



Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: **Taxation and Commercial Division**

File Number(s): **2016/0654**

Re: **BFCB**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President S A Forgie**

Date: **18 August 2017**

Place: **Melbourne**

The Tribunal decides to affirm the decision of the respondent dated 11 December 2015 disallowing the applicant's objection to his decision dated 17 July 2015 refusing to release her from her tax liability.

.....[sgd].....
Deputy President S A Forgie



Catchwords

TAXATION – release of tax liability - whether taxpayer would suffer serious hardship – decision affirmed

Legislation

Administrative Appeals Tribunal Act 1975 ss 37, 38AA

Income Tax Assessment Act 1936 s 265

Income Tax Assessment Act 1997 ss 4-1, 5-15, 995-1

Taxation Administration Act 1953 s 14ZZK, Sch 1 and ss 255-10, 255-15, 340-5, 340-10, 388-50

Cases

Australian Prudential Regulation Authority v VBN [2005] FCA 1868; (2005) 88 ALD 403

Buckley v Wathen [1973] VicRp 51; [1973] VR 511

Corlette v Mackenzie (1996) 62 FCR 597; 42 ALD 193; 96 ATC 4502; 32 ATR 667

Commissioner of Taxation v A Taxpayer [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450, 91 ALD 335, 2006 ATC 4393

Commissioner of Taxation v Milne [2006] FCA 1005; 153 FCR 52; 63 ATR 538; 2006 ATC 4503

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; 66 ALR 299

Minister for Immigration and Ethnic Affairs v Pochi [1980] FCA 85; (1980) 44 FLR 41; 31 ALR 666; 4 ALD 139

Powell v Evreniades [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415

R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd (1979) 144 CLR 45; 27 ALR 321

Re Rasmussen and Commissioner of Taxation [2013] AATA 746; (2013) 61 AAR 323

Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286; 248 ALR 390; 48 AAR 345; 103 ALD 467; 82 ALJR 1147

Van Grieken v Veilands [1991] FCA 167; (1991) 21 ATR 1639; 91 ATC 4,423

Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 492

Secondary Materials

Practice Statement: PS LA 2011/7

REASONS FOR DECISION

Deputy President SA Forgie

1. In the income tax year ending 30 June 2013, BFCB declared taxable income of \$241,999.00. It included net capital gain of \$159,444.00 as she had realised a capital gain of \$318,889 on the sale of her investment unit in that year.¹ In addition, BFCB's taxable income included business income of \$98,908.00. On 7 May 2015, the Commissioner of

¹ BFCB sold her home and the investment unit was attached to it and on the same title. She entered the contract of sale in February 2013 and settled on 2 July 2013.

Taxation (Commissioner) issued a Notice of Assessment to BFCB showing that, after taking account of the Medicare levy and surcharge as well as PAYG instalments she had previously paid, she had a taxation liability in the amount of \$70,571.50.² Payment was due by 5 June 2014.³ BFCB partially paid the tax debt leaving the sum of \$61,108.50 of the primary tax outstanding and \$13,540.41 of General Interest Charge (GIC) outstanding as at 16 June 2016 i.e. a total of \$74,648.91. As at 25 November 2016, BFCB's tax liability had risen to \$77,571.11.

2. BFCB applied to be released from this debt under s 340-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). The Commissioner refused her application on 17 July 2015. When, on 31 August 2015, she objected to his decision, the Commissioner disallowed her objection to his earlier decision. He did so on 11 December 2015. BFCB applied to this Tribunal for review of the Commissioner's reviewable objection decision. I have decided to affirm his decision. That means that BFCB continues to be liable to pay the full amount of her tax liability. In summary, I have found that BFCB is, or is about to be, suffering serious hardship because of her unpaid liabilities in general but that she would not suffer serious hardship if required to satisfy her tax liability. Given that finding, the Commissioner does not have a discretion under Item 1 of s 340-5(3) of Schedule 1 to the TAA. Even if there were discretion, I have decided that I would not have exercised it to release BFCB from all or part of her tax liability.

LEGISLATIVE BACKGROUND

3. BFCB has satisfied the requirements of s 340-5(2) of Schedule 1 to the TAA in that she has made an application for release from her taxation in the approved form.⁴ She has also met the requirements of s 340-5(1) as her application seeks release from a liability to which s 340-10 applies. In her case, that liability is tax incurred under s 4-1 of the *Income Tax Assessment Act 1997* (ITAA97) and the GIC payable on unpaid income tax under s 5-15 of ITAA97, which come within Items 6 and 3 respectively of s 340-10(2) of Schedule 1 to the TAA. Having met those requirements, s 340-5(3) provides:

"The Commissioner may release you, in whole or in part, from the liability if you an entity specified in the column headed 'Entity' of the following table and the condition specified in the column headed 'Condition' of the table is satisfied.

| Entity and condition | | |
|-----------------------------|---------------|---|
| Item | Entity | Condition |
| 1 | an individual | you would suffer serious hardship if you were |

² Documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975* (T documents)

³ T documents; T8 at 127

⁴ T documents; T11 at 163-181 For the definition of "approved form" see *Income Tax Assessment Act 1997*; s 995-1 and *Taxation Administration Act 1953*; Sch 1 and s 388-50.

| <i>required to satisfy the liability</i> | | |
|--|-----|-----|
| 2 | ... | ... |

4. The effect of s 14ZZK(b)(ii) of the TAA is that BFCB “... *has the burden of proving ... that the taxation decision concerned should not have been made or should have been made differently.*” From an evidentiary point of view, therefore, BFCB carried the burden of ensuring that there was evidentiary material on which I could be satisfied, on the balance of probabilities, that she would suffer serious hardship if she were required to satisfy her tax liability and, if so, that the discretion should be exercised in her favour. She could seek to do that by relying on evidentiary material or material generally she produced or that which the Commissioner produced. As the resolution of the issue depends on her income, expenditure, assets, debts and responsibilities, they are matters largely within her own knowledge and with regard to which she will have documentary evidence. Whatever form that evidentiary material takes, it must be both relevant and probative of the issues that must be decided for the findings of fact that must underpin my decision must be based on findings of fact and not on mere suspicion or speculation.⁵

CONSIDERATION

A discretionary power

5. Once it has been established that a taxpayer would suffer serious hardship if required to satisfy the liability, the Commissioner is not obliged to release that taxpayer from the liability. Rather, the power given to the Commissioner is a discretionary power. That is apparent from the wording of s 340-5(3) when it provides that “*The Commissioner **may** release you ...*” (emphasis added) from the liability either in whole or in part and from the terms of the condition that give rise to the power. In his judgment in *Corlette v Mackenzie*,⁶ Wilcox J came to that conclusion in relation to the similarly worded, but now repealed, predecessor of s 340-5(3), s 265(1) of the *Income Tax Assessment Act 1936* (ITAA36). His reasoning is equally apt in relation to s 340-5(3):

“ *The circumstances stipulated by s 265 of the Income Tax Assessment Act are extremely broad. It is sufficient, for example, for a taxpayer to establish that he or she has suffered a loss or is in such circumstances that the exaction of the full amount of the tax will entail serious hardship. On some occasions, of course, the loss or the circumstances may be for reasons that were outside the control of the taxpayer, but that will not necessarily be so. It would be extremely odd if a taxpayer who was the author of his or her own misfortunes, through imprudent or extravagant*

⁵ *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 44 FLR 41; 31 ALR 666; 4 ALD 139 at [24]; 67-68; 690; 160 as per Deane J

⁶ (1996) 62 FCR 597; 42 ALD 193; 96 ATC 4502; 32 ATR 667; Wilcox, Einfeld and Foster JJ

expenditure, was entitled, as a matter of right, to a release of unpaid income tax.
...⁷

6. There are, therefore, two steps to be taken when deciding whether to exercise power under s 340-5(3) and they are the same two steps described by Hill J in *Powell v Evreniades*⁸ in the context of s 265:

“... Where, as here, the case is one arising after the death of a taxpayer the Board must first decide whether owing to the death of the original taxpayer that person’s dependants are in such circumstances that the exaction of the full amount of tax would entail serious hardship. If that question is answered favourably to the applicant for relief the Board must then address the next set of issues, namely whether there should be release in the circumstances and if so whether that release will be of the whole or part of the liability. It is obvious that the factors that may be relevant to the second of these steps could be a great deal wider than the factors which are relevant to the first of the steps.”⁹

When would the taxpayer suffer “serious hardship if ... required to satisfy the liability”

A. At what time is “serious hardship if ... required to satisfy the liability” assessed?

7. In *Re Rasmussen and Commissioner of Taxation*,¹⁰ I considered the time at which I should consider the issues arising under s 340-5(3). For the reasons that I gave in that case and that I adopt in this, I concluded:

- (1) Whether a person would suffer serious hardship if required to satisfy the liability “... *is an issue which clearly enough arises to be looked at at the time of the application. ...*”: *Powell v Evreniades*,¹¹
- (2) Having regard to the principles decided by the High Court in *Shi v Migration Agents Registration Authority (Shi)* and to the terms of s 340-5(3), which do not give a contrary indication, regard may be had to evidence that is current at the date of the hearing. As Kirby J said:

“ When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration. When, therefore, the Tribunal elects to make ‘a decision in substitution for the decision so set aside’, as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.”¹²

⁷ (1996) 62 FCR 597; 42 ALD 193; 96 ATC 4502; 32 ATR 667 at 598; 194; 4,503; 668

⁸ [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415

⁹ [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [40]; 264; 128; 482; 4,424-4,425

¹⁰ [2013] AATA 746; (2013) 61 AAR 323 at [51]-[53]; 340-341

¹¹ [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [48]; 266; 130; 484; 4,426 per Hill J

¹² [2008] HCA 31; (2008) 235 CLR 286; 248 ALR 390; 48 AAR 345; 103 ALD 467; 82 ALJR 1147 at [41]; 299-300; 400; 356; 477; 1156

B. When does a taxpayer “suffer serious hardship if ... required to satisfy the liability”?

8. There are two elements of s 340-5(3) of Schedule 1 to the TAA that must be considered. One is the element of “*serious hardship*”. The other is that the Commissioner’s discretionary power is only enlivened if the taxpayer would suffer serious hardship if required to satisfy the liability. Therefore, if the taxpayer would suffer serious hardship quite apart from meeting the tax liability, the condition specified in Item 1 of s 340-5(3) of Schedule 1 to the TAA will not be met.
9. The following principles are taken from the courts’ interpretation of s 340-5(3) and its predecessor, s 265(1) of ITAA36:
- (1) “... *Those provisions ... assume the existence of the tax liability and provide for relief on special grounds beyond those considered in the process of assessment.*”¹³
 - (2) “... *The context in which the words appear make it clear that the Relief Board is to consider whether the exaction of the full amount of tax would involve the dependants of a deceased taxpayer in financial difficulty which in all of the circumstances can be said to be serious. The financial difficulty will be such that the dependants will be in significant need warranting action by the Relief Board to relieve their condition.*”¹⁴
 - (a) “... *the assessment is based so squarely on the individual circumstances ...*”¹⁵
 - (b) “... *Clearly there would be serious financial hardship if the dependants of a deceased person were left destitute without any means of support. That is not to say that in any particular case something less than that will not constitute serious hardship.*”¹⁶
 - (3) The question to ask is whether the taxpayer “... *would be placed in a situation of need warranting action, or in other words, whether the ... [taxpayer] or dependants would be deprived of necessities.*”¹⁷
 - (a) That question is answered “... *with regard to the whole of the taxpayer’s circumstances*”¹⁸ and by “... *assessing the ... [taxpayer’s] individual circumstances by reference to normal community standards*”.¹⁹

¹³ *Van Grieken v Veilands* [1991] FCA 167; (1991) 21 ATR 1639; 91 ATC 4,423 at [12]; 1644; 4,428

¹⁴ *Powell v Evreniades* [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [19]; 258; 122; 472-473; 4,420 per Hill J

¹⁵ *Commissioner of Taxation v A Taxpayer* [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450, 91 ALD 335, 2006 ATC 4393 at [16]; 339; 454; 339; 4,396 per Stone J

¹⁶ [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [21]; 259; 123; 478; 4,421 and cited with approval by Gummow J in *Van Grieken v Veilands* (1991) 91 ATC 4,423; 21 ATR 1639 at 4,428; 1644. See also *Commissioner of Taxation v A Taxpayer* [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450; 2006 ATC 4393 at [17]; 339; 454; 4,396 per Stone J

¹⁷ *Commissioner of Taxation v A Taxpayer* [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450; 2006 ATC 4393 at [56]; 347; 462; 4,403 per Stone J

¹⁸ [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450; 2006 ATC 4393 at [19]; 339; 454; 4,396

¹⁹ [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450; 2006 ATC 4393 at [55]; 347; 461; 4,402-4,403

- (i) What amounts to “*reasonable acquisitions*” of relevant necessities is assessed by reference to what is “... *not excessive or unreasonable in all the circumstances*. ...”.²⁰
- (ii) Those matters can be assessed by the decision-maker “... *from its own knowledge and experience, determine what were and what were not reasonable living costs* ...”.²¹
- (iii) “*Community standards*” are not a matter of evidence.²²

C. The Commissioner’s Practice Statement: PS LA 2011/17

10. In his Practice Statement: PS LA 2011/17 (Commissioner’s Policy), the Commissioner has provided guidance about his powers to grant individual taxpayers release from their obligation to pay certain tax-related liabilities. He begins by stating that he has an obligation to pursue the recovery of tax debts but also notes that he may release a taxpayer from the particular tax liabilities in the case of serious hardship. I am concerned only with the Commissioner’s powers under Item 1 of s 340-5 of Schedule 1 to the TAA.
11. The Commissioner’s Policy sets out his understanding of the expression “*serious hardship*”:

*“ ‘Serious hardship’ is given its ordinary meaning. We consider serious hardship to exist where the payment of a tax liability would result in a person being left without the means to afford basics such as food, clothing, medical supplies, accommodation, or education.”*²³
12. An income/outgoing test and an assets/liabilities test are used to determine financial hardship. The purpose of the income outgoing test is to assess a taxpayer’s capacity to meet his or her tax liability from current income. That requires identification and consideration of those, if any, who are dependent upon the taxpayer and the degree of responsibility the taxpayer and his or her partner, if any, has for them. The income/outgoing test also requires consideration of the taxpayer’s capacity to pay the tax liability within a reasonable time on the basis of their income and outgoings, the scope of the taxpayer to increase his or her income, whether all expenditure could be considered reasonable and whether the taxpayer has made attempts to defer or reschedule other financial commitments.²⁴
13. At [7] of the Commissioner’s Policy, he explains that the purpose of the assets/liabilities test is to assess a taxpayer’s equity in, or access to, assets which may be indicative of his or her capacity to pay the tax liability. Consideration is given to any property owned wholly or

²⁰ [2006] FCA 888; (2006) 91 ALD 335; 63 ATR 450; 91 ALD 335, 2006 ATC 4393 at [19]; 339; 454-455; 4,396 (emphasis in original)

²¹ *Powell* [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [43]; 264; 129; 483

²² *Buckley v Wathen* [1973] VicRp 51; [1973] VR 511 at 515 per Smith ACJ, with whom Little and Nelson JJ agreed.

²³ Commissioner’s Policy at [5]

²⁴ Commissioner’s Policy at [6]

jointly by the taxpayer and his or her partner whether in a private or business structure.

The Commissioner continues:

“There are several types of assets which are regarded as normal and reasonable possessions. These would not be expected to be surrendered in order to pay a tax debt, provided they are of a modest nature and include:

- *ownership of, or equity in, a residential property which is the taxpayer’s home*
- *a motor vehicle*
- *furniture and household goods*
- *tools of trade*
- *cash on hand or bank balances sufficient to meet immediate day-to-day living expenses, and*
- *funds put aside by aged persons to cover funeral expenses.*

All other significant assets need to be scrutinised to determine capacity to pay (either by sale or used as security for a loan). These assets include other real estate, luxury motor vehicles or boats, life insurance or annuity entitlements, shares and other investments, and collections for trading, investment or hobby purposes.”

D. Would BFCB “suffer serious hardship if ... required to satisfy the liability”?

D.1 The evidence

14. In her application for release dated 8 June 2015 and lodged with the Australian Taxation Office (ATO), she asked for regard to be had to a number of matters.²⁵ I have set them out but have also referred to separate documents that add to what she has said or that, in the case of her loans, make a small adjustment:

- (1) She has been self-employed in the provision of analyses of Australian wage markets since 1992 and has always met her taxation liabilities.
- (2) She has suffered chronic health problems, including major fatigue and depression, for most of her life. As a self-employed person, she could match her hours of work to her physical condition.
- (3) She has been a single parent since 1998 and has brought up her daughter, who was born in 1993, without child support payments.
- (4) In 2008, she was diagnosed as suffering from breast cancer.
- (5) In January 2013, she lost her major business client with the result that she:
 - (a) received payment in July 2013 for work she had last done for her major business client in January 2013;
 - (b) no longer had a reliable source of income;
 - (b) used all of her financial resources – including credit cards – to support her daughter and herself:

²⁵ T documents; T11 at 163-181

- (i) she is unable to borrow further from the Bank of Melbourne, which is the mortgagee of her home or on her credit cards.
 - (c) has not been able to find work whether as a self-employed management consultant or as an employee.
- (6) In February 2013, BFCB decided to sell her home and her investment unit “to sort out ... [her] finances”.²⁶
- (7) In August 2013, BFCB purchased:
 - (a) the house she lives in for the sum of \$630,000 and relying on a loan of \$350,000 from the Bank of Melbourne. She is required to make a minimum repayment of \$614.92²⁷ on the mortgage each fortnight. The house was built of brick in the 1950s and has three bedrooms; and
 - (b) a 1999 Subaru Liberty Sedan, which she valued at \$2,500, for an undisclosed amount.
 - (i) She retained for her daughters’ use a 1999 Ford Fairmont, which she had purchased in 2005 and which she valued at \$2,500.
- (8) In January 2015, BFCB approached Anglicare, which has assisted her in exploring options to resolve her financial problems.²⁸ In the meantime, she has continued to meet only those of her financial commitments relating to her accommodation, health and food. She has deferred payment of her rates due to the local City Council.
- (9) In December 2014, BFCB applied to Centrelink for benefits but had, until then, relied on her savings.²⁹
- (10) On 26 May 2015, BFCB’s General Practitioner wrote:

“This is to certify that the above patient has numerous, chronic health issues including a history of cancer. These all contribute to excessive fatigue which affects her daily physical and cognitive functioning.

*She is seeing appropriate health professionals including a counsellor to assist her management of these issues.”*³⁰
- (11) In a letter on MS Australia letterhead and dated 26 August 2015, Ms Nora Sheehan, Social Worker, wrote a letter of support. She referred to BFCB’s health problems and to her loss of her main business contract in 2013 as increasing those problems. At the time of writing the letter, Ms Sheehan noted that BFCB was somewhat better in terms of her health but asked the ATO to be sympathetic to the overwhelming problems caused by her health problems.³¹

²⁶ Objection Form: T documents; T15 at 229

²⁷ BFCB stated that the repayment was \$650 but the Statement of Loan prepared by the Bank of Melbourne showed a repayment figure of \$614.92 due on 30 November 2016: Exhibit A

²⁸ T documents; T11 at 181

²⁹ Letter of support by Mr Graeme Hilson JP dated 27 May 2015: T documents; T11 at 180

³⁰ T documents; T11 at 178

³¹ Objection Form: T documents; T15 at 232

- (12) At the date of the hearing:
- (a) BFCB's daughter was 23 years of age at the date of the hearing and a full-time tertiary student in Melbourne but then studying in France on a scholarship for another month or so; and
 - (b) on her return, BFCB's daughter would live with her.
- (13) BCBF receives a pension paid by the Irish Government. In her application for relief, BCBF stated that this converted to \$400 but, in her oral evidence, she said that she received \$350.
- (14) From the beginning of 2015, BCBF received a social security payment from Centrelink in the sum of \$350.³²
- (15) BCBF had been working since August 2016 for approximately 20 hours each week earning \$23.8375 gross per hour being a base rate of \$19.07 plus a 25% casual loading.³³ In the week of the hearing, she had earned \$524 gross and, as evidenced by pay slips for the fortnights ending 5 and 19 November 2016, received net payments of \$1,273.75 for 60.65 hours in the former and \$1,344.20 for 65.20 hours for the latter.³⁴ In the week of the hearing, she worked 22.5 hours.
- (16) BCBF received a Disconnection Notice for an overdue gas account dated 22 August 2016 in respect of an unpaid amount of \$263.89. She had also received an overdue Valuation and Rate Notice for payment of overdue rates amounting to \$1,370.25 and, for payment of the first instalment of \$358 as the first instalment payable by 30 September 2015.³⁵

15. The Taxation Agent/Lawyer/Solicitor Recommendation Template prepared by the solicitor whom BFCB consulted set out her fortnightly income and expenditure as stated on her application for relief and as re-aligned in January 2016 after she had consulted Anglicare and reviewed her financial situation. At that time, her daughter had moved away from home and was meeting the expenses of the motor vehicle she uses. Those figures are:

| Fortnightly Income | As Stated on Application | | Re-aligned |
|---------------------------|---------------------------------|---------------|---------------------|
| Fortnightly Income | \$750 | Gross | \$732 |
| Annual Income (combined) | \$19,568 | Gross | \$19,098 |
| Source of Income | Centrelink and Irish Pension | | |
| Expenditure (combined) | \$2,270 | per fortnight | \$700 ³⁶ |

16. Consistent with the re-alignment of her income, BFCB's expenditure was also re-aligned:

| Fortnightly Expense | As Stated on Application | Re-aligned |
|----------------------------|---------------------------------|-------------------|
| Mortgage | \$650 | \$ 0 |

³² Objection Form: T documents; T15 at 229

³³ BFCB's Outline of Submissions

³⁴ Exhibit B

³⁵ Exhibit A

³⁶ Exhibit 2: Shown as \$690 in the Taxation Agent/Lawyer/Solicitor Recommendation Template but the estimated expenditure shown in the table of expenditure is \$700.

| Fortnightly Expense | As Stated on Application | Re-aligned |
|--|---------------------------------|-------------------|
| Food and household | \$150 | \$150 |
| Repairs and maintenance | \$ 20 | \$ 20 |
| Electricity and gas | \$120 | \$100 |
| Telephone (including mobile phone) | \$ 60 | \$ 60 |
| Internet, pay television | \$ 25 | \$ 25 |
| Water, council rates | \$ 85 | \$ 85 |
| Vehicle registration, insurance | \$240 | \$ 15 |
| Vehicle repairs, maintenance, petrol and oil | \$135 | \$100 |
| Household insurance | \$ 30 | \$ 30 |
| Life insurance, sickness or accident insurance | \$ 60 | \$ 50 |
| Medical , dental and pharmacy | \$ 35 | \$ 35 |
| Credit card repayments | \$650 | \$ 0 |
| Entertainment | \$ 10 | \$ 10 |
| Miscellaneous | - | \$ 20 |
| Total | \$2,270 | \$700 |

17. The zero figures shown on the re-alignment for \$0 for Mortgage and Credit card repayments reflect the arrangements that she had made in relation to those debts.³⁷ That document was prepared in January 2016 and reflected arrangements that she had previously made with the city council on 8 June 2015 to defer her rates payment for 2015³⁸ and, on 26 August 2016, with the Bank of Melbourne to defer her mortgage repayments for six months.³⁹ Also in August 2016, BFCB was negotiating with her credit card creditors to defer payments.⁴⁰
18. Putting aside her tax liability, BFCB's liabilities shown in her Application for Relief and in the Taxation Agent/Lawyer/Solicitor Recommendation Template are:

| Liability | As Stated on Application | Re-aligned |
|-----------------------------|---------------------------------|-------------------|
| Mortgage | \$348,000 | \$353,000 |
| ANZ credit card | \$ 26,350 | |
| CBA credit card | \$ 29,500 | |
| Bank of Ireland credit card | \$ 5,050 | |

³⁷ Exhibit 2: Taxation Agent/Lawyer/Solicitor Recommendation Template at 2

³⁸ Application for Release: T documents; T11 at 177

³⁹ Objection Form: T documents; T15 at 229

⁴⁰ Objection Form: T documents; T15 at 229

| Liability | As Stated on Application | Re-aligned |
|--------------------------|---------------------------------|-------------------|
| Unspecified credit cards | | \$76,000 |
| Total | \$408,900 | \$429,000 |

At the time of the hearing, BFCB's ANZ credit card debt had increased to \$29,645.16 and her CBA credit card debt to \$44,070.58.⁴¹

19. BFCB set out her assets in both her Application for Relief and in in the Taxation Agent/Lawyer/Solicitor Recommendation Template:

| Asset | As Stated on Application | Re-aligned |
|--|-----------------------------------|-------------------|
| House | \$640,000 | \$640,000 |
| Subaru 1999, Liberty Sedan | \$2,500 | - |
| Ford Fairmont | \$2,500 (used by BFCB's daughter) | \$2,500 |
| ANZ Bank Savings Account ... 3567 | \$320 | - |
| Bank of Melbourne Savings Account ... 8134 | \$10 | - |
| Bank of Melbourne Savings Account ... 4622 | \$15 | - |
| Unspecified bank account | - | \$85 |
| Furniture and effects | - | \$3,500 |
| Total | \$645,435 | \$646,085 |

D.2 Consideration

20. On the figures that BFCB set out in her Application for Relief, she was well short of meeting her day to day living expenses. On the figures that she submitted in the Taxation Agent/Lawyer/Solicitor Recommendation Template, her income would exceed her expenses by \$32 per fortnight. Those figures, however, do not take account of the arrangements that BFCB had made to defer payments of her mortgage. She had made those arrangements in August 2016 for a six month period of deferral of her mortgage repayments. That would have come to an end in approximately February 2017 and her expenses would then exceed her income by \$618 per fortnight being \$650 less the sum \$32 that was previously in excess of her expenses.
21. To that figure needs to be added the amount of repayments due on BFCB's credit cards. At the time she lodged her application, BFCB had estimated her repayments to be \$650 per

⁴¹ Exhibit B

fortnight but had noted them as \$0 on the Taxation Agent/Lawyer/Solicitor Recommendation Template submitted in January 2016. Any deferral that BFCB had been successful in gaining from the Commonwealth Bank must have concluded for the Statement for a Low Rate Gold Mastercard for the period September to October 2016 shows that an amount of \$44,070.58 was overdue for payment and that a minimum payment of \$4,070.58 was due by 21 November 2016. That minimum amount had not been paid by BFCB and was overdue at the end of November 2016. That would equate with a fortnightly repayment of approximately \$1,900.

22. On the basis of BFCB's own evidence and disregarding payment of her tax liability, her fortnightly expenditure or liabilities exceeds her fortnightly income by something in the order \$2,518. In view of the size of the deficit between BFCB's income and her liabilities there is no doubt that she could not meet her debts as they fell due. That was so whether she owed the tax liability or not.
23. On the basis of the figures in the Taxation Agent/Lawyer/Solicitor Recommendation Template and ignoring the tax liability, BFCB owed a total debt of \$429,000 in January 2016. That had increased by November 2016 but remained in that order of debt. If she is correct in valuing her house in the sum of \$650,000, she would have a surplus of \$217,085 (less commission payable on the sale) once her debts, other than the tax liability, were paid. She would have enough remaining to pay her tax liability.
24. What these figures show is that, short of selling her house and starting again, BFCB is facing serious hardship. That serious hardship, however, does not arise if she is required to satisfy the tax liability but because of the debt she has incurred quite apart from that tax liability. She cannot meet the repayments on those debts when they fall due. Her inability stems from the loss of her main client in January 2013, her inability to obtain employment producing income at her previous January 2013 levels and the consequent loss of income to meet her liabilities as they fall due. It is not consequential upon any requirement to satisfy the tax liability.
25. It follows that BFCB does not meet the condition that is a prerequisite to the exercise of the discretion to release all or part of her tax liability. That means that the Commissioner and, consequently, I do not have power to exercise the discretion. Therefore, I must affirm the Commissioner's decision dated 11 December 2015 and do affirm it. That is an end of the matter. Despite that, I will consider how I would have exercised the discretion had I had the power to do so and explain why I would not have released BFCB from her tax liability.

The discretion

A. The limits of the discretion

26. The scope of any discretion given to a decision-maker under an enactment and the boundaries within which it must be exercised depend on the:

“... construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary ... to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. ... [W]here a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard ... By analogy, ... the court will not find that the decision-maker is bound to take a particular matter into account unless the implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.”⁴²

27. Section 340-5(3) does not expressly state any considerations to which the Commissioner must have regard in exercising the discretion but there are considerations implicit in the provision and in the legislation. One set of considerations lies in the nature of the taxation laws imposing income tax. I have already mentioned this above but, in summary, they impose income tax on members of the community by reference to a range of objectively based criteria. At the heart of those criteria lies the fact that the member of the community has earned income and has done so in an amount that attracts the payment of income tax. It is not imposed by reference to his or her personal circumstances or identity.
28. As well as imposing tax liability, the taxation laws provide for the recovery of that liability. Division 255 of the TAA is concerned with collection and recovery. Of particular relevance in the context of the release of a tax liability is the Commissioner’s power to defer the time of payment and the power to permit payment by instalments. They are provided for under ss 255-10 and 255-15 respectively. Release of a tax liability that relates to income tax amounts to the Commissioner’s relinquishing the right to claim the amount that is released.
29. By permitting the Commissioner to alleviate the liability either totally or in part, Parliament has allowed regard to be had to personal circumstances as well as to other relevant criteria. There is little guidance in the authorities as to the considerations that are relevant in

⁴² *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; 66 ALR 299 at 39-40; 309 per Mason J with whom Dawson J agreed. See also *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45; 27 ALR 321 at 49; 325 per Stephen, Mason, Murphy, Aickin and Wilson JJ citing with approval *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505

exercising the discretion. There is a little, though. One arises from this passage from the judgment of Wilcox J in *Corlette v Mackenzie*:

*“... If the basis of a request for release is to avoid a bankruptcy, there is really not much point in granting the application if the person is likely to be made bankrupt at the instance of another creditor. The only effect of the release would be to preclude the Australian Taxation Office from proving in the bankruptcy and taking whatever dividend might be available. ...”*⁴³

30. Another consideration arises from the behaviour of the taxpayer. In assessing serious hardship, consideration is not given to how the person came to be in the particular financial situation when the application for release of debt is made. The taxpayer may have spent money wisely, imprudently or even extravagantly but, at that stage, it is a matter of “... *little, if any significance, for the money, having been spent, is unavailable to be used again to alleviate the financial hardship. ...*”⁴⁴ Where it does become relevant is on the exercise of the discretion. That is where Wilcox J saw its relevance in *Corlette v Mackenzie* in the passage I have set out at [5] above. In his view, “*It would be extremely odd if a taxpayer who was the author of his or her own misfortunes, through imprudent or extravagant expenditure, was entitled, as a matter of right, to a release of unpaid income tax.*”⁴⁵
31. At the same time, Wilcox J acknowledged that loss or circumstances outside the control of the taxpayer might be relevant. In *Commissioner of Taxation v Milne*,⁴⁶ Mr Milne’s circumstances had to some extent been brought about by the fraud of his former business partner when they were practising in partnership as legal practitioners, his own deteriorating health that caused him to suffer both severe illnesses and physical disabilities. Justice Conti considered that these were among the circumstances to which the Commissioner was required to have regard.⁴⁷
32. One factor that is not relevant is how the tax liability came to be incurred. This was a matter considered by Hill J in *Powell* in looking at s 265(1)(b) of ITAA36, which now equates with Item 2 of s 340-5(3) of the TAA. It focuses on serious hardship to the dependants of a deceased individual. In his Honour’s view, the only relevance of a tax liability’s being incurred because the taxpayer was found to have been a party to a tax avoidance scheme is “... *that it explains how it came about that income tax was payable, but the fact that the income tax was payable will be present in every case where an application for relief under s 265 is made.*”⁴⁸

⁴³ *Corlette v Mackenzie* (1996) 62 FCR 597 at 600 per Wilcox J

⁴⁴ *Powell* [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [42]; 264; 128-129; 483; 4,425

⁴⁵ (1996) 62 FCR 597 at 598

⁴⁶ [2006] FCA 1005; 153 FCR 52; 63 ATR 538; 2006 ATC 4503

⁴⁷ [2006] FCA 1005; (2006) 153 FCR 52; 63 ATR 538; 2006 ATC 4503 at 76

⁴⁸ [1989] FCA 114; (1989) 21 FCR 252; 87 ALR 117; 20 ATR 472; 89 ATC 4,415 at [51]; 267; 131; 485; 4,427

B. The Commissioner's Practice Statement: PS LA 2011/17

33. In deciding whether to exercise the discretion whether to release the liability, the Commissioner has said:
34. Even if the application of the two tests leads to the conclusion that a taxpayer has demonstrated serious hardship, the Commissioner is not bound to exercise the discretion under Item 1 of s 340-5(1) of Schedule 1 to the TAA. The Commissioner notes, however, that he is obliged to act reasonably and responsibly and should not act either arbitrarily or capriciously. He goes on to give examples of situations in which he may decide against exercising his discretion even though implications of serious hardship may be drawn. They are:
- “*where a taxpayer appears to have unreasonably acquired assets ahead of meeting their tax liabilities*
 - *where a taxpayer appears to have disposed of funds or assets without giving thought to their tax liability*
 - *where release would not result in reduction of hardship, such as where the person has other liabilities or creditors*
 - *where a taxpayer has paid other debts (either business or private), in preference to their tax debt*
 - *where the taxpayer, without good reason, has not pursued debts owed to them*
 - *where serious hardship is likely only to be short term ...*
 - *where the taxpayer has a poor compliance record*
 - *where the taxpayer is unable to show that they have planned for future debts*
 - *where the taxpayer has structured their affairs to place themselves in a position of hardship (for example, placing all assets in trusts or related entities over which they have no control); and*
 - *where the taxpayer has delayed lodgement of returns resulting in the accumulation of a large debt that they are unable to pay.*
- ...
- “... Release from the full amount of the liability would not generally be appropriate where partial release is sufficient to avoid serious hardship.
- ... ”⁴⁹
35. The criteria that the Commissioner has developed are consistent with s 340-5(3), the TAA and the taxation law generally. It leaves the decision-maker with flexibility to make a decision that can take account of the individual's particular circumstances.

⁴⁹ Commissioner's Policy at [8] and [9]

C. BFCB's circumstances

36. BFCB stated in her objection dated 26 August 2015 to the Commissioner's decision dated 17 July 2015:

*"I was aware that the CGT liability had arisen and I have every intention to pay it but the health problems I experienced ... and my failure to secure work, meant that I had to live on whatever assets I had, including money for tax payments and credit cards. My accountant had caused considerable delays with my tax returns so the issue was not confronted until all my tax returns were complete early in 2015, by which time I had been forced to apply for assistance from Centrelink."*⁵⁰

37. In her earlier application for relief dated 8 June 2015, BFCB noted that:

*"My tax agent ... had my data for the 2013 and 2014 tax returns since October 2014 but did nothing to help me avoid penalties for late returns and other charges by the ATO, despite constant reminders from me and my calls to the ATO to notify you of the role of my accountant in contributing to some of my tax delays."*⁵¹

38. In her Statement of Facts Issues and Contentions dated 28 July 2016, BFCB wrote:

- "7. I was unfamiliar with CGT issues since I had never had an investment property before.*
- 8. Because of problems with the accountant who handled my tax returns in 2013, I was not aware of the size of the Capital Gains Tax liability until late autumn 2015 and had insufficient funds to meet the unexpectedly large debt.*
- 9. When I received the taxation assessment in May 2015 for an amount of \$70,571.50 I was shocked ..."*⁵²

39. In her Outline of Submissions, BFCB wrote:

*"The ATO has dismissed any opinions I have given about my lack of knowledge about **CGT issues** and issues with my tax accountant and how these contributed to my situation. I had never had an investment property before and the property was attached to my home and on the same title as my home; it was not a straight forward investment property. I was not initially aware that the CGT liability had arisen in February 2013 when I signed the contract for the sale of ..., rather than the sale completion date (2nd July, 2013). The CGT liability therefore arose in my last year of relatively high earnings and was therefore relatively large. Since 2013, my earnings have been very low or non-existent."*

D. Consideration

40. BFCB has made conflicting statements regarding her understanding of whether she would, or had, incurred a CGT liability. At the time she lodged her objection on 26 August 2015, she acknowledged that she knew that she had incurred a CGT liability. In her statement dated 28 July 2016, she stated that she was unfamiliar with CGT issues. That is a

⁵⁰ Objection Form: T documents; T15 at 229

⁵¹ T documents; T11 at 179

⁵² See also [20] of BFCB's Statement of Facts and Contentions

statement clearly at odds with her earlier statement made much closer to the events. In her later statement, she also claims that she had problems with her accountant who handled her tax returns in 2013. That is a statement that is inconsistent with the statement she made on 8 June 2015 that her tax agent had her data for the 2013 and 2014 tax returns since October 2014; not 2013. I prefer BFCB's statements made much closer to the time at which she sold her house when they would have been fresher in her mind.

41. Even though I find that she was aware that she owed CGT on the sale of her property, I accept that she might have been "*shocked*" at its being \$70,571.50. That said, the Commissioner has not questioned the basis on which she and her tax agent apportioned the proceeds of the sale to that part of the property which was her principal home and that part which was the investment unit. Despite any shock she might have felt later on, I find on the basis of her own evidence that she felt the need in February 2013 to sort out her finances. That was the deciding factor in selling her house. At that time, she had also lost her major client in her business and that had happened in the previous month; January 2013.
42. BFCB's business never recovered from the loss of her major client. She was never able to recover her previous level of income or anywhere near approaching it. In August 2013 when she purchased her current house, that might not have been apparent to her. What would, or should, have been apparent to her was the fact that she had neither obtained employment nor found another client or clients to generate her previous level of income in her business. Despite that, BFCB decided to purchase another house for \$630,000 and to commit to a mortgage of \$350,000 as well as to purchase a second car. Certainly, the second car was not expensive to purchase but it committed her to paying the running costs of a second car so that her daughter could use her former car. She did so at a time when she already knew that she had an outstanding liability to pay CGT.
43. BFCB relies on the fact that she did not know the size of her CGT debt until May 2015 but she made these choices knowing that she had a CGT liability but making no provision for it. Even if she did not know the precise amount of the debt, she would have been in possession of the information that would have enabled her to obtain advice as to its size. She ultimately did that but not until October 2014 when she gave the information to her tax agent. That does not change the fact that she knew that she had a CGT liability and that she could have taken steps to work it out at least on an approximate basis.
44. Even before she received the Commissioner's Notice of Assessment dated 7 May 2015 showing that she had a taxation liability in the amount of \$70,571.50, BFCB knew that she was in financial difficulties. She had been to see Anglicare in January 2015 regarding the

management of her finances and had applied for Centrelink benefits in that month or, perhaps, in the previous month. Her financial difficulties had arisen well before she knew the size of her CGT liability. That liability only added to the size of the debt that BFCB owed but was not the cause of her being in financial difficulties in the first place. Although she did pay \$5,000 from her tax liability, she was already in a position where she was meeting only those of her financial commitments relating to her accommodation, health and food. On her own evidence, BFCB continues not to meet her ongoing commitments as they fall due in circumstances in which she is not making any payments to reduce her taxation liability at all.

45. To relieve BFCB of all or part of her tax liability in these circumstances would be to prefer her other creditors should her income improve so that she can pay them or should she become bankrupt and her assets distributed.

46. For these reasons, I would have declined to exercise the discretion under s 340-5 of Schedule 1 to the TAA had I not already found that I was obliged to affirm it. As I said at [25] above, I have affirmed the Commissioner's reviewable objection decision on the grounds that, although she is facing serious hardship, she would suffer that serious hardship whether she is required to satisfy her tax liability or not. Had I reached a different conclusion on that issue, I would have affirmed it in any event for the reasons that I have given in this part of my reasons.

Other matters

47. BFCB has expressed bewilderment that the ATO did not include in the T documents the advice that she had received from the solicitor and the Commissioner has not referred to it in making the objection decision. The Commissioner would have been obliged to include it in the T documents under s 37(1)(b) of the AAT Act if it were "*relevant to the review of the decision by the Tribunal*". He would have had a continuing obligation to do so under s 38AA(1)(b)(ii) of that legislation. What is relevant to the review of the decision will depend on what it is that is relevant to consider the substantive issues raised by the relevant legislative framework within which the decision was made. The weight that the Tribunal might give to any particular piece of evidence would have no relevance in deciding what is relevant for that is a matter for the Tribunal.⁵³

48. Is legal advice relevant to the review of a decision by the Tribunal? The law, of course, underpins every decision that the Tribunal must make. That of itself does not necessarily mean that every legal opinion is relevant to the review of the decision. If the decision-

⁵³ *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 44 FLR 41; 31 ALR 666; 4 ALD 139, Smithers, Evatt and Deane JJ at [29]; 69; 691; 161 per Deane J, with whom Evatt J agreed

maker whose decision is under review has taken account of a legal opinion that has a bearing on the legal issues to be decided, it will be considered to be relevant to the review of the decision. It is not excluded from the obligation imposed by s 37(1)(b) by the application of the principles of legal professional privilege.⁵⁴ Provided the legal advice meets those two criteria, it matters not:

*“... whether the original decision-maker acted on, or adopted, the advice or opinion or rejected it. However, the reach of the subsection [s 37(1)(b)] does not extend to expressions of legal opinion or advice which may have been available to the decision-maker but were not considered in the course of arriving at the impugned decision. To hold otherwise would be to oblige the decision-maker to search out and lodge with the tribunal and supply to the other parties copies of every document containing a pertinent expression of legal opinion in the decision-maker’s possession or power, even if the existence of the document had not been present to the mind of the decision-maker when making the decision under review. The obligation would extend to legal texts or journals which had been available to the decision-maker but not consulted by him or her.”*⁵⁵

49. In this case, the Commissioner has not included the solicitor’s advice to BFCB in the T documents lodged under s 37(1)(b) and I do not consider that there was any obligation on him to do so in the circumstances. While there is no direct evidence on the issue, there are three indirect pieces of evidence that lead me to conclude that the Commissioner took no account of the solicitor’s opinion. One piece is its omission from the T documents, a second is the opinion itself and the third is material that the Commissioner did include. The first suggests that it was not taken into account. That suggestion is supported by the substance of the opinion and so the second indirect piece of evidence. The opinion does not address the issues. For example, it does not recognise that the first issue to address is not simply whether BFCB is facing serious hardship but whether BFCB would “*suffer serious hardship if ... required to satisfy the liability*”. It does not address that issue and does not address any issue with the legal and evidentiary rigour that would have assisted the Commissioner in coming to a decision. The third indirect piece of evidence is what the Commissioner did include in the T documents. He did include the Taxation Agent/Lawyer/Solicitor Recommendation Template that had been completed by the solicitor and he clearly had regard to it.
50. The ongoing obligation under s 38AA does not come into consideration for the legal opinion was obtained and provided to the Commissioner before he made his objection decision. It is subject only to the obligation under s 37(1)(b). Had it been subject to that in s 38AA, the same considerations would apply.

⁵⁴ AAT Act; s 37(3)

⁵⁵ *Australian Prudential Regulation Authority v VBN* [2005] FCA 1868; (2005) 88 ALD 403 at [32]; 412 per Ryan J

51. For the sake of completeness, I will mention the position if, after he had made the objection decision, the Commissioner were to obtain legal advice and that advice were relevant to the review of the decision. There would be no obligation on the Commissioner to include it in documents lodged in compliance with the ongoing obligation imposed by s 38AA. Unlike s 37, s 38AA does not contain any provision to the effect that it has effect notwithstanding any rule of law relating to privilege (or the public interest) in relation to the production of documents.

I certify that the preceding fifty one (51) paragraphs are a true copy of the reasons for the decision herein of Deputy President Forgie

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

Associate

Dated: 18 August 2017

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| Date of hearing: | 30 November 2016 |
| Self-represented Applicant: | Applicant in person |
| Counsel for the Respondent: | Ms Melanie Baker |
| Solicitor for the Respondent: | Ms Aimee O'Brien ATO Dispute Resolution |