


IT 2101 - Collection and recovery of tax in disputed assessment cases

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TAXATION RULING NO. IT 2101

COLLECTION AND RECOVERY OF TAX IN DISPUTED ASSESSMENT
CASES.

F.O.I. EMBARGO: May be released

REF

*** NOTE - THIS RULING HAS BEEN SUPERSEDED BY IT 2156

H.O. REF: S104/1/54 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED: 28 APRIL 1983

F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1122054	PAYMENT OF TAX IN DISPUTED ASSESSMENT CASES	201 204
	ADDITIONAL (PENALTY) TAX : IMPOSITION AND REMISSION	207 207(1A)

OTHER RULINGS ON TOPIC IT 2091

PREAMBLE

1. This ruling provides details of the collection and recovery policy to be applied in disputed assessment cases, other than those associated with assessments raised under the recoupment tax legislation.
2. Head Office memoranda of 3 November 1981 (H.O. ref J206/10) and of 5 January 1983 (H.O. ref S 104/1/54) are superseded by this ruling. To the extent that earlier rulings or principles are intended to be retained, they have been incorporated in this ruling.
3. The income tax law provides that tax assessed to a taxpayer is due for payment on the date specified in the assessment notice or on the thirtieth day after service of the notice on the taxpayer, whichever is the later (section 204). The fact that liability is disputed by reference or appeal is expressly declared not to affect the Commissioner's ability to recover the disputed tax (section 201). Where tax is not paid by the due date, section 207 imposes additional tax for late payment at the rate of 20 per cent per annum.
4. In the past, in disputed assessment cases, the Commissioner frequently accepted arrangements which allowed payment of 50 per cent of the tax attributable to the matter in dispute to remain in abeyance until the question of liability had been resolved and involved full remission of the additional tax for late payment. Arrangements of that kind that were entered into before 13 December 1982 remain effective, but it

has not been possible to make fresh arrangements on the same basis since 13 December 1982 when the amendments to section 207 of the Income Tax Assessment Act restricted the circumstances in which additional tax may be remitted.

5. The tightening of the rules for remission of additional tax for late payment effected by the amendments to section 207 creates a situation in which there is no room for remission simply because there is a dispute about the extent of the taxpayer's liability. This was made clear in the Treasurer's Second Reading Speech on the amending legislation, and is further borne out by the provisions of the Taxation (Interest on Overpayments) Act which allow for interest to be paid on refunds of overpayments where assessments are reduced as a result of the allowance of objections or appeals.

6. The policy set out in this ruling has been developed having regard to the amendments to section 207 mentioned above, and bearing in mind the views expressed in relation to section 201 in *DFC of T v Mackey*, 82 ATC 4571, 13 ATR 547 (see paragraph 7 et seq).

The Mackey Decision

7. In the Mackey case (supra), the Court considered the operation of section 201 where, in a contrived tax avoidance situation, the liability assessed was disputed by the taxpayer.

8. The decision confirmed that the Court has an overriding discretion to stay proceedings or execution, but also indicated that it should not exercise the discretion, other than in quite exceptional circumstances, in cases in which the taxpayer has been a party to a contrivance to avoid tax. In essence, therefore, the Court's view was that the fact that the assessment was disputed was not a sufficient consideration to override the Commissioner's right under section 201 to have the tax assessed paid.

9. For the purposes of this ruling, there are five particular matters arising from the Court's decision which must be borne in mind:

- (a) By consent of the parties, the Court did not consider the operation of section 201 in relation to penalty imposed under sub-section 226(2).
- (b) The Court saw the contrived tax avoidance situation as different from the situation of a non-avoidance case where a dispute as to liability has arisen in the ordinary course of events (without saying what view it might take of section 201 in the latter situation).
- (c) It is indicated, also, that even in a tax avoidance case the Court might exercise its discretion to grant a stay if there is an extraordinary prejudice to the taxpayer such as business being endangered by payment of the tax or

if hardship is seen to exist, or if the Commissioner is seeking payment notwithstanding that the High Court or other superior Court has given a decision against the Commissioner on the issue in question in the disputed assessment.

- (d) The decision clearly states that Parliament has expressed a principle in section 201 to which "great weight" must be given. On the other hand, it is indicated that the fact that the taxpayer's challenge to the assessment is arguable is seen as not irrelevant.
- (e) The Court specifically mentioned that the taxpayer's request for reference had been referred to a Board of Review, thus indicating that resolution of the dispute was not being delayed by the Commissioner (by inference, another ground on which the Court might exercise its discretion to grant a stay).

10. In the light of the above factors, and the views expressed in a range of other cases which have referred to section 201, it is recognised that the resultant legal position cannot be described as completely clear, and that it will be necessary to further clarify the issues as cases are tested in the courts.

11. Nevertheless, it is considered that the parameters within which legal recovery action may be pursued in artificial scheme cases are now fairly clear, and that, even in non-scheme "genuine dispute" cases, there is sufficient authority to indicate that taxpayers are exposed to actions taken in reliance of section 201 (although care needs to be exercised in selecting cases for recovery action to avoid conflict with the guidelines indicated above).

RULING

12. The collection and recovery policy to be applied in relation to disputed assessments depends initially on whether the dispute is in respect of an artificial scheme of tax avoidance, or is a genuine dispute.

13. Where an objection, request for reference or an appeal is considered to be frivolous or completely without merit the long-standing policy that deferment arrangements should not be made is to be continued.

Artificial Scheme Cases

14. In respect of artificial scheme cases in dispute, there are no arrangements for extensions of time to pay beyond those general rules contained in Taxation Ruling No. IT 2091.

15. Generally, but subject to paragraph 38 hereunder, legal recovery action is not to be taken until an objection has been determined.

16. Once an objection is wholly or partly disallowed, the taxpayer will be notified of the tax outstanding and the accruing additional tax for late payment, and advised that if the tax is not paid within 30 days, legal action for recovery may commence without further notice. On no account is any 50/50 arrangement (see paragraph 21 below) to be entered into in such a case.

17. Where additional tax under sub-section 226(2) has been levied, the taxpayer may be advised that legal recovery action will not be taken if the tax outstanding excluding the additional tax under sub-section 226(2) is paid, but that additional tax for late payment will continue to accrue on any unpaid sub-section 226(2) additional tax which is ultimately found to be payable.

18. If the taxpayer does not pay the amount of tax required by either paragraphs 16 or 17 within the stipulated time and the general guidelines contained in Taxation Ruling No. IT 2091 do not apply, legal recovery action should commence, except where there is a decision on the substantive issue against the Commissioner. Legal recovery action should be taken for the total debt but execution of a judgment should not be sought for the additional tax imposed under sub-section 226(2) or the section 207 additional tax that has accrued in respect of the unpaid sub-section 226(2) additional tax. At this stage, legal recovery action should not be taken where the only amount outstanding represents section 207 additional tax.

19. Because determination of an objection in an avoidance case usually means that the nature of the scheme has been investigated and that a test case involving substantially the same issues is before a Board of Review or Court, problems in relation to the point noted in paragraph 9(e) above should not arise.

20. It is considered that the amendments to section 207 to tighten the rules for remission of additional tax for late payment leave no room for any remission to be granted in an artificial scheme case simply because there is a dispute. At the same time, it is to be noted that the Amending Act gives the Commissioner authority to honour any arrangement entered into with a taxpayer prior to the enactment of the amending legislation (paragraph 4 above). This will mean that arrangements entered into prior to the enactment of the amendment to section 207 are to be honoured according to their terms. In the typical case, these terms would be that the arrangement ceases to have effect on determination of the objection. However, where it is clear and unambiguous that an arrangement covered a period to the ultimate resolution of a dispute that arrangement is to be honoured.

Genuine Dispute Cases

21. In respect of genuine dispute cases, there will be a special basis for granting an extension of time in addition to the arrangements set out in Taxation Ruling No. IT 2091. In

these cases an offer by the taxpayer to pay 50 per cent of the tax in dispute (plus the full amount of any tax not in dispute), with the balance being subject to additional tax for late payment from the original due date, and any overpayment accruing interest to the taxpayer, is to be accepted as sufficient to defer legal recovery action for the period of the stage of the dispute in which the payment is made. The 50 per cent payment of the tax in dispute should include 50 per cent of the amount of additional tax under section 226 unless there is a decision against the Commissioner on the application of section 226 in respect of the specific matter at issue.

22. Where a taxpayer makes such an offer at the objection stage, the offer is to be accepted pending the determination of the objection but it is to be made clear that the deferral of recovery action lapses on determination of the objection.

23. Where a taxpayer offers to pay an amount less than 50 per cent of the tax in dispute because of his or her financial circumstances, the case should be treated as being one in the category of a general request for extension of time for payment. Providing the criteria for granting extensions as set out in Taxation Ruling No. IT 2091 are satisfied, the taxpayer's offer should be accepted.

24. Whether a taxpayer enters into a 50/50 arrangement or not, action should be taken to determine the objection as soon as possible in accordance with a priority determined by the amount of tax outstanding.

25. Irrespective of whether or not a taxpayer makes an offer as in paragraphs 21 and 23, legal action for recovery is not, subject to the exception outlined in paragraph 38, to be taken while the objection remains undetermined.

26. Once the objection is wholly or partly disallowed, the taxpayer should be advised that legal recovery action for the outstanding tax and accrued additional tax for late payment may commence without further notice if payment is not made within 30 days of notification of the Commissioner's decision.

27. Where the objection has been determined against the taxpayer and the taxpayer requests a reference to a Board of Review or appeal to a Court, an offer by the taxpayer to pay 50 per cent of the tax in dispute plus any tax not in dispute following determination of the objection is to be accepted for purposes of deferring legal action for recovery. Similarly, where a taxpayer paid 50 per cent of the tax in dispute plus all tax not in dispute at the objection stage, and does not wish to pay the full amount of tax assessed until the matter at issue is finally resolved by a Board of Review or Court, the Commissioner will be agreeable to extending the earlier arrangement entered into with the taxpayer to defer legal recovery action.

28. In all cases where legal action is deferred at the reference or appeal stage, it should be made clear to the taxpayer that such an arrangement will subsist only until

resolution of the dispute in the taxpayer's case or in another case that is regarded by the Commissioner as on all fours with the taxpayer's case, and provided that the taxpayer is reasonably cooperative in ensuring that the reference or appeal proceedings are not delayed.

29. Where a taxpayer requesting a reference or appeal is not prepared to pay 50 per cent of the tax in dispute plus any amount of tax not in dispute, and the other conditions for granting an extension of time do not apply, legal recovery action should be commenced, subject to:

- (i) the matter at issue not being one on which there is a decision against the Commissioner (refer paragraph 9(c) above);
- (ii) the taxpayer's reference or appeal or a case clearly representative of it having been processed through Head Office and sent on to a Board of Review or Court, i.e., there is no impediment of the kind discussed at paragraph 9(e) which might lead the Court to rule against the operation of section 201; and
- (iii) agreement has been obtained from Head Office for the legal action to be initiated. (It is intended to reconsider the need for this step as the approach of the Courts to the application of section 201 is further clarified.)

30. In taking legal recovery action, cases should be brought forward on a priority determined by the amount of tax outstanding. As far as possible within that context it is preferable to first select for action those cases in which the matter at issue is one that has been subject to a decision in favour of the Commissioner in a case involving substantially the same issues as the taxpayer's case.

31. Unless an alternative avenue appears more favourable in the circumstances (section 218, Mareva injunction), legal action should be on the basis that judgment is sought for the total debt and the Court asked not to stay execution, except for those cases mentioned in paragraph 32. Winding-up applications and bankruptcy petitions should only be issued after approval has been received from Head Office.

32. As indicated above, judgment should be sought for the total debt, comprising primary tax and additional tax under sections 207 and 226. Execution of a judgment should not be sought, however, for the additional tax imposed under section 226 or the section 207 additional tax that has accrued in respect of the unpaid section 226 additional tax. In those cases where only section 207 additional tax remains outstanding, legal recovery action should not be taken until the dispute is settled.

33. As with artificial scheme cases, it is considered that there is no room for any remission of additional tax for late

payment simply because there is a dispute. However, as mentioned in paragraph 20, there may be a need to honour an arrangement entered into prior to the enactment of the amendments to section 207.

34. Where a taxpayer succeeds at a Board of Review or Court and the Commissioner appeals against the decision, it is considered that the Commissioner's appeal is an inappropriate event on which to initiate a demand for payment of any deferred tax liability. In such circumstances, payment of the deferred liability should be allowed to remain in abeyance until the matter is decided.

35. Where an appeal is decided in favour of the Commissioner additional tax for late payment accrued to the date of decision on the appeal is, generally speaking, to be maintained.

36. Where an arrangement of the type referred to in paragraph 20 is in force in respect of the appeal stage, and that appeal period is extended by virtue of the Commissioner appealing a Court/Board of Review decision in favour of the taxpayer, the terms of the arrangement should be honoured until ultimate resolution of the matters at issue.

37. It is reiterated that deferment arrangements should not be made where an objection, request for reference or appeal is frivolous or completely without merit.

Exception to Rule for Commencing Recovery Action

38. There is an important exception to the general rule set out above. It is where, in respect of a case involving an outstanding debt of \$5,000 or more, it is considered that the revenue is seriously at risk, e.g., information is obtained which indicates that the taxpayer is taking action to transfer funds/assets overseas or is taking action to arrange his or her affairs within Australia so that legal control of the funds/assets is no longer vested with the taxpayer. In such a case, recovery action may, following approval from Head Office, commence at a point prior to determination of the taxpayer's objection and notwithstanding the existence of factors which would otherwise preclude legal recovery action. The measures to be adopted to protect the revenue will include the obtaining of judgment for the debt, seeking of security, section 218 action, Mareva injunction.

Changed approach to Recovery Action against Artificial Scheme Taxpayers

39. Where a decision has been taken by a taxpayer to contest the disallowance of an objection, past practice has been to withhold legal action to recover tax outstanding until the relevant documents have been lodged with the designated tribunal. In line with the policy stated earlier, the transmission of formal documents to a tribunal is no longer to serve as a pre-requisite to instituting legal recovery

proceedings against a taxpayer. Rather, in artificial avoidance cases in particular, it will suffice if a test case involving the same issues is before a Board of Review or Court.

40. Finally, it remains the rule in all disputed assessment cases that winding-up applications and bankruptcy petitions should be issued only after approval has been received from Head Office.

COMMISSIONER OF TAXATION

6 September 1984

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