Federal Court of Australia

Commissioner of Taxation v Virgin Australia Regional Airlines Pty Ltd [2021] FCAFC 209

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| Appeal from: |  |
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| File numbers: | NSD 561 of 2021  NSD 562 of 2021 |
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| Judgment of: | **LOGAN, THAWLEY AND DOWNES JJ** |
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| Date of judgment: | 22 November 2021 |
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| Catchwords: | **TAXATION** – appeals under s 14ZZ of the *Taxation Administration Act 1953* (Cth) – car parking fringe benefits at airports provided to flight crew and cabin crew – whether flight crew and cabin crew have a “primary place of employment” on a particular day – where flight crew and cabin crew have a “Home Base” – employees’ “Home Base” airport the relevant “primary place of employment” – appeal against primary judge’s decision allowed |
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| Legislation: | *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 39A, 136  *Taxation Administration Act 1953* (Cth) s 14ZZ |
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| Cases cited: | *Virgin Australia Airlines Pty Ltd v Commissioner of Taxation* [2021] FCA 523 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 28 |
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| Date of hearing: | 8 November 2021 |
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| Counsel for the Appellant: | Mr BJ Sullivan SC with Mr CJ Peadon |
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| Solicitor for the Appellant: | ATO Review and Dispute Resolution |
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| Counsel for the Respondent: | Mr BL Jones |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | | NSD 561 of 2021 |
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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant | |
| AND: | VIRGIN AUSTRALIA REGIONAL AIRLINES PTY LTD ABN 76 008 997 662  Respondent | |

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| order made by: | LOGAN, THAWLEY AND DOWNES JJ |
| DATE OF ORDER: | 22 November 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Set aside the decision of the primary judge and, in lieu thereof order:
   1. the appeal be dismissed;
   2. the applicant pay the costs of the appeal;
3. The respondent pay the costs of the appeal.

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

ORDERS

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|  | | NSD 562 of 2021 |
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| BETWEEN: | COMMISSIONER OF TAXATION  Appellant | |
| AND: | VIRGIN AUSTRALIA AIRLINES PTY LTD ACN 36 090 670 965  Respondent | |

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REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The **Commissioner** of Taxation assessed the respondents in these two appeals (collectively **Virgin**)for fringe benefits tax for the years ended 31 March 2013 to 31 March 2016 inclusive in relation to car parking fringe benefits provided to its Flight Crew and Cabin Crew (collectively **Flight and Cabin Crew**). The assessments were arrived at on the basis that the Flight and Cabin Crew employees’ “primary place of employment” was each employee’s “Home Base” airport terminal in Sydney, Brisbane or Perth. Virgin objected to the assessments under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA 1953**). The Commissioner disallowed the objections and Virgin commenced appeals against those objection decisions in the original jurisdiction of this Court under s 14ZZ of the TAA 1953. The primary judge allowed Virgin’s appeals, concluding that the “primary place of employment” was not each employee’s “Home Base”: *Virgin Australia Airlines Pty Ltd v Commissioner of Taxation* [2021] FCA 523.
2. For the reasons which follow, the Commissioner’s appeals from the primary judge’s orders in both proceedings below must be allowed.

# RELEVANT LEGISLATION

1. Division 10A of the *Fringe Benefits Tax Assessment Act 1986* (Cth) (**FBTAA**) addresses car parking fringe benefits provided to employees. Division 10A is contained in Part III – Fringe Benefits. Section 39A(1) specifies a number of conditions which, if satisfied, result in the provision of parking facilities to employees being taken to constitute a benefit provided to the employee in respect of his or her employment. Only the conditions in paragraphs (e) and (f) of s 39A(1) are relevant in these appeals. Sections 39A(1)(e) and (f) provide:

**39A Car parking benefits**

(1) If the following conditions are satisfied in relation to a daylight period, or a combination of daylight periods, on a particular day:

…

(e) on that day, the employee has a primary place of employment;

(f) during the period or periods, the car is parked at, or in the vicinity of, that primary place of employment; …

1. Both paragraphs (e) and (f) require identification of the “primary place of employment” of the Flight and Cabin Crew on a particular day. The expression “primary place of employment” is defined in s 136(1) of the FBTAA:

***primary place of employment***, in relation to an employee in relation to a day, means business premises, or associated premises, of the employer of the employee, or of an associate of the employer, where:

(a) if the employee performed duties of his or her employment on that day—on that day; or

(b) in any other case—on the most recent day before that day on which the employee performed duties of his or her employment;

those premises are or were:

(c) the sole or primary place of employment of the employee; or

(d) otherwise the sole or primary place from which or at which the employee performs duties of his or her employment.

1. The expressions “business premises” and “associated premises”, referred to in the definition of “primary place of employment”, are also defined in s 136(1). It was not contended that relevant aircraft constituted “associated premises”. The definition of “business premises” is:

***business premises***, in relation to a person, means premises, or a part of premises, of the person used, in whole or in part, for the purposes of business operations of the person, but does not include: [various exceptions are set out, none of which have any relevant application] …

1. Section 136(2) of the FBTAA provides:

In the definition of ***business premises*** in subsection (1), ***premises*** includes a ship, vessel, floating structure, aircraft or train.

# THE DECISION BELOW

1. The primary judge accepted (at [4]) that the issues requiring determination were as follows:

* **First Issue**: On each relevant working day did Virgin’s Flight and Cabin Crew have a “primary place of employment”?
* **Second Issue**:If the answer to the first issue is “yes”, where was that “primary place of employment”?
* **Third Issue**: If the answer to the first issue is “yes”, on each working day was the employee’s car “parked at, or in the vicinity of [the employee’s] primary place of employment”?

1. The primary judge’s construction of the principal aspects of the legislation at issue on appeal may be summarised in the following way:
2. the effect of s 136(2) is to make clear that aircraft can be “business premises” and thus a primary place of employment for the purposes of the FBTAA: at [86];
3. an aircraft will fall within the definition of “primary place of employment” if it is either “the sole or primary place of employment” (paragraph (c) of the definition in s 136(1)) or “the sole or primary place from which or at which the employee performs duties of his or her employment” (paragraph (d) of the definition in s 136(1)): at [86];
4. the ordinary meaning of “primary” is “first or highest in rank or importance; chief; principal”: *Macquarie Dictionary* definition of “primary”: at [91]; see also [71];
5. the word “primary” invites attention to which place of employment is the first or highest in rank or importance [and this] involves a qualitative and quantitative exercise in comparing the duties which are performed by the relevant employees at their different places of employment during the course of a particular day: at [91];
6. such an approach is consistent with the passage from the Explanatory Memorandum: at [91]. The Explanatory Memorandum (referred to at [58]) stated:

The term “primary place of employment” is defined to mean the employer’s business premises, or associated premises, on which the employee would normally carry out his or her employment duties. Where an employee carries out employment duties on more than one of the employer’s business premises in a particular day, the primary place of employment on that day is the place where, in consideration of the time spent and the substance of the duties carried out, a reasonable person would conclude that place to be the primary place of employment.

1. The primary judge concluded that the employees did not have a “sole place of employment”: [90]. The primary judge then conducted the quantitative and qualitative exercise described at [91], namely “comparing the duties which are performed by the relevant employees at their different places of employment during the course of a particular day”.
2. That analysis led the primary judge to reject the Commissioner’s case that the “primary place of employment” was the “business premises” being the relevant “Home Base” airport terminal. Applying the same analysis to both paragraphs (c) and (d) in the definition of “primary place of employment”, the primary judge concluded that:
3. where duties were performed on one aircraft, it was that aircraft which was the “primary place of employment”;
4. where duties were performed on more than one aircraft, there was no “primary place of employment” (the circumstance that one of those aircraft is likely to have accounted for a majority of the employee’s time was not addressed): [96].
5. The primary judge stated at [92] – [94]:

In the case of domestic flights, where the Flight and Cabin Crew operate on only one aircraft during the particular day, I find that their primary place of employment on that day is that aircraft. In such a case, most of the relevant employees’ time is spent performing their duties on-board the aircraft and while it is in flight. They also perform some duties on the aircraft while it is not in flight but is connected to a gate at a terminal, whether at the beginning of the flight or after it has arrived at its destination. The quantitative and qualitative importance of those duties are described above, in the case of Flight Crew at [26]-[28], and in the case of Cabin Crew at [32]-[34]. The position is even stronger in the case of an international flight, where the time spent on-board is likely to be longer than is the case with a domestic flight and where similar duties are performed by relevant employees on the aircraft both before take-off, during flight, and after the aircraft has reached its destination.

I accept Virgin’s contention that the duties performed by Flight and Cabin Crew at terminals are appropriately described as ancillary to the principal duties which are performed on-board the aircraft. In a quantitative sense, such duties are of a short duration and do not exceed one hour in the case of a single sector shift of 13 hours. The duties performed by both Flight and Cabin Crew at terminals, such as attending pre-flight briefings, are, of course, important in a qualitative sense, but the evidence establishes that they are necessarily ancillary to the duties performed on-board the aircraft. As pointed out above, the Commissioner correctly acknowledged in the reasons for disallowing the objections that “Crew Members spend most of their time on the aircraft …”.

As highlighted above, the evidence is unclear as to the frequency with which Flight Crew or Cabin Crew have a domestic flight roster which involves multiple sectors using different aircraft during a particular day. That does not mean, however, that the “home base” airport, nor the terminal where the Flight and Cabin Crew sign on for a shift (as contended by the Commissioner in his alternative argument) is the primary place of employment. The amount of time spent performing duties at that terminal (or, indeed, any other terminal which is visited by the Flight and Cabin Crew on a particular day) is far outweighed by the time spent performing duties on the aircraft or aircrafts during a daily roster. Accordingly, for these reasons, I reject the Commissioner’s primary and alternative contentions on the Second issue.

1. At [96], the primary judge concluded in relation to the Third Issue:

[W]here the Flight and Cabin Crew operate on only one aircraft throughout a particular day, that is their primary place of employment. That place of employment is plainly not within the vicinity of any of the car parks. Where more than one aircraft is involved on a particular day, there is no primary place of employment and s 39A(1)(f) does not arise.

1. The primary judge referred at [95] to submissions which the Commissioner had advanced concerning paragraph (d) in the definition of “primary place of employment”.

# THE APPEAL

1. The introductory words of s 39A(1) focus the relevant inquiry to “a particular day”; see also s 39A(1)(e). The definition of “primary place of employment” also speaks of the primary place of employment “in relation to a day”. Paragraphs (a) and (b) in the definition of “primary place of employment” require identification of whether the employee performed duties on the day in issue. If an employee did perform duties on the relevant day (paragraph (a)), then the “primary place of employment”, in relation to the day, is the premises which are or were the “sole or primary place of employment of the employee” (paragraph (c)) or “otherwise the sole or primary place from which or at which the employee performs duties of his or her employment” (paragraph (d)). If the employee did not perform duties on the relevant day, it is the most recent day on which the employee did perform duties which is relevant (paragraph (b)).
2. As indicated, the primary judge did not treat paragraphs (c) and (d) in the definition of “primary place of employment” as posing different tests or requiring differing analyses. The primary judge treated paragraphs (c) and (d) as involving the same “qualitative and quantitative exercise”, namely a comparison of the duties performed by employees at their different places of employment during the course of a particular day. This approach involved error, because the two paragraphs contain different tests. Paragraph (d) in the definition would be otiose if it contained the same test as paragraph (c).
3. Paragraph (d) requires focus on the place of performance of “duties”. Paragraph (c) does not. That is not to say that the location from which or at which duties are performed is irrelevant in determining whether or how paragraph (c) applies; however, the test in paragraph (c) is broad and is not limited or exhausted by an inquiry into the places from which or at which the employee undertakes his or her duties.
4. The primary judge considered the ordinary meaning of the word “primary” was “first or highest in rank or importance; chief; principal”. This understanding of the word “primary” should be accepted, whilst acknowledging that the statute uses the word “primary” and that word is not to be substituted by similar or explanatory words.
5. Virgin’s principal business activity is the transportation of passengers on aircraft to various destinations from airports in Sydney, Melbourne, Perth and Brisbane. Virgin entered into contracts with owners of car parks adjacent to the terminals at Sydney, Perth and Brisbane to procure parking spaces for Flight and Cabin Crew. It was common ground that Virgin operated more than one aircraft between relevant airports and that Flight and Cabin Crew could be required to work on more than one aircraft, including on a particular day.
6. As the primary judge concluded:
7. Virgin’s “business premises” included the airport terminals at Sydney, Brisbane and Perth and each aircraft: [19], [87].
8. Flight and Cabin Crew performed their duties of employment for Virgin in several places, including the airport terminal where they commenced duty and attended to matters relating to signing-on and other related pre-flight duties as outlined above. The duties were also performed on the various aircraft on which the Flight and Cabin Crew were located for the particular day, and the destination airport terminal or terminals where the aircraft land, which may not have been their origin airport or the terminal where they commenced duty: at [90].
9. Other evidence was also relevant to the analysis required by paragraph (c) in the definition of “primary place of employment”. The conditions of employment of the Flight Crew were regulated by various Enterprise Agreements comprising the Short Haul Pilots’ Agreement 2013, Long Haul International Pilots’ Agreement 2011, Regional Airline Pilots’ Enterprise Agreement 2015, Wide Body Aircraft Pilots’ Agreement 2017, and the Narrow Body Aircraft Pilots’ Enterprise Agreement 2018. The conditions of employment of the Cabin Crew were regulated by various Enterprise Agreements comprising the Short Haul Cabin Crew Agreement 2015 and the Long Haul International Cabin Crew Agreement 2011.
10. The Enterprise Agreements had several relevant similar features. Flight and Cabin Crew were allocated a “Home Base”. Numerous rights and obligations of Virgin and the Flight and Cabin Crew were defined by reference to the Home Base including rosters, rest periods between “Tours of Duty” or “Trips”, allowances, and car parking entitlements. In certain circumstances Virgin could require both Flight Crew and Cabin Crew to change their Home Base for operational reasons.
11. The period commencing when Flight and Cabin Crew “signed on” at his or her “Home Base” to “signing off” at his or her “Home Base” was generally referred to as a “Tour of Duty”. Under at least one Enterprise Agreement, Virgin was required, for example, to ensure that a “Tour of Duty” or “Trip” for Flight Crew involved spending no more than 3 nights away from the Flight Crew’s “Home Base” (or 4 nights with agreement of the employee), or (in certain circumstances) to provide for extended rest periods upon return to “Home Base”. During a “Tour of Duty” where Flight Crew were away for one or more nights from their “Home Base”, transport was arranged or reimbursed between the airport and accommodation arranged and paid for by Virgin, and meal and other allowances paid.
12. Taking into account all of the foregoing facts, in relation to each of the relevant days, the employee’s “Home Base” airport was the “primary place of employment” within the meaning of paragraph (c) of the definition of that phrase in s 136(1), read with s 136(2). It was the primary place of employment on each day of the employment of the Flight and Cabin Crew, even on days where the employee did not attend the “Home Base” at all, for example, on one or more days of a “Tour of Duty” where the employee had no occasion to attend, or perform duties at, his or her “Home Base”. The “Home Base” was still the central place relevant to such matters as the employee’s rosters, rest periods, allowances and car parking entitlements. The “Home Base” was the central place from where a “Tour of Duty” might typically be expected to begin and end. It is relevant to the inquiry required under paragraph (c), but not determinative, that on any particular day an employee carried out central duties on aircraft away from the “Home Base”.
13. The primary judge should have found, in relation to each relevant day, that the employees had a primary place of employment, being each employee’s “Home Base”, and that the condition in s 39A(1)(e) was therefore satisfied. It was common ground that the relevant parking facilities were provided “in the vicinity of” the relevant “Home Bases”. It follows that the condition in s 39A(1)(f) was also satisfied. Given that these were the only conditions in dispute, and each was satisfied, the primary judge should have dismissed Virgin’s appeals.
14. It is not strictly necessary in those circumstances to reach a concluded view about the application of paragraph (d) to the facts. The terms of paragraph (d) direct attention to the place or places from which or at which the duties were performed on each particular day in order to determine the location of the “primary place”.
15. As the Commissioner submitted, it can be said that the Flight and Cabin Crew performed duties “from” the relevant “Home Base”, especially on a day that the employee commenced a “Tour of Duty” from that “Home Base”. It is more strained, but still possible, to say that duties are performed “from” the relevant “Home Base” even on a particular day of a “Tour of Duty” on which the employee does not set foot in the “Home Base”. However, the “*primary* place from which or at which” the duties of the Flight and Cabin Crew are performed “on the particular day” (s 39A(1)) is the aircraft from which or at which those duties were performed. This is demonstrated by the primary judge’s thorough analysis and comparison of the duties which were performed at the various different locations, which showed (unsurprisingly) that the predominant location from which or at which flight and cabin duties were performed was on the relevant aircraft. If duties are performed on more than one aircraft on a particular day, the “*primary* place from which or at which” the duties are performed would typically be the aircraft from which or at which the employee performed his or her duties for the longest period of time.
16. If it had been necessary to reach a conclusion on the application of paragraph (d) to the facts, the conclusion would have been that the relevant “Home Base” of each employee was not the “*primary* place from which or at which” the duties of the Flight and Cabin Crew were performed.

# CONCLUSION

1. For these reasons, both appeals should be allowed with costs.

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| I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Thawley and Downes. |

Associate:

Dated: 22 November 2021