IT 2455 - Income tax: applications to treat late objections and requests for reference as duly lodged

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TAXATION RULING NO. IT 2455

INCOME TAX: APPLICATIONS TO TREAT LATE OBJECTIONS AND REQUESTS FOR REFERENCE AS DULY LODGED.

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1010266	APPLICATIONS TO TREAT LATE OBJECTIONS AND REQUESTS FOR REFERENCE AS DULY LODGED. EXTENSIONS OF TIME	188,188A,188B: ITAA 76,76A,76B: A.C.T TAXATION ADMINISTRATION ACT. 24,25,25A: BANK ACCOUNT DEBITS TAX ADMINISTRATION ACT 26,27,27A: ESTATE DUTY ASSESSMENT ACT 82,83,84: FRINGE BENEFITS TAX ASSESSMENT ACT 33,34,34A: GIFT DUTY ASSESSMENT ACT 40A,40B,40C: PAYROLL TAX ASSESSMENT ACT 40A,40B,40C: PAYROLL TAX (TERRITORIES) ASSESSMENT ACT 42,42A,42B: SALES TAX ASSESSMENT ACT (NO 1) 14HA,14HB,14HC: TAXATION ADMINISTRATION ACT 56B,56C,56D: WOOL TAX (ADMINISTRATION) ACT

PREAMBLE 1. Under the provisions of the various taxation laws a person dissatisfied with an assessment or decision generally has a fixed period to object against the assessment or decision. The amendments effected by the Taxation Boards of Review (Transfer of Jurisdiction) Act ("the TBR(TJ) Act") ensure that, although under Commonwealth taxation laws the period for lodging

an objection is a uniform 60 days, a person may now apply to the Commissioner to accept a late objection as having been duly lodged.

2. The Act also contains provisions enabling a taxpayer who has failed to lodge, within the required time (also sixty days) a request for reference to the AAT or the Court, to nevertheless forward the request to the Commissioner with an application asking that the request be treated as having been duly lodged. The Commissioner must refer those applications to the AAT or Court, respectively.

3. The guidelines set down in this Ruling apply primarily to the exercise of the discretion vested in the Commissioner, namely to accept a late objection as having been duly lodged. Similar principles will be applicable to a decision as to whether the Commissioner should oppose an application to treat a late request for reference as duly lodged. Generally, the same principles are applicable to these discretions whether they be exercised by the Commissioner, the AAT or a Court.

STATUTORY PROVISIONS

4. Section 185 of the Income Tax Assessment Act ("ITAA"), provides that a taxpayer dissatisfied with an assessment under that Act may lodge an objection against the assessment within 60 days after service of the notice of assessment. The TBR(TJ) Act, which came into operation on 1 July 1986, inserted sections 188 and 188A into the ITAA. Section 188, together with section 188A, allows the Commissioner to treat a late objection as duly lodged. The discretion is only available where the sixty day time limit had not expired before 1 July 1986.

5. Sub-section 188(1) provides that where the period for lodgment of an objection against an assessment has ended the taxpayer may, notwithstanding that the period has ended, send the objection to the Commissioner together with an application in writing requesting the Commissioner to treat the objection as having been duly lodged. By reason of sub-section 188(3) it is necessary for the taxpayer's application to state fully and in detail the circumstances concerning, and the reasons for, the failure by the taxpayer to lodge the objection within the 60 day time limit. The Commissioner may, under sub-section 188A(1), either grant or refuse the application. A taxpayer who is dissatisfied with the decision by the Commissioner on the application may apply to the AAT for a review of that decision (sub-section 188A(3)).

6. The TBR(TJ) Act also inserted provisions similar to section 188 and 188A in other Commonwealth taxation laws to allow the Commissioner to treat late objections under those Acts as duly lodged.

7. The provisions relating to late requests to refer a decision on an objection to the AAT or court are found in sub-sections 188(2) and (3), and section 188B of the ITAA. Similar provisions are found in other taxation legislation. An application to treat

a late request for reference as duly lodged must be sent, together with the request for reference, to the Commissioner (sub-section 188(2)), and must state fully and in detail the circumstances concerning, and the reasons for, the failure to lodge within time (sub-section 188(3)). The Commissioner is required to refer the application to the AAT or the Court, as the case may be (sub-section 188B(1)) for consideration.

RULING A. CONSIDERATION OF APPLICATIONS TO ACCEPT LATE OBJECTIONS

8. Objections lodged outside the 60 day time limit should prima facie be considered as invalid objections. The 60 day time limit is included in Commonwealth taxation laws for a purpose. It is the clear legislative intent that disputes as to taxation should be brought to notice and resolved as soon as possible in order that the efficient and orderly collection of taxes and the administration of the taxation laws not be impeded. Accordingly, an objection received outside the prescribed time limit calls for a full and proper explanation or excuse before it is treated as duly lodged. It should be so treated only where an acceptable explanation of the delay is provided.

9. Sub-section 188(3) of the ITAA specifies the manner in which an application shall be made. An application must state fully and in detail the circumstances concerning and the reasons for the failure to lodge the objection within the 60 day time limit. Any application which does not show sufficient detail or explanation prima facie does not qualify for acceptance. In such circumstances a taxpayer should be given an opportunity to provide further material in support of his application but if in the final analysis the explanation is unacceptable or the detail insufficient the application should be refused.

10. Sub-section 188(1) provides that "the taxpayer may, notwithstanding that the period has ended, send the objection to the Commissioner together with an application in writing". In many instances the objection and the application will not be lodged simultaneously. The objection might be sent in first and then the application, or vice versa. It is considered that in the general context of the provisions governing applications for extensions of time the words "together with" in sub-section 188(1) and 188(2) are not to be construed literally. They mean "and", not "simultaneously" or "at the same time as". The spirit of the provisions allowing an extension will not be met if the technical limitation of contemporaneity is imposed. Accordingly while applications should preferably accompany the objection it is not essential that they do so. Where an application is lodged prior to the receipt of an objection, the taxpayer should be advised that the application cannot be considered until an objection is lodged. Where an objection lodged out of time is not accompanied by a proper application, seeking acceptance, the taxpayer, upon being advised of the invalidity, should also be informed of the right to advance reasons for acceptance. Of course, this procedure should not be followed if it is intended, notwithstanding the lack of a valid objection, to amend the assessment to allow the substantive claim.

THE RELEVANT PRINCIPLES

11. It is not possible to detail the variety of possible circumstances or classes of circumstances in which applications for extensions of time may properly be granted. There are no express statutory guidelines as to the principles to be applied in granting extensions of time beyond the prescribed period. In considering such applications therefore each case must be considered on its merits. As indicated by the Treasurer in introducing the legislation, generally the principles applied by judicial or quasi-judicial bodies in extending time will be relevant in determining whether or not an extension of time is to be granted.

12. The Federal Court of Australia has on a number of occasions given consideration to the principles applicable to the exercise of the discretion to allow further time in relation to section 11 of the Administrative Decisions (Judicial Review) Act, 1977 ("ADJR Act"). Section 11 imposes limitations with respect to time for the commencement of proceedings under that Act but gives the Court a discretion to allow further time. It has been accepted by the Federal Court that the limitation of the period of time within which an application may be made under section 11 is a matter of some importance despite the existence of the discretion to extend time: see Ralkon v Aboriginal Development Commission (1982) 43 ALR 535 at p.550. An allowance of a further period of time should certainly not be made as a matter of course: Intervest Corporation Pty Ltd v FCT 58 ALR 317 at p.324.

13. In Lucic v Nolan & Ors, 45 ALR 411 Fitzgerald J, in an application for an extension of time under section 11 of the ADJR Act, had regard to matters of proper public concern which were identifiable as relevant to the review of administrative acts and decisions. While there was a legislative intention that certain standards are to be observed in respect of such decisions and actions, there were other matters of proper public concern to take into account including the need for finality in disputes, the efficient use of public resources, the appropriate allocation and expenditure of public funds and, where a question of promotion and discipline in the Australian Public Service was involved, the orderly administration of that body. Although noting that the court was given a discretion to allow further time, his Honour said at p.416: "None the less, it must, in my opinion, be accepted that it has deliberately been made the prima facie rule that proceedings not commenced in time should not be entertained".

14. After referring with approval to the views expressed by Fitzgerald J. in Lucic v Nolan, Lockhart J. in Hickey & Ors. v Australian Telecommunications Commission 47 ALR 517, added: "Although sec.11 does not in terms place an onus on an applicant seeking an allowance for further time within which to lodge an application for an order of review, it is nevertheless incumbent upon him to satisfy the court that the extension of time should be granted. It is not for the decision-maker to establish that the applicant does not have a case for an extension of time. The applicant seeks an indulgence. It is for him to prove that he is

entitled to it. But the court should not surround the exercise of its discretion with unnecessary constraints such as a requirement that there be special circumstances or considerations of that kind. The statute does not require them. Nor should the courts. It is best left to the good sense of the judge hearing each case to determine whether, on the evidence before him, the court's discretion should be exercised in favour of granting an enlargement of time to bring an application for an order of review".

CIRCUMSTANCES IN WHICH OBJECTIONS MAY BE TREATED AS DULY LODGED

15. The circumstances in which applications to treat objections as duly lodged may be granted include delay in lodgment of the objection caused by the illness of the taxpayer or the taxpayer's agent, other factors outside his or her control, or absence of the taxpayer overseas at the time of issue of the notice of assessment. Delays in the post would also constitute grounds to accept the objection as duly lodged. The date of lodgment of the objection and application is relevant in considering whether to grant or refuse an application. A taxpayer would generally have to satisfy the Commissioner that the objection, together with the sub-section 188(1) application was lodged as soon as circumstances reasonably permitted. It is not envisaged that taxpayers could delay for an unreasonable period of time the lodgment of objections and extension applications.

16. Where it is alleged that late lodgment was due to the negligence of the taxpayer's agent or accountant, there are a number of considerations to take into account. On the one hand an agent of the taxpayer should be expected to be thoroughly familiar with the relevant statutory provisions governing the lodgment of objections. Retention of a professional advisor does not exonerate a taxpayer from responsiblity for ensuring that instructions are carried out especially where some action must be taken within a certain period of time. On the other hand taxpayers should not be deprived of their rights on account of an error of an agent especially where the error or delay was due solely to the fault of the agent. That the taxpayer acted promptly to instruct the agent to lodge an objection and there was nothing else that could reasonably have been done to ensure the objection was lodged on time would be a factor supporting the granting of the application. However the fact that late lodgment was due to the negligence or omission of the taxpayer's agent rather than the taxpayer is but one circumstance to be considered. It cannot be said that in every case where the delay is not the taxpayer's fault the application should be granted.

17. The conduct of the Australian Taxation Office and the taxpayer and/or an agent generally insofar as it bears upon the delay - including the on-going negotiations as to the dispute - may be relevant to consideration of an application. Misunderstandings may arise which, in retrospect, would justify validation of a late objection. The fault may on occasion be that of the Australian Taxation Office, or of the taxpayer or the agent or of both. The existence of similar unresolved disputes against assessments of previous years is a factor in favour of

granting an application.

18. Ignorance of the law will not by itself constitute a sufficient reason for failure to lodge the objection within the prescribed time limit. A taxpayer is informed on a notice of assessment of the period within which an objection against that assessment may be lodged.

19. Another situation in which an application would normally be granted is where uncertainty in the law to be applicable is created by the foreshadowing of a legislative change effective from the date of the announcement of the change. In such a situation, a taxpayer may have to lodge an objection against an assessment where it is not certain exactly how the yet to be enacted provisions will apply. An example of this situation has arisen in the Fringe Benefits Tax area. The Treasurer announced, on 26 August 1986, that certain changes to the Fringe Benefits legislation would be enacted, effective from that date. By mid 1987 returns would have been filed, assessments issued, and objections would have been lodged, yet the exact form of the legislation was still unknown. Once the legislation is enacted, applications to accept objections as duly lodged should normally be granted.

20. In some circumstances taxpayers may seek to include in their applications reasons which are unrelated to the late lodgement of the objection such as the merits of the objection and the likelihood of its being upheld, the seriousness of the issue in dispute to the taxpayer having regard in particular to the amount of tax in dispute, the absence of prejudice to the Commissioner or even the significance of the issue in dispute to taxpayers generally. In most cases the main consideration will be "the circumstances concerning, and the reasons for, the failure by the taxpayer to lodge the objection ..... as required by this Act". However each application must be considered on its merits. In some cases it will be appropriate to take account of factors unrelated to the late lodgement of the objection such as those mentioned above. If, for example, an objection would clearly have been allowed if it had been lodged within the prescribed period and was lodged as soon as circumstances reasonably permitted, the objection should ordinarly be accepted as valid. In considering the merits of an objection, in general it may be said that the more likely it is that an objection will be either partially or wholly allowed on appeal the stronger is the case for granting the application. On the other hand where an objection is frivolous or without apparent merit or where it appears that the objection would be unlikely to be allowed either partially or wholly on appeal, the case for granting the application is correspondingly weakened.

REFUSAL TO GRANT EXTENSION

21. The Commissioner must give a taxpayer who has made an application under sub-section 188(1) notice in writing of the decision on the application-section 188A.

22. If an application is refused a taxpayer may, under sub-section 188A(3), apply to the Administrative Appeals Tribunal

for review of the decision. An application for review made in accordance with sub-section 188A(3) is to be made directly to the Tribunal and is not, as with requests for reference on objection decisions, to be lodged with the Commissioner. It will be necessary therefore to inform a taxpayer of the procedure to be followed if he or she wishes to have the decision refusing the application reviewed. The manner in which an application may be made to the Tribunal for a review of a decision made under sub-section 188A(1) is set out in sub-section 29(1) of the Administrative Appeals Tribunal Act ("AAT Act"). The conditions are that the application:-

(a) shall be in writing;

(b) may be made in accordance with the prescribed form (Form 1 in the Regulations), but this is not obligatory;

(c) shall set out a statement of reasons for the application; and

(d) shall be lodged with the Tribunal within the prescribed time, i.e. within 28 days of the decision being furnished to the applicant (if the decision has been recorded in a written document).

23. A taxpayer who wishes to apply to the Tribunal under sub-section 188A(3) for review of the Commissioner's decision must pay a filing fee of $240 on lodgment of the application with the Tribunal. The fee is refunded if the taxpayer's application is granted. (Regulation 19, Administrative Appeals Tribunal Regulations).

24. The Registrar or Deputy Registrar will serve notice of the application for review on the decision-maker (sec.29(11), AAT Act) who will then be required pursuant to sec.37 to lodge material documents with the Tribunal.

25. It should be noted that AAT Act sections 28 (person affected by decision may obtain reasons for decision), 29 (manner of applying for review), 37 (lodging of material documents with Tribunal) and 38 (power of Tribunal to obtain additional statements) apply to the review of decisions of the Commissioner under ITAA section 188A. Accordingly, in considering and making decisions on applications to treat objections as duly lodged and especially in refusing applications officers should document their reasons for decision, set out findings on material questions of fact and refer to the evidence or other material on which those findings are based.

B. CONSIDERATION OF APPLICATIONS TO TREAT REQUESTS FOR REFERENCE AS DULY LODGED

26. There are important differences between the procedures, but not the principles, for considering applications to treat as duly lodged objections and requests for reference respectively. Under sub-section 188B(1) an application to treat a request for reference to the Tribunal or the Court as duly lodged is to be

sent by the Commissioner to the Tribunal or Court as soon as practicable. The Federal Court Rules require such an application to be referred to it within 28 days. The Commissioner does not have the power to grant or refuse this category of applications. Where a taxpayer lodges an application which purports to request the Commissioner to grant the application, the taxpayer should be advised that the Commissioner does not have the power to grant or refuse the application and that the application will be considered by the Tribunal or the Court to which the taxpayer has requested the reference be referred.

27. A taxpayer who has lodged a request for reference which is prima facie invalid because of failure to comply with the time limit and has not also lodged an application under subsection 188(2), should be informed of his right to do so. As with sub-section 188(1), it is considered that the words "together with" in sub-section 188(2) mean "and" and not "simultaneously" or "at the same time as".

28. When an application to treat a request for reference as duly lodged is sent to the Tribunal advice as to whether the Commissioner wishes to oppose or not to oppose the application should be included. Similar advice should be included in instructions to the Australian Government Solicitor when sending applications to the Court.

29. The taxpayer should also be advised in writing as to whether the Commissioner wishes to oppose or not to oppose the application. If the application is to the Tribunal a copy of the Commissioner's letter forwarding the application to the Tribunal should be sent to the taxpayer. If the Commissioner is not going to oppose the application it should be pointed out in the covering letter to the taxpayer that there is no guarantee that the application may be granted and that the Tribunal may require the applicant to establish a case for an extension.

30. In a recent AAT decision, reported as Case U175 87 ATC 2037; Tribunal Case 120 (1987) 18 ATR, the Tribunal has indicated that an applicant should annex copies of the following documents to his application:

(a) the assessments in question;

(b) the adjustment sheets (if any) attending such assessments;

(c) the objections; and

(d) the notice of disallowance of the objections attended by any explanations memoranda and/or amended assessments issued with the notice by the Commissioner.

Where relevant documents are not provided by the applicant, the officer referring the application should, as far as is practical, send copies of the documents with the application.

31. In the case of an application to the Federal Court for an

extension, the Federal Court Rules (Order 52A, Div.iv) set out the relevant procedure, including forms.

32. The decision to oppose or not oppose an application before the Administrative Appeals Tribunal or the Court should be determined on the basis of the merits of the particular application concerned, this Taxation Ruling and the decisions of the courts and the Tribunal generally in relation to applications for extensions of time. National Office should be advised of cases where it is proposed to oppose an application for extension but, in the interest of promptness, only after referral of the application and notice of opposition to the Tribunal or Court.

COMMISSIONER OF TAXATION
24 December 1987