

Taxation of Lump Sum Settlements of Total and Permanent Disability Claims

The Commissioner of Taxation v Scully (2000) HCA 6 (10 February, 2000)

In *The Commissioner of Taxation v Scully* [2000] HCA 6 (10 February, 2000) the High Court determined that a lump sum paid by the Trustees of a Superannuation Fund for total and permanent disability was taxable as an Eligible Termination Payment.

The majority of Gaudron ACJ, McHugh, Gummow and Callinan JJ said “the sole question for determination in this appeal is whether a payment from a Superannuation Fund for the termination of employment on the grounds of total and permanent disablement is an “Eligible Termination Payment” within the meaning of S27A (1) of the *Income Tax Assessment Act 1936* (Cth) (“the Act”). In the circumstances of this case, determination of that question turns on whether the payment is “(n) consideration of a capital nature for, or in respect of, personal injury to the taxpayer”.

Lynette Scully commenced employment with the RACV on the 25th November, 1989 and joined the Superannuation Fund of the employer. On 10 July, 1992 she suffered severe brain injury as a result of a car accident.

It was conceded that she was disabled within the meaning of the Trust Deed and a payment was made in accordance with the TPD Insurer.

The employer included this amount in the Eligible Termination Payment upon her resignation.

The relevant provision of the Taxation Act defines “Eligible Termination Payment” in relation to a taxpayer to mean:

(a) any payment made in respect of the taxpayer in consequence of the ter-

mination of any employment of the taxpayer, other than a payment;

(i) made from a Superannuation Fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund, but does not include “consideration of a capital nature for, or in respect of, personal injury to the taxpayer to the extent to which the amount or value of the consideration is, in the opinion of Commissioner, reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion.”

Because the parties had agreed to many of the elements of the matter the High Court concluded that “the sole question for determination therefore, is whether the payment can be properly characterised as consideration of a capital nature for, or in respect of, personal injury to the taxpayer. The dispute between the parties has revolved around three issues; (a) the meaning in this context of “consideration”; (b) the meaning, in this context, of “for, or in respect of”; and (c) the relationship between 27A (1)(n) and Section 27G of the Act”.

Much of the Court’s deliberations turned on the difference between the words “payment” used in other sections and “consideration” used in paragraph (n). At paragraph 25 the Court states “consideration in paragraph (n) therefore involves the notion of recompense - a payment or benefit to recompense the taxpayer for or in respect of personal injury”.

The majority concluded at paragraph 41 “in our opinion, the payment

in this case cannot be characterised as “consideration.....in respect of, personal injury”. The fact that the payment is not calculated by reference to the nature and extent of the injury or likely loss to the Respondent and the fact that the other benefits are similar to that for total and permanent disablement point inevitably to the conclusion that the payment was “consideration....for, or in respect of” the Respondent’s termination of employment and her rights under the Trust Deed and was not “consideration.....for, or in respect of her injury”.

Kirby J dissented arguing that a less tortured construction of the provisions ought to be undertaken. He states at paragraph 74 “where the Parliament has afforded this benefit or advantage to a class of taxpayers who have suffered a “personal injury” which is “likely” to have an “effect on the capacity of the taxpayer to derive income from personal exertion”, it is not for the Courts to cut back the applicable exemption. This is especially so because Parliament has enacted a substantial practical check against the abuse of, or the disproportion in, claims to such an exemption. That check is afforded by the discretion given to the Commissioner to determine the “amount or value of the consideration” which, in his opinion, is “reasonable”.

The case had another impact for Mrs. Scully in that under Victorian Law any Eligible Termination Payment causes a preclusion or a suspension period for weekly payments of compensation under State Compensation Schemes. For this reason the Victorian WorkCover Authority sought leave to intervene in the matter. ■