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1 Overview

This paper will cover some recent tax cases in the calendar years 2017 and 2018. This paper is not intended to cover all of the significant cases during this period.

In particular this paper does not include the case of *Chevron Australia Holdings Pty Ltd (CAHPL) v Commissioner of Taxation* [2017] FCAFC 62 which was a big $340 million win for the ATO with the Full Federal Court unanimously dismissing Chevron's appeal, making it Australia's biggest tax case with global implications for large companies and multinationals. This case has been dealt with in more detail else where in the conference program.

Thomas v Commissioner of Taxation [2017] FCFCA 57 was another interesting and controversial Full Federal Court case that once again highlights the tension between tax law and trust law. In that case the Court held that the Commissioner was compelled to follow a Queensland Supreme Court's orders regarding the interpretation and effect of a trustee's resolution. It also held that a trustee could distribute or stream dividend income to beneficiaries in different proportions to the franking credits attached to those dividends and thus distribute the trust's income in the most tax advantageous manner. Care should be taken in relying upon this case, with the law on this not being settled, as the High Court granted the Commissioner special leave to appeal on 20 October 2017.

In *Commissioner of Taxation v Jayasinghe* [2017] HCA 26, the High Court allowed an appeal against a decision of the Full Federal Court which allowed a taxpayer an income tax exemption for being an official of an international organisation under the *International Organisations (Privileges and Immunities) Act 1963* (Cth). Ultimately, the High Court decided two central questions being that the taxpayer did not hold an office in the United Nations and that a 1992 determination about employees did not operate to exempt him from the obligation to pay tax, as he was not an employee but an expert for the United Nations. Although this case is interesting, the application of this judgment only applies to persons who "hold an office in" an international organisation.

The paper mainly focuses on cases of procedural importance and have been summarized to identify some key strategies that can be undertaken for your clients.

2 Full Federal Court Cases

2.1 Commissioner of Taxation v Hacon Pty Ltd & Ors [2017] FCAFC 181 (23 November 2017)

Authority for:

When the Commissioner can and cannot decline to give a private ruling to a taxpayer.

Private Rulings

Private Rulings were first introduced just over a quarter century ago, in its original form, into the *Taxation Administration Act 1953* (Cth) ("the **TAA"**) by the *Taxation Laws Amendment (Self Assessment) Act 1992* (Cth). Since then, in substance unchanged, the private ruling regime has moved to Schedule 1 to the TAA. Within Part 5-5 Rulings, the private rulings regime is found in Division 359 - Private Rulings.

The importance of a private ruling cannot be overstated as a taxpayer may rely upon the ruling and will not incur additional liability for any tax shortfall, and prevents some penalties and interest charges from applying.

Of significant interest is when taxpayers request private rulings as to whether or not a set of transactions will attract Part IVA provisions. This requires that the taxpayers provide the Commissioner with a statement of the proposed "scheme" that has been undertaken or is proposed to be undertaken. A private ruling will bind the Commissioner where the facts of the proposed "scheme" implemented are not materially different from those provided to the Commissioner and the facts are not misleading or inaccurately stated.

Background

This case involved a large and complex grazing empire that was set up and owned by Mr Walter Hacon and his immediate family.[1] Mr Hacon was very successful in the grazing business and used a company structure that included "banking companies" to hold the profits from successful grazing years to be invested and made available in years of drought where the business required additional funds to operate. Mr Hacon's grazing business amassed $30 million net in these banking companies.

As time passed this structure became difficult to use as management decisions became more difficult to make amongst the family members, the assets were not properly protected from claims against the family members, and the structure would continue to be more and more difficult to manage and use as Mr Hacon's family grew older and the second and third generation would become involved in the grazing business.

[1] More factual details are set out in [2017] FCAFC 181 at [9].

After Mr Hacon passed away in 2012, his three sons owned and operated separate properties that made up this grazing empire. Due to the increasing management and logistical difficulties of properly operating the grazing business as a family and having sufficient asset protection, the three brothers agreed to divide the grazing business and split it into 3 new grazing businesses.

The taxpayers were concerned that this would involve a "scheme", as defined in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 97**) that would attract Part IVA anti-avoidance provisions, by dividing the existing pastoral business into three new businesses and providing asset protection to the 3 families operating these new businesses. This would be achieved by a series of transactions involving trusts, companies and copying the prior banking company structure.

On that basis, the Hacon family sought a private ruling from the ATO as to whether the proposed restructure of their family's grazing business would attract the Part IVA anti-avoidance provisions.

By letter dated 17 August 2016, the Commissioner advised the taxpayers that he had decided to exercise his discretion under s 357-110(1)(a) in Sch 1 of the TAA to decline to make a ruling. That section allows the Commissioner to decline to make a ruling if he considers the correctness of the ruling "would depend on which assumptions were made about a future event or other matter".

In the letter, the Commissioner declined to give a private ruling as:

- all facts and circumstances, including all surrounding circumstances which did not appear to be provided by the taxpayer, needed to be known for the proposed scheme/arrangement to be properly considered;
- there was insufficient information provided to make a ruling, though the Commissioner was not requesting further information from the taxpayers; and
- the private ruling required the Commissioner to make assumptions about future events that he was not prepared to make.

The matter was referred to the Federal Court for review and subsequently appealed through to the Full Court of the Federal Court.

Issue

The Commissioner declined to make a private ruling for the taxpayers. The taxpayers applied to the Federal Court for an order that the Commissioner provide a private ruling. The Federal Court was required to determine whether the Commissioner properly exercised his discretion to refuse to give a private ruling.

Decision at first instance

The Federal Court in *Hacon v Commissioner of Taxation* [2017] FCA 659 undertook a review of the Commissioner's decision to decline to make a private ruling. Logan J noted that the taxpayers' situation was neither unique to the taxpayers or the times and was a common example of an inter-generational transfer of a large rural estate and empire.

His Honour considered that s 357-105 of Schedule 1 to the TAA was relevant, which provides:

> *"357-105 Further information must be sought*

> *(1) If the Commissioner considers that **further information is required** to make a * private ruling or an * oral ruling, the **Commissioner must request** the applicant to give that information to him or her.*
>
> *Note: The Commissioner should make a private ruling within 60 days. However, if the Commissioner requests further information under this section, that period is extended: see subsection 359-50(2).*
>
> *(2) The Commissioner may decline to make the ruling if the applicant does not give the information to the Commissioner within a reasonable time.*
>
> *Note: The Commissioner must give the applicant written reasons for declining to make a private ruling: see section 359-35."* (emphasis added)

His Honour found that the Commissioner had formed the opinion that further information was required, as set out in his letter, and having formed that opinion was required to request information from the taxpayer prior to making a decision to give or decline to give a private ruling.[2]

His Honour stated that decisions to decline to give a ruling should be regarded as 'safe havens after a long voyage, not ports of first call'. It was found that the Commissioner by failing to request such *information was an error of law for the purposes of the Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**") and a jurisdictional error for the purposes of s 39B of the *Judiciary Act 1903* (Cth) ("**Judiciary Act**"), the Commissioner's decision was quashed and the matter remitted to the Commissioner to deal with the private ruling application according to law.

Appeal Decision

The Commissioner appealed Logan J's decision to the Full Federal Court. The Full Federal Court gave a decision on 23 November 2017 per Robertson, Pagone and Derrington JJ.

The Commissioner submitted that he was entitled to exercise his discretion in declining to provide a private ruling as the ruling required him to make assumptions about a future event or other matters.[3] This discretion to decline being available under s 357-110 of Schedule 1 of the TAA, which states:

> *"357-110 Assumptions in making private or oral ruling*
>
> *(1) If the Commissioner considers that the correctness of a * private ruling or an * oral ruling would depend on which assumptions were made about a future event or other matter, the Commissioner may:*
>
> *(a) decline to make the ruling; or*
>
> *(b) make such of the assumptions as the Commissioner considers to be most appropriate.…"*

The Full Court found that the Commissioner was required to give a private ruling except where the Commissioner is given a discretion to decline to do so.[4] Section 359-35 provides:

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[2] At [35].

[3] [2017] FCAFC 181 at [9].

[4] See s 395-35 of Schedule 1 of the TAA and [2017] FCAFC 181 at [6].

"359-35 Dealing with applications

*(1) The Commissioner must comply with an application for a * private ruling and make the ruling. However, this obligation is subject to subsections (2) and (3).*

*(2) The Commissioner may decline to make a * private ruling if:*

*(a) the Commissioner considers that making the ruling would prejudice or unduly restrict the administration of a * taxation law; or*

(b) the matter sought to be ruled on is already being, or has been, considered by the Commissioner for you.

*(3) The Commissioner may also decline to make a * private ruling if the matter sought to be ruled on is how the Commissioner would exercise a power under a relevant provision and the Commissioner has decided or decides whether or not to exercise the power.*

…"

In considering s 357-105 of Schedule 1 of the TAA, the Full Court determined that the operation of the provision was mandatory, but also limited and specific. It only compelled the Commissioner to require a taxpayer to provide information where the information is required "to make" a private ruling. It was noted that the "obligation on the Commissioner to require an applicant to give information, however, does not arise where the correctness of a ruling 'would depend on which assumptions were made about a future event or other matter". The Full Court considered that there was "no strict dichotomy between 'information' and 'assumptions' which require them to be seen as discrete or inconsistent categories of facts or circumstances. Interestingly, it was found that, "[t]here is no reason to confine the meaning of the word 'information' to existing facts or to construe the word 'assumption' as relating only to events or matters that do not yet exist or are unknown." [5]

Ultimately, it was found that although some of the matters identified by the Commissioner could be considered "information", it was not "information" the Commissioner "required to make a private ruling". Rather, they were assumptions about either a future event or about a future other matter that enlivened the Commissioner's discretion under s 357-110 to decline to make the ruling.[6]

On appeal, the Full Court overturned the decision of Logan J.

Practical Implications

This recent Full Court decision illustrates the practical difficulties in obtaining a private ruling that depends on assumptions about future events or other matters. This is particularly concerning where taxpayers are very concerned about not attracting the anti-avoidance provisions in Part IVA of the ITAA 97, but in these cases the parties will often not have undertaken transactions prior to receiving a ruling, which almost necessitates some assumptions being made.

It appears that the ATO may quite easily avoid providing a private ruling by determining that there is "an assumption about either a future event or about a future other matter" which allows the

[5] [2017] FCAFC 181 at [7] – [8].
[6] At [11] – [12].

Commissioner the discretion to decline to give a ruling under s 357-110(1)(a) of Schedule 1 of the TAA.

The case highlighted that it is mandatory for a Commissioner to give private rulings when properly applied for, and that there are only specific instances when the Commissioner can decline to give a ruling, such as when:

- having to make assumptions about future events or other matters;
- additional information is required and is not provided by the taxpayer within a reasonable time;
- it would prejudice or unduly restrict the administration of a taxation law, an example where the application is vexatious and frivolous, the arrangement is not being seriously contemplated by the taxpayer and merely hypothetical, or where there is no utility in the ruling as the transaction being considered has occurred and the amendment period has expired;
- the Commissioner is considering or has already provided a ruling on this matter for the taxpayer, for example in a related audit, where an objection has been lodged on the same matter, or the issue has been determined when making an assessment;
- the Commissioner chooses to exercise a particular power available under the law, rather than provide advice on how that power would be exercised, for example delaying the payment or incurring of a tax liability rather than giving a private ruling; and
- where a taxpayer declines to pay the cost of obtaining an accurate valuation.

This decision highlights the importance when drafting an application for a private ruling and possibly limiting the Commissioner's ability to exercise a discretion to decline to give a private ruling, whether on the basis of the need to make assumptions or otherwise. This will ensure greater certainty for taxpayers.

2.2 Shord v Commissioner of Taxation [2017] FCAFC 167 (26 October 2017)

Authority for:

When a person is an "employee" for the purpose of s. 23AG(7) of the *Income Tax Assessment Act 1936* (Cth) ("the **ITAA 36**") and procedural fairness aspects of the Tribunal's role in obtaining evidence regarding a taxpayer's affairs, and whether the Commissioner of Taxation is obligated to assist in obtaining such information.

Background

Mr Michael Shord was born in the United Kingdom and relocated to Australia as an adult after having served in the United Kingdom armed forces. Between 2006 and 2011 ("**the Relevant Period**"), Mr Shord was an oilfield diver in the oil and gas industry and, during the Relevant Period, he worked for overseas entities and remitted money earnt from his overseas work to a Commonwealth Bank

account in Australia. He holds a United Kingdom and Australia passport and married in Australia. He returned to Australia between overseas assignments and, when in Australia, he lived at a property in Western Australia which was one of two properties in the couple's joint portfolio.

Mr Shord did not lodge Australian income tax returns during the Relevant Period as it was his understanding that returns were not required in Australia as his work was conducted overseas. The Commissioner of Taxation ("**the Commissioner**") disagreed with this understanding and, during the course of an audit, Mr Shord lodged income tax returns for the Relevant Years; however, did not report assessable foreign sourced income. Consequently, the Commissioner issued amended assessments for these years together with a shortfall penalty of 50% of the shortfall amount. In the Commissioner's reasons for objection decision he considered "*[Mr Shord] to be a resident of Australia under the ordinary concepts for the period 1 July 2005 to 30 June 2011*"[7].

The matter was referred to the AAT for review under Part IVC and subsequently appealed through to the Full Court of the Federal Court.

Issue

The Tribunal affirmed the Commissioner's decision; however, in doing so a number of findings were made that ultimately form the ratio of the Full Court's decision. Firstly, and at the outset of the Tribunal hearing, counsel for the Commissioner withdrew a contention contained within the Commissioner's SFIC that Mr Shord's circumstances failed to meet the legislation's definition of 'foreign services'. The Tribunal nonetheless made a finding that Mr Shord's overseas activities were not 'foreign services' as he was not an employee within the ambit of s. 23AG of the ITAA36.

Fletcher v Federal Commissioner of Tax provides authority that a taxpayer is not afforded procedural fairness when a decision is made without there having been argument by either party. However, this issue was not raised in the appeal to the Federal Court and Mr Shord solely focused on the proper application of s. 23AG and whether he was entitled to foreign income tax offsets (although there was no evidence before the Tribunal of Mr Shord having paid foreign tax).

The issue of procedural fairness was not introduced into the Full Court proceeding until an advanced stage of those proceedings by an amended Notice of Appeal.

The taxpayer's appeal to the Federal Court was unsuccessful in *Shord v FCT* [2016] FCA 761 (Gilmour J).

The Full Federal Court Decision

In dealing with the issue of foreign income tax offsets, the Full Court agreed[8] with Gilmour J in the first instance that "*[t]he Tribunal had no obligation to make inquiries overseas to ascertain what, if any, income tax was paid by or on behalf of [Mr Shord]… [a]ccordingly, there was no "evidence" capable of establishing this necessary fact of which [Mr Shord] had the burden of proving: s. 14ZZK(b) of the Taxation Administration Act 1953*"[9].

[7] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [8] per Siopis and White JJ.
[8] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [107] per Siopis and White JJ; at [185] per Logan J.
[9] *Shord v Commissioner of Taxation* [2016] FCA 761 at [35] – [36] per Gilmour J.

In relation to the s. 23AG issue, the Commissioner initially objected to the application for leave to amend the Notice of Appeal to include this ground. The Court split on the relevance and conduct of the Commissioner in relation to this point with Siopis and White JJ finding that:

> *"[a]fter the Full Court allowed the amendment to the amended notice of appeal to include ground 1(ba) and for it to be construed as raising a complaint about procedural fairness, counsel for the Commissioner applied for a short adjournment to obtain instructions. When the hearing resumed, counsel informed the Court that the Commissioner accepted that the Tribunal's finding at [94] that Mr Shord was not an employee within the meaning s 23 AG(7) was attended by jurisdictional error… [i]n our view, no criticism can be made of the conduct of counsel for the Commissioner or the solicitors who acted for the Commissioner. To the contrary, in our view, counsel for the Commissioner acted with propriety in both advancing the interests of her client as a model litigant, and in discharging her duty to the Court. The same is the case in respect of the solicitors who acted for the Commissioner. We expressly disassociate ourselves from the observations of Logan J which may be construed as asserting a contrary position*"[10].

In stark contrast to the above, Logan J found that:

> "*[i]n the circumstances, particularly having regard to the concession by the Commissioner, the Tribunal's finding that Mr Shord was not engaged in service in the capacity of an employee entailed, with all respect to the Senior Member, a patent jurisdictional error constituted by a denial of procedural fairness to him. The factual concession, never withdrawn, was logically probative of this particular factual element and should have been acted upon by the Tribunal… [f]urther, though the concession was mentioned, the Commissioner's submissions nonetheless actively promoted the proposition that the Tribunal was entitled to conclude that Mr Shord was not an employee*"[11]*.*

His Honour, before agreeing that the matter be remitted to the Federal Court to be made according to law, took this opportunity to overtly remind the Commissioner that "*he and those who appear for him are subject to duties in litigation which fall upon the Crown, Ministers and departments, agencies and other officers of the Commonwealth… [t]he Commissioner's high office and important responsibilities mean that he has a special responsibility to lead by example in discharging these duties*"[12]. He continued his critique finding that:

> *"[i] t is, to say the least, most regrettable that this patent jurisdictional error was not drawn to the Tribunal's attention by the Commissioner forthwith after the decision was published or, that not having occurred, that it was not appreciated and then conceded in the original jurisdiction or, that also not having occurred, that the absence of error in the Tribunal's conclusion with respect to the employment issue was maintained by the Commissioner until, in the very course of the hearing of the appeal, the exchange with the Commissioner's*

[10] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [98] – [100] per Siopis and White JJ
[11] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [158] and [161] per Logan J.
[12] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [166] per Logan J.

> *counsel mentioned earlier occurred. Even more so is this conduct regrettable in light of this Court's recent reminder[13] to the Commissioner of his model litigant responsibilities"[14]*.

The Full Federal Court ultimately allowed the taxpayer's appeal and ordered that Gilmour J's orders be set aside and the matter be remitted to the primary judge to consider the taxpayer's appeal in relation to the application of s 23AG(6) and s 23AG(6A) and whether, consequentially the Tribunal's decision to affirming the Commissioner's objection decision should be set aside and the matter remitted to the Tribunal for further hearing.

Practical Implications

A take home from this case is that possibly there is a view that the ATO can at times act as an uncompromising litigant and may need to apply more discretion when raising procedural points or not making reasonable concessions early. Although these views are found in the dissenting judgment of Logan J, it may be that his Honour's views are shared more widely. This decision also highlights the importance of ensuring that careful attention is applied to concessions made before a Tribunal or Court.

A Bill[15] increasing the application, and enforcement, of model litigant obligations is currently before Parliament and, if passed, this will likely create substantial change in the procedural aspects of Part IVC proceedings.

2.3 Bazzo v Commissioner of Taxation [2017] FCAFC 139 (31 August 2017)

Authority for

Settlement deeds are construed as an ordinary commercial contract between the parties when identifying and interpreting the terms of the settlement deed.

Background

The case involved a settlement agreement entered into by two separate taxpayers with the Commissioner, with the appeals being heard together due to a common issue of construction of a common term in their settlement deeds.

Under the settlement deed, the Commissioner agreed to refrain from commencing proceedings to recover any part of the "taxation debt". It also provided for security to be given by the taxpayers to the Commissioner and the Commissioner was permitted to recover the balance of the "taxation debt" upon the occurrence of an event of default, which included the relevant taxpayer's failure "to comply with any requirement of the taxation law while this deed is in operation".

After about 12 months after the parties had entered into the settlement deed, the Commissioner demanded payment for the General Interest Charge ("**GIC**") accruing. The taxpayers failed to pay the

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[13] *LVR (WA) Pty Ltd v Administrative Appeals Tribunal* [2012] FCAFC 90.

[14] *Shord v Commissioner of Taxation* [2017] FCAFC 167 at [166] per Logan J.

[15] *Judiciary Amendment (Commonwealth Model Litigant Obligations) Bill* 2017.

demanded GIC, at which time the Commissioner gave notice of an event of default under the settlement deed.

Issue

The issue between the parties was whether the Commissioner's promise under the settlement deed to refrain from commencing any proceedings or employing his statutory "garnishee" power (pursuant to s 260-5 of Schedule 1 of the TAA) to recover any part of the Taxation Debt included general interest charges.

Decision

At first instance, the Tribunal found in favour of the Commissioner and determined that he was able to claim the GIC accruing from the date of the deed of settlement from the taxpayers.

The taxpayers appealed to the Full Federal Court who were asked to consider the construction of particular terms of the settlement deed. The important clauses in the settlement deed were set out in the following terms:

> *"The Commissioner agrees, subject to clause 11.2, to refrain from commencing any proceedings or employing his statutory "garnishee" power (pursuant to s260-5 of Schedule 1 of the TAA 1953) to recover any part of the Taxation Debt. For the sake of clarity, however, the Commissioner may employ any and all recovery options and powers to pursue any tax-related liabilities of the Taxpayer which are not part of the Taxation Debt which is the subject of this Deed, including any income tax liability that might be due following lodgment of the 2014 Income Tax return.*
>
> *…*
>
> ***Taxation Debt** means the amount of $13,828,790.35, which is comprised of Tax Related Liability and applicable GIC due and payable by the Taxpayer as at 7 August 2015, subject to any adjustment to those amounts by virtue of the Determination of the Objection Process."*[16]

The settlement deed clause were the same for Mr Caratti except the amount stated in that deed was just under $11 million.

The Full Court held that the Tribunal's decision was correct in finding that the definition of "Taxation Debt" in the deed did not include the GIC, which therefore continued to accrue on each taxpayer's outstanding tax liability after the date of the deed of settlement. The Tribunal applied an objective reading of the words of the clauses and found that the clauses stated a particular amount and its identified elements. Any adjustments were identified and were limited to those made through a Part IVC proceeding.

The Full Court found that the definition of Taxation Debt under the settlement deed clearly did not include the GIC that would continue to accrue on the taxpayers' tax liability. The Full Court affirmed

[16] *Bazzo v Commissioner of Taxation* [2017] FCAFC 139 at [3].

the Tribunal's decision that there is no reason why the parties could not agree to refrain from recovering part of a debt but allow the accruing balance to be recovered.[17]

The Full Federal Court dismissed the appeal and upheld the Tribunal's decision.

Practical Impact

This case is a timely reminder for advisers to pay close attention to the drafting of settlement deeds with the ATO. In particular, care should be taken to identify all of the possible components of the taxpayer's tax liability (current and future) and to provide for how these tax liabilities are to be accommodated under the settlement deed.

2.4 Gould v Deputy Commissioner of Taxation [2017] FCAFC 1 (9 January 2017)

Authority for

How a Commonwealth Officer's taxation assessment may be challenged, the timeframe for doing so, and the recovery proceedings in State Courts.

Background

On 17 December 2015, the Commissioner obtained summary judgment against Mr Vanda Russell Gould in the sum of $15,213,916.14. On that day, the Commissioner also obtained summary judgment against Russell Associates Ltd (a related party) in the sum of about $ $15,342,976.79 (collectively, "**the Applicants**").

The Applicants appealed the respective summary judgments to Federal Court under s 39B of the *Judiciary Act* (noting again that the substance of these proceedings relate to recovery, rather than Part IVC of the TAA). The essence of the dispute related to alleged conscious maladministration arising from the issue of amended assessments for the 2001 to 2009 income years which was possible as a consequence of the Commissioner obtaining and using documents from the Cayman Islands. The Applicants claim that due to the conscious maladministration there are no assessments.

The Applicants' specific concerns related to the Commissioner's delegate's request for information from the Cayman Islands Tax Information Authority (the **"Cayman Islands Authority"**) pursuant to the Agreement Between the Government of Australia and the Government of the Cayman Islands on the Exchange of Information with Respect to Taxes ("**the Agreement**"). The Agreement permitted requests to be made for information after 1 July 2010.

The documents (including pre-2010 documents) obtained by the Commissioner related to "*two companies incorporated in the Cayman Islands, namely JA Investments Ltd (**JA Investments**) and MH Investments Ltd (**MH Investments**) [and] [o]n 18 September 2012, those companies commenced proceedings in the Grand Court of the Cayman Islands against the Cayman Islands Authority seeking declarations that the provision by the Cayman Islands Authority of the information was ultra vires*."

[17] *Bazzo v Commissioner of Taxation* [2017] FCAFC 139 at [9].

Although MH Investments and JA Investments were successful in the Cayman Islands, Perram J held that "*I do not accept any of the taxpayers' arguments that the evidence was improperly obtained… the requests made by the ATO to CITIA were for purposes relating to periods after 1 July 2010 and the actions of the ATO in making those requests and of CITIA in providing documents under them were wholly in accordance with the Treaty; nor did the Commissioner act in contempt of this Court in making the requests*".

Issues

The Applicants sought to appeal the primary judge's decision to award summary judgment in favour of the Commissioner. The issue was whether the Commissioner's assessments were vitiated with conscious maladministration, because the Commissioner relied on information obtained under the Agreement, which was found to be improperly obtained by the Grand Court of the Cayman Islands.

Further, whether the Commissioner could seek to rely upon the conclusive effect of the assessment, pursuant to s 175 of the ITAA 36 and s 350-10(1) of Schedule 1 to the TAA.

Full Federal Court Decision

Both Logan and Robertson JJ considered the state of the Applicants pleadings, particularly as they related to the "state of mind" of the Commissioner's officers and employees. The plurality placed particular care and attention to the evidence given by Ms Richards in relation to the information requested pursuant to Art 5 of the Agreement and the "real time" nature of the investigations.

The Full Federal Court essentially disagreed with the Applicants' contention that the Commissioner had, himself, engaged in conscious maladministration by relying upon the information provided by the Cayman Islands Authority.

The Applicants "submitted that since the process of collection of information was part of the assessment process, if there was conscious maladministration in the collection of information the assessment was liable to be set aside. Alternatively, to the extent that there was a determination of an opinion of fraud or evasion which was based upon material produced or obtained through conscious maladministration, that assessment was liable to be set aside." They alleged that the assessments were invalid due to the conscious maladministration undertaken by the deliberate decision of officers of the ATO to request information under the Agreement knowing that it was outside the proper use of that Agreement and this information consequently being relied upon by the Commissioner in determining the raising of assessments and the opinion of fraud or evasion.[18]

The Court found that on the pleadings, the Applicants could not establish conscious maladministration by attacking the process of the assessment, that is, the way in which the information that formed the basis for the assessment was obtained.[19] The Court affirmed the case of *Commissioner of Taxation v Donoghue* [2015] FCAFC 183; 237 FCR 316 citing *Denlay v Federal Commissioner of Taxation* [2011] FCAFC 63; 193 FCR 412 at [81]-[82] where the Full Court held that in raising assessments the Commissioner is not only entitled, but required to use information which is in his possession even if he

[18] *Gould v Deputy Commissioner of Taxation* [2017] FCAFC 1 at [40] – [41].
[19] *Gould v Deputy Commissioner of Taxation* [2017] FCAFC 1 at [78].

knows it is subject to confidentiality or privilege and regardless of how the information was obtained due to the overarching policy consideration of the need for accurate assessments.[20]

Logan J held that there was no foundation for judicial review on the grounds of conscious maladministration.[21] Logan J also held that:

> "*George and Clarke before it are but two of many cases which establish that the process of assessment includes decisions which are conditions precedent to the making of the assessment with the consequence that the right of appeal (or review) presently found in Part IVC of the TAA is correspondingly comprehensive. This settled approach enables conditions precedent to the making of an assessment to be examined on the merits by an exercise of judicial power (or administrative review) as part of determining whether an assessment has been proved by a taxpayer to be excessive. The comprehensive quality of the right of appeal (or review) explains why, even where the alternative of a proceeding under s 75(v) of the Constitution or s 39B of the Judiciary Act exists, the pendency or availability of a proceeding under Part IVC of the TAA will usually dictate that any constitutional writ or injunctive proceeding ought peremptorily to be dismissed as a matter of discretion: Futuris at [48]*".

He continued to find, and provide useful guidance in, that "*[t]here are a number of ways in which* ["bad" assessments] *can occur. One is where the Commissioner has, for some reason, refrained from making a definitive ascertainment of a person's taxable income and related taxation liability, instead, as in Federal Commissioner of Taxation v Hoffnung & Co Ltd (1928) 42 CLR 39, issuing what is patently a tentative assessment; for a collation of later examples of this kind see Australia and New Zealand Banking Group Ltd v Federal Commissioner of Taxation* [2003] FCA 1410; 137 FCR 1. *Another is where, in one or the other of the ways described in Futuris, the making of the assessment is attended with conscious maladministration*". Accordingly, two creatures of conscious maladministration exist:

- tentative assessments; and
- *Futuris* assessments.

The Full Court held that the appeal be dismissed.

Special Leave Application

On 12 May 2017, Gageler and Keane JJ dismissed the application for an extension of time and an application for special leave to the High Court as "*[t]he decision of the Full Court of the Federal Court is not attended with sufficient doubt to warrant the grant of special leave. The application should be dismissed. It would be futile to grant an extension of time*".

Practical Implications

This case once again highlights the difficulty in setting aside an assessment by the Commissioner on the basis of conscious maladministration. This decision maintains the existence of two circumstances

[20] *Gould v Deputy Commissioner of Taxation* [2017] FCAFC 1 at [79].
[21] *Gould v Deputy Commissioner of Taxation* [2017] FCAFC 1 at [20].

whereby the Commissioner may engage in conscious maladministration and retains the high water marks set in *ANZ v FCT* and *Futuris*.

3 Federal Court Cases

3.1 Commissioner of Taxation v Miley [2017] FCA 1396 (28 November 2017)

Authority for

Valuation of private shares in the context of the small business CGT concession.

Background

This case involved a private company called AJM Environmental Services Pty Ltd which had 300 issued shares. The taxpayer and 2 other shareholders owned 100 shares each.

On 7 March 2008, the shareholders agreed to sell all of their shares to an arm's length purchaser, EIMCO Water Technologies Pty Ltd (**EIMCO**). The purchase price under an agreement was $17.7 million with each shareholder receiving $5.9 million.

The agreement included a condition that EIMCO would buy all of the shares held by the 3 shareholders contemporaneously and that EIMCO was not obliged to buy the shares held by one shareholder to the exclusion of the shares of any other shareholder.

The taxpayer claimed the general CGT concession by virtue of having held the shares for more than 12 months and being automatically entitled to a 50% reduction of his net capital gain. He also claimed the benefit of the small business CGT concession.

The taxpayer was required to satisfy the "basic conditions for relief" under s 152-10 of the *ITAA 97*. In this case the issue was whether the taxpayer satisfied the maximum net asset value test (**MNAV test**) contained in s 152-15 of the *ITAA* 97, which states that:

> *"You satisfy the maximum net asset value test if, just before the CGT event, the sum of the following amounts **does not exceed $6,000,000**:*
>
> *(a) the net value of the CGT assets of yours;*
>
> *(b) the net value of the CGT assets of any entities connected with you;*
>
> *(c) the net value of the CGT assets of any affiliates of yours or entities connected with your affiliates (not counting any assets already counted under paragraph (b)).*"

In June 2013, the Commissioner audited the taxpayer's tax returns and issued an amended income tax assessment on the basis that the taxpayer had not satisfied the MNAV test as the net value of his CGT assets was $6,020,000, just before the sale of the shares. The Commissioner made a critical finding that the market value of the shares was $5.9 million combined with other net assets of $120,000 meant that the taxpayer did not meet the MNAV test in s 152-15 of the ITAA.

In August 2013, the taxpayer objected to the amended assessment, but the objection was disallowed on the amended assessment, disallowed on the 25% administrative penalty, but successful on the remission of the shortfall interest charge. The taxpayer then appealed to the Administrative Appeals Tribunal (AAT)

AAT Decision

At first instance, the taxpayer and the ATO both led conflicting expert evidence as to the market value of the taxpayer's shares.

The taxpayer's position was that the market value of a CGT asset is to be determined by reference to a hypothetical sale between willing but not anxious parties and this was not necessarily equal to the amount paid by the actual buyer. He referred to the High Court decision in *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd* (2002) 209 CLR 651.

> *"…The determination of such an amount [that is, the unencumbered value of property on the open market] is a familiar task, to be carried out in accordance with the principles stated in Spencer v The Commonwealth. The subject of the valuation is the unencumbered estate in fee simple. In determining the value there is no warrant, either in the language of the statute or in principle, for departing from the hypothetical inquiry as to the point at which a desirous purchaser and a not unwilling vendor would come together. The purpose of making the inquiry hypothetical is to isolate the value of the estate or interest to be transferred from factors that are extraneous to the purpose for which such a value is to be ascertained. To introduce into the exercise a special condition for which, on a particular occasion, a particular vendor chose to stipulate, and to which a particular purchaser chose to agree, is to depart from the statutory requirement, which is to determine the value of that which was transferred. …"*

The Commissioner maintained that the market value of the shares was the purchase price from the most recent sale to the purchaser of $5.9 million.

The AAT found that the market value of the taxpayer's shares was $4,914,700, which was calculated using an initial figure of $5.9 million and then taking into account a reduction equating to 16.7% to compensate for the "relative lack of control" that a purchaser would attain from purchasing the taxpayer's minority interest in the company.[22]

The AAT preferred the taxpayer's approach and found that the correct valuation method was to consider the taxpayer's shares alone, and not as "a package comprising all 300 shares in the Company".[23] Therefore, viewed alone, the consideration received by the taxpayer for his shares was more than a hypothetical willing but not anxious buyer would have paid if it had purchased only the taxpayer's shares.

Consequently, this reduction in the share sale value to $4.9m resulted in the taxpayer's CGT assets just before the sale of the shares not exceeding $6 million. The taxpayer was successful on appeal to the AAT, who set aside the objection decision and allowed the objection in full.

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[22] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [3].

[23] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [41].

The Commissioner then appealed to the Federal Court pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), who found that the approach taken by the AAT was erroneous.

Federal Court Decision

Ultimately, the Federal Court found that although market value is not defined in the ITAA 97 that it refers to "what a willing and knowledgeable, but not anxious purchaser would pay a willing and knowledgeable, but not anxious vendor for the assets in question".[24] Although this can sometimes involve the need to hypothesise, this is generally unnecessary where there is a recent sale transaction between a willing but not anxious seller and buyer at arms length. In that case, the price actually agreed on "may generally be taken to be the market price, or at least a reliable indictor, if not the best evidence, of the market price."[25]

The Federal Court found that the AAT had ignored a relevant consideration being that the purchaser was wiling to purchase the shares at a price higher than the ordinary willing but not anxious purchaser as they weren't just purchasing a minority shareholding, but all of the shares contemporaneously under the agreement. That was not a "special circumstance" as contemplated in *Pioneer Concrete*, rather, it was the reality of the market and it was not appropriate to apply a discount for "lack of control".[26]

The Tribunal also failed to have regard to the principles that have been applied in valuation cases where the asset or property in question has special potential for a particular purchaser.

The Federal Court clarified the application of the discount for a "relative lack of control" and noted that although not applicable in this case, it would apply where a purchaser was unable to acquire further shares in the company to convert its position into a controlling shareholding.

Interestingly, the taxpayer argued that the agreement should be ignored in determining the market value, because the words of s 152-15 *ITAA 97* require that the assets be valued "just before" the CGT event. This submission was rejected as it was held that the words "just before" indicated the legislature's intention to exclude from the maximum net asset value test the effect of the CGT event itself, which in this case meant that the test included the value of the shares prior to disposal.[27]

The case was referred back to the AAT. It will be interesting to see whether the decision will be appealed.

Practical Impact

This case clarifies the calculation of market value which is the broadly accepted definition of the price that a willing and knowledgeable, but not anxious buyer would pay a willing and knowledgeable, but not anxious seller for the asset. Therefore, the market value to be taken into account when lodging tax returns will ordinarily be the price of the most recent sale, unless there are special circumstances that require a reduction or adjustment. When determining the market value or whether a discount should be applied, the surrounding circumstances are relevant e.g. where all shares in a company are being purchased contemporaneously.

[24] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [78].
[25] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [81].
[26] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [92].
[27] *Commissioner of Taxation v Miley* [2017] FCA 1396 at [109]-[110].

If there is no willing and knowledgeable, but not anxious buyer for the shares, the valuation method generally involves hypothesising the market value.

Hypothesising, is unnecessary if the asset was recently sold at arm's length as that price is generally be taken to be the market price, or at least a reliable indicator, if not the best evidence, of the market price. This is the case even if the purchaser pays a premium for gaining some added benefit e.g. buying all of the shares.

3.2 Sandini Pty Ltd v Commissioner of Taxation [2017] FCA 287 (22 March 2017)

Authority for:

The Federal Court's jurisdiction to grant declaratory relief in relation to the proper CGT treatment of a transfer of shares to a family trust by consequence of a Family Court Order, specifically in relation to roll over relief pursuant to subdivision 126-A of the ITAA97 and when a change in beneficial ownership constitutes a change in ownership for the purposes of s 104-10(2) of the ITAA97, and the spouse was involved in that change of ownership within the meaning of ss 126-5 and 126-15 of the ITAA 97.

Background

In brief, this proceeding related to the CGT implications associated with a property settlement arising from the separation of Mr and Ms Sandini who were married on 15 February 1992 and separated on 9 May 2010. The impugned transaction specifically related to the transfer of 2,115,000 shares by Sandini in Mineral Resources Limited ("**MIN Shares**"), an ASX listed company, which occurred following an order of the Family Court made on 21 September 2010 by consent[28]. The relevant Order provided that ("**the Order**"):

> *"Within 7 days of orders being made Sandini do all acts and things and sign all documents necessary to transfer to Ms Ellison 2,115,000 MIN Shares*."

Although there was contention to this point, his Honour found that Ms Ellison, on 29 September 2010, directed the transfer of the MIN Shares to Wavefront Asset Pty Ltd as trustee for the Felstead Family Trust (a trustee company controlled by Ms Ellison) ("**FFT**"). On 30 September 2010, the MIN Shares were duly transferred pursuant to a Standard Transfer Form.

On 20 August 2015, the Commissioner commenced an audit in relation to 'unreported capital gains' arising from the transfer of the MIN Shares from Sandini[29] and, 4 September 2015, the Commissioner issued a position paper regarding the audit. Further correspondence passed between Sandini's tax advisors and the Commissioner I relation to contentions that upon the "*Family Court making its order of 21 September 2010, or on 28 September 2010, being the date by which the orders needed to be*

[28] It is relevant to note that the "*the fact that the Family Court Order is a consent order has no bearing on whether the Family Court Order is such an order for the purpose of s 126-15*", see: *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [124] per McKerracher J.

[29] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [26] per McKerracher J.

performed, beneficial ownership in the MIN Shares passed to Ms Ellison"[30]. The contention was rejected by the Commissioner who instead asserted "*that the transfer of the MIN Shares to Wavefront [FFT] was such as to constitute a CGT disposal of the MIN Shares from Sandini, as trustee of the KRUT to Wavefront, which disposal did not attract roll-over relief*"[31] pursuant to subdiv 126-A of the ITAA 97.

Sandini applied to the Federal Court seeking declaratory relief regarding the application of roll over relief to the transfer of the MN Shares.

Issue – does the Federal Court have jurisdiction to order declaratory relief?

The applicants pursued declaratory relief pursuant to s 39B(1A) of the *Judiciary Act* and s 21 of the *Federal Court of Australia Act 1976* (Cth). In this proceeding, his Honour accepted that the factual background was distinguished from *Bob Jane T-Marts*[32] as there "*was no conclusion, (nor [in his Honour's] respectful opinion, could there be), that declaratory relief would not be available in revenue cases*"[33] and continued finding that "*[t]here is nothing hypothetical about the facts which have all occurred in the past. It is only the appropriate tax response which requires consideration on the established facts. Moreover, in this situation, unlike Bob Jane T-Marts, the facts are all substantially agreed*"[34].

His Honour ultimately held that:

> "A*lthough the Commissioner is yet to issue an assessment, that does not affect the fact that there is a genuine controversy between the parties that is susceptible to judicial determination. The lack of any assessment does not render, hypothetical, the declaratory relief sought… Indeed, put another way, it may be that the outcome of this proceeding would assist the parties in their arguments and possibly the Family Court in determining how such existing or future applications should be addressed.*"[35]

Issue – does the transfer of the MIN Shares attract CGT roll over relief?

McKerracher J usefully summarised the (deceptively) simple primary issue in this matter as follows:

> "*whether Sandini should be entitled to CGT roll-over relief in circumstances where:*
>
> 1. *such relief would normally be available when an asset was transferred by and to a former spouse under a family court order.*
>
> *But in this instance:*
>
> 2. *was transferred to a corporate entity solely controlled by the former spouse;*
>
> 3. *in accordance with the former spouse's direction as to the manner of compliance with the court order*"[36].

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[30] Ibid.
[31] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [27] per McKerracher J.
[32] *Bob Jane T-Marts Pty Ltd v Commissioner of Taxation* (1999) 94 FCR 457.
[33] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [33] per McKerracher J.
[34] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [35] per McKerracher J.
[35] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [45] – [47] per McKerracher J.
[36] *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [3] per McKerracher J.

In summary of the first instance decision (which should be approached with caution as it is presently under appeal), his Honour held that:

1. although the FFT was not a party to the relationship, the ultimate outcome to the Family Court Orders was the vesting of beneficial ownership of the MIN Shares in Ms Ellison.

2. the vesting of the MIN Shares for the benefit of Ms Ellison were aligned with the Family Court Order's notwithstanding:

    a. defects and incorrect descriptions in the Family Court Orders;

    b. a minor delay in compliance with the Family Court Orders;

    c. the Orders did not expressly require the transfer and instead were framed as the doing of "all act and things and sign all documents necessary to transfer the MIN Shares; and

    d. there would need to be additional steps taken to transfer legal ownership of the MIN Shares to Ms Ellison (as oppose to her beneficial ownership).

Consequentially, the Court found that the Family Court Order (and the beneficial vesting of the MIN Shares within FFT) attracted a CGT event A1 in relation to the MIN Shares and Sandini was able to rely upon the marital breakdown roll over relief to disregard the CGT event of the disposal of the MIN Shares.

Practical Implications

This decision expanded the application of CGT roll over relief to parties outside of an irretrievable relationship breakdown and although, as at the date of this paper, this decision is currently part-heard on appeal before Siopis, Logan and Jagot JJ, it ought to be an interesting development for family lawyers and tax advisors. It should be noted that reliance upon carefully drafted Family Court Orders (by consent or otherwise) to attract CGT roll over relief for parties outside of the relationship ought to be approached with caution until the appeal process has finalised.

4 Administrative Appeals Tribunal Cases

4.1 ACN 154 520 199 Pty Ltd v FCT [2018] AATA 33 (17 January 2018)

Authority

That although the Commissioner is able to limit the documents provided to the Tribunal when determining a review of a decision pursuant to s 14ZZF(1)(a)(v) of the TAA, the Tribunal can direct the Commissioner to produce and lodge documents pursuant to s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the **AAT Act**"), even where there may be a claim to legal professional privilege, if the Tribunal is satisfied that the documents may be necessary to review the objection decision.

Background

The taxpayer was a supplier of gold bullions (which is a precious metal and 'fine' if 99.5% pure or better). Under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the **GST Act"**), a precious metal is input taxed and the supplier is not entitled to credits on its inputs.

The supply of precious metals is 'GST-free' if it is the first supply of the metal after it is refined. The 'GST-free' treatment takes priority over the 'input taxed' treatment and consequently the taxpayer would be entitled to input tax credits on the first supply of the metal after it is refined.

There were arguments in relation to whether the taxpayer had refined the precious metal, but these arguments are overly technical and not necessary for this summary.

It is sufficient to note that the taxpayer argued that it was entitled to the supply being GST-free. The Commissioner took the view that the supply was not the first supply after the metal has been refined and therefore was subject to input tax.

In 2016, the Commissioner issued a number of notices of assessment and amended assessment of GST for earlier periods. Further notice of assessment of administrative penalty for approximately $58 million was issued, pursuant to s 284-75(1) of Schedule 1 to the TAA, that the Applicant 'recklessly' made false or misleading statements to the Commissioner.

To the extent that the assessments gave effect to the Commissioner's declarations to cancel input tax credits pursuant to s 165-40 of the GST Act the Commissioner imposed penalties on the alternative basis that the Applicant got a scheme benefit from a scheme for the purposes of s 284-145 of Schedule 1 to the TAA.

The Commissioner did not remit any of the administrative penalties.

Taxpayer objected to the assessments and the Commissioner disallowed the objections in full. The taxpayer objected on the basis that it did not recklessly make false or misleading statements to the

Commissioner. In the alternative, it claimed that the Commissioner ought to exercise his discretion to remit the penalty to nil or less than $58 million.

Issue

An issue between the parties arose when the Commissioner lodged approximately 51,000 documents with the Tribunal pursuant to s 37(1) of the AAT Act, as modified by s 14ZZF of the TAA.

The taxpayer wrote to the Commissioner stating that it was aware of at least two legal advices in relation to parts of the decision under review, which the Commissioner had not included in the documents produced to the Tribunal under s 37 of the AAT Act. The taxpayers were aware of some legal advices from documents released by the Australian Taxation Office under the *Freedom of Information Act 1982* (Cth). The Commissioner refused to produce the documents.

The taxpayer applied for the Tribunal to direct the Commissioner to produce the specific documents being internal legal advice, in relation to the issue of whether the taxpayer in claiming that the supply was GST-free under the GST Act.

Decision

The Tribunal was required to consider whether the documents sought by the taxpayer, the Commissioner's internal legal advices, were relevant to the review of the Commissioner's penalties issues.

Section 37(1)(b) of the AAT Act requires a person who has made the decision being reviewed by the Tribunal, to lodge with the Tribunal:

> "... every other document that is in the person's possession or under the person's control and **is relevant** to the review of the decision by the Tribunal." (Emphasis added.)

Section 14ZZF(1)(a)(v) of the TAA narrows that obligation for the Commissioner to:

> *"...every other document that is in the Commissioner's possession or under the Commissioner's control and* ***is considered by the Commissioner to be necessary to the review of the objection decision concerned****".* (Emphasis added.)

Section 37(2) of the AAT Act provides that the Tribunal can direct additional documents to be produced or lodged if in its opinion these documents may be relevant to the review of the decision by the Tribunal. This sub-section provides a safe guard against a decision maker who does not lodge under s 37(1) everything that it should.[37]

The taxpayers submitted that the documents were relevant to the decision under review as it went to the decision to disallow the objection against the imposition of administrative penalties. Further, they argued that if there was legal advice that indicated that a senior ATO officer considered that the taxpayer's position was either correct or that the position adopted by the Commissioner was unlikely to be accepted by a court then this went to whether the taxpayer was reckless or careless.

[37] *Re VLKG and Commissioner of Taxation* [2011] AATA 915 at [6].

The taxpayers conceded that if the legal advice was from an external adviser that the documents would not be disclosed to the taxpayer, due to legal professional privilege. However, this issue of "whether documents produced are subject to legal professional privilege is a matter to be addressed when documents have been lodged and the question arises whether the Tribunal should direct that they be provided to the Applicant".[38]

The Tribunal found that the test of relevance is that the taxpayer has to satisfy the Tribunal that the particular document or category of documents may be relevant "to specific issues of fact relating to the excessiveness of the assessments". In relation to relevance, the Tribunal stated that:

> *"[80] The Tribunal will apply the concept of relevance in s 37(2) of the AAT Act as formulated by Senior Member Taylor in Re KLGL QCCYY and APRA in [2008] AATA 452; 104 ALD 433 (**KLGL QCCYY**). At [18], the learned Senior Member stated:*
>
> > *'... the concept of relevance requires positive satisfaction of a sufficient relationship between the documents, or class of documents, whose production is in issue and the matters to be determined in the proceedings. Furthermore, the notion of relevance carries with it a purposive connotation dealing with the capacity of the document to influence the determination of the proceedings. This capacity, and the criterion it involves, is different from the mere existence of some correlation between the document in question and either the subject matter of, or evidence or issues, in the review proceedings.'*
>
> *[81] And at [46], he stated:*
>
> > *'The expression 'may be relevant' is apt because, by necessary hypothesis, the Tribunal will exercise the power when it does not know the contents of the contentious documents, and may only know their general class or character ... But s 37(2) of the AAT Act could not reasonably have been intended to confer on the Tribunal a power to require the production of documents because of a mere intellectual or speculative possibility of relevance. The threshold requirement that the Tribunal form an opinion requires some process of evaluation, based on reason and reasonable inference.'"*

The Tribunal found that the taxpayer has the burden of proving that the relevant assessments are excessive[39] and that this was an objective test.[40]

The Tribunal found that the internal legal advices may be relevant for such review and that the application was not premature or a fishing expedition, as the documents were specific and in relation to a narrowly identified issue. Moreover, it found that the direction would still be made notwithstanding the fact that the Commissioner denied that some of the documents did not exist.[41]

It was found that the issue of legal professional privilege was not a bulwark to directing the Commissioner to produce the documents to the Tribunal. Rather, that was an issue to be dealt with

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[38] *ACN 154 520 199 Pty Ltd v FCT* [2018] AATA 33 at [103].
[39] *ACN 154 520 199 Pty Ltd v FCT* [2018] AATA 33 at [82] and [83].
[40] *ACN 154 520 199 Pty Ltd v FCT* [2018] AATA 33 at [99].
[41] *ACN 154 520 199 Pty Ltd v FCT* [2018] AATA 33 at [102] and [104].

after the documents were produced and when considering whether the documents should be provided to the taxpayers.[42]

The Tribunal ultimately ordered the Commissioner to produce the internal legal advice, pursuant to s 37(2) of the AAT Act.

Practical Implications

This case highlights that care should be taken to identify all of the documents relevant to the Tribunal's review decision. This care extends to consideration of the documents produced by the Commissioner pursuant to s 37 of the AAT Act, as limited by the s 14FFZ of the TAA, and to ensure that all documents that the taxpayer considers is relevant for the Tribunal to review the decision has been included. Also, the case highlighted that taxpayers are able to obtain fruitful documents and assistance from Freedom of Information applications.

In the event that the Commissioner has not provided all of the relevant documents to the Tribunal to determine the review, the taxpayer can bring an application that the Commissioner be directed to produce the documents pursuant to s 37(2) of the AAT.

The documents that are to be produced by the Commissioner are not limited by legal professional privilege, though that is an issue as to whether the document should be provided to the taxpayer.

4.2 WLQC v Commissioner of Taxation [2018] AATA 14 (15 January 2018)

Authority for

When the Tribunal and Courts have jurisdiction to review nil assessments.

Background

This case involved a group of companies involved in the broadcasting industry, who were engaged in a large dispute with the ATO in which the taxpayers claimed that they should be considered a consolidated group for tax purposes. If the taxpayers contention was correct and they should be treated as a consolidated group, then a large number of assessments being nil assessments should consequently be reviewed. The review of these nil assessments was sought on the basis that when taken as a group some of these assessments would go down and a few may increase and would impact the overall, singular taxing of the group.

Issue

The parties were in dispute about the Commissioner's decision to refuse to amend the taxpayers' nil assessments. The issues of whether the Tribunal has jurisdiction to review the Commissioner's decision was raised.

[42] *ACN 154 520 199 Pty Ltd v FCT* [2018] AATA 33 at [103].

Decision

The Tribunal, with Deputy President McCabe sitting, held that it did not have jurisdiction to review the nil assessments sought to be reviewed by the taxpayers.

In relation to the nil assessments made prior to 2005, nil assessments were not assessments for the purposes of Part IVC of the TAA, per s 175A of the ITAA 36, as it then was:

> *"A taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the Taxation Administration Act 1953."*

Assessment was then defined in s 6 of the ITAA 36 as being the ascertainment of an amount of taxable income. Cases such as *Batagol v Commissioner of Taxation* [1963] HCA 51; (1963) 109 CLR 243 found that a valid assessment required the Commissioner to ascertain an actual amount of tax, which precluded a nil assessment from being an assessment.

The Tribunal considered the Full Federal Court's decision in *Commissioner of Taxation v Ryan* (1998) 82 FCR 345 ("***Ryan"***) that a nil assessment can be made under the ITAA 36 and was an assessment. However, the case was overturned on appeal in *Commissioner of Taxation v Ryan* [2000] HCA 4; (2000) 201 CLR 109, though on another point.

The Tribunal found that it was bound be the decision in *Commissioner of Taxation v BCD Technologies Pty Ltd* [2005] FCA 708; (2005) 144 FCR 457, ("***BCD Technologies***") which overturned a decision of the Tribunal that the time for issuing an amended assessment under s 170 of the ITAA 36 started running on the date the return was filed and the assessment was deemed to have issued (and therefore a nil assessment was an assessment). It was noted that that case dealt with a different issue to this case, being whether an applicant should be permitted to use the mechanisms in Part IVC to challenge a decision about its taxation affairs.

The Tribunal noted the discordance in the authority caused by the Federal Court in *BCD Technologies* where Heerey J did not appear to consider whether the reasoning in the Full Federal Court in *Ryan* continues to have any force notwithstanding the High Court's decision to overturn the decision on appeal, but not on this point. Nevertheless, the Tribunal held that it was bound to follow the Federal Court in BCD Technologies and that this discordance in the authorities may need to be dealt with on appeal in this matter to the Federal Court.[43]

The Tribunal found that it did not have jurisdiction to review nil assessments prior to 2005, as a nil assessment was not an assessment under the ITAA 36.[44]

The Tribunal then considered whether it had jurisdiction to review nil assessments made after 2005. The same issues in relation to whether nil assessments are assessments under the ITAA 36 are no longer controversial due to the amendments made by the *Tax Laws Amendment (Improvements to Self-Assessment) Act (No. 2) 2005,* which amended ss 6 and 175A of the ITAA 36. The effect of these subsections was that nil assessments became assessments, though taxpayers are precluded from objecting to a nil assessment unless the taxpayer seeks to increase their tax liability.

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[43] *WLQC v Commissioner of Taxation* [2018] AATA 14 at [19].
[44] *WLQC v Commissioner of Taxation* [2018] AATA 14 at [20].

In this case, the taxpayers had not produced evidence to establish that some of the assessments were to be amended to increase the liability of the taxpayers. Thus, the Tribunal held that it did not have jurisdiction to review any of the pre and post 2005 nil assessments.

Practical Implications

Care should be taken when advising taxpayers to self-assess no taxable income or no tax payable, as this will result in a nil assessment. Under the current ITAA 36, nil assessments allow the taxpayer only a restricted use of the review mechanisms in Part IVC proceedings, being when the taxpayer wants to increase its tax liability in the assessment.

This may have issues where individual tax returns could impact the overall tax payable by a consolidated group or within a taxing structure.

4.3 Sharpcan Pty Ltd v FCT [2017] AATA 2948 (14 December 2017)

Authority for

Outgoings and expenditure for gaming machine entitlements are deductible pursuant to s 8-1 of the ITAA 97.

Background

In 2005, a trustee purchased a business being a hotel with gaming machines for just over $1 million dollars. In 2010, due to gaming regulation changes, the trustee acquired 18 gaming machine entitlements as a result of a competitive auction process for $600,300 in total. The trustee then elected to pay the gaming machine entitlement fees over a 6 year deferred payment term.

The taxpayer, being the corporate beneficiary with a 100% interest in the trust's income, claimed the amounts paid for the gaming machine fees as deductions being a liability on a revenue account and reduced the taxpayer's net income in 2012 to nil, in the alternative the taxpayer argued that it was of a capital nature and deductible over 5 years under s 40-880(3) of the ITAA 97.

The Commissioner contended that the fees were of a capital nature and was not deductible pursuant to s 8-1 and also wasn't deductible under s 40-880(3) of the ITAA 97.

Issue

The issue was whether the deferred payments for the gaming machine entitlement fees of a revenue or capital nature.

Decision

The Tribunal held that the licence fees paid for pokies machines were deductible under section 8-1 of the ITAA 97 and were not "capital" in nature and so not deductible under s 40-880 of the ITAA 97.[45]

[45] *WLQC v Commissioner of Taxation* [2018] AATA 14 at [28].

The Tribunal found that the outgoings reflected the expected income stream from the use of the gaming assets which the gaming machine entitlements permitted, and were more like a fee paid for the regular conduct of a business than the acquisition of a permanent or enduring asset.

Practical Impact

What follows from this decision, is that it may be possible that a business's ongoing outgoings and expenditures may be deductible on a revenue account where they are paid for the regular conduct of a business rather than the acquisition of a permanent or enduring asset. However, care should be taken in relying upon this decision as the Commissioner has appealed to the Full Federal Court.