Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Silver Mines Limited and Minister for Infrastructure and Regional Development [2016] AATA 707 (13 September 2016)

Division	GENERAL DIVISION
File Number(s)	**2014/5671** **2014/5672**
Re	**Silver Mines Limited** APPLICANT
And	**Minister for Infrastructure and Regional Development** RESPONDENT

DECISION

Tribunal	**Professor R Deutsch, Deputy President**
Date	**13 September 2016**
Place	**Sydney**

The decisions under review are affirmed.

.....[sgd].....

Professor R Deutsch, Deputy President

CATCHWORDS

TAXATION – Industry Research and Development Act 1986 – research and development tax concessions – registration for concessions – applicant lodged applications for 2010/2011 and 2011/2012 income years out of time – whether exceptional circumstances exist – death of a director not an exceptional circumstance – tax agent failing to provide relevant advice held to be an exceptional circumstance – further delay caused in lodging applications fault of the applicant – decisions affirmed

LEGISLATION

Industry Research and Development Act 1986 (Cth) s 27A, 27D
Industry Research and Development Act 1986 (Cth) s 39J, 39JF, as amended by *Tax Laws Amendment (Research and Development) Act 2011* (Cth) sch 4, cl 1(1)

CASES

Bristol and West Building Society v Mothew [1996] 4 ALL ER 698
Carmody v Priestley & Morris Perth Pty Ltd (2005) 30 WAR 318
Gore v Montague Mining Pty Ltd [2000] FCA 1214
Hatcher v Cohn (2004) 139 FCR 425
Markham v Lunt (1983) 81 FLR 37
Provident Capital Limited v Papa (2013) 84 NSWLR 231
Re Bloomfield Collieries Pty Ltd And Rix's Creek Pty Ltd v Innovation Australia (2009) 49 AAR 352
Re SFGV and Innovation Australia [2010] AATA 677
R v Kelly [2000] QB 198
Tip Top Dry Cleaners Pty Limited v MacKintosh (1998) 98 ATC 4346
Sacca v Adam (1983) 33 SASR 429
Smith New Called Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd (1997) AC 254

SECONDARY MATERIALS

Guide to the R & D Tax Concession
Industry Research and Development Decision-making principles 2011, Part 3

REASONS FOR DECISION

Professor R Deutsch, Deputy President

13 September 2016

1. The facts in this case concern the failure by a company called Silver Mines Ltd (**the Applicant**) to lodge with the Respondent the necessary paperwork for the registration of certain research and development (**R&D**) activities in respect of 2010–2011 and 2011–2012 income years within the timeframe permitted under the relevant legislation.

2. As will be seen the relevant legislation gives some discretionary capacity in certain circumstances for the Respondent to extend the period of time permitted. It is the refusal of the Respondent to extend the deadline in respect of both income years that is the subject of dispute in these proceedings.

3. The saga begins on 6 January 2004 when the Applicant was incorporated.

4. In 2006, it commenced a business in which it explored for and developed silver mining operations throughout Australia and overseas. As part of that business activity on 5 October 2006, the Applicant acquired NSW exploration licence EL 5674.

5. The acquisition of that licence gave the Applicant the ability to explore the former Webb's Silver Mine (Webb's Silver Project) and surrounding areas in NSW. From January 2007 the Applicant commenced exploration pursuant to that licence.

6. At some time prior to 23 October 2006, the Applicant appointed Graham Abbott & Associates, Chartered Accountants (GAA) as its accountants and tax agents.

7. It is an uncontested fact that (GAA) were the registered tax agents for the Applicant throughout the period from around October 2006 to March 2014. According to the evidence provided by Charles Straw (who as will be seen, is a key person with the

Applicant) at no time in that nine year period did (GAA) provide any written or oral advice regarding R&D tax concessions that may be available to the Applicant: Statutory Declaration of Charles Straw sworn 22 June 2015 at[77].

8. From 2006, up until his death in 2010, David Straw was a director of the Applicant and was largely responsible for the assessment and evaluation of the geological merit of the Applicant's silver deposits.

9. In addition, from around May 2006, David Straw's son, Charles Straw became the General Manager and Exploration Manager of the Applicant.

10. On 19 January 2007, the Applicant was listed on the Australian Stock Exchange.

11. At some time in 2008 it appears that the Applicant, through the direction of David Straw, requested a scoping study be conducted by Lycopodium Minerals Qld Pty Ltd (LMQ) in respect of the Webb's Silver Project: Statutory Declaration of Charles Straw sworn 22 June 2015 at [29].

12. In June 2010, David Hobby was engaged by the Applicant as Exploration Manager and lead technical consultant. According to Charles Straw, the Applicant retained David Hobby as part of a wider strategy to replace the technical knowledge and expertise of David Straw, whose health was deteriorating before August 2010: Statutory Declaration of Charles Straw sworn 22 June 2015 at [25].

13. On 2 August 2010, David Straw passed away following which, his son Charles Straw was appointed Managing Director of the Applicant.

14. In the period immediately after David Straw's death, the Applicant set about finding replacement geological expertise to be used in the assessment and evaluation of the geological merit of projects owned by the Applicant.

15. On 8 March 2011 LMQ issued to the Applicant a scoping study report in respect of the Webb's Silver Project (**the 2011 Lycopodium Report**).

16. In April 2012, the Applicant, on the basis of a recommendation made in the 2011 Lycopodium Report (specifically clause 7.3) requested a further expert report from Core Process Engineering Pty Ltd (**CPE**) in relation to hydrometallurgical methods for processing ore for the Webb's Silver Project.

17. Meanwhile the deadline for lodging the R&D registration for the 2010-11 year, namely 30 April 2012, came and went with no lodgement being effected.

18. On 5 April 2013, CPE handed to the Applicant the Core Processing Engineering Report No 149A-002 (**the Conceptual Process Study**) in respect of the Webb's Silver Project.

19. The deadline for lodging the 2011-12 registration papers, namely 30 April 2013 also passed by with no lodgement again being effected.

20. From around April 2013 to June 2013, the Applicant assessed the Conceptual Process Study culminating in the view being formed that the Applicant may be able to secure a successful claim for R&D expenditure in accordance with the *Income Tax Assessment Act 1936* (Cth).

21. On 29 July 2013 and again on 11 February 2014, a competitor, Argent Minerals Limited (**Argent**) released a press release outlining some of the successful details of its recent R&D claims.

22. From around July 2013 to September 2013, the Applicant looked into identifying appropriate tax advisors to assist in the provision of suitable R&D tax advice and on 4 September 2013 it received a recommendation that BDO Australia (BDO) could provide suitable advice.

23. In November 2013, the Applicant attended a meeting with BDO to discuss R & D tax advice. However the Applicant chose not to retain their services because the fees BDO were proposing to charge were unacceptable. The Applicant then sought advice from other professional advisers.

24. Finally, in March 2014, the Applicant engaged a new tax agent, Traverse Accountants (Traverse) to act as its tax agent and to provide all relevant advice in relation to the proposed R&D claims.

25. Sometime in April 2014, the Applicant provided information to and received advice from Traverse which enabled Traverse to complete the relevant applications and on 30 April 2014 Traverse lodged the R&D application in relation to the year ended 30 June 2013.

26. On 14 May 2014, the Respondent issued a notice of registration for the year ended 30 June 2013.

27. On 19 June 2014, Traverse lodged extension requests in relation to the years ended 30 June 2011 and 30 June 2012.

28. On 2 July 2014, the Respondent made a decision denying the extension of time application in respect of the year to 30 June 2012.

29. On 17 July 2014, the Respondent made the same decision to deny the extension of time application in respect of the year to 30 June 2011.

30. On 15 August 2014, the Applicant made a formal request for an internal review of the Respondent's decision to deny an extension of time for lodging applications for both the 2011 and 2012 years.

31. On 8 October 2015, the Respondent again made decisions denying the extensions of time in respect of both income years.

32. On 30 October 2014 the Applicant requested written reasons for the Respondent's decisions in respect of both income years.

33. On 31 October 2015, the Applicant filed Applications with this Tribunal seeking reviews of the decisions not to allow an extension of time to lodge R&D tax concession applications for the 2010/2011 and 2011/2012 income years.

THE TWO APPLICATIONS

34. The Applicant has filed two applications seeking review of the two decisions made by the Respondent under the *Industry Research and Development Act 1986* (Cth) (the Act).

35. The first application seeks review of the Respondent's decision dated 8 October 2014 under s 39JF(1) of the Act to refuse the Applicant's application for an extension of time to apply for R&D activities in respect of the 2010-2011 income year (the First Application).

36. The second application seeks review of the Respondent's decision dated 8 October 2014 under s 27D(c)(ii) of the Act to refuse the Applicant's application for an extension of time to apply for R&D activities in respect of the 2011-2012 income year (the Second Application).

37. The Act was amended by the *Tax Laws Amendment (Research and Development) Act 2011* (Cth), which came into force 8 September 2011 (the TLA Act). Consequently, the First Application is governed by the Act prior to its amendment by the TLA Act.

THE FIRST APPLICATION

38. Under the legislation applicable to the First Application, s 39J(1) relevantly provided that a deduction in respect of R & D expenditure was not allowable unless the company that incurred the expenditure was registered.

39. To be so registered the company had to apply for registration and s 39J(1A)(d) relevantly provided that such an application had to be made after the end of the year in which the expenditure was incurred but within 10 months after the end of that year.

40. Critically, s 39JF(1) then provided that:

> *(1) The Board may register an eligible company under section 39J in respect of a year of income, despite the fact that the application for registration was not made within the period for making the application, if the Board considers that the application was made after the end of the period* ***due to exceptional circumstances****.* (Emphasis added)

41. Leaving aside the discretion provided for in 39JF(1), in respect of the 2010-2011 income year, the Applicant was required to apply for registration by 30 April 2012. The application was in fact made on 23 June 2014, some 26 months late.

42. In this context the Applicant argues that an earlier application was made on 30 April 2014 and therefore it was only 24 months late.

43. The application in relation to which the decision has been made is that which was filed on 23 June 2014 but the Tribunal does accept that the Respondent was on notice of the application from 30 April 2014.

44. Accordingly, the Tribunal accepts that for the purposes of this analysis the delay in the First Application was 24 rather than 26 months.

45. The structure of s 39JF(1) suggests that in order for an application of this nature to succeed the Applicant must show three things:

    1. that there were "exceptional circumstances" at the relevant times;

    2. that the application was made late due to those exceptional circumstances;

    3. that the discretion should be exercised in favour of granting an extension of time.

46. The cases of *Re Bloomfield Collieries Pty Ltd And Rix's Creek Pty Ltd v Innovation Australia* (2009) 49 AAR 352 (*Bloomfield*) and *Re SFGV and Innovation Australia* [2010] AATA 677 (*SFGV*) support this stepped approach although they speak only of a two-step approach by conflating the first and second steps into one step. I prefer to separate the first step so as to emphasise that it is not only necessary for there to be exceptional circumstances, but that it is also necessary for those exceptional circumstances to be the cause of the late application.

47. In my view, if either of the first or second steps do not apply, it is not necessary to go to the third step as the discretion can only be exercised if there are exceptional circumstances that caused the late application.

48. On this point, there is some ambiguity about the structure of s 39JF(1) in that it is not clear if there is a discretion available even if there are no exceptional circumstances. This ambiguity would have been removed if the conditional part of the section had read "if, **and only if**, the Board considers that the application was made after the end of the period due to exceptional circumstances" (emphasis added).

49. An issue arises here for the exercise of the discretion if it is found that there are no exceptional circumstances, or if there are, but those exceptional circumstances are not the cause of the late application. In my view, I do not believe that s 39JF(1) can or should be read so as to allow the exercise of that discretion if there are no exceptional circumstances, or if there are, but they are not the cause of the delay.

50. However, the issue did arise in *Bloomfield* where Deputy President Walker did consider whether or not to exercise the discretion to grant an extension in circumstances where he did not consider that there were exceptional circumstances. With respect I disagree with the approach taken by Deputy President Walker. The intent here is clear – the discretion can and should only be invoked when there are exceptional circumstances which caused the lateness and not otherwise. I propose to follow that approach here.

Are there exceptional circumstances in this case?

51. The Act itself does not define the expression "exceptional circumstances". Accordingly, the usual practice is that the expression should be given its ordinary English meaning.

52. The dictionary definition of the word "exceptional" includes "not usual, common or ordinary; uncommon in amount or degree; of an exceptional kind": *Bloomfield* at [58]; *SFGV* at [24].

53. Further, the *Guide to the R & D Tax Concession* (**the Concession Guide**) published by the Respondent gives examples of the types of circumstances which the Respondent will treat as being exceptional. That guide states that the term "exceptional circumstances" refers to an "unforeseen or unforeseeable event or circumstance (or combination of events or circumstances) that was outside the control of the applicant." According to the Concession Guide the following are likely to constitute exceptional circumstances:

- an unforeseen occurrence;

- a circumstance outside the control of the applicant company; or
- an external impediment, which causes the application to be dispatched late and not received on time.

54. The Concession Guide goes further and provides some examples of circumstances which the Respondent may consider to be exceptional, including "personal tragedy or illness".

55. The Applicant sought to rely upon the meaning given to the phrase "exceptional circumstances" by Kiefel J in *Hatcher v Cohn* (2004) 139 FCR 425 at [49] – [50] (*Hatcher*) and by Lord Bingham in *R v Kelly* [2000] QB 198 at [208].

56. Both of those cases emphasise the importance of giving the term a wide operation and in *Hatcher v Cohn* it is particularly emphasised that "no definition which limits their application should be adopted, unless the limitation appears from the words of the relevant statutory provision".

57. The Tribunal notes these decisions and the emphasis placed on a wide reading of the phrase, but it is important to note that the two quoted cases required construction of the expression "exceptional circumstances" in the context of very different statutory schemes. Thus, in *Hatcher v Cohn* the statutory scheme in question related to the servicing pattern of a medical practitioner, which would not constitute "inappropriate practice" if the practitioner fell within an "exceptional circumstance". Further, in *R v Kelly* the statutory scheme related to English criminal law where a conviction for a serious offence attracted a sentence of life imprisonment unless the sentencing judge found that there were "exceptional circumstances". Importantly, neither case concerned the interpretation of the expression "exceptional circumstances" in the context of the statutory scheme involving an extension of time application.

58. Accordingly, in the view of this tribunal these two cases are of limited if any relevance to the interpretation of the phrase "exceptional circumstances" in the current statutory context.

59. In this case, although it is not set out so emphatically by the Applicant, it appears to be the case that the Applicant relies on three related but independent grounds to support its contention that there are exceptional circumstances:

- the death of Mr David Straw on 2 August 2010;
- the Applicant's lack of knowledge concerning the fact of and the detail of the Concession Scheme; and
- the failure by the tax agent, auditor and accountant engaged by the Applicant, namely, GAA, to provide any advice or information regarding R & D at any of the relevant times as it was obligated to do.

Is the death of Mr David Straw an "exceptional circumstance"?

60. The First Application related to a project which was expected to run for five years, from 2010 until 2015. David Straw passed away on 2 August 2010; just one month after the project in question had begun. At the time of his death, David Straw was aged 79 and his normal place of residence, at the time of his death, was in a nursing home. His health had not been good for some time.

61. The Applicant had adopted a strategy to ensure that it had on-going access to technical knowledge and expertise with the appointment of David Hobby, a geologist, in June 2010. From the evidence, it appears that Mr Hobby had been employed by the Applicant throughout the period in which the relevant R&D project was conducted.

62. There is no tangible evidence presented to the Tribunal that would suggest that David Straw was the person responsible for preparing or coordinating the Applicant's applications for registration of R&D activities or any part of those applications. It seems that the Applicant had not previously applied to register any R&D activities despite having conducted mining exploration activities since January 2007: Applicant's Statement of Facts, Issues and Contentions at [5].

63. It is also worth noting in this context that at all relevant times David Straw's son, Charles Straw, was both the General Manager and the Exploration Manager of the Applicant, having assumed that role back in May 2006. Charles Straw was also appointed as a director of the Applicant on his father's death and held the position of Managing Director at all times after his father's death.

64. The death of David Straw was undoubtedly an unfortunate event which was entirely outside the Applicant's control.

65. However, it is not possible to accept that it is an "exceptional circumstance" within the meaning of s 39JF(1) of the Act where:

(a) he was 79 years of age at the time of his death;

(b) he was at that time living in a nursing home;

(c) his health had been poor for some time; and

(d) the Applicant had taken clear and unambiguous steps to replace the vacuum left by David Straw's involvement in the Applicant.

66. The Tribunal does not accept that David Straw's death was an "exceptional circumstance" in the context in which it arose in this case.

Did the Applicant have a lack of knowledge about the Concession Scheme and if so is that lack of knowledge an "exceptional circumstance"?

67. The Applicant asserts that from the evidence it is the case that it was not until 29 July 2013 that the Applicant began to consider whether its R&D claim could be made in respect of the Core Processing Engineering Report: Applicant's Statement of Facts, Issues and Contentions at [17]; Statutory Declaration of Charles Straw sworn 22 June 2015 at [51]. This occurred only after the Applicant came across a reference to the Concession Scheme in an ASX press release of that date relating to Argent.

68. In relation to this Argent press release, Charles Straw stated in his statutory declaration sworn 22 June 2015 the following:

> ***Argent Minerals Ltd Press Release dated 29 July 2013***
>
> *On or about 29 July 2013, at lunchtime in my office, and while reviewing ASX listed company press releases, I came across a press release dated 29 July 2013 from Argent Minerals Ltd ("Argent") as released by the ASX.*
>
> *The Argent ASX press release dated 29 July 2013 stated that Argent had received a Research and Development (R&D) tax refund for $1 million. The Argent press release dated 29 July 2013 is now produced and shown to me and marked Tab 4.*
>
> *Argent was engaged in similar business to [Silver Mines Limited] in exploring silver deposits in New South Wales.*
>
> *I considered that [Silver Mines Limited] should relook at the [Core Processing Engineering] work to see if the Albion Process could be considered R&D.*

After reviewing the Argent press release dated 29 July 2013, I sent an email to Mr Richard Holstein suggesting that [Silver Mines Limited] should relook at a possible R&D claim. The email dated 29 July 2013 to Richard Holstein from myself is now produced and shown to me and marked Tab 5.

69. The email exchange referred to in the Statutory Declaration of Charles Straw is also reproduced:

Email sent by Charles Straw to Richard Holstein at 1:09 pm on 29 July 2013

Subject: R and D tax offset

[Silver Mines Limited] should look at this for the spend on Albion testwork. Hob raised this once before but not sure if we ever followed it up.

Email sent by Richard Holstein to Charles Straw at 1:21 pm on 29 July 2013

Subject: R and D tax offset

I had a look before but the consultant I used in the past said it would not fly and that Core should be lodging the R and D claim.

I am happy to give Argent a call with the hope of getting their consultant to comment.

70. The content of these email exchanges clearly suggests that the Applicant was in fact aware of the existence of the Concession Scheme at some earlier, unspecified date.

71. Charles Straw himself not once but twice refers to having a "relook" at a possible R&D claim. The use of the word "relook" simply confirms the fact that Charles Straw was well aware of the possibility of an R & D claim although he may not have been aware of all the details which may have emerged as a result of the Argent press release.

72. This evidence shows that the possibility of an R&D claim was not entirely fresh news to Charles Straw when he came across the Argent press release on 29 July 2013. How much earlier he knew is unclear but the language used in the emails certainly suggests that it could have been months, if not years before.

73. Accordingly, the Tribunal finds as a fact that the Applicant was aware of the possibility of an R&D claim sometime before 29 July 2013. The exact time at which it became aware cannot be established.

74. As to when it became aware that it could lodge such a claim out of time the Applicant asserts that it did not know that it could make an out of time application, and the circumstances required to make such a claim, until 28 March 2014.

75. Furthermore, there is unchallenged evidence of Charles Straw to the effect that the Applicant did not receive any advice regarding late registration until 31 March 2014 at the meeting with Traverse Accountants: Statutory Declaration of Charles Straw sworn 22 June 2015 at [93]. Thereafter, Charles Straw and the Applicant assert that they acted promptly to secure the requisite advice and to lodge extension of time applications for the 2011 and 2012 income years: Statutory Declaration of Charles Straw sworn 22 June 2015 at [84] – [101].

Is the failure of Graham Abbott & Associates to provide any advice or information regarding R&D an exceptional circumstance?

76. The Applicant is of the view that GAA. being the tax agent, auditor and accountant engaged by the Applicant had the following duties to the Applicant:

(a) a duty not to provide negligent advice regarding R&D and a duty not to fail to advise the Applicant regarding R&D: *Bristol and West Building Society v Mothew* [1996] 4 ALL ER 698; *Markham v Lunt* (1983) 81 FLR 37; *Tip Top Dry Cleaners Pty Limited v MacKintosh* (1998) 98 ATC 4346; *Carmody v Priestley & Morris Perth Pty Ltd* (2005) 30 WAR 318;

(b) a duty to warn the Applicant regarding areas of tax advice outside the expertise of GAA, including R&D if that was the case, where such specialisation was not possessed by the firm: *Sacca v Adam* (1983) 33 SASR 429; *Smith New Called Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd (1997)* AC 254; *Gore v Montague Mining Pty Ltd* [2000] FCA 1214;

(c) a duty beyond the retainer which GAA had with the Applicant being a penumbral duty to advise the Applicant regarding R&D: *Provident Capital Limited v Papa* (2013) 84 NSWLR 231.

77. In this context, it is also worth noting that the company income tax returns prepared by GAA for the 2011 and 2012 years had specific questions which needed to be completed regarding R&D.

78. Thus, question 7 on page 5 of the 2011 company income tax return asked:

> *Do you need to complete a Research and development tax concession schedule 2011?*

79. It then required completion of labels "L" (Australian owned R&D tax concession) and "M" (Australian owned R&D tax concession – extra incremental 50% deduction).

80. Similarly, question 22 on page 9 of the 2012 company income tax return called for completion of label "A" (Non-refundable R&D tax offset) and label "U" (Refundable R&D tax offset). There then followed a further statement:

> *If you have completed labels A or U a Research and development tax incentive schedule 2012 is required to be completed and lodged with your Company tax return.*

81. Having regard to the fact that GAA was the tax agent of the Applicant and was charged with the responsibility of completing and filing all relevant tax returns, including those relating to the 2011 and 2012 income years, it is to my mind unarguable that its obligations included at the very least informing the Applicant that it had no expertise in the area of R&D if that in fact was the case.

82. If in fact that was not the case and it had the requisite expertise, it should have, under its ordinary obligations as the party charged with completing and filing the tax returns, provided the requisite information so as to draw to the attention of the Applicant the availability of the benefits in question. In this case, the precise terms of the retainer which the Respondent takes issue with are of no direct relevance in circumstances where:

(a) GAA was the tax agent for the 2011 and 2012 income years in respect of the Applicant;

(b) GAA prepared and lodged those returns on behalf of the Applicant; and

(c) GAA provided no written advice or oral advice regarding R&D tax concessions to the Applicant: Statutory Declaration of Charles Straw sworn 22 June 2015 at [77].

83. Of most significance is the fact that GAA failed to advise the Applicant that an R&D application could be lodged late if the discretion of the Respondent was enlivened.

Conclusions on whether there were exceptional circumstances

84. In the view of this Tribunal, the only matter that could possibly give rise to an exceptional circumstance in this case is the fact that the Applicant was not formally advised of its ability to lodge out of time applications for R&D concessions until sometime around March 2014. For the sake of argument the Tribunal is prepared to accept that this is an exceptional circumstance.

Was the application for the 2011 year made late because of the asserted exceptional circumstance?

85. In relation to this issue the facts need to be carefully analysed so as to ascertain the connection that exists between the exceptional circumstance and the late lodgement of the application for the 2011 year.

86. There is no doubt that there was clear deficiency in the level of advice that was provided to the Applicant, most particularly about lodging out of time.

87. The application needed to be filed by 30 April 2012.

88. The Applicant claims to have found out about the possibility of making an application on 29 July 2013.

89. However, as discussed above, the Tribunal has found this not to be the case, and has found that the Applicant knew about the possibility of making a claim before then. What is not clear is whether the Applicant knew, and when it knew, that an application can be made out of time.

90. The application was in fact made on 23 June 2014.

91. In summary, the Applicant knew of the possibility of an R&D claim at some stage well before 29 July 2013, yet notwithstanding that knowledge it took no steps to investigate a potential application or to seek any further advice in respect of such an application until

November 2013. This was some five months after Charles Straw himself claims to have first become aware of the possibility of an R&D claim as a result of the Argent press release of 29 July 2013.

92. Even if I were to accept that the Applicant only became aware of the Concession Scheme, through its managing director Charles Straw, on 29 July 2013, it is quite remarkable that a period of three months was allowed to pass before a meeting was arranged with the firm BDO in November 2013 for the purpose of discussing the possibility of making an R&D application: Applicant's Statement of Facts, Issues and Contentions at [20].

93. It seems from the evidence that the Applicant then decided that the fees that were to be charged by BDO were too high and then waited a further four months before engaging Traverse to provide R&D tax advice and assist with the preparation of the various applications: Applicant's Statement of Facts, Issues and Contentions at [23].

94. In other words, if we accept without argument that the Applicant became aware of the Concession Scheme on 29 July 2013, it therefore had no problem in waiting a further seven months before finally lodging its application for an extension. One would have thought that a prudent person who finds out on 29 July 2013 that that they were meant to have lodged an application by 30 April 2012 which could give rise to a significant financial advantage would move with some speed to reduce any further time delay rather than waiting seven months before doing so.

95. This reflects a remarkably relaxed attitude to what must have been recognised as a problem in need of urgent attention which is said to have emerged as a result of the failure by its tax agent to provide appropriate R&D advice or information.

96. Furthermore, if the Applicant only discovered in late April 2014 that it could make a late application why was it pursuing advice and what type of advice was it pursuing during the latter part of 2013.

97. In these circumstances, the Tribunal concludes that there is insufficient evidence to establish that the application was made out of time due to the failure of the tax agent to provide the relevant advice or information. Clearly a very substantial part of the delay was the direct result of the Applicant dragging its heels after it became aware of the relevant

circumstances at the very latest on 29 July 2013. From the Applicant's perspective, the best that can be said is that its own lack of understanding of the R&D processes, including the possibility of a late lodgement, was only a partial explanation for the delay, and a small part at that. The main reason for the delay was the on-going failure by the Applicant to properly pursue appropriate advice after 29 July 2013 on a timely and efficient basis. It knew from 29 July 2013 at the very latest that it had missed an opportunity but it approached the task of correcting this situation with surprising and highly damaging tardiness. The fact that it did not know about the possibility of making a late lodgement was almost entirely the result of its own inaction, with the failure of GAA to provide advice only partially to blame. Had the Applicant sought advice in a timely manner, it would have unearthed the possibility of a late lodgement more expeditiously and consequently would have lodged earlier, possibly much earlier, than it did.

98. Consequently, the application for an extension of time in respect of the First Application must fail.

THE SECOND APPLICATION

99. Under the legislation applicable to the Second Application, s 27D provides that an application to register activities under s 27A must be in an approved form, accompanied by a fee and most importantly:

(i) made within 10 months after the end of the income year; or

(ii) a further period allowed by the Board in accordance with the decision-making principles.

100. Accordingly, in this case the Applicant was required to apply for registration in respect of the 2011–2012 income year by 30 April 2013 or any further period allowed by the Respondent in accordance with the *Industry Research and Development Decision-making principles 2011* (**the Principles**).

101. Part 3 of the Principles contains a statutory framework for making decisions about extensions of time. Sub-section 3.2(1) of the Principles provides that an extension of time up to 14 days *must* be granted if the person seeking the extension explains to the Respondent *before* the expiration of the statutory timeframe why the statutory timeframe

cannot be met, and the thing in question (in this instance, the application) can be given to the Respondent within 14 days after the specified time.

102. Most particularly subsection 3.2(2) of the Principles provides that the Respondent:

> *…may also allow a thing to be given by an interested person within a further period only if the act, omission or event that led to the need for the further period was not the fault of the interested person and was not within the interested person's control.*

103. Section 3.3 of the Principles provides that when considering whether to allow a further period of time, the Respondent must decide, based on information given to the Respondent by the interested person, if the need for the further period has arisen because of:

(a) an act or omission of the Respondent;

(b) any other reason including the following:

(i) act or omission of the interested person;

(ii) an act or omission of another person;

(iii) an event for which no one is responsible.

104. Section 3.5 of the Principles deals with other reasons for a need for a further period of time, and provides as follows:

3.5 If there is some other reason an extension is required

(1) For paragraph 3.3(b), if the need for the further period has arisen because of a reason other than an act or omission of the [Respondent], the [Respondent], in considering the further period to be allowed, must take into account:

(a) any delay by the interested person in requesting a further period and the reasons (if any) for that delay; and

(b) the amount of time will pass between when the thing is due to be given (as specified in the relevant provision of the Act) and when the interested person proposes that it should be given.

(2) The [Respondent] must be satisfied that any extension of time it allows is in proportion to the severity of the interested person's level of inability to give the thing at the time specified in the relevant provision of the Act.

(3) For subsection (2), the longer the further period of time requested by the interested person:

(a) the higher the level of inability of the interested person to give the thing at the time specified must be; and

(b) the stronger the evidence of the level of inability the interested person must provide.

105. The broad thrust of all these Principles would seem to suggest that in order for the Applicant to succeed, it must show three things in particular:

(a) that the act, omission or event that led to the need for the further period was not the fault of the Applicant;

(b) that the act, omission or event that led to the need for the further period was not within the Applicant's control; and

(c) that if (a) and (b) above are established, the further period requested is in proportion to the severity of the Applicant's level of inability to comply with the statutory timeframe.

106. The Principles have not been the subject of any previous decision by this Tribunal.

107. Further, neither the Act nor the Principles give examples of the types of circumstances which will justify the grant of a further period of time to make an application for registration.

108. What is clear is that the Principles give a very limited discretion to grant an extension of time, a fact which is reinforced by the terms of the Explanatory Statement to the Principles. At paragraph 1.20 of the Explanatory Statement the following critical comment is made:

> *While it is expected that the majority of interested persons will comply with the standard deadlines under the program, the [Respondent] is aware that an extension of time may be justified in the case of exceptional circumstances, or in the case of very minor delays, in order to ensure that interested persons are not unduly or unjustifiably prevented from accessing the program.*

109. The Explanatory Statement also clarifies that in order for the Respondent to allow a further period of time, it must be shown that the omission or event that led to the interested person being unable to meet the relevant deadline must not have been the fault of the interested person, *and* not be within the interested person's control.

110. At paragraph 1.26 of the Explanatory Statement the following additional explanation is provided:

> *An interested person whose own actions prevent them from meeting a deadline is generally not entitled to a further period. An interested person who is aware that circumstances within their control – that is, the interested person has the power to intervene in and correct the situation – will prevent them from meeting a deadline, but does not act, or act sufficiently, to meet the deadline is also generally not entitled to a further period.*

111. Although neither the Act nor the Principles have provided any concrete examples by way of guidance, the Respondent has published a document called the "R & D Tax Incentive: Customer Information Guide" (**the Incentive Guide**). In the Incentive Guide it is reiterated that applications received after the deadline date are not normally accepted. However, the Incentive Guide goes on to provide that there is a discretion given to the Respondent which is limited, and is not intended to allow retrospective access to the R&D Tax Incentive. Helpfully, the Incentive Guide provides some guidance and some examples of situations in which a further period may be allowed:

> *Extensions to the application deadline may …be granted in … situations where an event has occurred that is beyond the ability of the applicant to control. In determining the length of the extension granted, [the Respondent] takes into account the severity of the situation that caused the delay, and the strength of the evidence that the applicant provides for that delay. Examples of such situations include:*
>
> - *unavailability of the company's key personnel*
> - *a breakdown of the company's record-keeping system*
> - *a failure of the company's key personnel to perform necessary functions*
> - *a problem that results in a failure of delivery of information*
> - *accidental destruction of key property all records*

112. Clearly, the Incentive Guide has no statutory force. However, it is a public policy which is consistent with the Act and with the Explanatory Statement to the Principles. It is a guide which this Tribunal should take into account unless there is something clearly inconsistent between the Incentive Guide and either the Act, the Principles or the Explanatory Statement to the Principles. This view would appear to be consistent with the approach taken by this Tribunal to the Concession Guide in *Bloomfield* and *SFGV.*

113. As to the question of the proportionality of the time period requested to the level of inability of the person to meet the relevant deadline the Explanatory Statement does provide some

assistance. At paragraph 1.39 of the Explanatory Statement it is mentioned that the unexpected absence of the interested person's key staff for a month at a critical time of year will normally justify a longer extension of time compared to the unexpected absence of key staff for a week at a critical time of year.

114. It also somewhat helpfully adds that the longer the additional period of time requested, the stronger the explanation and evidence must be to justify the Respondent granting the requested further period.

115. In relation to the Second Application, the Applicant is essentially relying on the same evidence it has relied on in relation to the First Application.

116. In this case the application for registration was received some 12 months (or again possibly 14 months) late.

117. Subsection 3.2(1) of the Principles has no application to the Second Application because it was lodged after the statutory deadline and the Applicant failed to make a request for an extension before that deadline as required by the terms of that subsection.

118. However, the Tribunal may, in accordance with subsection 3.2(2) of the Principles allow the Applicant a further period of time if two conditions are met – namely that the act, omission or event that led to the need for the further period was not the fault of the Applicant and the act, omission or event that led to the need for the further period was not within the Applicant's control.

119. Again, the Applicant advances the reason for its failure to lodge the relevant application before the statutory deadline as being the poor state of advice it received giving rise to a lack of knowledge regarding the R&D Tax Incentive Scheme.

120. In regard to the argument that there is a need for a further period of time because the Applicant was not aware of the availability of and the details of the R&D Tax incentive, the Tribunal does not accept that the circumstances were outside its control. It pursued further advice but in such a tardy fashion that the delays cannot be explained on this basis.

121. The Applicant had control of the situation with knowledge of the R&D initiative and the ability to claim outside the relevant period from 29 July 2013 but lodged some 12 or 14 months later.

122. Under subsection 3.5(3) of the Principles, the longer the additional period of time requested, the stronger the explanation and evidence must be to justify the Tribunal in granting the requested further period. The Applicant has provided unconvincing evidence about its suggested lack of knowledge of the details of the R&D Tax Incentive scheme and this evidence is insufficient to justify a lengthy further period of some 12 to 14 months.

123. Even after it became aware of the R&D Tax Incentive and that extra time could be sought, the Applicant failed to take appropriate steps to inform itself about the nature of the scheme or the circumstances in which it might make a belated application.

124. It also took no steps to prudently notify the Respondent of its intention to lodge out of time while it awaited the preparation of more formal legal documentation.

DECISION

125. The decisions under review are affirmed.

I certify that the preceding 125 (one hundred and twenty-five) paragraphs are a true copy of the reasons for the decision herein of Professor R Deutsch, Deputy President

.....[sgd].....

Associate

Dated 13 September 2016

Date(s) of hearing	**10 December 2015 and 18 March 2016**
Counsel for the Applicant	**D McGovern SC, B Young**

Advocate for the Applicant	**Traverse Accountants Pty Ltd**
Counsel for the Respondent	**M Allars SC**
Solicitors for the Respondent	**HWL Ebsworth**