

IT 2298 - Income Tax : applications by taxpayers for adjournments of proceedings before administrative tribunals



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TAXATION RULING NO. IT 2298

INCOME TAX : APPLICATIONS BY TAXPAYERS FOR ADJOURNMENTS
OF PROCEEDINGS BEFORE ADMINISTRATIVE TRIBUNALS

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1078255	BOARD OF REVIEW CONDUCT OF REVIEW ADJOURNMENTS ADMINISTRATIVE APPEALS TRIBUNAL	REG 38 ADMINISTRATIVE APPEALS TRIBUNAL ACT; s.40

PREAMBLE

In a recent decision the Federal Court of Australia considered, on appeal, a decision of a Taxation Board of Review following a refusal by the Board to grant to a taxpayer, on its request, an adjournment of the hearing of a review. The Federal Court's decision is reported as New York Properties Pty Ltd v. F.C. of T. 85 ATC 4503; (1985) 16 ATR 811.

2. The conduct of reviews by Taxation Boards of Review of references under Part V of the Income Tax Assessment Act ("ITAA") is governed by that Part of the Act and by Part V of the Income Tax Regulations. Sub-regulation 38(1) provides that reviews by a Board shall be conducted as the Chairman from time to time directs while sub-regulation 38(5) provides that the Chairman of a Board may adjourn any review from time to time as he thinks fit.

FACTS

3. During the year ended 30 June 1974, the taxpayer participated in a tax avoidance scheme involving certain transfers of land allegedly as trading stock and a claim for a deduction of a bad debt. Deductions claimed by the taxpayer under the scheme were disallowed. In June 1978, the taxpayer lodged a notice of objection against its assessment. The objection was disallowed in July 1978 and the taxpayer requested the Commissioner's decision be referred to a Board of Review for review. On 11 March 1983 the taxpayer was notified that the Board would hear the matter on 3 May 1983.

4. At the commencement of the hearing, senior counsel for the taxpayer sought an adjournment of the hearing for approximately three weeks on the ground that it had been unable to obtain all necessary evidence, especially documentary evidence, required in order to adequately present its case. An affidavit tendered in support of the request deposed that certain enquiries had been made and that further enquiries in Australia and overseas may locate other documents that might

advance the taxpayer's case. The affidavit further deposed that while some documentation was held by the taxpayer, it was incomplete and mainly comprised copies of unexecuted documents.

5. The Commissioner opposed the application for the adjournment asserting that there was nothing in the affidavit to support the view that the documents necessary for the taxpayer's case would be found or be relevant. The taxpayer argued that applications for adjournment should be determined by applying a general principle that adjournments will be granted if they are sought bona fide on reasonable grounds and if the other party would not be prejudiced.

6. The Board adjourned briefly, and on reconvening, the Chairman advised the taxpayer that he had decided not to grant the adjournment. He said that the Board could proceed without original documents, that there was nothing in the affidavit to suggest that co-operation necessary to obtain documents and records could be expected, that overseas enquiries to date had been totally unproductive and that the prospect of further relevant information emerging was very uncertain and nebulous. When the taxpayer advised that it was unable to proceed with the review because the material then available was insufficient, the Board confirmed the assessment on the ground that the taxpayer had not discharged the onus of proof placed on it by paragraph 190(b), ITAA.

7. The taxpayer appealed from the Board's decision confirming the assessment to the Supreme Court of Queensland. His Honour, Ryan J., in a decision reported as *New York Properties Pty Ltd v. FCT* 84 ATC 4542; (1984) 15 ATR 782, dismissed the appeal by holding that the Board's decision did not involve a question of law as required by sub-section 196(1), ITAA. The taxpayer then appealed, by leave, to the Federal Court.

8. The Federal Court (Northrop, Lockhart and Beaumont JJ) noted that by sub-section 196(1), ITAA, a taxpayer may only appeal to a Supreme Court from any decision of a Board of Review that involves a question of law. The decision of the Board confirming the assessment was the only decision from which an appeal could be taken under sub-section 196(1). The taxpayer's attack on the Board's decision confirming the assessment was mounted solely on the basis that refusal of the adjournment involved a question of law. The Federal Court held that no question of law was involved in the decision refusing the adjournment and, consequently, the Board's decision did not involve a question of law and no appeal lay from the decision under sub-section 196(1).

9. In reaching their conclusion the Federal Court judges made the following observations :-

- (a) Administrative law principles apply in determining whether a question of law was involved in a Board's decision to refuse an adjournment. For a question of law to be involved in the decision of a Board refusing a

taxpayer an adjournment of the hearing of its reference, it is necessary to establish that, in exercising its discretion to refuse the adjournment, the Board acted on wrong principles or took into account irrelevant considerations or failed to take into account relevant considerations or denied the taxpayer natural justice.

- (b) None of these factors was present in the Chairman's consideration of the adjournment application. All submissions had been considered and it was not improper for the Chairman to note the age of the reference, the difficulties already experienced by the taxpayer in obtaining evidence and the uncertainty whether further evidence would be located within the adjournment period sought or at all. The Chairman was entitled to take into account the matters to which he referred and it was not established that he acted on any wrong principle.
- (c) Even if a Board's decision to refuse an adjournment does not involve a question of law, this does not mean the decision cannot be the subject of judicial scrutiny.

Mr Justice Northrop observed that the High Court in an appropriate case could exercise its jurisdiction under section 75(v) of the Constitution or that the Federal Court could exercise its jurisdiction under section 39B of the Judiciary Act (by which injunctions and writs of mandamus or prohibition may be sought against officers of the Commonwealth).

RULING 10. The Federal Court's decision makes it clear that a decision made by a Chairman of a Board of Review to refuse a taxpayer's application for an adjournment can never, of itself, be the subject of an appeal to a Supreme Court under sub-section 196(1), ITAA. This is not to say, however, that it can never be the subject of judicial scrutiny e.g. by the High Court under jurisdiction conferred by section 75(v) of the Constitution or by the Federal Court under jurisdiction conferred by section 39B of the Judiciary Act (or possibly by the Administrative Decisions (Judicial Review) Act).

11. In proceedings before administrative tribunals such as the Administrative Appeals Tribunal or a Taxation Board of Review, the Commissioner's representative may be asked to give a reaction to a taxpayer's application for adjournment. In the light of the Federal Court decision, the opportunity is taken to formulate some guidelines.

12. The Commissioner's attitude towards an application by a taxpayer for an adjournment, when sought by a Tribunal, depends on the merits of each individual request. However, as a general guide, the request is not normally opposed by the Commissioner's representative, although it is rarely supported. If there are compelling reasons (e.g. taxpayer is involved in court proceedings on the same day as the hearing date, sudden illness of the taxpayer, taxpayer is involved in an accident, sudden illness of taxpayer's counsel late in the preparation of a complex matter) the Commissioner's representative should not

oppose a request for an adjournment for a reasonable period. Essentially, of course, the matter is one for the tribunal to decide (Income Tax sub-regulation 38(5), paragraph 40(1)(c) of Administrative Appeals Tribunal Act).

13. Special circumstances may, however, justify the Commissioner's representative vigorously opposing the granting of an adjournment. The following circumstances would not ordinarily be regarded as compelling reasons for an adjournment and where they constitute the basis of an application, opposition would usually be appropriate:

- (a) the taxpayer is still having difficulty obtaining evidence after the matter is set down for hearing;
- (b) the taxpayer has not adequately prepared his case;
- (c) the taxpayer decides immediately prior to the hearing to dispense with representation;
- (d) where a previous adjournment has been granted and the latest request is not supported with sound grounds;
- (e) where it is evident that an adjournment to be granted must be of an indefinite period because, for example, a witness is overseas and may not return to Australia in the foreseeable future;
- (f) where the Commissioner has been put to considerable expense in briefing counsel, calling witnesses and substantial inconvenience would follow from an adjournment;
- (g) where it is evident that the adjournment sought is simply to obtain a further extension of time for payment of the taxes in issue which may be substantial in amount; and
- (h) the taxpayer must incur expense in engaging counsel or in calling witnesses.

14. Short-term adjournments during the conduct of a hearing, for example, for an hour to seek further advice or instructions are a different matter. The Commissioner would not seek to oppose requests for such short-term adjournments but, again, they are matters for the tribunal to decide.

COMMISSIONER OF TAXATION

23 April 1986

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