PS LA 2003/7 - Taxation objections - late lodgment

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Practice Statement Law Administration

PS LA 2003/7

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SUBJECT:	**Taxation objections – late lodgment**
PURPOSE:	**To provide guidance in making decisions on requests to deal with late taxation objections as if they were lodged within time**

STATEMENT

1. Upon receiving a written request, the Commissioner has a statutory discretion, which he may delegate to a tax officer, to deal with a late objection as if it had been lodged within time. Parliament has laid down time limits for lodgment of objections and tax officers should not exercise the discretion unless it is proper to do so. Tax officers are to consider the guidance provided by relevant case law and take into account matters detailed below in exercising the discretion.

2. Tax officers have obligations under administrative law when making decisions whether to agree to or refuse a request. The main obligations are as follows:

   - each request must be decided on its merits
   - the decision-maker must have regard to the request, the contents of the objection itself and any other relevant matter
   - in particular, the decision must not be made in accordance with a policy [including this practice statement] without regard to the merits of the taxpayer's request
   - the decision-maker must take into account relevant considerations [including this practice statement] and not take into account irrelevant considerations
   - the decision must be made in good faith without bias
   - if there is material adverse to the request of which the taxpayer may not be aware, the decision-maker should make the taxpayer aware of it and ask the taxpayer to comment
   - the decision must be based on evidence not on surmise or conjecture
   - the decision-maker should follow the procedures prescribed by the Commissioner and relevant legislation and any binding case law, and

- the decision-maker must not make the decision at the behest of another person. Their decision must be independent. However, the decision-maker may take into account relevant matters put to them by anyone, including other tax officers.

3. Tax officers should consider the following factors and weigh them in the balance to decide either to agree to such a request or to refuse it:

   - the taxpayer's explanation for the failure to lodge the objection within the allowable time limits
   - the circumstances of the delay
   - whether the taxpayer has an arguable case for the objection to be allowed in whole or in part, and
   - other relevant matters that arise in the circumstances of a particular case.

   These factors are discussed in detail in paragraphs 10 to 22 of this practice statement.

EXPLANATION

4. Section 14ZW of the *Taxation Administration Act 1953* (all further legislative references are to this Act) imposes time limits for the lodgment of taxation objections against taxation decisions, including objections to income tax assessments. Subsection 14ZW(2) entitles taxpayers to request the Commissioner to deal with objections lodged outside those time limits as if they had been lodged within time. Subsection 14ZX(1) obliges the Commissioner to consider the request and decide whether to agree to it or refuse it. For convenience, the term 'extension of time' will be used in this practice statement even though the Commissioner's agreement to a request under subsection 14ZW(2) means that the objection is dealt with as if lodged within the time limit, rather than extending the original time limit for lodgment: subsection 14ZX(3).

Lodgment of a request

5. Subsection 14ZW(2) provides that, if the period within which an objection is required to be lodged has passed, taxpayers may nevertheless lodge the objection with the Commissioner 'together with a written request asking the Commissioner to deal with the objection as if it had been lodged within that period.' In some instances the objection and the request will not be lodged simultaneously. The objection might be sent in first and then the request, or vice versa. The words 'together with' are not to be construed literally. The spirit of the provision will not be met if the technical limitation of simultaneity is imposed.

6. ***If a request is lodged without an objection*** the taxpayer should be told that the request cannot be considered until the objection is lodged. ***If an objection is lodged without a request*** and the Commissioner intends to allow the claim(s) in full, there is no need to ask the taxpayer to make a request *provided* that the late objection is lodged *within* the period during which the Commissioner has power to amend the assessment. The Commissioner may have a power to amend in some cases because the periods for amending an assessment and objecting against it are not always the same. If the Commissioner does not intend to allow the claim(s) in full, the taxpayer should be told that the objection is invalid because it is out of time but that the taxpayer has a right to request that it be treated as if it had been lodged on time. These approaches will ensure that the taxpayer's rights in relation to the objection are preserved to the greatest extent possible and that compliance costs are minimised.

The nature of the decision involves a balancing act

7. The leading case concerning the discretion under subsection 14ZX(1) is the Federal Court judgment of Hill J in *Brown v. FC of T* 99 ATC 4516 (*Brown's* case). The Full Federal Court in *FC of T v. Brown* 99 ATC 4852; (1999) 42 ATR 672 upheld Hill J's decision but did not comment on the indicia referred to by Hill J. In considering the exercise of the discretion in subsection 14ZX(1), Hill J at p. 4527 said:

> What is required is the balancing of the delay; the explanation for it; the circumstances which gave rise to it and such prejudice if any as may be shown to exist to the Commissioner against the prejudice which may arise to a taxpayer who has by reason of the failure to object in time lost the right to a review of the assessment.

8. Tax officers may gain significant guidance from Hill J's judgment in *Brown's* case. Prior to *Brown's* case, the leading authority on applications for extension of time was *Hunter Valley Developments Pty Ltd v. Cohen* (1984) 3 FCR 344 (*Hunter Valley* case). However, as Hill J pointed out in *Brown's* case at pp. 4523-4524, there are significant contextual differences between the discretion of the Federal Court to extend the time for commencement of proceedings for judicial review (considered in the *Hunter Valley* case) and the discretion under subsection 14ZX(1) to agree to or refuse a request for an extension of time. However, some of the principles in the *Hunter Valley* case are relevant to the discretion under subsection 14ZX(1).

Onus is on the taxpayer

9. The onus is on the taxpayer to establish why the Commissioner should agree to his or her request for an extension of time. Subsection 14ZW(3) requires the taxpayer's request to state fully and in detail the circumstances concerning, and the reasons for, the person's failure to lodge the objection with the Commissioner within the required period. However, these are not the only matters that the Commissioner may take into account.

How to determine a request for an extension of time – relevant factors

10. Tax officers should consider the following factors and weigh them in the balance to decide either to agree to a request for an extension of time or to refuse it. No one factor by itself is conclusive, so all the factors relevant to a particular taxpayer's circumstances should be weighed in determining whether an extension of time should be granted. In weighing the factors against each other Tax officers should consider whether refusal of the request for extension of time will result in an injustice to the taxpayer. Hill J in *Brown's* case at p. 4527 said:

> The decision maker should not lose sight of the fact that s14ZW is an ameliorating provision designed to avoid injustice.

The taxpayer's explanation for the failure to lodge the objection within the time limits allowed

11. Parliament has laid down time limits for the lodgment of taxation objections, so that there is to be some finality in the decision making process. There is therefore a requirement that the applicant provide a satisfactory explanation for the delay.

12. Subsection 14ZW(3) provides that the request for extension of time must state fully and in detail the circumstances concerning, and the reasons for, the person's failure to lodge the objection within the required period. However, as stated above, these are not the only matters that the Commissioner may take into account.

13. Having regard to the principles outlined below, in some circumstances where the taxpayer's initial explanation appears to be inadequate, it may be prudent to give the taxpayer an opportunity to provide a further and better explanation before making a decision. Tax officers should take reasonable steps to obtain such an explanation for the inadequacy from the taxpayer or his or her agent. However, it is not essential that the taxpayer provide an adequate explanation for the delay in order for the other factors to be taken into account and weighed in the balance: *Brown's* case at p. 4526; *Comcare v. A'Hearn* (1993) 45 FCR 441 at p. 444.

The circumstances of the delay

14. In considering the circumstances of the delay, it may be appropriate to take into account steps taken by the taxpayer to keep the Commissioner informed that he or she does not accept the decision against which the taxation objection is lodged. Conversely, it may be appropriate to consider whether, by not objecting within the time limits, the taxpayer has led the Commissioner to believe that he or she accepts the decision. However, the fact that an applicant has delayed in disputing the matter should not, of itself, preclude the applicant from the grant of an extension of time where there is a satisfactory explanation for that delay: *Ciaglia v. Commissioner of Taxation* 2002 ATC 2066 at p. 2076.

Whether the taxpayer has an arguable case for the objection to be allowed in whole or in part

15. Paragraph 14ZU(c) provides that a person making a taxation objection must state in it, fully and in detail, the grounds that the person relies on. If the taxpayer has failed to address the grounds of the objection adequately, tax officers should take reasonable steps to obtain any additional information that may be required.

16. Consideration of whether the taxpayer has an arguable case does not involve a full inquiry into the merits of the objection. Taxpayers do not have to show that they will probably succeed in whole or in part on their objections if their requests for extension of time are allowed. Hill J in *Brown's* case p. 4527 said:

> What is involved is whether the objection on its face discloses a case which is arguable, not whether having regard to other matters, including evidence which may not even be known to the taxpayer at the time of making the application, the case is one that the taxpayer will or will probably lose.

Other relevant matters

17. In *Brown's* case at p. 4527 Hill J held that the fourth matter to be considered is:

> Such other matters as the circumstances of the particular case make relevant including, if prejudice to the Commissioner be asserted, such prejudice as is shown to arise.

18. In *Windshuttle v. DFC of T* 93 ATC 4992 at p. 5003 von Doussa J said:

> The kind of prejudice which is relevant is prejudice that could arise to the opposing party in properly and fairly dealing with the subject matter of the dispute that will require determination if the extension of time is granted.

For example, the lapse of time may affect adversely the ability of the Commissioner to defend an assessment. However, administrative inconvenience to the Commissioner does not establish prejudice: *Brown's* case at p. 4526.

19. The mere absence of prejudice to the Commissioner is not sufficient to provide a basis for the exercise of the discretion to extend the time limits: *Brown's* case at p. 4526.

20. Evidence, on the balance of probabilities, of the apparent negligent failure of a taxpayer's tax agent to lodge the objection in time is another relevant matter that may be taken into account. Ordinarily, the Commissioner would expect that a taxpayer represented by an agent is aware of the time limits and failure to meet them can be regarded as less excusable than where taxpayers represent themselves. However, if the taxpayer has given prompt and clear instructions to his or her agent, and is not in any way themselves at fault, refusal of a request for an extension of time may be seen to work an injustice against the taxpayer: *Case 27/97* 97 ATC 317 at p. 321. Decision-makers should consider other surrounding circumstances in determining whether any injustice to the taxpayer has occurred or, if there is such injustice, whether it is outweighed by prejudice to the Commissioner.

21. Considerations of fairness as between applicants and other persons in a like position will rarely tip the balance in favour of the Commissioner (Hill J in *Brown's* case at p. 4527).

Additional consideration for objections against income tax assessments lodged by most individuals and STS taxpayers

22. Where an individual or simplified tax system (STS) taxpayer has a two year time limit for lodging an objection against an income tax assessment under subsection 14ZW(1), the Commissioner will generally accept a request for an extension of time to lodge an objection if:

- it is received by the Commissioner within four years after the original notice of assessment was given to the taxpayer, and
- the objection discloses an arguable case for allowing the objection.[1]

Examples

23. It is emphasised that the examples given below are simple ones. They are not exhaustive or prescriptive. The requests for extensions of time encountered by tax officers may be more varied and complex in their facts and each one must be dealt with on its own merits. Each decision must be made based on all the relevant circumstances pertaining to the particular request. In each case, tax officers must take into account the relevant factors discussed above and weigh them in the balance in making a decision that avoids injustice.

Examples of cases where an extension of time may be appropriate

24. Subject to the need to decide each case on its own particular facts, an extension of time may be appropriate in the following cases provided that in each case there is no prejudice to the Commissioner, other than administrative inconvenience:

- **the taxpayer is so ill when the taxation decision arrives** that the objection cannot be lodged within the time limit
- **the taxpayer is overseas when the taxation decision arrives** and, due to that absence, the taxpayer cannot lodge an objection to the taxation decision until their return outside the time limit. Note that, if the taxpayer has a tax agent as their address for service of notices, the agent would be expected to make the Commissioner aware of this issue within the time limit
- **the taxation decision is not sent to the current address** as recorded on the Commissioner's records or a change of address has been advised by the taxpayer but has not been processed and consequently the taxpayer cannot lodge the objection within the time limit, as they are unaware of the decision
- the taxation decision did not reach the taxpayer owing to **systemic problems with the mail**
- the explanation for the delay is that, at the time of receiving the taxation decision, the taxpayer thought that lodging the objection would be futile, but that a **court decision handed down** shortly after the time limit for lodgment of an objection makes his or her objection tenable

[1] The Treasury, *Report on Aspects of Income Tax Self Assessment*, Canberra, August 2004, recommendation 3.9, page 36.

- the explanation for the delay is that, at the time of receiving the taxation decision, the taxpayer thought that lodging the objection would be futile, but **amendments to the legislation** passed shortly after the time limit for lodgment of objections make his or her objection tenable
- the explanation for the delay is that, at the time of receiving the taxation decision, the taxpayer thought that lodging the objection would be futile, but that **the issue of a Public Ruling by the Commissioner** shortly after the time limit for objections makes his or her objection tenable
- the explanation for the delay is that, at the time of receiving the taxation decision, the taxpayer thought that lodging the objection would be futile, but later discovered that he believed this because of **incorrect tax office advice or publications**
- the issue raised in the objection against the taxation decision **involves an important question of law or practice**
- the **objection discloses a strong case** for allowing the objection and the taxpayer had, prior to the time limit for lodgment of objections, **made the Commissioner aware that the issue arising in the objection was to be contested**
- **the objection discloses a strong case** for allowing the objection and the taxpayer had made the request for extension of time within a period for which there is a reasonable explanation for the delay
- the taxpayer's failure to lodge the objection in time is caused by **misleading conduct by officers of the Tax Office**
- **the taxpayer gave prompt instructions to his tax agent** to lodge an objection but the agent, on the balance of probabilities, appears to have negligently failed to execute those instructions. Such a delay must be entirely caused by the apparent negligence of the tax agent, and
- an individual or STS taxpayer with a two year time limit for lodging an objection against an income tax assessment lodges an objection with a request for an extension of time within four years after the original notice of assessment was given to the taxpayer, and **the objection discloses an arguable case** for allowing the objection.

Examples of cases where an extension of time may not be appropriate

25. Subject to the need to decide each case on its own particular facts, an extension of time may not be appropriate in the following cases:

- notwithstanding prompting from the Tax Office, **the taxpayer has given no explanation** for the failure to meet the deadline for lodging the objection
- in the lapse of time (however short) since the taxation decision **documents have been destroyed or witnesses have died or disappeared** so that the Commissioner can demonstrate that he or she can not longer effectively contest the objection

- to grant the extension of time would result in **hindrance to the fair and efficient conduct of the Commissioner's operations** (for example, in commencing Court proceedings to recover tax, or where the delay would prevent the Commissioner from issuing amended assessments [in relation to the latter see Case 26/95 95 ATC 269 at p. 274])
- to grant the extension of time would be contrary to the public interest in that the **extension would re-open a matter that had been settled after protracted negotiations**
- there has been **an inordinate lapse of time since the taxation decision** with no satisfactory explanation for the delay
- **the taxpayer had professional advisers** but nevertheless the taxpayer's failure to lodge the objection in time resulted from his or her own **ignorance of aspects of taxation law**, and
- an individual or STS taxpayer with a two year time limit for lodging an objection against an income tax assessment lodges the objection with a request for an extension of time within four years after the original notice of assessment was given to the taxpayer, and **the objection does not disclose an arguable case** for allowing the objection.

26. There is a range of other relevant cases not cited above listed in the case references. Many of the above examples were based upon the facts from these cases, although they have not been cited because the reasoning was not in accord with the judgment of Hill J in *Brown's* case. There is a degree of inconsistency in the case law, which is to be expected having regard to the wide discretion conferred by subsection 14ZX(1).

Documenting the decision

27. Where a decision-maker makes a decision to refuse a request for an extension of time, they must make a record of the reasons for their decision, as well as any other factors considered and the weight given to them in making the decision. For example, the decision-maker may have decided that the objection does not disclose an arguable case or the prejudice against the taxpayer is outweighed by the prejudice against the Commissioner.

28. Subsection 14ZX(2) requires the Commissioner to give taxpayers written notice of the Commissioner's decision.

The taxpayer's review rights regarding a decision to refuse the extension of time

29. A taxpayer who is dissatisfied with the Commissioner's decision to refuse an extension of time may apply to the Small Taxation Claims Tribunal to have the decision reviewed on the merits; that is, his or her request will be considered afresh by the Tribunal. Subsection 14ZX(4) gives the taxpayer the right to apply to the Tribunal for review of the decision. Paragraph 24AC(1)(b) of the *Administrative Appeals Tribunal Act 1975* provides that, when hearing and determining an application for review of a decision refusing an extension of time, the Taxation Appeals Division of the Administrative Appeals Tribunal is to be known as the Small Taxation Claims Tribunal.

The general law with respect to the exercise of discretions

30. This practice statement is limited to the exercise of the discretion that has to be exercised if a taxpayer requests that the Commissioner deal with an objection as if had been lodged within time. Tax officers may refer to *Assimakopoulos v. FC of T* 98 ATC 2037 at pp. 2041–2044; (1997) 38 ATR 1031 for a useful survey of the general law with respect to the exercise of discretions.

Previous ruling

31. Treating late lodged objections as if they were lodged on time was previous dealt with in Taxation Ruling IT 2455. This Ruling is now withdrawn.

subject references	credit amendment extension of time extension of time to lodge an objection objections refusal of extension refusal to grant extension of time taxation objections
legislative references	Administrative Appeals Tribunal Act 1975 24AC(1)(b) TAA 1953 2 TAA 1953 14ZL TAA 1953 14ZU TAA 1953 14ZW TAA 1953 14ZX
related public rulings	
related practice statements	
case references	Assimakopoulos v. FC of T 98 ATC 2037; (1997) 38 ATR 1031 Brown v. FC of T 99 ATC 4516; (1999) 42 ATR 118 Case W23 89 ATC 253; (1989) 20 ATR 3324 Case Y58 91 ATC 497; (1991) 22 ATR 3526 Case 8/93 93 ATC 144; (1993) 25 ATR 1076 Case 15/94 94 ATC 191; (1994) 28 ATR 1078 Case 18/94 94 ATC 204; (1994) 28 ATR 1091 Case 36/94 94 ATC 327; (1994) 29 ATR 1001 Case 17/95 95 ATC 205; (1995) 30 ATR 1219 Case 15/96 96 ATC 220; (1996) 31 ATR 1315 Case 37/96 96 ATC 394; (1996) 33 ATR 1011 Case 27/97 97 ATC 317; (1997) 36 ATR 1031 Case 7/98 98 ATC 139; (1998) 38 ATR 1119 Case 9/98 98 ATC 166; (1998) 39 ATR 1088 Case 4/2000 2000 ATC 144; (2000) 44 ATR 1005 Ciaglia v. F C of T 2002 ATC 2066; (2002) 49 ATR 1198 Comcare v. A'Hearn (1993) 45 FCR 441; [1993] 119 ALR 85 Fardon v. FC of T 92 ATC 4339; (1992) 23 ATR 323 Farouk Kouieder v. Commissioner of Taxation [2000] AATA 342 (Unreported, J Block, Senior Member, 18 February 2000) FC of T v. Brown 99 ATC 4852; (1999) 42 ATR 672 Hunter Valley Developments Pty Ltd v. Cohen (1984) 3 FCR 344 Lighthouse Philatelics Pty Ltd v. FC of T (1991) 32 FCR 148; 91 ATC 4942; (1991) 22 ATR 707 Mt Gibson Manager Pty Ltd v. DFC of T (1998) 81 FCR 335; 98 ATC 4012; (1997) 38 ATR 62 Windshuttle v. DFC of T 93 ATC 4992; (1993) 27 ATR 88 Zizza v. FC of T 99 ATC 4166; (1999) 41 ATR 96
file references	2003/85131

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