



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

GDGR and Commissioner of Taxation (Taxation) [2020] AATA 766 (30 March 2020)

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2017/2105–2108**
2017/4218–4223

Re: **GDGR**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **The Honourable Justice J A Logan RFD, Deputy President**

Date: **30 March 2020**

Place: **Brisbane**

1. The respondent's objection decisions of 1 September 2016 and 15 March 2017 be set aside.
2. In lieu thereof, the applicant's objections be allowed on the basis that each of the payments of invalidity pension under the *Military Superannuation and Benefits Act 1991* (Cth) (**MSB Act**), received by him in the 2010 to 2015 (inclusive) income years was a "superannuation benefit", a "superannuation lump sum" and a "disability superannuation benefit" and was required to be treated in accordance with s 307-145 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**).
3. The matter be remitted to the respondent for implementation of the Tribunal's decision, once it becomes final, in accordance with s 14ZZL of the *Taxation Administration Act 1953* (Cth).

.....
The Honourable Justice J A Logan RFD, Deputy President

CATCHWORDS

TAXATION – INCOME TAX – where applicant was medically discharged from the Army – where applicant was classified under the Military Superannuation and Benefits Act 1991 (Cth) (**MSB Act**) as having a Class A invalidity – whether the invalidity pension payments under the MSB Act for the income years ended 30 June 2010, 2011, 2012, 2013, 2014 and 2015 (**relevant income years**) should be treated in the manner prescribed in s 307-145(1) of the Income Tax Assessment Act 1997 (Cth) (**ITAA97**) – whether the applicant made any election under reg 995-1.03 of the Income Tax Assessment Regulations 1997 (Cth) in respect of any of the applicant’s invalidity pension payments in any of the relevant income years – whether the applicant’s invalidity pension was paid in respect of an interest that is a defined benefit under s 291-175 of the ITAA97 – where the Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth) (**amending regulations**) were made during the course of the review proceedings – where at the times of assessment and when the applicant exercised statutory rights of objection against the assessments, at the time when the objection decisions were made, at the time when the right of review was exercised in respect of those objection decisions there was no specification in the Income Tax Assessment Regulations 1997 (Cth) of any “superannuation benefit” for the purposes of s 307-70(1) of the ITAA97

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) s 35

Defence Force Retirement and Death Benefits Act 1973 (Cth)

Family Law Act 1975 (Cth)

Income Tax Assessment Act 1997 (Cth) ss 82-130, 280-1, 280-40, 291-175, 307-5, 307-10, 307-65, 307-70, 307-145

Military Superannuation and Benefits Act 1991 (Cth)

Retirement Savings Accounts Act 1997 (Cth)

Superannuation Industry (Supervision) Act 1993 (Cth) s 10

Taxation Administration Act 1953 (Cth) ss 14ZZE, 14ZZK, 14ZZL

Income Tax Assessment Regulations 1997 (Cth) regs 995-1.01, 995-1.03

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth)

CASES

Burns v Commissioner of Taxation [2020] AATA 671

Campbell v Superannuation Complaints Tribunal (2016) 155 ALD 66

Douglas v Commissioner of Taxation [2020] AATA 494

Nette v Howarth (1935) 53 CLR 55

Re Hammerton and Comcare (1995) 21 AAR 204

Sargent v ASL Developments Ltd (1974) 131 CLR 634

Scarf v Jardine (1882) 7 App.Cas. 345

Tubemakers of Australia Limited v Federal Commissioner of Taxation (1993) 25 ATR 183

REASONS FOR DECISION

The Honourable Justice J A Logan RFD, Deputy President

30 March 2020

Introduction

1. The applicant is an ex-serviceman. He is also the recipient of an invalidity pension and other invalidity benefits under the *Military Superannuation and Benefits Act 1991* (Cth) (**MSB Act**). He is at odds with the Commissioner of Taxation (**Commissioner**) in relation to how the *Income Tax Assessment Act 1997* (Cth) (**ITAA97**) applies to his invalidity benefits in the 2010 to 2015 income years (**the relevant income years**).
2. In accordance with the right conferred on him by s 14ZZE of the *Taxation Administration Act 1953* (Cth) (**TAA**), the applicant requested that the hearing of his applications for the review of objection decisions of the Commissioner with which he is dissatisfied be conducted in private. So as not to subvert Parliament's purpose in conferring that right, a pseudonym has been given to the applicant in the title of the proceeding. Like reasons dictated the giving of a direction under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) in the course of the hearing restricting access to documents on the Tribunal's file.
3. The present is one of a number of test cases that concern the interplay between legislative schemes made from time to time by Parliament for invalidity, retirement and death benefits for certain members and former members of the Australian Defence Force (**ADF**) and income tax law. I have already heard and determined two such cases, *Douglas v Commissioner of Taxation* [2020] AATA 494 (**Douglas**) and *Burns v Commissioner of Taxation* [2020] AATA 671 (**Burns**).
4. *Douglas* concerned an earlier legislative scheme, that for which the *Defence Force Retirement and Death Benefits Act 1973* (Cth) provides. Like the present case, *Burns* concerned the scheme for which the MSB Act provides. While I adhere to the views that I expressed in *Douglas* and in *Burns*, the issues of law and the background facts in the present case are not identical to either of those earlier cases, although there are some issues that overlap with *Burns* in particular.

Issues

5. The overarching issue in the present review proceeding is whether the applicant has proved the assessments in question to be excessive: s 14ZZK(b)(i), TAA. Subject to that, and having regard to the grounds of objection which came to be pressed, the following issues arise for determination:
 - (a) Is each payment of the invalidity pension under the MSB Act, received by the applicant in the relevant income years, a payment from a superannuation fund because the applicant is a fund member such that it is a “superannuation benefit” pursuant to s 307-5(1) of the ITAA97?
 - (b) Is the applicant’s invalidity pension a “superannuation income stream” such that each payment of that pension in the relevant income years is a “superannuation income stream benefit” pursuant to s 307-70 of the ITAA97 (and, if not, is each a “superannuation lump sum” pursuant to s 307-65 of the ITAA97)?
 - (c) Has the applicant made any election under reg 995-1.03 of the *Income Tax Assessment Regulations 1997* (Cth) (**ITAR**) in respect of any of the applicant’s invalidity pension payments in any of the relevant income years?
 - (d) Is the applicant’s invalidity pension paid in respect of an interest that is a defined benefit interest under s 291-175 of the ITAA97?
 - (e) What is the effect, if any, on the present proceeding of the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth) (**the 2018 Amendment Regulations**)?
6. The applicant originally also raised an issue as to whether his invalidity pension payments were employment termination payments under s 82-130 of the ITAA97. Ultimately, he did not press that issue.

Assessments, Objections, Objection Decisions and Review Applications

7. Summarised in the table below are the assessments and related objections relevant to this proceeding.

Income Year Ended	Assessment	Amended Assessment	Objection	Amended Assessment	Objection
30.06.2010	30.01.2012	24.12.2015 (Cancelled)	11.11.2015	-	-
30.06.2011	30.01.2012	-	11.11.2015	-	-
30.06.2012	10.03.2015	19.11.2015	17.06.2016	12.09.2016	25.01.2017
30.06.2013	10.03.2015	19.11.2015	17.06.2016	12.09.2016	25.01.2017
30.06.2014	10.03.2015	19.11.2015	17.06.2016	12.09.2016	25.01.2017
30.06.2015	09.10.2015	-	17.06.2016	12.09.2016	25.01.2017

8. There are two objection decisions that are subject to review by the Tribunal in this proceeding. Tribunal application numbers 2017/2105-2108 relate to the Commissioner's objection decision of 15 March 2017. That objection decision related to assessments and amended assessments for the 2012 to 2015 income years. Tribunal application numbers 2017/4218-4223 relate to the Commissioner's objection decision of 1 September 2016. That relates to the assessments for the 2010 and 2011 income years.

Background Facts

9. The background facts are not controversial. Based on the material before the Tribunal, I make the following findings of fact.
10. The applicant was born in 1967.
11. The arm of the ADF in which the applicant performed his military service was the Australian Army. Initially, the applicant was member of the Army Reserve, in which he enlisted in 1993. The applicant's period of service in the Army Reserve is not presently relevant, because it did not entail his becoming a member of the scheme for which the MSB Act provides.
12. On 7 November 1995, the applicant either enlisted in, or was transferred to (it is unnecessary to identify which) the Regular Army. He was allotted (or remained allotted) to the Royal Australian Infantry Corps from then until December 2002. Notably, his period of infantry service included duty as a Rifleman with the 4th Battalion, the Royal Australian Regiment.

13. The applicant was transferred from the Royal Australian Infantry Corps to the Australian Intelligence Corps (**AIC**) in January 2003. He remained a member of the AIC for the balance of his military service. While allotted to the AIC, he served as an intelligence analyst with the 1st Intelligence Battalion and the 7th Signal Regiment.
14. During the course of his service in the Regular Army, the applicant was deployed to East Timor in 1999, 2001, 2004 and 2007. Some of that overseas-deployed service included his participation in combat operations.
15. The applicant sustained a variety of physical injuries in the course of his military service. He also suffers from post-traumatic stress disorder as a result of his service. He was discharged from the Army on medical grounds on 12 November 2009. He then held the rank of Corporal.
16. The applicant's service with the Regular Army meant that he became a member of the MSB Act scheme. As a sequel to his discharge from the Army, the applicant was classified by determination as having a Class A invalidity for the purposes of the MSB Act scheme. That classification took effect on the day following his discharge from the Army. The applicant remained so classified for the whole of the relevant income years.
17. With effect on and from his Class A invalidity classification the applicant received, as part of the invalidity benefits to which he thereby became entitled, payments of an invalidity pension under the MSB Act. He continued to receive payments of that invalidity pension throughout the relevant income years.
18. On or about 27 January 2016, the applicant applied to the Commonwealth Superannuation Corporation (**CSC**) for an early release of his preserved benefits under the MSB Act scheme. By then, the CSC had assumed responsibility for the administration of that scheme. On or about 10 February 2016, received confirmation from the CSC that his application for early release of these preserved benefits had been granted.

Relevant legislation and subordinate legislation

19. Part 3-30 of the ITAA97, one of the Parts within Chapter 3 of that Act setting out "specialist liability" rules, makes extensive provision in relation to the taxation treatment of

superannuation. At a general level of abstraction, it may be said, as does s 280-1(2) within that Part, that the purpose of the tax concessions in the Part is “to encourage Australians to save in order to make provision for their retirement, recognising that superannuation investments, and the income from them, are quarantined for retirement”. Another observation that may be made is that this concessional tax treatment is, in general, dependent upon compliance by providers of superannuation with the prudential and operating standards found in and under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and the *Retirement Savings Accounts Act 1997* (Cth): s 280-40(1), ITAA97.

20. However, beyond this general level of abstraction, and certainly in the circumstances of the present case, the idiom, “the devil is in the detail” is undoubtedly applicable.

21. Found within Part 3-30 are Divisions 301 to 307. Divisions 301 to 306 make particular provision in relation to the income tax treatment of particular payments of superannuation benefits. Division 307 supplies the definitions for these Divisions.

22. Within Division 307, and as in *Douglas and Burns*, the relevant definitions for present purposes are the definitions of “superannuation lump sum” and “superannuation income stream benefit”, flowing from s 307-65 and, in turn and controversially, s 307-70. The importance of these definitions is that, at the heart of the controversy is a question as to whether the applicant’s invalidity pension payments ought to have been assessed in the relevant income years on the footing that s 307-145 of the ITAA97 was applicable to them. The Commissioner assessed the applicant in respect of those income years on the footing that this section was not applicable to those payments.

23. Section 307-145 of the ITAA97 provides:

307-145 Modification for disability benefits

(1) Work out the **tax free component** of the *superannuation benefit under subsection (2) if the benefit is a *superannuation lump sum and a *disability superannuation benefit.

Note: This section does not apply to an unclaimed money payment.

(2) The **tax free component** is the sum of:

- (a) the *tax free component of the benefit worked out apart from this section; and
- (b) the amount worked out under subsection (3).

However, the tax free component cannot exceed the amount of the benefit.

- (3) Work out the amount by applying the following formula:

$$\frac{\text{Amount of Benefit} \times \text{Days to retirement}}{\text{Service days} + \text{Days to retirement}}$$

where:

days to retirement is the number of days from the day on which the person stopped being capable of being *gainfully employed to his or her *last retirement day.

service days is the number of days in the *service period for the lump sum.

- (4) The balance of the *superannuation benefit is the **taxable component** of the benefit.

24. The drafting practice employed in the ITAA97 is that a term preceded by an asterisk (*) is a defined term. Of the three defined terms within s 307-145(1), it is common ground that the invalidity pension payments are a “superannuation benefit” and a “disability superannuation benefit” but not that they are each a “superannuation lump sum”; hence the importance of s 307-65 and s 307-70.

25. As I observed in *Douglas* and adopted in *Burns*, the effect of s 307-65 is to create a dichotomy. Any payment that is not a “superannuation income stream benefit”, as defined, is a “superannuation lump sum”. Sections 307-65 and 307-70 respectively provide:

307-65 Meaning of superannuation lump sum

A **superannuation lump sum** is a *superannuation benefit that is not a *superannuation income stream benefit (see section 307-70).

307-70 Meaning of superannuation income stream and superannuation income stream benefit

- (1) A **superannuation income stream benefit** is a *superannuation benefit specified in the regulations that is paid from a *superannuation income stream.
- (2) A **superannuation income stream** has the meaning given by the regulations.

*Note: for the purposes of the transfer balance cap, the meaning of **superannuation income stream** is affected by subsection 294-50(2).*

26. I set out pertinent provisions in the MSB Act scheme in *Burns*.

A “superannuation lump sum”?

27. For the reasons that I gave in *Burns*, each of the invalidity pension payments made to the applicant in the relevant income years under the MSB Act scheme was a “superannuation lump sum”. That is because none were, by definition, a “superannuation income stream benefit”.

28. These reasons apart, because the applicant pressed an alternative submission that the invalidity pension payments were not even a “pension” for the purposes of the definition of “pension” in s 10 of the SIS Act. In deference to that submission, some elaboration of the reasons that I gave in these two earlier cases is necessary.

29. For a payment to be a “superannuation income stream benefit”, it must not only be specified in “the regulations” but also be paid from a “superannuation income stream”. That is defined, by s 307-70(2), by reference to the meaning given in “the regulations” to “superannuation income stream”. The regulations concerned are the ITAR.

30. During the relevant income years, and materially in relation to the “pension” submission, reg 995-1.01(b) of the ITAR defined “superannuation income stream” to be an income stream that:

- (i) is an annuity or pension within the meaning of the SIS Act; and*
- (ii) commenced before 20 September 2007.*

31. On any view of the meaning of “pension”, the applicant’s invalidity pension payments did not commence before 20 September 2007. They commenced upon the making of the Class A invalidity classification determination with effect on and from the day following his discharge from the Australian Army. In itself, that renders the alternative offered by reg 995-1.01(b) of the ITAR inapplicable. However, the meaning of “pension” was fully argued in submissions and should therefore be addressed.

32. The meaning of “pension” in the SIS Act is supplied by s 10, which provides:

***pension**, except in the expression **old-age pension**, includes a benefit provided by a fund, if the benefit is taken, under the regulations, to be a pension for the purposes of this Act.*

33. The applicant’s submissions proceeded from a construction of the definition in s 10 of the SIS Act that afforded the conditional clause that refers to the regulations under that Act an overarching, qualifying role. Like the Commissioner in his submissions, I do not accept that the clause has this role. The definition of “pension” is inclusive. Apart from the meaning of “pension” as a matter of ordinary English, it includes what is taken to be a pension by the regulations. The conditional clause governs only the inclusive part of the definition.

34. In any event, the applicant submitted that the following features of the Rules (**MSB Rules**) scheduled to the MSB Deed (itself a schedule to the MSB Act) that detail eligibility for benefits and how the scheme is to be administered meant that, though described as an “invalidity pension”, the payments were not a “pension” within the ordinary meaning of that word:

- (a) in the circumstances of this case, the invalidity payments are made on a periodic basis but can be varied by reason of classification changes;
- (b) the CSC has power to require persons to be medically examined pursuant to r 25. Rule 27 deals with invalidity benefits for a person classified as Class A. His or her member benefit is payable to him or her as a lump sum and the employer benefit is converted into a pension payable to him or her;
- (c) the person who is entitled to be paid a member benefit under r 27(1) may elect instead that the member benefit be a preserved benefit in which case it is not payable in a lump sum and is preserved under the MSB Rules;
- (d) Rule 29 deals with the effect of change of invalidity classification on pension and preserved benefits. Where a person who is classified as Class A or B is reclassified as Class C, the pension payable under r 27 or r 28 is cancelled, and there is

applicable to him or her a preserved benefit of the amount of his or her employer benefit;

- (e) if that person is subsequently reclassified as Class A or Class B the preserved benefit referred to in r 29(1) ceases to be applicable to him or her and a pension is payable to him or her in accordance with r 27 or r 28, as the case may be, from the date specified under r 23 by CSC, or the Committee, as the case may be, as the date from which the reclassification has effect.

35. All of these features of the MSB Rules may be accepted. However, as I pointed out in *Douglas* by reference to the Royal Warrant under the terms of which the Royal Hospital Chelsea in London was established in 1681 for those members of the English army “broken by age or war”, there is a long established usage of the word “pension” in the English language to describe periodic payments to disabled ex-servicemen. The recipients of these payments, those who lived in the community away from the Royal Hospital Chelsea, were once known as “Out Pensioners”.

36. In turn, this longstanding, military invalidity, periodic payment usage of the word reflects a wider understanding of the ordinary meaning of the word, “pension”.

37. In *Nette v Howarth* (1935) 53 CLR 55, the High Court had occasion to consider whether a lump sum received after bankruptcy by a retired State public servant equal to the contributions paid by him during service as required by State superannuation legislation fell within the class of property which had vested in his trustee in bankruptcy. Under the then bankruptcy legislation, and apart from income, one item that did not vest in a trustee in bankruptcy was a “pension”. Each of the judges constituting the Full Court of the High Court considered that the lump sum payment fell outside the exception and, hence, passed to the trustee in bankruptcy. Of them, Dixon J, at 65, offered the most detailed analysis of the meaning of the word, “pension”:

“Pension” refers predominantly to payments which follow service. The time has passed when the idiomatic use of the word extended to non-recurring payments. But it may perhaps include in this section a succession of payments which are not the consequence of past service or the like.

38. A feature of this understanding of the meaning of the word, “pension” is recurrence of payments following service. This is consistent with the later understanding of the meaning

of the word evident in the judgment of Hill J in *Tubemakers of Australia Limited v Federal Commissioner of Taxation* (1993) 25 ATR 183 (**Tubemakers**). By reference to contemporary dictionary definitions, Hill J, at 189, stated:

There remains then the question whether the payments in either or both periods constituted a "pension" to the ex-employees.

The Macquarie Dictionary defines "pension" relevantly as:

1. *a fixed periodical payment made in consideration of past services, injury or loss sustained, merit, poverty etc.* 2. *an allowance or annuity.*

The word has as its origin the Latin pensio meaning "payment".

The Oxford English Dictionary, 2nd ed, vol XI contains the following definition relevant to the present context:

4. *An annuity or other periodical payment made by a person or body of persons, now esp. by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments.*

What these dictionary definitions show is that it is a necessary characteristic of a pension that it be periodical. A series of annual payments, that is to say, payments which happen to be made annually but where each payment is determined upon at or about the time it is made, may have an income character but not be periodical.

39. Periodicity of payment, but not in the nature of lump sum instalments, was also a feature of the word, "pension" which commended itself to Forgie DP in *Re Hammerton and Comcare* (1995) 21 AAR 204, at 218.
40. True it is that the applicant's invalidity pension might have ceased at any stage during the relevant income years because of a review by the CSC (or a Committee), leading to a change in his classification. If the applicant had been reclassified under the MSB Rules as having a Class B invalidity classification, his existing invalidity pension payments would have ceased and a different type of invalidity pension would have been paid to him. If he had been reclassified as having a Class C invalidity classification, his existing invalidity pension payments would have ceased and no alternative invalidity pension would have been payable to him under the MSB Act scheme. Even so, unless and until he was reclassified, one of the Class A invalidity benefits to which he was entitled was the periodic payment to him of an invalidity pension. As used in the MSB Rules, the

description of that periodic payment as a “pension” is not idiosyncratic. To the contrary, having regard to the authorities discussed and to the dictionary meanings consulted by Hill J in *Tubemakers*, that description accords with the meaning of the word as a matter of ordinary English.

41. However, for reasons already given, the applicant does not need his submission that the payments were not a “pension” to be accepted in order to establish that they were a “superannuation lump sum”.

Has the applicant made any election under reg 995-1.03 of the ITAR?

42. During the relevant income years, reg 995-1.03 of the ITAR provided:

*A payment from an interest that supports a superannuation income stream is not a **superannuation income stream benefit** if:*

- (a) *the conditions to which the superannuation income stream is subject allow for the variation of the amount of the payments of benefit in a year circumstances other than:*
- (i) *the indexation of the benefit under the rules of the product; or*
 - (ii) *the application of the family law splitting provisions; or*
 - (iii) *the commutation of the benefit (including commutation to pay a surcharge liability); or*
 - (iv) *the payment of an assessment of excess contributions tax; and*
- (b) *the person to whom the payment is made elects, before a particular payment is made, that that payment is not to be treated as a superannuation income stream benefit.*

43. It is explicit in reg 995-1.03(b) of the ITAR that an election must be made *before* a particular payment is made. The event that the applicant finally submitted constituted an election for the purposes of this regulation was a communication in October 2016¹. That was after he had received each of the payments of invalidity pension in the relevant

¹ He had earlier submitted that certain medical reports could constitute an election but that could not possibly be so.

income years. For this reason alone, it could not be an “election” for the purposes of reg 995-1.03.

44. The communication to which the applicant pointed was one made to the CSC, not to the Commissioner. It is not stated in reg 995-1.03 of the ITAR to whom, if anyone, the election must be communicated. Communication of a choice between alternatives with the person affected has been regarded as an element of an effective election in other contexts: *Scarf v. Jardine* (1882) 7 App.Cas. 345 at 360-1 and *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 655 - 656, per Mason J; see however Stephen J at 646 - 647. The Commissioner, not the CSC, administers the ITAA97 and the ITAR and has the task of assessing, including whether in so doing to treat a payment as a “superannuation income stream benefit”. That inclines me to the view that an election ought to be communicated to the Commissioner. However, I accept that there is an alternative construction which proceeds from reg 995-1.03(a) of the ITAR. That provision directs attention to the “conditions to which the superannuation income stream is subject”. These are first and foremost the concern of the CSC in its administration. On that basis, the necessary communication of the election would be to the CSC. To whom, if anyone, an election needed to be communicated was not canvassed in submissions. In these circumstances and because the only communication said to constitute an election was made after the relevant income years, it is unnecessary to reach any concluded view on the subject.

45. For the reason given, I reject the applicant’s submission that he made an election under reg 995-1.03 of the ITAR.

Is the applicant’s invalidity pension paid in respect of an interest that is a defined benefit interest under s 291-175 of the ITAA97?

46. Section 291-175 of the ITAA97 provides:

291-175 Defined benefit interest

- (1) *An individual’s * superannuation interest is a **defined benefit interest** to the extent that it defines the individual’s entitlement to * superannuation benefits payable from the interest by reference to one or more of the following matters:*

- (a) *the individual's salary, or allowance in the nature of salary, at a particular date or averaged over a period;*
- (b) *another individual's salary, or allowance in the nature of salary, at a particular date or averaged over a period;*
- (c) *a specified amount;*
- (d) *specified conversion factors.*

(2) *However, an individual's * superannuation interest is not a **defined benefit interest** if it defines that entitlement solely by reference to one or more of the following:*

- (a) ** disability superannuation benefits;*
- (b) ** superannuation death benefits;*
- (c) *payments of amounts mentioned paragraph 307-10(a)*

47. There is, with respect, an academic quality to the answering of the question as to whether the applicant's invalidity pension was paid in respect of an interest that is a defined benefit interest under this section. That is because, as the Commissioner correctly submitted, an affirmative answer to it cannot, for the reasons that follow, affect whether or not the applicant's invalidity pension payments were required to be treated for assessment purposes in accordance with s 307-145 of the ITAA97.

48. The application of each of sub-divisions 301-B, 301-C, 307-C, 307-D and 307-E of the ITAA97 is not dependent upon, and does not even refer to, s 291-175. The provisions in these subdivisions each set out both the elements and components of any "superannuation benefit" and how it is to be taxed. These provisions do not apply differently depending upon whether a "superannuation benefit" is paid from an interest that is a defined benefit interest. Thus, the applicant's contention that the assessments were excessive, because they did not treat his invalidity payments in accordance with s 307-145 of the ITAA97 cannot be advanced, even if I were to accept his submission that his

invalidity pension was not paid in respect of an interest that is a defined benefit interest under s 291-175 of the ITAA97.

49. With this caveat, and thus some diffidence, I proceed to answer the question posed. The applicant submitted that the invalidity benefit, which includes the invalidity pension, under the MSB Act scheme is not a “defined benefit” because a “disability superannuation benefit” is, by s 291-175(2), expressly excluded from that definition. He sought to gain support for this proposition from the judgment that I delivered in *Campbell v Superannuation Complaints Tribunal* (2016) 155 ALD 66 (**Campbell**).
50. *Campbell* did require delving into the MSB Act scheme but against the different background of its interface with provisions in the *Family Law Act 1975* (Cth) in relation to the provision of information to a superannuation fund member for the purposes of that Act. Like the present, *Campbell* offers an example of the Byzantine intricacies that, in the governance of our society, we have foisted upon superannuation fund members (including those whose membership is derived from membership of the ADF) and administrators. However, the legislative and subordinate legislative provisions considered in that case differ in detail from s 291-175 of the ITAA97 such that it is of no present assistance.
51. It was common ground that the applicant’s invalidity pension was a “disability superannuation benefit”. However, as the Commissioner correctly highlighted in his submissions, the applicant’s interest as a member of the MSB Act scheme is not defined “solely” by reference to that. The applicant’s submissions do not take into account the presence of the qualification “solely” in the chapeau to s 291-175(2) of the ITAA97.
52. On analysis, the applicant’s interest as a member of the MSB Act scheme always extended beyond one or more of the benefits described in s 291-175(2) of the ITAA97. The range of benefits for which the MSB Rules provide include not just the invalidity benefits detailed in Division 2 of Part 3 of those rules but also what are termed “member benefits” in Division 1 of Part 3. The latter comprise various benefits payable on retirement from the ADF for reasons other than incapacity.
53. Yet further, in relation to the s 307-10(a) criterion specified in s 291-175(2) of the ITAA97, that provision refers to “an amount payable to a person under an income stream because of the person’s temporary inability to engage in *gainful employment”. The “incapacity in

relation to civil employment” to which the incapacity determination for which Rule 22 of the MSB Rules is directed is not a “temporary inability”. Thus, s 291-175(2) could never be engaged by this criterion.

54. For these reasons, the exception for which s 291-175(2) of the ITAA97 provides is not applicable. Instead, as the Commissioner correctly submitted, the member’s employer benefit is “worked out under the MSB Rules by a formula that references their final average salary and various other factors such as their years of service”. Further, “in the event the benefit paid from the scheme is a pension, the annual pension amount is further worked out by the application of specified conversion factors”. It necessarily follows that the applicant’s interest as a member of the MSB Act scheme was a defined benefit interest in terms of s 291-175(1) of the ITAA97.
55. It is now necessary to examine whether the 2018 Amendment Regulations affect the conclusions reached thus far.

What is the effect, if any, of the 2018 Amendment Regulations?

56. The short answer to the question posed in the title to this section of the reasons is, “None”, for the reasons given in *Douglas* and in *Burns*. In particular, the applicant, like Mr Douglas and Mr Burns, became indebted to the Commonwealth because of the making and issuing of income tax assessments. Each of the resultant liabilities accrued prior to the making of the 2018 Amendment Regulations. Yet further, the applicant, like his fellow ex-servicemen, had invoked accrued rights of objection and review before then. Sitting in place of the Commissioner, the Tribunal is obliged to consider afresh, by reference to the law as it stood when the impugned, accrued liabilities were created by assessment, whether the objections to the assessments should be allowed because the assessments concerned were excessive.

Disposal

57. It follows that the Commissioner’s objection decisions must be set aside.
58. In lieu of those objection decisions, the applicant’s objections must be allowed on the basis that each of the payments of invalidity pension under the MSB Act received by the

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