

**Administrative Appeals Tribunal**

**ADMINISTRATIVE APPEALS TRIBUNAL )**

**)** No: 2014/0429

**Taxation and Commercial Division )**

Re: Jason Cornell

Applicant

And: Commissioner of Taxation

Respondent

**CORRIGENDUM**

**TRIBUNAL:** F D O’Loughlin, Senior Member

**DATE:** 5 January 2016

**PLACE:** Melbourne

The Tribunal directs the Registrar, pursuant to subsection 43AA(1) of the *Administrative Appeals Tribunal Act 1975,* to alter the text of the decision in this application as follows:

In paragraph 18 replace the words:

*More recently the Justice in the – Full Court ...*

with the words:

*More recently in the decision of the Full Court*

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

Senior Member

Cornell and Commissioner of Taxation (Taxation) [2015] AATA 852 (6 October 2015)

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| --- | --- |
| Division |  |
| File Number(s) | 2014/0429 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# REASONS FOR Decision

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| Tribunal | **F D O'Loughlin, Senior Member** |
| Date of oral decision | **6 October 2015** |
| Date of written reasons | **6 November 2015** |
| Place | **Melbourne** |

For the reasons given orally at the conclusion of the hearing, the Tribunal affirms the decision under review

[sgd]…………………………………………..

Senior Member

**TAXATION** **–** Deposits to bank accounts – whether income – whether taxpayer resident – whether company money should be treated as taxpayers money – separate legal persons – decision affirmed

**Legislation**

Income Tax Assessment Act 1997

**Cases**

Imperial Bottle Shops Pty Ltd & Anor v Federal Commissioner of Taxation [1991] ATC 4546

FAI General Insurance Company Ltd (in liquidation) v Sherry & Ors [2002] SASC 431

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) [(1948) 77 CLR 143](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281948%29%2077%20CLR%20143)

Charles v Federal Commissioner of Taxation (1954) 90 CLR 598

Commissioner of Taxation v BHP Billiton Finance Ltd [2010] FCAFC 25

Federal Commissioner of Taxation v Applegate 79 ATC 4307

# REASONS FOR DECISION

# (given orally)

**F D O'Loughlin, Senior Member**

**6 November 2015**

1. In the 2010 and 2011 years amounts totalling $55,000 and $203,365 respectively were transferred into Mr Cornell’s Australian bank account from the bank account of a company that he owned, or he and his wife owned in Hong Kong. The Commissioner has assessed those amounts as income. The amounts transferred in the 2010 year were $10,000 on 28 January 2010, $15,000 on 25 February 2010, and $30,000 on 22 March 2010 and in the 2011 year were $50,000 on 2 July, $21,598 on 19 August, $10,000 on 20 October, $10,000 on 16 November 2010, $10,000 on 23 December 2010, $10,368 on 26 January 2011, $56,399 on 3 May 2011, and $35,000 on 15 June 2011.
2. There is no dispute that those amounts were transferred, nor that they were transferred from the bank account of Cornell Sponsorship Group Limited which is a company that Mr Cornell and his wife owned.
3. Mr Cornell challenges the two assessments claiming that the bank deposits were not income.
4. In his tax returns for the 2010 and 2011 years Mr Cornell disclosed modest salary and wage income and in each return he made a declaration that he did not own or have any interest in assets worth $50,000 or more overseas and he also declared that he was a resident of Australia.
5. His oral evidence was that he doubted he was asked whether he had foreign assets by his tax agent and that as at 30 June 2010 he was a resident and he was a resident thereafter.
6. Mr Cornell is an Australian national who lived in Hong Kong for a number of years until September 2009. He had not planned to return to Australia in 2009 but for family health reasons he did. I will say more about his return to Australia shortly when addressing the residence contention.
7. While living in Hong Kong from 2003 Mr Cornell had provided services to the Hong Kong Jockey Club. He did so through his corporate entity Cornell Sponsorship Group Limited of which he was a director and shareholder. Providing services through a corporate entity was advantageous for Mr Cornell in terms of the ability to secure work in Hong Kong and to participate in gambling facilities offered by the Hong Kong Jockey Club that were not available to employees. The contract between the company and the Hong Kong Jockey Club was in writing.
8. The funds transferred to Mr Cornell’s Australian bank account came from his company’s bank account in Hong Kong. The company had prepared financial statements. Those financial statements disclose consulting revenues of HK$3,375,689 for the 2008 year and operating expenses of – HK$2,723,368 which include director’s remuneration of HK$943,937. Those accounts also disclose amounts owed to the company by its directors, HK$1,482,673, cash at the bank of HK$90,756, a blood stock investment of HK$257,970, net assets and retained profits each of marginally over HK$1.6 million.
9. It is apparent that the company’s available cash reserves as at 31 December 2008 do not show that the company was indebted to Mr Cornell, that could have been a source of the funds repatriated to Australia. On 30 September 2009 the company’s bank account in Hong Kong had balance of HK$67,478.29 and on 8 October 2009 Mr Cornell’s personal account in Hong Kong had a balance of HK$82,570.94. These accounts do not reveal any capacity to make transfers to Australia at the time Mr Cornell left Hong Kong.
10. There is no documentary evidence before the Tribunal of the company’s sources of money to transfer the amounts to Mr Cornell’s Australian bank account. The need to provide information as to the source of the amounts transferred was made clear to Mr Cornell before the hearing. After lodging his objection on 16 July 2013 the Commissioner sought from Mr Cornell the company’s bank statements from 2009 onwards and evidence of shareholder loans to the company and advised Mr Cornell that this information was needed to finalise his objection.
11. In addition, the Commissioner’s Statement of Facts, Issues and Contentions made it clear that Mr Cornell needed to prove the assessments were excessive and that there was no material that was consistent with the contention that the transfers to the Australian bank account were merely accumulated savings.
12. The law concerning burden of proof is clear. The Commissioner does not need to prove an assessment is correct. Taxpayers need to prove an assessment is excessive. And in circumstances where the issue in dispute concerns deposits to bank accounts, taxpayers need to prove with evidence that the amounts deposited are not income.
13. As was noted in *Imperial Bottle Shops Pty Ltd v Federal Commissioner of Taxation* [1991] ATC 4546, at page 4552:

The taxpayer who does not keep records of his deductible outgoings faces a very difficult task. If he goes into the witness box and swears that he has incurred the outgoings he’s making a self-serving statement. That does not necessarily mean he’s not to be believed. Such statement like statements of purpose or object or state of mind must, however, be tested most closely and received with the greatest of caution. It would, of necessity, be a rare case, indeed, where a taxpayer claiming to have expended a very large sum of money on trading stock and other business expenses would succeed in satisfying the burden of proving that the assessment is excessive. Some corroborative evidence would normally be required which makes it more probable than not.

1. The need for records of receipts of substantial sums credited to bank accounts stands on precisely the same footing as the need for records of deductible outgoings. Here there is evidence of a company that maintained financial records, those recorded being audited financial statements. However, during the critical period when the transfers were made no records of the company’s financial statements have been provided and no records of the company’s bank balances have been provided, notwithstanding a request from the Commissioner.
2. Mr Cornell’s consistent explanation for the source of the money transferred to Australia was that it was his savings; however, in oral evidence Mr Cornell indicated that it was a combination of earnings of his company and amounts credited to his company’s gambling account, both of which occurred after he left Hong Kong and he was not able to say how much fell into either category and that the company’s account was merely an extension of his own account. In substance, what Mr Cornell is now contending is that a distinction between the company and shareholder is to be ignored. Mr Cornell points to corporate credit card statements as evidence of the company being an extension of himself. The corporate credit card statements, however, are in Mr Cornell’s name and his wife’s name care of the company’s address. The statements do not support the contention that he makes.
3. Australian taxation law has for a long time recognised the existence of companies as entities separate from the shareholders. As the Court said in *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* [(1948) 77 CLR 143](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281948%29%2077%20CLR%20143) at 156 (endorsed since in cases such as in *FAI General Insurance Company Ltd (in liquidation) v Sherry* *& Ors* [2002] SASC 431):

A share in a company is not an “asset” in the company. It is a “chose in action”.

1. In *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598, at page 609 the Court said:

A share confers on the holder no legal or equitable interest in the assets of the company. It is a separate piece of property.

1. More recently the Justice in the – Full Court of the Federal Court in *Commissioner of Taxation v BHP Billiton Finance Ltd* [2010] FCAFC 25, at paragraph 37(2) Justice Edmonds said:

The conflation of the activities of separate entities into some fictional group or single entity is impermissible outside the confines of part 3-90 of the ITAA 1997; ...

1. The consistent message is companies are separate from shareholders and it is not permissible to regard a company’s assets as shareholder’s assets or a company’s income as shareholder’s income.
2. Mr Cornell also claims that some of the money that was transferred into this account was transferred before he became a resident of Australia. He contends that he became a resident in March 2010 when he began work for the first time after his return to Australia. His evidence was that he did not return to Australia with the intention of staying permanently and, hence, he did not transfer the money that he had overseas back to Australia in a lump sum.
3. Against that evidence, his oral evidence was that he returned to live in a property that he owned in September 2009. He returned to Australia with all of his family, that is his wife and three children, he did not maintain a residence in Hong Kong after his return to Australia. From late 2009 he attempted to enrol his eldest child in school in Australia. From late 2009, at the latest, he sought employment in Australia and from January 2010 he had his eldest child commencing schooling in Australia.
4. Whilst not raised as a ground of objection the Commissioner did not oppose the residency contention on that basis.
5. The conclusion in relation to residency is contrary to Mr Cornell’s contention.
6. He was a resident of Australia from at least as early as late 2009 and the amounts transferred to his account were transferred while he was a resident. It is not necessary for a person to intend to live in Australia permanently to be a resident here. Adopting the *Federal Commissioner of Taxation v Applegate* 79 ATC 4307, at page 4313, Mr Cornell’s usual place of abode from late 2009 was Australia, at least for the foreseeable future. The Tribunal also notes that the evidence of the reason for not transferring the money in Hong Kong to Australia in one lump sum needs to be received with great caution. When Mr Cornell returned to Australia the money was not available to be returned as a lump sum.
7. Dealing with the original accumulated savings contention first. When coupled with evidence of an inability of the company to have transferred the sums in question to Mr Cornell on the latest financial information which is available to the tribunal, the lack of evidence of the sources of money to the company that were transferred to Mr Cornell is such that the contention that the transfers were simply transfers of accumulated savings cannot be accepted as proven. Further, as there is recognition of separate ownership of assets as between company and shareholder and separate ownership of income as between company and shareholder, even if Mr Cornell’s uncorroborated oral testimony as to the company’s money being his money were accepted, that evidence does not show that the money transferred to his bank account was not income with his hands.
8. For the foregoing reasons, the objection decision must be affirmed.

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| I certify that the preceding 26 (twenty-six) paragraphs are a true copy of the reasons for the decision herein of F D O'Loughlin, Senior Member. |

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

Associate

Dated

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| Date(s) of hearing | **6 October 2015** |
| Applicant | **In person** |
| Counsel for the Respondent | **Nigel Evans** |
| Solicitors for the Respondent | **Benjamin Norman, ATO Dispute Resolution** |