


Decision impact statement

Aurizon Holdings Limited v Commissioner of Taxation

Court citation(s):	[2022] FCA 368
Venue:	Federal Court of Australia
Venue reference no:	NSD 1278 of 2020
Judge member name:	Thawley J
Judgment date:	8 April 2022
Appeals on foot:	No
Decision outcome:	Unfavourable to the Commissioner

Impacted advice

 The ATO has reviewed the impact of this decision on related advice and guidance products.

Précis

This Decision impact statement outlines the ATO's response to this case. The primary issue in this case concerned whether an amount contributed to a company, which was not in exchange for an issue of shares, qualifies as 'share capital' for the purposes of section 975-300 of the *Income Tax Assessment Act 1997*.

A secondary issue concerned whether the Court should decline to exercise its discretion to make a declaration under section 21 of the *Federal Court of Australia Act 1976* and section 39B of the *Judiciary Act 1903* because the private ruling process provided an alternative and more appropriate remedy for the applicant.

Brief summary of facts

Aurizon Operations Limited (formerly known as QR Limited) was the parent company of a group of companies now known as the QR Group, which carried on a large transport and logistics business throughout Australia. All the shares in Aurizon Operations Limited were held for, and on behalf of, the State of Queensland (Queensland) by Queensland Ministers.

As was set out in the reasons for decision, on 8 December 2009 the Queensland Premier and Treasurer announced the public float and listing on the Australian Securities Exchange initial public offering (IPO) of Aurizon Operations Limited's coal and freight network under the name of 'QR National Limited', which later became known as Aurizon Holdings Limited (Aurizon).

In anticipation of the IPO, Queensland hired the services of professional firms to advise on the restructure of the QR Group and the IPO. The original advice contemplated that the 'State Contribution' would be made in exchange for shares.

The QR Group, together with Queensland, undertook the following steps in preparing for the IPO:

- On 14 September 2010, Aurizon was incorporated with 2 fully-paid ordinary shares issued to Queensland Ministers.
- On 21 September 2010, Queensland transferred its 100% interest in Aurizon Operations Limited to Aurizon in consideration for the issue by Aurizon of 98 fully-paid ordinary shares to Queensland Ministers.
- On 6 October 2010, the 100 ordinary shares held by Queensland Ministers were split into 2.44 billion ordinary shares which would become the shares offered under the IPO.
- In accordance with the Transfer Notice – Project Direction issued on 15 November 2010 (November Direction), Queensland effectively forgave a \$4.3 billion receivable owed to it by Aurizon Operations Limited (Aurizon's subsidiary), by transferring the receivable to Aurizon. This transaction was referred to by the parties as the 'State Contribution'.
- The November Direction issued by the Queensland Treasurer provided that the State Contribution was provided for nil consideration and designated that the contribution was to be adjusted against the contributed equity of Aurizon.

In Aurizon's financial accounts, the \$4.3 billion State Contribution was credited to a newly-created equity account labelled the 'Capital Distribution' account, which was a distinct and separate account from the existing 'Authorised Capital' account of Aurizon, which the Commissioner had accepted as being a share capital account.

Aurizon did not apply for a private ruling regarding the characterisation of the State Contribution but instead, on 27 November 2020, filed an application in the Federal Court seeking a declaration pursuant to section 21 of the *Federal Court of Australia Act 1976* and section 39B of the *Judiciary Act 1903* that the State Contribution was share capital for the purposes of section 975-300 of the *Income Tax Assessment Act 1997*.

Issues decided by the Court

Aurizon contended that the State Contribution was share capital on 2 grounds:

- any contribution by a member that is not a loan or gift is share capital, and
- the State Contribution could be regarded as being sufficiently connected to, or being regarded as, consideration for an earlier issue of shares.

The Commissioner contended that the State Contribution was not share capital because it was not made in exchange for shares, and instead that it was another form of contributed capital.

The Commissioner also contended that the Court should decline to provide declaratory relief as the appropriate remedy for Aurizon was to seek a private ruling and, in the event that it did not agree with the ruling, to commence proceedings under Part IVC of the *Taxation Administration Act 1953*.

Thawley J found that cases such as *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)*¹, *Re the Swan Brewery Co Ltd*², *Cable & Wireless Australia & Pacific Holding BV (in liquidatie) v Commissioner of Taxation*³, *Kellar v Williams*⁴ and *The Commissioners for HM Revenue and Customs v Alan Blackburn Sports Limited*⁵ did not support Aurizon's contention that any money or property contributed by a member, in that capacity, to a company is share capital, except if it is made by way of loan or gift.

Instead, His Honour noted that these cases actually reaffirmed the Commissioner's position that members may make contributions of equity that are not share capital. That said, His Honour also observed that the cases⁶ do not eliminate the possibility of share capital existing in a scenario such as this where the contemporaneous evidence suggests the contribution was, in fact, for share capital despite shares not being issued.

His Honour stated at [7] that:

[t]he term "share capital" almost invariably refers to the capital contributed to a company in exchange for shares. However, as this case demonstrates, this does not supply an exhaustive definition of share capital.

His Honour also noted at [67] that while the cases such as *Archibald Howie* do consider what typically constitutes share capital, the cases do not consider the precise issue raised in this case:

... namely the classification of an amount paid to a company by its sole shareholder, expressed to be for "nil consideration" and not in exchange for a new issue of shares, but which was to be adjusted to the contributed equity of the company, that contributed equity at the time being constituted only by share capital.

His Honour then applied the principles discussed in the earlier part of the reasons to the facts and circumstance of the case. His Honour noted at [56] that '[t]he Commissioner contended that the character of the State Contribution was to be determined primarily from the plain language of ...' the formal legal documents and at [97] that '[u]nderstandably, the Commissioner emphasised that paragraph 6 of the November Direction expressly stated that the consideration for the State Contribution was "nil".'

However, His Honour pointed out at [97] that the plain language of nil consideration needs to be 'read in the context of the whole document' and 'must also be read in the context of the known background leading to the ...' production of the formal legal documents. His Honour observed at [98] that when the plain words are considered with the background context in mind, the words 'nil consideration' merely meant that the State Contribution was '... not a loan and that it was a contribution in respect of which further shares would not be issued'. It did not mean the State Contribution was not in respect of share capital.

His Honour also considered paragraph 7 of the November Direction, where he held at [99] that '... the November Direction confirms that the State Contribution was intended to augment the existing contributed equity'. His Honour considered at [99]

¹ [1948] HCA 28.

² (1976) 3 ACLR 164.

³ [2016] FCA 78 and [2017] FCAFC 71.

⁴ [2000] 2 BCLC 390 at [395]; [2000] UKPC 4.

⁵ [2008] EWCA Civ 1454.

⁶ At [53-96].

‘... that the word “designate” was used in paragraph 7 by reason of the terms of [AASB] Interpretation 1038’ and that:

[t]he “designation” makes [it] clear that the contribution was not intended as a gift; it was intended to be redeemable despite no new equity instruments in fact being issued in exchange ...

His Honour went on to note at [99] that as the ‘contribution was to be “adjusted against the contributed equity” ...’, which at the time only constituted of share capital, this ‘...suggests that the contribution was intended to be to share capital despite no new shares being issued’.

Assessed objectively against the known background events and earlier transactions, Thawley J concluded that the State Contribution was a contribution of share capital.

On the secondary issue, His Honour held that declaratory relief was available having regard to the specific circumstances in this case.

ATO view of decision

It is the ATO’s view that this decision has very limited application beyond its own factual circumstances. His Honour makes it clear that ultimately it was a case that turned on its own particular facts and circumstances. Noting the unusual circumstances of this particular matter, it is the Commissioner’s view that the decision reaffirms the pre-existing view as to what generally is to be treated as share capital, with His Honour stating at [7] that ‘...[t]he term “share capital” almost invariably refers to the capital contributed to a company in exchange for shares.’

The Commissioner considers that the approach in this case as to what constitutes share capital will only be relevant in the unusual circumstance where there is clear contemporaneous evidence that the objective intention was that the relevant amount was always meant to be a contribution to share capital.

In respect to the issue of declaratory relief⁷, His Honour at [108] accepted the utility of the private ruling regime as a way for taxpayers to obtain certainty on the Commissioner’s view about how particular laws administered by the Commissioner apply to specific circumstances of the taxpayer. His Honour observed at [108] that the ruling regime was not particularly well-suited to dealing with the present case. His Honour observed that:

- it would have been difficult to agree on a number of relevant facts
- any appeal against the ruling would be restricted to the facts set out in the ruling, some of which would have been wrong in some respect, and
- shareholders would not have the benefit of the ruling.

The Commissioner acknowledges that this was an unusual case. Nevertheless, the Commissioner considers that the private binding ruling process is capable of dealing with complicated factual circumstances.

Implications for impacted advice or guidance

It is the ATO’s view that the Aurizon decision is considered to have very limited application as it turned on its own facts.

The Commissioner does not intend to alter ATO precedential documents or Law administration practice statements. It is the Commissioner’s view that the decision

⁷ Law Administration Practice Statement PS LA 2009/9 *Conduct of ATO litigation and engagement of ATO Dispute Resolution*.

reaffirms the pre-existing ATO view as to what generally is to be treated as contributed share capital.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 25 August 2022

Contact officer details have been removed as the comments period has expired.

Legislative references

ITAA 1997
975-300

TAA 1953
Pt IVC

Federal Court of Australia Act 1976
21

Judiciary Act 1903
39B

Case references

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) [1948] HCA 28; 77 CLR 143; [1948] 2 ALR 489; 49 SR (NSW) 112; 66 WN (NSW) 51; 22 ALJ 331

Cable & Wireless Australia & Pacific Holding BV (in liquidatie) v Commissioner of Taxation [2016] FCA 78; 2016 ATC 20-555; 102 ATR 542; 110 ACSR 616

Cable & Wireless Australia & Pacific Holding BV (in liquidatie) v Commissioner of Taxation [2017] FCAFC 71; 251 FCR 483; 2017 ATC 20-617; 346 ALR 202

Kellar v Williams [2000] 2 BCLC 390

Re The Swan Brewery Co Ltd (1976) 3 ACLR 164

The Commissioners for HM Revenue and Customs v Alan Blackburn Sports Limited [2008] EWCA Civ 1454

Other references

PS LA 2009/9

ATO references

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