission was that the effect of s 4 of the Agreements Act was that her tax should not have been assessed by reference to Pt III of Sch 7 to the Rates Act but, instead, she should have the benefit of the tax free threshold.
3. Ms Addy’s submission was that the appropriate comparator was with an Australian national who undertook the same employment as she did, who derived the same income from that employment, who had the same personal history and who lived at the Earlwood house, but who did not hold a working holiday visa. Her submission was that the working holiday visa could not be included in the comparison because it is so “closely associated with nationality as to effectively be the same thing” and any other construction of Art 25(1) would make that article self-defeating.
4. One seeming, over-arching objection voiced by the Commissioner to this approach was that, having regard to the amount of income which Ms Addy derived in the 2017 income year, her income would be largely free from tax. This particular fiscal *cri de coeur* by a tax collector should be dismissed out of hand, for reasons given by Gleeson CJ in *Carr v Western Australia* (2007) 232 CLR 138, at 143 [6], in a passage cited with approval by Hayne, Heydon, Crennan and Kiefel JJ in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, at 47 - 48 [51]:

Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia* when he said:

“**[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose.** Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.”

[Footnote reference omitted; emphasis added]

1. If, truly, Ms Addy has been taxed in a way which is more burdensome than nationals in the same circumstances, it is no reason not to afford paramountcy to the Double Taxation agreement, as applied by the Agreements Act, that the consequence will be that she is largely free from tax. All it would mean is that she has been taxed according to law.
2. Another submission made by the Commissioner was that the comparison required by Art 25(1) could not be undertaken. He submitted that, under Art 25(1), the comparison should be with a notional Australian who holds a working holiday visa and has earned working holiday taxable income. That, he submitted, is the appropriate hypothetical comparator. However, the Commissioner submitted, the *Migration Act 1958* (Cth) (***Migration Act***) ensures that such a comparator cannot exist: it is not possible for an Australian national to earn working holiday taxable income while holding a working holiday visa. For that reason, he submitted, no comparison is possible and Art 25(1) is not engaged.
3. The Commissioner submitted that this approach to the construction and application of Art 25(1) was supported by the approach of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v United Dominions Trust* [1973] 2 NZLR 555 (***United Dominions Trust***) to an analogous non-discrimination clause in another double taxation agreement. An issue in that case was whether a United Kingdom (**UK**) company, which was incorporated and carried on business in that country but which had shares in a New Zealand(**NZ**)subsidiary, was subjected to more burdensome taxation than a company resident in NZ. It was not in dispute that the UK company would pay tax at a 5% higher rate than would a company resident in NZ; but the Commissioner of Inland Revenue (**NZ Commissioner**) submitted that under the NZ law, nationals of the UK not resident in NZ were treated in the same way as nationals of NZ not resident in the NZ. The UK company contended that, because under NZ law a NZ company could not be anything but a resident of NZ, this demonstrated that the difference in taxation was based on nationality.
4. The UK company succeeded in the original jurisdiction but not on the subsequent appeal by the NZ Commissioner to the Court of Appeal. On appeal in *United Dominions Trust*, it was held that the comparison for which the UK company contended was not possible. Referring to the submission made by counsel for the UK company (Mr Patterson), Richmond J stated, at 566:

Mr Patterson’s argument in effect assumes that it will always be possible notionally to place a national of the taxing territory “in the same circumstances” as the national of the other territory who complains of discrimination. The present case illustrates that this is not necessarily so. In order to obtain a true comparison between the English company and a national of New Zealand it would be necessary to envisage a company which is both a national of New Zealand and a resident of the United Kingdom. This, of course, cannot be done and in my view Article XIX(l) accordingly has no application.

To like effect, White J stated, at 573:

[T]he taxpayer claiming relief must be able to find by way of comparison a notional national of the other territory “in the same circumstances”. Once it is accepted that “same circumstances” includes “residence” the objector, in my opinion, cannot point to a national New Zealand company which is “in the same circumstances”.

1. Inability on the part of an NZ company under the NZ law by which it was given “birth” to be resident other than in NZ also persuaded the presiding judge, McCarthy P, at 561-562, that the NZ company’s postulated comparison was not possible.
2. Each judge in *United Dominions Trust* was agreed that the “same circumstances” meant “substantially identical” rather than “roughly the same”.
3. By analogy and given that it is not possible for an Australian national to hold a “working holiday visa”, the Commissioner submitted that the consequence was that there was no comparator in “the same circumstances”.
4. There is just no doubt that an Australian national cannot hold a working holiday visa issued under the Migration Act, or any other class of visa for that matter. Under that Act, visas may only be issued to non-citizens: s 29. But it does not necessarily follow from this that the *United Dominions Trust* based corporate analogy upon which the Commissioner’s submission is grounded should be accepted. As McCarthy P acknowledged in that case, at 561, nationality and residence are “treacherous words” when applied to companies. *United Dominions Trust* illustrates a difficulty which can arise from the assimilation of companies and individuals in an anti-discrimination provision in a double taxation agreement, and what was said in that case must be understood in that context. For present purposes, it is better to commence with the text of Art 25(1), in accordance with the principles for the interpretation of treaties set out above.
5. In relation to individuals, the definition of “national” in Art 3(1)(l) of the Double Taxation Agreement assimilates citizenship with, in the case of the UK, a right of abode and, in the case of Australia, a grant of permanent resident status. Either by mutual assumption or necessary implication, Art 25(1) envisages that a comparison is possible between, materially, a UK citizen in Australia who does not hold a permanent resident visa and not just an Australian citizen but also a UK or other non-Australian citizen who holds a permanent resident visa (who is also, by definition, a “national” of Australia) “in” Australia. Where his or her presence is lawful (and that is the case here) the “national” of the “Contracting State” will only ever be “in” the “other State” if he or she holds whatever the law of the “other State” requires to permit that individual to enter that “other State”. It seems to me to follow from these features of the text of Art 25(1) that the inability of a national of the “other State” to hold a particular visa of that “other State” authorising him or her to be “in” that “other State” must be taken to have been regarded as nothing to the point in relation to what might constitute “the same circumstances” for comparative purposes. The Commissioner’s submission based on an inability of an Australian citizen to hold a working holiday visa (or any other Australian visa) is, for this reason, flawed.
6. This analysis is also, in my view, a in keeping with a liberal construction of Art 25(1), which is the manner of construction counselled in *McDermott Industries*. In contrast, the Commissioner’s construction ascribes to the State parties to the Double Taxation Agreement an intention that Art 25(1) will never yield an Australian comparator, because no Australian citizen needs or can be given a visa permitting them to live and to work in Australia.
7. This point was nicely and aptly made on behalf of Ms Addy in her counsel’s reply submission:

If Catherine Addy had held an Australian permanent visa rather than a Working Holiday Visa she would have been an Australian national for the purpose of the treaty. The Applicant’s visa type, as a defining aspect of nationality (which the Respondent agrees does not need to be a ‘same circumstance’), does not need to be shared by an Australian comparator for relief to lie.

1. A corollary of this textual analysis of Art 25(1), given that an element is subjection to “taxation or any requirement connected therewith”, is that, in relation to income taxation, the national of the “Contracting State” will not just be in possession of an authority of the “other State” permitting him or her to be “in” that “other State” but will also possess an authority which permits the derivation there of income which is subject to taxation under the law of the “other State”. Once again, to construe Art 25(1) on the basis that no comparison is possible, because a citizen of the “other State” needs no such authority to derive income in that “other State” and is, in any event, ineligible to be issued with such an authority, is a necessarily flawed approach.
2. Another consequence of the definition of “national” in Art 3(1)(l) of the Double Taxation Agreement, given that, in relation to each State party, it includes those having a right of abode or right of permanent residence, even if not citizenship, is that, necessarily, the discrimination by the “other State” prohibited by Art 25(1) need not extend to *all* nationals in order to be “based on nationality”. For example and materially, that a British citizen might hold an Australian permanent resident visa and thus, by definition be a “national”. would not prevent an Australian taxation measure directed to other non-Australian citizens, including some British citizens, holding a different class of visa from being based on nationality.
3. Reading the text of Art 25(1) in context, the evident purpose of Art 25 as a whole is the prevention of discrimination based solely on a difference that is prohibited by one of its paragraphs, of which nationality as found in Art 25(1) is one, but only when all factors are equal and the different tax treatment is based on the prohibition. This is the point made in *Klaus Vogel on Double Taxation Conventions* (3rd ed, 1997) (***Vogel***), at 1296 [37]:

Ascertainment of a case of discrimination requires a hypothetical comparison with a person who is a national. The comparison must be based on the **actual circumstances which are decisive in connection with the taxation procedure**.

[Emphasis in original]

1. I turn then to the OECD “Commentaries on the Articles of the Model Tax Convention” (**OECD commentaries**) for the purposes envisaged by Art 32 of the Vienna Convention. The relevant part is the commentary on Art 24 of the Model Convention, because Art 25 of the Double Taxation Agreement follows Art 24 of the Model Convention. By way of general remarks, it is stated in the OECD commentaries concerning this article, at 332 [1]:

This Article deals with the elimination of tax discrimination in certain precise circumstances. All tax systems incorporate legitimate distinctions based, for example, on differences in liability to tax or ability to pay. The non-discrimination provisions of the Article seek to balance the need to prevent unjustified discrimination with the need to take account of these legitimate distinctions. For that reason, **the Article should not be unduly extended to cover so-called “indirect” discrimination**. For example, **whilst paragraph 1, which deals with discrimination on the basis of nationality, would prevent a different treatment that is really a disguised form of discrimination based on nationality** such as a different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State, **it could not be argued that non-residents of a given State include primarily persons who are not nationals of that State to conclude that a different treatment based on residence is indirectly a discrimination based on nationality** for purposes of that paragraph.

[Emphasis added]

1. In relation to each of the prohibitions found in Art 25, including that in Art 25(1), it promotes rather than subverts the purpose of Art 25 to construe a prohibition as extending to disguised or covert burdensome tax discrimination based on a prohibited ground. As the emphasised part of the above excerpt from the OECD commentaries, at 332 [1], highlights, such a construction of the equivalent article in the Model Convention is envisaged by the OECD. Construing Art 25(1) so as to extend the prohibition to disguised discrimination also accords with the understanding evident in the judgement of the Court of Justice of the European Communities in respect of EEC Treaty freedoms and equality of treatment requirements. In *R v Inland Revenue Commissioners, ex parte Commerzbank A G* [1994] QB 219, at 240 [14], in concluding a particular British tax provision which denied a refund to a German company because it was not a UK resident was discriminatory, the court observed that “the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of discrimination, lead in fact to the same result.” The same observation, in my view, might equally be made in relation to the nationality discrimination prohibition in Art 25(1). It follows that I do not accept a submission made by the Commissioner that the prohibition found in Art 25(1) is contravened only where the discrimination based on nationality is explicit.
2. Ms Addy made a submission that all that Art 25(1) required was that “a court … compare the tax treatment of a foreign taxpayer with the tax treatment of a national who is in the same circumstances as the foreign taxpayer” with the consequence that it was unnecessary to find discrimination, “based on the nationality of the foreign taxpayer”. I do not accept that this has any textual support in Art 25(1). The comparison is between “*Nationals* of a Contracting State” and “*nationals* of that other State in the same circumstances” (emphasis added). That is a test based not just on persons “in the same circumstances” but on the nationality of such persons. Were there any doubt about this, and in my respectful view there is not, the OECD commentaries, set out above, confirm my textually derived construction. It is not, however, necessary that this submission made by Ms Addy be accepted in order for her to succeed in respect of the ground of objection based on Art 25(1) of the Double Taxation Agreement.
3. Another textual feature of Art 25(1), flowing from the express qualification of “the same circumstances” by the phrase “in particular with respect to residence” is that residents and non-residents are not regarded as being in “the same circumstances”. Thus, even though it might be said that nationality will carry with it a right of residence, that type of indirect connection does not mean that a tax provision which burdens non-residents by comparison with residents offends the prohibition in Art 25(1) of discrimination based on nationality. This textually derived meaning is confirmed by reference to the OECD commentaries, at 333, [7]:

7. The expression “in the same circumstances” refers to taxpayers (individuals, legal persons, partnerships and associations) 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. **The expression “in particular with respect to residence” makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are placed in similar circumstances.** The expression “in the same circumstances” would be sufficient by itself to establish that a taxpayer who is a resident of a Contracting State and one who is not a resident of that State are not in the same circumstances.

[Emphasis added]

1. This excerpt from the OECD commentaries also discloses, in the reference to “substantially similar” an understanding of the meaning of “the same circumstances” which might be thought more liberal than the “substantially identical” understanding evident in the New Zealand Court of Appeal in *United Dominions Trust*. This difference has been noted by Dr John F Avery Jones CBE, who observes in “The non-discrimination article in tax treaties – Part 1”, (1991) *British Tax Review* 359 (***Jones***), at 361:

In the absence of the explanation in the Commentary one would expect that, in order to determine whether there is any discrimination, an exact comparison is required to be made between a real State B national, compared to a (hypothetical) State A national who is in the same circumstances. We shall refer to this hypothetical State A national as the *object of comparison*. As was said in a New Zealand case: “The word ‘same’ carries the connotation of uniformity, of exactness in comparison. The phrase does not ordinarily mean in roughly similar circumstances: it means in substantially identical circumstances and in [the nationality non-discrimination provision] it means in substantially identical circumstances in all areas except nationality.”

However, this is not the same as the commentary explains that *in* *the same circumstances* (*dans la même situation*) “refers to taxpayers placed, from the point of view of the application of the ordinary taxation laws and regulations, in substantially similar circumstances both in law and fact.” The French text of the commentary, *dans les circonstances de droit et de fait analogues* (meaning, in analogous circumstances), seems to be even further from the meaning of the Model than the English version of the Commentary.

[Emphasis in original, footnote references omitted]

The New Zealand case referred to in this excerpt from *Jones* is *United Dominions Trust*.

1. One view, canvassed in *Jones*, at 363, which I find attractive, is that “the same circumstances” is, in any event, inherent in the concept of non-discrimination and redundant with the consequence that the “substantially similar” view expressed in the OECD commentaries “goes beyond a permissible interpretation of the text of the Model, and should therefore be left out of account”. It may be that the explicit reference in Art 25(1) to “the same circumstances”, like the phrase “in particular with respect to residence”, was merely intended to make explicit what is in any event implicit in the concept of discrimination based on nationality. In the same way as differing tax consequences between different nationals based on residence are not discriminatory, neither are differing tax consequences between different nationals who are not in the same circumstances. It is not necessary in this case to determine whether “the same circumstances” extends as far as meaning “substantially similar”. That is because, as will be seen, it is sufficient to assume that the narrower meaning favoured in *United Dominions Trust* is correct.
2. The OECD commentaries, at 334 [8], confirm what a reading of the text of Art 25(1) would in any event suggest, which is that, “In applying paragraph 1, … 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” (emphasis added). I respectfully agree with these observations made by Professor Carlo Garbarino, professor of taxation at Bocconi University in Milan, Italy in his work, *Judicial Interpretation of Tax Treaties – The Use of the OECD Commentary*, Edward Elgar Publishing Ltd, 2016 (***Garbarino***), at 500 [13.03], in respect of Article 24 in the OECD Model Convention:

13.03 The principle of non-discrimination of Art. 24 is not meant to have the far-reaching afforded by other clauses of equal treatment found in international law (MFN clause in the WTO) or in EU law (Art. 18 of the EU Treaty), so the essential feature of this clause is what it does not achieve, rather than what it could possibly achieve. In summary, Art 24 *does not*:provide a broad equal protection clause; provide a broad definition of discrimination; cover discrimination based on residence; prevent reverse discrimination; provide MFN treatment; eliminate differentiated treatment imposed by treaty; or prevent differentiated treatments for public bodies or non-profit organizations.

[Emphasis in original – “MFN” = Most Favoured Nation]

1. The Rates Act expressly envisages that, in respect of persons who are resident in Australia, a different rate of tax will apply in respect of income derived in Australia from the same source, depending on whether the individual deriving that income is or is not a “working holiday maker” (as defined). On examination, the definition of “working holiday maker” in s 3A(1) of the Rates Act necessarily extends only to particular individuals who are not nationals of Australia. Likewise by reference to s 3A(2) of the Rates Act, it is only such persons who may derive “working holiday taxable income”. These are what *Vogel* terms the “actual circumstances which are decisive in connection with the taxation procedure”. In my view, this means that the discrimination between resident derived income from the same source in Australia is based on nationality. It is disguised by the reference to “working holiday maker” but the definition of that term makes it plain that what the disguise covers is nationality. A resident “national” of Australia undertaking the same work as did Ms Addy, in other words “in the same circumstances”, would not be taxed by reference to the rates specified in Pt III of Sch 7 to the Rates Act. Such a person would have the benefit of the tax free threshold.
2. In respect of each of her employments in Australia during the 2017 income year, Ms Addy, who was an Australian resident until 30 April 2017, was liable to a different rate of income tax than an Australian resident who was a “national” of Australia (as defined by the Double Taxation Agreement) solely because she was a “working holiday maker” (as defined by the Rates Act) and thus a non-“national” of Australia. As already mentioned, “national” of Australia (as defined by the Double Taxation Agreement) includes a non-citizen who is entitled to permanent residence, but it is not residence which is the relevant distinguishing feature here as between Ms Addy and Australian “nationals”. Materially, so far as the applicable rate of tax is concerned, the Rates Act distinguishes between individuals on the basis of the type of visa which that individual holds. Only non-citizens can hold the types of visa that constitute a “working holiday visa” (as defined), of which those successively held by Ms Addy were one type. That is a disguised form of discrimination based on nationality. That is exactly the type of discrimination which is prohibited by Art 25(1) of the Double Taxation Agreement and, per force of s 4 of the Agreements Act, prohibited by that Act. It is but a more particular variant of the disguised discrimination example given in the OECD commentaries, at 332, [1], of different treatment of individuals based on whether or not they hold, or are entitled to, a passport issued by the State.
3. Having helpfully been taken in oral submissions to *Garbarino*, where a number of international taxation decisions are referenced by the learned author, I directed the parties to file supplementary submissions in relation to whether any of those cases offered assistance in relation to the construction of Art 25(1). The Commissioner did not put forward that any particular case was of assistance, although he did helpfully append from his research sources summaries of a number of them. Ms Addy went further, supplying, where possible, English translations of the judgement text of the cases mentioned in these judgement summaries. More particularly, Ms Addy submitted that two of the cases, a judgement of the German *Bundesfinanzhof* (Federal Fiscal Court) IR 20/87, 14 March 1989, Bundessteuerblatt, 1989, 14, II, 649 (**German Case**) and a judgement of the French *Cour Administrative d’Appel Marseille* (Administrative Court of Appeal Marseille), 98MA01682, 8 February 2000 (**French Case**) were of assistance and supported the upholding of her appeal on the Art 25(1) ground. I agree.
4. The background to the German Case was as follows. A German resident Dutch national worked five days in 1983 in Italy on behalf of a German employer. If the Dutch national would have been a German national he or she would have been entitled to an exemption from German income tax with respect to the employment income earned in Italy. Article 24(1) of the tax treaty between the Netherlands and the Federal Republic of Germany of 1959, as amended by the Protocol of 1980, stated:

The nationals of one of the States shall not be subjected in the other State to any taxation which is other or higher than the taxation to which the nationals of that other State in similar circumstances are subjected. The same provision shall apply as regards the extent of any tax allowances, reliefs and reductions granted on the basis of marital status or family circumstances.

1. Article 24(1) of this Dutch-German tax treaty, as do some other double taxation agreements, uses “similar circumstances”, rather than “the same circumstances” but for present purposes that distinction is immaterial, because the agreement nonetheless prohibits discrimination based on nationality and it is as an exemplification as to how such discrimination occurs that the German case is of present assistance. One of the issues in the German Case was whether the Dutch national who was a resident of Germany was entitled to an exemption from German income tax with respect to the employment income earned during these five days under Art 24(1) of the Dutch-German tax treaty. The German Fiscal Court held that, in the circumstances, the effect of Art 24(1) was that the Dutch national was entitled to an exemption from German income tax with respect to employment income earned from activities performed in Italy during the five days in 1983. According to the English translation of its judgement with which I was provided, that court stated, *inter alia*:

The plaintiffs are liable to tax without restriction in Germany. According to Article 24 of the Germany/ Netherlands Double Taxation Agreement they are entitled to be taxed in the same way as every other party with German nationality liable to taxation without restriction, if the actual circumstances definitive for taxation are comparable. Article 11 No. 1 letter d in conjunction with Article 7 Section 1 Clause 1 of the Germany/ Italy Double Taxation Convention grants objective exemption from tax in favour of German nationals for revenues earned for worked performed in Italy not on a self-employed basis. In the year in dispute of 1983 the plaintiff performed his work not on a self-employed basis for five days in Italy. He earned revenues from performing this work. These revenues must be considered to be tax-free in the Federal Republic of Germany, because a German national liable to tax without restriction, likewise practising his profession for five days in Italy, not on a self-employed basis and receives revenues for this would have a corresponding claim.

1. Finding the further amended assessment to be excessive by upholding the Art 25(1) ground of objection is consistent with the outcome in the German Case. Ms Addy, a British national resident in Australia was, by virtue of the Rates Act, subjected to a higher rate of tax than would have been an Australian national performing the same work in Australia as did she.
2. The background to the French Case is more complicated but the result does offer another illustration of why Ms Addy’s Art 25(1) ground of objection is a good one.
3. Article 164C of the French Tax Code (**FTC**) provided that non-residents who owned real property in France were liable to income tax on three times the rental value of this property, unless (i) their French source income exceeded this amount, or (ii) their tax in their country of residence exceeded two thirds of the income tax they would have paid in France on the same income. The France-Monaco tax treaty of 18 May 1963 provided for a special tax regime for French nationals who transferred their residence to Monaco. The treaty made a distinction between French nationals who may claim residence in Monaco and those who may not. Under Art 7(1) of the treaty, French nationals who were resident in Monaco should, in principle, be considered as French tax residents, and were therefore liable to French income tax, unless they belonged to one of the following categories:
* they have been continuously resident in Monaco since 13 October 1957;
* they are part of his Serene highness’s Household;
* they were born in the Principality and have lived there continuously since; or
* they are officials, officers or employees of the public services of the Principality who established their habitual residence in Monaco before 13 October 1962.
1. According to the summary, contrary to most treaties signed by France, the France-Monaco treaty provided for a specific definition of the residence of French nationals that did not rely on objective criteria (habitual abode, centre of interest, nationality, competent authorities). It relied instead on a mere conventional rule according to which French nationals remained French tax residents, despite the transfer of their domicile to Monaco, except in very limited cases. The second unusual aspect of the treaty was that its aim was not to avoid double taxation but to prevent situations of double non-taxation. Monacan residents were thus, in principle, within the scope of Art 164C of the FTC and could benefit from the exemption applicable to residents of co-contracting states.
2. The taxpayers were an Italian and British national and both were residents in Monaco. Since they had a real property in France, the tax authorities applied Art 164 C of the FTC and imposed an income tax on three times the rental value of this property. The taxpayers challenged the decision of the tax authorities before the Lower Administrative Court (*Tribunal Administratif*) of Nice on the ground of non-discrimination provisions of France-UK and France-Italy treaties. The issue in the case was whether the imposition of income tax on three times the rental value of a property in France based on Art 164C of the FTC to a British national and Italian national who resided in Monaco, while the same was not imposed to a French national who resided in Monaco constituted a violation against Art 25 (1) of France-UK treaty and France-Italy treaty regarding non-discrimination.
3. The taxpayers succeeded before the Lower Administrative Court. The tax authorities challenged this judgment before the Marseilles Court of Appeals. According to the summary, they argued that (i) as Italian and British nationals and residents of Monaco, the taxpayers were not in the same situation as French residents of Monaco, as they were not liable to personal income tax in their country of residence (whereas French national residents of Monaco are treated as French residents) and (ii) the taxpayers were in a different situation from French national residents of Monaco since they were not treated as French tax residents.
4. According to the summary of the French Case:

The Administrative Court of Appeals of Marseille confirmed the decision of the Administrative Court. The Court first determined whether the taxpayers could benefit from the non-discrimination provision of the treaties, i.e. Article 25 of the France-Italy and France-UK treaties. Following the *Benmiloud* case (Case No. 128611 decided by *Conseil d'Etat* on 30 December 1996), the Court of Appeals applied the non-discrimination provision to the British national who was resident in Monaco. As far as the Italian national was concerned the Court of Appeals observed that, notwithstanding Article 1 of the treaty, the non-discrimination provision applies to non-residents. Article 25 of the France–Italy treaty provides:

*“Nationals of a Contracting State, whether resident or not of either Contracting State, shall not be subject to any taxation, or any requirement connected therewith, in the other contracting State, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subject to.”*

Two further issues were raised:

1. Is the fact that the discrimination results from the France-Monaco treaty itself an obstacle to the application of the principle?
2. Is an Italian or a British national resident in Monaco in the same situation as a French national resident in Monaco?

The first issue is exceptional as treaties usually refer to the residence criterion and do not therefore discriminate based on nationality. It is not a question of hierarchy of one treaty over the other, but it raises the question of the combination of the two treaties and the non-applicability of a French domestic provision to foreigners protected by a non-discrimination provision, to the extent that the French tax only applies to foreigners in the France-Monaco context. The Court of Appeals ruled that the fact that the discrimination resulted from a treaty was irrelevant and that it should be prohibited.

With respect to the second issue, whether French nationals and foreigners are in similar circumstances, the tax authorities took the view that, according to Article 7(1) of the France-Monaco treaty, French nationals have their “tax residence” in France under the treaty, whereas British and Italian nationals do not. The tax authorities asserted that the different treatment was due to the taxpayers’ tax residence rather than to their nationalities.

The Court of Appeals rejected this argument and held that *“in this particular case, it was only because of their nationality that the tax residence of the taxpayers was different from the residence of French nationals living in Monaco”*. The Court of Appeals held that the application of Article 164 C of the FTC to the taxpayer was in violation of non discrimination provisions of France- UK and France-Italy treaties.

1. The French Case offers an example of a disguised form of nationality discrimination, in that instance one superficially based on residence.
2. For these reasons, Ms Addy’s tax ought not to have been assessed by reference to the rate of tax specified in Pt III of Sch 7 to the Rates Act. That is because the effect of Art 25(1) of the Double Taxation Agreement, as applied by the Agreements Act, was to prohibit her being taxed at that rate of tax. During the 2017 income year, she was a “resident” until 1 May 2017 and until then a resident taxpayer to the income of whom the applicable rates of tax were those in Pt I of Sch 7 to the Rates Act. Her appeal must be allowed and the matter remitted to the Commissioner for the making of a consequential amended assessment.

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| I certify that the preceding one hundred and sixteen (116) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 30 October 2019