



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

[2016] AATA 788

Division TAXATION & COMMERCIAL DIVISION

File Number(s) **2015/3436**

Re **ZDCW**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal **Deputy President I R Molloy**

Date **7 October 2016**

Place **Brisbane**

The Tribunal affirms the decision under review.



[Sgd]

Deputy President I R Molloy

CATCHWORDS

TAXATION – application for release from taxation debts – serious hardship – assets available to meet tax liability – exercise of Commissioner’s discretion – poor compliance – preference to other creditors – decision under review affirmed

LEGISLATION

Taxation Administration Act 1953 (Cth) Sch 1, ss 340-5, 340-10; s 14ZZK(b)(iii)

CASES

Powell v Evreniades and Others (1989) 21 FCR 252
Commissioner of Taxation v A Taxpayer (2006) 63 ATR 450
Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634
Commissioner of Taxation v A Taxpayer (2006) 63 ATR 450
Van Grieken v Veilands and Ors (1991) 21 ATR 1639

SECONDARY MATERIALS

Practice Statement Law Administration 2011/17: Debt Relief

REASONS FOR DECISION

Deputy President I R Molloy

7 October 2016

INTRODUCTION

1. The applicant, ZDCW, applies to be released from a taxation liability pursuant to s 340-5 of Sch 1 of the *Taxation Administration Act 1953* (“the Act”).
2. As at 9 August 2016, the applicant’s total liability amounted to \$130,416.45 comprised of:
 - Primary tax \$104,177.60
 - General interest charges \$25,368.85

- Failure to lodge penalty \$870.00

ISSUES

3. Subsection 340-5(3) of Sch 1 of the Act provides that, before a person can be released from a liability for tax, it must appear that he or she would otherwise suffer serious hardship.
4. If this requirement is satisfied there remains a discretion whether or not to grant the application.
5. The issues are therefore:
 - Whether the applicant would suffer serious hardship if he were not released from his tax liability in whole or in part; and
 - If serious hardship is shown, how the discretion should be exercised.

BACKGROUND

6. The applicant was born in 1948. In 2006 he was diagnosed with Parkinson's disease. At the time, he was employed as a CEO of an organisation. In 2009 his illness forced him into early retirement.
7. The applicant received payments under an income protection policy in the years ended 30 June 2010, 2011, 2012 and 2013. He was unaware that the payments constituted assessable income until he received advice to that effect in 2012.¹
8. On 9 January 2014 the applicant lodged tax returns for each of the above financial years.² On 17 January 2014 the Commissioner of Taxation ("the Commissioner") issued assessments of those returns.³
9. On 2 May 2014 the applicant applied to the Commissioner for a release from liability for taxation.⁴ On 27 June 2014 the application was disallowed.⁵ On 22 August 2014 the

¹ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at [8].

² Exhibit 1, T-Documents, T3-6.

³ Exhibit 1, T-Documents, T7-10.

applicant objected to the Commissioner's decision.⁶ On 23 October 2014 an objection decision was made disallowing the applicant's objection.⁷

10. In the meantime, on 21 October 2014, the applicant made a second application for release.⁸ On 20 January 2015 the second application was also disallowed by the Commissioner.⁹ On 19 March 2015 the applicant objected to the Commissioner's decision.¹⁰ On 7 May 2015 an objection decision was made disallowing the applicant's objection.¹¹
11. This application, lodged on 8 July 2015, is brought from that second objection decision.¹²
12. It is accepted, on behalf of the applicant, that under s 14ZZK(b)(ii) of the Act the onus is on him to show that the decision should not have been made or should have been made differently.
13. The applicant provided affidavit evidence in support of his application. However, he was not available for cross-examination because he has difficulty speaking, and his doctor has expressed an opinion that the experience would be distressing and humiliating for him.¹³ The Commissioner did not raise any issue with this.

Serious hardship

14. The term "serious hardship" should be given its ordinary meaning. The description may be satisfied by something less than destitution.¹⁴
15. The application calls for consideration of the applicant's individual circumstances by reference to normal community standards.¹⁵ Whether payment of a tax liability would

⁴ Exhibit 2, Supplementary T-Documents, ST1.

⁵ Exhibit 2, Supplementary T-Documents, ST2.

⁶ Exhibit 2, Supplementary T-Documents, ST3.

⁷ Exhibit 2, Supplementary T-Documents, ST4.

⁸ Exhibit 1, T-Documents, T11.

⁹ Exhibit 1, T-Documents, T12.

¹⁰ Exhibit 1, T-Documents, T13.

¹¹ Exhibit 1, T-Documents, T14.

¹² Exhibit 1, T-Documents, T1.

¹³ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at attachment 3.

¹⁴ *Powell v Evreniades and Others* (1989) 21 FCR 252, 260.

entail serious hardship involves a consideration of the financial affairs of the taxpayer, including his financial relations with other members of his household.¹⁶

16. The applicant receives a retirement benefit.¹⁷ The evidence is it is \$100 per week.¹⁸
17. The applicant's wife is employed in part-time work as a guidance counsellor. She also works as a marriage celebrant. She receives a carer's pension.
18. The household also derives income from what was described as a bed and breakfast arrangement. There are also dividends paid from shares held in public companies. The exact amounts of income gained from these sources are unclear.
19. The major liabilities of the household are a mortgage and line of credit. The applicant and his wife also have some responsibility for their adult son, who suffers from schizophrenia.¹⁹
20. There is insufficient evidence to say exactly how the applicant and his wife's income compares to their expenditure. They are described by the applicant's solicitor as "in effect, just getting by".
21. The Commissioner points out, however, that according to both his second release application and his affidavit of 16 May 2016, and notwithstanding individual items in those documents differ, the applicant's expenses exceed his income by about \$500 to \$600 per fortnight. This, according to the Commissioner, would amount to a yearly deficit of around \$13,000 to \$15,000, suggesting that the applicant is already experiencing serious hardship, which relieving him from his tax liability would not alleviate.
22. However, looking at the documentary evidence, such as it is, I cannot see anything indicating the household is in financial distress such as could be expected if there were an overall deficit of that degree. It may be, of course, that the applicant's expenses do exceed his income as described, but that the deficit is covered by his wife's earnings. Overall I accept the description that the applicant and his wife are getting by.

¹⁵ *Commissioner of Taxation v A Taxpayer* (2006) 63 ATR 450 at 461.

¹⁶ *Van Grieken v Veilands and Ors* (1991) 21 ATR 1639 at 1646.

¹⁷ Exhibit 4, Affidavit of the applicant sworn 6 July 2016 at [10].

¹⁸ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at [22].

¹⁹ *Ibid* at [26]-[28] and attachment 12.

23. At the same time I find, and I do not think this is in dispute between the parties, that the applicant would not be able to satisfy his income tax liability within two to three years from his household's income. I turn now to the assets and liabilities.
24. The applicant and his wife own their own home as tenants in common in equal shares subject to a bank mortgage.²⁰ The applicant also has a three-quarter share in another property with the balance share owned by his wife.²¹ This property is variously describes as a holiday home, investment property, and a shack. Together these properties comprise the bulk of the applicant and his wife's assets.
25. The Commissioner points out that their combined assets have a value of \$843,699.50, with liabilities of \$225,000.00,²² leaving a balance of \$618,699.50. On this basis, the Commissioner contends that the applicant and his wife have sufficient equity to discharge his income tax liability.
26. The applicant contends that, as a result of mortgages over the two properties in favour of his wife, he is unable to dispose of either property to raise any amount to pay the taxation liability.
27. The mortgages arose out of circumstances in which it had become necessary for the applicant's wife to postpone plans for an early retirement to look after the applicant as his illness progressed. The evidence is that in order to secure his wife's ongoing support, the applicant promised her that he would give her their co-owned properties.²³
28. On 23 August 2014 the applicant and his wife entered into what has been described as a Contractual Will Arrangement by executing the following three documents:
- a Deed for Contractual Will;²⁴
 - an Option Deed granting the applicant's wife an option to purchase the applicant's share of each property for \$1.00 if any of a series of defined default events occur;²⁵
and

²⁰ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at [24].

²¹ Ibid.

²² Ibid.

²³ Ibid at [14]-[19].

²⁴ Exhibit A, T-Documents, T10 at pp. 175-195; Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at attachment 4.

- mortgages in favour of the applicant's wife over the applicant's interest in the two properties, securing her rights under the Deed for Contractual Will and Option Deed.²⁶
29. It is submitted on behalf of the applicant that the effect of these documents is that he does not have sufficient net equity in realisable assets to pay the tax liability. That is to say, because of his wife's mortgages, the applicant is unable to dispose of either property to raise money to pay his tax liability.
30. I am not satisfied that the applicant was under any obligation to enter into the Contractual Will Arrangement. Nor am I satisfied that his wife would seek to enforce her rights under that arrangement in the face of recovery action by the Commissioner against the applicant or that the properties would not be available to him to meet his tax liability.
31. In making this finding I have had regard to the nature and timing of the Contractual Will Arrangement. I also have regard to the payment proposal made by the applicant in support of his first application for release, which included his wife contributing a tax refund of \$30,000, and that she would sell shares and contribute the proceeds of approximately \$25,000.²⁷
32. It is further submitted that if the applicant is required to pay the tax liability, it would likely produce unduly burdensome consequences for him. It is submitted that if one or other of the properties is sold, that will compound the effect of the applicant's illness, and may ultimately make it more difficult for him to acquire food, clothing, medical supplies, or accommodation, and to provide support for his son.
33. I accept that serious illness of the taxpayer or of a household member, and the presence of dependent children, are matters to be taken into account when considering the individual circumstances of an applicant for release. The applicant's illness has obviously had a profound effect on his life including on his life expectancy.²⁸ However, I am not satisfied that the requirement that the applicant pay his tax liability will bring about

²⁵ Exhibit A, T-Documents, T10 at pp. 206-212.

²⁶ Ibid at pp. 196-205.

²⁷ Exhibit B, Supplementary T-Documents, ST1 at p. 252.

²⁸ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at attachment 3.

anything approaching the dire results in respect of his health or otherwise as advanced on his behalf.

34. In all the circumstances I am not satisfied that the applicant would suffer serious hardship if he was required to pay his tax liability.

Discretion

35. If this were a case of serious hardship I would not exercise my discretion to grant relief.

36. *Practice Statement Law Administration PS LA 2011/17 – Debt Relief* provides the following non-exhaustive list of factors to be considered:²⁹

- a) where it appears that the applicant has, questionably or otherwise, disposed of funds or assets without making proper provision to meet tax liabilities;
- b) where the granting of release would not result in reduction of hardship, such as where the person has other liabilities or creditors to such an extent that release from the tax debt will not relieve hardship;
- c) where the person has used available funds to discharge debts due to other private creditors in preference to debts due to the ATO;
- d) where the person has used available funds to discharge debts due to other business creditors where those payments are not considered reasonably necessary to maintain the viability of the business and could be considered as unfair preference payments to the detriment of the ATO;
- e) where the person, without good reason, has failed to pursue debts due to them, or to seek possible contributions from insurers, or persons with joint responsibility for debts;
- f) where serious hardship is associated with a single event or short term outcome, such as might be encountered in the more speculative or seasonable business undertakings where the effects are likely to be only short term;
- g) where the person has a poor compliance history; and

²⁹ *Practice Statement Law Administration PS LA 2011/17 – Debt Relief* at [8].

- h) where the person is unable to demonstrate that they have made provision for future debts.
37. As the Commissioner contends, ATO policies are not binding on the Tribunal, however, the Tribunal can and should have regard to those policies in reaching a decision.³⁰ Of the above factors, (a), (c), (g) and (h) in particular, are relied on by the Commissioner.
38. The Commissioner contends that, since becoming aware of his tax liability, the applicant has sold a car, and bought and sold shares in various entities, without making provision for his tax debt.
39. It is conceded that the applicant has disposed of assets to pay other non-taxation liabilities. This, it is submitted, is to be viewed in the context of his serious illness and resultant impulsive and risky purchases that have been associated with it. However, although there is medical evidence that the applicant may engage in impulsive behaviour,³¹ I am not satisfied that any of the transactions of which the Commissioner complains is explained in this way.
40. More significantly, according to the Commissioner, the applicant has attempted to dispose of his interest in the bulk of his assets through the Contractual Will Arrangement. No provision was made for payment of his tax in that arrangement.
41. In respect of the Contractual Will Arrangement, it is expressly contended on behalf of the applicant that he had capacity and was able to instruct solicitors.³² Therefore, the Commissioner contends, the arrangement cannot be explained as the consequence of any impulse on the applicant's part, but should be seen in the context of the applicant's dealings with the ATO.
42. The Commissioner had refused the payment proposal which the applicant submitted with his first release application, on the basis that the applicant owned an investment property

³⁰ *Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 642.

³¹ Exhibit 3, Affidavit of the applicant sworn 16 May 2016 at attachments 1-3.

³² *Ibid* at attachment 3.

with his wife, and that he could sell or borrow against that property to pay his tax liability more promptly than envisaged in the payment proposal.³³

43. The Commissioner submits that, given that it post-dated the Commissioner's refusal of the first release application, the Contractual Will Arrangement appears to be a conscious attempt to put assets beyond the reach of the Commissioner. That is not a finding I would be prepared to make without first hearing the applicant or his wife give evidence on the point. I do find, however, that the arrangement was entered into by the applicant without making provision to meet his tax liability.
44. According to the Commissioner, the applicant's compliance history since 2001 has been patchy at best. It is pointed out that he did not lodge his income tax returns for the years ended 30 June 2010, 2011, 2012 and 2013 until January 2014. I think that is largely explained by the applicant being unaware, until he received advice from his accountant, that the proceeds of his income protection policy constituted assessable income.
45. The Commissioner also highlighted that, since 2001, the applicant has only once lodged an income tax return on or before the due date for lodgement. His tax returns were usually lodged in batches of up to four years at a time. This hardly favours the exercise of the discretion in the applicant's favour. However, I do not think it should weigh heavily against him.
46. I also take into account the applicant's solicitor's submission, that he may have lodged his tax returns late, but that is the extent of his non-compliance. There is no under-reporting of income or other dishonest behaviour. I also take into account that the applicant does not find himself in the current situation as a result, for example, of a speculative investment or poor business decisions.
47. The Commissioner submits that if the applicant's evidence of weekly household income and expenses contained in his affidavit dated 16 May 2016 are to be accepted, he cannot demonstrate that he has made provision for future debts. His household weekly outgoings exceed his household weekly income, and as such he is currently in hardship. However my view, for reasons indicated above, is that the applicant and his wife are getting by and will continue to do so.

³³ Exhibit 2, Supplementary T-Documents, ST4

48. Not all the factors relied on by the Commissioner support refusal to exercise the discretion in the applicant's favour. Nonetheless, in my view the discretion, if the occasion for its exercise arises, should not be exercised to grant relief. The matters which convince me of that, after taking all the circumstances into account, are the applicant not making proper provision to meet his tax liabilities and preferring to pay other debts.

CONCLUSION

49. The objection decision under review is affirmed.

I certify that the preceding 49 (forty-nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President I R Molloy

.....[Sgd].....

Associate

Dated 7 October 2016

Date of hearing	19 August 2016
Solicitors for the Applicant	Mr B Trost, Cleary Hoare Solicitors
Counsel for the Respondent	Ms C Muir
Solicitors for the Respondent	Ms A Roberson, Australian Taxation Office