



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

[2016] AATA 684

Division TAXATION & COMMERCIAL DIVISION

File Number(s) **2015/6065 and 2015/6134**

Re **DTMP**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal **F D O'Loughlin, Senior Member**

Date **6 September 2016**

Place **Melbourne**

The Tribunal declines both the Grounds Expansion Request concerning primary tax and the Procedural Request. The Grounds Expansion Request concerning penalty is allowed.

[sgd].....

F D O'Loughlin, Senior Member



INCOME TAX – expansion of grounds of objection - prejudice to the Commissioner – grounds expansion declined - procedural request for further hearing – procedural request declined

Cases

Lighthouse Philatelics Pty Ltd v Federal Commissioner of Taxation (1991) 32 FCR 148
Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and Environment (1984) 3 FCR 344
Gilder v Federal Commissioner of Taxation (1991) 22 ATR 872
AAT Case 4782 (1988) 20 ATR 3064
AAT Case 7510 (1991) 22 ATR 3521
AAT Case 7512/13 (1991) 22 ATR 3526
AAT Case 8/93; No 8601 (1993) 25 ATR 1076
Re Cronan and Commissioner of Taxation [2014] AATA 745

Legislation

Administrative Appeals Tribunal Act 1975 (Cth), s 44.
Income Tax Assessment Act 1936 (Cth), s 170(1) Table item 1.
Taxation Administration Act 1953 (Cth), ss 14ZW(1BA) and 14ZZK(a).
Tax Agent Services Act 2009 (Cth), s 30-10.

REASONS FOR DECISION

F D O'Loughlin, Senior Member

6 September 2016

THE REQUESTS

1. The Applicant has been issued an amended income tax assessment within the time allowed by s 170(1) Table item 1 of the 1936 Assessment Act¹ and has objected to that assessment.
2. The Applicant has requested the Tribunal to order that her grounds of objection to her income tax assessments and associated penalty assessments for the 2009 and 2010 years² be expanded (the **Grounds Expansion Request**).

¹ *Income Tax Assessment Act 1936* (Cth).

² The 12 month periods that ended on 30 June 2010 and 30 June 2011 respectively.

3. The original grounds were:

As [DTMP] is not a Director of the [REDACTED], however as I understand a paid employee, the audit process has made it quite evident she left all matters of taxation to her husband (sole Director of the company). It has become quite obvious that she had no direct knowledge of the taxation affairs of the company, despite acknowledging that she certainly failed to take reasonable care in ensuring she personally complied with the requirements of the law as it stands. Indeed, we would argue that that [DTMP] was definitely ignorant of the circumstances that have eventually given rise to the amended assessments raised. As a result, at the very least we feel that should if she be penalised at all, it would be appropriate to do so accordingly, firstly based on the amended betterment figures provided and secondly not for "intentional disregard" but rather "failure to take reasonable care to comply". Your consideration would be much appreciated.

4. The expanded grounds sought are:

(a) for the 2009 and 2010 year income tax objections:

1. *The assessment is not in accordance with or justified by the **Income Tax Assessment Act 1997** (hereinafter called "the Act") and is arbitrary, erroneous, excessive and contrary to law.*
2. *The assessment is not justified by the provisions of Section 170 of the Income Tax Assessment Act 1936 (hereinafter called "the 1936 Act"), and in particular without in any way limiting the generality of the foregoing, is not justified under Section 170(3), (8), (10), (10A), (12) or (13) of the 1936 Act.*
3. *Further or alternatively, the taxpayer made to the Commissioner a full and true disclosure of all material facts necessary for the assessment of the taxpayer and an assessment was made after that disclosure and the assessment increased the liability of the taxpayer and was not made to correct an error in calculation or a mistake of fact.*
4. *The assessment was purportedly made pursuant to Section 167 of the 1936 Act but –*
 - (a) *no circumstances exist or existed which authorised or made it proper to make an assessment pursuant to Section 167;*
 - (a) *in particular (but without prejudice to the generality of the foregoing):*
 - (i) *proper books of account were kept by the taxpayer and were at all times available for inspection by the Commissioner;*
 - (ii) *no circumstances prevented the Commissioner from obtaining full information as to all matters concerning the affairs of the taxpayer;*

- (iii) *in purporting to exercise his judgment under that section in determining the amount of taxable income on which he considered the taxpayer should be assessed he did not act bona fide, he took into account irrelevant matters and failed to take into account relevant matters and he acted arbitrarily, capriciously, unfairly and unreasonably and the purported exercise of his judgment should be set aside or alternatively reviewed by the Administrative Appeals Tribunal or a Court;*
- (iv) *further or alternatively, his judgment as to the taxable income on which he considered the taxpayer ought to be assessed was excessive and wrong and ought to be set aside or reduced by the Administrative Appeals Tribunal or a Court.*
5. *In making or purporting to make the relevant judgment pursuant to Section 167 the Commissioner was not acting bona fide for the purposes of the Act but improperly and capriciously and/or actuated by improper or irrelevant purposes and/or the said assessment is based upon an abuse of or an excess of power and is bad in law.*
6. *No part of the additional amount is or represents income or assessable income or taxable income of the taxpayer for the purposes of the Act pursuant to Sections 6 or 15 or any other section of the Act.*
7. *No part of the additional amount was received or derived by the taxpayer in the year of income as income, assessable income, taxable income or at all.*
8. *There is no authorisation in the Act or elsewhere whereby the additional amount is equivalent to or may be treated as equivalent to income, assessable income or taxable income.*
9. *There is no authorisation in the Act or elsewhere by reason of which an excess of assets over liabilities from year to year may be treated as income, assessable income or taxable income.*
10. *There is no authorisation in the Act or elsewhere whereby deposits into bank accounts or purchases of items or the receipt of loans or cash at hand from year to year may be treated as income, assessable income or taxable income.*
11. *The Commissioner has concluded that for the year of income, [REDACTED] (hereinafter called "[REDACTED]") had understated its income by a significant amount. That conclusion is incorrect, and is based upon a false basis. The Commissioner proceeded to apportion a part of the asserted understatement to the taxpayer.*
12. *The taxpayer was not during the year of income (or at any other time) a shareholder in, or a director of, [REDACTED]. The taxpayer was not engaged in the management of [REDACTED]. The taxpayer did not receive a dividend, or a deemed dividend from [REDACTED]. The taxpayer was not in any way entitled to any of the income of [REDACTED]. There is no*

warrant for attributing to the taxpayer any part of the asserted understatement.

13. *The additional amount consists, in whole or in part of the amount apportioned to the taxpayer and referred to in paragraph 11 herein.*
14. *The burden of proving that the assessment is excessive does not lie upon the taxpayer as the provisions contained in the Taxation Administration Act regarding the burden of proof apply only when the assessability of income properly so called is in dispute.*
15. *The assessment is based, upon an artificial, unreal and assumed analysis and account of the taxpayer's and of her husband's comparative assets and liability position and of the taxpayer's and of her husband's cash payments, purchases of items, or the receipt of loans or cash at hand and cash deposits during the year of income.*
16. *The betterment statement is an inappropriate method for arriving at the income or assessable income or the taxable income of the taxpayer or of the net income of the taxpayer and her husband because all receipts of the taxpayer and of the taxpayer and her husband which are assessable under the Act are properly recorded in properly kept books of account of the taxpayer and of the taxpayer and her husband.*
17. *Alternatively, if the whole or any part of the additional amount was received or derived by the taxpayer (which is not admitted but which is expressly denied), then it was received or derived by the taxpayer as gifts or loans or repayments of loans or as other capital receipts or receipts of a capital nature.*
18. *Further and alternatively, without in any way limiting the generality of any other ground or grounds herein:*
 - (a) *an excessive allowance has been made in the calculations comprising the betterment statement for the private expenditure of the taxpayer and her husband;*
 - (b) *calculations comprising the betterment statement are incorrect;*
 - (c) *no item in the betterment statement is correct.*
19. *Further and alternatively, the figures, calculations, estimates, values, characterisations, categorisations and allocations contained in the notice of assessment and the betterment statement and upon which the taxpayer's so called additional taxable income has been calculated for the year of income are wholly or in part wrong, miscalculated and fictitious and they do not form any basis upon which the taxpayer's taxable income can properly be assessed or, alternatively, have formed the wrong basis upon which the taxpayer's income, assessable income and taxable income has been assessed.*
20. *Further and alternatively, if any part of the additional amount was received or derived by the taxpayer as income or assessable income or taxable*

income of the taxpayer (which is not admitted but which is expressly denied) then in making the assessment the Commissioner has wrongfully failed to reduce the taxpayer's assessable income by the amount of the taxpayer's losses and outgoings to the extent that they were incurred in gaining or producing the assessable income or necessarily incurred in carrying on business the purpose of which was the gaining or producing of such income.

21.

- (a) *Neither Part IVA of the 1936 Act nor any other provision of the Act and the 1936 Act, either as presently enacted nor as it may be amended, has any application so as to permit, authorise require or entitle the Commissioner to make the assessment*
- (b) *Without prejudice to the generality of the foregoing the taxpayer did not obtain any tax benefit (within the meaning of Section 177C) from or in connection with any scheme to which Part IVA of the Act applies.*

22. *As to the Medicare Levy –*

- (a) *for the reasons set out in this Notice of Objection the taxpayer did not have an assessable income during the year of income, and therefore no part of the Medicare Levy should have been assessed to the taxpayer.*
- (b) *further, or alternatively, for the reasons set out in this Notice of Objection the taxpayer should have been assessed to a lesser sum in respect of the Medicare Levy.*

23. *Further, or alternatively, insofar as any matter arising out of or concerning the assessment, this objection or the determination thereof involves the exercise by the Commissioner of any discretion, or his opinion, determination, judgment or satisfaction of any matter, the same should be exercised and determined by him favourably to the taxpayer; and any failure on his part to do so should be reviewed by the Administrative Appeals Tribunal which should substitute for the Commissioner's exercise of discretion, opinion, determination, judgment or satisfaction its own, which should be favourable to the taxpayer; and further or alternatively any exercise of discretion, opinion, determination, judgment or satisfaction of the Commissioner or the Administrative Appeals Tribunal which is adverse to the taxpayer should be set aside by the Court upon the basis that it was arrived at upon a wrong understanding of principle, or a mistake of law, or took into account irrelevant matters or failed to take relevant matters into account, or was otherwise wrongly arrived at.*

(b) for the 2009 and 2010 year penalty objections:

- 1. *The penalty assessments are not in accordance with or justified by the Taxation Administration Act (hereinafter called "the Act") and are arbitrary, erroneous, excessive and/or contrary to law.*

2. *The penalties have been calculated at the rate of 75 and 90% respectively of the shortfall amounts alleged by the Commissioner of Taxation to have arisen in respect of the years of income (hereinafter called "the assessed shortfall amounts").*
3. *The Commissioner has not given written notice to the taxpayer of the taxpayer's liability to pay the purported penalties.*
4. *On or before the issue date, the Commissioner has not given written notice to the taxpayer of the reasons why the taxpayer is liable to pay the purported penalties. Alternatively, if any reasons were so given (which is denied) the reasons were not adequate reasons.*
5. *For the reasons set out in Notices of Objection of the taxpayer dated the same date as this document, there is no shortfall amount any of the years of income. Alternatively, the shortfall amounts are less than the assessed shortfall amounts.*
6. *Neither the taxpayer nor any agent of the taxpayer made any statement to the Commissioner or any other relevant entity that was false or misleading in a material particular that results in a shortfall amount in the years of income.*
7. *Neither the taxpayer nor any agent of the taxpayer made any statement to the Commissioner or any other relevant entity in which the taxpayer or the agent treated any income tax law as applying to any matter in a way that was not reasonably arguable and that results in a shortfall amount in any of the years of income.*
8. *To the extent that there may be a shortfall amount (which is denied) the same did not result from an intentional disregard of a taxation law, from recklessness as to the operation of a taxation law, nor from a failure to take reasonable care to comply with a taxation law by either the taxpayer or any agent of the taxpayer.*
9. *The taxpayer acted appropriately by seeking, undertaking and relying upon the advice of the taxpayer's professional taxation adviser.*
10. *The taxpayer engaged a tax agent and the taxpayer has taken reasonable care to comply with her obligations by giving to the tax agent all relevant information.*
11. *Furthermore, the Commissioner was not entitled to increase the penalty from 75% to 90% in the year of income ended 30 June 2010. None of the factors set out in Section 284-220 in Schedule 1 to the Taxation Administration Act are applicable.*
12. *Further, or alternatively, insofar as any matter arising out of or concerning the penalty assessments, this objection or the determination thereof involves the exercise by the Commissioner of any discretion, or his opinion, determination, judgment or satisfaction of any matter, the same should be exercised and determined by him favourably to the taxpayer; and any failure on his part to do so should be reviewed by the Administrative*

Appeals Tribunal which should substitute for the Commissioner's exercise of discretion, opinion, determination, judgment or satisfaction its own, which should be favourable to the taxpayer; and further or alternatively any exercise of discretion, opinion, determination, judgment or satisfaction of the Commissioner or the Administrative Appeals Tribunal which is adverse to the taxpayer should be set aside by the Court upon the basis that it was arrived at upon a wrong understanding of principle, or a mistake of law, or took into account irrelevant matters or failed to take relevant matters into account, or was otherwise wrongly arrived at.

5. In the hearing of the Grounds Expansion Request, the Applicant made a request concerning the procedure that should be adopted for finalising the Grounds Expansion Request: that if the Grounds Expansion Request was likely to be denied, the Tribunal advise the Applicant in advance and allow the Applicant the opportunity to engage counsel to advance further argument (the **Procedural Request**).
6. For the reasons that follow, the Grounds Expansion Request concerning primary tax and the Procedural Request have been denied, and the Grounds Expansion Request concerning penalty has been allowed.

THE GROUNDS EXPANSION REQUEST

Law

7. The Grounds Expansion Request has been made pursuant to s 14ZZK(a) of the Administration Act³ which is in the following terms:

Section 14ZZK Grounds of objection and burden of proof

On an application for review of a reviewable objection decision:

- (a) *the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and*

....

8. Section 14ZZK is a piece of remedial legislation. It allows grounds not previously advanced to be pursued. In making a decision to allow or reject an objection grounds expansion request, ordinary litigation principles are to apply.⁴

³ *Taxation Administration Act 1953 (Cth).*

9. In *Hunter Valley Developments*⁵ Wilcox J examined a series of authorities and distilled six guiding principles to be applied when considering exercise of discretionary powers to allow extensions of statutory time limits. The passage is as follows:

Section 11 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) does not set out any criteria by reference to which the court's decision to extend time for an application for review under s. 5 is to be exercised. Already there have been a number of decisions of judges of this Court, all sitting at first instance, dealing with the approach proper to be taken. They differ a little, both in language and in emphasis, but I venture to suggest that from them may be distilled the following principles to guide, not in any exhaustive manner, the exercise of the court's discretion:

1. *Although the section does not, in terms, place any onus of proof upon an applicant for extension an application has to be made. Special circumstances need not be shown but the court will not grant the application unless positively satisfied that it is proper so to do. The "prescribed period" of twenty-eight days is not to be ignored (**Ralkon Agricultural Co. Pty Ltd v. Aboriginal Development Commission**). Indeed, it is the prima facie rule that proceedings commenced outside that period will not be entertained (**Lucic v. Nolan**). It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an "acceptable explanation of the delay" and that it is "fair and equitable in the circumstances" to extend time (**Duff; Chapman v. Reilly**).*
2. *Action taken by the applicant, other than by making an application for review under the Act, is relevant to the consideration of the question whether an acceptable explanation for the delay has been furnished. A distinction is to be made between the case of a person who, by non-curial means, has continued to make the decision-maker aware that he contests the finality of the decision (who has not "rested on his rights": per Fisher J in **Doyle v Chief of Staff**) and a case where the decision-maker was allowed to believe that the matter was finally concluded. Compare **Doyle, Chapman, Ralkon and Douglas v. Allen** with **Lucic and Hickey v. Australian Telecommunications Commission**. The reasons for this distinction are not only the "need for finality in disputes" (see **Lucic**) but also the "fading from memory" problem referred to in **Wedesweiller v. Cole**. Any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension: see Doyle, Duffat, Hickey.*

⁴ *Lighthouse Philatelics Pty Ltd v Federal Commissioner of Taxation* (1991) 32 FCR 148 at p 156, Lockhart, Burchett and Hill JJ.

⁵ *Hunter Valley Developments Pty Ltd v Cohen, Minister for Home Affairs and Environment* (1984) 3 FCR 344 at p 348-349.

4. *However, the mere absence of prejudice is not enough to justify the grant of an extension: **Douglas, Lucic, Hickey**. In this context, public considerations often intrude (**Lucic, Hickey**). A delay which may result, if the application is successful, in the unsettling of other people (**Ralkon, Becerra**) or of established practices (**Douglas**) is likely to prove fatal to the application.*
5. *The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted: **Lucic, Chapman**.*
6. *Considerations of fairness as between the applicants and other persons otherwise in a like position are relevant to the manner of exercise of the court's discretion: **Wedesweiller**.*

*In considering the authorities it is, I believe, important to bear in mind the point made by Sheppard J. in **Wedesweiller**, relating to the diversity of decisions to which review may be sought under the Act:*

" ... there will be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an applicant by the refusal of an application, the prejudice which may be suffered by the Government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases wider considerations will be involved."

*He went on to mention the reference to public interest made by Fitzgerald J. in **Lucic**.*

*It is in relation to the former category of cases, that is, those "which affect only the immediate parties" that the approach adopted by Bray C.J. in **Lovatt v. Le Gall** in respect of private litigation but adopted in this context in both **Doyle and Duff**, is apposite namely:*

"If the defendant has suffered no prejudice, as when he was well within the limitation period of the plaintiff's claim, or where the excess period of time is small, or where he cannot show that he has lost anything by reason of the delay, it may well be that the court will not find it difficult to come to the conclusion that it is fair and equitable in the circumstances to grant extension." [Citations omitted]

Facts

10. The Applicant's husband had been the sole shareholder and director of a company⁶ from March 2002 through 30 June 2010 and beyond.

⁶ [Name Redacted] Pty Ltd.

11. Following an audit or investigation into the affairs of the company which included the Applicant and her husband, on 12 June 2012 the Commissioner amended the Applicant's 2009 and 2010 year assessments. On 11 June 2012 the Commissioner amended the Applicant's husband's assessments for these years. The adjustments to the Applicant's and her husband's taxable incomes in each year were the same.
12. The Applicant's objections to the relevant 2009 and 2010 year assessments were prepared by her tax agent and filed on or about 12 July 2012. The Commissioner made his objection decisions on 19 November 2012.
13. The Applicant subsequently engaged her current solicitors shortly before 18 March 2015 and her solicitors reasonably promptly asked that the grounds of objection be expanded on or about 18 March 2015.
14. By March 2015 the period in which the Commissioner could amend the Applicant's husband's and the company's assessable income for the 2009 and 2010 years had well and truly passed. Amendments to these assessments would be the natural consequence of successful pursuit of some of the expanded grounds of objection. The company was placed in liquidation on 18 March 2015 and the Applicant's husband became a bankrupt in April 2015.
15. There is evidence that as at 16 April 2015 and 24 June 2015 respectively it was unlikely that distributions would be made in the insolvent corporate and personal administrations, but there is no evidence of what might have been distributed had amended assessments been made within time and issued to the Applicant's husband and/or the company. There were assertions from the bar table that the Commissioner would not have been paid anything in any event had he been able to amend the Applicant's husbands' assessment and/or the company's assessment. Without evidence such a finding cannot be made.

Contentions

16. The Applicant contends that:
 - (a) March 2015 is only nine months after the two year period within which the Commissioner accepts the Applicant could object to the two amended assessments and nine months is not a long time. Implicit in this argument is the

proposition that if a taxpayer can sit for two years before objecting, then a taxpayer who objects early should not be put in any worse a position by being limited to grounds included in the early objection that could have been included in an objection filed later, but within time, with full grounds expressed;⁷

- (b) the Applicant's position under the new grounds is clearly arguable;
 - (c) it would be ground breaking for prejudice to the Commissioner's position in relation to third parties to be influential;
 - (d) the Applicant's husband and the company are bankrupt and in liquidation respectively and the Commissioner would not have been paid anyway;
 - (e) the real issue in the application is what the Applicant's taxable income is;
 - (f) the Grounds Expansion Request does not arise at the hearing;
 - (g) the Applicant should not be punished for the actions of a non-lawyer;
 - (h) there has not been material delay after the Applicant engaged a lawyer in this matter;
 - (i) there is no suggestion that documents and evidence is no longer available;
 - (j) the Applicant's legal adviser in the present application was not involved in the insolvency matters concerning the Applicant's husband or the company.
17. The Commissioner points to prejudice in now being unable to amend other taxpayers' assessments in the event that some of the added grounds succeed. He contends that the Applicant has always had professional assistance, that from the time the amended assessments were raised the best outcome would have been an equal split of the disputed income between the Applicant and her husband, and that the Applicant can be presumed to have been competently and properly so advised. Now, at a time when it is

⁷ In this regard see *Lighthouse Philatelics* at 32 FCR 151 to 156, Lockhart, Burchett and Hill JJ.

quite advantageous for her, the Applicant wants to say that the disputed income all belonged to her husband as director of the company when presumably some or all of any additional tax will not be paid. The Commissioner contends there ought be a serious question raised as to whether there was tax agent error.

Analysis

18. This is not a matter that arises at the hearing of the matter so the lateness of request, in reality a manifestation of the fairness or prejudice aspects of the ordinary litigation principles that apply, that framed the outcome in *Gilder*⁸ does not arise.
19. Consideration of the 2010 year income tax position is sufficient to dispose of both years' Grounds Expansion Requests.
20. Assuming the Applicant's contention that nine months is the relevant period of delay (which it is not given the objection process was completed in November 2012 with the consequence that the delay period exceeds two years) nine months is a significant period of delay. Technically, the Applicant sat on her rights for the period from approximately 12 July 2012 when her original objection was lodged until 18 March 2015 when her lawyers sought the expansion of grounds.
21. It is apparent that the lateness of the request is explained by the change from tax agent representation to lawyer representation in March 2015. No explanation is offered for why the Applicant's tax agent did not include at least some of the expanded grounds in the original objection. This does not suggest that the expansion ought be allowed.
22. The submission that the Applicant should not be punished for the actions of a non-lawyer needs comment. First, not allowing the expansion by application of the foregoing principles is not a form of punishment. Second, this is not a case of an unrepresented Applicant, which appears to have attracted lenient treatment in *Re Cronan*.⁹ Third, and more broadly, any suggestion in the submission that a taxpayer ought be more favourably treated by using a tax agent for representation as opposed to other types of

⁸ *Gilder v Federal Commissioner of Taxation* (1991) 22 ATR 872 at p 884, Davies J.

⁹ *Re Cronan and The Commissioner of Taxation* [2014] AATA 745.

representation ought be rejected. Registered tax agents have a registration, or license, that allows them to charge fees for undertaking taxation controversy work on behalf of taxpayers. The *Code of Professional Conduct*¹⁰ requires registered tax agents to ensure services they provide are provided competently and to maintain knowledge and skills relevant to the services they provide.¹¹ For so long as registered tax agents are entitled to charge fees for services associated with resolution of taxation controversies as a general feature of their registration they ought be held to the same standards as others who provide such services. It is inappropriate to allow a service provider to charge fees for undertaking particular work and then allow a different or lower standard to apply compared with those applicable for other service providers. Matters of the requisite training and education of registered tax agents for taxation controversy resolution work are for the Tax Practitioners Board.

23. The present application requires consideration of the principle that *Any prejudice to the respondent including any prejudice in defending the proceedings occasioned by the delay is a material factor militating against the grant of an extension ...* reflected in the second of Wilcox J's principles above. The types of prejudice that fall within this principle include limitations in responding to successful pursuit of the expanded grounds of objection caused by the delay in making the request. Such limitations include inability to assess another taxpayer by reason of time limitations. This approach has been taken in this Tribunal,¹² although some care is needed in respect of these examples because prejudice was asserted by the Commissioner, and those assertions were accepted, with the relevant prejudice not always readily apparent or explained.
24. Here, the prejudice to the Commissioner has been real. Had he been aware of the expanded grounds of objection he could, and in all probability would have, issued amended assessments to two other taxpayers well within time in order to protect the position in the event of successful pursuit of the expanded grounds of objection. The contention that it would be ground breaking for prejudice to the Commissioner's position *viz a viz* third parties to be influential must be rejected. It is contrary to authority. In the

¹⁰ *Tax Agent Services Act 2009* (Cth), s 30-10.

¹¹ *Tax Agent Services Act 2009* (Cth), s 30-10.

¹² *AAT Case 4782 (1988) 20 ATR 3064* (P M Roach), *AAT Case 7510 (1991) 22 ATR 3521* (R A Balmford), *AAT Case 7512/13 (1991) 22 ATR 3526* (R A Balmford), *AAT Case 8/93; No 8601 (1993) 25 ATR 1076* (R A Balmford).

present matter, that type of prejudice is not only influential, it is determinative. The Applicant has allowed the Commissioner to proceed in the belief that the grounds sought were not to be agitated and the Commissioner is now prevented from taking the steps required to assess another taxpayer for the income the Applicant now says belongs to someone else. That is material prejudice and, in circumstances where the delay is not explained in any meaningful way, determines the outcome. Absent that prejudice, the outcome would have been different.

25. In essence the expanded penalty grounds are not a surprise and can be seen as stating the original grounds more formally.
26. For penalties, the same prejudice considerations do not arise. Here the appropriate penalty is determined by referenced to the Applicant's shortfall, if there be one, and the appropriate standard of penalty to apply which was squarely raised by the original grounds. Importantly, the Commissioner has not advanced any case of prejudice he suffers.

THE PROCEDURAL REQUEST

27. As this ruling to decline the Grounds Expansion Request is an independent decision and can be the proper subject matter of an appeal under s 44(1) of the AAT Act,¹³ the process by which it is made can become the subject of such an appeal. Accordingly, short reasons for why that procedural request was declined follow.
28. On 14 June 2016, the Applicant was directed to provide the Tribunal with a statement on or before 8 July 2016 seeking leave of the Tribunal to argue additional grounds to those raised by the Applicant in her objection, and the Respondent was directed to give the Tribunal a statement in response within two weeks. On 7 July 2016 the parties were advised that the 25 July 2016 hearing would be listed for the Grounds Expansion Request. The Applicant provided her statement on 8 July 2016. The Commissioner provided his statement on 22 July 2016. A hearing was convened to hear the Grounds Expansion Request on 25 July 2016.

¹³ *Administrative Appeals Tribunal Act 1975* (Cth).

29. The Commissioner engaged Counsel for the 25 July 2016 hearing. The Applicant was represented by a very experienced solicitor of many years standing in working in the taxation jurisdiction. Further, the Applicant's representative made no suggestion of unavailability, generally, of counsel able to appear for the Applicant. For this type of application such a suggestion would be unlikely. Nor did the Applicant's representative advise that there had been counsel engaged in this matter for a long time who would be unavailable on the hearing date.
30. In these circumstances, s 2A of the AAT Act calls for a single opportunity to advance a request. The Applicant was not a litigant in person, had representation of her choosing, and was represented by an experienced person, albeit not in advocacy per se.

CONCLUSION

31. Accordingly, the Tribunal's conclusion is that both the Grounds Expansion Request concerning primary tax and the Procedural Request are denied. The Grounds Expansion Request concerning penalty is allowed.

I certify that the preceding 31 (thirty-one) paragraphs are a true copy of the reasons for the decision herein of Senior Member F D O'Loughlin

[sgd].....
Associate

Dated 6 September 2016

Date of hearing	25 July 2016
Advocate for the Applicant	Mr T May
Representative of the Respondent	Ms J Chan
Counsel for the Respondent	Ms A Wilson