



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:LB:734189

28 May 2013

The Hon. Greg Pearce MLC
Minister for Finance & Services
Level 36, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister,

Proposal for alternative NSW Test Case Funding Program

I refer to earlier correspondence between yourself and the Law Society in relation to this matter.

While the Law Society members of the Office of State Revenue Liaison/Law Society Committee (Committee) are disappointed with your decision not to support a test case litigation funding program for New South Wales revenue laws, the Committee accepts that you consider there may be higher priority for use of New South Wales taxpayer funds.

As this is, however, an access to justice issue, the Committee suggests a more modest proposal for your consideration. There are two aspects to this revised proposal:

1. the funding by the NSW Office of State Revenue (OSR) of legal costs of a taxpayer where the Chief Commissioner of State Revenue (Commissioner) appeals against a favourable decision obtained by the taxpayer in the Administrative Decisions Tribunal (ADT); and
2. a greater utilisation of the "stated case" procedure currently available under the relevant legislation.

1. Funding of taxpayers costs where Commissioner appeals from ADT

As you are aware, the ADT was established as a low cost tribunal where, relevantly in revenue cases, taxpayers could appeal against assessments issued by the Commissioner.

However, this low cost purpose of the ADT may be frustrated where the taxpayer is successful at first instance in the ADT but the Commissioner decides to appeal the decision because it affects other matters, or otherwise. Therefore the taxpayer, despite having had a favourable decision, must then fund defence of an appeal either to the Appeal Panel or to the Supreme Court. The legal costs to be incurred by the taxpayer may then multiply substantially, putting the taxpayer in a position where it may not be financially viable for the taxpayer to continue yet the taxpayer is effectively forced by the Commissioner to do so. Accordingly the Committee's proposal is that where the taxpayer has been successful in the ADT and the Commissioner appeals, the Commissioner should fund the taxpayer's reasonable legal costs of contesting the appeal.

This would not require the establishment of a panel or committee to evaluate the claims of the taxpayer. It would be an automatic policy of the Commissioner, funded out of the OSR's litigation budget. This would also ensure that the Commissioner would not routinely appeal favourable decisions obtained by taxpayers in the ADT, or seek to take advantage of the fact that the Commissioner has a better financial capacity (via access to the public purse) for such matters than a taxpayer might.

The Committee notes that the Australian Taxation Office has an analogous policy in circumstances where it appeals against a favourable decision obtained by the taxpayer in the Administrative Appeals Tribunal or the Small Claims Tribunal. Again, this is generally an automatic right of the taxpayer and is not dependent on a review or evaluation by a panel or committee.

Your consideration of this aspect of the proposal would be welcomed.

2. Stated case procedure

There is an existing provision (namely section 106 of the *Taxation Administration Act 1996*) which allows the Commissioner to state a case on any question of law concerning the assessment or refund of tax and to forward the case to the Supreme Court for its opinion.

This procedure has, as far as the Committee is aware, only been utilised by the Commissioner once since it was enacted in 1996, in *Chief Commissioner of State Revenue v Darling Harbour Authority and 4 ors.* [2001] NSWSC 429 (25 May 2001). It was also raised by the Commissioner and commented upon in *Harrington Park v Chief Commissioner of State Revenue* [2008] NSWSC 266). However, there is some uncertainty as to how it operates on a practical level, particularly regarding costs.

The Committee proposes that this procedure be revised and "fleshed out" as a means by which questions of law can be resolved without the expense of a "test case", with its associated unfair burden on the relevant affected taxpayer.

Specifically, the Committee suggests that should an unresolved question of law arise which affects an assessment of tax for a particular taxpayer that also affects other matters, that question could be resolved, at the expense of the Commissioner, through the use of the stated case procedure. Instead of the taxpayer applying for a review (which, if successful might be appealed by the Commissioner), the taxpayer could request the Commissioner to state a case to the Supreme Court, greatly simplifying the procedure.

It is submitted that utilising this procedure would result in costs savings to the State. The recent case of *De Marco v Chief Commissioner of State Revenue* [2013] NSWCA 86 is a good example. In that case, the Court of Appeal allowed the taxpayers' appeal against the Appeal Panel's decision in *Hayward v Chief Commissioner of State Revenue (RD)* [2011] NSWADTAP 17. The Appeal Panel had dismissed the taxpayer's appeal against the ADT first instance decision in *Hayward v Chief Commissioner of State Revenue* [2010] NSWADT 117 and awarded costs against the Commissioner. As a result of this litigation, the State had to pay the costs of both the Commissioner and the taxpayers. In addition, the State was required to fund hearings in the ADT at first instance, the ADT Appeal Panel and the hearing in the Court of Appeal.

Had the stated case procedure been adopted in the *De Marco* case, the Supreme Court would have directly determined the questions of legal interpretation involved and saved both parties legal costs, and additionally saved the State expending resources funding multiple hearings.

The Committee respectfully requests your approval for the establishment of a joint committee between the Law Society and the OSR to develop guidelines for the practical application of the stated case procedure, so the Commissioner funds any legal representation of the taxpayer at the stated case hearing.

I look forward to your response to these revised proposals on this issue.

A copy of this letter is also being sent to Mr Tony Newbury, Chief Commissioner of State Revenue for his information.

If your officers have any questions in the meantime, they should contact Liza Booth, policy lawyer for the Committee on telephone (02) 9926 0202 or via email on: liza.booth@lawsociety.com.au .

Yours sincerely,



John Dobson
President

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