FEDERAL COURT OF AUSTRALIA

Benjamin v Commissioner of Taxation [2016] FCA 1157

Appeal from:	Benjamin v Commissioner of Taxation [2015] AATA 923
File number:	VID 928 of 2015
Judge:	**DAVIES J**
Date of judgment:	23 September 2016
Catchwords:	**TAXATION** – appeal of decision to refuse application for an extension of time in which to lodge an application for review of the Commissioner's decision to disallow taxpayer objections – whether denial of procedural fairness – principles to be applied in an application for an extension of time – whether proper reasons for decision given
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth), ss 29(7), 29(8), 29(9), 29(10)
Cases cited:	*Brown v Commissioner of Taxation* (1999) 42 ATR 118 *Federal Commissioner of Taxation v Brown* (1999) 42 ATR 672 *Mentink v Minister for Home Affairs* [2013] FCAFC 113 *Windshuttle v Commissioner of Taxation* (1993) 46 FCR 235
Date of hearing:	29 June 2016
Registry:	Victoria
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	50
Counsel for the Applicant:	C Wallis
Counsel for the Respondent:	M Schilling
Solicitor for the Applicant:	J Mapleston

Solicitor for the Respondent: Australian Taxation Office, Review and Dispute Resolution

ORDERS

VID 928 of 2015

BETWEEN:	**JOHN BENJAMIN** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **DAVIES J**

DATE OF ORDER: **23 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The Applicant pay the Respondent's costs of, and incidental to, the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DAVIES J:

1 The applicant (**"the taxpayer"**) has appealed the decision of the Administrative Appeals Tribunal (**"the Tribunal"**) refusing his application under s 29(7) of the *Administrative Appeals Tribunal Act 1975* (**"the AAT Act"**) for an extension of time in which to lodge an application for review of the decision of the respondent (**"the Commissioner"**) to disallow the taxpayer's objection to assessments and amended assessments for the income years ended 30 June 2000 to 2005 inclusive (**"the assessments"**).

BACKGROUND

2 The taxpayer was some seven years out of time in which to file an application to review the disallowance of his objections to the assessments. The objections had been disallowed in September 2008 (**"the objection decision"**) but the taxpayer claimed that he never received notification of the disallowance which had been sent to his former tax agent, Davey Accounting, in September 2008, and that the first time that he saw the objection decision was in April 2015, after the Commissioner produced a copy at his solicitor's request.

3 In an affidavit sworn by the taxpayer in October 2015, the taxpayer deposed that he had also been unaware that the Commissioner had sued him in the County Court for recovery of the unpaid tax and had obtained judgment against him in default of appearance for the amount of $2,734,107.99 in June 2014.

4 In July 2014, the Commissioner issued a bankruptcy notice against the taxpayer based on the judgment debt.

5 The taxpayer filed an application in the County Court to set aside the default judgment in December 2014. The taxpayer also made application in the Federal Circuit Court of Australia seeking an extension of time in which to comply with the bankruptcy notice on the ground that he was waiting for his application in the County Court to be heard.

6 In August 2015, the taxpayer made application to the Tribunal for review of the objection decision. The Tribunal notified the taxpayer's solicitor, Mr Mapleston, that the review request was out of time and that an application for an extension of time needed to be made. An application for an extension of time was filed in September 2015. On receipt of the

application, the Tribunal gave notice of the application to the Commissioner who then filed a notice of opposition to the application.

7 On 24 September 2015, the Tribunal notified the taxpayer's solicitor that an "interlocutory hearing" by telephone was convened for 6 October 2015 as follows:

> APPLICANT: John Benjamin
>
> RESPONDENT: Commissioner of Taxation
>
> This application has been listed as shown below:
>
> Interlocutory hearing by telephone – extension of time application
>
> Date: Tuesday 6 October 2015
>
> Time: 9.15 am

8 The interlocutory hearing by telephone was held on 6 October 2015. Following the interlocutory hearing the Tribunal made the following directions:

> The Tribunal DIRECTS:
>
> 1. On or before 13 October 2015, the [taxpayer] shall lodge with the Tribunal and serve on the [Commissioner] any additional material explaining the delay in lodging the [taxpayer's] application for review.
>
> 2. On or before 20 October 2015, the [Commissioner] shall lodge with the Tribunal and serve on the [taxpayer] any material in reply to the materials lodged by the [taxpayer] regarding the delay in lodging the [taxpayer's] application for review.

9 On 12 October 2015, the taxpayer swore an affidavit in support of his application for an extension of time which was filed with the Tribunal on 13 October 2015. The Commissioner filed responding material on 19 October 2015.

10 On 30 November 2015, the Tribunal dismissed the taxpayer's application for an extension of time to lodge his application for review and published reasons: *Benjamin v Commissioner of Taxation* [2015] AATA 923. The order was made without a further oral hearing of the application.

THE TRIBUNAL DECISION

11 The factors taken into account by the Tribunal in dismissing the application for an extension of time included the explanation given by the taxpayer for the delay, the merits of the proposed application for review of the objection decision and the prejudice to the Commissioner occasioned by the delay.

12 The Tribunal considered that the evidence disclosed "a less than satisfactory explanation for the seven year delay in seeking a merits review of the Commissioner's objection decision by the Tribunal" and pointed to the taxpayer "having rested on his rights or simply ignored his income tax liabilities following issue by the Commissioner of his objection decision".

13 The Tribunal concluded that the taxpayer had not shown an arguable basis for the merits review, reasoning that:

> Unless the facts are found to be substantially different to those exposed by the documents before me on this application, it cannot be said that [the taxpayer] has an arguable case. In the materials [the taxpayer] lodged with the Tribunal for the purposes of this application for an extension of time, he has produced nothing which counters or which may displace or alter the evidence which was before me.

14 The Tribunal also accepted the Commissioner's submission that the Commissioner would suffer prejudice should an extension of time be granted to the taxpayer by reason that the Commissioner would not be able to provide to the Tribunal all relevant documents on which the Commissioner's decision was based as some of the documents upon which the Commissioner had relied in making his objection decision were missing and could not be located.

15 In concluding that the application should be dismissed, the Tribunal took into account that if the extension of time were not granted, the taxpayer would suffer significant detriment because it was quite likely that he would be bankrupted.

THE APPEAL

16 The taxpayer has appealed the decision of the Tribunal under s 44 of the AAT Act. After further amendment to the amended notice of appeal, ten questions of law were identified as follows:

> 1. Once the Tribunal formed a view that the Commissioner was a person affected by the applicant's Application for it Extension of Time, whether section 29(9) obliged the Tribunal to require the applicant to notify the respondent of the applicant's Application for an Extension of Time rather than the Tribunal notify the respondent directly?
>
> 2. What meaning is to be attributed to the word "hearing" in section 29(10) of the [AAT Act]?
>
> 3. Whether a hearing convened by the Tribunal as an "interlocutory hearing" satisfies the requirements of a "hearing" as that word is used in section 29(10) of the [AAT Act]?
>
> 4. What is the meaning of the expression "reasonable opportunity" in section (10) of the [AAT Act]?

5. Whether the Tribunal, by making its decision in the course of an interlocutory hearing, provided the applicant a reasonable opportunity of presenting his case?

6. Whether the Tribunal extended procedural fairness to the Applicant by proceeding to determine the application during the course of an interlocutory hearing without providing the applicant a right of reply to the Commissioner's submissions lodged on 19 October 2015 where those submissions went beyond replying to the affidavit material lodged by the applicant on 13 October 2015.

7. Whether, in making the Tribunal erred in law by accepting evidence from documentation supplied to the Tribunal by the Respondent in submission called a "Work Management Activity Notes Report" without allowing that evidence to be tested by the Applicant in a hearing of the matter.

8. Whether, in making its decision, the Tribunal reached its conclusion without adequately disclosing its reasoning process in relation to Mr Benjamin's prospects of success.

9. Whether the Tribunal should have been satisfied by the evidence constituted by the Deed of Settlement, Mr Power's Advice and Mr Benjamin's affidavit that Mr Benjamin had an arguable case.

10. Whether the Tribunal erred in law by failing to consider the prejudice to the taxpayer.

17 Those ten questions of law can be reduced to five key issues:

(1) Did the Tribunal fail to comply with the requirements s 29(9) of the AAT Act? (Question 1)

(2) Was the taxpayer denied procedural fairness? (Questions 2–7)

(3) Did the Tribunal apply the correct principles in determining that an extension of time should not be granted? (Question 9)

(4) Did the Tribunal fail to give adequate reasons for its decision? (Question 8)

(5) Did the Tribunal fail to consider the prejudice to the taxpayer? (Question 10)

THE LEGISLATION

18 The relevant statutory provisions are contained in s 29(7) – (10) of the AAT Act as follows:

Tribunal may extend time for making application

(7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision (including a decision made before the commencement of this section) if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.

(8) The time for making an application to the Tribunal for a review of a decision may be extended under subsection (7) although that time has expired.

(9) Before the Tribunal determines an application for an extension of time, the Tribunal or an officer of the Tribunal may:

(a) give notice of the application to any persons the Tribunal or officer considers to be affected by the application; or

(b) require the applicant to give notice to those persons.

(10) If a person to whom a notice is given under subsection (9), within the prescribed time after the notice is received by him or her, gives notice to the Tribunal stating that he or she wishes to oppose the application, the Tribunal shall not determine the application except after a hearing at which the applicant and any person who so gave notice to the Tribunal are given a reasonable opportunity of presenting their respective cases.

ISSUE 1: DID THE TRIBUNAL BREACH S 29(9) OF THE AAT ACT?

19 It was contended that the Tribunal failed to comply with s 29(9) of the AAT Act by not requiring the taxpayer to notify the Commissioner of his application for an extension of time and that "in failing to comply with [s 29(9)] the Tribunal did not give itself jurisdiction in the hearing of any application brought under s 29(7) of the [AAT Act]".

20 Section 29(9), however, did not require the Tribunal to put the onus upon the taxpayer to notify the Commissioner of the taxpayer's application for an extension of time. The section provides in express terms that the Tribunal may either give notice to any person the Tribunal considers to be affected by the application (s 29(9)(a)) "or" may require the applicant to give notice to those persons (s 29(9)(b)). In the present case, the Tribunal gave notice of the taxpayer's application for an extension of time to the Commissioner, and the Tribunal advised the taxpayer's solicitor that it had done so. The Commissioner duly filed a notice of opposition to the application, having received notice of the application from the Tribunal. The notice was given by the Tribunal in conformity with s 29(9) and there was no failure either to comply with that section or want of jurisdiction as claimed.

ISSUE 2: WAS THERE A DENIAL OF PROCEDURAL FAIRNESS?

21 Three contentions were advanced in support of the claim that the taxpayer was denied procedural fairness.

22 First it was contended that the "interlocutory hearing" that was held on 6 October 2015 was not a "hearing" for the purposes of s 29(10) of the AAT Act because, the argument went, "an interlocutory hearing is by its nature not a 'hearing'" and, it was contended, the Tribunal made its decision on the application without conducting a "hearing" as required by s 29(10). Both propositions are rejected.

23 The statutory requirement is that there be a hearing at which the applicant and the person opposing the extension of time are given a reasonable opportunity of presenting their respective cases before the Tribunal makes its decision on the application for an extension of time: s 29(10). That requirement was met in this case.

24 Prior to the hearing, both parties exchanged written submissions and the Commissioner also filed supporting evidence. The taxpayer's solicitor did not file any supporting evidence because, it appears, he did not know that it was required. Both parties were represented at the hearing on 6 October 2015. No transcript of the hearing is available but the contemporaneous notes of Senior Member Fice and Angela Lee, the barrister who appeared for the Commissioner, are in evidence.

25 Ms Lee's notes record that the hearing lasted approximately one hour and that both parties made submissions on the merits of the application. The notes also record that at the conclusion of the hearing the Tribunal made directions about the filing of evidence by the taxpayer and any reply by the Commissioner and advised that there would be no further hearing unless requested by the parties. Ms Lee wrote:

> One week to provide further materials, particularly
>
> re: delay
>
> One week to reply
>
> Written reasons
>
> No further hearing unless requested by parties

26 Ms Lee was not challenged on the accuracy of her notes.

27 Senior Member Fice's notes consistently record:

> I gave parties my tentative view - not final because of subject to A providing further evidence of reasons for delay."
>
> I directed
>
> A to lodge & serve affid material from Mr Benjamin explaining delay in one wk i.e. 13/10.
>
> R to lodge & serve reply in 7 days after i.e. 20/10.
>
> I will then make final decision & give written reasons.

28 Senior Member Fice's notes were prepared on a standard AAT form which contained a "tick-box" if a further hearing was required. That box was not ticked.

29 Both parties filed further material in accordance with the directions made. No party requested a further hearing and the Tribunal subsequently gave judgment and published written reasons. Senior Member Fice stated at [6] of the reasons for decision:

> I held a hearing by telephone on 6 October 2015 at which Mr Benjamin was represented by Mr Mapleston and the Commissioner was represented by Ms A Lee of counsel. While I heard submissions from both parties at that hearing, I also directed that the applicant lodge with the Tribunal and serve on the respondent a statement from Mr Benjamin explaining the reason for the delay in lodging his application. I also directed the respondent to lodge and serve any reply which he wished to make to that statement. On 13 October 2015 the Tribunal received an affidavit sworn by Mr Benjamin on 12 October 2015. Ms Z Harwood, on behalf of the Commissioner, lodged a reply on 19 October 2015. I have taken that material into account in making this decision.

It was also noted at [54] of the reasons for decision that:

> Having made his application some seven years beyond the statutory time limit, Mr Benjamin only has the right to seek a hearing on the exercise of discretion to extend the statutory time period. Mr Benjamin has been given that right including extra time to lodge any further evidentiary material in support of his application. In those circumstances, it cannot be said that he has been denied procedural fairness.

30 It is evident that the telephone interlocutory hearing on 6 October 2015 was conducted as the hearing of the application. It is also evident that both parties were given full and proper opportunity to present their cases at that hearing. Both parties relied on written and oral submissions and at the conclusion of the hearing the taxpayer was given the opportunity to support his case by evidence, which he did before the Tribunal made its decision on the application and which the Tribunal took into account in making its decision. There is no substance in the claim that the application was determined without a hearing.

31 Secondly, it was contended that the taxpayer was not given reasonable opportunity of presenting his case because the taxpayer was denied the opportunity to file material in response to the further documentary evidence that the Commissioner filed with submissions on 19 October 2015. It was contended that, in the circumstances, procedural fairness required that the taxpayer be given the opportunity to respond to that additional documentary evidence which comprised documents described as "work management activity notes". These notes were relied on by the Commissioner to refute aspects of the taxpayer's evidence in the affidavit that he filed pursuant to the Tribunal's directions made on 6 October 2015.

32 It was not disputed that the Tribunal had indicated that it would make a final decision on the application without a further hearing following receipt of the parties' material pursuant to the

directions made on 6 October 2015. Mr Mapleston did not depose to having misunderstood the Tribunal's statements to that effect nor did he contend that the Tribunal made any representation that the hearing would be adjourned to a later date for further oral submissions. No request was made of the Tribunal on behalf of the taxpayer that further responding material be filed and it was not incumbent upon the Tribunal to provide any further opportunity to put material before the Tribunal after the Commissioner had filed his submissions and material in response to the taxpayer's affidavit. In so far as the submissions of the taxpayer cast the additional material relied on by the taxpayer as "new" it is well apparent that this material was furnished in contradiction of the taxpayer's evidence and that the new evidence furnished by the Commissioner was responsive to the evidence adduced by the taxpayer. The new evidence simply went to refuting, or providing information to refute, the evidence given by the taxpayer. The taxpayer was given the opportunity to file his supporting evidence and to present his case and procedural fairness did not require the Tribunal to give him any further opportunity to adduce more evidence in response to the Commissioner's responding material before determining the application.

33 Thirdly it was contended that the taxpayer was not given reasonable opportunity of presenting his case because his solicitor was unaware of the process to be followed at the hearing on 6 October 2015 and had been unable to ascertain from inquiries made by him of the Registry prior to the hearing how the telephone hearing would proceed. It was submitted that the Tribunal "had a duty to ensure that the applicant understood precisely what would occur" and that "by denying the applicant information about the manner in which the matter would proceed the Tribunal denied the applicant a reasonable opportunity of presenting his case". The submission is also without any foundation. The taxpayer was represented by a qualified lawyer and whether or not his solicitor was unsure of the process, the taxpayer was afforded the full opportunity to be heard and no practical injustice to the taxpayer resulted. Submissions were filed by the solicitor on the taxpayer's behalf in advance of the hearing, the taxpayer's solicitor was given full and proper opportunity to address the Tribunal on the merits at the hearing and the opportunity to address the lack of evidence before the Tribunal made its decision.

34 The claim that the taxpayer was denied procedural fairness is rejected.

ISSUE 3: DID THE TRIBUNAL APPLY THE CORRECT PRINCIPLES IN DETERMINING THAT AN EXTENSION OF TIME SHOULD NOT BE GRANTED

35 It was contended that the Tribunal did not apply the correct principles in its consideration of the merits of the taxpayer's application to review the Commissioner's objection decision and erred by not finding that the taxpayer had demonstrated an arguable case on his proposed merits review of the Commissioner's objection decision.

36 The assessments in issue had included an amount of $1.5 million in the taxpayer's assessable income. The taxpayer had received the $1.5 million in instalments between November 1999 and October 2004 pursuant to a Deed of Settlement entered into in October 1999. The parties to that Deed of Settlement were the taxpayer, his brother, an associate of his brother and their respective spouses and/or associated companies. The Tribunal decision records at [38]–[40] that:

> The Deed recites that Mr Benjamin's brother, Mr Terence Benjamin, his spouse and three corporate entities were involved in a property development project in Ballarat. It states that a dispute had arisen, in particular between Mr Benjamin and his late wife on the one hand and his brother, his brother's spouse, two other individuals and the four corporate entities in relation to the property development. It does not state what the dispute was about, other than that it related to the property development.
>
> By way of settlement of the dispute, it was agreed that one of the corporate entities would deliver to Mr Benjamin an executed transfer of its 25% interest in the property along with some other documents. No consideration was said to be paid for the transfer other than entering into the deed. In addition, Mr Terence Benjamin and three of the corporate entities agreed to pay to Mr Benjamin the total sum of $1,500,000 by way of instalment payments occurring between 20 November 1999 and 22 October 2004.
>
> The Commissioner included the instalment payments made to Mr Benjamin in his assessable income. Mr Benjamin maintained those amounts were not assessable because they related to payments arising from the settlement of a family dispute.
>
> ...

37 The Tribunal concluded that the taxpayer did not have an arguable case that the $1.5 million was not assessable as income. The taxpayer contended that the Tribunal erred in reaching that conclusion because, included in the material before the Tribunal, was an advice from counsel obtained by the taxpayer in 2006 in which counsel had expressed the view that the $1.5 million received by the taxpayer could not be characterised as a receipt of income (**"Mr Power's advice"**).

38 At [40], the Tribunal made reference to that advice:

> [The taxpayer] maintained those amounts were not assessable because they related to

> payments arising from the settlement of a family dispute. In support of his position [the taxpayer] obtained the advice of counsel, Mr Edward Power. That advice is dated 25 June 2006. In essence, Mr Power was instructed that the $1,500,000 payment and the 25% interest in the property received by [the taxpayer] were offered in negotiations between family members and was not based on anything finite such as profit forgone, rent foregone etc from the development. He determined on that basis that the amount received by [taxpayer] could not be characterised as a receipt of income. Mr Powell (sic) went on to consider whether the capital gains tax provisions applied and concluded that they did not. He described the receipt of the money and the 25% interest in the property as proceeds received from a family settlement.

39 The Tribunal accepted the Commissioner's argument that there was a "fundamental flaw" in that advice, noting that Mr Power's advice was given urgently on the basis of instructions and without a conference with the taxpayer and stating it was "sufficiently clear that Mr Power was not fully briefed of the circumstances giving rise to the dispute between [the taxpayer] and his brother" and that Mr Power did not "mention [the taxpayer's] claimed interest in the property development as a joint venturer. That much is clear from the Logie-Smith Lanyon letter".

40 Logie-Smith Lanyon letter was a reference to a letter of demand sent by Logie-Smith Lanyon, the taxpayer's then solicitors, to the taxpayer's brother in 1999. This letter was put into evidence by the Commissioner. The letter stated:

> According to our instructions, late last year Mr John Benjamin [the taxpayer] entered into a joint venture arrangement with you, Mr Terry Benjamin, and Mr Michael J Brooks, to purchase and develop the Lakeside Hospital site in Ballarat, in accordance with a proposal styled as The Domain, Ballarat.
>
> The terms of the joint venture arrangement, which were the subject of discussion at our meeting with you and Mr Selwyn Cohen on 14 January 1999, and our facsimile transmission to you of 15 January 1999, were that the three venturers, or interests associated with them, would share equally in the costs of and profits to be derived from the venture.
>
> We are further instructed that, in accordance with the joint venture arrangement, late last year Mr John Benjamin and you, Mr Terry Benjamin, worked together to prepare and to submit a detailed and far-ranging tender for the purchase of property, which ultimately proved successful. Mr John Benjamin was responsible for bringing together the team of expert consultants whose assistance resulted in the preparation of the detailed tender document that proved to be successful.
>
> In further pursuit of the joint venture, in December 1998 you, Mr Terry Benjamin, arranged for Ben Brook Homes Pty Ltd, to enter into a contract for the purchase of the property at a price of or approximating $1,518,000.00 on behalf of the joint venture.
>
> In January 1999, however, upon the tender by Mr John Benjamin to you of his share of the deposit payable under the contract for the purchase of the property, you, Mr Terry Benjamin, refuted the existence of the joint venture and asserted that you and Mr Brooks will proceed alone with the acquisition and development of the land

> to the exclusion of Mr John Benjamin.
>
> ...
>
> Based upon our instructions, we have expressed the opinion to Mr John Benjamin (which is supported by the opinion of senior counsel) that your actions in refuting the existence of the joint venture and purporting to exclude Mr John Benjamin from further participation in the venture, constitute an actionable repudiation of your obligations under the joint venture and that the land, once acquired, and any profits resulting from the acquisition development or realisation of the land will be held upon constructive trust as to one third for our client, Mr John Benjamin.
>
> ...
>
> Unless we have that assurance from you, Mr Terry Benjamin by no later than **4 pm** on **Tuesday, 20 April 1999**, we are instructed to institute proceedings without further notice to you for appropriate declaratory and other relief.

41 The Tribunal held at [43]:

> For the purposes of this application, as I have already indicated above, it is not my duty and in fact it would be incorrect for me to make any findings about the facts set out in the documents to which I have referred. However, simply accepting what is set out in the Logie-Smith Lanyon letter and the Deed of Settlement, the application of legal principles to those facts appears to support the Commissioner's argument. Put at its highest from Mr Benjamin's viewpoint, his prospects of succeeding in a merits review are not good. Unless the facts are found to be substantially different to those exposed by the documents before me on this application, it cannot be said that Mr Benjamin has an arguable case. In the materials Mr Benjamin lodged with the Tribunal for the purposes of this application for an extension of time, he has produced nothing which counters or which may displace or alter the evidence which was before me.

42 The taxpayer argued that the Logie-Smith Lanyon letter was irrelevant and should not have been taken into account by the Tribunal because it preceded the Deed of Settlement and made no mention of any payment. The taxpayer also argued that the Tribunal should have accepted Mr Power's advice on its terms as establishing that the taxpayer has an arguable case that the $1.5 million is not assessable and that the Tribunal had erred in law by misapplying the relevant principles in considering the merits of the proposed substantive application in determining an application for an extension of time to bring that application. Reliance was placed on *Brown v Commissioner of Taxation* (1999) 42 ATR 118; [1999] FCA 563; on appeal *Federal Commissioner of Taxation v Brown* (1999) 42 ATR 672 (***"Brown"***). That case was an appeal from a decision of the Tribunal refusing to grant the taxpayer an extension of time in which to lodge an objection to assessments having assessed the substantive merits of the taxpayer's objection, including making findings of credit, and ultimately concluding that an objection would be futile because the taxpayer must lose. The Court held that the Tribunal had erred in law in going into the merits of the case and making findings of credit.

43 I do not consider that that error has been shown in the approach of the Tribunal in this case.

44 A more recent Full Federal Court decision than *Brown* on the question of the approach to be taken in considering the merits of a substantive application in determining whether to grant an extension of time to bring that application is *Mentink v Minister for Home Affairs* [2013] FCAFC 113. In that case, Griffiths J (with whom Edmonds J agreed) made some general observations concerning the list of matters identified by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 as relevant in determining whether to grant an extension of time to make an application. His Honour stated as follows at [36]–[39]:

> First, it is important not to lose sight of the fact that the matters are not exhaustive. They were intended to provide only general guidance in the exercise of the relevant discretion. As French J (as his Honour then was) pointed out in *Seiler v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 83 at 97 in respect of the matters or criteria identified by Wilcox J:
>
> > His Honour did not purport to set out an exhaustive list of the criteria to be considered in an application for an extension of time. Nor should the propositions contained in the judgment be elevated into rules of law fettering the discretion. They identify factors relevant to the exercise of the power and approaches to their consideration. In each case the discretion must be exercised with regard to all the circumstances.
>
> Secondly, it is equally important in my view not to lose sight of the fact that, while the merits of a substantive application are a relevant matter, the assessment of those merits arises in the context of an interlocutory application. Appropriate caution is required in assessing the merits of a substantive application at that stage of the proceeding. I respectfully agree with the following additional observations of French J in *Seiler* at 98 on that issue:
>
> > ... The question of the merits of a substantive application has to be approached with some caution in any consideration of a claimed extension of time. If an application has no reasonable prospect of success, then the decision to refuse an extension on that basis reduces to a decision to strike it out. To say a substantive application has a reasonable prospect of success is to say no more than that there is a finite non-trivial probability that it will succeed. The statement of its merits is then stochastic. It is based upon necessarily incomplete evidence or consideration of the case. It is difficult to imagine any case which appeared weak but not hopeless in which it would be proper to refuse an extension on that account. On the other hand, the stronger the case appears to be, the higher may be the probability that an injustice will be done if an extension is refused. So a strong case may be a positive factor in favour of the grant of extension, but an apparently weak case cannot be treated as a factor weighing against it...
>
> More recently, in *ActewAGL Distribution v Australian Energy Regulator* (2011) 195 FCR 142 at [111], Katzmann J adopted a similar approach when her Honour said:
>
> > Taking these matters in order, the first point to make is that when Wilcox J in *Hunter Valley Developments* referred to the merits he cited *Lucic v Nolan* (1982) 45 ALR 411 ("Lucic") at 417 and Chapman v Reilly, unreported, Federal Court of Australia, 9 December 1983 at 6, where Neaves J also

> referred to Lucic. What those cases make clear is that it is inappropriate for this purpose to fully investigate the merits, although an obvious strength or weakness in the applicant's case is a factor for or against the exercise of the discretion. It seems to me that the proper approach is that which French J (as his Honour then was) described in Seiler v Minister for Immigration, Local Government and Ethnic Affairs (1994) 48 FCR 83 at 98 [her Honour then set out the same passage from *Seiler* as is set out in [37] above].

Pagone J also refers to the decision of Besanko J in *Hamden v Secretary, Department of Human Services* [2013] FCA 3. In my view, it is particularly important to note what Besanko J had to say in [40] about the need for caution at the interlocutory stage of proceedings in assessing the relevance of the merits of the substantive application:

> As far as the merits of the substantive application are concerned, it is not for the Court to determine the application at this stage. However, an extension of time should not be granted if the substantive application is not reasonably arguable. Furthermore, if the prospects of success of a substantive application are plainly strong or plainly weak, then that may be a relevant consideration depending on the nature of the other factors (for example, the period of the delay and the explanation for it) relevant to the application for an extension of time.

As the authorities make clear, the merits of the substantive application are relevant to take into account in the exercise of discretion as to whether to grant an extension of time, but this does not involve a determination of the substantive application. The matter to be addressed is whether an arguable case on the merits of the application is shown based upon the material relied upon by the applicant, and not upon an inquiry into the true existence of the facts: *Windshuttle v Commissioner of Taxation* (1993) 46 FCR 235 at 243–44.

45 The Tribunal did not depart from these principles. The relevant material before the Tribunal was the Deed of Settlement, Mr Power's advice and the Logie-Smith Lanyon letter. The taxpayer himself did not give any evidence about the circumstances of the Deed of Settlement, save to assert that in his view "the settlement was in essence a Family Settlement between [his] brother and [himself] and this matter was confirmed by Counsel who was retained to provide an advice on this matter to the [Commissioner]". The Tribunal did not engage in a fact finding exercise or undertake an assessment of the merits of the taxpayer's proposed review application, but considered whether the material showed an arguable case that the $1.5 million that the taxpayer received pursuant to the Deed of Settlement was not income and the Tribunal's conclusion that the taxpayer's "prospects of succeeding in a merits review [were] not good" was based upon that material. The reason given by the Tribunal for not accepting Mr Power's advice as showing an arguable case was that his advice was demonstrated not to be based upon all the relevant facts and circumstances. In the circumstances, the Tribunal was entitled to base its conclusion that an arguable case was not

shown having regard to the totality of the facts on the material before the Tribunal and open to the Tribunal to form the view that on the totality of those facts an arguable case had not been shown.

ISSUE 4: WAS THERE A FAILURE TO GIVE PROPER REASONS?

46 The taxpayer requires leave to raise this ground as it is an additional ground. The submissions appeared to be put in two ways: first that the Tribunal failed to give proper reasons for rejecting Mr Power's advice as showing an arguable case; and secondly, there was a failure to give proper reasons for concluding that "simply accepting what is set out in the Logie-Smith Lanyon letter and the Deed of Settlement, the application of legal principles to those facts appears to support the Commissioner's argument".

47 The reasons must be read as a whole and when read as a whole the Tribunal's reasoning process for concluding that the taxpayer had not shown an arguable case on the merits of his proposed application to review the Commissioner's objection decision is sufficiently apparent. The reasons identified both the basis for placing no weight upon Mr Power's advice, namely that it was based on incomplete instructions, and the basis for concluding on the state of the evidence that the $1.5 million was an income receipt, namely that the nature of the dispute which was the subject of the settlement deed concerned a joint venture property development, not just a mere "family dispute" as asserted by the taxpayer in his affidavit. Both matters sufficiently disclosed and explained the Tribunal's reasoning process and as there is no merit in the proposed ground, leave to rely on the additional ground is refused.

ISSUE 5: DID THE TRIBUNAL FAIL TO CONSIDER THE PREJUDICE TO THE TAXPAYER?

48 The question of prejudice to the taxpayer was considered by the Tribunal at [45]:

> What was submitted by Mr Mapleston was that [the taxpayer] would suffer prejudice because, if an extension of time were not granted, his right to having the Commissioner's objection decision reviewed would be lost. As a consequence, he may well be bankrupted on the application of the Commissioner. However, it should be apparent to [the taxpayer] that his right to have the Commissioner's decision reviewed is a qualified right. He only has such a right, in this case, provided he lodges an application seeking review of that decision within 60 days of the date on which he was given that decision. While I am mindful of the fact that [the taxpayer] said he did not receive the Commissioner's Objection Decision until September 2015, if the Commissioner were to rely on s. 29 (1) of the *Acts Interpretation Act 1901*, the Objection Decision would be deemed to have been given to [the taxpayer] at a time when it would have been delivered in the ordinary course of post. It is safe to say that Mr Benjamin lost the right to seek review of the Commissioner's Objection Decision many years ago. He must now rely on the exercise of the

> discretion granted to the Tribunal by s. 29(7) of the AAT Act. The Tribunal will only grant that application if it is satisfied that it is reasonable in all the circumstances to do so.

49 The taxpayer argued that the Tribunal erred in its consideration of the prejudice to the taxpayer in that it failed to have due regard to the considerable prejudice that the taxpayer would suffer if he is unable to challenge the Commissioner's objection decision in Part IVC proceedings. As the Tribunal correctly stated, the taxpayer lost the right to have an independent merits review many years ago and the evidence before the Tribunal pointed to the taxpayer "having rested on his rights or simply ignored his income tax liabilities following issue by the Commissioner of his objection decision". There was no legal error in the Tribunal's reasoning at [45].

CONCLUSION

50 Legal error in the decision of the Tribunal has not been shown and the appeal should be therefore be dismissed.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 23 September 2016