Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2016] AATA 638

Division	TAXATION & COMMERCIAL DIVISION
File Number(s)	**2014/0935-0938**
Re	**Leon Carr**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal	**Deputy President S E Frost**
Date	**25 August 2016**
Place	**Sydney**

Objection decisions affirmed.

.....[sgd].....

Deputy President S E Frost

CATCHWORDS

TAXATION – default assessments – whether assessments excessive – whether taxpayer discharged burden of proving assessment excessive – limited evidence of actual taxable income – decision affirmed

LEGISLATION

Income Tax Assessment Act 1936 s 167
Taxation Administration Act 1953 s 14ZZK

CASES

Commissioner of Taxation v Rigoli [2013] FCA 784
Rigoli v Commissioner of Taxation (2014) 141 ALD 52; [2014] FCAFC 29
Resource Equities Limited v Garrett [2009] NSWSC 1385

REASONS FOR DECISION

Deputy President S E Frost

25 August 2016

INTRODUCTION

1. Leon Carr is a man with over 30 years of experience as a company director and investment adviser.

2. In February 2011, after several unsuccessful attempts to secure the lodgement of outstanding tax returns, the Commissioner issued a final notice to Mr Carr requiring him to lodge income tax returns for the period 1 July 1995 to 30 June 2006.

3. The Commissioner proceeded to undertake an audit of Mr Carr's tax affairs. Eventually, in April 2012, and in light of the fact that Mr Carr had still not lodged the returns, the Commissioner made default assessments of Mr Carr's income tax liability for the income years ended 30 June 2003, 30 June 2004, 30 June 2005 and 30 June 2006 (the relevant years). The assessments were made under s 167 of the *Income Tax Assessment Act 1936* (ITAA 1936); such assessments are often referred to as 'default assessments'.

4. Mr Carr claims that he had in fact lodged his returns for the relevant years and that they were not outstanding at all. He claims that his returns had been lodged even before the Commissioner started sending notices to him in 2011. Mr Carr was not able to produce file copies of any such tax returns, nor any notices of assessment to support his claim that he had previously lodged returns for the relevant years. The Commissioner had no record of Mr Carr's having lodged returns for the relevant years. I do not accept Mr Carr's claim that he had lodged returns for those years.

5. Mr Carr objected against the Commissioner's default assessments but his objections were disallowed. He has applied to the Tribunal for review of the objection decisions.

6. I have concluded that the Commissioner's objection decisions are correct. I will explain why.

THE ISSUE FOR DETERMINATION

7. The ultimate question for the Tribunal is whether the assessments are excessive. The burden of proving that the assessments are excessive is borne by the taxpayer: s 14ZZK of the *Taxation Administration Act 1953* (the TAA).

8. The way a taxpayer proves an assessment under s 167 is excessive was explained by Pagone J in *Commissioner of Taxation v Rigoli* [2013] FCA 784 at [9]-[10]:

> *… the combined effect of s 167 and the legal burden of proof falling upon the taxpayer is that for a taxpayer to succeed in establishing the excessiveness of an assessment under s 167 (absent agreement between the Commissioner and the taxpayer concerning the conduct of the proceeding) requires the taxpayer to establish not that the amount assessed by the Commissioner under s 167 of the 1936 Act was wrong but, rather, by establishing what the actual amount was. How that may be achieved will no doubt vary from case to case but it cannot be done as the Tribunal proceeded, namely, by assuming that what was in contention in the proceeding before the Tribunal was only part of the Commissioner's assessment.*

> *A taxpayer seeking to challenge an assessment under s 167 will not succeed merely by proving error by the Commissioner:* George v Federal Commissioner of Taxation *[1952] HCA 21; (1952) 86 CLR 183; [*Federal Commissioner of Taxation v Dalco *[1990] HCA 3; (1990) 168 CLR 614]. The task for the taxpayer on objection is not to prove that the Commissioner erred but to prove, albeit on the balance of probabilities (see* Ma v Commissioner of Taxation *[1992] FCA 359; (1992) 37 FCR 225), the correct amount upon which tax should be levied. The subject matter of challenge to an assessment under s 167 of the 1936 Act is "the amount" upon which the Commissioner has determined tax ought to be levied. The subject matter of challenge in such cases is not to the individual elements of assessable income and deductions which together would have made up taxable income to the assessment if it had been made under s 166.*

9. The Full Court rejected the taxpayer's appeal from that decision (*Rigoli v Commissioner of Taxation* (2014) 141 ALD 529; [2014] FCAFC 29), observing at [27] that '[t]he reasoning and conclusions of the primary judge were entirely correct'.

10. As Pagone J noted in *Rigoli* at first instance, the Commissioner can agree to approach the review of a s 167 assessment differently – for example, by accepting that an assessment should be reduced if the taxpayer can show that particular components in a total do not represent amounts of income. But that is not so in this case, as the extensive discussion between the Commissioner's counsel, Mr O'Mahoney, and me on the first day of hearing confirmed[1].

11. So, to prove the Commissioner's assessments excessive, Mr Carr must prove what his actual taxable income was in each of the relevant years. That requires him not only to identify those categories of activity (if any) that generated income, but also to prove that there were no others that did so. Having done that, he must satisfy me as to the quantum of income attributable to those categories. The sum of all such amounts would equal his 'actual taxable income' for each of the relevant years. If, but only if, that amount is less than the amount assessed by the Commissioner, then the assessment will be excessive.

THE ASSESSMENTS

12. For the 2003 income year the assessment was the result of a mathematical calculation triggered by a loan application that Mr Carr made to HSBC Bank in around June 2003 (T20-300ff). I accept Mr Carr's claim that he did not provide to HSBC any indication as to

[1] Transcript page 32 line 43 – page 35 line 42

his income, and that the income figure shown on the HSBC documentation, $600,000, is not accurate. But that is beside the point, since the Commissioner's assessment was not based to any extent on the $600,000 figure on the form. Instead it was based on the loan approval amount of $1.1 million. As explained in the reasons for the objection decision (T2-117 at [98]):

> *… the Commissioner has applied the debt/income ratio of 37% determined by HSBC in considering your application for a loan of $1.1 million …*

13. The Commissioner determined that Mr Carr's taxable income for 2003 was 37% of $1.1 million, namely $407,000.

14. For the 2004, 2005 and 2006 income years the assessments were largely based on the quantum of unexplained deposits to Mr Carr's bank accounts. The Commissioner determined that Mr Carr's income in those years was:

- for the 2004 year – $852,507;
- for the 2005 year – $647,746;
- for the 2006 year – $261,122.

MR CARR'S APPROACH TO DISPUTING THE ASSESSMENTS

15. Mr Carr set out to establish that many of the large, previously unexplained, deposits to his bank accounts did not represent income amounts he had derived. I will refer to a few of them.

16. First, in relation to deposits of $427,689.97 and $11,452.65 made in August and October 2003 respectively (that is, within the 2004 income year), Mr Carr said they were received from a firm of solicitors, Christensen Legal, who acted for him to recover money owed to him under a second mortgage over a property in Western Australia. Mr Christensen, the managing partner of the law firm, gave evidence that resonated to some extent with Mr Carr's claims, although it became clear that Mr Christensen's firm was acting not for Mr Carr personally but for one of Mr Carr's companies, Brooks Investments Pty Ltd. I accept that the amounts in question are the amounts Mr Christensen's firm was able to recover from the borrower. However, I am in no position to make a finding that the entire amount recovered represented a return to Mr Carr's company of the capital it had lent to the borrower. Mr Carr said that he – but of course he meant Brooks – had initially lent

$500,000, and that to recover a little under $440,000 meant that Brooks had incurred a loss. That seems a reasonable characterisation, but it still tells me nothing about whether what was recovered represented capital, or interest, or a combination of the two. And if it was partly capital and partly interest, there is no reliable information about how the total should be apportioned between the two components. Ultimately, though, it does not matter, for reasons already explained, at [10]-[11].

17. There is a deposit of $60,000 on 21 December 2004 (T20-349) which Mr Carr explains at T37-483 as 'a transfer of sundry cash from one account to another'. Under cross-examination by Mr O'Mahoney, he said it had been transferred from a company called Hednesford Pty Ltd which had earlier been owned by a Mr Arnott-Smith. Mr Carr acquired the company 'because it had a securities dealer's licence in it'[2]. Mr Carr was a director of the company from September 1995 but he claimed not to have been a signatory to Hednesford's bank account[3]. Mr Carr said that he and Mr Arnott-Smith 'agreed to tidy up the balance sheet'[4]; when asked to explain what 'sundry cash' meant he said 'It was – sundry cash was – I knew the money was there and had – it had laid there for quite some time'[5]. That was one of the many opaque answers Mr Carr gave to questions asked of him.

18. There is a deposit of $200,000 on 2 April 2004 (T20-325) which Mr Carr explained, in a letter to the Commissioner dated 16 October 2012 (T37-482), as being 'the repayment of a redeemable convertible note redeemed by Cosmos Limited'. In support of that claim Mr Carr provided a copy of a 'Transfer form for non-market transactions' (T36-481, and also as an annexure to his witness statement in this proceeding, Exhibit A1). The transfer form is dated 12 August 2005 and specifies as the consideration for the transfer 'A$NIL'. The transferor is 'Hednesford Limited' (*sic*). Mr O'Mahoney asked him to explain[6]:

> *Sir, if this document evidences what you say about how it came to pass that you received a payment in April of 2004 why is the reference there to Hednesford? --- Because I would suggest that, as in the case of certain transactions, if I got a cheque made out to Hednesford and I decided to put it in my personal account I*

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[2] Transcript page 77 line 19

[3] Transcript page 78 lines 4-6

[4] Transcript page 77 lines 19-20

[5] Transcript page 78 lines 43-44

[6] Transcript page 89 line 32-page 91 line 37

would turn it over - the cheque over and make - "Please make payable to the account of Leon P Carr" sign it, bank it in this account.

So was that really how you treated Hednesford at this time? It was really a company that you were the directing mind and will of? --- I - I've only just - if it was a - if that was held in Hednesford - if those convertible notes were held in Hednesford then maybe I did. The cheque would have come in and it would have been payable to maybe Hednesford.

DEPUTY PRESIDENT: I'm sorry to make the point again, Mr Carr, but that doesn't seem to be a response to Mr O'Mahoney's question? --- Okay, sorry. What was the question? I was trying to think of - what was the question?

You might want to put it again, Mr O'Mahoney.

MR O'MAHONEY: Is it the case, given what you've indicated, that you were the directing mind and will of this company Hednesford Pty Limited during the relevant period? --- No.

So if it is the case that you, picking up on what you've just said, were able to intercept payments that were to be made to Hednesford by directing that they be made to you, that suggests a very close relationship with this company Hednesford, does it not? --- I had a close relationship with Brent Arnott-Smith, yes.

It suggests a very close relationship with this company Hednesford, does it not? --- Yes.

A relationship so close that you could from time to time, according to your evidence, direct that payments that were to be made to Hednesford were to be made to you, is that right? --- In consultation with Brent Arnott-Smith, yes.

…

So sir, could you explain how a document indicating nil consideration dated 12/08/2005 relating to Hednesford Ltd on your account sheds any light on the character of a payment made into your personal bank account some year and a half earlier? --- I'm trying to think of why they would have put nil in there. I didn't - that's been typed in. Hang on, that's - no, that's part of the form, I think. I think that might be part of the form. There's no - that's nobody's put nil in there. I think you'll find that is part of the form.

Is that your answer, Mr Carr? --- Yes.

Is there anything else you want to say in response to that question? --- No.

19. There are other large deposits that Mr Carr provided some explanation for. These include:

- a deposit of $155,273 on 30 January 2004 – which Mr Carr claims was a dividend from Resource Equities Limited (REL), a registered pooled development fund, and thus not assessable;
- a deposit of $215,656.67 on 31 December 2004 – which he claims was the proceeds of the sale of shares in REL.

- deposits of $553.95, $50,000, $3,888, $50,000, $50,000 and $53,750 during the period April to June 2006 – which he claims are reimbursements of expenses he incurred in the establishment of a company named Fermiscan Limited.

20. Mr Carr was unable to provide any documentation to support the claims that he made in relation to the first two of those deposits.

21. As for the third group, Mr Carr's claim was supported, to some extent, by the evidence of Gary Garton, who had been a director of Fermiscan, and of Greg West, who had been the chief financial officer. However, Mr Garton was unable to confirm the exact amounts of reimbursement or the dates on which payments were made. Mr West indicated that Mr Carr had been reimbursed in 'a number of tranches' but neither Mr Garton nor Mr West was able to give a plausible explanation as to how the claimed reimbursement or reimbursements (paid, on Mr Carr's version, during April to June 2006) related to an invoice issued to Fermiscan in September of that year, and which Mr Carr asserted was the document relating directly to the payments. Nor could either of them point to an agreement struck between Fermiscan and Hednesford, the entity that issued the September invoice[7].

22. Mr Carr's ultimate proposition in relation to the deposits to his bank accounts is that none of them represented income that he had derived[8].

ASCERTAINING MR CARR'S TAXABLE INCOME

23. Despite his assertion that none of the deposits represented income, Mr Carr acknowledged that he did derive income from Fermiscan, at least for some part of the relevant years. He said his employment with Fermiscan started in 2005 or 2006[9] and that he was being paid either $225,000 or $250,000 per annum[10]. It remains unclear where his regular salary was deposited if none of it was going to either of his identified bank accounts.

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[7] Transcript pages 154-158 and 232
[8] Transcript page 101 lines 30-32
[9] Transcript page 101 lines 38-43
[10] Transcript page 104 line 10

24. He also told the Tribunal[11]:

> *The only income that I earned during that period was from Fermiscan, and other forms of money that came into my accounts were by way of capital from other projects, or monies which I already had.*

25. That conflicts with information Mr Carr had previously provided to the Commissioner, where he had said that some amounts the Commissioner had identified 'may well have been from the sale of cattle'[12], and indeed, during the hearing he confirmed that he had in fact sold some cattle during the relevant period[13], although there is no reliable information about the amounts attributable to that activity. He was also, from time to time, earning modest agistment fees – $10,500[14] (30 June 2004), $3,990[15] (30 June 2005) and $6,701[16] (27 June 2006). Now, it may be that those amounts are not attributable to Mr Carr personally, but rather to his private company, Rellcain Pty Ltd, or some other entity, such as Hednesford, or perhaps Brooks Investments. In truth, the position is not clear.

26. What is also not clear is the extent to which Mr Carr derived income prior to the date, in 2005 or 2006, when he was engaged as an employee of Fermiscan. In cross-examination he said, at one stage, that for two to two and a half years before starting with Fermiscan he 'was not employed by anybody'[17]. There followed a remarkable exchange between Mr Carr and Mr O'Mahoney during which Mr Carr tried, unsuccessfully, to explain how that statement could stand in light of his admitted directorship of REL during at least part of that period. Mr O'Mahoney brought to Mr Carr's attention the judgement of the Supreme Court of New South Wales in *Resource Equities Limited v Garrett* [2009] NSWSC 1385, in which Mr Carr had given evidence that he had issued an invoice to REL in about March 2004 for $200,000, representing the work he had performed for the company. He confirmed in the current proceeding that he issued an invoice to REL[18] but doubted that the invoice had ever been paid[19]. However, given the timing of the issuing of the invoice, there is room for the view that the payment of $200,000 received by Mr Carr on 2 April

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[11] Transcript page 26 lines 15-18
[12] T1-16, letter dated 26 October 2012
[13] Transcript page 43 lines 9-44
[14] T20-333
[15] T20-364
[16] T20-389
[17] Transcript page 101 line 40
[18] Transcript page 102 line 28
[19] Transcript page 94 line 26-27

2004 relates to Mr Carr's services as a director of REL. That seems more plausible than Mr Carr's explanation as outlined in [18] of these reasons.

27. Ultimately Mr Carr's evidence about his *actual taxable income* during any of the relevant years was meagre. Some of it – such as that relating to his directorship of REL, and (although much less significant, in monetary terms) the agistment fees – was meandering and often unresponsive. The evidence given by his witnesses did not focus on the central issue that needed to be addressed – what was Mr Carr's taxable income during the relevant years? – and it could not, because they did not know the full story. Even his long-term executive assistant, Gloria Rogers, did not know everything about Mr Carr's financial affairs. Only Mr Carr knows what his taxable income was. I certainly was unable to ascertain what Mr Carr's taxable income was based on the evidence he put forward.

RESOLUTION

28. In [11] of these reasons I summarised the task confronting Mr Carr. It was to identify his income sources and the amount of income attributable to each of them. Unfortunately he has left me in a state of considerable uncertainty on both counts.

29. Mr Carr's approach to contesting the assessments, as I have tried to explain, has been entirely responsive to the Commissioner's methodology of adding up deposits in Mr Carr's bank accounts. But the Commissioner's methodology was only ever an imprecise way of arriving at a figure that would represent the amount on which the Commissioner thought Mr Carr was liable to pay tax. It was arrived at in the absence of any assistance from Mr Carr – the type of assistance that taxpayers generally provide when they lodge their tax returns. Once the assessments were made, Mr Carr had to lay out, in detail, what his tax position was for those years. He had to do more than say that specified components in the Commissioner's methodology were wrong. He had to show what the right figure was. He did not do that. He told the Tribunal too much about what was *not* his income, and too little about what *was*.

30. There is also considerable lack of clarity around his relationship with Hednesford. The fact that Mr Carr could (on his own version) so easily divert, into his own account, money that belonged to Hednesford is something that required a more detailed explanation than Mr Carr provided: see [18] of these reasons.

31. In those circumstances, I cannot conclude that Mr Carr's sources of income were confined to his employment with Fermiscan, his director's fees from REL, his sales of cattle and his derivation of agistment fees. And even if I concluded that way, I could not put a reliable figure on any of those components or, by extension, on the total.

DECISION

32. Mr Carr has not shown that any of the assessments are excessive, because he has not shown what his true taxable income was for the relevant years. The objection decisions are therefore affirmed.

I certify that the preceding 32 (thirty - two) paragraphs are a true copy of the reasons for the decision herein of Deputy President S E Frost

.....[sgd].....

Associate

Dated 25 August 2016

Date(s) of hearing	**22 - 24 February 2016**
Applicant	**In person**
Counsel for the Respondent	**Mr G O'Mahoney**
Solicitors for the Respondent	**ATO Review and Dispute Resolution Group**