QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	Gallagher v Queensland Building Services Authority [2010] QCAT 383
PARTIES:	Mr Dean John Gallagher v Queensland Building Services Authority
APPLICATION NUMBER:	QR155-07
MATTER TYPE:	General administrative review matters
HEARING DATE:	19 July 2010
HEARD AT:	Brisbane
DECISION OF:	Mr Richard Oliver
DELIVERED ON:	18 August 2010
DELIVERED AT:	Brisbane
ORDERS MADE:	1. The decision of the respondent made on the 16 August 2007 is set aside. 2. The applicant be categorised as a permitted individual. 3. The application for an extension of time to review a decision granted. 4. The application to review the decision to categorise the applicant as an excluded individual is dismissed. 5. Application OCR092-10 and QR309-09 are to be consolidated into QR155-07.
CATCHWORDS :	Excluded individual and permitted individual; re-registration of a company for the for the purposes of winding up; whether the applicant was a director of the company within 12 months of the relevant event; whether winding up of company for the benefit of a creditor; consideration of "benefit"; whether reliance on generic advice provided by applicant's accountant amounted to reasonable steps; the extent to which the respondent relied on the evidence of the applicant without corroboration in considering the application; distinction between reliance on evidence as opposed to submissions made to a court.

APPEARANCES and REPRESENTATION:

APPLICANT :	Dean John Gallagher represented by Mr Fleming QC, of counsel instructed by Morgan Conley Solicitors
RESPONDENT:	Queensland Building Services Authority represented by Mr Robinson, solicitor of Forbes Dowling Solicitors

REASONS FOR DECISION

1. Mr Gallagher was a former Director of Dean Gallagher Developments Pty Ltd ("the company"). The company carried on the business of building and developing principally commercial sites, tilt panel buildings and showrooms.

2. On 1 December 2006 the company was ordered to be wound up with liquidators appointed. As a consequence of this the applicant became an excluded individual pursuant to section 56AD(4) of the *Queensland Building Services Authority Act* ("QBSA Act"). He then applied to become a permitted individual pursuant to section 56AC. The Queensland Building Services Authority (the Authority) considered the application and refused to categorise him as a permitted individual.

3. This is an application to review that decision.

4. The applicant also filed an application to renew the Authority's decision to categorise the applicant as an excluded individual in file OCR155-07. As this application was out of time the applicant filed an application for an extension of time to file this review application. Both these applications were considered during this hearing.

Background

5. In March 2004 the company ceased trading. On 30 July 2004 the company lodged its final tax returns and on 9 September 2004 it lodged an application with the Australian Securities and Investment Commission to be deregistered. At the time of the application to deregister there were no outstanding creditors and in particular, no notices from the Australian Tax Office ("ATO") for outstanding tax.

6. At all times during this process, Mr Gallagher said, and I accept, he relied on the advice and assistance of his accountant Mr Andrew Daley of Income Tax Professionals ("ITP") in Southport. It was on his advice that the company was deregistered and the whole associated business with the company was restructured. The company, after the application for deregistration had been lodged was formally deregistered by the Australian Securities and Investment Commission on 19 December 2004.

7. In 2006 the Australian Tax Office undertook an investigation into the company's affairs, despite the fact it was deregistered. The result of that investigation raised two concerns with respect to the company's distribution of income in the 2003 and 2004 financial years.

8. The first issue of concern was the failure to disclose partnership income of $377,132.00 as a result of a joint venture with Halfpenny Family Trust. Both the company and Halfpenny had submitted a partnership tax return showing an income of $754,264.00 which had been distributed to the company and Halfpenny in equal shares.

9. It was therefore alleged by the ATO that the company had understated its income in the 2003 financial year by $377,132.00.

10. The second issue was the payment of $968,750.00 to Atlas Trustees Ltd ("Atlas"), a trust fund, to secure any contingent liabilities for costs relating to the employment

of staff in the company. These potential costs are said to be covered by an Employee Entitlement Fund ("EEF") to provide for any future liability for compensation claims, payment disputes, legal costs, and industrial disputes. The EEF was set up at a time when there was an expectation that the company would continue to expand as it did, after the restructure in the mid 2000's.

11. The money paid to Atlas was treated as a deductible expense in the company's accounts however, the ATO, after a subsequent investigation, formed a contrary view. This expenditure was then added back and the ATO issued a new notice of assessment on 20 October 2006 requiring the company, to pay to the ATO $251,516.00. In an addition to that, penalties were claimed in the sum of $62,879.00.

12. To pursue this tax liability and prior to the issuing of the notice of assessment, the ATO made application to the Federal Court on 16 October 2006 for an order that Dean Gallagher Developments Pty Ltd be reregistered. The company was reregistered and as a consequence of the it being reinstated the Applicant once again became a director of the company pursuant to section 601AH(5) of the Corporations Act 2001. At that same time, an application was made to wind the company up although, no amended assessments had been issued by the ATO. This application did not proceed and was adjourned and then, on 17 November 2006 the company received the amended assessments referred to above.

13. An application for the winding up of the company was heard before Justice Dowsett of the Federal Court and on 1 December 2006 the Court made an orders appointing Gregory Michael Maloney and Peter Ivan Felix Geroff as liquidators and that the company be wound up.

14. On the making of the winding up order, by virtue of section 56AC(4) of the Queensland Building Services Authority Act ("the QBSA Act") the Applicant became an excluded individual for the relevant company event, being the appointment of liquidators.

Application to be a permitted individual

15. On 22 December 2006 the Applicant applied to the Authority to be categorised as a permitted individual pursuant to section 56AD of the QBSA Act. That application was made through his solicitors at the time, Home Wilkinson Lawry, Lawyers.[1] In that correspondence the Solicitors set out in detail the history of the deregistration of the company, its reinstatement and the pursuit by the ATO of both the alleged non disclosure of income in 2003 and the payment to Atlas Trustees Ltd. The purpose of this lengthy explanation was to satisfy the criteria in section 56AD(8) of the QBSA Act which provides:

"The authority may categorise the individual as a permitted individual for the relevant event only if the authority is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event."

16. In response to that application, the Authority, on 16 August 2007 refused to categorise the Applicant as a permitted individual for the relevant event [2].

17. In its original statement of reasons[3] the Authority set out a number of findings of fact, largely taken from documents provide to it by the ATO, which covered the

[1] Statement of reasons ("SOR") 6
[2] SOR 26

period between 22 December 2006 and 5 April 2007. All of those documents are annexed to the Authority's statement of reasons. In reliance on those documents the decision maker set out the reasons for decision in paragraph 3.1 of the statement of reasons and are as follows:

"The Authority was not satisfied, on the basis of the material contained in the Applicants application to be categorised as a permitted individual that the Applicant had taken all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. The Authority repeats and relies on the reasons set out in its letter dated 16 August 2007".

18. It is immediately apparent from this statement that no particulars are provided in support of the conclusions reached by the Authority in coming to that decision.

19. In a subsequent amended statement of reasons dated 16 September 2009, which were the reasons relied on at the hearing, the Authority amended the that reason (referred to above) and inserted more detail as to why the decision to refuse to categorise the applicant was made. In particular, the Authority focussed on the winding up order made in respect to the company and that it was insolvent due to the tax debt which arose following the amended assessment two years after deregistration and said this:

"the reason the amended assessment occurred was due to:

(a) failure to disclose partnership income in the amount of $377,132.00; and
(b) wrongful claims for deduction of payments to a New Zealand company said to be employee superannuation in the amount of $968,750.00."

20. The statement of reasons stated that the circumstances that existed which resulted in the relevant event, as defined in section 56AC(2) was the incorrect completion of tax returns and the entry into the scheme, being the EEF.

21. It is contended in the statement of reasons that the Applicant failed to provide any evidence that any of the following reasonable steps were taken:

a) Ensuring the returns prepared and lodged for the company truthfully affected the company's affairs. In this regarding the outline of submissions from the ATO clearly demonstrates why the ATO considered that the returns were not correct.
b) As there was omission of income from the return, as identified by the ATO, there is no evidence of any steps taken to ensure that the return was accurate, or indicating why the Applicant omitted the income on the return.
c) As the claim for deduction was obviously contentious, the obtaining of specific legal and accounting advice. (note the documentation provided by the Applicant after the initial application includes generic advice from lawyers not briefed by the Applicant and addressed to unrelated people).
d) Obtaining a Private Ruling from the ATO prior to entering the contentious scheme.

22. During the course of the cross examination of the decision maker, Ms Leean Tyler it became apparent that, contrary to what is asserted in paragraphs 3.6(a), and (b) of the statement of reasons, the failure to disclose partnership income in the amount of $377,132.00 was not the basis of the issuing of the amended

[3] Dated 10 December 2007

assessment and therefore not a ground upon which the company was ordered to be wound up.

23. Prior to preparing the statement of reasons, Ms Tyler prepared a memorandum[4] in which she effectively sets out the history of the company's reinstatement and pays particular attention to counsel's outline of submissions made to the Federal Court. From that material, it was concluded that "the ATO did determine that the company owes the ATO in the amount of $377,130.00 to the ATO". The ATO's position was in fact that the company under declared its income for the 2003 financial year by that sum and this did not amount to a tax liability.

24. As it transpired, the ATO did not come to any conclusive view about this issue due to the loss of records through a flood event on the Gold Coast. Also reliance, to a degree, was placed on statements by the company's accountant Mr Daley, that income had been placed in the wrong column on the tax return and that this did not make any difference to the overall assessable income of the company.

25. After these matters were pointed out to Ms Tyler in cross examination by Mr Fleming QC, Counsel for the Applicant, she conceded that the relevant event, being the liquidation of the company, did not come about as a result of the company's alleged failure to disclose income in the 2003 tax year.

26. Further, Mr Robinson, solicitor for the Authority, candidly accepted in his final submissions that in considering this matter afresh[5] the Tribunal should only have regard to the second issue being to the ATO's contention that the payments made to Atlas Trustee's Ltd was not a deductible expense. Therefore this payment should have been included in the company's assessable income, which then gave rise to the further tax liability set out in the amended notice of assessment.

27. For the decision maker, or this Tribunal standing in the shoes of the decision maker, to categorise the Applicant as a permitted individual, section 56AD(8) must be satisfied. His Honour Judge McGill in Younan v Queensland Building Services Authority[6] set out the steps that need to be taken. He said:

> *"The section speaks about taking reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event. The tests in section 56AD(8) requires first, the identification of the relevant event; second, the identification of the circumstances that resulted in the happening of a relevant event; third, a consideration whether the relevant individual took all reasonable steps to avoid those circumstances coming into existence; and, if satisfied of that, fourth, a decision whether to categorise the individual as a permitted individual.*
>
> *What were reasonable steps depend on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had. It is not a question of whether he did everything possible to prevent the circumstances from arising or whether they would not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight".*

28. In applying that test, here the relevant event is the liquidation of the company.

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[4] SOR 25 dated 5 April 2007
[5] Queensland Civil and Administrative Tribunal Act section 22
[6] (2010) QDC158

29. It is now accepted by the Authority that the circumstances that gave rise to that relevant event is the issuing of an amended notice of assessment as a consequence of the ATO's rejection of the payment to Atlas Trustees Ltd as a tax deductible expense.

30. The question then is whether the Applicant, as a Director of the company took all reasonable steps to avoid those circumstances coming into existence. That is, the setting up of the EEF and the payment of the money to Atlas Trustees Ltd.

31. In support of the contention that the Applicant did take reasonable steps to avoid the coming into existence of the amended notice of assessment the Applicant relies on the advice given to him by his accountant and to the advice given by Nicholas Petroulias, a legal and financial advisor.

32. He was initially told by Mr Daley that payments to the EEF were deductible in accordance with section 8.1 of the Income Tax Assessment Act. Mr Daley referred him to Mr Petroulias who was at the time, a business consultant in a taxation, was a legal practitioner admitted to practice in Queensland and Victoria, a former Solicitor of a reputable national firm Mallinsons Stephens Jacques, was a former assistant commissioner and senior tax counsel in the employer of the ATO and was at the time working as private legal and financial advisor. Mr Petroulias advised the Applicant, through Mr Daly, that based on the advice given to him by prominent barristers with particular expertise in taxation law, the EEF was a legitimate investment and was a tax-deductible expense.

33. The Applicant has provided to the Tribunal generic copies of the legal opinions provided by those barristers [7].

34. It was on the basis of that advice, Mr Gallagher swears, that the company made the payments to Atlas Trustee's Ltd.

35. Mr Gallagher was cross examined as to the number of employees the fund sought to protect, whether sub contractors were involved and whether there were any liabilities or contingent liabilities at the time the fund was set up which might result in the need to access the fund. Despite this line of enquiry, which was rather speculative, there is no evidence to suggest that the fund did not have a legitimate purpose at the time it was established. No positive evidence has been led to the contrary.

36. The criticism of the Authority with respect to the evidence provided by Mr Gallagher as to the legitimacy of the payment is that the advice given was of a generic nature and did not specifically apply to the company's particular circumstances. That criticism may have some validity in the absence of Mr Gallagher, or the company, obtaining specific advice from Mr Daley or Mr Petroulias. However, once they were engaged, then in my view it is reasonable for him to not only rely on their independent advice, but also the basis of that advice which is the respective opinions from the barristers, which opinions go to the question of the tax deductibility of the payment.

37. In my view, the fact that both Mr Daley and Mr Petroulias were in possession of this advice, advised Mr Gallagher that on the basis of that advice, although generic in nature, it is sufficient to satisfy the criteria that he did take reasonable steps on behalf of the company to enter into the scheme. The scheme documentation itself provided by Atlas Trustees Ltd also supports the benefits that the Applicant believed the company would get by entering into the scheme.

[7] See exhibit DJG6

38. Also of interest was the respondents approach to the evidence in support of the application to be categorised as a permitted individual. Ms Tyler when considering the material put before her in the application, said would only accept Mr Gallagher's statements or the information from the his solicitors if it that evidence was corroborated by other evidence. Strangely, she did not regard the applicants explanation of the circumstances that led to the winding up of the company, or his evidence as to the "reasonable steps" taken as evidence. She was questioned at length by Mr Fleming and did not resile from this position. Clearly, it is every decision maker's duty to consider and weight up the evidence of an applicant and not disregard it merely because it lacks corroboration. On occasions this may be the only evidence before the Authority in specific issues.

39. The evidence then in this case clearly supports a conclusion that, in terms of section 56AD(8), the applicant has taken all reasonable steps to avoid the coming into existence the circumstances, being the issuing of the amended assessment for the claiming non deductible expense, which resulted in the relevant event being the winding up of the company. As a result, I'm of the opinion that the Applicant ought to be categorised as a permitted individual and the Authority's decision should be set aside.

Application for an extension of time

40. On 1 April 2010 the Applicant filed an application in proceeding number OCR092-10 seeking to review the decision of the Authority made on 11 December 2006 whereby, by reason of the liquidation of the company he was categorised as an excluded individual pursuant to section 56AF of the QBSA Act. This application is well out of time because it must be brought within 28 days of the decision[8]. The Applicant has filed an application for an extension of time to commence this review application.

41. The application for an extension of time is opposed. The Tribunal has power to provide relief from procedural requirements. Section 61(1) provides:

The tribunal may, by order—
(a) extend a time limit fixed for the start of a proceeding by this Act or an enabling Act; or
(b) extend or shorten a time limit fixed by this Act, an enabling Act or the rules; or
(c) waive compliance with another procedural requirement under this Act, an enabling Act or the rules.

42. Section 61(3) provides that the Tribunal can not extend time if it would cause prejudice or detriment not able to be remedied by appropriate order for costs or damages to a party to the proceeding.

43. The accepted principles to be considered on an application for an extension of time are:

a) Whether there has been a reasonable explanation for the delay in filing the application for review
b) Considering whether the granting of extension of time would be fair and reasonable in all the circumstances
c) Whether there has been any prejudice suffered as a result of the delay

[8] Section 86(2)(b)

d) That the substantive application review has some merit[9].

Delay

44. There is obvious delay in bringing this application however, the delay is explained in an affidavit by Mr Hamilton which supports the finding that Mr Gallagher was not aware of his rights at the time of being advised that he was an excluded individual and further, there was no notification in the letter of notification of 11 December 2006 that he had a right to review the decision. What is important, in my view, is that he did apply to become a permitted individual and therefore in considering that application, the authority would have considered the same facts and circumstances with respect to Mr Gallagher being categorised as an excluded individual had an application for review been filed in time. In my view although there is considerable delay, the delay should not disentitle him to seek a review of this decision.

Is it fair and equitable

45. The circumstances surrounding the winding up of the company and the findings above as to Mr Gallagher's involvement in the relevant event does raise in my view a question as to whether or not he should be categorised as an excluded individual. The company had ceased trading, was deregistered and only reinstated by the ATO. These events were outside the applicant's control and it seems, at least at face value for the purposes of this application, the Tribunal would have to accept that it was reasonable for him to act on the advice he was given by both Mr Daley and Mr Petroulias. Without making any decision that his application to review would be successful, I'm of the opinion that it is fair and reasonable and equitable for him to at least be given an opportunity to review that decision.

Prejudice

46. There can not be any prejudice on the part of the Authority. The Authority is armed with all of the necessary facts and circumstances to consider the application to review his categorisation as an excluded individual as it is with respect to his application to review the refusal to categorise him as a permitted individual.

47. It is submitted by the Authority that there is prejudice to the public through the rendering redundant the licensing exclusion for 5 years. The prejudice in the consideration of this application must be to the Authority in that given the considerable delay they are not in the position to properly resist the application for review that is not the case here. I find there is no prejudice.

Merits

48. The application for review does have some merit. This success will turn on whether or not it can be said that the applicant was a director or influential person of the company within 12 months preceding the relevant event. The applicant argues that the date of the relevant event is the commencement of the winding up which is the date the winding up application was filed. This date is 15 June 2006. The argument is that as at 15 June 2006 the company was not in existence having been deregistered on 14 December 2004, the applicant was not a director and did not become a director until 16 October 2006, there were no creditors of the company and the ATO was not a creditor at that time.

[9] Hunter Valley Developments Pty Ltd v The Honourable Barry Cowan, Minister for Home Affairs Environment 3 FCR 344

49. In addition, the Applicant was not a Director within 12 months preceding the date of the relevant event whether it be the commencement of the winding up application or the order made.

50. It is contended by the Applicant that the winding up was not for the benefit of a creditor and therefore the application has prospects of success.

51. In my opinion, there are sufficient merits in this application to warrant an extension of time and it is granted.

The application to review the decision to categorise the applicant as an excluded individual.

52. By reason of the appointment of the liquidators to the company the applicant, as a director, became an excluded individual pursuant to section 56AC(4) of the QBSA Act.

"*If this section applies to an individual because of subsection (2), the individual is an* ***excluded individual*** *for the relevant company event*"

53. I have already recited the fact giving rise to the appointment of liquidators to the company which is the relevant company event.

54. The applicant contends that he was not a director of the company within 12 months of the relevant event, being the winding up of the company. Reliance is placed on section 9 of the Corporations Act to argue that the "relation-back day" is the date on which the application to wind up was filed because this is when the winding up commenced. That date being the 15 June 2010 then one has to consider the position of the company and the applicant 12 months earlier. The applicant submits that as at 16 June 2006

    (a) DGD was not in existence, having been deregistered on 19 December 2004;
    (b) The applicant was not the director of DGD whilst deregistered;
    (c) The applicant did not become the director until 16 October 2006;
    (d) There were no creditors of DGD;
    (e) The ATO was not a creditor of DGD.

55. The difficulty with the applicant's argument, as I see it, is that in the circumstance of this case, the relation back date could only commence when the company became reregistered, not when the application was filed. As at 15 June 2010 the company did not exist and was no longer a legal entity. Before any steps could be taken to wind the company up it had to firstly become a legal entity, by re-registration, and secondly the application to wind up, already filed, became an operative instrument to enable the ATO to proceed with the appointment of liquidators. Upon re-registration, the applicant was automatically reinstated as a director then the application for wind up, already filed, was enlivened and could only then be proceeded with.

56. On this analysis the applicant was a director within 12 months of the making of the winding up order. It follows then that the relation back date here is 16 October 2006.

Was the winding up for the benefit of a creditor?

57. The applicant submits that as at 15 June 2006 the ATO was not a creditor of the DGD. This is correct, as no notice of assessment had issued as at that date.

However, upon re-registration and the issuing of the notices of assessment on 17 November 2006, the ATO immediately became a creditor, with the application already in place to proceed with the winding up proceedings.

58. Although no opportunity was given to the company to pay the debt, and despite objections lodged, Justice Dowsett considered it appropriate in the circumstances to proceed to make the winding up order. Therefore, I conclude that the ATO was a creditor for the purposes of section 56AC of the Act.

59. The applicant contends that as there was no dividend paid to the ATO as a consequence of the appointment of liquidators, there was no benefit to the ATO as the only creditor.

60. This submission assumes that the phrase “for the benefit of a creditor” must mean that unless some benefit is received, such as a payment as the applicant submits, then section 56AC does not apply.

61. Creditors can benefit in many ways as a consequence of the appointment of liquidators. It is obviously a benefit to creditors just to have liquidators investigate the company’s accounts to ascertain if there are any assets available to creditors, preference payments or debtors. In my view the very appointment of a liquidator can be said to be a benefit to creditors.

62. I therefore conclude that the appointment of the making of the winding up order and the appointment of liquidators in this case was for the benefit a creditor, that creditor being the ATO.

63. As a consequence of these findings the application to review the decision to categorise the applicant as an excluded individual is dismissed.

64. To give effect to this decision in respect of all applications proceeding OCR092-10 and QR309-09 will be consolidated into QR155-07.