

TAXATION RULING NO. IT 2464

INCOME TAX : REQUESTS FOR ADJOURNMENT OF TAXATION
APPEALS PENDING OUTCOME OF CRIMINAL PROCEEDINGS

F.O.I. EMBARGO: May be released

REF

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ADJOURNMENTS

PREAMBLE

This Ruling deals with matters to be considered when a taxpayer seeks adjournment or stay of the hearing of a tax appeal pending the finalisation of criminal charges against either the taxpayer or a likely witness.

2. In several recent cases, appeals against tax assessments by persons associated with the promulgation of arrangements for the avoidance of tax have to some extent coincided with criminal prosecutions of persons who participated in those arrangements. This has led to applications to adjourn the tax appeals, that is, appeals against an income tax or sales tax assessment, or an assessment issued under the Taxation (Unpaid Company Tax) or Promoters Recoupment tax provisions. Criminal charges might only be anticipated, the charges might have been laid but the proceedings not commenced, or the criminal proceedings might have commenced but be awaiting hearing, be at the committal trial, appeal, or judicial review stage. The matters at issue in the tax appeal might be dealt with in depth or referred to in the criminal proceedings; they might be outside the matters dealt with in the criminal proceedings.

THE LAW

3. It is an established principle in criminal proceedings that an accused person has the 'right of silence'. From this it has been argued that where there are concurrent civil and criminal proceedings the accused should be entitled to maintain the right of silence in the civil proceedings as well. However, it has been established that the 'right of silence' in the civil proceedings is a matter of discretion, not a right. (Jefferson Ltd v Bhetcha [1979] 1 WLR 898). This principle has been accepted in Australia; refer McMahon v Gould (1982) 7 ACLR 202; Cameron's Unit Services Pty Ltd v Whelpton & Associates Pty Ltd and Another (1984) 59 ALR 754; FCT v Ahern 1986 ATR 535. The onus is on the applicant to show a stay of the civil proceedings should be granted.

4. In McMahon v Gould (supra at p.206) Wootten J. listed those factors which a court may take into account in the exercise of its discretion to stay civil proceedings:

"(a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court (Rochfort v John Fairfax & Sons Ltd (1972 1NSWLR 16) at 19);

(b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (ibid);

(c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with (Jefferson v Bhetcha at 905);

(d) Neither an accused (ibid) nor the Crown (Rochfort v John Fairfax & Sons Ltd at 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;

(e) The court's task is one of "the balancing of justice between the parties" (Jefferson Ltd v Bhetcha at 904), taking account of all relevant factors (ibid at 905);

(f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (ibid at 905);

(g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's "right of silence", and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (ibid at 904);

(h) However, the so-called "right of silence" does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (ibid at 904-5);

(i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (ibid at 905);

(j) In this regard factors which may be relevant include :

- (i) the possibility of publicity that might reach and influence jurors in the civil proceedings (ibid at 905);
- (ii) the proximity of the criminal hearing (ibid at 905);

- (iii) the possibility of miscarriage of justice e.g., by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (ibid at 905);
 - (iv) the burden on the defendant of preparing for both sets of proceedings concurrently (Beecee Group v Barton ((1980) 5 ACLR 33));
 - (v) whether the defendant has already disclosed his defence to the allegations (Caesar v Somner ((1980) 2 NSWLR 929) at 932; Re Saltergate Insurance Co Ltd ((1980) 4 ACLR 733) at 736);
 - (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf Re Saltergate Insurance Co Ltd at 735-6);
- (k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection it may be relevant to consider the nature of the defendant's obligation to the plaintiff;
- (l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed (Beecee Group v Barton)".

TAXATION CASES

5. It is also useful to look to the major factors influencing the way judges choose to exercise their discretion on adjournment applications in recent matters to which the Commissioner was a party.

6. In *FCT v Ahern* (supra), Ryan J., in the Supreme Court of Queensland, refused the taxpayer's application for stay of the hearing of his appeals against his income tax assessments. It was alleged that the income assessed had in fact been derived by certain taxpayer controlled entities. At the time of the application the taxpayer had been committed to stand trial on charges arising out of his activities as a promoter of tax schemes. In forming the conclusion that there was no real danger of causing injustice in the criminal proceedings by refusing a stay, Ryan J. took into account the following :-

- (a) As the trial was not imminent there was only a remote chance that any publicity arising from the civil proceedings could prejudice a potential juror;
- (b) There was no guarantee the criminal hearing would proceed in the very near future;
- (c) The possibility of a miscarriage of justice, e.g. by disclosure of a defence enabling fabrication of evidence by prosecution witnesses or interference with a defence witness was extremely slight;

- (d) In an affidavit in other proceedings the taxpayer had deposed that he was anxious for a decision on his objections to be given as soon as possible and the matters raised in the objections be determined by the courts as quickly as possible.

7. In *Hughes & Baker v FCT* Shepherd J. in the Federal Court in an unreported oral decision of 14 May 1987 refused Hughes' and Baker's applications to stay the hearing of their appeals against Promoters Recoupment Tax assessments pending the outcome of anticipated criminal charges arising from their taxation avoidance activities. The basis for refusing the application was that no charges had been laid and there was no indication if and when the DPP might lay such charges.

8. An adjournment application was granted in Case U115 87 ATC 687. There Davies J., in the AAT, considered an application by the taxpayer that the hearing of its reference in respect of the disallowance of a scheme deduction be stayed pending the outcome of proceedings in respect of criminal charges against the promoter of the scheme, who, the taxpayer argued, was a crucial witness in its appeal. The promoter and others had applied to the Federal Court for review under the ADJR Act of the magistrate's decision to commit them for trial on the charges arising out of their tax avoidance activities. The Federal Court (Jackson J.) remitted the matter back to the magistrate to consider the efficacy of the schemes. When Davies J. gave his decision on the stay application on 26 May 1987 the DPP had appealed from the decision of Jackson J.

9. Davies J. ordered that the AAT hearing not take place until the Full Federal Court delivered judgment on the DPP's appeal. The factors he gave prominence to in reaching this decision were the imminence of the Full Federal Court hearing and the possibility of the Tribunal being in contempt of court if it were to proceed to deal with the appeal which required it to consider the efficacy of the scheme which Jackson J. had said was to be determined by the magistrate.

RULING

10. Whether or not the Commissioner will resist an application for adjournment will be a question to be decided in view of all the relevant facts in each matter. Generally, however, the Commissioner would oppose an application for a stay of a tax appeal pending the outcome of criminal proceedings. It would normally be in the Commissioner's interests for the tax appeal to be finalised, particularly where, as is often the case, many other taxpayers' cases may be affected by the decision. The Commissioner would normally seek to counter the factors suggested in the judgments discussed above which might support the granting of a stay application.

11. Each case should of course be examined as to the merits of the application and the consequences of it. Almost invariably the criminal charges will have been laid by the DPP and liaison with them is required. Because of the nature of the cases where such applications are likely to be made, National Office should

be informed of all matters where a stay of the tax appeal is sought on grounds of the type considered in this Ruling.

COMMISSIONER OF TAXATION

21 January 1988