


IT 2318 - Income Tax : appeals to a court : applications by commissioner for security for costs

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TAXATION RULING NO. IT 2318

INCOME TAX : APPEALS TO A COURT : APPLICATIONS BY
COMMISSIONER FOR SECURITY FOR COSTS

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PREAMBLE

It not infrequently happens that a taxpayer will dispute an assessment, requesting that the appeal be lodged with a Supreme Court, in circumstances where the taxpayer is impecunious or insolvent and it is highly probable that there will be no funds to meet any order for costs against the taxpayer should the appeal be dismissed. Examples would include companies that have engaged in avoidance arrangements which leave the companies effectively stripped of their assets and which seek to use the appeal process to delay recovery action; where assets consisting of loans to associated companies are valueless as the associated companies are also impecunious, and where assessments are issued under the Taxation (Unpaid Companies Tax) Act.

2. Although the courts have a wide and unfettered discretion to grant an order for security for costs, the circumstances upon which the order will be made are dependent on the facts of each case. In *Gemelle Investments Pty Ltd v. F.C. of T.* 82 ATC 4432; 13 ATR 390, where the taxpayer had assets of \$102 and had been inactive for a number of years, the Supreme Court of Victoria (Anderson J.) ordered security for costs on the grounds that the taxpayer fitted clearly within the impecuniosity provision of section 533 of the Companies (Victoria) Code. The application had been made under Order 65 Rule 6 of the Supreme Court (Victoria) Rules.

3. It has also been held that where the impecunious state of a plaintiff company may be due, to a material extent, to the conduct of the company itself, it is a circumstance fit and proper to be taken into account on the question whether the security for costs should be ordered (cf. *Smithers J. in Newtowns Travel Services Pty & Ors. v. Ansett Transport Industries (Operations) Pty Ltd & Anor* (1982) 44 ALR 163). *Smithers J.* also observed that the court could make an order even though it was obvious that the ability of the company to comply with the order was dependent on the willingness of the shareholders and creditors to provide the necessary funds.

4. Where considerable expenditure has already been incurred before an application for security is made, this is a factor which the court will take into account in considering

whether it should refuse the application. In *Smail v. Burton* (1975) 1 ACLR 74 the Full Court of the Supreme Court of Victoria referred to the fact that if an appellant had expended sums of money preparing the appeal and all matters necessary had already been performed and the appeal was ready for hearing it would be unjust to permit a respondent to seek an order for security for costs.

5. Where it appears that the plaintiff is ordinarily resident outside the State, the court, on application of a defendant, may order the plaintiff to give security for costs. Matters relevant to an exercise of the court's discretion include the connection between the State and the plaintiff; the extent of the plaintiff's assets both within and outside the State, and in particular in the place where the plaintiff is ordinarily resident, and the availability of the plaintiff's assets outside the State for satisfaction of any judgment for costs obtained against him in the State - see *Connop v. Varena Pty Ltd* (1984) 1 NSWLR 71.

6. Other considerations relevant to the exercise of the discretion by the court in respect of plaintiff companies are as follows :-

- (a) whether the company's claim has a reasonably good prospect of success;
- (b) whether the company's claim is bona fide and not a sham;
- (c) whether, having regard to the nature of the proceedings, an order for security for costs should not be made because the proceedings involved matters of public importance; and
- (d) whether the defendants were using the application for an order for security for costs oppressively so as to try to stifle the genuine claim of the applicants. -

see *Drumduro Pty Ltd v. Braham* (1982) 42 CLR 463.

7. In the case of a natural person who sues, there appears to be a basic rule that he will generally not be ordered to give security for costs, regardless of how poor he is (see *Barton v. The Minister for Foreign Affairs* (1984) 54 ALR 586 at 592).

8. Applications made by the Commissioner of Taxation to a Supreme Court should be made under High Court Rules 071r5 which is applicable by virtue of section 196A of the Income Tax Assessment Act.

9. Applications to the Federal Court are governed by section 56 of the Federal Court Act and 028r3 of the Federal Court Rules. 028r3 does not limit the section and is not intended to be an exhaustive statement of the cases in which an

order for security for costs can be made (see Full Federal Court in Bell Wholesale Co Pty Ltd v. Gates Export Corporation (1984) 52 ALR 176 at 178). In that case the Full Federal Court also considered the question of impecuniosity and stated at pp.179-180 as follows :

"In our opinion a court is not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here established that those who stand behind it and who will benefit from the litigation if it is successful (whether they be shareholders or creditors or, as in this case, beneficiaries under a trust) are also without means. It is not for the party seeking security to raise the matter; it is an essential part of the case of a company seeking to resist an order for security on the ground that the granting of security will frustrate the litigation to raise the issue of the impecuniosity of those whom the litigation will benefit and to prove the necessary facts".

10. Order 28 rule 2 of the Federal Court Rules provides that an application that an applicant shall provide security for costs shall be made by motion upon notice and supported by an affidavit stating the material facts and the grounds upon which security for costs is sought. Applications for security of costs should be made promptly (King v. The Commercial Bank of Australia Limited (1921) VLR 48 at p.54).

11. "The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case ... It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide" - T. Sloyan & Sons (Builders) Ltd v. Brothers of Christian Instruction (1974) 3 All ER 715 at 720.

RULING

12. Officers authorising the referral of a taxpayer's appeal to a court should have regard to the financial circumstances of the taxpayer and consider whether the Australian Government Solicitor should be instructed to seek an order for security for costs.

COMMISSIONER OF TAXATION
18 June 1986