

## No Sanctuary at the Lakes

### Litigation Update

The Australian Taxation Office recently released a Decision Impact Statement regarding the decision of the Full Court of the Federal Court in *Sanctuary Lakes Pty Ltd v Commissioner of Taxation* [2013] FCAFC 50.

The case raised issues as to whether a taxpayer was entitled to various deductions and whether related penalties were properly imposed and remitted.

Noteworthy was the rejection by the Court of the proposition that it necessarily follows that a taxpayer must have taken reasonable care if the taxpayer has a reasonably arguable position at law on a shortfall amount.

The taxpayer was involved in the construction of Sanctuary Lakes Resort, a residential development at Point Cook in Victoria offering a “resort style” of living to its residents including membership of a golf club.

The taxpayer claimed deductions for losses on the sale of memberships in the golf club and pecuniary obligations to undertake development works under various agreements.

The Commissioner disallowed many of the deductions claimed and imposed a 25% administrative penalty for failure to take reasonable care (3 claimed deductions) and taking a position that was not reasonably arguable on shortfall amounts (2 claimed deductions).

The Administrative Appeals Tribunal found that the taxpayer was not entitled to any of the disputed deductions and affirmed the Commissioner’s objection decision regarding the penalties imposed for failure to take reasonable care.

However, in relation to one of the issues in dispute, the Tribunal remitted the penalty to zero because it found that the taxpayer had a reasonably arguable position on that issue.

Both parties appealed unsuccessfully to the Full Federal Court.

#### Who does this affect?

- Taxpayers and tax agents

#### Article Highlights

- Full Court rejects proposition that if a taxpayer has a reasonably arguable position at law on a shortfall amount, it necessarily follows that the taxpayer must have taken reasonable care.
- Recognition that having a reasonably arguable position on a shortfall amount and taking reasonable care are independent statutory standards for the imposition of administrative penalties.
- In deciding whether to remit a penalty imposed for failing to take reasonable care, a decision-maker may take into consideration a finding that the taxpayer’s position was reasonably arguable.



On the question of penalties, the Full Federal Court rejected the taxpayer's contention that it necessarily follows from the finding that its position was reasonably arguable that the taxpayer (and its tax agent) must have taken reasonable care in filing the relevant return.

In dismissing the taxpayer's appeal, the Court noted that similar arguments had been rejected in a number of decisions which held that having a reasonably arguable position and taking reasonable care are independent standards: *Federal Cmr of Taxation v Traviati* (2012) 205 FCR 136 at [10]-[22]; *Pratt Holdings Ltd v FCT* [2012] FCA 1075 at [167].

The Commissioner argued that in exercising its discretion under s.298-20 of Sch 1 to the TAA to remit the penalty amount, the Tribunal took into account an irrelevant consideration, namely, its finding that the taxpayer's position regarding the deduction issue in dispute was reasonably arguable.

The Commissioner placed heavy reliance upon *Traviati*, which it was said stood for the proposition that whether or not a taxpayer's position is reasonably arguable is an irrelevant consideration to the exercise of the discretionary remittal power.

The Court rejected the Commissioner's argument and held that the contrary view expressed in *Traviati* should not be followed.

In dismissing the Commissioner's appeal, the Court held that the legislative scheme did not preclude a decision-maker, who was deciding whether or not to exercise the discretion to remit under s.298-20, taking into consideration a finding that the taxpayer's position was reasonably arguable in circumstances where a penalty had been imposed for failing to take reasonable care.

By majority and whilst noting that the Tribunal's reasoning was scant, the Court also rejected the Commissioner's argument that the Tribunal applied the wrong test under s.298-20 in determining to remit the penalty to zero.

The Court noted that the Tribunal acknowledged there needed to be circumstances which could be regarded as mitigating the taxpayer's behaviour and appreciated that the particular circumstances of the taxpayer were relevant to its decision.

The High Court refused the taxpayer's application for special leave to appeal.

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