PS LA 2002/2 (Withdrawn) - Costs awarded by the courts

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Law Administration Practice Statement PS LA 2002/2 was withdrawn on 12 March 2007 and has been replaced by PS LA 2007/2.

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ATO Practice Statement Law Administration

PS LA 2002/2

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FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: **Costs awarded by the courts**

PURPOSE: **To advise staff on the processes where courts award costs to be paid by the ATO.**

STATEMENT

1. Where a court orders that the ATO pays the other parties' costs, and

   - the court does not specify what costs are to be paid, or
   - when the invoice is presented to the ATO for payment by the other party, the costs claimed appear unreasonable,

   then the procedures detailed in this Law Administration Practice Statement must be followed.

EXPLANATION

2. This Law Administration Practice Statement is restricted to party / party costs. The courts have the discretion to award costs (all costs including disbursements) to be paid to a party to proceedings by another party. These are known as party / party costs. Depending on the rules of the particular court, the order to pay costs may include to what extent costs are to be paid in relation to the action. Some lower courts may not have the power to award costs, in which case each party must pay their own.

3. This Law Administration Practice Statement does not refer to the situation where the court awards costs to the ATO, nor to solicitor / client costs, which are those costs paid to a solicitor for work undertaken by them on their client's instructions. Nor does the Practice Statement apply to indemnity costs which are the reasonable costs paid to another party as a result of an undertaking to provide security or protection to that party against any loss as a result of action taken at the request of the indemnifying party.

4. Where the court orders that the ATO pay the other party's costs and does not specify what costs are to be paid, there are certain procedures which need to be followed. There are provisions in all court rules and relevant legal practitioner's legislation to allow for costs to be assessed by the courts. The tests applied by cost

assessors may be slightly narrower than those for a solicitor and client. Relevant rules should be checked.

Where costs appear reasonable

5. Generally the other party will forward details of the costs they are claiming as a result of the court order. The invoice should be of sufficient detail to identify all costs and how they were determined. If the invoice does not give sufficient details then it should be queried and further details should be requested. Upon receipt of the invoice and possibly following a query of the costs claimed, if the ATO has no objection i.e., the costs claimed are reasonable given the nature of the matter litigated, then payment should be made. Where the ATO is not using an external solicitor, the paperwork is forwarded to the BSL to arrange payment. If the Australian Government Solicitor (AGS) has handled the matter they will arrange for payment and bill the ATO through the ATO*legals* system.

6. Staff may need to seek guidance from the Legal Practice Manager or a Principal Litigator in order to assist them in determining whether costs claimed are reasonable or not. In some circumstances the Legal Practice Manager or Principal Litigator may even seek the advice of AGS after consultation with and agreement by the relevant BSL. In considering whether costs are reasonable regard should be had to the matters outlined in paragraphs 14 and 15 of this Law Administration Practice Statement.

Where costs appear unreasonable

7. Where the costs claimed appear to be excessive given the nature of the matter litigated or sufficient details have not been provided to support the costs claimed, the other party should be requested to provide full details. If the costs appear unreasonable there should be some negotiation with the other party to see if an agreement can be reached as to the amount the ATO will pay. If sufficient information is not obtained for a decision to be made on the reasonableness or otherwise of the costs, then the other party should be requested to provide a Bill in Taxable Form. When that is received it needs to be examined in detail.

8. The ATO litigator can undertake the negotiation on behalf of the ATO or a cost assessor can be engaged. The decision to use a cost assessor will depend on the degree of disparity in what is being sought and the amount that is considered reasonable by the litigator. Another consideration is the total of the amount of costs being sought. A cost assessor cannot be engaged without the consent of the BSL and must be approved by the Legal Practice Manager or a Principal Litigator prior to referral to the ATO Solicitor for agreement to that course of action.

9. Any agreement as to costs should only be made after discussions with and instructions from the relevant BSL in accordance with the BSL's Service Agreement. In considering whether costs are unreasonable regard should be had to the matters outlined in paragraphs 14 and 15 of this Law Administration Practice Statement.

Assessment of costs

10. Having costs assessed is an expensive procedure and should not be undertaken without due consideration. Some jurisdictions do allow for arbitration where the matter is referred by the court.

11. Where the ATO has queried costs and it would appear that an amount will not be agreed through negotiation, then the matter should be escalated to the ATO Solicitor as soon as possible for advice. Where the ATO is proposing to have costs assessed, the approval of the ATO Solicitor must be sought following discussions with and agreement by the Legal Practice Manager or a Principal Litigator.

Engaging a cost consultant

12. When a cost consultant is used, the consultant should be advised of the secrecy provisions and warned that they cannot disclose any information which they obtain as a result of the work they undertake on behalf of the ATO. The cost consultant should also be advised of the need to act in accordance with the Taxpayers' Charter and the Model Litigant Guidelines at all times.

13. The ATO has a panel of cost consultants and the individuals / organisations listed are the only ones approved to act as a cost consultant on behalf of the ATO. Enquiries regarding the list can be directed to the Legal Policy & Coordination section of OCTC in National Office. GST Ruling GSTR 2001/4 should be considered in respect of the GST implications.

Matters to be considered by a cost assessor[1]

14. A cost assessor is bound by the relevant legal professional legislation and court rules which apply in the particular jurisdiction. When a cost assessor is determining what is fair and reasonable, the assessor will have regard to the following matters:

- skill, labour and responsibility displayed on the part of the barrister or solicitor responsible for the matter;
- the complexity, novelty or difficulty of the matter;
- the quality of the work done and whether the level of expertise was appropriate to the nature of the work done;
- the place and circumstances where the legal services were provided;
- the time within which the work was required to be done;
- the outcome of the matter.

[1] The information provided in paragraphs 14 and 15 refers to the *NSW Legal Profession Act 1987* and can be found in The College of Law, Practice Papers, Litigation 1, Practice Paper BCL11, Costing in Civil Litigation by Katherine Mulcahy. There will be some variances between states.

15. Some costs may be disallowed or partly disallowed:

- costs incurred before the issue of the originating process and after judgement is obtained;
- charges incurred for convenience only of the legal provider;
- costs beyond what is necessary for the proper conduct and understanding of the case;
- unnecessary costs e.g., more than one attendance to issue subpoenas or instruct a process server;
- extra work due to lack of knowledge;
- over-preparation of a case;
- extraneous matters included in counsel's brief;
- repetitive observations or undue verbosity in counsel's brief;
- redundant photocopies.

Split orders

16. The courts may order that costs be split between the two parties, i.e., 2 or more defendants. When this situation occurs the negotiations can be difficult. Engaging a cost assessor may be appropriate for the negotiations depending on the amount of costs involved.

ATO is joined with another party

17. There will be some matters where the ATO is joined in a matter with a third party. In these instances any negotiations undertaken by the ATO must be strictly on the basis that we are negotiating in respect of our share of the costs only and do not represent the third party.

18. Where there is a third party involved and the ATO intends to query costs claimed, it is appropriate that the third party be advised that the ATO is to query the costs and be given an opportunity to negotiate jointly or agree to use a cost consultant who will act on behalf of both parties. The third party needs to be advised that the ATO acts in accordance with the Taxpayers' Charter and the Model Litigant Guidelines at all times.

Australian Government Solicitor (AGS)

19. Where the AGS has acted on our behalf they will sign off as to whether the costs being sought are reasonable. If the costs are considered to be unreasonable by AGS

then following discussions between AGS and the case officer and in consultation with the BSLs, AGS will be instructed to act on the ATO's behalf in the matter.

ATO is awarded costs

20. Where the ATO is awarded costs against another party it has a duty under the *Financial Management and Accountability Act 1997* to seek to recover the costs. If the costs are recovered within the same financial year that they were expended they are returned to the BSL which expended them, but if they are recovered outside that financial year they are returned to Consolidated Revenue. If the party ordered to pay the costs seeks to dispute the costs then similar principles to those set out in this Law Administration Practice Statement should be applied. If AGS is involved, they should be instructed to negotiate with the other party.

subject references:	AGS; costs; cost assessors; assessment of costs
legislative references:	Legal Profession Act 1987 (NSW) Financial Management and Accountability Act 1997
related public rulings:	GSTR 2001/4
file references:	2002/000770

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