

# FEDERAL COURT OF AUSTRALIA

## Commissioner of Taxation v ACN 154 520 199 Pty Ltd (in liq), formerly EBS & Associates Pty Ltd [2018] FCA 1140

File number: NSD 163 of 2018

Judge: **BROMWICH J**

Date of judgment: 3 August 2018

Catchwords: **ADMINISTRATIVE LAW** – application for judicial review of decision by Administrative Appeals Tribunal to issue direction under s 37(2) of *Administrative Appeals Tribunal Act 1975* (Cth) – where direction compels applicant to produce internal legal advices prepared in relation to respondent – whether Tribunal erred in forming opinion that the internal legal advices “*may be relevant*” to its review – whether asserted error was a jurisdictional error or an error within jurisdiction – whether subjective material can be relevant to objective assessment – **held:** basis on which Tribunal formed an opinion that legal advices may be relevant was not open to it – **held:** Tribunal’s decision to issue direction was made without lawful formation of the opinion giving rise to jurisdiction and thus constituted jurisdictional error

Legislation: *A New Tax System (Goods and Services Tax) Act 1999* (Cth), ss 11-15(2)(a), 38-385, 40-100, 195-1(a)  
*Administrative Appeals Tribunal Act 1975* (Cth), s 37(1), (2), (3)  
*Administrative Decisions (Judicial Review) Act 1977* (Cth)  
*Taxation Administration Act 1953* (Cth), ss 14ZZF, 14ZZK, Sch 1, ss 284-15(1), 284-75, 284-90, 298-20(1)

Cases cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564  
*Australian Prudential Regulation Authority v VBN* [2005] FCA 1868; 88 ALD 403  
*Cosco Holdings Pty Ltd v Federal Commissioner of Taxation* (1997) 37 ATR 432  
*Foley v Padley* (1984) 154 CLR 349  
*Gardner v Dairy Industry Association (NSW)* (1977) 52 ALJR 180  
*Kennedy v Administrative Appeals Tribunal* [2008] FCAFC 124; 168 FCR 566

*Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611

*Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 244 CLR 144

*Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16; (2017) 343 ALR 362

*R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407

*R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190

*Re KLGL QCCYY and APRA* [2008] AATA 452; 104 ALD 433

*Re Thomas Cook Australia Pty Ltd and Collector of Customs* (1994) 34 ALD 301

*Sanctuary Lakes Pty Ltd v Federal Commissioner of Taxation* [2013] FCAFC 50; 212 FCR 483

*Trives v Hornsby Shire Council* [2015] NSWCA 158; 89 NSWLR 268

Date of hearing:	7 June 2018
Registry:	New South Wales
Division:	General
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	54
Counsel for the Applicant:	Mr P Hanks QC with Mr E F Wheelahan
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr B L Jones
Solicitor for the Respondent:	Polczynski Robinson Lawyers

## ORDERS

NSD 163 of 2018

**BETWEEN:**                    **COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA**  
Applicant

**AND:**                         **ACN 154 520 199 PTY LTD (IN LIQUIDATION)**  
First Respondent

**ADMINISTRATIVE APPEALS TRIBUNAL**  
Second Respondent

**JUDGE:**                    **BROMWICH J**

**DATE OF ORDER:**    **3 AUGUST 2018**

### **THE COURT ORDERS THAT:**

1.     The decision of the second respondent to issue a direction under s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) be set aside.
2.     The first respondent pay the applicant's costs of and incidental to the proceeding.

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

## REASONS FOR JUDGMENT

### BROMWICH J:

#### Introduction

- 1 This proceeding arises due to a **direction** given by the Administrative Appeals Tribunal under s 37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) that the Commissioner of Taxation produce documents for the purposes of a Tribunal proceeding. The Commissioner applies to this Court for judicial review of the decision to give the direction. The direction, which has been stayed pending the outcome of this proceeding, compels the Commissioner to produce to the Tribunal internal legal advices prepared by officers of the Australian Taxation Office (**ATO**) in relation to the respondent.
- 2 The respondent, ACN 154 520 199 Pty Ltd (in liq), formerly **EBS & Associates Pty Ltd**, applied to the Tribunal for the review of adverse goods and services tax (**GST**) objection decisions made by a Deputy Commissioner. Those decisions disallowed EBS' objections to the Commissioner raising assessments and amended assessments (**GST assessments**) for the payment of additional GST totalling in excess of \$122 million, the imposition of administrative **penalties** in relation to those assessments totalling over \$58 million, and the non-remittal of those penalties.
- 3 The only part of the objection decisions under review which the Tribunal relied upon to give the direction was the decision not to remit penalties. It follows that this proceeding does not give rise to any need to consider in detail the part of EBS' application that is directed to the Tribunal's review of the disallowance of the objections to the raising of the assessments or to the imposition of penalties, as it must be assumed for present purposes that that aspect of the application before the Tribunal will fail, for otherwise there is no penalty to be remitted.
- 4 The discretion to give the direction was only validly triggered under s 37(2) of the *AAT Act* if the Tribunal made a determination within jurisdiction that it was "*of the opinion*" that the documents in question "*may be relevant*" to its review of the decision made on behalf of the Commissioner to disallow objections to the non-remittal of the penalties. The Commissioner contends that the Tribunal erred in forming that opinion, and that this error went to jurisdiction so as to be a jurisdictional error. EBS contends that there was no error, but that even if there was, it was no more than an error within jurisdiction. The Tribunal hearing of EBS' substantive application for merits review is scheduled to take place in September 2018.

## Overview

- 5 The relevant GST assessments that were the subject of objections were for each of the 29 months from February 2012 to June 2014. The Commissioner disallowed input tax credits that had been claimed by EBS under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (*GST Act*) for the acquisition of goods described as “*scrap gold*”. EBS acquired the scrap gold for use in its production of gold bullion that had a 99.99% fineness. I note that the term “*fineness*” is a measure of purity, referring, in the case of gold, to the pure content in 1,000 parts of a bar of gold. I will therefore use the more common word, “*purity*”, as being sufficient for present purposes.
- 6 The Commissioner determined that, by ss 11-15(2)(a), 38-385 and 40-100 of the *GST Act*, EBS’ input tax credit entitlement turned on, amongst other things, EBS’ use of the scrap gold to make the first supply of gold bullion after refining. Under the GST assessments, the Commissioner disallowed the input tax credits that EBS had claimed for acquiring scrap gold, which the Commissioner found had the same 99.99% purity as the gold bullion that EBS produced from that scrap. Those input tax credits were disallowed on the basis that EBS did not undertake refining, because the purity of the scrap inputs into EBS’ production process was the same as the purity of EBS’ bullion output. That basis for the assessments is referred to here for convenience as the “*no refining issue*”.
- 7 The Commissioner also issued penalty assessments, imposed pursuant to s 284-75 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (*TA Act*), in relation to the shortfall amounts that arose from EBS incorrectly claiming the input tax credits as follows:
- (1) for the period from 1 February 2012 to 31 October 2013, the penalty was calculated pursuant to s 284-90 of Schedule 1 to the *TA Act*, on the basis that the shortfall amounts resulted from recklessness on the part of EBS or its agents as to the operation of a taxation law – it is this aspect of the objection disallowance that was in issue before the Tribunal in relation to the direction sought; and
  - (2) for the period from 1 November 2013 to 30 June 2014, the penalty was calculated pursuant to s 284-90 of Schedule 1 to the *TA Act*, on the basis that the shortfall amounts resulted from the failure by EBS or its agents to take reasonable care to comply with a taxation law.
- 8 The Commissioner did not exercise his discretion to remit any of the administrative penalties pursuant to s 298-20(1) of Schedule 1 to the *TA Act*. His reasons, by his delegate, for adhering

to the decision to impose penalties and not to remit them was set out in the reasons for the objection decision as follows (reproduced here because EBS relies in this Court upon the reasons given to disallow the objection to the decision not to remit the penalties; emphasis added by underlining):

**Question 3**

**Was EBS liable to an administrative penalty of \$58,059,829.75 under section 284-75 of Schedule 1 to the TAA in respect of the relevant tax periods?**

90. A penalty of \$58,059,829.75 was imposed under section 284-75 of Schedule 1 to the TM. The penalty was imposed for the reasons contained in the audit Reasons for Penalty Decision.

- a. For the reasons set out in paragraphs 19-62 relating to purported transactions from the IPJ Group, the Majid Group and Gold Buyers for the monthly tax periods ended 29 February 2012 to 31 March 2014 it is considered that there was intentional disregard of a taxation law. However, a lesser penalty was imposed for the reasons set out in paragraphs 63 to 170. As the assessments of penalty were imposed at the rate of 50% for the monthly tax periods ended 29 February 2012 to 31 October 2013 and 25% for the monthly tax periods ended 30 November 2013 to 31 March 2014, they are not excessive.

In relation to transactions from entities other than the IPJ Group, the Majid Group and Gold Buyers, it is considered that the assessments of penalty are correct for the reasons contained in paragraphs 63 to 85.

There are no additional valid grounds to remit the penalty imposed. It is considered that the assessments of penalty are correct.

- b. Alternatively, it is considered that the assessments of penalty are correct for the reasons contained in the Reasons for Penalty Decision in general and specifically for the reasons at paragraphs 63 to 85. There are no additional valid grounds to remit the penalty imposed.

...

9 The audit reasons for the penalty decision referred to in the passage at [90(a)] reproduced above were not in evidence in this proceeding.

10 On 17 January 2018, the Tribunal made the direction under challenge in this proceeding, pursuant to s 37(2) of the *AAT Act*, in the following terms:

The Tribunal directs, pursuant to s37(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), that the Respondent produce any internal legal advice produced by officers of the Australian Taxation Office in relation to the contention by the Respondent that s 38-385 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) does not apply to the supplies of gold bullion by the Applicant because the supply of that bullion was not the first supply after its refining because the Applicant did not undertake any 'refining' to produce the bullion as the refining material from which the gold was produced had a purity of at least 99.5%.

11 That direction is to be read as being confined to internal legal advices directly concerning EBS. The Tribunal used the figure of 99.5% purity in the direction, instead of the figure of 99.99% purity, because that was what was set out in EBS' draft of the direction. As will be seen, the Tribunal misunderstood a submission by counsel appearing for the Commissioner as being to the effect that there was no document of the type sought in relation to 99.5% purity, when, in fact, that submission clearly refers to documents in relation to 99.99% purity. However, in the end result, not much turns on that error, even if it does suggest that the Tribunal decided to make a direction in respect of documents which it understood the Commissioner was saying did not exist. The parties were unable to assist in understanding why the direction was given with that apparent understanding, which would seem futile.

### **Relevant legislation**

12 The application by EBS for merits review by the Tribunal of the objection decisions is brought under s 14ZZK of the *TA Act*, which provides as follows:

#### **14ZZK Grounds of objection and burden of proof**

On an application for review of a reviewable objection decision:

- (a) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and
- (b) the applicant has the burden of proving:
  - (i) if the taxation decision concerned is an assessment—that the assessment is excessive or otherwise incorrect and what the assessment should have been; or
  - (ii) in any other case—that the taxation decision concerned should not have been made or should have been made differently.

The relevant burden upon EBS in relation to the non-remittal of penalties is therefore stipulated in s 14ZZK(b)(ii), namely to prove that the non-remittal decision “*should not have been made or should have been made differently*”.

13 Section 37 of the *AAT Act* relevantly provides as follows:

#### *Decision-maker must lodge material documents*

- (1) Subject to this section, a person who has made a decision that is the subject of an application for review (other than second review) by the Tribunal must, within 28 days after receiving notice of the application (or within such further period as the Tribunal allows), lodge with the Tribunal a copy of:
  - (a) a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision; and

- (b) subject to any directions given under section 18B, every other document that is in the person's possession or under the person's control and is relevant to the review of the decision by the Tribunal.

...

*Tribunal may require other documents to be lodged*

- (2) Where the Tribunal is of the opinion that particular other documents or that other documents included in a particular class of documents may be relevant to the review of the decision by the Tribunal, the Tribunal may cause to be given to the person a notice in writing stating that the Tribunal is of that opinion and requiring the person to lodge with the Tribunal, within a time specified in the notice, the specified number of copies of each of those other documents that is in his or her possession or under his or her control, and a person to whom such a notice is given shall comply with the notice.

14 Section 37(1) is modified for the purposes of merits review applications under s 14ZZK by s 14ZZF(1)(a) of the *TA Act*, which provides as follows (key part emphasised):

**14ZZF Modification of section 37 of the AAT Act**

- (1) Section 37 of the AAT Act applies in relation to an application for review of a reviewable objection decision as if:
  - (a) the requirement in subsection (1) of that section to lodge with the Tribunal a copy of:
    - (i) a statement giving the reasons for the decision; and
    - (ii) the notice of the taxation decision concerned; and
    - (iii) the taxation objection concerned; and
    - (iv) the notice of the objection decision; and
    - (v) **every other document that is in the Commissioner's possession or under the Commissioner's control and is considered by the Commissioner to be necessary to the review of the objection decision concerned;** and
    - (vi) a list of the documents (if any) being lodged under subparagraph (v);

15 While the direction was made under s 37(2), the terms of s 37(1) were also raised in cases relied upon and in arguments advanced. A parallel modification of s 37(2) by s 14ZZF(1)(b) did not materially affect the Tribunal's power to give the direction, nor, in particular, the requirement that the Tribunal only exercise the power to give a direction if it were of the opinion that the documents to be produced "*may be relevant*" to the review by the Tribunal of the non-remittal part of the objection decision.

### The key legal principle

- 16 Where a power such as that in s 37(2) of the *AAT Act* is expressly conditioned upon the formation of a state of mind by the decision-maker, including an opinion, the existence of that state of mind is a jurisdictional fact: see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; 244 CLR 144 (*Malaysian Declaration Case*) at [57], [109]. It has been suggested that a better term than “*jurisdictional fact*” might be a “*precondition to the engagement of a statutory power*”: see *Trives v Hornsby Shire Council* [2015] NSWCA 158; 89 NSWLR 268 at [52]. The High Court has also described such a state of mind as “*a precondition to the performance of a duty or to the exercise of a power*”: *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16 (2017); 343 ALR 362 at [39].
- 17 There is an extensive body of High Court authority and intermediate appeal court authority, stretching back to at least the end of the first half of the last century, on the approach to be taken to judicial review of a finding, or purported finding, that a state of mind as a precondition to the exercise of a power has been reached lawfully. That line of authority has been repeatedly endorsed by the High Court in more recent times in the context of judicial review of administrative action, especially in *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 per Gummow J at [130]-[137] and culminating in the *Malaysian Declaration Case*, which approved Gummow J’s analysis.
- 18 It is clear that neither a tribunal nor a court can give itself jurisdiction by erroneously deciding that a precondition to the exercise of a power exists: *Eshetu* per Gummow J at [127], citing *R v Federal Court of Australia*; *Ex parte WA National Football League* (1979) 143 CLR 190 at 214. Gummow J in *Eshetu* stated at [133]-[134] (footnotes inserted into text in square brackets):

In *R v Connell*; *Ex parte Hetton Bellbird Collieries Ltd* [(1944) 69 CLR 407 at 430], Latham CJ said:

“[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.”

The Chief Justice added [*Connell* (1944) 69 CLR 407 at 432]:

“It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really

been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide.”

In *Foley v Padley*, the passages from the judgment of Latham CJ were approved by Gibbs CJ [*Foley* (1984) 154 CLR 349 at 353] and Brennan J [*Foley* (1984) 154 CLR 349 at 370. See also at 375, per Dawson J.] as correct statements of the law. In particular, Brennan J went on to emphasise that the question for the court is not whether it would have formed the opinion in question but whether the repository of the power could have formed the opinion reasonably and that an allegation of unreasonableness in the formation of that opinion may often prove to be no more than an impermissible attack upon the merits of the decision then made in purported exercise of the power [*Foley* (1984) 154 CLR 349 at 370].

19 The footnote inserted in the last passage above in relation to Brennan J’s decision in *Foley v Padley* (1984) 154 CLR 349, and referring to Dawson J’s decision in that case, also listed the following other authorities in support of the conclusion reached by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407:

The point is made in other authorities, including *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Bayly* (1952) 86 CLR 506 at 510; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Buck v Bavone* (1976) 135 CLR I 10 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303, 308.

20 It follows that the principles in *Hetton Bellbird Collieries* remain as relevant to a case such as this as they were 70 years ago. This application falls to be determined by the application of those principles. The Commissioner asserts jurisdictional error by reason of error by the Tribunal in reaching the requisite opinion that the Commissioner’s internal legal advices concerning EBS “*may be relevant*” to the review of the decision not to remit the penalties, while EBS asserts no error at all in forming that opinion, or alternatively that it was an error within jurisdiction.

21 EBS also seeks to defend the opinion reached by reference to considerations that were not relied upon by the Tribunal. However, I do not consider it permissible, or alternatively appropriate, to adjudicate as to whether the Tribunal’s opinion, if found to be erroneously formed, could properly have been formed by a different path of reasoning.

22 Before turning to the competing arguments, it is necessary to summarise the key aspects of the Tribunal’s reasons.

### **Before the Tribunal**

- 23 The Tribunal set out its approach to the proceeding by stating that it would only consider exercising its power under s 37(2) of the *AAT Act*, as modified by s 14ZZF of the *TA Act*, in relation to *internal* legal advice, noting that the applicant had expressly conceded that legal professional privilege would attach to any external legal advice, and thus that the Tribunal would not order its disclosure. I note that if the direction were to stand, and documents were produced to the Commission, there would still be a need to determine access by EBS and the scope for a claim of legal professional privilege would probably still be required to be considered: see s 37(3) of the *AAT Act*.
- 24 The Tribunal based its application of “*relevance*” in s 37(2) of the *AAT Act* on the formulation of the concept in *Re KLGL QCCYY and APRA* [2008] AATA 452; 104 ALD 433, in which Senior Member Taylor stated that the expression “*may be relevant*” allows the Tribunal to exercise its power where it does not know the contents of contentious documents, and only knows their general class or character, but that s 37(2) could not have been intended to allow the Tribunal to require production of documents on a mere intellectual or speculative possibility of relevance. The Tribunal thus stated that a “*process of evaluation, based on reason and reasonable inference*” would be required to determine the question. The Tribunal noted that EBS had the burden of proving that the internal legal advices “*may be relevant*” to “*specific issues of fact relating to the excessiveness of the assessments*”.
- 25 The Tribunal briefly summarised the parties’ competing characterisations of the no refining issue at the heart of the proceedings, but considered that it was not for the Tribunal to determine whether either formulation was correct at this stage. Insofar as the remission issue was concerned, however, the Tribunal stated the following:
98. The Respondent’s legal representative accepted that whether the Applicant’s position on the No refining issue was reasonably arguable could be a relevant consideration for the purposes of remission of penalty pursuant to s 298-20 of the TAA, on the authority of *Sanctuary Lakes Pty Ltd*. But, he argued, even if that test was relevant, it is an objective test which the Tribunal would need to resolve based “upon not the subjective views of an adviser to the Commissioner, or perhaps an internal officer of the Commissioner, but on actual legal authority”.
  99. It is not for this Tribunal to determine whether the Respondent’s latter proposition is correct. That will be for the Tribunal that hears the substantive matter. The Tribunal accepts that the test is an objective test.

26 The Tribunal then went on to state that internal legal advices produced by officers of the Commissioner on the no refining issue which either support EBS' position, state that it is arguable or do not support its position at all, "*may be relevant*" to the Tribunal's review of the objection decision, in that those advices would address EBS' "*particular circumstances*" and would go to the issue of whether EBS' position on the no refining issue was reasonably arguable, as was in turn relevant to the issue of remission. The Tribunal considered that EBS' application for the disclosure was not premature or a fishing expedition, and that, given that the category of documents specified was narrow, it was appropriate to issue a direction for the disclosure of the relevant advices pursuant to s 37(2).

### **The Commissioner's arguments**

27 The Commissioner asserts that there are four reasons why the Tribunal erred in forming the opinion that the legal advices may be relevant to the review of the objection decision not to remit the penalties, based upon EBS' position being reasonably arguable:

- (1) an internal legal advice cannot be relevant to the question of whether the taxpayer's position was reasonably arguable;
- (2) the opinion was based on a fishing expedition;
- (3) the conclusion that any advices may be relevant was based on legally impermissible reasoning; and
- (4) the Tribunal asked the wrong question in reaching the opinion.

### ***Commissioner's first asserted basis for error: an internal legal advice cannot be relevant to the question of whether the taxpayer's position was reasonably arguable***

28 The Commissioner relies, for parity of reasoning rather than binding authority, upon a passage from the Tribunal decision in *Re Thomas Cook Australia Pty Ltd and Collector of Customs* (1994) 34 ALD 301, by which a s 37(2) direction for the production of a legal advice was refused. The Commissioner asserts that the reasoning was equally apposite to the present situation. The Tribunal in *Thomas Cook* said at 305:

The legal opinion of Mr Lynch is, in my opinion, not a document which records any fact relevant to the decision-maker in the making of his decision to refuse the claim for drawback. The circumstances of the importation of the traveller's cheques and all associated and relevant events, particulars, transactions, conduct and occurrences constitute the facts. These circumstances were or are within the responsibility or creation of the applicant, not Mr Lynch. His opinion was provided confidentially in relation to the powers, duties, obligations and functions of the Australian Customs Service in relation to claims made upon it for drawback, in the context of traveller's

cheques.

It is not in the same category of documents which are sought to be tendered in evidence, either in substitution for or complementary to oral evidence. Nor could it be said that if Mr Lynch was called as a witness, his evidence, in so far as it related to the content of his opinion, would be relevant to the review by the tribunal of the decision being reviewed. The opinion has no weight, it would be inadmissible as irrelevant and could not be probative of any fact sought to be proved or established.

- 29 The Commissioner submits that, given that the Tribunal stands in the shoes of the Commissioner for the purposes of a s 14ZZK(b)(ii) merits review of the decision not to remit the penalties imposed, and must, when considering that decision, determine the questions of fact and law for itself, the historical legal opinions of ATO officers are and must be irrelevant. On that argument, any such view expressed cannot be of any moment to the Tribunal's decision. Accordingly, the Commissioner submits, it was not open to the Tribunal to form the opinion that any internal legal advices on this topic may be relevant.
- 30 The Commissioner further submits that this argument is supported by the decision of this Court in *Australian Prudential Regulation Authority v VBN* [2005] FCA 1868; 88 ALD 403 (*APRA v VBN*). In that case, the Tribunal made a direction under s 37(2) that APRA lodge all legal advices and related documents that were relevant to the interpretation of the law that was under consideration for the purposes of the merits review. APRA challenged the decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*). In finding that the s 37(2) direction made was beyond power, Ryan J considered the related operation of s 37(1)(b), subsequently noting at [35] that s 37(1)(b) and s 37(2) had to be read together. His Honour said:

***(ii) Are documents containing legal advice or opinions "relevant to the review" within the meaning of s 37(1)(b) of the Act?***

[32] I am prepared to assume that a document of this kind which bears on one of the issues which the original decision-maker had to resolve in arriving at the decision and which was considered by the decision-maker is relevant in this sense. That is so, whether the original decision-maker acted on, or adopted, the advice or opinion or rejected it. However, the reach of the subsection does not extend to expressions of legal opinion or advice which may have been available to the decision-maker but were not considered in the course of arriving at the impugned decision. To hold otherwise would be to oblige the decision-maker to search out and lodge with the tribunal and supply to the other parties copies of every document containing a pertinent expression of legal opinion in the decision-maker's possession or power, even if the existence of the document had not been present to the mind of the decision-maker when making the decision under review. That obligation would extend to legal texts or journals which had been available to the decision-maker but not consulted by him or her.

31 The Commissioner submits that there was no suggestion that the legal advices sought by the direction were considered by the decision-maker in this case, so as to make what would otherwise be irrelevant possibly relevant by reason of being something that formed part of the decision-making process under review. The Commissioner submits that while the above quote from *APRA v VBN* was concerned with s 37(1)(b), the same reasoning applied to s 37(2) insofar as the legal advices, to be possibly relevant, had to have been before the original decision-maker, with the ambit of s 37(2) being even more limited in taxation cases by s 14ZZF(b) of the *TA Act*. Otherwise, the Commissioner submits, such legal advices were purely subjective opinions which had nothing to do with the original decision-making process and nothing to do with the objective assessment required to be carried out by the Tribunal on the facts and law as it was required to find and consider respectively.

32 The substance of the Commissioner's submission is that the views of any writer of an internal advice were no more relevant to EBS' case if they aligned with that case than they would be to the Commissioner's case if they aligned with his case. They could not add to or subtract from the question to be determined as to whether or not the original stance taken by EBS on the no refining issue was reasonably arguable.

33 The Commissioner thus argues that it was not open to the Tribunal to conclude at all, or alternatively to conclude in the circumstances of this case, that the legal advices sought may be relevant to the review of the objection decision not to remit the penalties.

***Commissioner's second asserted basis for error: the opinion was based on a fishing expedition***

34 The Commissioner submits that casting the net beyond documents that may be relevant to specific issues of fact regarding the correctness of the penalty remission decision, without knowing the content or effect of such advices and where their potential relevance was highly speculative, was to sanction a "fishing expedition", citing *Cosco Holdings Pty Ltd v Federal Commissioner of Taxation* (1997) 37 ATR 432 at 439.05 and *Kennedy v Administrative Appeals Tribunal* [2008] FCAFC 124; 168 FCR 566 at [27]. This argument may be disposed of swiftly. A value judgment by the Tribunal as to whether or not a direction would constitute "fishing" is a function within jurisdiction and does not, at least in the present circumstances, afford any sufficient basis of itself for impugning the conclusion reached as to whether the legal advices may be relevant. That is especially so given that the Tribunal directed itself to this very issue.

***Commissioner's third asserted basis for error: the conclusion that any advices may be relevant was based on legally impermissible reasoning***

35 The Commissioner points out that while the Tribunal's direction makes reference to the percentage of purity necessary for gold to meet the statutory test in s 195-1(a) of the *GST Act* for being a precious metal, namely 99.5% purity, the facts in this case concerned 99.99% purity. The no refining issue was determined adversely in the objection decision upon the basis that gold scrap that was already 99.99% pure could not be refined, given that it was already above the 99.5% threshold for being a precious metal. In this case, the Commissioner submits, the circumstances relied upon by the Tribunal were incorrect and the direction made referring to 99.5% purity and not to 99.99% purity does not address EBS' circumstances.

36 Upon reading the transcript of the Tribunal hearing, it is reasonably clear that the Commissioner's counsel before the Tribunal was asserting that there were no documents of the kind sought concerning the no refining issue at 99.99% purity, and not that there were no such documents concerning the no refining issue at 99.5% purity. The Commissioner submits that the determination of whether the documents sought may be relevant was therefore fatally affected by this error.

37 Again, this argument does not sufficiently advance the Commissioner's case as this rises no higher than a factual error within the Tribunal's jurisdiction, rather than an error of the kind that denies the existence of the opinion reached, however factually erroneous. As EBS pointed out, a legal advice concerning the no refining issue at 99.5% purity could still ground the conclusion that such a document may be relevant even if the actual purity was greater at 99.99%, if such an opinion was otherwise able to be relevant.

***Commissioner's fourth asserted basis for error: Tribunal asked the wrong question in reaching the opinion***

38 This argument for the Commissioner is, in substance, a different way of making the same point as the first argument summarised above. The Commissioner submits that while the Tribunal accepted that the evaluation of whether EBS' approach was reasonably arguable required objective determination, it gave a direction that sought legal advices that could only go to the reasonableness of EBS' subjective position. The Commissioner characterises this as the Tribunal having asked the wrong question in reaching the opinion upon which the availability of the power within s 37(2) depends. The Commissioner contends that it was wrong, in the sense of not being open, for the Tribunal to avoid grappling with the question of whether the historical views of advisors to the Commissioner could be relevant to the question of whether

the position adopted by EBS was reasonably arguable. It is argued that the Tribunal was required to address that issue in order to form the opinion. Had the Tribunal done so, the only conclusion it could have reached was that the views of the Commissioner's advisors could not be relevant to the question of whether the position adopted by EBS in claiming input credits was reasonably arguable. On the Commissioner's account, this is because that question is required to be answered by reference to authority after all of the facts have been determined, and not by reference to anyone else's opinion.

### **EBS' argument**

39 Rather than addressing each of the Commissioner's arguments separately, EBS submits that none of the four reasons advanced by the Commissioner, even if constituting an error, were an error within jurisdiction. EBS characterises the reliance by the Commissioner on *Thomas Cook* and *APRA v VBN* as being misplaced.

40 EBS submits that *Thomas Cook* was not a case concerning a decision about a general and unconfined discretion and whether it should be exercised by the Tribunal. It is therefore submitted that *Thomas Cook* is not authority for the proposition that internal legal advices could not possibly be relevant to a review of a decision concerning the exercise of a general discretion, such as that in s 298-20. EBS also points to the fact that such a proposition was not accepted by the assumption made by Ryan J in *APRA v VBN*, reproduced above.

41 In relation to *APRA v VBN*, EBS submits that this case also did not concern a decision about a general and unconfined discretion, and that it related to the obligation under s 37(1)(b), rather than the obligation under s 37(2), which posed a different statutory question as to whether the documents may be relevant.

42 EBS submits that it is "axiomatic" that its application before the Tribunal for merits review concerns the exercise of the discretion reposed in the original decision-maker, and is not confined to a consideration of the material that was before that decision-maker. In those circumstances, it is submitted that the internal opinions of officers of the Commissioner may be relevant to the exercise of the discretion to remit penalties, whether or not they were considered by the original decision-maker. In support of this argument, EBS relies upon the Full Court decision of *Sanctuary Lakes Pty Ltd v Federal Commissioner of Taxation* [2013] FCAFC 50; 212 FCR 483, in which Griffiths J, with whom Edmond J and Greenwood J separately agreed, said at [240], in relation to the Commissioner's appeal from a Tribunal decision to remit penalties to zero, that it was not an irrelevant consideration for the Tribunal

to have regard to whether or not the approach taken by the taxpayer to the original tax liability was “*reasonably arguable*” in circumstances where the penalty was imposed for failing to take reasonable care.

43 EBS submits that *Sanctuary Lakes* per Griffiths J at [249], by referring to the capacity of a decision-maker to determine that it is appropriate to remit a penalty in whole or in part because the outcome would otherwise be unreasonable or unjust and therefore inappropriate, is a further reason why it was open to the Tribunal to consider that any legal advice concerning EBS on the no refining issue may be relevant. It is therefore submitted that if the legal advices in question supported the construction of the *GST Act* taken by EBS, contrary to the position for which the Commissioner now contends in the Tribunal proceedings, they would be relevant to a consideration of whether it would be unreasonable or unjust not to remit the penalty.

44 EBS submits that it would not be inconsistent with the object, scope or purpose of the *AAT Act* for the Tribunal, in deciding whether to exercise the discretion to remit the penalties, to have regard to internal advices of officers of the Commissioner concerning the application of the provisions in question to this case. It is submitted that such advices would not be irrelevant considerations, and that it was therefore open to the Tribunal to conclude that the advices may be relevant to its review of the objection decision on remittal of penalties.

45 EBS further submits that the opinions may be relevant to the question of whether or not the position taken by it was reckless, in the sense of being grossly careless, if officers of the Commissioner adopted a view that was materially the same.

### **Consideration**

46 The live question to be answered by reference to the well-established analytical approach in *Hetton Bellbird Collieries* reproduced above is whether the Tribunal’s opinion that the legal advices sought to be produced may be relevant is an opinion that was capable of being, and was, in fact, formed, by reference to a correct understanding of the law applicable to the merits review process. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist in law, the direction was made without jurisdiction and it thus constituted a jurisdictional error.

47 In the circumstances of this case, in forming the opinion that the legal advices sought to be produced may be relevant to the review of the objection decision not to remit the penalties, even if that is carried out by reference to whether EBS had a reasonably arguable position on

the no refining issue, the Tribunal could not avoid addressing the question of whether the objective test, which the Tribunal accepted had to be applied, could be affected by a subjective opinion that was not before the decision-maker and not known to EBS.

48 It is important to note that, in reaching the conclusion in *Sanctuary Lakes* at [240] and also at [249] (and [250]), as relied upon by EBS, Griffiths J had at [235] reproduced and considered the statutory expression in s 284-15 of the *TA Act* as to when a matter is “*reasonably arguable*”. That statutory expression supports the view that the question of whether or not a stance is reasonably arguable is objective, because, as s 284-15(1) then provided, with a subsequent amendment inserted in square brackets to reflect the current form of the provision:

A matter is reasonably arguable if it would be concluded in the circumstances, having regard to the relevant authorities, that what is argued for is [about] as likely to be correct as incorrect, or is more likely to be correct than incorrect.

The term “*relevant authorities*” was and is non-exhaustively defined by reference to taxation law, extrinsic material, decisions of Courts, the Tribunal or a taxation Board of Review, or a Part IVA public ruling.

49 It is impossible to see how, in light of reliance upon s 284-15(1) in *Sanctuary Lakes*, and its application to this case, the factors that may be taken into account by the Tribunal on the question of remission of penalties can be expanded to include subjective material, especially if that material was not before the original decision-maker and could not have been known to EBS so as to influence and in some way explain the stance that it took. It is far from clear that such material would necessarily be relevant even if those circumstances did exist. Any internal legal advice held by the Commissioner concerning EBS and the no refining issue cannot be of any relevance to the objective question that the Tribunal is required to ask of itself once the facts have been determined and to answer by reference to the “*relevant authorities*” in relation to the remittal of penalties. If there is any issue of the non-remittal decision being unreasonable or unjust, that must be determined by reference to EBS’ individual facts and circumstances, as informed by the authorities, and not by reference to the advices of others, even if those advices were written by ATO officers.

50 EBS argues that, because the relevant penalties were imposed by this aspect of the objection decision by reason of recklessness, the decision of the Tribunal could be defended by reference to an opinion expressed in a legal advice held by the Commissioner that was consistent with EBS’ stance, such that it could not be reckless to have adopted that stance. However, the

Tribunal's decision was based upon EBS running a "*reasonably arguable*" case, rather than a case of an absence of recklessness. It is not open to defend the Tribunal's decision upon a basis that it did not rely upon. In any event, this does not overcome the need for the evaluative exercise by the Tribunal to be carried out on an objective basis, rather than a subjective basis, and particularly not on a subjective basis that was neither before the decision-maker nor known to EBS.

51 Even if EBS had advanced the recklessness case as an argument before the Tribunal and it had been accepted, that would not have produced a result that was any less erroneous. Once again, the question of recklessness has to be considered by way of an objective assessment of what EBS did, informed by authority, which cannot be affected by views held by the Commissioner's advisers, especially as they were not before the objection decision-maker and were not known to EBS. Such internal advices held by the Commissioner are not and cannot be relevant to the Tribunal's task, at least in the circumstances of this case.

52 It follows that the Tribunal formed an opinion that the internal legal advices concerning EBS and the no refining issue may be relevant upon a basis that was not open to it. The purported opinion to that effect was formed by reference to an incorrect understanding of the meaning of the law in question. As such, it was not an opinion that was open to be formed, and at law cannot exist so as to have triggered the power to give a direction under s 37(2). The decision to give the direction was made without jurisdiction being engaged and therefore constituted a jurisdictional error.

### **Conclusion**

53 In light of the forgoing, the Commissioner's application must succeed and the Tribunal's direction under s 37(2) must be set aside. EBS must pay the Commissioner's costs.

54 The Commissioner sought declaratory relief in addition to having the Tribunal's s 37(2) direction set aside. It was not explained why a declaration was necessary if the direction was set aside, as it must be. Declaratory relief is not appropriate if it will produce no foreseeable consequences for the parties: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.2, citing *Gardner v Dairy Industry Association (NSW)* (1977) 52 ALJR 180 at 188; 18 ALR 55 at 71. I therefore decline to grant declaratory relief as being unnecessary.

I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

A handwritten signature in black ink, appearing to read 'Ugma...', written in a cursive style.

Associate:

Dated: 3 August 2018