Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Ogden and Commissioner of Taxation (Taxation) [2016] AATA 574 (4 August 2016)

Division	TAXATION & COMMERCIAL DIVISION
File Number(s)	**2014/6763; 2014/6764**
Re	**Gary Ogden**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal	**Deputy President S E Frost**
Date	**4 August 2016**
Place	**Sydney**

Objection decisions set aside; matters remitted to the Respondent with a direction that in respect of each of the income years ended 30 June 2011 and 30 June 2012, administrative penalty be assessed at $11,500.

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

Deputy President S E Frost

CATCHWORDS

TAXATION - administrative penalty - primary tax issue decided - Commissioner given opportunity to reconsider the amount of penalty imposed on the taxpayer - overstated claims - certain expenditure not claimable - lack of evidence for some claims - whether failure to take reasonable care - whether reckless - whether intentional disregard for the law - portions of the tax shortfall amount resulting from each level of behaviour - different revised amounts depending on severity of behaviour - avoidance of expending too many Commonwealth resources in line by line calculations - adjustment of revised amount to accommodate certain claims - decision under review set aside and remitted

LEGISLATION

Administrative Appeals Tribunal Act 1975 s 43
Administrative Appeals Tribunal Regulation 2015
Taxation Administration Act 1953 Schedule 1

CASES

Re Ogden and Commissioner of Taxation [2016] AATA 32
Re Ogden and Commissioner of Taxation [2014] AATA 385
Re Roche Products Pty Ltd and Commissioner of Taxation [2008] AATA 639
Stevenson v Commissioner of Taxation (1991) 29 FCR 282

REASONS FOR DECISION

Deputy President S E Frost

4 August 2016

INTRODUCTION

1. The taxpayer's tax returns for 2011 and 2012 contained deduction claims that I found to be significantly overstated: *Re Ogden and Commissioner of Taxation* [2016] AATA 32 (the Primary Tax Decision). I declined to deal with administrative penalty, considering it appropriate to give the Commissioner the opportunity to reconsider the amount of penalty initially imposed upon the taxpayer. I then gave Mr Ogden the opportunity to respond. The Commissioner has submitted that the initial penalty amounts should be increased. The taxpayer disagrees, arguing that the penalty should be reduced, and even, in some respects, reduced to nil.

2. The Commissioner had initially thought the taxpayer and/or his agent had failed to take reasonable care in making the relevant deduction claims in the tax returns. That led to the assessment of penalty at the rate of 25 per cent of the amount of the tax underpaid[1]. But the Commissioner now says that the taxpayer and/or his agent were reckless (justifying a base penalty of 50 per cent of the tax shortfall[2]) or, alternatively, that they intentionally disregarded the law (for which the base penalty is 75 per cent of the tax shortfall[3]). The Commissioner also submits there are aggravating factors justifying a 20 per cent increase on the respective base amounts.

THE TRIBUNAL'S POWERS

3. I agree with the Commissioner's submission, founded on *Re Roche Products Pty Ltd and Commissioner of Taxation* [2008] AATA 639 at [202]-[204] and *Stevenson v Commissioner of Taxation* (1991) 29 FCR 282 at [22] that, in reviewing the Commissioner's objection decision in relation to administrative penalty, s 43 of the

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[1] Table item 3 in s 284-90(1) in Schedule 1 to the *Taxation Administration Act 1953* (the TAA)
[2] Table item 2 in s 284-90(1) in Schedule 1 to the TAA
[3] Table item 1 in s 284-90(1) in Schedule 1 to the TAA

Administrative Appeals Tribunal Act 1975 (the AAT Act) confers on the Tribunal all the powers and discretions the Commissioner had when making the objection decisions in question. That means the Tribunal has the power to direct the Commissioner to increase a penalty assessment provided the Commissioner had power to increase the assessment at the time of making the objection decisions.

CONSIDERATION

4. It will be clear from a reading of my reasons in the Primary Tax Decision that the position taken by the taxpayer and his agent was in many respects unprincipled and unjustifiable. I dealt at length with the following categories of deduction claims:

   (a) 'overtime meal allowances' at [51]-[59];

   (b) 'staff and client amenities' at [60]-[65];

   (c) 'heating and lighting expenses' at [66]-[70];

   (d) 'home office running costs' at [71]-[74];

   (e) 'sunscreen and sunglasses' at [79]-[90]; and

   (f) 'rubber-soled shoes' at [91]-[94].

5. The claims in categories (a), (b) and (f) were entirely without merit. Those in categories (c) and (d) had some basis to them, but the amounts claimed were overstated. To some extent that was because the percentage was overly ambitious but there were also classes of expenditure (e.g. some computers and a desk) that should not have been included in the first place. Category (e) is different again: that claim failed for lack of evidence.

6. In his written submissions on the penalty question, Mr McNeice on behalf of the taxpayer sought to challenge my factual findings in several of the categories but of course that opportunity is not open to him. Nevertheless, I do accept in the taxpayer's favour that, in the category of occupancy costs for example (which I dealt with at [32]-[49] of the Primary Tax Decision), it was not entirely unreasonable for a claim to be made, even though I found it not allowable. In Mr Ogden's earlier Tribunal review, *Re Ogden and Commissioner of Taxation* [2014] AATA 385, Senior Member Ettinger had allowed a deduction for a proportion of his occupancy costs. In that circumstance it is not

appropriate to impose a penalty on the entire shortfall amount, even though the statements made in Mr Ogden's tax returns for 2011 and 2012 were made prior to SM Ettinger's decision. On the other hand, it is certainly appropriate to penalise for any unreasonable overstatement of the percentage claimed. SM Ettinger had allowed a home office percentage of 11.7 per cent, but the taxpayer claimed 31.6 per cent. On any view that is almost three times as high as could ever be justified – and it is almost 20 times as high as I would have allowed. Furthermore, it is entirely appropriate to penalise for the inclusion of classes of expenditure that should not have been included in any event.

7. I reject Mr McNeice's submission that, since Mr Ogden's income tax running account with the Commissioner at different times was in credit, there was no tax shortfall at those times. The reason for my rejection of the submission is that the state of a taxpayer's running account with the Commissioner has no bearing at all on whether a taxpayer has a shortfall amount. Table item 1 in s 284-80(1) in Schedule 1 to the TAA simply provides, relevantly, that you have a shortfall amount if a tax-related liability of yours, worked out on the basis of the statement, is less than it would be if the statement were not false or misleading. Whether your account is in debit or credit is beside the point.

8. I also reject Mr McNeice's submission that Mr Ogden made a voluntary disclosure warranting a reduction in the penalty under s 284-225 in Schedule 1 to the TAA, on the basis that the submission is not supported by the evidence.

9. My conclusion is that some of the tax shortfall amount resulted from intentional disregard of the law – the so-called 'staff and client amenities', which Mr Ogden conceded were almost entirely consumed by the family, and Mr Ogden's supposed 'payments to associated persons' (his son), which were not paid at all, fall into this category – some of the tax shortfall amount resulted from recklessness and some of it resulted from a failure to take reasonable care. It is also clear that the 20 per cent uplift in s 284-220(1)(c) in Schedule 1 to the TAA applies since Mr Ogden has had penalty applied previously.

10. The Commissioner has calculated that, based on the Tribunal's findings in the Primary Tax Decision, if administrative penalty remained at 25 per cent of the shortfall amount, it would rise to $5,253.11 for the 2011 year and to $4,926.59 for the 2012 year (the Lower Revised Amounts). If administrative penalty instead were increased to 75 per cent for staff and client amenities, and 50 per cent for all other categories, and then uplifted by 20

per cent across the board, the penalty amounts would be $12,757.85 for 2011 and $12,465.91 for 2012 (the Higher Revised Amounts).

11. Some very minor downward adjustment would need to be made to the Higher Revised Amounts since, as indicated above, not all categories of statements made in the tax returns attract the 50 or 75 per cent penalty loading. But by far most of them do. Accordingly, and to avoid the need for either the Tribunal or the Commissioner to undertake further time-consuming, line-by-line calculations with respect to every single one of the multitude of false or misleading statements made by Mr Ogden in his tax returns, I will strike the penalty amounts at $11,500 for each of the income years ended 30 June 2011 and 30 June 2012. Those amounts will undoubtedly be lower than a line-by-line calculation would reveal, but in my view both the Commissioner and the Tribunal have already invested too many of the Commonwealth's resources in Mr Ogden's objection and review processes, and should not invest any more.

12. Finally, and as should be abundantly clear, I would expect the Registrar to decline to certify that any of Mr Ogden's applications to the Tribunal in respect of the 2011 and 2012 income years have terminated in a manner favourable to him: see table item 6 in s 26 of the *Administrative Appeals Tribunal Regulation 2015*.

I certify that the preceding 12 (twelve) paragraphs are a true copy of the reasons for the decision herein of Deputy President S E Frost

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

Associate

Dated 4 August 2016

Date(s) of hearing	**9,10,11 September 2015**
Date final submissions received	**18 April 2016**
Solicitor for the Applicant	**D McNeice, MoneyWise Accounting**

Solicitor for the Respondent	**V Hammond, Australian Taxation Office**