

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

COMMISSIONER OF TAXATION

APPELLANT

AND

KAMAL JAYASINGHE

RESPONDENT

Commissioner of Taxation v Jayasinghe
[2017] HCA 26
9 August 2017
S275/2016

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Full Court of the Federal Court of Australia made on 9 June 2016 and in its place order that:*
 - (a) *the appeal to that Court be allowed; and*
 - (b) *the decision of the Administrative Appeals Tribunal made on 29 June 2015 be set aside and in its place order that the decision under review be affirmed.*

On appeal from the Federal Court of Australia

Representation

J O Hmelnitsky SC with T L Phillips for the appellant (instructed by Australian Government Solicitor)

A H Slater QC with L McBride for the respondent (instructed by Balazs Lazanas & Welch LLP)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Jayasinghe

Income tax – *International Organisations (Privileges and Immunities) Act* 1963 (Cth) ("the IOPI Act"), s 6(1)(d)(i) – Whether taxpayer "holds an office in" an international organisation to which the IOPI Act applies – Whether taxpayer entitled to exemption from taxation on salaries and emoluments.

Income tax – *Taxation Administration Act* 1953 (Cth), Sched 1, s 357-60(1) – Taxation Determination TD 92/153 – Whether Commissioner bound to exempt taxpayer from taxation.

Words and phrases – "expert on mission", "incidents of the relationship", "international organisation", "person who holds an office", "skills and expertise", "specialist services", "terms of engagement".

International Organisations (Privileges and Immunities) Act 1963 (Cth), s 6(1)(d), Fourth Schedule, Pt I.

Taxation Administration Act 1953 (Cth), Sched 1, s 357-60(1).

United Nations (Privileges and Immunities) Regulations 1986 (Cth), reg 10.

Taxation Determination TD 92/153.

Convention on the Privileges and Immunities of the United Nations [1949] ATS 3, Art V, s 18.



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1 KIEFEL CJ, KEANE, GORDON AND EDELMAN JJ. Section 6(1)(d)(i) of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) ("the IOPI Act") provides for the conferral of particular privileges and immunities upon a person "who holds an office in an international organisation to which [the IOPI Act] applies". One privilege is "[e]xemption from taxation on salaries and emoluments received from the organisation"¹. The United Nations ("the UN") is an international organisation to which the IOPI Act applies².

2 Under an Individual Contractor Agreement, the respondent, Mr Kamal Jayasinghe, was engaged by the United Nations Office for Project Services ("UNOPS"), an operational arm of the UN, as a "project manager" in the building of a 190 kilometre gravel road in Sudan.

3 Two questions were raised on appeal to this Court. The first is whether, in the income years ended 30 June 2010 and 30 June 2011, Mr Jayasinghe was a person who held an office in an international organisation within the meaning of s 6(1)(d)(i) of the IOPI Act, such that he was entitled to exemption from taxation on the income he received from UNOPS. The second is whether, by reason of s 357-60(1) of Sched 1 to the *Taxation Administration Act 1953* (Cth) ("the Administration Act") and Taxation Determination TD 92/153³, the appellant, the Commissioner of Taxation, was bound to exempt Mr Jayasinghe from taxation on the income he received from UNOPS. Both of those questions should be answered in the negative. The appeal should be allowed.

4 These reasons will set out the relevant facts, the assessments issued by the Commissioner and the decisions below, consider the applicable legislative framework and the proper construction of s 6(1)(d)(i) of the IOPI Act and then turn to address TD 92/153.

1 See cl 2 of Pt I of the Fourth Schedule to the IOPI Act.

2 See the definition of "international organisation to which this Act applies" in s 3(1) of the IOPI Act; reg 3 of the United Nations (Privileges and Immunities) Regulations 1986 (Cth).

3 Titled "Income tax: who is a 'person who holds an office' as specified in various regulations made under *the International Organisations (Privileges and Immunities) Act 1963?*".

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Facts

5 Mr Jayasinghe is a qualified civil engineer. During the relevant income years, he was an Australian resident and, for parts of those years, he was engaged by UNOPS to work in Sudan as a project manager. Mr Jayasinghe worked in Sudan from approximately 13 October 2009 until 31 December 2010 and again from 28 June 2011 until 31 December 2011.

6 Mr Jayasinghe was engaged under an "Individual Contractor Agreement". The two periods were covered by three Individual Contractor Agreements, which were relevantly in substantively similar terms⁴.

7 Each Individual Contractor Agreement was deemed to comprise four documents, in the following order of priority – the Individual Contractor Agreement, the General Terms and Conditions of Individual Contractor Agreements in Annex A, the Terms of Reference in Annex B and the Individual Contractor Agreement Policy⁵. Annexes A and B were both an "integral part" of the Individual Contractor Agreement.

8 An Individual Contractor Agreement was used to engage a person in their individual capacity "to perform a specific task or deliver a specific piece of work"; it could not be used to engage a person "[t]o perform regular core functions". Functions "discharged to implement a project or a portfolio of related projects" were not normally considered core functions.

9 Mr Jayasinghe was engaged by UNOPS as an individual contractor to provide specialist services in Sudan. His functional title was "Project Manager".

4 The first Individual Contractor Agreement commenced on 13 October 2009 and expired "without prior notice upon satisfactory completion of the services", but no later than 12 October 2010. The second Individual Contractor Agreement commenced on 13 October 2010 and expired "without prior notice upon satisfactory completion of the services", but no later than 10 January 2011. The third Individual Contractor Agreement commenced on 28 June 2011 and expired "without prior notice upon satisfactory completion of the services", but no later than 31 December 2011.

5 For convenience, in these reasons a reference to "Individual Contractor Agreement" is to each Individual Contractor Agreement that applied during the relevant period and the documents that were deemed to form part of each of them.

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His task was "[c]ompletion of the road ... on time and under budget"⁶. His supervisor was the Head of Programme. Upon certification that the services had been satisfactorily performed in accordance with the Individual Contractor Agreement, Mr Jayasinghe was to be paid a monthly fee by UNOPS.

10 Under the Individual Contractor Agreement, Mr Jayasinghe had the legal status of an independent contractor of UNOPS, serving in his individual capacity. He had no authority or other right to enter into any legal or financial commitments or incur any obligations on behalf of UNOPS and was responsible for paying any tax levied by the Australian Government on his UNOPS earnings.

11 Moreover, Mr Jayasinghe was solely liable for claims by third parties arising from his own negligent acts or omissions in the course of his service under the Individual Contractor Agreement. Under no circumstances was UNOPS liable for such claims by third parties. Accordingly, Mr Jayasinghe was expected to obtain professional liability insurance if providing professional services to UNOPS.

12 Under the Individual Contractor Agreement, he did not have the status of an official of the UN for the purposes of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the UN on 13 February 1946⁷ ("the 1946 UN Convention").

13 However, under the Individual Contractor Agreement, he was engaged to perform "specialist services" in recognition of his "skills and expertise". Further, at least from 1 May 2010, he was considered an expert on mission for the UN within the terms of s 22 in Art VI of the 1946 UN Convention and was accorded, by the UN, the privileges and immunities provided for in s 22 in Art VI of the 1946 UN Convention⁸.

14 While Mr Jayasinghe was engaged by UNOPS, he held a "UNOPS ID Card". The back of the card contained a request that "all those

6 From 28 June 2011, his task was, in general terms, to prepare and issue regular project reports and maintain diaries and progress reports.

7 [1949] ATS 3.

8 The Individual Contractor Agreement Policy effective from 1 May 2010 provided that, in general, all international individual contractors were considered "experts on mission for [the UN]" within the terms of s 22 in Art VI of the 1946 UN Convention.

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whom it may concern ... extend to the bearer the courtesies, facilities, privileges and immunities which pertain to his/her office, and ... facilitate, by all suitable means the journeys and missions on which he (or she) is engaged. If found, please return to the UN Security Office".

Assessments and decisions below

15 In September 2013, notices of amended assessment were issued to Mr Jayasinghe for his earnings from UNOPS in the income years ended 30 June 2010 and 30 June 2011. Mr Jayasinghe lodged an objection to those assessments. The Commissioner disallowed the objection.

16 Mr Jayasinghe applied to the Administrative Appeals Tribunal for a review of the Commissioner's decision. The Tribunal set aside the Commissioner's decision⁹. The Tribunal concluded that the substance of the relationship between Mr Jayasinghe and UNOPS, and the obligations created and implemented in carrying out the project, were such that he was the holder of an office within the meaning of s 6(1)(d) of the IOPI Act and that Mr Jayasinghe was a person who worked as an employee of UNOPS and was therefore entitled to the benefit of TD 92/153.

17 A majority of the Full Court of the Federal Court of Australia (Pagone and Davies JJ, Allsop CJ dissenting) dismissed an appeal by the Commissioner¹⁰. The majority upheld the Tribunal's construction of s 6(1)(d)(i) of the IOPI Act and held that TD 92/153 applied to exempt Mr Jayasinghe from taxation.

The IOPI Act¹¹

18 Section 6 of the IOPI Act, titled "Privileges and immunities of certain international organisations and persons connected therewith", relevantly provides for the conferral, by regulations, of privileges and immunities on entities and persons in the following terms:

9 *Re Jayasinghe and Federal Commissioner of Taxation* (2015) 101 ATR 476.

10 *Federal Commissioner of Taxation v Jayasinghe* (2016) 103 ATR 357.

11 The legislative history of the IOPI Act was relevantly described by this Court in *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519 at 527-530 [23]-[37]; [2015] HCA 44.

5.

"(1) Subject to this section, the regulations may, either without restriction or to the extent or subject to the conditions prescribed by the regulations:

(a) confer upon an international organisation to which this Act applies:

...

(b) confer:

(i) upon a person who *holds, or is performing the duties of, an office prescribed by the regulations to be a high office in an international organisation to which this Act applies* all or any of the privileges and immunities specified in Part I of the Second Schedule; and

(ii) upon a person who has ceased to hold, or perform the duties of, such an office the immunities specified in Part II of the Second Schedule;

(c) confer:

(i) upon a person who is accredited to, or is in attendance at an international conference convened by, an *international organisation to which this Act applies* as a representative of:

(A) a country other than Australia;

(B) another international organisation to which this Act applies; or

(C) an overseas organisation to which this Act applies;

all or any of the privileges and immunities specified in Part I of the Third Schedule; and

(ii) upon a person who has ceased to be accredited to such an organisation, or has attended such a conference, as such a representative the immunities specified in Part II of the Third Schedule;

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(d) confer:

- (i) upon a person *who holds an office in an international organisation to which this Act applies* (not being an office prescribed by the regulations to be a high office) all or any of the privileges and immunities specified in Part I of the Fourth Schedule^[12]; and
- (ii) upon a person who has ceased to hold such an office the immunities specified in Part II of the Fourth Schedule; and

(e) confer:

- (i) upon a person who is serving on a committee, or is *participating in the work*, of an *international organisation to which this Act applies* or is *performing*, whether alone or jointly with other persons, *a mission* on behalf of such an organisation all or any of the privileges and immunities specified in Part I of the Fifth Schedule; and
- (ii) upon a person who has served on such a committee or participated in such work or has performed such a mission the immunities specified in Part II of the Fifth Schedule.

(2) Regulations made for the purposes of this section may be of general application or may relate to:

- (a) particular *international organisations to which this Act applies*;
- (b) particular offices or classes of offices;
- (c) particular conferences, committees or missions or classes of conferences, committees or missions; or

12 Clause 2 of Pt I of the Fourth Schedule to the IOPI Act provides for "[e]xemption from taxation on salaries and emoluments received from the organisation".

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- (d) representatives of particular countries, of particular international organisations to which this Act applies or of particular overseas organisations to which this Act applies." (emphasis added)

19 The phrase "international organisation to which this Act applies" is defined relevantly to mean "an organisation that is declared by the regulations to be an international organisation to which [the IOPI Act] applies"¹³ and includes:

- "(a) an organ of, or office within, an organisation that is so declared;
- (b) a commission, council or other body established by such an organisation or organ; and
- (c) a committee, or sub-committee of a committee, of such an organisation, organ, commission, council or body."

20 A number of matters should be noted at the outset. First, under s 6(1) of the IOPI Act, by reference to the First to Fifth Schedules to the IOPI Act, certain privileges and immunities are extended to an international organisation to which the IOPI Act applies and then on different bases to different categories of persons "connected" with that international organisation. The Schedules set the "upper limits"¹⁴ of the privileges and immunities that are to be extended to an international organisation and the different categories of persons connected with that international organisation. Privileges and immunities as prescribed in the Second to Fifth Schedules are extended to those persons connected with the international organisation while they maintain the connection (Pt I of each Schedule) and after the connection ceases (Pt II of each Schedule).

21 The structure of s 6(1) assumes that there will be criteria to distinguish between different categories of personnel entitled to different privileges and immunities. So, for example, if a person holds a high office in an international organisation¹⁵, the privileges and immunities conferred on them in accordance with the Second Schedule are more extensive than those privileges and immunities that would be conferred on them in accordance with the

13 s 3(1) of the IOPI Act. See also s 6(2)(a) of the IOPI Act.

14 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 May 1963 at 1161.

15 See s 6(1)(b)(i) of the IOPI Act.

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Fourth Schedule if they held an office (that did not qualify as a high office) in an international organisation¹⁶.

22 This appeal is concerned with s 6(1)(d)(i) and the Fourth Schedule – the privileges and immunities of a person who holds an office, other than a high office. The Fourth Schedule provides:

"Part I

*Privileges and Immunities of **Officer** (other than High Officer) of International Organisation*

1. Immunity from suit and from other legal process in respect of acts and things done **in his capacity as such an officer**.
2. **Exemption from taxation on salaries and emoluments received from the organisation.**
3. Exemption (including exemption of a spouse and any dependent relatives) from the application of laws relating to immigration and the registration of aliens.
4. Exemption from the obligation to perform national service.
5. Exemption from currency or exchange restrictions to such extent as is accorded to an official, of comparable rank, forming part of a diplomatic mission.
6. The like repatriation facilities (including repatriation facilities for a spouse and any dependent relatives) in time of international crisis as are accorded to a diplomatic agent.
7. The right to import furniture and effects free of duties when first taking up a post in Australia and to export furniture and effects free of duties when leaving Australia on the termination of his functions.

¹⁶ See s 6(1)(d)(i) of the IOPI Act.

9.

Part II

*Immunities of **Former Officer** (other than High Officer) of International Organisation*

Immunity from suit and from other legal process in respect of acts and things done **in his capacity as such an officer.**" (emphasis in bold added)

23 Second, s 13 of the IOPI Act provides the Governor-General with the power to make regulations, not inconsistent with the IOPI Act, prescribing all matters required or permitted by the IOPI Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the IOPI Act.

The UN Regulations

24 This appeal concerns the UN. Regulation 3 of the United Nations (Privileges and Immunities) Regulations 1986 (Cth) ("the UN Regulations") provides that the UN is an international organisation to which the IOPI Act applies¹⁷. The Commissioner accepted that the IOPI Act also applies to UNOPS, as it is an operational arm of the UN.

25 Regulations 4 to 11 of the UN Regulations reflect the structure of s 6(1) of the IOPI Act. Regulations 4 and 5 address the UN and prescribe specific privileges and immunities in the First Schedule to the IOPI Act that attach to the UN as an organisation. Regulations 6 to 8 prescribe the offices of Secretary-General of the UN, Under Secretary-General of the UN and Assistant Secretary-General of the UN to be high offices in the UN and provide that a person who holds, or is performing the duties of, each of those offices has the privileges and immunities specified in Pt I of the Second Schedule. Regulation 9(1) provides that a person accredited to or in attendance at an international conference convened by the UN as a representative of a country (other than Australia) has the privileges and immunities specified in Pt I of the Third Schedule. Regulation 11 is concerned with a person performing a mission on behalf of the UN.

26 Relevantly for Mr Jayasinghe, reg 10 of the UN Regulations, titled "Privileges and immunities of officers (other than high officers) of [the UN]", provides that:

17 See also s 6(2)(a) of the IOPI Act.

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"(1) ... [A] person who holds an office in [the UN], other than a person who holds, or is performing the duties of, an office specified in subregulation 6(1), 7(1) or 8(1), has the privileges and immunities specified in Part I of the Fourth Schedule to [the IOPI Act].

...

(3) A person who has ceased to hold an office in [the UN], other than an office specified in subregulation 6(1), 7(1) or 8(1), has the immunities specified in Part II of the Fourth Schedule to [the IOPI Act]." (emphasis added)

Mr Jayasinghe – not "a person who holds an office"

Proper construction of s 6(1)(d)(i)

27 This appeal raises the question of the proper construction of s 6(1)(d)(i) of the IOPI Act and, in particular, the phrase "a person who holds an office in an international organisation". Neither the word "office", nor the composite phrase "holds an office in an international organisation", is defined in the IOPI Act. So, what does "holds an office in an international organisation" mean?

28 Although a similar phrase, "a person who holds an office in [the UN]", is used in reg 10(1) of the UN Regulations, the phrase in s 6(1)(d)(i) of the IOPI Act cannot be limited to or defined by reference to the UN Regulations, because the IOPI Act extends to any organisation that is declared by the regulations to be an international organisation to which the IOPI Act applies¹⁸.

29 The relevant statutory language in s 6(1)(d)(i), "a person who holds an office in an international organisation", directs attention to the concept of holding *an office* in an international organisation. Section 6(1)(b)(i) of the IOPI Act is similarly directed to the concept of holding an office – a high office – in an international organisation.

30 Those provisions can be contrasted with s 6(1)(c)(i) and (e)(i), which are directed to being accredited to or undertaking an identified activity with the organisation. "[A] person who holds an office in an international organisation" stands in contrast to "a person who is accredited to, or is in attendance at an international conference convened by, an international organisation"¹⁹ or

18 s 5 of the IOPI Act.

19 s 6(1)(c)(i) of, and the Third Schedule to, the IOPI Act.

11.

"a person who is serving on a committee, or is participating in the work, of an international organisation ... or is performing, whether alone or jointly with other persons, a mission on behalf of such an organisation"²⁰. Of course, a person may not fall within any of the categories in s 6(1).

31 The word "office", although a general word, must not be read in isolation; it must be read in context²¹. And read in context in s 6(1) of the IOPI Act, it is apparent that the word "office" in the phrase "holds an office in an international organisation" is not, and cannot be, defined by reference to permanence or succession.

32 In *Great Western Railway Co v Bater*, Rowlatt J said that an office was something "which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders"²². The Tribunal²³ and the majority of the Full Court²⁴ adopted and applied that test, the correctness of which Mr Jayasinghe sought to uphold on appeal to this Court, in concluding that he was the holder of an office within the meaning of s 6(1)(d)(i) of the IOPI Act.

33 *Bater* does not assist in construing s 6(1)(d)(i) of the IOPI Act. First, it was concerned with the meaning of the word "office" in a different statutory context – one which involved language that, on appeal to the House of Lords, Lord Wrenbury described as "unintelligible"²⁵.

20 s 6(1)(e)(i) of, and the Fifth Schedule to, the IOPI Act.

21 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455; [1925] HCA 5; *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213; [1976] HCA 36; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315; [1985] HCA 48; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57]; [2015] HCA 14.

22 [1920] 3 KB 266 at 274.

23 *Jayasinghe* (2015) 101 ATR 476 at 481 [35], 482 [44].

24 *Jayasinghe* (2016) 103 ATR 357 at 370 [47].

25 *Great Western Railway Co v Bater* [1922] 2 AC 1 at 30.

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12.

34 Second, in construing s 6(1)(d)(i) of the IOPI Act, the word "office" in the composite phrase "holds an office in" cannot be limited, or defined by reference, to the meaning of "office" in *Bater*; it cannot be limited, or defined by reference, to notions of permanence or succession. The concept of holding an office in an international organisation compels that conclusion. Put simply, to focus on whether an office in an international organisation is permanent or filled by successive holders (or both) is to define the concept of "office" within the meaning of s 6(1)(d)(i) of the IOPI Act by reference to criteria that are not relevantly applicable to the holding of an office in an international organisation.

35 Rather, on its proper construction, s 6(1)(d)(i) (as well as s 6(1)(b)(i)) is concerned with the incidents of the relationship between a person and an international organisation – a person who "holds an office in" an international organisation. The incidents of that relationship will depend on the terms upon which a person is engaged. Examination of those terms may lead to the conclusion that a person holds an office in an international organisation that is neither permanent nor filled by successive holders.

36 The centrality of the terms of engagement to the inquiry required by s 6(1)(d)(i) reflects the fact that the IOPI Act can, and does, apply to a variety of international organisations. Different international organisations engage staff in different ways, depending on the governing instruments of the particular international organisation. Typically, those instruments set out, in very general terms, how "staff" are to be engaged and the scope of their duties. The Charter of the United Nations itself illustrates the point: it provides that "[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly"²⁶. Similarly, the Director-General of the World Trade Organization "shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference"²⁷. The Secretary-General of the Organisation for Economic Co-operation and Development "shall appoint such staff as the Organisation may require in accordance with plans of organisation approved by

26 Art 101(1) of the Charter of the United Nations [1945] ATS 1.

27 Art VI:3 of the Marrakesh Agreement establishing the World Trade Organization [1995] ATS 8. See World Trade Organization (Privileges and Immunities) Regulations 1996 (Cth).

13.

the Council"²⁸. In other words, instruments governing international organisations are not prescriptive about the incidents of the relevant relationships. The heads of international organisations tend to have a broad discretion as to how staff will be engaged and on what terms. An international organisation may establish a relationship between it and the relevant person such that the person holds an "office", but there is nothing that requires that "office" to align with the understanding of "office" expressed by Rowlatt J in *Bater*. It is for the international organisation to define the incidents of the relationship between it and the relevant person.

37 That is not to adopt the Commissioner's contention that the phrase "a person who holds an office in an international organisation" in s 6(1)(d)(i) of the IOPI Act and the similar phrase in reg 10(1) of the UN Regulations should be construed as referring to a person who holds a position that the UN has "established and designated" as an office. That is not the question posed by s 6(1)(d)(i) of the IOPI Act. In ascertaining whether a person "holds an office in" an international organisation, s 6(1)(d)(i) is concerned with the incidents of the relationship between a person and an international organisation. It focuses on the substance of the terms upon which a person is engaged – not whether the relevant organisation has attributed a particular label to the engagement – and on the relationship between that engagement and the organisation's performance of its functions.

38 The phrase "a person who holds an office in an international organisation" directs attention to the structure of the organisation and the place of the person within it. The holder of an "office" in such an organisation may be expected to have a position to which certain duties attach²⁹, duties relating to the performance of the organisation's functions and a level of authority with respect to the organisation. The position of the person within the international organisation and the duties and authority associated with it should render explicable why the privileges and immunities are conferred. By comparison, a person whose terms of engagement place them outside the organisational structure, and do not provide that person with any defined duties or authority with respect to the organisation and its functions, could hardly be said to hold an office within the organisation.

28 Art 11(1) of the Convention on the Organisation for Economic Co-operation and Development [1971] ATS 11. See Organisation for Economic Co-operation and Development (Privileges and Immunities) Regulations 1983 (Cth).

29 See *R v Boston* (1923) 33 CLR 386 at 402; [1923] HCA 59.

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39 The construction of s 6(1)(d)(i) explained above is reinforced by s 6(2)(b) of the IOPI Act, which relevantly provides that regulations made for the purposes of s 6 may relate to "particular offices or classes of offices". Moreover, that construction is consistent with the statutory purpose or purposes of the IOPI Act³⁰. In particular, that construction is consistent with the purpose of conferring the privileges and immunities in the way the IOPI Act does: that conferral is not for the benefit of, or personal to, the persons connected with an international organisation, but is rather to assist the international organisation in the "performance of [its] functions"³¹. That purpose of "functional necessity"³² is itself reinforced by the inclusion in the IOPI Act³³ and, relevantly here, the UN Regulations³⁴ of a provision allowing for the waiver of any privileges and immunities to which an international organisation or a person is entitled by reason of the IOPI Act or the regulations made under it. For present purposes, it is the Secretary-General of the UN who may waive any privilege or immunity to which a person who holds an office in the UN is entitled under the IOPI Act and the UN Regulations.

40 Further, the construction explained above accords with Australia's international obligations under the 1946 UN Convention³⁵. That construction recognises a distinction between creating an *office* that attracts privileges and immunities under s 18 in Art V, engaging an *expert on mission* who attracts different privileges and immunities under s 22 in Art VI, and engaging a person to *perform a task or tasks* who does not attract privileges and immunities. For example, the privileges and immunities under Pt I of the Fourth Schedule to the IOPI Act³⁶ conferred on a person who holds an office in the UN reflect those conferred on officials of the UN under s 18 in Art V of the 1946 UN Convention. And the different set of privileges and immunities under Pt I of the

30 See *Macoun* (2015) 257 CLR 519 at 535 [54].

31 *Macoun* (2015) 257 CLR 519 at 535 [54].

32 *Macoun* (2015) 257 CLR 519 at 535 [54].

33 s 10 of the IOPI Act.

34 reg 12(2) of the UN Regulations.

35 See, eg, *Macoun* (2015) 257 CLR 519 at 539 [67] and the authorities cited.

36 See reg 10(1) of the UN Regulations.

Fifth Schedule to the IOPI Act³⁷ conferred on a person performing a mission on behalf of the UN reflects those accorded to experts performing missions for the UN (other than UN officials falling within Art V) under s 22 in Art VI of the 1946 UN Convention.

41 Finally, the nature of the privileges and immunities conferred reinforces the above construction. A person performing a mission is entitled to inviolability of papers and documents under s 6(1)(e)(i) and cl 3 of Pt I of the Fifth Schedule to the IOPI Act³⁸, consistent with the position of experts performing missions under s 22(c) in Art VI of the 1946 UN Convention. By contrast, the holder of an office within the meaning of s 6(1)(d)(i), consistent with the position of an official under s 18 in Art V of the 1946 UN Convention, will not be so entitled. Conversely, a tax exemption is conferred on the holder of an office under s 6(1)(d)(i) and cl 2 of Pt I of the Fourth Schedule to the IOPI Act³⁹, consistent with s 18(b) in Art V of the 1946 UN Convention, but such a privilege is not conferred on a person performing a mission within the meaning of s 6(1)(e)(i)⁴⁰, which is again consistent with the terms of the 1946 UN Convention.

Mr Jayasinghe

42 So, what were the incidents of the relationship between Mr Jayasinghe and the UN? During the relevant period, did he "hold[] an office in" the UN within the meaning of s 6(1)(d)(i)? The answer to the latter question is "no". The Individual Contractor Agreement is determinative. As seen earlier, that agreement provided in its terms that:

- (1) Mr Jayasinghe was engaged in his individual capacity to undertake a non-core function – "to perform a specific task or deliver a specific piece of work", namely "[c]ompletion of the road ... on time and under budget";

37 See reg 11(1) of the UN Regulations.

38 See reg 11(1) of the UN Regulations.

39 See reg 10(1) of the UN Regulations.

40 Regulation 11(1) of the UN Regulations does not refer to cl 2A of Pt I of the Fifth Schedule to the IOPI Act, which reads "[e]xemption from taxation on salaries and emoluments received from the organisation".

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- (2) upon certification that his services as a project manager had been satisfactorily performed in accordance with the Individual Contractor Agreement, Mr Jayasinghe was to be paid a monthly fee by UNOPS;
- (3) Mr Jayasinghe had the legal status of an independent contractor of UNOPS, serving in his individual capacity and with no authority or other right to enter into any legal or financial commitments or incur any obligations on behalf of UNOPS;
- (4) Mr Jayasinghe did not have the status of an official of the UN for the purposes of the 1946 UN Convention – in fact, at least from 1 May 2010, he was considered an expert on mission for the UN within the terms of s 22 in Art VI of the 1946 UN Convention and was accorded, by the UN, the privileges and immunities provided for in s 22 in Art VI of the 1946 UN Convention;
- (5) Mr Jayasinghe was responsible for paying any tax levied by the Australian Government on his UNOPS earnings, contrary to s 6(1)(d)(i) of the IOPI Act and reg 10(1) of the UN Regulations; and
- (6) Mr Jayasinghe was solely liable for claims by third parties arising from his own negligent acts or omissions in the course of his service under the Individual Contractor Agreement, contrary to s 6(1)(d)(i) of the IOPI Act and reg 10(1) of the UN Regulations.

43 For those reasons, Mr Jayasinghe did not hold an office in the UN within the meaning of s 6(1)(d)(i) of the IOPI Act.

TD 92/153

The Administration Act

44 Part 5-5 of Sched 1 to the Administration Act, titled "Rulings", comprises a number of divisions. This appeal is concerned with Div 357, titled "Object and common rules".

45 Section 357-5, titled "Object of this Part", provides that:

- "(1) The object of this Part is to provide a way for you to find out the Commissioner's view about how certain laws administered by the Commissioner apply to you so that the risks to you of uncertainty

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when you are self assessing or working out your tax obligations or entitlements are reduced.

- (2) This object is achieved by:
- (a) making advice in the form of rulings by the Commissioner available on a wide range of matters and to many taxpayers; and
 - (b) ensuring that the Commissioner provides rulings in a timely manner; and
 - (c) enabling the Commissioner to obtain, and make rulings based on, relevant information; and
 - (d) protecting you from increases in tax and from penalties and interest where you rely on rulings; and
 - (e) protecting you from decreases in entitlements where you rely on rulings; and
 - (f) limiting the ways the Commissioner can alter rulings to your detriment; and
 - (g) giving you protection from interest charges where you rely on other advice from the Commissioner, or on the Commissioner's general administrative practice."

46

There was no dispute that a ruling issued by the Commissioner is to be construed by reference to that object⁴¹. And consistent with that object, s 357-60(1), titled "When rulings are binding on the Commissioner", is one of the common rules that apply to all rulings issued by the Commissioner. It relevantly provides that:

"[A] ruling binds the Commissioner in relation to you (whether or not you are aware of the ruling) if:

- (a) the ruling applies to you; and

⁴¹ See *Jayasinghe* (2016) 103 ATR 357 at 374 [55]; see also at 366 [38].

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- (b) you rely on the ruling by acting (or omitting to act) in accordance with the ruling."

The ruling

47 TD 92/153 is a public ruling⁴² issued by the Commissioner. It relevantly provides that:

"1. Salaries and emoluments received from an international organisation by a **person who holds an office** in that organisation may be exempt from Australian income tax under regulations made under [the IOPI Act]. The availability and extent of exemption varies from organisation to organisation, and in this regard individual regulations should be consulted. The question arises, however, who is a 'person who holds an office' for the purposes of the regulations under [the IOPI Act].

2. The Department of Foreign Affairs and Trade, who administer [the IOPI Act] and regulations, take the view that the phrase 'person who holds an office' in relation to a prescribed international organisation covers those people who work as employees for that organisation. They do not accept, however, that the phrase includes either:

- persons who are locally engaged by the organisation and paid at an hourly rate; or
- persons engaged by the organisation as experts or consultants.

We agree with those views.

3. In determining whether a person holds an office, the relevant international organisation is required to apply these tests. As a practical matter, if the international organisation designates a person as one who holds an office in that organisation, we will accept, in the absence of contrary evidence, that this designation is sufficient evidence of the status of that person. If the other requirements of the regulations are satisfied, that person will be entitled to the privileges and immunities available to a person who holds an office in that organisation." (emphasis in original)

42 See Div 358 in Pt 5-5 of Sched 1 to the Administration Act. See also *Bellinz v Commissioner of Taxation* (1998) 84 FCR 154 at 168-169.

19.

48 The Tribunal found that Mr Jayasinghe was "a person who worked as an employee" of UNOPS, was not engaged as an expert or consultant and was therefore entitled to the benefit of TD 92/153⁴³ (emphasis in original). The Tribunal concluded that Mr Jayasinghe was not engaged as an expert or consultant because his duties as a project manager were not confined to "advis[ing] or giv[ing] opinions from time to time as to the implementation, design or progress of the [road works]", but rather included "managerial, administrative, negotiation, supervision and numerous other activities"⁴⁴.

49 The majority of the Full Court concluded that TD 92/153 was "not to be read as removing from the class of persons working as employees, those persons who both work as employees and are engaged as experts and consultants"⁴⁵. Accordingly, without needing to determine whether Mr Jayasinghe was engaged as an expert, the majority concluded that, because Mr Jayasinghe worked as an employee, he was entitled to the benefit of the ruling⁴⁶.

Commissioner not bound to exempt Mr Jayasinghe

50 On appeal to this Court, the Commissioner did not contest the finding of the Tribunal, upheld on appeal by all members of the Full Court⁴⁷, that Mr Jayasinghe was an employee. Rather, the question for this Court was whether, although he was found to be an employee, Mr Jayasinghe otherwise fell outside the scope of the phrase "person who holds an office" for the purposes of TD 92/153 because he was engaged by UNOPS as an expert.

51 TD 92/153 is addressed to taxpayers who need to determine whether they are to be assessed on salaries and emoluments received from a relevant international organisation and, in particular, whether they are to be assessed on the basis that they hold an office in a relevant international organisation.

52 As the words of par 2 of the ruling suggest, the phrase "person who holds an office" does not include persons who fall into either of the two listed

43 *Jayasinghe* (2015) 101 ATR 476 at 483 [54].

44 *Jayasinghe* (2015) 101 ATR 476 at 484 [57].

45 *Jayasinghe* (2016) 103 ATR 357 at 375 [56].

46 *Jayasinghe* (2016) 103 ATR 357 at 375 [57].

47 *Jayasinghe* (2016) 103 ATR 357 at 367 [38], 375 [57].

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categories. Therefore, on its natural reading, TD 92/153 provides that a person who works as an employee for a relevant international organisation will not be a "person who holds an office" if that person is also either locally engaged by the organisation and paid at an hourly rate or engaged by the organisation as an expert or a consultant. In other words, if a person falls into one of the two listed categories, they will not be a "person who holds an office" under TD 92/153 – whether they are *also* an employee is beside the point.

53 The correctness of this construction can be tested by considering the alternative construction adopted by the majority of the Full Court. On that construction, whether a person holds an office in an international organisation is determined solely by the criterion in the first sentence of par 2 – whether the person is an "employee". That construction raises the question: if all that matters to the analysis of whether a person is one who "holds an office" is whether they are an employee, why are the two categories listed in par 2 included at all? Whether a person is engaged as an expert or a consultant would be of no practical consequence – put simply, those categories would not serve any purpose. The majority of the Full Court sought to address that concern. Their Honours considered that the balance of par 2 is simply an attempt to explain that persons falling within the two listed categories would not "ordinarily" be working as an employee⁴⁸. However, it is not necessarily the case that persons who are locally engaged and paid at an hourly rate, or engaged as experts or consultants, are not "ordinarily" regarded as employees. Paragraph 2 cannot be read in the way that the majority did. Nothing in the terms of the ruling suggests that the two listed categories are to be treated as surplusage, "helpful" or otherwise. To the contrary, par 2 is in terms that a person who answers one of those two descriptions is not included within the phrase "person who holds an office".

54 Here, as seen above, although the Tribunal found that Mr Jayasinghe was an employee but not engaged as an expert, he was engaged to perform "specialist services" and, at least from 1 May 2010, he was considered an expert on mission within the terms of s 22 in Art VI of the 1946 UN Convention⁴⁹. The terms of Mr Jayasinghe's engagement cannot be ignored for the purposes of TD 92/153. On that basis, he fell within one of the categories listed in par 2 of TD 92/153.

48 *Jayasinghe* (2016) 103 ATR 357 at 375 [56].

49 See [12]-[13], [42(4)] above.

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Notice of contention

55 On appeal to this Court, Mr Jayasinghe did not rely on the reasoning of the majority of the Full Court. Mr Jayasinghe filed a notice of contention contending that the decision of the Full Court should be upheld but on the ground that:

- "(a) on the proper construction of ... TD 92/153, the phrase 'persons engaged by the organisation as experts or consultants' is a reference to persons 'who work as employees for that organisation' and are engaged by the organisation for the principal purpose of performing the role of expert or consultant and not for a principal purpose of performing a different role, and
- (b) on the facts as found by the Tribunal, [Mr Jayasinghe] was engaged not to perform the role of expert or consultant but to perform the role of Project Manager,

and in consequence that [the Commissioner] was bound by the public ruling to assess [Mr Jayasinghe] as a person who held [an] office in [the UN] for the purposes of s 6(1)(d) of [the IOPI Act] and reg 10 of [the UN Regulations]."

56 Put in different terms, Mr Jayasinghe did not advance a construction of TD 92/153 inconsistent with the construction explained above, but he contended that he was not engaged as an expert within the meaning of TD 92/153. That contention should be rejected.

57 As the Commissioner submitted, whether or not Mr Jayasinghe was engaged as an expert within the meaning of TD 92/153 depended on the terms of his engagement. The terms of Mr Jayasinghe's Individual Contractor Agreement were and remain determinative. As explained above, an examination of those terms reveals that he was engaged as an expert to perform "specialist services" in recognition of his "skills and expertise" and to perform the functional role of "Project Manager". On the facts of the present case, there is no inconsistency between being engaged as an expert and performing the functional role of "Project Manager".

58 Accordingly, on the proper construction of TD 92/153, the Commissioner was not bound to exempt Mr Jayasinghe from taxation on the income he received from UNOPS during the relevant income years.

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Orders

59 The appeal should be allowed. The order of the Full Court made on 9 June 2016 should be set aside, and in its place it should be ordered that the appeal to that Court be allowed, and that the decision of the Tribunal made on 29 June 2015 be set aside and in its place it be ordered that the decision under review be affirmed.

60 It is unnecessary to make an order as to costs in light of the Commissioner's undertaking to pay Mr Jayasinghe's costs in this Court.

23.

61 GAGELER J. What presents as a specific question about exemption from taxation is also a more general question about entitlement to the range of privileges and immunities specified in the Fourth Schedule to the IOPI Act. The question is whether, by reason of engagement by UNOPS under an Individual Contractor Agreement, a person answers the description of "a person who holds an office" in the UN within the meaning of the UN Regulations, made under the IOPI Act.

62 The meaning of "office", like the meaning of most if not all other words, "turns largely on the context in which it is found"⁵⁰. The context of the word in the UN Regulations includes principally the IOPI Act as well as the two principal international instruments in respect of which the IOPI Act is designed to facilitate performance of Australia's international obligations: the Convention on the Privileges and Immunities of the United Nations ("the Privileges Convention") and the Convention on the Privileges and Immunities of the Specialized Agencies ("the Agencies Convention")⁵¹.

63 The language of the description in the UN Regulations is taken from the language of the IOPI Act and therefore has the same meaning as that language has in that Act⁵². Within the IOPI Act, the language is used to describe the second of three categories of persons who have an ongoing connection with an international organisation to which the IOPI Act applies sufficient to be capable of attracting entitlement by regulation to a corresponding range of privileges and immunities specified in diminishing order of coverage in the Second, Fourth and Fifth Schedules to the IOPI Act.

64 The three categories are:

- "a person who holds, or is performing the duties of, an office prescribed by the regulations to be a high office in [the] international organisation"⁵³;

50 *Sykes v Cleary* (1992) 176 CLR 77 at 96-97; [1992] HCA 60.

51 See generally *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519; [2015] HCA 44.

52 Section 13(1)(b) of the *Legislation Act* 2003 (Cth).

53 Section 6(1)(b)(i) of the IOPI Act.

- "a person who holds an office in [the] international organisation ... (not being an office prescribed by the regulations to be a high office)"⁶⁴; and
- "a person who is serving on a committee, or is participating in the work, of [the] international organisation ... or is performing, whether alone or jointly with other persons, a mission on behalf of [the] organisation"⁶⁵.

65 The contrast in the expression between the references in the first two of those categories to a person holding office "in" the international organisation and the reference in the third to participating in the work "of" the international organisation indicates that an office within the meaning of the IOPI Act is a position which exists within the organisational structure of the international organisation. A person may be participating in the work of the international organisation without holding an office in the organisation, just as a person may be performing a mission on behalf of the organisation without holding an office in the organisation.

66 The contrast in the expression within the first category between holding an office and performing the duties of an office indicates two further things about an office within the meaning of the IOPI Act. The first is that an office is a position which exists independently of the person who from time to time might hold it. The second is that an office is a position to which duties attach.

67 Those three features of an office within the meaning of the IOPI Act – that it is a position which exists within the organisational structure of the international organisation, that it is a position which exists independently of the person who from time to time might hold it, and that it is a position to which duties attach – align the statutory concept of a person who holds an office to the concept under the Privileges Convention and the Agencies Convention of a person who is an "official" of an international organisation as distinct from an "expert on mission". Of the category of "experts on mission", as distinct from "officials", within the meaning of the Privileges Convention, the International Court of Justice has noted that the category has in international practice been treated as covering persons who have "participated in certain peacekeeping forces, technical assistance work, and a multitude of other activities", and has stated⁶⁶:

54 Section 6(1)(d)(i) of the IOPI Act.

55 Section 6(1)(e)(i) of the IOPI Act.

56 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, [1989] ICJ Reports 177 at 194 [47]-[48]. See also *Difference Relating to Immunity from Legal Process of a* (Footnote continues on next page)

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"The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission."

68 The three features of an office within the meaning of the IOPI Act which I have identified are not adequately captured by the test drawn from *Great Western Railway Co v Bater*⁵⁷ adopted and applied by the Tribunal⁵⁸ and approved by the majority in the Full Court of the Federal Court⁵⁹. When those three features are borne in mind, it is apparent not only that the Tribunal applied the wrong test but that the conclusion that his engagement by UNOPS under an Individual Contractor Agreement led Mr Jayasinghe to answer the description of a person who holds an office in the UN within the meaning of the UN Regulations was not open.

69 Moreover, as the factual analysis of the plurality demonstrates, Mr Jayasinghe's engagement was as an expert. The contrary finding of the Tribunal was not open. As an expert, as the legal analysis of the plurality demonstrates, Mr Jayasinghe was excluded from the scope of the relevant public ruling properly construed.

70 I agree with the orders proposed by the plurality.

Special Rapporteur of the Commission on Human Rights, Advisory Opinion, [1999] ICJ Reports 62 at 82-83 [42].

57 [1920] 3 KB 266 at 274.

58 *Re Jayasinghe and Federal Commissioner of Taxation* (2015) 101 ATR 476 at 481 [35], 482 [44].

59 *Federal Commissioner of Taxation v Jayasinghe* (2016) 103 ATR 357 at 370 [47].