These two decisions arose out of the one case, an objection decision by the Tax Commissioner that dismissed the taxpayer’s objection to an assessment of Superannuation Guarantee Charge. The SG Charge was assessed on the basis that the taxpayer had not made superannuation contributions on behalf of 21 workers for the 2001 tax year.

The Tribunal determined that by virtue of section 12(11) of the *Superannuation Guarantee (Administration) Act 1992*, the workers were not regarded as employees for whom the taxpayer was obliged to make superannuation contributions. The following outlines the reasons for decision.

The taxpayer ran a business providing community support services – cooking, cleaning, lawnmowing, household help, shopping etc – to disabled, infirm and elderly people. The taxpayer employed workers to do the work which was requested by clients of the business. The work was done in the clients’ homes, usually using equipment such as vacuum cleaners provided by the clients.

Section 12 of the Act defined the term employee in some detail; sub-section 12(11) provided an exception in that:

> A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.

The taxpayer’s objection to the Commissioner’s assessment was based on the ground that the workers did domestic care work and that they worked less than 30 hours each week.

The first Tribunal decision (that of 28 June 2010) dealt with the issue of domestic care work.

The Commissioner’s principal argument against the application of section 12(11) was that the work, while domestic or private work for the clients of the business, when viewed from the taxpayer’s point was ‘labour provided in the course of the Applicant’s [taxpayer’s] business’, not work relating to the taxpayer’s ‘home, household affairs or family organisation’ (para 17).

The Tribunal considered that the Commissioner’s argument misconstrued section 12(11). ‘The focus [of the subsection] is on the nature of the work for which the worker is paid’ (para 18). The Tribunal said (para 19):

> It may be accepted that the workers are not providing domestic services to the taxpayer, but that is not the question. The question does not concern itself with the
nature of the services the workers provide to the taxpayer; instead the question is whether the workers are "paid to do work wholly or principally of a domestic or private nature".

The Tribunal was unable to determine whether the workers worked for less than 30 hours each week and so remitted the objection decision to the Commissioner for reconsideration and gave 42 days for that reconsideration.

The Commissioner subsequently appealed the first decision to the Federal Court. In the meantime, the 42 days expired without the Commissioner having undertaken the reconsideration. This led to the second decision of the Tribunal (that of 23 September 2010).

With no change to the Commissioner’s decision, the Commissioner is taken to have affirmed the decision, so that the proceeding in the Tribunal was resumed (para 4). Counsel for the Commissioner indicated that he would not oppose the taxpayer’s contention that the workers worked for less than 30 hours per week. The Tribunal decided that the best course was to determine this element in favour of the taxpayer.

Therefore the Tribunal set aside the Commissioner’s objection and decided that the taxpayer’s objection would be allowed in full.

The decisions can be found at:


Implications of this case

This is a potentially significant decision for workers who provide domestic care services such as cooking and cleaning on a labour hire basis, because it means that if they work less than 30 hours per week, their employer does not have to provide superannuation contributions. The Tax Commissioner argued on the basis that the section was only intended to exempt workers providing domestic services directly for those who paid them, but the AAT considered it was the nature of the work not the employment arrangement that determined the issue.

The Tax Commissioner’s appeal to the Federal Court had not been decided at the time of writing this case note.