

OPINION

APPLICATION OF PRECEDENT TO TAX CASES - FURTHER OPINION

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FURTHER QUESTION

1. On 15 December 2005, the Solicitor-General and I provided an opinion on the extent to which the Australian Taxation Office (ATO) was obliged to follow tribunal or court decisions in subsequent tax matters raising similar issues. I am now asked to provide a further opinion in relation to the statement in paragraph 13 of the earlier advice that 'if the ATO considers that a decision is wrong, it should as soon as possible put those affected on notice of this view. It should only seek to challenge an earlier decision where it has legal advice to the effect that the decision is wrong.' I am asked whether the reference to legal advice can be read to include legal advice from within the ATO.

CONSIDERATION

2. The requirement to have legal advice that a decision is wrong before a decision is challenged was principally intended to ensure that any such decision would be defensible from the perspective of good public administration. Clearly, it is not appropriate for the ATO to seek to challenge a particular interpretation of the tax laws adopted by a court or tribunal just because, as a matter of policy, it considers it wrong or undesirable. If that is the basis for concern then the appropriate approach is to change the tax law. However, if the basis of the ATO's attack on an earlier decision is that as a matter of law it is wrong, then our earlier advice indicated that it was proper for the ATO to seek an appropriate vehicle in which to test that issue. However, it should, among other things, before making a decision to do that have legal advice that supports the argument that the decision is legally wrong.
3. The nature of the legal advice that is required will obviously differ depending on the nature of the tribunal or court whose decision is to be attacked. The level or extent

of legal advice required to challenge a tribunal decision is likely to be quite different from that appropriate where a challenge is made to an appellate court's decision.

Where external counsel have been involved in a case on behalf of the Commissioner, it may often be appropriate to have advice from the same counsel or similar level of counsel. In certain cases it may be appropriate to seek the views of more than one legal adviser.

4. In suggesting that legal advice should be obtained we did not, however, intend to prescribe any particular form of legal advice. There is, therefore, no inherent reason why internal ATO legal advice may not suffice depending on the circumstances of the case and the source of the legal advice from within the ATO. From my perspective, what matters is that the legal advice is credible and can withstand public scrutiny. Thus, it is probably undesirable that the legal advice come from lawyers located within the operational area directly concerned with the tax policy, as opposed to advice from the Office of the Chief Tax Counsel or some other source of independent internal advice such as a consultant retained by the Tax Commissioner. There is no hard and fast rule that needs to be adopted in this regard. The question that principally should be asked is whether the advice is credible and whether the decision to challenge the decision has been based on that legal advice. It should not be open to the charge, for instance, that it is a petulant determination of a particular area within the ATO to pursue what is considered to be the correct or preferable interpretation, regardless of whether or not that interpretation can be said to be reasonably based as a matter of law.
5. It is important in this regard to distinguish between the policy decision to pursue a challenge to a legal decision and the provision of legal advice to support that decision. Normally, a policy decision will need to be made at an appropriately high level within the organisation reflecting the nature of the decision, the likely impact

that the challenge to an earlier decision may have on other tax payers and broader tax policy. In making the policy decision, legal advice supporting a challenge is an important element but not the only element to be considered. The legal advice is concerned only with whether there are reasonable legal arguments for a particular interpretation which justify an attack on a previous decision that, for probably good reasons, was not appealed from at the time. The policy decision needs to consider broader issues. For this reason, it will usually be undesirable for the legal advice to be given by the person making the policy decision.

6. In many ways the decision to challenge an earlier decision is not that dissimilar to the decision that might have been taken when the original decision was handed down as to whether an appeal should be pursued. The Legal Services Directions require that an appeal not be pursued unless an agency believes that it has reasonable prospects for success or that the appeal is otherwise justified in the public interest. For that purpose legal advice is obtained. It may be that at the time of the original decision the factual or other circumstances did not make an appeal appropriate. It seems to me, however, that the same burden needs to be met where an earlier decision is to be challenged in another case. The legal advice obtained for this purpose needs to be sufficiently robust and credible to ensure the decision can be seen as consistent with the same principles as determine whether an appeal is justified. Beyond that it does not seem to me necessary or appropriate to try and be prescriptive as to the precise form that any legal advice to support an attack on an earlier decision should take.



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