


IT 2082 - Additional tax in respect of overclaimed partnership losses - claim withdrawn before assessment.

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TAXATION RULING NO. IT 2082

ADDITIONAL TAX IN RESPECT OF OVERCLAIMED PARTNERSHIP
LOSSES - CLAIM WITHDRAWN BEFORE ASSESSMENT.

F.O.I. EMBARGO: May be released

REF

H.O. REF: J196/1/1

DATE OF EFFECT: Immediate

B.O. REF: AP VJ192/77
(Melbourne)

DATE ORIG. MEMO ISSUED: 25 May 1984

F.O.I. INDEX DETAIL

REFERENCE NO: SUBJECT REFS: LEGISLAT. REFS:

I 1078675	ADDITIONAL TAX	226(2)
	PARTNERSHIP LOSSES	
	WITHDRAWAL OF	
	SUBSTANTIVE CLAIM	

PREAMBLE

The Supreme Court of Victoria (Tadgell J.) in the recent case of FCT v Leckie, reported at 83 ATC 4809, 15 ATR 117, dismissed the Commissioner's appeal against the decision of Board of Review No. 1 (Case P122 82 ATC 623, Case 54 26 CTBR(NS) 411) allowing the taxpayer's objection against the imposition of additional tax.

2. The taxpayer, with several others, joined a partnership to participate in a tax avoidance scheme in the year ended 30 June 1978. For that year the taxpayer claimed in his return, inter alia, his individual share of the net loss of the partnership. Prior to assessment of his return the taxpayer wrote to the Commissioner seeking to "amend" his return by excluding the previously claimed partnership loss. The assessment issued disallowing the partnership loss and imposing additional tax of \$14,928.38. The taxpayer objected to both the disallowance of the partnership loss and the imposition of the additional tax and, upon disallowance of the objection, requested that the decision be referred to a Board of Review for review.

3. Before the Board the taxpayer abandoned his claim for his share of the partnership loss and the only issue before the Board concerned the imposition of additional tax under sub-section 226(2). In reaching its conclusion that the assessment should be amended to exclude the additional tax, the Board took the view that sub-section 226(2) did not apply to a claim for a share of a partnership loss and, alternatively, as the taxpayer had withdrawn the claim before the assessment was made, the additional tax should, in any case, be fully remitted.

4. In the Supreme Court, it was submitted for the Commissioner that the Board decided only that sub-section 226(2) did not apply and that the Board's reasons to support the full remission of the additional tax should merely be treated as "obiter". This submission was not accepted and his Honour held that the Board's decision to excise additional tax

was quite properly based on alternative grounds. Having concluded thus, his Honour proceeded, for purposes of discussion, to assume the correctness of the submission for the Commissioner that sub-section 226(2) applies and considered only the question whether the Board's conclusion that additional tax should be wholly remitted was wrong in principle.

5. On this question, the Commissioner had submitted that the Board erred -

- (i) in taking into account the purported withdrawal of the taxpayer's claim for the partnership loss;
- (ii) in holding that there was no loss to the revenue at the time the assessment was made; and
- (iii) in not taking into account all the surrounding circumstances, which included that fact that the claim had been unfounded.

His Honour held that he did not consider that the Board, in remitting the additional tax, was wrong to take into account the withdrawal letter nor the fact that the revenue was not, in the end, put at risk. He also found that the Board did not rely on these matters in isolation from the surrounding circumstances. He accordingly held that the Board validly exercised its power to remit the additional tax in dispute.

RULING

6. It has been decided to accept the decision of the Supreme Court in this case. The main question which this case determines is whether, in the particular circumstances here present, there has been a valid exercise of the Board's discretion under sub-section 226(3). It is accepted that it was open to his Honour to find on the facts of the case that the Board had validly exercised the discretion found in sub-section 226(3).

7. On the other hand it is not accepted that a letter purportedly withdrawing a claim will necessarily have the effect that sub-section 226(2) is inapplicable. Nor is it accepted that such a letter is a sufficient reason in all cases for the Commissioner to remit the whole of the additional tax imposed.

8. The question of the application of sub-section 226(2) to claims by a taxpayer in his personal return to deduct his individual share of a partnership loss was not decided in the judgment of Tadgell J. This matter remains to be decided in another case. In this regard, the Commissioner has obtained leave to appeal to the Federal Court against the decision of the Supreme Court of Victoria (Fullagar J.) in *FCT v. Sahhar* 84 ATC 4167, 15 ATR 400. Until the outcome of this latter appeal, it is considered that the view that the provisions of sub-section 226(2) apply to such claims should be maintained.

COMMISSIONER OF TAXATION
1 June 1984