Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Spence and Commissioner of Taxation (Taxation) [2017] AATA 307 (10 March 2017)

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2016/2717**

2016/2718

2016/2719

2016/2720

Re: **Allan Spence**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Professor R Deutsch, Deputy President**

Date: **10 March 2017**

Place: **Sydney**

The decision under review is affirmed.

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

Professor R Deutsch, Deputy President

CATCHWORDS

TAXATION – income tax – failure to lodge income tax returns – entitlement to deductions – burden of proof – carrying on a share trading business – share trading losses – carry forward of losses – failure to object to penalties – whether penalties should have been considered in objection decision – decision affirmed

LEGISLATION

Income Tax Assessment Act 1997 (Cth) s 8-1
Tax Administration Act 1953 (Cth) ss 14ZZK(b), 353-10 of Sch 1

CASES

AAT Case 6,297 (1990) 21 ATR 3747
Commissioner of Taxation v Radnor Pty Ltd (1991) 102 ALR 187
Devi and Commissioner of Taxation [2016] AATA 67
Executor for the late Joan E Osborne and Commissioner of Taxation [2014] AATA 128
Federal Commissioner of Taxation v Dalco (1990) 168 CLR 614
Gauci v Federal Commissioner of Taxation (1975) 135 CLR 81
Hartley and Commissioner of Taxation [2013] AATA 601
Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation (1991) 22 ATR 148
Shields and Commissioner of Taxation (1999) 41 ATR 1042

REASONS FOR DECISION

Professor R Deutsch, Deputy President

10 March 2017

INTRODUCTION

1. By an application filed 23 May 2016, Mr Spence **(the Applicant)** seeks review of the Respondent's objection decision dated 22 March 2016 **(T2 pp 23-33)**.

2. The objection decision relates to assessments for income tax for the:

- Income year ended 30 June 2007 **(FY2007)**;
- Income year ended 30 June 2008 **(FY2008)**;
- Income year ended 30 June 2009 **(FY2009)**; and
- Income year ended 30 June 2010 **(FY2010)**.

BACKGROUND

3. The Applicant failed to lodge income tax returns for each of the four years in question and was sent a letter headed "default assessment warning" dated 25 May 2012.

4. On 27 May 2013, the Commissioner issued notices of assessment of penalty for failing to provide a document for FY2007, FY2008, FY2009 and FY2010.

5. On 28 May 2013, the Commissioner issued notices of assessment, for FY2007, FY2008, FY2009 and FY2010, as a consequence of the Applicant's non-lodgement of returns for those years. The taxable income identified in those assessments arose from interest earned by the Applicant in each year.

6. On 7 June 2013, the Applicant lodged an objection to each of the notices of assessment and each of the notices of assessment of penalty. Attached to each objection was a tax return, completed by the Applicant, for each income year in dispute.

7. On 17 September 2013, the Respondent determined these objections to be invalid because the Applicant had failed to provide information necessary to finalise the objections.

8. On 20 September 2013, the Applicant indicated to the Respondent that he incurred share losses in respect of which he was claiming deductions as follows:

- $11,457 (FY2007);
- $106,732 (FY2008);
- $36,379.50 (FY2009); and

- $37,399.95 (FY2010).

9. On 20 April 2015, the Applicant lodged further objections to each of the notices of assessment. Attached to the objections were, inter alia, tax returns completed by the Applicant for each income year in dispute.

10. Subsequently, the Respondent agreed to deal with these objections even though there were difficulties in dealing with them as such.

11. On 5 January 2016, the Respondent sought from the Applicant a range of further information in order to determine the objections.

12. Relevantly for present purposes, the Respondent sought an explanation and substantiation (including source documents) of the losses the Applicant alleged he had incurred in the course of share trading.

13. The Applicant did not provide the requested information but made reference to information he had provided to the Respondent in 2013. This information was taken by the Respondent to be a reference to a certain spreadsheet dated September 2013 that purported to summarise the Applicant's share trading activities **(the September 2013 Spreadsheet)**. This spreadsheet forms part of the T Documents that was provided to the Tribunal by way of tendered evidence.

14. On 29 January 2016 and 1 February 2016, the Respondent used his powers under s 353-10 of Schedule 1 to the *Tax Administration Act 1953* **(TAA)** to request information concerning the Applicant's share trading activities from COMMSEC, CMC Markets and E*Trade.

15. On 8 February 2016, CMC Markets provided annual statements for the Applicant's account and a list of trades undertaken. A list of trades undertaken by the Applicant using E*Trade was also received. COMMSEC responded, indicating that the Applicant had not undertaken any trades.

16. On 4 March 2016, the Respondent wrote to the Applicant in relation to the information received under the s 353-10 notices. The Respondent indicated a proposed amendment

to the Applicant's taxable income, on the basis of the share trading losses reflected in the information received under the s 353-10 notices, and sought comment from the Applicant on the proposal. No response was received.

17. On 22 March 2016, the Respondent finalised the objections as follows:

Year	Previous Taxable Income	Change	Carried Forward Loss	New Taxable Income
FY2007	$19,313	-$718	$0	$18,595
FY2008	$42,213	-$89,569	$47,356	$0
FY2009	$44,755	-$47,356	$2,601	$0
FY2010	$44,829	$2,601	$0	$42,228

18. At the hearing, the Applicant raised a further contention which was not raised in the objections but was previously raised by the Applicant.

19. This concerned the year to 30 June 2006 **(FY2006)** in relation to which the Applicant claimed that he had lodged his income tax return and had claimed an amount of some $21,000 as a share trading loss which should be carried forward for offset in subsequent years.

20. This raised certain procedural issues inasmuch as the matter was raised, in the words of Counsel for the Respondent, "on the fly" without any prior warning. The Applicant would ordinarily need to seek leave to raise the matter in this way and the Respondent would no doubt object. In view of the fact that the Applicant was self-represented and not familiar with legal processes and Tribunal procedure, I allowed the matter to be ventilated without addressing the complex procedural issue in raising a matter not specifically objected to.

21. The Respondent produced evidence from its internal records to indicate that no tax returns had ever been received in respect of this taxpayer for the years ending 30 June 2004, 2005 and 2006.

22. Finally, the matter of penalties was not objected to by the Applicant and accordingly the matter was not considered in the objection decision.

ISSUES

23. The main issue for consideration by this Tribunal is whether the Applicant is entitled to claim deductions under s 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) for losses allegedly incurred by him from the disposal of shares.

24. This in turn leads to two specific issues namely:

- Did the Applicant carry on a share trading business in respect of FY2007, FY2008, FY2009, and FY2010 **(Issue One)**; and
- What is the magnitude of the deductions for share trading losses incurred by the Applicant for FY2007, FY2008, FY2009 and FY2010 **(Issue Two)**?

25. Two further subsidiary issues have also arisen as a result of certain matters canvassed at the hearing.

26. First, what is the position regarding the income tax return in respect of FY2006 and the carry forward of losses alleged to have arisen in that year **(Issue Three)**.

27. Secondly, as the Applicant did not include penalties in his objection, is it acceptable that the Respondent did not consider the matter of penalties in the objection decision **(Issue Four)**.

LAW

28. A loss or outgoing may be deducted from assessable income to the extent that it is necessarily incurred *"in carrying on a business for the purpose of gaining or producing your assessable income"*: s 8-1(1)(b) ITAA 1997. Whether a taxpayer is carrying on a business is a question of fact. Usually, the Tribunal will determine that question by assessing a number of factors about a taxpayer's activities, although the Tribunal must assess all the circumstances and no single factor is necessarily determinative: *Commissioner of Taxation v Radnor Pty Ltd* (1991) 102 ALR 187, 202. In *AAT Case 6,297* (1990) 21 ATR 3747, cited in *Shields and Commissioner of Taxation* (1999) 41 ATR 1042, it was said:

> *The question is…essentially one of fact. In deciding this issue the case law has established the following factors as generally relevant considerations:*

(a) *the nature of the activities and whether they have the purpose of profit-making;*

(b) *the complexity and magnitude of the undertaking;*

(c) *an intention to engage in trade regularly, routinely or systematically;*

(d) *operating in a business-like manner and the degree of sophistication involved;*

(e) *whether any profit/loss is regarded as arising from a discernible pattern of trading;*

(f) *the volume of the taxpayer's operations and the amount of capital employed by him;*

and more particularly in respect of share traders:

(a) *repetition and regularity in the buying and selling of shares;*

(b) *turnover;*

(c) *whether the taxpayer is operating to a plan, setting budgets and targets, keeping records;*

(d) *maintenance. of an office;*

(e) *accounting for the share transactions on a gross receipts basis;*

(f) *whether the taxpayer is engaged in another full-time profession*.

29. These factors have been endorsed as the key matters to consider in a number of Tribunal decisions including *Hartley and Commissioner of Taxation* [2013] AATA 601 at [15]-[20]; *Executor for the late Joan E Osborne and Commissioner of Taxation* [2014] AATA 128 at [29]-[32]; and *Devi and Commissioner of Taxation* [2016] AATA 67 at [17]-[21].

BURDEN OF PROOF

30. Where default assessments have been raised as occurred here, it is for the Applicant to prove that the assessments in question are excessive *and* what the assessments should have been: s 14ZZK(b) TAA; *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614, 621.

31. In this context it is insufficient for the Applicant to show that the Respondent made an error. Doing so is an important first step but on its own is insufficient to establish the Applicant's case.

32. Rather, the Applicant must prove what the correct position should be.

33. There is no onus imposed on the Respondent. He is neither required to support the assessment by evidence nor to establish that the assessment is correct: *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81, 89; *Dalco* at 624.

34. In this case, the Applicant has adduced no concrete tangible evidence in support of his case. He had been asked to provide a summary of how the share trading losses were calculated. In response he provided the September 2013 Spreadheet which he used to support his position but that Spreadsheet was not consistent with the records provided to the Respondent by COMMSEC, CMC Markets and E*Trade as a result of the request for information arising from the exercise of the Respondent's powers under s 353-10 of Schedule 1 to the TAA. The Applicant also made some errors in the calculations and attributed the wrong dates to some of the transactions in question.

35. At the hearing, the Applicant was by consent appearing by phone, the arrangement having been made the previous week.

36. Counsel for the Respondent was keen to cross-examine the Applicant on the September 2013 Spreadsheet but when he sought to do so, the Applicant indicated that he did not have it in front of him and was unable to obtain it. This was despite the material in the form of the entire bundle of T Documents being hand delivered to him before the hearing after he claimed that they had never previously been delivered to him which assertion seems at odds with the records held by the Respondent. Furthermore, the Tribunal wrote to the Applicant two days before the hearing indicating to him very clearly that he should have the material with him on the day of the hearing so that he can make reference to the material if required to do so while giving evidence. He clearly paid no regard to the Tribunal's request.

37. In the circumstances, I conclude that I am not able to rely on the September 2013 Spreadsheet provided by the Applicant as it is unlikely to be accurate and the Respondent could not satisfactorily cross-examine the Applicant due to the Applicant's unwillingness to cooperate.

38. In the absence of evidence from the Applicant explaining the nature of his share trading activities and substantiating the losses allegedly suffered, the Applicant has not discharged the burden placed on him.

39. Moreover, the type of activities allegedly undertaken by the Applicant (ie. operation of a share trading business) is one that would ordinarily be readily verifiable by documentation (such as bank statements, share trading reports, business plans, loan agreements etc). The Applicant has produced nothing of this nature either to the Tribunal, or to the Respondent when requested. The lack of documentary verification inhibits the Applicant discharging his burden, both as to whether he was carrying on a business and also the extent (if any) of his losses. Any claims the Applicant may himself make, especially without substantiation, must be carefully scrutinised. As Hill J said in *Imperial Bottleshops Pty Ltd & Egerton v Federal Commissioner of Taxation* (1991) 22 ATR 148:

> *A taxpayer who does not keep records of his deductible outgoings faces a very difficult task. If he goes into the witness box and swears that he has incurred the outgoings he is making a self-serving statement. That does not necessarily mean that he is not to be believed. Such a statement, like statements of purpose, or object or state of mind must, however, be "tested most closely, and received with the greatest caution": Pascoe v Federal Commissioner of Taxation (1956) 11 ATD 108 at 111. It would, of necessity, be a rare case indeed where a taxpayer, claiming to have expended a very large sum of money on trading stock and other business expenses, would succeed in satisfying the burden of proving that the assessment is excessive. Some other corroborative evidence would normally be required which makes it more probable than not that his sworn testimony is to be believed.*

ISSUE ONE

FY2007 and FY2008

40. The objection decision accepted that the Applicant was involved in a share trading business for FY2007 and FY2008.

FY2009 and FY2010

41. The Respondent contends that the Applicant was *not* involved in a share trading business in FY2009 and FY2010.

42. Significantly, the information obtained by the Respondent in response to the s 353-10 notices from COMMSEC, CMC Markets and E*Trade, establishes that the Applicant engaged in no share trades in FY2009 or FY2010.

43. By contrast, the Applicant's September 2013 Spreadsheet refers to only three share transactions in FY2009, all occurring on 30 June 2009. The September 2013 Spreadsheet

also identifies three transactions in FY2010, but oddly and inexplicably, the date given for these three transactions is 30 June 2008.

44. Having regard to the primary source being the records of COMMSEC, CMC Markets and E*Trade it seems there was no activity whatsoever in these years. In such circumstances, by reference to the factors identified in *AAT Case 6,297* and *Shields* (above), the Tribunal cannot, without further evidence, accept that the Applicant was engaged in a share trading business.

45. Further, even if one were to accept the Applicant's records at face value the three share transactions identified by the Applicant are more likely to be viewed as being on capital rather than revenue account. In each case, on the Applicant's own case, the shares in question were purchased in mid-2001 and retained, suggesting an intention to hold the shares for long term capital growth, not short term resale. As such these transactions are more likely to be on capital rather than on revenue account and accordingly any losses are not deductible but must be retained for offset against future capital gains which may arise.

ISSUE TWO

FY2007 and FY2008

46. In relation to FY2007 and FY2008, the objection decision allowed the Applicant a deduction for share trading losses of $67.08 (FY2007) and $89,569.44 (FY2008) (these amounts are less than the losses claimed by the Applicant, namely $11,457 (FY2007) and $106,732 (FY2008) (eg. at T24 p 243)).

47. The Respondent calculated the deduction by reference to the information provided in response to the s 353-10 notices and the September 2013 Spreadsheet.

48. The Applicant has not identified any proper evidential basis on which the Tribunal can be satisfied that he incurred losses *greater* than that already allowed in the objection decision. The only document relied on by the Applicant to quantify his losses appears to be the September 2013 Spreadsheet at T24 pp 249-262 However, as observed above, the Applicant has provided neither documentary evidence to substantiate the amounts

identified in the September 2013 Spreadsheet nor any documentary evidence to substantiate share losses greater than that already allowed by the Respondent.

49. Accordingly, the Applicant has not discharged his burden of establishing that he incurred share trading losses greater than that allowed as a deduction in the objection decision.

FY2009 and FY2010

50. In relation to FY2009 and FY2010, the Applicant cannot be entitled to deductions for share trading losses because he was not engaged in a share trading business. The loss is not one incurred *"in carrying on a business for the purpose of gaining or producing your assessable income*s 8-1(1)(b) ITAA 1997.

51. The Applicant has also provided no evidence whatsoever to substantiate the alleged losses (other than his own assertion of the quantum of loss at T24 pp 243 and 261-262).

52. Finally, as observed above, the transactions in FY2009 and FY2010 also appear to be on capital account and are not deductible in any event: s 8-1(2)(a) ITAA 1997. The Applicant has provided no evidence to suggest otherwise.

ISSUE THREE

53. At the hearing, somewhat belatedly, the Applicant asserted that there were carried forward share trading losses for the year to 30 June 2006 **(FY2006)** as there were share losses that arose in that year.

54. As already mentioned I chose to overlook the procedural issue raised by this somewhat tardily presented assertion and sought the Respondent's assistance in dealing with the matter on a substantive basis.

55. The Respondent sought and was granted a short adjournment to seek further information from their internal sources.

56. After the adjournment, the Respondent advised the Tribunal that their records indicate that no income tax returns have been lodged by the Applicant in respect of FY2006 and for that matter in neither of the two previous years of income.

57. In support of this conclusion, the Respondent provided the Tribunal with their internally generated document which indeed indicates that returns were not lodged by the Applicant in respect of those three years. That two page internally generated document was formally tendered in evidence and was accepted as part of the Respondent's evidence and marked as "R2".

58. In response, the Applicant maintained his position asserting that the Respondent's records were wrong and that his accountants, who he named as Lo Surdo Braithwaite & Co, had lodged the returns for the three years in question.

59. The Applicant also indicated that he initially suffered a penalty of $550 for failure to lodge but that this was subsequently refunded to him. This he indicated must mean that the Respondent accepts that he has lodged the returns as required.

60. In cross-examination, the Applicant indicated that he did not recall seeing or signing the returns but he was adamant that they had been lodged.

61. At my insistence, Mr Patrick Ryan Sheehan, Team Leader, Review and Dispute Resolution Objections was called at short notice to give telephone evidence and he confirmed the veracity of the document identified as R2 and that no returns for the three years in question had ever been lodged by the Applicant.

62. Mr Sheehan was also asked questions about the $550 "refund". Mr Sheehan spent some time checking the records he had available to him. From the records he was able to access at that time he confirmed that the $550 was either refunded or that it was offset presumably against other amounts owing by the Applicant. Upon further questioning it became evident that it is quite routine for the Respondent to remit penalties of this nature for a variety of reasons which may include, for example, that it is a first time offence.

63. Following the hearing, Mr Sheehan sent an affidavit, sworn on 3 March 2017, to the Tribunal and to the Applicant in which he sought to correct what he had said at the hearing. Upon further investigation, he has realised that the $550 amount was not remitted but remains outstanding as a debt due by the Applicant.

64. Whatever may have happened in relation to the $550 amount, one thing seems clear and that is that the way it was treated had no relationship to whether the relevant tax returns had been lodged.

65. The Applicant seeks to argue that the amount was remitted because he had lodged the relevant tax returns. The Respondent is now firmly of the view that there was no remission and no tax returns lodged.

66. Even if the Applicant were shown to be correct (which is not the case) remission per se cannot be taken to lead to the inevitable conclusion that the returns were in fact lodged. That is a quite separate matter and the uncontradicted evidence which is available strongly indicates that no returns were lodged for the relevant years.

67. In the circumstances, the Tribunal concludes that no returns were lodged at any time in respect of the Applicant for FY2006 or the two previous years of income.

68. The Applicant complains that all this took place at the Tribunal with no prior warning to him. That is true but the Applicant, in so complaining, conveniently overlooks the fact that all these matters arose because he sought to introduce at the hearing evidence regarding the FY2006 and previous years about which he had not objected. I could have simply excluded any such argument based on the failure to so object but decided to allow the Applicant some latitude to argue the matter. It was in response to that that the issues regarding the lodgement of the relevant tax returns and the treatment of the $550 amount arose. The Respondent could hardly be expected to have anticipated in advance of the hearing that the Applicant would seek to argue about matters he had not formally objected to. In the circumstances it is a bit rich for the Applicant to now complain that he was somehow caught by surprise.

69. Ordinarily, share losses cannot be taken to arise if tax returns have not been lodged. The Respondent nonetheless indicated in a letter addressed to the Applicant and dated 19 September 2016 (R3) that it would consider evidence of the share losses in the relevant years if the Applicant provided a list of all income and deductions and a declaration stating that the information is true and correct. Thus, even as late as September 2016 the Respondent was willing to accept verified evidence by way of a sworn statement from the Applicant but no such statement was forthcoming.

ISSUE FOUR

70. In relation to the question of penalties no objection was taken by the Applicant either as to the fact of or the amount of the penalties imposed.

71. Numerous attempts were made by the Respondent to clarify with the Applicant whether penalties were proposed to be objected to.

72. This included an email from Patrick Sheehan to the Applicant dated 5 January 2016 in which Mr Sheehan says:

> *"We are willing to treat your objection as though it was lodged within time and consider the substantive tax matter. Furthermore, upon you request, we can extend the objection to review your penalty that is yet to be remitted from 75%. If you want to expand the objection just respond to this email requesting so."*

73. This was followed by a lengthier email dated 12 January 2016 again from Mr Sheehan to the Applicant in which Mr Sheehan rather helpfully suggests:

> *"Furthermore, I would like to extend your November 2015 objection to include a review of your penalties which currently are calculated to be 75%; will you agree to this extension?"*

74. The flow of correspondence clearly indicates that the Applicant did receive and read both these emails but no relevant response about the question of penalties was ever received by the Respondent.

75. In these circumstances it is not possible for this Tribunal to interfere with the decisions made in respect of penalties.

DECISION

76. The decision under review is affirmed.

I certify that the preceding 76 (seventy-six) paragraphs are a true copy of the reasons for the decision herein of Professor R Deutsch, Deputy President

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

Associate

Dated: 10 March 2017

Date(s) of hearing:	**16 February 2017**
Applicant:	**By telephone**
Solicitors for the Respondent:	**Review and Dispute Resolution, Australian Taxation Office**