[2015] AATA 34

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| Division | **TAXATION APPEALS DIVISION** |
| File Numbers | 2013/3338; 2013/3339; 2013;3340; 2013/3341 |
| Re | Raschta Coatings Pty Ltd as trustee for the Raschta Coatings Trust |
|  | APPLICANT |
| And | Commissioner of Taxation |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President P E Hack SC** |
| Date | **23 January 2015** |
| Place | **Brisbane** |

In each application the objection decision is set aside and a decision substituted that the objection be allowed in full.

It is certified that the proceedings have terminated in a manner favourable to the applicant.

...................[Sgd].....................................................

**Deputy President P E Hack SC**

**Catchwords**

TAXATION – income tax and GST liability – assessments – whether assessments excessive – shortfall penalty – decisions under review set aside

**Legislation**

Income Tax Assessment Act 1936 (Cth) ss 166, 167

Taxation Administration Act 1953 (Cth) s 14ZZK(b)(i); Schedule 1 s 105-5, Division 155

**Cases**

Gashi v Federal Commissioner of Taxation (2013) 209 FCR 301

Ma v Federal Commissioner of Taxation (1992) 37 FCR 225

Rigoli v Federal Commissioner of Taxation (2014) ATC 20-446; [2014] FCAFC 29

Thomas v Legal Practitioners Admissions Board [2005] 1 Qd R 331

# REASONS FOR DECISION

**Deputy President P E Hack SC**

**23 January 2015**

## Factual background

1. The applicant, Raschta Coatings Pty Ltd (the Company), acted at all material times as the trustee of the Raschta Coatings Trust (the Trust). Its business involved buying and selling protective coatings used on steel and concrete in the mining and energy industries.[[1]](#footnote-1) Mr Matthew Thomas was the controlling mind of the Company.
2. The Company was registered for GST from January 2008. In April 2011 the respondent, the Commissioner of Taxation, commenced an audit of the Company’s compliance with its GST obligations. In due course that audit was widened to include the Company’s compliance with its income tax obligations.
3. It seems convenient to set out the background to this matter by tracing the course of the Commissioner’s audit and its outcome. It started with a letter from the Commissioner to the Company of 20 April 2011[[2]](#footnote-2) advising of the fact of the audit and requesting access by 4 May 2011 to:

* your summary accounting records (for example – cash book, electronic or other records)

• statements of financial performance (formerly known as trading accounts or profit and loss statements)

• statements of financial position, with notes (formerly known as balance sheets)

• bank statements showing all transactions (for the aforementioned period [1 July 2008 to 30 March 2011]).

Despite various extensions of time, the documents sought were not provided. Mr Thomas says that all financial records of the Trust, including source documents pertaining to the audit period, “were destroyed in the 2010/2011 Brisbane Floods”.[[3]](#footnote-3)

1. In the absence of documents, the Commissioner undertook an analysis of deposits and payments shown on the Company’s bank statement. That showed total deposits over the period of $3,935,292.19, whereas the activity statements for the period July 2008 to December 2010[[4]](#footnote-4) disclosed $1,442,577 of taxable supplies. Additionally, the Commissioner’s examination of the bank statements over the period identified $515,332.75 of withdrawals which gave the impression of being related to business activities. That compared with capital acquisitions of $357,848 and other acquisitions of $2,312,043 shown in activity statements lodged for the period. In his interim report,[[5]](#footnote-5) sent under cover of a letter of 7 September 2011, the Commissioner proposed:

* to regard $3,495,168 as the total of taxable supplies in the period 1 July 2008 to 31 December 2010 (in lieu of the figure of $1,435,423 reported), leading to a revised GST liability for that period of $317,738 (in lieu of $130,687), an increase of $187,051;
* to regard $347,004 as the total of taxable supplies in the period 1 January 2011 to 31 March 2011, leading to a GST liability of $31,546;
* to revise input tax credits in the period 1 July 2008 to 31 December 2010 from $244,455 to $46,847, resulting in a reduction in input tax credits by $197,608;
* to allow input tax credits of $1,073 for the period 1 January 2011 to 31 March 2011;
* to determine that the Trust had taxable income of $392,515 for the 2009 income year and $940,951 for the 2010 income year and to make default assessments accordingly;
* to determine a shortfall penalty of 25% (on the basis of a lack of reasonable care) in relation to the GST shortfall for the period July 2008 to December 2010, a total of $97,388;
* to determine a failure to provide a document penalty of 75% of the liability for the GST liabilities for January to March 2011, a total of $22,854.75; and
* to determine a failure to provide a document penalty of 75% of the liability for the 2009 and 2010 income tax years, a total of $450,044.77.

1. Thereafter, on 24 October 2011, the Company lodged the Trust’s income tax returns for the 2009 and 2010 income years.[[6]](#footnote-6) Each year showed a considerable trading loss. On the same day, the Company lodged its activity statements for January, February and March 2011.[[7]](#footnote-7) On 22 November 2011 the Company lodged revised activity statements for those months.[[8]](#footnote-8)
2. The Commissioner finalised his audit in early March 2012 and forwarded a final audit report to the Company on 7 March 2012.[[9]](#footnote-9) The Commissioner, using the same method of analysing deposits and withdrawals on the Company’s bank account, concluded that it had understated GST on supplies between July 2008 and March 2011 by $214,362 and had overstated input tax credits by $121,803. Additionally, the Commissioner made default assessments for the 2009 and 2010 income tax years on the basis of an analysis of receipts and an estimate of expenses based on industry standards and concluded that the Trust’s assessable income from the 2009 income year had been $383,805 and for the 2010 income year $665,042. The Commissioner determined that the GST shortfall had come about through recklessness and that a shortfall penalty of 50% was warranted. He reached a similar conclusion in relation to the income tax shortfalls.
3. The result of this was that on 7 March 2012 the Commissioner:

* made an assessment of GST net amount for the period 1 July 2008 to 31 March 2011 in the amount of $336,165;[[10]](#footnote-10) and
* made an assessment of GST shortfall penalty in the amount of $170,528.[[11]](#footnote-11)

Then, on 23 April 2012, the Commissioner:

* made an assessment of the Trust’s taxable income for the 2009 income year in the amount of $383,805;[[12]](#footnote-12)
* made an assessment of the Trust’s taxable income for the 2010 income year in the amount of $665,042;[[13]](#footnote-13)
* made an assessment of shortfall penalty (income tax) for the 2009 income year in the amount of $89,234.65;[[14]](#footnote-14) and
* made an assessment of shortfall penalty (income tax) for the 2010 income year in the amount of $154,622.25.[[15]](#footnote-15)

1. Objections to these assessments were lodged on 30 April 2012. Thereafter the Company supplied to the Commissioner further documents, including documents evidencing loans made to the Company. These documents satisfied the Commissioner that two of the bank deposits that had been treated as both assessable income and taxable supplies did not have that character. The Commissioner reduced the amount of taxable supplies in the month of August 2009 by $9899 and for the month of July 2010 by $9091. Moreover, the Commissioner revisited his approach to the calculation of input tax credits. Rather than combining some demonstrated expenditure with industry-standard costs, the Commissioner applied industry-standard costs (59.3%) to the monthly figures for adjusted sales. In the result, the amount allowed for input tax credits increased by $137,897, making an overall reduction of the GST net amount by $156,887. The Commissioner gave effect to that conclusion by making an amended assessment on 18 March 2013.[[16]](#footnote-16)
2. The Commissioner followed a similar methodology in calculating the Trust’s assessable income and allowable deductions for the 2009 and 2010 income tax years. On 7 May 2013, he made an amended assessment of $186,788 for the Trust’s taxable income for the 2009 income year[[17]](#footnote-17) and of $175,145 for the 2010 income year.[[18]](#footnote-18)
3. The administrative penalties for the GST shortfall in the income tax shortfalls were reduced accordingly but the level of penalty was maintained at 50% on the footing that the shortfalls had resulted from reckless behaviour. Amended assessments of shortfall penalty were made for both the GST net amount, and income tax, shortfalls, but the notices evidencing those amended assessments appear not to be in the material before me.
4. These proceedings were commenced on 8 July 2013. The hearing took place, eventually, on 8 and 9 July 2014 (with submissions on 3 September 2014) after, it must be said, considerable delays in Mr Thomas providing his material. It is relevant to note as well that a further short hearing took place on 25 November 2014 when the parties were directed to lodge further submissions regarding one particular aspect of an exhibit tendered by Mr Thomas, Exhibit 7. I deal below with the outcome of those submissions.

## The statutory setting

1. No detailed analysis of the legislation is called for. By virtue of s 167 of the *Income Tax Assessment Act 1936* (Cth) (the ITAA 1936), the Commissioner is empowered to make an assessment (called a default assessment) of the amount upon which, in the Commissioner’s judgement, income tax ought be levied where one of three pre-conditions to the exercise of the power is satisfied. It is necessary only to note that one of those conditions, and that relied on by the Commissioner in the case of the Company in the 2009 and 2010 income years, is that the Commissioner “is not satisfied with the return furnished”. The cases on default assessments[[19]](#footnote-19) emphasise the distinction to be drawn between a default assessment under s 167 of the ITAA 1936 and the assessment of taxable income undertaken under s 166 of that Act. In *Gashi*,[[20]](#footnote-20)the Court explained the difference in this way:

The s 167 power is necessarily different to that in s 166. Under s 166, the power is to “make an assessment of the amount of the taxable income”. The phrase “taxable income” is defined to mean “assessable income” minus “deductions”: s 4-15 of the 1997 Act and s 6(1) of the 1936 Act. Under s 167, that process of calculating taxable income as assessable income minus deductions is not possible (in whole or in part) because of one of the preconditions to the exercise of the power in subss (a)-(c) of s 167 – a failure by a person to lodge a tax return, the tax return is deficient or the Commissioner has reason to believe that a person who has not lodged a return has derived taxable income. It is for those reasons that the balance of s 167 empowers the Commissioner to make an assessment of the amount upon which income tax ought to be levied and for that amount to be deemed to be the taxpayer’s taxable income for the purposes of s 166.

1. These cases also emphasise that it is not enough for a taxpayer to establish that the Commissioner’s assessment is wrong; the task is to show, on the balance of probabilities, the correct amount upon which tax should be levied.
2. The legislative position with GST is similar in effect although found in Schedule 1 to the *Taxation Administration Act 1953* (Cth) (the Administration Act). Section 105-5 to that Schedule empowered[[21]](#footnote-21) the Commissioner to make an assessment of a taxpayer’s “net amount”, an amount determined by deducting input tax credits from GST. Such an assessment might be made at any time and was not dependent on the Commissioner being dissatisfied with the return lodged or default in lodging a return.
3. Given the similarity between the concept of the Commissioner making an assessment of the amount upon which income tax ought be levied and that of an assessment of the GST net amount, and in the absence of any argument from the parties to the contrary, I propose to treat the jurisprudence in income tax cases as applicable to the manner in which a taxpayer discharges the burden of showing that a GST net amount assessment is excessive. In each case, the mechanism for objection, and review of or appeal against objection decisions, is common and is found in Part IVC of the Administration Act. By virtue of s 14ZZK(b)(i), within that Part, an applicant,

… has the burden of proving … that the assessment is excessive or otherwise incorrect and what the assessment should have been.

## The applicant’s case

1. The Company presented a case which, at first blush, appears unpromising. It does not produce original documents and advances its case by relying on the evidence of Mr Thomas, a person whose reliability was the subject of considerable challenge by the Commissioner. The essence of that challenge was that Mr Thomas had failed to produce relevant documents and that he could not, and should not, be believed when he asserted that all the documents of the Company had been lost in the floods in 2010/2011. Additionally, the Commissioner points to unrelated historical matters that he says cast doubt on Mr Thomas’ credibility.
2. There is force in the Commissioner’s submissions regarding the absence of documents and reason for scepticism about the veracity of the assertions, although not all of the Commissioner’s arguments are sound. One of them, in paragraph 33 of the Commissioner’s submissions,[[22]](#footnote-22) suggests that the claim is inconsistent with the position taken by Mr Thomas and his then-advisor in September 2011 when, so it was said, the advisor offered to produce source documents in relation to acquisitions and documentation to verify the nature of non-trading receipts. I do not regard the document relied upon by the Commissioner for this submission[[23]](#footnote-23) as making it good when the passages relied upon are read in context. Other parts of the same document refer to the need to replace all source documents and put forward a proposal to seek copies of invoices from the top five suppliers by value.[[24]](#footnote-24) That in fact was done, a topic to which I shall return.
3. It is, though, the case that some of the documents must relate to documents that came into existence after the floods – they cannot have been affected yet they have not been produced and their absence is not explained in any satisfactory manner.
4. The Commissioner points to the absence of witnesses who could corroborate Mr Thomas’ evidence about the nature of some of the transactions evidenced by deposits to the Company’s bank accounts. The Commissioner invites the drawing of an inference that the evidence of those other parties would not have assisted the Company in establishing the true nature of those transactions.
5. It was submitted that Mr Thomas was “evasive” in response to cross-examination and had a “selective memory” although I must say that was not my impression; my impression, as I will seek to explain in due course, was that Mr Thomas was obstinate and likely treated the Commissioner’s processes, and his officers, with disdain.
6. The Commissioner also pointed to a decision of the Queensland Court of Appeal[[25]](#footnote-25) where reference was made to Mr Thomas’ “lack of candour” in disclosing convictions for dishonesty on his application for the Legal Practitioners Admission Board’s consent to his entry into articles of clerkship.
7. There is, as I say, considerable force in the Commissioner’s submissions. I need first to examine the affirmative case propounded by Mr Thomas on behalf of the Company.
8. It may first be noted that whilst most source documents have not been produced, Mr Thomas has produced (and provided to the Commissioner some time ago) a complete printout of the Company’s general ledger for the period 1 July 2008 to 31 March 2011. The Commissioner did not suggest that the general ledger ought not be relied on. Additionally, various bank statements for the Company and for some related entities are in the material before me.
9. In that setting, Mr Thomas produced a document – Exhibit 7 – that sought to demonstrate that amounts totalling $1,934,863.75 recorded as credits on the Company’s bank accounts (and included by the Commissioner in the total of taxable supplies and assessable income) were not taxable supplies and could not, by their very nature, amount to taxable supplies or assessable income. The significance of that figure is that it is very close to the difference between the total of taxable supplies reported by the Company between 1 July 2008 and 31 March 2011 (an amount of $1,442,577)[[26]](#footnote-26) and the amount determined by the Commissioner at the objection stage to be the total of taxable supplies, a figure which Mr Thomas put as $3,357,090 in Exhibit 7. That figure is itself controversial. Because I was unable to understand how it had been derived I listed the matter for a further short hearing to enable Mr Thomas to explain its derivation. Ultimately, on 25 November 2014, I directed that the parties put on supplementary submissions designed to show the amount by which that the Commissioner had increased the Company’s taxable supplies. Unsurprisingly, given Mr Thomas’ history in providing material, the document he produced did not demonstrate the derivation of the figure of $3,357,090 and it remains a mystery to me how it was arrived at. Nonetheless the Commissioner’s supplementary submissions demonstrate, by reference to the material in evidence, that the figure by which the Commissioner increased to taxable supplies was $3,593,808.
10. Put more simply, the Company, via Exhibit 7, sought to demonstrate that all, or the major part of, the amount by which the Commissioner had increased taxable supplies was explicable otherwise than as taxable supplies and, at the same time, demonstrate that the “unexplained deposits” did not amount to assessable income.
11. The first group of transactions comprise 11 deposits totalling $332,200 said to be loans to the Company by a related entity Raschta MPS. Perusal of the bank statements of the Company and those of Raschta MPS demonstrate that a deposit of $145,000 to the account of the former on 27 September 2010[[27]](#footnote-27) coincides with a withdrawal of that exact amount from the account of the latter on the same day.[[28]](#footnote-28) The same is true of deposits of $79,000 on 25 November 2010,[[29]](#footnote-29) $4,000 on 6 December 2010,[[30]](#footnote-30) $20,000 on 21 December 2010,[[31]](#footnote-31) $6,000 on 22 December 2010,[[32]](#footnote-32) $54,000 on 20 January 2011,[[33]](#footnote-33) $6,000 on 28 February 2011,[[34]](#footnote-34) $2,000 on 4 March 2011,[[35]](#footnote-35) $3,000 on 7 March 2011,[[36]](#footnote-36) $10,000 on 8 March 2011[[37]](#footnote-37) and $3,200 on 29 March 2011.[[38]](#footnote-38)
12. I should add that, with the exception of the transactions on 27 September 2010, all of the entries are noted on the bank statements as being transfers from “mps to rc”. I infer that the transfers were effected by internet banking. I note, as well, that the treatment of the transactions in the Company’s general ledger is consistent with them being loans – the various amounts are shown as debits to the cash at bank account and as credits to the loan accounts of Raschta MPS.
13. The effect of the Commissioner’s audit was such that each of these transactions was treated as being a taxable sale. On the face of it, they plainly were not.
14. The same is true of the next group of transactions – 27 transactions involving transfers to the Company from another related entity, Wardell St Investments Pty Ltd, whose bank statements form part of Exhibit 3.
15. It is unnecessary to list the transactions individually. It is enough to say that each credit to the bank statement of the Company (xxxx 0747) is matched by an identical debit to the account of Wardell St Investments Pty Ltd (xxxx 4521), accompanied frequently, but not invariably, by notations confirming that the particular transaction was a transfer. And, once again, the treatment within the general ledger is consistent with each transaction being an intercompany transfer, not a receipt from a taxable sale.
16. Mr Thomas next deals with two deposits – $110,000 on 29 November 2010 and $152,245.60 on 17 March 2011 – which he says represent the proceeds of loans from an external financier. As to the first of these there is, in the material,[[39]](#footnote-39) a letter from Macquarie Leasing Pty Ltd, dated 25 November 2010, enclosing an unexecuted copy of a hire purchase agreement for the hiring by the Company of industrial machinery with a cash price of $110,000. This material was, I infer, provided to the Commissioner at the objection stage. The Commissioner’s Reasons for Decision say of these documents:

Regarding Macquarie Leasing, you advise an amount of $110,000 related to a Commercial Hire purchase. The documentation you have provided relating to this agreement details a proposal for a commercial hire purchase however we can find no evidence of the amount of $110,000 being deposited into your Commonwealth Bank account in the period covered by the audit.

I find that surprising given that a deposit of $110,000 appears on the Company’s bank statement on 29 November 2010.[[40]](#footnote-40) Given the coincidence of dates between the letter from Macquarie and the deposit and the coincidence between the amount shown in the letter and of the deposit, I am well satisfied that the deposit of $110,000 on 29 November 2010 represented the proceeds of a hire purchase transaction as Mr Thomas claimed.

1. There appear to be fewer documents that relate to the other deposit, an amount of $152,245.60 on 17 March 2011. Mr Thomas says that represents the proceeds of a finance transaction, also with Macquarie Leasing. He has produced a schedule[[41]](#footnote-41) that I infer was obtained from Macquarie Leasing. It demonstrates that Raschta MPS, an entity related to the Company, borrowed $152,245 over a term of five years to acquire some industrial equipment. The reference number shown was 0454195-002. The Commissioner’s Reasons for Decision say this:

In respect to Macquarie Leasing contract number 454195-002 that has a balance outstanding as at 8 August 2012 of $155,480.55, there is no evidence of this amount or any other amount relating to the leasing agreement having been deposited into your Commonwealth Bank Account (xxxx 0747) in the period covered by the audit.

There was though a deposit of $152,245.60 on 17 March 2011, an amount that comes within 60c of a Macquarie Leasing transaction with an identical contract number, a transaction undertaken in March 2011. It is curious that the party that transacted with Macquarie Leasing was a related entity rather than the Company, however, the material satisfies me that the deposit of $152,245.60 on 17 March 2011 represented the proceeds of a finance transaction, not taxable supplies.

1. The next category of transactions is called PEP loans. There are 13 transactions totalling $577,652. According to Mr Thomas they do not represent taxable supplies; rather, they represent the proceeds of loans made to the Company by arm’s length third parties. Mr Thomas was able to provide to the Commissioner the loan agreement dated 8 July 2010 between the Company and a Mr Martin Cuthbertson, which evidences a loan from Mr Cuthbertson to the Company of $100,000 for a term of 12 months. The Commissioner accepted that transaction was a loan. Mr Thomas has produced limited documentation regarding the other transactions. He explained[[42]](#footnote-42) that the lending was done through the trust account of The Law Place, a firm of solicitors, and produced what he said was an extract of that firm’s trust account ledger.[[43]](#footnote-43) The Commissioner accepted that the document was a trust account ledger[[44]](#footnote-44) although putting in issue that it evidenced what it purported to evidence – that is, loans from the various lenders to the Company.
2. Despite the Commissioner’s reservations, and notwithstanding that the Company did not call any of the lenders or produce any loan agreements (other than that with Mr Cuthbertson), I am satisfied that the transactions are indeed loans, not proceeds of taxable supplies. The character of those transactions as loans, in my judgement, is sufficiently evidenced by the trust account ledger, the Company’s general ledger and Mr Thomas’ evidence.
3. The nature of the material from which I draw that conclusion can be sufficiently described by reference to a deposit of $90,000 shown on the Company’s bank statement on 24 December 2009. I note first that the bank statement, against the deposit, bears the notation “The Law Place”. Next, reference to the trust account ledger shows that on 10 December 2009 a Mr Bliss deposited $60,000, which was described in this way:

Raschta Coatings & Graham Bliss – Dep.

Reason: Deposit for PEP Finance agreement

On the same day, a further $30,000 was deposited by a Mr John Warwick and a similar notation made. Then, on 23 December 2009, those two amounts were paid out to “Raschta Coating Pty Ltd” with the notation “release deposit”.

1. The deposit of $90,000 was made to the Company’s account the following day. In the Company’s general ledger, the cash at bank account has two debits on 24 December 2009[[45]](#footnote-45) recorded as:

Graham Bliss $60,000

John Carr Warwick $30,000

The corresponding entries are credits to loan accounts in the names of Mr Bliss and John Warwick Carr [sic].

1. The next transaction was a deposit of $60,000 on 20 January 2010[[46]](#footnote-46) with the reference “David John Bowles”. Mr Bowles was a solicitor who either traded as, or was employed by, The Law Place. Mr Thomas says that the $60,000 represents loans to the Company by persons by the names of Robin and Langford, each in the amount of $30,000. The Solicitor’s trust account ledger is certainly consistent with that and shows a payment to the Company of $60,000 on 18 January 2010. Again, the accounting treatment in the Company’s general ledger is consistent with a loan transaction with loan accounts in the names of the persons said by Mr Thomas to have been the lenders.
2. On 9 March 2010, $30,000 was deposited to the Company’s bank account with the notation “The Law Place”.[[47]](#footnote-47) Mr Thomas says that was a loan from a person named Siebrecht, however, the trust account ledger suggests that the lender was a person named Cole. The general ledger shows a loan account in the name Siebrecht with a credit of $30,000 on 9 March 2010.
3. Then, on 25 March 2010, $30,000 was transferred by a person with the name Hall. There is nothing in the trust account ledger, presumably because it was a direct transfer, but there is a loan account in the Company’s general ledger that reflects the transaction. As it happens the Commissioner’s supplementary submissions point out that this amount had already been excluded by the Commissioner as having been substantiated at audit.
4. On 13 April 2010, $57,652 was deposited by The Law Place. That amount is shown as being paid out in the trust account ledger (albeit on the following day) and the general ledger shows an entry for $60,000 in a loan account in the name of the lender. I infer from the trust account entries that the difference between the amount received and the amount shown as borrowed represents prepaid interest.
5. Thereafter there are no entries in the trust account ledger but there are entries in the Company’s general ledger that record loans being made to it of $10,000 on 31 May 2010, a further $50,000 on the same day, $15,000 on 27 June 2010[[48]](#footnote-48), $10,000 on 29 June 2010, $150,000 on 6 August 2010 and $30,000 on 29 November 2010.
6. It is odd that Mr Thomas has not produced copies of loan agreements nor provided any evidence from any of its lenders. I think that failure is attributable to obstinacy on his part, as I explain in greater detail below. I do not draw an adverse inference from those failures. I consider that there is sufficient evidence to satisfy me that these receipts were, in fact, loans and not taxable supplies. The various matters I have listed above and the accounting treatment which is consistent with a loan, including, in various cases, a pattern of repayments being made, satisfy me that is so.
7. I do not propose to examine every single transaction appearing in Exhibit 7 – some are quite small – rather I will confine my attention to significant transactions. The first is a deposit of $80,000 made on 1 June 2010 and described in the statement as “BD Loan”, a reference, according to Mr Thomas, to Mr Brendan Duffy who was an associate of Mr Thomas and a fellow director with him of other entities associated with the Company. It is recorded as a loan from Mr Duffy in a loan account in his name in the Company’s accounts. Additionally, Mr Thomas provided an affidavit from Mr Duffy.[[49]](#footnote-49) The Commissioner’s criticism that Mr Duffy was not available for cross-examination was somewhat blunted by his failure to let Mr Thomas know that Mr Duffy was required for cross-examination. The Commissioner, though, submitted that little weight ought be given to Mr Duffy’s statement.
8. As it happens I do not propose to give that affidavit any weight so far as it refers to the $80,000 deposit. I take that approach because, on that aspect, it is internally inconsistent. In the text of the affidavit Mr Duffy refers to all of the payments made by him to the Company as being “refunds of monies borrowed by me from [the Company]”. It would seem, both from Mr Thomas’ evidence and the Company’s general ledger, that it was a loan by Mr Duffy to the Company. But on either basis I am satisfied that the amount of $80,000 did not represent taxable supplies.
9. Next are a series of four transactions totalling $30,050 said by Mr Thomas to be reversal entries. Examination of the general ledger and the bank statements satisfies me that is so although the Commissioner’s supplementary submissions satisfy me that one of those entries, a deposit of $10,000 on 4 October 2010, had already been treated by the Commissioner as having been substantiated. Two of the entries are described as reversal entries and all have a contra entry in the cash at bank account on the same or the following day.
10. In July and August 2008, the Company received payments totalling $150,000 from Mr Bentley. Mr Thomas’ explanation of the transactions was convoluted and difficult to understand but, as I perceive it, his evidence was that the payment represented a deposit against the performance by the Company of future work which was invoiced as that work was performed. For reasons that Mr Thomas was unable to explain, the amounts were credited to a balance sheet account called “Owner’s/Shareholder Capital”. Separately, Vulcan Coatings, the entity associated with Mr Bentley, was invoiced for particular work, recorded in the general ledger in account 4-1000 Sales, and GST collected is similarly recorded in account 2-1310 in the general ledger. The pattern that is evidenced by the accounting treatment is that the Company was accounting appropriately for GST on taxable supplies to Vulcan but treated the payments of $150,000 differently because the payments were not in respect of taxable supplies.
11. I am then satisfied that the payments of $150,000 from Mr Bentley are not taxable supplies.
12. Mr Thomas has identified $23,000 as monies loaned by him to the Company. They are recorded in that way in the Company’s accounts. I see no reason to doubt that they had that character.
13. Finally, Mr Thomas has listed six amounts totalling $67,413.85 deposited to the Company’s bank account. None of these, he says, represents taxable supplies.
14. One of them, a credit of $40,000 on 30 July 2008,[[50]](#footnote-50) is plainly related to, and a reimbursement of, a debit in the same amount on 17 July 2008.[[51]](#footnote-51) Notwithstanding the Commissioner’s understandable criticisms of Mr Thomas’ evidence, I accept what he says about these particular transactions and more generally his evidence that the Company accounted, as it was obliged to, for GST on taxable supplies and input tax credits on creditable acquisitions. I should explain why I take that view despite Mr Thomas’ failure to produce relevant documents and witnesses, or to adequately explain their absence.
15. I have already observed that Mr Thomas struck me as being obstinate. That was my impression both during the hearing and during the case management stages leading up to the hearing. In the case management stages Mr Thomas showed little respect for the processes of the Tribunal and, throughout the process of the application, even less respect for the Commissioner’s officers. He ignored or put off their requests for information and I suspect his approach may have engendered a similarly unhelpful approach on the part of the Commissioner. In that regard I note that the Commissioner, when presented with Exhibit 7, or earlier manifestations of it, was apparently not able, or not prepared, to undertake the tedious exercise that I have undertaken and look past the evident shortcomings in the Company’s material to examine whether what Mr Thomas was saying was supported by contemporaneous and apparently reliable accounting records.
16. I should add that there is, as well, some indirect corroboration for Mr Thomas’ evidence from the provision by him of what he said were copies of invoices of the five top suppliers to the Company. That was done and did not lead to any suggestion on the part of the Commissioner that the invoices demonstrated that input tax credits had been wrongly claimed.
17. It is particularly the accounting treatment shown in the general ledger and the corroboration they provide for Mr Thomas’ account that satisfies me that I am generally able to rely on his evidence. I am also satisfied that I may rely on Exhibit 7 despite the Commissioner’s submissions to the contrary. It is true, as the Commissioner’s supplementary submissions point out, that two amounts listed by Mr Thomas have already been treated as having been substantiated and Mr Thomas could not explain how one of the entries was derived. Nonetheless, my examination otherwise of the document demonstrates it to be reliable.
18. The position then is this. The Company reported total taxable supplies of $1,442,577 between 1 July 2008 and 31 March 2011. At audit, the Commissioner treated all deposits to the Company’s account as the proceeds of taxable supplies unless it was plain that it was not. After further adjustments at objection, the Commissioner concluded that the taxable supplies totalled $3,593,808,[[52]](#footnote-52) an increase of $2,151,231 over the amount returned by the Company in its BAS. Mr Thomas has explicitly satisfied me, by reference to Exhibit 7, that:

* $332,200 of the deposits were transfers from the related entity Raschta MPS;
* $393,306 of the deposits were transfers from the related entity Wardell Street Investments Pty Ltd;
* $262,245 of the deposits were the proceeds of loans from an external financier;
* $547,652[[53]](#footnote-53) of the deposits were loans to the Company from third parties;
* $82,596 of the deposits were either repayments of loans made by the Company to Mr Duffy on a loan by him to it;
* $20,050[[54]](#footnote-54) of the deposits were reversal entries;
* $150,000 of the deposits were non-taxable deposits;
* $23,000 of the deposits were loans from Mr Thomas; and
* $67,413 of the deposits were, for various reasons, not sales income.

Those exclusions total $1,878,462 leaving a difference of about $273,000. The question is whether the Company has proved sufficient to entitle it to the setting aside of the net amount assessment and its replacement by an assessment in the amounts of the Business Activity Statements (BAS) as returned (and later amended in some cases).

1. That language is adapted from the judgement of Burchett J in *Ma v Federal Commissioner of Taxation*,[[55]](#footnote-55) a case involving an assets betterment assessment. His Honour, after considering what was decided in *Dalco*, said this:[[56]](#footnote-56)

As was pointed out in argument, the position before the Tribunal, when the taxpayer has proved, in the words of Brennan J, that “the amount assessed as taxable income is wrong”, is neither exactly as it is before a court (the situation in Dalco itself), nor exactly as it was before the Boards of Review. The Tribunal, under s 43 of its Act, is expressly empowered to set aside the assessment and remit the matter to the Commissioner for reconsideration. If the taxpayer has shown by evidence that the only receipts which could possibly be income were the amounts paid into the bank account, and that many of those amounts represented the same capital reinvested after previous withdrawals, he has shown that an assessment based upon the counting as income of all the payments (save certain, which the argument set on one side) must be excessive. The question, then, is whether he has proved sufficient to entitle him to the setting aside of the amended assessments and their replacement by assessments in the amounts of the original assessments, assuming assessments had earlier issued upon his returns, or to entitle him only to the setting aside of the amended assessments and a referral back to the Commissioner, or to some other decision.

1. In my view, the Company has shown sufficient to warrant setting aside the GST objection in full. In addition to the sums already identified, Mr Thomas referred to two further sums totalling $16,400 that were not taxable supplies although he could not identify what they were for. On the face of the material it seems highly unlikely that they represented sales; they are each rounded amounts and in each case the proceeds of transfers. I do not doubt that many other deposits could be identified that have been included in the Commissioner’s aggregate but that are not the proceeds of taxable supplies. I do not consider that the Company should be obliged to demonstrate to the dollar the precise way in which the assessment is excessive. As it seems to me, in circumstances where the Company has shown that nearly $1.9 million of the additional $2.1 million attributed to taxable supplies cannot answer that description and where, despite his considerable failings, I accept Mr Thomas’ evidence that the Company accounted appropriately for its GST, the Company has demonstrated that the Commissioner’s assessment was excessive. Again what Burchett J said in *Ma[[57]](#footnote-57)* is apposite:

Furthermore, the making of estimates upon inexact evidence, which is so much a feature of both judicial and administrative decision-making, cannot be uniquely excluded from appeals against betterment assessments. To refuse to consider the credit, not only of the applicant, but also of his independent and unchallenged witnesses, simply because the effect of the evidence was to support his accountant’s generalisations about double-counting rather than to hit upon a precise figure, was to fall into an error of law. If authority be needed for this proposition, it may be found in the decision of Walsh J in Krew v Federal Commissioner of Taxation (Cth) (1971) 45 ALJR 324; [1971] ATC 4,213, to which Mr Gibb, with his usual frankness, referred me. That was a betterment case, bearing some similarity to the present, in which Walsh J, in various parts of his judgment, acted on evidence that “substantial” portions of sums of money represented the proceeds of gambling; expressly eschewed (at [ATC] 4,223) any attempt to reach a “precise result”; and acknowledged (at [ATC] 4,224) that his decision as to certain “large payments” lacked “satisfactory evidence of a specific kind”, concluding nevertheless that it was “probable that a large part of the money was derived from gambling”, with the result that “a somewhat arbitrary decision” was required, to some extent in favour of the taxpayer.

1. The result here too is somewhat imprecise and arbitrary but I am satisfied that the Company has demonstrated not only that the Commissioner’s GST assessment was wrong but also that its correct GST liability was as shown in its various BAS. In saying that, I am conscious that cross-examination of Mr Thomas might be thought to have demonstrated that the BAS for the three months of 2011 did not accurately report taxable supplies. I do not think that was demonstrated in reference to particular and isolated transactions. The Commissioner might have been on stronger ground had he used the general ledger to reconstruct the accounts; however, I gather that he eschewed taking that course preferring to require Mr Thomas to provide source documents. I must say I think it a great pity that stance was adopted. Considerable public and private resources might have been saved had the Commissioner undertaken his investigations by reference to the general ledger and had Mr Thomas exhibited greater co-operation, respect, and candour in his dealings with the Commissioner rather than disregard and obstinacy.
2. So far as the income tax amended assessments are concerned, they had, as their foundation, the proposition that the Company had sales in the 2009 year of $609,849 and in the 2010 year of $1,358,163. That proposition was in turn based upon the conclusion that the majority of deposits to the Company’s bank account were sales – a conclusion I reject for reasons I have already explained. The Company’s returns show business income of $189,122 in the 2009 income year and $1,274,304 in the 2010 income year. Having rejected the mechanism by which the Commissioner determined his amended assessments, I accept the evidence of Mr Thomas that the returns as lodged reflected the Company’s true position. That being so, the Commissioner’s objection decisions ought be set aside and a decision substituted that the objection be allowed in full.
3. There being, on the view I take of the matter, no shortfall either of GST net amount or of income tax, there is no question of shortfall penalty. Those objections should also be allowed.

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| I certify that the preceding 59 (fifty -nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC |

.....................[Sgd]...................................................

Associate

Dated 23 January 2015

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| --- | --- |
| Dates of hearing | **8-9 July 2014; 3 September 2014; 25 November 2014** |
| Date final submissions received  Applicant | **15 December 2014**  **In person** |
| Counsel for the Respondent | **Dr R C Schulte** |
| Solicitors for the Respondent | **Australian Taxation Office** |

1. Exhibit 1, page 329. [↑](#footnote-ref-1)
2. Exhibit 1, page 884. [↑](#footnote-ref-2)
3. Exhibit 2, page 2. [↑](#footnote-ref-3)
4. Activity statements for January, February and March 2011 had not been lodged as at 7 September 2011, when the initial audit was completed. [↑](#footnote-ref-4)
5. Exhibit 1, pages 329 – 346. [↑](#footnote-ref-5)
6. Exhibit 1, pages 354 – 381. [↑](#footnote-ref-6)
7. Exhibit 1, pages 348 – 353. [↑](#footnote-ref-7)
8. Exhibit 1, pages 390 – 395. [↑](#footnote-ref-8)
9. Exhibit 1, pages 404 – 432. [↑](#footnote-ref-9)
10. Exhibit 1, pages 434 – 436. [↑](#footnote-ref-10)
11. Exhibit 1, pages 437 – 444. [↑](#footnote-ref-11)
12. Exhibit 1, pages 453 – 454. [↑](#footnote-ref-12)
13. Exhibit 1, pages 455 – 456. [↑](#footnote-ref-13)
14. Exhibit 1, pages 457 – 458. [↑](#footnote-ref-14)
15. Exhibit 1, pages 459 – 460. [↑](#footnote-ref-15)
16. Exhibit 1, pages 851 – 853. [↑](#footnote-ref-16)
17. Exhibit 1, pages 854 – 856. [↑](#footnote-ref-17)
18. Exhibit 1, pages 857 – 859. [↑](#footnote-ref-18)
19. See, for example Gashi v Federal Commissioner of Taxation (2013) 209 FCR 301 and Rigoli v Federal Commissioner of Taxation (2014) ATC 20-446; [2014] FCAFC 29. [↑](#footnote-ref-19)
20. At [53]. [↑](#footnote-ref-20)
21. There is now a different scheme, in Div 155 of Schedule 1 to the Administration Act, that operates for tax periods starting after 1 July 2012. [↑](#footnote-ref-21)
22. Exhibit 11. [↑](#footnote-ref-22)
23. Exhibit 1, pages 975 – 977. [↑](#footnote-ref-23)
24. Exhibit 1, page 978. [↑](#footnote-ref-24)
25. Thomas v Legal Practitioners Admissions Board [2005] 1 Qd R 331. [↑](#footnote-ref-25)
26. See Exhibit 1, page 414. [↑](#footnote-ref-26)
27. Exhibit 1, page 324. [↑](#footnote-ref-27)
28. Exhibit 1, page 300. [↑](#footnote-ref-28)
29. Exhibit 1, page 276 and 300. [↑](#footnote-ref-29)
30. Exhibit 1, pages 278 and 302. [↑](#footnote-ref-30)
31. Exhibit 1, pages 279 and 302. [↑](#footnote-ref-31)
32. Exhibit 1, pages 281 and 302. [↑](#footnote-ref-32)
33. Exhibit 1, pages 282 and 304. [↑](#footnote-ref-33)
34. Exhibit 1, pages 285 and 306. [↑](#footnote-ref-34)
35. Exhibit 1, pages 286 and 308. [↑](#footnote-ref-35)
36. Exhibit 1, pages 286 and 308. [↑](#footnote-ref-36)
37. Exhibit 1, pages 286 and 308. [↑](#footnote-ref-37)
38. Exhibit 1, pages 289 and 312. [↑](#footnote-ref-38)
39. Exhibit 1, pages 695 – 731. [↑](#footnote-ref-39)
40. Exhibit 1, page 276. [↑](#footnote-ref-40)
41. Exhibit 2, RCT3. [↑](#footnote-ref-41)
42. Transcript pages 46 – 49. [↑](#footnote-ref-42)
43. Exhibit 4. [↑](#footnote-ref-43)
44. Transcript, page 49, lines 15 – 45. [↑](#footnote-ref-44)
45. There is also a debit for $90,000 shown as “The Law Place” however that was reversed out the same day. [↑](#footnote-ref-45)
46. Exhibit 1, page 93. [↑](#footnote-ref-46)
47. Exhibit 1, page 96. [↑](#footnote-ref-47)
48. The entry in the general ledger (Exhibit 2) is dated 27 June 2010. Exhibit 7, taken from the bank statements, is dated 28 June 2010. There are other similarities that make it plain that the entries refer to the same transaction. [↑](#footnote-ref-48)
49. Exhibit 8. [↑](#footnote-ref-49)
50. Exhibit 1, page 41. [↑](#footnote-ref-50)
51. Exhibit 1, page 40. [↑](#footnote-ref-51)
52. The figure comes from page 5 of Annexure A to the Commissioner’s supplementary submissions dated 9 December 2014. [↑](#footnote-ref-52)
53. Mr Thomas’ sub-total in Exhibit 7 has been reduced by $30,000 to take into account that this sum had already been treated as having been substantiated. [↑](#footnote-ref-53)
54. Again, this represents a reduction of $10,000 in the amount shown in Exhibit 7. [↑](#footnote-ref-54)
55. (1992) 37 FCR 225. [↑](#footnote-ref-55)
56. Ibid, pages 232 – 233. [↑](#footnote-ref-56)
57. Ibid, page 233. [↑](#footnote-ref-57)