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Administrative Appeals Tribunal of Australia

Khanna and Commissioner of Taxation (Taxation) [2022] AATA 33 (14 January 2022)

Last Updated: 17 January 2022

Khanna and Commissioner of Taxation (Taxation) [2022] AATA 33 (14 January 2022)

Division: **TAXATION AND COMMERCIAL DIVISION**

File Number: **2021/2979**

Re: **Mohan Lal Khanna**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Senior Member Dr M Evans-Bonner**

Date: **14 January 2022**

Place: **Perth**

The Reviewable Decision, being the objection decision dated 23 April 2021, is affirmed.

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

Senior Member Dr M Evans-Bonner

CATCHWORDS

TAXATION – income tax assessment for year ended 30 June 2019 – personal superannuation contributions – whether Applicant entitled to a deduction for personal superannuation contributions – Applicant made redundant due to effect of COVID-19 pandemic and is seeking assistance as a “COVID victim” – Applicant lodged notice of intent to claim or vary a deduction for personal superannuation contributions late – no discretion to extend the time limit – whether the application should be dismissed on the basis it has no reasonable prospects of success or whether the substantive application should be determined – Reviewable Decision affirmed

LEGISLATION

[Administrative Appeals Tribunal Act 1975](#) (Cth) s 42B(1)(b)

[Coronavirus Economic Response Package Omnibus Act 2020](#) (Cth)

[Income Tax Assessment Act 1997](#) (Cth) s 290-150(2), 290-170(1)

CASES

Frugtniet v Australian Securities and Investments Commission [2019] HCA 16; (2019) 266 CLR 250

REASONS FOR DECISION

Senior Member Dr M Evans-Bonner

14 January 2022

BACKGROUND

1. The Applicant is seeking a review of an objection decision of the Deputy Commissioner of Taxation dated 23 April 2021 (**Reviewable Decision**).
2. The effect of the Reviewable Decision was that the Applicant was not able to claim a tax deduction for personal superannuation contributions for the income year ended 30 June 2019 (**Claim**).
3. This was due to the operation of ss 290-150(2) and s 290-170(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).
4. Subsection 290-150(2) provides that, among other provisions, s 290-170(1) must be satisfied before a deduction can be claimed for personal superannuation contributions made in that income year.
5. The effect of s 290-170(1) was that the Applicant was required to give a notice of intent to claim or vary a deduction for personal superannuation contributions (**Notice**) to the trustee of his superannuation fund on or before the date on which he lodged his income tax return for the income year in which the contribution was made (which was 3 July 2019); or otherwise, the end of the next income year (which was 30 June 2020). Thus, because the Applicant submitted his income tax return on 3 July 2019, the date he was required to give the Notice by was 3 July 2019.
6. However, the Applicant lodged the Notice with his superannuation fund on 17 July 2020, over a year after the 3 July 2019 time limit, and so the fund was not able to process his request.

PRIVATE RULING

7. The Applicant then made an application to the Commissioner for a private ruling. The Commissioner issued a private ruling concerning the question, "*Are you [the Applicant] entitled to claim a deduction of \$9,600 for personal superannuation contributions made to [the Applicant's superannuation fund] during the 2018-19 income year under section 290-150 of the [ITAA 1997]?*". The private ruling stated that the answer was "*No*".
8. The Applicant lodged an objection to the private ruling on 23 October 2020, but as I have explained above, his objection was unsuccessful, and the Deputy Commissioner made the Reviewable Decision.
9. On 7 May 2021, the Applicant filed an application seeking a review of the Reviewable Decision in this Tribunal.

THE SUBMISSIONS

10. The Applicant says, and I accept, that he is a "*COVID victim*" and that he has been suffering emotional and financial hardship. This is because on 22 June 2020, he received a notice of redundancy from his employer which stated that he was being made redundant from 20 July 2020. He was experiencing stress and was unable to lodge his Claim by the statutory time limit. I also acknowledge his frustrations at being unable to find another job, and at having to rely upon the age pension due to his age, despite wanting to work.
11. I also note, as counsel for the Commissioner helpfully pointed out in the hearing, that the Applicant is a responsible taxpayer. He lodged his 2018-2019 income tax return on 3 July 2019, three days after the end of the

financial year. He has paid his taxes and does not owe any money to the Commissioner. He simply wants to claim a tax deduction for personal superannuation contributions.

12. The Applicant referred to the Australian Taxation Office (**ATO**) website, and MyGov alerts he had received. These advertised support options for taxpayers who are affected by disaster events such as the COVID-19 pandemic. He believes that he should have been granted an extension to lodge his Notice due to these options for taxpayers being advertised on the ATO website. I acknowledge that he is a person who has been affected by the economic implications of the COVID-19 pandemic and that it must be frustrating for him to see offers of COVID-19 relief on the ATO website, whilst not being able to obtain the extension of time to lodge his Notice.

13. The Commissioner says that there is no discretion at law to excuse non-compliance with the time limit or to extend the time for the giving of the Notice pursuant to s 290-170(1) of the ITAA 1997, and that there is no discretion at law to ignore any failure to comply with ss 290-150(2) or 290-170(1) of the ITAA 1997. In written submissions, the Commissioner submitted that the application should be dismissed under s 42B(1)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) on the basis that it has no reasonable prospect of success.

14. The matter was programmed to proceed to a substantive hearing, rather than as an interlocutory dismissal matter. Although the question before me is a somewhat narrow one given that there is no discretion in the ITAA 1997 to give the Applicant the result he is seeking, I find that it is appropriate for me to proceed to determine the substantive application, rather than to dismiss it. I therefore decline to dismiss the application under s 42B(1)(b) of the AAT Act.

CONSIDERATION

15. The wording of s 290-170(1)(b) is that “*the notice **must be given***” (my emphasis) before the statutory time limit.

16. Subsection 290-150(2) also uses the word “*must*”. Specifically, it states that “*the conditions in sections 290-155, 290-165, 290-167, 290-168, 290-169 and **290-170 must also be satisfied for you to deduct the contribution***” (my emphasis again).

17. I find that the word “*must*” indicates an obligation to comply with the requirements of s and 290-150(2) and 290-170(1), including the statutory time limit for giving the Notice. There is no discretion to extend the time or to disregard non-compliance with that time frame afforded by those provisions.

18. There is also no discretion in any other provisions of the ITAA 1997 to disregard non-compliance with the time limit or to extend the time for the Notice to be given to the trustee of the superannuation fund under s 290-170(1). Counsel for the Commissioner also drew my attention to the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) (**Coronavirus Act**) which extended some timeframes for compliance with taxation legislation, but not with respect to s 290-150(2) and 290-170(1). I agree that there is nothing in the Coronavirus Act that assists the Applicant in this application.

19. The Applicant submitted at the hearing that regardless of the provisions of the ITAA 1997, I should find in his favour. He said that the ATO had accepted that he was under financial hardship due to COVID-19 in the reasons accompanying the objection decision. He said that the ATO had advertised assistance to persons affected by COVID-19, and that he was a person in need of assistance and therefore he should receive it. However, the Tribunal exercises the same powers and is subject to the same constraints as the Commissioner (*Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 266 CLR 250 at [51]). This means that like the Commissioner, I am bound by the limits of the legislation and cannot exercise any discretion that the Commissioner is not empowered to exercise by the legislation. So as much as I sympathise with the Applicant's situation, I am limited to the powers and discretions contained in legislation.

20. Unfortunately for the Applicant, the operation of the ITAA 1997 (and specifically the lack of any discretion to extend the time or to overlook non-compliance with the time limit), effectively means that he is not able to claim a

tax deduction for personal superannuation contributions of \$9,600 for the income year ended 30 June 2019 because he did not submit his Notice on or before 3 July 2019.

DECISION

21. The Reviewable Decision, being the objection decision dated 23 April 2021, is affirmed.

I certify that the preceding 21 (twenty-one) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr M Evans-Bonner

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

Associate

Dated: 14 January 2022

Date of hearing:	12 January 2022
Applicant:	Self-represented
Solicitors for the Respondent:	Mr M Moharich instructed by Ms V Bei, Australian Taxation Office