

JUD/*2023*AATA3493 -



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

**QQRK and Commissioner of Taxation (Taxation) [2023] AATA 3493 (27
October 2023)**

Division: TAXATION AND COMMERCIAL DIVISION

File Number(s): 2019/5899 – 2019/5904

2019/5911 – 2019/5916

Re: **QQRK**

APPLICANT

WHKY

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Deputy President Bernard J McCabe and Nick Gaudion, Member**

Date: **27 October 2023**

Place: **Sydney**

1. With respect to the application made by **QQRK**:
 - a. The objection decisions under review are affirmed
2. With respect to the application made by **WHKY**:
 - a. The objection decisions under review are varied with respect to the rate of base penalty imposed in the 2013-2016 years of income so that WHKY is liable to base penalty amount at the rate of 50%;

- b. The objection decisions are otherwise affirmed.

..... **SGD**

Deputy President Bernard J McCabe

Catchwords

Section 14ZZK(b) of the Taxation Administration Act 1953 – Onus – substantiation – gambling – betting – winnings – losses – record-keeping – assessment of evidence – substantive liability – administrative penalty – intentional disregard – recklessness – Austrac

Legislation

Taxation Administration Act 1953 (Cth)

Corporations Act 2001 (Cth)

Cases

Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234

Russell v Federal Commissioner of Taxation [2009] 1224; 74 ATR 466

Sanctuary Lakes Pty Ltd v Commissioner of Taxation [2013] FCAFC 50

REASONS FOR DECISION

Deputy President Bernard J McCabe

Member Nick Gaudion

27 October 2023

1. The applicants in this case, QQRK and WHKY, are brothers. The Commissioner of Taxation said both brothers significantly understated their taxable income in the years ended 30 June 2011 through to 30 June 2016.
2. The Commissioner also determined QQRK had not properly accounted for GST over part of that period in connection with a concrete pumping business that he operated before it was taken over by WHKY in 2013.
3. After conducting extensive audits that combed through the applicants' financial affairs, the Commissioner issued:

- amended assessments in respect of the years ended 30 June 2011 through to 30 June 2016 in respect of QQRK together with shortfall penalty assessments for the same years;
 - amended assessments of GST net amounts for the tax periods from 1 July 2011 through 31 March 2013 in respect of QQRK together with penalty assessments;
 - default assessments in respect of the 2011 and 2012 years of income for WHKY together with penalty assessments for those years on the basis WHKY failed to provide a document; and
 - amended assessments in the 2013-2016 years of income for WHKY together with shortfall penalty assessments in respect of those years.
4. The Commissioner surmised the applicants were making more than they admitted from the concrete pumping business. Alternatively, he alluded to the possibility the brothers had other unidentified sources of income. In any event, the Commissioner said their affairs did not add up.
 5. QQRK and WHKY both claim large amounts of cash passing through their hands in the relevant years were attributable to their (mostly successful) individual records as prolific gamblers or to loans given and received in connection with their gambling. QQRK and WHKY also denied the concrete pumping business was nearly as busy or profitable as the Commissioner apparently assumed. They offer alternative estimates of their taxable income (and the turnover of the concrete pumping business) in their statement of facts, issues and contentions which they say can be sustained on the evidence. While they concede (or do not contest) some amounts should have been reported as income, they say the Commissioner's assessments are wrong.
 6. QQRK indicated in written opening submissions that he no longer contested the objection decision with respect to the GST liability and the attendant administrative penalties. That meant the hearing and the submissions which followed it focused on the unexplained income issues for both taxpayers.

A note about the applicants' burden of proof

7. Section 14ZZK(b) of the *Taxation Administration Act 1953 (Cth)* (**the Administration Act**) makes clear the taxpayer bears the onus of establishing the assessment is excessive or otherwise incorrect *and* what the assessment should have been. It is not enough to prove the Commissioner was wrong. The Commissioner is guessing, so it would be unsurprising if his estimate of a taxpayer's income was off. The taxpayer must go further and positively establish their taxable income to the satisfaction of the Tribunal. As a practical matter, that means establishing the assessment was excessive - and by how much.
8. Sometimes the Commissioner will make a concession so the Tribunal can focus on one transaction or class of transactions at the hearing. Where there has been a clear concession that specifies which transactions are in dispute, the Tribunal need only reach a view about the disputed transaction(s). But where the Commissioner has not made a concession which allows the dispute to be so confined, the taxpayer is obliged to go further and establish the correct amount of taxable income. That means the taxpayer must establish on the balance of probabilities the correct amount of assessable income they derived from all sources and any deductions which together constitute the taxable income.
9. As a model litigant, the Commissioner is expected to make concessions where possible, and certainly where there is no real dispute over particular transactions or deductions. The parties should not waste the Tribunal's time (and their own resources) by arguing over transactions or deductions that are not genuinely in dispute. But even where the Commissioner makes concessions about individual transactions or deductions or classes of transactions or deductions, it will remain incumbent on the taxpayer to provide evidence which positively establishes each of the integers of taxable income. It does not inevitably follow that the Tribunal is permitted to reduce the assessment by the amounts associated with a concession if there remains doubt over other components.
10. In cases which focus on hitherto unexplained movements of cash through the applicant's hands or accounts, the applicant must provide a reasonable explanation that persuades the Tribunal on the balance of probabilities about what was going on with those transactions. Of course, that explanation must be grounded in probative evidence that is capable of persuading.

11. The sworn evidence of a taxpayer certainly qualifies as evidence, although it is a matter for judgment in each case whether that evidence is sufficient to persuade without corroboration. The Tribunal will look carefully at self-serving testimony that is not corroborated in circumstances where one would ordinarily expect records or other documentation or testimony from another witness to be available, or where the taxpayer's testimony is unusual or unlikely on its face or inconsistent with other probative evidence. The Tribunal might also prefer corroboration where the taxpayer's evidence has been impeached in some respect. Ultimately, though, common sense must prevail: on the balance of probabilities, is the Tribunal persuaded by the applicant's explanation having regard to the evidence, or not?

The evidence of QQRK

12. QQRK gave evidence at the hearing and provided statements dated 21 October 2020 (exhibit 1) and 2 December 2021 (exhibit 2). He is the older brother of WHKY. QQRK talked in his statements and at the hearing about his life in the period between 2003 and 2010. He said he lived a modest existence. He said he had minimal expenses and mostly lived rent-free at his parents' family home with his siblings, including WHKY, although he also referred to staying rent-free at the home of another brother at some points. The mother of QQRK and WHKY, the matriarch of the family, would do the cooking and attend to the needs of her husband and adult children (transcript at p 39).
13. QQRK has worked in a variety of roles in the construction industry since 1997. He had undertaken an apprenticeship but also worked as a labourer, electrician and tiler (transcript at p 43). He began to operate the concrete pumping business in 2003. The business was not large. He said he was a sole trader with a single truck that he would drive to building sites around Sydney (exhibit 1 at [6]). He had an ABN and the bank account for sales was a Commonwealth Bank account. He says that account was not used exclusively for the business (exhibit 1 at [17 – 19]).
14. During cross-examination, QQRK recalled he typically worked in the concrete pumping business four or five days a week. He said it was hard physical work that caused health problems. (We note he mentioned two hernia operations: transcript at p 41.) In his statement, he said (at [20]) he brought WHKY into the business to help out. In 2012, he said he began to step back from the business. WHKY began to play a more active role at that

point. WHKY took over the business in April 2013. There was no formal agreement or documentation recording the transfer of control. QQRK said he was unemployed between 2013 and 2015 (at [7]) although he said he would occasionally do unpaid jobs for his brother as a favour: at [21]; transcript at pp 41-42.

15. That brings me to the gambling. QQRK said he started gambling regularly in 2001 (transcript at p 73). He initially focused on making small bets on rugby league matches and American basketball games: exhibit 1 at [22]. He said he would attend the TAB during his lunchbreak or in the afternoons and evenings after work. He spoke of gambling increasingly large sums of money over time. He said he might win thousands of dollars or even \$100,000 in a single day from his betting, and he was gambling between two and five days each week. While he agreed he lost money on occasions, his evidence suggested he came out significantly ahead over time. He said that was because "I was pretty good at what I was doing" (transcript at p 45).
16. In exhibit 1, QQRK spoke of amassing sizeable winnings during the period prior to 2010. He said he began to branch out and bet on other sports, including soccer, tennis, American football, ice hockey and boxing matches. He said he did not ordinarily need to provide any identification in connection with his bets at the TAB in those days unless the transaction exceeded \$10,000. QQRK said he would take his winnings in cash or by cheque, or in the form of a voucher. He said he did not keep a paper record or maintain a spreadsheet recording his winnings during this period. He reasoned that he was an amateur gambler and did not see why he would ever need to justify or explain his winnings.
17. Starting around 2010, QQRK said he changed his gambling habits. He was going to the casino as well as the TAB during this period. He was playing poker, baccarat, roulette and blackjack (exhibit 1 at [23]). He said he would also make two or three trips to Crown Casino each year between 2011 and 2016. Each trip might last for up to ten days and he would gamble extensively (at [31]). He said he also started to keep betting slips and other records of his winnings. He said he did that partly so he could show off winning tickets to his friends (at [24]), but also because he became aware it might after all be important to have some records to explain the source of his money. In cross-examination, he said it was desirable to have proof "[i]n case I ever got pulled over leaving the TAB with big amounts of money, proof of where the money has come from" (transcript at p 45.) He said he would stash winning betting slips in a bag at his home. Many of those slips were made available to the

Commissioner to substantiate QQRK's claim that he was a successful gambler, although he mentioned some of them were also provided to the New South Wales Crime Commission (transcript at p 47). (We do not draw any adverse inference from his involvement with the Crime Commission, although we will have more to say below about aspects of the court orders which resulted from that otherwise unexplained entanglement.)

18. This casual approach to record-keeping was not restricted to QQRK's gambling. During cross-examination, he was questioned about his record-keeping practices when he was operating the concrete pumping business. He referred to keeping receipts in relation to fuel purchases in the ashtray in the truck, and other receipts would be collected "[a]t home, somewhere at home in a folder" (transcript at p 117). He said he would occasionally gather the receipts and provide them to his accountant. When pressed to identify the accountant, he was unable to recollect the name or how often they met (transcript at p 118).
19. We note QQRK provided an expert report prepared by a forensic accountant, Ms Conoulty. The main report was reproduced at tab 672 of the Tribunal book (exhibit 21); it followed up on an earlier report that was provided in the form of a letter. The report analysed TAB betting slips provided by QQRK and concluded QQRK did win significant amounts over an extended period.
20. While QQRK had a casual approach to record-keeping in relation to his wins, he claimed to have a clear recollection of what happened to the actual winnings – although he conceded he did not remember telling the unidentified accountant about the proceeds of his gambling (transcript at p 11). QQRK said he would keep his gambling winnings at the family home (exhibit 1 at [25]). In this oral evidence, he said he hid bundles of cash at various locations around the house or in a small safe (transcript at pp 48-50). He did not keep a record of those amounts but he insisted in his oral evidence that he knew how much was there on any given occasion "to the dollar". (He pointed out in his oral evidence that he was "pretty good with numbers": transcript at p 50). He recalled there might be up to \$600,000 in cash in the house on any given occasion during this period. He said he would draw down and add to the cash reserves as he gambled.
21. In exhibit 1, QQRK included (at [34]) a table summarising his casino winnings over the course of 2011-2016. QQRK explained he visited Crown casino for several days at a time on several separate trips each year. He said he would make a deposit into his Crown

account when he arrived because he did not want to carry large amounts of cash while he gambled. He would draw on the account as he needed funds to gamble, and he would pay his winnings into the account as they accrued (exhibit 1 at [32]). During cross-examination, he was asked questions about the records provided by Crown that related to some of the same visits. His attention was drawn to a visit that Crown records say occurred in October 2015 (transcript at pp 67). The Crown records reproduced in the Tribunal book at p 1896 suggest QQRK made a loss of \$338,000 on that visit. Yet exhibit 1 includes a table at [34] which does not record a win or a loss on casino gambling that month – as if the visit did not occur.

22. QQRK clarified that the table in his statement only referred to wins or losses incurred through the casino from gaming activity in the ordinary course. He said the table did not record QQRK's winnings and losses from private poker games that were hosted at (but not conducted by) Crown casino during the 'Aussie Millions' week in January each year, and from private games that might be hosted at the casino at other times (transcript at pp 69-70). He said he generally came out in front when all the winnings and losses were calculated in the wake of those trips. Confusingly, he said he did not mention the \$338,000 loss from the casino in October 2015 in his statement because, after taking into account the wins on the private games, "I didn't end up losing that trip" (transcript at p 71). But if the table in paragraph [34] purported to tally all the wins and losses from all gaming on that occasion, it is unclear why an amount is not recorded in relation to the trip.
23. Even if we accept QQRK's account of his track record in these private games, that evidence does call into question the completeness and reliability of the evidence contained in the tables. Mr McLure SC, counsel for QQRK, interrupted the cross-examination at this point to acknowledge there was plainly an erroneous entry in the statement in relation to October 2015 (transcript at p 72). Those anomalies are troubling to the extent they call the reliability of the figure into question.
24. QQRK said he also regularly hosted private poker games involving friends and acquaintances. There was a good deal of evidence in exhibit 1 and at the hearing when QQRK was questioned about these events. In his statement, he said he began hosting the games at home, and in the homes of friends, in about 2005 (exhibit 1 at [28]). Interestingly, the statement was vague about the timeframe over which the games were held. While they apparently started in 2005, the statement does not make clear whether they continued at

the same rate and in the same format in the same places over the income years under review.

25. In any event, QQRK explained (exhibit 1 at [37]):

I hosted private poker cash games at my home about once a month each year, and a few times a month around Christmas time (December and January). I mostly hosted Texas hold 'em poker games but would also host Omaha hold 'em poker and Manilla [sic] hold 'em poker games. There was usually between 8 to 9 players at the poker games, including myself. The buy-ins were anywhere between \$5,000 to \$50,000 and players would often walk away with hundreds of thousands of dollars in winnings.

26. This evidence was generally corroborated by WHKY (transcript at p 220-221). Yet QQRK's evidence about the games evolved at the hearing. In his oral evidence, QQRK suggested he was engaged in these events as a host "two days a week at one stage" (transcript at p 74) notwithstanding what he said in his statement (quoted above from exhibit 1 at [37]). He agreed the events "were occurring for a substantial period of time", by which we understood him to mean he regularly hosted games during the period under review (transcript at 74-76). He also suggested the events moved around. Upon further questioning, he confirmed he was gambling in private poker games on three or four nights each week during the period under review. He hosted games himself on up to two days per week and attended games hosted by other gamblers who were known to him on the other days (transcript at p 84). QQRK was able to gamble at events he hosted (transcript at p 84).

27. Hosting a poker game carried certain responsibilities, we were told. The host was apparently expected to provide catered food and drinks (although there was also mention of sending out for McDonalds if a particular gambler's tastes ran to fast food or coffee), massages, cigarettes and other perquisites that appealed to the invited guests (transcript at p 85). A game might run for up to two days (transcript at p 84). As QQRK explained, there were a number of staff required to run these elaborate events (transcript at pp 92-93):

Yes, someone's doing drinks, someone's cleaning the ashtrays, some of these games could go for one and a half days, two days. So pretty intense, you know? They click their finger, they want a drink, the drink has to be there straight away. They want cigarettes, someone has to go to the servo and buy them cigarettes. They want a coffee from McDonald's, someone has to drive down. So there's workers there that need to get paid as well.

28. The host also engaged professional dealers. We were told there were always at least two dealers at every event because they needed to change regularly. QQRK said the dealers

typically worked for tips provided by the individual gamblers according to custom (transcript at p 84-85, 90).

29. QQRK insisted – and the Commissioner hitherto conceded – QQRK was not a professional gambler during the period under review. Yet in exhibit 1, QQRK explained (at [7]) that he was not otherwise employed between April 2013 and March 2015. He said he lived off the proceeds of his gambling activities. QQRK's description of the games he hosted raised a question over whether he might be a professional gambling *promoter*, if not a professional *gambler* (since he also participated in the games he hosted). The evidence about the way in which QQRK received payments for hosting was particularly interesting in this regard. He explained the host received a "kickback from every pot" or a "rake" (transcript p 84 - 85) rather than some sort of hosting fee paid directly by the gambler or a time charge like that which might be levied on gamblers in a casino (transcript at p 85). He insisted the amounts paid to the house in the 'rake' were intended to cover all the expenses associated with conducting the game (transcript at p 85). Mr McLure objected to the questions about the 'rakes' because he said the Commissioner's case had not been framed on the basis that QQRK was a professional gambler or promoter who derived assessable income from the games: transcript at p 87. We allowed the question because it arose out of evidence QQRK had already given.

30. When pressed to explain how much money he derived from the 'rake', QQRK explained (transcript at p 91):

Just enough to pay - cover all the expenses and all the bills, and whatever needs to be paid. It's not - it's not a set fee, it's just - everyone knows someone's hosting a game, you're spending all this money, it's enough to cover everything or make sure all the expenses are paid for the night, so no one's out of pocket that's running a game.

31. Mr Coffey, who appeared for the Commissioner, pressed for clarification. The following exchange ensued (transcript at p 91):

Mr Coffey: Okay?

QQRK: No one's going to run all these games all night, all this food and everything, and be out of pocket. So the players cover it. They know that it's the right thing to do.

Mr Coffey: Let's just be - to be clear about it, you've got to cover things like your dealers, your massages, your food, your cigarettes, all those things. Let's, just for argument's sake, that comes up to \$2,500 or \$5,000; is there any other money that

you are making, as the host? Are you making - receiving money for the purposes of actually being the host?

QQRK: No.

32. QQRK has not produced (and apparently has not retained) any records of the costs incurred in conducting the games. At this stage, he can only provide a general indication. Nor does he have any records confirming the size of the rake he received on any given occasion. It follows his explanation cannot be verified or corroborated. We are left with evidence that he received and expended an unquantified amount in connection with his hosting activities, and an assertion that there was rarely, if ever, a surplus. He makes that claim even though:

- the monies coming in were calculated with reference to the size of the pot, which meant the quantum of the rake varied in each game; and
- the costs going out were fixed having regard to the services provided or which might be required at the whim of a gambler in a game of uncertain duration.

33. The evidence does not affirmatively establish QQRK was a professional gambler or gambling promoter, but it underlines the uncertainty over the quantum and sources of money flowing through his hands.

34. We were told the host of these events was expected to act as a kind of banker. As QQRK explained in cross-examination (transcript at p 75):

...when we run poker games, for example, when you're doing buy ins you don't actually pull out the money out of your pocket and put it on the table. So you get chips, everyone starts with 10,000 – I'll just explain it for the people who don't know how the poker games are run. So everyone starts off maybe for example, with 10,000 or 20,000 depends on the game, and you lose that buy in, whoever the host is, you'll still owe the host another \$10,000, they'll write the 10,000 down, that you owe 10,000. End of the night do a tally, [X]'s up \$20,000, [Y]'s down 70,000, this guy – and everyone settles at the end, its after the next game, or the game after. For example, [Y]'s down 60,000 and he's got 20,000 on him, he owes 50,000. And if I'm up, for example, he'll say "Look, can you cover me? I'll give it to you next game or in the week". And it's very simple, just like that.

35. When QQRK was asked whether there were any limits to the financial accommodation he provided to gamblers in games that he hosted, the following exchange ensued (at p 83):

Mr Coffey: Did you ever decline covering people, offering people money on a loan?

QQRK: Of course, some players have a limit. They come to the game and you know they're good for 20, 30,000, you're not going to give them chips for 150,000 if you know they can't cover it. Certain players, different players have different limits.

36. The following exchange (transcript at p 84) shed some further light on the dynamics of the games and the relationships between the host and the gamblers:

Deputy President: Did you ever have cause to say to someone who turned up to [play] the following week after having lost money the week before, if they hadn't repaid that money would you say "No, no, you're not coming into this one until you've paid the last one"?

QQRK: Correct. The other players won't play with them, unless the boss covers that person for example. Because the host is the guarantee, he's like the banker. So you're going to his game, if that player doesn't pay the person that's hosting the game has to cover that bill. So if he wants to cover him the following week for another 20,000 or 30,000, he's got a good relationship with that player, that's up to the host. Because the host is making the money, they get kickbacks from every pot and time charge, whatever, however they charge, so they're making money from it.

37. These post-game transactions are said to explain many of the large deposits and withdrawals in QQRK's bank statements during the years under review. The financial transactions did not only relate to the games in which QQRK was the host and therefore the banker. He made clear he might extend credit to his friends and fellow gamblers even when he was not the host (transcript at pp 74-75) although he was more accommodating when he was the host (transcript at p 83). None of these loans were documented, and QQRK said he did not request security, charge interest or make repayment arrangements (statement at [43]).
38. QQRK was cross-examined in some detail about his relationship with an associate who was a party to many of the entries showing deposits. We shall refer to him as Smith. At [40] in exhibit 1, QQRK said he first met Smith at a casino where they gambled together. QQRK and Smith thereafter began to gamble at private poker games that Smith hosted at an apartment in the city and other locations. Smith was also a frequent guest at events hosted by QQRK. QQRK said he won sizeable amounts from games that Smith hosted.
39. QQRK provided further information about the relationship in cross-examination. As it turns out, he knew surprisingly little about Smith. QQRK said he could not remember when they first met. He did not know what Smith did for a living. QQRK said they only knew each other through the poker scene (transcript at pp 74-75). He had Smith's phone number in the past, but he has not kept it because he no longer sees Smith (transcript at p 76). That evidence is perplexing given QQRK said he routinely loaned large amounts to Smith when QQRK hosted games, or as one gambler to another. QQRK explained (transcript at p 75):

Depends on the games, how much he had to pay, he'd say [QQRK] can you cover me? I'll pay you tomorrow, I'll pay you in a week. We were playing poker three or four days a week for a long time, we became friends, you know, the trust was there. The amounts changed over various weeks and months, vice versa, he'll cover me, I'll cover him if we needed to, and a lot of the players used to do that.

40. When asked how much Smith might borrow at any given time, QQRK said it varied: it could be anywhere between \$50,000 and \$150,000, although the vagueness of QQRK's answer invited the inference that it could be even more (transcript at p 75). QQRK was asked whether he kept a record of amounts that were loaned. He said he did keep a paper record (although he also kept a record in his head and occasionally on his phone (transcript at p 79)). He said the paper records were always disposed of once the debt was repaid (transcript at p 75).
41. In cross-examination, QQRK accepted Smith deposited a total of \$641,200 into QQRK's bank account in the year ended 30 June 2016. QQRK said those amounts were repayments of loans when QQRK had accommodated Smith, or they were Smith paying out winnings to QQRK from a game where Smith was the host (transcript at p 78-79). Interestingly, QQRK added that he also received monies in cash from Smith, and in the form of casino chips (transcript at p 79).
42. The applicant's evidence about the transactions involving Smith is thin. QQRK does not have a clear recollection of the details of any individual transaction, and the transactions themselves are not otherwise documented. QQRK did not appear to know much about Smith even as QQRK extended him credit and became financially exposed. QQRK did not even have Smith's email address and did not appear to know Smith's home address. It is possible this is the way seasoned gamblers behave towards each other, but the evidence is sufficiently unusual (and central to QQRK's case) that it was obviously desirable to hear from Smith. Yet QQRK said he did not recall having any contact with Smith nor did QQRK attempt to contact him while the audit proceeded or in the lead-up to these proceedings (transcript at pp 79-80). While in the witness box, QQRK produced his phone to check if he still had Smith's number, but he did not. There was no reasonable excuse proffered for the failure to obtain evidence from Smith.
43. The same observation can be made about another potential witness who had participated in several games and came to owe QQRK money that was paid into one of his accounts. That individual was said to be an old friend of QQRK's father. QQRK said it was agreed the

individual could pay off the gambling debt over time “because he was a friend. He couldn’t pay it in one hit” (transcript at p 82). There is no record of this arrangement notwithstanding it involved an apparent departure from QQRK’s usual practice of not setting repayment terms. When asked about why the individual had not been asked to provide a statement, QQRK said he had not spoken to the man for years and no longer had his phone number. While the individual was described as a friend of QQRK’s father, QQRK suggested (transcript at p 82) his father had lost contact with the individual as well:

...because we had a fall out over this money, like because it took a long time for him to pay it, and I just covered him. So we just lost contact, I couldn’t get through to him, even if I tried I don’t have his number.

44. Another associate who was connected with regular deposits into QQRK’s accounts, Mr A, did provide a statement (exhibit 3 at tab 222 pp5185ff) and gave evidence at the hearing. Mr A is involved in building and construction. He used a number of corporate vehicles to run his business over time. There are deposits recorded in the name of those companies into the bank account of QQRK. Mr A said QQRK was a lifelong friend. In his statement, Mr A said the financial transactions between them were all gambling-related. Mr A said he regularly attended games hosted by QQRK and Mr A occasionally hosted his own games that QQRK would attend. Mr A’s account in exhibit 3 of what happened in the wake of those games generally comports with QQRK’s explanation of what transpired:

- 6 *It was not uncommon for people to loan money to one another at those games. This would often happen when someone lost their buy-in amount and asked for a stake.*
- 7 *I recall that I had borrowed money from [QQRK] on several occasions during those games. When [QQRK] lent me money, he never charged any interest or asked for any security.*
- 8 *I often repaid the amounts I borrowed from [QQRK] by making out a cheque. The payer on those cheques was either [of Mr A’s companies] - I deposited money from my savings into the bank accounts held by [those companies] from time to time to cover the amounts repaid to [QQRK] from those companies. As the arrangements were informal, I never kept records of the loans.*
- 9 *I made repayments to [QQRK] whenever I was able, and this would sometimes be shortly after a poker game. However, I did not always repay the amounts I borrowed within a short period. I kept a mental tally of the amounts I had borrowed, and this tally would sometimes accumulate to a large sum (between \$100,000 to \$200,000) before I repaid [QQRK]. I did this because there was a chance that I could repay [QQRK] at the next poker game if I had won a large sum of money.*

45. We note exhibit 3 included a table at [11] summarising deposits connected with Mr A that were made into QQRK's accounts throughout the period 2011 through 2016. He denied the deposits had any connection with QQRK's concrete pumping business. Mr A explained:

Having seen that list, I recall that all those payments were repayments I made to [QQRK] in respect of money I borrowed during private poker games. I know this because [Mr A's companies]... did not make any payments to [QQRK] for a business-related purpose. That is, [QQRK's] concrete pumping business never did any work for [Mr A's companies] and those companies never paid [QQRK] for any concrete pumping services. The only amounts paid to [QQRK] were for the repayment of my loans.

46. We pause to note Mr A conceded in cross-examination that QQRK's concrete pumping services had been engaged on one of Mr A's company's projects in the past. (QQRK had suggested as much in his evidence.) Mr A could not remember when that occurred. He thought it might have been in 2008, although it could have been later. His answer when asked about that interaction was nonetheless oddly emphatic. He insisted (transcript at p 162):

But I didn't call him to come. That time I can - that time we had a contractor there and he couldn't come up with the (indistinct) and they called [QQRK] to help to bring the pump. I didn't pay [QQRK]; they paid him, the other contractor. So I didn't call him, I didn't pay him, but they work on my site a couple of time. But I didn't pay them.

47. It is also strange that payments to settle personal gambling debts referred to in the table in Mr A's statement were paid from company accounts. Mr A was questioned about that and his answers in cross-examination were ultimately confusing. After it was pointed out he was not a corporate officer of the companies in question at the time the payments were made from corporate accounts, he explained he nonetheless kept control of the cheque books and had access to the bank accounts (transcript at pp 159-161). He was unable to point to any company records in which those payments of personal expenses were recorded or attributed. We would expect such records to exist although we acknowledge they may be difficult to access in circumstances where the companies (or two of them, at any rate) have long since been deregistered. Even so, there is no suggestion in the evidence that the payments were recorded in company accounts. That is itself unusual given the company's obligation to keep books and records in accordance with s 286 of the *Corporations Act 2001* (Cth). In any event, Mr A painted a picture of haphazard internal accounting, controls and processes in those entities. Mr A said in his statement (at [8]) that he would deposit money from his savings into the company bank accounts. We infer those deposits were intended to cover the cheques he was drawing to pay personal expenses. That is conduct that would

alarm any competent director, accountant or corporate lawyer, but that was his evidence. Yet in cross-examination, the following exchange (transcript at p 159) muddled the waters somewhat:

Mr Coffey: Just to be clear, when you say, "My savings", who do you mean by my savings? Are you saying it's your personal savings or are you saying there was bank accounts for the companies that you had the savings?

Mr A: My business savings.

48. Mr A subsequently clarified (transcript at p 159) the reference to 'savings' meant cash he had on hand. That revelation prompted the following, largely unenlightening, exchange (at transcript p 160):

Mr Coffey: Okay. Why did you not give the cash directly to [QQRK], why did you draw a cheque to pay the money?

Mr A: Because the money is not like – that cheque is not happened at that time, the cheques have been over few period of gambling time. You know, and then when I'd give him the cheque sometimes – like, I recall sometimes he need cheque, or he needed money, at that time I didn't have cash. I give a cheque; we give it to a third party where they cash it take 3 per cent and we pay [QQRK] on the spot because he needs to continue gambling. So I used to use the cheque as - through another party, they used to cash it on a - like they take 3 per cent. Mr Coffey: Who are these people that you took 3 per cent? I just didn't understand that I'm sorry?

Mr A: They take cash it for you, you know, you write a cheque to them, they cash it and they give you money on the spot but they charge you 3 per cent. Just on an estimate, you know, like, you know. They always around where we play asking "You want to cash a cheque" or something, and sometimes we desperate for cash so we cash with them. That's why when you tell me give him cash, you know what I mean, sometime you don't have that \$100, \$80 cash, you know. So when it become that much money I went - I used to just write a cheque, give it to someone, cash it and give to [QQRK].

49. It is difficult to know what to make of the evidence of Mr A. On its face, it corroborated the evidence of QQRK, at least in the sense it confirmed QQRK's claims that the highlighted deposits were all connected with the repayment of gambling debts. But Mr A was relying on his recollection and was unable to corroborate his assertion about the deposits – deposits that were sourced from company accounts in respect of personal expenses, if Mr A is to be believed.
50. We do not have any difficulty with the proposition that Mr A and QQRK gambled together and that Mr A may have borrowed money from QQRK in connection with gambling debts which had to be repaid. That the payments should be made from company accounts is certainly unorthodox, probably inappropriate, and potentially unlawful, but that does not in

and of itself make the story unlikely. Yet we are satisfied we should still treat the evidence of Mr A with caution – at least insofar as he purported to explain the provenance of the specific deposits referred to in the table in his statement. He was not an entirely satisfactory witness. We were troubled by the fact there plainly was some engagement between QQRK's business and Mr A's companies despite claims to the contrary. Mr A initially denied any work-related interaction before the other evidence was put to him in cross-examination – at which point Mr A downplayed the contact in an oddly emphatic way. His answers in cross-examination when questioned about the use of company cheques to settle personal debts when he plainly had cash to hand were full of bluster. That prevarication may have been prompted by the witness's appreciation of the irregularity of his behaviour with respect to the companies. Irrespective of his motivation when giving evidence, his answers did not satisfactorily explain what transpired.

51. While QQRK did not record or document his gambling-related loans, he did refer in cross-examination to other loans he made from time to time that were not connected to gambling. He said the loans were made out of his gambling winnings (transcript at p 94). He said he might make a written note of advances but he did not have copies of those records and did not recollect the amounts or the time frame over which the loans were made. He did recollect the loans were all made to "close people. I wasn't lending it to a stranger down the street, they were very close people" (transcript at p 95).

52. The relationship between QQRK and Mr K is an example. QQRK provided a statement from Mr K, who was not ultimately required for cross-examination. Mr K's evidence in his statement is relatively narrow in its compass. Mr K also runs a building and construction business, and he is also a gambler. He is a friend of QQRK. They have known each other for years. While they are both involved in the construction game, Mr K was adamant that he did not do any business with QQRK while QQRK operated the concrete pumping enterprise (statement at [4]). Mr K recalled he approached QQRK for a loan in mid-2012. Mr K said he needed help with living expenses after losing money at the casino. Mr K recalled (exhibit 6 at [5]) QQRK:

...provided me with that sum in cash within a few days of me having approached him. There was no written agreement, no interest, or repayment basis. [QQRK] only asked that I repay him when I could.

53. Mr K said he was unable to pay the debt immediately. He subsequently arranged for his father to repay the entire amount in one transaction. His father wrote a cheque in the amount

of \$30,000 on 19 December 2012. The payment was deposited into one of QQRK's accounts (transcript p 105). Mr K confirmed the deposit related to the debt. It was not a payment for services rendered through QQRK's concrete pumping business, or otherwise (at [7]).

54. The Commissioner did not require Mr K for cross-examination. We have no reason to reject his evidence, and we accept it as far as it goes.
55. QQRK was questioned in cross-examination about deposits made into his accounts by other individuals, including Mr S (mentioned in paragraph [49] of exhibit 1) and Mr W (mentioned in paragraph [51] of the same statement) who were not called to give evidence. QQRK said he loaned Mr S and Mr W large amounts to cover their gambling debts. In the case of Mr S, the money was loaned in cash that would be delivered, perhaps inevitably, in a bag (transcript at p 104). QQRK had a surprisingly poor memory of both these individuals and the transactions when asked questions about them in cross-examination. The following exchange in relation to Mr S (at transcript p 101-102) is illustrative of the quality of QQRK's recollection that bordered on evasive:

Mr Coffey: [Mr S]. That gentleman, who is he to you?

QQRK: Just a friend.

Mr Coffey: How did you come to be friends with him?

QQRK: From casinos and gambling together over the years.

Mr Coffey: Do you know, can you pinpoint a year in which you first met him?

QQRK: No, a long time ago.

Mr Coffey: Okay. When did you last speak to him?

QQRK: A long time ago.

Mr Coffey: Okay. What's a long time ago? Are you able to pinpoint a period in time in which you spoke to him?

QQRK: Over five, six, seven years ago.

Mr Coffey: If you commenced these proceedings in the tribunal in September 2019, 5 roughly, was it before the proceedings were commenced and after the objection had happened, or was it - whereabouts, can we try and pinpoint to a period?

QQRK: Way before.

Mr Coffey: When you knew him or at least when you were conversing with him, what did he do for work?

QQRK: Not sure to be honest with you.

Mr Coffey: So in this paragraph 49 you say, in the second sentence,

I met [Mr S] at the casino in Sydney and have known him for more than 10 years.

It's the case that you knew the gentleman for more than 10 years, but you didn't know what type of work he was involved in?

QQRK: No.

Mr Coffey: Did he know what type of work you were involved in; did you tell him?

QQRK: We just - we knew each other from the gambling scene, that's about it. Just spreads from the gambling.

Mr Coffey: Your evidence is that you lent him \$350,000 in cash. What was the purpose of giving him \$350,000, what would he need it for?

QQRK: Gambling.

Mr Coffey: So to pay off people that he had borrowed money for or owed money to because he lost?

QQRK: I'm not sure.

Mr Coffey: I'm sorry?

QQRK: He asked for it, I'm not sure what he'd done with the money, if he gambled it, if he paid debts with it, I'm not sure. I didn't really ask questions.

Mr Coffey: So just to be clear when he asked you to borrow the \$350,000, do you recall where you were or how that contact or communication happened with him?

QQRK: To be honest with you I can't remember that far back, where it was.

Mr Coffey: Do you know if he asked you in person, face to face, or over the telephone?

QQRK: I don't recall.

56. In a similar vein, the following exchange occurred later in the cross-examination (transcript at p 103):

Mr Coffey: So your evidence, if I understand it correct, is that at some point the gentleman asked you to borrow an amount of money which consisted of \$350,000, and you gave it to him. But do I understand your evidence correctly to be that you don't recall today what the purpose of the loan was for or he did not tell you and you did not ask?

QQRK: I can't remember that far back what it was, to be honest with you. If it was at the casino, if it was to pay debt, I can't remember, we're going back 10 years.

Mr Coffey: But you accept the \$350,000 is a substantial amount of money to lend to a person that you know through gambling?

QQRK: Yes, well we became very close gambling together all the time.

Mr Coffey: Very close, thought but you didn't have a relationship or a friendship where you spoke about things such as any other occupation that he might have?

QQRK: I mean you see each other at the casino every day, playing poker together every day.

Mr Coffey: What nationality is he, background?

QQRK: Lebanese.

Mr Coffey: Okay, do you know where he lives? Or lived at the time that you lent the money?

QQRK: At the time where he lived?

Mr Coffey: Yes, or about late August 2011?

QQRK: I really can't remember.

Mr Coffey: Since September 2019 have you made any attempts to contact this gentlemen in order to obtain a statement or an affidavit for these proceedings?

QQRK: No, I lost contact with him a long time ago.

Mr Coffey: You say you lost contact but does that mean that you didn't have his phone 35 number to call him?

QQRK: Yes, I don't have his phone number, I lost contact.

Mr Coffey: Did you make any inquiries with other friends or acquaintances or associates that you have in order to attempt to identify him, to obtain a statement from him for the purposes of giving evidence about why he borrowed the \$350,000 off you?

QQRK: No.

57. QQRK's evidence on this question is unsatisfactory, and it informs our unfavourable assessment of his evidence more generally. His answers to these questions were at once evasive but revealing. We do not accept his recollection of the significant loan he claims to have advanced in cash is so poor that he could not remember important details of what occurred, even allowing for the passage of time and the fact that – at least on QQRK's account – he routinely dealt in large sums. (We note his boast earlier in cross-examination that he would keep track of deposits he held in his home "to the cent" and that he "was pretty good with numbers" (transcript at p 50). It was an improbable story in any event. It is inherently unlikely he would loan such a large amount of money in cash to someone he knew so little about – particularly a gambler who already had significant debts to others who were obviously pressing for payment – without:

- asking why the borrower needed the money;
- obtaining any security; or
- keeping any records.

58. QQRK invited us to infer that was just the way he and his gambling associates rolled. At a minimum, we would have expected QQRK to call corroborating evidence from Mr S before

we could credit a story that seems so unlikely on its face. QQRK did not do so and did not provide a satisfactory explanation for that failure.

59. The evidence in relation to Mr W was also unsatisfactory. In cross-examination, QQRK said he knew Mr W through gambling with him. A company associated with Mr W made a series of large deposits into QQRK's accounts. When asked (transcript at p 107) about the reason for the deposits, he said:

It could have been for a poker - poker loss. Money lent in the casino when we're gambling. Or it could have been money that I've lent him from my bank account when I've transferred it to him and he's transferred it back. It could be either one of those.

60. QQRK did not exhibit a clear recollection of his dealings with Mr W. Once again it was unclear whether he genuinely did not remember what transpired – which does not reflect well on his capacity as an historian, given the amounts involved - or if he was just being evasive. He accepted he might have loaned the monies to Mr W in cash, but QQRK claimed he could not remember when or why that occurred, although he said he assumed it was to cover poker losses (transcript at p 108). QQRK did not appear to think it was odd that the funds were repaid by Mr W from a corporate account, and QQRK did not see the need to document the loan, obtain security, or confirm the terms of repayment. Once again, we would have thought such an unlikely story would be corroborated by calling Mr W, but no satisfactory explanation was provided for the failure to do so.

61. Statements were provided from three other individuals after QQRK's cross-examination had concluded. They should have been filed earlier in the proceedings. The first (unsigned) statement (exhibit 17) was from Mr G, a cousin of QQRK. The statement recalled the individual borrowed \$60,000 from QQRK in mid-2013 to cover a gambling debt incurred at one of QQRK's poker games. The statement confirms the amount was repaid when \$60,000 was deposited into QQRK's bank account. The second (unsigned) statement (exhibit 18) was provided by another cousin, Mr Y. Mr Y confirmed he borrowed \$61,500 in cash from QQRK in March 2015 to cover the cost of home renovations. The loan was repaid when Mr Y deposited the full amount into QQRK's bank on or about 24 June 2015.

62. The Commissioner did not ask to cross-examine Mr G or Mr Y but that might have as much to do with the fact the material was filed so late in the proceedings that meaningful cross-examination may have been difficult. Mr Coffey pointed out in written closing submissions

that neither statement was signed or supported by objective evidence such as contracts, or bank statements that recorded payments. He said we should give these late-breaking statements limited weight. We agree that is appropriate given the circumstances in which the material was produced.

63. QQRK also tendered a signed statement by Mr MD (exhibit 16), a chartered accountant who had gambled with QQRK. The statement was also tendered after QQRK concluded his evidence. The statement confirmed the individual had attended poker games that QQRK attended (although not events hosted by QQRK) on a number of occasions where the buy-in varied from \$10,000 to \$100,000. Mr MD recalled giving QQRK a cheque for \$26,000 on or about 9 May 2016. Mr MD said (at [4]):

...[he did] not remember the precise circumstances that led to me giving [QQRK] that cheque, however, the only reason for me paying [QQRK] money would have been to repay him for covering a gambling debt I incurred at one of the poker games.

64. Perhaps understandably, the Commissioner did not ask to cross-examine Mr MD given the evidence was produced so late in the day: cross-examination at short notice might yield little benefit, yet seeking an adjournment to undertake further enquiries would be costly. The story is not inherently unbelievable as far as it goes, but it is not precise and does not significantly advance QQRK's case.
65. There were several other individuals identified as making deposits into QQRK's accounts. They were not called to give evidence nor were statements obtained. QQRK said during cross-examination that the deposits were repayments of loans. His evidence in relation to each of those individuals was thin. He explained his failure to call most of these individuals or obtain statements on the fact they were poker acquaintances and he no longer played poker (transcript at p 111). We do not go so far as to draw an adverse inference from the failure to call these individuals, but the evidence provided by QQRK about them and the provenance of the transactions in question is of limited weight given our concerns about QQRK's credit.
66. We should mention one further matter because it reflects on our assessment of QQRK's evidence and explains why we think his evidence must be treated with caution. QQRK was asked about some of his other assets – in particular, about the cars he owned at various points. In exhibit 2, QQRK recorded a modest collection of assets (at [4]-[6]). He expressly

denied owning any other assets during the years under review that were valued at more than \$10,000 (at [7]). He went on to add (at [8]):

I did not own any assets that exceeded \$10,000 in value that I would consider to be luxury assets. For instance, I did not own any luxury cars or boats. I did not live the kind of more expensive lifestyle I would want to live if I earned the income in the amended assessments or the objection decision issued by the Commissioner of Taxation.

67. QQRK was evasive in response to questions about his assets during cross-examination. For example, he denied being able to remember what car he was driving in 2013. When pressed, he replied (transcript at p 119):

You asked me what vehicle I was driving, I said I can't remember what car it was at the time. If it was a Holden, if it was a Merc, if it was a BMW, I can't remember.

68. He later clarified that he had never owned a Mercedes or a BMW, although he had driven BMWs owned by family members. (He said it was common for family members to access each other's cars (transcript at p 129.)) He said he mostly owned Hiluxes or "little cheap cars" like a Pulsar or a Honda Civic. But it transpired he also owned an Audi R8. The Audi was mentioned in Supreme Court orders made following interactions with the New South Wales Crime Commission. QQRK had been required to dispose of assets including the Audi in settlement of a debt (a copy of the orders was included in the Tribunal book at tab 191). He said the Audi was his favourite car, although he seemed to have trouble remembering its colour ("Blue, I think. Like a blue colour") and he thought it was manual (transcript at p 130).

69. Mr McLure objected to the questions about QQRK's vehicles because he said the Commissioner should not be focusing on assets when the real focus of the inquiry was on the payments received into his bank accounts. We mention QQRK's evidence in relation to the Audi because of the unforthcoming way in which he answered the questions. That hesitation over detail – about the colour of his favourite car, for example – was a feature of his evidence. He professed early on that he had a good head for figures, but he did not demonstrate a good grasp of detail. He repeatedly responded to questions about transactions and events and relationships by claiming not to remember.

Conclusions in relation to QQRK's substantive liability

70. We have already explained the Commissioner is not required to prove his case. He is free to point to shortcomings in the proof offered by a taxpayer. If the taxpayer is to discharge his onus, he must point to evidence which provides a probable and reasonable explanation of his taxable income.
71. QQRK was not a satisfactory witness for reasons we have already explained. He had, at best, an inconsistent recollection of detail and was often evasive when pressed in cross-examination. When confronted with evidence that was inconsistent with his statement – for example, the evidence about winnings he derived from trips to Crown casino – he sought to clarify that evidence in a way that was conveniently difficult to check. Another example of inconsistency can be found in his claim that he did not own any luxury cars. That claim ignored his ownership of an Audi R8, the very definition of a luxury car. Those inconsistencies were troubling in circumstances where QQRK was telling the Tribunal a story about gambling and financial transactions that were, at a minimum, unusual.
72. Taken at its highest, QQRK's evidence suggests he was a prolific gambler with a lengthy track record of gambling increasingly large amounts prior to the period under review. (That conclusion is supported by the analysis contained in the 'Conoulty' expert report at tab 672 of the Tribunal book). We have no reason to doubt he had access to cash in the form of winnings at the outset of the period under review. It is unclear whether he had access to cash from other sources as well, although we were not invited to make any findings about that. In any event, monies were available to fund gambling activities that involved making large bets in various venues throughout the period under review. QQRK said he tended to win more than he lost, a conclusion which is generally consistent with the expert report of Ms Conoulty. But even if we accept he was a skilled and lucky gambler, there must be some doubt over the extent to which he consistently won. We can also accept he hosted poker games at his home and elsewhere on a regular basis. Those games attracted friends and associates who also bet large sums of money. As host, we can accept QQRK provided financial accommodation to other gamblers who were required to settle bets following games, and he also occasionally helped friends with loans for gambling debts and for other purposes. We can even accept the short-term credit extended to some other gamblers at games he hosted might have been undocumented, that no interest was paid, and security was not required. We have more trouble accepting that was the routine followed in every

case. Some of the other loans (if that is what they were) were made in circumstances where one would expect more care to be taken in recording the arrangements.

73. It follows we accept QQRK has provided an explanation in respect of amounts flowing into his accounts. But it is unclear whether it is a sufficiently complete and satisfactory explanation of his taxable income in circumstances where the extent of his winnings is unclear. We have also identified concerns over the explanations relating to provenance of deposits into his accounts, including those supposedly made by Mr S and Mr W. Given our concerns about the evidence of QQRK, we are not prepared to accept his assertions about other deposits he attributed to individuals who did not provide statements. Those gaps mean QQRK has not adequately explained his taxable income. In those circumstances, he has failed to discharge his onus.

Penalties in respect of QQRK

74. Having confirmed there is a tax shortfall, it is necessary to address the question of penalties. The Commissioner issued assessments imposing administrative penalties pursuant to Division 284 of Schedule One to the Administration Act. The Commissioner found QQRK made false statements in his returns which were filed after the Commissioner contacted him about late lodgement. The Commissioner concluded the absence of adequate records in support of the returned amounts suggested intentional disregard, which meant a penalty of 75% was appropriate.
75. An applicant in these circumstances bears the onus of showing there was no intentional disregard. QQRK did not do that. While written closing submissions suggest he was, at worst, guilty of a want of reasonable care or even recklessness, the evidence of his approach does not admit of that conclusion. He did not keep adequate records while he ran the concrete pumping business. He may have had a tax agent in connection with the business enterprise but he was unable to identify that individual when asked questions in cross-examination. Once he left the business, he did not appear to keep any records or engage with his taxation obligations at all: in other words, he was wholly indifferent to the taxation consequences of his activities. He certainly did not provide evidence capable of satisfying us he was merely naïve, careless or even reckless. It follows there is no satisfactory basis for us deciding a different rate of penalty was appropriate.

76. We are also unable to identify anything in the taxpayer's circumstances or otherwise suggesting it would be appropriate to remit the penalties either wholly or in part pursuant to section 298-20(1) of Schedule One to the Administration Act. Lastly, we were not made aware of any satisfactory basis for concluding the 20% uplift in the penalty imposed in the 2012-2016 years should be remitted.

Conclusion with respect to QQRK

77. The objection decisions under review are affirmed.

WHKY

78. We turn next to the affairs of WHKY, the younger brother of QQRK. We have already pointed out WHKY failed to file returns in respect of the 2011 and 2012 years of income, so the Commissioner issued default assessments which included penalty assessments. WHKY did file returns in respect of the 2013-2016 years of income but the Commissioner issued amended assessments that reflected a shortfall in those years together with penalty assessments.
79. The Commissioner says an audit of WHKY's financial affairs shows many deposits into his accounts that are unexplained. The Commissioner estimated the quantum of the unexplained deposits in each year of income and concluded they should have been included in WHKY's taxable income.
80. During the audit and objection processes, the Commissioner accepted explanations for some of the deposits. WHKY in turn has conceded some deposits should be included in his taxable income, if only because he accepted he did not have the records that would permit him to adequately explain them. His statement of facts, issues and contentions sets out a table (at [33]) recording his explanation of his taxable income in the relevant years of income. There remains a significant gap between his estimate of his taxable income and that suggested by the Commissioner. A total of \$3.6 million worth of transactions over the entire period remained in dispute at the hearing.
81. WHKY gave evidence at the hearing. He was cross-examined at length. He earlier provided two statements that were admitted into evidence (exhibits 7 and 8) with a third statement being provided on 18 November 2022 (exhibit 9). He also provided witness statements from

Mr GN (exhibit 12) and Mr PS (exhibit 13) that were both dated 3 December 2021. Mr GM gave evidence at the hearing as well.

WHKY's account of what happened

82. WHKY left school at the end of 2007 (transcript at p 181). He said in his statement that he worked in the building and construction industry in a variety of roles between 2009 and 2013. In April 2013, he formally took control of the concrete pumping business that was previously operated by his brother. Thereafter, he operated that business as a sole trader. He supplied concrete pumping services at building sites located around Sydney (exhibit 7 at [6]).
83. In his statement (exhibit 7 at [5]), WHKY said he had shown promise as a soccer player when he was a young man. He said he had played "semi-professionally" for several clubs before injuries ended his career in 2013. In the period between 2009 and 2013, he said he devoted a lot of time to playing sport. He trained intensively (up to four days per week: transcript at p 182) and travelled for fixtures. He confirmed that while he played soccer "semi-professionally", he was not actually paid by the clubs (transcript at p 179). He said he only undertook paid employment on a day or two each week because of his sporting commitments, and he worked in 35-37 weeks in a year (transcript at p 180). He estimated he earned less than \$20,000 in wages in 2009 and made as little as \$400 per week.
84. We pause to note the table of income provided by WHKY in his statement of facts, issues and contentions (at [33]) that purports to summarise his taxable income for the years under review. The table discloses no wage income and no business income for both the 2011 and 2012 years. In fact, the table asserts WHKY had no income from any sources for the 2012 year. The 2011 year discloses \$79,524 of "Other income" but no other sources of income. There is no mention in that table of the limited amount of wages that he acknowledged earning. The mystery deepens when one has regard to the summary of deposits included in WHKY's statement dated 18 December 2020 (exhibit 7) at [49]. The summary of deposits into WHKY's bank account refers to individual deposits that he acknowledged should be included in his assessable income. We have included the amounts that were accepted by WHKY as assessable income in the table below. The different descriptions for the transactions have been taken from WHKY's statement and the bank records at Tab 404 of the Tribunal book and Tdocs page 6899.

Date	Description per WHKY statement	Description per Bank	Amount (\$)
5/07/2010	Deposit	DEP 0	2,000.00
8/07/2010	Deposit	DEP 0	2,687.75
20/07/2010	Deposit	DEP 0	2,436.00
20/09/2010	Deposit	DEP 0	27,000.00
5/10/2010	Deposit	DEP 0	2,000.00
11/10/2010	Deposit	DEP 0	9,000.00
12/10/2010	Deposit	DEP 0	7,000.00
18/10/2010	Deposit	DEP 0	6,000.00
18/10/2010	Payment	PAYMENT	6,000.00
22/10/2010	Payment	PAY	5,000.00
25/11/2010	Deposit	DEP 0	10,000.00
24/02/2011	Cheque deposit	Cheque 062133 deposit	400.00
Total			79,523.75

85. With one possible exception, none of the amounts listed above were referable to the (modest) amounts of salary or wages that WHKY acknowledges he earned during the period covered by the table. We acknowledge there was one large payment labelled as 'pay', which *may* be a reference to being paid wages. But a lump sum deposit in that amount is not consistent with WHKY's claim he was paid much smaller amounts in wages. We accept it is *possible* he derived wages in cash, but it is passing strange that regular deposits

of those amounts do not show up in the records – an observation which calls into question the integrity and reliability of his evidence.

86. That said, we return to the narrative. We note WHKY said his expenses throughout the period under review were modest. He lived at his parents' home and did not pay rent or board. He continued living with his parents until 2018 (transcript at p 182). He said his main expense during this period was his phone bill (transcript at p 180).
87. WHKY said he did not own his first car until 2011. Before that occurred, he made do by accessing other cars owned by the family. Those cars were available at his parents' home when he needed them. He recalled using his sister's car in particular. It was a satisfactory arrangement from his point of view. His sister even paid for the fuel (transcript at p 180). WHKY's first car was a 2010 model Lexus that he acquired in 2011. He recalled the near-new vehicle cost him \$25,000 to buy. When asked how he paid for the vehicle given he was undertaking little paid work at the time, he said he funded the purchase out of his gambling winnings (transcript at p 181).
88. WHKY was asked how he could afford to gamble during this period given his limited income from salary or wages. He explained he already had around \$70,000 in savings by the time he left school (transcript at p 181). He said the savings were accumulated from "gifts from birthdays, christening, Christmas, Easter. My parents would have saved it for me over the years" (transcript at p 216). While it is surely unusual for a young person to have accumulated that much cash in this way by that age, WHKY's evidence to that effect was not challenged. There is no reason for us to reject his evidence that he had accumulated a large amount of cash at a relatively early age.
89. In his statement, WHKY said he began gambling "extensively" in about 2010 (exhibit 7 at [12]) but he confirmed in cross-examination that he started gambling on a regular basis in around 2008 after he left school. In the period 2009-2013, he said he would attend soccer training up to four days a week in the evenings and play poker during the day at the casino (transcript at pp 182-183). He was also regularly visiting a local RSL club that hosted poker games but he suggested he stopped doing that around 2010 (transcript at p 186). WHKY claimed he also visited TAB outlets all over Sydney. He explained in cross-examination (transcript at p 183):

We would walk into the TAB with cash money that was generated from poker, or poker winnings or my savings. I placed a bet. I placed a bet of \$1,000 and the collect was \$3,000. After the race, or the sport game, I'll scan the ticket and they'll - I'll receive cash.

90. In exhibit 7, he explained the scope of his betting as follows (at [12]):

...I was placing bets on a variety of sporting matches, including rugby league, Australian football league, basketball and cricket matches at TAB venues. I was gambling on horse races at Canterbury Park Racecourse, Randwick Racecourse and Hawkesbury Racecourse, and greyhound races at Wentworth Park Greyhounds. I also began to gamble at high stakes tables at Star Casino.

91. In due course, WHKY began visiting casinos around the country. Those visits would occur "several times each calendar year" (exhibit 7 at [17]). He said he was also gambling through online sports betting agencies like BetFair and BetVictor. He said those online services often offered better odds than the TAB and they provided a more convenient way to lay bets (exhibit 7 at [18]). Annexed to his witness statement are statements from those accounts which recorded betting activities using those accounts during the period under review.

92. By 2010, WHKY said he was attending casinos and the TAB on a daily basis (transcript at p 186). WHKY also said he began participating in private poker games alongside close friends at his own home, and at homes around Sydney. He explained (exhibit 7 at [21]):

...I gambled privately a few times a month and more frequently during the Christmas holidays. When I gambled privately, I played Texas hold 'em poker cash games. There were about 8 to 9 players at those poker games. The buy-ins ranged from \$500 to \$2,000 and cash winnings were often in the tens of thousands.

93. WHKY provided more detail in cross-examination about these events. The following exchange ensued (transcript at pp 196-197):

Mr Coffey: Can we just firstly address, or direct attention to gambling at your home. When did you start privately gambling at your house?

WHKY: 2011, 2012.

Mr Coffey: Okay. Were you the host of the gambling, or just a participant?

WHKY: If it was played at my house, I will organise the game, you know, tell eight to 10 players, and then on the night we'll order pizza. I'll, you know, provide some food and drinks. And then if I was to go play at a friend's house or get invited to play at a private game, it'll be the same.

Mr Coffey: Whereabouts in your house were you doing this private gambling?

WHKY: At the time, in my parents' garage at a poker table. We were just playing there.

94. The games which WHKY was playing at home were not elaborate affairs like those described by QQRK. They also tended to be shorter: whereas QQRK said his games might run for up to 48 hours, WHKY's games tended to finish late on the same evening they began. The games hosted by WHKY also did not involve professional dealers (transcript at pp 197-198).
95. WHKY was asked about the frequency of his brother's games at the house during the period 2011-2016. He recalled QQRK's games were generally held once a month although he said they might become more frequent around Christmas time – just as QQRK asserted in his statement, although I note QQRK's oral evidence suggested the games at the residence they shared were much more frequent. Importantly, WHKY said he was aware of QQRK's games going on because he lived in the house where the games were being hosted. Indeed, they used the same space in the garage which was equipped with a poker table (transcript at pp 198-199). WHKY said he had observed QQRK's games in progress but did not participate (transcript at p 198). His account of those games ultimately diverged in some respects from the account provided by QQRK. For example: WHKY said QQRK's games might feature a dealer but the players might also take turns dealing themselves (transcript at p 198). That is not how QQRK described those games. WHKY's evidence cleaved more closely to the less detailed account QQRK had provided in his statements, which raises questions over credit in relation to either or both of QQRK and WHKY.
96. The thrust of WHKY's evidence in his statements and at the hearing makes clear he enjoyed considerable success in his gambling activities throughout the period under review. In exhibit 7, he said (at [16]):

During the period under review, I was gambling weekly with thousands of dollars. I was in a significant net position and had hundreds of thousands of dollars set aside from my gambling activities in cash, which made up my cash winnings.

97. When he was asked about his record of successful gambling in cross-examination, the following exchange ensued (transcript at pp 193-194):

Mr Coffey: Do you accept that on occasions when you placed bets that there were occasions that you did not win?

WHKY: A few occasions.

Mr Coffey: If you had placed a bet, hypothetically, for example for \$10,000 on a particular game, and you lost what did you do with that slip?

WHKY: If I lost?

Mr Coffey: Yes, if you lost and you didn't get any money out of the game and your winnings, what would you do with the slip?

WHKY: But it was very rare.

Mr Coffey: Sure?

WHKY: On a rare occasion I'll just throw the ticket.

Mr Coffey: And what was the basis of throwing the ticket, why didn't you retain it to have a complete record?

WHKY: I don't know.

98. Towards the end of his cross-examination, WHKY was asked questions from the bench about his gambling history. The following exchange (transcript at pp 216-217) ensued:

Deputy President: Who taught you to play poker?

WHKY: Who taught me to play poker?

Deputy President: Yes?

WHKY: I used to watch it on TV, and, you know, on the internet, and then just started engaging with mates, and then playing at local - at Newtown RSL.

Deputy President: All right. I take it you would say that you're a very good poker player; is that right?

WHKY: Correct.

Deputy President: But surely poker's something you get good at over time? Or is it something you're just good at from the start?

WHKY: You get better over time, but you could be good at it from the start. You've got control.

99. It is possible some individuals are gifted poker players, and some of them may more quickly master the skills required of a successful poker player. But WHKY was a young man. On his account, he developed remarkable proficiency as a poker player in a very short time without obvious training or extensive experience. We note there was also evidence that he consumed alcohol while gambling (transcript at p 217) which potentially impaired whatever judgment he was exercising. Given he claims he rarely lost in any of his many different gambling pursuits (transcript at p 218), it would be necessary for us to infer he was something of a preternatural gambling genius. That might be an easier inference to draw if the evidence suggested he was only betting against friends and other amateur gamblers with more cash than talent, but that is not what occurred. He was using the TAB and commercial websites and betting at the casino as well. In those venues, he was presumably competing against 'the house', or against other experienced players. The favourable inference he seeks is even harder to draw when one recalls the diversity of WHKY's betting (from games of skill to games of chance at the casino to a wide-range of sports).

100. WHKY was asked about the extent of his knowledge of the various sports in which he would bet. By way of example, he was asked about what he knew of American sports that would help him to bet successfully on those fixtures. His answers did not disclose any sophisticated strategies. Instead, his evidence suggested he engaged in head-to-head betting (i.e., betting on outcomes) on the strength of limited data and analysis. The following exchange (transcript at pp 217-218) is illustrative:

Deputy President: But presumably you'd have to actually - did you watch a lot of American sport? How did you research who to bet on?

WHKY: I used to watch it, look at the, you know, the ladder, see the players that are in and out, you know?

Deputy President: Okay?

WHKY: Like, if you're betting, you know, before, LeBron James was one of the best NBA players, so if he's playing on a given day, his team's the most likely to win.

Deputy President: Okay. You bet on the horses as well?

WHKY: Yes, sometimes, when I'm at a local TAB on a Saturday, I used to bet on the horses.

Deputy President: So did you follow the races carefully?

WHKY: Yes.

Deputy President: Okay?

WHKY: I wasn't, like, it wasn't - my majority of betting was more sport than horses.

101. That exchange did not disclose the sort of expertise or insight one would expect of someone who gambled as successfully as WHKY claims. Having said that, WHKY did show flashes of expertise when he was asked about playing baccarat at the casino. Baccarat is a game of chance. When questioned about playing baccarat, the following exchange ensued (transcript at p 217):

Deputy President: Okay. You also mentioned, I think, in your evidence that when you played at Star, you also played baccarat; is that right?

WHKY: Correct, yes.

Deputy President: How much baccarat did you play, compared to how much poker?

WHKY: I played more poker as, you know, poker goes for hours, and in between, at the end of the poker night, I might just, you know, I would have won, say, 10, 15,000, have the chips, me and me mates want to continue the night so we'll go and play baccarat, because sometimes the poker room in the casino closes at a certain time.

Deputy President: Right?

WHKY: So we'll continue staying at the casino drinking and playing baccarat as it is a fifty-fifty - you've got a fifty-fifty chance.

Deputy President: Is it fifty-fifty? My understanding was that - - -?

WHKY: A bit less, but in the way that - if you bet on banker, certain tables, if you win on six, he gives you half-price, and then there's certain tables in the casino that if you bet banker and you win, they take a stake of five per cent.

Deputy President: Right, okay?

WHKY: So if I bet banker at \$10,000 and the hand won, they'll give me nine and a half, because I'm not playing on a table where you get 50 per cent winning on six, if I put \$10,000 on baker and I won on the number 6, I only get paid 5,000.

102. That exchange certainly suggests WHKY understood the dynamics of the particular game and some of the quirks of a casino's operations. That knowledge might help him to improve the odds of winning in a game of chance – but it was still a game of chance. WHKY was asked about the role of luck in the following exchange (transcript at p 218):

Deputy President: Okay. Because you did say that you rarely lost; have I got that right?

WHKY: Yes.

Deputy President: So, you know, this is over a longer period, you rarely lost - I appreciate that many of the games that you're playing involve an element of skill and that if you're informed about those games, you can improve the odds in your favour so that you're not betting on things randomly?

WHKY: Correct.

Deputy President: But it just strikes me - were you just extraordinarily lucky to be making such large amounts of money over a period of time, and rarely losing?

WHKY: Yes.

Deputy President: What do you put that down to? Is it just luck?

WHKY: I was patient, I was controlled, and then sometimes, luck got involved.

Deputy President: Right. When you say you were patient, I mean, you were betting a lot, weren't you? It wasn't as if you, sort of, held back. You were betting on a very regular basis in quite significant sums of money?

WHKY: Correct, but I wasn't betting on every game that was played in a day. I'll pick the games and I'll just place a bet on those games.

103. The exchange confirms WHKY believes being “extraordinarily lucky” is an ingredient in his success, but he also attributed that success to his skill, experience and discipline. There must be some doubt over whether a comparatively young, self-taught gambler would enjoy the record of winning that WHKY claims over a lengthy period in circumstances where he does not have access to sophisticated data analysis, and does not profess to employ sophisticated strategies. It is certainly difficult to credit his claim that he “rarely lost”. Having said that, it may be important to distinguish what WHKY said about his betting activities in his oral evidence from what the records disclose. While the oral evidence includes more extravagant claims that may be informed by bravado - bravado that was effectively

acknowledged in the written closing submissions (at [39]) - the available records tell a tale of more modest success in which WHKY won less frequently than his oral evidence suggests. It follows it is important to have regard to that evidence.

104. WHKY certainly has some records that, taken at face value, suggest he was a prolific gambler. We have already mentioned his BetFair and BetVictor accounts annexed to his statement. We also referred to the written and oral evidence confirming he retained betting slips from the TAB which evidenced some of his winnings although he acknowledged he did not have a complete record of wins and losses (exhibit 7 at [14]). He explained he might not always collect the slips, or he might lose them, or they might relate to smaller wins (transcript at p 193). WHKY said he started to keep the slips after he saw his brother doing that (transcript at p 191). He said his brother had advised him to keep the slips because QQRK experienced “an issue” in 2008 which made that advisable (transcript at p 193). WHKY subsequently acknowledged (transcript at p 218) his brother had experienced “some trouble” which made good record-keeping desirable, but WHKY did not appear to know the nature of the trouble in question. We do not draw any adverse inferences from that evidence against either brother.

105. WHKY explained he would often win more than an individual TAB had available to pay-out in cash, so in that event he would obtain a voucher in his name – assuming the winnings exceeded \$10,000 - that he could later cash at the casino where there was always cash on hand (transcript at p 188). He said he ordinarily deposited most of his cash winnings into one of his bank accounts (transcript at p 191). After 2013, the account in question was also used as a business account (transcript at p 190). Alternatively, he would keep some cash with him at home in various locations in his bedroom (transcript at p 192). He said he ordinarily kept at least \$100,000 in cash at home. As he explained in cross-examination (transcript at p 195):

It was just easier to keep cash at home instead of every day, if I wanted to place a bet, go to the bank, pull out - it takes time, sometimes I was, you know, the game will start and I had, you know, 10 minutes to place the bet. So if I was to always have to go to the branch and then go to the TAB and place a bet, I'll probably miss the bet.

106. In practice, that meant he might carry large amounts of cash on his person when he was visiting a casino. In cross-examination, he was asked about his practice when making trips to the casino in Melbourne. He explained (transcript at p 195):

Sometimes I'd go to the bank, sometimes I'll just use the money that I had at home, and if I was to go to Melbourne, I'll just take that money with me. Or sometimes I could go to Melbourne, I'd maybe only take 20,000 cash and when I'm down, I'd withdraw from my Commonwealth account if I was - if I needed further cash.

107. WHKY confirmed in exhibit 7 (at [22]):

I did not keep a strict record or account of my gambling winnings. I drew from my cash surplus winnings to engage in the...gambling activities. I would also deposit large sums of cash into my bank accounts from cash winnings and, from time to time, draw from those bank account[sic] to continue gambling.

108. In short, WHKY claims to have won a good deal of money throughout the years under review. To the extent that was true, we accept at least some of the winnings made their way into his accounts, particularly the account he used for his business. It is unclear what proportion of his winnings wound up as deposits in circumstances where he gave evidence that he kept large but indeterminate amounts of cash on hand. We accept his bank statements tell only part of the story – and a confusing story at that – about WHKY's financial affairs during the relevant period.

109. We note there is evidence provided by the following entities which tends to confirm WHKY gambled regularly, and that he appeared on balance to come out ahead from the interactions with those entities. In particular, the records of:

- Crown Casino (at tab 424 of the Tribunal book) show WHKY made a net profit from his gambling there in the amount of \$69,750 between 2009 and 2016;
- Star Casino (at tab 429 of the Tribunal book) show WHKY made a net profit of \$12,432 gambling at that venue between July 2011 and January 2014;
- BetVictor (at tab 329) show WHKY made a net profit from gambling on that site in the amount of \$58,769 in March and April 2012;
- Betfair (at tab 322) show WHKY made a net profit from gambling on that site in the amount of \$41,341.35 (exclusive of commission) in the period 2010- 2015;
- The TAB as analysed by Ms Conoulty at exhibit 21 show a running profit of at least \$1.58 million.

110. The Commissioner said there were other interactions which were less successful than those referred to above. WHKY was taken to evidence obtained from Casino Canberra recording the outcome of WHKY's visits there in January and February 2014. The account suggests WHKY *lost* a net sum of \$143,100 over four visits to that establishment. That evidence serves to underline an important feature of WHKY's evidence: while he focused on the winnings and was able to refer to evidence of that occurring, he did not dwell on the amounts

he lost and he did not regularly retain records of losses, like losing betting slips. That brings us to the evidence of Ms Conoulty which we will pause to consider at this juncture.

111. Ms Conoulty's reports dated 3 December 2021 and 24 October 2022 included a running balance of the profits derived from TAB bets placed by WHKY. Ms Conoulty concluded that over the 2011 to 2016 income years the TAB betting slips provided to her resulted in a running profit of \$1,582,029 (or \$1,785,006 depending on the assumptions she made). The calculation assumed (amongst other things) that each of the betting slips provided to Ms Conoulty was a winning bet and WHKY did not keep copies of losing betting slips. The importance of this assumption is that any losing bets recorded on a betting slip would have reduced her calculation of the running profit. That is a problem for WHKY in circumstances where he confirmed he did not retain all of his gambling records, and may not have retained losing betting slips in particular.
112. If there was any doubt that Ms Conoulty was not fully briefed with a comprehensive record of WHKY's betting, the doubt is resolved by reference to the AUSTRAC reports which included records of WHKY's betting transactions exceeding \$10,000. The AUSTRAC transactions were summarised in a table annexed to the Respondent's closing submissions (**Annexure B**). (The information was provided in response to questions we asked about the AUSTRAC records during the hearing: transcript at pp 246-248.)
113. For the 2015 year, Austrac recorded WHKY placing 45 bets of \$10,000 for \$450,000 and 14 bets over \$10,000 for \$306,500, being a total of \$756,500. Yet for that same year, the schedules to Ms Conoulty's report disclose 32 bets of \$10,000 for \$320,000 and 6 bets over \$10,000 for \$94,750, being a total of \$414,750. This implies there were losing bets of \$10,000 or more that total \$341,750 which were not included in Ms Conoulty's calculations.
114. For the 2016 year, Austrac recorded WHKY placing 44 bets of \$10,000 for \$440,000 and 34 bets over \$10,000 for \$858,000, being a total of \$1,298,300. Yet Ms Conoulty's report discloses 49 bets of \$10,000 for \$490,000 and 21 bets over \$10,000 for \$405,800 for a total of \$895,800 in the same period. This implies that there were losing bets of \$10,000 or more that total \$402,500 which were not included in Ms Conoulty's calculations.
115. It is not clear why Ms Conoulty discloses five more \$10,000 bets in the 2016 year than was recorded by Austrac. It could be that WHKY obtained betting slips from bets placed by

others. It could be that some bets did not get included in those Austrac records that were summarised at Annexure B.

116. Regardless of the explanation, it is clear WHKY placed a significant number of large bets that were not accounted for in Ms Conoulty's analysis. Most of the winning bets in Ms Conoulty's report were less than \$10,000. There is no reason to assume they were all winning bets: indeed, the fact the relevant betting slips were apparently not retained and provided to Ms Conoulty invites the inference that they were losing bets since WHKY said he tended to keep the winning betting slips.
117. We accept the reports confirm WHKY was a prolific gambler who often won significant amounts. But the reliability of Ms Conoulty's conclusions turns on the quality of the information that she was provided. The fact she was not provided with a complete set of records of wins and losses, and the fact WHKY was given to exaggerating his wins, suggests her analysis should be treated with real caution. The likely failure to account for an indeterminate number of losing bets means that her estimate of the net balance derived from TAB betting is not a reliable guide to the extent of WHKY's winnings.
118. The Commissioner also pointed to evidence in closing submissions that WHKY may not have been the only person who used the TAB account. WHKY claimed nobody else could have deposited money in the account (transcript at p 195) although – when asked about the possibility of deposits being made by third parties – he did not categorically rule out the possibility that somebody else might access and trade on the account with (or without) his permission. With that response in mind, Mr Coffey asked WHKY about a letter from Tabcorp's 'Resolutions Team' dated 27 June 2016 (reproduced at p 9464 in the Tribunal book). The letter noted WHKY's account had been frozen after a third party attempted to lodge \$100,000 into the betting account on 12 May 2016. The letter reminded WHKY that he was the only person permitted to access under the applicable terms and conditions. He was warned not to disclose the account information to anyone else.
119. WHKY explained in cross-examination (transcript p 206) that the person who attempted to lodge the money was one of his brothers – but not QQRK. WHKY said he was not aware at the time that it was a problem to have a third party make a deposit. While he claimed to have limited memory of the incident, he explained his brother was attempting to deposit

WHKY's own money at WHKY's request because it was not convenient for WHKY to attend the TAB at the time.

120. The evidence did not take us very far. While it is passing strange that WHKY's brother would attempt to deposit such a large amount of cash into WHKY's online betting account, the brother was unsuccessful in his attempt to do so and there was no evidence that he or anyone else had succeeded in doing so on other occasions. Standing back from the (incomplete) transaction, it comes as no surprise that WHKY would be depositing large amounts into his betting account given the evidence suggests he was a heavy gambler. There is also nothing especially remarkable about WHKY's brother carrying that much cash, or that he had access to cash amounts belonging to WHKY, given WHKY's evidence that he kept large amounts at home and entrusted those amounts to his mother.
121. The evidence certainly raises a possibility that WHKY was allowing other people to use his online betting account. If he were doing so, that would undermine his claims that (a) the records associated with his account confirm he was generally successful in his gambling, and (b) those successes help explain the large amounts of otherwise unexplained monies passing through his hands. As it happens, we do not think the evidence about third party attempts to deposit money into the TAB account suggests anything nefarious in circumstances where the applicant offers an essentially plausible explanation of his brother's activities in relation to the account.
122. WHKY also gave evidence about the concrete pumping business that he took over from his brother. He initially referred to purchasing the business in 2013 (transcript at p 219). That is odd because QQRK said in his statement that WHKY had not paid anything for the business because it was "not worth anything meaningful" (exhibit 1 at [23]). WHKY subsequently confirmed he did not pay anything for the business (transcript at p 222). He and his brother reached a mutual agreement that he take over the business (transcript at p 221) but that agreement was never formally documented (exhibit 8 at [17]). WHKY said he worked five or six days each week in the business once he took over, subject to the weather, and claimed he only had short holidays (transcript at p 219). He said he continued to operate the business thereafter at around the same level of intensity.
123. There is a significant gap in the records of the business. WHKY acknowledged during cross-examination that he had misplaced the invoice books after they were shown to the

accountant and the relevant information was provided to the Commissioner. He did not have computerised records or engage a bookkeeper to record the information (transcript at pp 212-213). Other records (registration details for the concrete pump truck, for example) were left in a desk at his home but they have been misplaced (transcript at p 214).

124. Undaunted by the absence of a complete set of proper records, WHKY argued it was still possible to reach sound conclusions about the contributions of the business towards his income. The argument appeared to come down to this: even if the business was operated at maximum intensity, there is no way given the parameters identified in exhibit 8 at [14]-[24] (e.g., one truck with a single operator working during regular hours at a plausible hourly rate) that WHKY could have generated all the cash going through his accounts from that business. WHKY explained in his statement (exhibit 7 at [24]):

In about August 2012, I recall that I lent \$4,970 to [GN] and [MY] each in the manner described in paragraph 23 above. [GN] and [MY] were in Lebanon at the time. I lent that money to [GN] and [MY] via Western Union. [GN] and [MY] subsequently repaid me the amounts I had lent them, in cash, in about December 2012. Behind Tab 56 is a copy of letter dated 21 December 2018 from Western Union evidencing that payment.

125. WHKY insists the proceeds of gambling, although not precisely quantified, were a good and plausible explanation for the bulk of the deposits. He says the rest of the otherwise unexplained income was attributable to the repayment of loans. As counsel for WHKY pointed out in written closing submissions, there is no explicit reference in the evidence to any other source of income apart from that.
126. WHKY provided several statements from persons who claimed to have borrowed and repaid money, and reference was made to other borrowers who were not called to give evidence. One of the witnesses who provided a statement and who was called at the hearing was Mr GN, a cousin of WHKY. Mr GN ran his own concrete pumping business. In cross-examination he said his business mainly focused on 'commercial work' whereas WHKY focused on 'residential' work (transcript at p 227). He filed a short statement in which he confirmed he had borrowed monies from WHKY on several occasions to cover gambling debts and to deal with other short-term cashflow problems. We were told the deposits into WHKY's accounts that were attributable to Mr GN were repayments of those interest-free, short-term undocumented advances and were not income from WHKY's concrete pumping business. Mr GN insisted (at [4]):

Although [WHKY] and I both operated a concrete pumping business, I never worked for [WHKY's] business or subcontracted any work to [WHKY]. He also never worked for my business or subcontracted any work for me.

127. WHKY's evidence on this topic evolved somewhat during cross-examination. After initially denying any engagement between WHKY's business and the business controlled by Mr GN (transcript at p 214), WHKY conceded he may have referred customers to Mr GN. He then conceded he might have received some monies from Mr GN because of arrangements with head contractors (transcript at p 215). Mr GN was more forthcoming when he gave evidence. He explained he often referred smaller jobs to WHKY. In that event, WHKY would typically invoice the head contractor but he agreed there might be occasions where WHKY invoiced Mr GN direct (transcript at pp 227-228). Mr GN subsequently confirmed he would only end up paying WHKY in about 10% of cases, and it was not a large amount over time (transcript at p 231). While Mr GM had a dim recollection of the individual loan advances he claims to have received and repaid, we do not have any reason to reject his evidence about the advances and repayments.
128. The other witness who provided a statement on behalf WHKY was Mr PS. The brief statement (exhibit 13) confirmed Mr PS was a gambling acquaintance of WHKY, and that Mr PS borrowed money from WHKY on several occasions that was repaid. He did not recall the amounts or dates of the loans but he confirmed the loans were always related to private poker games. There is no suggestion of any connection between Mr PS and the concrete pumping business.
129. WHKY referred to other borrowers he met through the gambling fraternity but he said he had lost contact with them. It is not clear what those witnesses would have added to his account.
130. The only other source of income that was explicitly identified in the evidence was rental income from a property that WHKY had purchased.

Conclusions in relation to WHKY's substantive liability

131. WHKY's evidence is central to the outcome of the review. That is a problem because he was an unsatisfactory witness who was given to exaggeration. His representatives effectively acknowledged as much: written closing submissions lodged on his behalf euphemistically referred to his more extravagant claims of success as being "tinged with a

gambler's overconfidence": at [39]. He was a problematic historian in other respects as well: he was given to making categorical statements that he subsequently had to qualify (e.g., he asserted he did not deal with Mr GN's concrete pumping business when it subsequently became apparent that he did). In those circumstances, it is appropriate to treat his evidence with caution, and to look for corroboration. WHKY's counsel encouraged us to focus on the other evidence which had been provided, and to note the absence of a positive case against WHKY which suggested alternative sources of income.

132. We will return to the evidence tendered on WHKY's behalf and the gaps therein, but we should first say something about the criticisms of the Commissioner's failure to call witnesses or advance a positive case or challenge evidence in various respects. The Commissioner does not bear the onus. It is incumbent on an applicant to establish his correct (or more nearly correct) taxable income. To the extent an applicant fails to discharge that burden, the Commissioner's decision will remain undisturbed. The Commissioner is certainly not required to defend his assessment by leading positive evidence. Indeed, he is not required to lead any evidence at all, except to the extent it would be necessary to discharge his own obligations to assist the Tribunal and be a model litigant. The Commissioner might confine himself to criticising the evidence proffered by the applicant.
133. Of course, those criticisms must be rationally based. The Commissioner is not entitled to simply insinuate the applicant's evidence is unbelievable without explaining why that submission is made. The Commissioner should not conduct his case with a hint towards some dark unarticulated (and thus unanswerable) concern – about an applicant's 'real' source of income, for example. The Commissioner is entitled to say the evidence should not be accepted for one reason or another, but those reasons should be articulated. Ordinarily, those reasons should be put to the applicant in cross-examination so the applicant is on notice of the challenge to their credit and has an opportunity to respond. For its part, the Tribunal must also avoid speculation about factual matters that have not been put in issue. Having said that, the Tribunal is not inevitably constrained to accept an account proffered by a witness that is not directly challenged, contradicted or impeached on cross-examination, especially where the witness can be in no doubt that their credit is subject to challenge: see, for example, *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [105] per Campbell JA. It is still incumbent on the applicant to satisfy us. If evidence is inherently unlikely, or if it comes from an unreliable or uncertain source, that

evidence may be given less weight even though it has not been expressly impeached or contradicted.

134. We return to the evidence proffered on behalf of WHKY. We have already noted his testimony must be approached with caution. Even so, we are satisfied the evidence as a whole (including his testimony and the documents and the other witness accounts) establishes WHKY gambled prolifically and with some success during the relevant periods. We also accept his early gambling was funded out of savings and gifts and other monies before the relevant years of income. We also accept he provided financial accommodation to other gamblers and loans to at least one acquaintance, and that repayments of those advances might have passed through his accounts.
135. We can accept WHKY has established the objection decisions are wrong, at least to some extent. But that is not enough for WHKY to succeed in the review. He is also obliged to identify the correct (or more nearly correct) amount of taxable income in the years under review. We are not satisfied he has done so in circumstances where:
 - (a) the extent of his winnings throughout the years under review is unclear given his own evidence exaggerated his winnings and evidence of losing bets did not appear to be taken into account, especially in Ms Conoulty's reports. Those gaps in the information available to her significantly limits the weight and value of the reports;
 - (b) there is uncertainty about amounts of income generated by the business in the 2013-2016 years of income given many of the records have been lost.

Penalties in respect of WHKY

136. Having concluded there was a tax shortfall in the relevant years of income, we turn to the question of penalties.
137. The Commissioner assessed penalties pursuant to s 284-75(3) of Schedule One to the Administration Act in respect of the 2011 and 2012 years of income. That sub-section provides for an administrative penalty calculated as percentage of the shortfall in circumstances where the taxpayer fails to provide a return or other document which is necessary for the Commissioner to make an assessment. WHKY did not furnish returns in the 2011 and 2012 years of income and the Commissioner proceeded to issue

assessments, so the shortfall penalty of 75% is applicable. The Commissioner says a further 20% is payable in respect of the 2012 year of income by reason of the 'uplift' provided for in s 284.220(1)(e). We are not aware of any basis for disputing the imposition of the administrative penalties.

138. The Commissioner also imposed administrative penalties in respect of the 2013-2016 years of income pursuant to s 284-75(1) of Schedule One to the Administration Act. The penalties were imposed at the rate of 75%. That was said to be appropriate because the shortfall arose because of a false or misleading statement that was itself the product of the taxpayer's intentional disregard of obligations: s 284.90(1). There was also a 20% uplift imposed in respect of the 2014-2016 years of income.
139. WHKY's case did not focus on the penalties issue. In written submissions, his counsel pointed out '*intentional* disregard' required awareness of the laws and obligations that were being disregarded: *Russell v Federal Commissioner of Taxation* [2009] FCA 1224; 74 ATR 466 at [180]-[182] per Logan J. The Commissioner suggested in written submissions (at [319]) that insight into the obligations he supposedly disregarded could be inferred from WHKY's failure to keep business records and the way he operated his accounts. We note the submissions point out: "As a business owner, he **should** have been aware of his business obligations". [Emphasis added] Saying that a taxpayer *should be aware* of their obligations suggests recklessness or even a want of reasonable care rather than intentional disregard.
140. We acknowledge the taxpayer is obliged to establish the finding as to penalties was wrong and that it should have been made differently. Given the lack of focus on evidence to that effect at the hearing, that is a challenge. As it happens, we are satisfied WHKY's conduct suggests recklessness rather than intentional disregard. We reach that view in light of WHKY's statements and oral evidence, and in light of his youth and inexperience. In contrast with his brother who was a more experienced and deliberate person, there was nothing in the evidence which suggested WHKY had any insight into the extent of his taxation obligations. In that sense, he was reckless and the base penalty amount should be adjusted to 50% of the shortfall to reflect that finding. We are not aware of any basis why the uplift should not be imposed.

141. That leaves only the question of remission. We acknowledge there is a broad discretion to remit all or part of a penalty that was otherwise properly imposed. The discretion is contained in s 298.20(1) of Schedule One to the Administration Act. The correct approach to the exercise of the discretion was discussed in the Full Court's decision in *Sanctuary Lakes Pty Ltd v Commissioner of Taxation* [2013] FCAFC 50. In that case, Griffiths J explained (at [249]):

the question is simply whether the decision-maker is satisfied having regard to the taxpayer's particular circumstances that it is appropriate to remit penalty in whole or in part. For example, a decision-maker might determine that it is appropriate to remit penalty in whole or in part because otherwise the outcome for a particular taxpayer would be unreasonable or unjust (and therefore inappropriate), as opposed to harsh...

142. We are conscious of WHKY's age and inexperience – this is a young man that only left the family home comparatively recently, after all. Even so, we are not persuaded his circumstances are such that it would be appropriate to remit the penalties.

CONCLUSION WITH RESPECT TO WHKY

143. The objection decisions under review are varied with respect to the rate of base penalty imposed in the 2013-2016 years of income so that WHKY is liable to base penalty amount at the rate of 50%. The objection decisions are otherwise affirmed.

*I certify that the preceding 143
(one hundred and forty -three)
paragraphs are a true copy of
the reasons for the decision
herein of Deputy President
Bernard J McCabe*

.....**SGD**.....

Associate

Dated: 27 October 2023

Date(s) of hearing:	21 November 2022 to 25 November 2022
Date final submissions received:	17 January 2023
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