Administrative Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2016/6201**

Re: **Mango Reef Pty Ltd**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President I R Molloy**

Date: **28 August 2018**

Place: **Brisbane**

The decision under review is affirmed.

.....[SGD].....

Deputy President I R Molloy

Catchwords

TAXATION – objections to assessments – creditable acquisitions – alleged gold transactions – creditable acquisitions of scrap gold of which input tax credits should be attributed – administrative penalties – remission of administrative penalties

Legislation

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

Taxation Administration Act 1953 (Cth)

Cases

Ciprian and Ors v Commissioner of Taxation (2002) 50 ATR 1257

Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation (2008) 69 ATR 627

Ebner v Commissioner of Taxation (2006) 63 ATR 1073

Federal Commissioner of Taxation v Dalco (1990) 168 CLR 614

Federal Commissioner of Taxation v White (No. 2) [2010] FCA 942

Fox v Percy (2003) 214 CLR 118

Martin v Federal Commissioner of Taxation (1993) 93 ATC 5200

Palassis v Commissioner of Taxation [2011] FCA 1305

Sanctuary Lakes Pty Ltd v Commissioner of Taxation (2013) 212 FCR 483

Trautwein v Federal Commissioner of Taxation (1936) 56 CLR 196

Secondary Materials

Practice Statement Law Administration 2012/5

REASONS FOR DECISION

Deputy President I R Molloy

28 August 2018

BACKGROUND

1. This is an application by Mango Reef Pty Ltd ("**Mango Reef**" or "**the Applicant**") for review of an objection decision of the Commissioner of Taxation ("**the Commissioner**" or "**the Respondent**") disallowing objections to assessments under the *Taxation Administration Act 1953* (Cth) ("**the TAA**").

ISSUES

2. The assessments were two amended primary tax assessments and two penalty assessments for the monthly tax periods of May 2014 and June 2014. The issue, broadly-speaking, is whether the Applicant, as it claims, acquired scrap gold in those periods constituting "creditable acquisitions" within the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("**the GST Act**").

3. The Applicant claims that in May and June 2014 it purchased, in sixteen transactions, a total of approximately 145 kilograms of gold from a company, Golden Horizon Pty Ltd ("**Golden Horizon**"). The transactions allegedly took place in Sydney and in each case the gold was transported to Melbourne to be refined by a company, 888 Refinery Australasia Pty Ltd ("**888 Refinery**").

4. The Commissioner maintains that the transactions simply did not take place:

> "…This is on the basis of significant inconsistencies and discrepancies in the Applicant's material, a paucity of contemporaneous documents, the lack of '*logic of events*' and the '*glaringly improbable*' nature of the Applicant's claims." [1]

5. The Applicant was represented by its sole shareholder and director, Terrence Dalby. At times Mr Dalby claimed that the Respondent was questioning the Applicant's activities as a gold dealer generally. But that is much broader than what the review really involves.

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[1] The Respondent's final written submissions dated 1 August 2018 at [5], citing *Fox v Percy* (2003) 214 CLR 118 at [29]-[31].

6. The Commissioner accepts that the Applicant is a dealer in precious metals, predominantly gold. It was also accepted there were transfers of money between the bank accounts of the Applicant and Golden Horizon, but not that those transfers were for the purchase of scrap gold as alleged by the Applicant.

7. The specific issues as stated by the Commissioner are:

   (a) Did the Applicant make creditable acquisitions of scrap gold from Golden Horizon of which input tax credits of $127,743 for the May 2014 period and $493,119 for the June 2014 period should be attributed to the relevant periods in accordance with Divisions 11 and 29 of the GST Act, as claimed or at all?

   (b) In relation to the administrative penalties:

      (i) Is the Applicant liable to administrative penalties of $558,775.80 under s 284-75 of Schedule 1 to the TAA in respect of the relevant periods?

      (ii) Should there be any remission of the administrative penalties under s 284-75 by exercise of the discretion in s 298-20 of Schedule 1 to the TAA?

8. Under s 14ZZK(b) of the TAA the onus of establishing that the assessments were excessive is borne by the Applicant. In order to discharge the onus of proof, the Applicant must prove not only that the assessments were excessive, but also prove what the true amounts should be.[2]

9. In relation to the penalties the Applicant bears the burden of showing that the decisions should not have been made or should have been made differently.

10. For the reasons set out below, I have concluded that the decision under review should be affirmed.

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[2] *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 623-625 and 631-634; *Martin v Federal Commissioner of Taxation* (1993) 93 ATC 5200; *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 196 at 88; and *Palassis v Commissioner of Taxation* [2011] FCA 1305 at [9].

GST ACT

11. The following provisions of the GST Act are relevant to the Applicant's claims for creditable acquisitions.

> **11.20 Who is entitled to input tax credits for creditable acquisitions?**
>
> You are entitled to the input tax credit for any *creditable acquisition that you make.

12. Section 11.5 of the GST Act provides the definition of a "creditable acquisition":

> **11.5 What is a creditable acquisition?**
>
> You make a **creditable acquisition** if:
>
> (a) you acquire anything solely or partly for a *creditable purpose; and
>
> (b) the supply of the thing to you is a *taxable supply; and
>
> (c) you provide, or are liable to provide, a *consideration for the supply; and
>
> (d) you are *registered, or *required to be registered.

13. The requirements of s 11.5 are cumulative and all must be satisfied for there to be a creditable acquisition. Section 11.15 defines a creditable purpose, which requires *"a thing"* be acquired in carrying on the enterprise. Section 9.5 defines taxable supply; s 9.15 provides an inclusive definition of consideration; and s 195.1 defines *"registered"*, relevantly, in relation to an entity registered under Part 2-5 of the GST Act. There is no issue of registration as Mango Reef was registered and held ABN 86 127 406 277.

14. Section 11.25 of the GST Act provides how much the input tax credits are for creditable acquisitions, as follows:

> **11.25 How much are the input tax credits for creditable acquisitions?**
>
> The amount of the input tax credit for a *creditable acquisition is an amount equal to the GST payable on the supply of the thing acquired. However, the amount of the input tax credit is reduced if the acquisition is only *partly creditable.
>
> Note: The basic rule for working out the GST payable on the supply is in Subdivision 9-C. However, the GST payable may be affected by other provisions in:
>
> (a) this Act (for a list of provisions, see section 9-99); and

(b) other GST laws (for example, see subsection 357-60(3) in Schedule 1 to the *Taxation Administration Act 1953* (about the effect of rulings made under Part 5-5 in that Schedule)).

15. Section 38.385 provides that certain supplies of *precious metals are GST-free. Precious metal is defined in s 195.1 and includes gold (in an investment form) of at least 99.5 per cent fineness. Section 40.100 provides that otherwise *"a supply of *precious metal is **input taxed**."* Scrap gold is not within the definition of precious metal, and therefore its supply is subject to GST.

ORAL EVIDENCE

16. There were four witnesses called, all on behalf of the Applicant: Mr John Spiteri, Ms Sharee Grunow, Mr Jeffrey Leahy and Mr Dalby. There was only one witness who gave first-hand evidence concerning the alleged transactions between the Applicant and Golden Horizon and that was Mr Dalby.

17. None of the other witnesses were present at, or took any part in, any of the alleged dealings between the two companies. None of them had any direct contact with Golden Horizon at all.

Mr Spiteri

18. Mr Spiteri at the relevant time was employed as the refining manager by 888 Refinery in Melbourne. He said that gold in the form of scrap jewellery or doré bars was delivered to the refinery on behalf of the Applicant by Mr Dalby or by registered post. Doré bars, he said, consist of a mixture of scrap gold turned into a bar – not pure gold.

19. Mr Spiteri's only knowledge of the source of the gold, or that the Applicant had any dealings with Golden Horizon at all, was from what Mr Dalby mentioned to him, and a vague reference to "paperwork" which included that company's name. The gold delivered to the refinery had no marks identifying its source. Mr Spiteri had no direct dealings with Golden Horizon and had not met anyone from there.

Ms Grunow

20. Ms Grunow provided book-keeping services to 888 Refinery. She agreed with Mr Dalby that she redid invoices for Mango Reef and Golden Horizon so that they could be put into

an accounting system. She agreed she was “aware” that the Applicant was buying scrap gold from Golden Horizon.

21. Once again, this witness had no direct dealings with Golden Horizon. She was not present during any transactions between the Applicant and Golden Horizon. Her knowledge of any such dealings was limited to what Mr Dalby told her and some “paperwork” she had seen.

22. Now it is not disputed that documents exist which on their face could be said to evidence relevant transactions between Mango Reef and Golden Horizon. Whether these or any other documents which Ms Grunow may have seen or processed record actual transactions is another matter. In consequence Ms Grunow’s evidence does not provide any assistance in respect of the issues in dispute.

Mr Leahy

23. Mr Leahy described himself as sole director and majority shareholder of 888 Refinery. He gave evidence of a financial tie between 888 Refinery and Mango Reef, describing the company or Mr Dalby as a “funder”. Mr Leahy said he had no involvement with Golden Horizon. He has never directly transacted with Golden Horizon on behalf of 888 Refinery. He has never met anyone from Golden Horizon. He was not present at any transaction between the Applicant and Golden Horizon.

24. Mr Leahy gave evidence of overhearing Mr Dalby on the telephone negotiating a deal with Golden Horizon. He conceded, however, that Mr Dalby could have been talking to anyone as the Applicant bought gold from other people as well. His only source of knowledge of any transactions between Mango Reef and Golden Horizon was Mr Dalby.

Mr Dalby

25. My impression was that Mr Dalby well-understood the issues and anticipated much of the cross-examination. Unfortunately, I have to say, having seen and heard Mr Dalby give evidence for more than a day and half, I was not impressed by him as a witness.

26. At times he was evasive and unwilling to answer questions directly. He was taken through each of the alleged transactions between Mango Reef and Golden Horizon. His attention was drawn to apparent discrepancies between the tax invoices for the Applicant’s purchases from Golden Horizon, and 888 Refinery’s assay reports apparently recording gold received and refined following from those purchases.

27. Mr Dalby was unable to explain to my satisfaction these apparent discrepancies between the weight of gold purchased and the weight of gold delivered to the refinery.

28. He seemed to say that the Golden Horizon invoices recorded the weight of scrap gold, not pure gold. Elsewhere he agreed that the invoices recorded the pure gold weight, because that was the measure of the price paid. He gave evasive answers about the weights recorded in the refinery's documents. Whatever way you read the documents there appeared to be irreconcilable discrepancies.

29. Later in his evidence, Mr Dalby offered the explanation that gold was sometimes "removed" from the gold delivered to the refinery. He claimed the refinery had instructions to remove, for example, valuable jewellery. This would account, he said, for some of the discrepancies, in particular, lesser weights recorded in the refinery's documents.

30. There is no record of this explanation being offered prior to the hearing. There was no attempt to adduce this information from Mr Spiteri or Mr Leahy who each gave evidence prior to Mr Dalby. One of them, at least, could be expected to have been aware of this instruction if it existed, and would have been able to give evidence of the practice.

31. Mr Dalby also said that 888 Refinery sometimes "added" gold, from gold already stored for the Applicant at the refinery; this by way of explanation for actual increases in the weight of gold received for refining compared to what had been allegedly purchased from Golden Horizon. Again no such evidence was given by Mr Spiteri or Mr Leahy.

32. When questioned why, when he had known that the Commissioner relied on the weight discrepancies, he had not offered these explanations earlier, Mr Dalby's answer was that he had not been asked**.** Having seen and heard Mr Dalby give this evidence about adding and removing gold at the refinery I was left with the impression he was making it up as he went. I am convinced it is untrue.

33. Amongst other things I was not satisfied with Mr Dalby's explanation of how the quantities of scrap gold the Applicant allegedly purchased from Golden Horizon could so often (or perhaps ever) translate to virtually pure gold of approximately the same weight as recorded in 888 Refinery's records. This led, in part, to the changing evidence about whether the various documents recorded pure gold or scrap gold weights. Again, however you read them, the differences in the documents were not adequately explained.

34. Mr Dalby also tried to say that the gold purchased from Golden Horizon was virtually pure gold. This conflicted with the other evidence that it was scrap gold. Mr Dalby claimed, at one stage, not to know the purity of gold jewellery commonly sold by retail jewellers.

35. I was not satisfied with Mr Dalby's explanation of the manner in which the Applicant allegedly purchased and took delivery of the gold from Golden Horizon. All of the dealings were said to be in Sydney, at the airport carpark, in hotels or at the Applicant's office.

36. In a written response to the Commissioner, Mr Dalby stated that "predominately I picked up the scrap gold".[3] He also said that he tested the gold for purity at the time using a portable XRF machine, and then calculated the price relative to the day's spot gold price.

37. In evidence it emerged that if the transactions occurred then Mr Dalby only attended five out of sixteen. Mr Dalby was not in Sydney on all the dates shown in the tax invoices. He said that other employees of the Applicant, including Leigh Prosser who was employed in the Applicant's Sydney office, more than once picked up the gold.

38. This was a new assertion made only at the hearing. Ms Prosser was not called as a witness. Mr Dalby explained her absence on the basis that she had left the Applicant on bad terms. He also said someone on her behalf (possibly an accountant) told him she could not be required to attend because the Tribunal is not "a Chapter 3 Court". This was offered as a reason not to summons her.

39. Yet the Applicant caused a summons to be issued and served on each of Mr Spiteri, Ms Grunow and Mr Leahy, all of whom did attend. I am not satisfied that the Applicant made any genuine attempt to secure Ms Prosser's attendance. I infer that her evidence would not have assisted the Applicant.

40. Mr Dalby stated that no documentation was exchanged at the pick-ups. He said he made notes confirming the value of the gold as tested by him and calculated the purchase price. He said Golden Horizon would subsequently send an invoice by email.

41. When it was put to him that he had not provided any of the emails, he claimed the Commissioner had not requested them – "I don't recall getting that request. But I believe I've given them everything they've asked for."

42. The Commissioner had sought "details of other forms of communication between Mango Reef and Golden Horizon".[4] In Mr Dalby's response[5] he did not mention any email communications, only telephone and text messages.

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[3] Exhibit 1, T60, p.1303.
[4] Exhibit 1, T57, p.1273.
[5] Exhibit 1, T60, p.1305.

43. Furthermore, there was evidence, including copies of text messages and bank statements, said to relate to the alleged transactions which, if true, showed the Applicant simply paying the price sought by Golden Horizon prior to delivery. Mr Dalby confirmed that this did occur. That means that money was transferred for gold not only before taking delivery, but prior to any assessment by the Applicant of its weight or purity.

44. It seems improbable that transactions involving hundreds of thousands of dollars and often tens of kilograms of gold would be undertaken in this way. It is also remarkable that, where money was supposedly paid in advance, there was apparently never any adjustment consequent upon checking the weight, or testing the composition, of the gold received.

45. The Applicant did not call anyone from Golden Horizon to give evidence. The director of Golden Horizon, Mr Ibrahim, had provided a statement and information to the Commissioner. He said the scrap gold was acquired from jewellery shops in Liverpool, but he was unable to provide any documentary evidence of the transactions occurring, and has said that no such documentary evidence was available.

46. Much of what Mr Ibrahim said conflicted with the evidence of Mr Dalby. For instance, Mr Ibrahim stated he personally attended each transaction and only dealt with Mr Dalby. Mr Dalby's evidence was neither he nor Mr Ibrahim attended every transaction. Mr Dalby also said that on some occasions he dealt with people other than Mr Ibrahim from Golden Horizon.

47. Mr Ibrahim stated that invoices were handed over when each transaction physically took place. Mr Dalby said Golden Horizon sent invoices later by email. As I have said, no such emails from Golden Horizon were produced.

48. Mr Dalby said he did not call Mr Ibrahim to give evidence because he was not able to contact him. There was no evidence of any attempt to serve him with a summons to attend. There was no satisfactory evidence of any attempt by the Applicant to call anyone from Golden Horizon to give evidence or why no-one from that company was called.

DOCUMENTARY EVIDENCE

49. The documents said to be relevant to the Applicant's claim of purchases of scrap gold from Golden Horizon are:

    (a) text messages, to advise of the transaction;

    (b) travel, flight details;

    (c) tax invoices purportedly from Golden Horizon;

    (d) 888 Refinery Assay Reports purportedly of the scrap gold relevant to each tax invoice; and

    (e) bank statements of payments made.

50. There are errors, omissions and inconsistencies in the documents. I have already mentioned some of these. I will refer to a few other matters identified by the Respondent.

51. In the third alleged transaction, on 22 May 2014, the tax invoice records "Include GST (0.00%)". However, the Applicant has accounted for GST in its books of account.

52. All of the invoices for June record a subtotal and balance due as identical amounts. The GST is recorded as 10 per cent of the subtotal. The entries in the Applicant's books, however, record amounts for GST which presume an error in the tax invoices. That is, they record an amount for GST which is $1/11^{th}$ of the balance due.

53. Mr Dalby's evidence is that these errors in the invoices had not previously been noticed by him or brought to his attention. This seems improbable given that this review is concerned with GST supposedly paid in the transactions said to be the subject of these invoices.

54. The Commissioner submits there are gaps and anomalies in the flight information produced. This includes a Velocity statement (with Virgin Australia) which fails to record a flight for Mr Dalby which he says he took on 30 May 2014. There is, however, a reference to such a flight in the Qantas material.

55. The Commissioner suggested that the Velocity statement may not be Mr Dalby's. Mr Dalby vigorously defended the Velocity statement as being his.

56. There do appear to be some anomalies but I am not sure how accurate these statements are. I am not willing to make any findings against the Applicant or Mr Dalby in respect of Mr Dalby's air travel based on these documents.

57. Ultimately, however, whether Mr Dalby did or did not travel from A to B on a certain day would make no difference to my findings on the alleged transactions involving Golden Horizon.

PRIMARY TAX ASSESSMENTS

58. Having regard to the matters referred to above, including of course the oral evidence of Mr Dalby, I am not satisfied that any of the transactions in May and June 2014 took place, whether as alleged or at all.

59. The Applicant has failed to establish that either of the amended primary tax assessments is excessive.

60. Moreover, this is not just a case of the Applicant simply failing to discharge the evidentiary burden. I am satisfied that the tax invoices relied on by the Applicant are false and that the transactions they purport to record or evidence did not take place.

61. In saying that I appreciate that a finding of this nature should not be arrived at on a mere balance of probabilities. I have had regard for the need for convincing evidence, taking into account the seriousness of the finding and the potential adverse consequences for the Applicant and/or its director/shareholder, Mr Dalby.

62. In light of these findings, I refer now to the penalty assessments.

PENALTIES

63. Section 284-75 of Schedule 1 to the TAA sets out the administrative penalty regime that applies for making false or misleading statements that result in shortfall amounts. The Applicant, as I have said, bears the burden of showing that the administrative penalty assessments were excessive.[6]

64. In this case, shortfall amounts have resulted due to the Applicant's reporting and claiming of input tax credits for the purported scrap gold acquisitions within the meaning in s 284-80 of Schedule 1 to the TAA. The base penalty amount for a false or misleading statement can be satisfied by a statement made or given in writing, orally or in any other way including electronically.[7]

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[6] *Federal Commissioner of Taxation v White (No. 2)* [2010] FCA 942 at [18]-[19]

[7] See generally Practice Statement Law Administration 2012/5: *Administration of Penalties for Making False or Misleading Statements that result in shortfall amounts*.

65. A taxpayer is not liable if reasonable care was taken with the making of the statement: s 284-75(5) of Schedule 1 to the TAA. In this case, however, the Commissioner relies on statements which were false or misleading in respect of transactions which did not actually take place as claimed or at all, being facts which were known to the Applicant through its director and shareholder.

66. A penalty of 75 per cent is justified if the shortfall resulted from an intentional disregard of a taxation law. Intentional disregard, in the context of this case, requires actual knowledge that the statement made is false. The Commissioner submits that dishonesty is often said to be a requisite feature of showing an intentional disregard for the operation of the law.

67. In the circumstances of this case, that requirement is satisfied. The application of a penalty in the amount of 75 per cent of the shortfall amount for intentional disregard is appropriate in the circumstances.

68. An additional uplift of 20 per cent was also applied by the Commissioner pursuant to s 284-220(1) of the TAA. Reliance was placed on subsection (1)(a) which provides:

> **284-220 Increase in base penalty amount**
>
> (1) The *base penalty amount is increased by 20% if:
>
> (a) you took steps to prevent or obstruct the Commissioner from finding out about a *shortfall amount, or the false or misleading nature of a statement, in relation to which the base penalty amount was calculated;…

69. The Commissioner referred to paragraph 119 (and following) of *Practice Statement Law Administration 2012/5* concerning an increase of the base penalty amount:

> **Increase in BPA**
>
> 119. Under subsection 284-220(1), the BPA is increased by 20% where the entity:
>
> - prevents or obstructs the Commissioner from finding out about the shortfall amount
> - becomes aware of the shortfall amount after the statement is made and does not tell the Commissioner about it within a reasonable time, or
> - has a BPA worked out for this type of penalty previously.
>
> For statements made before 4 June 2010, the term 'for a previous accounting period' is use instead of 'previously'.

120. The increase in the BPA is not cumulative, that is, the maximum amount the BPA can be increased by is 20% regardless of the number of conditions which are satisfied.

Prevents or obstructs the Commissioner

121. The Commissioner expects that in the majority of cases tax officers will receive reasonable co-operation from entities and their representatives.

122. However, under paragraph 284-220(1)(a), where the entity takes steps to prevent or obstruct the Commissioner from finding out about the shortfall, the BPA will be increased by 20%. These steps can include:

- repeated failure or deferral by the entity to supply information without an acceptable reason,
- repeated failure by the entity to respond adequately to reasonable requests for information including:
  - excessive or repeated delays in responding,
  - giving information that is not relevant or does not address all the issues in the request, or
  - supplying inadequate information,
- failure to respond to a request for information pursuant to formal information notices,
- providing false or misleading information or documents,
- destroying records, or
- a combination of the factors above.

123. Not replying to a letter or not returning call does not necessarily indicate the entity was taking steps to prevent or obstruct the Commissioner from identifying a shortfall amount.[8] A single action of a passive nature, such as not responding to an ATO letter, although unhelpful, is not necessarily hindrance.

[8] *Ebner and Commissioner of Taxation* (2006) 63 ATR 1073, [19]; *Ciprian and Ors and Commissioner of Taxation* (2002) 50 ATR 1257.

124. However, the Commissioner holds the expectation that entities cooperate with the Tax Office. Whether or not an entity's failure to reply constitutes obstruction will depend upon the facts of a particular situation.

70. The Commissioner submitted that the uplift was arrived at and justified by the deliberate steps taken by the Applicant to obstruct the Commissioner from determining whether or not the alleged transactions between Golden Horizon and the Applicant actually took place.

71. The objection decision dealt with this as follows:

> 88. Additionally, our view is that the 20% uplift applied under subsection 284-220(1) of Schedule 1 of the TAA is appropriate for the monthly tax period ended 31 May 2014 as you took deliberate steps to obstruct the Commissioner from determining the veracity of the purported transactions between Golden Horizon and Mango Reef. You were also liable to the 20% uplift for the monthly tax period ended 30 June 2014 as you had a penalty for the previous period, that is, the May 2014 period.[9]

72. Before the Tribunal, the Commissioner pointed out that on 10 February 2015 the Applicant through its representative responded to a request for information that it *"is not willing to comply".* The communication is by letter from the Applicant's accountant to the Commissioner and includes:

> I relayed your request for all the paperwork to support the Business Activity Statements lodged in respect of the months of May & June 2014. My client is not willing to comply with this request at this time. [10]

73. The letter goes on to set out "the basis for this", including "our client complied with all requests for copies of invoices and other information in respect of the transactions for this month".[11]

74. Mr Dalby told the Tribunal what had happened was his accountant called him to say the Tax Office had asked for extra information "because they kept changing their case officers". He said it had already cost "a fortune" in accountancy fees, and it was in these circumstances that "this not willing to comply has come from."

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[9] Exhibit 1, T2, p.48.
[10] Exhibit 1, T49, p.1218
[11] Exhibit 1, T49, p.1218.

75. I am not satisfied that the above response from the Applicant's accountant justified the 20 per cent or any uplift. The Commissioner, however, does not rely on this alone. The Commissioner submitted that the totality of the requests and the totality of the responses should be looked at.

76. I was referred to Mr Dalby's answers to questions from Commissioner.[12] In his answer to question 9(a), for instance, he said "predominately I picked up the scrap gold [from Golden Horizon]." This differed from the evidence as it came out before the Tribunal. That evidence was that he attended only five of the sixteen alleged transactions.

77. The point, however, is not that the Applicant overstated how many transactions Mr Dalby personally attended. It is, that it claimed he attended any such transactions with Golden Horizon or that they took place at all. That information conveyed to the Commissioner during the investigation was false.

78. It was also pointed out that, at the hearing, Mr Dalby produced tax invoices for June 2014 transactions alleged to have occurred between the Applicant and Golden Horizon. During the investigation the Applicant only produced tax invoices for the month of May.

79. Again, the point is not that the Applicant did not produce the June invoices at an earlier date, but that it deliberately and knowingly produced invoices in support of fictitious transactions.

80. I am well-satisfied, as I have said, that the Applicant provided false and misleading information and documentation to the Commissioner to prevent or obstruct the Commissioner from finding out about the shortfall in each tax period.

81. I am not satisfied that the Applicant has discharged the burden of establishing that the 20 per cent increase is excessive.

REMISSION

82. Pursuant to s 298-20 of Schedule 1 of the TAA there is power to remit all or part of an administrative penalty. The question is whether having regard to the taxpayer's particular circumstances it is appropriate to remit the penalty in whole or in part.[13]

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[12] Exhibit 1, T57, p.1273.

[13] *In Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* (2008) 69 ATR 627, [21]; *Sanctuary Lakes Pty Ltd v Commissioner of Taxation* (2013) 212 FCR 483[249].

83. The Applicant has failed to satisfy me that there are any grounds which would warrant remission of all or part of the 75 per cent base penalty amount or the 20 per cent increase.

DECISION

84. For the reasons given above, the decision under review is affirmed.

I certify that the preceding 84 (eighty-four) paragraphs are a true copy of the reasons for the decision herein of Deputy President I R Molloy

.....[SGD].....
Associate

Dated: 28 August 2018

Dates of hearing:	**21 May 2018**
	19 July 2018
	20 July 2018
	3 August 2018
The Applicant:	**In person**
Solicitors for the Respondent:	**McInnes Wilson Lawyers**
Counsel for the Respondent:	**Ms Amelia Wheatley**