


ST 2454 - SALES TAX : SALES TAX OBJECTION & APPEAL PROCEDURES JURISDICTION AND STANDING IN DECLARATORY PROCEEDINGS DISPUTING SALES TAX LIABILITY

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TAXATION RULING NO. ST 2454

SALES TAX : SALES TAX OBJECTION & APPEAL PROCEDURES
JURISDICTION AND STANDING IN DECLARATORY PROCEEDINGS
DISPUTING SALES TAX LIABILITY

F.O.I. EMBARGO: May be released

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I 1011515	SALES TAX DISPUTES SALES TAX OBJECTION & APPEAL PROCEDURE JURISDICTION & STANDING IN DECLARATORY PROCEEDINGS DISPUTING SALES TAX LIABILITY	SALES TAX ASSESSMENT ACT (NO.1); SECTIONS 25, 25AA, 26, 40, 41, 42, 42A, 42B, 42E AND 67. JURISDICTION OF COURTS (CROSS-VESTING) ACT 1987; SECTIONS 4, 5, 11 AND 13.

PREAMBLE The purpose of this Ruling is to review the Commissioner's policy on sales tax objection and appeal procedures and on declaratory proceedings which dispute various aspects of sales tax liability. The review has been prompted by changes made to the sales tax legislation by the Taxation Boards of Review (Transfer of Jurisdiction) Act 1986 (Cth) ("the (Transfer of Jurisdiction) Act") and the changes made to the jurisdiction of Australia's superior courts by the national cross-vesting of jurisdiction scheme.

RULING 2. Prior to the enactment of the (Transfer of Jurisdiction) Act, a sales tax taxpayer only had objection and appeal rights under the sales tax legislation against the sale value, i.e., the taxable value, of goods. Where a taxpayer had a dispute with the Commissioner over, for example, the rate of tax payable on goods, i.e., the classification of goods under the Sales Tax (Exemptions and Classifications) Act 1935, that dispute was resolved either by the taxpayer refusing to pay the tax calculated and defending a recovery action brought by the Commissioner or by commencing proceedings for declaratory relief.

3. Under amendments made to the Sales Tax Assessment Acts by the (Transfer of Jurisdiction) Act, the Commissioner was empowered to make an assessment of sales tax where he found in any case that tax or further tax was payable by a taxpayer (section 25 of Assessment Act (No.1), section 10 of Assessment Acts (Nos. 2-10) and section 14 of Assessment Act (No.11)). In addition, a taxpayer was given a right to request the Commissioner to make an assessment of sales tax in respect of a specified act done, or specified transaction or operation effected, by the taxpayer (section 25AA of Assessment Act (No.1), section 10A of Assessment Acts (Nos.2-4, 6-10), section 10AA of Assessment Act (No.5) and section 14A of Assessment Act (No.11)). The amendments then provided objection and appeal rights to a taxpayer against an assessment (including an

assessment of additional tax payable under Part VIII of Assessment Act (No 1)) and to certain persons against other decisions of the Commissioner. A taxpayer can now dispute the ascertainment of the sale value of goods and also such matters as the rate of tax payable on the sale value of goods; the refusal in certain circumstances to register a person for sales tax purposes; the denial of a refund application; and whether particular goods are exempt from tax.

4. The broad purpose of these amendments was to give a taxpayer similar objection and appeal rights in sales tax matters as are available to a taxpayer in income tax matters, while effectively replacing the previous right to dispute the rate of sales tax payable in defending a recovery action. The latter effect was achieved through the introduction of section 67 into Assessment Act (No.1), which provides that the production of a notice of assessment or a notice of the making of a refund decision in any proceedings, except the appeal proceedings referred to in paragraph 3, will be conclusive evidence that the amounts and all of the particulars of the assessment are correct.

Objection and Appeal Rights

5. The objection and appeal procedures provided by the amendments follow very closely the procedures which operate in the income tax system. Under section 40 of Assessment Act (No.1):

- i) a taxpayer may lodge an objection in writing with the Commissioner against an assessment, within 60 days after service of a notice of assessment on the taxpayer;
- ii) an applicant for a refund of tax under section 26 of Assessment Act (No 1) or under the Sales Tax Regulations may lodge an objection in writing with the Commissioner against an adverse refund decision, within 60 days after service of a notice of the decision on the applicant;
- iii) a person affected by certain reviewable decisions may lodge an objection in writing with the Commissioner against the reviewable decision, within 60 days after service of a notice of the decision on the person.
Those decisions are:
 - a) a refusal to register a person as a manufacturer or as a wholesale merchant;
 - b) a requirement to give security, fresh security or additional security for compliance by a registered person, or a person required to be registered, with the conditions of any certificate of registration.
 - c) a prohibition from quoting a certificate of registration;
 - d) a revocation of a person's registration.

An objector who is dissatisfied with the Commissioner's decision on an objection may, within 60 days after service of a notice of the decision on him, request, in writing, the Commissioner to refer the decision either to the Administrative Appeals Tribunal ("the Tribunal") or to the Federal Court of Australia for review (section 41 of Assessment Act (No 1)).

6. There is provision for an objector to apply to the Commissioner for an extension of time within which to lodge an objection and to apply either to the Tribunal or to the Federal Court for an extension of time within which to lodge a request for review (section 42 of Assessment Act (No.1)). The former application is decided by the Commissioner and his decision is reviewable by the Tribunal (section 42A). The latter application must be referred by the Commissioner either to the Tribunal or to the Federal Court for decision (section 42B). The Commissioner's policy on these extensions of time is set out in Taxation Ruling IT 2455. When appeal proceedings are before either the Tribunal or the Federal Court, the objector is limited in his arguments to the grounds stated in the objection, unless the Tribunal or the Court orders otherwise (section 42E). In addition, the objector bears the burden of proving that an assessment is excessive or that a refund decision or a reviewable decision is incorrect (section 42E). That burden is the normal standard of proof in civil cases, i.e., on the balance of probabilities. The objection and appeal rights in Assessment Act (No.1) have been incorporated into the other Assessment Acts (section 12 of Acts (Nos.2-10) and section 16 of Act (No.11)).

7. Decisions on sales tax objections are made in the Appeals and Review Group of the Australian Taxation Office. One of the key objectives of that Group is to achieve high calibre, well explained decisions on objections. Within the bounds of broad Office policy, the Group carries out that objective independently of the original decision maker on assessment, refund application or reviewable decision. When an objector decides to seek review of an objection decision before the Tribunal, the decision maker is required, by paragraph 37(1)(a) of the Administrative Appeals Tribunal Act 1975 ("the Tribunal Act"), to provide the objector with a statement of the reasons for the decision, as well as of the decision maker's findings on material questions of fact and the evidence on which those findings were based.

Declaratory Proceedings

8. Since the introduction of the new procedures referred to in paragraphs 3 to 7, certain issues of jurisdiction and standing in relation to declaratory proceedings have arisen before the courts. In *Re the Totalisator Administration Board of Queensland* 88 ATC 4178, 19 ATR 1091, the Commissioner had argued that the power of the Supreme Court of Queensland to make the declaration sought had been excluded by the introduction of the provisions discussed in paragraphs 3 to 7. The Court held that its jurisdiction had been neither expressly nor impliedly excluded by the introduction of these provisions. However, it recognised that the question remained whether, as a matter of discretion, it was appropriate to exercise that jurisdiction. In *FC of T v Biga Nominees Pty Ltd* 88 ATC 4270, 19 ATR 1035, the plaintiff sought a declaration as to the sales tax classification of a forklift truck. The plaintiff was not liable to pay sales tax on the truck, but sub-section 70C(2) of Assessment Act (No.1) ensured that the taxpayer could recover the tax from the plaintiff (the plaintiff being the purchaser of the truck from the taxpayer). The Full Court of the Supreme Court of Victoria rejected the Commissioner's contention that the plaintiff had no standing to obtain the relief sought, holding that the plaintiff's obligation to the taxpayer under sub-section 70C(2)

gave it an interest in the classification dispute clearly greater than that of other members of the public.

9. A review of the Commissioner's position following these decisions has led to the conclusion that, as the 1986 amendments were intended to broaden review rights in respect of sales tax decisions, it would be inconsistent with this aim to continue with the jurisdiction and standing challenges to the decisions. Following this, it has been decided that:

- a) the jurisdiction of the Supreme Courts of the States and Territories to grant declaratory relief in sales tax matters will no longer be contested;
- b) the standing of a person seeking such relief will be conceded in any case where that person can establish a special interest in the matter in dispute beyond that of any ordinary member of the public; and
- c) the approval of the Appeals and Review Group in National Office will be required before any contest to the jurisdiction of the Federal Court to grant declaratory relief in sales tax matters can be made. The Federal Court decision in *Kodak (Australasia) Pty Ltd v The Commonwealth* 89 ATC 4010 held that the Court only has jurisdiction to grant such relief in limited circumstances.

Section 75(iii) of the Constitution effectively precludes the Commissioner from being able to contest the jurisdiction of the High Court of Australia to grant the relief referred to above.

10. The question arises, however, as to how section 67 of Assessment Act (No.1) interacts with the declaratory jurisdiction of the Supreme Courts of the States and Territories and of the Federal Court. As sales tax imposition can strike at the heart of a taxpayer's business, there is often a need for disputes about sales tax liability to be resolved promptly. Sales tax assessments are still the exception rather than the rule and as the new special assessment procedure in section 25AA is optional and can be time-consuming, declaratory relief is seen in some circumstances as a prompt remedy available to persons in addition to the statutory procedures set out in Assessment Act (No.1). Reliance on section 67 in declaratory proceedings to conclusively prove the matters set out in any document referred to in that section could frustrate the effective conduct of such proceedings. Accordingly, such action should not be taken in these types of declaratory actions.

Disputes in General

11. Notwithstanding the availability of declaratory relief, it is clear that Parliament intended that the new objection and appeal procedure should be the main remedy available to dispute sales tax liability. The question then arises as to what should be the Commissioner's policy when declaratory proceedings have been commenced and at the same time a decision on an objection has been referred to either the Tribunal or the Federal Court under section 42C of Assessment Act (No.1), both proceedings seeking to resolve the same issues. The guiding objective is that any action should seek the quickest resolution of the issues in dispute, by whatever means. In some circumstances, this may be

achieved by seeking to join both proceedings in one forum. In other circumstances, it may be achieved by accelerating one proceeding and seeking, as a matter of discretion, to have the other proceeding stayed or dismissed. In determining which action should be taken, care should be exercised to ensure that all issues in dispute will be dealt with in the litigation.

12. The following examples provide guidance on suggested courses of action:

- a) If declaratory proceedings are commenced in the High Court, an application could be made to the Court under sub-section 44(1) of the Judiciary Act 1903 to remit the matter to the Federal Court. Then, if the objection decision is before the Federal Court, an application could be made to that Court to have both proceedings heard together. A similar joinder could be achieved where declaratory proceedings have been remitted to the Federal Court and the objection decision is before the Tribunal for review. An application could be made to the Tribunal under sub-section 45(1) of the Tribunal Act to refer questions of law (being those questions to be resolved in the declaratory proceedings) to the Federal Court.
- b) Where declaratory proceedings are commenced in the Supreme Court of a State or Territory, use could be made of the national cross-vesting of jurisdiction scheme. (The cross-vesting scheme became operative as from 1 July 1988.) Depending on which of the declaratory proceedings or the objection proceedings in the Federal Court is more advanced, an application could be made to transfer the less advanced proceedings to the other Court so that they can be heard together. Under section 4 of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), and equivalent provisions in each State and the Northern Territory, so far as sales tax matters are concerned, Supreme Courts are vested with the jurisdiction of the Federal Court, and the Federal Court (by sub-section 4(3) of the Cth Act) is given the same jurisdiction as the Supreme Courts have, once a matter is transferred under section 5 of the Cth Act to the Federal Court. Section 5 permits a Court to transfer proceedings to another Court in which related proceedings are pending if it considers that it is more appropriate for the proceedings to be determined by the other Court. It is acknowledged that transfer of sales tax matters will not be achieved in all cases. The ability of the Commissioner and taxpayers to make effective use of the scheme in this regard partly depends on the approach Courts take on what is more appropriate in particular circumstances. It is noted that no appeal lies from any decision about whether to transfer (section 13) and that section 11 deems any steps taken in the transferor Court to be steps taken in the transferee Court.
- c) If one of the proceedings is far more advanced than the other, and provided that all the issues in dispute are covered by those proceedings, then an application could be made to the Court hearing the other proceeding for a stay or a dismissal on the basis that the first action will determine the issues in dispute more expeditiously. However, in the light of recent High Court authority, the Commissioner would need to show, in seeking a stay, that continuation of the other proceedings would be oppressive, vexatious or otherwise

an abuse of process and that a stay would not cause injustice to the applicant. It may be difficult to satisfy this burden save in exceptional circumstances.

- d) Where the declaratory proceedings and objection proceedings cover different issues, though may be in relation to the same facts, both proceedings should be allowed to run their normal course. Adjustments may have to be made to the running of the less advanced proceedings when the decision in the more advanced proceedings is handed down.

13. Where declaratory proceedings have been commenced and the assessment and review procedure has not yet reached either the Tribunal or the Federal Court, the objective still remains to ensure a quick resolution of the issues in dispute. Accordingly, while the Commissioner does not wish to see any delay in the reference of requests made under section 41 of Assessment Act (No.1) or in the determination of any objections, there is an obvious benefit in concentrating resources on the litigation of the declaratory proceedings. Where assessment action is contemplated when declaratory proceedings have commenced, such action should be put on hold unless a taxpayer has specifically requested the issue of an assessment under section 25AA.

COMMISSIONER OF TAXATION
17 August 1989