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Non-discrimination: equal treatment prevails for young backpacker

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Monday, January 3rd, 2022

The right to be free from discrimination is perhaps the single most important human right as indicated by the fact that it appears as the first article in the UN Universal Declaration of Human Rights:

"All human beings are born free and equal in dignity and rights."

In the field of international taxation, article 24 of the OECD and UN model treaties provides limited protections against discrimination. The somewhat incomplete and inconsistent collection of prohibitions mostly to apply to the taxation of business. Despite this, article 24(1) prohibits tax discrimination on the basis of nationality and 24(2) prohibits discrimination against stateless persons who are residents of a contracting state.

In *NEC Semi-Conductors Ltd & other test cases v Inland Revenue Commissioners* [2003] EWHC 2813 (Ch), Park J, in the English High Court, observed that the non-discrimination rules in art 24 are mostly prophylactic rather than aimed at specific provisions. Limited case law on nationality-based discrimination may indicate that discriminatory tax measures on this basis are rare.

The unanimous decision of Australia's highest court in November 2021 in *Addy v Commissioner of Taxation* [2021] HCA 34, on article 25(1) of the Australia-United Kingdom is a welcome contribution to the jurisprudence in this area.

Catherine Addy, a British citizen who grew up in the UK travelled for an extended period. In 2015, when she was 23 years old, she travelled to Australia which she had visited twice before. This time he stayed for nearly two years, apart from a two-month trip when she toured around South-East Asia. Australia granted Ms Addy a working holiday visa, which permitted her to remain in Australia and undertake work. She also travelled around Australia including to visit family. She lived in a shared house and took up casual employment as a waitress as well as working and living on a horse farm. During the 2017 income year when she became resident in Australia, Ms Addy earned A$26,576 from her waitressing work.

Working holiday visa

Many countries, including Australia, offer working holiday visas. These are aimed primarily at young people who wish to travel and experience living in different countries by permitting them to work while doing so, to support themselves without the more onerous rules that frequently apply to

foreign workers. They offer opportunities for cultural exchange and the promotion of international understanding. In many countries, they also provide a source of short-term, often low-paid, workers.

Australia offers working holiday visas to people between age 18 and 30 who are citizens of eligible countries, including the United Kingdom.

Backpacker Tax

Income tax was imposed on residents of Australia for tax purposes regardless of nationality at the same rates. Residents were entitled to earn the first A$18,200 tax-free. Graduated rates then applied starting at 19 per cent on income up to A$37,00019.

A separate system that came to be known as the "Backpacker Tax" applied to "working holiday taxable income". This was income earned by holders of a working holiday visa and was charged at 15 per cent on income up to A$37,000. Ordinary graduated income tax rates applied to this income to the extent that exceeded that threshold. The Backpacker tax applied regardless of whether the individual was Australian resident or not.

Ms Addy's appeal against the higher tax that she paid compared to other Australian residents was upheld by the Federal Court of Australia and the High Court of Australia who both ruled that the Backpacker Tax infringed the non-discrimination provisions of article 25(1) of the Australia-UK tax treaty (corresponding to article 24(1) of the model treaties). At the intermediate appellate stage, the Full Court of the Federal Court of Australia (Davies J dissenting) considered there was no discrimination.

Discriminatory taxation

The High Court made short work of the question. There was no dispute that Ms Addy was a "national" of the United Kingdom as defined in article 3(1) of the Treaty. Similarly, it was indisputable that the rate of tax imposed on her as a resident was "other or more burdensome" than that which applied to other residents.

The Australian Tax Office (ATO) contended that the difference in treatment was not due to her nationality. This proposition was swiftly rejected by the High Court who ruled that the only conclusion that could be drawn was that the higher rate of tax applied because Ms Addy was a UK national. She was an Australian resident, and her circumstances were the same as an Australian resident national: She did the same kind of work and earned the same amount of income from the same source. The only difference was that an Australian national would pay less tax.

ATO arguments

The discrimination in this case is self-evident and analysis of the issue was dealt with in a suitably short way by each of the judges who upheld Ms Addy's appeal (*Addy v Commissioner of Taxation* [2019] FCA 1768, Logan J at [98]; *Commissioner of Taxation v Addy* [2020] FCAFC 135, per Davies J, dissenting, at [12] to [15] and unanimously by the High Court).

The case is, nonetheless, instructive in relation to the arguments made by the ATO before the various courts.

At first instance, the ATO contended that having regard to the amount of income which Ms Addy earned, her income would be largely free from tax if art 25(1) applied. This was be dismissed out of hand. All that conclusion would mean is that she had been taxed according to law if the treaty applied.

The Court also rejected the ATO argument that art 25(1), requires comparison with a notional Australian who holds a working holiday visa and has earned working holiday taxable income which mean there was no comparator. A national of Australia could not hold such a visa or have that kind of income which was the difference in treatment.

On appeal to the Full Federal Court, Derrington J accepted that no comparison could be made because the relevant circumstance which prevents any comparison being made is the holding of a "working holiday visa". He considered that although Ms Addy was a British national, and held such a visa, she did not hold it because she was a British national. The holding of that visa was a matter of her choice and not a necessary concomitant of her being a British national. She could, he said, have applied for other visas such as one for individuals with special skills or as a business owner. There was he said, "no necessary causal nexus between her nationality and her liability to pay the rates of tax imposed by … the Backpacker Tax." Consequently, the higher rate of tax on the holders of a specific visas did not discriminate against the holder solely on the basis of nationality.

Steward J agreed with the ATO that it was Ms Addy's choice to apply for the working holiday visa and consequently the higher rate of tax was because of her choice and not her British nationality. He noted that the provisions of the Backpacker Tax did not apply to persons of a particular nationality and that British nationals who are Australian resident (but not backpackers) pay income tax at the normal rates for residents, rather than at the Backpacker rate.

The ATO arguments were bound to fail, as they ultimately did. The holding of a visa is only possible for non-nationals of a country. That is what constitutes the difference in treatment and thus the discrimination rather than constituting a factor that both the non- national and the national must have in common to be in the "same circumstances". The mutually inconsistent contentions that discrimination only exists if the difference applies to all categories of non-national, regardless of visa type, or that it must be directed at nationals of a particular country, defy all notions of equality, let alone the treaty language.

Where is the beef?

Why would a tax authority pursue a case on such threadbare legal reasoning against a backpacker earning modest amounts from waiting on tables? Perhaps the answer lies in media reports suggesting that around A$185 million is owed in refunds to those who have paid the tax.

I have to disclose an interest in the Addy case, having assisted Ms Addy's counsel, John Hyde Page with the foreign authorities and sources and the formulation of submissions.

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