IT 2547 - Income tax: part IVA determinations made after an appeal against the commissioner's decision on an objection is referred to the federal court.

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TAXATION RULING NO. IT 2547

INCOME TAX: PART IVA DETERMINATIONS MADE AFTER AN APPEAL AGAINST THE COMMISSIONER'S DECISION ON AN OBJECTION IS REFERRED TO THE FEDERAL COURT.

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011402	PART IVA DETERMINATIONS ASSESSMENTS SUBPOENA DISCOVERY	177F PART IVA

PREAMBLE The purpose of this Ruling is to give the Commissioner's view on Part IVA determinations made after a taxpayer's objection against an assessment has been disallowed and an appeal has been made to the Federal Court. The occasion for this Ruling is an interlocutory decision by Gummow J on 21 April 1989 in Jackson v F.C. of T. 89 ATC 4429 that the Commissioner may not rely on such determinations in the appeal.

2. Section 177F provides that, where a tax benefit would be obtained in connection with a scheme to which Part IVA applies, the Commissioner may determine that an amount that would otherwise not be included in the taxpayer's assessable income should be included; or determine that a deduction which would otherwise be allowable should not be allowable. Where he does so, he shall take such action as he considers necessary to give effect to that determination.

DECISION

3. Gummow J was called upon to answer certain questions on an interlocutory basis separately from the other questions arising in the proceedings. Those proceedings concerned assessments and amended assessments for the years ended 30 June 1982-1985. For each assessment, a determination had been made under sec. 177F to include further amounts in the taxpayer's assessable income. In relation to the 1982 and 1983 years, the determinations had been made after the appeals had been referred to the Federal Court. Amended assessments had not been issued.

4. The first question was whether for all these appeals it was necessary or relevant for the Court to enquire into the matters the Commissioner took into account, or into his reasoning process, in forming the view that a tax benefit had been obtained in connection with a scheme to which Part IVA applied. His Honour answered this question "No". The Commissioner in making the assessment must form a view of the facts and of the interpretation of Part IVA to

determine whether there was a tax benefit and whether it was obtained in connection with a scheme to which Part IVA applied. But those are states of affairs which exist irrespective of the Commissioner's reasoning process. The taxpayer must show that they did or did not exist, not what the Commissioner thought of them.

5. The second question asked whether it was proper for the Court to subpoena production of documents being submissions, memoranda and rulings relating to the Commissioner's determinations. His Honour answered this question "Yes". The taxpayer may seek to establish that the determinations were a crucial element in the process of assessment but lacked the authority of the Act because the Commissioner did not address himself to the questions formulated in sec. 177F, or because he made a mistake of law, or because he took an extraneous matter into account or excluded a relevant matter. However, it is for the Court to determine to what extent and in what manner there should be discovery or a subpoena.

6. The third question asked whether in an appeal the Commissioner is entitled to rely upon a determination under sec. 177F made after the institution of the appeal. His Honour answered this question "No". To allow these determinations to intrude after the institution of proceedings would be to change the nature of these matters from the appeals against the Commissioner's decisions of some years ago. The determinations must be given effect to by assessment or amended assessment. Support for this view, the Court held, can be found in sec. 177G, sec. 226 and former sub-sec. 226(2A). The Court also found that the Commissioner gains no assistance from the decision of the Full Court in Fletcher v F.C. of T. (1988) 84 ALR 295; 88 ATC 4834 because it dealt with powers granted to the Administrative Appeals Tribunal ("AAT") by sec. 43 of the Administrative Appeals Tribunal Act 1975.

RULING

7. The Commissioner will not be challenging his Honour's answers to the first two questions.

8. In relation to the third question, the Commissioner's policy has been that Part IVA determinations should normally be made in the course of raising assessments but that the failure to do so does not preclude reliance upon subsequent determinations. Where such cases are detected at the objection stage, the Part IVA determination and advice to the taxpayer should be an integral part of the process of determining the objection.

9. Where Part IVA cases are identified after receipt of a request for referral of the objection to the Federal Court or the AAT, the determination should be made promptly and written advice given to the taxpayer.

10. Part IVA should not be raised for the first time just before or in the course of a hearing unless the circumstances are exceptional. However, the Commissioner's view is that Part IVA, being a provision of last resort, can be relied on, once a determination has been made, to defend an existing assessment.

11. In many of these cases, the Commissioner's view is that it is neither necessary nor appropriate to issue an amended assessment to

give effect to the Part IVA determination. In most cases, in fact, the assessable income will remain unchanged by a determination.

12. The Commissioner had decided to apply for leave to appeal to the Full Federal Court against the answer to the third question. Until such time as that application is determined and, if successful, the appeal decided, the existing policy should continue to be applied. The Court's decision is seen to have application only to appeals before the Court, and not to references to the AAT. Should further cases arise before a Court prior to the resolution of the appeal in Jackson, submissions should be put to the Court in accordance with the policy stated above, whilst, of course, drawing the Court's attention to Gummow J's decision in this case.

COMMISSIONER OF TAXATION
20 July 1989