



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: **SMALL BUSINESS TAXATION DIVISION**

File Number(s): **2020/8508-8516**

Re: **The Counsellor**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Senior Member G Lazanas**

Date: **13 February 2024**

Place: **Sydney**

In relation to proceedings No. 2020/8508-8515, the Tribunal affirms the reviewable decisions.

In relation to proceedings No. 2020/8516, the Tribunal dismisses the proceedings for want of jurisdiction.



.....
Senior Member G Lazanas

CATCHWORDS

TAXATION – income tax default assessments due to non-lodgement of income tax returns – whether the taxpayer discharged onus of proof in showing nil taxable income in relevant income years – no agreement to limit issues in dispute except agreed prior year losses to be carried forward – whether payments to taxpayer or for taxpayer’s personal expenses by taxpayer’s company properly characterised as repayments of loans made by taxpayer to company – whether loans made by company to taxpayer – whether loans made by taxpayer’s brother to taxpayer – provenance of amounts – intermingling of taxpayer’s funds with those of the company - failure to adduce reliable evidence – credibility of taxpayer and brother – whether administrative penalties correctly imposed for failure to lodge tax returns – objection decision affirmed – objection to shortfall interest charges dismissed for want of jurisdiction as no shortfall interest charges imposed

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) s 43

Income Tax Assessment Act 1936 (Cth) Division 7A, s 167, 262A

Income Tax Assessment Act 1997(Cth) s 4-15, 6-5, 6-10(1)

Taxation Administration Act 1953 (Cth) ss 14ZZE, 14ZZJ, 14ZZK, Schedule 1, 284-75, 284-90, 284-220, 298-220

CASES

Allied Pastoral Holdings Pty Limited v Federal Commissioner of Taxation (1983) 44 ALR 607

Bosanac v Federal Commissioner of Taxation [2019] HCA 41

Commissioner of Taxation v Dalco (1990) 168 CLR 614

Commissioner of Taxation v Radilo Enterprises Pty Ltd (1997) 72 FCR 300

Commissioner of Taxation v Rawson Finances Pty Ltd (2012) 89 ATR 357

Commissioner of Taxation v Ross [2021] FCA 766

Condon v Commissioner of Taxation [2023] FCA 561

Danmark Pty Ltd v Federal Commissioner of Taxation (1944) 7 ATD 333

Gashi v Commissioner of Taxation (2013) 209 FCR 301

Haritos v Federal Commissioner of Taxation [2015] FCAFC 92

Hua-Aus Pty Ltd v Commissioner of Taxation (2010) 184 FCR 430

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

Melbourne Corporation of Australia Pty Ltd v Commissioner of Taxation [2022] FCA 972

Picton Finance Ltd v Commissioner of Taxation [2013] AATA 116
Re DLMD and Federal Commissioner of Taxation [2017] AATA 739
Richard Walter Pty Ltd v Commissioner of Taxation (1996) 67 FCR 243
Rigoli v Commissioner of Taxation (2014) 96 ATR 19
Sanctuary Lakes Pty Ltd v Commissioner of Taxation [2013] FCAFC 50
Trautwein v Commissioner of Taxation (Cth) [1936] HCA 77

REASONS FOR DECISION

Senior Member G Lazanas

13 February 2024

INTRODUCTION

1. The applicant is referred to as the **Counsellor** in these reasons for decision as he asked for a private hearing pursuant to s 14ZZE of the *Taxation Administration Act 1953* (Cth) (**TAA**) and it is necessary to keep his name confidential in the reasons for decision.¹ I have also used neutral descriptions for his private company (the **Company**)², his counselling business which was taken over by the Company (the **Clinic**) and his brother (the **Brother**), to preserve the taxpayer's confidentiality, as required.
2. The Counsellor applied to the Tribunal seeking review of the objection decision made by the respondent (the **Commissioner**) on 22 October 2020 to not allow his objection to the Commissioner's assessments (the **Objection Decision**) for the income years ended 30 June 2014, 2015, 2016 and 2017 (the **Relevant Years**). Each of the assessments were default assessments issued pursuant to s 167 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**). The Counsellor had not lodged income tax returns in respect of the

¹ See s 14ZZJ(2) of the TAA which modifies s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) regarding the Tribunal's obligation to give public reasons.

² The Company had filed an application for review of GST assessments and, it was on that basis that the Counsellor's proceedings were also allocated to the Tribunal's Small Business Taxation Division. Subsequently, the Company withdrew its application. However, the Counsellor's proceedings remained and were dealt with in the Small Business Taxation Division.

Relevant Years on the premise that no tax returns were required to be lodged. The Counsellor also sought review of the Commissioner's Objection Decision which additionally covered the imposition of administrative penalties, as well as the decision not to remit the penalties.

3. The Commissioner had determined the assessments on the basis that amounts paid during the Relevant Years by the Company to the Counsellor, or on his behalf, were his ordinary income, or alternatively, statutory income under Division 7A of the ITAA 1936 (*Div 7A*).
4. The Commissioner's primary argument was that the Counsellor had not discharged his onus under s 14ZZK of the TAA to prove that the amounts paid by the Company were not his assessable income. In particular, the Commissioner was of the view that the evidence relied on by the Counsellor was unreliable and contradictory. The Commissioner also assessed the Counsellor for administrative penalties on the basis that the Commissioner had determined his tax-related liability without the assistance of tax returns and, therefore, imposed a penalty of 75% for the 2015, 2016 and 2017 income years. This base penalty amount was further uplifted by 20% in respect of the 2016 and 2017 income years. The Commissioner separately decided not to remit the administrative penalty.
5. The Counsellor submitted that all of the assessments were excessive. He maintained at the hearing that his taxable income for each of the Relevant Years was nil.³ During the tax objection stage, the Counsellor relied on signed income tax returns that had been subsequently prepared for him to support his position. The Counsellor also relied on further calculations prepared by his advisors including his current tax agent to support his position. The Counsellor argued that the Company's payments to him, or on his behalf, were not assessable income but repayments of loans that he had made to the Company. In his Amended Statement of Facts, Issues and Contentions dated 18 August 2022, the Counsellor alternatively contended that the payments were a loan from the Company to him, and the Company had no "distributable surplus" in the Relevant Years for the payments to constitute deemed dividends under Div 7A of the ITAA 1936.⁴

³ The assessment issued by the Commissioner for the 2014 income year was nil, owing to the carry forward of tax losses for earlier years allowed by the Commissioner – see [13] and [15] below.

⁴ HB Volume 1, pp.54 - 55.

6. As these reasons will explain, I was not persuaded that the Objection Decision is incorrect and that the assessments issued to the Counsellor were excessive. This was because the Counsellor failed to prove what was his actual taxable income for each of the Relevant Years. The key problems for the Counsellor were the shortcomings in the evidence, including the paucity of reliable records. This was highlighted by the mismatches and discrepancies in the multiple iterations of attempted reconciliations and calculations that were produced by the Counsellor. Accordingly, the issue of whether there were indeed loans between the Counsellor and the Company and whether the Company's payments made to him or on his behalf, for settling his expenses were indeed repayments of loans, loomed large in these proceedings. Furthermore, I was not persuaded that the administrative penalties imposed by the Commissioner should be disturbed. The penalties were imposed at the correct percentages as set by the TAA and remission was not appropriate.

THE ISSUES BEFORE THE TRIBUNAL

7. The essential issue in these proceedings is whether the Counsellor has discharged his onus under s 14ZZK(b)(i) of the TAA. This requires the Counsellor to prove, on the balance of probabilities, that the default assessments issued to him by the Commissioner were excessive and what his actual taxable income was for each of the Relevant Years. Relevantly, the Counsellor has to prove that the amounts which were treated by the Commissioner as his assessable income were not ordinary income or statutory income.
8. The key substantive issues before the Tribunal were whether the Counsellor was able to show that the payments by the Company to him or for his benefit during the Relevant Years were correctly characterised as repayment of loans. This depended on the Counsellor proving that there were loans provided by the Counsellor to the Company. At the heart of that issue was the provenance of the amounts paid to or for the benefit of the Counsellor. That is, the source of the money paid by the Company to or on behalf of the Counsellor and whether that was the Counsellor's ordinary income. If there were loans from the Company to the Counsellor during the Relevant Years, the issue was whether the amounts were not otherwise assessable as statutory income of the Counsellor in the form of deemed dividends under Div 7A, as the Company had no "distributable surplus".
9. With respect to penalties, the issues concerned both the imposition and the remission aspects arising under the statutory provisions of the TAA.

THE FACTUAL BACKGROUND AND THE EVIDENCE

10. The following findings of fact are based on the respective Amended Statements of Facts Issues and Contentions filed by the Counsellor and the Commissioner, as well as the evidence given in support of the Counsellor. That evidence comprised of the written and oral evidence of the Counsellor, the Brother and the Counsellor's current tax agent, Mr Mark Bigeni.⁵ I have addressed the evidence in detail further below including matters arising from the cross-examination and re-examination of the witnesses.
11. Also filed with the Tribunal were voluminous documents including the T-Documents. As the parties had filed an agreed hearing book (**HB**) comprised of 17 folders containing all of the materials before the Tribunal (except for the submissions of the parties filed in the lead up to and following the hearing), the references in these reasons are to volumes and page numbers of the HB, unless otherwise specified.

The Commissioner's audit and default assessments

12. On 2 August 2017, the Commissioner informed the Counsellor, as director and public officer of the Company, of the commencement of a tax audit of the Company. During the audit, the Commissioner found that the Counsellor had been withdrawing funds from the Company's bank accounts to pay for his personal expenses. A tax audit of the Counsellor ensued.
13. On 5 June 2018, the Commissioner finalised the audit of the Counsellor and determined that the total withdrawals and private expenses paid out of the Company's bank accounts were assessable income of the Counsellor, being ordinary income under s 6-5 of the ITAA 1997. The Commissioner indicated that he would be issuing default assessments for the underreported income but would allow the Counsellor to claim a deduction of \$900 towards the cost of managing his tax affairs for each of the Relevant Years. The Commissioner also

⁵ No application was made to anonymise the name of Mr Bigeni nor did I consider it appropriate in all the circumstances to exercise the discretion to do so to protect the Counsellor's identity. There was no evidence suggesting that the confidentiality of the Counsellor would be prejudiced by naming Mr Bigeni and his related entities as he is a principal of an accounting firm that provides tax return services to numerous clients: see *Re DLMD and Federal Commissioner of Taxation* [2017] AATA 739 as to confidentiality orders generally.

allowed deductions for losses carried forward from previous years. The calculation of the Counsellor's taxable income for each of the Relevant Years was, as follows:⁶

Income year	Loss carried forward	Total income	Deduction for managing tax affairs	Deduction for loss carried forward	Taxable income
2014	-\$385,924	\$173,124	\$900	-\$385,924	NIL
2015	-\$213,700	\$322,876	\$900	-\$213,700	\$108,276
2016	\$0	\$320,020	\$900	\$0	\$319,120
2017	\$0	\$719,682	\$900	\$0	\$718,782

14. On 12 June 2018, the Commissioner issued the Counsellor with default assessments for the Relevant Years pursuant to s 167 of the ITAA 1936. The Commissioner also issued assessments of administrative penalties pursuant to s 284-75(3) of Schedule 1 to the TAA for the Counsellor's failure to lodge his tax returns. The penalty amount for the 2015 income year was calculated at the base penalty amount of 75% of the tax liability under s 284-75(3). In respect of the 2016 and 2017 income years, the Commissioner imposed a further 20% uplift on top of the base penalty amount of 75% since a penalty had already been imposed for a previous accounting period. As set out in the table immediately above and below, the 2014 income year had nil tax payable and did not attract any administrative penalties.

15. The following table summarises the Commissioner's default assessments:

Income Year	Taxable Income	Default Assessment – Tax Payable	Penalties
2014	\$0.00	\$0.00 ⁷	0
2015	\$108,276.00	\$28,009.12 ⁸	\$23,646.00 ⁹

⁶ HB Volume 4, p.876.

⁷ HB Volume 1, p. 21.

⁸ HB Volume 1, p. 23.

⁹ HB Volume 1, p. 29.

2016	\$319,120.00	\$117,151.00 ¹⁰	\$117,992.35 ¹¹
2017	\$718,782.00	\$296,683.90 ¹²	\$299,355.20 ¹³

The objection, the Objection Decision and the Tribunal proceedings

16. On 29 June 2018, the Counsellor lodged an objection to the abovementioned notices of assessment. The Counsellor's then lawyers, Argyle Lawyers, relevantly stated as follows:

1. Omitted income

(a) in the letter dated 5 June 2018, the Commissioner noted that the Taxpayer had under reported income of \$213,700 for the 2014 tax year, \$108,276 for the 2015 tax year, \$320,020 for the 2016 tax year and \$719,682 for the 2017 tax year. The Commissioner had identified cash withdrawals from the bank accounts of the company ... which he considers as assessable income of the Taxpayer under s 6-5 of the Income Tax Assessment Act 1997.

(b) The Taxpayer asserts the amounts identified by the Commissioner are not assessable income of the Taxpayer during the years ended 30 June 2014 to 30 June 2017 inclusive pursuant to Division 6 of the Income Tax Assessment Act 1997 (Cth).

(c) The current position of the Commissioner expresses an intention to assess the Taxpayer to receipts which represent either:

1. cash withdrawals from bank accounts of [the Company]. These have arisen simply as the result of [the Company] repaying loans previously provided to the company by the Taxpayer; and/or

2. the sale of capital assets.

The Taxpayer has engaged a new accountant and a new tax agent to prepare financials which will contain material and information in support of the Taxpayer's position....

2. Penalties

¹⁰ HB Volume 1, p. 25.

¹¹ HB Volume 1, p. 33.

¹² HB Volume 1, p. 27.

¹³ HB Volume 1, p. 37.

(a) The Taxpayer asserts that the conditions which must be met before the administrative penalties under Section 284-75 of Schedule 1 ... can be imposed by the Commissioner ... are not satisfied.

(b) Furthermore, the Taxpayer asserts that a tax administrative amount has not arisen during the years ended 30 June 2014 to 30 June 2017 inclusive which resulted from:

(i) recklessness by the Taxpayer and its tax agent as to the operation of a taxation law;

(ii) failure by the Taxpayer and its tax agent to take reasonable care to comply with a taxation law;

(iii) the Taxpayer and its tax agent treating an income tax law in a particular way that is not reasonably arguable.

...

(e) Safe harbour exception

... The Taxpayer asserts that the safe harbour exception, in particular, the requirements Section 284-75(6) of the TAA 1953 are satisfied.

(f) Having regard to the facts and circumstances of this matter, administrative penalties should be remitted in full pursuant to section 298-20 of Schedule 1 to the TAA 1953.

(g) Any GIC and SIC should be remitted in full.

17. On 22 October 2020, by way of the Objection Decision, the Commissioner notified the Counsellor that his objection was disallowed.
18. On 21 December 2020, the Counsellor applied to the Tribunal for a review of the Objection Decision.

The Counsellor and his legal disputes

19. The Counsellor is known to use two different names and has engaged in providing counselling services to patients. He has a brother (the **Brother**) who is a builder and carpenter.

20. The Counsellor had operated a counselling business as a sole trader until around February 2011, when he incorporated the Company which took over that business. Up until about that time, the Counsellor operated clinics in Sydney, Melbourne and Parramatta and claims to have had about 42 contractors working for him and providing counselling services to patients. The Melbourne and Parramatta clinics ceased operating in 2010 and 2012 respectively, leaving only the Clinic being operated by the Company in Sydney during the Relevant Years.
21. Between 2009 and 2011, the Counsellor was subjected to various complaints including what he described as “*serious character assassination attempts*” and “*malicious accusations*” by various government agencies. The Counsellor stated that the final charges against him were dismissed in 2011. He claimed to have been demonised and unable to operate “*his business*” until 2016. The Counsellor also stated that, throughout the entire period, he was able to continue practising on a part-time basis together with one contractor who remained loyal to him despite the considerable stress and distractions as well as professional and reputational damage visited upon the Counsellor due to the legal disputes.
22. The Counsellor’s testimony was that his barrister had advised him in 2016 that if he didn’t withdraw from certain proceedings which he had commenced claiming damages in the sum of \$3.5 million, the persecution of him would continue and he would be unable to work again in New South Wales. The Counsellor stated he eventually opted to withdraw those proceedings. He stated that the “*adverse business circumstances*” meant he did not earn any money during the Relevant Years.
23. In February 2016, he reached a settlement of one of his disputes resulting in him being paid a settlement sum of \$200,000, of which \$100,000 was paid directly to his lawyers to settle his contingency legal fees. The remaining \$100,000 was received by the Counsellor in two tranches, namely, \$80,000 on 27 May 2016 and a further \$20,000 on 4 November 2016. The Commissioner accepted that this compensation amount does not constitute assessable income of the Counsellor. In May 2016, the Counsellor was required to pay \$200,000 to a government agency as part of a settlement of another dispute. However, according to the Counsellor, in March 2017, an amount of \$50,000 was refunded to him as that agency had apparently breached the terms of settlement. Overall, therefore, the Counsellor had received less settlement monies than what he had paid out during the Relevant Years with respect to his various legal disputes and proceedings. This basic calculation also did not take into account all of his legal expenses, some of which were on a fee for service basis.

24. Another legal dispute which impacted how the Counsellor arranged his financial affairs was with a taxation authority of a foreign jurisdiction (the ***Inland Revenue***) concerning his child support liabilities. In October 2011, the Inland Revenue had taken garnishee action against him, and an amount of \$53,261.73 was deducted from the Counsellor's personal bank account with respect to his three children living overseas. At the Tribunal hearing, the Counsellor claimed that the Inland Revenue's actions were wrong and misplaced as it failed to consider the amounts that the Counsellor had directly paid for his children's maintenance and education and, in any event, the Counsellor stated the assessments were made based on excessive income levels. Significantly, however, the Counsellor did not provide any details regarding any legal proceedings challenging the Inland Revenue's garnishee action.
25. The Counsellor stated that the dispute with the Inland Revenue caused him to be reluctant to deposit funds into his personal bank account and, instead, he started using the Company's two bank accounts with the Commonwealth Bank of Australia to hold his personal deposits.

The Clinic

26. The Counsellor stated that his counselling business, which was taken over by the Company from about February 2011, was started by him in 1999 and that he had "*developed policies and procedures*". He stated that clients were referred by general practitioners or insurance companies and following appointments, invoices would be generated, the details of which were then reconciled in hard-copy spreadsheets. According to the Counsellor's testimony, those records were then provided to a bookkeeper with EMB Solutions, who he stated were the accountants and tax agent acting for him and the Company during the Relevant Years, to prepare accounts and financial reports. The Company was not using any accounting software although it "*later got QuickBooks online*".
27. There was no independent evidence before the Tribunal corroborating the Counsellor's claims that there was a process of providing information to EMB Solutions or, if there was such a process, what precise information was provided by the Counsellor and or the Company to EMB Solutions and which accounts and financial reports were prepared by that firm. Nobody from the Clinic nor from EMB Solutions gave evidence at the hearing as to the book-keeping practices or arrangements for preparation of tax returns employed by the Counsellor and the Company during the Relevant Years.

28. In the objection lodged on behalf of the Counsellor dated 29 June 2018 (see [16] above), Argyle Lawyers stated “[t]he Taxpayer has engaged a new accountant and a new tax agent to prepare financials which will contain material and information in support of the Taxpayer’s position.” Nobody from Argyle Lawyers gave evidence at the hearing to explain, amongst other things, the status of the financials or the details of any new accountant and tax agent engaged at or about that time, although Mr Bigeni gave evidence that he was engaged in 2020, as set out further below.

The Counsellor’s family, assets and expenses

29. In the Relevant Years, the Counsellor had a partner and two children living with him in Sydney who he supported. As referred to at [24] above, he had another three children living overseas who he claims to have also supported financially, although the Inland Revenue had taken a different viewpoint.
30. The Counsellor explained that he managed to support himself and keep the Company afloat during the Relevant Years by selling his home in Sydney, relying on the rental income from an investment property he owned in Melbourne (the **Rental Property**), as well as loans from the Brother. The Counsellor claimed his only assessable income during the Relevant Years was the rental income from the Rental Property.
31. In May 2014, the Counsellor sold his residence in Sydney and received the sum of \$384,666.18 and \$56,166.66 on 16 and 19 May 2014, respectively, from the sale after the payment of his mortgage and expenses. The Commissioner accepted that the proceeds of sale were not assessable income.
32. It was common ground between the parties that during the Relevant Years, the Company paid the Counsellor’s personal expenses. Also, the Counsellor withdrew cash from the Company’s two bank accounts. However, the Counsellor stated that all payments made by the Company to him or on his behalf, for example, the payment of his credit cards and personal expenses, were all loan repayments by the Company to him.
33. The Counsellor also stated that the abovementioned legal disputes resulted in a tendency for him to “*recycle the same funds*”, which I understood to mean he would make cash deposits and withdrawals and or transfers between the Company’s bank accounts, to meet expenses as and when they arose. He stated that this was due to the difficult financial

circumstances created by the various disputes and the conflicting needs for funds in the Company's business, as well as funds for his personal and family living expenses. Obviously, once any payments were made, the available funds would have been reduced so any suggestion that the funds were being re-used did not make sense.

The Counsellor's income tax returns

34. The Counsellor had reported tax losses in the four income years preceding the Relevant Years, as follows:¹⁴

Income year	Reported tax loss (\$)
2009	58,620
2010	182,370
2011	68,429
2012	75,171
Total	384,590

35. On 23 September 2013, the Counsellor lodged his income tax return for the year ended 30 June 2012.¹⁵ The Counsellor reported a taxable loss of \$385,924 which was deferred to later years, and which the Commissioner did not take issue with.¹⁶
36. As stated above, the Counsellor had not filed tax returns for the Relevant Years as he considered it was unnecessary to do so based on his former tax agent's advice. In particular, on 21 July 2014, the Counsellor informed the Commissioner that he had no obligation to lodge an income tax return for the years ended 30 June 2013 and 2014.¹⁷ On 17 August 2015, the Counsellor informed the Commissioner that he had no obligation to lodge a return

¹⁴ HB Volume 1, p. 10.

¹⁵ HB Volume 1, p. 126.

¹⁶ HB Volume 1, p. 130.

¹⁷ HB Volume 3, p. 638. – The Commissioner's filing receipt acknowledges the Counsellor's notice of no-lodgement necessary.

for the year ended 30 June 2015.¹⁸ On 2 September 2016, he informed the Commissioner that he had no obligation to lodge a return for the year ended 30 June 2016.¹⁹

37. However, on 18 April 2019, after the issue of the assessments in June 2018 following the tax audit (see [14] - [15] above), the Counsellor provided handwritten and signed income tax returns to the Commissioner in respect of the Relevant Years to support his objection (see [16] above). No details were provided as to any accountant or tax agent that was involved in preparing these tax returns, including on the handwritten tax returns. They were sent to the Commissioner by Argyle Lawyers on the Counsellor's behalf.²⁰ The returns contained the following information including a line reference to "*Pre-2011 Income*", which is explained further below:

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Gross Rent	\$15,600	\$15,600	\$15,600	\$15,600
Pre-2011 Income	\$25,156	\$45,087	\$16,782	\$13,951
Total Income	\$36,990	\$54,033	\$26,808	\$23,266
Rental Deductions	\$3,766	\$6,654	\$5,574	\$6,285
Losses carried forward	\$385,924	\$348,934	\$294,901	\$268,093
Taxable Income	\$0	\$0	\$0	\$0

38. On 22 February 2021, the Counsellor attempted to lodge signed income tax returns dated 13 December 2020 for the income years ended 30 June 2014, 2015, and 2016 with the Commissioner. These were prepared by his current tax agent, Mr Bigeni of Bigeni & Toy

¹⁸ HB Volume 3, p. 669.

¹⁹ HB Volume 3, p. 710.

²⁰ HB Volume 4, pp. 985-1048.

Pty Ltd and contained the information set out in the table below, including a new line reference to “*Allowances, Earnings, Tips, Directors Fees etc*”.²¹ On 15 September 2021, the Counsellor provided to the Commissioner draft income tax returns for himself for the 2014 to 2016 income years that were consistent with the table below.²² In addition, the Counsellor provided a signed draft income tax return for the income year ended 30 June 2017 with the information set out in the table below.²³

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Gross Rent	\$9,900	\$17,160	\$17,160	\$17,160
Allowances, Earnings, Tips, Directors Fees, etc	\$29,000	\$23,000	\$23,000	\$0
Rental Deductions	\$2,701	\$3,328	\$3,344	\$6,285
Taxable Income	\$36,199	\$36,832	\$36,816	\$10,875

39. On 21 March 2022, the Commissioner notified the Counsellor that the request to amend the assessments through the lodgement of the abovementioned tax returns had been cancelled as default assessments for these returns had been issued.²⁴

The Company and its financial statements

40. The Company was incorporated in February 2011. At all relevant times, the Counsellor was the sole shareholder and director of the Company.

²¹ HB Volume 6, pp. 1600 – 1620, noting these were not signed by tax agent, but were signed by the Counsellor.

²² HB Volume 6, pp. 1642 – 1648, 1665 – 1671, 1690 – 1696 (individual tax returns prepared by Bigeni & Toy Pty Ltd).

²³ HB Volume 6, p. 1717.

²⁴ HB Volume 6, p. 1723.

41. As stated above, during the Relevant Years, the Company operated the Clinic. The Company also used the services of a number of counsellors as contractors. The Counsellor claimed that as he was focused on the abovementioned legal disputes during the Relevant Years, the Company's business started to struggle, and business turnover reduced. In particular, during the 2016 and 2017 income years, he claimed the business barely traded as he was occupied full-time with clearing his name.²⁵ The Counsellor stated that the Company was in a loss position during the Relevant Years and did not have any profit to distribute.²⁶

42. The table below summarises the amounts deposited and withdrawn from the Company's two bank accounts, excluding transfers between the two accounts, during the Relevant Years:

Year Ended	Bank Account 1		Bank Account 2	
	Deposits	Withdrawals	Deposits	Withdrawals
30 June 2014	\$150,922.47	\$156,612.58	\$446,687.39	\$409,396.37
30 June 2015	\$245,811.90	\$126,929.60	\$67,133.99	\$198,583.38
30 June 2016	\$228,378.13	\$125,813.29	\$85,237.04	\$109,739.32
30 June 2017	\$215,139.55	\$134,797.21	\$126,675.03	\$295,960.68
Total	\$840,252.05	\$544,152.68	\$725,733.45	\$1,013,733.75

43. In summary, the amounts deposited and withdrawn in both of the Company's bank accounts, and the net cashflow to the Company were, as follows:

²⁵ HB Volume 2, p. 560.

²⁶ HB Volume 2, pp. 560 – 561.

Year Ended	Bank Accounts 1 and 2		
	Total Deposits	Total Withdrawals	Net Cashflow
30 June 2014	\$597,609.86	\$566,008.95	\$31,600.91
30 June 2015	\$312,945.89	\$325,512.98	-\$12,567.09
30 June 2016	\$313,615.17	\$235,552.61	\$78,062.56
30 June 2017	\$341,814.58	\$430,757.89	-\$88,943.31
Total	\$1,565,985.50	\$1,557,832.43	\$8,153.07

44. On 13 March 2019, in response to the Commissioner’s request, the Counsellor provided financial statements for the Company for the income years of 2014 to 2017, under a cover email from Argyle Lawyers (the **Company’s Financials for 2014-2017**).²⁷ In a further email dated 13 March 2019, Argyle Lawyers confirmed to the Commissioner that “[t]he financials were prepared by accountants who have work papers to support the numbers included in the financials”.²⁸ As with the handwritten tax returns provided by Argyle Lawyers on 18 April 2019 to the Commissioner in respect of the Counsellor, no details were provided about who prepared the Company’s Financials for 2014-2017. In response to queries raised by the Commissioner dated 6 August 2019, Argyle Lawyers confirmed to the Commissioner that the Clinic required patients to pay in cash for services provided and further, that approvals for funding for services were sought and paid for by insurers in the form of cheque or electronic fund transfers.²⁹

45. The Company’s Financials for 2014-2017 are summarised in the following table:³⁰

²⁷ HB Volume 4, pp. 924 – 932.

²⁸ HB Volume 4, p. 933.

²⁹ HB, Volume 4, p. 1200.

³⁰ HB Volume 1, pp. 114 – 115.

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Total Income	\$51,631.81	\$108,470.35	\$204,593.50	\$181,494.81
Total Expenses	\$28,979.72	\$63,250.84	\$110,035.42	\$282,133.30
Net Earnings	\$22,652.09	\$45,219.51	\$94,558.08	-\$100,638.49
Total Assets	\$37,316.66	\$37,235.02	\$115,243.58	\$26,300.27
Director Loan ³¹	\$43,955.11	-\$18,426.45	-\$47,848.92	-\$88,959.89
Total Liabilities	\$53,151.05	\$7,849.90	-\$8,699.62	\$2,995.56
Shareholder's Equity	-\$15,834.39	\$29,385.12	\$123,943.20	\$23,304.71

46. On 15 September 2021, the Counsellor provided to the Commissioner further financial statements for the Company in respect of the 2014, 2015 and 2016 income years. These financial statements were prepared by Mr Bigeni of Fruition Accountants & Advisors, a business affiliated with Bigeni & Toy Pty Ltd, being the Counsellor's current accountants and tax agent (the ***Company's Further Financials for 2014-2016***).³² Also on 15 September 2021, the Counsellor provided the Company's financial statements for the 2017 income year, prepared by Always TaxTime being a business affiliated with Bigeni & Toy Pty Ltd (the ***Company's Further Financials for 2017***).
47. The Company's Further Financials for 2014-2016 and 2017 are summarised in the following table:³³

³¹ The negative figures in the row of 'Director Loan' reflect amounts owed by the Counsellor to the Company.

³² HB Volume 6, pp. 1621 – 1627 (2014); 1657 – 1663 (2015); 1682 – 1688 (2016) (prepared by Fruition Accountants & Advisors).

³³ HB Volume 6, pp. 1706 – 1714 (2017).

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Total Income	\$81,038	\$158,050	\$141,375	\$129,918
Total Expenses	\$59,322	\$94,813	\$152,415	\$72,821
Profit/Loss before Taxation	\$21,716	\$63,237	-\$11,040	\$57,097
Total Assets	\$43,651	\$36,965	\$135,212	\$30,823
Loans from Director ³⁴	\$54,218	-\$30,927	\$47,771	\$248,869
Total Liabilities	\$63,026	\$6,780	\$116,067	\$281,592
Total Equity	-\$19,375	\$30,185	\$19,145	-\$250,770

The Company's income tax returns

48. On 5 May 2014, the Company lodged its tax returns for the income years ended 30 June 2012 and 30 June 2013 prepared by the Company's former accountants and tax agent.³⁵ The information contained in the tax returns is summarised in the following table:

Item	30 June 2012	30 June 2013
Total Income	\$43,980	\$25,235

³⁴ The negative figure in the row 'Loans from Director' reflects an amount claimed to have been owed by the Counsellor to the Company.

³⁵ HB Volume 3, pp. 794 – 799.

Total Expenses	\$43,295	\$66,906
Taxable Income or Loss	\$685	-\$41,671
Total Assets	\$0	\$0
Total Liabilities	\$0	\$0
Tax Losses Carried Forward to Later Income Years	\$0	\$41,671

49. On 30 July 2014, the Company lodged its tax return for the income year ended 30 June 2014 prepared by the Company's former accountants and tax agent.³⁶ The information contained in the tax return is summarised in the following table:

Item	30 June 2014
Total Income	\$41,131
Total Expenses	\$111,622
Taxable Income or Loss	-\$70,491
Total Assets	\$0
Total Liabilities	\$0
Tax Losses Carried Forward to Later Income Years	\$112,162

³⁶ HB Volume 3, pp. 800 – 802.

50. On 18 August 2015, the Company lodged its tax return for the income year ended 30 June 2015 prepared by the Company's former accountants and tax agent.³⁷ The information contained in the tax return is summarised in the following table:

Item	30 June 2015
Total Income	\$159,646
Total Expenses	\$213,005
Taxable Income or Loss	-\$53,359
Total Assets	\$0
Total Liabilities	\$0
Tax Losses Carried Forward to Later Income Years	\$165,521

51. On 5 September 2016, the Company lodged its tax return for the income year ended 30 June 2016.³⁸ The information contained in the tax return is summarised in the following table:

Item	30 June 2016
Total Income	\$287,744
Total Expenses	\$430,875
Taxable Income or Loss	-\$143,131
Total Assets	\$0

³⁷ HB Volume 3, pp. 803 – 805.

³⁸ HB Volume 3, pp. 806 – 808.

Total Liabilities	\$0
Tax Losses Carried Forward to Later Income Years	\$308,652

52. On 18 April 2019, the Counsellor provided to the Commissioner handwritten revised tax returns for the Company with respect to the Relevant Years signed by him. (As stated above, the Counsellor had also provided signed and handwritten tax returns for himself to the Commissioner on the same date – see [37] above). The revised tax returns for the Company are summarised below, noting that again no details were given as to the involvement of any accountant or tax agent.³⁹

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Total Income	\$51,631.00	\$108,470.00	\$204,594.00	\$181,495.00
Total Expenses	\$28,978.00	\$63,250.00	\$110,035.00	\$282,133.00
Taxable Income or Loss	\$0.00	\$26,202.00	\$94,671.00	-\$100,524.00
Total Assets	\$37,316.00	\$67,485.00	\$184,891.00	\$0.00
Total Liabilities	\$53,151.00	\$38,101.00	\$60,949.00	\$0.00
Tax Losses Carried Forward to Later Income Years	\$19,018.00	\$0.00	\$0.00	\$100,524.00

³⁹ HB Volume 4, pp. 937 – 948 (2017); 949 – 960 (2016); 961 – 972 (2015); 973 – 984 (2014).

53. On 17 September 2020, the Company lodged its tax return for the income year ended 30 June 2017 prepared by Bigeni & Toy Pty Ltd.⁴⁰ The information contained in the tax return is summarised in the following table:

Item	30 June 2017
Total Income	\$129,918
Total Expenses	\$72,821
Taxable Income or Loss	\$0
Total Assets	\$20,879
Total Liabilities	\$271,648
Tax Losses Carried Forward to Later Income Years	\$251,974

54. On 15 September 2021, in addition to the Company's further financial statements referred to above (see [46] - [47] above), the Counsellor also provided to the Commissioner signed tax returns for the Company prepared by Bigeni & Toy Pty Ltd for the years ended 30 June 2014, 2015, 2016 and 2017 (the ***Company's Revised Tax Returns 2014-2017***).⁴¹ Mr Bigeni was involved in the preparation of all the relevant financial statements and tax returns prepared by various entities for the Company after 2020. These are summarised below:

Item	30 June 2014	30 June 2015	30 June 2016	30 June 2017
Total Income	\$81,038.00	\$158,052.00	\$141,376.00	\$129,918.00
Total Expenses	\$59,322.00	\$94,815.00	\$152,416.00	\$72,821.00

⁴⁰ HB Volume 3, pp. 809 – 811.

⁴¹ HB Volume 6, pp. 1628 – 1640 (2014); 1649 – 1656 (2015); 1672 – 1681 (2016); 1698 – 1705 (2017).

Taxable Income or Loss	\$0.00	\$45,588.00	-\$10,721.00	\$0.00
Total Assets	\$43,651.00	\$67,892.00	\$135,212.00	\$20,879.00
Total Liabilities	\$63,026.00	\$37,707.00	\$116,066.00	\$271,648.00
Payments to Associated Persons	\$29,000.00	\$23,000.00	\$23,000.00	\$0.00
Tax Losses Carried Forward to Later Income Years	\$18,948.00	\$0.00	\$11,269.00	\$251,974.00

The Loan Ledger

55. On 21 June 2019, the Counsellor provided to the Commissioner, through Argyle Lawyers, a ledger outlining the amounts claimed to have been loaned and repaid between the Counsellor and the Company (the **Loan Ledger**). There was no formal loan agreement provided, nor was there any indication of when and who prepared the Loan Ledger. The Loan Ledger for the Relevant Years is summarised in the table below:⁴²

Year Ended	Payments to Company	Payments from Company	Closing Balance
30 June 2014	\$560,714.42	\$558,155.01	\$43,955.10
30 June 2015	\$379,138.96	\$441,520.52	-\$18,426.46
30 June 2016	\$192,958.53	\$222,381.30	-\$47,848.93
30 June 2017	\$126,633.88	\$167,748.11	-\$88,963.16

⁴² HB Volume 4, pp. 1054 – 1055; 1064 – 1178.

56. It is noteworthy that the Commissioner had raised a number of queries in relation to the Loan Ledger by email dated 6 August 2019, to which Argyle Lawyers responded by email, as follows:

*The previous Accountants/Tax agents engaged by the taxpayer to assist in all tax and GST related matters, had not created a ledger for the taxpayer's business, nor did they advise him that he was required to separate the personal and business income and expenses. Since the ATO initiated the current audit, the taxpayer has engaged EMS Solutions Bookkeepers at his cost to revisit all original source documents which the taxpayer provided and which is in the Bookkeeper's possession and the taxpayer has sought assistance to respond to requests for information by the ATO.*⁴³

(sic)

The Counsellor's evidence

57. The Counsellor had signed a witness statement dated 15 July 2022⁴⁴ and a supplementary witness statement dated 17 August 2022 in support of his application.⁴⁵ Paragraph 3 of the supplementary witness statement stated “[t]his supplementary statement replaces errors made in the earlier statement. I have made the corrections by striking through the replaced information”. Consequently, references in this decision to the Counsellor's written evidence are to the supplementary statement including the various corrected figures.
58. The Counsellor stated in his supplementary statement that he received funds through three main sources in the Relevant Years, namely, (1) rental income; (2) payments from the Company in the form of repayment of loaned funds; and (3) payments made by the Company on his behalf in respect of his personal expenses, which in his evidence the Counsellor characterised as repayment of loans from the Company to him.⁴⁶ The Counsellor

⁴³ HB Volume 4, p 1199.

⁴⁴ HB Volume 2, pp. 558 – 566.

⁴⁵ HB Volume 2, pp. 580 – 588.

⁴⁶ HB Volume 2, p. 580, 584.

stated that his only income during the Relevant Years was his rental income from the Rental Property.⁴⁷

59. The Counsellor stated that he had explained the rental income and expenses to the best of his recollection. The Rental Property was directly leased by the Counsellor to the tenant, and he had no rental statements. He stated the rental agreement was signed on 7 November 2013 and was for \$660 per fortnight. The rent was increased from 1 January 2014 to \$1,430 per month and remained that until April 2020. He also stated he included a deductible amount for expenses incurred, including for council rates and strata fees.⁴⁸
60. In relation to the second source of funds sourced by the Counsellor, being the payments from the Company in the form of repayment of loaned funds, the Counsellor stated in his supplementary statement, by way of background:⁴⁹

14. *To assist the company with its business, I provided funds to [the Company] that I variously sourced from:*

- A. Directing Accounts Receivable from my previous sole trader business to the bank accounts of [the Company];*
- B. Amounts paid as compensation, pursuant to a Deed of Release in a legal case where I was successful;*
- C. Amounts borrowed from my brother, [the Brother], either paid to my personal bank account and then paid to [the Company's] bank account, or directly from my brother to [the Company's] bank account.*
- D. Funds I obtained from the sale [of] the Parramatta... clinic office;*
- E. Funds I obtained from the sale of my previous primary residence; and*
- F. Rental income I was due to receive from the [Rental Property].*

...

15. *I intended for [the Company] to pay me back these amounts as and when the funds were available. During the Relevant Income Years, I drew against the credit loan balance that I held with [the Company] that had been generated from the above funds*

...

⁴⁷ HB Volume 2, p. 584 [34], 585 [42], 586 [50], 587 [58].

⁴⁸ HB Volume 2, p. 581.

⁴⁹ HB Volume 2, pp. 581 – 582.

24. *The following table is a summary of the figures in my witness statement for each of the Relevant Income Years under the heading “Amounts owed to me by [the Company]”. In each of the Relevant Income Years, the amounts recorded under the heading “Amounts owed to me by [the Company]” record the payments by me to [the Company] and repayments of those monies by [the Company] to me...*

61. The table referred to in the extract above, which was in the Counsellor’s supplementary statement is referred to as “Annexure A” and is reproduced at the end of this decision. Broadly, it captures, amongst other fund flows, what the Counsellor asserted were the payments from him to the Company and from the Company to him in respect of the Relevant Years and the alleged sources of the payments. In relation to the third source of funds, being payments made by the Company on his behalf, the Counsellor stated that he used a debit card attached to one of the Company’s bank accounts for both business and personal expenses.⁵⁰
62. The Counsellor relevantly stated the following in his oral evidence about the sources of his funds during the Relevant Years and the information contained in Annexure A:
- (a) he was able to fund his lifestyle and support the Company, even though he did little work during the Relevant Years, by receiving payments for counselling services that he had provided prior to 2011 when he was operating as a sole trader, and from the proceeds of the sale of his primary residence and his rental income from the Rental Property;
 - (b) he had borrowed money and continued to borrow money from the Brother since 2011, including in the week before the Tribunal hearing;
 - (c) he had previously sold his Parramatta clinic which he owned with another business partner and his share of the proceeds of sale were about \$127,000 (although no documentation was produced to verify the amount or the date in relation to this sale);
 - (d) he did not need to know how much he had advanced to the Company or that the Company had loaned to him during the Relevant Years as he was the Company and he “*didn’t need to keep a tab on his Company*”;

⁵⁰ HB Volume 2, p. 584.

- (e) he stated that *“without him the Company didn’t exist”* and *“without him [the Company] has no money”* and *“either the Company owes me money or I owe the Company”*;
- (f) he had accountants, tax agents and lawyers to prepare the financials and to show the financial positions and sort out the calculations, and he could not interpret the information in Annexure A because he was not an accountant;
- (g) he could not explain how the Company was able to make payments to him that were in excess of \$100,000 more than what he had paid to the Company in the 2014 income year (see Column (G) of Annexure A), in circumstances where the Company’s tax return for the 2014 income year showed a loss exceeding \$70,000;
- (h) he similarly could not explain how the Company was able to make payments to him that were in excess of \$169,000 more than what he had paid to the Company in the 2015 income year (see Column (G) of Annexure A);
- (i) he could not explain the pattern of the Company making payments to him in excess of what it had reported as its income in its tax returns;
- (j) he could not explain the pattern of the Company making payments to him in excess of what he claimed to have loaned the Company;
- (k) he confirmed there was no written loan agreement between him and the Company and there was nothing in his witness statements about such a loan nor about a loan ledger;
- (l) he confirmed there was nothing in his witness statements about his record-keeping nor about his interactions with his various accountants and tax agents and what, if any, information and documents he had provided them with to advise him;
- (m) he could not explain why the compensation amount he received as a result of a settlement was recorded as a credit in the 2016 income year (see Column (D) of Annexure A and paragraph [55] of his witness statement) but the net payment of \$150,00 he had to make to settle other proceedings (reflecting the \$200,000

payment in the 2016 income year less the refund from the agency of \$50,000 – see [23] above) had not been recorded as a debit;

(n) he could not explain why, in respect of the 2017 income year, the payments from him to the Company totalled approximately \$357,000 according to Annexure A (see sum of Columns (B)+(C)+(D)) but the Company’s bank accounts showed the receipt of \$341,000.

63. The Counsellor provided the following further table in support of his position following the hearing, in compliance with the Tribunal’s directions allowing the parties to provide additional explanations regarding the calculations:⁵¹

Applicant’s Submission				
Item	2014	2015	2016	2017
Net Rent	\$1,199.00	\$15,392.00	\$15,376.00	\$12,435.00
Income from accrued billing for previous years as sole trader/ [Clinic]	\$25,150.90	\$45,086.95	\$16,781.90	\$13,951.50
Deemed dividend as a result of [the Company] loan	\$0.00	\$61,012.00	\$0.00	\$112,265.00
Taxable Income	\$26,349.90	\$121,490.95	\$32,157.90	\$101,354.31
Losses remaining after losses utilised (starting balance from 30 June 2012 is \$385,924)	\$359,574.10	\$238,083.15	\$205,925.25	\$104,570.94
Taxable Income after losses	\$0.00	\$0.00	\$0.00	\$0.00

64. The above table was accompanied by explanatory notes referencing the sources of the integers. For example, in relation to the line item Income from accrued billing for previous

⁵¹ Applicant’s Table in Support of Oral Closing Submissions filed with Tribunal on 8 December 2023.

years as sole trader/[the Clinic]', the Counsellor cited the handwritten tax returns that had been provided by Argyle Lawyers to the Commissioner on 18 April 2019 (see [37] above).

65. The Commissioner submitted there were numerous discrepancies and the information provided supporting the above table had no probative value. For example, the Counsellor had referenced documents, such as the handwritten tax returns provided to the Commissioner, where Argyle Lawyers did not identify the author or on what basis the information was prepared (see [37] above).⁵² The Commissioner also noted that other figures in the table were contradicted by other figures that the Counsellor had provided to the Commissioner, including the 'Net Rent' figures for the 2014, 2015 and 2016 income years.⁵³
66. Additionally, other figures included in the table were unsubstantiated. The Commissioner had earlier requested information about them and not been provided with satisfactory responses. For example, in relation to the line item 'Income from accrued billing for previous years as sole trader/ [the Clinic]', amounts were claimed to represent the Counsellor's income from his sole trader counselling services prior to 2011. During the tax audit, the Counsellor was asked to provide evidence of the amounts purportedly earned from his sole trader business, and evidence was only ever provided with respect to one patient. Even then, the amount claimed to have been received for that one patient on 7 April 2015 was \$16,577 whereas the remittance advice on 27 March 2015 was for services totalling \$24,797.
67. Furthermore, while the line item amounts in the table immediately above matched the amounts in the handwritten and signed tax returns provided by Argyle Lawyers, no one was called from that firm to give evidence as to the preparation of the returns, and the Commissioner was not afforded an opportunity to test the inclusion of the figures in the draft tax returns. Besides, the Counsellor's evidence in his supplementary statement dated 17 August 2022 was to the effect that his *only* assessable income in the Relevant Years being rental income was contradicted by the handwritten and signed tax returns provided in April 2019 and in the table immediately above. The table above also included, for the first time

⁵² HB Volume 3, p. 782.

⁵³ HB Volume 6, pp. 1602, 1611, 1618 and 1721.

the line item 'Deemed dividend as a result of [the Company] loan'. It suffices to note, at this stage, that the Counsellor had not previously canvassed this aspect in his supplementary statement nor in the earlier handwritten tax returns prepared for the Counsellor at the time of lodging his objection.

The Brother's evidence

68. In his witness statement declared on 21 December 2021, the Brother stated he had always had a close relationship with the Counsellor and they always helped each other when needed. The Brother stated that in 2010, shortly after the Counsellor encountered financial issues due to various legal disputes, the Counsellor approached the Brother for assistance with his business and personal expenses. The Brother stated that he was happy to loan him the funds, and that he continued to do so from 2010 to 2020.
69. The Brother stated in his witness statement that in October 2010, they had *"an initial loan agreement which specified the funds could be used as required by [the Counsellor] and repayments made when it was financially viable for [the Counsellor] to do so*. The Brother also stated he did not impose any time restraints or interest on repayments. Oddly, this was contrary to the half-page signed loan agreement in evidence dated 7 January 2010, between the Brother and the Counsellor which expressly stated the loan amount of *"\$100,000.00 was for the purposes of funding legal defence and damages action... to be repaid within 2 years"*.⁵⁴ Contrary to the terms of the written loan agreement, the Brother stated in his oral evidence that the initial agreement for a loan of \$100,000 was to assist with the Counsellor's business. All of the funds said to have been loans by the Brother to the Counsellor for his legal disputes, according to the written loan agreement, were paid from the Brother's NAB account directly to the Company's bank accounts.
70. The Brother stated *"the funds I loaned to [the Counsellor] were sourced from my savings account held at the National Australia Bank (NAB). The funds were source[d] from my business as a builder and carpenter, sales of assets and rental property income"*. Aside from these glib assertions, no further details were provided by the Brother in his witness statement as to the sources of the funds and, as described further below, the oral evidence

⁵⁴ HB Volume 5, p.1374.

was also unsatisfactory. According to the Brother, the amounts that were loaned and repaid to the Counsellor were as follows:

Period	Amounts Borrowed by Counsellor	Amounts Repaid by Counsellor
8 September 2010 to 30 June 2013	\$142,695.00	\$33,481.35
1 July 2013 to 30 June 2017	\$146,425.99	\$320,000.00
1 July 2017 to 30 June 2020	\$148,639.00	\$11,504.95

71. The Brother gave a breakup of the amounts borrowed and repaid by the Counsellor during the Relevant Years (the period 1 July 2013 to 20 June 2017) by reference to bank statements, where these were available, as follows:⁵⁵

Income Year	Amounts borrowed by Counsellor	Amounts repaid by Counsellor
2014	\$22,350	\$205,000
2015	\$59,000	\$0
2016	\$40,000	\$40,000
2017	\$25,075.99	\$75,000

72. The shortcomings in the evidence about the alleged loans from the Brother to the Counsellor were highlighted by the differing calculations of the amounts involved between the Brother and the Counsellor. For example, on 30 June 2020, the Counsellor provided a spreadsheet detailing the amounts he claims to have borrowed from, and repaid to, the Brother (the **First Spreadsheet**). For the income years ended 30 June 2011 to 30 June 2017, the First Spreadsheet is summarised below, noting that the Counsellor (like the Brother) also claimed that there were missing bank statements.

⁵⁵ HB Volume 2, pp. 590 – 592.

Year Ended	Amounts Borrowed by Counsellor	Amounts Repaid by Counsellor
30 June 2011	\$89,500.00	\$1,300.00
30 June 2012	\$31,195.00	\$33,181.35
30 June 2013	\$24,000.00	\$0.00
30 June 2014	\$22,350.00	\$205,000.00
30 June 2015	\$59,000.00	\$0.00
30 June 2016	\$40,000.00	\$40,000.00
30 June 2017	\$25,000.00	\$75,000.00
Total	\$291,045.00	\$354,481.35

73. However, on 15 September 2021, the Counsellor provided another spreadsheet detailing the following amounts he claims to have borrowed from, and repaid to, the Brother (the **Second Spreadsheet**) showing substantially different amounts in the 2011 and 2012 income years:

Year Ended	Amounts Borrowed by Counsellor	Amounts Repaid by Counsellor
30 June 2010	\$10,000.00	\$0.00
30 June 2011	\$187,500.00	\$1,300.00
30 June 2012	\$31,195.00	\$170,157.73
30 June 2013	\$24,000.00	\$0.00
30 June 2014	\$22,350.00	\$205,000.00

30 June 2015	\$59,000.00	\$0.00
30 June 2016	\$40,000.00	\$40,000.00
30 June 2017	\$25,066.32	\$75,000.00
Total	\$399,111.32	\$491,457.73

74. Besides some mismatches in the amounts that were claimed to have been borrowed by the Counsellor from the Brother, there were other deficiencies in the evidence. Of particular concern was the Brother's financial capacity to make any loans to the Counsellor in circumstances where the Brother had a family of his own to support and had reported the following amounts as taxable income in his income tax returns for the years ended 30 June 2011 to 30 June 2017:

Year Ended	Taxable Income
30 June 2011	\$28,144
30 June 2012	\$262
30 June 2013	\$16,358
30 June 2014	\$43,751
30 June 2015	\$39,622
30 June 2016	\$20,458
30 June 2017	\$62,235

75. In cross-examination, the Brother explained that following the global recession in 2008, his building work had slowed down and he also had a back injury which hampered him from working. However, he stated he had a property, a boat and a car which he sold, and he continued to earn some rental income from three investment properties that he built and owned. However, it transpired that the rental income from three investment properties was

earned in later years. It also emerged that some insulation contract work that he claimed to have procured was undertaken in or about 2019, namely, after the Relevant Years. The Brother further explained in relation to his financial commitments, that he supported his wife and three dependent children, and he was living with his parents in their home in Victoria due to the parents' health issues.

76. After further legitimate probing by the Commissioner's counsel, and in the course of re-examination, the Brother explained that the property was owned by his company and the boat and car were personal use assets, all of which he did not have to report in his tax returns. Even so, the Brother did not provide relevant details as to the dates or the amounts leaving an incomplete picture as to his financial position. He stated that he did not give further details of his sources of funds, including in prior income years, as he had not been asked to do so.
77. Another issue about which the Brother was cross-examined at length was his NAB account. Counsel pointed out that the postal address on the bank statements was the one used for the Clinic operated by the Counsellor, and later operated by the Company, in New South Wales. The Brother confirmed he lived in Victoria and did not live in New South Wales at any time. Additionally, after being taken to NAB account statements in evidence, the Brother confirmed he did not use the NAB account for his personal or everyday purchases. He claimed to have set up the NAB account after 2008 in case he needed another account in his construction business. However, at another point in his oral testimony, the Brother stated that, at one stage, he planned to work with the Counsellor providing counselling services as the reason for setting up the NAB account with the Clinic's postal address in New South Wales.
78. The statements for the NAB account revealed very few transactions except for amounts being transferred to the Company and marked as "[Clinic] loan", which the Brother claimed to be the amounts he advanced to the Counsellor, albeit being paid to the Company's bank account.⁵⁶ It was put to the Brother in cross-examination that his NAB account was not being used by him but controlled by the Counsellor. While the Brother denied this, there were specific transactions which the Counsellor had made utilising a credit and or debit card

⁵⁶ HB Volume 2, p 567.

attached to the NAB account, which lent strong credence to the Commissioner's suspicions that the Counsellor was in fact controlling the NAB account. For example, the Counsellor attempted to purchase a gemstone at Macy's in Chicago, USA for his partner on or about 24 June 2013.⁵⁷ There were also two other transactions which were for the benefit of the Counsellor or his son, namely, the purchase of a flight on Jetstar in the Counsellor's name paid from the NAB account on or about 14 April 2014,⁵⁸ and a transfer out of the NAB account for the payment of car expenses on or about 15 April 2014.⁵⁹ When it was additionally put to the Brother that both of the latter amounts were not reflected in the table in his witness statement showing funds provided to the Counsellor as loans,⁶⁰ the Brother stated the tables had been prepared by accountants and solicitors for the Counsellor and he assumed they were accurate.

79. The Brother offered further explanations in re-examination for these and other discrepancies. These included that some payments, such as for the Jetstar flight and the car expenses referred to immediately above – which he claimed to have transacted - may have been treated as gifts and, therefore, not recorded as loans to the Counsellor. Separately, the Brother later conceded that he would have provided the credit and or debit card on his NAB account to the Counsellor for use as needed, mainly in the case of an emergency. The Brother stated that he truly operated and owned the NAB account and, although he lived in Victoria, he planned to work in the Clinic, and he also travelled to Sydney frequently. He could not recall whether he had online banking set up with respect to the NAB account.
80. The Commissioner's counsel specifically put to the Brother that he was not being truthful. The Brother explained that most families may not operate the way they do, but that he and his brother helped each other out, and he did not check any of the loan amounts because he trusted and relied on the accountants to check the accuracy of the numbers. He also would not question his brother on family matters. When it was further put to the Brother that his own income tax returns revealed he wouldn't have had the financial resources to lend

⁵⁷ HB Volume 2, p. 532 and HB Volume 8, p. 2252 - the transaction was rejected by Macy's because the signature on the card did not match with the signature for the transaction.

⁵⁸ HB Volume 2, p. 567 and HB Volume 10, p. 3014.

⁵⁹ HB Volume 2, p. 567 and HB Volume 9, p. 2926.

⁶⁰ HB Volume 2, p. 590.

the amounts he claimed to have loaned to the Counsellor, his testimony was that he had those funds from previous years including from construction work and insulation contracts. He reiterated that he hadn't provided those further details because he wasn't asked to. He also referenced the existence of text messages between him and his brother about the loans but did not provide them either. (In contrast, the Counsellor's oral testimony was that there were no written communications such as text messages between him and the Brother about the loans.)

The accountant's evidence

81. Mr Bigeni have written and oral evidence in support of the Counsellor and was cross-examined. In his first witness statement dated 23 December 2022, Mr Bigeni stated he had been an accountant since 2012. He has a Bachelor of Commerce and is a certified practicing accountant. His accounting firm, which he started in 2017, provides mostly tax and management accounting services to individuals, small businesses and self-managed super fund clients.
82. Mr Bigeni stated his firm, formerly known as Fruition Accountants and Advisors, was engaged by the Counsellor and the Company in 2020 and he supported the Counsellor with engaging with the ATO and his legal representatives. He stated that he prepared the tax returns for the Relevant Years for the Counsellor referred to at [38] above. He explained that initially he prepared the Company's financial statements for the Relevant Years based on the QuickBooks file that the Counsellor informed him had been prepared by a previous bookkeeper. Mr Bigeni stated he requested the Company's bank statements so as to undertake a reconciliation process. He confirmed in his oral evidence that he had not reviewed any personal bank statements for the Counsellor, and that it was not his practice to do so where, as here, the taxpayer had given him the rental figures for property he owned and where the taxpayer wasn't operating any business.
83. Mr Bigeni stated that he *"briefly reviewed the QuickBooks file, but kept it brief as this work had already been completed by the previous bookkeeper, and the Applicant did not have any concerns about the QuickBooks file."*⁶¹ Mr Bigeni also stated that *"[t]he loan account*

⁶¹ HB Volume 3, p. 594, paragraph 17.

was constructed from what was in the QuickBooks file (prepared by the previous bookkeeper) allocated to the loan account. I made several adjustments for personal expenses that were not related to the company – which had the effect of increasing the loan amount to the Applicant...” Mr Bigeni added that he “advised that it would be appropriate to include a minimum wage amount to the Applicant, which was then included in the Applicant’s tax return. The amount was based on the Applicant’s personal circumstances and cash available in the company.”⁶² (See also [38] above).

84. In his second witness statement dated 17 February 2023, Mr Bigeni addressed various queries that had been raised by the Commissioner in relation to his earlier witness statement, in particular relating to the documents and information that he had used to prepare the Counsellor’s tax returns as well as the financial statements and further returns for the Company. Mr Bigeni confirmed in cross-examination that he had not seen any Div 7A loan agreements and the only documents suggesting loans were the loan ledgers which he then adjusted on account of the Company having paid the Counsellor’s personal expenses.

Summary re Evidence

85. I consider the evidence of the Counsellor to have been vague and unreliable. In particular, the Counsellor was not forthcoming in providing details in relation to his financial affairs during the Relevant Years and only provided general information in his witness statements and in his oral testimony. Moreover, the Counsellor’s limited evidence was inconsistent and not substantiated by independent, contemporaneous records. The shortcomings in his evidence were highlighted by the numerous iterations of his financial affairs as well as tax returns, after the commencement of the tax audit (see [37] and [38] above). I was also not convinced of the accuracy of the records that the Counsellor relied on, including Annexure A or the tables submitted after the hearing (see [63] above). The Counsellor was unable to satisfactorily explain how he was able to make loans to the Company, which was incorporated in 2011, in circumstances where he had lodged income tax returns for the 2009 to 2012 income years in which he had declared tax losses in each of them (see [34]

⁶² HB, Volume 3, p. 595, paragraphs 23 and 24.

above). The Counsellor's partial explanation that he had borrowed monies from the Brother which were paid into the Company's bank accounts was implausible in circumstances where the Brother's tax returns for many years showed modest income (see [74] above). The Counsellor's story of supporting his 3 children living overseas was self-evidently at odds with the garnishee action taken by the Inland Revenue in 2011 to recover his child support liabilities. I find that the Counsellor was not a credible witness.

86. The Brother was also an unreliable witness. The Brother was clearly motivated by a desire to assist the Counsellor and was argumentative and deflective in cross-examination, often engaging in long speeches which did not answer the questions posed by the Commissioner's counsel. He was also unwilling to make concessions in his testimony except when compelling evidence was presented against his version of events, for example, in relation to the use of the credit card tied to his NAB account. When the Brother was appropriately pressed to explain why he had not been forthcoming in relation to details about the assets and the property that he claimed to have sold and allowed him to make loans to the Counsellor, the Brother was evasive and inexplicably stated he had not been asked to give this information. In the absence of any persuasive evidence, I was not convinced that the Brother had loaned to the Counsellor monies in the sums that he claimed, despite the existence of a written loan agreement which was relied on by the Brother (see [69] above). None of the evidence given by the Brother in relation to that written loan agreement was coherent with the terms of the written agreement nor did his evidence satisfactorily explain the differences. It will be recalled that, according to the written loan agreement, the amount of the loan was \$100,000, the purpose of the loan was for legal defence costs and the repayment term was 2 years, which were inconsistent with other statements.
87. The issue of whether there was a loan from the Brother to the Counsellor in the order of what was claimed was complicated by not only the conflicting accounts of the amounts claimed to have borrowed and repaid but also the issue regarding the effective control of the Brother's NAB account. The Brother's evidence that the transactions on the NAB account were all undertaken by him was not believable, especially in light of the Counsellor's concession in cross-examination that he had a credit and/or debit card attached to the Brother's NAB account that he used. As set out above, the limited transactions on the NAB account were all to do with the Counsellor, the Clinic and the Company. Even when there were purported loans from the Brother's NAB account to the Company, the amounts were not captured in the Brother's loan account tables (see [78] above). As stated above, the NAB account statements were also being sent to the Clinic's postal address in Sydney

where the Counsellor worked. These factors, together with the Counsellor's evidence that he did not use his own personal bank accounts because of the risk of further garnishee actions by the Inland Revenue, strongly pointed to the NAB account being in truth operated and controlled by the Counsellor.

88. I do not consider Mr Bigeni's evidence to have been particularly helpful except to reinforce the fact that the Counsellor's records were deficient. Therefore, the adjustments that Mr Bigeni made to the loan account between the Company and the Counsellor could also not be relied on because the accuracy of those records depended on the accuracy and completeness of the information provided to him, which was questionable. In this regard, Mr Bigeni confirmed in cross-examination that he had no first-hand knowledge of the transactions undertaken during the Relevant Years and was completely reliant on the documents and information that were provided to him by the Counsellor. Mr Bigeni volunteered in his written and oral evidence that he "*briefly reviewed the QuickBooks file, but kept it brief*". Mr Bigeni also confirmed that he not been provided with the handwritten tax returns prepared for the Counsellor which included amounts for "Pre-2011 income", nor was he informed about these amounts by the Counsellor, as corroborated by the fact these amounts were not included in the further tax returns prepared for the Counsellor (see [37] above). Furthermore, Mr Bigeni was cross-examined about various amounts in Annexure A and accepted that there were errors and omissions, including the amount of the \$200,000 initially paid by the Counsellor to settle one of his legal disputes (see [23] above). Mr Bigeni acknowledged he was not responsible for preparing Annexure A and was not aware of the methodology used to prepare it. In summary, Mr Bigeni's evidence could not be relied on to provide support to the Counsellor's position because it was based on incomplete information he had been provided.

RELEVANT STATUTORY PROVISIONS AND PRINCIPLES

Default assessments and onus of proof

89. The Commissioner is empowered to make a default assessment pursuant to s 167 of the ITAA 1936 in certain circumstances. That section relevantly provides:

If:

(a) any person makes default in furnishing a return; or

(b) ...

(c) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income;

the Commissioner may make an assessment of the amount upon which in his or her judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166.

90. Section 14ZZK of the TAA relevantly provides as to the grounds of objection and burden of proof with respect to tax disputes in Tribunal proceedings, as follows:

On an application for review of a reviewable objection decision:

(o) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and

(a) the applicant has the burden of proving:

(i) if the taxation decision concerned is an assessment—that the assessment is excessive or otherwise incorrect and what the assessment should have been; or

(ii) in any other case—that the taxation decision concerned should not have been made or should have been made differently.

91. In *Bosanac v Federal Commissioner of Taxation* [2019] HCA 41, Nettle J observed as follows:

29 ...As the primary judge recorded, although the Commissioner conceded that the two amounts totalling \$600,000 were not taxable income, the Commissioner “did not otherwise admit the underlying factual foundation alleged by the [plaintiff]”. Thus, as both the primary judge and the Full Court reasoned, in effect, the position remained that the amount of taxable income for which the Commissioner contended was the amount shown in the Objection Decision. In substance, the only effect of the Commissioner’s concession was that the plaintiff was relieved of the necessity of negating the inference, otherwise available, that the two amounts totalling \$600,000 were taxable income. The onus remained on the plaintiff to adduce evidence sufficient to establish on the balance of probabilities the true amount of his taxable income (of course, making such forensic use as could be made of the Commissioner’s concession that the conceded amounts were not assessable income²⁶) and thereby that the amount of taxable income as determined by the Commissioner exceeded the true amount. The plaintiff was not entitled to proceed

on the basis that the conceded amounts could simply be deducted from the amount of taxable income that the Commissioner had determined in the relevant year of income.

30 That reasoning was correct. As has been seen, although the Commissioner and a taxpayer may agree to confine an appeal to a specific point of law or fact – and where that occurs, the taxpayer might succeed in the appeal by demonstrating that he or she is entitled to succeed on that point – in the absence of such an arrangement, the Commissioner is entitled to rely on any deficiency in the taxpayer's proof of the excessiveness of the amount assessed in order to uphold the assessment. Equally, if all the facts are known, and the amount of taxable income in dispute depends only on the legal complexion of the established facts, the taxpayer may succeed by demonstrating on the balance of probabilities that the amount in question does not bear that legal complexion. But where, as here, an appeal proceeds on the basis that not all of the material facts are known, either because the taxpayer has been less than forthcoming in making disclosures to the Commissioner or for some other reason, the taxpayer cannot succeed by showing only that the basis of the Commissioner's assessment was in some respect erroneous; since for all that can be told, unless and until the taxpayer proves to the contrary, there may be other income of which the Commissioner was not aware and which the Commissioner has not taken into account. In order to succeed in such a case, the taxpayer must discharge the burden of demonstrating on the balance of probabilities the true amount of the taxpayer's taxable income and thus that the amount determined by the objection decision is excessive. Here, that required the kind of wide survey and exact scrutiny of the plaintiff's business activities to which the primary judge referred and which was conspicuously absent from the plaintiff's presentation.

(footnotes omitted)

92. It follows from the above, that the Counsellor bears the onus of proving that the assessments issued to him were excessive and “*the amount upon which ... income tax ought to be levied*” – that is to say that he must prove that the amount assessed exceeds

his “*actual taxable income*”.⁶³ The onus rests upon the Counsellor to establish the facts upon which he relies.⁶⁴ It is not enough to show that the Commissioner made an error or that an assessment is wrong.⁶⁵

93. It is significant to also note that there was no agreement between the Counsellor and the Commissioner to confine the issues in dispute with respect to the Relevant Years, except for the carried forward losses which the Commissioner has allowed.⁶⁶ The Commissioner is under no burden to establish that the assessments were correctly made⁶⁷ and he is entitled to rely upon any deficiency in proof of the excessiveness of the amount assessed to uphold the assessments.⁶⁸

Ordinary Income and Statutory Income

94. Under the ITAA 1997, a taxpayer’s liability to income tax depends on their “*taxable income*” for the income year which is worked out by determining “*assessable income*” and then subtracting “*deductions*”: s 4-15. “*Assessable income*” includes income according to ordinary concepts which is called ordinary income and amounts that are not ordinary income which is referred to as “*statutory income*”: ss 6-5(1) and 6-10(1). “*Deductions*” includes general deductions and specific deductions, including for tax losses of earlier income years.
95. The Commissioner had found that the amounts withdrawn from the Company’s bank accounts were ordinary income of the Counsellor. As stated above, for the Counsellor to succeed on the grounds outlined in his objection, he must prove the existence of a loan agreement between him and the Company and the character of the advances, in particular, whether they are made pursuant to that loan agreement.

⁶³ *Commissioner of Taxation v Dalco* (1990) 168 CLR 614 (**Dalco**) at 618-619, 624-626 per Brennan J; see also *Commissioner of Taxation v Ross* [2021] FCA 766 at [48] (**Ross**) and *Condon v Commissioner of Taxation* [2023] FCA 561 at [27] (**Condon**).

⁶⁴ *Hua-Aus Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 430 at 436 [22] citing *Danmark Pty Ltd v Federal Commissioner of Taxation* (1944) 7 ATD 333 at 337.

⁶⁵ *Gashi v Commissioner of Taxation* (2013) 209 FCR 301 (**Gashi**) at 314 [62]-[63]; *Rigoli v Commissioner of Taxation* (2014) 96 ATR 19 at 25 [12]; *Trautwein v Commissioner of Taxation* (Cth) [1936] HCA 77 at 88 (**Trautwein**); *Ma v Federal Commissioner of Taxation* (1992) 37 FCR 225 at 230; *Ross* at [48], [63], [66], [68]-[69].

⁶⁶ Respondent’s Amended Statement of Facts, Issues and Contentions dated 17 April 2023: HB Volume 1, p. 130, [70].

⁶⁷ *Dalco* at 623-624; *Gashi* at 314 [61].

⁶⁸ *Dalco* at 624.

96. Division 7A of the ITAA 1936 is only applicable if the amounts are not otherwise assessable income.⁶⁹ Relevantly, s 109C of the ITAA 1936 treats amounts paid by a private company to a shareholder as dividends unless the payments are properly characterised as loans. The concept of “payment” is broad and includes the crediting of amounts to or on behalf of or for the benefit of an entity and the transfer of property to an entity. Payment by direction will satisfy the requirements of s 109C.
97. Under s 109D of the ITAA 1936, a private company will be taken to pay a dividend at year-end if a loan is made by a private company to an entity during the income year (the current year) that is not fully repaid by the lodgement day for the current year and, relevantly, for present purposes, the entity is a shareholder when the loan is made. Section 109Y limits the total amount of dividends taken to have been paid by a private company under Div 7A to the company’s “distributable surplus” for that year. A private company’s distributable surplus for an income year is derived from the calculation set out in s 109Y(2). The taxpayer has to prove that there is no distributable surplus in each income year.

DID THE COUNSELLOR DISCHARGE THE ONUS OF PROOF IN RELATION TO THE DEFAULT ASSESSMENTS?

98. The Counsellor had to discharge the onus of proof in s 14ZZK(b)(i) of the TAA to prove the assessments issued to him were excessive and what the assessments should have been for each of the Relevant Years.
99. I was not satisfied that the Counsellor established that the amounts paid by the Company to the Counsellor, or on his behalf, were repayments of loans made by the Counsellor to the Company. Nor was I satisfied that the Company had made any loans to the Counsellor. My conclusion is that the amounts paid by the Company to the Counsellor were his assessable income, namely, income according to ordinary concepts. Accordingly, the Counsellor failed to discharge the burden of proving that the default assessments were excessive and what his taxable income was for each of the Relevant Years.

⁶⁹ Section 109L of the ITAA 1936.

100. As I have concluded that the Counsellor has not demonstrated that the amounts assessed to him did not constitute his ordinary income, it is strictly unnecessary to consider the application of Div 7A. That Division only applies where the amounts are not otherwise assessable income of the taxpayer.
101. Granted, the repayment of a loan is not a transaction that leads to assessable income for the person making the payment or for the recipient of the payment. The threshold issue is, however, whether there was a loan agreement in the first place between the Counsellor and the Company. If there was a loan agreement, it would also be necessary to consider whether the source of any loans may have been income where that income had not been brought to account. The Counsellor had argued that the source of the money that he claimed to have loaned to the Company was, amongst other things, from the proceeds of sale of his residence, settlement monies from his legal disputes and loans from the Brother.
102. I was not satisfied of the existence of the alleged loan from the Counsellor to the Company as there was insufficient reliable evidence to prove the existence of a loan agreement. Similarly, there was no persuasive evidence that the Company had made a loan to the Company. The evidence supporting the existence of the alleged loans was sparse. In particular, besides the uncorroborated evidence of the Counsellor which merely assumed the existence of the loans, the documents relied on by the Counsellor, such as the Loan Ledger and the Company's financial statements, were prepared afterwards on the basis of the asserted existence of the loans. Those documents did not directly prove the existence of any loan agreement. Critically, the asserted loan agreements were undocumented and there was no reliable evidence about any terms, including the important obligation for repayment of the loans. Nor was there any evidence as to any other terms of the loan agreements such as interest payable. All of the material before the Tribunal, including the evidence of the Counsellor, which was found to be unreliable, was too ambiguous and uncertain to prove the existence of a legally binding loan.
103. To the extent certain banking transactions were earmarked as "loan" or "repayment of loan", including in the Brother's NAB account and in the Company's bank accounts, they were not determinative, especially as certain transfers between the Company's two bank accounts

were described as “loans”, when they were plainly not capable of being loans from the Company to itself.⁷⁰

104. My conclusion is also supported by the manner in which the Counsellor mingled his business and personal financial affairs in the Company’s bank accounts. The Counsellor also “recycled” the same money through the Company’s bank accounts by withdrawing cash, and then depositing it again into the Company’s bank accounts, to pay expenses as and when needed. These transactions supported the conclusion that the money was not provided by way of loan to the Company for any period of time with an obligation as to repayment. Rather, the evidence pointed to the fact the Counsellor utilised the Company’s bank accounts as transactional accounts. That arrangement and the conduct of the Counsellor suggest that the Company’s accounts existed merely for the Counsellor’s convenience, and do not support the existence of a loan agreement. Based on the overall lack of evidence supporting the existence of any loan and the Counsellor’s adoption of the Company’s bank accounts as if they were his own, I find that there was no loan agreement between the Counsellor and the Company.
105. In reaching this conclusion, I have had regard to the following statement of Edmonds J in *Federal Commissioner of Taxation v Rawson Finances Pty Ltd* (2012) 89 ATR 357 at [20] and the cases cited by his Honour, as regards the fundamentals of a loan:

20 The essence of a loan of money from A to B is a corresponding contemporaneous obligation on the part of B to repay the money transferred from A to B: Commissioner of Taxation v Radilo Enterprises Pty Ltd [1997] FCA 22; (1997) 72 FCR 300 at 313 per Sackville and Lehane JJ; Commissioner of Taxation v Firth (2002) 120 FCR 450 at [73] per Sackville and Finn JJ. Absent that obligation, the transfer of the money from A to B is something else – a gift, a payment by direction, a payment or repayment of an anterior obligation – but it is not a loan. The obligation of repayment is not proved by subsequent payment of the same amount, let alone a different amount, from B to A; that may be explicable by reference to another obligation or circumstance having nothing to do with the original payment from A to B. Rather, the

⁷⁰ HB, Volume 1, p. 164 and Volume 2, p. 302.

obligation of repayment is proved by the terms of the contract under which the money was transferred from A to B.

106. My conclusion is also reinforced by the decision of Rares J in *Rowntree v Federal Commissioner of Taxation* [2018] FCA 82 and the cases cited therein at [52] – [57], where his Honour considered how a sole director of a company can establish the terms of a transaction between a company and the director. In the present case, there was no probative evidence as to the existence of a loan between the Counsellor and the Company (or between the Company as lender and the Counsellor as borrower). The Counsellor believed that he and the Company were the same, and without him the Company did not exist. He also believed that what he did vis-a-vis the Company created loans so that he either owed the Company money or the Company owed him money. However, notwithstanding the Counsellor's beliefs, I was not satisfied that there was sufficient objective support to satisfy the existence of any loans. See also *Richard Walter Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243 at [259] per Hill J; *Melbourne Corporation of Australia Pty Ltd v Commissioner of Taxation* [2022] FCA 972.
107. The Counsellor argued that no adverse finding should be made on account of the Counsellor not producing contemporaneous records, and that the Counsellor had discharged his burden consistent with the Full Court's decision in *Haritos v Federal Commissioner of Taxation* [2015] FCAFC 92. Specifically, the Counsellor relied on the following passages at [235]-[236]:

235. The third way in which the appellants put their argument that the Tribunal had misused the burden of proof section is related to the second. The appellants submitted that even if Mr Haritos' evidence was correctly rejected, they had nevertheless established subcontractor expenses of at least a certain amount. The Tribunal was not entitled to adopt what the appellants described as an "all or nothing" approach. If an "at least" figure was established on the evidence, then the Tribunal should have made a finding in accordance with that evidence.

236. We think that proposition is correct. If a taxpayer claims his or her expenses were \$10, but fails to prove that fact because their evidence is rejected, this does not prevent the Tribunal from finding that the expenses were \$5 where there is other satisfactory evidence establishing expenses of at least that amount. In our opinion, the burden of proof section does not dictate a different conclusion.

108. The Counsellor also relied on the following statements by Derrington J in *Condon*:

... in performing its review function, the Tribunal may be required to make an estimate upon inexact evidence, and it cannot avoid its responsibility to make findings by relying on the burden of proof section ... (at [61])

... there is no stipulation as to how the standard [of proof] can be met ... (at [57])

...[a] taxpayer is not required to prove matter by reference to contemporaneous primary documentation" (at [58]).

109. The Counsellor also referenced the following statement of Hunt J In *Allied Pastoral Holdings Pty Limited v Federal Commissioner of Taxation* (1983) 13 ATR 825 at 834

... And it is not obligatory for a taxpayer, before he can discharge his burden of proof to call all the material witnesses and to produce all the material documents which support his evidence, as Mr Fairleigh suggests. It is certainly wiser for the taxpayer to do so in most cases so as to ensure that his own evidence is accepted, but even where he does not do so the tribunal of fact may nevertheless be sufficiently impressed with the taxpayer as a witness that his evidence is accepted without such corroboration or without the whole of such corroboration. If his evidence as to his purpose is accepted, then he has discharged his onus of proof whatever corroborative evidence he has or has not called.

110. None of the above references, which are mostly concerned with the possibility that it is open for a taxpayer to discharge his or her burden of proof in various ways, assist the Counsellor in circumstances where he was unable to adduce sufficiently reliable evidence, and his own evidence was found to be wanting. This is the case regardless of whether the Tribunal makes a finding favourable to the taxpayer, partially or otherwise.

111. To the extent that the Counsellor sought to rely on s 1305 of the *Corporations Act 2001* (Cth), that reliance was also wholly misplaced. Broadly, that section provides that books kept by a company under that Act are prima facie evidence of any matter stated or recorded in them. The term 'books' is defined in s 9 to include financial reports or financial records. 'Financial records' include documents of prime entry and working papers and other documents needed to explain the methods by which financial statements are made up. Under s 286 of the *Corporations Act*, all proprietary companies must keep financial records that correctly record and explain their transactions. A key problem for the Counsellor was that he could not establish that the Company kept its records in accordance with s 286. Indeed, there was no sufficiently reliable evidence which demonstrated how the Company's records were kept, by whom and what methodology was relied on in the keeping of records.

Regardless, the presumption that records are admissible in evidence and prima facie evidence of any matter stated or recorded in them is not conclusive and can be displaced.

112. The Commissioner added that the Counsellor could not demonstrate that there was compliance with s 262A of the ITAA 1936 which states that a person carrying on a business must keep records that explain all transactions and other acts engaged in by the person that are relevant for any purpose of the income tax legislation. The records to be kept include any documents that are relevant for the purpose of ascertaining the person's income and expenditure: s262A(2). As set out in [28] and [56] above, Argyle Lawyers alluded to the fact there were deficiencies in the state of the Company's records in correspondence with the Commissioner.
113. In light of the conclusion reached that there was no loan agreement between the Counsellor and the Company (including between the Company as the lender and the Counsellor as borrower), the analysis of the application of Div 7A is unnecessary. It suffices, however, to observe that the Counsellor would have faced significant obstacles with respect to his argument that there could be no deemed dividend under Div 7A because there was no "distributable surplus" for the purposes of s 109Y owing to the chaotic state of his records.
114. As recounted above, the Counsellor had provided numerous iterations of income tax returns for himself and for the Company, as well as numerous versions of financial statements for the Company, all of them after the issue of the default assessments to him. The Counsellor also proffered various tables showing fund flows of amounts claimed to have been loans between him and the Company, including Annexure A. However, for the most part, the Counsellor could not satisfactorily answer questions posed to him in cross examination about how the sums provided in the tables were calculated, including in Annexure A. As the Commissioner pointed out, the various documents provided different figures and, relevantly, none could be reconciled back to loan amounts declared in the Counsellor's supplementary statement. The Commissioner also observed the Counsellor accepted that during the Relevant Years, more money was withdrawn from the Company's bank accounts for the Counsellor's benefit than what he had paid to the Company in circumstances where the Company and the Counsellor had both declared losses in their respective tax returns. Accordingly, the various inconsistencies undermined the calculations prepared for the Counsellor, including those in Annexure A.

115. It follows, that the Tribunal was not satisfied that the calculations for the purposes of s 109Y(2) of the ITAA 1936 could possibly have been undertaken accurately on the information provided.

DID THE COUNSELLOR DISCHARGE THE BURDEN OF PROOF WITH RESPECT TO THE IMPOSITION OF PENALTIES?

116. The Commissioner had imposed an administrative penalty at the base penalty rate of 75% of the tax shortfall because of the Counsellor's failure to lodge income tax returns with respect to the Relevant Years. In this regard, s 284-75(3) of Schedule 1 of the TAA states:

284-75 Liability to penalty

...

(3) *You are liable to an administrative penalty if:*

- (a) *you fail to give a return, notice or other document to the Commissioner by the day it is required to be given; and*
- (b) *that document is necessary for the Commissioner to determine a * tax-related liability (other than one arising under the * Excise Acts) of yours accurately; and*
- (c) *the Commissioner determines the tax-related liability without the assistance of that document.*

Note: You are also liable to an administrative penalty for failing to give the document on time: see Subdivision 286-C.

117. The base penalty amount can be calculated by reference to item 7 of s 284-90(1) of Schedule 1 of the TAA, which relevantly provides that where a taxpayer is liable to an administrative penalty under s 284-75(3), the penalty rate shall be "75% of the tax-related liability concerned".

118. That base penalty amount was uplifted by a further 20% for the 2016 and 2017 income years on the basis that the Counsellor had been previously liable to penalties of the same type: s 284-220(1)(e) of Schedule 1 to the TAA. The uplift is applicable even if the penalties for the latter income years were determined at the same time as the word 'previously' in this context is a reference to a prior accounting period: *Picton Finance Ltd v Commissioner of Taxation* [2013] AATA 116 at [102]–[104]; see also *Gashi* at [57].

119. I agree with the Commissioner's submission that the administrative penalty was correctly imposed under the abovementioned statutory provisions as the Counsellor failed to lodge his tax returns by the due dates, and the returns were necessary for the Commissioner to

determine his tax liability. The Commissioner had to determine the Counsellor's tax liability for the Relevant Years without the assistance of those returns. The Counsellor's grounds of objection - that the penalties should not apply as there was no recklessness or failure to take reasonable care by the taxpayer and his tax agent - were not applicable (see [16] above).

120. The Counsellor contended that if the administrative penalties were properly imposed in the first instance, the safe harbour exception in s 284-75(6) of Schedule 1 of the TAA should nevertheless apply as the Counsellor relied on his tax agent who had specialised knowledge of tax law to manage his tax affairs. Relevantly, s 284-75(6) which contains the safe harbour exception states:

- (6) You are not liable to an administrative penalty under subsection (1) or (4) if:*
 - (a) you engage a * registered tax agent or BAS agent; and*
 - (b) you give the registered tax agent or BAS agent all relevant taxation information; and*
 - (c) the registered tax agent or BAS agent makes the statement; and*
 - (d) the false or misleading nature of the statement did not result from:*
 - (i) intentional disregard by the registered tax agent or BAS agent of a * taxation law (other than the * Excise Acts); or*
 - (ii) recklessness by the agent as to the operation of a taxation law (other than the Excise Acts).*

121. I agree with the Commissioner's submission that on the express wording of the statutory provision, the safe harbour exception only applies if the administrative penalties are imposed pursuant to ss 284-75(1) or (4). Accordingly, the safe harbour exception does not apply where the penalty was imposed pursuant to s 284-75(3) of Schedule 1 to the TAA, as in the Counsellor's case. The Counsellor's failure to lodge tax returns rendered it necessary for the Commissioner to make assessments without the benefit of this returns and the shortfall penalty of 75% was imposed in respect of the tax shortfall for the 2015, 2016 and 2017 income years. No penalty was applicable for the 2014 income year as the Counsellor's taxable income was nil.

122. The Counsellor had argued that the penalty and uplift should not be imposed as he was effectively being penalised for concluding that he had no obligation to lodge tax returns, and he exercised reasonable care in coming to that (albeit mistaken) conclusion. He also submitted that a taxpayer who had lodged a tax return declaring nil taxable income would be advantaged, compared to him (who had not lodged because he had nil taxable income),

because the safe harbour exception would potentially apply, notwithstanding each taxpayer had nil taxable income. However, that argument has no merit in the face of the abovementioned express statutory provisions regarding the imposition of penalty, the uplift and the safe harbour exception, which apply on their terms.

123. The Tribunal does not have any discretion to consider the behaviour of the taxpayer or the fact that a taxpayer acted on advice given by his tax agent where the penalties were imposed pursuant to the terms of s 284-75(3). Accordingly, I agree with the Commissioner's contentions that the penalty and uplift were correctly imposed. It is for that reason that it is also unnecessary to consider the Counsellor's separate submission that he provided all relevant documents to his tax agent at the time as, even if he did - which is highly doubtful given the paucity of his documents explaining the relevant transactions and calculations that were referenced as being in existence at that time – it is of no assistance where the safe harbour exception cannot apply.

SHOULD THE ADMINISTRATIVE PENALTIES BE REMITTED?

124. The Counsellor contended that if any penalties were applicable, the discretion should be exercised by the Tribunal standing in the shoes of the Commissioner to remit the penalties in full. Section 298-20 of Schedule 1 of the TAA states:

298-20 Remission of penalty

(1) The Commissioner may remit all or a part of the penalty.

(2) If the Commissioner decides:

(a) not to remit the penalty; or

(b) to remit only part of the penalty;

the Commissioner must give written notice of the decision and the reasons for the decision to the entity.

Note: Section 25D of the Acts Interpretation Act 1901 sets out rules about the contents of a statement of reasons.

(3) If:

(a) the Commissioner refuses to any extent to remit an amount of penalty; and

(b) the amount of penalty payable after the refusal is more than 2 penalty units; and

Note: See section 4AA of the Crimes Act 1914 for the current value of a penalty unit.

(c) the entity is dissatisfied with the decision;

the entity may object against the decision in the manner set out in Part IVC.

125. The Commissioner acknowledged that there is a broad discretion to remit all or part of a penalty that was otherwise properly imposed, pursuant to s 298-20(1) of Schedule 1 to the TAA. Whilst the harshness of the penalty is not the relevant test, the discretion may well call on the decision-maker, here the Tribunal standing in the shoes of the Commissioner, to determine whether *“the outcome for a particular taxpayer would be unreasonable or unjust (and therefore inappropriate)”*.⁷¹ However *“there need to be circumstances that could be regarded as mitigating the applicant’s behaviour in some way.”*⁷²
126. The Counsellor did not advance any submissions as to the specific grounds for the remission of penalties beyond the broad reference to the *“Applicant’s true circumstances”* and the premise that he relied on advice from his tax agent at the time that no tax returns were required to be lodged. According to the Counsellor, he took all reasonable steps expected of *“a simple taxpayer”* by engaging with a tax agent to ascertain his tax position.
127. I was not satisfied that the Counsellor’s circumstances warranted remission of all or a part of the penalty. In particular, the Counsellor did not advance or explain what his mitigating circumstances were. In any event, while the Counsellor may have relied on his then accountant and tax agent to advise him, he did not satisfy me that he or the Company kept records that recorded and explained all transactions relevant to their tax affairs, as required by s 262A(1) of ITAA 1936. An example relates to the amounts invoiced by the Counsellor while he was a sole trader for periods prior to 2011, which he claimed were subsequently received and advanced by him as loans to the Company. There were no supporting documents such as the relevant invoices issued or the number of appointments with patients which reconciled the amounts claimed to have been received. In the absence of any corroborating evidence as to the documents that were given to the tax agent, I do not accept the Counsellor’s claims that he was compliant with his tax obligations and gave all relevant documents to the former tax agent as a mitigating circumstance.
128. Finally, the Counsellor had intermingled his funds with those of the Company during the Relevant Years making it difficult to discern the accuracy of his and the Company’s financial

⁷¹ *Sanctuary Lakes Pty Ltd v Commissioner of Taxation* [2013] FCAFC 50 (**Sanctuary Lakes**) at [249] per Griffiths J.

⁷² *Sanctuary Lakes* at [273] and [274] per Griffiths J.

affairs with any degree of confidence, as evident from the numerous tax returns and the Company's financial statements, with the amounts shifting with each iteration. Far from being "a simple taxpayer" as he sought to portray himself, the Counsellor's financial arrangements were unnecessarily made opaque and complicated. On his own evidence, he was reluctant to bank any money in his personal bank account because of the garnishee recovery action by the Inland Revenue. But there was no evidence that he engaged in a proper legal process to challenge the Inland Revenue's assessments and recovery actions. In all the circumstances, there is nothing meritorious about his conduct that warrants remission of penalties.

129. Accordingly, the Counsellor also failed to prove that the decision not to remit the administrative penalty should not have been made or should have been made differently for the purposes of s 14ZZK(b)(ii) of the TAA.

CONCLUSION – PROCEEDINGS NO. 2020/8508-8515

130. The Counsellor failed to discharge the burden of proving that the assessments issued to him by the Commissioner in respect to income tax and penalties for the Relevant Years were excessive.
131. Therefore, the decisions under review are accordingly affirmed.

OTHER MATTER – PROCEEDINGS NO. 2020/8516

132. The Counsellor had objected to the Commissioner not remitting shortfall interest charges (**SIC**) imposed on his tax liability, however, it transpired that SIC had not in fact been imposed. The Commissioner had stated in an attachment to the Objection Decision (not part of the Objection Decision) that there was no need to consider the Counsellor's request to reduce the SIC because *none* had been imposed as the assessments were default assessments. The proceedings commenced under 2020/8516 with respect to the issue of SIC are, therefore, dismissed for want of jurisdiction.

I certify that the preceding 132 (one-hundred-and-thirty-two) paragraphs are a true copy of the reasons for the decision herein of Senior Member G Lazanas

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

Associate

Dated: 13 February 2024

Date(s) of hearing:	6 and 7 December 2023
Date final submissions received:	15 December 2023
Solicitors for the Applicant:	Mr B Collins, Tax Controversy Partners Pty Ltd
Counsel for the Respondent:	Ms D Levi
Solicitors for the Respondent:	Mr V Nellalingam, Australian Taxation Office

Annexure A

Year	(A) Opening Balance	Payments from Applicant to [Company]			Payments from [Company] to Applicant		(G) Movement for the Financial Year (B) + (C) + (D) + less (E) + (F)	(H) Closing Balance (A) + (G)
	(H) of the prior year	(B) Cash*	(C) Rental Income	(D) Funds from sale of property and legal settlement	(E) Loan repayments to Applicant from [Company]	(F) Payments for Applicant's personal expenses		
2014	\$41,395.70	\$19,850.00	\$9,600.00	\$440,832.84	\$210,000.00	\$360,741.86	\$(100,459.02)	\$(59,063.32)
			45,600.00			339,524.79	(73,241.95)	(31,846.25)
2015	\$59,063.32	\$112,000.00	\$17,160.00	\$ -	\$17,678.57	\$280,814.56	\$(169,333.13)	\$(228,396.45)
	(31,846.25)					264,859.26	(153,377.83)	(185,224.08)
2016	\$228,396.45	\$128,425.27	\$17,160.00	\$80,000.00	\$117,211.32	\$117,951.87	\$(9,577.92)	\$(237,974.37)
	(185,224.08)					420,003.03	(11,629.08)	(196,853.16)
2017	\$237,974.37	\$269,178.23	\$17,160.00	\$70,000.00	\$443,549.82	\$(12,243.82)	\$(74,967.81)	\$(312,942.18)
	(196,853.16)					87,856.91	(175,068.50)	(371,921.66)

* Sourced from the Applicant's brother and recycled funds.

