

DCT v MWB -

Interim decision impact statement

DCT v MWB

Court citation(s):	[2019] VCC 1516
Venue:	County Court of Victoria
Venue reference no:	CI-17-04907
Judge name(s):	Judge Marks
Judgment date:	20 September 2019
Appeals on foot:	Yes
Decision outcome:	Partly favourable to the Commissioner

Précis

Outlines the ATO's response to this case which concerns whether section 8AAZN of the *Taxation Administration Act 1953* (TAA) can be used to recover amounts that the Commissioner has paid to a tax agent by mistake because the agent has lodged activity statements without the authority of the taxpayer which resulted in refunds issuing to the agent.

Background

Broadly speaking, section 8AAZN of the TAA allows the Commissioner to recover amounts that the Commissioner has paid to a person by mistake, which the person is not entitled to.

In this case, the Commissioner sought to recover from MWB Accountants Pty Ltd (MWB) a running balance account (RBA) deficit debt comprised of administrative overpayment liabilities under section 8AAZN of the TAA and general interest charge. The administrative overpayment liabilities were raised by the Commissioner to recover payments made to MWB by mistake in the following circumstances:

- MWB acted as tax agent for BIT Pty Ltd (BIT).
- MWB lodged business activity statements (BASs) for BIT claiming credits which were not authorised.
- The unauthorised BAS resulted in BIT having RBA surpluses which were refunded by the ATO and paid into MWB's bank account.
- BIT later identified and disclosed these matters to the ATO, together with corrections required to its BASs to properly report its tax liability. On the basis of these disclosures, the ATO cancelled the BASs that had been lodged by MWB without BIT's authority.
- The ATO sought to recover the unauthorised refunds paid to BIT by mistake as an administrative overpayment giving rise to a recoverable debt under section 8AAZN.

Decision

Judge Marks delivered her reasons for judgment on 20 September 2019. Her Honour decided that section 8AAZN of the TAA could not be used to recover the alleged unauthorised refunds because the defendant was not the 'recipient' of an administrative overpayment.

Her Honour held that:

- (a) for the purposes of section 8AAZN of the TAA, the 'recipient' of an overpayment could only be someone who was overpaid and not someone who was paid something they were never entitled to be paid (at [51–52] and [120]), and
- (b) BIT, and not MWB, was the 'recipient' of the administrative overpayment because BIT '...was the taxpayer the Commissioner intended to pay as a result of its entitlement under a taxation law' (at [66]).

In coming to the decision, her Honour concluded that it was unnecessary for the Court to determine whether the BASs had been lodged by MWB without BIT's authority, or whether MWB or BIT had received the benefit of the refunds.

ATO view

The decision of the County Court is inconsistent with the ATO's view in Law Administration Practice Statements PS LA 2008/11 *Suspected fraud by a third party or tax practitioner* and PS LA 2011/5 *Recovery of administrative overpayments*. In accordance with those practice statements, the ATO is of the view that her Honour erred in finding MWB was not the recipient for the purposes of section 8AAZN of the TAA. The ATO takes the view that there was an administrative overpayment recoverable from MWB.

The Commissioner has filed an application for leave to appeal from Her Honour's judgment to the Victorian Court of Appeal.

The Commissioner will continue to seek recovery of overpayments in accordance with its published view in PS LA 2008/11 and PS LA 2011/5, pending the outcome of the appeals process.

Furthermore, in any case where litigation is proposed to recover a refund mistakenly paid, consideration will be given to pleading common law causes of action that are available to the Commissioner to recover monies paid by mistake in the alternative to section 8AAZN of the TAA.

A final decision impact statement will be published after the litigation in this matter is concluded.

Date issued: 22 April 2020

Legislative references

Taxation Administration Act 1953
8AAZN

Other references

PS LA 2008/11
PS LA 2011/5

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