ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MARKS & ANOR v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2018] ACAT 84

AT 61/2017

Catchwords: **ADMINISTRATIVE REVIEW –** land tax – penalty tax – owner's failure to tell the Commissioner in writing that their residential property was rented – communication to the Commissioner in writing that the property was under management of a real estate agent – no inquiry by the Commissioner regarding rental – taxpayer reasonably believed that land tax had been paid – investigation 10 years after the event – meaning of 'failure to take reasonable care' – meaning of "took reasonable care' – 'tax default' includes non-compliance with obligation to notify in writing under section 14 of the *Land Tax Act 2014* – burden of proof on taxpayer – Commissioner should not have been satisfied that taxpayer failed to take reasonable care – penalty tax reduced to default rate – interest not reviewable by Tribunal – decision varied

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 s 68
ACT Civil and Administrative Tribunal Legislation Amendment Act 2008 (No 2), amdt 1.453
Land Tax Act 2004 ss 9, 14, 19A,
Land Tax (Interest and Penalty) Amendment Act 2007
Legislation Act 2001 s 250
Migration Act 1958 (Cth) ss 4, 22AA
Taxation Administration Act 1999 ss 29, 31, 32, 37, 64, 82, 101
Taxation Administration Act 1953 (Cth) s 284-90(1), Sch 1, item 3, 14ZZK
Territory Records Act 2002 s 16

Subordinate Legislation cited:
Miscellaneous Taxation Ruling MT2008/1

Cases cited:
A Plus Plumbing and Building Services Pty Ltd & Commissioner for ACT Revenue [2012] ACAT 76
Aurora Developments Pty Ltd v Commissioner of Taxation (No 2) [2011] FCA 1090
Bushell v Repatriation Commission [1992] HCA 47
Hanley & Commissioner for ACT Revenue [2012] ACAT 64
Highrise Concrete Contractors (Aust) Pty Ltd v Commissioner for ACT Revenue [2014] ACAT 31

James v Commissioner for ACT Revenue [2013] ACAT 32
Jokhan and Jokhan & Commissioner for ACT Revenue [2012] ACAT 15
Metropolitan Gas Co v Federal Commissioner of Taxation (1932) 47 CLR 621
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6
Rawson Finances Pty Ltd v Commissioner of Taxation [2013] FCAFC 26
Repatriation Commission v Smith (1987) 15 FCR 327
RVO Enterprises Pty Ltd v Chief Commissioner of State Revenue [2004] NSWADT 64
Scott and Anor v Commissioner for ACT Revenue [2013] ACAT 73
Steele v Commissioner for ACT Revenue [2010] ACAT 15
Theron v Commissioner for ACT Revenue [2013] ACAT 33
Tier Toys Ltd v Commissioner of Taxation [2014] AATA 156
Vestas - Australian Wind Technology Pty Limited and Chief Executive Officer of Customs [2013] AATA 721
Wade & Tan v Commissioner for ACT Revenue [2014] ACAT 79

Texts/Papers cited: *Law of Torts*, 3rd edition, (2004) RP Balkin and JLR Davis

Tribunal: Presidential Member G McCarthy

Date of Orders: 29 August 2018
Date of Reasons for Decision: 29 August 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 61/2017

BETWEEN:

TONY ALLAN MARKS
First Applicant

ALISON JANE MARKS
Second Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Presidential Member G McCarthy

DATE: 29 August 2018

ORDER

The Tribunal orders that:

1. The decision under review is varied by allowing the applicants' objection to the assessment of penalty tax and imposing penalty tax of 25%.

……..
Presidential Member G McCarthy

REASONS FOR DECISION

Background

1. This application concerned the applicants' objection to a land tax assessment made by notice dated 15 March 2017 (**the Assessment**) arising from the rental of their residential property in O'Connor (**the subject property**) in the period 1 December 2007 to 31 March 2009. The Assessment totalled $26,389.82 comprising:

   (a) $8,303.04 - unpaid land tax;

   (b) $4,151.53 - penalty tax at a rate of 50%; and

   (c) $13,935.25 – market and premium interest.

2. The applicants objected on the grounds that they had not had an opportunity to assemble the documents they needed to establish that in 2007 (10 years previously) they gave notice to the Commissioner for ACT Revenue **(the Commissioner**) that the subject property was rented, that the land tax had been paid and that the Assessment was an error.

3. Despite the applicants' provision of further documents to the Commissioner, on 18 September 2017 a delegate of the Commissioner by way of a reconsideration decision disallowed the applicants' objection and confirmed the Assessment.

4. By application dated 16 October 2017, the applicants applied to Tribunal for an order that the Commissioner's reconsideration decision be set aside or varied.

5. On 14 June 2018, after resolution of some preliminary issues, I heard the application. The first applicant, Mr Marks, appeared for himself and on behalf of his wife (the second applicant). Ms Katavic of counsel appeared for the Commissioner.

Relevant facts

6. At all material times, the applicants owned another residential property also in O'Connor (**the other property**). In relation to that property, by means of a *pro forma* written notice signed and dated 17 April 2007 headed 'Residential Land Tax Notification that property is rented', Mr Marks advised the Commissioner

that the other property "is currently rented" and "has been rented since 5/3/07". The Commissioner raised land tax assessments against the other property, and it remained rented until the applicants sold it in 2010. The *pro forma* notice commenced with the statement:

> *Under Section 14 of the Land Tax Act 2004 the owner of a parcel of land is required to notify the Commissioner, within 30 days, in writing of any change in circumstances in relation to that land which would result in the parcel of land being liable for land tax.*

7. In November 2007, the applicants resided next door to the other property. Mr Marks gave evidence that he and his wife became concerned about personal difficulties for them if tensions arose with the tenants of the other property and therefore engaged a licensed real estate agent (**the Agent**) to manage the other property on their behalf.

8. By letter dated 15 November 2007, Mr Marks wrote to the Commissioner concerning the other property as follows:

> *We write to advise you that we have appointed* [Agent] *as managing Agents for the above-mentioned property.*
>
> *Would you please be kind enough to send the Rates & Land Tax Notices for the above property to their office address being* [address provided].

9. A copy of the letter bearing a 'received' stamp confirms that the Commissioner received the letter on 16 November 2007.

10. On 19 October 2007,[1] the applicants exchanged contracts for their purchase of the subject property.

11. On 16 November 2007, the applicants settled their purchase of the subject property. [2] It appears clear that the applicants intended to rent the subject property immediately following registration of the transfer of title because, on the same day, the applicants entered into another property management agreement with the Agent, this time in relation to the subject property. Under the agreement, the Agent was directed to pay rates, land tax and water rates "from rental monies".

---

[1] Transfer (T documents, page 34)
[2] Transcript of proceedings, page 21, lines 9-10 and line 43; Transfer (T documents page 34)

12. On the same day, presumably at the time of entering into the agency agreement with the Agent, by letter dated 16 November 2007 Mr Marks wrote to the Commissioner concerning the subject property in terms identical to his letter dated 15 November 2017 concerning the other property as follows:

> *We write to advise you that we have appointed* [Agent] *as managing Agents for the above-mentioned property.*
>
> *Would you please be kind enough to send the Rates & Land Tax Notices for the above property to their office address being* [address provided].

13. Whilst there was some discrepancy as to whether Mr Marks or the Agent prepared the letters, it matters little because Mr Marks signed them.

14. Ms Katavic contended that the Commissioner received the first letter concerning the other property, but not the second letter concerning the subject property. She relied on a 'screenshot' from the Commissioner's computer records regarding the subject property that, she said, recorded all communications or dealings with the subject property. She submitted that I should draw an inference that the letter was not received because there is no mention of it on the screenshot.

15. I was not prepared to draw that inference. The Commissioner did not call a witness in this matter, particularly any witness who could have given evidence regarding entry of information in the Commissioner's record system giving rise to the screenshots.

16. It is also clear that the screenshots are not a complete record of communications between the applicants (or the Agent) and the Commissioner. For example, the Commissioner received a letter dated 29 April 2008 from the applicants concerning the subject property referred to below, but there is no mention of it in the screenshot. On 21 November 2008 an officer of the Commissioner sent a facsimile to the Agent stating the amount owing in relation to the other property to be paid by 31 December 2008, but there is no mention of it in the applicable screenshot.

17. In any event, the submission does not respond to the evidence of Mr and Mrs Marks, on oath, that Mr Marks signed both letters and gave them to the Agent

for the purpose of the Agent sending them to the Commissioner on their behalf. I accept their evidence.

18. It is also inherently unlikely that the Agent would receive from the applicants two identical letters dated 15 and 16 November 2007, both correctly addressed, and that the Agent would send one letter but not the other. Also, in a contemporaneous email dated 7 August 2008 from the Agent to Mrs Marks concerning the subject property, the Agent stated:

> *Please find following a copy of the letter dated 16 November 2007 sent to ACT Revenue regarding the Rates and Land Tax*

19. I make no finding about what became of the letter dated 16 November 2007 (and give the delegate of the Commissioner the benefit of the doubt that he did not intend to say in his Reasons Statement that the Commissioner received it), but I am satisfied that the applicants signed it and gave it to the Agent who sent it to the Commissioner on their behalf for the purpose of notifying the Commissioner that the subject property was under the management of the Agent and requesting rates and land tax notices concerning the subject property be sent to the Agent.

20. The applicants were also entitled to presume that the Commissioner received the letter. Sections 250(1) and (2) of the *Legislation Act 2001* provide:

> *250 (1) A document served by post under this part is taken to be served when the document would have been delivered in the ordinary course of post.*
>
> *(2) However, subsection (1) does not affect the operation of the Evidence Act 2001, section 160 (Postal articles).*
>
> *Note The Evidence Act 2001, s 160 provides a rebuttable presumption that the postal article sent by prepaid post addressed to a person at an address in Australia or an external territory was received on the 4th working day after posting.*

21. In my view, the applicants were entitled to presume that the Commissioner received the letter until, say, 7 August 2008 when Mrs Marks became concerned about the absence of any land tax assessments in relation to the subject property.

22. On 30 November 2007, the applicants became the registered owners of the subject property. On 1 December 2007, they rented the subject property to tenants. The tenancy remained in place until 31 March 2009 (**the tenancy period**), following which the applicants commenced living in the property.

23. There is no issue that, arising from their rental of the subject property, the applicants were liable to pay land tax. Section 9(1)(a) of the *Land Tax Act 2004* (**the LT Act**) provides:

> *Land tax at the appropriate rate is imposed for a quarter on each parcel of rateable land that is –*
>
> *(a) rented residential land.*

24. The applicants accepted that land tax was payable for each quarter when the subject property was rented.

25. By letter dated 29 April 2008 the applicants again wrote to the Commissioner concerning the subject property as follows:

> *We write to advise you that we have appointed* [Agent] *as managing Agents for the above-mentioned property.*
>
> *Would you please be kind enough to send the Water & Sewerage Accounts for the above property to their office address being* [address provided].

26. The letter bears a 'received' stamp confirming that the Commissioner received it on 1 May 2008.

27. It was, as the Commissioner noted, odd that the applicants would write to the Commissioner requesting re-direction of water and sewerage accounts where the Commissioner had no role or responsibility for such accounts. However the letter put the Commissioner on notice that the subject property was under the management of the Agent.

28. On 6 August 2008, concerned about the apparent absence of any land tax payments, Mrs Marks sent an email to the Agent as follows:

> *Hope you are well. We were just doing our tax the other weekend and looking at the statements from you. It does not look like we have paid any land tax on either property. I know the paper work was filled in and sent in and all was being sent to your office. Would you please let me know if*

we have paid any and if not could you please chase up with the ACT government where the notices are?

29. On 7 August 2008, the Agent sent an email to Mrs Marks in reply as follows:

Thank you for your email - hope that all is going well with your family!

Today we shall post a list of payments to you for both properties ... included with the printout is a copy of the [subject property] *Rates paid for the first instalment to 2008-09 plus a copy of the* [other property] *Rates paid for the fourth instalment for 2007-08 &* [the other property] *Land Tax for the quarter 01/04/08 to 30/06/08.*

Please find following a copy of the letter dated 16th November 2007 sent to ACT Revenue regarding the Rates and Land Tax - we do not have any record of receiving a Land Tax account for the [the subject property].

Today I spoke with ACT Revenue ([phone number]*) and they advised that when they receive notification of a new owner of a property they then send the letter with the land tax form to the new owners to completed* (sic). *They need to talk directly with the landholder about land tax so you may wish to give them a call on the above number to seek there* (sic) *instruction in this regard.*

We trust that this provides you with assistance.

30. Mrs Marks gave evidence regarding these emails. Regarding her email to the Agent, the following exchange with Ms Katavic occurred:

... you've referred to your email there, to paperwork being filled in and sent it and it was all being sent to your office. Do you have a recollection now of what paperwork you're referring to as being filled in and sent in and being sent to your office?---I think because I had sent a previous email to [the Agent], *and I'd rung the Revenue Office prior to this email and I couldn't - that's what I was trying to download, the other email, and I'm not sure - I couldn't get it - that I had run[g] that Revenue Office to see if I could get a copy of the tax, the land tax, and that I wasn't getting any success from them, so I asked if* [the Agent] *could do that on our behalf as our agent, and so then I think the conversation was that I was informed that I needed to have a letter from us to say that the* [Agent] *were actually managing the property and that they then - for all bills and things to be sent to them.*[3]

So you knew as at 7 August that land tax was the subject of a separate document if it was payable in relation to a property?---Yes, but that's

[3] Transcript of proceedings, page 50, lines 26 - 37

> *what I'm saying. I think I rang before this email. I rang the Revenue Office after receiving …*[4]
>
> *…*
>
> *But Mrs Marks, I suggest to you that in August 2008 you can't be certain that you contacted the Revenue Office in the manner that you say you did?---I'm - I'm very certain. If I sent an email to* [the Agent] *saying that I've contacted the Revenue Office, I would have contacted the Revenue Office. I honestly believe - I know that I would have and I would not have just done it once because I would have done it several times and if* [the Agent] *had said to me, "You need to contact them again," I'm telling you, honestly, I will have rung them.*
>
> *You also said in your witness statement that this period was a very busy time in your life when you had three small children, a new baby?---Yes.*
>
> *Could it be that you simply forgot to follow it up after August 2008?---No.*
>
> *Is the better explanation, Mrs Marks, that the reason there were no land tax assessments issued even after these emails of August 2008 it was being nothing was done about it?---No, I believe that I followed up as I should have and that I did. I'm very particular about that.*[5]

31. I am satisfied that ongoing communication occurred between the Commissioner's office and the applicants (or at least Mrs Marks) and/or the Commissioner's office and the Agent because, on 21 November 2008, an officer on behalf of the Commissioner sent a copy of the rates assessment notice "for the year 1/7/2008 to 30/6/2009" regarding the other property to the Agent by facsimile. On it, an officer of the Commissioner had handwritten "$3247.75 to pay in full by 31.12.08".

32. On 27 November 2008, the Agent forwarded a copy of the facsimile to Mrs Marks.

33. On 28 November 2008, in a different handwriting, someone (accepted at hearing to be a person from the Agent) had handwritten:

> *$2500.00* - [subject property]
> *$747.75* - [other property].

[4] Transcript of proceedings, page 51, lines 18 - 26
[5] Transcript of proceedings, page 54, lines 18 - 34

34. In December 2008, the applicants received from the Agent their statement of receipts and disbursements for the subject property "for the month of December 2008". The first entry on the list of disbursements states:

> *1 DEC 08 … Chq 21508 … Council Rates payable to ACT Revenue Office for Rates & Land Tax …. 2,500.00*

35. Relying on the facsimile from the Commissioner and the December 2008 statement from the Agent, Mr Marks submitted:

> *This matter falls to whether advice was provided to the Commissioner about the rental of* [the subject property]. *My contention is that the standard was met (by telephone, postal letter, email, and ultimately a payment of $2,500). The failure of the Commissioner to issue, or record the issue of assessments at that time, or to have adequate records of the correspondence at the time, does not lead to a failure on my part to exercise reasonable care.*[6]

36. Mr Marks contended that the entry for $2,500 reflected a payment of land tax for that amount in relation to the subject property.

37. At hearing, Mr and Mrs Marks both gave evidence that Mrs Marks took primary responsibility for their dealings with the Agent regarding rental of the subject property and the other property. When questioned about the facsimile from the Commissioner sent on 21 November 2008, the following exchange occurred:

> *Well, Mrs Marks, I suggest to you that the only account attached from* [the Commissioner] *was the fax that appears at Annexure C for* [the other property] *which required the amount of $3,247.75 to be paid for that property?---I see that but can you see on that page that it says two and a half thousand for* [the subject property] *and 747.*
>
> *But there was no land tax assessment notice issued for* [the subject property]*, was there?---No, but I've been having conversations with* [the Agent] *about* [the subject property] *and* [the other property] *rates and rates and land tax, so I - I'm asking her is that what you've paid it for, assuming that's what she's paid it for. I - I didn't have this in front of me. I didn't - I'm trusting on what* [the Agent] *have got in front of them to - to pay. I haven't actually got this notice knowing how much each individual tax is paid.*[7]
>
> …

[6] Witness statement, Tony Marks, dated 12 June 2018, paragraph 12
[7] Transcript of proceedings, page 58, line 42 - page 59, line 8

> *The proposition I'm putting to you, Mrs Marks, is that the only amount that you were told needed to be paid was for* [the other property] *and it was an amount of 2000 - $3,247.75. Do you agree with that?---I don't know. I'm - I'm telling you - I'm just saying that whatever the bills were that were not addressed to us that were at the wrong address we've asked* [the Agent] *... to pay for them. She's paid the amount and then it's come back that it's - that it's* [the subject property] *and* [the other property] *and we had been talking about rates and land tax, so I have assumed that she's paid whatever's needed to be paid.*
>
> *But the only - the only property in which notices were sent to the wrong address was* [the other property], *wasn't it?---But I had - but I hadn't received anything for - for* [the subject property], *so I had been talking to her about paying the rates for both of them. So I'm assuming that that's what was paid.*[8]

38. I was not persuaded that Mrs Marks understood from her receiving the Commissioner's facsimile that $2,500 of the $3,247.75 was attributable to the subject property. First, that 'break down' between the subject and other properties was written on the facsimile by the employee of the Agent on 28 November 2007, after the facsimile in the form sent by the Commissioner had been sent to Mrs Marks. There is no evidence as to when the applicants became aware of that further annotation, save for some time in 2017 when the applicants were seeking information from the Agent in response to the Assessment.

39. Second, in an exchange of emails between Mrs Marks and the Agent on 1 and 2 December 2008 regarding what the proposed payment of $3,247.75 was for, and whether it was "for the rates and taxes which we spoke about with [the officer from the Office of the Commissioner]", the Agent wrote "The payment was only for the attached account from [the Commissioner]".

40. Taking the documents as a whole, I am satisfied that Mrs Marks should reasonably have understood that the proposed payment of $3,247.75 was for rates and/or land tax payable in relation to the other property only.

41. That, however, has no bearing upon the Agent's statement for December 2008 regarding the subject property, which the applicants did receive, and which records a payment of $2,500 for "Rates and Land Tax".

---

[8] Transcript of proceedings, page 60, lines 4 - 18

42. Regarding the Agent's statement, Ms Katavic suggested to Mrs Marks that the disbursement entry of $2,500 for the subject property was an error in that the money was drawn from the rent revenue derived from the subject property but applied to pay outstanding rates and/or land tax owing on the other property. In other words, the handwriting on the facsimile "*$2500.00* [subject property] *$747.75* [other property]" was only to indicate the source of the funds. In response to that suggestion, the following exchange with Mrs Marks occurred:

> *... for that cheque, for that purpose, i.e. rates and land tax* [the subject property]*, is an error, it's not what it was paid for. What - do you - what do you say about that?---Well, I believe that it was paid for* [the subject property] *rates and land tax but - and perhaps it wasn't. I don't know.*
>
> ..
>
> *MS KATAVIC: And, Mrs Marks, I also put to you that there could not have been an amount of rates and land tax payable for that amount for* [the subject property] *because there had been no land tax assessment issue for* [the subject property] *as at this point in time?---I don't know. I had asked* [the Agent] *to pay the land tax and the rates and when you get this back in the month of December and we probably got it at the end of December and you see that then you assume that that's been paid. I didn't - I haven't gone through it with a fine tooth comb for, you know - I don't know.*[9]

43. At hearing, after being taken through the Commissioner's records showing a combination of unpaid rates instalments and accrued interest amounts to a total of $3,247, Mr Marks agreed that that amount, handwritten on the facsimile, reflected the total owing for unpaid rates and interest attributable to the other property only; that the money was drawn in part from revenue received from rental of the other property ($747.75) and in part from rental of the subject property ($2,500); and that the Agent's statement for the month of December 2008 issued for the subject property incorrectly recorded $2,500 for rates and land tax payable referable to that property.[10]

44. However, important for present purposes, I am satisfied that the error in the statement misled the applicants and that neither of the applicants was aware of the error in 2008.

---

[9] Transcript of proceedings, page 61, lines 6 - 32
[10] Transcript of proceedings, page 36, line 1 - page 37, line 21

45. The applicants' misunderstanding about payment of land tax for the subject property is corroborated by Mr Marks' income tax return for FY 2009. With reliance on the Agent's statement, Mr Marks claimed $2,475 in his income tax return by way of land tax owing on the subject property (the amount reflecting his 99% ownership of the property)[11] and Mrs Marks claimed $25 in her income tax return (reflecting her 1% ownership of the property).

46. Having regard to the evidence on oath from Mr and Mrs Marks and the returns lodged with the Australian Taxation Office (**ATO**), I am satisfied that both applicants believed at the time (although incorrectly) that land tax had been paid on the subject property. It is inherently unlikely (and I would reject the suggestion) that they would both claim for that expense in such a transparent way if they had understood that the expense had been neither invoiced nor paid.

47. By letter dated 16 January 2009, the applicants' Agent wrote to the Commissioner concerning the subject property and the other property, giving the ACT Revenue account numbers for both properties. The letter relevantly stated:

> *Please be advised that we are no longer the Managing Agents for both* [address of subject property] *and* [address of other property].
>
> *Would you please change the postal address for these accounts to the owners, care of the property address at* [address of subject property].
>
> *Thank you for your cooperation in this regard and please don't hesitate to contact the office … should you have any queries.*

48. A 'received' stamp on the letter confirms that the Commissioner received the letter on 27 January 2009.

49. There is no evidence of any further action or communication relevant to this matter until 2017, when the Commissioner in the course of routine tax compliance inquiries with the ATO noted that the applicants had reported rental income for the subject property (and the other property) in their income tax returns. Further inquiry with the ACT Office of Rental Bonds confirmed the tenancy.

---

[11] T documents, page 23

50. By letter dated 3 March 2017, the Commissioner informed the applicants that "an investigation commenced by the ACT Revenue Office indicates the property may be rented or may have been rented in the past." The Commissioner attached a residential land tax notice issued under section 82 of the *Taxation Administration Act 1999* (**the TAA**) and asked the applicants to complete it and return it to the Commissioner. On 8 March 2017, the applicants completed and returned the notice. Relevant details were as follows.

51. Question 1 asked whether the subject property is "currently rented or has it been rented at any time in the past?" The applicants answered "Yes".

52. Question 2 asked the applicants to provide all of the dates that the property had been rented including past periods. The applicants answered 'Approximately rented 2008-2009 only. Accurate records available at ACT Government Bond Office'.

53. Question 4 asked the applicants whether they notified the ACT Revenue Office in writing of the property being rented. The applicants answered "Don't remember but assume the advice would have been constituted by the payment of land tax against assessment notices".

54. On 15 March 2017, arising from the applicants' responses, the Commissioner issued the Assessment.

55. Despite their previous understanding to the contrary, the applicants accepted at the hearing that they had not paid the primary land tax ($8,303.04), and were liable to pay it. In issue was the assessed penalty tax and the assessed interest.

Penalty tax

56. A liability to pay penalty tax is determined under section 31 of the TAA, which provides:[12]

[12] The applicants' liability to pay land tax must be determined according to the law in force at the time of the tax default, namely 31 December 2007 being 30 days after the property was rented by which time they were required (under section 14(3) of the *Land Tax Act*) to tell the Commissioner in writing that the subject property was rented. However this does not have consequence because section 31 has not been amended since 2000, save for addition of the

31 Amount of penalty tax

(1) The amount of penalty tax payable in relation to a tax default is 25% of the amount of tax unpaid, subject to this division.

(2) The amount of penalty tax payable in relation to a tax default is 50% of the amount of tax unpaid if the commissioner is satisfied that the tax default was caused wholly or partly by a failure by the taxpayer (or a person acting on behalf of the taxpayer) to take reasonable care to fulfil the taxpayer's obligations under a tax law.

(3) Subsection (2) does not apply if the tax payer satisfies the commissioner that the taxpayer (or a person acting on behalf of the taxpayer) had a reasonable excuse for the failure.

(4) Subsections (2) and (3) apply to a tax default that happened before their commencement in the same way as they apply to a tax default that happened after their commencement.

(5) The amount of penalty tax payable in relation to a tax default is 75% of the amount of tax unpaid if the commissioner is satisfied that the tax default was caused wholly or partly by the intentional disregard by the taxpayer (or a person acting on behalf of the taxpayer) of a tax law.

(6) No penalty tax is payable in relation to a tax default if the commissioner is satisfied that—

(a) the taxpayer (or a person acting on behalf of the taxpayer) took reasonable care to comply with the tax law; or

(b) the tax default happened solely because of circumstances beyond the taxpayer's control (or if a person acted on behalf of the taxpayer, because of circumstances beyond either the person's or the taxpayer's control) but not amounting to financial incapacity.

Note *The commissioner's decision to impose penalty tax is an internally reviewable decision (see s 107, def* **internally reviewable decision***), and the commissioner must give an internal review notice to the taxpayer (see s 107B).*

57. For the purposes of the TAA, and section 31 in particular, 'tax default' is defined in the Dictionary to the TAA as follows:

> ***tax default*** *means a failure by a taxpayer to pay, in accordance with a tax law, the whole or part of tax that the taxpayer is liable to pay.*

58. A 'tax default', as defined in the TAA, involves a failure to pay tax. However section 19A(4)(a) of the LT Act expands the definition to include non-compliance with section 14 of the LT Act which is a 'notification' provision, not a 'liable to pay' provision. Section 19A of the LT Act provides:

19A Interest and penalty tax payable on land tax if no disclosure

(1) This section applies if—

'Note' inserted by the *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008 (No 2)* A2008-37, amdt 1.453

(a) land tax is imposed on a parcel of rateable land; and
(b) the owner of the parcel of land fails to comply with section 14 (Commissioner to be told of change in circumstances).

(2) The owner is liable to pay interest on the amount of land tax from the end of 30 days after the 1st day of the 1st quarter for which the tax is imposed.

(3) Interest on the amount of land tax is worked out—
(a) for each month that the amount is payable; and
(b) on the 1st day of that month; and
(c) at the interest rate applying to that day; and
(d) on the total amount of land tax that is payable on a day when the interest is worked out.

Note The Minister may determine an interest rate for this section under the Taxation Administration Act, s 139.

(4) ***The Taxation Administration Act, division 5.2 (Penalty tax) applies to the owner of the parcel of land as if—***
(a) ***the owner's failure to comply with section 14 were a tax default****; and*
(b) a reference to interest under division 5.1 were a reference to interest under this section; and
(c) a reference to the amount of tax unpaid were a reference to the amount of land tax payable.

(5) This section applies to land tax imposed before or after the commencement of this section. (emphasis added)

59. Section 14 of the LT Act provides:

14 Commissioner to be told of change in circumstances

(1) This section applies in relation to a parcel of land that is—
(a) leased for residential purposes; and
(b) exempt from land tax or a foreign ownership surcharge.

(2) A relevant person for the parcel of land must tell the commissioner—
(a) of any change in the person's circumstances in relation to the parcel that would cause land tax or a foreign ownership surcharge to become payable for the parcel; and
(b) the date of the change in circumstances.

Note 1 If a form is approved under the Taxation Administration Act, s 139C, the form must be used.

Note 2 It is an offence to fail to notify the commissioner under this section (see Taxation Administration Act, s 67 (2)).

Note 3 It is also an offence to knowingly avoid paying, or disclosing a liability to pay, part or all of an amount of tax (see Taxation Administration Act, s 65 (1)).

(3) For subsection (2), the relevant person must tell the commissioner not later than 30 days after the date the circumstances change.

Examples—s (2) and s (3)—changed circumstances
1 a change of ownership of the parcel
2 the parcel is owned by an individual as trustee
3 the parcel is owned by a foreign person or an owner subsequently becomes a foreign person

4 the parcel is no longer a principal place of residence
5 the parcel is rented
6 the parcel is otherwise no longer exempt from land tax or a foreign ownership surcharge

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(4) In this section:

relevant person, for a parcel of land, means—

(a) the owner of the parcel of land; or
(b) if the owner has authorised an agent to act on the owner's behalf in relation to the parcel—the agent; or
(c) if the owner has died—the personal representative.

Examples—par (b)—agent
accountant, real estate agent, solicitor

60. As the Tribunal noted in *Hanley & Commissioner for ACT Revenue*:

> *Section 14 of the LTA requires the owner of land or an authorised agent to inform the Commissioner when residential land is rented and when the rental began. This must be done within thirty days of the start of the tenancy or the day ownership of the land changes. This strict obligation is placed on the owner because it is the owner who knows when the property is rented or when ownership changes. If the owner fails to do this, section 19A of the LTA treats that failure as a tax default for the purposes of penalty tax under Division 5.2 of the TAA.* [13]

61. In *Wade v Tan* the Tribunal made the same observation:

> *16. In summary, the grounds for imposition of land tax are that the property is leased on the first day of the quarter and is rented at any time in the previous quarter. The LTA provides for a written notice to be given to the Commissioner by the landowner or their agent about a property being rented and the date from which it is rented. If land tax is imposed and section 14 is not complied with, then interest and penalty tax apply in addition to the land tax payable.*
> *17. Non-compliance is treated as a tax default under the TAA. The amount of penalty tax is payable at a statutory rate depending on the circumstances of the default and in some circumstances, is not payable, can be reduced and/or can be remitted.* (footnotes omitted) [14]

[13] *Hanley & Commissioner for ACT Revenue* [2012] ACAT 64 at [42]
[14] *Wade & Tan v Commissioner for ACT Revenue* [2014] ACAT 79 at [16] – [17]

62. The explanatory memorandum to the *Land Tax (Interest and Penalty) Amendment Bill 2007* which introduced section 19A[15] confirms that position. It states:

> *Division 5.2 of the Taxation Administration Act 1999 applies penalty tax in the event of a tax default. Under section 19A, the failure to comply with section 14 of the Land Tax Act 2004 will be taken to be a tax default and as such, attract penalty tax under the Taxation Administration Act 1999.*

63. In this legislative context, the Commissioner relied upon two tax defaults for the purpose of imposing penalty tax:

    a. the applicants' failure to tell the Commissioner in writing that the subject property was rented and when the rental began as they were required to do under section 14(2) of the LT Act (**the first tax default**); and

    b. the applicants' failure to pay the land tax that they were liable to pay under section 9(1) of the LT Act (**the second tax default**).

64. The Commissioner contended that each tax default was caused wholly or partly by a failure by the applicants (or by the Agent acting on their behalf) to take reasonable care to fulfil their tax obligations under the LT Act, and that penalty tax of 50% is therefore payable under section 31(2) of the TAA.

65. The applicants contended that they (or the Agent acting on their behalf) took reasonable care to comply with the LT Act, and that under section 31(6) of the TAA no penalty tax is therefore payable. The applicants contended in the alternative that, if their actions did not amount to taking reasonable care, the actions constituted 'voluntary disclosure' of their tax liability so that the amount of penalty tax should be reduced by 80% under section 32 of the TAA, which provides:

> ***32 Reduction in penalty tax for voluntary disclosure***
> *The amount of penalty tax determined under section 31 is reduced by 80% if, before the commissioner informs the taxpayer that an investigation relating to the taxpayer is to be carried out, the taxpayer discloses to the commissioner, in writing, sufficient information to enable the nature and extent of the tax default to be determined*

[15] The Bill became law on 14 June 2007 per the *Land Tax (Interest and Penalty) Amendment Act 2007* A2007 - 20

66. Under section 31(1) of the TAA, if none of the circumstances described in Division 5.2 applies, the penalty tax payable is 25%. That rate is sometimes described, appropriately, as the 'default rate'.[16]

67. Under section 31(2), for the rate of penalty tax to be increased to 50%, the Commissioner must be "satisfied" that the tax default was "caused" (wholly or partly) by a failure by the taxpayer (or agent) to take "reasonable care" to fulfil the taxpayer's obligations under a tax law.

68. 'Satisfied' is not defined in the TAA and so takes its ordinary meaning. It is defined, relevantly, in the *Macquarie Dictionary* (7th edition) as "**3**. to give assurance to; convince: to satisfy oneself by investigation. **4**. to answer sufficiently (an objection etc."; solve (a doubt, etc.)". In the *Australian Concise Oxford Dictionary* (7th edition) it is defined relevantly as "**5**. furnish with adequate proof, convince, make confident, (of fact, that it is so; satisfy oneself, attain to practical certainty). **6**. adequately meet (objection, doubt, request, conditions)".

69. In *Vestas - Australian Wind Technology Pty Limited and Chief Executive Officer of Customs*,[17] the Administrative Appeals Tribunal (**the AAT**), per DP Forgie, observed that the meaning of 'satisfied' in a legislative provision depends upon the context in which it is used.

70. For example, in *Repatriation Commission v Smith*[18] a Full Court of the Federal Court considered section 120(4) of the *Veterans Entitlements Act 1986* (Cth) which required the Repatriation Commission to decide matters "to its reasonable satisfaction" when deciding whether Mr Smith was entitled to a pension. Regarding this requirement (where the AAT was conducting *de novo* review), Beaumont J for the Court said:

> *Even if the tribunal is not bound by the traditional evidentiary principles, s120(4) constitutes a clear direction to the tribunal that it must be reasonably satisfied before it makes any decision. In my opinion, this*

---

[16] *Van Duren & Anor v Commissioner for ACT Revenue* [2016] ACAT 121 at [17]

[17] *Vestas - Australian Wind Technology Pty Limited and Chief Executive Officer of Customs* [2013] AATA 721 at [93] – [101]

[18] *Repatriation Commission v Smith* (1987) 15 FCR 327; 12 ALD 798; 7 AAR 17

> *could only have been intended to introduce the standard of proof required in civil litigation.*

71. DP Forgie observed that in a different context to equate 'satisfied' or 'satisfaction' as requiring proof to the civil standard, meaning the balance of probabilities, only leads to confusion. She referred to the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[19] in which the Court considered section 22AA of the *Migration Act 1958* (Cth) which provides:

> *If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee.*

72. Whether the Minister could be so satisfied depended on whether the Minister was satisfied that the person met the definition of 'refugee' in section 4(1) of the *Migration Act*.

73. Regarding the Minister's task, the High Court stated:

> *Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature .... A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term 'balance of probabilities' played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term 'evidence' as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.*

74. DP Forgie went on to observe that 'satisfaction' to a standard other than the balance of probabilities does not give a decision-maker freedom to be satisfied on a purely subjective basis. She referred to the decision of the High Court in *Metropolitan Gas Co v Federal Commissioner of Taxation* in which the Court said:

> *It is the Commissioner that must be satisfied, not this Court; but* [the Commissioner] *must act 'according to the rules of reason and justice, not*

---

[19] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6 at [54]

> *according to private opinion …; according to law, and not to humour': he must not act in a vague or fanciful manner, but legally and regularly …'* [20]

75. In my view, 'satisfied' for the purposes of section 31(2) and 31(6) does not engage the civil standard of proof. Neither section calls for findings of fact for the purpose of resolving a dispute or granting a benefit. The sections involve the Commissioner's consideration of all relevant issues for the purpose of being satisfied (or not) that a taxpayer took (or failed to take) reasonable care to comply with the taxpayer's tax obligations. Referring to the dictionary definitions, 'satisfaction' requires the Commissioner to be 'convinced' or 'confident' or 'certain to a practical standard' that the stated circumstance applies in order to increase the penalty tax from the default rate to 50%, or to reduce it from the default rate to 0%.

76. 'Caused' is also not defined for the purposes of section 31 of the TAA and so it too should take its ordinary meaning. It is used as a verb and is defined, relevantly, in the *Macquarie Dictionary* (7th edition) as "**8**. to be the cause of; bring about.". As a noun, it is defined, relevantly, as "**1**. that which produces an effect; the thing, person, etc., from which something results. **2**. the ground of any action or result; reason, motive". In the *Australian Concise Oxford Dictionary* (7th edition) it is defined relevantly as "be the cause of, produce, induce, make".

77. For the tort of negligence to be actionable, a plaintiff must prove that the claimed damage is linked to, or 'caused' by, the fault of the defendant. The concept is easily stated, but is often difficult to apply. Every occurrence is the result of many causes which, jointly and with varying degrees of significance, produce the occurrence.

78. In *Law of Torts*,[21] Balkin and Davis comment that courts and academic writers have tried to explain the concept of causation using phrases such as 'result in', 'lead to', 'operate as a cause of' and 'be a factor in bringing about' the result. Courts have commented that the conduct in question needs to be a 'substantial', 'material' or 'real' cause of the outcome in issue. The authors comment

---

[20] *Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621, 632
[21] *Law of Torts*, 3rd edition, (2004) RP Balkin and JLR Davis

however that even these descriptors can be problematic and that more recent case law recognises that causation is essentially a question of fact to be resolved as a matter of common sense and experience.

79. Section 31(2) of the TAA addresses this conundrum, to some degree, because it applies if the tax default was caused 'wholly or partly' by a failure by the taxpayer to comply with their tax obligations.

80. Under section 31(6)(a), no penalty tax is payable if the Commissioner is "satisfied" that the taxpayer (or agent) "took reasonable care" to comply with the tax law. Implicit, for the purposes of section 31(6)(a), is that the tax default occurred despite the taxpayer taking reasonable care. It would be incorrect to approach section 31(6)(a) by thinking that if the person had taken reasonable care the tax default would not have occurred: such an approach would render section 31(6)(a) purposeless.

81. In this respect, section 31(6)(a) reflects principles of common law negligence. In other words, there is a point at which a person is not liable for another person's loss: accidents happen. I draw support for that view from *Miscellaneous Taxation Ruling* MT2008/1 issued by the ATO concerning a taxpayer's obligation to take reasonable care to comply with obligations under Commonwealth tax legislation, in force at the time of the applicants' tax defaults, which states:

> ***Meaning of reasonable care***
>
> *The expression 'reasonable care' is not a defined term and accordingly takes its ordinary meaning. The Australian Oxford Dictionary, 1999, Oxford University Press Melbourne, defines 'care' as '…3 serious attention; heed, caution, pains' and 'reasonable' as '3a within the limits of reason; not greatly less or more than might be expected'. Taking 'reasonable care' in the context of making a statement to the Commissioner or to an entity within the meaning of subsection 284-75(4) means giving appropriately serious attention to complying with the obligations imposed under a taxation law.*
>
> *28.* ***The reasonable care test*** *requires an entity to take the same care in fulfilling their tax obligations that could be expected of a reasonable ordinary person in their position. This means that even though the standard of care is measured objectively, it takes into account the circumstances of the taxpayer. This aspect of the test is addressed in the*

Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 where it states at paragraph 1.69:

> *Reasonable care requires a taxpayer to make a reasonable attempt to comply with the provisions of the ITAA and regulations. The effort required is one commensurate with all the taxpayer's circumstances, including the taxpayer's knowledge, education, experience and skill.*

...

35. Another important aspect of the reasonable care test that has a clear link to the principles applied in the law of negligence is that 'reasonable' does not connote the highest possible level of care or perfection. As Barwick CJ observed in Maloney v Commissioner for Railways (NSW) (1978) 52 ALJR 292 at 292; (1978) 18 ALR 147 at 148 in considering whether the respondent had failed to take reasonable care for the safety of a passenger:

> *the respondent's duty was to take **reasonable** care for the safety of his passengers. It is easy to overlook the all important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect.*

82. In *Aurora Developments Pty Ltd v Commissioner of Taxation (No 2)* the Federal Court, per Greenwood J, considered section 284-90 (1), item 3, of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**the TA Act**) which provides for a 'base penalty amount' if a tax shortfall resulted from a failure by a taxpayer "to take reasonable care to comply with [the applicable] taxation law". Greenwood J commented on the meaning of 'reasonable care' as follows:

> *38. It follows as a matter of principle that the reasonable care test calls upon a taxpayer to exercise the care that a reasonable person would be likely to have exercised in the circumstances of the taxpayer in fulfilling the taxpayer's tax obligations. The test looks to whether such a person would have foreseen, as a reasonable probability or reasonable likelihood, the prospect that the action or step or the failure to act or take an affirmative step would result in a shortfall amount and in determining that question, a relevant factual enquiry is whether the taxpayer made the reasonable attempts a person in the position of the taxpayer ought to have taken so as to comply with the provisions of a taxation law. At para 1.75 of the Explanatory Memorandum, the observation is made that a taxpayer who prepares his or her own Business Activity Statement would usually be taken to have exercised reasonable care if the taxpayer relies upon the advice of an accountant or lawyer (or both) whom the taxpayer could*

> *reasonably expect to provide competent advice on the relevant matter in issue.*
>
> *39. At para 1.76, the observation is made that a taxpayer would be at risk of a penalty if the taxpayer was careless (that is to say, did not act reasonably) in presenting all of the relevant facts to an adviser and such a failure material affected the advice upon which the taxpayer sought to rely.*
>
> *40. Although the facts of every case vary (and especially so in relation to factual questions of what may or may not be reasonable care in all of the contextual circumstances), … one question to be answered in determining whether the taxpayer and its advisers took reasonable care is whether, on the facts, there are steps that the taxpayer ought to have taken but did not take or steps that it did take that it ought not to have taken.* [22]

83. In *Tier Toys Ltd v Commissioner of Taxation*, the AAT commented on the meaning of 'reasonable care' for the purposes of section 284-90 (1), item 3, as follows:

> *74.… The expression "reasonable care" is an undefined term and so takes its ordinary meaning. "Reasonable" is defined in The Macquarie Dictionary as "1. endowed with reason. 2. agreeable to reason or sound judgment… 3. not exceeding the limit prescribed by reason, not excessive… 4. moderate…". "Care" is defined in The Macquarie Dictionary as "1. worry, anxiety, concern… 2. a cause of worry, anxiety, distress, etc….. 3. serious attention; solitude; heed; caution… 4. protection, charge… 5. an object of concern or attention… 7. to be concerned or solicitous; have thought or regard." The Revised Explanatory Memorandum to the A New Tax System (Tax Administration) Bill (No. 2) 2000 states (at [1.69]):*
>
> > *Reasonable care requires a taxpayer to make a reasonable attempt to comply with the provisions of the ITAA and regulations. The effort required is one commensurate with all the taxpayer's circumstances, including the taxpayer's knowledge, education, experience and skill.*
>
> *75.It follows that in the context of making a statement to the Commissioner within the meaning of s 284-75(4) of the TAA, taking "reasonable care" means giving appropriately serious attention to complying with the obligations imposed under a taxation law.* [23]

84. The ATO's Ruling and the cases demonstrate, in my view, that "reasonable care" does not require perfection or success. Rather, it requires a reasonable and

---

[22] *Aurora Developments Pty Ltd v Commissioner of Taxation (No 2)* [2011] FCA 1090 at [38] – [39]; (2011) 196 FCR 457

[23] *Tier Toys Ltd v Commissioner of Taxation* [2014] AATA 156 at [74] – [75]

serious (albeit unsuccessful) attempt to comply, having regard to the person's circumstances including their knowledge, education, experience and skill. I have considered the applicants' efforts to comply on that basis.

85. In *RVO Enterprises Pty Ltd v Chief Commissioner of State Revenue*[24] the (then) NSW Administrative Decisions Tribunal commented on factors which suggest a taxpayer took reasonable care, or failed to take reasonable care:

> *...attempts to comply with tax law, reasonable professional and other inquiries to ensure compliance, reliance on professional advice or on official published views of the tax law. Factors which indicate that a taxpayer failed to take reasonable care include oversight or forgetfulness to meet with obligations, failure to maintain adequate records and procedures to prevent errors from occurring, not seeking professional advice and errors in complying with the law.*[25]

86. It can be seen that taking reasonable care is not a mirror of a failure to take reasonable care. Each involves consideration of different facts.

Burden of proof

87. In the ordinary course, when determining an application for a review of an administrative decision under section 68 of the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**), the Tribunal 'stands in the shoes of the decision maker' and considers the issues *de novo* or afresh. It determines what it considers to be the correct or preferable decision based on the material before it.[26] However this does not apply to the Tribunal's review of tax decisions. When reviewing a decision of the Commissioner to which a taxpayer objects, section 101(3) of the TAA provides:

> *The burden of showing that an objection should be sustained lies with the taxpayer making the objection.*

88. The same position applies under section 14ZZK(b)(i) of the TA Act when a taxpayer applies to the AAT for review of a tax assessment made by the Federal Commissioner of Taxation. Regarding discharge of this burden, in *Rawson*

---

[24] *RVO Enterprises Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWADT 64

[25] *RVO Enterprises Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWADT 64 at [23], quoted with approval in *Scott and Anor v Commissioner for ACT Revenue* [2013] ACAT 73 and in *Highrise Concrete Contractors (Aust) Pty Ltd v Commissioner for ACT Revenue* [2014] ACAT 31

[26] *Bushell v Repatriation Commission* [1992] HCA 47; (1992) 175 CLR 408, 424-425

Finances Pty Ltd v Commissioner of Taxation, Jagot J of the Federal Court, said:

> *In a case where s 14ZZK(b)(i) of the TA Act applies the correct or preferable decision is to set aside the decision under review if the applicant has discharged the burden of proving that the assessment is excessive and to dismiss the review application if the applicant has not discharged that burden. The fact that the Tribunal cannot be satisfied that the Commissioner's assessments represent the correct or preferable decision does not mean that the applicant must succeed and the Commissioner fail. This would involve not only the casting of an onus of proof on the Commissioner but would also relieve the applicant of the applicant's burden of proof. Both would be impermissible*.[27]

Applicants' contentions

89. Regarding their failure to comply with section 14, the applicants properly acknowledged that they had not 'told' the Commissioner in writing that the subject property was rented or when the rental began. They contended however that, in substance, they had done so in the form of their oral and written communications informing the Commissioner that the subject property was under the management of the Agent and requesting that rates and land tax notices be sent to the Agent. As Mrs Marks succinctly put it in cross-examination regarding the applicants' letter dated 16 November 2007 to the Commissioner:

> *Do you agree with me, Mrs Marks, that nowhere on this letter, the 16 November 2007 document, does it say that the property is actually rented?*
>
> *---No, it doesn't but I wouldn't think that you would have to pay land tax if it wasn't rented.* [28]

90. Regarding their failure to pay the land tax, the applicants acknowledged that they owe (and have always owed) land tax on the subject property for the 11 month period when it was rented. They contended that they took reasonable care to comply with their obligation to pay the land tax, and – at the time – understood that they had paid it. They referred to their several communications

---

[27] *Rawson Finances Pty Ltd v Commissioner of Taxation* (2013) FCAFC 26 at [116]
[28] Transcript of proceedings, page 52, line 37 - page 53, line 5

with Commissioner and with their Agent which, they said, demonstrated their reasonable care to comply.

91. They contended that the Commissioner's recordkeeping system is fallible, and that it is unfair that the applicants are now being asked, 10 years after the event, to prove their communications and actions.

92. They contended that the 'typical' limitation period for commencing an action is seven years. They also relied upon section 64 of the TAA, which provides that a person who is required by a tax law to keep a record must keep the record for not less than five years after the date it was made or obtained, or the date of completion of the transaction or act to which it relates, whichever is the later.

93. The applicants contended that the Commissioner's investigation into 'high-value properties' did not comply with its own audit plan, which provided for a targeting of such properties from 1 July 2010, yet the subject property was rented from December 2007 to March 2009.

94. The applicants also complained about a misrepresentation of their response to the Commissioner's 'section 82 notice' in the Commissioner's report dated 15 March 2017 that accompanied the Assessment. Mr Marks stated, in answer to the question whether the applicants notified the Commissioner's office in writing that the subject property had been rented, that he could not remember but assumed the advice would have been constituted by the payment of the land tax. Yet the Commissioner's report, for the purpose of recommending 50% penalty tax and penalty interest, recorded only "The owners stated he [sic] doesn't remember notifying this Office of the property's rental status."

95. The applicants also noted that at the time when the subject property was rented they were very busy with a young family and in demanding employment. They contended that they relied upon the Agent to pay all rates and taxes arising on the subject property, and understood from the statements they received from the Agent that all rates and taxes were being paid.

96. They contended that to receive an assessment, 10 years after the event, for more than $26,000 arising from a land tax obligation arising from a single rental year

was unfair. They contended that with their belief that the land tax had been paid, and having moved into the subject property as their principal place of residence, their lives 'moved on'. They contended that "if it transpires that there was a shortfall in payment of land tax, it was by no means due to a lack of reasonable care on our part."[29]

Commissioner's contentions

97. The Commissioner contended that for many reasons the applicants were aware, or should have been aware, of their obligations under section 14 of the LT Act to tell the Commissioner in writing that the subject property was and to pay land tax in relation to the subject property.

98. The Commissioner contended that under section 31(2) of the TAA the applicants were liable to pay penalty tax at the rate of 50% because of their failure to take reasonable care to comply with either tax obligation. The Commissioner contended that the applicants failed to ascertain whether land tax for the subject property was being levied correctly or at all, despite paying land tax on the other property. The Commissioner contended that the applicants' understanding that the Agent had paid the land tax or would pay the land tax is irrelevant because it was their responsibility to check that it had been levied and paid. Under section 31(2), a taxpayer is liable for a failure by a person "acting on behalf of the taxpayer".

99. The Commissioner contended that at least from 6 or 7 August 2008 the applicants were aware that land tax had not been levied, but still they did not take steps to "check the status of land tax paid or payable for the subject property".

100. Regarding the first tax default, in his reconsideration decision dated 18 September 2017, the delegate of the Commissioner acknowledged receipt of the letters dated 16 November 2007 and 29 April 2008 but regarded that information provided as insufficient for the purposes section 14 because "unfortunately" neither letter stated that the subject property "was actually rented". The delegate stated that his Office "could make no assumption that the

[29] Witness statement of Mrs Marks

property was rented based upon the information contained in the letters noted above."

101. At hearing, the Commissioner retracted his position that the letter of 16 November 2007 had been received, but maintained that even if it had been received it did not constitute the 'requisite written disclosure' required under section 14 of the LT Act.

102. The Commissioner contended that there should not be any remission of penalty tax under of section 37(a) of the TAA because the circumstances that resulted in the liability for penalty tax were not 'exceptional'. Ignorance of the law or failure to properly ascertain whether land tax had been levied were not exceptional circumstances that resulted in either tax default.

103. The Commissioner urged upon the Tribunal to be "mindful that in order to promote the scheme of taxation legislation and the TAA, taxpayers who comply with their obligations should be in a better position than those who do not; that the outcome of the assessment reflects the intention of the legislature and promotes compliance" and is also "fair".

Consideration: non-compliance with section 14 of the LT Act

104. Regarding the first tax default, I am satisfied that at all material times the applicants were aware of their obligations to tell the Commissioner in writing that the subject property was rented, and when the rental began.

105. The best evidence of that awareness comes from Mr Marks' notice dated 17 April 2007 in relation to the other property signed by him.

106. The applicants made no real attempt (nor could they have reasonably done) to contend that they took reasonable care to comply with section 14 of the LT Act. Why the applicants did not complete a notice in relation to the subject property in the same way that Mr Marks did eight months earlier in relation to the other property was not explained.

107. At best, the applicants relied upon their letter dated 16 December 2007 to the Commissioner advising that the Agent was managing the subject property to contend that it was implicit, or the Commissioner should have presumed from

the letter, that the subject property was rented. However, as the Commissioner pointed out, the letter does not 'tell' the Commissioner that the property was rented as the applicants were required to state under section 14(2)(a). Also, it does not 'tell' the Commissioner 'when the rental began', nor could that be presumed or inferred from the letter.

108. For these reasons, I am not persuaded that the applicants have discharged the onus they carry to show why the Commissioner should not have been satisfied that the applicants' failure to comply with section 14 was caused by their failure to take reasonable care to comply with the tax obligation arising under that section.

109. It must follow that section 31(2) of the TAA applies, meaning that the penalty tax payable is 50% of the amount of tax unpaid, unless other provisions of Division 5.2 apply to permit reduction of the penalty tax. I return to that question below.

Consideration: non-payment of land tax

110. Regarding the second tax default, there was no suggestion from the applicants (nor could there be) that they were unaware of their obligation to pay land tax in relation to the subject property. The thrust of their evidence was that they were well aware of that obligation, and made efforts to comply.

111. There was also no issue that the applicants did not pay the tax despite their belief in December 2008 that they had done so. The issues were:

    (a) have the applicants demonstrated (having regard to the onus they carry) that the Commissioner should not have been satisfied that their failure to pay the land tax was caused (wholly or partly) by their failure to take reasonable care; and

    (b) if 'yes' to (a), have the applicants demonstrated that they took reasonable care to pay the tax.

112. If the answers are 'yes' to (a) but 'no' to (b), the default penalty tax rate of 25% is payable, unless other provisions of Division 5.2 apply to permit reduction of the penalty tax.

113. In my view the applicants have demonstrated that the Commissioner should not have been satisfied that the tax default was caused by their failure to take reasonable care.

114. On the Commissioner's own case, it received letters on 1 May 2008 and 27 January 2009 advising that the subject property was, or had been, under the management of the Agent. From reading the letters, in my view it should have been apparent that the subject property was rented. It is difficult to envisage another reason why the applicants would tell the Commissioner that the subject property was, or was no longer, managed by a real estate agent.

115. Also, the letter dated 27 January 2009 advising that the Agent was no longer the managing agent for the subject property, and requesting the Commissioner to direct further notices to the applicants personally at the subject property's address at least suggests that the termination of the property management agreement for the subject property arose because a tenancy had ceased and the applicants had commenced living in the property themselves.

116. I do not suggest that the Commissioner was obliged to inquire in order to remove uncertainty or obtain confirmation about the rental, or that there was any failure on the Commissioner's part by not doing so. I only observe, in the context of deciding whether the applicants failed to take reasonable care - which must be determined within the framework that their attempts to comply were unsuccessful - that a straightforward inquiry of the Agent by the Commissioner in response to the letters received would have resolved the non-compliance.

117. Counsel for the Commissioner contended that the written advice that the subject property was under the management of a real estate agent does not mean that the property was rented. She contended that the rental might not have eventuated so that land tax would not be payable.[30] She contended that it was

[30] Transcript of proceedings, page 107, lines 23-26

"not beyond the realms of possibility" that the applicants did not rent the property at all and appointed the Agent because they needed somebody "to monitor the mail."[31]

118. In my view, both possibilities are inherently unlikely. Regarding the former scenario, if the rental had not eventuated a further letter would have followed. Regarding the latter scenario, it would be rare indeed that a real estate agent would be appointed only for the purpose of monitoring a landholder's mail.

119. I here note that the Commissioner did not need to inquire about Mr Marks's letter dated 15 November 2007 concerning the other property, because the letter only confirmed what the Commissioner already knew from Mr Marks' notice sent on 17 April 2007.

120. I accept that a taxpayer's obligation to take reasonable care to comply with a tax law, and in this case to pay land tax for which they know they are liable, is an ongoing obligation. The applicants' letters of 16 November 2007 and 29 April 2008 advising the Commissioner that the subject property was under the management of a licensed real estate agent did not permit them to take no further step. When assessments were not received, as the Agent and the applicants expected, an obligation to address the absence of assessments arose.

121. In my view, in part, they attended to that obligation albeit unsuccessfully. The evidence shows that the applicants acted upon the apparent omission, although perhaps not as promptly as they might have done, by enquiring of the Agent by email and the Commissioner by telephone calls in 2008.

122. The Commissioner submitted that I should conclude from the absence in the screenshot regarding the subject property of any record of a phone call from Mrs Marks that she never made a phone call or phone calls.

123. Consistent with my conclusion regarding the applicants' letter dated 16 November 2007, I am not prepared to draw that conclusion in the face of the evidence on oath of Mrs Marks. As mentioned, the screenshots are not a complete record of communications to or from the Commissioner. It would also

[31] Transcript of proceedings, page 109, lines 16-19

appear that the information in the screenshot was manually entered, meaning that if a person from the office of the Commissioner took a phone call from Mrs Marks but did not record doing so in the computer system giving rise to the screenshot, no mention of the phone call would appear.

124. None of the authorities upon which the Commissioner relied was applicable. Cases such as *A Plus Plumbing,*[32] *Theron,*[33] and *Steele*[34] all concerned a circumstance where the taxpayer contended that they were not aware of their obligations to pay land tax. The cases stand for the settled proposition that lack of awareness is not an excuse, and that taxpayers have a positive obligation to know. Not to know and/or not to have made enquiries, in most cases, amounts to a failure to take reasonable care. That is not this case: the applicants knew their obligations and were making efforts to discharge them.

125. Other cases such as *Jokhan and Jokhan,*[35] concern circumstances where a taxpayer has not said anything to the Commissioner about rental of their residential property on the basis that they had instructed an agent (an accountant, a solicitor or a real estate agent) to do so on their behalf. The cases stand for the settled proposition that a taxpayer cannot defer responsibility to a third party. If the third party has failed to take reasonable care on behalf of the taxpayer, the taxpayer is responsible for the failure and is liable for any penalty. Those cases too are not applicable. There was no attempt to blame the Agent. Rather the applicants relied upon the Agent's conduct, in particular the Agent's communications (and their own) with the Commissioner.

126. Nevertheless, the fact that the applicants were aware of their land tax obligations and were making efforts to discharge them begs the question as to why they did not realise that, despite their efforts, land tax assessments had not been raised and land tax had not been paid. That was answered, in part, by the December 2008 statement regarding the subject property that they received from the Agent.

---

[32] *A Plus Plumbing and Building Services Pty Ltd & Commissioner for ACT Revenue* [2012] ACAT 76
[33] *Theron v Commissioner for ACT Revenue* [2013] ACAT 33
[34] *Steele v Commissioner for ACT Revenue* [2010] ACAT 15
[35] *Jokhan and Jokhan & Commissioner for ACT Revenue*[2012] ACAT 15 at [19] – [20]

127. Having reviewed the facts, I revisited the central question in this case: for what reasons, exactly, does the Commissioner contend that the applicants' failure to take reasonable care caused the tax default?

128. In his Reasons Statement and subsequently in his Statement of Facts and Contentions,[36] the Commissioner contended in different ways that the applicants were aware of their obligations in relation to land tax, and failed to tell the Commissioner in writing that the subject property was rented and the date when the rental began.

129. Neither proposition is disputed, but neither responds to the language in section 31(2). The subsection is not directed to a taxpayer's failure to comply with their obligation to pay land tax *per se*. It is directed at the cause of the tax default.

130. I accept that the applicants did not 'tell' the Commissioner 'in writing' that the subject property was rented or when the rental began, but I am not persuaded that that failure 'caused wholly or partly' the second tax default.

131. Twice the applicants wrote to the Commissioner (even if the first letter was not received) stating that the subject property was under the management of a real estate agent. The Agent in a third letter confirmed it. I accept Mrs Marks' evidence that she spoke with someone at the Commissioner's office regarding the rental of the subject property and inquired about absent land tax assessments. In light of these several subsequent communications, in my view the non-compliance with section 14 of the LT Act as a cause of the second tax default fades into the background.

132. I am satisfied that the applicants' failure to pay land tax was not caused, wholly or partly, by their failure to take reasonable care. The better conclusion is that, despite their communications with the Commissioner regarding the Agent's management of the subject property and their inquiries with their Agent and with the Commissioner about land tax obligations, there was not a 'joining of the dots' that, in my view, should have occurred and would have caused a land

[36] Statement of Facts and Contentions dated 11 April 2018, paragraphs 46 and 49

tax assessment to be raised. It follows that the decision to impose penalty tax of 50% must be set aside.

133. I turn then to the applicants' contention that they took reasonable care to comply with their obligation to pay land tax. This is a different test. It requires positive satisfaction that the applicants took all steps that they should reasonably have taken to comply with their obligation to pay land tax in relation to the subject property.

134. As mentioned above, the question should not be considered objectively. It involves consideration of the applicants' knowledge, education, experience and skill. There are too many deficiencies in the applicant's case for me to be satisfied that the applicants took reasonable care. I give two examples.

135. By email sent on 7 August 2008, the Agent told Mrs Marks that it "did not have any record of receiving a Land Tax account for [the subject property]". At that point, the applicants must (or should have) have understood that their letter dated 16 November 2007 had not caused a land tax assessment to be raised. Even if Mrs Marks then pursued the matter by telephone with the Office of the Commissioner, there is no evidence, (save perhaps the December 2008 statement from the Agent to which I return) to show why the applicants were, or could have been, reasonably satisfied that the oversight (if it can be characterised in that way) had been addressed. In particular, there is no evidence that the Agent ever informed the applicants that the assessments were being received.

136. The applicants knew, or should have known, from their ownership of the subject property and the other property, and the monthly statements they received from the Agent in relation to each property, that rates and land tax are payable quarterly and at different times. Whilst the Tribunal received in evidence only the statements for the subject property for October and December 2008, and none for the other property, I anticipate (consistent with the October 2008 statement) that the subject property statements would show the absence of any quarterly payments for land tax referenced to an account number in relation to the subject property, unlike the other property, and that the disbursement of

$2,500 against the subject property on 1 December 2008 was anomalous. It does not refer to any account number. It is a 'one off' payment. It referred to 'rates and land tax', not just 'land tax'. I do not suggest that the applicants realised the anomaly at the time, but they would have done so had they taken reasonable care.

137. Where I am not satisfied that the applicants took reasonable care to comply with their tax obligation to pay land tax in relation to the subject property, it follows that section 31(6) of the TAA does not apply, and the default rate applies unless there are other grounds upon which it should be remitted.

Remission of penalty tax

138. Section 37 of the TAA provides:

> ***37 Remission of penalty tax***
> *The commissioner may remit all or part of an amount of penalty tax payable by a person if satisfied that—*
> *(a) either—*
> *(i) the person has taken reasonable steps to mitigate, or to mitigate the effects of, the circumstances that resulted in the liability for penalty tax; or*
> *(ii) the circumstances that resulted in the liability for penalty tax were exceptional; and*
> *(b) it would be fair and reasonable to remit all or part of the penalty tax.*
>
> *Note The commissioner's decision to refuse to remit penalty tax payable by a person is an internally reviewable decision (see s 107, def internally reviewable decision), and the commissioner must give an internal review notice to the person (see s 107B).*

139. Regarding the failure to comply with section 14 of the LT Act, the purpose of section 14 is to establish a system of self-reporting. The onus is on the taxpayer to disclose the rental of a residential property to the Commissioner, and when the rental began. It is not sufficient to disclose the rental to a third party, for example the Office of Rental Bonds or the Registrar-General of Land Titles, and expect the Commissioner to learn about the rental by making his own inquiries.[37]

[37] *James v Commissioner for ACT Revenue* [2013] ACAT 32 at [31] – [33]

140. I also recognise that the obligation under section 14 to tell the Commissioner about the rental 'in writing' means that an oral communication about the rental, for example by a telephone call, is not sufficient. When managing tax assessments, the Commissioner should not be exposed to debate after the event about 'who said what'. It is, under the TAA, for the taxpayer to provide these details in writing to preclude such debate.

141. However, in the context of remittal of penalty tax arising from a failure to comply with section 14, it is necessary to consider the purposes of the section: self-reporting and contemporaneous proof of the self-reporting.

142. To illustrate, assume the Commissioner held on his or her file a contemporaneous file note, signed and dated, of a telephone call from a taxpayer recording the taxpayer's statement that a residential property owned by the taxpayer was rented, the address, section and block numbers and the date when the rental began. The taxpayer would still have failed to comply with section 14, despite the Commissioner having all the information needed to raise an assessment. I reject the proposition that in such a circumstance the Commissioner could or would not act upon the information received to assess the property for land tax, or could or would take no action.

143. In this case, the applicants' written communications to the Commissioner, whilst not actually stating that the subject property was rented or from when, came very close to achieving their purpose. As discussed, it should have been apparent that the purpose of the letters was to inform the Commissioner of the rental of the subject property. I accept that in response to the letters and to calculate the land tax the Commissioner needed to know the date upon which the rental began, and perhaps to confirm the rental of the property, but he only had to ask.

144. I am satisfied that the circumstances that have resulted in the liability to pay land tax arising from compliance with section 14 are 'exceptional', and that it would be fair and reasonable to remit the penalty tax in part. I remit by 25%.

145. I reached a different view regarding the applicants' failure to pay the land tax. Mitigation under section 37(a)(i) of the TAA is not applicable because there is

nothing to mitigate: this case concerns a short-term liability that occurred 10 years ago. Also, there is nothing 'exceptional' about the circumstances that resulted in the applicants' failure to pay the tax. At core, all it can be said is that the applicants provided information, but it did not cause the Commissioner to raise an assessment. They are, in part, responsible for that inaction.

Interest

146. Neither the decision to impose interest nor the decision not to remit interest is a reviewable decision. Those decisions can be the subject of an objection to be reviewed by a delegate of the Commissioner, as occurred in this case,[38] but cannot be the subject of review by the Tribunal.[39]

147. I can only offer a view that market interest would appear properly levied to reflect the fact that the Commissioner has been without his money, but the Commissioner should consider whether to waive the premium component having regard to these reasons for decision.

148. The delegate of the Commissioner acknowledges that the applicants 'responded immediately and truthfully to the land tax investigation'.[40] Is also appears clear, for reasons discussed above, that the applicants were unaware of their unpaid land tax liability until it was drawn to their attention by the Commissioner 10 years after the event. Had the Commissioner done so earlier, the issue would have been resolved earlier and consequential interest would have been avoided. This is not a case where the Commissioner knew nothing about an apparent land tax liability until conducting its investigation in 2017. The correspondence from the applicants and the Agent in 2008 and 2009 is to the contrary.

149. I also note that where I have concluded that penalty tax should be partly remitted under section 37, the Commissioner's power to remit interest under section 29(1)(c) of the TAA is available.

Other matters

---

[38] Reasons Statement dated 18 September 2017, pages 9 and 10, T documents, pages 16 and 17

[39] *Wade & Tan v Commissioner for ACT Revenue* [2014] ACAT 79 at [XX]; *Van Duren and Anor v Commissioner for ACT Revenue* [2016] ACAT 121 at [50]

[40] Reasons Statement, T documents, page 9

150. Nothing turns upon the applicants' complaint about the assessing officer's 'selective quoting' of Mr Marks' response to the section 82 notice. First, on review, I have considered the full response not just the part quoted by the assessing officer. Second, that part of Mr Marks' response not quoted is irrelevant because Mr Marks' assumption about advice being constituted by payment of land tax was not correct: there was no payment.

151. Mr Marks' general complaint about the fallibility of the Commissioner's records management system and non-compliance (in 2008) with section 16 of the *Territory Records Act 2002* did not advance his case. Save for Mr Marks' letter dated 16 November 2007, there was no suggestion of any correspondence or notice sent to the Commissioner but not received. I acknowledge that, under section 64 of the TAA, the applicants were not required to keep records for more than five years after a tax law required them to keep the record, but there was no claim that the applicants disposed of any record that may have assisted their case.

152. Last, I have accepted Mrs Marks' evidence that she telephoned the Office of the Commissioner to discuss the applicants' land tax liability in relation to the subject property, but those telephone calls did not discharge their statutory obligation under section 14 or establish that the applicants took reasonable care to pay the land tax.

153. The applicant's claim for a reduction of penalty tax by 80% under section 32 of the TAA is misconceived. In order for that section to apply, the applicants were required to provide "sufficient" information to enable the nature and extent of the tax default to be determined before an inquiry began. The core issue in this case was the insufficiency of the information provided.

154. Last, whilst I have sympathy for the applicants in having to face a claim for unpaid land tax 10 years after the event, Mr Marks did not refer me to any statutory limitation provision, nor could I find such a provision, which prevented the Commissioner from imposing the tax. Nor did Mr Marks refer me to or any authority commenting on when the Commissioner should not raise an assessment because of the passage of time.

155. Ms Katavic submitted that the obligation on a taxpayer is "a static obligation and it remains continuous … It always exists".[41]

156. The Commissioner's power to 'make an assessment of the tax liability on the taxpayer' under section 7(1) of the TAA is stated at large. I was not persuaded on the material or law put forward that the Commissioner lacked power to issue the Assessment because of the passage of time.

Conclusion

157. Taking all these matters into account the Tribunal will vary the decision under review by imposing 25% rather than 50% penalty tax consequent upon the applicants' failure to pay land tax in the period 1 December 2007 to 31 March 2009 and their failure to comply with section 14.

……..
Presidential Member G McCarthy

[41] Transcript of proceedings, page 119, lines 21-28

HEARING DETAILS

FILE NUMBER:	AT 61/2017
PARTIES, FIRST APPLICANT	Tony Allan Marks
PARTIES, SECOND APPLICANT	Alison Jane Marks
PARTIES, RESPONDENT:	Commissioner for ACT Revenue
COUNSEL APPEARING, FIRST APPLICANT	N/A
COUNSEL APPEARING, SECOND APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	Ms K Katavic
SOLICITORS FOR FIRST APPLICANT	N/A
SOLICITORS FOR SECOND APPLICANT	N/A
SOLICITORS FOR RESPONDENT	ACT Government Solicitor
TRIBUNAL MEMBERS:	Presidential Member G McCarthy
DATE OF HEARING:	14 June 2018