

15 NOVEMBER 2011

Commissioner ordered to pay indemnity costs

The Commissioner of Taxation was dealt a heavy blow in the Federal Court last Thursday, when ordered to pay taxpayers' costs in respect of the appeal on an indemnity basis, pursuant to Order 23 Rule 11(6) of the Rules of Court.

On 21 January 2011, the Federal Court dismissed appeals by the Commissioner against decisions of Greenwood J to set aside objection decisions of the Commissioner, and allowed objections by the taxpayers against amended income tax assessments. Following this 'victory', the taxpayers sought costs orders against the Commissioner.

Prior to the hearing of the appeal, the taxpayers had made several settlement offers to the Commissioner, all of which were quickly rejected by the Commissioner. The court rejected the proposition made by the Commissioner that a tax appeal differs significantly from a private litigation, and ruled that the Commissioner could not escape the court's scrutiny of his conduct in refusing to accept the offers.

The court found four propositions implicit in the Commissioner's reasons for rejecting the taxpayers' offers. These propositions were:

- the Commissioner is not obliged to take into account the outcome at first instance in deciding whether to accept any offer;
- the Commissioner's assertion that payment arrangements included as part of a settlement of a tax dispute must be in accordance with his own policies and procedures, is an answer to the taxpayers' application for costs on an indemnity basis; and
- the Commissioner has, by his prescription of policies and procedures, limited his own power to compromise litigation to which he is a party; and any offer to settle, for the purpose of Order 23, must involve the offer of a substantial amount.

The Commissioner also asserted that the taxpayers in question could not establish that the Commissioner's assessments were excessive, and that the offers were not genuine attempts to reach a negotiated settlement.

The court rejected the Commissioner's assertions but accepted that in appropriate cases, the public interest may be better served by having the *'[c]ourt decide a case...rather than settling it*



upon the basis of purely commercial considerations. However, the court did not accept that the Commissioner had identified any particular aspect of his policies and procedures that entitled him to *'persevere in the prosecution of the appeals in the face of reasonable offers of settlement'*. The court held that it was unreasonable for the Commissioner to reject the offers made to him, at least in the absence of any countervailing consideration, and therefore was liable to compensate the taxpayers for the consequential losses incurred.

The court noted the *High Court case of Australian Communication Exchange Ltd v Deputy Commissioner of Taxation (2003)* in which they commented, in relation to an appeal against the Commissioner's disallowance of an objection, that *'this remains civil litigation between parties who have identified the issues upon which they are joined'*. The Federal Court maintained

that the Commissioner was not in a special class of litigant and remained answerable to the court regarding his conduct in litigation. This decision thereby offers encouragement to taxpayers that in an appeal from a single judge of the Federal Court to a Full Court, the Commissioner may still be required to pay the taxpayers' costs on an indemnity basis where he has rejected offers of compromise because, according to section 64 of the *Judiciary Act 1903 (Cth)*, *'the rights of parties shall nearly as possible be the same... as in a suit between subject and subject'*.

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