

Tax Alert February 2011

Tax Objections – Be Careful What You Say!

The recent case of *Saxby v R* must be sending massive tremors, not just in the tax profession, but in the wider community. This is a case where a taxpayer was severely punished, not because of what he did, *but what he said!*

Practitioners must often be faced with the dilemma that they suspect that a taxpayer might be failing to declare cash income in a tax return, but the return is still lodged anyway. If a tax audit later occurs, and results in an amended assessment, the only way to preserve a taxpayer's appeal rights, as a matter of law, is to object against the amended assessment. It is only if the Commissioner disallows the objection, that a taxpayer's appeal rights to the AAT or the courts are enlivened.

Under the *Taxation Administration Act 1953* ("TAA") an objection to an amended assessment must set out fully, and in detail, the grounds that the taxpayer relies on. The TAA also says that if you give a return, notice, statement, application or other document to the Commissioner, you must make a declaration that any information in the document is true and correct. The reason for this requirement is to ensure the integrity of material given to the Commissioner.

The content of most objections is usually generic, and in the case of objections against assessments raised on an undeclared cash receipts or assets betterment basis, there is a blanket denial of any undeclared income. Most taxation practitioners have adopted this approach to

preserve the rights of taxpayers to raise those grounds as part of their pleadings during the litigation process.

Unfortunately, this practice will have to change because of *Saxby's* case, which breaks new ground, because it shows that a single statement in a notice of objection, which was found to be false and untrue, led to the conviction and imprisonment of a taxpayer.

Court's Decision

In *Saxby v R* [2011] TASCRA 1 the Supreme Court of Tasmania (Court of Criminal Appeal) upheld the Tasmanian Supreme Court's earlier judgement which convicted a taxpayer on two counts of defrauding the Commonwealth and a further two counts of imposition, sentencing him to a term of imprisonment for two years, after a jury found him guilty of committing the offences.

The charges of which the taxpayer was convicted stemmed from four notices of objection which the taxpayer's agent prepared, and the taxpayer signed and sent to the Commissioner, relating to the 1992 to 1995 income tax years inclusive.

The jury at first instance found that the statement made was false, and the offence of imposition was also proven.

The offence of defrauding the Commonwealth is not confined to any actual fraud, but can also include making false statements with an intent to defraud, where the person making the statement knew that it was false and incorrect.

Imposition is a criminal act if it is proven that a taxpayer engaged in conduct that was calculated to deflect a public officer from the proper performance of his or her public duty.

Background

The facts before the jury at first instance were:

- the taxpayer and his then wife ran a bakery business in Hobart and there was a practice of \$1,000 in cash being removed from the takings on Saturdays, Sundays and public holidays and those takings not being recorded in the weekly sales sheets;
- there were also other shops that operated as franchises under franchise arrangements involving the taxpayer and the franchise fees were also not declared as income by the taxpayer;
- the ATO audited the taxpayer for the 1992 and 1995 income tax years respectively and for the trust estate from which the taxpayer conducted his business for the 1994 and 1995 income tax years; and
- although an external accounting firm prepared the trust returns, the taxpayer himself prepared his own income tax returns and lodged them.

In evidence given to the Court at first instance, the taxpayer's then wife admitted to the taking of monies which were applied to personal expenditure. Three former staff members also attested that they were in the practice of withdrawing the cash takings and altering the weekly sales sheets to reconcile with amounts that were banked.

The taxpayer's internal accountants were responsible for recording all takings and providing the summaries of those takings to the external accountants, however, surprisingly, they were not called to give evidence for the prosecution.

Despite that lack of key evidence for the prosecution, the jury was still satisfied that the evidence of the former wife and the three staff was sufficient proof beyond reasonable doubt that the cash takings were understated as assessable income in the taxpayer's individual tax returns in the relevant income years.

The taxpayer lodged four identical notices of objection with the Commissioner on 31 August 2000, requesting a remission of additional income, penalties and interest. The taxpayer asserted that the amount of additional income

was not earned, received or derived by him during the income year or at any other time. The taxpayer also asserted:

"the total amount of income earned, received or derived by the Trust during the income year was properly and accurately recorded in its weekly sales sheets and returned as gross income in calculating the net income of the trust estate ... for the income year."

The Appeal Court confirmed that the TAA imposes an obligation on a taxpayer to assert facts in any notice of objection that are not false or misleading on a material particular. Therefore, to assert that income was "properly and accurately recorded in weekly sales sheets" was found to be in breach of the TAA, allowing the taxpayer to be subsequently charged under the *Crimes Act 1914*. (The Criminal Code Act 1995 and the TAA also contain additional criminal offences for false statements).

Lessons to be learned

Saxby's case is one of the first reported court decisions where the Commissioner has successfully prosecuted a taxpayer for making a false statement. Not only did the taxpayer still have to pay the amounts owing on the amended assessments, he now finds himself with a criminal conviction and incarceration.

All taxpayers need to ensure that in future, all communications to the Commissioner must be true and accurate in every respect, and blanket assertions are to be avoided unless such statements are true and correct.

It may also be the case that if a taxpayer finds himself or herself in similar circumstances, being faced with an administrative penalty, that it may be well enough not to object and simply pay what is owing.

Taxpayers are now put on notice. The Commissioner has a victory and it is likely that other taxpayers will be charged with similar offences in the future. Only time will tell.

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