[2013] AATA 866

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| Division | **TAXATION APPEALS DIVISION** |
| File Number(s) | 2013/4555 |
| Re |  |
|  | APPLICANT |
| And | Commissioner of Taxation |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President S E Frost** |
| Date | **15 November 2013** |
| Date of written reasons | **5 December 2013** |
| Place | **Sydney** |

Pursuant to section 42D of the Administrative Appeals Tribunal Act 1975, the Tribunal remits to the Respondent for reconsideration on or before 29 November 2013 the decision of the Respondent dated 9 August 2013.

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

**Deputy President S E Frost**

# Catchwords

PRACTICE AND PROCEDURE – Taxation – Respondent suggests resolution of dispute under s 42C of the AAT Act – effect of proposed s 42C decision is to allow the Applicant's objection in full – Applicant reluctant to agree to s 42C terms – alternative application by Respondent for remittal under s 42D of the AAT Act – Respondent foreshadows entirely favourable outcome for Applicant – Applicant opposes remittal – Applicant dissatisfied with reasons – whether remittal under s 42D should be ordered only in rare instances – discretion to be exercised according to the circumstances of the particular case, confined only by the subject matter and object of the section – appropriate to exercise the discretion in this case – decision remitted for reconsideration

# Legislation

Administrative Appeals Tribunal Act 1975 (Cth), ss 2A, 25, 27, 42C, 42D

Taxation Administration Act 1953 (Cth), s 14ZZ

# Cases

NT98/41-48 and Commissioner of Taxation [1998] AATA 311

Re Lavery and Registrar, Supreme Court of Queensland (No. 2) (1996) 23 AAR 52

N1112/00A v Minister for Immigration and Multicultural Affairs [2000] FCA 1597

# REASONS FOR remittal under s 42D of the AAT Act

**Deputy President S E Frost**

**5 December 2013**

# Introduction

1. The decision under review is the Commissioner’s objection decision dated 9 August 2013 disallowing the taxpayer’s objection against an income tax assessment.
2. On 6 November 2013 the Commissioner applied for an order under s 42D of the *Administrative Appeals Tribunal Act 1975* (AAT Act) remitting the objection decision to the Commissioner for reconsideration. The taxpayer opposed the making of such an order, and filed written submissions in support of his position on 7 November 2013. In preparation for an interlocutory hearing on 15 November 2013, the Commissioner filed written submissions in support of his application on 14 November 2013 and on the same day the taxpayer provided further written submissions in reply.
3. After hearing the parties on 15 November 2013, I granted the Commissioner’s application and gave brief oral reasons for my decision. I indicated to the parties that I would provide more detailed written reasons shortly. These are those reasons.

# Background

1. The taxpayer is an Irish citizen who arrived in Australia on a working holiday visa on 30 June 2011. He departed Australia on 29 June 2012.
2. On 16 July 2012 the taxpayer lodged an income tax return for the year ended 30 June 2012. The return, as lodged, reflected the taxpayer’s view that he was a resident of Australia in the relevant income year. After conducting a review of the return, the Commissioner formed the view that the taxpayer was not a resident of Australia in that year, and issued a notice of assessment consistent with that view. The taxpayer objected against the assessment but the Commissioner considered the objection invalid. The taxpayer objected again. This time the Commissioner accepted the objection as a valid objection, but he disallowed the objection. The taxpayer then applied to the Tribunal for review of the objection decision.

# The Tribunal proceedings and the Commissioner’s revised position

1. The Tribunal listed the matter for a preliminary conference before a Conference Registrar, to take place on 7 November 2013. However, on 6 November 2013, the day before the conference was to take place, the Commissioner sent a letter to the Tribunal to outline the Commissioner’s revised position:

The Respondent has considered the particulars of the Applicant’s case, and has determined that the objection decision dated 9 August 2013 should be set aside, and the objection allowed in full. The Respondent has reached this position on the basis that, on a balancing of all the facts available, we are not satisfied that the Applicant had a usual place of abode outside Australia during the relevant year. Accordingly, we have reconsidered our view, and now consider that the Applicant is an Australian resident for income tax purposes for that year.

1. The letter also explained that the Commissioner had sent to the taxpayer’s representative a proposed consent decision under s 42C of the AAT Act, by which the Tribunal would set aside the objection decision and substitute a decision that the objection was allowed in full, on the basis that, in respect of the 2012 income year, “[t]he Applicant is an Australian resident for income tax purposes, pursuant to subsection 995-1(1) of the *Income Tax Assessment Act 1997*”.
2. It seems that the taxpayer’s representative had already foreshadowed a reluctance to have the application disposed of by way of a consent decision under s 42C. That explains why the Commissioner’s letter dated 6 November 2013 continues as follows:

Should the Applicant proceed with their view that the matter should be heard by the Tribunal, the Respondent would respectfully request that the Tribunal remit the decision back to the Respondent for reconsideration of the decision under section 42D(1) of the Act. Remission under this section can be made at any stage of a proceeding for review, and may be ordered by a Conference Registrar.

The Respondent further considers that progressing the matter under section 42C, preferably, or 42D in the alternative, would assist the Tribunal in pursuing its stated objectives [of providing a mechanism of review that is fair, just, economical, informal and quick: s 2A of the AAT Act].

# The taxpayer’s position

1. The Commissioner’s letter dated 6 November 2013 triggered a response from the taxpayer’s representative, Mr Phillip Browne of CABEL Partners. [[1]](#footnote-1) The response made it clear that the Commissioner’s application for an order under s 42D was opposed. The reasons included:
* that remittal under s 42D would not resolve the dispute or clarify the issue in dispute;
* that without a Tribunal hearing, “the matter [would remain] unclarified by an independent party”;
* that remittal would “abolish the prerogative of the taxpayer to proceed with his intentions of appeal”; and
* that the taxpayer had identified “a point of law related to residency” which he wished to have tested by the Tribunal.
1. The letter also made these observations (emphasis added):

We are quite concerned that the Commissioner has not done his job, which is required of him, before assessment of this taxpayer, namely to, inter alia, be satisfied that the taxpayer actually has firstly a usual place of abode and secondly that it is outside Australia.

* The Commissioner has the right to assess, which was done on 17 September 2012
* The Commissioner has the right to decide an objection which was done on 9 August 2013

For the purposes we are talking about here **the Commissioner has no further rights**. When called upon, as is the case now, **the AAT Act comes into play and should be played out** with the Commissioner as Respondent and the taxpayer as Applicant.

1. Mr Phillip Browne explained in his later written submissions in reply that his family owns a firm of chartered accountants known as Backpackers Buddy, or BB, which lodged the taxpayer’s tax return for 2012. He also explained that he is a partner in CABEL Partners, a firm of chartered accountants which undertakes “tax consulting services such as objections and appeals for BB on a commercial basis”. BB seems to have a number of clients who have visited Australia on a temporary basis and who have had to take a position on whether or not they are residents of Australia for tax purposes.
2. The written submissions claim that there are valid reasons for opposing the Commissioner’s request for an order under s 42D of the AAT Act, including:

…

**Travel to Australia again**

If the taxpayer obtains a Visa and travels to Australia again he wishes to be informed about the matters which are relevant to him in deciding whether he is a resident of Australia for tax purposes.

If this matter is remitted he will have no further information arising from his first visit to assist him in his self-assessment decision-making.

**Assessment of Residency**

Currently the taxpayer has access to a taxation ruling, various statements on the Australian Taxation (ATO) website and an online residency questionnaire in order to inform himself when self-assessing his residency status. In our view these resources inadequately address the issues of residency, particularly for an inbound traveller to Australia. As a tax agent dealing mostly in this field BB assists its clients and potential clients in the assessment process. We agree with many ATO views, however we are at variance with some written statements of the ATO and with the stated views expressed by ATO officers.

…

1. Mr Browne also perceives that if the matter were to proceed to hearing, the Tribunal would be conducting a very wide-ranging enquiry. As the submissions note:

Specifically the areas to be tested by the taxpayer in this case are:

1. ‘Resides test’ in the residency definition in section 6(1) Income Tax Assessment Act 1936 (ITAA 1936)
	1. Visa relevance
	2. Casual employment relevance
	3. Family ties relevance
	4. Casual or temporary living arrangements relevance
	5. Timing of test
2. ‘One half of the year of income (183 day) test’ in the residency definition in section 6(1) ITAA 1936
	1. Relevance of parents home
	2. Relevance of post trip actions
	3. Timing of test
3. Income Tax Ruling IT 98/17
4. ATO Website
	1. “residency – the 183 day test”
	2. Examples of residents and foreign residents
	3. Residency – what you need to know
5. ATO tax file number declaration
6. Residency tax Tool
7. Tax file number – application or enquiry for individuals living outside Australia.
8. Under the heading “Appeal on Residency”, he submits as follows (emphasis added):

**There are real issues between the parties** as a result of the assessment issued by the [Commissioner]. These are sought to be agitated before the Tribunal which will hear the substantive objections.

**The issue here isn’t about the decision but about the reasons for the decision.**

**We wish to test the reasons for the ATO decision. The actual review decision of the Tribunal is secondary.**

We believe the reasons for the decision on the substantive issues of the meaning and application of the ‘resides’ and ‘one half of the year of income’ tests have wide applicability to the ATO employees, tax agents and the public including visitors to Australia generally.

1. Mr Browne also told me that his client is prepared, in taking this matter to hearing, to risk an unfavourable outcome (that he was *not* a resident of Australia in the relevant year) for the sake of getting clarification on the identification and application of proper criteria to his circumstances. He said:

… I am not at all in any way assuming that when this matter proceeds to the Tribunal that the Tribunal will hold that he’ll be a resident or a non-resident. It’s a completely open matter. [My client] understands that and we will get reasoning that I believe will add value to what is on the table at the moment which is principally a Tax Ruling 98/17. That will give him clarity as to whether he is properly treated as a resident or properly treated as a non-resident. [[2]](#footnote-2)

# Consideration

1. One of the submissions the taxpayer makes is that remittal under s 42D “should only be made in rare instances”. That is said to be based on the observations of Senior Member Block (as he then was) in *NT98/41-48 and Commissioner of Taxation* [1998] AATA 311 (reported as *Case 18/98* 98 ATC 246; *AAT Case 12,865* (1998) 39 ATR 1032). The observations referred to (see [17] below) follow a discussion of the decision of Deputy President Forgie in *Re Lavery and Registrar, Supreme Court of Queensland (No. 2)* (1996) 23 AAR 52. In *Lavery* the Deputy President explained the interaction of a number of provisions of the AAT Act, including the then recently introduced s 42D, and said at 56-57:

…

It would follow from the framework of the AAT Act and the nature of administrative merits review that the power given by section 42D to remit a decision to a decision maker should not be exercised simply because inadequate findings of fact, references to evidence or reasons have been given. Nor should it be exercised simply because a decision-maker supports his, her or its decision on a basis different from that originally put forward. The AAT Act provides other means to remedy those situations.

Determining the occasions on which the power given by section 42D may be exercised is more difficult. It is not clear from the AAT Act itself. I have, therefore, looked to the Explanatory Memorandum which accompanied the Law and Justice Legislation Amendment Bill No. 3) 1994. Section 42D was inserted by Item 21 of Schedule 2 to that Bill. The notes in relation to that Item state:

[99] The Tribunal does not have the power to order that a
matter be remitted (sic) the decision-maker for further
consideration unless it sets aside the decision under
subparagraph 43(c)(ii) of the Act. This can result in
matters proceeding to a hearing even where the parties
agree that the decision-maker should review the decision.

[100] Item 21 of Schedule 2 inserts new section 42D which
will provide that the Tribunal has the power to order that
a matter may be remitted to the decision-maker for further
consideration at any stage of the proceedings. Where a
decision is remitted the decision-maker may affirm, vary,
or set aside the decision and make a new decision in
substitution for the decision set aside.

[101] New subsections 42D(3) and (4) will provide that where
a decision is varied, or a new decision is substituted, the
applicant may proceed with the application for review in
respect of the varied or new decision or withdraw the
application.

The notes do not provide any assistance as to when the power should be exercised. There are, however, two things that can be gleaned from the notes. The first is that there seems to be an underlying assumption that case management procedures are at the heart of the new section 42D. The second is that the power is needed in cases in which the decision maker should review the decision but does not give any indication of when such cases might arise.

…

1. That is the immediate context in which the Tribunal made the following observations in *NT98/41-48*:

[12] (a) As Deputy President Forgie said in Lavery’s case, the explanatory memorandum does not furnish any real assistance as to when the Tribunal should exercise its power under section 42D(1) of the Administrative Appeals Tribunal Act. It may be that the section confers a power which will be exercised rarely; the absence of case authority (other than Lavery’s case) in respect of section 42D, even though it was introduced into the Administrative Appeals Tribunal Act some three years ago, suggests that this may be so.

(b) It may perhaps be correct to say that the power should be exercised where the reasons are so unsatisfactory that it is fair to infer that the decision maker has not applied his or her mind, or where the reasons are indeed aptly categorised as a “sham”, but that is very far from being the case in this instance. It may be that the Respondent’s reasons could perhaps be refined but this is not an aspect in respect of which this Tribunal need (or indeed should) attempt to be specific.

1. It is quite plain that the Tribunal in *NT98/41-48* was not seeking to declare, as a matter of principle, that the s 42D power should be exercised only rarely. The observations are typically cautious, introduced by the words “it may be”, and offering a prediction rather than suggesting a principle.
2. If history now tells us that the power to remit under s 42D has *in fact* been exercised infrequently, that would simply indicate that the circumstances appropriate for its exercise have arisen only infrequently. And that would not be surprising. Most decisions that come to the Tribunal for review have undergone rigorous, and often high-level, checking and review in the decision-making agency concerned, so that remittal for reconsideration would often be considered unnecessary and unhelpful.
3. In *N1112/00A v Minister for Immigration and Multicultural Affairs* [2000] FCA 1597; 32 AAR 76 (the *N1112* case) the applicant was seeking judicial review of a decision of the Tribunal not to remit a matter for reconsideration under s 42D. Emmett J said at 82 (original emphasis):

… while the object of s 42D is not entirely clear, it would apply where, at an early stage in a proceeding before the Tribunal, it was apparent that the respondent acknowledged that a decision was flawed. In order to save the time of the Tribunal and the costs that would be involved in a proceeding before the Tribunal, it may well be appropriate in such circumstances, that the Tribunal, even though not by consent, remit a matter back to the decision maker. However, the circumstances in which the Tribunal would be **bound** to do so must be rare, if there are in fact any such circumstances.

1. His Honour went on to refer, also at 82, to the observations of the Tribunal in *NT98/41-48*:

… Mr Block suggested that the section confers a power that would probably be exercised rarely. He suggested that it may be that the power should be exercised where the reasons of a decision-maker are so unsatisfactory that it is fair to infer that the decision-maker has not applied his or her mind to the decision or whether the reasons may be aptly categorised as a sham.

I express no view as to whether that proposition is correct. …

1. I agree with the Commissioner’s submission that there is nothing in the text, context or apparent policy behind s 42D that compels the conclusion that the discretion conferred by it ought to be exercised rarely. Indeed, in my view, there is nothing that even *hints* at such a conclusion. The statute leaves the discretion unfettered, to be exercised according to the circumstances of the particular case, having regard to any considerations thought by the Tribunal to be relevant, and confined only by the subject matter and object of the section[[3]](#footnote-3) That object being to help the Tribunal to achieve the quick and efficient resolution of disputes.
2. While the kind of scenario referred to by Emmett J in the *N1112* case is one which would likely weigh in favour of remittal, I do not understand his Honour to be suggesting that it is the only scenario that would favour remittal. Equally there will be scenarios where the balance lies against remittal. But in my view it is not helpful to attempt to be prescriptive about the types of fact patterns that would drive the exercise of the discretion in either one direction or the other. Each case needs to be considered on its merits, and should be approached on the basis that there is neither a presumption in favour of the exercise of the discretion, nor a presumption against it.
3. There are some other propositions put forward by Mr Browne in his written and oral submissions that I do not accept.
4. One is the submission that “the Commissioner has no further rights” when an application is made to the Tribunal. Mr Browne seems to be suggesting that the Commissioner should be explicitly denied the opportunity to correct what he now sees as an erroneous decision. That is, with respect, a perverse notion. One of the aspirations of the executive arm of government should be to make correct decisions in relation to the affairs of individuals and organisations; it makes no sense to stand in the way of a decision-maker who is trying to do precisely that.
5. Another is that, when an application is made to the Tribunal, “the AAT Act comes into play and should be played out”. While in broad terms I agree with the statement, I do not agree with the way Mr Browne has interpreted it. There are many ways for the matter to be “played out”; a hearing is only one of them. The Tribunal’s statistics show that only about 10 to 15 per cent of applications for review of government decisions find their way to a hearing. Alternative dispute resolution processes dispose of many applications. Section 42D is another process that should be used whenever appropriate.
6. There are three factors that have led me to the conclusion that this is a case where remittal under s 42D is appropriate.
7. The *first* is that there is no longer a dispute between the parties as to the correct or preferable *decision*; the taxpayer simply takes issue with the *reasons* for it.
8. Mr Browne explained that his client:

… is aggrieved by having received an assessment of $1,500 and a penalty on top of that of nearly $1,500 and he wishes to agitate the matter.

…

Well, he cares about it because he thinks he’s due a refund and he’s got a bill and he’s got a penalty. So he’s fairly much aggrieved by this …[[4]](#footnote-4)

1. However, at the same time, he said his client was prepared to risk losing the foreshadowed favourable outcome because the reasons for the outcome were more important than the outcome itself.[[5]](#footnote-5)
2. Assuming that the Commissioner now sets aside the original objection decision and substitutes a decision that the objection is allowed in full (as is foreshadowed), the taxpayer will achieve precisely the outcome that he was after. Taking a decision-maker to task on the *reasons* for a decision, when the decision itself is not a source of dissatisfaction, is not an avenue contemplated by s 25 (“applications may be made to the Tribunal for review of *decisions*”) or s 27 of the AAT Act (“application may be made to the Tribunal for a review of a *decision*”) or, in a taxation context, s 14ZZ of the *Taxation Administration Act 1953* (“If the person is dissatisfied with the Commissioner’s objection *decision*”). While the Tribunal routinely considers, and often comments on, the *reasons* for a reviewable decision, it does so only as part of the fundamental power to review the decision itself.
3. The *second* factor is that it is not an efficient use of the Tribunal’s resources to conduct a hearing for the sole purpose of providing the Tribunal’s reasons for what is likely to be an uncontested decision. The Commissioner’s current view is that the taxpayer was a resident of Australia in the relevant year. Assuming the current view is maintained, the Commissioner will not be in a position to provide assistance to the Tribunal as a contradictor of the taxpayer’s arguments. The value of the Tribunal’s reasons in those circumstances is considerably diminished.
4. The *third* factor overlaps with the first two. Section 2A of the AAT Act says that the Tribunal must “pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick”. To launch this matter towards hearing, as things stand at the moment, is not fair to the Commissioner, and it is not economical. Nor will it provide a quick resolution – or at least, not as quick a resolution as a remittal under s 42D should provide. And while the matter remains unresolved it has the potential to hinder the Tribunal’s ability to provide a fair, just, economical and quick outcome to other users of the Tribunal’s services who are waiting patiently in line: see *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [93]-[95].

# Conclusion

1. On the current state of play the most efficient way to finalise this application would be through a consent decision under s 42C of the Act.
2. While the Tribunal cannot force one party to accept the other party’s proposed terms of agreement, it should not be expected to stand idly by when efficiency demands that it act. That is why I chose to take the second most efficient way forward – to remit the objection decision to the Commissioner for reconsideration under s 42D.

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| I certify that the preceding 35 (thirty -five) paragraphs are a true copy of the reasons for the decision herein of Deputy President S E Frost.  |

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

Dated

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| Date of interlocutory hearing | **15 November 2013** |
| Advocate for the Applicant | **Mr P Browne, CABEL Partners** |
| Counsel for the Respondent | **Mr B C Kasep** |
| Solicitors for the Respondent | **ATO Legal Services Branch** |

1. Mr Phillip Browne is not related to the taxpayer. [↑](#footnote-ref-1)
2. Transcript, P-13 to 14 [↑](#footnote-ref-2)
3. Water Conservation and Irrigation Commission (NSW) v Browning [1947] HCA 21; 74 CLR 492 at 504-505, per Dixon J [↑](#footnote-ref-3)
4. Transcript, P-13 [↑](#footnote-ref-4)
5. Transcript, P-13 to 14; see [15] of these reasons [↑](#footnote-ref-5)