Form 17
Rule 8.05(1)(a)

Statement of claim

No. of 2013

Federal Court of Australia

District Registry: New South Wales

Division: General

Gary Kurzer

Applicant

Commissioner of Taxation

Respondent

Background Facts

1. The Respondent is the head of the Australian Taxation Office ('ATO') and is capable of suing and being sued.

2. On 22 March 2000 and 17 April 2000, the Applicant ('Gary Kurzer') and Virginia Aghan, acquired Unit 1 and Unit 2, 20 Barnhill Road Terrigal NSW ('Property'), respectively, as Joint Tenants.

Particulars

(i) Contracts dated 22 March 2000 and 17 April 2000 respectively.

3. The Property acquisition was settled from the Applicant and Virginia Aghan's combined personal funds and funds provided by the Applicant's sister.

4. The Property was purchased with the intention of making alterations and additions to the Property with one unit to be used as the Applicant and Virginia Aghan's main residence and the other units being used as rental accommodation.

5. The builder, Pluim Projects P/L, was appointed to undertake the alterations and additions to the Property.

Filed on behalf of (name & role of party) Gary Kurzer

Prepared by (name of person/lawyer) C/- Serene Teffaha (Advocate under General Power of Attorney)

Law firm (if applicable)

Tel 0425 754 299 Fax

Email Serene.teffaha@gmail.com

Address for service (include state and postcode) 30 McIntyre Street Burwood Victoria 3125

6. The alterations and additions to the Property were funded by various loans, including a loan from the National Australia Bank ('Bank').

7. The Property, consisting of Units 1 and 2, 20 Barnhill Road Terrigal NSW, was subdivided into Renumbered Units 1 to 4, with Renumbered Unit 2 becoming the main residence of the Applicant and Virginia Aghan.

8. The Bank made construction re-finance conditional upon all units being immediately listed for sale.

9. On 1 April 2005, upon advice of the Applicant's (then) accountant, a partnership consisting of Virginia Aghan and the Applicant with 'ABN 68 813 618 546' was registered for GST ('Partnership').

10. The certificate of occupancy was issued on 8 July 2005. Strata approval was granted in December 2005.

11. Between 21 August 2005 and 21 November 2005, Renumbered Units 1, 2, 3 and 4 were listed for sale through two advertising campaigns, but did not result in a cash sale for any unit.

12. On or about January 2006, the Applicant was approached by a Barter Trade Exchange firm, BBX Management Ltd to help him expeditiously dispose of the units by including a high percentage of trade dollars in the sales ('BBX').

Particulars

(i) Barter Trade Exchanges use a proprietary form of trade dollars in lieu of Australian Currency to transact the facilitation of goods and services exchanges between members of their trade exchange.

(ii) The value of the trade dollar is set by members ascribing their own values to the goods and services being exchanged. There is no facilitation to convert the proprietary trade dollars into cash, and the trade dollars cannot be used to pay tax or GST. Barter Trade Exchanges are businesses that make profits primarily from charging membership, banking and commission fees in Australian dollars.

(iii) The Respondent considers trade dollars or barter credits as assets other than money. Trade dollars or barter credits can generally only be exchanged for goods and services. As such, they are not unconditional, nor convertible to cash, and have no assigned monetary value. In addition, credit units arising from barter and counter trade transactions are not acceptable forms of payment for parties external to the bartering arrangements.

13. Renumbered Unit 1 was sold by Land Sale Contract dated 14 February 2006 with settlement occurring on 21 February 2006. Renumbered Unit 1 was sold for a cash payment of AUD$810,000 and BBX$540,000. GST was not charged on the sale.

14. Renumbered Unit 4 was sold by Land Sale Contract dated 6 March 2006 with settlement occurring on 2 May 2006. Renumbered Unit 4 was sold for a cash payment of AUD$990,000 and BBX$810,000. GST was not charged on the sale.

15. The Applicant and Virginia Aghan made capital losses on the sales as follows: Renumbered Unit 1 resulted in capital losses of AUD$158,378.04 and, Renumbered Unit 4 resulted in capital losses of AUD$205,908.55 (a total loss of AUD$364,287.19).

16. The Applicant and Virginia Aghan also carried forward the outstanding interest payable.

17. On 19 October 2007, the Applicant and Virginia Aghan were issued a Notice of Cancellation by the ATO of 'ABN 68 813 618 546', and a Notice of Cancellation by the ATO of GST registration effective as of 1 April 2005.

Particulars

(i) On 3 August 2006, by way of letter, the ATO clarified to the Applicant that the BAS lodged by their accountant was erroneous and that the Applicant and Virginia Aghan had made '*an honest mistake'* in lodging the BAS.

(ii) The ATO stated in the correspondence dated 19 October 2007 that: '*Your registration has been cancelled due to you ceasing to carry on an enterprise*.'

18. On 20 May 2008, the Applicant lodged his Income Tax Return for income tax year ended 30 June 2006.

19. The Applicant declared a total tax liability of AUD$13,265.16 for income tax year ended 30 June 2006, based on the prevailing tax laws and tax methodologies that applied to his circumstances.

20. The tax liability, pleaded in the previous paragraph, reflected the capital losses from the sales of the two units.

21. From 20 December 2007 until 28 July 2008, the Respondent conducted an audit into alleged tax law Partnership of Virginia Aghan and the Applicant with 'ABN 68 813 618 546', despite previous ATO cancellation of ABN and GST registration. The audit dealt with 'BAS' and 'GST' related issues.

22. The principal Respondent Audit Officer was Ashish Jha and the Respondent Deputy Commissioner responsible for the audit was Shane Reardon.

23. On 18 December 2008, the Respondent issued an assessment for income tax year ended 30 June 2006 to the Applicant and Virginia Aghan, as Partners in a tax law Partnership with 'ABN 68 813 618 546'.

24. The assessment included a document titled 'Assessment Completed Document-Completion of Audit of VB Aghan and G Kurzer ABN 68813618546' dated 18 December 2008 ('ACD'). The ACD was signed: 'Shane Reardon, Deputy Commissioner of Taxation, Per (Field Officer) Pium Attanayake'.

25. The Respondent issued the Applicant and Virginia Aghan the assessment, pleaded at paragraph 23, based on its reasoning set out in its Interim Decision Summary Report ('IDSR') dated 28 July 2008 and the ACD dated 18 December 2008.

26. The ACD set out a number of conclusions reached by the Respondent, which included:

    a. The Applicant and Virginia Aghan are a tax law Partnership carrying on an enterprise.

    b. The Partnership was required to be registered for GST as at 1 October 2004.

    c. 'Substantial Renovations' had been proven.

    d. GST was charged to the Applicant and Virginia Aghan as Partners in the Partnership at: AUD$101,641.00, with non-compliance penalties charged at 50%: AUD$77,893.10

    e. That 'profits' of AUD$667,995.03 were made on the following basis: '*You have made profit from this activity leading to net increase in cash flow reflecting in your trade dollar account'*.

    f. The sales of the units were on revenue account, and not on capital account.

    g. The 'non-monetary consideration' (BBX trade dollars 'TD') would be assessed at: '$1AUD = $1TD'.

    h. The Applicant and Virginia Aghan will also be assessed separately on the basis of a total of AUD$667,695.03 '*net profit*'.

27. In December 2008, the Respondent unilaterally registered the Applicant and Virginia Aghan as a tax law Partnership liable for GST from 1 October 2004.

28. The Respondent did not inform the Applicant of the GST registration described in the preceding paragraph as required under section 25.5 of the *'A New Tax System (Goods and Services Tax) Act 1999'*.

29. The Applicant complied with the audit and provided to the ATO extensive facts and evidence of his and Virginia Aghan's positions. The following was provided to the ATO:

    a. A document from Pluim Projects P/L, provided to the ATO on or about April 2008, stating that that the works were completed within the existing footprint of the building, retaining 65% of the original building.

    b. A position paper dated 19 April 2008, from the Applicant, outlining that the Property was purchased as a residence and for investment purposes, the forced sales of the Renumbered Units were not to realise profit, that the sales were on capital account, and that the Respondent previously advised the Applicant and Virginia Aghan in writing that GST was not applicable to their position.

    c. A comprehensive 140-page response to the IDSR, provided to the ATO on or about August 2008, which set out extensive examples of BBX sales in the free market which showed that the BBX trade dollar 'did not trade consistently', and set out trade dollar valuations, in accordance with tax law requirements for bringing non-monetary considerations into taxable income pursuant to IT 2668 at paragraph [15] as varied by IT 2668A, which confirmed that market valuations of the trade dollar value was '20c in the dollar' i.e. AUD$0.20 per BBX trade dollar, for these transactions.

    d. A 30-page independent valuation of Renumbered Units 1 and 4 prepared by Robertson & Robertson, as at 26 April 2005, which determined that the correct market value for Renumbered Unit 1 was AUD$950,000 and Renumbered Unit 4 was AUD$1,350,000 and that the capital losses were calculated based on the difference in the cost base of Renumbered Units 1 and 4, as at 8 July 2005, and the market value of Renumbered Units 1 and 4.

    e. A second independent valuation of Renumbered Units 1 and 4 by MJD Valuers, as at 17 August 2004, which determined that the correct market value for Renumbered Unit 1 was AUD$925,000 and Renumbered Unit 4 was AUD$1,275,000.

    f. A copy of a 'cash offer' of AUD$885,000 for Renumbered Unit 1 made to the Applicant and Virgina Aghan in 2006, as supplied by the licenced real estate agent who had the Renumbered Units listed for sale, as an indication of an 'arm's length value' to a stranger.

30. On 21 June 2009, the Applicant lodged objections to the assessments of the Applicant and Virginia Aghan as detailed in the ACD document dated 18 December 2008 ('Objections').

31. The Objections were allocated to the Respondent Objection Officer Gerard Polon of the Melbourne ATO offices (ref. GST/MPO/6203448).

32. The Applicant and Virginia Aghan engaged Ron Jorgensen of Harwood Andrews Lawyers to represent them in their matter.

33. On 30 November 2009, the Respondent partly disallowed the Objections of the Partnership, the Applicant and Virginia Aghan ('Objections decisions').

Particulars

(i) Notice of Decision on Objection dated 30 November 2009 to Virginia Aghan and the Applicant as Partners in tax law Partnership with 'ABN 68813618546'.

(ii) Notice of Decision on Objection dated 30 November 2009 to the Applicant.

(iii) Notice of Decision on Objection dated 30 November 2009 to Virginia Aghan.

34. The Objections decisions, pleaded in the previous paragraph, were signed: 'Shane Reardon, Deputy Commissioner of Taxation, per Gerard Polon.' Shane Reardon is the Respondent Responsible Officer for the Objections decisions.

35. The Objections decisions, pleaded at paragraph 33 set out a number of conclusions reached by the Respondent, which included:

a. The Applicant and Virginia Aghan are a tax law Partnership carrying on an enterprise as the Partnership is '*in receipt of ordinary income under ITAA 97'* because it receives *'rental income from'* the units,

b. The Partnership was required to be registered for GST as at 1 October 2004,

c. Substantial renovations had been proven.

d. GST was charged to the Applicant and Virginia Aghan as Partners in the Partnership at AUD$255,113.00.

e. The sales of the units were, determined to be on capital account and not on revenue account, based on the Respondent's conclusion that the disposal of the two units was a '*mere realisation of capital assets*' and the Applicant and Virginia Aghan did *'not derive any rental income from the units',*

f. The 'non-monetary consideration' (BBX trade dollars 'TD') would be assessed at '$1A = $1TD' based on '*stamp duty*' and the '*sum paid to the builder*' in the final settlement,

g. The taxable income for the Applicant, for the income tax year ended 30 June 2006, will be reduced from $524,545 to $350,253.20.

h. The taxable income for Virginia Aghan, for the income tax year ended 30 June 2006, will be reduced from $351,059 to $176,767.20.

36. On 19 January 2010, the Applicant appealed the Objections decisions to the Administrative Appeals Tribunal, on the basis that the Respondent failed to apply the relevant tax laws, and failed to correctly consider the facts and evidence in determining tax due.

37. On 30 March 2010, the Respondent issued tax assessments for income tax year ended 30 June 2006 for the Applicant and Virginia Aghan in their individual capacity on the basis of AUD$635,712.81 gross capital gains. The Applicant's 'tax payable' was AUD$196,494 and Virginia Aghan's 'tax payable' was AUD$109,610.00.

38. On 30 March 2010, the Respondent issued tax assessments for income tax year ended 30 June 2006 for the Applicant and Virginia Aghan stating that GST was payable by the Applicant and Virginia Aghan, as Partners, for the Partnership 'ABN 68813618546', in the amount of AUD$160,396.

39. On or about December 2010, the Applicant and Virginia Aghan attended a final meeting at the AAT, with Respondent Litigation Officer Rimma Miller, and the AAT's representative Kim Richardson. No AAT hearing proceeded.

40. At the AAT phase, the Respondent had not been furnished with any substantive information, differing from the information furnished at the audit and objection phases.

41. The Respondent Litigator Rimma Miller, admitted without argument, at the AAT final meeting, the following:

a. GST should never have been applied to the Applicant and Virginia Aghan's positions.

b. The sales of the units were on capital account.

c. No capital gains were made on the sale of Renumbered Units 1 and 4.

d. Capital losses were made on the sale of Renumbered Units 1 and 4.

e. The market valuations of the BBX trade dollar ('TD') value; being '20c in the dollar' were correct i.e. AUD$0.20 per BBX trade dollar.

f. No 'Substantial Renovations' had occurred.

42. On 9 December 2010, the AAT issued section 42C orders under the *Administrative Appeals Tribunals Act 1975* ('AAT Decision'), signed by the Respondent Assistant Commissioner Grahame Tanna and the Applicant.

43. Despite the AAT Decision, the Respondent issued a revised assessment on 8 January 2011 for the de-registered Partnership of the Applicant and Virginia Aghan with 'ABN 68813618546' for AUD$177,002.00 in GST which was contrary to the AAT Decision that the '*GST net amount will be amended to $0*'. In addition, GIC was imposed on the Applicant and Virginia Aghan as Partners in the now de-registered Partnership.

44. Despite the AAT Decision, the Respondent issued a revised assessment for the Applicant, dated 11 March 2011, demanding payment of AUD$216,782.00 (with GIC accruing at 11.92% interest pa) which was contrary to the AAT Decision.

45. Despite the AAT Decision, the Respondent issued a revised assessment for the Applicant dated 6 April 2011, demanding payment of AUD$230,369.62 (with GIC accruing at 12.02% interest pa) which was contrary to the AAT Decision.

46. In March 2011, the Applicant requested a review, in writing, from the ATO of the revised assessments pleaded herein at paragraphs 43-45.

Particulars

(i) In March 2011, the Applicant requested the ATO to review the revised assessments, in addition to making a claim under the 'Compensation for Detriment caused by Defective Administration' Scheme to review conduct leading up to the AAT Decision.

47. Despite the AAT Decision, the Respondent issued the Applicant a 'Notice of Intended Legal Action/Garnishee' on 17 May 2011 for income tax due of AUD$107,396.86 'without further notice,' with GIC accruing at 11.92% pa, which was contrary to the AAT Decision.

48. On 26 May 2011, the Respondent refused the proposition of the Applicant to pay down the alleged debt at the rate of AUD$100 per month, demanding immediate payment of AUD$108,663.82, with GIC accruing at 11.92% and stating that '*Failure to pay may result in the commencement of legal action for the recovery of amounts outstanding without further notice.*'

49. Despite the AAT Decision, and the appeal for the tax assessments to be re-evaluated, the Respondent issued revised assessments for the Applicant dated 30 May 2011 and 6 June 2011, demanding payment of AUD$108,663.82 (with GIC accruing at 11.92%), which was contrary to the AAT Decision.

50. The Respondent engaged legal firm Minter Ellison to handle the review of the tax matters and the revised assessments by way of a 'Legal Service Work Order Request' dated 19 May 2011.

51. Minter Ellison received AUD$127,421.97 in fees from the Respondent to execute their legal work.

Particulars

(i) ATO FOI payment statements for matter N11M1495.

52. On 14 July 2011, Minter Ellison, by letter, advised the Applicant that the Respondent had engaged the firm *'to advise and assist in the resolution of the claim generally'* as per ATO 'Legal Services Work Order Request' dated 19 May 2011.

53. On or about 6 September 2011, Minter Ellison (through Andrew Gill - Partner) corresponded with the Applicant, by email, setting out that they will be handling the review of the revised assessments.

54. On 25 November 2011, by letter, the Respondent Principal Legal Adviser Melissa Hinde, in conjunction with Minter Ellison, made a determination that there were no mathematical and computational errors in the revised assessments, no defective administration arose, no mental injury was caused by the conduct of the ATO, and no compensation was payable.

55. On 10 January 2012, the Applicant submitted a further review request, by email, into the incorrect revised assessments and the lack of adherence to the CDDA rules as set out in Finance Circular 2009/09.

56. On or about 19 January 2012, the Applicant was advised through Minter Ellison, by letter, that the Respondent would not consider this new review request and the matter was closed and all future correspondence on the tax matters should be forwarded to the Ombudsman and not Minter Ellison or the ATO.

57. During February-March 2012, the Applicant attempted to call the ATO's Canberra offices to discuss the outstanding tax matters, and was advised by the switchboard staff that they had been advised not to put his calls through to Respondent Staff. Telephone messages left by the Applicant were not responded to.

58. Through the Applicant's sheer persistence, the Respondent Assistant Deputy Commissioner Elizabeth Goli was appointed to conduct a review of the revised assessments on or about April 2012.

59. Despite the AAT Decision and the review by Elizabeth Goli, the Respondent issued another revised assessment for the Applicant dated 5 July 2012, demanding payment of $123,469.72, which was contrary to the AAT Decision.

60. On or about 9 August 2012, the Respondent admitted in a report titled 'Gary Kurzer – Review of the Tax Assessment for the Year Ended 30 June 2006', emailed to the Applicant, that the revised assessments following the AAT determination were incorrect in that the sums of AUD$21,886 (stamp duty) and AUD$332,961 (finance costs) were erroneously omitted in the calculations of the cost base of Renumbered Units 1 and 4; with the consequence that the assessment was incorrect by a total of AUD$354,847.

Particulars

(i) In the letter dated 9 August 2011, Elizabeth Goli provides in part: *I have revised that part of my interim report that relates to the handling of the appeal to set out the error that occurred and the impact that it had on your liability for the income tax year ended 30 June 2006. I have also set out what actions have been taken to rectify the error.*

(ii) Elizabeth Goli admitted, in the same letter, that the correct mechanism of determining the quantum of capital losses was the methodology of valuing the properties and not the trade dollars as done in the prior assessments.

61. In the same correspondence, Elizabeth Goli determined that the Applicant's correct tax liability for income tax year ended 30 June 2006 was AUD$8,554 and not AUD$13,265.16 (the later amount had been paid to the ATO via two instalments on 3 August 2008 and 15 August 2008 respectively).

Negligence

62. Legislative references pleaded herein are to the *Income Tax Assessment Act 1997* ('ITAA97'), the *Taxation Administration Act 1953* ('TAA53'), *A New Tax System (Goods and Services Tax) Act 1999* ('GSTA99') and the *Administrative Appeals Tribunal Act 1975* ('AATA75').

63. The Respondent, being the Commissioner of Taxation, is not immune from suit.

Particulars

(i) The Respondent did not take a reasonable position under the law having regard to the facts and evidence provided to him by the Applicant.

(ii) The Respondent disregarded the applicable tax laws, the facts and the quantifiable evidence provided to him by the Applicant.

64. The Respondent owed the Applicant a duty of care to perform the Objections decisions in accordance with applicable tax laws pursuant to section 14ZY of the TAA53.

Particulars

(i) Under section 14ZY of the TAA53, the Respondent has an obligation to determine each taxpayer's objection by evaluating whether the assessments or amended assessments have been made in accordance with the applicable tax laws and the facts pertaining to the case.

(i) The Respondent has an obligation to be thorough and reasonable in the application of tax laws and consideration of the facts pertaining to the case.

65. The Respondent was in breach of his duty of care in the conduct of the performance of his duties as the Commissioner of Taxation pursuant to section 14ZY of the TAA53.

Particulars

(i) The Respondent acted negligently by maintaining the Objections decisions up to conceding in the AAT when it was known or should have been known to do so was contrary to law and inconsistent with ATO administrative policies.

(ii) The Applicant relies on paragraphs 66, 67 and 68 pleaded herein.

66. The Respondent acted negligently, in contravention of section 14ZY of the TAA53, by applying GST to the Partnership, as at 1 October 2004, when it was known or should have been known to do so was contrary to section 23-5 of the GSTA99 and inconsistent with ATO administrative policies because the Applicant and Virginia Aghan were not carrying on an enterprise, did not meet the GST turnover threshold and did not dispose of Renumbered Units 1 and 4 as at 1 October 2004.

Particulars

(i) Section 23-5 of the GSTA99 sets out two tests to determine whether you are required to be registered for GST: firstly, whether you are carrying on an enterprise, and secondly, whether your GST turnover meets the registration turnover threshold.

(ii) It was known or should have been known to the Respondent that the Property was acquired by the Applicant and held at all times with the sole objective intention for use as a main residence and as an investment/rental Property and therefore the indicia of MT 2006/1 were not met.

(iii) It was known or should have been known to the Respondent that the consideration received from the disposal of Renumbered Units 1 and 4 was excluded from the projected annual GST turnover because the supply of the units by sale was an excluded supply of a capital asset under section 118-25 of the GSTA99.

(iv) It was known or should have been known to the Respondent that the Partnership was not registrable or required to be registered pursuant to section 23-5 of the GSTA99 and its registration was erroneous in fact and at law so the registration was ineffective pursuant to section 25-5 of the GSTA99.

(v) It was known to the Respondent that the Respondent previously cancelled the GST registration for the Partnership, on the basis that the Partnership was not carrying on an enterprise.

(vi) It was known to the Respondent that the Respondent failed to serve the Applicant with a GST registration notice pursuant to section 25-5 of the GSTA99.

(vii) It was known or should have been known to the Respondent that Renumbered Units 1 and 4 were put on sale between 21 August 2005 and 21 November 2005 and not from 1 October 2004.

(viii) The Applicant relies on admissions made by the Respondent Litigator Rimma Miller in Freedom of Information documentation at FOI 117, titled 'Change of ATO position from Objection decision', which provides in part:

TCN [Tax Counsel Network] *had a look at the matter and was of the opinion that GST matter should be settled on the basis that the applicant should never have been registered.*

67. The Respondent acted negligently, in contravention of section 14ZY of the TAA53, by applying GST to the Partnership in the Objections decisions when it was known or should have been known to do so was contrary to law and inconsistent with the parallel capital gains tax treatment of the Applicant and Virginia Aghan.

Particulars

(i) The Objections decisions indicated, for the purposes of applying GST, that the Partnership was carrying on an enterprise in the form of an adventure or concern in the nature of trade based on the following factor:

'You are a partnership in receipt of ordinary income under ITAA 97 because you receive rental income from your properties'.

(ii) The Objections decisions arrived at, in the preceding particular for the purposes of applying GST, by the Respondent were inconsistent and contradictory to the Objections decisions for the purposes of applying CGT.

(iii) For the purposes of applying CGT, the Respondent concluded that the '*profit-making intention of TR 92/3 had not been satisfied*' and that the disposal of the two units '*were mere realisation of investment assets*'. Furthermore, the Respondent concluded that the Applicant and Virginia Aghan *'did not derive rental income from the units'.*

(iv) From the audit investigations, the Respondent knew that there was no rental income produced from the units. Despite this, GST was applied based on the false assertion that rental income was derived from the units.

(v) The Applicant relies on admissions made by the Respondent Litigator Rimma Miller in Freedom of Information documentation at FOI 117, titled 'Change of ATO position from Objection decision', which provides in part:

The objection decisions by the Commissioner in the partnership and individual matters were mutually inconsistent. The individual decisions accepted that the applicants purchased the property for renting it out, and were only forced to sell by the bank in order to meet their obligation under the loan. The decision stated that there was no profit making intention and inferred that there was no enterprise. The individual decisions held that the sale resulted in capital gain assessable to each partner in their individual capacity.

And:

The Commissioner was incorrect in assessing the applicant to GST on sale of properties, at the same time as assessing the individual partners to a CGT on the sale of the same properties.

(vi) The Applicant's legal representative, Ron Jorgensen, made numerous requests for a joint meeting of the GST auditors and the CGT division to resolve the conflict within the ATO between the GST auditors who maintained that the taxpayers were carrying on a profit-making scheme, and the CGT division who maintained that the taxpayers were not carrying on a profit-making scheme. The Applicant relies on the fact that the refusal of the GST auditors and the CGT division to resolve this conflict resulted in detriment to the Applicant.

68. The Respondent acted negligently, in contravention of section 14ZY of the TAA53, by applying unsubstantiated methodologies to determine the value of the BBX trade dollar

in the Objection decisions when it was known or should have been known to do so was contrary to law and inconsistent with ATO administrative polices.

Particulars

(i) The disposal of Renumbered Units 1 and 4 was on capital account and subject to Parts 3.1 and 3.3 of the ITAA97.

(ii) 'Capital proceeds' for the purposes of Parts 3.1 and 3.3 of the ITAA97 is the total money received and the 'market value of any other property' received pursuant to section 116-20 of the ITAA97.

(iii) The capital proceeds from a CGT event are replaced with the market value of the CGT asset that is the subject of the event if some or all of those proceeds cannot be valued pursuant to section 116-30(2)(a) of the ITAA97.

(iv) The capital proceeds from the CGT event referable to the BBX trade dollar cannot be valued, accordingly, section 116-30(2)(a) of the ITAA97 applies.

(v) Where section 116-30(2)(a) of the ITAA97 applies, it is the market value of the CGT asset to which the event occurs that is used and not the market value of the property rights.

(vi) Accordingly, under section 116-30(2)(a) of the ITAA97 it is the market value, or arm's length value, of Renumbered Units 1 and 4 which is used to determine the capital proceeds and not the market value of the BBX trade dollar property rights.

(vii) The Respondent did not apply the correct tax methodologies set out in the preceding particulars to determine the value of the BBX trade dollar but rather relied on unsubstantiated methodologies, including the stamp duty paid by the purchasers and the BBX trade dollar sums paid to Pluim Projects P/L (builder).

(viii) The Respondent was informed that the builder accepted a highly discounted settlement payment as multiple defects were remaining on the building. The builder accepted 'trade dollars' in lieu of cash. The Respondent ignored this aspect.

(ix) The Respondent disregarded the independent property valuations provided by the Applicant from Robertson & Robertson and MJD Valuers.

(x) The Applicant provided a further independent sworn property valuation at the AAT from Abbots Valuers dated 1 July 2010 which confirmed that the *'Robertson & Robertson Report'*, previously provided to the ATO, *'is a very professionally*

prepared, comprehensive document' that accurately assessed *'the fair market value'* of Renumbered Units 1 and 4.

(xi) The Respondent disregarded evidence presented by the Applicant that the BBX trade dollar is traded consistently for a lower price being AUD$0.15 to AUD$0.20 per BBX trade dollar.

(xii) The effect of applying the unsubstantiated methodologies, set out in the preceding particulars, to determine the value of the BBX trade dollar meant that the value of Renumbered Unit 1 was 42% above the cash market value at the time of disposal when using cash and trade dollars and the value of Renumbered Unit 4 was 33.3% above the cash market value at the time of disposal when using cash and trade dollars (as shown to the Respondent at the Objection stage).

(xiii) The Applicant relies on admissions made by the Respondent Litigator Rimma Miller in Freedom of Information documentation at FOI 117, titled 'Change of ATO position from Objection decision', which provides in part:

The substantial volume of materials provide(d) by the applicant, including a number of judicial decisions discussing and defining the value of a BRX barter dollar from being "worthless" to about 30 cents in a dollar, led the Commissioner to the conclusion that the better view would be accepting the values in the arm's length valuation obtained by the applicant is a most acceptable way of determining the value of the barter dollar.

69. The Respondent owed the Applicant a duty of care to perform the section 42C AATA75 orders in accordance with law pursuant to section 14ZZL of the TAA53.

Particulars

(i) Under section 14ZZL of the TAA53, the Respondent must give effect to the decision of the AAT, within 60 days, of the decision becoming final (including where section 42C AATA75 orders have been made).

70. The Respondent was in breach of his duty of care in the conduct of the performance of his duties as the Commissioner of Taxation pursuant to section 14ZZL of the TAA53.

Particulars

(i) The Respondent acted negligently by issuing revised assessments contrary to the section 42C AATA75 orders.

(ii) The Respondent acted negligently by enforcing the revised assessments, and issuing 'Notice of Intended Legal Action/Garnishee', contrary to the section 42C AATA75 orders for a period of over 12 months.

(iii) The Respondent acted negligently by failing to identify the basic arithmetical errors in the Applicant's revised assessments.

(iv) The Respondent acted negligently by uncritically relying on Minter Ellison's advice that was contrary to the section 42C AATA75 orders and did not identify the basic arithmetical errors in the Applicant's revised assessments

(v) The Respondent acted negligently by instructing ATO staff not to return the Applicant's communications. All direct messages left with the Respondent Dom Sheil (being Senior Litigator in ATO Compensation area) were never responded to.

(vi) The Applicant relies on admissions made by the Respondent Commissioner of Taxation Chris Jordan, in email dated 5 February 2013, which provides in part that the ATO made a '*mistake'* that resulted in a *'significant over-statement of the tax'.*

71. The Respondent acted negligently by pursuing the Applicant from December 2007 until August 2012 when it was known or should have been known that the Applicant did not have an outstanding tax liability.

Breach of Statutory Duty

72. The Respondent owed the Applicant a statutory duty to perform the Objection decisions in accordance with law pursuant to section 14ZY of the TAA53.

73. The Respondent was in breach of the statutory duty pursuant to section 14ZY of the TAA53 in the conduct of the performance of his duties as the Commissioner of Taxation.

Particulars

(i) The Applicant relies on particulars pleaded at paragraphs 65,66, 67 and 68.

74. The Respondent owed the Applicant a statutory duty to perform the section 42C AATA75 orders in accordance with law pursuant to section 14ZZL of the TAA53.

75. The Respondent was in breach of the statutory duty pursuant to section 14ZZL of the TAA53 in the conduct of the performance of his duties as the Commissioner of Taxation.

Particulars

(i) The Applicant relies on particulars pleaded herein at paragraph 70.

Damages

76. The Respondent's actions described herein resulted in the Applicant suffering injury and loss.

Injury

77. The Applicant suffered mental injury as a result of the conduct of the Respondent.

78. The events described herein resulted in significant economic and non-economic losses attributed to mental injury suffered by the Applicant arising directly from the conduct of the Respondent

Particulars

(i) The Applicant's local General Practitioner ('GP'), Dr Virginia Solomon, was the practitioner who had co-ordinated the Applicant's psychiatric intervention, the medication, and issue of the Mental Health Care plan for admission to Psychological counselling described herein.

(ii) On 10 July 2010, Dr Hamish McArthur (the Applicant's psychiatrist) diagnosed the Applicant with 'an Adjustment Disorder with mixed anxiety and depressed mood'.

(iii) The medical report produced by Dr Hamish McArthur noted in part: *Gary has been experiencing marked emotional distress over the last 6 -12 months, manifesting with sleep disturbance, restlessness, difficulty concentrating, fatigue, irritability and muscle tension*.

(iv) Dr Hamish McArthur referred the Applicant for formal treatment. The referral provides in part that the Applicant was referred to: *the St Vincent's Anxiety Clinic for formal assessment and ongoing management. This psychological distress has had a major adverse impact on his general well-being and his occupational and social functioning*.

(v) On or about 19 July 2010 commenced medication (Sertraline and Zoloft) and psychological sessions via a mental health care plan. The psychological sessions continue to date.

(vi) On or about 29 July 2010, the Applicant was admitted to St Vincent's Hospital CRUfAD Clinic for treatment for severe anxiety and depression under the care of

Dr Matthew Boulton, Psychiatry Registrar at the CRUfAD Clinic (St Vincent's Hospital).

(vii) In August 2010, the Applicant underwent counselling sessions with Lorraine Corne, Consulting Psychologist.

(viii) Lorraine Corne produced a report dated 23 August 2010 stating in part, in relation to the Applicant that he was presenting as: *highly anxious and severely depressed. He has presented with symptoms that are causing him to be unable to function effectively. He rates in the severe range on the BDI (Beck Depression Inventory) and the BAI (Beck Anxiety Inventory). Mr Kurzer has committed to further sessions for continuing treatment*.

(ix) Dr Virginia Solomon's medical report, dated 16 July 2012, regarding the Applicant's medical history states in part: *Gary was also assessed and treated at St Vincent's Hospital Anxiety and Depression clinic where the diagnosis of Depression was made in the context of a significant case being brought against him by the ATO. It was deemed that this contributed directly to Gary developing Depression. At the time he was started on anti-depressant medication, Zoloft, and started seeing a clinical psychologist for Cognitive Behaviour Therapy*.

79. The mental injury rendered the Applicant unable to function in society and all work and employment opportunities were forfeited from October 2009 onwards.

80. The mental injury rendered the Applicant unable to meet his obligations towards his daughter who is now 20 years of age and terminated his relationship with Virginia Aghan who withdrew her personal support and financial contributions to the mortgage.

81. The mental injury rendered the Applicant destitute as he was unable to sustain the costs, (both legal and otherwise), over five years, in defending his position against the Respondent.

Losses

82. The Applicant incurred legal and accountancy fees of AUD$81,449.

83. The Applicant incurred interest and medical expenses of AUD$22,120.

84. The Applicant incurred credit card debts of AUD$95,000 for living expenses.

85. To sustain the costs, mainly for legal and accountancy fees, living expenses and the mortgage repayments on 8A Castlefield Street Bondi NSW (main residence), the Applicant disposed of most of his residual assets and businesses, including those originally slated for long-term holding and superannuation purposes.

Particulars

(i) Particulars will be provided by way of evidence including the divestment of the Applicant's shares at a loss of AUD$50,184 and loss of projected capital gains of AUD$123,000.

(ii) Particulars will be provided by way of evidence including the divestment of the Applicant's properties (both investment and rental) at a loss of AUD$284,511 and loss of projected capital gains of AUD$1,740,000.

(iii) Particulars will be provided by way of evidence including the existing Mortgage Default of AUD$65,000 on 8A Castlefield Street Bondi NSW.

86. The Applicant's sister provided the Applicant and Virginia Aghan a loan of AUD$600,000 in 2000. The loan was used to purchase the Property. The Applicant was unable to meet the loan repayments due to mental injury and loss of employment. The Applicant suffered loss of AUD$300,000.

87. As a result of the divestment of the Applicant's properties, the Applicant suffered loss of projected rental income of AUD$313,434.

88. The mental injury rendered the Applicant unable to function in society and all work and employment opportunities were forfeited from October 2009 onwards.

Particulars

(i) Particulars will be provided by way of evidence including position held as Committee Member for Rendezvous Reef Resort (this work was ongoing for 12 years prior to the mental injury and gave rise to yearly remuneration of AUD$40,000) resulting in economic losses of AUD$520,000.

(ii) Further particulars will be provided by way of evidence including position held as design consultant for Rendezvous Reef resort for interiors, exteriors and landscape projects (this work was ongoing for 12 years prior to the mental injury and gave rise to yearly remuneration of AUD$38,860) resulting in economic losses of AUD$505,180.

(iii) Further particulars will be provided by way of evidence including for consultancy businesses in child care and architectural design (this work was ongoing for 25 years prior to the mental injury and gave rise to yearly remuneration of AUD$78,000) resulting in economic losses AUD$1,014,000.

89. As a result of the mental injury, the Applicant has been unable to work and will continue to be unable to work.

Particulars

(i) Particulars will be provided by way of evidence.

90. The Applicant experienced emotional distress and pain and suffering as a result of the events described herein.

91. The Applicant claims damages of $5,113,878, in addition to emotional distress and pain and suffering.

Date: 26 June 2013

Signed by Gary Kurzer
Applicant