

TAXATION RULING NO. IT 2310

INCOME TAX : DISCOVERY OF DOCUMENTS IN PART V APPEAL  
CLAIM FOR PRIVILEGE UNDER SECRECY PROVISIONS

F.O.I. EMBARGO: May be released

REF H.O. REF: J20/8 DATE OF EFFECT: Immediate  
84/16329-5

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

F.O.I. INDEX DETAIL

REFERENCE NO: SUBJECT REFS: LEGISLAT. REFS:

I 1206307 OFFICERS TO OBSERVE 16(2)  
SECURITY 16(3)  
SECURITY PROVISIONS  
DISCOVERY OF DOCUMENTS  
PRIVILEGE  
CLAIMED IN RELATION  
TO DISCOVERY OF  
DOCUMENTS

PREAMBLE This ruling deals with a decision of the Supreme Court of New South Wales in Fortex Pty Ltd v. FCT (handed down 7 May 1986, presently unreported) that a number of documents, listed in an affidavit of discovery filed by the Commissioner, be produced for inspection. In making the order the Court rejected an argument that the documents were privileged from production by reason of sub-section 16(3) of the Income Tax Assessment Act ("the Act").

FACTS 2. The Commissioner had disallowed the taxpayer's claims in relation to its interests in two partnerships, which had been formed in order to take advantage of the decision in Curran v. F.C. of T. (1974) 131 CLR 409. The taxpayer appealed to the Supreme Court of New South Wales pursuant to section 187 of the Act and, prior to the hearing, applied for an order allowing it to inspect certain documents in the possession of the Commissioner, which had been discovered following an order of Lee J. The Commissioner resisted inspection in relation to some documents relying on legal professional privilege, own case privilege and section 16.

3. The claims of privilege were upheld by the Court except that based on section 16. Internal documents prepared for the purpose of the appeal, the investigation report and similar documents and records of interviews with officers of "victim" companies which were involved in the Curran-type transactions implemented by the partnerships of which the taxpayer was a partner, were accepted on the facts of this case as privileged by reason of legal professional privilege. The records of interview were also privileged from inspection in this case by reason of own case privilege.

4. The Commissioner claimed that the remainder of the documents could not be produced because of the operation of section 16 of the Act. These documents included returns of income, minutes, and bank and company records relating to the "victim" companies.

5. In ordering that these documents be produced, his Honour held that, where the Court considers that the documents are relevant and necessary in relation to the interests of justice and for the proper and fair hearing of an appeal under Part V of the Act, sub-section 16(3) of the Act did not prevent production of the documents to the Court. Further, his Honour held that in this situation, the Court could, in the interests of justice, order the Commissioner to permit inspection by the taxpayer. Such an order would render it necessary for the Commissioner to produce the documents for the purpose of carrying into effect the provisions of the Act.

RULING 6. No appeal has been lodged against the decision of the Supreme Court.

7. The decision is considered to be within established principles, in the particular circumstances of this case. The decision confirms that where, on the facts, it is necessary for the purpose of carrying into effect the provisions of the Act that documents be produced to a Court, such production is authorised by sub-section 16(3) of the Act and may be compelled.

COMMISSIONER OF TAXATION  
16 JUNE 1986

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