


MT 2037 - Miscellaneous taxes: administrative law: guidelines for preparing statement of reasons for decision

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TAXATION RULING NO. MT 2037

MISCELLANEOUS TAXES: ADMINISTRATIVE LAW: GUIDELINES FOR
PREPARING STATEMENT OF REASONS FOR DECISION

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I 1211106 STATEMENT OF REASONS AD(JR), s.13
REASONS FOR DECISION

PREAMBLE

As foreshadowed in recent communications from National Office, statements of reasons requested pursuant to section 13 of the AD(JR) Act may now be prepared and issue without reference to National Office. Of course this Ruling is subject to the need for National Office input and/or perusal where this is perceived to be desirable or necessary.

The following guidelines and examples have been prepared to assist officers in the task of preparing satisfactory statements of reasons.

Access to the reasons for decisions is fundamental to the whole scheme of administrative review embodied in the Administrative Decisions (Judicial Review) Act ("AD(JR) Act") and the Administrative Appeals Tribunal Act.

2. The underlying reasons for imposing an obligation in section 13 of the AD(JR) Act to furnish statements of reasons are:

- (a) from the point of view of a citizen seeking to resolve a grievance:
 - (i) to overcome any grievance a person might experience when he is not told why something affecting him has been done; and
 - (ii) to enable a person affected by a decision to see what considerations were taken into account and whether an error has been made so that he is sufficiently informed to determine whether to challenge the decision and if so to adopt the most appropriate means for doing so; and
- (b) from the point of view of the administrative decision-maker:
 - (i) to stimulate that person to consider

carefully the correct and proper decision to be made in the circumstances and, thereby, to improve the quality of the decision-making; and

- (ii) to cause that person to identify the reasons which motivate the decision.

RULING LEGISLATIVE REQUIREMENTS

Persons Entitled to Statements of Reasons

3. Sub-section 13(1) of the AD(JR) Act provides as follows:

"13(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision".

General Observations on Requirements of Sub-section 13(1)

4. The following observations may be made in relation to sub-section 13(1):

- (a) The sub-section applies only where a person (e.g. the Commissioner) makes a "decision to which this section applies" as defined in sub-section 13(11). The definition of "decision to which this section applies" adopts, subject to three specific exclusions (paragraphs (a) to (c) of the definition), the definition of "decision to which this Act applies" in sub-section 3(1). By adopting this approach the former definition excludes from its scope a decision included in any of the classes of decisions set out in Schedule 1. Moreover, a decision included in any of the classes of decisions set out in Schedule 2 is also specifically excluded from the scope of section 13 (paragraph (c) of the definition). No request may therefore be made under sub-section 13(1) in respect of:

- (i) the classes of taxation decisions that are totally excluded by Schedule 1 from the scope of operation of the Act (see Appendix A); or
- (ii) the classes of taxation decisions that are specifically excluded by Schedule 2 from the operation of section 13 (see Appendix B).

- (b) The only persons who may make a request under sub-section 13(1) by the specific terms of that sub-section are those who are entitled to make an application to the court under section 5 in relation to a decision i.e. persons who are aggrieved by such a decision (including persons whose interests are adversely affected by such a decision). A person does not have to commence an application for an order of review under section 5 of the Act to entitle him to obtain a sub-section 13(1) statement but he must be entitled to make such an application. The general right to be provided on request with a sub-section 13(1) statement may therefore be exercised either independently of an application for an order of review or as an adjunct to review proceedings.
- (c) The section applies only in respect of decisions reviewable in accordance with section 5 of the Act i.e. decisions that have been made. It does not apply to decisions that are proposed to be made or required to be made. Nor does it apply in relation to conduct related to making a decision in respect of which a person may be entitled to apply for review under section 6 of the Act or in relation to a failure to make a decision in respect of which a person may be entitled to apply for review under section 7 of the Act (see *Lally v West*, unreported decision of Mr Justice Northrop, 5 November 1984).
- (d) The section also does not apply by the definition in sub-section 13(11) in relation to:
 - (i) A decision in respect of which there is an obligation to furnish a statement of reasons under section 28 of the Administrative Appeals Tribunal Act 1975 (para. 13(11) (a)).
 - (ii) A decision that includes, or is accompanied by a statement satisfying the requirements of sub-section 13(1) (para. 13(11) (b)).
- (e) The request under sub-section 13(1) must be made by notice in writing given to the person who made the decision (see paragraphs 28 and 30 for details).
- (f) Although referred to at times, for convenience, as a statement of reasons, the statement must not only give the reasons for the decision, but must also set out the findings on material questions of fact and must refer to the evidence or other material on which those findings were based.
- (g) The requirements of section 13 will be satisfied by

a "statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision." It is important to notice that the section does not require that the relevant evidence or other material be set out in the statement, only that it be referred to : c.f. Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206; 1 ALD 183 at 193.

- (h) The statement of reasons, unless effectively challenged, is evidence of the reasons for the decision to which it relates: Sezdirmezoglu and Another v Acting Minister for Immigration and Ethnic Affairs (1983) 51 ALR 561 per Smithers J at 570

Time Limit for Providing Statement of Reasons

- 5. Sub-section 13(2) of the Act provides as follows:

"13(2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request."

- 6. The requirement to furnish the statement is specifically expressed to be subject to section 13. It is also subject to the operation of:

- . sub-section 13A(2) - which, broadly stated, provides that certain personal or business information supplied either in confidence or under a statutory duty or which is subject to a secrecy provision in some other legislation is not required to be included in a statement furnished under sub-section 13(1) - see paras. 19 to 22 below for more details; or
- . sub-section 14(2) - which provides that certain information which the Attorney-General has certified would, if disclosed, be contrary to the public interest is not required to be included in a statement furnished under sub-section 13(1) - see paras. 23 to 26 below for more details.

Non-Entitlement to Reasons

- 7. Sub-section 13(3) of the Act provides as follows:

"13(3) Where a person to whom a request is made under sub-section (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request:

- (a) give to the second-mentioned person notice in writing of his opinion; or
- (b) apply to the Court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request."

8. This provision is self-explanatory. It provides a procedure whereby a decision-maker, such as the Commissioner or a Deputy Commissioner, may obtain redress where he considers that the person who requests a statement of reasons is not entitled to do so. It is important to note that the right either to notify the person who made the request of his opinion or to apply to the court attaches personally to the decision-maker. The circumstances in which a person who has made a request under sub-section 13(1) in relation to a taxation decision may not have been entitled to do so include the following:

- (a) Where the person who made the request is not a person aggrieved by the decision for the purposes of section 5 of the Act.
- (b) Where the decision in respect of which the request was made under sub-section 13(1) is not one to which section 13 applies for one of the following reasons:
 - (i) it is within one of the classes of taxation decisions included in Schedule 1 and totally excluded from the scope of the Act (sub-section 13(11) and definition of "decision to which this Act applies" in sub-section 3(1));
 - (ii) it is within one of the classes of taxation decisions included in Schedule 2 and excluded from the operation of section 13 (para. 13(11) (c));
 - (iii) it is not a decision reviewable in accordance with section 5 of the Act (sub-section 13(1)); or
 - (iv) the decision itself included, or was accompanied by, a statement setting out the information required by sub-section 13(1) i.e. findings of fact, reference to the evidence and reasons for the decision (para. 13(11) (b)).
- (c) where the person who made the request did not do so within the time limits set out in sub-section 13(5).

9. Sub-section 13(4) of the Act provides as follows:

"13(4) Where a person gives a notice under

sub-section(3), or applies to the Court under sub-section (4A), with respect to a request, the person is not required to comply with the request unless:

- (a) the Court, on an application under sub-section (4A), declares that the person who made the request was entitled to make the request; or
- (b) the person who gave the notice under sub-section (3) has applied to the court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request and the Court refuses that application,

and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the Court."

10. This sub-section provides the method for finalising an application to the court under sub-section 13(3). Where the decision-maker gives a notice under sub-section 13(3) or applies to the Federal Court under sub-section 13(4A), he is not required to give a statement of reasons unless the court declares the applicant to be entitled to a statement.

11. Sub-section 13(4A) of the Act provides as follows:

"13(4A) The Court may, on the application of -

- (a) a person to whom a request is made under sub-section (1); or
- (b) a person who has received a notice under sub-section (3),

make an order declaring that the person who made the request concerned was, or was not, entitled to make the request."

It was held in *Ralkon Agricultural Co Pty Ltd v Aboriginal Development Commission* (1981) 43 ALR 535 that a declaration sought by a person mentioned in paragraph 13(4A) (a) could only be made that the person who made the request was not entitled to make it if the Federal Court was satisfied that the person requesting 'reasons' did not fall within the class of persons entitled to request reasons as provided in sub-section 13(1). i.e. persons who are aggrieved within the meaning of section 5. The Court considered that sub-section 13(4A) does not confer a right to seek an order declaring that a person, who does fall within the class of persons so entitled, is no longer entitled to seek reasons because of the expiration of 28 days after the day on which the decision was furnished.

Time Limits for Requests for Statements of Reasons

12. Sub-sections 13(5) and 13(6) of the Act provide as

follows:

"13(5) A person to whom a request for a statement in relation to a decision is made under sub-section (1) may refuse to prepare and furnish the statement if -

- (a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request - the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or
- (b) in any other case - the request was not made within a reasonable time after the decision was made,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished."

"13(6) For the purposes of paragraph (5) (b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made."

13. The effect of these sub-sections is that a request for reasons may be refused by the decision-maker where:

- (i) the person requesting reasons had been notified in writing of the decision and had not made his request within 28 days of being so notified (para. 13(5) (a)); or
- (ii) the person requesting reasons had not been notified in writing of the decision and had not made his request within a reasonable time after the decision was made (para. 13(5) (b)).

14. There is no specific provision in the Act allowing the Court to extend the period of 28 days within which the request for reasons may be made under paragraph 13(5) (a) (Waterhouse v. D.F.C. of T. 86 ATC 4631, 17 ATR 997)

15. The court is empowered, however, by sub-section 13(b) to declare whether a request was made within a reasonable time or not. The person who made the request may apply to the court for a declaration that the request was made within a reasonable time either before or after any refusal by the decision-maker to furnish the statement. If the decision-maker does refuse to furnish the statement he must by sub-section 13(5) give to the person who made the request notice in writing within 14 days

after receiving the request:

- (a) stating that the statement will not be furnished to him; and
- (b) giving the reason why the statement will not be so furnished.

Further and Better Particulars of Reasons to be Supplied

16. Sub-section 13(7) of the Act provides as follows:

"13(7) If the Court, upon application for an order under this sub-section made to it by a person to whom a statement has been furnished in pursuance of a request under sub-section (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons."

17. In *FCT v. Nestle Australia Ltd* 86 ATC 4760 17 ATR 1130 the full Federal Court recognised that this sub-section empowers the Court to order that further and better particulars in relation to matters specified in the order be given in respect of a written statement furnished in response to a request made under sub-section 13(1). However the Court rejected the Commissioner's contention that sub-section 13(7) provides a substitute for the processes of discovery and inspection and therefore the Court could order discovery and inspection even though the taxpayer does not call sub-section 13(7) in aid of his case.

Classes of Decisions Excluded from Section 13 may be Extended by Regulation

18. Sub-section 13(8) of the Act provides for the making of regulations to declare that certain classes of decisions, in addition to those set out in Schedule 2 to the Act, are not to be subject to the obligation to furnish a statement of reasons under section 13 of the Act. Sub-section 13(9) provides for the form in which classes of decisions may be specified in the regulations. Sub-section 13(10) provides that regulations so made only apply prospectively.

Certain Information Not to be Disclosed

19. Section 13A of the Act provides as follows:

"13A.(1) This section applies in relation to any information to which a request made to a person under sub-section 13(1) relates, being information that -

(a) relates to the personal affairs or business affairs of a person, other than the person making the request; and

(b) is information -

(i) that was supplied in confidence;

(ii) the publication of which would reveal a trade secret;

(iii) that was furnished in compliance with a duty imposed by an enactment; or

(iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

(2) Where a person has been requested in accordance with sub-section 13(1) to furnish a statement to a person -

(a) the first-mentioned person is not required to include in the statement any information in relation to which this section applies; and

(b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by section 13 to furnish the statement.

(3) Where, by reason of sub-section (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -

(a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or

(b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court."

20. The purpose of section 13A is to ensure that the obligation under section 13 to provide a statement of reasons does not require the disclosure of information if it relates to the personal or business affairs of a person other than the person requesting the reasons. This will be the case if the information was supplied in confidence or under a statutory duty, which would reveal a trade secret or which is subject to a secrecy provision in some other legislation e.g. section 16 of the Income Tax Assessment Act. Sub-section 13A(1) defines the category of information to which section 13A relates.

21. There is no provision in section 13A specifying the time within which a decision-maker must give written notice to a person requesting a statement of reasons stating:

- (a) that certain information to which section 13A applies has been omitted; or
- (b) that the statement of reasons will not be furnished.

22. The Act appears to envisage that such a notice should be given within the same time limit as is specified in sub-section 13(2) for the furnishing of statements of reasons, namely, "as soon as practicable, and in any event within 28 days, after receiving the request". As indicated below (see paragraph 62(c)), this is the time limit that it is suggested should be adhered to.

23. Section 14 of the Act provides as follows:

"14.(1) If the Attorney-General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to the public interest -

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed (this would extend not only to 'Crown privilege', but also to any privilege which might be claimed for a document in judicial proceedings, including legal professional privilege);

the following provisions of this section have effect.

(2) Where a person has been requested in accordance with section 13 to furnish a statement to a person -

- (a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with sub-section (1) of this section; and
- (b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by that section to furnish the statement.

(3) Where, by reason of sub-section (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -

- (a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or
- (b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court."

24. Section 14 provides that a decision-maker is excused from the obligation to provide any information concerning a specified matter in a statement of reasons under section 13 where the Attorney-General certifies, for any of the reasons specified in sub-section 14(1), that information would be contrary to the public interest.

25. It is not expected in the normal run of taxation decisions that the Commissioner or his officers will be required to furnish many statements of reasons that would involve a disclosure of information that would be contrary to the public interest by reason that it would prejudice the security, defence or international relations of Australia or by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet. While some statements of reasons could involve disclosure of information concerning a specified matter that would be contrary to the public interest for the reason that it would be contrary to the secrecy provisions contained in section 16 of the Income Tax Assessment Act and the comparable secrecy provisions in other taxation legislation the appropriate procedure that would normally be followed in such cases is that provided for in section 13A of the

Act as discussed above.

26. Like section 13A, there is no provision in section 14 specifying the time within which an application should be made to the Attorney-General for a certificate in terms of the section or within which the Attorney-General should make such a certification. However, paragraphs 14(2)(a) and 14(3)(a) also seem to envisage that the Attorney-General's certificate will be made available within sufficient time to enable a statement of reasons to be furnished within the 28 day time limit to be specified in sub-section 13(2).

AD(JR) Act to Operate Notwithstanding Anything in Existing Laws

27. Section 4 of the Act provides that the Act has effect notwithstanding anything contained in any law in force at the commencement of that Act. The meaning of the word "law" in the context of section 4 is accepted as including any "enactment" as defined in sub-section 3(1). The section is expressed in very general terms and, taken at its face value, it would have the effect of prevailing over, amongst other things, contrary provisions of any other Act. Although one consequence of section 4 would otherwise have been that section 13 of the AD(JR) Act would have overridden the secrecy provisions contained in taxation legislation, the provisions of sections 13A and 14 of the AD(JR) Act ensure that the secrecy provisions will remain intact.

PRE-CONDITIONS FOR VALID REQUEST

Form of Section 13 Request Need Only Substantially Comply with Sub-section 13(1)

28. The Secretary to the Department of the Prime Minister and Cabinet sought advice from the Attorney-General's Department of the circumstances in which the obligation arises to furnish a statement of reasons under section 13 of the Act. It was specifically inquired whether the person requesting a statement is required to express or imply that the request be made under the Act. Set out in the following paragraphs is the substantial part of the reply from the Attorney-General's Department.

"In my view, the obligation under sub-section 13(2) of the Act to furnish a statement of the kind set out in sub-section 13(1) does not arise unless -

- (a) notice in writing is given to the person who made the decision in question; and
- (b) the form of the notice is in substantial compliance with sub-section 13(1); that is, it must either be in the form required by that sub-section or it must be apparent from the notice that what is being requested is a statement of the kind referred to in that sub-section.

Person on Whom Notice is Served

Section 13 provides that a request for a statement under that section is to be by way of 'notice in writing given to the person who made the decision'. The requisite notice must be given to the person who, for the purposes of the Act, is the person who made the decision, and not to some other person. It is on that person that the obligation to furnish the statement is imposed by section 13.

In most cases, the person who actually made the decision will be the person to whom the notice is to be given. There may however be cases where the notice is required to be given to some other person. For example, section 17 of the Act provides that where a person has, in the performance of the duties of an office, made a decision in respect of which an application may be made to the Federal Court under the Act and that person no longer holds or is not performing the duties of that office, the Act has effect as if the decision had been made by the person for the time being holding or performing the duties of the office in question or, where there is no such person, such person as the responsible Minister, or some person authorised by him, specifies. In such a case the notice under sub-section 13(1) must be given to the person who is ascertained in accordance with paragraph 17(c) or 17(d) of the Act. In other cases, where a decision is made by a person on behalf of another person, that other person being invested with the statutory authority to make the decision, the person who made the decision for the purposes of section 13 will be that other person. Such a case may arise where a Minister is invested with statutory power to make a decision and the decision is made in his name by an officer of his Department. In such a case the person who made the decision for the purposes of section 13 would seem to be the Minister and not the officer of his Department.

How Service is Effected

Sub-section 13(1) requires that the notice be given to the person who made the decision. In the absence of any relevant statutory provisions, that would require personal service on the person who made the decision. Sub-section 3(6) of the Act provides, however, that a notice that is required by the Act to be given to a person may be posted to the person by a pre-paid letter addressed in a manner which accords with the provisions of paragraphs (a) or (b) of that sub-section.

The requirement in sub-section 13(1) for the relevant notice to be given to the person who made the decision in question requires that, at least as a matter of good administration, that person be sufficiently identified and his address given when the decision is communicated to a person adversely affected by it. Whether that would be required as a matter of law, either generally

or in a particular case, is not an issue on which it is necessary to express an opinion in the present context.

Next, a notice is required by sub-section 13(1) to be in writing. An oral request would not suffice.

Form of the Notice

Thirdly, there is the matter of the form of the notice. Sub-section 13(1) refers to a notice in writing requesting 'a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'. Clearly, a notice in these terms is one which is capable of giving rise to an obligation under sub-section 13(2). The question for consideration is whether a notice which is not so expressed may be capable of having that effect.

There is a well-recognised distinction between statutory requirements which are mandatory in character and those which are directory only. In the latter case, all that is required is substantial compliance with the statute. I have no doubt that a court would hold that the requirement in sub-section 13(7) as to the content of a notice under that sub-section is directory only, and a notice may be valid so long as there is substantial compliance with the requirement. In my view, a notice would substantially comply with the sub-section if it were apparent to the decision-maker that he were being requested to furnish a statement of the kind referred to in that sub-section - *Guyot v. Evans* (1980) 1 N.S.W.L.R. 636. No particular form of words is required for this purpose. Thus, a letter requesting 'a statement under section 13 of the Administrative Decisions (Judicial Review) Act' would be plainly adequate; a letter saying only 'please tell me why the decision was made' would seem not to be enough.

There will, of course be borderline cases. It may be expected that departments will, in the interests of good administration, not seek unduly to limit responses to requests for reasons to those requests which satisfy sub-section 13(1) of the Act. In the great majority of cases it is likely to be more economical of time to respond sympathetically and fully to an informal request than to take the point that no proper request has been made. There may, however, be cases where a department has reason to believe that a request is not made in good faith and it may be proper to refuse any such requests that do not comply with the section."

Whether Section 13 Statements of Reasons Become Part of the Record

29. There is no specific provision in the Act requiring that a statement of reasons (sub-section 13(1)) or a further and

additional statement of reasons (sub-section 13(7)) will become part of the record of the decision for the purposes of any application under section 5 for an order of review in respect of a decision. However, it can reasonably be expected that such a statement or additional statement will be treated as part of the record so that it may be subject to corrective action (if necessary) by appropriate order of the court. This appears to be what the Commonwealth Administrative Review Committee (the Kerr Committee) envisaged in its report of August 1971 at pages 78/79, paragraph 266.

Obligation to Furnish Section 13 Statement of Reasons Personal to Decision-Maker

30. It is important to note that the obligation to furnish reasons imposed by section 13 attaches personally to the decision-maker. The actual reasons relied upon by the decision-maker at the time the decision was made must be set out, and not other reasons or facts which may subsequently have come to light or appear to be more desirable : Re Palmer and Minister for Capital Territory (1978) 23 ALR 196 at 209; 1 ALD 183 at 196. Section 17 of the Act provides for cases where a person who made a decision in the performance of the duties of an office either no longer holds that office or for some other reason, is not performing the duties of that office e.g. temporary absence due to illness, leave or overseas travel.

Whether Decision Can be Supported by Other Reasons

31. The question has been considered whether a decision can be supported before the Federal Court on an application under section 5 for an order of review for reasons other than those on which it was originally based. The Committee of Review in its Report on Prerogative Writ Procedures (the Ellicott Committee Report) clearly envisaged that a decision which can be so supported should not necessarily be upset and that the court should have power in such cases to confirm the original decision (p.9, para 38). The view is therefore taken that, in an appropriate case, it is open to the Commissioner to seek to support a decision for reasons other than those on which it was originally based.

Failure to Furnish Section 13 Statements of Reasons

32. There is no sanction provided in the Act for a failure to furnish a statement of reasons, on request, within the prescribed time limit of 28 days (although mandamus may be sought under s39B of the Judiciary Act - see *Clanwilliam v. Bartlett*, unreported decision of Mr Justice Fitzgerald 8 May 1984). Notwithstanding this, however, it is intended that every effort be made to comply with the provisions of section 13 within the time limit prescribed.

PROCEDURES

33. There is an obvious need at the outset to identify urgently requests by taxpayers for statements of reasons. It can

be expected that some notices under section 13 will specifically refer to section 13 of the Act and request a statement in writing in terms of the section viz "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision". No difficulty is expected in identifying such requests. In other cases, however, it can be expected that notices by taxpayers will make no reference to section 13 of the Act but will merely seek reasons for particular decisions. In the latter cases, provided that the notices are in some way directed to the provisions of section 13, the view is taken that they should be regarded as a section 13 notice and would need to be dealt with accordingly. A notice under section 13 may be in the form of a written communication expressed in words that are reasonably calculated to convey to the understanding of the person to whom it is addressed that the writer is seeking a relevant statement of reasons (see also paragraphs 41-50) and *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 A.L.R. 500 where Mr Justice Woodward at page 508 stated that:

"It is to be noted that no form of request is prescribed. Nor does section 13 require that the request be stated as being made pursuant to the Judicial Review Act. Persons making decisions to which that Act applies must be taken to know of their obligation to supply reasons when requested to do so.

They should not need to be referred to the relevant legislation. Nor should a person with rights under the Judicial Review Act be denied those rights merely because he does not know of them, or only knows of them vaguely, and so makes a request in some informal letter or other communication which does not follow the wording of s13(1)."

Allocation of Requests

34. The PAO or APAO in the Appeals area in each Branch Office will examine the requests and determine whether they are, or ought to be, properly a matter falling within the responsibility of the Appeals area or are matters relating to decisions taken by other areas of the office where Appeals did not have, and ought not to have had, an involvement (other than that of keeping statistics). For instance, the Sales Tax area, the Debt Management area or the Audit area will each have sole responsibility for the preparation of an appropriate response to requests in respect of decisions made in those areas of the Office.

35. In the former case the matter will be allocated to an appropriately experienced Advising Officer in Appeals to determine the competency of the request, to ascertain the terms of the decision, to collect the relevant documents and to formulate a proposed course of action in relation to the request including drafting a response to the request for reasons where this is considered to be the appropriate course of action.

36. In the latter cases the matter will be referred to the area of the office where the decision was made for action similar to that in paragraph 35 above. The assistance of the Appeals area may be sought by that other area if necessary.

STATEMENT OF REASONS - FORMAT

37. As to the appropriate content of statements of reasons, there can be no blueprint or universal pro forma for such statements. What would be an adequate statement of reasons for one decision will not necessarily be adequate for another. The characteristics of an individual decision will largely determine the material to be set out in a statement of reasons. Generally, the more complex a decision, the greater will be the material necessary in a statement of reasons for that decision. Bearing in mind the purpose and function of a statement for reasons, the desirable aim of a decision-maker should always be to provide as full and adequate a statement as he or she can in all the circumstances. What is clear is that Parliament certainly intended that the person requesting the statement of reasons should be fully informed.

38. Generally, the adequacy of a statement of reasons may be tested by asking two linked questions:

- (a) What, if anything, did the person who made the request for a statement of reasons have to show or seek to show?
- (b) What had to be determined in order to reach the decision made?

A statement of reasons should answer these questions and state how the decision-maker dealt with the matters contained in those answers. In the Ansett case (*supra*), Mr Justice Woodward stated that the decision-maker should set out his statement in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision and its complexity.

39. A statement of reasons must be intelligible to the recipient (*Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206 and 209; 1 ALD 183 at 193 and 196) and be of sufficient precision to give him or her a clear understanding of why the decision was made. The court will judge the adequacy of a statement of reasons by reference to the purposes of the obligation to furnish reasons, in particular, that of enabling persons affected to determine whether to challenge the decision and how to do so.

An important practical point to note is that if a valid request for a statement of reasons is made under the Act and the statement provided in response to that request is inadequate or insufficient to meet the requirements of the Act, the 28 day time period for lodging an application for review does not commence to

run (see Mr Justice Wilcox in *Herlihy v Minister for Foreign Affairs* (16 November 1984)).

40. A statement of reasons must contain all three elements set out in sub-section 13(1) : the findings on material questions of fact, a reference to the evidence or other material on which those findings were based, and the reasons for the decision. The Act does not require that the three elements be set out under separate headings although in many cases it may be convenient to do so.

The Facts

41. The findings of fact to be set out are on the questions of fact material to the decision. There is no obligation to set out findings on all questions of fact irrespective of their substantiality or materiality. It is therefore not necessary that the statement canvass all of the evidence or other material submitted, or all of the contingencies raised by the person seeking the decision in question. What is required is that the decision-maker sets out such findings of fact as were taken into account in making the decision and were sufficient to resolve the material issues. The decision-maker must make amply clear the factual basis on which he has proceeded; all material findings of fact that he relied on must be set out. If a matter was regarded by the decision-maker as material, and was considered by him, then the findings of fact in relation to it must be set out.

42. In so far as the statement of reasons does not set out findings of fact on a matter, it is possible that the court may infer that those facts were considered to be immaterial; if the court finds that those facts are material, it may follow that the decision-maker has erred in law : *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-9 and 352-3 and *Public Service Board of NSW v Osmond* (1986) 4 Leg. Rep. 1 at 2, where the High Court said "if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason". See also *Ahern v D.F.C. of T.* 83 ATC 4698 17 ATR 807 where the Federal Court held that the fact that the taxpayer had lodged an objection, the fact that the objections had not been dealt with and the fact that the taxpayer had not been informed of the basis on which he had been assessed were relevant considerations which the Deputy Commissioner was bound to take into account in deciding whether to grant or refuse an extension of time for payment of tax. It was conceded that he had failed to do this and the decision was set aside for the Deputy Commissioner to reach a fresh decision taking into account all relevant facts.

43. In *Clarke & Kann v D.F.C. of T* 83 ATC 4764 15 ATR 42 the court canvassed various considerations which were or were not taken into account in deciding whether compliance with section 264 notices should be insisted upon. Sheppard J. also gave the reminder that it is only the material which was before the decision-maker that is important, not material led in evidence before the court by the applicant (83 ATC at p.4772) (15 ATR at

p.51).

44. Findings on questions of fact may relate to what are sometimes called basic or primary facts (i.e. those established directly by the evidence or other material) or they may relate to what are sometimes called ultimate facts (i.e. those derived or inferred from findings on basic or primary facts). Findings on ultimate facts will often be expressed in terms of the language of a statutory standard, for example, that a person would be likely to suffer hardship if such and such an act or thing is done or not done, as the case may be. The findings of primary facts will be based on such material as may be available concerning his income, his savings, his assets, his family size, his outstanding debts and the like. It will ordinarily be necessary to state the material primary facts and the process of derivation or inference from those facts in order to provide adequate information about the way in which the decision was reached.

45. Findings on facts are distinguishable from subjective judgments or opinions. Where a subjective judgment or opinion is based on facts, it is desirable that those underlying facts should be set out as well as the judgment or opinion formed on the basis of them.

The Evidence or Other Material

46. The evidence or other material upon which the findings on material questions of fact are based must be referred to in the statement. As previously stated, the requirement is that they be referred to and not that they be set out in the statement. A reference to the evidence or other material should, however, be sufficiently specific for persons affected to identify that which is referred to, i.e. the detail of the statement should be sufficient to enable the applicant to decide whether there are grounds for challenging the legality of the primary decision (see *Elliot v London Borough of Southwark* [1976] 2 All E.R. 781 at 791). The evidence or other material may be identified by stating its source or nature, whichever is the more intelligible and informative. In *A.R.M. Constructions Pty Limited & Ors v D.C. of T.* (86 ATC 4213, 17 ATR 459, Burchett J), it was stated that a purported list of all the documents which were before the decision-maker is not sufficient.

47. Where the evidence or other material before the decision-maker is conflicting, the reasons for preferring some and rejecting other items should be stated.

The Reasons for the Decision

48. Every decision should be capable of a logical explanation. A statement of reasons should contain all the steps of reasoning linking the facts to the ultimate decision which are necessary for a person affected to understand how the decision was reached. It would not be helpful to a person affected to be told simply that the decision in respect of which he sought reasons had been reached, for example, because he was considered

to come within the ambit of a particular statutory provision. The actual reasons relied upon at the time the decision was made are to be set out, and not other reasons or facts which may subsequently have come to light or appear to be more desirable (Re Palmer, supra).

49. The criteria relevant to the decision, the weight to be attached to each criterion, and the conclusion reached on the criteria should be stated. Clarity of explanation may make it desirable in some cases to state separately the conclusion on each criterion. The statement of reasons must not leave the reader to guess or to choose between conflicting inferences. It should not consist of such uncritical generalities or looseness or expression as to make it impossible to determine what lies behind the conclusions.

50. The reasoning should identify any element of official policy or official guideline (whether written or oral and whether emanating from the Government or internal to the Australian Taxation Office) or official practice which is part of the justification for the decision made. See Ahern (supra) where documents detailing official policy in relation to extensions of time for payment of tax were enclosed as attachments to the statement of reasons. Care must however be taken in attributing weight to criteria found in policies or guidelines and relied upon to justify the decision. A recent Tribunal decision reported as Case U88 87 ATC 505, Tribunal Case 66 18 ATR illustrates the point. The issue in that case was whether the Commissioner's decision to impose section 226 additional tax was the correct and preferable decision in the circumstances. Income Tax Ruling 2012 provided relevant guidelines to taxation officers considering requests for remission of section 226 additional tax but in directing the Commissioner to reduce the additional tax payable the Tribunal, at p.512, emphasised "that if the guidelines are to be applied as signposts rather than fences, the computations inherent in them must be tempered by an exercise of discretion. To insist on a blind application of a culpability factor of 40% is not to exercise the discretion which the Commissioner is bound to exercise under sub-section (3) ... The application of an inflexible formula to those facts without considering other elements, is not a proper exercise of discretion".

51. Decision-makers frequently act upon recommendations, reports and results of investigations carried out by subordinate officers or appropriately qualified experts. Where these recommendations etc. are considered in making a decision, the statement of reasons should incorporate the recommendation, etc. as well as the facts (and a reference to the evidence or other material on which they are based) and the reasons leading thereto. It is insufficient merely to state that the decision-maker has relied upon the advice of a named person.

52. Where a decision is made in which the decision-maker must apply his judgment or experience to the facts, or in which the decision-maker must exercise a statutory discretion in relation to the facts, in explaining the process of reasoning

leading to the decision it may be sufficient:

- (a) to state the findings on material questions of fact and any relevant official policy;
- (b) to state the decision reached; and
- (c) to explain that the decision was made, having regard to the material findings of fact and/or policy, on the basis of his judgment or experience, or in his discretion, as the case may be.

53. Where a person who has made a request under section 13 has presented arguments, submissions or evidence to the decision-maker, it is desirable that these should be referred to and the way in which they were dealt with be indicated. For example, in *Barina Corporation Ltd. v. D.F.C.* of T. 85 ATC 4186 16 ATR 336 the person who requested reasons had applied for the exercise in his favour of a statutory discretion and took advantage of the opportunity of putting before the decision-maker such material as he believed would support his case. In his statement of reasons the Deputy Commissioner stated that he "was not satisfied that the company was unable to pay the tax assessed by 19 April 1984" a finding which the Federal Court held was consistent with an insufficiency of information to find either way. In supporting the Deputy Commissioner's evaluation of the applicant's material Wilcox J. stated that no principle of law requires the decision-maker to give advance notice of a view that the material is insufficiently persuasive to warrant a favourable exercise of discretion.

54. In *Nestle Australia Ltd. v. D.F.C.* of T. 86 ATC 4499 17 ATR 747 the Federal Court (Wilcox J.) noted that in a case where the complaint is that a matter considered by the decision-maker was extraneous to the decision or that the decision reflected an error of law it will often be enough for the applicant to point to the statement of section 13 reasons in which the decision-maker has revealed the matters taken into consideration and the process of reasoning involved. However in a case in which the complaint is that the decision-maker failed to take into account a particular matter the section 13 statement will normally reveal that the particular matter was not considered. It will not normally show the existence of facts said to be material or their availability to the decision-maker. These matters must be separately proved and sometimes discovery will be necessary to procure access to documents necessary to be tendered for this purpose.

55. Errors contained in a section 13 statement may lead to an inference that the decision-maker took irrelevant considerations into account and failed to take into account relevant considerations : *Lally v The Minister for Immigration & Ethnic Affairs* (unreported, 17 Jan 85, Keely J). As well, the Federal Court can look at the reasons provided by a decision-maker and conclude that he did not give any consideration at all to relevant matters: *Tagle v Minister for Immigration & Ethnic Affairs* (1983) 48 ALR 379 at 386-7. Also

see A.R.M. Constructions Pty Limited v D.C. of T. (supra) where Burchett J. severely criticised a section 13 statement for making no mention of argument put by the applicants that the objections had specially good prospects of success, and, for making no reference, as a matter taken into account, to the likely effects upon the business of the applicants of the almost immediate payments of tax due, or to the claim made on their behalf in respect of that matter. In that case the applications were remitted to the Deputy Commissioner for further consideration according to law.

56. It is recognised that section 13 of the Act increases the work expected in each office. This occurs in two ways. First, it is most desirable that in respect of all classes of decisions reviewable under the Act (other than those where the operation of section 13 is to be specifically excluded) a sufficient record be made of the decision at the time it is given to enable a statement fulfilling the requirements of section 13 to be given later if requested. Secondly, the actual processing of requests and the writing of the reasons takes time.

57. It is possible that procedures may be able to be adopted to minimise the additional workload. For instance, it may be appropriate that a pro forma document or rubber stamp, with provision for insertion of the findings on material questions of fact, evidence and the reasons which led to the decision, be filled out at the time the decision is made and entered on the relevant file. Wherever practicable at the time decisions are made it would be advantageous for the decision to be accompanied by a statement setting out findings of fact, a reference to the evidence or other material on which those findings were based and the reasons for the decision. If this is done, paragraph 13(11)(b) of the Act would be satisfied and would obviate the need to furnish later any statement of reasons under sub-section 13(1).

58. As to further decided cases that bear on the extent of information that will need to be supplied in a statement of reasons some guidance is available from decisions of the Administrative Appeals Tribunal under the comparable provisions (section 28 and 37(1)(a)) in the Administrative Appeals Tribunal Act (the AAT Act) for the supply of reasons for decisions. In *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 the Tribunal held that the statement of reasons furnished to the applicant in that case was inadequate and that further and better particulars, as detailed in the decision, should be lodged with the Tribunal. The Tribunal in that case made some useful observations on what is required in a statement given under section 28 and 37 of the AAT Act. It emphasised, in particular, that the actual reasons for the decision and the findings on material facts at the time the relevant decision was taken must be set out, that the applicant is entitled to be sufficiently informed of the matters which prompted the decision to determine whether he or she wishes to take the matter further, and that the statement must be intelligible to a layman. In *Re Palmer and Minister for the Capital Territory* (No. 2) (1979) 2 ALD 209 the Tribunal held that the additional information

supplied by the Minister was sufficient to comply with the Tribunal's previous order. The fact that there may have been a better means of providing information to the applicant was regarded as not being to the point.

59. On the form that a statement of reasons must take, the decision of the Tribunal in *Re Harkins and Minister for the Capital Territory* (1978) 1 ALD 537 is also relevant. The Tribunal mentioned that a statement of reasons that might be adequate in one case might not be sufficient in another. The Tribunal also made it clear that a reference to documentary evidence on which a decision was based does not lead to an obligation to produce the documents prior to the hearing.

60. The Tribunal in *Re Ajamian and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 366 criticised a statement of reasons furnished under section 37 of the AAT Act because it did not:

- (a) make clear which facts recited in the statement had been accepted by the Minister and which had not; and
- (b) did not deal with the specific matters relevant to the decision but contained only a general formulation.

61. Attached at Appendices C, to H are examples of the form of statements under section 13 which were recommended by National Office.

ALTERNATIVE COURSES OF ACTION

62. Broadly, the appropriate response to a request for a statement of reasons may take one of the following forms:

- (a) Where the decision-maker is of the opinion that the person who made the request was not entitled to make it (e.g. because the decision involved is one that is either totally excluded from the scope of the Act or one that is specifically excluded from the operation of section 13, because the person who made the request was not a person aggrieved by the decision for the purposes of section 5, or because the decision included or was accompanied by a statement of reasons) the decision-maker may, within 28 days after receiving the request:
 - (i) Notify in writing the person who made the request of the decision-maker's opinion that the person was not entitled to make the request.
 - (ii) Apply to the Federal Court under paragraph 13(4A) (a) for an order declaring that the person who made the request was not entitled to make it.

- (iii) Take both of the courses of action specified in sub-paragraphs (i) and (ii) above.
- (iv) Take action as in (i) above but give reasons where this would not be inappropriate.

It is not envisaged that either of the courses of action in (ii) or (iii) above be taken unless the request for a statement of reasons exhibits features of an unusual, important or exceptional nature.

If the court should determine that the person is entitled to a statement of reasons, the decision-maker must prepare the statement and furnish it to that person within 28 days after the decision of the court (sub-section 13(4)).

The initial action will be to decide whether the person making the request for reasons is entitled to do so. If it is decided that the person is not so entitled, in the normal course, he should be informed of this opinion. Otherwise the reasons requested should be supplied. Both actions have a time limit of twenty-eight days. It is expected that it will only be in rare cases that you would apply to the Federal Court under sub-section 13(4A) but such an application may be necessary in important cases.

- (b) Where it is considered that the person who made the request has not applied in time (i.e. within the time limit specified in sub-section 13(5)), issue of a statement of reasons may be refused. It is not obligatory, however, that the decision-maker refuse to furnish a statement.

Where such a request is received and it is contemplated that the request be refused you must give to the person who made the request notice in writing within 14 days after receiving the request:

- (i) stating that the statement will not be furnished to him; and
- (ii) giving the reason why the statement will not be so furnished e.g. the request was not made within the time required.

In any case where the decision was made in National Office the relevant papers should be forwarded to this Office immediately as it will be the responsibility of the decision maker in National Office.

- (c) Where it is considered that the information to which a request under section 13 relates is information of the kind specified in section 13A - that is, personal or business information which has been supplied in confidence or under a statutory duty, which would reveal a trade secret or which is subject to a secrecy provision in some taxation legislation - the decision-maker is not required to include in a statement of reasons any such information. If the omission of that information would make such a statement of reasons false or misleading, then there is no obligation to furnish that statement.

On receiving a request for a statement of reasons which is considered to seek information to which sub-section 13A(1) refers, a decision will need to be made:

- (i) whether the statement of reasons to be furnished needs to omit the personal or business information to which section 13A applies; or
- (ii) whether no statement of reasons should be furnished because, with the omission of such information, the statement would be false or misleading.

In a case where a statement of reasons is to be furnished which will omit personal or business information to which section 13A refers, the decision-maker, as soon as practicable, and in any event within 28 days, after receiving the request, must give to the person who made the request notice in writing stating that the information is not included and giving the reason for its omission (paragraph (3) (a)).

In a case where no statement of reasons is to be furnished the decision-maker, as soon as practicable, and in any event within 28 days, after receiving the request must give to the person who made the request notice in writing stating that the statement of reasons will not be furnished and giving the reason for it not being furnished (paragraph (3) (b)).

Note that sub-section (4) provides that nothing in section 13A affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

- (d) Where it is considered that a statement of reasons in response to a request under section 13 will involve disclosure of information concerning a

specified matter that would be contrary to the public interest:

- (i) an application will need to be made to the Attorney-General under section 14 (the provisions of which are discussed more fully below) for a certificate in terms of that section;
- (ii) on receipt of a certificate from the Attorney-General:
 - . if the statement of reasons would not be false or misleading if it omitted such information - the decision-maker is not required to include in the statement any such information;
 - . if the statement of reasons would be false or misleading if it omitted such information - the decision-maker is not required to furnish the statement;
- (iii) the decision-maker must give notice in writing to the person who made the request:
 - . in a case where information is not included in a statement of reasons - stating that the information is not so included and giving the reason for not including the information;
 - . in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

On receiving a request for a statement of reasons which is considered to necessitate an application under section 14 for a certificate, a copy of any such request together with a report from the Branch Office should be prepared and forwarded to the appropriate Branch in National Office to enable any such application to be made. It is considered more appropriate for applications to the Attorney-General under section 14 to be made by National Office rather than by the Branch Offices.

- (e) Where it is considered that the person who made the request was entitled to make it and that a statement of reasons under section 13 should be furnished, the following procedures should be followed to ensure that the statement is furnished as soon as practicable and in any event within 28 days after receiving the request.

Immediately after a request under section 13 is

received and identified as such and it is accepted that the person who made the request is entitled to a statement of reasons the request should be directed to the person who made the decision. That officer, with the assistance, if necessary, of an Appeals Officer, will then need to prepare a draft statement of the actual reasons he relied upon at the time the decision was made and set out in the statement his findings on material questions of fact referring to the evidence or other material on which those findings were based. The following factors should be taken into consideration when preparing the statement :

- (i) the decision and any related papers the subject of the request;
- (ii) any document setting out the terms of the decision furnished to the person who made the request;
- (iii) whether the officer was properly authorized to make the decision;
- (iv) whether the decision was based on a report or recommendation of some other subordinate officer;
- (v) the facts leading up to the decision including any relevant correspondence with the person involved and any discussions or interviews held with him;
- (vi) any other considerations taken into account by the decision-maker at the time the decision was made;
- (vii) if there were procedures that were required by law to be observed in connexion with the making of the decision (whether by statute, regulations or otherwise), whether those procedures were observed by the decision-maker;
- (viii) whether the decision made is still regarded as a lawful decision, and could be successfully defended on the basis of the reasons for decision, etc. at the time the decision was made;
- (ix) whether on examination it appears to the decision-maker that a different decision would have been preferable, and whether the original decision should be withdrawn and a new decision (based on more adequate or other reasons) made;
- (x) whether the decision is regarded as lawful and could be successfully defended for reasons other than, or in addition to, those at the

time the decision was made;

- (xi) relevant provisions of the appropriate taxation Act, regulations, etc. and relevant Taxation Rulings, circular memoranda, head office memoranda etc.;
- (xii) the official policy (if any) in the matter, whether the decision was made in accordance with that policy and, if so, whether and how the merits of the particular case were also taken into account;
- (xiii) whether there are matters in prior or subsequent years etc. which affect the decision made; and
- (xiv) whether the decision, if an application for an order of review is made, will affect other taxpayers.

If it appears that the reasons which actuated the decision were inadequate or erroneous and render the decision unlawful, the decision should be withdrawn if possible and a new one rendered. Similarly, if it appears that a different decision would be preferable, the decision should be withdrawn if possible and a new one rendered. If the original decision is the preferable one, but further or better reasons appear than those which actuated it, it will be necessary to either:

- (i) furnish separately from the actual reasons for the decision a statement of these further or better reasons; or
- (ii) where the reasons are changed to such an extent that it would be better to withdraw the original decision, withdraw the decision, assuming power to do so, and render a new one.

If a new decision is to be rendered, it is to be communicated to the person who made the request together with a statement of reasons for the new decision.

COMMISSIONER OF TAXATION
20 AUGUST 1987

APPENDIX

Appendix A

DECISIONS TO WHICH THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT DOES NOT APPLY - SCHEDULE 1

While the Act applies generally to administrative decisions made under statutory powers, certain classes of decisions are wholly excluded from the scope of the Act including certain classes of taxation decisions. This is achieved by:

- (a) specifically excluding from the definition of "decision to which this Act applies" in sub-section 3(1) "a decision included in any of the classes of decisions set out in Schedule 1"; and
- (b) setting out in Schedule 1 to the Act the classes of decisions (including the relevant classes of taxation decisions) that are not decisions to which the Act applies.

In addition, provision is made in the Act (section 19) for the making of regulations to exclude from review under the Act further classes of decisions.

2. The classes of taxation decisions that are included in Schedule 1 and therefore totally excluded from the operation of the Act are as follows:

- (a) Decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty, or decisions disallowing objections to assessments or calculations of tax or duty, or decisions amending, or refusing to amend, assessments or calculations of tax or duty, under any of the following Acts:-

Australian Capital Territory Taxation
(Administration) Act 1969.
Bank Account Debits Tax Administration Act 1982.
Estate Duty Assessment Act 1914.
Gift Duty Assessment Act 1941.
Income Tax Assessment Act 1936.
Pay-roll Tax Assessment Act 1941.
Pay-roll Tax (Territories) Assessment Act 1971.
Acts providing for the assessment of sales tax.
Taxation (Unpaid Companies Tax) Act 1982.
Trust Recoupment Tax Assessment Act 1985.
Wool Tax (Administration) Act 1964.

- (b) Decisions under Part IV of the Taxation Administration Act 1953

3. In addition, such decisions made under regulations in force under the abovementioned Acts are also totally excluded from the scope of the Act. By sub-section 3(7) of the Act, a reference in Schedule 1 to any of the abovementioned Acts (or to any provision of those Acts) is to be read as including a reference to regulations or by-laws in force under any of those Acts (or for the purpose of any such provision).

4. Paragraph (e) was discussed by Ellicott J. in *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 4 ALD 277 at 288-9. He stated:

"under the Income Tax Assessment Act, the Commissioner can make a default assessment in certain circumstances

e.g. if he is not satisfied with the returns furnished by any person but before making the assessment he must be so satisfied. A decision that he is so satisfied is, in my view, an example of a decision 'leading up to' the making of an assessment. He may then proceed to make an assessment and in the course of so doing will make a number of decisions which form 'part of the process of making it'."

5. Decisions held to fall outside the ambit of paragraph (e) are as follows :-

- (i) a decision refusing a request for determination of a further period to make a sufficient distribution under section 105AA of the ITAA : Intervest Corporation Pty Ltd v FCT (1984) 3 F.C.R. 591
- (ii) a decision to issue a notice under section 264 of the ITAA : Sixth Ravini Pty Ltd v D.C. of T. (unreported, 18 June 1985, Northrop J)
- (iii) a decision refusing an extension of time for compliance with a section 264 notice : Clarke & Kann v D.C. of T. (1983) 50 A.L.R. 351.
- (iv) a refusal to issue a certificate under section 128H : Mercantile Credits Ltd v FCT (1985) 61 ALR 331, Domaine Finance P/L v FCT (2 August 1985, Fisher J.).
- (v) a decision pursuant to section 11 of the Sales Tax Assessment Act (No. 1) 1930 declining to register an Applicant as a wholesaler merchant on the ground that he is not as a matter of fact engaged in the sale of goods : Re O'Reilly : Ex parte Bayford Wholesale Pty Ltd (1983) 57 ALJR 675 at 677-78.
- (vi) a decision to grant an extension of time for the lodgment of a return : Balnaves v D.C. of T. (unreported, 1 October 1985).
- (vii) a refusal of an extension of time to pay income tax : Ahern v D.C. of T. (1983) 5 ALN No. 254.

6. Decisions held to fall within the ambit of paragraph (e) of Schedule 1 are as follows :-

- (i) the decision that income tax in the sum of a specified amount is due and payable : The Hells Angels Limited v D.C. of T. (1984) 3 F.C.R. 83.
- (ii) a decision as to the value of goods subject to tax : Bennett Honda Pty Ltd v Commissioner of Taxation (1984) 4 F.C.R. 98.

7. The Commissioner in preparing a regulation 35 statement is not involved in a process of 'making a decision' but in

furnishing to a statutory tribunal details of a decision he had made at some earlier time (T Dalton v Commissioner of Taxation, Full Federal Court 9 August 1985).

8. In D.F.C. of T. v. Clarke and Kann 84 ATC 4273 at p.4276, 15 ATR 483 at p.486 the Full Court of the Federal Court of Australia said "It is inappropriate to attempt to define the boundary between those decisions which are and those which are not 'decisions leading up to' the making of an assessment. However a decision does not lead to the making of an assessment merely because it precedes the making of an assessment or because its purpose is to enable or facilitate the making of any assessment which may be made. A decision is not a decision leading up to the making of an assessment unless the making of an assessment has followed or will follow from the decision."

Another case which assists in distinguishing the Commissioner's assessment function and his administrative function is *Interinvest Corporation Pty. Ltd v. FCT* and D.FCT 84 ATC 4744 15 ATR 1204 in which the Federal Court had to deal with the question of whether or not the grant or refusal of a request for a further period to pay dividends is within the scope of clause (e) of the Schedule. In finding that it was not *Smithers J.* held that the Commissioner's decision related to the question of whether a taxpayer shall be permitted to carry out transactions which may reduce the amount of income upon which he is liable to pay tax.

Appendix B

DECISIONS FOR WHICH REASONS ARE NOT REQUIRED - SCHEDULE 2

There are certain classes of decisions (including certain classes of taxation decisions) which, though not wholly excluded from judicial review under the Act, are specifically excluded from the scope of section 13 of the Act. These classes of decisions are not subject to the obligation to furnish a full statement of the reasons for the decisions but are nevertheless reviewable by the Federal Court under the Act. Again, this is achieved by:

- (a) specifically excluding from the definition of "decision to which this section applies" in sub-section 13(11) "a decision included in any of the classes of decisions set out in Schedule 2"; and
- (b) setting out in Schedule 2 to the AD(JR) Act the classes of decisions that are not decisions to which section 13 applies.

2. In addition, provision is again made in the Act (sub-section 13(8)) for the making of regulations to exclude further classes of decisions from the obligation under section 13 to give reasons.

3. The obligation under section 13 to provide a statement

of reasons does not require the disclosure of personal or business information which has been supplied in confidence, under a statutory duty, which would reveal a trade secret or which is subject to a secrecy provision in some other legislation e.g. section 16 of the Income Tax Assessment Act (section 13A). Furthermore, the obligation under section 13 does not require the disclosure of certain information that the Attorney-General has certified would, if disclosed, be contrary to the public interest (section 14).

4. The classes of taxation decisions that are excluded from the obligation under section 13 to give reasons, but otherwise subject to review by the Federal Court under the Act, and which are specified in Schedule 2 to the Act are as follows:

- (a) Decisions relating to the administration of criminal justice, and in particular:
 - (i) decisions in connection with the investigation or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants under a law of the Commonwealth or of a Territory;
 - (iv) decisions in connection with the issue of Writs of Assistance or Customs Warrants, under the Customs Act 1901; and
 - (v) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses.
- (b) Decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular:
 - (i) decisions in connection with the investigation of persons for such contraventions;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purpose of such investigations;
 - (iii) decisions in connection with the issue of search warrants, Writs of Assistance or

Customs Warrants under enactments; and

(iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses.

(c) Decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth.

5. Generally, paragraphs (e), (f) and (m) in Schedule 2 of the Act ((a) (b) and (c) above) are considered to be sufficiently wide in their scope to encompass such matters as decisions taken in connection with civil proceedings for the recovery of taxes and charges administered by the Commissioner and decisions taken in connection with proceedings (civil or criminal) by way of taxation prosecutions or other proceedings for contraventions of taxation laws administered by the Commissioner.

6. A decision to seek to recover moneys from a taxpayer is so closely bound up with any subsequent decision to actually sue, that they both must answer the general description of "decisions in connection with the institution or conduct of proceedings in a civil court" for the purposes of Schedule 2(f) and therefore are decisions to which sub-section 13(1) does not apply (Mostyn v. D.F.C. of T. 86 ATC 4930)

Appendix C

STATEMENT IN RESPONSE TO REQUEST PURSUANT
TO SECTION 13 OF THE ADMINISTRATIVE DECISIONS
(JUDICIAL REVIEW) ACT 1977

APPLICANT :

With reference to your letter dated October 198 , the following information is provided in relation to the decision not to accept as valid notices of objection lodged against income tax assessments for the years ended 30 June 19 and 19 . The original statement incorrectly omitted references to the statutory declaration signed by on May 19 .

A. Findings on material questions on fact

- a. The notices of assessments for the years ended 30 June 19 and 19 were posted to the taxpayer at her address for service of notices by pre-paid letter post on February 198 .
- b. The statutory declaration sworn by on May 198 , which appears not to be based on records but merely in recollection, does not establish that the notices of assessment were not received at the address for service on or about

February 198 .

- c. The circumstances did not establish that the taxpayer had satisfied the requirements of Section 185 of the Income Tax Assessment Act.
- B. Evidence or other material on which these findings were based
 - a. The notices of assessments for the years ended 30 June 19 and 19 dated February 198 .
 - b. Notice/Cheque Acquittance Reconciliation Statement and Mail Statement of February 198 .
 - c. The notices, received in my office on May 198 , disputing the correctness of the assessments.
 - d. The statutory declaration sworn by on May 198 .
- C. Reasons for the decision
 - a. The notices of objection were not posted to or lodged at my office within 60 days after service of the notices of assessment for the years ended June 19 and 19 .

Appendix D

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

REQUEST FOR STATEMENT OF REASONS

I refer to your letter of October 198 concerning the income tax affairs of ('the taxpayer'). You asked for a statement of reasons under section 13 of the Administrative Decisions (Judicial Review) Act 1977 in relation to the decision not to grant the taxpayer an extension of time to pay his outstanding taxes in respect of the years ended 30 June 19 to 30 June 19 .

The findings on material questions of fact were that:

- (a) The only grounds stated by the taxpayer as warranting an extension of time for payment were that:
 - (i) Objections lodged to the assessments for the years ended 30 June 198 , 198 and 198 were likely to be allowed by the Commissioner.
 - (ii) Due to a 'downturn in earnings and an adverse cashflow' the taxpayer was unable to pay the full amount of tax outstanding or, alternatively, that payment on the due date

would wholly or partly abolish the taxpayer's business.

- (b) The circumstances did not warrant the granting of an extension of time for payment of outstanding taxes pursuant to sub-section 206(1) of the Income Tax Assessment Act ('the Act').

The evidence or other material on which the findings were based were :

- (c) Notices of Objection for the years ended 30 June 198 , 198 and 198 ;
- (d) A Balance Sheet as at October 198 ;
- (e) An Income and Expenditure statement for the period July 198 - October 198 ;
- (f) As at September 198 the following tax was outstanding:

	\$
Balance of 198 assessment	
198 assessment	
198 assessment	
198 assessment	
198 assessment	
Additional tax for late payment computed to August 198	
- (g) Letter dated September 198 from the taxpayer requesting an extension of time for payment of outstanding taxes.
- (h) A computer printout showing, inter alia, the assessed tax outstanding as at September 198 .
- (i) The only payment received from the taxpayer against the tax assessed in respect of the years ended 30 June 198 to 30 June 198 was an amount of \$, paid on September 198 .
- (j) The Guidelines laid down by the Commissioner of Taxation as set out in Taxation Ruling No. IT 2156 dated 6 May 1985.

The reasons for the decision not to grant an extension of time pursuant to section 206 of the Act were:

- (k) The taxpayer in his application for an extension of time furnished no evidence to demonstrate that he would be unable to pay his outstanding tax liabilities if an extension of time was not granted or that the likely effects on the taxpayer's business of the required payment of tax would endanger or curtail the taxpayer's business. In addition the Objections were not sufficiently

meritorious to conclude that they would be ultimately allowed. Accordingly, there were insufficient grounds for concluding that the taxpayer was unable to pay the tax on or before the due date notified in the notice of assessment.

- (1) It was considered that there were no special circumstances which warranted the granting of an extension of time to pay the outstanding taxes.

Appendix E

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

REQUEST FOR STATEMENT OF REASONS

I refer to your letter of September 198 concerning the income tax assessments for the years ended 31 December 19 and 19 . You asked for a statement under section 13 of the Administrative Decisions (Judicial Review) Act in relation to the decision not to grant an extension of time to pay the tax assessed. That statement was provided in my letter dated October 198 . This letter contains amendments to that statement and further and better particulars of the reasons for the decision.

The findings on material questions of fact were:

- (a) On June 198 notices of assessment issued to the applicant for years of income ending 31 December 19 and 19 for income tax amounting to \$ due and payable on July 198 .
- (b) At an interview with , Acting Deputy Commissioner of Taxation, and Australian Taxation Office, on July 198 , and on behalf of the company advised that the assessments were disputed and would be litigated, they proposed the following payment/deferment arrangements:
 - (i) \$ to be paid by the due date;
 - (ii) payment of the balance to be deferred pending the final outcome of the disputed assessments; and
 - (iii) that the amount deferred be not subject to additional tax for late payment.
- (c) In a letter dated July 198 from , Acting Deputy Commissioner of Taxation, to Managing Director of , the applicant was requested to provide the following information in order to give further consideration to the proposal

referred to in (b):

- (i) to supply full details of the present financial position of the applicant and to address such matters as:
 - lines of credit available to the applicant;
 - whether the applicant had any drawdown facilities at its disposal and if so, whether there is any restriction on the use of these facilities to pay taxation;
 - whether any financial support would be forthcoming from the parent company.
 - (ii) if it was claimed that payment by the due date would cause severe financial hardship, to demonstrate clearly that such will be the case.
- (d) In a letter dated July 198 , headed "without prejudice", from to , it was advised:
- (i) the applicant had no current lines of credit available on terms which included an understanding that they may be used to meet income tax liabilities;
 - (ii) the parent company had taken the attitude that the applicant should fund any income tax liability from its own resources.
- (e) By a further letter dated July 198 the applicant indicated its intention to lodge objections to the assessments and sought an extension of time to pay the whole of the tax liability pursuant to Section 206 until such time as the objections 'have been allowed or, if not allowed and the disallowances are referred to the Board of Review or the Supreme Court, then until such time as those references or appeals (including any proper appeal therefrom) are finally determined'. In support of the request the applicant:
- (i) provided further detail relating to the grounds for disputing the assessments;
 - (ii) expressed concern with the alleged delay in the application of section 136 to assess the taxable income for the years in question;
 - (iii) referred to its compliance with its obligations under the Income Tax Assessment

Act and its level of co-operation in subsequent enquiries;

(iv) advised that it would suffer financial hardship if it had to pay the full amount of tax in dispute, as

- the applicant did not have cash or liquid assets to meet the liability,
- the effective cost to the applicant was \$ per annum if the company borrowed funds to meet the liability and was ultimately successful. A copy of the applicant's reports and financial statements for the year ended 31 December 198 were attached.

(f) By letter dated August 198 the applicant was advised that the request for an extension of time to pay on the basis proposed was not granted. The applicant was referred to the policy behind the legislative changes introduced by the Income Tax Assessment Amendment (Additional Tax) Act 1982 which enacted sub-section 207(1A) as evidenced by:

- an extract from the Treasurer's press release dated 10 August 1982;
- an extract from the Treasurer's Second Reading Speech dealing with the amended legislation;
- an extract from the explanatory memorandum which accompanied the amending legislation.

The applicant was also advised that it had the option of paying the full amount of tax or paying 50 per cent of the amount due with the remaining 50 per cent being subject to late payment penalty from the original due date. If the applicant paid 50 per cent of the amount due, legal recovery action for the outstanding 50 per cent would be deferred pending resolution of the dispute.

(g) On March 198 the Second Commissioner circulated a memorandum to all branches outlining the new policy guidelines for the late payment of tax.

(h) On April 198 the Second Commissioner circulated a memorandum to all branches outlining policy guidelines for the collection and recovery of tax in cases of disputed assessments.

The evidence or other material on which these findings were based were:

(i) Notices of assessment for years of income ending 31

December 19 and 19 .

- (j) Notes of the interview between
and of
and and of the
Australian Taxation Office dated July 198 .
- (k) The letter dated July 198 to and
referred to at (c) above.
- (l) The letter from dated July 198
referred to at (d) above.
- (m) The letter from the applicant dated July 198
referred to at (e) above and the accompanying
reports and financial statement for year ended
31 December 198 .
- (n) The press release of the Treasurer dated 10 August
1982 referred to in (f) above.
- (o) The Treasurer's Second Reading Speech referred to
in (f) above.
- (p) The explanatory memorandum which accompanied the
Income Tax Assessment Amendment (Additional Tax)
Act 1982.
- (q) The memorandum from the Second Commissioner dated 8
March 1983 circulated to all Deputy Commissioners
of Taxation headed "New Arrangements for Late
Payment of Tax."
- (r) The memorandum from the Second Commissioner dated
28 April 1983 circulated to all Deputy
Commissioners of Taxation headed "Income Tax :
Collection and Recovery of Tax in Cases of Disputed
Assessments".

The reasons for the decision not to grant an extension of time
under section 206 were:

- (s) There were insufficient grounds for concluding that
the financial position or liquidity of the
applicant was such that at the time of the
application the applicant was unable to pay the tax
on or before the due date.
- (t) The circumstances of the case, including the
disputed taxable incomes, were not considered
exceptional circumstances which warranted the
granting of an extension of time for payment.
- (u) The circumstances of the case, particularly the
fact that objections were proposed to be lodged
against the assessments, and subject to the
applicant agreeing to pay 50 per cent of the amount

due, did warrant a deferment of legal recovery action in relation to the balance of the amount due.

Yours faithfully,

()
ASSISTANT COMMISSIONER

Appendix F

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

REQUEST FOR STATEMENT OF REASONS

I refer to your letter of December 198 concerning the income tax assessment of Pty Ltd as trustee for the Family Trust ('the Trustee') for the year ended 30 June 198 . You asked for a statement of reasons under section 13 of the Administrative Decisions (Judicial Review) Act 1977 in relation to the decision not to grant a remission of additional tax for late payment.

The findings on material questions of fact were that:

- (a) The only grounds stated by the Trustee as warranting a remission of additional tax for late payment were that :
 - (i) The Trustee company was led to believe that its accountant, Mr , had requested reference to a Board of Review for review of the decision to disallow the objection for the year ended 30 June 198 and had been negotiating a settlement of tax outstanding; and
 - (ii) The Trustee had taken reasonable steps to mitigate, or mitigate the effects of, those circumstances which contributed to the delay in the payment of the tax.
- (b) The circumstances did not warrant a remission of tax under sub-section 207(1A) of the Income Tax Assessment Act ('the Act').

The evidence or other material on which the findings were based were:

- (c) As at August 198 additional tax for late payment of primary tax for the year ended 30 June 198 was \$, .
- (d) Return of income for the year ended 30 June 198 .
- (e) Letter dated April 198 disallowing the objection dated December 198 against the

assessment for the year ended 30 June 198 .

- (f) Letter dated August 198 which advised amount of tax outstanding and that additional tax was accruing.
- (g) Minute of the telephone conversation between the trustee's accountant and a Taxation Officer dated December 198 .
- (h) Notice under section 364(2) of the Companies (Victoria) Code issued to the registered office of the Trustee on May 198 .
- (i) Minute of the meeting between Mr and a Taxation Officer dated June 198 .
- (j) Minutes of the telephone conversation between Mr and a Taxation Officer dated June 198 and June 198 concerning the matter as to whom the adjusted distribution should be assessed.
- (k) The setting down for hearing of a motion for a winding-up order and its subsequent adjournment to allow payment of the tax outstanding.
- (l) Payment on October 198 of \$, , representing the primary tax outstanding in relation to the 198 assessment.
- (m) Letter dated October 198 requesting remission of additional tax for unpaid tax in relation to the assessment for the year ended 30 June 198 under sub-section 207(1A) of the Act.
- (n) Guidelines laid down by the Commissioner of Taxation as set out in Taxation Ruling No. IT 2091 dated 6 September 1984.

The reasons for the decision not to grant remission of tax pursuant to sub-section 207(1A) of the Act.

- (o) Applying the Commissioner's guidelines to the circumstances of the case.
 - (i) There were insufficient grounds for concluding that the trustee was unable to pay the tax on or before the date due and payable in the relevant notices of assessment;
 - (ii) The trustee failed to take reasonable action to mitigate, or mitigate the effect of, the circumstances that contributed to the delay in paying the primary tax;
 - (iii) There were no special circumstances which warranted remission of additional tax pursuant

to sub-section 207(1A) of the Act; and

- (iv) There were no reasons which justified a departure from these guidelines.

Appendix G

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

REQUEST FOR STATEMENT OF REASONS

I refer to the representation of February 198 from concerning your income tax assessments for the years ended 30 June 198 , 198 , 198 and 198 . requested a statement of reasons under section 13 of the Administrative Decisions (Judicial Review) Act 1977 in relation to a decision not to grant your request to pay taxes outstanding by instalments.

The findings of material questions of fact were:

- (a) The grounds stated by you in support of your application to pay by instalments were:
 - (i) you were not aware that your previous employer had failed to deduct group tax from the salary payments to you;
 - (ii) your high level of personal financial commitments relative to your total income has resulted in you having insufficient funds available to discharge the debt; and
 - (iii) you own few assets that could be realised to discharge your outstanding tax liability.
- (b) The circumstances did not warrant the granting of your request to pay the outstanding tax by instalments under sub-section 206(1) of the Income Tax Assessment Act ('the Act').

The evidence or other material on which these findings were based were:

- (c) As at December 198 the following taxes were outstanding for the years ending 30 June 198 to 198 inclusive:

Year Ended 30 June	Primary Tax \$	Incorrect Return Penalty \$	Late Payment Penalty \$
198			
198			
198			
198			

- (d) As at January 198 no payment had been made by you to discharge this outstanding tax liability of \$.
- (e) Your application dated December 198 requesting deferment of recovery action and offering to pay the debt by instalments.
- (f) Your letter dated December 198 requesting a reconsideration of your earlier request for deferment of recovery action and offer to pay by instalments.
- (g) Letter dated December 198 from requesting that the tax outstanding be paid by instalments.
- (h) Guidelines laid down by the Commissioner of Taxation as set out in Taxation Ruling No.IT 2091 dated 6 September 1984, and Taxation Ruling No.IT 2156 dated 6 May 1985.

The reasons for the decision not to grant an application to pay by instalment pursuant to section 206 of the Act were:

- (i) The period for payment offered was excessive.
- (j) Applying the Commissioner's guidelines to the circumstances of the case:
 - (i) There were insufficient grounds for concluding that you were unable to pay the tax on or before the due date; and
 - (ii) There were no reasons which justified a departure from those guidelines.

Appendix H

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

REQUEST FOR STATEMENT OF REASONS

I refer to your application for an order of review filed on May 198 in respect of provisional tax in the amount of \$ notified for the year ended 30 June 198 . In your application you have asked for a statement under section 13 of the Administrative Decisions (Judicial Review) Act in relation to the decision to raise provisional tax for the year ended 30 June 198 , in terms of sub-section 221YDA(4) of the Income Tax Assessment Act.

The findings on material questions of fact were:

- (a) Your income tax return for the year ended 30 June

198 that disclosed gross income of \$ and returned a loss of \$.

- (b) The notice of assessment for the year ended 30 June 198 that issued on January 198 was based on a taxable income of \$ (after allowing deductions totalling \$ and increasing gross income by \$) and was due for payment on April 198 .
- (c) The application for variation of provisional tax dated February 198 and a covering letter which indicated you had estimated your gross income and allowable deductions for 198 as nil.
- (d) The letter dated March 198 in which you were requested to review your application of February 198 .
- (e) The letter dated March 198 in which you rejected that approach.
- (f) A review of transactions, as summarised in records kept by the trustee of your bankrupt estate, on the joint account, No. at the Bank, Branch for the period 1 July 198 to April 198 revealed gross income of \$ and items of expenditure similar to those claimed in the 198 return. It was estimated from this review that your gross income for the year ended 30 June 198 would be \$, and that allowable deductions would be similar to the 198 year.
- (g) The notice of variation of provisional tax dated May 198 and accompanying letter of explanation notified that provisional tax for the year ended 30 June 198 had been varied to \$ based on an estimated taxable income of \$.

The evidence or other material on which these findings were based were:

- (h) The return of income for the year ended 30 June 198 .
- (i) The notice of assessment for the year ended 30 June 198 issued January 198 , and the accompanying adjustment sheet.
- (j) The application to vary provisional tax dated February 198 .
- (k) The letter dated February 198 to the Deputy Commissioner, referred to in (c) above.
- (l) The letter dated March 198 , referred to in (d) above.

- (m) The letter to the Deputy Commissioner dated March 198 , referred to in (e) above.
- (n) Summaries of debits and credits to the Joint Account at the Bank, Branch, as prepared by the Trustee, Mr .
- (o) Notice of provisional tax dated May 198 .
- (p) The letter dated May 198 accompanying the notice of provisional tax.

The reasons for the decision to issue a notice of provisional tax under sub-section 221YDA(4) were:

- (q) On the basis of your letter of February 198 you had not made a proper estimate of your taxable income for the year ended 30 June 198 .
- (r) Although requested to review the application dated February 198 you maintained that your estimated taxable income for the 198 year would be Nil.
- (s) In the light of the information from the Trustee it was considered that you had made a low estimate. It was estimated that your taxable income for the 198 year would exceed \$ but the operation of sub-section 221YDA(5) limited our estimate to \$.

Appendix H.

STATEMENT PURSUANT TO SEC. 13 OF THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

I, , a Senior Assistant Deputy Commissioner, Australian Taxation Office, , am an officer duly authorized to exercise, on behalf of the Deputy Commissioner, the power to grant extensions of time or permit payment to be made by instalments pursuant to Sec.206 of the Income Tax Assessment Act and to remit additional tax for late payment pursuant to Sec.207(1A) of the Income Tax Assessment Act 1936.

I received a letter dated June 198 from , a firm of solicitors acting on behalf of , requesting that in the event that a decision had been made not to accede to the terms of a request for extension of time to pay assessments issued to pursuant to Sec,136 of the Income Tax Assessment Act 1936 and the Australian Double Tax Agreement, a statement be given pursuant to Sec.13(1) of the Administrative Decisions (Judicial Review) Act.

I hereby make the following statement setting out my findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the

reasons for my decision.

Background

On June 198 I received a letter from dated June 198 requesting an extension of time for payment of assessments issued to pursuant to Sec.136 of the Income Tax Assessment Act 1936 and the provisions of the Australia Double Tax Agreement, for a total sum of \$. The company further requested that the extension be granted until the date on which the Commissioner notified of his decision to allow the objections being prepared by against the assessments, or, should the Commissioner disallow the objections, the date 30 days after the decision of a Board of Review upon the reference of the objections and the Commissioner's decision thereon for review, and further, to seek the Commissioner's determination that the date for payment pursuant to that extension of time is the date from which there is computed any liability for additional tax pursuant to Sec.207 of the Act, or alternatively, the remission of any such additional tax as may become payable.

On June 198 I wrote to over the name of the Deputy Commissioner, drawing attention to Income Tax Rulings 2091 and 2156, covering the general requirements for granting extensions of time for payment of tax and remissions of additional tax or late payment. In addition attention was drawn to the relevant provisions of the Income Tax Assessment Act 1936 relating to the remission of additional tax for late payment.

On July 198 I received the letter from dated June 198 requesting, in the event that a decision had been made against any of the matters raised by in their letter of June 198 , a statement pursuant to Sec.13(1) of the Administrative Decisions (Judicial Review) Act be provided.

On July 198 I again wrote to over the name of the Deputy Commissioner confirming the decision not to accede to the taxpayer company's request and setting out reasons for that decision.

Findings on Material Questions of Fact

1 The amount owing in respect of the abovementioned assessments (i.e. \$) remained unpaid at June 198 - the date on which the assessments were due and payable and the date on which the extension request lodged by on June 198 was considered.

2 In support of the request for extension, advised that the taxpayer proposed to object against the assessments under consideration but at the time their request was considered there was no record of objections having been lodged. Consequently the request was considered with reference to the provisions of Sec.204, Sec.206 and Sec.207 of the Income Tax Assessment Act 1936 and the Commissioner's guidelines relating to non-disputed assessments as set out in Income Tax Ruling 2091.

3 I was not satisfied on the basis of statements made in support of the request for extension that the taxpayer was unable to pay its tax on or before the due date.

4 In the circumstances I could not reach a conclusion that the taxpayer company satisfied the Commissioner's guidelines as set out in Income Tax Ruling 2091, for the granting of extension arrangements, nor was any reason apparent for the exercising of a discretion of depart from those guidelines in order to grant the extension of time sought.

5 It was considered, however, that in the event of objections being lodged against the assessments, it would be appropriate to consider a further extension request in terms of the guidelines covering genuine disputes (Income Tax Ruling 2156) whereby recovery action would be deferred upon payment of 50% of the amount in dispute with the balance being subject to additional tax for late payment from the original due date.

Evidence or Other Material on Which My Findings Were Based

In making my decision I had regard to the following -

- . The letter dated June 198 written on behalf of by .
- . An extract from the taxpayer's computer record showing, inter alia, the relevant tax outstanding at June 198 .
- . Secs. 204, 206 and 207 of the Income Tax Assessment Act 1936.
- . Income Tax Rulings 2091 and 2156.

Reasons for My Decision

The reasons for my decision were that -

- . There was insufficient information for concluding that the financial position of the company was such that the company was unable to pay its tax on or before the due date.
- . The circumstances of the case, including the fact that the company proposed to lodge objections against the assessments in question, were not considered exceptional circumstances which warranted granting an extended date due and payable for the purposes of additional tax pursuant to Sec.207 of the Income Tax Assessment Act 1936 nor were there sufficient grounds stated for the remission of additional tax that may become payable.

No decision had been made to exact payment of tax due and payable as it was considered appropriate to defer consideration of further action pending lodgment of objections against the disputed assessment.

SENIOR ASSISTANT DEPUTY COMMISSIONER

