[2015] AATA 78

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Numbers | 2014/1949;2014/1950;2014/1951; and2014/1952 |
| Re | Gui Ping Wu |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Deputy President P E Hack SC** |
| Date | **13 February 2015** |
| Place | **Brisbane** |

The decisions under review are set aside and the matter remitted to the respondent for reconsideration in accordance with directions:

1. that the applicant’s taxable income for the 2009 income year was $509,147;
2. that the applicant’s taxable income for the 2010 income year was $102,594;
3. that the applicant’s taxable income for the 2011 income year was $437,287;
4. that the applicant’s taxable income for the 2012 income year was $370,342; and
5. that the shortfall penalty be assessed at 50% and not remitted.

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

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

**Deputy President P E Hack SC**

**CATCHWORDS**

TAXATION – assessable income – whether assessments were excessive – whether income derived from overseas interests – decision set aside – remitted for reconsideration

TAXATION – shortfall penalty – recklessness – statements false or misleading in a material particular – shortfall penalty affirmed

**LEGISLATION**

Taxation Administration Act 1953 (Cth), s 14ZZK

**CASES**

BRK (Bris) Pty Ltd v Commissioner of Taxation [2001] FCA 164; 2001 ATC 4111

# REASONS FOR DECISION

**Deputy President P E Hack SC**

**13 February 2015**

## Introduction

1. Mr Gui Ping Wu is a citizen of China and, since 2005, a resident of Australia. Mr Wu has business interests in Australia, China and Malaysia. He reported income from his Australian business interests in his income tax returns for the 2009, 2010, 2011 and 2012 income years but those returns did not disclose any income from his overseas business interests.
2. In mid-2012 the Commissioner commenced an audit into Mr Wu’s affairs. The Commissioner concluded that certain monies received, or assumed to have been received, by Mr Wu from overseas sources amounted to assessable income. The Commissioner made amended assessments of Mr Wu’s taxable income for the 2009, 2010, 2011 and 2012 income years and of shortfall penalty in each of those years and gave notices of those assessments to Mr Wu.
3. Mr Wu objected to the assessments but his objections were, in substance, disallowed. He seeks a review of the objection decisions.

## Background

1. I will start with some uncontroversial background, taken in the main, from the documentary material.
2. Mr Wu was born in China in 1962. He is an engineer by profession. In 1995 he started a business in Malaysia, San Xiang (M) Sdn Bhd (which I shall call the Malaysian company). It buys and sells heavy mineral sands all over the world. He is, as well, the managing director and majority shareholder of a company registered in China, Hunan Hezhong Trading Co Ltd (which I shall call the Chinese company), a company he started in 2002. The Chinese company is in the business of importing non-ferrous minerals. It sources those minerals from various countries including Malaysia and Australia, and imports them for sale to factories in China.
3. Mr Wu came to Australia in February 2005. He was the holder of a State/Territory Sponsored Business Owner (Provisional) (Subclass 163) visa. He obtained that visa with the assistance of a migration agent in Perth where Mr Wu lived and continues to live. In about March 2005, shortly after his arrival in Australia, Mr Wu arranged for the incorporation of a company, B W Minerals Pty Ltd (which I shall call the Australian company). It is the vehicle through which Mr Wu conducts his business in Australia. The Australian company buys Western Australian heavy mineral sands and sells them to the Chinese company which on-sells to factories in China.
4. One of the conditions of Mr Wu’s 2005 visa required him to invest in, and be involved in the management of, a business in Australia. The Australian company was that business. By May 2006 the Australian company had a paid up share capital of 785,000 $1 ordinary shares. Mr Wu held 706,500 of them and his spouse held the remaining 78,500.
5. In September 2008 Mr Wu applied for a permanent visa. It was granted in February 2009.
6. Mr Wu lodged income tax returns for each of the 2009, 2010, 2011 and 2012 income years with the assistance of Mr Peter Pang, an accountant. Mr Pang’s firm had assisted in the incorporation of the Australian company and prepared and lodged its tax returns for the 2005 to 2012 income years.
7. None of Mr Wu’s personal income tax returns disclosed income from overseas sources. In the four income years in issue his assessable income was limited to interest (in one year) and Mr Wu’s salary as a director of the Australian company (in each of the other three). In each return the answer “no” was given to the question:

During the year did you own or have an interest in assets located outside Australia which had a total value of AUD $50,000 or more?

1. In late 2010 the Commissioner became aware from the Australian Transactions Reports and Analysis Centre (AUSTRAC) that Mr Wu had transferred money to or from another country. On 24 November 2010 a letter was sent to Mr Wu, care of his accountants (Mr Pang’s firm), advising him of the fact of the report from AUSTRAC and inviting him to consider whether any information needed to be disclosed to the Commissioner. The letter did not prompt any disclosure of information to the Commissioner by Mr Wu.
2. It seems likely that the report by AUSTRAC concerned two deposits made to Mr Wu’s USD account xxxxxx-389 at HSBC: one of USD $300,000 on 9 October 2008,[[1]](#footnote-1) the other of USD $59,975 on 15 June 2009.[[2]](#footnote-2) It is common ground that these amounts were equivalent to AUD $433,025 and AUD $72,812 respectively. On 10 October 2008 Mr Wu transferred USD $300,000 from his USD account to the account of the Australian company. On 25 September 2009 USD $20,000 was transferred from Mr Wu’s account to the account of the Australian company.
3. It is next relevant to note that on 12 September 2011 Mr Wu and his wife contracted to purchase a house in a suburb of Perth at a price of $2.5m.[[3]](#footnote-3) To complete the purchase they applied to HSBC for a housing loan of $1,875,000. The loan application[[4]](#footnote-4) describes Mr Wu as the full-time “M.D” of the Chinese company. It records, as well, that Mr Wu and his wife had other assets comprising a home in China valued at $500,000, other real estate in Malaysia valued at $300,000, cash deposits of USD $2m, motor vehicles valued at $200,000 and other unspecified assets valued at $500,000. One of the requirements of the loan application was that an applicant was required to provide to the lender a signed and typed letter, on the letterhead of the employer showing the applicant’s gross income. Mr Wu signed the loan application adjacent to a declaration that the information supplied was “complete, true and correct”.
4. HSBC was provided with a letter dated 19 September 2011, on the letterhead of the Chinese company, and certifying that Mr Wu was the managing director of that company, had been working for it for 10 years and had a yearly salary of RMB 2,200,000 “after paying taxes”.
5. The loan was approved and purchase of the property was completed on 8 November 2011. Mr Wu and his wife were thereafter required to make monthly repayments of $12,211. In connection with the loan application Mr Wu and his wife opened a cash management account, xxxxxx-118. Between 4 October 2011, when the account was opened, and 14 March 2012 amounts totalling $720,750 were deposited into one or the other of those accounts. Each was described on the bank statements as “cash deposit”.
6. The Commissioner commenced an audit into the affairs of Mr Wu in June 2012. Among the issues raised with Mr Wu was that of the salary certification provided to HSBC in September 2011. In a response in May 2013 to an interim audit report Mr Wu’s tax agent informed the Commissioner that he received a monthly salary of RMB 1,500 from the Chinese company.[[5]](#footnote-5) A further salary certificate attested to Mr Wu’s employment with the Chinese company and continued:

The salary income is RMB 1,500 per month (no taxes), which is used for company expenditure without invoice. Actually he has not income from [the Chinese company]. (Note: The certification issued at the same day that proved the annual salary RMB 2,200,000.00, just only for loan.

1. The Commissioner was unmoved by the explanations provided by Mr Wu. On 16 July 2013 he made amended assessments of Mr Wu’s taxable income as follows:
* For the year ended 30 June 2009 taxable income was increased by $888,135 to $888,294;
* For the year ended 30 June 2010 taxable income was increased by $370,535 to $470,075;
* For the year ended 30 June 2011 taxable income was increased by $331,906 to $406,441; and
* For the year ended 30 June 2012 taxable income was increased by $499,352 to $548,892.
1. In coming to those conclusions the Commissioner determined, by reference to the original salary certificate, that throughout the period Mr Wu had received a salary of RMB 2,200,000 annually. This amount was converted to AUD at the applicable exchange rate. Additionally, the Commissioner treated the deposits of USD $300,000 (AUD $433,025) in October 2008 and of USD $59,975 (AUD $72,812) in June 2009 as Mr Wu’s assessable income in the 2009 income year. Finally, and on the basis that they had been made to a joint bank account, the Commissioner treated half of what he calculated to be the deposits to the cash management account as Mr Wu’s assessable income in the 2012 income year. Unfortunately the calculation was erroneous and two deposits, $12,600 on 2 November 2011 and $30,000 on 7 November 2011, were omitted with the result that the Commissioner concluded that the deposits totalled $678,150 rather than $720,750 and that $339,075 ought be included in Mr Wu’s assessable income for the 2012 income year.
2. On the same day the Commissioner made an assessment of the shortfall penalty on the basis of recklessness, warranting a rate of 50%, which was increased by 20% on the footing that Mr Wu had failed to co-operate with the audit process. None of the penalty was remitted.
3. Mr Wu objected to the amended assessments and the penalty assessments in September 2013. The Commissioner changed his position on the deposits of $678,150. First, he treated that entire sum as having been derived by Mr Wu, not the half that had been attributed to him at audit. Next, the Commissioner determined that the income represented by the deposits had been derived when it had been deposited into Mr Wu’s Chinese bank accounts, not when it had been deposited in Australia. The result was that, on 14 April 2014, the Commissioner made further amended assessments increasing Mr Wu’s taxable income for the 2011 income year by $360,016 and reducing the taxable income for the 2012 income year by $20,941. Mr Wu’s objections were otherwise disallowed.
4. These proceedings were commenced on 15 April 2014. Mr Wu seeks a review of the various objection decisions.

## The applicable principles

1. There is no issue concerning the applicable principles. By virtue of s 14ZZK of the *Taxation Administration Act 1953* (Cth) Mr Wu has the burden of showing that the assessments are excessive. But the present case is one in which the Commissioner has agreed to confine the controversy to three particular factual issues.[[6]](#footnote-6) Mr Butler, counsel for the Commissioner, accepted that Mr Wu was entitled to succeed if, and to the extent that, he discharged the burden of showing:
	1. that the deposits totalling AUD $505,837 made in October 2008 and June 2009 were transfers of savings originally held in China;
	2. that the deposits totalling AUD $678,150 made between October 2011 and March 2012 represented Mr Wu’s share of profits from the business venture in China with Mr Pang, and that those profits were derived prior to Mr Wu becoming an Australian resident; and
	3. that his salary from the Chinese company was RMB 18,000 per year rather than the RMB 2,200,000 shown in the salary certificate provided to the bank.
2. There is, as well, an issue concerning penalty, in particular whether any shortfall was occasioned by recklessness. I note in that regard, that the Commissioner no longer seeks to sustain the uplift in penalty of 20%. Mr Wu is entitled to succeed, at least to that extent.

## Consideration

1. The first issue is that of the provenance of the deposits of $505,837 in October 2008 and June 2009. Those amounts, according to Mr Wu, came from savings he had in China; they do not represent income earned by him during the year in question.
2. There are, the Commissioner submits, at least five difficulties with Mr Wu’s explanation. First, he points to the absence of any bank statement or other documents showing these amounts of savings in China. Next, it is said, that Mr Wu himself accepted that his explanation was not “very precise” and that he did not “remember clearly”.[[7]](#footnote-7) Then it was said, by reference to a document completed by, or on behalf of Mr Wu in connection with his Visa application, that Mr Wu did not have savings in China in the order of $505,837 able to be transferred to Australia. Then reference was made to Mr Wu’s tax return for the 2009 income year and the answer in it that Mr Wu did not own or have an interest in assets outside Australia with a total value in excess of $50,000. Finally, it was said, Mr Wu’s claim that this transfer of funds was in partial satisfaction of the conditions of his Visa could not possibly have been correct. The obligation to bring money into Australia had been satisfied sometime earlier. The Commissioner points to some evidence of Mr Pang, Mr Wu’s accountant (an accountant for the Australian Company), about the extent of funds available to Mr Wu.
3. Next there are the funds deposited between October 2011 and March 2012. I note, at the outset, that the error in the Commissioner’s calculation of the total of these deposits emerged only after the conclusion of the hearing. The matter was drawn to the attention of the parties. The Commissioner, whilst acknowledging the error, does not seek to have the two omitted deposits totalling $42,600 included in Mr Wu’s assessable income. Unsurprisingly, Mr Wu is of the same view. Not without some misgivings I propose to proceed on that basis. Ultimately it is the Commissioner, and not the Tribunal, who has the general administration of the taxation statutes.
4. The funds deposited to Mr Wu’s cash management account, he says, represented his share of profits from the venture with Mr Tang in 2003 and 2004. At the conclusion of the venture, Mr Wu was entitled to RMB 4,150,000 as his share of the profit. This sum, he said, was not then paid to him. Instead it was lent to Mr Tang interest-free and eventually repaid, but deposited into eight of Mr Wu’s bank accounts in China, and then withdrawn by him and deposited into his Australian bank accounts together with other funds withdrawn on trips to China and also deposited on his return.
5. Again, the Commissioner submits that there is reason to be sceptical of this evidence. There is, he says, not a single document evidencing any aspect of the business venture with Mr Tang including within the various documents submitted in connection with the visa applications. This absence is significant, it is said, when regard is had to the size of the venture which, on Mr Wu’s evidence, had a turnover of hundreds of millions of dollars. Additionally, the Commissioner points to the absence of any evidence that the claimed business was registered, which made the conduct of the business in China illegal, or so it was submitted. Finally, the Commissioner points to a difference between the account of these events now given by Mr Wu and that given in correspondence from his accountant in the course of the tax audit when it was said that the venture was between the Chinese company and Mr Tang.
6. Finally, there is the issue of the salary certificate given to the bank in connection with Mr Wu’s home loan which certified that his income from the Chinese company was RMB 2,200,000 per year. This certificate, according to Mr Wu, did not reflect his actual salary from the Chinese company. Instead, it was the product of discussions he had with the bank’s representative who calculated the salary necessary to obtain the loan of the size sought by Mr Wu. The figure of RMB 2,200,000 was calculated in this way by the bank’s representative who told Mr Wu he needed to obtain the certificate to that effect. That process did not seem unusual to Mr Wu because, as he explained, in China a salary certificate is a guarantee by the employer company of the employee’s obligation to the lender. His salary from the Chinese company was, in reality, quite small as set out in the other certificate bearing the date 19 September 2011, a certificate which he said was prepared on the same day as that given to the bank.
7. The Commissioner submits that the RMB 2,200,000 certificate should be taken at face value. He again points to the absence of documents of the Chinese company, financial accounts, tax returns and suchlike, which would demonstrate the true position. He points to the figure of USD $2,000,000 shown as cash deposits on the loan application, an amount which Mr Wu denies ever having had. Finally the Commissioner points to the level of repayments necessary to repay the loan: initially $13,000 per month but now $11,000 per month. The salary drawn by Mr Wu from the Australian company (and an amount paid to his spouse) were and are insufficient to meet that obligation. To date the Australian company has paid the loan instalments by repaying its loan from Mr Wu (the amount of $505,837) but that loan will be repaid in the near future. The only way that the loan could be serviced thereafter, so the Commissioner contends, is if Mr Wu has a salary of RMB 2,200,000 from the Chinese company, an amount said by the Commissioner to equate to between AUD $27,000 and AUD $31,000 monthly.
8. It is convenient to deal with these issues in reverse order and to say immediately that I am satisfied that Mr Wu was not paid RMB 2,200,000 annually by the Chinese company. On the contrary, the evidence satisfies me that Mr Wu’s salary was considerably smaller, an amount in the order of RMB 18,000 annually as he says.
9. In coming to that conclusion it seems to me to be important to note that the Commissioner does not point to the fact of actual receipt of any funds said to be attributable to this source: his case is based entirely on the certificate provided by Mr Wu to his bank. But there is considerable reason to accept that the document was created in the circumstances described by Mr Wu. There is extrinsic evidence[[8]](#footnote-8) verifying the difficulties that Mr Wu had in obtaining finance. Mr Wu’s earnings from the Australian company at that time were quite modest. It is unlikely that any bank would lend him the amount required to complete the purchase on the basis of those earnings. It is not outside the bounds of human experience for borrowers to exaggerate their earnings (and assets) to obtain a loan. Mr Wu’s account of the production of a certificate is logical and accords with common sense.
10. There is corroboration of Mr Wu’s evidence of the actual level of his remuneration from the Chinese company in the bank statements annexed to his witness statement. They show regular monthly deposits of RMB 1,511 to Mr Wu’s account between March 2010 and August 2011. I should add that I do not accept Mr Wu’s evidence that the second certificate dated 19 September 2011 (that purporting to show that his salary from the Chinese company was RMB 1,500 per month) was produced on the date it bears. It seems to me to be highly likely that it was produced, and back-dated, in response to the Commissioner’s audit in order to nullify the effect of the other certificate.
11. In the result though, and despite my view about the provenance of the second certificate, I am satisfied that Mr Wu has discharged his onus in relation to the third issue. The parties are though agreed that Mr Wu should be assessed on the salary agreed to have been paid by the Chinese company: an amount of AUD$3,151 in the 2009 income year, AUD$3,054 in the 2010 income year, AUD$2,736 in the 2011 income year and $2,668 in the 2012 income year.
12. I turn then to the payments totalling $720,750 received in the 2011 and 2012 income years. Some further examination and explanation of the material that has been produced is necessary. In China, according to Mr Wu, there is an entity, Union Pay, which offers its customers the facility of debit cards. Whilst there were restrictions on the amount of money that may be transferred out of personal bank accounts in China, including Union Pay accounts, there were no restrictions on the number of Union Pay accounts that might be opened by an individual customer. Mr Wu had eight such accounts, one with the China Construction Bank and the others with the Industrial Bank Co Ltd. The limit on withdrawals was RMB 10,000 per card per day, thus Mr Wu had the capacity to withdraw RMB 80,000 per day in total, at the time, a little over AUD $1,000.
13. What I take to be the statements of the eight Union Pay accounts are in the material.[[9]](#footnote-9) They show:
	1. a deposit of RMB 1,000,000 to the China Construction Bank account on 15 September 2010;
	2. deposits of RMB 200,000 to each of the Industrial Bank Co accounts on 1 April 2011 (a total of RMB 1,400,000);
	3. deposits of RMB 250,000 to each of the Industrial Bank Co accounts on 23 September 2011 (a total of RMB 1,750,000).

The total deposited was RMB 4,150,000. Some of the bank statements are difficult to read but the pattern that emerges is one of regular withdrawals. Account xxxx8714[[10]](#footnote-10) exemplifies the pattern. Following the deposit of RMB 200,000 on 1 April 2011, two withdrawals totalling RMB 9,881 were made on 2 May 2011. Amounts of the same order were withdrawn on 3, 5 and 6 May 2011; 13, 14, 15 and 17 June 2011; 17 July 2011; 14, 16, 17, 18, 19, 21 and 22 August 2011. That pattern was repeated after the deposit of RMB 250,000 on 23 September 2011. What emerges from the bank statements is consistent with Mr Wu’s evidence and, in particular, his claim to have withdrawn the funds in cash using automatic teller machines.

1. These funds, according to Mr Wu, together with some other monies available to him, were the source of the deposits between October 2011 and March 2012. The majority of the deposits were made in October and early November 2011. An amount in excess of $650,000 was applied in the settlement of the house purchase on 8 November 2011.
2. Ultimately, the issue comes down to whether I accept Mr Wu’s account of his dealings with Mr Tang. After anxious consideration I have concluded that I am not able to do so. I accept that there may be difficulties in obtaining contemporaneous documents from China but I am concerned that there is not a single document that evidences what must have been a considerable business, nor any concerning a relationship that seems, in substance, to have been a partnership, nor even any that document a very large loan. Mr Wu says that the business relationship with Mr Tang came to an end in 2004 when he moved to Australia and that he did not retain any written records of the business. He explained this on the basis that,

… we no longer needed those records and in China, it can be dangerous if personal or financial information such as this gets into the wrong hands.

That assertion, with respect, defies logic. It may be accepted that there are cultural differences in the way business is carried on in China however I am unable to accept that documents evidencing a business relationship would not be retained against the possibility of some authority, whether in China or Australia, requiring some proof or detail of the relationship. Additionally any danger from the documents getting into the wrong hands could be abated by Mr Wu keeping them in Australia where he has resided since early 2005.

1. Mr Wu was able to obtain from Mr Tang a document, said to have been executed by Mr Tang on 8 December 2011, which lends some support to Mr Wu’s account of events but, as well, raises questions of its own. First, it is dated 8 December 2011, some months prior to the commencement of the Commissioner’s audit. There is no explanation proffered for its production in December 2011. Moreover, if Mr Tang was able to be prevailed upon to provide that document it may be wondered why he could not have been prevailed upon to provide a witness statement or even some documents evidencing the earlier relationship. This is a man who, on Mr Wu’s account, was a “trusted friend” who had had the benefit of an interest free loan over a number of years. His absence was not explained.
2. Additionally, and as the Commissioner points out, reference to these dealings with Mr Tang (and indeed to the Chinese company) was absent from Mr Wu’s answer to the question on his visa application that asked him to provide a list of all businesses he had been involved in.
3. I am, then, not satisfied that Mr Wu has discharged the onus of showing that the amended assessments are excessive so far as these deposits are concerned. On the contrary, I am satisfied that the assessments are too generous to Mr Wu given the incorrect calculation of the total of the deposits. The correct decision, on the material before me, is that all of the $720,750 be treated as Mr Wu’s assessable income. It should be apportioned between the 2010 and 2011 income years in the manner earlier undertaken by the Commissioner.
4. Finally, there is the question of the deposits of $505,837 in October 2008 and June 2009. Again, I regret to say that I am unable to accept Mr Wu’s explanation for these deposits. The complete absence of documents evidencing these claimed savings in China and the complete absence of any reference to them in visa application in particular, have me dissatisfied with Mr Wu’s explanation. I place no weight on the passage of Mr Wu’s evidence relied upon by the Commissioner. It is obvious from the transcript, and it was obvious at the time, that some subtlety of language is lost in the process of interpretation from English to Chinese and back again. But the point is made out by the absence of detail of the claimed savings in Mr Wu’s affidavits. He is unable to remember which account the funds came from.
5. It is understandable that banks are not now able to supply copies of bank statement from before 2005 (all the more so why Mr Wu cannot recall the account details) but he gives no explanation of the absence of the copies sent to him, or provided to him, at the time. Nor does Mr Wu give any explanation of the circumstances under which the money was saved – was it accumulated over a period of years, was it the result of the disposal of an asset. The absence of such detail detracts from the reliability of Mr Wu’s explanation.
6. The same is true of his claim that the transfer assisted him to meet the visa conditions. That simply is not true. He was obliged to have funds of $500,000 available to be transferred to Australia. He did so by subscribing in excess of $700,000 to the capital of the Australian company. He was not obliged by his visa conditions to transfer more. I reject this aspect of Mr Wu’s evidence; he is mistaken in his recollection.
7. It is notable that Mr Wu’s visa application, completed in February 2004, makes no reference to these funds which, on his case, were then held in his Chinese accounts. It is difficult to accept that this could be due to difficulties he had in communicating with his migration agent given the level of detail of the information otherwise conveyed in that application.
8. In the result Mr Wu has not satisfied me that his amended assessments are excessive in this regard.
9. The effect of all of this is that, in each application, the decision under review should be set aside and the matter remitted to the Commissioner for reconsideration in accordance with directions to the effect that:
10. the deposits of $678,150 between October 2011 and March 2012 were part of Mr Wu’s assessable income; and
11. Mr Wu did not have a salary of RMB 2,200,000 from the Chinese company.

The parties are agreed that, on the basis of these conclusions, Mr Wu’s taxable income was $509,147 for the 2009 income year, $102,594 for the 2010 income year, $437,287 for the 2011 income year and $370,342 for the 2012 income year.

1. The question of penalty remains. On the view I have taken, Mr Wu had a shortfall and it was brought about because statements in his tax return were false or misleading because they omitted amounts of assessable income. The Commissioner submits that the shortfall resulted from recklessness and points to Mr Wu’s failure to inform his tax agent of the fact of the foreign income, despite the agent asking on “at least two or three occasions”[[11]](#footnote-11) if he had any foreign income. Additionally, he points to the letter of 24 November 2010 that explicitly invited Mr Wu to consider whether he needed to disclose information regarding overseas transactions to the Commissioner. The returns for the 2010, 2011 and 2012 years were all lodged after the date of that letter.
2. Mr Wu’s submissions point to the well-known observations of Cooper J in *BRK (Bris) Pty Ltd v Commissioner of Taxation*[[12]](#footnote-12) where his Honour said of “recklessness” in the penalty provisions of the legislation at that time:

Recklessness in this context means to include in a tax statement material upon which the Act or regulations are to operate, knowing that there is a real, as opposed to a fanciful, risk that the material may be incorrect, or be grossly indifferent as to whether or not the material is true and correct, and that a reasonable person in the position of the statement-maker would see there was a real risk that the Act and regulations may not operate correctly to lead to the assessment of the proper tax payable because of the content of the tax statement. So understood, the proscribed conduct is more than mere negligence and must amount to gross carelessness.

1. In my view, the conduct of Mr Wu in relation to omitted income cannot be viewed other than as reckless. He was grossly indifferent to the true character of the income in issue. Despite explicit enquiry by his tax agent, he kept the agent ignorant of his considerable overseas dealings. He did not seek advice and, consistent with his failure to inform his agent, denied both foreign assets and income in his tax returns. He does not satisfy me that he had any reasonable basis for believing that the funds received were not assessable income. Mr McCafferty, counsel for Mr Wu, on this and other aspects of the case, placed emphasis on the absence of cross-examination of Mr Wu on why he did not consider the sum of $505,837 to be income. He was not directly challenged on his evidence that the funds were savings and not income.
2. There are at least two answers to the argument. First, there was no need for counsel for the Commissioner to cross-examine Mr Wu on this, or indeed any of the other aspects where a similar complaint is made. The Commissioner’s case was articulated in his Statement of Facts, Issues and Contentions. It was that Mr Wu could not discharge his onus of showing that the funds were not income and thus that the assessments were excessive. It was plain that his evidence was challenged and that the Commissioner would be inviting me to be dissatisfied with Mr Wu’s evidence. But beyond that, had I accepted Mr Wu’s evidence on this aspect he would have succeeded in showing the liability assessments to have been excessive. Necessarily, in that event, the penalty assessment would have fallen away.
3. The same is true in relation to the contention regarding the payments of $678,150. Had I accepted that Mr Wu had derived those funds in 2004 I would have set aside the objection decision. He did not satisfy me of that fact.
4. In truth, Mr Wu does not put forward any real argument to show why the penalty assessment was excessive. On the view I take of the matter his conduct was correctly characterised as reckless. The penalty assessment decision will be affirmed albeit that the penalty will be adjusted to give effect to my conclusions on liability.
5. Finally, I note that whilst the issue of remission is, in theory at least, part of Mr Wu’s case no basis for remission was advanced in his Statement of Facts, Issues and Contentions or his closing submissions. Where no reason to exercise the discretion is suggested (and none is apparent to me) I would not interfere with the Commissioner’s decision.

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| I certify that the preceding 54 (fifty -four) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC |

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

Associate

Dated 13 February 2015

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| --- | --- |
| Dates of hearing | **1, 2 and 12 December 2014** |
| Date final submissions received | **30 January 2015** |
| Counsel for the Applicant | **Mr P McCafferty** |
| Solicitors for the Applicant | **Hopgood Ganim** |
| Counsel for the Respondent | **Mr D J Butler** |
| Solicitors for the Respondent | **ATO Dispute Resolution** |

1. Exhibit 1, page 365. [↑](#footnote-ref-1)
2. Exhibit 1, page 386. [↑](#footnote-ref-2)
3. Exhibit 1, pages 808 – 810. [↑](#footnote-ref-3)
4. Exhibit 1, pages 815 – 827. [↑](#footnote-ref-4)
5. Exhibit 1, page 594. [↑](#footnote-ref-5)
6. Cf Federal Commissioner of Taxation v Dalco (1990) 168 CLR 614, 624. [↑](#footnote-ref-6)
7. Transcript, page 22, lines 13 & 18. [↑](#footnote-ref-7)
8. Exhibit 2, Annexure K, email of 21 September 2011. [↑](#footnote-ref-8)
9. Exhibit 1, pages 607 – 639. [↑](#footnote-ref-9)
10. Exhibit 1, pages 628 – 631. [↑](#footnote-ref-10)
11. Transcript, page 100, line 1. [↑](#footnote-ref-11)
12. [2001] FCA 164; 2001 ATC 4111 at [77]. [↑](#footnote-ref-12)