

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

26 February 2014

Question: AET 3030-3031

Topic: Commissioner of Taxation v Messenger Press Pty Ltd

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Senator MILNE asked:

Senator MILNE: This is a question in relation to the recent case of the Commissioner of Taxation v Messenger Press Pty Ltd on appeal. Did the tax office consider applying for special leave to appeal to the High Court?

Mr Jordan: I will have Neil Olesen, the Second Commissioner for Compliance answer that question. As I understand it, there was advice received on that appeal matter and it was considered whether that should be. The provisions, as I understand it—the old division 3B—were no longer operative, and the opinions that we received were of the view that it was unlikely to get special leave as there was no precedential value going forward. But I will ask the second commissioner.

Mr Olesen: Yes we did consider it.

Senator MILNE: When you say you did consider it, did you seek advice as to whether or not to apply for special leave to appeal to the High Court from the Solicitor-General or anybody else in a legal context?

Mr Olesen: I do not have that information here, I will have to take that on notice. It would not be unusual for us. In fact, it would be usual for us to seek such advice. But I cannot confirm it from the information I have in front of me at the moment.

Senator MILNE: I find it hard to believe that you cannot give me an answer to that in the sense that the decision came down, as I understand, on 25 July. As I understand it there was a period of time—28 days—in which you had an opportunity to appeal, and in that period we went into caretaker mode,. Somebody had to have made a decision before 16 August whether or not to appeal. I want to go back through who knew what, when, and who was making these decisions. When the decision came down on 25 July, did the tax office then discuss this matter with the then Treasurer or minister as to what should be done?

Mr Olesen: No, to the best of my knowledge. We have very thorough processes when there are unfavourable decisions for us in the Federal Court. We routinely allocate senior officers to look at those cases and make judgements about whether we want to proceed with an appeal to the High Court. In a lot of those cases we will seek advice from the Solicitor General. We may have in this case; I just do not have that particular information here in front of me. My understanding in accordance with our normal process is that we would have considered the pros and cons of an appeal, having regard to the matter that was litigated, and formed an independent view about whether to proceed with an appeal.

Mr Jordan: Can I just address the specific part? I think part of your question went to whether the ATO discussed this with the Treasurer or the Assistant Treasurer? Is that what—

Senator MILNE: Yes, with the Treasurer, or the Assistant Treasurer or anyone who was a government minister—

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Mr Jordan: I can certainly say that I did not, and I am not aware of anyone else in the ATO discussing that. I would think that it would be somewhat unusual for anyone to discuss—

Mr Olesen: It would be extraordinary.

Mr Jordan: Extraordinary.

Mr Olesen: We are not able to discuss individual taxpayer matters with ministers.

Mr Jordan: But I can say that I did not and I can virtually say that the second commissioners did not—and Jeff Leeper would not, because that would not be his area—discuss that with the Treasurer or the Assistant Treasurer.

Senator MILNE: Okay. So I want on notice from you whether the tax office sought advice from the Solicitor-General or any other legal counsel, if not the Solicitor-General. Then secondly, did the Solicitor General recommend that the commissioner seek special leave or not? Or did any other legal professional make that recommendation pertaining to that matter?

Mr Jordan: We will take that on notice.

Answer:

Please refer to AET 1-2