FEDERAL COURT OF AUSTRALIA

Shears v Deputy Commissioner of Taxation [2014] FCA 800

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| Citation: | Shears v Deputy Commissioner of Taxation [2014] FCA 800 | |
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| Parties: | **RICHARD JOHN SHEARS v DEPUTY COMMISSIONER OF TAXATION** | |
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| File number: | NSD 454 of 2014 | |
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| Judge: | **FOSTER J** | |
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| Date of judgment: | 30 July 2014 | |
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| Catchwords: | **PRACTICE AND PROCEDURE** – whether a putative applicant for judicial review should be granted an extension of time within which to make his judicial review application – whether the foreshadowed judicial review application is bound to fail because the decisions and conduct under challenge are not amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) because the relevant decisions are within the classes of decision exempted from the operation of that Act by par (e) of Sch 1 to that Act and because some of those decisions are not otherwise amenable to review under that Act because they are not *“decisions”* within the meaning of that Act | |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977*, ss 3, 5 and 6  *Income Tax Assessment Act 1936* (Cth), ss 104, 105A and 105AA  *Income Tax Assessment Act 1997* (Cth)  *Judiciary Act 1904* (Cth), s 39B  *Taxation Administration Act 1953* (Cth), s 255-5(2) and Pt IVC  *Federal Court Rules 2011*, r 31.01 and r 31.02 | |
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| Cases cited: | *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321  *Federal Commissioner of Taxation v Administrative Appeals Tribunal* (2011) 191 FCR 400  *Intervest Corporation Pty Ltd v Commissioner of Taxation* (1984) 3 FCR 591  *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* (2010) 189 FCR 189 | |
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| Date of hearing: | Decided on the Papers |
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| Date of last submissions: | 17 July 2014 |
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| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | CATCHWORDS |
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| Number of paragraphs: | 55 |
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| Solicitor for the Applicant: | Mr M Griffin of The People’s Solicitors |
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| Counsel for the Respondent: | Mr CJ Peadon |
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| Solicitor for the Respondent: | ATO, Review & Dispute Resolution |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 454 of 2014 |

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| BETWEEN: | RICHARD JOHN SHEARS  Applicant |
| AND: | DEPUTY COMMISSIONER OF TAXATION  Respondent |

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| JUDGE: | FOSTER J |
| DATE OF ORDER: | 30 JULY 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The applicant’s Application for an Extension of the Time within which he might file an Originating Application for Judicial Review in accordance with the draft Originating Application lodged with the Court on 7 May 2014 be dismissed.
2. The applicant pay the respondent’s costs of and incidental to the said Extension of Time Application.

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

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| GENERAL DIVISION | NSD 454 of 2014 |

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| BETWEEN: | RICHARD JOHN SHEARS  Applicant |
| AND: | DEPUTY COMMISSIONER OF TAXATION  Respondent |

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| JUDGE: | FOSTER J |
| DATE: | 30 JULY 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. The applicant is an Australian resident who works as a journalist and author. From time to time, he receives payments from overseas sources.
2. At the end of 2010, the respondent (**Commissioner**) conducted an audit of the applicant’s tax affairs for the 2005, 2006, 2007, 2008 and 2009 Income Tax Years.
3. On 16 May 2011, the Commissioner issued a position paper to the applicant in relation to his tax affairs. No response to that paper was received from the applicant or from any other person on his behalf within the time requested.
4. In August and September 2011, the Commissioner issued default assessments to the applicant for each of the 2006, 2007, 2008 and 2009 Income Tax Years. He also issued an amended assessment in respect of the 2005 Income Tax Year. In addition, the Commissioner issued penalty notices to the applicant for failing to lodge Income Tax Returns and for making false and misleading statements in relation to his tax affairs.
5. On 20 October 2011, the Commissioner commenced proceedings in the Supreme Court of New South Wales to recover the outstanding tax liabilities claimed in the assessments and notices which he had by then issued to the applicant together with interest. When the Supreme Court proceedings were commenced, the total amount claimed by the Commissioner (excluding costs) was $1,658,938.95.
6. On 20 December 2012, the Commissioner obtained judgment by default against the applicant in the amount of $1,883,653.31 (inclusive of costs).
7. On or about 10 July 2012, which was after the Supreme Court proceedings had been commenced but before judgment by default was obtained, the applicant’s tax agent lodged objections to each of the assessments made by the Commissioner in respect of the 2005, 2006, 2007, 2008 and 2009 Income Tax Years.
8. On 10 October 2013, the Commissioner allowed the applicant’s objections in part. The Commissioner’s decisions in respect of the applicant’s objections to the 2011 assessments were notified to the applicant care of his accountant by letter dated 10 October 2013 with which was enclosed a 12-page document entitled *Reasons for decision*. By his letter dated 10 October 2013, the Commissioner informed the applicant that he would shortly receive amended assessments for each of the 2005, 2006, 2007, 2008 and 2009 Income Tax Years.
9. On 18 October 2013, the Commissioner issued a Notice of Amended Assessment of Income Tax to the applicant for each of the 2005, 2006, 2007, 2008 and 2009 Income Tax Years. Those amended assessments gave effect to the Commissioner’s decisions in respect of the objections lodged by the applicant in July 2012. The effect of the Commissioner’s decisions in respect of the applicant’s objections was to reduce the applicant’s tax debt. As at 5 May 2014, that debt was $1,153,126.50.
10. On 29 November 2013, the Commissioner issued a Bankruptcy Notice to the applicant for the sum of $1,115,050.35. That amount was the amount owing by the applicant as at that date after due allowance was made for the Commissioner’s decisions in respect of the applicant’s objections to the 2011 assessments.
11. On 28 March 2014, the applicant commenced a proceeding in this Court seeking to set aside the Bankruptcy Notice. That application has been adjourned to the Registrar’s list today.
12. All of the October 2013 amended assessments were sent to the applicant care of his accountant.
13. The applicant says that he did not become aware of the amended assessments until early March 2014 when he obtained them from his accountant. He gave no evidence as to whether he was ever informed about the Commissioner’s letter dated 10 October 2013 and, if so, when and in what circumstances he was so informed.
14. On 7 May 2014, the applicant applied to this Court for:

… an extension of time under r 31.02 [of the *Federal Court Rules 2011*] to lodge an application for an order for review under [the *Administrative Decisions (Judicial Review) Act 1977* (Cth)] (**ADJR Act**).

1. Rule 31.02 of the *Federal Court Rules 2011* allows a person who wishes to seek relief under the ADJR Act out-of-time to apply for an extension of time within which to seek such relief.
2. By Notice of Objection to Competency filed on 10 June 2014, the Commissioner contends that the whole of the foreshadowed judicial review application would be incompetent. The grounds specified in that Notice are:

**GROUNDS OF OBJECTION**

1. The decision is one that falls within a class of decisions that is excluded under Schedule 1(e) of the ADJR, being decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under the *Income Tax Assessment* Act1936*, Income Tax Assessment* Act 1997 and *Taxation Administration* Act 1953.

1. The only issue raised by the Commissioner in his Notice of Objection to Competency is whether all of the decisions made by the Commissioner which are sought to be challenged by the applicant in his foreshadowed judicial review application are exempt from challenge by reason of the operation of par (e) of Sch 1 to the ADJR Act and whether, for similar reasons, the conduct of the Commissioner which is sought to be reviewed is also incapable of being challenged under the ADJR Act. If those decisions and that conduct are not amenable to challenge under the ADJR Act, then there would be no point in granting an extension of time to the applicant. In that event, the whole of this proceeding should be dismissed. The arguments before me addressed the substance of the matter without regard to the technicalities. The real question under consideration was whether it would be open to the applicant to seek judicial review of those decisions and conduct of the Commissioner identified in his draft Application for Judicial Review or whether the applicant’s foreshadowed Application was bound to fail because of par (e) of Sch 1 to the ADJR Act and the interpretation of the expression *“decision”* under that Act.
2. By these Reasons for Judgment, I determine whether the foreshadowed judicial review application would be competent and thus whether this proceeding should be dismissed.

# The Materials Before the Court

1. The applicant has not identified in his Extension of Time Application the decision or decisions made by the Commissioner which he seeks to have reviewed.
2. However, in the draft Originating Application for Judicial Review lodged with his Extension of Time Application, the applicant identified the decisions and conduct of the Commissioner which he seeks to challenge in the following terms:

The Applicant applies to the Court to

Review the decisions of the Respondent that:

1. The Applicant was not in a partnership with another party when assessing his tax liability;

2. Held that the Applicant was solely and exclusively liable for the tax liabilities of the partnership businesses he was conducting with others;

3. Amounts held by the Applicant in bank account numbers 55-498-7740 & 69‑666‑9000 at National Australia Bank (‘the NAB accounts’) and in other accounts were derived as the sole and exclusive income of the Applicant and, hence, were his taxable income;

4. Amounts held in the NAB accounts and in other accounts did not include amounts paid into that account by third parties for work undertaken by parties other than the Applicant and for that other party’s exclusive use or joint use with Applicant;

5. Amounts paid from the NAB accounts and from other accounts were not business expenditures of the Applicant but the expenditures of a corporation (Neo Media Pty Ltd (now in liquidation)) – in which the Applicant held shares and for which he was a director and, hence, were not deductions the Applicant could claim against his assessable income.

6. In determining that the income in the NAB accounts and in other accounts was the sole income of the Applicant, failed to make further determination that the amounts paid out as expenditures from the NAB accounts and other accounts, which the Respondent had determined were expenditures of Neo Media not the Applicant, were loans made by the Applicant to Neo Media Pty Ltd and, hence, due to Neo Media’s liquidation, were bad debts that the Applicant could never recoup and, on that basis, were losses incurred by the Applicant in the course of his business that are deductable from his assessable income. Put simple, failed to assess amounts paid out by the Applicant for maintenance of equipment determined to be owned by Neo Media Pty Ltd, as loans to Neo Media Pty Ltd and, hence, as losses incurred by the Applicant in the form of bad debts that would need to be written off by the Applicant against his income as they would never be recouped due to Neo Media Pty Ltd’s liquidation.

7. Amounts held by the Applicant in the NAB accounts were taxable ‘income’ rather than a business debt owed by the Applicant to a third party under contract;

8. Treated amounts held by the Applicant in the NAB accounts as taxable income when orders had been previously made in the Supreme Court NSW in matter *The Deputy Commissioner of Taxation v Richard John Shears* 2011/00334208 (‘the Supreme Court matter’) that the same amounts were a business debt that the Applicant had to repay to another party with interest;

9. Failed to consider that the interest owed on the loan from which the Supreme Court matter arose was a debt owed by the Applicant to the lender and, hence, an allowable deduction against his assessable income.

10. Sought to obtain unpaid withholdings tax for royalty payments made to the Applicant by publishes, agents and other payers for the Applicant’s creation of intellectual property from the Applicant not from the parties obligated to make and pay the withholdings tax.

11. Treated payments made to the Applicant by publishers, agents and other payers as royalty payments, salaries and fees subject to income and with holdings tax and not as assignments of the Applicant’s rights in intellectual property subject to Capital Gains Tax.

12. Failed to consider the hardship application made by the Applicant.

13. Caused proceedings to be commenced, orders and judgements to be obtained in the Supreme Court matter for claims of outstanding tax on amounts that had earlier been determined by orders in another Supreme Court NSW matter to be a business debt the Applicant was required to repay with interest to a third party thus causing an abuse of process in that Court by causing inconsistent judgements and orders to be made in that Court with respect to the same subject matter and funds;

14. Brought claims in the Supreme Court matter for amounts originally assessed on the first Notices of Assessments issued to the Applicant rather than lesser amounts reassessed subsequently on Notices of Amended Assessments and, thereby, in effect, rejecting the Applicant’s Objections after initially accepting them.

15. Imposed penalties, fines and interest upon amounts assessed for periods during which the Respondent was making its determinations, assessments and its re-assessments.

Review the conduct of the Respondent in:

1. Failing to investigate the true character and source of the funds held by the Applicant in the NAB accounts and in other accounts that the Respondent had predetermined was the exclusive taxable income of the Applicant rather than business debts and losses arising from a loan agreement between the Applicant and a third party and bad loans made by the Applicant;

2. Failing to investigate whether orders has been made in other proceedings that would have been inconsistent with the orders sought and obtained in Supreme Court matter;

3. Failing to properly investigate by whom, for what purpose and to whom, amounts paid to the Applicant in the NAB accounts, as well as into other accounts, were actually paid;

4. Failed to properly investigate which parties other than the Applicant had access to the NAB accounts and to other accounts and which of those other parties made use of, or took the benefit of, the funds in the NAB accounts and in other accounts;

5. Failed to investigate whether the payments made to the Applicant for intellectual property he had created with others, and that the Respondent determined were ‘royalties’, were actually assignments of rights in intellectual property created by the Applicant;

6. Failed to pursue payers obligated to make withholdings tax against payments made to the Applicant and who were obligated to pay the amounts of with-holdings tax to the Respondent, but who had failed to do so, in the amounts the Respondent sought from the Applicant;

7. Commencing proceedings in the Supreme Court matter for orders and judgement that would be inconsistent with pre-existing orders and judgements on the same subject matter, that subject matter being the funds held by the Applicant, and, thus, causing an abuse of process;

8. Obtaining orders and judgement in the Supreme Court matter that were inconsistent with pre-existing orders on the same subject matter in the same court;

9. Claiming and obtaining Default judgement and orders against the Applicant in the Supreme Court matter for amounts of outstanding tax on the initial Notice of Assessments rather than reduced amounts on Notices of Amended Assessment made after ostensibly accepting the Applicant’s Objections;

10. Issued Bankruptcy Notice to the Applicant and commenced proceedings in Bankruptcy against the Applicant for amounts it obtained in the Supreme Court matter through an abuse of process and in furtherance of that abuse of process;

11. Confiscated funds intended for the Applicant as payment for intellectual property in the form of a book he had created, from publishers and interfered with the Applicant’s contract and relations with the publisher such that the publisher will not enter any agreement or have economic relations with the Applicant.

1. I have reproduced the relevant parts of the applicant’s draft Originating Application for Judicial Review without correcting spelling errors or other errors of expression.
2. The applicant’s draft Originating Application for Judicial Review limits the applicant’s grounds of review and claims for relief to grounds of review and relief available under the ADJR Act. In that draft, the applicant does not make any claim for relief based upon the common law or s 39B of the *Judiciary Act 1903* (Cth). Further, the hearing before me of the Commissioner’s objection to competency was conducted upon the basis that the Court’s power to consider and determine the applicant’s foreshadowed claims was to be found in the ADJR Act and nowhere else. The applicant’s Extension of Time Application is expressly confined to an application under the ADJR Act.
3. At par 11 of his Reply Submissions, the applicant submitted:

If the court is not persuaded that the decisions at para 7 – 10 of the Draft are reviewable under the AD (JR) Act then, in reliance upon *Rawson Finances Pty Limited v Deputy Commissioner of Taxation* [2010] FCA 538 the Applicant seeks leave to amend his application to seek relief from these decisions under jurisdiction conferred by s 39 B *Judiciary Act* 1903.

1. The applicant’s reference in par 11 to *“… the decisions at para 7–10 of the Draft …”* appears to be a reference to those paragraphs numbered 7–10 which appear on p 4 and p 5 of the applicant’s draft.
2. Decisions 7–10 relate to the commencement of the recovery proceedings in the Supreme Court and the issuing and service of the Bankruptcy Notice.
3. I am not prepared to entertain an application for leave to amend the applicant’s Extension of Time Application in order to allow that application to be determined in light of a foreshadowed judicial review application which also relies upon s 39B in some fashion. The applicant has not provided a draft of the amendments which he seeks nor has he provided a draft of the case which he would seek to make under s 39B. Further, he has allowed the present application to proceed upon the basis that no s 39B case was in the ring. It is now too late for him to seek to rely upon s 39B in relation to the matter with which I am dealing.
4. The applicant filed an affidavit affirmed by him on 7 May 2014 in support of his Extension of Time Application. I have had regard to that affidavit for the purposes of determining the competency of the applicant’s foreshadowed application for judicial review. By means of that affidavit, the applicant placed before the Court the Commissioner’s position paper dated 16 May 2011, the July 2012 objections, the Notices of Amended Assessment dated 18 October 2013, the Commissioner’s letter dated 10 October 2013 and the *Reasons for decision* sent under cover of that letter. In pars 4 and 5 of that affidavit, the applicant said:

4. I am challenging the orders and judgment made against me in favour of the Respondent in the Supreme Court NSW and obtained by default and seeking to have those orders and the judgement set aside as the orders and amounts the Respondent claimed from me had already been decided in earlier proceedings *Hilton v Gildley & Others* 12135 of 2008 in the Supreme Court NSW to be a business debt I, with others, owed with interest. On that basis, I believe the Respondent has committed an abuse of process and, I further believe, has acted contrary to law and abused his authority in seeking to act beyond and outside the law and without regard to the rule of law.

**Reason for Delay.**

5. I do not believe that my delay in seeking this review has been excessive. The assessments and re-assessments of my taxation affairs by the Respondent were only finalised in October 2013 and I was not aware of these until early March 2014 when I obtained them from my accountant. I am a freelance journalist and I write for media outlets overseas. Since the time I received Notices of Amended Assessment from the Respondent I have had assignments overseas including the recent Malaysian Airline disappearance. I have also recently become homeless due to my home being sold to pay out my mortgages and debts so it has been difficult for me to receive mail and notices. Furthermore, I was unaware of any need to expedite this review because, up until recently, I considered that I was still in negotiations with the respondent. It was not until I became aware of a Bankruptcy Notice issued against me by the Respondent in March 2014 for orders he obtained against me in my absence, without notice and without my knowledge in the Supreme Court NSW that I considered that I needed to deal with the decisions and conduct of the Respondent with some urgency. Since receiving that Bankruptcy Notice I have acted diligently in relation to this matter.

1. The applicant filed two sets of Written Submissions, the first on 18 June 2014 and the second on 17 July 2014. The Commissioner filed his Written Submissions on 8 July 2014.

# The Relevant Statutory Provisions

1. Section 5 of the ADJR Act provides that a person who is aggrieved by a decision to which the ADJR Act applies … may apply to this Court or the Federal Circuit Court of Australia for an order of review in respect of the decision on any one or more of the grounds specified in subs (1) of s 5. Sub-sections (2) and (3) of s 5 explain and amplify the meaning of two of the grounds specified in subs (1).
2. Section 6(1) of the ADJR Act provides that, where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which the ADJR Act applies, a person who is aggrieved by the conduct may apply to this Court or to the Federal Circuit Court of Australia for an order of review in respect of the conduct on any one or more of the grounds specified in subs (1) of s 6. In substance, those grounds reflect the same grounds specified as grounds of review in s 5(1) of the ADJR Act.
3. The expression *decision to which this Act applies*, when used in both s 5 and s 6 of the ADJR Act, is defined in s 3 of that Act in the following terms:

***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of ***enactment***; or

(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of ***enactment***;

other than:

(c) a decision by the Governor General; or

(d) a decision included in any of the classes of decisions set out in Schedule 1.

Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

1. *Enactment* is also defined in s 3 of the ADJR Act. It is not necessary for present purposes to set out the definition of that term in full. It is sufficient to note that, in the present case, each Commonwealth statute pursuant to which the Commissioner purported to act in relation to the tax affairs of the applicant falls within the definition of *enactment* in s 3 of the ADJR Act.
2. The definition of *decision to which this Act applies* set out in s 3 of the ADJR Act exempts from review under that Act any decision which is included in any of the classes of decisions set out in Sch 1 to the ADJR Act. Paragraph (e) of Sch 1 to that Act is in the following terms:

(e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:

*A New Tax System (Goods and Services Tax) Act 1999*

*A New Tax System (Luxury Car Tax) Act 1999*

*A New Tax System (Wine Equalisation Tax) Act 1999*

*Customs Act 1901*

*Customs Tariff Act 1995*

*Excise Act 1901*

*Fringe Benefits Tax Assessment Act 1986*

*Fuel Tax Act 2006*

*Income Tax Assessment Act 1936*

*Income Tax Assessment Act 1997*

*Minerals Resource Rent Tax Act 2012*

*Petroleum Resource Rent Tax Assessment Act 1987*

*Superannuation Guarantee (Administration) Act 1992*

*Taxation Administration Act 1953*, but only so far as the decisions are made under Part 2-35, 3-10, 3-15 or 4-1 in Schedule 1 to that Act

*Training Guarantee (Administration) Act 1990*

*Trust Recoupment Tax Assessment Act 1985;*

1. *Decision* is not defined in the ADJR Act. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336, Mason CJ (with whom Brennan and Deane JJ agreed) said, in respect of the concept of *decision* under the ADJR Act:

Nonetheless other considerations point to the word having a relatively limited field of operation. First, the reference in the definition in s. 3(1) to “a decision of an administrative character made ... under an enactment” indicates that a reviewable decision is a decision which a statute requires or authorizes rather than merely a step taken in the course of reasoning on the way to the making of the ultimate decision. Secondly, the examples of decision listed in the extended definition contained in s. 3(2) are also indicative of a decision having the character or quality of finality, an outcome reflecting something in the nature of a determination of an application, inquiry or dispute or, in the words of Deane J., “a determination effectively resolving an actual substantive issue”. Thirdly, s. 3(3), in extending the concept of “decision” to include “the making of a report or recommendation before a decision is made in the exercise of a power”, to that extent qualifies the characteristic of finality. Such a provision would have been unnecessary had the Parliament intended that “decision” comprehend every decision, or every substantive decision, made in the course of reaching a conclusive determination. Finally, s. 3(5) suggests that acts done preparatory to the making of a “decision” are not to be regarded as constituting “decisions” for, if they were, there would be little, if any, point in providing for judicial review of “conduct” as well as of a “decision”.

1. At 337, his Honour also said:

The policy arguments do not, in my opinion, call for an answer different from that dictated by the textual and contextual considerations. That answer is that a reviewable “decision” is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

Another essential quality of a reviewable decision is that it be a substantive determination. …

# The Parties’ Submissions

## The Commissioner’s Submissions

1. The Commissioner made the following submissions:
2. The 15 decisions sought to be challenged by the applicant fall into two broad categories. The first category comprises decisions made by the Commissioner in respect of his investigation into the applicant’s tax affairs and his assessment of income tax payable by the applicant. The second category comprises decisions to seek to recover unpaid withholding tax and income tax in the Supreme Court and to issue a Bankruptcy Notice in respect of the unpaid tax.
3. A decision, or conduct for the purpose of making a decision, described in par (e) of Sch 1 to the ADJR Act, is not reviewable either under s 5 or under s 6 of the ADJR Act because such a decision is not one to which the ADJR Act applies. Decisions covered by par (e) of Sch 1 to the ADJR Act are reviewable under Pt IVC of the *Taxation Administration Act 1953* (Cth).
4. There is a distinction between decisions made in the course of the Commissioner’s assessment functions (which are not reviewable under the ADJR Act) and other administrative decisions made by the Commissioner (which may be reviewable under the ADJR Act). This distinction was explained by Smithers J in *Intervest Corporation Pty Ltd v Commissioner of Taxation* (1984) 3 FCR 591 at 593.
5. A decision made by the Commissioner will only fall outside the exemption created by par (e) of Sch 1 to the ADJR Act if the decision is so far removed from the assessment process that it does not, in any relevant sense, lead up to the making of an assessment (*Intervest* at 595; and *Federal Commissioner of Taxation v Administrative Appeals Tribunal* (2011) 191 FCR 400 at 411–412 [47]–[48] per Keane CJ and Gordon J).
6. In no sense were the decisions complained of in this case (or decisions in respect of which conduct is complained of in this case) decisions that may produce a different state of facts by reference to which the applicant’s liability to tax must be assessed. Rather, the decisions complained of were decisions made in order to ascertain the applicant’s liability to tax by reference to the facts evidenced by the material available to the Commissioner. The decisions and conduct were not so far removed from the assessment process that it could be said that they did not lead up to the making of an assessment.
7. A careful reading of the grounds of review specified by the applicant in his draft Originating Application for Judicial Review and a careful reading of the relief claimed by him in that draft Application confirm that what the applicant really wishes to challenge are the assessments made by the Commissioner and the decisions made along the way leading to those assessments.
8. The Commissioner’s decision to seek to recover the outstanding tax is not a reviewable decision because it did not confer, alter or otherwise affect legal rights or obligations (*Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* (2010) 189 FCR 189 at 199–203 [50]–[66] per Yates J).
9. An application for judicial review under the ADJR Act is not the appropriate process by which to make an application for release of tax debts on hardship grounds.

## The Applicant’s Submissions

1. The applicant submitted:
2. The decisions under challenge are not sufficiently connected with the process of making a taxation assessment as to be exempted from review by reason of the operation of par (e) of Sch 1 to the ADJR Act. They are all decisions of an administrative character which go to the basis of fact by reference to which an assessment, or an amended assessment, depending upon appropriate calculations, might be made.
3. The conduct of the Commissioner which is sought to be reviewed under s 6 of the ADJR Act is properly characterised as fact gathering activities or failings with respect to fact gathering activities. That conduct comprises actions and omissions occurring during the process of ascertaining the basis of fact or conduct relating to the collection and enforcement of amounts already assessed not with the calculation of tax for the purposes of issuing or making an assessment.
4. Insofar as the Commissioner’s decision to commence proceedings in the Supreme Court for the recovery of the outstanding tax debt is concerned, that decision resulted in the applicant being subjected to a liability or detriment to which he was not already subject. Because the Commissioner allowed the applicant’s objections in part and subsequently reduced the amount of his tax debt, the decision to commence proceedings in the Supreme Court subjected the applicant to a liability to pay a larger amount than that amount which he was truly obliged to pay. The original assessments made in 2011 were defective.
5. The Commissioner’s failure to consider the applicant’s hardship application is a reviewable decision within the meaning of the ADJR Act.
6. The Commissioner’s conclusion expressed in his *Reasons for decision* enclosed with his letter to the applicant dated 10 October 2013 to the effect that the applicant was not in a partnership within the meaning of the *Income Tax Assessment Act 1997* (Cth) is a reviewable decision.

# Consideration

1. Decisions 1–9 and 11 specified by the applicant in his draft Application for Judicial Review as decisions which he seeks to review are all decisions made by the Commissioner which are recorded either in the 16 May 2011 position paper or in the *Reasons for decision* provided to the applicant under cover of the Commissioner’s letter to the applicant dated 10 October 2013. In substance, those *“decisions”* comprise decisions to treat certain amounts or payments as assessable income of the applicant or decisions to treat certain amounts in a particular way for the purposes of Australian taxation law. The applicant argues that, in reaching the decisions which he did in respect of these amounts, the Commissioner made reviewable errors.
2. The *“decisions”* sought to be challenged by par 15 of the challenged decisions section of the applicant’s draft Application for Judicial Review comprise those decisions whereby the Commissioner imposed penalties, fines and interest upon the applicant. I shall refer to all of the decisions referred to in pars 1–9, 11 and 15 of the applicant’s draft Application as a group as **Category 1 decisions**.
3. Challenged decisions 10, 13 and 14 comprise the Commissioner’s decisions to seek to recover the applicant’s outstanding tax debt in the Supreme Court of New South Wales. I shall refer to these decisions as a group as **Category 2 decisions**.
4. Challenged decision 12 concerns the Commissioner’s alleged failure to deal with *“… the hardship application made by the applicant”*.
5. All of the Category 1 decisions concern the Commissioner’s investigation of the applicant’s tax affairs for the purpose of determining his true tax liability for the relevant years. Each of the impugned decisions reflects or constitutes a step along the path to assessing the applicant’s true tax liability.
6. In *Intervest*, the issue was whether a decision by the Commissioner refusing requests under s 105AA of the *Income Tax Assessment Act 1936* (Cth) for a further period during which dividends might be paid for the purpose of making a sufficient distribution within the meaning of s 105A(1) of that Act was within the exemption provided for in par (e) of Sch 1 to the ADJR Act. Smithers J held that that decision was not exempt from review under the ADJR Act.
7. At 593–594, his Honour said:

It would appear by no means certain that a decision refusing a request for determination of a further period to make a sufficient distribution under s. 105AA of the Act is reviewable by the Board: see s. 187(1). But interest in these observations is not so much in their relation to that question as in the views of members of the Board as to whether or not a refusal of such a request is an integral part of the process of making an assessment. To my mind it is difficult to accept that it is. Assessment as defined in s. 6 of the Act is the ascertainment of the amount of taxable income and of the tax payable thereon. The amount of taxable income and the tax payable thereon must be ascertained by the Commissioner by reference to the facts before him concerning the income of the taxpayer. Those facts are established by the taxpayer’s return of income and such other information as he may supply voluntarily or on demand of the Commissioner. In this case upon the facts put before the Commissioner by the applicant the Commissioner made assessments of the taxable income and the tax payable thereon in respect of the income years ending 30 June 1977 and 30 June 1978. Those assessments of tax payable, according to the notice of assessments served in respect thereof, included additional tax imposed in respect of undistributed income pursuant to s. 104(1) of the Act on the ground that in respect of each year the company was not, by s. 105A, deemed to have made a sufficient distribution. Thereupon pursuant to s. 105AA(l) there arose in the applicant an entitlement to request the Commissioner to determine a further period in which it might pay dividends for the purpose of making a sufficient distribution in relation to relevant years. On 23 August 1983 the applicant made such requests. Had those requests been granted the applicant might have paid further dividends in such amount as would constitute a distribution sufficient to eliminate or reduce the additional tax imposed under Pt III Div. 7 of the Act. Had that occurred amended assessments reducing tax payable might have been issued pursuant to s. 170. Such amended assessments would have been made in respect of the situation concerning taxable income and sufficient distribution taking into account the payment of the further dividends. But as a result of the refusal of the applicant’s request for a further period to pay such dividends the factual situation in relation to the income of the company and the distribution made by it did not change. The notices of assessment of tax and additional tax remained in full force and effect.

A refusal of a request made under s. 105AA after service of a notice of assessment is relevant to the liability of the applicant to pay the tax demanded in the notice of assessment which has been issued. If the request is granted a reduction in liability may result. If it is refused the chance of any such reduction is eliminated. But there is no sense in which a decision to refuse the request is a decision making an assessment or calculation of tax, or a decision forming part of the process of making an assessment or calculation of tax. A decision refusing a request denies to the taxpayer making the request an opportunity to change the basis of fact by reference to which an assessment, or an amended assessment, depending upon appropriate calculations, might be made.

Also, a decision granting or rejecting a request is not, in my opinion, a decision leading up to the making of an assessment or calculation of tax. Of course a refusal of a request made after the notice of assessment has been given does not in any sense lead up to an assessment.

1. At 595–596, his Honour continued:

The distinction between the Commissioner’s assessment function and his administrative function is relevant in this case. It is in his administrative function that he may or may not sanction the taking of steps by a taxpayer which, if taken by him, may produce a state of facts by reference to which an amended assessment may be made which might differ from that upon which the assessment already made was made. When he approaches the task of making an assessment with reference to the facts before him and makes the necessary calculations for that purpose he is exercising his assessment function. But however widely the net is cast by the words of cl. (e) it does not cover a decision not being part of the process of assessment and which relates only to the question whether a taxpayer shall be permitted to carry out transactions which may reduce the amount of income upon which he is liable to pay tax. It may result in the making of an amended assessment. But it is so far removed from the assessment process that it does not, in the relevant sense, lead up to the making of an assessment. It provides an opportunity for the taxpayer to make payments the making of which will introduce new elements into his financial affairs by reference to which the amount of income on which he is liable to pay tax may be reduced and the amount of his taxable income may be ascertained. Decisions making or forming part of the process of making an assessment or calculation of tax are clearly made in the process of assessing tax. Decisions leading up to the making of an assessment may not necessarily be so confined. But, in my view, a decision not being connected directly or indirectly with the process of the making of an assessment is not within the category specified in cl. (e) of the Schedule merely because the making of an assessment or a particular assessment thereafter was a consequence of business dealings which flowed from the decision and affected its income position and tax liability but did not otherwise operate upon or have any other significance in respect of the assessment.

The observations of Ellicott J. in *Tooheys Ltd v. Minister for Business and Consumer Affairs* (1981) 54 F.L.R. 421 at 436 are relevant. In that case an applicant sought review under the Judicial Review Act of the refusal of the Minister of a request for a determination that a particular item of the customs tariff should apply to certain goods. His Honour said:

“It is one of the provisions in the light of which customs duty is to be calculated. The making of it is not part of the process of calculations of duty nor is it in my view a decision which can properly be said to be a decision ‘leading up to the making’ of the calculation of duty. The words ‘leading up to the making’ are intended to point to decisions which have to be made or in the circumstances it is appropriate to make before the actual process of assessment or calculation can begin. A determination may be made under s. 273 relating to particular goods but the process of calculating duty does not depend on it any more than it depends on the existence of the general provisions of the Act relating to value or duty.

In other words, what par. 9e) is directed to is the process whereby the liability to tax or duty is calculated in a particular case. A decision to make a by-law or determination is a decision which affects liability. It is not a decision dealing with the calculation of liability.”

These observations were approved on appeal by the Full Court: see *Minister for Industry and Commerce v. Tooheys Ltd* (1982) 42 A.L.R. at 271.

1. The essence of the reasoning of Smithers J in *Intervest* was approved by Keane CJ and Gordon J in *Federal Commissioner of Taxation v Administrative Appeals Tribunal* at 411–412 [47]–[48].
2. Here, the whole rationale for the Commissioner to come to the various views, conclusions and *“decisions”* which are challenged in pars 1 to 9, 11 and 15 of the applicant’s draft Application for Judicial Review was to enable him to assess the applicant’s true liability to tax. Each and every Category 1 *“decision”* about which complaint is now made was made as part of that assessment process. Each of those decisions was intimately connected with the assessment process. None of those decisions was a decision that might have produced a different state of facts by reference to which the applicant’s tax liability was to be assessed.
3. *Intervest* was a very different case from the present case. In *Intervest*, had the Commissioner acceded to the requests made to him, the facts against which the taxpayer’s liability under s 104 of the 1936 Act were to be assessed would have been altered by the Commissioner’s discretionary decision in respect of those requests. Here, all that happened was that the Commissioner came to a view about the true facts, as they already existed, against which the applicant’s tax liability was to be assessed and then assessed that liability. He also imposed penalties, fines and interest.
4. In my judgment, all of the Category 1 decisions are within par (e) of Sch 1 to the ADJR Act and are thus not reviewable under that Act.
5. For the same reasons, the challenged conduct on the part of the Commissioner which corresponds or relates to the making of the Category 1 decisions is also not reviewable under the ADJR Act.
6. The Category 2 decisions and conduct relating to the Category 2 decisions which is sought to be challenged by the applicant are also not reviewable for the reasons stated by Yates J in *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* at 196–203 [30]–[66]. In that case, at 200 [54], his Honour held that the decisions made by the Commissioner to institute proceedings pursuant to s 255-5(2) of the *Taxation Administration Act 1953* (Cth) did not, and could not, alter or affect the taxpayer’s liability to pay tax. His Honour observed that the taxpayer’s liability to pay tax to the Commonwealth arose upon the making of the assessments, not upon the institution of any recovery proceedings. His Honour said:

Sections 175 and 177(1) of the ITAA had effect as soon as the assessments were made, prior to any decision to sue (or to refuse to refrain from suing) or to take any other step to recover the amount of that liability. The decision to sue (or to refuse to refrain from suing) to recover the amount of the liability did not alter the pre-existing effect of those provisions in relation to that liability; nor could either decision alter the future effect of those provisions in relation to that liability. Similarly, ss 14ZZM and 14ZZR of the TAA had effect as soon as the assessments were made. The decision to sue (or to refuse to refrain from suing) did not alter and could not alter the effect of those provisions in relation to the liability. The decision to sue (or to refuse to refrain from suing) did no more than initiate the process of recovery which, at all times, the Commissioner was obliged to undertake should the debt representing that liability remain unpaid after it had become due and payable. The commencement of legal proceedings would expose the applicant to the prospect of substantive determinations being made in those proceedings by the separate exercise of judicial power. But the challenged decisions themselves did not confer, alter or otherwise affect legal rights or obligations respecting the applicant. They were not substantive determinations of any kind or in any sense.

1. The final matter to which I must make brief reference concerns the applicant’s references in his draft Originating Application for Judicial Review and in his Written Submissions to his *“hardship application”*.
2. There is no evidence before me that the applicant made any application to the Commissioner for release of all or part of his tax debt on the grounds of hardship prior to the filing of his Extension of Time Application. It appears that the reference in his Submissions to that hardship application is a reference to claims sought to be made in his draft Originating Application for Judicial Review rather than to any antecedent claim. If that be correct, the Commissioner can hardly be criticised for failing to deal with an application which has not yet been made but only foreshadowed. The true nature of the applicant’s complaint concerning his so-called hardship application is not at all clear from the materials before me. In any event, as submitted on behalf of the Commissioner, such an application has to be made and then determined by the Commissioner in the usual way before consideration could conceivably be given to reviewing the Commissioner’s decision in respect of that application or, alternatively, reviewing his failure to make a decision in respect of that application.

# Conclusions

1. For all of the above reasons, the so-called decisions made by the Commissioner and conduct of the Commissioner sought to be reviewed by the applicant under the ADJR Act are not capable of review under that Act. It follows that the applicant’s Extension of Time Application must be refused with costs. There will be orders accordingly.
2. I should add that, had it been relevant to consider other matters of a discretionary nature going to the applicant’s Extension of Time Application, I would not have been satisfied that he has put before the Court a satisfactory explanation for his delay in taking steps to challenge the decisions and conduct which he now seeks to challenge.

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| I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 30 July 2014