Submission No. 4

Committee Secretary
Joint Committee of Public Accounts and Audit
Department of the House of Representatives
Parliament House
Canberra ACT 2600
Australia by Email jcpa@aph.gov.au

Dear Secretary

SUBMISSION

Re: Inquiry reviewing a range of taxation issues within Australia

This is a lengthy submission relating to the above inquiry. Perhaps one may gain the impression that the submission relates simply to a grievance with the Australian Taxation Office (ATO). That is clearly not my intention.

The submission while it does refer to the factual scenario in my case, it is intended to highlight how difficult it is under a self assessment regime to comply with the Income Tax Assessment Act.

In the main it addresses the every day deduction for interest incurred by taxpayers throughout Australia who borrow money and then deposit those funds into a working account for application. My return of income was prepared in what I considered accorded with long standing ATO policy, supported by case law and the content of public rulings.

Brief Summary of the Submission.

The following is provided as a summary of the aspects which I wish to raise in relation to the terms of reference to the Committee. I have prepared the following summary in light of the guidelines issued which suggested a summary of should be provided if the submission to the Committee was lengthy.

The deductions for interest was claimed under Section 51(1) of the Act and the Commissioner contrary to all Public Rulings issued disregarded the wording of Section 51(1) and contended the wording of Section 50(a) of the Act had to be read into the wording of Section 51(1).

That is, a direct trace of funds was required and where there was any co-mingling of borrowed funds within a bank account of a private nature or on a person deductibility would be lost.

If that is the position of the Commissioner a cash business cannot claim a deduction for interest as those funds could be tainted by other funds on the person. If a party draws down loan funds and deposits those funds to a working account that contains non income related

funds e.g. privately sourced or exempt income the borrowed funds would become tainted and deductibility of the interest would be lost. If loan funds are deposited to an account and later a deposit is made to the account a similar outcome results.

Parties including large business and small business are impacted by such an interpretation as most operate bank overdrafts where it is inevitable some co-mingling would occur with income and non income related funds.

Section 50(a) has nothing whatsoever to do with the application of Section 50(1) and is not supported in one public ruling. If such a position had any merit at all then those public rulings that express long time ATO policy that stem from the High Court of Australia decision of *Ronpibon Tin NL and Tongkah NL v F C of T (1949) 78 CLR 47* that accepts allocation and apportionment are flawed. The High Court rejected in *Ronpibon* that a wholly and exclusive test applied.

The Commissioner in TR2000/2 at Paragraph 45 states if loan funds are drawn down and then recouped from that source and deposited back to the loan account then the original purpose ceases. Yet only applies that rationale to income related transactions. It is somewhat inconsistent when the Commissioner views loan funds that are drawn down for private purposes and reinstated to the loan account as not settling the original drawdown, but instead are required to be apportioned between income and private.

The ruling is inconsistent and impacts on any party that draws down funds for private purposes and makes restitution from privately sourced funds.

The reason the submission is so lengthy is due to many issues that arose out of an audit. The submission addresses even when there are Public Rulings in existence the Commissioner does adopt a different interpretative position.

It also expresses concern on the second point of reference concerning the application of common practices and the third on penalties and rate of the General Interest Charge (GIC).

The second point of reference concerning common standards of practice by the ATO is also covered in the attached submission that supports an alarming irregularity. I challenged the non application of paragraphs 11 and 12 of TR 97/4 to compensating adjustments where deductible interest was excised from my return of income as it was considered by the Commissioner to be deductible to my spouse.

The Commissioner had imposed penalty where no further tax was payable which specifically contradicts the content of TR 97/4. I complained to the Ombudsman who advised that the Commissioner was free to challenge the content of his own public ruling before an appellant body. The Ombudsman was relying on what he had been advised in that regard by ATO officer/s. To me that is staggering inconsistency.

The Commissioner steadfastly refused to remit the second lot of dual taxation. Initially he insisted dual taxation had not occurred and did collect a second lot from me, having already on the due date collected the disputed tax from my spouse, in addition imposed penalty and GIC.

This too was contrary to TR 97/4 that states only one lot of tax should be collected and no penalty imposed where no net tax arises. Despite no further tax debt being established the Commissioner also imposed GIC. The public ruling is specific on the matter and here you have a senior officer Assistant Commissioner level disregarding specific ATO policy.

The audit team also disregarded ATO policy in disallowing Canberra stamp duty even after being advised that my son held a private ruling on the matter confirming its deductibility, a Canberra enquiry officer contacting the audit team confirming its deductibility several times and also a rulings officer from the Sydney office of the ATO.

After handing down the decision the AAT Member directed we meet and agree the basis of calculated adjustment. After 15 months the A/g Assistant Commissioner has disregarded any approach from me in an endeavor to reconcile the 1999 figures which relate to compensating adjustments. The figures provided by the ATO do not reconcile, I have pointed out where the apparent error arises and the A/g Assistant Commissioner is non committal. My spouse has now been forced to appeal to have the matter resolved. Clearly that is an abuse of administrative process.

Again the attached submission gives further examples of inconsistent standards of practice.

I was originally penalized 50% for being reckless in claiming the disputed interest as I had not followed long standing ATO policy that was reflected in TR 2000/2.

Firstly that was impossible because TR 2000/2 was not issued when I lodged my 1997 - 1999 returns. Secondly when I requested where the long standing policy referred to, that was supposedly addressed in TR 2000/2, neither the audit team, audit manager nor the ATO legal officer could identify one public document that addressed redraw accounts.

The remission guidelines in TR 94/4 were never addressed. A simple philosophy was adopted by the Commissioner in that there was a shortfall and you are therefore reckless. TR 94/4 is specific expressing that merely if you have not followed a particular tax ruling and you do have reasonable grounds to support the position then the imposition of additional tax will be considered for remission

The penalty was eventually remitted to 25% and when the Commissioner was requested to provide grounds as to why a 25% penalty was reasonable, the officers refused to provide any reasons simply maintaining I had been told enough. The AAT member at a call over of the case directed reasons be provided and those reasons were not provided until a mere few days before the case was heard.

With the penalty on the compensating adjustments the Commissioner refused to remit that additional tax until my husband requested the matter be referred to the AAT. That is staggering even after the AAT in my case had determined that the interest was correctly allowable to my spouse.

In relation to GIC on the two compensating adjustments the Commissioner has refused to remit any of the GIC.

The Commissioner imposed GIC on me as I had claimed the deduction and the ATO ruled the deductions were deductible to my husband. My husband had not made a claim so was entitled to a refund. We were both on the same tax rate and thus there was no further tax to be collected. The Commissioner in effect has never been out of pocket of the funds.

In respect to the lump sum payment adjustment the Commissioner has recently refunded the second amount of tax collected to my husband by allowing the deduction and refunded the penalty. The Commissioner also paid my spouse interest on overpayments at the 5.2% rate approximately on the refund..

I approached the Commissioner to remit the GIC down to the rate applicable to interest on overpayments, 5.2%. Remission was refused and the A/g Assistant Commissioner will not provide any explanation apart from continually stating the matter has been addressed.

One reason previously provided when the Assistant Commissioner would not remit the GIC was that it was Government policy that remission of GIC should be resisted. This is contradicted by ATO policy contained in IT 2444 that states that each officer has the power to remit and that remission should be exercised in a fair and equitable manner.

The amount of tax in this matter is minimal, $800 a year for 3 years on the exercise of some very questionable application of the law.

It does distress me that the Commissioner can act in such an inconsistent manner and if I had not stood my ground originally this senior officer would have caused significant financial damage to me. The administration of this case highlights several inconsistencies in ATO interpretations, lack of regard to ATO policy including rulings, uncompromising imposition of penalty and the imposition of GIC when the underlying criteria is not present for the imposition of GIC and that being that the Commissioner be out of pocket for the disputed funds.

Again I do not wish you to become entangled in the mess that I consider has been brought on by pedantic and ill conceived actions by the ATO. However the Commissioner must clarify how he is going to apply the interpretation of Section 51(1) which is now Section 8 - 1 of the 1997 Act. If the High Court of Australia states deductions can be apportioned allocated or segregated then the Commissioner surely has to apply the interpretation consistently across all Australians. If the Commissioner can in any way support that Section 50(a) has any place in interpreting Section 51(1) of the Act then he should clarify on what basis he considers that view is supported.

DETAILED SUBMISSION

I have been having an ongoing dispute with the Commissioner of Taxation over issues arising from an audit of my income tax affairs involving my 1997 to 1999 returns of income. My case was heard by the Administrative Appeals Tribunal (AAT) and a decision was handed down 5 August 2004, and in the main it concerned the deductibility of interest. During the course of the audit there were other issues in dispute.

I am very disturbed at the manner that this case has been administered and would like to address those concerns in this submission in respect to the following terms of reference:

- the impact of the interaction between self-assessment and complex legislation and rulings;
- the application of common standards of practice by the ATO across Australia;
- the level and application of penalties, and the application and rate of the General Interest Charge and Shortfall Interest Charge;

I reside in Canberra and the audit was conducted by officers from the Upper Mt. Gravett ATO in Queensland who insisted on doing the audit in written format.

Background

- **Interest Dispute**

My spouse and I had a joint loan account which was entirely drawn down to finance income producing assets being property and shares. The loan had a redraw facility which permitted the borrowers to deposit additional funds over and above the required loan installments. Only the capital component of the required loan installment reduced the loan limit and no withdrawals could be made that caused the loan to exceed that reduced balance. Subsequent withdrawals could only be made if additional funds over and above the monthly loan repayment were made to the account and the loan had been fully drawn.

Monthly statements recorded the transactions through the facility and recorded the balance of the facility upon which interest was calculated. The statement also recorded the amount of funds to the credit of the redraw facility. Any funds sitting to the credit of the redraw facility could not be applied by the bank to settle required loan repayments. If any of those funds sitting to the credit of the redraw facility were required to be used to meet the monthly instalment, the funds had to be withdrawn from the facility and re deposited to be offset against the loan balance.

Because of the substantial additional deposits made to the facility the amount upon which interest was calculated went into credit; however despite the credit balance the regular monthly loan repayment was required to be made as the loan was not considered settled. These factors more than demonstrated the facility was far more than a simple loan account and that the bank did not treat the loan as being settled when the balance of the account was in credit as the Commissioner and his Public Ruling TR 2000/2 maintain.

The Redraw Facility contract with the Bank used general banking terminology with interchanging wording having the same meaning. The contract document used the word redraw, withdrawal and advances a number of times in the one document all of which had the same banking meaning. The Commissioner seized upon the word 'advance' which the AAT accepted and argued that meant a new loan rather than a withdrawal. If regard was had to the overall document that finding I believe is very questionable.

The Bank could terminate the redraw facility at any time and treat the balance in the facility as the loan balance. This too was seized upon by the AAT as being a reason to find the facility was merely a loan in the sense I suppose as not dissimilar to an overdraft. But if the Bank did that without reason the commercial world and Banking Ombudsman would have something to say on the Bank's commercial credibility. The contract also stipulated if the terms of the contract were to be changed by the bank a 28 day notice was required before becoming effectual. During that 28 day if we did not like the variation we had the option to restructure our affairs.

During the 3 year period we deposited some $260,000 of private funds to the facility and had substantial funds sitting to the credit of the redraw facility which we considered were there at call for our use when required.

We had two operating accounts apart from the loan account. A cheque account and a Visa account from which we paid income related outgoings on the rental properties as well as private expenses. These two accounts were our working accounts. In the main the income related outgoings paid from these two accounts were sourced out of private funds deposited to the account from salaries. Occasionally the accounts were supplemented with redrawn funds.

On 9 occasions we were required to supplement cash flow to support outgoings which related to both income and private purposes and funds were redrawn from the redraw facility and this is what gave rise to the dispute with the Commissioner. On six of the nine occasions the redrawn funds were restored to the loan account shortly after being drawn down. Seven of the withdrawals were deposited to the cheque account and the other two to the Visa account. The funds deposited to the cheque account were co-mingled with an existing balance in the account while the Visa account had no other funds in the account and thus there was no co-mingling.

Summary and use of the account:

	Total Redraws	**Specific Restoration shortly after redraw**	**Redrawn funds traceable to income usage**
8 Standard Redraws	$42,366	$33,000	$19,133
Car	19,910	15,000	

The above table reflects that there was very little tax mischief intended. Of the $42,366 redrawn $33,000 was restored to the loan account from private sources within a very brief period of withdrawal. One amount not restored, for $6,000, was applied to income purposes and is included in the $19,133 amount. In determining any perceived intended tax mischief that should also be weighed against the $260,000 private deposits to the account, yet I was penalized for being reckless by the Commissioner and an initial 50% penalty imposed which was later reluctantly decreased to 25%.

Comments on one of the redraws for $8,000, that was restored shortly after being redrawn, shows how interpretation impinged on whether the adjustment for interest on the amount should have been $5 and probably Nil if it was our own funds that were redrawn. The $8,000 example is typical of the other redrawn amounts that were restored shortly after draw down.

Lump Sum Payment

In 1999 my spouse retired and from his lump sum payment he deposited what he considered was his share of the outstanding balance of the loan into the account and left the balance as my responsibility. We approached the bank to change the account from joint names to my sole name but as my husband was required to be guarantor the account remained in joint names. After the deposit I funded the debt from then on from my salary. We considered that I had the beneficial use of the remaining debt and it was the use of those remaining funds that we considered determined the tax application.

Sale of half interest in Downer

In 1999 we sold a half interest in a rental property to one of my sons and he telegraphic transferred the purchase price directly to the settlement of a rental property that was purchased in my name. The Commissioner disallowed the interest on the basis that the funds could not be directly traced despite being made directly by a telegraphic transfer. The AAT supported my position.

NAB and BHP share disposal

We also sold some NAB and BHP shares to help fund the purchase of the second property and the proceeds were deposited to the cheque account as the cheque required to be cleared. That is pure and simply day to day commercial requirements because the funds could not be otherwise accessed. The Commissioner states in TR 2000/2 at Paragraph 46 that the application of funds is '... calculated to effect from a practical and business point of view, ...' The proceeds were paid out promptly to settle property outgoings for solicitor costs, making up the balance, stamp duty, etc.

The Commissioner successfully argued at the AAT that the interest should be disallowed after the sale of those shares because of co-mingling. He argued that the continuing use of the borrowed funds that were used to initially purchase the shares could not be established as the proceeds on the sale were co-mingled with $101 of private funds sitting to the credit of the cheque account before the proceeds were applied to the Braddon settlement outgoings, within a very brief period after the deposit of the proceeds.

Car Funding

On the 8 October 1996 we drew down from the loan account $19,910 to repay my mother in law for money she had previously lent us to purchase a car. The car was purchased 16 April 1996.

On the 14 August 1996, my mother gifted me $15,000 and there was a credit balance in our cheque/savings account of $5,199.30. My mother in law was approached and we offered to repay her from those funds. She said she would prefer to wait to around 8 October 1996 until her next term deposit was due to expire so she could add the amount to that term deposit.

The $15,000 was deposited to the loan account on 14 August 1996 knowing that when she required payment, the funds would be readily accessible. If it was not for the way the loan account operated with the redraw facility and allowing the funds to be re accessed then the funds would not have been deposited there in the first place.

- **Dual Taxation**

There were two issues here.

Lump Sum Payment

My husband retired in 1999 and used his lump sum payment to settle his share of indebtedness on the joint loan account. I then claimed the remaining interest as I had the beneficial use of the remaining indebtedness. The only aspect left unaddressed was having the loan account changed from joint names to solely my name. The interest on my account was identical to the interest payable by me had the lump sum payment not being made.

The ATO rejected my claim for a 100% of the interest and maintained that because the loan account was in joint names the interest had to be continued to be split 50/50.

There was no additional tax payable as my husband was on the same tax rate as me. The ATO penalized me 50% for being reckless and reduced that to 25% immediately prior to the AAT hearing. This is seen as simply an exercise in semantics as there was in effect no additional amount of tax to be collected.

The ATO collected the tax in dispute from me, penalized me 50% and imposed a General Interest Charge (GIC) at 13%. The ATO refused to amend my husband's return to allow him the 50% interest and thus has collected the tax twice.

Allocation of interest

There was a number of income producing assets financed through the loan account. Some assets were wholly owned by me but in the main were jointly owned.

The Commissioner did not like our basis of allocation and recast the figures. But what difference this made to our taxation affairs was meaningless in 1999 as we were on the same tax rate and taking a deduction out of one and including it in the other return resulted in no further tax being paid.

- **Penalties**

I was penalized 50% initially for being reckless. Immediately prior to the AAT hearing the rate of penalty was reduced to 25% for not taking reasonable care. The objection report addressed the grounds relied upon for the 50% reckless penalty and when the penalty was reduced to 25% the Commissioner refused to provide any grounds for considering that I had not taken reasonable care in preparing my return.

The only time any reasons were provided for the 25% penalty was in a submission to the AAT by the Commissioner. Prior to then the attitude of the ATO legal officer and audit representatives was that I had been told enough.

The following issues were not before the AAT, but were adjustments made as a result of the audit and resolved prior to the AAT hearing.

- **Stamp duty dispute**

Briefly stamp duty was incurred on two properties; one located in Canberra and the other on the Gold Coast. I claimed the stamp duty as deductible after consulting the Canberra office of the ATO on both properties. A private ruling had previously issued to one of the owners of the Canberra property that confirmed deductibility and that was provided to the auditor. Further the ATO enquiry officer telephoned the auditor, as did a technical adviser from the rulings section in Sydney, to clarify the ATO position with the auditor on the Canberra property. Their approaches were dismissed and the audit team formed their own position and completely disregarded the ATO position on Canberra stamp duty.

Eventually the Canberra stamp duty was allowed and the auditor advised that it would be allowed on this occasion, seemingly inferring do not try it again.

The audit report disallowed both amounts and recommended a 50% penalty be imposed for being reckless on the amount claimed on the Queensland property despite the audit team being made aware that I had relied on ATO advice. Eventually after persistent complaints concerning not conforming to ATO policy regarding relying on ATO advice the penalty was remitted.

As it turns out the Canberra stamp duty is deductible as it was a leasehold property while the Gold Coast duty is not deductible because it is freehold.

- **Depreciation of Buildings and Fixtures**

I purchased a rental unit in Canberra from a Government authority and the documents provided to me by the vendor included a depreciation schedule which the authority had engaged a quantity surveyor to prepare. That schedule was headed depreciation schedule and stated it was prepared having regard to ATO guidelines and had no disclaimer clauses to the effect that it could not be relied upon for taxation purposes. The audit team did not accept the surveyor's categorization of some items of plant and classified them as subject to capital write off and penalized me 50%. Eventually that penalty was remitted in full.

Later the audit team requested the quantity surveyor to revise his schedule after the auditors had directly spoken to the quantity surveyor. The revised schedule prepared after the 2000 year had a disclaimer clause saying it could not be relied upon for taxation purposes.

- **Interest to acquire shares**

We acquired shares in six blue chip companies being Coca-Cola, Amatil, Amcor, BHP, Coles Myer, NAB and Newscorp in1995 to the value of $39,970 out of borrowed funds.

There was no dispute over the borrowed funds being used to acquire those shares and taxable dividends had been returned as income prior to the audit that commenced in the 2000 year. That interest was disallowed on the basis that the shares were acquired solely for capital profit and a 50% penalty imposed for being reckless. Eventually common sense prevailed and the interest was allowed.

- **Minor issues**

As mentioned above the auditors were from Queensland and audited a taxpayer in Canberra. A $9 replacement rake was disallowed as the auditor would not accept that such a gardening implement would be supplied to a tenant to rake up leaves in Canberra. Plastic record storage boxes were disallowed on the grounds that we would have had insufficient records to require such storage. Trailer registration was disallowed as it was assumed we used the trailer in pursuit of a hobby when we had no hobby requiring the use of the trailer. It was simply a category of a registration that the Canberra registration branch allocated to trailers. A $4 Queensland tollway fee was disallowed as we had no receipt for placing the charge in an automated payment shute. However car costs for that Queensland trip were accepted as deductible.

- **My tax experience**

I have very little tax experience and that is confined to preparing my own tax return. The AAT considered I had kept meticulous records. I had year 10 education and was in my late 50's when the audit began. I had no tertiary education and worked in a government department as a clerk unassociated with tax.

I regularly attended the Canberra office of the ATO to clarify any tax concern I had. In essence, as far as tax is concerned, I was a simple lay person who endeavored to comply with the system.

The impact of the interaction between self-assessment and complex legislation and rulings.

In relation to redraw facilities there was no publicly available document issued by the Commissioner that expressed any opinion on how the Commissioner viewed redraw facilities until Public Ruling TR 2000/2 issued in March 2000. Tax Pack and the ATO rental guidelines to assist taxpayers prepare rental returns never addressed the matter.

The Commissioner's attitude was that TR 2000/2 simply re expressed long standing ATO policy. The audit of my affairs covered the 3 years 1997 to 1999 and there was no clarification of the Commissioner's view until March 2000 when the ruling issued. Audit staff and the ATO legal experts were asked to identify where the asserted long standing ATO policy had been previously stated concerning redraw facilities and they were unable to identify one document.

I was penalized 50% for being reckless in not following the content of TR 2000/2 and with the greatest respect in 1997 to 1999 that was impossible because it did not exist until 2000.

Paragraphs 48 to 53 of TR 2000/2 addresses alternative views held by experts that disputed the ATO view expressed in TR 2000/2. So to assert the view expressed in TR 2000/2 expressed a long standing view is somewhat absurd.

Under the heading of '**Further borrowings**' commencing at Paragraph 39 of the ruling it expresses opinions premised on wording to the effect of 'we consider' and 'in our view' which in essence only expresses a view rather than being based on an authorative position.

The view expressed there states that the additional deposits to the facility reduce the loan balance and the account holder has no further right to those funds. In effect the funds become an asset of the bank. In the final sentence of Paragraph 41 of the ruling the Commissioner contends that the bank (being the lender) can withdraw the facility at any time and thus the borrower has no rights to the additional funds. The loan facility balance upon which interest was calculated did go into credit and if the bank withdrew the facility I had every right to the credit balance. Further, despite being in credit I was still required to pay the monthly loan repayment which somewhat contradicts the non commercial view of the Commissioner.

The loan facility agreement spelt out the terms of the loan agreement and created a contractual right and thus a chose in action. That right is enforceable against the bank and it could not under any circumstances without reason withdraw the rights under the redraw facility. Both the AAT member and counsel for the Commissioner when this argument was raised stated neither of them had an appreciation of a chose in action in relation to contractual rights. This is even after I had addressed the matter in a written submission to the AAT at the initial stages of the AAT process and had also made representations to the Commissioner on the matter.

Naturally if there is a default by the borrower the bank will take action to protect any debt owed to it. If the bank wishes to revise the terms of the arrangement then it is required under the contract to give 28 days notice of the proposed contractual terms.

If the bank was to cancel the facility and refuse to grant the account operator the right to withdraw the additional funds deposited not only would it be commercial suicide but it would expose the bank to legal challenges because of the contractual right held by the customer in very specifically worded contractual terms.

In effect the redraw facility addressed in TR 2000/2 is not unlike interest offset accounts that are readily acceptable by the Commissioner expressed in TR 93/6. In interest offset arrangements the loan balance is reduced by any amount sitting to the credit of a nominated deposit account and the interest is then calculated on the net balance of the between the two accounts.

Even if a party withdraws funds from the deposit account and thus increases the interest payable on the loan account the interest paid has no regard to what the withdrawn funds were used for even if private. A private outgoing thus increases interest payable and is accepted as deductible for taxation purposes if the loan was drawn down for income purposes.

Similarly to interest offset accounts, the bank with redraw facilities applies the additional deposits to the loan balance to determine interest on the net amount. Like offset accounts the bank also provides on its monthly statement a separate figure for the amount sitting to the credit of the redraw facility, so a separate record is made of the additional deposits. Eventually the loan facility balance moved into credit due to the additional deposits that were made and no interest was payable. However despite being in credit we were still required to make the monthly loan repayment and if the position the Commissioner takes is correct then the loan would have been considered to have been repaid.

Throughout the loan document reference is made to redraws as being withdrawals from the account and in one section it refers to those withdrawals as being advances. Both the AAT and the Commissioner seized upon the word 'advance' and concluded the word meant a loan or further loan. In banking parlance those words are interchangeable and it is a very narrow view to say the meaning of those words is significantly different. Naturally if the additional deposits are taken into account by the bank in determining the net amount upon which interest is charged then it follows that any withdrawal/advance should also be taken into account in determining interest. It is plain common sense.

There was clearly no abuse of the tax system envisaged as we had deposited some $260,000 privately sourced funds to the loan facility which included the car scenario.

If my mother in law accepted my offer of repayment of the $19,910 on 14 August 1996 the problem that arose with the Commissioner concerning this arrangement would not have arisen. The $15,000 would not have been deposited to the redraw facility to save interest otherwise payable and thus benefit the revenue.

The Commissioner disregarded the overall arrangement and simply concentrated on the $19,910 redrawn on 8 October 1996 and formed the view that it was a new loan that was applied to a private debt. The earlier deposit was treated by the Commissioner as reducing the loan and not being applied to the redraw facility.

The Commissioner also formed the view that I was reckless and penalized me 50%. That is ludicrous.

Deane and Shepherd JJ in Ure V FC of T (1981) 11 ATR 484 expressed:

> '... the whole set of circumstances including direct and indirect objects and advantages which the taxpayer sought in making the outgoing ... it is "a common sense appreciation of all the guiding features which must provide the ultimate answer".

To simply only have regard to the withdrawal of $19,910, lacks the common sense that the above justices expressed. Regard must be had for **taxation purposes,** not on how a bank records its accounting entries, the overall purposes giving rise to how the bank account operates and how the customers used that account in the manner they operated to determine tax liability.

I continually asked the audit team for an explanation of different aspects contained in TR 2000/2 and they were unable to answer my questions and continually responded with we will have to seek clarification of that. If they could not understand what was supposedly expressed to be confirmation of long term ATO policy one ponders how a lay person would comprehend the policy at a time when nothing was expressed and TR 2000/2 had not issued.

Restitution of redrawn amounts

As mentioned there were 9 redrawn amounts. Six of those amounts were replenished to the loan account in a short time. I will refer to only one amount to highlight the inconsistencies in ATO expressed policy and how that conflicts with what is expressed in TR 2000/2 and a decided AAT case.

- **Restitution $8,000 Redraw 16 July 1996**

$8,000 was redrawn on 16 July 1996 and the amount was restored to the loan facility on 23 July 1996, just 7 days later. The funds used to restore the amount came from private sources and had nothing whatsoever to do with my income producing activities. The asserted private withdrawal was settled by funds privately sourced and the loan account was increased by a mere $5 for interest during that 7 day period. Besides the $8,000 deposit a further $3,130 was paid into the account at that time.

The Commissioner's approach was the $8,000 was redrawn and deposited to the cheque account and constituted a new loan. The $8,000 restoration was not the identical funds redrawn and thus the amount had to be applied to the loan balance and apportioned across usage of the overall balance of the account. The Commissioner treated the $8,000 as being used for private purposes and as the loan balance was well over $200,000 the majority of that restoration was applied to the income related proportion of the loan balance (8/208ths).

As a result instead of $5 being disallowed, the Commissioner's approach resulted in disallowance of interest in 1997 $249, 1998 $186 and 1999 $150 as being applicable to private use

In fact $7,166.05 of the $8,000 redrawn on 16 July 1996 remained unused and sitting to the credit of the cheque account when restitution was made on the 23 July 1996 and $303 out of that $8,000 had been applied to an income outgoing. The Commissioner talks of being practical and if this is the result of a practical application of the law that is ludicrous.

When the $8,000 was deposited from the loan to the cheque account, the cheque account had a small overdraft on one of the few occasions it went into overdraft. The $303 was only allowed as a deduction because no other funds had been deposited into the account to co-mingle. Shortly after the $303 was paid a further deposit was made to the cheque account from private sources any further income related payments made to the account were disallowed, despite there being ample funds in the account out of the $8,000 to meet the income related outgoings.

The Commissioner's own public taxation ruling TR 2000/2 at Paragraph 17 states:

> 'Where money borrowed and applied to a particular use ... is recouped in whole or part, in the sense that the amount or some part of it is recovered (e.g., on the sale of an asset purchased with borrowed funds) that part of the outstanding balance of the mixed

> purpose line of credit debt which has been applied to the relevant use can no longer be regarded as continuing to be applied to that use. Where borrowed funds recouped are repaid...those funds can no longer be regarded as continuing to be applied to that use ... those funds have ceased to be outstanding funds used for any purpose.'

The view expressed at Paragraph 17 is echoed again at Paragraph 45 of the ruling.

Clearly if the $8,000 was drawn down and applied to private purposes as the Commissioner maintains then the debt is settled when it is recouped from private sources. The debt simply does not exist any longer if what is contained in Paragraph 17 of the ruling has any merit. It should be noted that at the time of restoration $7,166.05 of the $8,000 had not been used for any purposes, so how the Commissioner concluded that the $8,000 had been applied for private purposes is questionable.

There is absolutely no difference between making restitution to the loan account when loan funds are applied to either an income or private purpose so long as restitution is from the source that the funds were applied. Restitution in any practical sense cannot be the identical funds withdrawn as 'A' might have bought an asset from 'X' and sold it to 'Y' and thus the restored amount are not the identical funds as originally drawn down.

In *Case 14/98* Paragraph 8, the AAT concluded that restitution was made to an overdraft account where funds deposited came from the source to which the drawn funds related:

> '...Even if there was evidence that the payment of the interest related to the investment property increased the overdraft when debited to the account it is likely that deposits made soon after *(from rental)* restored the overdraft to its previous balance'. *Italics added.*

The whole structure of the Income Tax Assessment Act is built around segregating and classing the flow of funds of a party between income, private, exempt and capital classes of transactions from both an income and expenditure perspective. The above examples support that view as does the wording of the Income Tax Assessment Act, see Section 51(1) in particular.

Despite asserting that a taxpayer cannot pick and choose to what segment of a loan debt a deposit to the loan account is to be applied, the Commissioner takes a somewhat different view and practical view at Paragraph 46 of the ruling.

The Commissioner expresses there that he will accept if a loan has been drawn down for say 80% income producing and 20% private usage, he will accept that two new borrowings can be made one for the income amount and the other for the private amount and settle to original debt. The taxpayer can then pay off the 20% private loan.

This is somewhat contradictory to what is expressed in the ruling as surely the individual borrowings settle the original debt then each new borrowing has to be split 80/20 if the Commissioner is being consistent.

- **$7,000 Redraw 5 December 1998**

In relation to the above redraw which was restored on 25 March 1998 again from private sources; this restoration was challenged by the Tribunal Member at paragraphs 51 and 56 of his findings. In essence he challenged my integrity.

The AAT Member took some 14 months to make his decision; he left the AAT shortly after handing down the decision in my case and had lost the assistant who sat in on the case and also the person who replaced that initial assistant.

In relation to the quote at Paragraph 51 of his decision it was submitted to him while the $7,000 restitution was made 25 March 1998, that there was an alternate to that. In that 3 loan repayments of $2,400 made prior to 25 March and as those 3 amounts were from private sources (direct from salary) it was submitted in the alternative that those funds should be first applied to private usage as an alternative argument resulting in the loan account being restored earlier than 25 March 1998.

I am not sure how the AAT member got confused but perhaps he was a little rushed prior to leaving his post at the AAT.

The Member was equally confused with the deposits to the Visa accounts in finding the funds had been co-mingled. There were no existing funds in the Visa account at the time the two lots of funds from the loan account were deposited to the Visa account.

Co-mingling of funds – direct trace – Section 50(a)

This aspect also falls under the second terms of reference re '**the application of common standards of practice by the ATO across Australia'**

Initially I argued that the redrawn funds were the re accessing of our own private deposits to the account and thus it did not matter for tax purposes to what those funds were applied. Alternately we argued that the redrawn funds deposited to the working accounts (Cheque/Visa) settled in part income related outgoings which should be apportioned in accordance with usage as decided in the High Court of Australia in *Ronpibon Tin.*

The loan account did not have any procedure to disburse funds and thus any redrawn funds were either deposited to a joint cheque account that in all but one occasions had an existing balance when it was in overdraft for a very short period or to a joint Visa account that never had any existing credit balance.

The Commissioner took the view that, and the AAT supported that view, as the redrawn funds were co-mingled with other funds in the accounts at the time when the redrawn funds were deposited and thus a direct trace of funds could not be established and that precluded deductibility under Section 51(1) of the Act.

The Commissioner relied upon the High Court of Australia decision in *Palvestments* to support his position.

The Commissioner's position was unambiguous that any borrowed funds had to be the specific loan funds that settled the indebtedness that arose from income producing activities. Any tainting of those funds resulted in the non deductibility of interest. The following examples were expressed by the Commissioner to the AAT in support of his view:

- If A had a $100 in his account and borrowed $100,000 to invest in shares and co-mingled those funds then the interest deductibility would be lost on the $100,000 as it could not be established out of what part of the $100,100 the $100,000 was withdrawn to settle the share purchase.
- If A withdrew $100 in cash from his loan account in cash to deposit at another bank to meet an income related out going, deductibility would be lost because A may have co-mingled the $100 with other funds on his person (in his wallet or pocket) and the deposit to the second bank may have been with different notes to those withdrawn from the loan account at the first bank.

If the Commissioner's view is correct then every party who draws down any funds would suffer disallowance as the largest of business would co-mingle non tax related funds e.g. exempt funds from grants or non taxable activities, where an account is used merely as a conduit for other cash flow activities that any party becomes involved. Every small business operating a bank overdraft would also suffer significant disallowances as often personal funds of one type or another are deposited. A cash business could never establish which funds settled which debt and thus interest on loan funds would be automatically denied.

The High Court of Australia decision in *Palvestments* solely dealt with Section 50(a) of the Act. That section has a direct trace requirement for 2 of the 3 classes of income it refers. The third class of income receives the benefit of a deduction for any interest not applied under the first two classes of income that require a specific trace. It disallows no interest or other deduction whatsoever. *Palvestments* disputed the Commissioner had the right to offset interest against dividend income as a direct trace was required and where funds had been co-mingled a direct trace could not be established and the High Court supported that position. The interest was then offset against the final category of income in accordance with Section 50(a) and thus no interest was disallowed in the Palvestments case.

Before Section 50(a) has any application at all the interest that is considered under that Section must first be allowable under Section 51(1) of the Act or any other Section of the Act.

In arguing for the wording of Section 50(a) to be read into the provisions of Section 51(1) such an approach has been rejected by the courts maintaining that words not appearing in the Section of the Act can not be read into the Section.

As far as a direct trace of the type applicable in Section 50(a) is concerned it is not a position adopted by the Commissioner in any published material or by any tax expert that I am aware. The Assistant Commissioner Personal Tax and the Australian technical leader for Personal Tax advised me after the AAT decision was handed down that it was not a position that the Commissioner supported and that the ATO representatives at the appeal were not authorized to argue that position. Those officers even disputed that Section 50(a) was even raised or argued at the AAT by the Commissioner.

I provided those officers with the written submission by counsel for the Commissioner to the AAT that confirms that the Commissioner argued Section 50(a) and a direct trace. The AAT decision at Paragraphs 43 to 46 and paragraph 69 of the decision removes any doubt as to the Commissioner raising and arguing that where funds were co-mingled deductibility could not be determined. Further the adjustments made by the Commissioner leaves no doubt what approach the Commissioner was adopting.

The two examples quoted above removes any doubt as to the basis argued by the Commissioner.

Despite that, these two very senior officers refuse to have the position corrected and still insist on a 25% penalty on the adjustments. It was concluded I had not taken reasonable care in not following long established ATO policy. Again I was penalized 50% for not taking reasonable care. Throughout the audit, objection and appeal stage the Commissioner continually changed his position. Not at any stage was Section 50(a) mentioned to me.

I could not appreciate the approach of the Commissioner and the approach continually changed and the level of adjustment continually changed. Further the Commissioner would not confirm with any clarity how the figures were arrived.

At the last call over of the case when I complained that the Commissioner would not confirm how certain figures were arrived at the Member asked the ATO representative to clarify certain matters. When that officer could not explain the figures he directed ATO officer to meet in Canberra at the AAT to clarify its position and figures. Two officers, one from Queensland and the other from Sydney, attended for two days. We appeared before the Member and confirmed explanations had been given and the basis of determining the figures was understood. Still there was no mention made of Section 50(a).

Prior to the hearing the ATO changed its position again which negated the meeting held at the AAT. Further disallowances were made to the outgoings so only two amounts were now allowed and only one of those two amounts for $303 was paid from the cheque account. No explanations were forthcoming apart from the amounts could not be established under Section 51(1) that they were allowable.

On the first day of the hearing, in presenting documents to support the position of the Commissioner, Counsel for the Commissioner submitted two case references, neither of which had previously been drawn to my attention, one of which raised the concept of Section 50(a) as the basis for the disallowances on the grounds the redrawn funds, apart from those two amounts, could not be directly traced. This was the only time Section 50(a) was drawn to my attention; if it reflected long standing policy of the Commissioner why was it not drawn to my attention previously? The ATO audit team, by continually changing position on outgoings that were considered deductible, was clearly not familiar with whatever they interpreted as the long standing ATO policy and then asserts I did not take reasonable care when they themselves continually changed position.

Case 14/98, relied upon for the Section 50(a) argument, was not drawn to my attention by the Commissioner until it was handed to me by the Commissioner's Counsel immediately prior to the AAT case otherwise I would have made strong representations to the Commissioner about that application of the law prior to the matter getting to the AAT.

The conduct of not informing me prior to the AAT hearing of what the Commissioner relies upon and not explaining the position he has adopted conflicts directly with the Taxpayers' Charter that states the position of the Commissioner and what is relied upon will be explained to the taxpayer. The actions of the Commissioner in regards to not attending to the matter when two senior officers state that a direct trace was not authorized to be argued and not advising me of relying on Section 50(a) prior to the AAT hearing in my view is deplorable conduct.

In the former Act prior to the 1936 Act the equivalent section to Section 51(1) instead of having a 'necessarily incurred' requirement the test it had was a 'wholly and exclusive' test. In the High Court case of *Ronpibbon Tin* the Commissioner argued for a direct trace or for a wholly and exclusive test and this was rejected. The High Court expressed that in determining deductibility and whether an expense has been necessarily incurred:

> '... the present s. 51(1) adopts a principle that will allow of the dissection and even apportionment of losses and outgoings. It does this by providing for the deduction of losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income.'

Ronpibbon Tin is the case that was integral in developing ATO policy recognizing the 'dissection and even apportionment' of outgoings where there is co-mingled usage and applies, not only to borrowed funds but also to motor car, telephone, electricity expenses.

The 1988 decision of *Foster J. in F. C. of T. V Reed* elaborated on the decision in *Ronpibbon Tin* quoting:

> ' In the result, the outlays of interest can be seen as servicing a number of objects indifferently......It is however established that apportionment is, in these circumstances not only permissible but required'

In dissecting and analyzing the redrawn amounts in accordance with the High Court of Australia's decision in *Ronpibbon Tin* decided, such an analysis results in $19,133 being able to be traced out of the $42,366.17 of redrawn funds (excluding the car arrangement), as settling income related outgoings that have been allowed as deductible by the Commissioner.

The disallowance due to co-mingling is completely contrary to ATO policy. In TR 2000/2 regarding a mixed purpose account the Commissioner states apportionment must be made on a fair and reasonable basis and that there is more than one approach to determining a fair and reasonable basis, see paragraph 15 and ensuing paragraphs.

TR 2000/2, at paragraph 46 the Commissioner states:

> '...we consider that a strict tracing approach is not appropriate' and adds '...what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of legal rights...'

In a response to a query raised by the National Taxation Liaison Group (NTLG), a peak advisory group of externals to the ATO, they were advised at their January 2005 meeting that the Commissioner's submission in my case did not represent a change in ATO policy nor in relation to the tracing of funds through a mixed purpose account. The response added that 'The basis of the decision was not the fact that the draw downs had become co-mingled with other funds in their cheque savings account'.

The ATO went on to advise the NTLG that their 'case was not based upon a more rigorous test of deductibility in subsection 50(a) ...'

The NTLG were advised that a reasonable basis of apportionment was adopted in my case and that it was clear from the AAT decision that the Commissioner did allow deductions for interest where it could be established that the drawn down funds were used for income producing purposes.

There were only two minor amounts allowed out of the total redrawn funds and neither of those amounts was included in co-mingled funds. One occasion was when the draw down was not deposited to the cheque account but was paid directly to a share broker. The other when there were no funds in the account because it was in overdraft when the $8,000 was deposited. The first payment from the account was for an income related outgoing after the deposit and it was considered there was a direct trace as the $8,000 was the only amount the $303 could have been paid from. As soon as other funds were co-mingled in that account, no further deductions were allowed despite there being remaining funds in the account from the $8,000 deposit. The ATO response to the NTLG from my viewpoint is distorted and inaccurate and deliberately misleading.

The factual scenario is completely different to the response to the NTLG and I believe that peak body has been deliberately misled. It also shows that the Commissioner would not assert to a professional group that Section 50(a) had any relevance whatsoever in interpreting Section 51(1).

Even when funds were not co-mingled in the Visa account disallowance was maintained. One is only left to ponder, because the Commissioner will not elaborate on what funds actually settled the $1,696 and $1,224 of income related outgoings paid from the Visa account if it was not the redrawn funds that were deposited to the account. The facts clearly are that it was only the loan funds that could possibly have settled those outgoings as there were no other funds deposited to the account or in the account at the time. The only transactions recorded on the statement were debits charged to the account as a result of Visa purchases.

In TR 2000/2 at paragraph 30, in relation to use of funds, the Commissioner states:

> 'use' in this context does not necessarily require a strict tracing approach to the application of borrowed money .... (but) is ascertained by reference to the advantages sought from the use of the borrowed funds ... (and then quotes from a decided case)

(that) in most cases, the purpose of the borrowing will be ascertained from the use to which the borrowed funds were put...

I only had two operating accounts being the Visa and Cheque account and those two accounts settled outgoings related to both income and private purposes. In fact estate agents directly deposited rental collections to the loan account for a period and so the cheque account had very little if any income related deposits to fund the substantial property outgoings. In effect the loan account also doubled as an operating account. With the Visa account there was no co-mingling and clearly the borrowed funds settled $1,696 and $1,224 of income related outgoings.

TR 2000/2 at paragraph 23 clearly supports the allocation of the interest between income and private:

> 'the taxpayer uses the redrawn funds wholly or partly for income producing purposes, that part of the accrued interest attributable to the redrawn funds used for income producing purposes is deductible.'

The Australian Technical Leader for Personal Tax has verbally responded saying that the funds may not have been co-mingled and is not prepared to address the matter. To me that lacks professional ethics and is far from the model litigant the Commissioner asserts that he is. Surely tax administration does not stoop to these levels.

The Income Tax Assessment Act does not require a taxpayer to have a bank account, let alone multiple accounts where each transaction can be isolated and directly trace specific use of funds to individual borrowings. A taxpayer is required to keep adequate records to support the substance of their return of income. A cash business could not operate in the scenario that the Commissioner argued in my case, if that business relied on borrowed funds. The position is absurd and it is noted that while the position was put by the Commissioner and challenged by myself at the AAT, that Section 50(a) had no impact on the interpretation of Section 51(1), the Member never addressed the situation at all in his decision. He virtually rewrote the Commissioner's submission and to me that is deplorable by an administrative body that is supposed to address the issues. Where does that leave the public who endeavor to comply and operate a business on borrowed funds?

Surely the two examples I quoted above involving the $100,100 and $100 cash transaction should have been sufficient to suggest to the Member that what was being put was impractical and absurd.

At the commencement of the hearing the AAT Member asked the Commissioner to explain how the Public Ruling system worked and one ponders the level of tax experience that Member had. To sit on a case for 14 months before making a decision and hand down a decision shortly before leaving the Tribunal makes one wonder.

- **Deemed partnership**

My husband and I are considered to be a tax partnership because we derive income from jointly owned property, being shares and real property. I also derive income from property solely in my name. The Income Tax Assessment Act does not place any requirement on a deemed partnership to have individual records confined solely to deemed partnership activities e.g. separate bank accounts. The Tax Act simply requires records to be kept to establish the net income of that deemed partnership. A deemed partnership is not a separate entity.

Therefore, does having a bank account with a redraw facility, whereby we can deposit our private savings and at the same time reduce the amount of interest payable under the loan, lead to those privately sourced funds becoming an assets of the deemed partnership? This was an argument put to the AAT and the Member never addressed the argument.

Case 12/95 95 ATC 175 – Fisher J - Deeming Provisions – Deemed Partnership

The AAT in Case 12/95 95 ATC 175 considered the deeming provisions of Section 6 of the ITAA and the application of Sections 90, 91 and 92 and at Paragraph 21 concluded:

> ' ...Against that background, and here the words of Fisher J are repeated, the deeming provisions are required by their nature to be construed strictly and only for the purpose for which they are resorted to and it is improper to extend by implication of such statutory fiction.'

The loan facility was used for a number of purposes including:

- To finance joint income producing property including share and real estate.
- To finance solely owned property of myself including real estate and shares.
- To deposit privately sourced funds to reduce interest otherwise payable.
- To give us flexibility to pursue investment opportunities including a Sydney unit which we paid a deposit on and the sale fell through.
- To make a short term loan to a friend.
- To have cash accessible if the need arose.

While the loan account may be in joint names that does not bring the loan account into the realms of the statutory fiction to which Fisher J. refers. The only aspect of the loan account that applies to that fiction is where it has been used to support the joint income producing activities as defined in Section 6(1) of the Act under partnership. That loan facility also financed income producing assets acquired solely in my name and simply having a joint bank account does not make those assets deemed partnership assets.

Therefore the private funds deposited to the loan facility are not partnership assets or liabilities and cannot be brought into that statutory fiction. The Commissioner also recognized that by allowing the interest incurred on the joint loan to me solely where funds were withdrawn and financed income producing assets solely in my name.

Magna Alloys and Research Pty Ltd v FCT (1980) 11 ATR 276: 80 ATC 4542 and 4549

The Court in the Magna Alloys expressed aspects to be taken into account in determining how a loan facility was used. These included the objective circumstances which human experience would judge to be relevant to the issue and the commercial explanations and concepts including a common sense appreciation of all the guiding features which must provide the ultimate answer.

Ronpibbon Tin

The case of *Ronpibbon Tin* which is raised in other parts of this document also alludes to the fact that the Commissioner is required to analyze, apportion and segregate the usage of a facility to determine how its overall usage impacts on tax liability. That includes having regard to the source of deposits and application of withdrawals from an account. Considering I had deposited substantially greater privately sourced deposits to the account that outweighed any perceived private withdrawals; then in my view no interest adjustment should have arose. In fact the private activity in the account reduced income related interest substantially.

When one views these decided cases and the way the ATO have administered my case and imposed penalty it is very difficult for an individual taxpayer to determine even how the ATO will apply its publicly stated application of the law. I see the position adopted by the Commissioner in TR 2000/2 as being very self serving and highly questionable. Throughout that Public Ruling it is couched with such phrases as this is 'how we see it' and 'in our view' which to me suggests it has a lot of feeling about it without being strongly supported at law. Then to penalize a taxpayer for not following its content when it was not even issued when the 1997-1999 were lodged is an uncompromising exercise of the contents of TR 94/4 that expresses the Commissioner's view of the remission of penalties.

- **$6,000 redrawn 21 October 1997**

$6,000 was redrawn on 21 October 1997 and at that time the cheque account had a balance of $6,389 making an overall balance of $12,389 and the following income related payments were made out of that balance:

30 October 1997	$1,100	Telstra shares
3 November 1997	2,400	Loan repayment
1 December 1997	2,400	Loan repayment
Sundry withdrawals income related outgoings	1,100	Approx.

There were sufficient privately sourced funds in the cheque account during that time to meet our private needs and if it was not for the above income related outgoings there was absolutely no need to make the $6,000 draw down.

The balance of the account on 1 December after the $2,400 loan withdrawal was $2,908.25 and at no stage was any private outgoings funded out of the $6,000 redrawn. Any analysis, apportionment or dissection of the account as alluded to by the High Court of Australia in *Ronpibon Tin* would support a conclusion that the interest was deductible. Instead 100% of the interest was disallowed due to co-mingling. One ponders what a mixed purpose bank account is that TR 2000/2 refers if it is not one that relates to some private activity in the manner the account is used.

In fact income related outgoings were again partly financed out of the private component of the balance of the cheque account. Our private activities were completely funded out of the private funds in the account at that time.

- **Continuing use of funds – Sale of BHP and NAB shares to fund Braddon**

Shares (NAB and BHP) were sold to assist in the funding of the acquisition of a rental property at Braddon. Loan funds had been used to acquire the shares in the first place and the proceeds from the sale of shares of $13,921 were deposited to the cheque account that had an existing balance of $101 and the interest was disallowed due to co-mingling despite the $13,921 being applied to the Braddon outgoings within a matter of days. The purpose for the sale of the shares and the continuing use of the funds was clear yet the interest was disallowed due solely to co-mingling, see paragraph 69 of the AAT decision. There was no other purpose for selling the shares other than to provide funds to settle outgoings required to acquire Braddon. No effort was made to apportion the amounts in the mixed purpose account (which would have confirmed 100% usage), rather deductibility was disallowed as the funds had been co-mingled with the $101.

There is no requirement for a taxpayer to even have a bank account for taxation purposes and, if the position contended in my case is the Commissioner's policy, how many bank accounts does one envisage for a taxpayer to have to open to continually segregate funds. As withdrawing cash is not acceptable to the Commissioner one would be continually required to purchase bank cheques to support deductibility as it would be too burdensome to open individual accounts for each transaction.

The position adopted in my case is totally unreasonable and unsound and what is more infuriating is that I am penalized initially 50% for being reckless which was reduced to 25% for not taking reasonable care when what has been decided conflicts with established case law and policy that the Commissioner has applied for a substantial number of years.

It is evident from the response by the Commissioner to the NTLG that the Commissioner does not want to associate himself with the Section 50(a) interpretation, yet his application of the law is now out in the community which will cause investors and business people a great concern. One only has to search the internet under Domjan Tax and the concern can clearly be seen.

- **Interest on shares.**

The interest on the loan to finance the acquisition in 1995 of the six blue chip shares that were still held when the audit was conducted in 2000, and from which taxable dividends were returned, was disallowed on the basis that the shares were merely acquired to derive a capital profit.

I had never been a share trader and investing in these specific shares was my initial foray into share investment.

The interest was disallowed and I was penalized 50% for being reckless.

The decision by the auditor was purportedly reviewed in depth by the audit manger and a technical adviser.

I protested to the Complaints Resolution section of the ATO and the officer told me that he knew the party who made the decision and was confident that such an error would not occur. The Commonwealth Ombudsman virtually took the same position and would not action my concerns.

Reason was eventually seen at the objection stage and the interest was finally allowed. A fundamental tax textbook would have confirmed deductibility and as to why such a basic technical error could be made by an auditor, audit manager and technical adviser and then to have the Complaints Resolution unit do nothing about my complaint makes one ponder about the quality control mechanism in the ATO.

This is fundamental tax law that in my view being a lay person makes one ponder about the ATO technical expertise. How many other taxpayers Australia wide has this Personal Tax Section in Queensland endeavored to ride rough shod over? To me that action is complete maladministration.

The Acting Assistant Commissioner would view the allowance of this interest as a concession.

In addition a 50% penalty was imposed on me for being reckless. If auditors have not got the technical knowledge to determine that the interest in this scenario is tax deductible then they should not be put in an administrative position to adjust a person's return of income let alone penalize a taxpayer. How a senior technical officer and audit manager could approve the adjustment is astonishing.

When complaints are made to senior ATO officials, including the Second Commissioner and nothing transpires this is appalling and reflects badly on the technical expertise of the ATO. This mistake is on a fundamental issue, but what concerns me more is the demeanor displayed by the officer handling the case.

Stamp Duty

As mention above the audit team disallowed stamp duty incurred on the purchase of a Queensland property and a Canberra property.

I advised the audit officers that my son had a private ruling regarding the deductibility of Canberra stamp duty and that I had confirmed before the audit commenced the deductibility with the Canberra office of the ATO. Notwithstanding the audit officer advised that the amount would be disallowed. The Canberra stamp duty is distinguished on income producing properties from stamp duty in other states of Australia because Canberra properties are leasehold.

I revisited the Canberra ATO enquiry area and saw the enquiry officer who had given me the original view. He telephoned the audit team and confirmed the ATO position to them. When the auditors still persisted he had an officer from the rulings team telephone the audit team and they still persisted.

Eventually reason was seen and the deduction was allowed.

In relation to the Queensland stamp duty that expense is not deductible. However I also attended the ATO and asked for clarification whether the amount was deductible. I was advised it was and went ahead and claimed the amount relying solely on ATO advice.

The claim was penalized by 50% for being reckless and GIC imposed.

I protested at the action and said the penalty was contrary to the Taxpayers' Charter as I relied on ATO advice. The ATO resisted remitting the penalty and GIC. They advised that an ATO officer would not make such a simple mistake.

Those audit officers made the same 'simple' mistake in disallowing the Canberra duty as did the Canberra enquiry officer who said the Queensland duty was deductible.

Again my representations were dismissed by the audit team, the technical people, the complaints Unit of the ATO and the Ombudsman.

Eventually the additional taxes were remitted as was the GIC on the grounds that there had been a misunderstanding. In light of the numerous representations made and complaints laid one ponders why the misunderstanding persisted for so long.

Depreciation of Buildings and Fixtures

The issue arose as a result of a depreciation schedule provided by the vendor that was a government department. I was provided with, and relied upon in good faith, a depreciation schedule, prepared by Quantity Surveyors, that clearly stated it was prepared having regard to tax guidelines. It had no disclaimer whatsoever that it was not to be relied upon for taxation purposes.

I relied upon it to prepare my returns and the Commissioner challenged the view adopted by the quantity surveyor. The revised schedule that was completed by the surveyor in 2001, after having the ATO contacting him and discussing its content, had a disclaimer that it could not be relied upon for taxation purposes.

The ATO officers had imposed 50% penalty and GIC on the amount and I protested due to the vagueness of the ATO directions put out in the rental guidelines on depreciation. The documentation under building write offs states valuations should be obtained from a quantity surveyor. Building write offs are in the depreciation section of the ATO publications.

I pressed the point on the confusion and that it was the later document that had the disclaimer clause and not the original document and thus the disclaimer could not be relied upon to impose penalty. Again a dogged resistance was met and it is evident that the documentation was never checked even after lodging the complaint, including to the Ombudsman drawing attention to inaccuracy of the facts relied upon to impose penalty.

Eventually it was conceded on the grounds that the matter had not been drawn to attention which is nonsense.

- **Minor issues**

The administrative stance taken on these minor issues referred to above lacked complete substance, common sense and professionalism. The officer was not prepared to clarify any matter and went ahead and made adjustments merely on innuendo. The adjustments were then penalized on the grounds that I was reckless. Eventually the amount was allowed and the penalties refunded.

The concern really is the actions inconvenienced us and if the adjustments were not challenged these pathetic work practices would have succeeded in totally unfair circumstances and by officers who were not prepared to acquaint themselves with the facts before taking unfounded action.

- **Dual Taxation.**

In relation to the loan account the interest incurred was allocated proportionately against the range of assets and having regard to the respective ownership rights of the individual assets.

The Commissioner reallocated my basis of apportionment due to two transactions which resulted in three areas of adjustment arising. Those 3 areas were the lump sum payment, the rejection by the AAT of the Commissioner's position that the funds drawn down to fund Downer were not continued to be used to finance the acquisition of my interest in Braddon (direct funds transfer). The Commissioner attended to the transfer of the proceeds from the disposal of the interest in Downer and reallocated the funds to the Braddon use in accordance with the AAT decision. However in attending to the allocation adjustments the Commissioner in my view has made an error of $398 which I argue is an allocation issue and if I am not entitled to the deduction then my husband is entitled to the adjustment.

Then there is the re-allocation stemming from the lump sum payment to the loan account by my spouse to settle his indebtedness. While I do not agree with the findings of the AAT on this matter that is beside the point because the overall tax impact is nil as the loan has been repaid, we were on the same tax rate in 1999 and it does not matter at all whether I am allowed the amount or my husband.

When raising the amended assessments on me regarding the Downer/Braddon transaction, the lump sum payment and the allocation difference the Commissioner as well as increasing my taxable income; he penalized the amount 50% and imposed GIC on the adjustment. He later remitted the penalty back to 25%.

The interest on all these adjustments were either allowable to myself or to my husband. In essence the Commissioner collected two lots of tax by not amending the return of my spouse and imposed penalty despite the unambiguous ATO policy contained in TR 94/7, Paragraphs 11 and 12, that compensating adjustments should not be penalized. This is so even where two different taxpayers are involved in the compensating adjustment.

I complained vigorously to the Commissioner and to the Ombudsman as well as to The Minister for Revenue and Assistant Treasurer, The Hon. Mal Brough, MP. There were significant sums involved in the dual taxation and I had to borrow to fund the payment of the second amount of tax due to the amended assessment and refusal to excise the amount from my spouse. While the issues may have still been open to dispute there was no reason to insist on the second amount of tax being paid.

The Ombudsman responded asserting no dual taxation had taken place; the matter had been considered several times and staggeringly advised, obviously from advice from a senior ATO officer, that the Commissioner had the right to challenge the content of his own public ruling before the AAT. To me that lacks any semblance of understanding of the purpose of the public ruling system and the lack of fairness in collecting two amounts of tax on the one adjusted amount, plus 50% penalty and GIC and forcing taxpayers into debt to pay the assessment.

I made a submission to the AAT regarding the content of TR 94/7 and the Commissioner ignoring its content and applying penalty to me. Notwithstanding that submission the Commissioner pressed on and argued for a 25% penalty.

The Member took 14 months to hand down his decision on 5 August 2004 and the substance of that decision I have substantial reservations with apart from the penalty aspect. Just prior to the handing down of the decision the Commissioner wrote to the AAT on 17 June 2004 without providing me with a copy of the representations, advising penalty should not have been imposed on the Braddon transaction and made no mention of the dual tax raised on the lumps sum payment and the allocation adjustments. That letter is referred to by the Member at paragraph 139 of his decision.

The Member never addressed the other areas of dual taxation and supported the imposition of a 25% penalty.

These concerns on dual taxation, the basis of relied upon for imposing 25% penalty had substantially changed as a result of the above letter to the Member quoted at paragraph 139 and I challenged why I was not given an opportunity to address the contents of that letter. I challenged the content of that letter by writing to the AAT, the Commissioner and the Ombudsman in a letter dated 20 August 2004 and a copy of that letter is attached. No response was received.

Inconsistent application of ATO policy on the lump sum payment.

My spouse paid off his share of the debt, from independent sources being his lump sum payment on his retirement from full time employment. I then took over responsibility for the debt funding the loan payments directly from my salary. I claimed no further interest than I would have if the lump sum payment had not been made. The only aspect we did not attend to was having the loan changed from joint names to my sole name. The view we had was that it was not material.

The Commissioner's attitude was that as the loan was in joint names the interest had to be split where it applied to jointly owned properties. The AAT supported the Commissioner at Paragraphs 57 to 62 of the decision by the Member.

The Member relied upon Case 63/96 to support his decision which was the case relied upon by the Commissioner. The factual scenario of that case is completely different to my case and conflicts with ATO standard policy.

That case involved where a taxpayer and his wife borrowed funds jointly to acquire jointly owned property. Originally the interest was claimed 50/50. The taxpayer refinanced the debt by borrowing 100% of the funds in his name only and applied the new borrowing to settle the joint debt. The Member in Case 63/96 correctly decided that the character of the second borrowing had the same purpose as the first borrowing and that he was only entitled to a deduction of 50% of the interest on the second loan.

The Commissioner also referred to *Cripps v the FC of T* and this was also relied upon by the Member at Paragraph 60 of his decision. However that decision expressed that the expenses relating to the jointly owned property had to be split 50/50 such as rates, repairs and general running costs but contrary to the findings of the member in these circumstances did not apply to interest. It was expressed in the Cripps' decision that if either joint owner funded their own investment funds then the cost of those funds was deductible to the party who incurred the cost of borrowing.

The following is an extract from the Case relied upon by the Commissioner and AAT that completely contradicts the position they adopted.

> In Cripps v F C of T 99 ATC 2428, Senior Member Block quoted from Senior Member Pascoe in Case 63/96, at Page 2440, paragraph 11 of Senior Member Pascoe's view:
>
> > 11. In my view, this does not necessarily mean that, as co-owners and persons in receipt of income jointly and, therefore, a deemed partnership for tax purposes, every expense relative to that co-ownership, no matter by whom incurred or paid, must be first brought to account in arriving at the net income of the partnership for the purposes of section 92 of the Act. For example, it would seem that where two people agree to jointly purchase property for rental purposes and one borrows money solely for the purposes of contributing his or her share of the purchase price, then the interest on that borrowing would be an expense of the borrower and deductible from his or her share of the net rental income. It would not be appropriate that such interest be required to be taken into account in arriving at the net income of the partnership. On the other hand where the parties jointly incur an expense related to the property as a whole such as rates, insurance and interest on borrowings to fund the joint equity, such expenses must be taken into account in arriving at the net income of the partnership notwithstanding that the payment of the expense was made by one of the partners only (see the decision of the Board of Review, cited as Case 66, 71 ATC 297).
> >
> > 12. Consequentially, the decision in this case depends upon the answer to the question of whether the interest incurred by the applicant was an expense of deriving his interest in the net income from the joint ownership or whether it was an expense of the joint owners in deriving the rental income and to be taken into account in arriving at the net income of the partnership.

The Federal Court in the 1988 decision of *Foster J. in F. C. of T. V Reed* also disregarded in whose name the loan funds were borrowed in and looked to who had the beneficial use of those funds. This principle was also referred to by Davies J. in Yeung & Anor v FC of T 88 ATC 4193.

In relation to who has the beneficial use of borrowed funds the same principle is supported at Paragraph 9. of the decision in case Q35, that expressed:

> ' ... No evidence was adduced by the taxpayer as to providing a basis for dividing profits and losses other than in equal shares, and therefore the action of the Commissioner in granting to the taxpayer deduction of 50% only of the partnership's losses is, we consider, eminently reasonable.'

Those finding are consistent with the content in the following ATO documents:

- The ATO Audit Rental Guidelines, produced by the ATO Property Cell situated in Western Australia, it is understood, to specifically states that having a loan in joint names does not automatically lead to the conclusion that the interest is required to be split 50/50.
- The Commissioner accepts equitable interest as out lined in paragraph 6 of Taxation Ruling TR 93/32. The view expressed is that rental income/loss from the rental property must be shared according to the legal interest of the owners except in those very limited circumstances where there is sufficient evidence to establish that the equitable interest is different from legal title.
- TD 92/106 relates to who should be assessed on interest received on a joint bank account. It concludes that the joint holders generally should be assessed. However if it is rebuttable to show evidence to the contrary that a party has beneficial entitlement to those funds the interest should be assessed to the beneficial party.

  The TD states the sort of acceptable evidence includes who contributed to the account, in what proportions the contributions were made, the nature of the contributions, who drew on the account and who used the money and accrued interest as their own property. It adds evidence might be provided that joint account holders hold moneys in the account on trust for other persons, e.g. dependants.

Despite these ATO documents the Commissioner in my view has applied a different technical approach to my case and it conflicts with case law mentioned above.

With the lump sum payment adjustment the A/g Assistant Commissioner, who was previously the Senior Technical Adviser when he first became involved in the case, refused to give effect to the AAT decision and attend to the penalty scenario. He verbally advised me he would not do so unless forced to attend to the matter.

With the lump sum payment adjustment the A/g Assistant Commissioner, who was previously the Chief Technical Adviser for Personal Tax in Australia, agreed 50% penalty had in fact been applied and refunded the 50% penalty, disallowed the $750 interest on lump sum payment amount to me, refused to remove the General Interest Charge, and refused to allow the $750 of reallocated interest to my spouse. He verbally advised me he would not do so. He also suggested that I should get on with life.

He was apparently unaware that my spouse had lodged an objection to have any interest disallowed as a compensating adjustment allowed to him. Despite being made aware of the protective objection being lodged by my spouse the A/g Assistant Commissioner still refused to action the matter and be reasonable.

My spouse then advised the A/g Assistant Commissioner if the objection was not determined he would seek to have it referred on to an appellant body as a deemed disallowance as provided for under the Tax Administration Act. The officer then had the objection determined and only addressed the lump sum payment adjustment in the objection report. The $398 for the other compensating allocation adjustment was not addressed at all.

As my spouse had paid the tax on the interest in dispute when he lodged his return because he had not claimed the deduction and I had been forced to pay a second amount of tax I requested the GIC to be remitted down to the amount applicable to interest on overpayments. I was paying 13% GIC while my husband received 5.2% on interest on overpayments.

The substance of my request for remission was that the Commissioner had never been out of pocket for the disputed tax and thus comparable rates of interest should apply and the fundamental criteria for imposing GIC was not present, that is the Commissioner had to be out of pocket of the disputed tax . The A/g Assistant Commissioner responded saying the matter had been addressed previously and he would not grant remission. The A/g Assistant Commissioner has been pressed for his reasons and to specify where the matter had been previously addressed if that is his view.

He had earlier addressed the matter when he refused to accept that double tax had been collected. Since conceding double taxation had taken place the Commissioner has not proffered one reason why he will not remit the GIC down to the rate applicable to interest on overpayments.

His earlier position was that Government policy was that GIC was to be imposed rigidly and it was only in exceptional circumstances that remission of GIC was ever intended to be granted. This conflicts directly with the content of IT 2444 that states officers do have the discretion to remit GIC and infers the discretion must be exercised in a reasonable manner having due regard to the facts.

In relation to remitting additional tax TR 94/7 makes it clear where there is no net tax payable as a result of compensating adjustments being made no additional tax is to be imposed. That public ruling gives a reasonable guide to whether that discretion should be afforded to GIC and common sense dictates it should as the Commissioner has not been out of pocket of the funds.

He has refused to date to respond to my request for an explanation and I have also protested to the Ombudsman on the matter. Past experience with the Ombudsman is that he simply echoes what has been advised to him by this A/g Assistant Commissioner.

In essence the amount of remission is absolute peanuts but the attitude displayed by the Commissioner and his staff has been hard nosed and in my view appalling.

In relation to the $398 allocation issue the A/g Assistant Commissioner refuses to accept that the difference relates to re-allocation and will not excise the amount from my husband's return or refund the penalty imposed on me of 25% on the amount and also remit GIC.

The total adjustment for interest in 1999 is $2,256 of which $1,107 has been disallowed as private and those figures are agreed. There is no other disallowed interest and that leaves $1,149 of the adjustment to re-allocation of which $750 relates to the lump sum being re-allocated to my spouse. So a simple reconciliation leaves $398 unexplained. It is more than evident that it comes about due to reallocation on the ownership percentages as there is no other disallowed interest and the Commissioner has merely allocated the allowable interest between me and my husband having regard to ownership. His figures do not balance by the $398 and I have even identified to the A/g Assistant Commissioner where on his allocation schedule I consider the discrepancy arises.

He will not address the matter and continually states the matter has been addressed. My husband has now lodged an appeal to the Small Claims Tribunal to have this matter rectified or explained and that incurs costs which I consider has come about from maladministration.

On the 16 September 2005 my husband wrote to the A/g Assistant Commissioner authorizing the Commissioner discuss any aspect connected with the objection that had been disallowed.

I wrote to the A/g Assistant Commissioner on 29 November 2005 addressing where the discrepancy existed and advised him it was apparent from a reconciliation his figures were inaccurate. As Christmas was approaching I had telephoned him in a final endeavor to resolve the figures. He was absent and I left a message to return my call.

On 19 December 2005 I telephoned again and the female officer who answered the telephone said the A/g Assistant Commissioner was on sick leave and would be unlikely to return until after 10 January 2006 when the appeal had to be lodged.

I contacted the nominated officer on the objection report of my spouse and after some discussion he referred me to the officer acting in the A/g Assistant Commissioner's position. That officer took no interest whatsoever and advised that my husband should go ahead and lodge his appeal. He said the A/g Assistant Commissioner had full control of the matter and had expressed the view that I had been given enough concessions and no further concessions would be afforded. The mind set of the officer was very evident.

I advised that was unsatisfactory and the issue really involved what I saw as an arithmetical error. I added the issue had been drawn to the A/g Assistant Commissioner's attention over an extended period. It had been again raised specifically when seeking my spouse's objection to be determined and had been again raised in my letter dated 29 November 2005. I maintained it was completely unsatisfactory for the Commissioner to expose my husband to incur costs in lodging an appeal in that situation.

I emailed that officer the work sheets highlighting the area where the perceived error was. He advised he would endeavor to contact the A/g Assistant Commissioner and get back to me. He emailed me and advised the A/g Assistant Commissioner would respond before the expiry of the appeal date.

He responded 5 January 2006 to my spouse by simply stating the matter had previously been addressed and in a similar letter to me advised the same, but added that because I was referring to my husband's matter in correspondence, he could not discuss the matter. He apparently had failed to recall the letter of authority provided to him from my husband dated 16 September 2005. He also overlooked the occasions that he asked my husband to attend interviews in my presence when he was discussing the impact of the adjustments made in my case.

Again the A/g Assistant Commissioner endeavored to use a mundane excuse for not addressing the issue. This type of administrative conduct is unacceptable by any standard and contradicts the service standards espoused in the Taxpayers' Charter that is supposed to be uniformly adopted. At the initial interview I had with that officer after the AAT I raised the issue of the compensating adjustment and he advised me he would examine the matter. At our next meeting he could not recollect what aspects to which I had asked him to give consideration. To me that highlighted the lack of endeavor by this senior officer to bona fidely address the situation.

This situation is similar to when an AD(JR) request was made seeking reasons and the officer advised it would not be provided because the request was addressed to the wrong officer. That lack of action conflicts directly with the Taxpayers' Charter that expresses an ATO officer will explain the situation or assist in getting matters addressed.

The AAT on 5 August 2004 directed the Commissioner to agree the figures with me to give effect to the decision. We have agreed the 1997 and 1998 figures but the officer refuses to even contact me to discuss the difference of $398. He sanctioned the re-allocation adjustment and saw it as material at that stage and I see it as equally material at this stage. To a level headed person we are talking tax of 40% approximately on $398 or $160.

- **Penalty**

Initially I was penalized 50% for being reckless in not following the Commissioner's view in TR 2000/2 when preparing my 1997, 1998 and 1999 returns of income, which was difficult because the ruling was not in existence when I lodged my 1997 to 1999 returns of income. It issued on 1 March 2000.

The penalty was subsequently reduced to 25% for not taking reasonable care. When I pressed the audit and ATO legal teams for their reasons why they considered a 25% penalty warranted, I was told that I had been given enough information and that reasons would not be provided; so much for the Taxpayers' Charter. Reasons for the 25% penalty were not provided until the Tribunal member directed the matter be addressed. Again this highlights the stubbornness I have had to endure.

I then asked the officers where the principles enunciated in TR 2000/2 concerning redraw facilities were previously made available for the community to know the Commissioner's view. The ATO officers were not able to identify any ATO publication. Further, Tax Pack and the Rental Property Guidelines were silent.

The Commissioner's view as stated above is premised on the bank being able to walk away from the loan agreement as far as redraw facilities is concerned and prior to the issue of TR 2000/2 I am not sure how a taxpayer would have envisaged that.

Further Section 50(a) has never been relied upon by the Commissioner to disallow interest under Section 51(1) and again how is a reasonable person to know that the Commissioner would recant from his position.

The AAT at Paragraph 134 in supporting the imposition of a 25% penalty relied upon the following:

1. Not following up TR 93/D38 - that draft ruling had nothing whatsoever to do with redraw facilities.
2. The rules in TR2000/2 merely reflect established principles under the general law – that neglects the situation that the Commissioner had not made that view publicly known and fails to note that redraw facilities are only a recent innovation. It is a self serving statement without any endeavor to identify where any such 'established principles' had been made known or was readily ascertainable. TR 2000/2 acknowledges experts had conflicting views, see Paragraphs 48 to 52.
3. That I had some experience in taxation matters – a self serving statement. I had Year 10 education, no tertiary qualification, never involved myself in taxation matters apart from preparing my own tax return which I did by frequenting the Canberra ATO for assistance.
4. Intelligent enough to seek expert assistance – TR 2000/2 at Paragraphs 48 to 52 unambiguously expresses that there were a number of experts in the community at the time that had an alternative view to what the Commissioner expressed in TR 2000/2.
5. Failure to obtain the final Taxation Ruling - being TR95/25, that ruling did not address redraw facilities and is completely irrelevant.
6. As far as Section 50(a) is concerned that has never been the Commissioner's policy in interpreting Section 51(1).

When the weight of the above is viewed in the context of the guidelines on imposing penalty contained in TR 94/4 it is more than evident to conclude no penalty should be imposed and at no stage has the Commissioner taken any account of whether there were reasonable grounds for adopting the position I took.

The ATO officers have not once taken the criteria set down in TR 94/4 and applied that criterion to the facts of my case. That again is an abuse of administrative power as officers are required to apply the ATO view and not set their own standards.

Further there was absolutely no tax mischief ever intended given the amount of private funds that I had put into the redraw facility $260,000, the restitutions to the loan account and the requirement to pay income related out goings from the cheque account.

Giving the above proper weight in considering whether to remit the additional tax under TR 94/4 I believe a reasonable person would support that a culpability penalty should not be imposed and definitely not to the extent of 25%.

Summary

I appreciate this submission is lengthy but it is only so because of the abnormally high number of incidents that have occurred in this case. I would hate to see other small taxpayers put through the torment, expense and inconvenience of what has transpired above.

In essence I believe my submission highlights poor and inconsistent technical decision making, lack of regard to ATO policy contained in public rulings and other ATO policy documents, unwillingness to properly address representations, a disregard of the undertakings given by the Commissioner in the Taxpayers' Charter and abuse of the remission guidelines for the imposition of GIC and penalty.

It also highlights how ineffective the Complaints Resolution Unit of the ATO is and questions the impact of the Ombudsman.

In effect over 3 years adjustments to interest which are highly disputable were made that equates to $960 tax. At the AAT hearing the Commissioner was represented by junior counsel, the case took 4 days and was heard in Canberra. The Commissioner flew in Counsel from Sydney, who arrived half a day late for the hearing due to fog, a senior officer from Upper Mt. Gravett and at least two senior ATO legal people from the Tax Network Counsel in Sydney. Accommodation was also required for those persons. In addition there would have been a number of briefings with counsel and to collect that $960 tax some $25,000 in estimated costs would have been spent. In my view that is deplorable and the matter still has not finished.

Once again I apologize for the length of the submission but I believe you will find it informative. If you have any queries do not hesitate to contact me.

Yours faithfully

W. D. Domjan

Attachments.
1. Decision of AAT handed down 5 August 2004
2. Letter to ATO – Tham Dao – dated 20 August 2004