



**Administrative
Appeals Tribunal**

**DECISION AND
REASONS FOR DECISION**

LQNN and Commissioner of Taxation (Taxation) [2020] AATA 1915 (24 June 2020)

Division **TAXATION AND COMMERCIAL DIVISION**

File Numbers **2016/4546-9**

Re: **LQNN**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President Dr P McDermott RFD**

Date: **24 June 2020**

Place: **Brisbane**

I affirm the objection decisions.

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Deputy President Dr P McDermott RFD

Catchwords

TAXATION – income tax – whether payments were ordinary income – overpayments – penalties – whether penalties should be remitted – decisions under review affirmed

Legislation

Income Tax Assessment Act 1936 (Cth)
Income Tax Assessment Act 1997 (Cth)
Taxation Administration Act 1953 (Cth)

Cases

Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation (1965) 114 CLR 314
BRK (Bris) Pty Ltd v Commissioner of Taxation (2001) 46 ATR 347; [2001] FCA 164
Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105; [1979] 3 All ER 1025
Commissioner of Taxation v Scully (2000) 201 CLR 148; [2000] HCA 6
Donald Financial Enterprises Pty Ltd v APIR Systems Limited (2008) 67 ACSR 219; [2008] FCA 1112
East Finchley Pty Ltd v Federal Commissioner of Taxation (1989) 19 ALD 85
Federal Commissioner of Taxation v Dixon (1952) 86 CLR 540
Harmony & Montague Tin & Copper Mining Company, Re (Spargo's Case) (1873) LR 8 Ch App 407; [1861-73] All ER Rep 261
Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation (1991) 91 ATC 4546
J & G Knowles and Associates Pty Ltd v Commissioner of Taxation (2000) 96 FCR 402; [2000] FCA 196
MacFarlane v Federal Commissioner of Taxation (1986) 13 FCR 356
Mathoura Property Pty Ltd and Commissioner of Taxation, Re (2013) 97 ATR 1059; [2013] AATA 922
Reiter v Commissioner of Taxation (2001) 113 FCR 492; [2001] FCA 1068
Sinclair v Brougham [1914] AC 398; [1914-15] All ER Rep 622
Trautwein v Federal Commissioner of Taxation (1936) 56 CLR 63; [1936] ALR 425
Zobory v Federal Commissioner of Taxation (1995) 64 FCR 86

Secondary Materials

Miscellaneous Taxation Ruling MT 2008/1 Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard

Taxation Ruling 2008/9 Income tax: meaning of 'Australian superannuation fund' in subsection 295-95(2) of the Income Tax Assessment Act 1997

REASONS FOR DECISION

Deputy President Dr P McDermott RFD

24 June 2020

INTRODUCTION

1. LQNN, (“**the applicant**”) seeks review of the decisions of the Commissioner of Taxation (“**the respondent**”) in respect of the additional amounts assessed by the respondent as business income pursuant to section 6-5 of the *Income Tax Assessment Act 1997* (Cth) (“**ITAA 1997**”) and the administrative penalties imposed under section 284-75 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (“**TAA**”).

BACKGROUND

2. The applicant operated a business as a sole trader in his own name (“**the Business**”). A customer of the Business, (“**the Company**”), based in the Solomon Islands, is a bottler and a supplier of soft drinks and bottled water. The Company sells goods to entities including Logistics Company 1 (“**LC1**”) and Logistics Company 2 (“**LC2**”). To avoid currency conversion costs, LC1 and LC2 would pay for the goods purchased from the Company directly to the applicant’s bank account. It was agreed that the payments owed to the applicant for the purchase of the goods by the Company would be satisfied in full or in part by the amounts received from LC1 and LC2. The Company would then subsidise the applicant where the payments were insufficient.
3. The applicant became a director of the Company in 1981. When the applicant moved to Australia from the Solomon Islands in 1991, he became a passive director of the Company; from the evidence before the Tribunal it is unclear whether the applicant is still a director of the Company. The applicant held 50.4% of the shares in the Company in 1991, having previously held 50% of the shares since 1981.
4. On 18 February 2005, the Company agreed to purchase two properties, Property 36 and Property 38 from the applicant. The Company and the applicant agreed that any payments made by LC1 and LC2 into the applicant’s bank account would subsidise the purchase of the properties.
5. On 18 April 2010, the applicant confirmed that he had received sufficient payments for the agreed price of the properties through payments made by LC1. Legal title of Property 36 and Property 38 was transferred to the Company on 15 July 2010 and 17 October 2014 respectively.

6. On 9 June 2010, the Company engaged the applicant as an advisor on the purchase of brewery equipment in China. The applicant estimated that the purchase would approximately be \$3 million United States Dollars (“**USD**”).
7. On 17 July 2010, the Company agreed to deposit monies to the applicant by way of payment for his advisory role. Around the same time, the applicant re-estimated the cost of the equipment, being \$3.5 million USD.
8. On 15 December 2011, the Company agreed to purchase another property from the applicant, Property 176. The purchase price of the property was \$2 million Australian Dollars (“**AUD**”).
9. On 11 May 2012, the Company notified the applicant that the Company had overpaid the applicant resulting from accounting errors. The Company recorded some of the payments made by LC1 and LC2 into the applicant’s bank account as having been made in Solomon Islands Dollars (“**SBD**”) instead of AUD.
10. On 16 January 2013, the applicant informed the Company that, by his calculations, the overpayments amounted to \$533,136.00 AUD. On 18 January 2013, the Company advised the applicant that, by their calculations, the overpayments amounted to around \$2.2 million AUD. Subsequently, on 22 January 2013, the applicant confirmed that the overpayments amounted to \$2,128,858.69 AUD.
11. On 24 January 2013, the Company advised the applicant that the overpayments would be retained by the applicant for payment for the applicant’s advisory role. On 25 April 2013, the Company advised the applicant, due to a downturn in business, the overpayments would be used by way of payment for the property, and not for the applicant’s advisory role.
12. The applicant has stated that he resigned as director of the Company on 7 May 2013.
13. On 14 July 2013, the applicant confirmed that he had received sufficient payment from the Company for Property 176.

14. On 1 August 2013, the applicant was advised of an income tax audit from the tax years ending June 2009 to June 2012. The audit was initiated due to discrepancies in income reported and expenses claimed in relation to the Business. On 15 April 2013, the applicant confirmed in a phone call with the respondent that the applicant had applied the “*cash method*”, also known as the receipt method, when reporting income for income tax purposes.
15. The applicant had reported his business income as:¹

Year ending	Income (AUD)
30 June 2009	\$1,282,821.40
30 June 2010	\$2,340,571.89
30 June 2011	\$2,833,261.96
30 June 2012	\$1,878,297.36

The applicant reported no income from supplying goods or services during these years. This is despite the fact that in his second witness statement he stated that there were “*very minor items and small goods which I sold to other customers during the relevant period of 1 July 2008 to 30 June 2018*”.²

16. The audit reviewed the GST reported on supplies, the input in the applicant’s Business Activity Statement (“**BAS**”), and the source of the income the applicant relied on for the acquisition and maintenance of the applicant’s rental properties.
17. On 13 September 2013, the applicant stated that “[*The Company*] does not have a loan account with [*him*] for the years 2008 to 2011 inclusive.”

¹ Exhibit L.

² Exhibit C.

18. On 18 June 2014, the respondent provided the applicant with a Position Paper³ and asked the applicant to provide further information due to the information the respondent had received from the Australian Transactions Reporting system.
19. The position paper outlined the applicant's business income pursuant to section 6 and section 7 of the ITAA 1997 as:

Year ending	Income (AUD)
30 June 2009	\$2,203,048
30 June 2010	\$4,020,558
30 June 2011	\$2,835,357
30 June 2012	\$2,098,896

The respondent applied a 20% uplift factor for administrative penalties in respect of the tax shortfalls arising in relation to omitted business income. Subsequently, the respondent raised these penalties to 50% for recklessness.

20. On 25 June 2014, the Company required from the applicant the sum of \$350,000.00 AUD as residual overpayment to the applicant. On 27 June 2014, the applicant repaid the amount to the Company. On 30 June 2014, the Company confirmed that it had received the amount.
21. On 17 September 2014, the respondent provided the applicant with the audit, reasons for the decision and a summary of the audit outcomes. A further month to provide further information was not granted to the applicant before the audit was released.
22. On 25 September 2014, the respondent issued an amended notice of assessment to the applicant which relevantly provided:

³ Exhibit A T-Documents, T12.

Year ending	Item	Original (AUD)	Amended (AUD)	Income (AUD)
30 June 2009	Non-Primary Production business income	\$664,126	\$2,203,048	\$1,839,398
30 June 2010	Non-Primary Production business income	\$1,280,388	\$4,020,558	\$3,772,838
	Foreign Rental Income	Nil	\$130,502	
	Small Business and Tax Break	\$18,462	\$3,692	
30 June 2011	Non-Primary Production business income	\$1,782,434	\$2,835,357	\$2,835,357
	Foreign Rental Income	Nil	\$9,200	
30 June 2012	Non-Primary Production business income	\$1,878,016	\$2,098,896	\$1,740,750

23. On 20 November 2014, the applicant lodged an objection to the decision pursuant to section 14ZY of the TAA. On 25 November 2014, the applicant also lodged an objection to the notices of the amended assessment for the financial years ending 2009, 2010, 2011 and 2012.
24. On 22 July 2015, the applicant made submissions to the respondent relating to the applicant's taxable income.
25. On 28 June 2016, the respondent sent to the applicant the notice of objection decision, which calculated the tax penalties as:

Year ending	Total Penalty (AUD)
2009	\$352,412.10
2010	\$635,342.13
2011	\$239,148.64
2012	\$47,561.85

LEGISLATION

26. Section 6-5 of the ITAA 1997 provides:

6-5 *Income according to ordinary concepts (ordinary income)*

- (1) Your **assessable income** includes income according to ordinary concepts, which is called **ordinary income**.

Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

- (2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.
- (3) If you are a foreign resident, your assessable income includes:
- (a) the *ordinary income you *derived directly or indirectly from all *Australian sources during the income year; and
 - (b) other *ordinary income that a provision includes in your assessable income for the income year on some basis other than having an *Australian source.
- (4) In working out whether you have **derived** an amount of *ordinary income, and (if so) when you **derived** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.

27. Section 59-30 of the ITAA 1997 provides:

59-30 Amounts you must repay

- (1) *An amount you receive is not assessable income and is not *exempt income for an income year if:*
 - (a) *you must repay it; and*
 - (b) *you repay it in a later income year; and*
 - (c) *you cannot deduct the repayment for any income year.*
- (2) *It does not matter if:*
 - (a) *you received the amount as part of a larger amount; or*
 - (b) *the obligation to repay existed when you received the amount or it came into existence later.*
- (3) *This section does not apply to an amount you must repay because you received a lump sum as compensation or damages for a wrong or injury you suffered in your occupation.*

28. Section 167 of the *Income Tax Assessment Act 1936* (Cth) (“**ITAA 1936**”) provides:

167 Default assessment

If:

- (a) *any person makes default in furnishing a return; or*
- (b) *the Commissioner is not satisfied with the return furnished by any person; or*
- (c) *the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income;*

the Commissioner may make an assessment of the amount upon which in his or her judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166.

29. Section 166 of the *Income Tax Assessment Act 1936* (Cth) provides:

166 Assessment

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and*
- (b) the amount of the tax payable thereon (or that no tax is payable); and*
- (c) the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refunds).*

30. The basis for a deduction for the cost of goods sold for trading stock is provided in section 8-1 of the ITAA 1997:

8-1 General deductions

- (1) You can **deduct** from your assessable income any loss or outgoing to the extent that:*
 - (a) it is incurred in gaining or producing your assessable income; or*
 - (b) it is necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.*

Note: Division 35 prevents losses from non-commercial business activities that may contribute to a tax loss being offset against other assessable income.

(2) *However, you cannot deduct a loss or outgoing under this section to the extent that:*

- (a) *it is a loss or outgoing of capital, or of a capital nature; or*
- (b) *it is a loss or outgoing of a private or domestic nature; or*
- (c) *it is incurred in relation to gaining or producing your *exempt income or your *non-assessable non-exempt income; or*
- (d) *a provision of this Act prevents you from deducting it.*

For a summary list of provisions about deductions, see section 12-5.

(3) *A loss or outgoing that you can deduct under this section is called a general deduction .*

For the effect of the GST in working out deductions, see Division 27.

Note If you receive an amount as insurance, indemnity or other recoupment of a loss or outgoing that you can deduct under this section, the amount may be included in your assessable income: see Subdivision 20-A.

31. The public ruling, namely the *Miscellaneous Taxation Ruling MT 2008/1 Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard ("MT 2008/1")* provides guidance upon the meaning of the terms "reasonable care" and "recklessness" referred to in subsection 286-75(1A) of Schedule 1 to the TAA and "intentional disregard".
32. Section 284-75 of Schedule 1 to the TAA provides that the taxpayer can be subject to an administrative penalty where recklessness by an agent is found as the section applies to a statement made by a taxpayer's agent as if it had been made by the taxpayer.

33. Subsection 284-75(6) of Schedule 1 to the TAA provides a “safe harbour” provision:

- (6) *You are not liable to an administrative penalty under subsection (1) or (4) if:*
 - (a) *you engage a *registered tax agent or BAS agent; and*
 - (b) *you give the registered tax agent or BAS agent all relevant taxation information; and*
 - (c) *the registered tax agent or BAS agent makes the statement; and*
 - (d) *the false or misleading nature of the statement did not result from:*
 - (i) *intentional disregard by the registered tax agent or BAS agent of a *taxation law (other than the *Excise Acts); or*
 - (ii) *recklessness by the agent as to the operation of a taxation law (other than the Excise Acts).*

34. Subsection 284-90(1) of Schedule 1 to the TAA states that the taxpayer is liable to an administrative penalty of 50% of the shortfall amount or part if the taxpayer makes a statement to the respondent which is false or misleading in a material particular and the taxpayer acted recklessly when making the statement.

35. Section 298-20 of Schedule 1 to the TAA allows the respondent to remit all or part of the penalty imposed in specific circumstances.

EVIDENCE

Position Paper

36. The following paragraphs outline the respondent’s Position Paper.

37. The applicant received regular payments from the Company, LC1 and LC2, which should be assessed as income tax payments in reference to *Federal Commissioner of Taxation v*

Dixon.⁴ The applicant used these regular payments for personal expenses; this indicates that the payments are assessable income. Though the applicant claims that the Company made overpayments to the applicant's bank account, the applicant still relied on the incoming payments for personal commitments. The applicant, as the sole operator of the Business, should have been aware of the overpayments. The applicant did not account for any of the payments from LC1 and LC2 to the respondent.

38. The respondent concluded that the applicant submitted tax returns which were false and misleading. The respondent determined that the safe harbour provision did not apply, because the applicant did not provide all of the relevant documents to the accountant.
39. In the Position Paper the respondent found that the applicant had failed to take reasonable care, taking into consideration:
- (a) The applicant had been lodging tax returns since 1991;
 - (b) The applicant engaged a registered tax agent;
 - (c) The applicant advised the respondent incorrectly in correspondence dated 22 May 2013 "*you were incorrectly advised that you didn't need to declare income in Australia that had been taxed in another country*";
 - (d) The respondent had no evidence of the advice the applicant claimed to have received; and
 - (e) The applicant did not contact the respondent for clarification.
40. The respondent found that the applicant acted recklessly, considering:
- (a) The applicant had the opportunity to consult with tax agents regarding the additional funds;
 - (b) The applicant did not include the payments as business income;
 - (c) Greater amounts were received from the Company than what the applicant told the respondent;

⁴ (1952) 86 CLR 540.

- (d) The additional amounts were relied upon for personal expenses by the applicant; and
 - (e) The amounts were not reported over a significant period of time.
41. The respondent determined that the applicable shortfall penalty amounted to 25%, regarding the foreign rental income, having regard to the business income 50% base penalty for recklessness, and taking a position that is not reasonably arguable
42. The applicant notified the respondent of the shortfall before tax affairs were conducted, as such, the foreign rent penalty was reduced by 80%.
43. Therefore, the respondent determined a 50% penalty for omitted business income for the income years, 2009, 2010, 2011 and 2012, and a 25% penalty for omitted foreign rent income with a further reduction of 80% for voluntary disclosure. The shortfall charge interest was remitted to the base rate from 2 October 2012 to 18 July 2013.

Objection

44. On 25 September 2014, the applicant objected to the amended assessment and, on 30 September 2014, to the notice of assessment shortfall penalties. The applicant had a number of grounds of objection, including:
- (a) Gross amounts assessed as ordinary income;
 - (b) Assessed on accruals basis;
 - (c) Deductions should not be allowed;
 - (d) The unaccounted payments should be treated as monies held on trust not as ordinary income; and
 - (e) The penalties should fall under the safe harbour provisions.
45. The applicant submitted that the amended assessments should be assessed on an accruals basis. The applicant also submitted that the goods acquired by the applicant amounted to "*trading stock*", as such, the goods were deemed not to be capital outgoings, hence their deductibility was not excluded.
46. The applicant accepted that the sales of the properties were taxable as capital disposals, but only to the extent the advances were not captured, and the amount should be treated as held on trust. The applicant stated:

A presumed resulting trust arises in favour of a person, the 'presumed beneficiary' where they voluntarily transfer property into the name of another, the 'presumed trustee', or in their joint names, and the presumed trustee provides no consideration (Calvery v Green (1984) 155 CLR 242 at 246-7).

The presumed beneficiary's equitable interest in the resulting trust arises at the moment of the transfer (DKLR Holding Co (No 2) Pty Ltd v Cmr of Stamp Duties (NSW) (1982) 149 CLR 431 at 463-4). The presumption of resulting trust is rebuttable by evidence that the presumed trustee was intended to take a beneficial interest. The presumption does not arise if the transfer was intended as a gift to the presumed trustee (the 'resumption of advancement') (Muschinski v Dodds (1985) 160 CLR 583 at 590).⁵

47. The applicant submitted that he was not grossly careless as he engaged tax professionals to assist with the lodgement of the tax returns, and in any event, the safe harbour provision should apply.

Business Income

48. The respondent contended that the consideration received by the applicant from the Company for the disposal of Property 36 and Property 38 were assessable under Capital Gains Tax provisions. The reconciliation payments for properties were, \$1,507,881.01 between 2005 and 2008 and \$92,118.95 in 2009.
49. The applicant advised the respondent that the reconciliation payments from the Company for Property 176 were, \$847,134.61 in 2009 and \$1,152,865.39 in 2010. However, the respondent submitted that these payments were not for Property 176, rather the payments were for Property 36 and Property 38, as the agreed price for Property 176 was not decided until 2011.
50. The respondent was of the view that, on 15 December 2011, the applicant disposed of a Capital Gains Tax ("CGT") asset, the asset being Property 176. Later, the applicant agreed with the respondent, that a CGT event occurred, the capital proceeds for Property 176 being \$2,000,000.⁶ The net capital gain in respect of the sale of Property 176 was \$330,435.⁷

⁵ Exhibit A T-Documents T17.

⁶ Exhibit A T-Documents T2-30; Exhibit B.

⁷ Exhibit A T-Documents T2-31; Exhibit B.

51. The applicant agreed that a CGT event occurred in respect of the sales of Property 36 and Property 38 on 18 February 2005, as the capital proceeds that the applicant was entitled to for Property 36 was \$900,000, and \$700,000 for Property 38.⁸
52. In the absence of complete records, the respondent was unable to properly distinguish the amount received for ordinary income or for the sale of the properties. As such, the respondent made the following calculations:

Year ending	Description	Amount (AUD)
2009	Monies received in personal bank account	\$2,203,048
	Proceeds of \$1.6million were received between 15 February 2005 to 18 April 2010 for properties 36 and 38	
	Average payment per day	\$848.36 per day (for 1886 days)
	Average payment per year	\$309,650
Assessable income for year ending 2009	\$2,203,048 - \$309,650	\$1,893,398
2010	Personal bank account	\$4,020,558
	Estimated amount received (292 days up to 18 April 2010 X \$848.36)	\$247,720
Assessable income for year ending 2010	\$4,020 558 - \$247,720	\$3,772,838

⁸ Exhibit A T-Documents T2-29; Exhibit B.

2011	No amounts received in relation to CGT events	
Assessable income for year ending 2011		\$2,835,357
2012	For property 176, the proceeds of \$2 million were received from 15 December 2011 to 14 July 2013	
	Average payment per day	\$3,460.21 per day (for 199 days)
	Estimated amount received (199 days to 15 December 2011 X \$688.51)	\$688,581
	Net Capital Gain for property 176	\$330,435
Assessable Income for year ending 2012	\$2,098,896 - \$688,581 + \$330,435	\$1,740,750

53. The applicant agreed that the assessable income, excluding the net capital gain from the sale of Property 176, for the income year was \$1,410,315.⁹

Cash basis or accruals basis

54. Cash basis refers to payments which are received during the income year regardless of when work was done. Accruals basis refers to income earned during the year even if a payment was not received. The income assessment was assessed by the applicant on a

⁹ Exhibit A T-Documents T2-31; Exhibit B.

cash basis. Therefore, the applicant calculated on the basis of payments actually received.

55. The applicant submitted that the assessable income he derived in each of the income years is the same amount regardless of being assessed on a cash or accruals basis.¹⁰

Costs of goods sold

56. Costs of goods sold are the direct costs attributable to the production of the goods sold by the Company. The amount includes the costs of the materials used in creating the goods along with the direct labour costs used to produce the goods. The goods acquired from Australia and overseas to sell in the Solomon Islands are called “trading stock”. The respondent contended that trading stock is subject to deductions under section 8-1 of the ITAA 1997.

57. The applicant agreed that the deduction under s 8-1 of the ITAA 1997 in connection with trading stock is:¹¹

Year ending	Deduction
30 June 2009	\$1,211,291.08
30 June 2010	\$2,267,762.02
30 June 2011	\$2,617,868.35
30 June 2012	\$1,872,699.33

Funds held on trust

58. An entity that holds assets on trust for one or more beneficiaries is not taxed on those assets, nor on any income which is derived from those assets in their own right.

¹⁰ Exhibit A T-Documents T2-31; Exhibit B.

¹¹ Exhibit A T-Documents T2-32; T 19 p 120; Exhibit B.

59. The respondent contended that the applicant had not provided enough evidence to suggest that he was holding the unaccounted for funds received by the Company on trust. The applicant had provided evidence of some discussions that the funds for the purchase of the brewery equipment may have been held on trust, but the respondent submitted that there was not enough evidence to establish a trust. The respondent also submitted that the property payments, of which the applicant had ownership interest in, and the ability to loan funds to others suggested that the funds in question were used for the applicant's private purposes rather than being held on trust.

Administrative Penalties

60. The applicant submitted that where there is no tax shortfall there should be no administrative penalty under Division 282 of Schedule 1 to the TAA. In any event, the applicant submitted that he was not grossly careless in not returning the net proceeds from the sale of goods and other assessable income for the relevant years and that the applicant exercised reasonable care by engaging tax professionals.

Lack of reasonable care

61. The MT2008/1 provides that, when fulfilling tax obligations, the care of a reasonable person in the same circumstances must be exercised. Experience, level of experience, experience, and skill are considered. The respondent must also have considered what efforts had been made to avoid incorrect statements in keeping activities, in conducting research and making enquiries before making a statement.

62. The respondent submitted that in this case, the income was simply omitted by the applicant.

Recklessness

63. MT2008/1 provides that recklessness goes beyond mere carelessness or inadvertence by displaying a high degree of carelessness. The care should fall short of the standard expected by a reasonable person in the same circumstance. Therefore, risks that are foreseeable by a reasonable person must be considered, such as making of a statement that has at a real risk of being incorrect. The actual intention of the entity has no

relevance. The entity does not necessarily have to be aware of the risk. The required care is assessed by the likelihood of the risk, as in, the degree of risk and the gravity of the consequences of the relevant factor. If the risk is great, and the probable damage is great, then the behaviour may be described as reckless, even though the entity, in making the statement, thought it reasonable and justified.

64. In the current matter, the applicant was aware of the payments from the Company, but chose not to disclose the payment to the respondent. Subsequently, the respondent submitted that the actions of the applicant were reckless.

Safe harbour

65. A taxpayer may be exempt from administrative penalty where the taxpayer gave all relevant material to their tax agent. However, there is no exemption if the tax agent made the statement as a result of recklessness or intentional disregard of the taxpayer.

66. The applicant submitted that he is exempt from administrative penalty under subsection 284-75(6) of Schedule 1 to the TAA.

67. The respondent contended that, as the false and misleading statements resulted from recklessness, the safe harbour exception cannot apply to this situation.

Remission of Penalty

68. The applicant relied on section 298-20 of Schedule 1 to the TAA for full remission of penalties. The specific circumstances outlined in section 298-20 of Schedule 1 to the TAA include:

- Where there is a genuine mistake in the book-keeping;
- Where the shortfall amount is for tax deferred rather than amount of tax permanently avoided; and
- Where another taxpayer incorrectly discloses an amount or claims a deduction or credit rather than the amount.

69. The respondent contended that there are no exceptional circumstances to warrant a remission of the penalty in this particular matter.

Additional Tax Liability

70. The applicant submitted that the taxpayer must be beneficially entitled to an amount in order for the amount to be assessable, and the following amounts should be excluded from the applicant's assessable income because the respondent did not derive the amounts as ordinary income for the purposes of section 6-5 of the ITAA 1997:

Year Ending	Income (AUD)
30 June 2009	\$610,576.60
30 June 2010	\$1,432,266.11
30 June 2011	\$2,095.04
30 June 2012	\$137,547.36

71. The applicant relied on *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation*,¹² where the Court observed that “*derived income*” is not just income received, but gains completely made.
72. In *MacFarlane v Commissioner of Taxation*,¹³ the Court found in that matter that, though the taxpayer had legal title to income, it could not be classified as solely “*derived income*”. In that matter, the taxpayer's investment income was held in half share under an express, resulting or constructive trust for his de facto spouse. The Court found that the de facto spouse had beneficiary entitlement to the income. The Court concluded at [18]:

“It follows, in my opinion that, for taxation purposes the income in question should be treated as derived by the appellant and Miss Masterman in equal shares”

¹² (1965) 114 CLR 314.

¹³ (1986) 13 FCR 356.

73. In *Zobory v Commissioner of Taxation*,¹⁴ the Court remarked that “*the general provisions of the Income Tax Assessment Act 1936 are directed to income to which a taxpayer is beneficially entitled*”.
74. In the matter of *Reiter v Commissioner of Taxation*,¹⁵ the Court found the taxpayer was not entitled to worker’s compensation income the taxpayer had received, therefore the taxpayer was not taxed for that income as the taxpayer had no legal entitlement to that income.
75. *Taxation Ruling 2008/9 Income tax: meaning of ‘Australian superannuation fund’ in subsection 295-95(2) of the Income Tax Assessment Act 1997 (“TD 2008/9”)* provides that any amounts mistakenly paid to a taxpayer to which the taxpayer is not beneficially entitled cannot be regarded as ordinary income under section 6-5 of the ITAA 1997. The applicant submitted that the following amounts were not ordinary income:
- (a) Inadvertent overpayments made by the Company to the applicant to which he was not beneficially entitled as a result of the Company’s internal accounting errors (which were subsequently repaid by the applicant, or set-off against the purchase price of properties sold to the Company);
 - (b) Amounts transferred by the Company for the Brewery Project which had no connection to the applicant’s business income and did not relate to the sale of any goods;
 - (c) Part of the purchase price for Property 36 and Property 38 of \$1.6 million AUD, which had no connection to the applicant’s business income; and
 - (d) Part of the purchase price for Property 176 of \$2 million AUD (previously held by the applicant for Brewery Project) which also had no connection to the applicant’s business income.
76. In *Re Harmony and Montague Tin and Copper Mining Company (Spargo’s Case)*,¹⁶ it was decided that repayment can include circumstances where the liability to repay the

¹⁴ (1995) 64 FCR 86.

¹⁵ (2001) 113 FCR 492; [2001] FCA 1068.

¹⁶ (1873) LR 8 Ch App 407; [1861-73] All ER Rep 261.

particular amount is set-off against a separate payment obligation of the other party. Subsection 170(10AA) of the ITAA 1936 permits the respondent to amend assessments at any time in order to give effect to section 59.30 Item 2.

77. The applicant submitted that section 59-30 of the ITAA 1997 excludes amounts repaid from the applicant's assessable income including the set-off of purchase prices for the real properties and \$350,000 AUD to the Company on 27 June 2014.

Applicant Witness Statement

78. The applicant stated that since moving back to Australia in 1991 he has had limited involvement with the daily operations of the Company. In 1991, he held 50.4% of the shares, and the Company had five directors, including the applicant. The applicant stated that he formally resigned as a director from the Company on 7 May 2013.

79. In 1991, the directors were Director 1 ("D1"), Director 2 ("D2"), Director 3 ("D3"), Director 4 ("D4"), and the applicant. Later, the applicant stated that D1, D2 and D3 were not directors in 1991, only D4 (who is also the applicant's wife)¹⁷ and himself, who were also directors when the Company was incorporated in 1981. D1 was not a director when the Company became incorporated in 1981.¹⁸

80. On 11 May 2012, the General Manager ("the GM"), who had been the general manager of the Company since 2000,¹⁹ wrote to the applicant stating that the Company had made overpayments to the applicant's bank account as a result of accounting errors. The applicant claims that prior to the GM's letter he was not aware of the overpayments. The applicant, after the overpayments were brought to his attention, reviewed the bank statements and records to determine the total amount resulting from the overpayments. The overpayments were then considered as part of the payment for the applicant's participation as an advisor on the Brewery Project. When the applicant received another notification of an overpayment of \$350,000 AUD, the applicant repaid the amount. The

¹⁷ Exhibit C

¹⁸ Exhibit M.

¹⁹ Exhibit G.

applicant claimed that the confusion between payments was due to the currency conversions.

81. The applicant claimed that the *“discrepancy between business income and business expenses claimed in my original tax returns ... were the result of transposition errors made by my accountant at the time in lodging my tax returns.”*²⁰

82. Annexed to the applicant’s witness statement are documents demonstrating:

- (a) On 11 May 2012, the Company informed the applicant that there were errors discovered in payments, this letter was signed by the GM;
- (b) On 16 January 2013, the applicant replied to the Company with an estimated amount of overpayment;
- (c) On 18 January 2013, the Company disputed the estimated amount of overpayment;
- (d) On 22 January 2013, the applicant revised the estimated amount of overpayment;
- (e) On 24 January 2013, the Company agreed that the estimate was correct;
- (f) On 25 April 2013, the Company sent a letter to the applicant, stating that all overpayments will go towards payment for the Brewery Project;
- (g) On 25 June 2014, the Company asked for payment of \$350,000; and
- (h) On 27 June 2014, the applicant repaid the full amount.

The applicant also attached, to his supplementary witness statement dated 8 March 2018, bank statements demonstrating that he was incorrectly paid amounts into his bank account.

83. The applicant, as at 8 March 2018, was a majority shareholder of the Company, holding approximately 53.25% shares.²¹

²⁰ Exhibit C.

²¹ Exhibit C.

84. On 28 January 2013, the applicant was informed that his services were no longer required in respect of the acquisition of equipment from China and that the Company would proceed with the project using Solomon Islands based financiers and suppliers.
85. The applicant and D4, his wife, have also been directors of another company (“**the Other Company**”) since 1994 and, on 2 March 2011, they became shareholders.²²

James Neville Allen, Solicitor for the Applicant, Witness Statement

86. Mr Allen stated that the exchange rates for USD to AUD in the years 30 June 2009 to 20 June 2012 were as follows:²³

Income Year	Exchange Rate (1 AUD = x USD)
2009	0.7611
2010	0.9042
2011	1.0159
2012	1.0632

87. Mr Allen stated that the operating profit margin during 2012-2013 was 4.6% for wholesale businesses “*machinery and equipment wholesaling*” and 3.2% for wholesale businesses “*grocery, liquor and tobacco wholesaling*”.
88. On 5 March 2018, the respondent advised that it did not accept the exchange rates or the operating profit margin for “*grocery, liquor and tobacco wholesaling*”. Mr Allen stated that the exchange rates specified were the same as those used in the respondent’s Position Paper, and in the applicant’s accountant’s business income determination. On 6 March 2018, Mr Allen undertook a search of the Australian Bureau of Statistics’ database and found the same calculations for the profit margin.

²² Exhibit O.

²³ Exhibit D.

Andrew Radclyffe Affidavit

89. On 8 March 2018, Mr Radclyffe, a “*barrister and solicitor practicing in Solomon Islands*”,²⁴ was engaged by the applicant’s solicitors to obtain certified copies of the fixed-term agreements of the relevant properties. On 12 March 2012, Mr Radclyffe certified the copies. The documents demonstrate that the properties were transferred to the Company.

The Applicant’s Accountant, Witness Statement

90. The Applicant’s accountant is employed with an accountant firm that has acted as the applicant’s accountant since 5 June 2013 (“**the Accountant**”).
91. On 17 July 2014, the Accountant was engaged to determine the applicant’s business income, costs of goods sold, gross profit, net business profit, taxable income and tax payable for years ending 2009-2012.
92. The Accountant states that the sale invoices issued were on an accruals basis and the business income of the applicant is as follows:

Income Year Ending	Business Income (AUD)
2009	\$1,282,821.40
2010	\$2,340,571.89
2011	\$2,833,261.96

93. The Accountant determined the business income for the years ending June 2009, June 2010, and June 2011 by converting the invoices from USD by using the exchange rate provided in the Position Paper. She added the income for the AUD and USD to calculate the business income.
94. The Accountant stated:

The difference between the business income amounts relied on by the Respondent as a result of the Respondent’s notice of objection decision and the

²⁴ Exhibit E.

business income amounts relied on by the applicant as a result of my determination of the applicant's business income is as follows:

- a) \$610 576.60 for the 2009 Income Year (\$1 893 398 - \$1 282 821)
- b) \$1 432 266.11 for the 2010 Income Year (\$3 772 838 - \$2 340 571.89)
- c) \$2 095.04 for the 2011 Income Year (\$2 835 357 - \$2 833 261.96)²⁵

The General Manager, Witness Statement

95. The GM had been working as general manager of the Company since 2000. The GM wrote to the Company on 24 March 2016, stating that the last day of his employment would be 24 June 2017.²⁶

96. LC1 and LC2 paid monies into the applicant's account, which satisfied the excess for the purchase of properties. The applicant was overpaid as a result of accounting errors.

97. The GM stated:

Whilst the Applicant received payments from [LC1] and/or [LC2] in AUD, an employee of [the Company] recorded those payments as though they were received in Solomon Islands Dollars (SBD).²⁷

98. The GM went on to say:

Based on [the Company]'s purchase journal..., the following amounts were paid to the Applicant for the purchase of goods during the 2009 to 2011 financial years

- a. \$1 282 821.40 for the year ended 30 June 2009;
- b. \$2 340 571.89 for the year ended 30 June 2010; and
- c. \$2 833 261.96 for the year ended 30 June 2011.

All funds in excess of the above amounts that were deposited into the Applicant's bank account during the Relevant period were due to inadvertent overpayments, which were initially applied toward the Brewery Project and/or subsequently applied toward the purchase of the real properties.²⁸

²⁵ Exhibit F.

²⁶ Exhibit I.

²⁷ Exhibit G.

²⁸ Exhibit G.

SUBMISSIONS

Applicant Submissions

99. The respondent's assessment was based on bank deposits as income. The applicant recorded all sales through invoice books.²⁹ These invoices, together with MYOB files, were provided to the applicant's accountants. The Accountant checked the MYOB files against the sale invoices, applying the respondent's own exchange rates.
100. The applicant submitted that the respondent did not put to the applicant that his business income had been misstated, as the sale invoices were incomplete. However, the respondent calculated the applicant's business income with a difference of \$2,044,937.75.
101. The applicant contended that the Tribunal must determine whether the respondent's calculations were correct, in respect of the additional business income, and whether the amounts assessed constituted an ordinary income pursuant to section 6-5 of the ITAA 1997; if the respondent's calculations were correct, whether section 59-30 of the ITAA 1997 applies and whether the respondent should have imposed administrative penalties for recklessness under Subdivision 284-B of Schedule 1 to the TAA. The applicant also submitted that the Tribunal must consider whether there is any discretion to remit the administrative penalties.
102. The applicant submitted that the respondent's calculations are attributable to inadvertent overpayments made by the Company, or on behalf of the Company by LC1 and LC2, due to an accounting error, the amounts transferred to the applicant because of his advisory role in the Brewery Project and the amounts transferred to him by the Company for Property 36, Property 38 and Property 176. The applicant's submitted that there were no overpayments made by LC1 and LC2, and that any overpayments were not separate from the payment made for the advisory role and then for Property 176. The applicant also submitted that the monies received for Property 36 and Property 38 were not attributable to the additional amount, as the payments were made on 18 April 2010, and the overpayments were discovered on 11 May 2012.

²⁹ Exhibit J; Exhibit K.

103. The applicant did not claim that the overpayments funded the advisory role, Property 36, Property 38 and Property 176. In fact, Property 36 and Property 38 were funded from payments from LC1, as directed by the Company. As evidenced, Property 176 was to be funded in the same way, until the Company decided that the overpayments would finance the property. When the overpayments were first discovered the Company agreed that these overpayments would subsidise for the advisory role the applicant played.
104. The applicant submitted that the applicant's calculated business income reflected the total amounts found in the applicant's sales invoices. The applicant's profit margin ranges were between 3% and 7.6% in the disputed years. This is comparable with the industry benchmarks. The applicant's percentage mark-ups were similar to his profit margins of those years. The applicant contended that the payments which were entered the applicant's account were in excess of the total sales invoices, and are not ordinary income pursuant to section 6-6 of the ITAA 1997. The excess payments were overpayments, therefore, the payments cannot be regarded as income derived by the applicant. The applicant submitted that if the respondent's calculations were correct that for the years ending 30 June 2009 and 30 June 2010, the applicant would have derived profit margins up to 39% and marked-up the cost of his goods by up to 66%.
105. The evidence showed that the applicant was paid in excess; there is no evidence to suggest that the applicant sought payment in excess of entitlement. The applicant accounted for the money which did not belong to him. The applicant referred to the decision of *Sinclair v Brougham*.³⁰ The applicant accepted that there is an obligation for the taxpayer to account for monies as in the case of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*.³¹
106. Section 6-5 of the ITAA 1997 provides that ordinary income derived by a taxpayer is assessable income of the taxpayer. Therefore, the taxpayer must be beneficially entitled to the money, if it is to be assessable. It is not sufficient to say that money received is money derived. The applicant refers to the High Court matter of *Arthur Murray (NSW) Pty*

³⁰ [1914] AC 398; [1914-15] All ER Rep 622.

³¹ [1981] Ch 105; [1979] 3 All ER 1025.

Ltd v Federal Commissioner of Taxation.³² In that matter the Court determined the money received is money which has “come home”. The Court observed that:

... amounts received are unaffected by legal restrictions, as by reason of a trust or charge in favour of the payer – not only that they have been received beneficially – but in that the situation has been reached in which they may properly be counted as gains completely made...

107. In *MacFarlane v Commissioner of Taxation*,³³ the Full Court of the Federal Court held that the taxpayer was not required to pay full tax on some assets, because he was holding the assets in constructive trust for his de facto partner. This decision was applied in the matter of *Zobory v Commissioner of Taxation*,³⁴ where the taxpayer had misappropriated funds from a company, the Court found that this was not income received, as he was not a beneficiary of the money. The issue was also considered in *Reiter v Commissioner of Taxation*,³⁵ which involved the applicant being rejected for worker’s compensation.

108. TD 2008/9 provides that:

10. For an amount to be income according to ordinary concepts it must be income derived by the taxpayer. The proposition that a taxpayer will not derive ordinary income unless they are beneficially entitled to the amount has longstanding judicial support.

109. The respondent, in their calculations, has included the overpayments, which the applicant contends are not derived income. When the Company agreed to purchase Property 176 from the applicant, the respondent was not aware of the accounting errors, nor the overpayments. The applicant submitted that the respondent’s observation that the payments could not have been received before 2012, is incorrect.

110. Based on the rule in *Spargo’s Case*,³⁶ repayment can include circumstances where the liability to repay the particular amount is set-off against a separate payment obligation of

³² (1965) 114 CLR 314.

³³ (1986) 13 FCR 356.

³⁴ (1995) 64 FCR 86.

³⁵ (2001) 113 FCR 492; [2001] FCA 1068.

³⁶ (1873) LR 8 Ch App 407; [1861-73] All ER Rep 261.

the other party. This rule was affirmed in *East Finchley Pty Ltd v Federal Commissioner of Taxation*.³⁷

111. Subsection 170(10AA) of the ITAA 1936 allows the Commissioner to amend assessments at any time in order to give effect to section 59-30 of the ITAA 1997.
112. The purchase of Property 176 has been assessed according to section 104-10 of the ITAA 1997. This means that the respondent determined the capital proceedings under section 116-20 of the ITAA 1997. The phrase “*in respect of*” in paragraph 116-20(1)(a) of the ITAA 1997 has a wide meaning.³⁸ The payment here is a set-off, and constitutes repayment pursuant to section 59-30 of the ITAA 1997.
113. The applicant contended “*importantly, the operation of section 59-30 produces a fair and equitable outcome in this case because it avoids the incidence of double taxation on the Applicant.*”
114. The applicant contended that there is no basis for imposing an administrative penalty under Division 284 of Schedule 1 to the TAA, as the applicant was not grossly careless in not returning the net proceeds from the sale of goods and other assessable income in respect of the relevant period, and the applicant took reasonable care in complying with the tax law provisions. The applicant referred to *Re Mathoura Property Pty Ltd and Commissioner of Taxation*.³⁹ The applicant submitted that he was not reckless as he engaged a registered tax agent.
115. The applicant disputed the submission that the non-appearance of a witness and untendered evidence, which the applicant claims is irrelevant evidence, should negatively affect the applicant’s case.

³⁷ (1989) 19 ALD 85.

³⁸ *Commissioner of Taxation v Scully* (2000) 201 CLR 148; [2000] HCA 6; *J & G Knowles and Associates Pty Ltd v Commissioner of Taxation* (2000) 96 FCR 402; [2000] FCA 196.

³⁹ (2013) 97 ATR 1059; [2013] AATA 922.

Respondent Submissions

116. The respondent submitted that *“taxable income is calculated by deducting from a taxpayer’s assessable income all allowable deductions. Assessable income consists of ordinary income and statutory income that is not exempt or otherwise excluded.”*
117. The regularity of the payments is relevant to a consideration of income, according to ordinary concepts, as is the use of that money for regular commitments, such as living expenses.
118. The respondent submitted that:
- (a) The applicant is limited to the grounds in the objection, unless the Tribunal otherwise orders; and
 - (b) The applicant bears the onus of proof in the review, on a balance of probabilities, to show that the assessment was wrong, and the applicant’s view is the correct order.
119. The respondent contended that the applicant sought to draw a distinction between payments received directly from the Company and payments received on behalf of the Company.
120. The respondent submitted that *“the task of the applicant as the taxpayer, upon this application to the Tribunal, is to show that the amount of money for which tax is levied by an assessment exceeds his actual substantive liability.”* The respondent relied on the case of *Trautwein v Federal Commissioner of Taxation*.⁴⁰
121. The respondent contended that the *“applicant’s material is unreliable, inconsistent, incomplete, and the suggested explanation for the additional money would not satisfy the Tribunal to the requisite standard.”* The respondent submitted that the applicant had produced documents, but had not gone so far as to impart his unique knowledge as the taxpayer in respect of the documents. The respondent relied on the comments of Hill J in

⁴⁰ (1936) 56 CLR 63; [1936] ALR 425.

Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation,⁴¹ who found that it is for the taxpayer to provide evidence for the relevant determination, and the Court cannot simply rely on the taxpayer's testimony.⁴²

122. The respondent described the applicant's evidence as "*inconsistent, unreliable, and at times, implausible*." The applicant commenced his evidence by accepting that he was still a director of the Company, contrary to his witness statement which recorded that the applicant resigned as director on 7 May 2013, the applicant confirmed the resignation in cross-examination. The applicant appeared to distance himself from the Company, however, he refers to an asset as "*ours*", speaking on behalf of the Company. The applicant provided "*inconsistent*" and "*implausible*" testimony in relation to the overpayment, the respondent submitted that "*the applicant's suggestion that he could check his records thoroughly and more completely in 4 days than he could check his records over a period of 8 months is quite unlikely*." The applicant provided evidence that he recorded the overpayment amounts, this record was described as not being regularly maintained, but it was up to date, and incomplete. The applicant suggested that consulting 5 years' worth of bank statements was more efficient than consulting the records. The applicant contended that the payments from LC1 and LC2 were not a part of his income; however, the payments were used to pay the invoices issued from the applicant to the Company. The applicant described the process, stating that the applicant would issue an invoice to the Company, the Company would issue invoices to LC1 and LC2, LC1 and LC2 would pay into the applicant's bank account, the Company would provide an email of the invoices to the applicant, the applicant would notify the Company when the monies were deposited, the Company would issue a receipt to LC1 and LC2 and the applicant would make his own record. The respondent contended that as such there should have been a detailed paper trail; however, none of these records had been produced.
123. The GM provided a witness statement dated 19 May 2017. The applicant claimed that the GM and the GM's wife were involved in a domestic dispute with D4, the applicant's wife. The payment made by the applicant to the GM, the applicant claims, was actually in relation to the death of a dog, which was allegedly owned by the GM. When asked, the

⁴¹ (1991) 91 ATC 4546 at [31].

⁴² See also; *Donald Financial Enterprises Pty Ltd v APIR Systems Limited* (2008) 67 ACSR 219; [2008] FCA 1112 at [119].

applicant did not simply agree that he no longer had anything to do with the GM; rather, he did not have any more business dealings. The GM is recorded as the contact person for the Company and the Other Company. The respondent contended that the inability to cross-examine the GM was a denial of procedural fairness. The respondent submitted that the GM's witness statement should be afforded no weight.

124. D4, the applicant's wife appeared to have had direct involvement with the events in issue. She is still a director of the Company, however, she did not provide any evidence before the Tribunal. There has been no explanation offered for the absence of her evidence.
125. The Accountant agrees that the applicant's bank account records more money being deposited than the invoices issued, she did not explain why this was the case. On the basis of the Accountant's evidence, the applicant's total income is incomplete and inaccurate, as the applicant did not provide her with all of his invoices.
126. The applicant has not provided independent evidence from any other director, shareholder or employee of the Company.
127. The respondent submitted that "*there is no supporting documentation, no receipt, no calculation sheet or spreadsheet showing the excess payments made and allocated to this supposed purchase*", referring to the purchase of Property 36 and Property 38. The applicant claims that he checked his own bank statements to ascertain what excess payments had been received from LC1 and LC2. The respondent contended that the applicant would have been required to consult invoices issued by the Company as well. The applicant claimed that excess payments from LC1 and LC2 satisfied the purchase prices of Property 36, Property 38 and Property 176.
128. The respondent submitted, that the applicant's calculations were significantly different from those of the Company regarding the overpayments, and took a period of over 8 months to finalise the figure. The respondent contended that "*no calculation, reconciliation or any supporting documentation was provided by the Applicant to [the Company], and none has been produced since.*"
129. The respondent submitted in relation to the overpayment, it is unlikely that the Company suggested that the applicant retain the money by way of payment for acting as advisor on

the Brewery Project, a project which took place 2 years prior. The respondent contended that the interest alone would be incentive for the Company to have the money, "*the opportunity costs and lost earnings would be considerable.*" The respondent noted that the applicant had no documentary evidence of his work on the brewery project, though the applicant claimed that he conducted investigations for the project. The proposal for the project, the respondent submitted, was "*vague, imprecise and lacking specificity*" as to what kind of equipment the Company was seeking. The documents which were provided included "*working capital*", which the respondent contended is "*unnecessary and unconventional.*"

130. The respondent submitted that the overpayment was then used to satisfy payment for Property 176, the respondent submitted that "*there is no explanation why it took 3 months to record that the entire payment had been received*". The respondent accepted that some of the payments made into the applicant's account were relating to a CGT event, however not all of the payments. The respondent apportioned the calculations according to these amounts. The respondent submitted that "*given the lack of documentation by the Applicant it is not possible to properly reconcile any such claimed amounts.*" The applicant used the expenses provided to him by the Company for his personal expenses. The respondent submitted that the applicant's evidence was insufficient.

131. The respondent submitted that section 59-30 of the ITAA 1997 does not apply. The applicant contended that the section applies in two ways; in relation to a set-off; and in relation to the \$350,000 AUD. The respondent submitted that the section does not allow for any set-off and the \$350,000 AUD should be classified as a transfer and not a repayment.

132. The respondent contended that the applicant's behaviour demonstrated recklessness more than mere failure to take reasonable care. The respondent referred to the test for recklessness in *BRK (Bris) Pty Ltd v Commissioner of Taxation*.⁴³

Recklessness means to include in a tax statement material upon which the Act or regulations are to operate, knowing that there is a real, as opposed to a fanciful, risk that the material may be incorrect, or be grossly indifferent as to whether or not the material is true and correct, and that a reasonable person in the position of

⁴³ (2001) 46 ATR 347; [2001] FCA 164.

the statement-maker would see there was a real risk that the Act and the regulations may not operate correctly to lead to the assessment of the proper tax payable because of the content of the tax statement. So understood, the proscribed conduct is more than mere negligence and must amount to gross carelessness.

133. By not including a significant amount of his income, the applicant showed gross carelessness, a disregard or indifference to risks foreseeable by a reasonable person. The respondent submitted that the safe harbour provisions cannot apply.
134. The respondent submitted that “*the application of the penalties in all of the circumstances of this case does not produce an unreasonable or unjust result*”, therefore there can be no remission of penalties.

CONSIDERATION

135. This application was made in respect of the income years ending 30 June 2009, 30 June 2010, 30 June 2011, and 30 June 2012. The applicant no longer seeks review of the objection decision in relation to the income year ending 30 June 2012. The income years ended 30 June 2009, 30 June 2010, 30 June 2011 are now in consideration by the Tribunal.
136. I have unfortunately concluded that the applicant is not a credible witness. One matter of concern was the status of the applicant as a director of the Company. The Tribunal was informed that the applicant became a “*passive*” director in 1991 when he migrated to Australia. The applicant, when giving evidence before the Tribunal, stated that he was a director of the Company. He then confirmed that he said in his witness statement that he had resigned as a director of the Company in 2013, which purported resignation was recorded in a company registry. The applicant asserted that he did not know how the transactions of the Company were recorded in the books of the Company.
137. The case of the applicant is that overpayments of money that he received from the Company, LC1 and LC2 were included in his taxable income.
138. A letter dated 11 May 2012 from the GM was provisionally admitted into evidence. In that letter, the GM informed the applicant that the Company had discovered errors in the payments account to the applicant and that these errors involved the Company’s direct

payments to the applicant, as well as payments by customers of the Company, namely LC1 and LC2. The applicant has asserted that he was not aware of the overpayments before he received the letter of 11 May 2012. The applicant has indicated he thought that the letter of 11 May 2012 may have been received by email.

139. The central case of the applicant is that there was an overpayment of money, but he has on different occasions provided the respondent with different amounts of the overpayment.
140. On 16 January 2013, the applicant asserted in his response “*after checking [his] records*” that the amount of the overpayment was \$533,136.13 AUD.⁴⁴ When the applicant was asked, in giving evidence before the Tribunal, how this amount was calculated, he stated that he made it up and that he just did an estimate. The applicant later admitted: “*This figure not true*”. He then later stated that he did not make it up and the figure was “*incomplete*”.
141. On 22 January 2013 the applicant wrote a further response in which he stated that he had checked his records thoroughly and the amount of the overpayment was \$2,128,858.69 AUD.⁴⁵
142. On 24 January 2013 the GM wrote a letter in which he stated that the amount of the overpayment was \$2,128,858.69 AUD. The applicant was not asked for the return of the funds but to keep it as a deposit for a brewery project. The applicant produced that letter to the respondent during the audit on 25 May 2013.
143. In evidence is a letter to the applicant from the GM dated 18 February 2005 which is headed “*Proceeds of Sales from [LC1]*”.⁴⁶ The applicant, in giving evidence, agreed that the excess payments from LC1 that he would be receiving should be allocated to the purchase of the two properties referred to in the letter. In evidence is a letter to the GM from the applicant in which the applicant referred to the letter of agreement dated 13 February 2005 (and not the letter dated 18 February 2005) in which the applicant

⁴⁴ Exhibit C, Annexure 2.

⁴⁵ Exhibit C, Annexure 4.

⁴⁶ Exhibit A T-Documents, T20, p. 123.

confirmed that the moneys have now reached the required amount.⁴⁷ While the reference to the incorrect date in the letter of 13 February 2005 may be excused as a typographical error as was suggested to the applicant in cross-examination, it does detract from the authenticity of the document.

144. The applicant, in giving evidence, stated that he went through five years' worth of bank statements to quickly work out whether that \$1.6 million AUD had been received. The applicant stated that he did this rather than keep a book of account that records the overpayments from LC1 and LC2. The applicant was asked whether it would have been just as simple to check his book of account. The applicant conceded that the book of account was incomplete. One item of evidence which the applicant regards as crucial was the book of account, but this was not provided to the respondent or the Tribunal prior to the hearing.
145. When this application was originally listed for hearing the GM was unavailable to attend the hearing and the hearing was vacated. Even though the applicant conceded that the GM is an important witness for his case, as was listed on the hearing certificate, he informed the Tribunal that he only gave the GM less than one month's notice to attend the Tribunal. This was despite the fact that the applicant had, on 7 December 2017, been provided with the Listing Notice of the hearing of this matter, giving him over three months' notice of the date of the hearing. In his letter dated 24 March 2017 in which the GM gave notice of his resignation as the general manager of the Company, he stated that he was available to "*assist with the transition*". Presumably, such assistance would have included appearing as a witness before the Tribunal.
146. Now the applicant asserts that because of domestic violence issues the GM is not in the "*camp*" of the applicant. The applicant asserts that there was an attempted physical assault of his wife, but his wife was not called as a witness to give evidence to explain this event. I do not accept the explanation of why the GM did not attend the hearing. While the applicant stated that he doesn't have any business dealings with the GM, he did not agree that he does not have anything to do with him at all. The applicant has an interest in companies in which the GM is still registered as a contact person; namely, the Company, and the Other Company (of which the applicant is a director and shareholder).

⁴⁷ Exhibit A T-Documents, T22, p. 126.

147. Nevertheless, whatever the reason why the GM did not attend the hearing, the respondent and the Tribunal were denied the opportunity to ask the GM questions about the considerable correspondence that was addressed to, and authorised by him. The GM could have been asked to explain how the “*inadvertent overpayments*” had occurred as well as producing the documentation that explained how these overpayments were made. The GM may have been asked to produce the emails that he sent to the applicant. The applicant has not produced his own emails to the respondent or Tribunal so that the providence of the emails could be verified.
148. The GM could have been asked to explain and produce documentation concerning the unusual transaction whereby advance payments were made for the purchase of two properties without any apparent security being provided for the protection of funds being sent to Australia which is a distinct jurisdiction from the Solomon Islands. The respondent has referred to the fact that the interest alone on a sum of over \$2 million AUD would be considerable. The applicant, in giving evidence, stated that he was not liable to account for that interest.
149. After considering the evidence before me I have determined that the applicant has not discharged the onus under section 14ZZK of the TAA of showing that the assessment is excessive. The applicant is not a credible witness in putting forward three estimates of money which was said to be overpaid. I am concerned that in his letter dated 16 January 2013 he asserted to the respondent that after “*checking [his] records*”, the amount of the overpayment was \$533,136.13 AUD. However, in giving evidence before the Tribunal, the applicant stated that he had made up that amount and the amount was only an “*estimate*”. The applicant made a false statement to the respondent in stating that he checked “*[his] records*”. There is no cogent evidence before the Tribunal to explain the unusual features of the transaction whereby the overpayment could be retained for two years before the sale of the properties.
150. The Accountant was called to give evidence because, since June 2013, she has undertaken bookwork for the applicant. The Accountant mentioned that her firm did not act for the applicant for the relevant years in question. While she gave evidence of her work in analysing invoices issued to the Company, she agreed that the bank account of the applicant recorded more money being deposited than there were invoices issued. The applicant had stated that he sold some minor items to customers during the relevant

years. This leads me to conclude that, even if the book of account was in existence during the relevant years, the records of the applicant were incomplete. The “safe harbour” provisions do not apply as there is no cogent evidence that the applicant provided all his documents to his agent. There is no evidence of any recklessness by the agent as to the operation of a taxation law: subsection 284-75(6) of Schedule 1 to the TAA.

151. There is no cogent evidence before the Tribunal that enables the application of section 59-30 of the ITAA 1997. The case of the applicant is based upon a statement in paragraph 25 of the amended witness statement of the applicant in which he stated that he repaid \$350,000 AUD to the Company.⁴⁸ The GM, in his letter of 25 June 2014,⁴⁹ has requested the transfer of \$350,000 AUD to the Company, this was done on 27 June 2014 by bank transfer. The GM did not appear in person to explain the reason why the payment was requested. The applicant himself, in giving evidence, has disclaimed the suggestion in his statement that money was actually repaid. He remarked: “*I don’t think we agree in that precise statement to say we repay*”. The applicant stated that when he was asked to make a payment, he “*just make the payment*”. He did not explain why he made the payment of \$350,000 AUD.
152. The applicant seeks remission of the penalty. Division 298 in Schedule 1 to the TAA contains machinery provisions for administrative penalties. I do not consider that there should be any remission of the administrative penalty under section 298-20 of Schedule 1 to the TAA.
153. There is no basis to disturb the decision that the applicant was considered to have been recklessness. To impose an administrative penalty for recklessness, it is settled by the decision of Cooper J in *BRK (Brisbane) Pty Ltd v Commissioner of Taxation*,⁵⁰ that the conduct of a taxpayer must be more than mere negligence and must amount to gross carelessness. I consider that the conduct of the applicant had certainly, at the very least, amounted to gross carelessness.

⁴⁸ Exhibit C.

⁴⁹ Exhibit C, Annexure 7.

⁵⁰ (2001) 46 ATR 347; [2001] FCA 164.

154. A taxpayer is liable to an administrative penalty if a taxpayer makes a statement to the respondent and the statement is false and misleading in a material particular, because of things in it or omitted from it: subsection 284-75(1) of Schedule 1 to the TAA. I am concerned about the response to the respondent of the applicant which is dated 16 January 2013. The applicant asserted in his response after “*checking [his] records*” that the amount of the overpayment was \$533,136.13 AUD. However, in giving evidence before the Tribunal, the applicant stated that he had made up that amount and the amount was only an “*estimate*”. It is difficult to reconcile this oral evidence of the applicant with his assertion in his response that he had only informed the respondent of the amount after checking his records. I have earlier (at [15]) referred to another example where the applicant has made false statements to the respondent. In the period from 1 June 2008 to 30 June 2012, the applicant reported no income from supplying goods. This is despite the fact that in his second witness statement the applicant stated that there were “*very minor items and small goods which I sold to other customers during the relevant period*”.⁵¹
155. Had the Commissioner put forward a submission that the conduct of the applicant was false and misleading in a material particular and warranted a higher level of penalty, the Tribunal would have had to give consideration to the imposition of an administrative penalty at the rate of 75 per cent of the shortfall amount for the intentional disregard of a taxation law: subsection 284-90(1) of Schedule 1 to the TAA. However, I have determined that it would not be “*fair*” for the Tribunal to consider such a course of action when the applicant had no notice of such a course of action.
156. The imposition of the administrative penalty does not produce an unreasonable or unjust result.

⁵¹ Exhibit C, para 2.

DECISION

157. I affirm the objection decisions.

I certify that the preceding 157 (one hundred and fifty-seven) paragraphs are a true copy of the reasons for the decision herein of Deputy President Dr P McDermott RFD

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Associate

Dated: 24 June 2020

Dates of Hearing: **21, 22 March 2018, 11 June 2018**

Counsel for the Applicant: **Mr David Marks QC**

Solicitor for the Applicant: **Mr James Allen, HWL Ebsworth**

Counsel for the Respondent: **Mr Amelia Wheatley QC**

Solicitor for the Respondent: **Mr Matthew Cuskelly, for the Commissioner of Taxation**