HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

CATHERINE VICTORIA ADDY

Appellant

and

COMMISSIONER OF TAXATION

Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet.

Part II:

The application of Article 25

1. The language of Article 25 gives particular reason to think Article 25 applies to prevent tax discrimination against foreign nationals, like Addy, who are tax resident in Australia.

2. Article 25 applies when two separate criteria are satisfied: (i) a tax is *'other or more burdensome'*, and (ii) the relevant foreign national is *'in the same circumstances, in particular with respect to residence'* as an Australian who is not liable for the extra tax.

20 3. An Australian cannot possess a Working Holiday Visa (or any Australian visa), so a visa is a characteristic that will never be shared by an Australian and a foreign national: section 29, *Migration Act 1958*.

4. Addy's possession of an Australian visa should not prevent Addy from being sufficiently in the same circumstances as an Australian who, like Addy, was tax resident of Australia. A foreign national needs a visa to acquire tax residence of Australia, and tax residence of Australia is one of the cases where it is most clear that Article 25 has a remedial effect. For this reason, possession of a visa should not disqualify a foreign national from relief. Also:

   (i) The exclusion of all foreigners who are tax resident of Australia (who also hold a
30 visa) from obtaining relief under Article 25 is inconsistent with the purpose of Article 25, and there are no textual considerations that require such an outcome.

(ii) The necessity for a foreign national to possess a visa in order to be in Australia is intrinsic to the nationality of that person. The Respondent concedes nationality is a circumstance that does not need to be shared for Article 25 to apply.

(iii) The authorities say a treaty should not be interpreted with undue technicality. The fact that an Australian citizen is not eligible for an Australian visa is a legal technicality. It should not prevent the application of Article 25.

(iv) Tax residence of Australia is the only characteristic that an Australian must possess in order to be taxed at the rates in Part I of Schedule 7. When applying Article 25, one should be cautious about requiring circumstances to be shared that are not necessary for the hypothetical Australian to obtain the desired tax treatment. Generally speaking Article 25 should apply when a foreign national shares all the substantive characteristics that entitle an Australian to the tax treatment sought by the foreign national. When these substantive characteristics are the same, it is likely the foreign national is being taxed more harshly for an unacceptable reason.

(v) The Backpacker Tax is a tax to which one would expect Article 25 to apply. Its effect is that a UK national who is tax resident of Australia will *always* pay more tax than an Australian (who is tax resident) on income from sources in Australia.

Should there be a rule that Article 25 only applies to tax discrimination that is imposed on the sole basis of nationality? AS 'issue (a)', Paragraphs 40 - 45

5. The suggested rule is the explanation for the outcome in the Full Federal Court.

6. The extrinsic materials do not genuinely indicate that Article 25 is limited to (and can only offer relief from) higher taxes that are based solely on nationality.

7. If the extrinsic materials do indicate there is this limitation on Article 25 then it would involve too much of a departure from the ordinary meaning of the text to interpolate such a rule into Article 25.

On the assumption that Article 25 is restricted to tax discrimination imposed on the sole basis of nationality, does Article 25 provide relief to Addy? AS, 'Issue (b)', Paragraphs 46 - 54

8. If one applies the test adopted by the Full Court, Addy should have succeeded because harsher tax treatment was imposed on Addy on the sole basis of nationality.

9. The Full Court majority erred in applying this test. For tax treatment to be imposed on the sole basis of nationality it is not necessary for the tax to utilise a criterion that is universal to all members of the identified national group. The Full Court majority was incorrect in concluding that this is the only circumstance where tax treatment is imposed on the basis of nationality.

10. Tax treatment is imposed on the sole basis of nationality if: (i) the tax treatment applies only to foreign nationals, and not to Australians; and (ii) the tax treatment of the relevant foreigner is harsher than that of an Australian who took the same actions and engaged in the same economic activity.

Miscellaneous

11. It is not accurate (as has been said at RS[11] and FFC[261]) that the Backpacker Tax was intended to benefit Working Holiday Makers. The Second Reading Speech said the goal was for Backpackers to be made to pay their fair share of tax.

12. This Court should be cautious about articulating any absolute rules about when Article 25 (or any other tax discrimination provision) does or does not apply. The jurisprudence should be worked out incrementally.

Dated: 23 June 2021

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Name: John Hyde Page

Counsel for the Appellant