Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2016] AATA 810

Division	TAXATION & COMMERCIAL DIVISION
File Number(s)	**2015/4756**
Re	**FKYL**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal	**Egon Fice, Senior Member**
Date	**14 October 2016**
Place	**Melbourne**

The Tribunal varies the decision under review as follows:

a. The Applicant's net amount for the tax period ended 31 March 2011 is varied to $28,784.

b. The Applicant's shortfall penalty is varied to be $14,394.

c. The reviewable decision is otherwise affirmed.

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

Egon Fice, Senior Member

© Commonwealth of Australia 2016

TAXATION - GST - residential premises - application of 'margin scheme' to sale of residential premises - where no agreement between buyer and applicant to apply 'margin scheme' - claim for income tax credits - whether expenses incurred for a creditable purpose - where expenses incurred in making income taxed supply - where insufficient evidence to establish expenses incurred for a creditable purpose - assessment not excessive - penalties - failure to take reasonable care in completing business annual statements - no legal or financial advice sought by applicant - no grounds for remission established.

Legislation
Administrative Appeals Tribunal Act 1975 (Cth) s. 29
A New Tax System (Goods and Services Tax) Act 1999 (Cth) ss. 9-70, 9-75, 11-5, 11-10, 11-15, 11-20, 11-30, 17-5, 29-10, 40-35, 40-65, 40-75, 75-5, 75-20, 195-1
Taxation Administration Act 1953 (Cth) ss. 14ZZ, 14ZZC, 14ZZK, 105-5, 105-25, 155-5, 155-35, 155-60, 155-65, 155-90, 284-75, 284-80, 284-90, 298-20
Income Tax Assessment Act 1997 (Cth) s. 995-1

Cases
Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation (1991) 22 ATR 148

Secondary Materials
Australian Taxation Office Practice Statement Law Administration 2012/5 - Administration of penalties for making false or misleading statements that result in shortfall amounts

REASONS FOR DECISION

Egon Fice, Senior Member

1. Between November 2003 and August 2007 the Applicant, who at all relevant times was registered for GST pursuant to Division 25 of *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act), was a sole trader carrying on a house construction enterprise. The Applicant entered into building contracts for the construction of new residential premises on each of four vacant blocks in Victoria. On completion of

construction, each of those properties was initially rented and then subsequently sold. The details of those transactions are as follows:

Property	Date of Purchase	Purchase Price	Date of Sale	Sale Price
15 Red River Grove, Pakenham (Red River Grove)	29 November 2003	$88,0000	21 January 2011	$350,000
8 Mallee Circuit, Pakenham (8 Mallee Circuit)	30 September 2004	$92,000	16 April 2012	$310,000
10 Mallee Circuit, Pakenham (10 Mallee Circuit)	30 September 2004	$92,000	12 April 2012	$315,000
8 Nandaly Place, Cranbourne West (Nandaly Place)	11 August 2007	$125,000	15 August 2012	$302,000

2. The Applicant did not provide any tax invoices to the Australian Taxation Office (ATO) and did not claim any input tax credits for the purchase of the four properties. The Applicant claimed, and the Commissioner of Taxation (Commissioner) accepted, that the Applicant purchased the four properties under the margin scheme as described in s. 75-5 of the GST Act. The Applicant was granted an extension of time until 21 December 2015 to obtain written agreements with each of the purchasers of the four properties evidencing agreement to use the margin scheme. At the time of lodging this application with the Tribunal, the Applicant had not provided written agreements to the Commissioner.

3. The Applicant did not report the sales of 8 Mallee Circuit, 10 Mallee Circuit and 8 Nandaly Place in her business activity statements (BASs). She did report the sale of 15 River Red Grove in her BAS for the quarter ending 31 March 2011. During the period in question, the Applicant claimed GST credits totalling $81,635.

4. In a letter dated 3 October 2014 the Commissioner informed the Applicant that she was to be the subject of an audit in respect of her BAS for the tax period 1 July – 30 September 2014 which was lodged on 28 September 2014. In a subsequent letter dated 13 October 2014 the Commissioner informed the Applicant that the audit would encompass the period 1 July 2010 – 30 June 2014.

5. The Commissioner notified the Applicant in a letter dated 27 November 2014 that the audit had been completed and, as a result, the activity statement she had lodged during the relevant period had been amended. The Commissioner also cancelled her GST and

ABN registrations from 30 September 2014 having determined that she was not carrying on an enterprise for tax purposes. The Commissioner also applied an administrative penalty of $40,817.50.

6. The Commissioner issued a notice of assessment of the net amount owing for each quarter between 1 July 2010 and 30 June 2012 which resulted in a $43,945 debit. The Commissioner further issued notices of assessment for each quarter between 1 July 2012 and 30 September 2014, resulting in a debit of $37,690. The total GST liability was therefore $81,635. The Commissioner also issued a notice of assessment of shortfall penalty on 28 November 2014 reflecting the $40,817.50 assessed penalty.

7. The Applicant lodged an informal objection to the Commissioner's assessments and the administrative penalty assessment on 29 December 2014. It is plain from that letter stating her objections that the Applicant is not at all familiar with the GST Act and had not obtained accounting or legal advice in respect of her duties and obligations. She appeared to have attempted to rely on explanations given to her by officers of the ATO. That is despite the fact that, of course, the ATO has no responsibility whatsoever to provide a taxpayer with advice regarding the completion of BAS returns.

8. An officer from the ATO requested further information from the Applicant in a letter dated 9 January 2015. The ATO officer dealing with the Applicant displayed remarkable patience and restraint and finally, on 9 February 2015, sent an email to the Applicant simply asking her to send in all the information she had regarding the property transactions and that the officer would then calculate all of her entitlements under the objection process. Effectively, the ATO officer was offering to properly complete all of the BAS statements in issue for the Applicant.

9. After conducting its own investigations the ATO advised the Applicant in an email dated 31 March 2015 that her ABN and GST registrations would be reinstated. The ATO officer also informed the Applicant that sales of the four properties in question should be treated as sales of new residential premises and were subject to GST. The Applicant was not entitled to apply the margin scheme, presumably for the reason that there were no written agreements with purchasers to that effect. The GST Act was amended by Act No. 78 of 2005 which came into effect on 29 June 2005. Section 75-5 dealing with application of the margin scheme then provided:

*(1) The *margin scheme applies in working out the amount of GST on a *taxable supply of *real property that you make by:*

(a) selling a freehold interest in land; or

*(b) selling a *stratum unit; or*

*(c) granting or selling a *long-term lease;*

*if you and the *recipient of the supply have agreed in writing that the margin scheme is to apply.*

10. The ATO officer then calculated the Applicant's GST liability in respect of each of the transactions as follows (calculated by multiplying the sales price by 1/11):

Property	**Sales Price**	**GST Liability**
Red River Grove	$350,000	$31,818
8 Mallee Circuit	$310,000	$28,636
10 Mallee Circuit	$315,000	$28,182
Nandaly Place	$302,000	$27,455
Total GST Liability		**$116,091**

11. The ATO officer also pointed out that the Applicant was not entitled to 100% of her claimed input tax credits relating to construction costs of the properties. That was because she had rented the properties for a period of time before selling them. That supply, by way of rental, was not made for a creditable purpose. Section 11-20 of the GST Act provides that a person is entitled to an input tax credit for any creditable acquisition made. Her input tax credits on construction costs across the four properties were allowed at $45,652. She was allowed further input tax credits totalling $8,115 for non-construction costs.

12. The ATO notified the Applicant that her objection had been allowed in part and that her total GST liability was now $55,052. The penalty applied to the shortfall on claimed GST credits was also reduced from a 50% penalty to a 25% penalty, and recalculated to $14,848.75. Formal notice of the objection decision was given to the Applicant in a letter dated 1 April 2015. It included the decision to reinstate her GST and ABN registrations. A notice of amended assessment of net amount was sent to the Applicant on 14 April 2015.

13. Undeterred, the Applicant requested that the ATO review her objection decision. Although an ATO officer conducted an informal review of the objection decision, the Applicant was notified in a letter dated 13 July 2015 that the objection decision was correct and if still dissatisfied with the objection decision, she should seek review by the Administrative Appeals Tribunal or appeal to the Federal Court.

14. The Applicant lodged her application with the Tribunal on 3 September 2015. Although the Applicant's application was lodged about three months outside of the statutory time limit (s. 14ZZC of the *Taxation Administration Act 1953* (Administration Act)), the Commissioner did not object to the Tribunal extending time for lodgement. The Tribunal made an order on 5 October 2015 extending the time for lodgement of her review application in accordance with s. 29 of the *Administrative Appeals Tribunal Act 1975*.

TIME LIMITATIONS ON ASSESSMENTS AND RECOVERY

15. Division 105 of the Administration Act sets out the general rules which apply to indirect taxes. The GST is an indirect tax. Section 105-5 relevantly provides:

> *(1) The Commissioner may at any time make an assessment of:*
>
> *(a) Your *net amount, or any part of your net amount, for a *tax period; or*
>
> *(b) …*

16. The expression *net amount* is defined in s. 995-1 of the *Income Tax Assessment Act 1997* (1997 Act) which states it has the same meaning as that set out in s. 195-1 of the GST Act. In respect of GST, the expression *net amount* is described in s. 17-5 of the GST Act as:

> *(1) The **net amount** for a tax period applying to you was worked out using the following formula:*
>
> *GST - Input tax credits*
>
> *where:*
>
> ***GST** is the sum of all of the GST for which you are liable on the *taxable supplies that are attributable to the tax period.*
>
> ***input tax credits** is the sum of all of the input tax credits to which you are entitled for the *creditable acquisitions and *creditable importations that are attributable to the tax period.*

17. The Commissioner may also amend an assessment at any time. An amended assessment is an assessment for all purposes of any indirect tax law (s. 105-25 of the Administration Act).

18. I also need to consider Subdivision 155-A of the Administration Act which came into effect from 1 July 2012 and which is applicable to payments and refunds that relate to tax periods starting on or after 1 July 2012. Section 155-15 of the Administration Act provides that the Commissioner is treated as having made an assessment under s. 155-5 of an assessable amount when the tax payer lodges their GST return for the tax period. The assessable amount is the net amount.

19. The Commissioner may amend an assessment of an assessable amount within what is described as the *period of review* for the assessment (s. 155-35 of the Administration Act). The *period of review* is defined in s. 155-35(2) of the Administration Act as follows:

> *(2) The **period of review**, for an assessment of an *assessable amount of yours, is:*
>
> *(a) the period:*
>
> *(i) starting on the day on which the Commissioner first gives notice of the assessment to you under section 155-10; and*
>
> *(ii) ending on the last day of the period of 4 years starting the day after that day; or*
>
> *(b) if the period of review is extended under subsection (3) or (4) of this section – the period so extended.*

20. The Commissioner cannot amend an amended assessment of an assessable amount if the period of review for the assessment has ended (s. 155-65 of the Administration Act). That is, the Commissioner must make any further amendments within the four year period referred to in s. 155-35(2) of the Administration Act. However, there is no restriction on the Commissioner amending an assessment of an assessable amount to give effect to a decision on review or appeal; or as a result of an objection made by the taxpayer, or pending a review or appeal (s. 155-60 of the Administration Act).

REVIEW OF ASSESSMENTS

21. Section 155-90 of the Administration Act provides:

> *You may object, in the manner set out in Part IVC of this Act, against an assessment of an *assessable amount of yours if you are dissatisfied with the assessment.*

22. Part IVC of the Administration Act deals with taxation objections, reviews and appeals. A review by this Tribunal or appeal to the Federal Court applies only to the Commissioner's objection decision (s. 14ZZ of the Administration Act). Division 4 of Part IVC deals with the AAT review of objection decisions. Relevantly, s. 14ZZK of the Administration Act provides:

> *On an application for review of the 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*
>
> *(b) the applicant has the burden of proving:*
>
> *(i) if the taxation decision concerned is an assessment – that the assessment is excessive or otherwise incorrect and what the assessment should have been; or*
>
> *(ii) in any other case – that the taxation decision concerned should not have been made or should have been made differently.*

23. While the means by which a person can discharge their burden of proof will vary according to the particular circumstances, as the Commissioner submitted, the burden is not discharged by conjecture or speculation. Furthermore, because in this case the Applicant appears to have relied substantially on her recollection, particularly of expenditure for which input tax credits were claimed, I should mention what Hill J said in *Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation* (1991) 22 ATR 148 at 155:

> *A taxpayer who does not keep records of his deductible outgoings faces a very difficult task. If he goes into the witness box and swears that he has incurred the outgoings he is making a self-serving statement. That does not necessarily mean that he is not to be believed. Such a statement, like statements of purpose, or object or state of mind, must however be "tested most closely, and received with the greatest caution": Pascoe v FCT (1956) 6 AITR 315; 11 ATD 108 at 111.*

24. The statement made by Hill J has particular significance in tax cases dealing with GST. That is because of the attribution rules set out in s. 29-10 of the GST Act. A taxpayer making valid claim for an input tax credit must hold a tax invoice (which is a defined

expression in the GST Act) for a creditable acquisition for the tax period to which the claim refers when they provide a GST return in which they make that claim (s. 29-10 (3) of the GST Act).

THE APPLICATION OF THE GST ACT TO RESIDENTIAL PREMISES

25. Subdivision 40-C of the GST Act deals with sales of residential premises. Section 40-65 relevantly provides:

> *(1) A sale of *real property is **input taxed**, but only to the extent that the property is *residential premises to be used predominantly for *residential accommodation (regardless of the term of occupation).*
>
> *(2) However, the sale is not input taxed to the extent that the*residential premises are:*
>
> *(a) *commercial residential premises; or*
>
> *(b) *new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.*

26. There was no issue in this case that the properties which were developed by the Applicant resulted in residential premises being constructed.

27. The meaning of new *residential premises* is set out in s. 40-75 of the GST Act. Relevantly, it provides:

> *(1)*Residential premises are **new residential premises** if they:*
>
> *(a) have not previously been sold as residential premises (other than *commercial residential premises) and have not previously been the subject of a *long-term lease; or*
>
> *(b) have been created through *substantial renovations of the building; or*
>
> *(c) have been built, or contain a building that has been built, to replace demolished premises on the same land.*
>
> *(2) However, the premises are not **new residential premises** if, for a period of at least 5 years since:*
>
> *(a) if paragraph (1)(a) applies (and neither paragraph (1)(b) nor paragraph (1)(c) applies) – the premises first became *residential premises; or*
>
> *(b) if paragraph (1)(b) applies – the premises were last *substantially renovated; or*
>
> *(c) if paragraph (1) applies – the premises were last built;*
>
> *the premises have only been used for making supplies that are *input taxed because of paragraph 40-35(1)(a).*

28. The expression *long-term lease* is defined in s. 195-1 of the GST Act as follows:

> ***long-term lease*** *means a supply by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) for at least 50 years if:*
>
> *(a) at the time of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, it was reasonable to expect that it would continue for at least 50 years; and*
>
> *(b) unless the supplier is an *Australian government agency – the terms of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, as they apply to the *recipient are substantially the same as those under which the supplier held the premises.*

29. I have already referred to the application of the so-called margin scheme set out in s. 75-5 of the GST Act. The application of the margin scheme permits the seller of new residential premises to calculate the GST as 1/11 of the *margin* for the supply as opposed to 1/11 of the consideration for the supply required by ss. 9-70 and 9-75. The margin is the difference between the consideration paid for the acquisition of what is sold and the consideration received for the sale.

30. That scheme is attractive to consumers because it will almost always mean they acquire property for less than 1/11 of the consideration for the sale. However the disadvantage in applying the scheme falls on the vendor because they are not entitled to input tax credits on the acquisition of properties which are subsequently sold (s. 75-20 of the GST Act). In the present case, it means that the Applicant would not be entitled to GST credits on the purchase of the properties concerned.

31. Broadly speaking, an applicant is entitled to a GST credit if he or she makes an acquisition in carrying on an enterprise and the acquisition is made for a creditable purpose. The meaning of the expression *creditable purpose* is set out in s. 11-15 as follows:

> *(1) You acquire a thing for a **creditable purpose** to the extent that you acquire it in *carrying on your *enterprise.*
>
> *(2) However, you do not acquire the thing for a creditable purpose to the extent that:*
>
> *(a) the acquisition relates to making supplies that would be *input taxed; or*
>
> *(b) the acquisition is of a private or domestic nature.*
>
> *…*

THE APPLICANT'S OBJECTIONS

32. As I have already indicated, most of the Applicant's objections have no apparent legal basis but rather are concerned with the fairness of the process in making reassessments. Because of the onus which must be borne by the Applicant to prove that the assessments were excessive (s. 14ZZK of the Administration Act) I will only deal with those issues which have a legal basis.

33. The first discernible issue raised by the Applicant goes to the right of the Commissioner (or the ATO) to make assessments outside what she described as *time limits*. However, as I have set out above at [15], s. 105-5 of the Administration Act provides that the Commissioner may, at any time, make an assessment of the net amount or any part of the net amount for a tax period. Furthermore, the Commissioner can also amend an assessment at any time as a result of an objection or pending a review (s. 155-60 of the Administration Act).

34. As I have noted above, the Commissioner issued the Applicant with notices of assessment of net amount on 27 November 2014 for the quarterly tax periods between 1 July 2010 and 30 June 2012. The Commissioner also issued a notice of amended assessment of net amount in respect of the quarters beginning 1 July 2012 to 30 September 2014. Those assessments were plainly lawful. The Commissioner may amend an assessment within 4 years starting on the day the Commissioner first gives notice of the assessment (s 155-65 of the Administration Act). The date on which those BASs were lodged is deemed to be the date on which the Commissioner made his assessment. In each case, the date of lodgement is well within the 4 year period allowed.

35. As the Commissioner pointed out, the Applicant has misdirected her focus onto the years she purchased the land and the year the house was completed rather than the date on which the supply of each of those four properties occurred. It is the date of supply, not the date of purchase or completion of construction, which triggers a GST liability.

36. The Applicant also referred to the houses being more than five-years old when they were sold. As such, the Applicant claimed they were no longer subject to any GST. However that is not an accurate description of what is set out in s. 40-75 of the GST Act.

37. The so-called five-year rule only applies if residential premises are new residential premises which have **only** been used for making supplies that are input taxed because of s. 40-35(1)(a) of the GST Act. The start day is the day on which the premises first became residential premises, that is, a building or land that is occupied as a residence for residential accommodation or is intended to be occupied; and is capable of being occupied as a residence or for residential accommodation. In other words, time only begins to run once a person has a right to occupy the premises, which is not necessarily the date of completion of building and it cannot be during the period when construction continues to take place. It should be apparent that each property needs to be examined in order to determine when it first became residential premises and whether the five-year rule applies. I should also note that in an email dated 18 February 2015 to the ATO, the Applicant said: *I built each house, with the express purpose of selling it*.

River Red Grove

38. The land was purchased by the Applicant on 29 November 2003 and construction of the residential premises was completed on 30 June 2005. In a letter dated 2 March 2015 the Applicant told the Commissioner that she did not rent the house out for the first year after it was built. She also said that she only rented it to persons who were willing to buy the property.

39. I had in evidence a statement prepared by the Applicant in which she set out details of tenants in this property prior to its disposition. The first tenants were in occupation between 10 November 2006 and 25 May 2007. The Applicant said the couple signed an agreement that they would purchase the house and rent it while saving for the deposit. They subsequently changed their minds and left. The second tenant rented the premises between 10 August 2007 and 28 March 2008. Again, the tenants signed an agreement that they would purchase the house and they paid rent while saving for the deposit. They also subsequently changed their mind and left. The third tenant occupied the premises between 20 June 2008 and 4 August 2010. That tenant caused considerable damage to the house and the Applicant required a Court Order in order to evict her. There were significant arrears of rent and in this case, there appears there was no agreement to buy the house at any stage. The property was finally sold on 31 January 2011.

8 Mallee Circuit

40. This property was first tenanted on 21 September 2007 with the tenants signing an agreement that they would purchase the house and they paid rent while saving for the deposit. They change their minds and left the premises on 12 February 2008. The premises was then let to another couple on 17 March 2008 on the same basis, that is, they would purchase but paid rent while saving for the deposit. They too changed their minds and left on 12 October 2009. The third tenants entered the premises on 4 November 2009 on the same basis as the first two tenants. They too changed their mind, leaving on 9 April 2010. The fourth tenant took up residence in the property on 11 August 2010 on the same basis as the first three tenants. They change their minds, leaving on 7 December 2011. A note in the statement suggests that the house was *trashed* and not rented until it was sold on 16 April 2012.

10 Mallee Circuit

41. It appears this property first had a short-term tenant between 28 September 2007 and 14 January 2008. It was then tenanted by persons who signed an agreement to purchase the house, renting while saving for the deposit. That occurred on 19 July 2008. However, due to many defaults in payment of rent, the Applicant obtained an order to evict the tenants as they would not leave voluntarily. They left on 20 September 2011. Again, a note in the statement suggests that the house was *trashed*. The property was sold on 16 April 2012.

8 Nandaly Place

42. A couple first took up residence in this property on 16 March 2009 under an agreement to purchase but to pay rent. They remained until 29 June 2012 when they changed their minds and vacated the property. Another tenant rented the property from 27 November 2009 and vacated on 29 June 2012. The property was sold on 16 July 2012.

43. The question which needs to be answered of course in relation to all four properties is whether, in the period of five years following those properties becoming residential premises, they have only been used for making supplies which are input taxed, that is, whether in that five-year period they were only supplied by way of lease, hire or licence.

The five-year period in fact commences from the time the residence is intended to be occupied and is capable of being occupied as a residence.

SATISFYING THE FIVE-YEAR RULE

44. The River Red Grove property construction was completed on 30 June 2005. However the Applicant did not intend to have anyone occupy the residence for the first year after it was built because she was concerned that tenants might cause damage. She subsequently rented the property between 10 November 2006 and 4 August 2010. However, last tenant caused considerable damage to the house making it incapable of being rented out until repairs had been completed. Furthermore, the tenant stopped paying rent 10 months before she was able to be evicted. It appears to have been vacant from 4 August 2010 until it was sold on 31 January 2011.

45. Ignoring for the moment that the first two tenants entered it into an agreement to purchase the house but were allowed to pay rent while saving for the deposit, this property was rented for only three years and nine months and was vacant for some five months before being sold. It is therefore does not satisfy the five-year rule. In fact, from the information before me in evidence, the Applicant had the tenants, save for the last tenant, sign a contract for the sale of land and a rental agreement prior to taking up occupation Therefore, arguably, this premises was not used only for making input supplies in the relevant five-year period. Accordingly, it must be classified as new residential premises for the purposes of the GST Act.

46. The 8 Mallee Circuit residence, which was completed 2 March 2007, was rented between 21 September 2007 and 7 December 2011, being sold four months later. Assuming that this property was intended to be occupied and capable of being occupied from 2 March 2007, the five year period runs between that date and 2 March 2012. Again, ignoring the fact that all four tenants initially entered into an agreement to purchase the property but were permitted to pay rent until they had saved the deposit, this property could be said only to have been used for making input taxed supplies for a period of four years and nine months. Even that calculation ignores a four-month period between the third and the fourth tenants when the house was vacant. Either way, it does not meet the five-year rule.

47. The 10 Mallee Circuit residence was also completed 2 March 2007 and rented out between 28 September 2007 and 20 September 2011. Therefore the five-year period for this property ended on 2 March 2012. This residence was also substantially damaged by the second tenants and an Order was required to eventually evict them. Therefore, from 20 September 2011 until it was sold on 16 April 2012, it was not capable of being occupied.

48. Ignoring the fact that the second tenants signed an agreement to purchase the house, the period between completion and the time when the property was no longer capable of being occupied due to damage was four years and six months. It cannot be said that this premises was only used for making input taxed supplies in the five-year period. That is because it ceased to be residential premises for the purposes of the GST Act, at the latest, on 20 September 2011, but probably sometime before that. In any event, it is arguable that because the second tenants entered into an agreement to purchase the property when they had saved sufficient money for the deposit, it was not only used for making input taxed supplies in that five-year period.

49. The 8 Nandaly Place residence was completed on 7 December 2008. Assuming that this property was capable of being occupied from that date, the five-year period ended on 7 December 2013. The property was rented out between 16 March 2009 and 29 June 2012. It was sold on 16 July 2012. Clearly, irrespective of the fact that the tenants signed an agreement for the contract of sale and were permitted to rent the property while saving for the deposit, this residence was not used only for the purpose of making input taxed supplies during that five-year period.

50. For the reasons I have set out above, I agree with the submission made by the Commissioner that the Applicant has not discharged the burden of proving that any of the four properties satisfied the five-year rule. Therefore, the supply of each of those properties was a supply of new residential premises for the purposes of the GST Act and therefore subject to GST.

SUPPLY UNDER THE MARGIN SCHEME

51. Although the Commissioner accepted that the Applicant had acquired the four properties for development under the margin scheme, he did not accept that the Applicant had, after residential dwellings had been built on the properties, sold those properties under the

margin scheme. Although the Applicant claimed she had, she was not able to produce a written agreement between her and each of the purchasers evidencing that the supply was to be under the margin scheme. In other words, the statutory requirement in s. 75-5 of the GST Act had not been met. Accordingly, GST on the supply of each of those four properties must be calculated on 1/11 of the consideration provided by the purchasers in respect of each sale.

52. I had no evidence before me on hearing this matter of a written agreement between the Applicant and subsequent purchasers of the four properties. On that basis, I must find that the Commissioner's decision to levy GST on the supply of those four properties outside the margin scheme was correct.

INPUT TAX CREDITS

53. Section 11-5 of the GST Act describes what a creditable acquisition is. It provides:

> *You make a **creditable acquisition** if:*
>
> *(a) you acquire anything solely or partly for a *creditable purpose; and*
>
> *(b) the supply of the thing to you is a *taxable supply; and*
>
> *(c) you provide, or are liable to provide, *consideration for the supply; and*
>
> *(d) you are *registered, or *required to be registered.*

54. As noted above, the meaning of the expression *creditable purpose* is set out in s. 11-15.

55. It is of course possible that an asset has been acquired at least partly for creditable purpose. In those circumstances, s. 11-30 applies. Relevantly, it provides:

> *(1) And acquisition that you make is **partly creditable** if it is a *creditable acquisition to which one or both of the following apply:*
>
> *(e) you make the acquisition only partly for a *creditable purpose;*
>
> *(f) you provide, or are liable to provide, only part of the *consideration for the acquisition.*
>
> *…*
>
> *(3) The amount of the input tax credit on acquisition that you make that is *partly creditable is as follows:*
>
> *Full input tax credit x Extent of creditable purpose x Extent of consideration …*
>
> *…*

56. The Applicant said in an email to the ATO dated 24 February 2015 that she did not claim GST (input tax credit) when she purchased the land because it was acquired under the margin scheme. That was undoubtedly correct as s. 75-20 of the GST Act provides:

> *(1) An acquisition of a freehold interest in land, a *stratum unit or a *long-term lease is not a *creditable acquisition if the supply of the interest, unit or lease was a *taxable supply under the *margin scheme.*
>
> *(2) This section has effect despite section 11-5 (which is about what is a creditable acquisition).*

57. In determining the Applicant's entitlement to input tax credits, the Commissioner looked at construction costs and non-construction costs.

Construction costs

58. Because each of the four properties in question were rented out before being sold, the Commissioner determined that construction costs were in part related to making taxable supplies and in part related to making input taxed supplies. Therefore, the Commissioner applied s. 11-30 of the GST Act and made an apportionment based on what he considered was fair and reasonable in the circumstances. Expressed as a percentage, the Commissioner allowed 87.89% of construction costs related to River Red Grove; 86.15% to 8 Mallee Circuit; 85.79% to 10 Mallee Circuit; and 85.52% to 8 Nandaly Place. Those figures were calculated by dividing the sale price by the sum of the sale price and rental income. By way of illustration, the River Red Grove property sold for $350,000 and the rental income from that property was $48,205. The calculation is then: 350,000/ (350,000+48,205) = .8789 or 87.89%.

59. In my opinion, the basis for the calculations of the Commissioner set out above is fair and reasonable. The proportion allowed reflects the returns available from sale and rental respectively.

60. The construction costs allowed by the Commissioner were $136,095 for River Red Grove; $145,845 for 8 Mallee Circuit; $150,935 for 10 Mallee Circuit; and $148,990 for 8 Nandaly Place. I did not have any evidence which disputed these figures. Therefore, applying the percentages calculated by the Commissioner, the total allowable input tax credit in respect of the four properties amounts to $45,652. The Applicant has not discharged the burden of proving that this assessment was excessive.

61. It is of no assistance to the Applicant to say that she completed the BAS returns in the way she was told should be done by ATO personnel who had carried out the audit. While I have no doubt the ATO staff were attempting to assist the Applicant as much as possible, they are not in a position to provide her with legal advice. Had there been any concern, she should have obtained independent legal advice.

62. The Commissioner disallowed the Applicant's claim for expenditure incurred as a consequence of renting the four properties. I agree with the Commissioner's submission that those expenses related to making input taxed supplies of residential rent and therefore were not incurred for a creditable purpose. They must be disallowed.

Non-construction costs

63. Following the hearing of this matter on 23 March 2016, the Applicant requested an additional two weeks to lodge further documents which she claimed were relevant. I made a direction to that effect and also directed that the Commissioner provide further submissions dealing with the additional material within seven days of receiving it. On 8 April 2016 I amended that direction at the request of the Applicant allowing her to lodge any further documents by 20 April 2016. On 15 April 2016 I again amended the direction allowing the Applicant to lodge those documents by 27 April 2016. Eventually, at the Applicant's request, ATO officers collected material from the Applicant on 3 May 2016. They comprised an additional 381 pages. The Commissioner provided submissions regarding those documents on 13 May 2016.

64. I should mention that the officers of the ATO who dealt with this additional material have been particularly diligent, identifying each and every item in that bundle of documents (which the Applicant plainly did not do) and commenting on whether and why a GST credit was either allowed or disallowed as well as the amount of GST where was allowed. All of this work should have, of course, been conducted by the Applicant. The ATO staff would have been well and truly within their right to simply claim that the Applicant had not discharged the onus of proving the assessments were excessive. The Applicant cannot suggest that she has not been treated fairly by the ATO.

65. The task of course has been made difficult because many expenses claimed related to the fact that the properties were rented before being sold. Those expenses had been disallowed because they were input taxed. Furthermore, numerous documents had been

duplicated, those documents having previously been provided to the ATO and the claim made in respect of them. Also embedded in the documents were many items which are properly described as private expenditure. They plainly do not relate to the creditable acquisitions. For example, there were invoices for a Foxtel subscription at the Applicant's home address. There was also a claim for home office expenses and, despite the fact that the Applicant provided no evidence as to the extent to which those expenses should be treated as creditable, the Commissioner allowed 20% of those claims. The patience shown by ATO staff in dealing with the Applicant was remarkable.

66. I find that Appendix A to the Commissioner's submissions, being 25 pages of tables setting out the nature of the claims, the GST credits allowed and identifying the category of expense should be accepted as being correct. In fact, they are generous to a fault.

67. Originally, the Commissioner allowed non-construction costs in the amount of $8,115. Despite finally coming to the conclusion that the allowable GST credits amounted to only $4,083.97, the Commissioner stated he was prepared to accept the original assessment of $8,115. It follows, and I find, that the additional material does not prove that the original assessment was excessive.

68. For the sake of completeness, I should also state that the Applicant, despite leave not being granted by the Tribunal to lodge any further documents in support of her application, provided the Tribunal and the ATO with an email on 5 May 2016 which set out expenses in addition to the new material. Given that in my opinion, the Applicant has had more than ample time to finalise the material upon which she claimed to rely upon for the purposes of this application, I decline to deal with those further claims. Furthermore, a bundle of invoices with unclear descriptions are of no assistance whatsoever.

PENALTIES

69. Division 284 of the Administration Act deals with administrative penalties. Section 284-75 relevantly provides:

> *(1) You are liable to an administrative penalty if:*
>
> *(a) you make a statement to the Commissioner or to an entity that is exercising powers or for forming functions under a *taxation law (other than the *Excise Acts); and*

(b) the statement is false or misleading in a material particular, whether because of things in it or omitted from it.

70. The Commissioner claimed that the Applicant made statements to the Commissioner in activity statements for the quarterly tax periods 1 July 2010 to 30 September 2014 which were false and misleading because they understated taxable supplies and overstated creditable acquisitions. The Applicant included in her BASs for the quarterly periods in question creditable acquisitions which did not give rise to GST credits, such as purchases related to making input taxed supplies. Also, she did not hold or had not kept tax invoices as required by the GST Act. The Commissioner did not impose any penalties on the Applicant for failure to pay GST on three of the four properties during the relevant period.

71. Section 284-80 describes what amounts to a shortfall amount. Relevantly, it provides:

*(1) You have a **shortfall amount** if an item in this table applies to you. That amount is the amount by which the relevant liability, or payment or credit, is less than or more than it would otherwise have been.*

72. The base penalty amounts are worked out using the table in s. 284-90 of the Administration Act. Following audit, the Commissioner determined that the base penalty amount should be 50% of the shortfall amount because the shortfall resulted from recklessness as to the operation of a taxation law. However, following the Applicant's objection, the Commissioner reduced the base penalty rate to 25% for lack of reasonable care. That resulted in a reduction of the penalty payable by $26,329.25. In arriving at that base penalty amount, the Commissioner considered that:

(a) the Applicant was not a new entrant to the tax system and had been through the audit and objection process in a previous year for the same enterprise. Her turnover in respect of the four properties in question exceeded $1.2 million;

(b) the Applicant was alert to her rights and obligations as a developer/landlord/vendor. In the past, she had instituted a number of legal proceedings, particularly in relation to tenants in the properties in question;

(c) the Applicant was aware of her tax obligations and entitlements evidenced by the fact she had claimed a refund on each occasion, from lodging the BAS only days after the close of the tax period; and

(d) the Applicant should have been aware of her tax obligations as a developer/landlord/vendor, particularly the obligation to complete her BASs correctly and to maintain records including tax invoices.

73. The Commissioner also submitted that in the circumstances described above, there was no basis for remission of penalty. The Commissioner considered Practice Statement Law Administration 2012/5. The Commissioner also considered remission under the principles of the ATO compliance model and Taxpayers' Charter. However he decided there were no facts which warranted any further remission of penalty. In doing so, the Commissioner complied with s. 298-20 of the Administration Act by giving written notice of the decision and the reasons for the decision not to remit the penalty.

74. The Applicant simply submitted that she should not be liable for penalties because the mistakes she made were totally honest and not as perceived by the ATO.

75. With respect to the Applicant, the Commissioner has levied penalties against her on the ground that she failed to take reasonable care. There can be no question that the Applicant made statements which were incorrect, that is, false or misleading statements on her BAS returns for the period in question. It has nothing to do with an honest mistake. In fact, because the Applicant has previously been audited (2010/2011), her claim for input tax credits without holding tax invoices cannot be said to be an honest mistake.

76. In addition, there is no evidence that the Applicant sought legal advice regarding the application of the five-year rule which applies to new residential premises. It is also not sufficient for the Applicant to say that she completed the BASs in the way she was told to by ATO personnel who conducted the audit in 2010/2011. It was her responsibility alone to ensure that what was contained in the BASs was true and correct in every particular.

77. Accordingly, I find that the penalties levied by the Commissioner at the rate of 25% for failure to take reasonable care in completing the BASs during the relevant period were correct. Furthermore, no grounds for remission have been established by the Applicant.

CONCLUSIONS

78. I have found that each of the four properties the subject of this application were new residential premises and accordingly subject to GST. They were not excluded under the

so-called five-year rule. That is because they were not only used for making input taxed supplies, by way of rental, for a period of at least five years since they first became residential premises. Although the Applicant claimed the properties had been sold under the margin scheme, she was not able to produce an agreement in writing with the purchasers evidencing agreement to apply the margin scheme. Therefore, I have found that the margin scheme did not apply to the supply of those properties.

79. I have also found that the Commissioner was legally entitled at any time to make an assessment of the Applicant's net amount (GST less input tax credits) for the quarterly periods between 1 July 2010 and 30 June 2012. After 1 July 2012, following the introduction of Subdivision 155-A, the Commissioner's right to amend an assessment of an assessable amount must be exercised within the period of four years starting the day after the day on which the Commissioner first gives notice of the assessment under section 155-10 of the Administration Act. That limitation has been met by the Commissioner. There is no restriction on the Commissioner to amend an assessment of an assessable amount in order to give effect to a decision made on review, such as the decision by this Tribunal.

80. This matter raises one issue pointed out by the Commissioner and that relates to non-construction costs claimed as input tax credits. In his objection decision, the Commissioner determined that sum to be $6,296. That figure contains an arithmetical error and should be amended to $8,115. I find that is the correct figure. It is in the Applicant's favour.

81. There was no issue that the Applicant was entitled to GST credits on acquisitions related to the four properties in question, particularly as I have found that they were not sold under the margin scheme. However, the Applicant said she purchased the vacant properties prior to development on the margin scheme and the Commissioner accepted that was correct. On that basis, the Applicant was not entitled to claim GST credits in respect of the cost of purchase of the land on which dwellings were built. However the Applicant was entitled to claim GST credits for construction and non-construction expenditure, provided that expenditure was not related to the rental of each of those properties.

82. I have found that the Commissioner's assessment of the percentage of GST credits entitlements reflected a reasonable apportionment between allowable and disallowable expenditure. The Applicant, who bears the onus of proving that an assessment is excessive, has not discharged her onus in that respect.

83. After the hearing had concluded, I allowed the Applicant further time to lodge additional evidentiary material particularly in respect of non-construction costs incurred in respect of the four properties. I have found, having examined them in detail, that the Commissioner's assessment of those non-construction costs is likely to be correct. The Applicant has not discharged her onus of proof in respect of those expenses disallowed.

84. The Commissioner reduced the Applicant's shortfall penalties from 50% to 25%. I have found that the Commissioner's shortfall penalty assessment was correct. The Applicant failed to take reasonable care in completing her BASs.

85. Given the above conclusions, I find that the Commissioner's decisions regarding the Applicant's GST liabilities in each quarter assessed were correct save for the net amount assessed in the tax period ended 31 March 2011. That amount should be varied to $28,784. It follows that the Applicant's shortfall penalty should be reduced to $14,394. There was no evidence before me which might found a basis for any further remission.

86. I find that the Applicant has failed to discharge the onus of proving that the assessments made by the Commissioner for the quarterly tax periods between 30 September 2010 and 30 September 2014 were incorrect except for the tax period ended 31 March 2011. I also find that the Applicant has failed to discharge the onus of proving that a penalty assessment should not have been made although the amount of that penalty is reduced to $14,394.

87. For the reasons set out above, I vary the decision under review as follows:

    a. The Applicant's net amount for the tax period ended 31 March 2011 is varied to $28,784.

    b. The Applicant's shortfall penalty is varied to be $14,394.

    c. The reviewable decision is otherwise affirmed.

I certify that the preceding 87 (eighty-seven) paragraphs are a true copy of the reasons for the decision herein of Egon Fice, Senior Member

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

Dated 14 October 2016

Date of hearing	**23 March 2016**
Applicant	**In Person**
Counsel for the Respondent	**Ms Angela Lee**
Solicitors for the Respondent	**Australian Taxation Office,** **Review and Dispute Resolution Group**