

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

KIMBERLEY v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2020] ACAT 112

AT 55/2020

Catchwords:

ADMINISTRATIVE REVIEW – land tax – objection to penalty tax and interest – failure to notify Commissioner that property was rented since at least February 2001 – whether applicant took reasonable care to comply with land tax obligations – whether tax defaults happened solely because of circumstances beyond the applicant's control – whether remission of penalty tax appropriate in the circumstances

Legislation cited:

ACT Civil and Administrative Tribunal Act 2008 s 68
Land Tax Act 2004 ss 8, 9, 14, 19A, 37, 39, 48, 57
Land Tax Amendment Act 2018 s 22
Land Tax (Interest and Penalty) Amendment Act 2007 (repealed)
Legislation Act 2001 s 88
Rates and Land Tax Act 1926 (repealed) ss 6, 22A, 22B, 22BA, 22BB, 22E, 22EB, 26
Rates and Land Tax Legislation Amendment Act 2009 (repealed) s 4
Taxation Administration Act 1999 ss 4, 30, 31, 32, 37, 100, 101, 107A, 108A, Dictionary

Cases cited:

A Plus Plumbing and Building Services v Commissioner for ACT Revenue [2012] ACAT 76
Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner for Taxation [2018] FCAFC 54
Dess v Commissioner for ACT Revenue [2015] ACAT 63
James v Commissioner for ACT Revenue [2013] ACAT 32
Kessey v Commissioner for ACT Revenue [2019] ACAT 83
Marks & Anor v Commissioner for ACT Revenue [2018] ACAT 84
Steele v Commissioner for ACT Revenue [2010] ACAT 15
Theron v Commissioner for ACT Revenue [2013] ACAT 33
Van Duren & Anor v Commissioner for ACT Revenue [2016] ACAT 121
Wade and Tan v Commissioner for ACT Revenue [2014] ACAT 79

List of

Texts/Papers cited: Explanatory Statement – Land Tax Bill 2003
Explanatory Statement – Rates and Land Tax Amendment Bill
2009

Tribunal: Senior Member M Orlov

Date of Orders: 17 December 2020

Date of Reasons for Decision: 17 December 2020

**AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL)**

AT 55/2020

BETWEEN:

JOHN KIMBERLEY
Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Senior Member M Orlov

DATE: 17 December 2020

ORDER

The Tribunal orders that:

1. The decision under review is varied to provide that penalty tax is payable at 25% for Quarter 1, 2004-05 to Quarter 1, 2006-07 and Quarter 3, 2006-07 to Quarter 1, 2016-17.

THE TRIBUNAL NOTES:

The interest charged for these periods should be adjusted accordingly.

.....
Senior Member M Orlov

REASONS FOR DECISION

Introduction

1. The issues in this application concern the applicant's liability for land tax, penalty tax and interest assessed on a residential rental property in Wanniasa (**the property**). The applicant seeks a review of a decision by the Commissioner for ACT Revenue (**the Commissioner**) in relation to an objection to the assessment of penalty tax and interest. The applicant seeks remission of all penalty tax and interest. The parties have agreed that I should decide the application on the papers.

Background

2. The applicant and his wife are the registered proprietors of the property, which they have owned since 1991.¹ They lived there initially but moved to Melbourne for work in 1994 and have lived in Melbourne since then.²
3. The applicant signed a Declaration in Respect of Principal Place of Residence on 3 October 1991, declaring that, on 1 August 1991, the property was occupied by him as his principal place of residence for the purposes of the *Rates and Land Tax Act 1926 (R< Act)*.
4. There are indications in the applicant's evidence that the property may have been rented at various times since 1994, when the applicant and his family relocated to Melbourne. The Commissioner has not investigated the early rental history of the property – specifically from 1994 to early 2001 – and the applicant has not made voluntary disclosure in that regard. The focus of the Commissioner's investigation has been on the period from February 2001 to date. The applicant does not dispute that the property has been rented for most of the time since then.
5. According to the applicant's evidence, he managed the property himself for some time, but "due to the difficulties in managing it" he appointed L J Hooker Tuggeranong (**L J Hooker**) as the managing agent.³ An undated and unsigned

¹ Tribunal documents page 36

² Tribunal documents page 7

³ Tribunal documents page 7

copy of the Instructions to Act as a Managing Agent suggests this happened in the second half of November 2006.⁴ Later, Luton Properties Tuggeranong purchased L J Hooker's business and took over as managing agent. A signed Authority to Act as Managing Agent establishes this happened on 18 January 2016.⁵

6. Neither the applicant, nor the managing agents, notified the Commissioner that the property was rented at any time before the Commissioner commenced an investigation in February 2020 to determine whether the applicant and his wife were liable for land tax.
7. On 20 March 2020, a delegate of the Commissioner issued a Notice of Assessment of land tax, penalty tax and interest (**the assessment**) payable by the applicant and his wife in relation to the property. The assessment was for \$83,786.21 and included land tax assessed at \$34,439.05 for Quarter 1, 2004-05 to Quarter 1 2006-07 and Quarter 3, 2006-07 to Quarter 3 2019-20, penalty tax assessed at \$8,609.86 for the same period pursuant to section 31(1) of the *Taxation Administration Act 1999* (**Taxation Administration Act**), and interest of \$40,737.50 imposed under section 19A of *Land Tax Act 2004* (**Land Tax Act**).
8. The applicant made representations to the Chief Minister of the ACT by letters dated 26 March 2020 and 8 April 2020 seeking to be exempted from penalty tax, essentially on the grounds that the applicant and his wife had been unaware that the property was liable for land tax, partly because they had lived in Melbourne since 1994 "isolated from development in the ACT and cocooned in a small Korean community" and partly because they had left the management of the property to agents whom they claimed failed to inform them that the property was liable for land tax and failed to forward the land tax brochure issued each year by the ACT Revenue Office (**ACT Revenue**) with the rates assessment for the property.⁶

⁴ Tribunal documents page 19

⁵ Tribunal documents page 21

⁶ Tribunal documents pages 9-11

9. The applicant's correspondence was referred to ACT Revenue, which treated it as an objection to the assessment of penalty tax and interest under section 100(1) of the Taxation Administration Act.⁷
10. The Commissioner allowed the objection in part.⁸ The following factual matters about the rental status of the property appear from the Commissioner's Reviewable Decision and Reasons Statement dated 3 July 2020 (**reasons statement**).
 - (a) There was evidence that satisfied the Commissioner that the property was rented to Mrs Jongim Yoo from 23 February 2001 (Quarter 3, 2000-01) until 18 August 2006 (Quarter 1, 2006-07). However, the Commissioner considered that the introduction of the Land Tax Act, which came into effect on 1 July 2004, meant that properties that were tenanted before that date became liable for land tax only after 1 July 2004 – i.e., from Quarter 1, 2004-05. Accordingly, the Commissioner was satisfied that under Mrs Yoo's tenancy the property was liable for land tax from Quarter 1, 2004-05 until Quarter 1, 2006-07.
 - (b) There was evidence that satisfied the Commissioner that the property was rented to Ms Lana Bruton and Ms Haidee Stevenson from 12 December 2006 until 25 March 2014. Accordingly, the Commissioner was satisfied that under Ms Bruton's and Ms Stevenson's tenancy the property was liable for land tax for Quarter 3, 2006-07 to Quarter 3, 2013-14.
 - (c) There was evidence that satisfied the Commissioner that the property was currently rented to Ms Kara Sellers and that her tenancy commenced on 22 April 2014. Under section 8 of the Land Tax Act as in force at that time,⁹ the property must be taken to have been rented on 1 April 2014 (the first day of the quarter) because the property did not remain vacant for a continuous period of 91 days. Accordingly, the Commissioner was satisfied that under Ms Sellers' tenancy the property was liable for land

⁷ Tribunal documents page 165

⁸ Tribunal documents pages 27-32

⁹ Land Tax Act section 8(4)(d), Republication 16 (effective 23 May 2013 to 30 September 2014)

tax for Quarter 4, 2013-14 to Quarter 3, 2019-20 and would continue to be liable for land tax while it remained rented.

11. The applicant does not dispute these findings.
12. The reasons statement refers to the fact that a search of ACT Revenue's records turned up a "Notification of Appointment of an Agent for Rates and Land Tax and Notification of Rental Status of a Residential Property" dated 23 August 2016 (**the Notification**) advising that Luton Properties Tuggeranong (**Luton**) was the managing agent of the property.¹⁰ The applicant and his wife dispute the authenticity of this document, claiming that the signature of the owner is a forgery. Although the signature clearly does not belong to the applicant, there was no evidence from Luton about the circumstances in which the document came into existence. However, nothing turns on this. The documents produced by ACT Revenue to the Tribunal include a later (typed) version of the Notification dated 26 August 2016 that clearly does bear the applicant's signature.¹¹ The words "Already actioned" and the initials and date "ES 22/9/16" appear in handwriting at the bottom right-hand corner of the page, indicating that the document was provided to and received by ACT Revenue. The authenticity of the later version of the Notification does not appear to be in dispute.
13. The reasons statement shows that the Commissioner considered there was evidence that the applicant had failed to exercise reasonable care to ensure that the land tax obligations in relation to the property were properly discharged and that the appointment of a managing agent did not excuse a failure to do so. The Commissioner considered that tax defaults occurred on 31 July 2004, 11 January 2007 and 22 May 2014 as a result of the applicant's failure to notify the Commissioner that the property was rented within the 30-day period required by section 14 of the Land Tax Act. In those circumstances section 31(1) of the Land Tax Act required, as a minimum, that penalty tax must be applied at the rate of 25%. However, the Commissioner considered that the email from Luton attaching the Notification, which requested that invoices for land tax and rates

¹⁰ Tribunal documents pages 23-26

¹¹ Tribunal documents page 111

should be sent to Luton's postal address, was sufficient to put ACT Revenue on notice that the property may have a land tax liability (notwithstanding the Notification did not disclose that the property was rented at the time) and that, if enquiries had been made at the time, it is likely that it would have been found that the property had a prior and ongoing land tax liability.

14. The Commissioner concluded:¹²

In light of the email dated 23 August 2014, I am satisfied that a remission of penalty tax in accordance with section 37 (remission of penalty tax), TAA is appropriate in the circumstances. I do not consider it warranted to enliven section 31(5), (no penalty tax payable), TAA.

The objection to penalty tax is part allowed.

Interest

It is for the same reasons as above, that I consider a partial remission of interest to be appropriate in the circumstances in accordance with section 36 (remission of interest), LTA. The objection to interest is allowed in part and appropriate adjustments will be made. [emphasis added]

15. The "email dated 23 August 2014" mentioned in the first line of the extract is an incorrect reference to the date of the email from Luton attaching the Notification, the date of which is identified correctly in the reasons statement as 23 August 2016. In fact, the email is dated 23 August 2016.
16. A Notice of Reassessment (**the reassessment**) was issued on 7 July 2020, reflecting the error in the date of the Luton email. The reassessment included penalty tax at 25% assessed at \$4,498.86 for Quarter 1, 2004-05 to Quarter 1 2006-07 and Quarter 3, 2006-07 to Quarter 1 2014-15 and interest assessed at \$35,702.37. As the email was sent in sent in Quarter 1, 2016-17, not Quarter 1, 2014-15, the effect of the Commissioner's decision should have been that penalty tax was assessed at 25% for Quarter 1, 2004-05 to Quarter 1 2006-07 and Quarter 3, 2006-07 to Quarter 1 2016-17 and interest adjusted accordingly.

Scope of the Tribunal's jurisdiction to review the Commissioner's decision

17. Section 108A of the Tax Administration Act provides that a taxpayer in relation to whom a 'reviewable decision' is made may apply to the ACAT for review of

¹² Tribunal documents page 31

the decision. In this case, the applicant seeks “waiver of the penalty and interest” on the grounds that the Commissioner’s decision is based on “falsified documents and against the natural justice”.¹³ The reference to “falsified documents” relates to the issue about the authenticity of the Notification mentioned earlier. The reference to the decision being “against natural justice” relates to the applicant’s assertion, in a letter to the tribunal explaining the applicant’s reasons for applying for a review, that:

*It is unreasonable and against the natural justice to expect me to bear the onus of being informed of the land tax liability in view of the special circumstances surrounding me as mentioned in my correspondence to Chief Minister.*¹⁴

18. I have summarised the “special circumstances” to which the applicant refers in paragraph 8 of these reasons.
19. The Commissioner’s decision in relation to the applicant’s objection to the assessment of penalty tax under section 31 of the Tax Administration Act – involving a decision assessing the amount of penalty tax payable under section 31 and a decision refusing to remit the penalty tax under section 37 – is a ‘reviewable decision’ within the meaning of section 107A(1)(a) of the Tax Administration Act. However, the effect of section 39(1) of the Land Tax Act is that the Commissioner’s decision to refuse the applicant’s objection to the assessment of land tax interest – involving a decision refusing to remit interest under section 37 of the Land Tax Act – is not a ‘reviewable decision’.
20. The Tribunal’s jurisdiction in this case is limited to a review of the Commissioner’s decision in relation to the assessment of the amount of penalty tax payable by the applicant under section 31 of the Tax Administration Act and the Commissioner’s decision to refuse to remit land tax under section 37 of the Act. The issue I have to decide is whether the Commissioner’s decision is the correct or preferable decision based on the material the parties have placed before me.

¹³ Application for Review of a Decision filed on 31 July 2020

¹⁴ Tribunal documents page 7

21. Under section 68(2) of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) I may exercise any function given by the Taxation Administration Act to the Commissioner for making the decision. In effect, I stand in the shoes of the Commissioner for the purpose of making a decision on this application. Section 68(3) of the ACAT Act requires that I must either confirm, vary or set aside the Commissioner's decision. If I set aside the decision, I must make a substitute decision or remit the matter to the Commissioner for reconsideration in accordance with any direction or recommendation I make.

Liability for penalty tax – relevant legislation

Rates and Land Tax Act 1926

22. Before 1 July 2004, liability for land tax, penalty tax and interest on land tax in the ACT was governed by the R< Act.
23. Pursuant to section 6 of the R< Act, all land in the ACT was rateable land, subject to exceptions that are not presently material.
24. Pursuant to section 22A, land tax was imposed for a quarter for each parcel of rateable land that was not exempt from land tax.
25. Pursuant to section 22B(1)(a), a parcel of residential land owned by a person other than a company or trustee that was rented by a tenant was not exempt from land tax unless the Commissioner had granted an exemption on compassionate grounds under section 22BA.
26. Section 22BB(2) provided that the owner of a parcel of land that is leased for residential purposes must tell the Commissioner in writing within 30 days if the parcel becomes rented by a tenant.
27. Section 22E(1) provided that land tax imposed by section 22A in relation to a parcel of land was payable to the Territory by the owner of the parcel of land.
28. Section 22EB(1) provided that if the owner of a parcel of land failed to give any information as required by the Act, among other things, the owner was liable to pay, as a penalty, an additional amount equal to double the amount of any land tax payable in relation to that parcel of land.

Lands Tax Act 2004 - transitional provisions

29. The R< Act was repealed on 1 July 2014 and the Land Tax Act came into effect on that date. The explanatory statement for the *Land Tax Bill 2003* states that the bill is the result of a decision to split the R< Act to separate land tax provisions from those applying to rates. The explanatory statement goes on to say:

This Bill makes no significant policy changes to the effect of the legislation. It includes provisions in relation to the imposition of land tax and its payment, and exemptions from liability to land tax. In line with the administration of other ACT tax legislation, this Bill will be administered under the Taxation Administration Act 1999...unless otherwise indicated.

30. Part 7 of the Land Tax Act deals with transitional arrangements. Section 48, which is in Part 7, states:

- (1) *This section applies if—*
- (a) *land tax (including penalty tax and interest) was payable under the repealed Act; and*
 - (b) *the land tax had not been paid before 1 July 2004.*
- (2) *The land tax is taken to be payable under this Act.*

31. Section 57 provides that Part 7 expires on 1 July 2005. However, section 88 of the *Legislation Act 2001* preserves the operation of section 48 notwithstanding its repeal.¹⁵
32. The effect of section 48 is that land tax, penalty tax and interest that was payable under the R< Act in relation to residential property rented before the commencement of Quarter 1, 2004-05, which had not been paid before 1 July 2004, became (and remains) payable under the Land Tax Act after 1 July 2004.
33. Liability for land tax, penalty tax and interest for land tax imposed on rented residential property from the commencement of Quarter 1, 2005-05 is determined in accordance with the provisions of the Land Tax Act and the Tax Administration Act.

¹⁵ The Commissioner's submissions state at footnote 11 that section 48 has been repealed. In my view this is incorrect. The section expired on 1 July 2005. However, the continued operation of section 48 is preserved by section 88(1) of the *Legislation Act 2001*.

The requirement to notify the Commissioner if a property is rented

34. Section 14 of the Land Tax Act, as in force on 1 July 2004, reproduces the effect of section 22BB of the R< Act with some minor changes in language that do not affect its meaning. Subsections 14(1) and (2) state:

- (1) *A person who becomes the owner of a parcel of land that is leased for residential purposes, and becomes or continues to be rented by a tenant on the change of ownership, must tell the commissioner in writing within 30 days after the day the person becomes the owner –*
 - (a) *that the parcel has begun or continued to be rented; and*
 - (b) *the date when the rental began.*
- (2) *If a parcel of land that is leased for residential purposes becomes rented by a tenant, the owner of the parcel must tell the commissioner in writing about the rental (including the date the rental began) within 30 days after the day the rental begins.*

35. A new section 14 was substituted by section 4 of the *Rates and Land Tax Legislation Amendment Act 2009*, which provides:

- (1) *This section applies in relation to a parcel of land that –*
 - (a) *is leased for residential purposes; and*
 - (b) *is rented by a tenant.*
- (2) *A relevant person must tell the commissioner, in writing –*
 - (a) *that the parcel is rented; and*
 - (b) *when the rental began.*
- (3) *The relevant person must tell the commissioner the information mentioned in subsection (2) not later than 30 days after –*
 - (a) *if there is a change of ownership of the parcel – the day the ownership changes;*
 - (b) *in any other case – the day the rental begins.*
- (4) *This section does not apply if the owner of the parcel of land is a corporation.*
- (5) *In this section:*
relevant person *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 rental of the parcel – the agent.*

36. The explanatory statement for the *Rates and Land Tax Amendment Bill 2009*, shows that the changes to section 14 were intended “to provide a stronger

mechanism to ensure compliance with the requirement to notify the commissioner when a parcel of land becomes rented". The explanatory statement goes on to say:

The changes strengthen the existing legislative mechanism by –

1. *requiring agents to notify the commissioner of the rental if the owner of the parcel of land has entrusted the agent with the management of the parcel of land. For the purposes of the amendments, an agent includes agents such as real estate agents, accountants, and solicitors; and*
2. *Highlighting that an Approved Form made under section 139C of the Taxation Administration Act 1999 must be used to tell the commissioner about the rental; and*
3. *highlighting that a failure to tell the commissioner about the rental is a criminal offence under the Taxation Administration Act 1999.*

Notwithstanding the changes, the amendments do not imply that agents are liable to pay interest and penalty tax under section 19A of the Land Tax Act for a failure to notify the commissioner of the rental of the parcel. Accordingly, the amendments will have the effect that the owner of the parcel will remain liable for interest and penalty tax under section 19A of the Land Tax Act if their agent fails to comply with the notification requirement.

37. A new section 14 was substituted by section 22 of the *Land Tax Amendment Act 2018*. The current section 14 provides:

- (1) *This section applies in relation to a parcel of land that is leased for residential purposes if –*
 - (a) *land tax or a foreign ownership surcharge is not imposed on the parcel; or*
 - (b) *the parcel is 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 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.*
- (3) *For subsection (2), the relevant person must tell the commissioner not later than 30 days after the date the circumstances change.*
- (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.*

38. The common thread running through section 22B of the R< Act and the various iterations of section 14 of the Land Tax Act up to the present time, is that there are two parts to an owner's obligation to notify the Commissioner of a change in circumstances that may result in an owner becoming liable for land tax imposed on a rented property. The first determines *what* the owner must do if they become the owner of a rented property or if a property that they own becomes rented – namely, notify the Commissioner in writing of the rental and when the rental began. The second determines *when* the owner must do so – namely within 30 days of becoming the owner or the rental commencing.
39. Failure to notify the Commissioner within the 30-day period does not excuse an owner from the requirement to notify the Commissioner. Where more than 30 days has passed since the relevant change in circumstances without the Commissioner having been notified, the requirement that the owner notify the Commissioner of the change of circumstances, albeit late, continues in my view, whether the requirement to notify arose originally under section 14 of the Land Tax Act in its various forms, or its statutory predecessor, section 22BB of the R< Act.
40. A statutory incentive to do so is provided by section 32 of the Tax Administration Act, which states:

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.

Penalty tax consequences of failing to notify the Commissioner

41. From 1 July 2004, liability for penalty tax is determined in accordance with division 5.2 of the Taxation Administration Act. Section 30(1) states that if a 'tax default' happens, the taxpayer is liable to pay penalty tax in addition to the amount of tax unpaid. The Dictionary to the Act defines 'tax default' to mean 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. The Land Tax Act is a 'tax law' for the purpose of the Taxation Administration Act [see section 4(f)].

42. As mentioned earlier, under section 22EB(1) of the R< Act, failure to inform the Commissioner that a property had become rented would result in the owner becoming liable to a penalty equal to double the amount of land tax payable on the property. Initially, there was no equivalent provision in the Land Tax Act. This was remedied when section 19A was inserted into the Land Tax Act by the *Land Tax (Interest and Penalty) Amendment Act 2007*. In its current form section 19A provides:

- (1) *This section applies if –*
 - (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.*
- (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 where 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.*

43. The effect of subsection (5) is that section 19A operates retrospectively in relation to land tax imposed for every quarter since the commencement of the Land Tax Act where the owner has failed to notify the Commissioner that their property is rented in accordance with section 14.

44. Section 31 of the Tax Administration Act provides:

- (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 commissioner may increase the amount of penalty tax payable in relation to a tax default to 50% of the amount of tax unpaid if the commissioner is satisfied that the tax default –*
 - (a) *was caused wholly or partly by the taxpayer (or a person acting on behalf of the taxpayer) –*
 - (i) *delaying the payment of tax; or*
 - (ii) *delaying the provision of information required for the assessment of tax; or*
 - (iii) *providing information required under a tax law that is incorrect, incomplete or misleading; or*
 - (b) *is the taxpayer's second or subsequent tax default in relation to a tax liability, or in relation to a similar or related tax liability.*
- (3) *Subsection (2) applies to a tax default in the same way whether the tax default happened before or after the subsection commenced.*
- (4) *The commissioner may increase the amount of penalty tax payable in relation to a tax default to 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.*
- (5) *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 acting on behalf of the taxpayer, because of circumstances beyond either the person's or the taxpayer's control) but not amounting to financial incapacity.*

45. Section 37 of the Tax Administration Act provides:

The commissioner may, if the commissioner considers it appropriate in the circumstances, remit penalty tax by any amount.

46. The effect of section 101(3) of the Tax Administration Act is that the taxpayer bears the onus to establish that the taxpayer's objection should be sustained.

Consideration

47. I disagree with the Commissioner's view that tenancies that commenced prior to the introduction of the Land Tax Act result in the property being made liable for land tax only for periods commencing from 1 July 2014. I have explained my view of the effect of the transitional provisions of the Land Tax Act earlier in these reasons. See also *Theron v Commissioner for ACT Revenue* [2013] ACAT 33 and *Dess v Commissioner for ACT Revenue* [2015] ACAT 63 which discuss the assessment of land tax under the repealed and current legislation. However, the Commissioner's failure to assess land tax for periods earlier than Quarter 1, 2004-05 is not part of the decision under review.
48. Insofar as the Commissioner has assessed land tax commencing from Quarter 1, 2004-05, I am satisfied that the assessment is correct. As noted earlier, the applicant does not dispute the assessment of land tax.
49. I am satisfied that at all material times since the rental to Mrs Yoo commenced in about February 2001, the applicant was required to notify the Commissioner that the property was rented, initially in accordance with section 22BB of the R< Act and, on and after 1 July 2004, in accordance with section 14 of the Land Tax Act. The applicant failed to do so. A tax default for the purposes of section 30(1) of the Taxation Administration Act happened on 1 July 2004 as a result. The commencement of the Land Tax Act did not restart the 30-day period within which the applicant was required to notify the Commissioner. That period had already expired by 1 July 2014, although the requirement to notify the Commissioner continued.
50. A further tax default happened when the applicant and his wife failed to notify the Commissioner that the property was rented within 30 days after the rental to Ms Bruton and Ms Stevenson began on 12 December 2006.
51. A further tax default happened when the applicant and his wife and L J Hooker, the managing agent at the time, failed to notify the Commissioner that the property was rented within 30 days after the rental to the current tenant, Ms Sellers began on 22 April 2014.

52. Independently of those circumstances, a tax default occurred in each quarter commencing from Quarter 1, 2004-05 when the applicant failed to pay land tax imposed on the property under section 9(1) of the Land Tax Act.
53. I am satisfied therefore that Division 5.2 of the Tax Administration Act applies to the applicant and his wife.
54. Pursuant to section 31(1) the minimum amount of penalty tax payable in relation to a tax default is 25% of the unpaid tax, subject to Division 5.2.
55. The Commissioner may increase the amount of penalty tax to 50% or 75% in the particular circumstances provided by section 31(2) and 31(4). The Commissioner did not do so in this case and, although I consider the applicant's explanation of the circumstances in which the tax defaults occurred is unsatisfactory in important respects, I see no reason to do otherwise, particularly where I must decide the application on the papers.
56. The Commissioner was not satisfied that the applicant took reasonable care to comply with his land tax obligations or that the tax defaults happened solely because of circumstances beyond the applicant's control. As a result, the Commissioner considered that the applicant was not excused from paying penalty tax under section 31(5).
57. I am satisfied that the Commissioner's decision is clearly correct, as I will explain.
58. In every year since 1994, when the applicant relocated to Melbourne, ACT Revenue issued a brochure explaining land tax on residential properties with the annual rates assessment notice. The brochures are not difficult to understand and make it obvious that land tax is payable on rented residential property in the ACT. I am satisfied that a rates assessment notice, addressed to the applicant and his wife, together with a land tax brochure, was posted to the address of the property every year from 1994-95 up to and including 2016-17. The 2017-18 rates assessment notice issued on 17 July 2017 and notices issued subsequently for 2018-19 and 2019-20 were addressed to the applicant and his wife c/- Luton Properties.

59. The applicant claims that the managing agents failed to inform him that the property was liable for land tax and to pass on the land tax brochure with the rates assessment notices. For the latter claim to be accepted as true the applicant bears the onus to satisfy me that two different managing agents, over a period spanning more than 10 years, forwarded the rates assessment notices to the applicant but, either deliberately or carelessly, on *every* occasion omitted to include the land tax brochure that accompanied the notice. That seems to me to be inherently improbable but, in any event, the applicant did not provide any evidence from L J Hooker or Luton to support his claim.
60. I note that L J Hooker was appointed as managing agent shortly before the rental to Ms Bruton and Ms Stevenson began in December 2006. Even if the applicant's claim that L J Hooker failed to pass on the land tax brochure is true, and I am not satisfied by the applicant's unsupported assertions that it is true, it does not answer the fact that between 1994-95 and 2006-07 the applicant managed the property himself and therefore received the rates assessment notices (which he paid) and land tax brochures. If the applicant truthfully was unaware that a rented residential property was liable for land tax in the ACT, and I am not satisfied that he was unaware, in my view it could only be because he chose not to read the land tax brochure on each occasion that he received it in the years prior to the appointment of L J Hooker as managing agent.
61. The applicant also claims that he left the management of the property to the agents and believed that the managing agents "would look after the property faithfully on our behalf by paying all the statutory taxes and charges in time".¹⁶ The Instructions to Act as Managing Agent appointing L J Hooker does not state that paying rates and taxes on the owner's behalf is one of the agent's duties.¹⁷ The applicant did not produce any evidence to show that L J Hooker ever was required to pay the rates, or did so. A feedback form that the applicant completed on the ACT Revenue website on 15 November 2015,¹⁸ while L J

¹⁶ Tribunal documents page 11

¹⁷ Tribunal documents pages 19-20

¹⁸ Tribunal documents page 103

Hooker remained the managing agent, records that the applicant paid the rates personally.

62. The onus is on a taxpayer to be aware of and comply with their tax obligations.¹⁹ The appointment of an agent does not relieve a taxpayer of their duty to do so,²⁰ or from liability for any associated penalty tax or interest.²¹
63. Even if I was satisfied by the applicant's unsupported assertions seeking to excuse the tax defaults on the basis that he was unaware that land tax was payable and seeking to shift responsibility for the tax defaults onto the managing agents – which I am not – it would not assist the applicant's position. Circumstances in which a taxpayer has been found to have failed to exercise reasonable care include²² delegating their responsibility for compliance to a third party and being unaware of their obligations under tax laws (i.e., ignorance of the law is not an excuse),²³ forgetting or overlooking the need to meet their tax obligations,²⁴ and failing to make any or any reasonable enquiries about their tax obligations. Each of those circumstances may be considered to apply to the applicant, even on his own case.
64. It is not necessary to examine the circumstances of this case in closer detail. I am satisfied that the Commissioner clearly was correct *not* to be satisfied that the applicant took reasonable care to comply with his land tax obligations, or that the tax defaults happened solely because of circumstances beyond the applicant's control.
65. I am satisfied therefore that section 31(5) of the Tax Administration Act does not apply to the applicant and his wife.
66. Next, I must consider whether it is appropriate in the circumstances to remit any part of the penalty land tax under section 37 of the Tax Administration Act. As

¹⁹ *Steele v Commissioner for ACT Revenue* [2010] ACAT 15 at [12] and [16]

²⁰ *Wade and Tan v Commissioner for ACT Revenue* [2014] ACAT 79

²¹ *Van Duren & Anor v Commissioner for ACT Revenue* [2016] ACAT 121 at [38]

²² *Theron v Commissioner for ACT Revenue* [2013] ACAT 33 at [52]

²³ *Steele v Commissioner for ACT Revenue* [2010] ACAT 15 at [12] – [13]; *Theron v Commissioner for ACT Revenue* [2013] ACAT 33 at [52]

²⁴ *A Plus Plumbing and Building Services v Commissioner for ACT Revenue* [2012] ACAT 76 at [57]–[59]

the tribunal stated in *Marks & Anor v Commissioner for ACT Revenue* [2018] ACAT 84 at [139], referring to *James v Commissioner for ACT Revenue* [2013] ACAT 32 at [31] – [33]:

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 enquiries.

67. In *Kessey v Commissioner for ACT Revenue* [2019] ACAT 83, the tribunal stated at [72]:

In considering whether it is appropriate to remit penalty tax by any amount, the Tribunal must take into account subject matter, scope and purpose of the LTA, the TAA, and in particular section 37 of the TAA. The Tribunal must keep in mind the purpose for which land tax is imposed and paid. The Tribunal must keep in mind that the imposition of penalty tax and interest is intended to promote compliance with the self-reporting scheme for land tax, and to provide general deterrence of tax default. The Tribunal must keep in mind the legislative intention that the taxpayer is liable for any default by the taxpayer's agent. The Tribunal must keep in mind that section 37 does not require special or exceptional circumstances for the remission of penalty tax. Keeping all these matters in mind, the Tribunal must consider whether the penalty (as imposed by the Commissioner) is harsh, having regard to the particular circumstances of the taxpayer.²⁵

68. The Commissioner was satisfied that Luton's email forwarding a copy of the Notification of Appointment of an Agent for Rates and Land Tax dated 23 August 2016 and requesting that rates and land tax invoices should be sent to Luton's postal address in future, was a circumstance justifying remission of penalty tax and interest for the quarter in which the email was sent and subsequent quarters. I agree.
69. However, as I have noted earlier, the Notice of Reassessment issued on 7 July 2020 was based on the email being sent on 23 August 2014, instead of the

²⁵ Referring to *Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* [2018] FCAFC 54 at [15] – [20]

correct date, which is 23 August 2016. The assessment must be corrected accordingly.

70. I am not satisfied that there are any other circumstances that make it appropriate to remit penalty tax payable in this case.

Conclusion

71. In the circumstances, I am satisfied that the correct or preferable decision in this case is that the Commissioner's decision should be varied to provide that penalty tax is payable at 25% for Quarter 1, 2004-05 to Quarter 1, 2006-07 and Quarter 3, 2006-07 to Quarter 1, 2016-17 and for interest to be adjusted accordingly.

.....
Senior Member M Orlov

Date(s) of hearing

17 November 2020

Applicant:

In person

Solicitors for the Respondent:

Ms G Belcher, ACT Government Solicitor