

FEDERAL COURT OF AUSTRALIA

Bakri v Deputy Commissioner of Taxation [2017] FCA 20

File number: NSD 32 of 2017

Judge: **BURLEY J**

Date of judgment: 23 January 2017

Catchwords: **TAXATION** – application to set aside departure prohibition order – whether order was granted for improper purpose – whether reasonable grounds existed for Commissioner’s belief under s 14S of the *Taxation Administration Act 1953* (Cth) – application dismissed

Legislation: *Taxation Administration Act 1953* (Cth) ss 14S, 14T, 14U, 14V, 14X, Schedule 1

Cases cited: *Pattenden v Commissioner of Taxation* (2008) FCA 1590
Poletti v Commissioner of Taxation [1994] FCA 623;
(1994) 52 FCR 154
Troughton v Deputy Commissioner of Taxation [2008] FCA 18; (2008) 166 FCR 9

Date of hearing: 20 January 2017

Registry: New South Wales

Division: General Division

National Practice Area: Taxation

Category: Catchwords

Number of paragraphs: 53

Counsel for the Applicant: Mr A Duc

Solicitor for the Applicant: Edgeworth Legal Pty Ltd

Counsel for the Respondent: Mr M O’Meara

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

NSD 32 of 2017

BETWEEN: **MHAMED BAKRI**
Applicant

AND: **DEPUTY COMMISSIONER OF TAXATION**
Respondent

JUDGE: **BURLEY J**

DATE OF ORDER: **20 JANUARY 2017**

THE COURT ORDERS THAT:

1. The application be dismissed with costs.

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

REASONS FOR JUDGMENT

(Revised from transcript)

BURLEY J:

- 1 In this proceeding the applicant seeks an order pursuant to s 14X, *Taxation Administration Act 1953* (Cth) (**TA Act**), setting aside a departure prohibition order issued by the Deputy Commission of Taxation dated 6 January 2017 (**DPO**). The respondent opposes the application. The proceedings have come before the court quickly. The application was filed on 13 January 2017. It was returned for directions on 18 January 2017 and heard on 20 January 2017. The application was said to be urgent because the applicant wishes to depart Australia for Dubai in the United Arab Emirates on Sunday, 22 January 2017.
- 2 On 20 January 2017, I gave my decision dismissing the application with costs. Set out below are my reasons for that decision.
- 3 The evidence relied upon in the application was two affidavits affirmed by the applicant Mhamed Bakri, affirmed on 11 January 2017 and 18 January 2017. The respondent relied upon the affidavit of Aris Zafiriou, affirmed on 18 January 2017. Mr Zafiriou is the acting Assistant Commissioner of the Significant Debt Management Team of the Australian Taxation Office. His affidavit annexed the decision to issue the DPO made by Mr Steve Atkins, the Assistant Commissioner, Significant Debt Management, which was set out in an email dated 22 December 2016 (**Decision**). Mr Zafiriou's affidavit also annexed Notices of Amended Assessment for the applicant from 2011 to 2015, the reasons for decision in relation to those amended assessments and other supporting documents.
- 4 The Decision referred to a departmental brief provided to Mr Atkins dated 21 December 2016 and which was also annexed to Mr Zafiriou's affidavit (**minute**). The parties accepted that the Decision was to be understood as incorporating the minute by reference.
- 5 Each party provided written submissions on the morning of the hearing and addressed those submissions in oral argument. In summary, the applicant contends that the DPO should be set aside because the Decision was made for an improper purpose and because the Decision was not based on reasonable grounds.

Background

- 6 The evidence of the applicant relevantly indicates the following matters.
- 7 He is an Australian citizen who first came to Australia from Dubai in 2003. In 2004 he founded BBC Building Group Pty Ltd (**BBC**) and was a director of that company, which built residential and commercial constructions in Australia. These constructions were financed from funds received from relatives and others located overseas and, upon their sale, the funds were repatriated to overseas investors. Whilst in Australia the applicant used the services of NFS & Accounting Pty Ltd to lodge tax returns.
- 8 Since about 2013 the applicant has lived and worked in Dubai, although he regards Australia as his permanent place of residence. He was first married in 2006 and has three children by that marriage aged nine, eight and six. He was divorced in 2016 and has remarried. His wife lives with him in Dubai and is in her first trimester of pregnancy. On 6 January 2017 the applicant returned to Australia and, when passing through customs, was served with notices of amended assessment of his tax liabilities for the years of 2011 to 2015 that were issued by the Deputy Commissioner of Taxation on 23 December 2016. The reassessments resulted in a tax liability in the amount of \$4,451,775.
- 9 Prior to receipt of these notices the applicant had understood that he owed no outstanding money for taxation. He intends to issue a notice of objection to the assessments.
- 10 Also on 6 January 2017 the applicant was served with the DPO. He has booked to return to Dubai on 22 January 2017. He says that if he does not return to Dubai, then he will be dismissed from his employment and will lose his accommodation and have nowhere to live. He has no job in Australia and no place to live here. His tie to Australia is his children, and he regularly returns to Australia to see them. The applicant is also concerned that if the DPO is not set aside, then the health of his wife will suffer.
- 11 A medical certificate tendered in evidence states that the applicant's wife is "*under stress since her husband is away and she's expecting him to be in the country by 23rd of January 2017.*"
- 12 Also annexed to his second affidavit were two letters that the applicant said were from his employer. The first was an entity called NSCO CONT CO, dated 15 January 2017. It said that it is the authorised contractor of WE FOR U Real Estate Development LLC (**WE FOR U Real Estate**) concerned with a development project of a building construction at Jumeirah

Village Circle, Dubai, of some 24 storeys (**Dubai project**). The letter said that the applicant is required to be in Dubai by 23 January 2017 to sign a monthly civil report and another document. Failure to do so will lead to a delay in the Dubai project.

- 13 The second letter is dated 15 January 2017 and from NEXT Engineering Consultants. They are also consultants for WE FOR U Real Estate. The letter says that the applicant is required in Dubai before 23 January 2017 to sign a document also relevant to the Dubai project. Despite the description in the affidavit, neither the NSCO letter nor the NEXT Engineering letter, reveal that they are the applicant's employer.
- 14 Instead, a contract for employment is also annexed to the second affidavit of the applicant which indicates that WE FOR U Real Estate is his employer. However, no letter indicates that the applicant's employment is in jeopardy if he does not return to Dubai. Other documents in evidence indicate that the applicant is a co-owner with Mr Majed Hawatt of the Dubai project.
- 15 The applicant submitted that the present application was urgent because he would lose his job if he does not catch his flight on 22 January 2017. He was obliged to be personally present in Dubai to sign certain documents and because of his wife's poor health which will be exacerbated by any delay in his return.
- 16 I am sceptical of the first two of these reasons. It appears that whilst the applicant is an employee of WE FOR U Real Estate, he is also co-owner of the Dubai project. No explanation was offered as to why the applicant could not provide any signatures required from Australia. No evidence was provided from the employer that delayed return would lead to his dismissal. Despite this scepticism, I have treated the application as having the urgency for which the applicant contends.

The Decision of the Commissioner

- 17 The Decision of Mr Atkins to issue the DPO was made pursuant to a delegation of authority from the Commissioner of Taxation. That delegation is not challenged, and below I refer to the decision-maker as the Commissioner.
- 18 The Decision was made in the following terms:

I approve the issue of a DPO against Mhamed Bakri subject to the issue of the NOAAs.

My decision is informed by the brief provided, and further by the brief concerning

the related party, Majed Hawatt, as well as by discussions with SDM Director ... on the particulars of this case.

In making my decision, I note the following points:

- Mr Bakri has a significant taxation liability for which NOAAs will issue
- Mr Bakri has:
 - A poor compliance record
 - Limited links to Australia, indicated by:
 - A travel history that suggests a capacity to live comfortably overseas indefinitely
 - Significant business interests overseas
 - A connection to significant sums of money that have been transferred overseas
- It is reasonable for Mr Bakri to be required to stay in Australia in order to enable him to adequately address his taxation liabilities. His presence in Australia would enable him to participate in appropriate interviews, enquiries and other processes which would allow him to:
 - fully explain the circumstances leading to his tax liability, the nature of the significant international funds transfers, and his overseas asset position, and
 - to make arrangements suitable to the Commissioner for the repayment of his tax debts.

19 The “*brief provided*” is the minute. It is 14 pages long and is based on extensive documentary material. Counsel for the respondent, Mr O’Meara, made those documents available for tender, but ultimately decided that given the grounds advanced by the applicant, it was not necessary to do so. I agree with that course.

20 The minute records that a group within the ATO had conducted a covert audit of the applicant, that the applicant is listed as a director and shareholder of five named Australian companies and that he has a history of remitting and receiving significant funds from Dubai either personally or through various businesses.

21 The records, including the reasons for Decision of the Commissioner to issue the amended assessments which were annexed to Mr Zafiriou’s affidavit, indicate that in the period from 27 March 2014 to 16 October 2014 around \$1.6 million was transferred from Dubai to accounts held by by the applicant. With one minor exception, those transfers were effected while the applicant was not in Australia. In the income years ending 30 June 2014 and 30

June 2015, the applicant caused Merosa and BBC (both companies ultimately owned and directed by the applicant) to purchase United States currency to the value of around AUD\$820,000.

- 22 Following the purchase by Merosa of US currency to the value of AUD\$400,000 (USD\$357,400) on 5 December 2013, the applicant travelled to the UAE the next day. Other purchases of US currency were by BBC in August and September 2014 and occurred while the applicant was not in Australia. AUSTRAC records demonstrate that the US currency was remitted to an account that the taxpayer operated with Dubai Islamic Bank. In the income year ending 30 June 2015, around \$1.52 million was transferred to Dubai from Australia either by or for the applicant.
- 23 On 9 October 2014, \$137,239 was transferred to the applicant by BBC and on 16 October 2014, \$136,942 was transferred to the applicant by Ocean Parts Finance Proprietary Limited. The applicant was out of Australia at the time. The amounts were deposited into the applicant's account with the Dubai Islamic Bank. In December 2014, February 2015 and March 2015, moneys in the order of \$1.2 million were transferred by the applicant from BBC's St George bank accounts to LHO Real Estate Development LLC in Dubai. Additionally, in December 2014 BBC transferred funds to a real estate agency in Dubai called WE FOR U Real Estate, with which the applicant is associated. Those funds were sourced from a loan obtained by BBC from St George Bank secured on property at Lakemba in Sydney.
- 24 Additionally, in February 2016 the applicant transferred \$820,000 to WE FOR U Real Estate in Dubai. In the reasons for the Decision to issue the notice of amended assessments, the Commissioner arrived at the view that the following amounts should be included in the assessable income of the taxpayer for the income years end of 30 June 2011 to 30 June 2015: \$2,104,452 for 2011; \$280,000 for 2012; \$400,000 for 2014; and \$1,934,324 for 2015.
- 25 Under the heading "*Recoverability of the debt*", the minute records as follows:
- 26. Information available indicates that Mr Bakri does not directly hold sufficient assets in Australia for the Commissioner to be able to readily recover the amount of the tax liability of \$4,451,775.31.
 - 27. At this stage, we cannot fully determine the recoverability of the debt as Mr Bakri does not seem to have any tangible assets in Australia. The presence of Mr Bakri in Australia is necessary to properly determine his asset situation and any assets he may hold a beneficial interest in.

28. The recoverability of Mr Bakri's debt may be enhanced if he is prevented from leaving Australia which will allow the Commissioner to formally interview him in order to:
- Further investigate and establish whether Mr Bakri has an interest in any properties in Australia;
 - Ascertain whether there are any other assets and investments that are held by Mr Bakri in Australia or overseas; and
 - Initiate legal recovery proceedings, including bankruptcy action, to allow a trustee in bankruptcy to properly investigate the assets of Mr Bakri.
29. If Mr Bakri was to depart Australia, it will be very difficult for the ATO, or any court appointed trustee, to investigate Mr Bakri with respect to identifying his assets either in Australia or overseas.
30. There is currently no international treaty with the UAE which would assist with obtaining any information, nor provide any assistance in collection.

Reasonable grounds

31. A DPO is not exercised against every person subject to a tax liability who is planning to leave Australia. In addition to having a tax liability, the Commissioner must believe on reasonable grounds that it is necessary to issue a DPO to protect revenue.
32. In this instance, the departure of Mr Bakri from Australia has a direct bearing on the ability of the Commissioner to recover the tax owing given the shortfall between the value of Australian assets and the liability, and the inability to successfully execute the judgments against offshore interests to make up the shortfall.

...

Risk to revenue

34. Based on Mr Bakri's previous behaviour, travel history and the fact that he does not seem to have any evident assets in Australia, there is a high probability that he may permanently leave Australia once he is served with the Notice of Amended Assessments.
35. In the event that Mr Bakri is free to depart Australia without either discharging or making satisfactory arrangements to pay his debts, the debts are at risk of not being paid.

26 The minute then proceeded to apply the factors set out in an internal tax office document identified as PSLA 2011/18 that the Commissioner should consider in making a decision to issue a DPO.

The Legal Background

27 Section 14S of the TA Act relevantly provides:

- (1) Where
 - (a) a person is subject to a tax liability; and
 - (b) the Commissioner believes on reasonable grounds that it is desirable to do so for the purpose of ensuring that the person does not depart from Australia for a foreign country without:
 - (i) wholly discharging the tax liability; or
 - (ii) making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged;

the Commissioner may, by order in accordance with the prescribed form, prohibit the departure of the person from Australia for a foreign country.
- (2) Subject to subsection (3), a departure prohibition order remains in force unless and until revoked under section 14T or set aside by a court.

28 Section 14V of the TA Act is entitled “*Appeals to courts against making of departure prohibition Orders*”. That section provides:

- (1) A person aggrieved by the making of a departure prohibition order may appeal to the Federal Court of Australia or the Supreme Court of a State or Territory against the making of the departure prohibition order.
- (2) This section has effect
 - (a) subject to Chapter III of the Constitution; and
 - (b) notwithstanding anything contained in section 9 of the *Administrative Decisions (Judicial Review) Act 1977*.

29 Section 14X of the TA Act is entitled “*Orders of court on appeal*” and provides:

A court hearing an appeal under section 14V against the making of a departure prohibition order may, in its discretion:

- (a) make an order setting aside the departure prohibition order; or
- (b) dismiss the appeal.

30 In *Troughton v Deputy Commissioner of Taxation* [2008] FCA 18; (2008) 166 FCR 9 (*Troughton*), Jessup J said in relation to s 14S of the TA Act:

- 21 However, there is authority which I should follow that suggests that the purposive dimension of s 14S should not be ascertained from such a literal

reading of the words of the section. In *Dalco v Federal Commissioner of Taxation* (1987) 19 ATR 443, 447-458, Young J said of s 14S:

I am of the view that that is the way that one approaches the section. The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas.

His Honour's view was endorsed in the court in *Edelsten v Federal Commissioner of Taxation* (1989) 85 ALR 226, 230 and in *Skase v Commissioner of Taxation* (1991) 32 FCR 206, 209 and 210-211. In the latter case, Pincus J said that "there must be ... the circumstance that recoverability will be affected by the departure of the taxpayer from Australia." (32 FCR at 211)

- 22 It follows that s 14S(1)(b) should be read not literally, but as though it referred to a belief by the Commissioner (on reasonable grounds) that it was desirable that the person not leave Australia without discharging the tax liability or making the arrangements there referred to. Thus it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at least less likely, that the tax liability will be discharged, or that the ability of the Commissioner to recover the tax will be impaired. These are things which must be considered by the Commissioner in every case. The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia *simpliciter*: it is the prevention of such persons from leaving Australia where, in the Commissioner's belief reasonably arrived at, the recovery of tax would or might thereby be impaired.
- 23 In that result, at least so far as revealed by s 14S, the general scope and objects of Part IVA of the Administration Act are as contended for by both sides in the present case. As contended for by the Commissioner, they are the projection of the revenue. As contended for by the applicant, they are the prevention of persons (owing tax) from leaving Australia where that would affect the recoverability thereof.

- 31 The present application arises from s 14V. Although termed an appeal, it is a proceeding in the original jurisdiction of this Court. The features of such an appeal were discussed by the Full Court of the Federal Court in *Poletti v Commissioner of Taxation* [1994] FCA 623; (1994) 52 FCR 154 (**Poletti**) at 160-162 as helpfully summarised in *Pattenden v Commissioner of Taxation* (2008) FCA 1590 (**Pattenden**) (Logan J) at [8]. In *Poletti*, the full court of the Federal Court found that an appeal against the making of a DPO involves the determination of three principal questions: (a) whether the person is subject to a tax liability; (b) whether the Commissioner held the belief of which s 14S(1)(b) speaks; and (c) whether reasonable grounds existed for the formation by the Commissioner of the requisite belief.

32 In the present application, the applicant concedes that he is subject to a tax liability and that the Commissioner held the requisite belief. Accordingly, subparagraphs (a) and (b) in *Poletti* are not relevant for present purposes.

The Arguments

33 Counsel for the applicant, Mr Duc, identified two bases for setting aside the DPO. First, he contended that the power to grant the DPO was used for an improper purpose in that it was used to detain the applicant in Australia in order to gather information from him concerning his domestic and international financial position. This, the applicant argued, was an improper purpose because the power under s 14S of the Act is confined to the collection of tax and does not concern investigation. The reasons given by the Commissioner, including the minute and the email correspondence, indicate that the “*real reason*” for the issue of the DPO was to conduct further investigation into the applicant’s affairs, not to recover the debt.

34 This was, the applicant contended, apparent from the language used in [28] of the minute, the final paragraph of the Decision and an email to the decision-maker at page 109 of Mr Zafiriou’s affidavit.

35 The respondent submitted that the whole purpose of the DPO was manifestly to enhance the ability of the respondent to recover the crystallised tax liability. Nothing in the material suggested otherwise. The postulate of s 14S is that the taxpayer is going overseas. The section then directs the Commissioner to ask whether the taxpayer going overseas would impair or affect adversely the recoverability of the tax. The Decision was made in accordance with that purpose, which included a purpose to facilitate the conduct of investigations suitable for the recovery of the tax debt.

36 The second argument advanced by the applicant was that reasonable grounds did not exist for the formation by the Commissioner of the requisite belief. In this regard, the applicant submitted that there were not reasonable grounds for the Commissioner to form the belief that it was desirable to prevent the taxpayer from leaving Australia. The applicant focused his challenge on the five reasons advanced in the respondent’s written outline of submissions, which were as follows:

30. There were clearly reasonable grounds for the Commissioner to form the belief that it was desirable to prevent the taxpayer from leaving Australia because the discharging of the tax liability would be affected or impaired if the taxpayer is not in Australia. This is for the following reasons:

31. First, there is nothing to indicate that the taxpayer has assets in Australia capable of meeting his tax liability of around \$4.45 million against which the Commissioner may seek recovery.
32. Second, in contrast, from the material summarised in paragraphs 10 to 18 above and although the total extent of his assets remain uncertain, it would appear that the taxpayer does have substantial assets in the UAE, including an interest in the development of 25 storey office tower and an ability to access significant funds in the UAE.
33. Third, the taxpayer's history, also discussed in paragraphs 10 to 18 above, demonstrates a capacity to reside outside of Australia for lengthy periods and to access substantial funds from Australia by having them transferred to him or to his benefit offshore. There must be considered at least some risk that the taxpayer will avail himself of this capacity in order to avoid recovery of his tax liability.
34. Fourth, there are no arrangements between Australia and the UAE to facilitate the recovery of tax debts. If the taxpayer is able to depart Australia without paying, or making satisfactory arrangements for the payment of his tax liability, the Commissioner is unlikely to be able to recover it from the taxpayer's non-Australian assets, including those in the UAE.
35. Fifth, if the taxpayer is not in Australia the Commissioner will likely be unable to fully exercise his statutory powers to investigate the taxpayer's asset position, both in Australia and overseas, including by issuing notices to the taxpayer under s353-10 of Schedule 1 of the Administration Act requiring the taxpayer to give information and/or documents to give evidence on oath or affirmation, in order to facilitate the recovery of the taxpayer's tax liability.

37 The argument of both parties proceeded on the basis that these five reasons accurately summarised the reasons provided in the Decision. As to the first, the applicant submitted that it does not follow as a matter of logic that the applicant should not be permitted to leave Australia if he has no assets in Australia to pay his debt. As to the second, the fact that the applicant has assets in the UAE does not make it desirable to stop him from leaving Australia, and given that the applicant has not even had an opportunity to lodge an objection or discuss matters with the ATO, the DPO was issued for the incorrect reason.

38 Further, it was incorrect for the Decision to identify that the applicant "*had a poor compliance record*" or was a "*flight risk*". Related to this point, the applicant submitted that the minute and Decision neglected to address the fact that the applicant had close ties to Australia in the form of his attachment to his three children. Accordingly he was not a flight risk. The applicant accepts that the third factor could reasonably be taken into account, but submits that the fourth factor (no ability to enforce debt recovery in the UAE) was irrelevant, as was the fifth.

39 The respondent accepted that the five points identified, in effect, summarised the reasons set out in the Decision (and accordingly, the minute) but defended those reasons.

Consideration - Improper Purpose

40 In my view, the reasons given in the Decision do not reflect any improper purpose. In *Troughton*, Jessup J at [22] noted:

... The purpose of s 14S, and accordingly a central to the purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia *simpliciter*: it is the prevention of such persons from leaving Australia where, in the Commissioner's belief reasonably arrived at, the recovery of tax would or might be impaired.

41 The Commissioner has powers to conduct investigations in order to facilitate the recoverability of the taxpayer's tax liability. Those powers include the issuing of notices to the taxpayer under s 353-10 of Schedule 1 of the TA Act requiring the taxpayer to give information. I do not accept the applicant's submission that the issue of the DPO for the purpose of conducting such investigations of this type reflects an improper purpose. If investigations of this type would enable or assist the recoverability of the tax debt, then they would meet the purpose of s 14S. In the present case, the absence of the applicant abroad might impair such inquiries.

42 In the Decision, the Commissioner considered that the applicant had a significant tax liability, a poor compliance record and limited links to Australia. He said that it is "*reasonable for Mr Bakri to be required to stay in Australia in order to enable him to adequately address his taxation liabilities.*" The reference to "*significant taxation liability*" was, in my view, a reference to the crystallised tax debt that was reflected in the notices of amended assessment issued on 23 December 2016.

43 There is no suggestion that there was a desire further to conduct investigations for the purpose of assessments. Rather, the purpose was, in terms, to require the applicant to remain in Australia to pay his crystallised tax liability. The reference in the Decision to the applicant's "*poor compliance record*" was, in my view, to the failure of the applicant between 2011 and 2015 to report his personal income, which led to the amended assessments. That amounted, in the Commissioner's view, in an under-assessment of the personal income of the applicant of millions of dollars, and was a legitimate consideration.

44 The applicant drew particular attention to the final part of the Decision where the Commissioner said that the applicant's presence in Australia would enable him to participate in inquiries and other processes which would allow him to explain his circumstances "*leading to his tax liability*" and to make arrangements for repayments of his tax debts. I do not understand this part of the Commissioner's reasons to reflect a different or improper purpose. The reference to exploring circumstances leading to the tax liability is to be understood in the context where there is no doubt, so far as the Commissioner is concerned, that the tax debt has crystallised. This is also clear from [28] of the minute, and [8] of the email to the Commissioner of 22 December 2016 which is at page 109 of Mr Zafiriou's affidavit. The investigations are for the purpose of ensuring that the tax liability is paid. As I have noted, such investigations are properly within the purview of s 14S.

Consideration - No Reasonable Grounds

45 In my view, the challenge based on the five identified reasons for the Decision must fail. Each of the reasons should be read together and in light of the purpose and language of s 14S. The correct question to ask is whether it is desirable to prevent the taxpayer from leaving Australia because the discharging of the tax liability would be impaired or affected if he is not in Australia; *Troughton*, [22] – [23]. The first consideration is plainly relevant and reasonable. If the taxpayer had assets in Australia to meet his obligation, then the physical presence of the applicant would be redundant and the Commissioner could proceed against the assets.

46 Similarly, the second and fourth factors are relevant. If the applicant has significant assets in the UAE, and there is no ability to enforce a tax debt incurred in Australia in the UAE, then it is desirable for any action to be brought against the applicant personally in Australia. In *Pattenden*, Logan J said at [94]:

Having regard to this approach to the construction of s 14S(1)(b) it is, in my opinion, relevant to take account when considering whether reasonable grounds for the requisite belief existed, to take account of the ability to enforce an Australian revenue debt in places for which a debtor might reasonably be expected to reside abroad, insofar as it may be possible to identify the same.

Plainly, the enforceability of judgments abroad is a relevant consideration.

47 The minute identifies that very substantial amounts of money have over time been transferred to the applicant in Dubai. The applicant is apparently one of two owners and developers of a substantial 24-storey building development in Dubai. It is not unreasonable to suppose that

the applicant may be able to facilitate the payment of his tax obligations by having access to those funds.

48 Further, in this context, the applicant criticises the minute for failing to record that he has three children in Australia and that his desire to see these children will assure his return to Australia. The applicant submits that it was unreasonable for the Decision to fail to take this factor into account or to record that he will regularly return to Australia. However, the relevant consideration for the Commissioner, pursuant to s 14S, is whether it is desirable for the applicant to remain in Australia whilst the debt remains outstanding on the basis that the discharge of the taxpayer of his debt will be impaired or affected if he is not in Australia. That does not mandate consideration of the likelihood that the applicant may from time to time return to Australia.

49 Further, the applicant's submission must be understood in its proper context. There is no doubt that he does intend to leave the jurisdiction. In that context, he is undoubtedly a "*flight risk*". He has significant personal and professional and commercial ties to Dubai, and apparently assets there. His absence from Australia and travel to Dubai could impair or affect the recoverability of the tax liability and is a relevant consideration. The fact that the applicant may return to Australia from time to time to see his children is not made a mandatory consideration by the language of PS 2011/18, paragraph 141(xv). Indeed, humanitarian factors and personal circumstances of the applicant are more aptly considered in the context of an application made to the Commissioner under s 14U of the TA Act.

50 In this context, in *Troughton*, Jessup J said:

24. The next provision to which reference should be made is s 14U. Here the legislature has turned its mind to the kind of exceptional circumstances that might arise, in which the non-achievement of the purpose referred to in s 14S(1) might be tolerated. Section 14U deals with four situations. First, there is the situation in which the Commissioner is satisfied that the person, having departed from Australia, will return within an appropriate period, that existing liabilities will be wholly discharged, and that future liabilities will either be wholly discharged or be completely irrecoverable. Secondly, there is the situation in which the person has given security. Thirdly, there is the situation in which permission to depart might be sustained on humanitarian grounds. And finally, there is the situation in which a refusal to permit departure would be detrimental to the interests of Australia. The circumstances to which s 14U is addressed are detailed and apparently comprehensive. ...

...

As I read the Full Court [referring there to *Poletti*], their Honours were

referring to the legislative balance which had been achieved by the enactment of s 14S, rather than to a process of balancing which, at the level of administrative decision-making, was mandated by the section. ... For my own part, I consider that, at least so far as it goes, s 14U encapsulates such a legislative concern as there is in the personal circumstances of a taxpayer with respect to whom a DPO is extant.

- 51 The fifth criticised factor is that if the taxpayer is not in Australia the Commissioner will likely be unable to undertake investigations to facilitate recovery of a tax liability. The applicant submits that the power in s 14S is not directed at information gathering. However, for the reasons that I have advanced above by reference to authority, I disagree with that submission. In my view, investigations conducted for the purpose of enabling the recovery of the tax liability are relevant for the purpose of s 14S. If the Commissioner reasonably believes that such investigations would or might be impaired by the absence of the taxpayer overseas, then that is also a legitimate consideration.
- 52 Finally, the applicant submitted that he was not provided with an opportunity to discuss the reassessment notices with the ATO, to lodge a notice of objection, to seek legal or accounting advice, or to otherwise explain the basis for his criticism of the reassessment of his tax liability. However, the subject of the applicant's tax liability was not challenged in this application. In written submissions, the applicant conceded that he is subject to a tax liability. In fact, the applicant does have an opportunity to lodge objection to the assessment and obtain advice and make submissions in relation to any objection. These processes are not impeded by the issue of the DPO. In those circumstances, this criticism is not made out.

Disposition

- 53 On 20 January 2017 I dismissed the application. It is appropriate that costs should follow the event and that the applicant should pay the respondent's costs.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Burley.

Associate:

Dated: 24 January 2017