

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *O'Neill v Commissioner for State Revenue* [2019] QCAT
132

PARTIES: **PENELOPE O'NEILL**
(applicant)
v
COMMISSIONER FOR STATE REVENUE
(respondent)

APPLICATION NO/S: GAR173-18

MATTER TYPE: General administrative review matters

DELIVERED ON: 15 May 2019

HEARING DATE: 1 April 2019

HEARD AT: Brisbane

DECISION OF: Member King-Scott

ORDERS: **The decision of the Commissioner for Sate Revenue to
disallow the objection is confirmed.**

CATCHWORDS: TAXES AND DUTIES – LAND TAX – LIABILITY
FOR LAND TAX – OTHER MATTERS – objections
and appeals to land tax – Exemption as a Primary
Producer – Cattle raising and bee keeping – business or
hobby – failure to keep records

Land Tax Act 2010 (Qld)
Taxation Administration Act 2001 (Qld)

Evans v FCT (1989) 20 ATR 922
Ferguson v FCT [1979] 37 FLR 310

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented

Respondent: B Kabel for the Commissioner for Sate Revenue

REASONS FOR DECISION

- [1] This is an application by Ms Penelope O'Neill to review a decision of the Commissioner for Sate Revenue ('the Commissioner') to refuse her application for a primary production exemption from land tax.

Background

- [2] Ms O'Neill owns land situated at 767 New Cleveland Road, Gumdale more particularly described as Lot 5 on SP135919. A home exemption (from land tax) was previously applied to the property in conjunction with Lot 4 on SP135919 during the 2012-13, 2013-14 and 2014-15 financial years (the earlier period). From 30 June 2012, the Valuer-General issued separate valuations for Lots 4 and 5 on SP135919.
- [3] Ms O'Neill was advised by the Commissioner 12 November 2014 that the home exemption would apply to only one parcel of land. She was prohibited thereby from claiming the home exemption in respect of the two lots. On 12 November 2014, the Commissioner issued reassessment for the earlier period to give effect to that decision.
- [4] On 7 January 2015, Ms O'Neill lodged an objection with the Commissioner in respect of the removal of the home exemption. By letter dated 11 February 2015 the Commissioner disallowed the objection and confirmed her earlier decision of 12 November 2014. Ms O'Neill did not appeal that decision.
- [5] On 11 August 2015 the Commissioner issued an assessment for land owned by Ms O'Neill as 30 June 2015. On 30 January 2017 an assessment was issued for land owned by Ms O'Neal as 30 June 2016.
- [6] By email dated 28 April 2017, Ms O'Neill lodged a Form LT 11- *Land Tax Exemption- land used for the business of agriculture, pasturage or dairy farming*, seeking an exemption from land tax (the primary production exemption) in relation to the property.
- [7] The Commissioner sought further information from Ms O'Neill before determining the application for exemption. That information was provided.¹
- [8] An assessment was issued by the Commissioner on 15 August 2017 for land owned by Ms O'Neill as at 30 June 2007.
- [9] By letter dated 21 August 2017 Commissioner notified Ms O'Neill that her claim for primary production exemption on the property was disallowed.
- [10] Ms O'Neill, by email dated 15 October 2017, objected to the Commissioner's decision of 21 August 2017. The objection was not confined to the decision to refuse the primary production exemption but included objection to all the land tax payments she had been required to pay since 2012. The Commissioner refused to consider those objections unrelated to the refusal of primary production exemption on the basis that Ms O'Neill had not exercised her rights of appeal against the earlier decisions and was out of time. However, the Commissioner was prepared to consider the objection to the reassessments to the earlier period only to the extent that they were related to the primary production exemption.
- [11] The principal issue to be determined by the Tribunal is whether the activities conducted by Ms O'Neill in relation to cattle raising and bee keeping constituted a business or was it just a hobby.

¹ See Tab 51 Book 1.

Legislation

- [12] Sections 6, 7, 8, 9 and 19 of the *Land Tax Act 2010* (Qld) essentially provide that land tax is payable by an owner of a taxable land on the taxable value of all Queensland freehold land owned by that person, and not exempt from land tax, as at midnight on 30 June immediately preceding the financial year to which the tax relates.
- [13] Section 17 of the *Taxation Administration Act 2001* (Qld) provides the Commissioner with the general power, at any time, to make a reassessment of the taxpayer's liability for tax, subject to sections 21 and 22. Section 22 states the reassessment increasing a taxpayer's liability must be made within the limitation period. The limitation period for a reassessment is defined in Schedule 2 of the Act is five years after the assessment notice for the original assessment was given.
- [14] Section 53 of the *Land Tax Act 2010* (Qld) provides an exemption for land or the part of the land that is used solely for the business of agriculture, pasturage or dairy farming.

The Commissioner's decision

- [15] The Commissioner refused to grant the primary production exemption on the property because she could not be satisfied the land was being used to undertake a 'significant primary production business as at 30 June 2016'. The Commissioner noted that even though Ms O'Neill had native bees on her property, the honey production and number of hives appeared to fall below commercial produce numbers. The Commissioner was of the view that the business of beekeeping on the property was more akin to a hobby. Further, it was noted that there were no cattle sales during '2015 and 2016' and in the previous years for 2012, 2013 and 2014 there were minimal sales of cattle.

Review

- [16] Section 71 of the *Taxation Administration Act 2001* (Qld) provides for review by the Tribunal of a decision of the Commissioner on an objection. The review must be heard and decided by way of reconsideration of the evidence before the Commissioner when the decision was made unless the Tribunal considers that necessary in the interests of justice to allow new evidence. It must also decide the review in accordance with the same law that applied to the making of the original decision.

New evidence

- [17] A preliminary issue that arose in the course of the hearing was whether Ms O'Neill could rely upon references, testimonials and letters (new evidence) that were not available to the Commissioner when she made her decision.
- [18] Counsel for the Commissioner did not object to the Tribunal receiving the documents but objected to the documents being considered by the Tribunal in reaching its decision as the material constituted new evidence but, in any event, it was submitted that the evidence was of little value and should not be given much weight. Further, this material was not reduced to statements in accordance with the

directions of the Tribunal. Counsel for the Commissioner did not request the authors to be available for cross-examination.²

[19] The material comprises:

- (a) a signed letter from Brad Maidmant, a neighbour, dated 10 August 2018. He states that he has known Ms O'Neill and her daughter since 2000 and over that period he considers that they have raised and sold over 30 or so calves in that time;
- (b) a signed letter from Valley Hay Supplies Pty Ltd dated 10 August 2018. The author states that he has known Ms O'Neill since 2012 and has provided hay to the property since 2014 and confirms that she keeps calves;
- (c) a handwritten letter dated 21 August 2018 from West Morton Stock Feeds. The author states that he has known Ms O'Neill since 2005 and she has raised calves and kept cattle since that time;
- (d) a signed letter from Franz Ripphausen dated 21 August 2018. He has known Ms O'Neill since 2009 and states that since that time she has raised numerous calves at the property and sold a lot of calves during that time. He has also made bee boxes for Ms O'Neill;
- (e) An unsigned letter from Ross Newman, a Veterinary Surgeon, who states that he has visited the property since 2009 (on 9 occasions) for multiple livestock related reasons including calf husbandry procedures;
- (f) A signed letter from Mr Russell Zabel of Australian Stingless Native Bees. He is an authority on native bee keeping and says he has visited Ms O'Neill's property and noted that she kept 10 hives which he considered was far in excess of a hobbyist who may only keep one or two hives.

[20] This material does not comply with the Directions given by the Tribunal on 9 August 2018, however, I agree with Counsel for the Commissioner that the information contained in the letters and testimonials are broad and non-specific. They do not advance Ms O'Neill's case to any great degree.

Respondent's submissions

[21] The Respondent submits that while there is no sole factor sufficient to negate existence of a business, the Applicant has not provided sufficient evidence to outweigh the following factors which it is submitted strongly suggest that she was not carrying on a business:

- (a) the activities are of a very small scale and the volume of sales is not at a commercial level. Sales completed to date have

² Transcript 1-14 line 1.

been cash sales and have not occurred at organised marketplaces. No attention appears to have been given to the ascertainment and achievement of a market price for either cattle or honey sales;

- (b) the Applicant has not kept clear records including records of costs or sales, or projections of profit and loss accounts for anticipated sales and costs. She has not provided detailed and precise records of levels of honey production each year. It was not until further information was requested in support of her application, that records were kept.
- (c) The applicant has not provided evidence of preparatory work undertaken for the conduct of a business or achievement of a profit, including:
 - (i) the development of the business plan or any particular plan as to how the business will come to earn a profit;
 - (ii) investigations of the markets in which the business activities were proposed to occur;
 - (iii) although the applicant has previous experience in respect of cattle raising, she does not appear to have previous experience in respect of native bees and extraction and sale of honey. In this regard it was only in 2016-17 financial year that she sought literature on the subject; or
 - (iv) research into the efficiency and costs of production, and the likelihood of earning a profit.
- (d) The applicant has not provided any records of inputs and costs of production, seasonal factors affecting production, or how growing market conditions have varied to improve or impact upon the viability or profitability of activities;
- (e) she has not maintained continuity of the cattle raising activities, instead 'pausing' for a number of years. Further, the 'livestock trading account' indicates that the applicant had no natural increase or purchases of livestock in the relevant period between 2012 and 2016. In that sense, there was lack of continuity of the activities and of the profits, as well as lack of evidence of activities directed towards generating profits.
- (f) The applicant did not take steps during the relevant period to market or sell her products to a commercial market. Instead her sales are entirely *ad hoc*, based on a sign on her property. In this respect it was only in the 2016-17 financial year that the applicant developed the logo for her native bee keeping activities.
- (g) There is generally a lack of system and organisation about the activities. For example, despite her evidence that she hoped to have 30 hives by 2020 and that she had focused upon stock

increase, in fact she had only increased her hives from 4 to 12 in five years. This is despite the Applicant suggesting she can ‘double’ her stock each year by splitting the hives. Instead, her production of native bees and her proposed pausing of sales for the purpose of stock increase is inconsistent with the lack of repetition of systemic increase in her stock levels, even by splitting hives or purchases of further hives for honey production. Further, as above, there is no natural increase nor purchases of livestock recorded in the applicant's ‘livestock trading account’ to support this aspect of the applicant's activities being in the character of a business.

- (h) The applicant has not investigated or recorded the costs or proposed costs of the activities. For example, costs of extracting and producing a saleable honey product. She asserts that the sale of the honey is very profitable and in demand, but has not assessed this by reference to her own production rates, costs, current sales approach or marketing.
- (i) The applicant has not factored in costs of producing or selling honey. For example, the first cost for ‘containers’ - presumably for storage for sale of honey - appears to have been incurred only in 2016.
- (j) The applicant accepts that the sales of hives were ‘infrequent’ and that she ceased sales in 2015; and
- (k) she has provided no evidence in support of the proposed profit motive with investigations into expenses necessary to achieve that profit or how she plans to change from informal and *ad hoc* to consistent sales (and what the likely profit will be), or investigations of a kind that in fact demonstrate the demand levels for the product to support the extent or nature of the activities, or of her forecast profits.

The Applicant’s case

- [22] The Applicant submits that her intention in carrying on the activities is to make a profit. That is her subjective intention.
- [23] She says that she has conducted these activities in a businesslike and professional manner, purchasing supplementary feed and consulting with her veterinarian when necessary.
- [24] Ms O’Neill submits that she has a number of bee hives well in excess of what one would expect a hobbyist might keep.
- [25] In that regard the Applicant has organised the property in a way so as to facilitate her activities, including making separate paddocks, sheds, shelters and a large dam.
- [26] The Applicant gave evidence that her cattle rearing activities required a lot of work in the early hours of the morning at certain times.

- [27] The Applicant was unaware of the primary production exemption and the need for formal business documentation. She says she did not keep records because, given the limitation of the property size, the size of the business, the management of which was straightforward there was no need for such records. She submits that businesses can and frequently do exist despite the lack of specific records.
- [28] She submits that the small but consistent profit was not included in her income tax returns as any income over the last five years was either a net loss or a capital gain only, and the inclusion of the primary production income would have had no net effect.
- [29] The Applicant relied upon the testimonials of her neighbours, feed suppliers, bee keepers and veterinary surgeon as evidencing the existence of a profitable business.

The Law

- [30] Counsel for the Respondent referred me to a number of authorities. The most relevant being *Evans v FCT*.³ Where Hill J said:

Did the activities of the applicant in gambling constitute a business?

The question whether a particular activity constitutes a business is often a difficult one, involving as it does questions of fact and degree. Although both parties referred me to comments made and decided cases, each of the cases depends upon its own facts and in the ultimate is unhelpful in the resolution of some other and different fact situation.

There is no one factor that is decisive of whether a particular activity constitutes business. As Jessel MR said in the famous dictum in *Erichsen v Last* (1881) 8 QBD 414 at 416:

There is not, I think, any principal law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade.

Profit motive (but see cf *IRC v Incorporated Council Law Reporting* (1888) 22 QBD 279, scale of activity, whether ordinary commercial principles are applied characteristics of the line of business in which the venture is carried on (*IRC the Livingston* (1926) 11 TC 538), repetition and a permanent character, continuity (*Hope v Bathurst City Council* (1980) 144 CLR 1 at 9; *Ferguson v FCT* (1979) 9 ATR 873 at 876, and system (*Newton v Pike* (1908) 25 TLR 127), are all indicia to be considered as a whole, although the absence of any one will not necessarily result in the conclusion that no business is carried on.⁴

- [31] Later, Hill J said:

The test of whether a business of gambling, or for that matter any business, is carried on will be largely objective, determined by reference to the nature and extent of the activities carried on, and it has been said by Lord Buckmaster in *J & R O'Kane & Co v IRC* (1919-22) 12 TC 303 at 347 that:

... The intention of a man cannot be considered as determining what it is that his axe amount to...

³ 20 ATR 922.

⁴ 20 ATR 922, 939.

Nevertheless, the subjective purposes and intentions of the person said to be carrying on a business will have relevance whether the activity be some more normal activity such as breeding cattle ...⁵

- [32] In *Ferguson v FCT*⁶ Bowen CJ and Franki J, in distinguishing a business from a hobby, said:

There are many elements to be considered. The nature of the activities, particularly whether they have the purpose of profit-making, may be important. However, an immediate purpose of profit-making in a particular income year does not appear to be essential. Certainly, it may be held a person is carrying on a business notwithstanding his profit is small or even where he is making a loss. Repetition and regularity of the activities is also important. However, every business has to begin and even isolated activities may be, in the circumstances, held to be the commencement of carrying on business. Again, organisation of activities in a businesslike manner, the keeping of books, records and the use of system may all serve to indicate that a business is being carried on. The fact that, concurrently with the activity in question, the taxpayer carries on the practice of a profession or another business, does not preclude a finding that his additional activities constitute the carrying on of a business. The volume of his operations and the amount of capital employed by him may be significant. However, if what he is doing is more properly described as the pursuit of a hobby or recreation or an addiction to a sport, he will not be held to be carrying on a business even though his operations are fairly substantial. (Cited authorities omitted)

Discussion

- [33] I accept that Ms O'Neill did not claim the primary production exemption earlier because she was unaware of it.⁷ Consequently, she claims she was unaware that she had to keep financial records of her primary production business. For this reason, many of the records had to be recreated from memory. Ms O'Neill is a qualified accountant, and in a previous life worked in that profession. I find it surprising that with that background she did not keep financial records of her cattle raising and bee keeping activities if those activities were, indeed, being run as a business.
- [34] The reconstructed Profit and Loss Statement for bees discloses very modest incomes. The costs of production are similarly modest. Honey sales reached a peak in 2016 of \$1,040 dropping back to \$550 in 2017. Interestingly, the product was sold in recycled jars⁸ so that the cost of containers is for all but one year, nil. Further, there was no uniform size of jar or price.
- [35] The following passage is instructive of Ms O'Neill's commitment to her honey business:

You'd say that the business enables you to, on your account, make a profit without having to expend very much effort, is that right?---That's right.

And about how often would you harvest honey?---Well, that varies. We don't sell it very quickly either, but we sort of keep it in the fridge so we've always

⁵ 20 ATR 922, 941.

⁶ [1979] 37 FLR 310, 314.

⁷ Transcript 1-25 line 35.

⁸ Transcript 1-34 lines 40 – 46.

got some if someone is seeking some. So that's why I've brought some to show you, sort of, precisely what it's actually like and just to prove that we actually have it. But you literally harvest, again, depending on the seasons, the flowers, how active the bees are, how active they look. You can actually tap on it and feel how heavy it feels. You can literally pick it up and feel how heavy it feels. I'd say if you wanted to harvest them every 12 months, you certainly could. But I suppose it just depends on when you feel like harvesting it and what it feels like and what the season's been like.⁹

- [36] Marketing was by word of mouth and a sign at the gate.¹⁰
- [37] Ms O'Neill conceded that for the period from 2012 to 2016 she did not purchase any cattle nor did she breed any cattle during that period.¹¹
- [38] At the outset, I find Ms O'Neill to be a truthful witness and frank in the manner she gave her evidence. There is no doubt that she now believes that she was conducting the activities of calf raising and bee keeping as a business. Prior to being levied with land tax and becoming aware of the primary production exemption, I doubt that she ever turned her mind to whether those activities constituted a business or not. In my opinion, up to that time, it is tolerably clear from the evidence that Ms O'Neill was conducting such activities as a hobby.
- [39] The following factors influenced my conclusion that the activities conducted by the Applicant were not conducted as business activities:
- (a) The small scale of the activities;
 - (b) The absence of written records or accounts kept of the business;
 - (c) The lack of any investigation and or planning into the efficient operation of the activities with a view to running it in a businesslike manner;
 - (d) The lack of continuity of the activities and of the profits, as well as the lack of evidence of activities directed towards generating profits;
 - (e) That there was no natural increase or purchases of livestock (cattle) in the relevant period between 2012 and 2016;
 - (f) Income earned from the activities was not declared in her income tax returns;
 - (g) The lack of any containers for the sale of honey; and
 - (h) The absence of any promotion or marketing plans for the sale of honey.
- [40] Consequently, I confirm the decision of the Commissioner to disallow the Applicant's objection.

⁹ Transcript 1-32 lines 35 – 46.

¹⁰ Transcript 1-32 lines 35 – 46.

¹¹ Transcript 1-42 lines 33 – 43.