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Administrative Appeals Tribunal of Australia

Johnston and Commissioner of Taxation [2011] AATA 20 (20 January 2011)

Last Updated: 20 January 2011

Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION [2011] AATA 20

ADMINISTRATIVE APPEALS TRIBUNAL)

) No 2010/2740

TAXATION APPEALS DIVISION)

Re BYRON JOHNSTON

Applicant

And COMMISSIONER OF TAXATION

Respondent

DECISION

Tribunal Senior Member S E Frost

Date 20 January 2011

Place Canberra

Decision The objection decision in relation to the 2008 income year is varied so as to remit the shortfall penalty to nil.

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

S E Frost

Senior Member

CATCHWORDS

Taxation – Imposition of administrative penalty - Taxpayer failed to give valid notice of intention to claim deduction for contribution to superannuation fund - Lack of reasonable care – Remission appropriate on basis that imposition of penalty harsh with regard to particular circumstances of taxpayer

Income Tax Assessment Act 1997 ss 290-170, 290-170(1)(b)

Taxation Administration Act 1953 ss 284-75(1), 284-90(1) and 298-20

Dixon v Federal Commissioner of Taxation (2008) 167 FCR 287; [2008] FCAFC 54

REASONS FOR DECISION

Senior Member S E Frost

INTRODUCTION

1. The taxpayer has made two applications to the Tribunal; both relate to claims for deduction in respect of personal superannuation contributions.
2. The first application, relating to the 2007 income year, was resolved by way of a consent decision under s 42C of the *Administrative Appeals Tribunal Act 1975*.
3. The second application, relating to the 2008 income year, has been narrowed to a dispute about penalty. The taxpayer now accepts that the claim for a deduction cannot be sustained because the strict terms of the income tax law, authorising such a deduction, have not been complied with.
4. The lack of entitlement to the deduction resulted in a tax shortfall, and that, in turn, led to the imposition of administrative penalty for what the Commissioner says amounts to a failure to take reasonable care to comply with a taxation law. The taxpayer says that neither he nor his agent failed to take reasonable care, but if either of them did, then the penalty should be remitted, in whole or in part.
5. I have decided that the circumstances leading to the lodgment of the taxpayer's tax return for the 2008 year disclose a failure on the part of the taxpayer's agent to take reasonable care, and that the administrative penalty at the rate of 25% of the tax shortfall was properly imposed. However, I have also decided that, in the particular circumstances of this case, it is appropriate to remit the administrative penalty in full. My reasons for these conclusions follow.

THE CIRCUMSTANCES LEADING TO THE DEDUCTION CLAIM

6. In 2007, when Mr Johnston sold an investment property that he had held for many years, he saw the opportunity to obtain significant tax benefits by depositing the sale proceeds, over a period of several years, into his superannuation account. He discussed his strategy in general terms with his accountant, Mr Gregory Hollands of Hollands & Partners, who had assisted Mr Johnston with his tax affairs for around 30 years. Mr Hollands thought the strategy was sound.
7. In due course Mr Johnston made what he thought would be tax-deductible contributions to his superannuation fund.

THE DISALLOWANCE OF THE DEDUCTION CLAIM

8. What he did not know at the time was that, for the contribution for the 2008 income year to be deductible, he needed to give the trustee of his superannuation fund a "valid notice, in the approved form, of [his] intention to claim the deduction", and the trustee must have given him an acknowledgment of receipt of that notice: s 290-170 of the *Income Tax Assessment Act 1997* (ITAA). Mr Johnston did in fact provide the notice to his superannuation fund, but he only did that in July 2010 after the Tax Office had queried his deduction claims and indicated that there were some shortcomings in the paperwork. By then it was too late, because the inflexible time limit set by s 290-170(1)(b) of the ITAA had been exceeded.

WHY WAS THE DEDUCTION CLAIM INCLUDED IN THE TAXPAYER'S RETURN?

9. The deduction claim was included in the taxpayer's 2008 return because:
. Mr Johnston made a contribution to his superannuation fund which he mistakenly thought was deductible; and
. his tax agent, Mr Hollands, failed to ensure that the strict requirements of the ITAA had been complied with.

WAS THERE A FAILURE TO TAKE REASONABLE CARE?

10. Mr Johnston could hardly be blamed for not being aware that he had to provide a "notice of intent to claim a deduction" to his superannuation fund. He is not a superannuation expert or a taxation expert, and the requirement for a "notice of intent" is not particularly well highlighted in the public material dealing with the tax treatment of superannuation contributions. Mr Johnston's research, undertaken around the time of the then Government's announcement in late 2006 and early 2007 of the so-called "simpler super" proposals, uncovered the deduction limits for a person his age but did not alert him to any additional administrative requirements for deductions to be allowable. In my view, the inclusion of the deduction claim in his 2008 tax return is not attributable to any extent to a failure on Mr Johnston's part to take reasonable care to comply with a taxation law.
11. Unfortunately the same cannot be said in relation to his agent Mr Hollands. Mr Hollands said in his witness statement, at paragraph 8:

> *It was my direct experience as a tax agent to that point in time that superannuation funds asked contributors the type of contribution that was being made so that the appropriate allocation could be made by them. It was my understanding that this was done either at the time of the contribution being made or at the end of the financial year. In the past we had been asked by clients to clarify correspondence received by them from superannuation funds as to the correct classification of their contributions if they were in any doubt.*

12. Mr Hollands also noted in his witness statement that Mr Johnston had not asked him in any detail about specific superannuation investments or any of the processes by which tax advantages might be achieved.
13. When Mr Johnston provided to Mr Hollands' firm the information that would be used to prepare Mr Johnston's tax return, no questions were asked as to whether Mr Johnston had sent any notifications to his superannuation fund, or whether the fund had provided any correspondence to Mr Johnston. Mr Hollands conceded in his oral evidence that it was "assumed" within the firm that the superannuation fund had properly attended to the paperwork and that Mr Johnston was properly entitled to a deduction for the personal superannuation contribution he had made.
14. It is clear that the single most significant factor that led to the lodgment of the 2008 return with an unsupportable deduction claim was the failure of Mr Hollands, or any member of staff at Mr Hollands' firm, to ask Mr Johnston for confirmation that the administrative requirements to support the claim had been complied with.
15. The deduction, if allowable, would have reduced Mr Johnston's taxable income by almost 75%. In those circumstances, reasonable care on the part of a registered tax agent should have triggered an enquiry of Mr Johnston to confirm the availability of the deduction. The failure to make that enquiry constitutes a failure on the part of Mr Johnston's agent to take reasonable care to comply with a taxation law. As a result, the administrative penalty of 25% of the shortfall amount was properly imposed under s 284-75(1) and item 3 in the table in s 284-90(1) in Schedule 1 to the *Taxation Administration Act 1953* (TAA).

IS REMISSION OF THE PENALTY WARRANTED?

16. Section 298-20 in Schedule 1 to the TAA gives the Commissioner (and the Tribunal, on review) the discretion to remit a shortfall penalty.

17. In *Dixon v Federal Commissioner of Taxation* [2008] FCAFC 54; (2008) 167 FCR 287, the Full Court of the Federal Court stated (at 292) that the relevant question to be determined when exercising the discretion to remit is:

> *whether any part of the penalty should be remitted on the basis that the outcome is harsh, having regard to the particular circumstances of the Taxpayer.*

18. This is a taxpayer who contributed a significant amount to his superannuation fund in the honest but mistaken belief that he would be entitled to a tax deduction. He would, in fact, have been entitled to the deduction if the paperwork had been properly attended to. The disallowance of the deduction increased his tax bill by almost $40,000. It is harsh, in the circumstances, that he should pay a penalty of almost $10,000 when it was a shortcoming in the paperwork, pure and simple, that led to the denial of the deduction.

19. To the extent that administrative penalties serve the combined purposes of encouraging compliance with the law and deterring non-compliance, the penalty in this case does not achieve either of those ends. Mr Johnston struck me as a person of integrity who already treats his tax obligations seriously. Mr Hollands impressed me as a competent tax agent who regrets his error and the impact it has had on a client of 30 years' standing. There is no good purpose to be served by leaving the penalty in place.

CONCLUSION

20. The penalty should be remitted in full.

DECISION

21. The objection decision in relation to the 2008 income year is varied so as to remit the shortfall penalty to nil.

I certify that the 21 preceding paragraphs are a true copy of the reasons for the decision herein of Senior Member S E Frost

Signed: .....[sgd].....

Associate

Date of Hearing 15 December 2010

Date of Decision 20 January 2011

Applicant's Representative: G Hollands (Hollands & Partners)

Respondent's Representative: Rana Sayed (Australian Taxation Office)