IT 2250 - Income Tax : issue of assessments where commissioner appeals against adverse decision of taxation board of review or court directly in taxpayer's favour : advice to taxpayers : remission of additional tax for late payment

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TAXATION RULING NO. IT 2250

INCOME TAX : ISSUE OF ASSESSMENTS WHERE COMMISSIONER APPEALS AGAINST ADVERSE DECISION OF TAXATION BOARD OF REVIEW OR COURT DIRECTLY IN TAXPAYER'S FAVOUR : ADVICE TO TAXPAYERS : REMISSION OF ADDITIONAL TAX FOR LATE PAYMENT

F.O.I. EMBARGO: May be released

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I 1205882	ISSUE OF ASSESSMENTS PRINCIPLES APPLYING WHERE DECISION AGAINST COMMISSIONER ON APPEAL ADVICE TO TAXPAYER ON ASSESSMENT REMISSION OF ADDITIONAL TAX FOR LATE PAYMENT	166 207

PREAMBLE Where the Commissioner has appealed against a decision of a Taxation Board of Review or of a Supreme Court of a State or Territory involving the operation of a particular aspect of income tax law which directly affects a number of taxpayers it is the practice of this office not to apply the decision appealed against in making assessments against other taxpayers or in determining objections involving the same aspect. The practice is followed until such time as the matter has been finally determined. In the interim assessments may be issued which are contrary to existing decisions.

2. The sort of situation to which the preceding paragraph refers may be illustrated by reference to the Nilsen Development Laboratories case, 81 ATC 4031 : 11 ATR 505. There the Supreme Court of Victoria held that, as a matter of law, the taxpayer was entitled to an income tax deduction for amounts set aside, i.e. provisions, to meet future long service leave, annual leave, etc obligations. The reasoning of the decision could be seen as having application to all other taxpayers who engaged employees. It was not a situation of closely examining the facts of other cases and determining whether the decision ought to apply - its reasoning had direct application to other cases. In the events that transpired the High Court reversed the decision of the Supreme Court but, in the meantime, assessments were issued disallowing claims made on the authority of the Supreme Court decision.

3. By way of contrast and as an illustration of a

situation to which the opening paragraph does not apply are cases which require a close examination of facts in order to determine whether the reasons for decision given by a Court in a reported judgment ought to apply to them. Tax avoidance schemes are an example. Each of these cases requires a consideration of a whole range of factors. It is always necessary, for example, to establish that the arrangements have been carried into effect, i.e. that it is not a sham situation. There may be a question of determining general concepts in each case, i.e. whether the taxpayer is in business. A decision of a Court in one case of this nature does not necessarily apply in other cases of a similar nature.

4. There are a number of reasons for the official practice. An appeal may take 2 or 3 years before it is ultimately determined and it is not practicable to withhold the issue of assessments to other taxpayers pending the finalisation of an appeal. In many cases the point in issue in the appeal may only be one element in the calculation of taxable income. If assessments were made on the basis of the decision(s) existing at the time of making the assessment the Commissioner may have no power under the income tax law to go back and amend the assessments if the matter is ultimately decided in his favour. Furthermore, it would be discriminatory to take one taxpayer's case to a higher court while at the same time conceding the contested matter in assessments of other taxpayers.

5. It is not inconsistent with the law for this office to issue assessments contrary to an existing decision of an independent tribunal where the decision is under appeal. It has long been established that:

(a) decisions in income tax matters apply only to the taxpayer involved and in respect of the year to which the decision relates;

(b) decisions in respect of one year are not binding in respect of subsequent years notwithstanding that the relevant facts of both years may be identical;

(c) decisions given in respect of the assessment of one taxpayer do not apply in respect of other taxpayers;

(d) findings of fact and of law in relation to one year are no more than matters to be taken into account in making assessments against the same taxpayer in subsequent years or in raising assessments against other taxpayers.

6. For the purposes of this Ruling lengthy discussion of the principles of estoppel and res judicata as they apply to income tax decisions is not necessary. The following observations of Lord Radcliffe in Caffoor v. Commissioner of Income Tax, Colombo [1961] AC 584 at pages 598-600 illustrate the principles which apply:

"The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it."

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"It is in this sense that, in matters of a recurring annual tax, a decision on appeal with regard to one year's assessment is said not to deal with 'eadem quaestio' as that which arises in respect of an assessment for another year, and consequently, not to set up an estoppel. It is precisely that point that was raised and accepted by this Board in 1925 in Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council [1925] AC 94; 37 CLR 284, where it is said:

> 'The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, viz. the valuation for a different year and the liability for that year. It is not eadem quaestio, and therefore the principle of res judicata cannot apply.'

"It may be that the principles applied in these cases form a somewhat anomalous branch of the general law of estoppel per rem judicatam and are not easily derived from or transferred to other branches of litigation in which such estoppels have to be considered; but, in their Lordships' opinion, they are well established in their own field, and it is not by any means to be assumed that the result is one that should be regretted in the public interest."

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7. Where it is necessary to issue assessments in these circumstances care must be taken to ensure that the taxpayers receiving the assessments are made aware of the existing decision and of the Commissioner's appeal. They should also be advised of their own rights of objection and appeal and of the need to exercise those rights in order to protect their own positions.

8. The issue of assessments in these circumstances does not warrant a general extension of time for payment of the tax involved. If the taxpayer actually involved in the appeal sought an extension of time to pay the tax involved in the appeal, any extension of time granted would be on terms which required the payment of additional tax for late payment on any amount ultimately found to be payable. Fairness to the taxpayer involved in the appeal requires that other taxpayers affected by it who seek extension of time to pay should be treated similarly.

9. At the same time the situation does raise the question whether, in the event that an extension of time for payment is granted, additional tax for late payment should be remitted for the period that the decision directly applicable to the taxpayer exists. For example, a taxpayer may have a decision of a Supreme Court in his favour. An appeal against the decision is taken by this office. It is decided by the Federal Court in favour of the Commissioner some 12 months later. No further appeal is taken and the taxpayer is required to pay the tax involved in the appeal. It has been decided that the existence of a decision of a Taxation Board of Review or a Court directly in a taxpayer's favour constitutes a special circumstance within the meaning of sub-paragraph 207(lA)(c). In the result additional tax for late payment which may accrue in these cases during the period that there is a decision directly in a taxpayer's favour may be remitted.

COMMISSIONER OF TAXATION
17 February 1986

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