[2013] AATA 862

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| Division | **TAXATION APPEALS DIVISION** |
| File Number | 2013/2998 & 2013/2999 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President P E Hack SC**  |
| Date | **27 November 2013** |
| Date of written reasons | **3 December 2013** |
| Place | **Brisbane** |

The application is dismissed pursuant to s 42A(5) of the *Administrative Appeals Tribunal Act 1975* (Cth).

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**Deputy President P E Hack SC**

**Catchwords**

PRACTICE AND PROCEDURE – failure to proceed with application – failure to comply with direction by Tribunal – application dismissed

**Legislation**

Administrative Appeals Tribunal Act 1975, s 42A(5)

# REASONS FOR DECISION

**Deputy President P E Hack SC**

**3 December 2013**

1. This is an application by the respondent, the Commissioner of Taxation, to dismiss the underlying proceedings for the failure of the applicant, Mr Terence Byrt, to comply with the directions of the Tribunal.
2. The proceedings concern objection decisions made by the Commissioner on 19 April 2013 in relation to assessments of income tax made by the Commissioner in relation to Mr Byrt’s income, in the 2007 and 2008 income years. Mr Byrt, by solicitors then acting for him, lodged an application to review the Commissioner’s objection decisions on 21 June 2013. A telephone directions hearing took place on 7 August 2013. Mr Byrt was represented by solicitors at that hearing. Directions were made requiring Mr Byrt to lodge and serve any witness statements and other evidence on which he intended to rely at the hearing together with a statement of facts, issues and contentions by 4 September 2013. A similar direction was made in relation to the Commissioner’s material which was required to be lodged and served by 2 October 2013. The matter was listed for conciliation conference on 13 November 2013 and listed for hearing on three days commencing on 2 December 2013. I add that the timetable was agreed to by the parties.
3. On 21 August 2013, Mr Byrt’s solicitors requested an extension of time to comply with the directions. That extension was not opposed by the Commissioner and on 22 August 2013 the date on which Mr Byrt was to lodge and serve his material was extended to 18 September 2013. A corresponding extension was granted to the Commissioner.
4. Then on 3 September 2013 Mr Byrt’s solicitors notified the Tribunal that they were no longer acting for him and that he was acting in person. On 17 September 2013 Mr Byrt applied for an extension of time to lodge and serve his statement of facts, issues and contentions. His email to the Tribunal said that he would need “in the order of one month or so”. The matter was listed for a telephone conference with a conference registrar on 27 September 2013 to discuss the future scheduling of the matter. A copy of the listing notice advising of that conference was sent to Mr Byrt by email on 23 September 2013. On that occasion the conference registrar was able to get through to Mr Byrt on the telephone number he provided however the call was terminated very soon after the conference registrar made contact. The second and third calls made by the conference registrar shortly thereafter were not answered. The conference registrar varied the direction such that Mr Byrt was granted until 16 October 2013 to lodge and serve his material. The amended direction was sent to Mr Byrt on 27 September 2013.
5. Mr Byrt did not, by 16 October 2013, lodge and serve his material. As a consequence of that non-compliance the matter was listed for a telephone directions hearing before Senior Member McCabe on 28 October 2013. On 23 October 2013 Mr Byrt emailed the Tribunal seeking an adjournment of this matter for several months on the basis that other proceedings were on foot in the Federal Court. That request was heard by Senior Member McCabe on 28 October 2013. The Senior Member did not accede to the request and set a new timetable for the matter. The hearing dates of 2, 3 and 4 December 2013 were vacated and directions were made requiring Mr Byrt to lodge and serve his material on or before 18 November 2013. The matter was listed for hearing for three days commencing on 17 March 2014. The conciliation conference was re-scheduled for 12 December 2013.
6. Mr Byrt did not comply with the direction to lodge and serve his material by 18 November 2013 and the matter was listed for a telephone directions hearing before me on 22 November 2013. Notice of that hearing was given to Mr Byrt on 19 November 2013.
7. On 22 November 2013 at the time scheduled for the directions hearing, my associate telephoned Mr Byrt who answered but the telephone call was immediately disconnected once the associate advised Mr Byrt it was the Tribunal who was telephoning. The solicitor for the Commissioner sought to have the application dismissed for Mr Byrt’s failure to comply with the direction, however, I was concerned Mr Byrt may have not had sufficient notice of the hearing.
8. Accordingly, I directed that Mr Byrt appear today to show cause why the application should not be dismissed for his continuing failure to comply with the directions of the Tribunal. The direction permitted him to appear by telephone provided that he notify the Tribunal by email of a telephone number on which he might be contacted. He in fact contacted the Tribunal by telephone this morning to inform the Tribunal of a number on which he could be contacted and he participated in the proceedings until shortly before I commenced delivering this decision.
9. I should add for completeness on each occasion that directions have been made or re‑made copies of those directions have been forwarded to Mr Byrt. Those directions contained the Tribunal’s standard notes which advise in these terms:

1. If you do not comply with a direction, the Tribunal will usually list the application for a directions hearing. You will be required to attend the directions hearing in person and explain why you have not complied with the direction.

2. The Tribunal can dismiss an application if an Applicant fails within a reasonable time to comply with a direction made by the Tribunal. This power is set out in section 42A(5)(b) of the Administrative Appeals Tribunal Act 1975.

If you are the Applicant and you fail to comply with a direction, the Tribunal may list the application either for a directions hearing or a dismissal hearing. You may be asked to explain why your application should not be dismissed.

1. There is, as was submitted by the Commissioner today, a long history of non-compliance by Mr Byrt. In response to the Commissioner’s argument today, Mr Byrt essentially sought to have these proceedings adjourned for several months to enable him to conclude other proceedings in which he is involved with the Commissioner. He provided no detail of what those proceedings were and how they are related to the present proceedings other than the suggestion that his lawyers needed to concentrate on those other proceedings. Given that the lawyers ceased to act for him in early September 2013 the argument is curious.
2. It is to be borne in mind that the Parliament, by s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth), has required the Tribunal to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. To that end, directions were made that would bring the matter on for hearing at an early opportunity. At no stage has a direction been made regarding the delivery of Mr Byrt’s material other than in accordance with a request made either by the solicitors representing Mr Byrt or by Mr Byrt himself.
3. I am left to conclude that Mr Byrt failed within a reasonable time to comply with directions of the Tribunal, most recently the direction made by Senior Member McCabe on 30 October 2013 to lodge and serve his material by 18 November 2013. Given the earlier history, I consider that a reasonable time has elapsed after that date, particularly in circumstances where Mr Byrt cannot suggest any time within which he might comply with the direction. Moreover I am well satisfied that Mr Byrt is not genuinely interested in pursuing these proceedings. He has simply failed to proceed with the application. Accordingly I will dismiss the application pursuant to s 42A(5) of the *Administrative Appeals Tribunal Act*. I am satisfied that each of paragraphs (a) and (b) are made out on the evidence before me.

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| I certify that the preceding 12 (twelve) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC  |

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

Dated

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| Date of hearing | **27 November 2013** |
| Applicant | **In person** |
| Solicitors for the Respondent | **McInnes Wilson Lawyers** |