

Taxation: Watching the time demands of the Tax Office

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Taxation: Watching the time demands of the Tax Office

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I AM OFTEN IRRITATED BY THE one-sidedness of taxation law that puts time demands on taxpayers but seldom on the Tax Office. Be that as it may, if a practitioner wants to avoid negligence problems – or, at the least, embarrassment before a client – the practitioner needs to understand those time demands.

Objections

The law on the timing of lodging objections used to be unduly strict, particularly since before lodging an objection, a taxpayer might want to obtain advice or make a *Freedom of Information Act* request to ensure that the objection stated “fully and in detail, the grounds that the person relies on” (s.14ZU *Taxation Administration Act 1953*). They used to have to be lodged within 60 days of service of the assessment.

The law is now much more generous. The general rule is that an objection must be lodged with the Tax Office within four years of the day of service of the assessment (which for self-assessment taxpayers includes deemed service) that the taxpayer wants to object against.

Special rules apply to “shorter period of review” (SPOR) taxpayers (broadly those with simple tax affairs); for them the objection period is only two years.

If the objection is against an amended assessment (given self-assessment, this is normally more likely than not to be the case), the objection must be lodged by the later of four years after the original assessment was served (two for a SPOR taxpayer), or 60 days after the amended assessment was served. If the objection is against a private ruling, the objection has to be made not later than 60 days after the ruling was made, or four years (two for a SPOR taxpayer) after the date of lodgment of the return for the relevant year.

If a taxpayer wants to lodge an objection out of time, he or she can send the objection to the Tax Office, at the same time requesting the Tax Office to treat the objection as having been lodged within time.

The general rule appears to be that such extensions will be allowed, provided the taxpayer has a reason which explains the delay: what is required “is the balancing of the delay; the explanation for it; the circumstances which give rise to it and such prejudice if any as may be shown to exist to the [Tax Office] 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” (per Hill J, *Brown v F C of T*, 6 May 1999).

Appeals

If the Tax Office disallows an objection on appeal, the decision can be referred to the Federal Court or to the Administrative Appeals Tribunal. This has to occur within 60 days of service of the objection decision.

Appeals can be lodged against decisions of the Tribunal within 28 days or the Federal Court within 21 days. In theory, extensions of time can be applied for; however, as a matter of practice I cannot recall ever seeing one given.

Once within the Administrative Appeals Tribunal or Federal Court system, the taxpayer is subject to the rules of the Tribunal or Court, which means that any appeal against a decision has to be made in a manner and with timing required by their rules.

Capital gains tax

Capital gains tax law contains a number of provisions which allow a taxpayer a choice – in particular, about whether or

not to take rollover relief.

Choices made under the capital gains tax provisions must generally be made on the day the taxpayer lodges the income tax return for the income year in which the relevant capital gains tax event happened, or with such further time as allowed by the Tax Office. The way the taxpayer prepares the tax return is deemed to be evidence of the making of the choice (ss.103-25 of the *Income Tax Assessment Act 1997*).

Employee share schemes

The general rule in employee share schemes is that a taxpayer will be assessed on any discount given, at the time of receipt of a share or option, or, if the share or option is a "qualifying share" or a "qualifying option", at the "cessation time", whichever is later.

Broadly, a "qualifying share" is one where at least 75 per cent of the employees of the company are entitled to receive shares in the company: qualifying options are not subject to any such requirement, which explains their popularity with senior executives. The "cessation time" is, broadly speaking, when conditions restricting the disposal of the share or option cease to have effect, or ten years, whichever comes first.

While waiting for the cessation time will defer taxation, the taxpayer would be assessed on the total gain up to that point as ordinary income. A taxpayer might prefer to be assessed at the time of allotment of the share or option so that any gain made after that point is subject to the 50 per cent capital gains tax discount. The tax law allows a taxpayer to make an election to be assessed at the earlier time.

The election must be made on or before the taxpayer lodgment of the income return for the year of income. While the Tax Office can allow additional time for lodgment of the election, this is not a matter one can object against, and certainly not so as to allow a taxpayer to use hindsight in making the choice, although an *Administrative Decisions (Judicial Review) Act* review might be appropriate.

Informal tax office requests

The Tax Office often writes letters demanding that replies should be made to a letter within, say, 28 days.

As a matter of law, one could simply ignore such a letter, although this is not a good idea, particularly if the Tax Office letter might lead to penalties – in such a case, to minimise penalties you will want to show that you cooperated with the Tax Office.

Obviously, there is no point in ignoring a letter if all that will do is to provoke a more formal Tax Office response. (However, sometimes a practitioner should insist on a formal demand before providing the Tax Office with requested information – otherwise the practitioner might well be in breach of a confidence or negligent.)

But one need not be panicked into complying with some artificial demand. If there is a problem, or the time demand is unrealistic, simply write to the Tax Office, acknowledging the letter, and stating when you expect to be able to respond to it.

Justice Graham Hill: The end of an era

There are few tax practitioners who would not have personally known the late Justice Graham Hill, who died unexpectedly on 24 August 2005. Over the last 30 years, he and the late Professor Ross Parsons were effectively the final arbitrators of tax thought in this country.

The reason why Graham Hill was so well known to the tax profession was because of his unparalleled accessibility. He lectured in stamp duty and indirect taxes at Sydney University for over 40 years, there were few significant tax conferences which he did not attend and contribute to, and few tax discussion groups and the like which could not rely upon him to grace their annual dinners.

Justice Graham Hill was born in 1938. He attended Fort Street High School then Sydney University. He completed a Master of Law at Harvard University at a time when overseas study was rare. He became a partner in Dawson Waldron, as Blake Dawson Waldron was then known, before going to the Bar; after only a short period becoming a Queen's Counsel. In 1989 he became a judge of the Federal Court of Australia.

Over the last 20 or more years there have been few significant tax cases with which he has not been involved (either as counsel or as a judge). Popularly, he achieved greatest notoriety (even front-page newspaper recognition) for his participation in the

Consolidated Press case (*Consolidated Press Holdings Limited v FC of T*, 13 October 1998).

I used to suspect that Justice Hill was a staunch traditionalist in tax matters – for example, I felt that he disliked the

tax ruling system (judges generally do not like the tax ruling system; it runs counter to the role of a court being that of resolving actual rather than hypothetical disputes) and that he was a 'black letter' lawyer. But in recent years he appeared to have both accepted the ruling system and, in particular, shied away from 'black letter' law. I say the latter given his feisty remarks about the ambit of Part IVA of the Income Tax Assessment Act 1936 in *Macquarie Finance Limited v Commissioner of Taxation* [2004] FCA 1170 (14 September 2004) and his examination of the scheme of the goods and services tax in *HP Mercantile Pty Limited v FC of T*, Full Federal Court 8 July 2005.

It is unlikely that we will again see individuals dominating the tax scene as did Ross Parsons and Graham Hill. The Australian tax profession has become just too big. Thirty years ago there might not have been more than 30 individuals whom one could say had a comprehensive understanding of Australian tax law; now, while there are countless hundreds of lawyers in accounting and legal firms, most specialise in one aspect of tax and few understand the 'big picture'.

< [Prev](#) [Next](#) >