



IT 2521 - Income tax : power of remission of additional tax imposed under Part VII and former section 226 of the Income Tax Assessment Act.

 This cover sheet is provided for information only. It does not form part of *IT 2521 - Income tax : power of remission of additional tax imposed under Part VII and former section 226 of the Income Tax Assessment Act*.

This document has been Withdrawn.

There is a [Withdrawal notice](#) for this document.

 This ruling is directed to situations where the taxpayer has not objected against the assessment of penalty tax. In *Commissioner of Taxation v Queensland Trading & Holding Co Ltd* [2006] FCAFC 112, the Commissioner appealed to the full Federal Court from the decision of the Federal Court holding that the taxpayers were entitled to request reasons under the ADJR Act in respect of the Commissioner's objection decision to remit additional tax. The Commissioner's appeal was allowed with the Federal Court determining that as there could only be one objection by each of the taxpayers in respect of the assessment in primary tax and additional tax notified by the notice issued to each of them, there could be only one decision in respect of each decision and that was the objection decision referred to in section 14ZY of the TAA. Decisions disallowing objections to assessments of additional tax were not decisions to which the ADJR Act applied. Where an objection to an assessment of penalty tax has been made which includes grounds for remission, the issue of remission forms part of the ordinary tax objection/appeals process and is subsumed in any objection decision.

TAXATION RULING NO. IT 2521

INCOME TAX : POWER OF REMISSION OF ADDITIONAL TAX
IMPOSED UNDER PART VII AND FORMER SECTION 226 OF THE
INCOME TAX ASSESSMENT ACT.

F.O.I. EMBARGO: May be released

REF N.O. REF: 87/9395-6 DATE OF EFFECT: Immediate

B.O. REF: DATE ORIG. MEMO ISSUED: 4.5.1988

F.O.I. INDEX DETAIL

REFERENCE NO: SUBJECT REFS: LEGISLAT. REFS:

I 1011066	ADDITIONAL (PENALTY) TAX	170, 177
	MOSTYN CASE	former 226(3)
	REMISSION AT ANY TIME	227(3)
	INCORRECT RETURN PENALTY	
	REMISSION AT ANY TIME	

OTHER RULINGS ON TOPIC IT 2073, 2091, 2141, 2517

PREAMBLE The Full Court of the Federal Court of Australia has dismissed the Deputy Commissioner's appeal from the decision of a single judge of the Federal Court reported as *Mostyn v Deputy Commissioner of Taxation* 87 ATC 4482; (1987) 18 ATR 912. The decision of the Full Court is reported as *Deputy Commissioner of Taxation v Mostyn* 87 ATC 5056; (1987) 19 ATR 588. No application was made to the High Court for special leave to appeal. This ruling provides guidelines for the application of the judgment to other cases, particularly for processing requests for remission of additional tax under former subsection 226(3) of the Income Tax Assessment Act (the Act) and under subsection 227(3) of the Act as the Act presently stands.

FACTS 2. The taxpayer in the *Mostyn* case claimed a deduction in the year ended 30 June 1979 for a share of a loss from a partnership involved in an arrangement of the type involved in *Curran v The Commissioner of Taxation* (1974) 131 CLR 409. In the year ended 30 June 1981 a deduction was claimed in respect of calls paid on afforestation shares. Both claims were disallowed and additional tax was imposed by former subsection 226(2) of the Act. Objections in both years were lodged and requests for remission of additional tax were made. The objections were disallowed. No appeals were lodged by the taxpayer.

3. The Deputy Commissioner instituted recovery proceedings for the amount of unpaid additional tax, the primary tax having been paid. The taxpayer sought judicial review of the Deputy Commissioner's decisions to seek to recover the additional tax and to commence legal proceedings for its recovery on the grounds that the decisions were contrary to law and an improper exercise of power.

4. The taxpayer claimed that the Deputy Commissioner should have

remitted the additional tax imposed in both years following the decisions in *FCT v Rabinov* (1983) 71 FLR 450, (1983) 50 ALR 541 and *FCT v Sahhar* (1985) 59 ALR 98.

5. The Deputy Commissioner submitted that remission of additional tax could only be done by way of an amended assessment and that this was governed by section 170 of the Act. Because the taxpayer had not maintained appeals against the assessments, the Deputy Commissioner submitted that he had no power to amend the assessments, and consequently, he had no power to remit the additional tax.

THE DECISION OF THE FEDERAL COURT

6. The Federal Court (Beaumont J.), at first instance, considered that the words of the former subsection 226(3) of the Act which empowered the Commissioner to remit the additional tax "either before or after making any assessment", authorised remission of additional tax at any time and not only as part of the process of assessment. The exercise of the discretion in subsection 226(3) was therefore not limited to situations where section 170 would permit an amendment. Remission was possible even when it is not open to a taxpayer to seek an amendment of his assessment, e.g. because the statutory period for amendment had expired.

7. The Court found that the Deputy Commissioner made an error of law and ordered him to consider and determine the taxpayer's request for remission according to law.

8. The Deputy Commissioner appealed from the decision of the single judge.

9. The Full Federal Court (Bowen C.J., Sheppard and Wilcox JJ.) dismissed the appeal. It also partly allowed the taxpayer's cross-appeal by ordering that the amount of additional tax imposed for the year ended 30 June 1979 was not due and payable.

10. In the opinion of the Full Court it was impossible to give full effect to the words "after making any assessment" unless it covered cases such as the one under consideration. The Court concluded that subsection 226(3) authorised the remission of additional tax at any time. The provisions of section 170 therefore cease to be relevant. The words of subsection 226(3) may be given effect irrespective of what notice of assessment may have issued.

11. The Full Court then dealt with the administrative consequences of their decision. Section 177 of the Act renders a notice of assessment conclusive evidence that the amount and all the particulars of the assessment are correct. In a situation where the Commissioner remits additional tax and does not amend the assessment under the provisions of section 170, section 177 continues to operate on the unamended notice of assessment. The additional tax is, however, not payable and not recoverable.

12. The Full Court held, and the Commissioner accepts, that a

decision to refuse to remit additional tax is a decision which does not fall within paragraph (e) of Schedule 1 of the Administrative Decisions (Judicial Review) Act 1975 (the AD(JR) Act), and is therefore subject to judicial review.

RULING

13. The decision of the Full Federal Court has been accepted and the principles emerging from it are to be applied generally.

14. In the course of the judgment, the Full Court noted that section 227, (which it recognised as the present counterpart of former section 226), is in a substantially different form from section 226 and that it was not intended in the judgment to indicate a view of the proper construction of section 227.

15. On examination of the wording of subsection 227(3) and the explanatory memorandum which accompanied its enactment, it has been decided that the interpretation placed on subsection 226(3) by the Federal Court can and should be extended to apply to the present subsection 227(3).

16. The discretions in subsection 227(3) and the former subsection 226(3) may therefore be exercised independently of the assessment process. The assessment imposing the additional tax does not necessarily have to be amended in order to give effect to a decision to remit the additional tax. Wherever an amendment of the assessment imposing the additional tax is authorised by section 170, however, it is desirable that, following a decision to remit, the assessment be amended.

17. The discretions in subsection 227(3) and the former subsection 226(3) may be exercised after the statutory time limit for lodging an objection against an assessment or for lodging an appeal against the disallowance of an objection has expired.

18. The Commissioner's discretion to remit additional tax must be exercised according to reason and justice, and not arbitrarily (Lord Halsbury LC in *Sharp v Wakefield* (1891) AC 174 at 179). Accordingly, the Commissioner has published his guidelines for the remission of additional tax under subsection 227(3) and the former subsection 226(3); see Taxation Ruling No. IT 2517. The additional factors which should be taken into account when deciding whether to remit additional tax where the remission would take place outside of the process of assessment include, but are not limited to, the following :

- (a) whether the additional tax was correctly imposed. For example, in a situation where the decision in *Sahhar* when applied to a particular case means that the additional tax imposed under the former subsection 226(2) was incorrectly imposed, then subject to the other considerations, the additional tax may be remitted;
- (b) the extent of any previous remissions of the additional tax, whether under the Commissioner's guidelines in Taxation Ruling Nos IT 2012, 2043, 2206, 2517, or in this Ruling, and whether those remissions were in accordance with the guidelines; and

- (c) the amount of time which has elapsed since the issue of the assessment in which it was notified that additional tax was payable. Where there has been negligence or unreasonable delay by the taxpayer in making the request for remission then it may be denied. Where, however, the delay is justifiable, for example where the taxpayer has been awaiting the final decision in *Mostyn*, the remission may be considered. However, if the taxpayer does not make the request for remission for some considerable amount of time after the decision of the Full Federal Court in *Mostyn*, and without good reason, then the request could be denied.

19. No single consideration is conclusive and all aspects should be given due weight. Each case will be considered on its individual merits.

20. The Federal Court (Beaumont J.) at first instance in the *Mostyn* case (87 ATC 4488, 18 ATR 920) refused to grant an order requested by the taxpayer to compel the Commissioner to actually remit the additional tax in the light of the decisions in *Rabinov* and *Sahhar*. The Court found that subsection 226(3) confers a power to remit but does not impose any duty or obligation upon the Commissioner to act in any particular manner. His discretion is unconfined but nevertheless he is obliged to act according to the law. Beaumont J. went on to say :

"But there is no basis for reading into s.226(3) the limitation that the tax should be remitted where, by subsequent judicial decision, it appears that the additional tax was wrongly assessed in the first instance. This is not to say that the decisions in *Rabinov* and *Sahhar* are not relevant matters to be taken into account in the consideration of a request for remission. Clearly, they must be taken into consideration in that context but their weight is a matter for the decision-maker and not for the Court."

This view was supported by the Full Federal Court on appeal (87 ATC 5063, 19 ATR 597).

21. A taxpayer who is aggrieved by a decision by the Commissioner to refuse to remit additional tax may apply to the Federal Court for review of the decision. The grounds on which a taxpayer may rely are set out fully in section 5 of the AD(JR) Act. It is then a matter for the court to decide whether any ground for seeking the review has in fact been proved.

22. Where it is decided to remit some or all of the additional tax and the taxpayer has paid all or part of the additional tax, or where subsequent credits have been offset against the additional tax, a refund may be payable to the taxpayer. Interest under the Taxation (Interest on Overpayments) Act 1983 is not payable on those refunds where the decision to remit gives effect to a taxpayers request for remission and is not a decision relating to a current objection by that taxpayer.

23. Where additional tax imposed under Part VII or the former section 226 is remitted, consideration under section 207 may be given to remitting the additional tax for late payment which may have accrued on the former amount. Guidelines for remission of additional tax for late payment are contained in Income Tax Ruling No. IT 2091.

COMMISSIONER OF TAXATION
9 March 1989