Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

31 May – 2 June 2011

Question No: BET 62

Topic: Denlay case

Hansard Page: 119-120

Senator Bushby asked:

Senator BUSHBY: During the previous round of estimates I also asked a question about the Queensland appeal court case of ATO v Denlay, during which I asserted that you had lost the case in the appeal court. You countered that you had won.

Mr D'Ascenzo: I apologise about that. There were two cases.

Senator BUSHBY: I was going to ask whether you had your officers brief you on that.

Senator Sherry: You would be in trouble with two cases.

Mr D'Ascenzo: I did not mean it. Honestly, I had one case in my mind.

Senator BUSHBY: I understand. I did not ask the question, because I thought you would no doubt be right and I was wrong. But, as it turned out, it was the other way around. Have you had the opportunity to review that case now and confirm that the ATO proposition in taking on the case itself was, to quote the judge, preposterous? Have you had a chance to review that decision? Is the ATO looking at taking any action as a result?

Mr D'Ascenzo: We did review it. I am not precise on the details. But my advice is that we did review it and that we did change our processes to take into account the comments made by the judge. I could perhaps clarify that in more detail on notice.

Answer:

The case referred to by Senator Bushby is *Deputy Commissioner of Taxation v Denlay & Anor* [2010] QCA 217 (20 August 2010), a decision of the Supreme Court of Queensland, Court of Appeal.

The decision upheld the granting of a stay to the taxpayers, restraining the Commissioner from commencement of enforcement of the judgment he had obtained on the assessments issued to the taxpayers which were unpaid. Crucial to the decision of the Court of Appeal was evidence of the taxpayers that they would be forced to liquidate their Australian assets to pay the judgment.

In all instances where there is an application for a stay, including the Denlay case, the ATO is guided by the principles set out by French J in *Snow v Deputy Commissioner of Taxation:*

1. *The policy of the ITAA as reflected in its provisions gives priority to recovery of the revenue against the determination of the taxpayer's appeal against his assessment.*
2. *The power to grant a stay is therefore exercised sparingly and the onus is on the taxpayer to justify it.*
3. *The merits of the taxpayer's appeal constitute a factor to be taken into account in the exercise of the discretion (although some judges have expressed different views on this point).*
4. *Irrespective of the legal merits of the appeal a stay will not usually be granted where the taxpayer is party to a contrivance to avoid his liability to payment of the tax.*
5. *A stay may be granted in the case of abuse of office by the Commissioner or extreme personal hardship to the taxpayer called on to pay.*
6. *The mere imposition of the obligation to pay does not constitute hardship.*
7. *The existence of a request for reference of an objection for review or appeal is a factor relevant to the exercise of the discretion.*

As outlined in the ATO's response to the February Senate Estimates 2011 Question on Notice AET 97, the ATO has reviewed the *Deputy Commissioner of Taxation v Denlay & Anor* case and has circulated a briefing note to relevant ATO officers regarding future recovery proceedings involving a stay application by the taxpayer. Where other avenues of recovery are available, the ATO will provide an undertaking to the court that bankruptcy proceedings will not be started whilst there is an objection or tax appeal in process. However, in cases where there is dissipation of assets or where the taxpayer is party to a contrivance to avoid liability to pay tax, bankruptcy may still be considered an option. These considerations will be taken into account for all future stay applications.

The ATO continues to take this approach although the *Deputy Commissioner of Taxation v Denlay & Anor* case has not been applied in any subsequent proceedings and has been distinguished on its facts; including the following cases for example:

- *Deputy Commissioner of Taxation v Hua Wang Bank Berhad (No.2)* [2010] FCA 1296 Kenny J in refusing the taxpayer's stay, distinguished *Denlay* on the basis that "*commercial injury is not akin to the "extreme personal hardship" that has justified a stay in other circumstances".*
- Unreported decision of the District Court of New South Wales dated 27 September 2010, Gibson DCJ in refusing the taxpayer's stay distinguished *Denlay* on the grounds that the "stay" was indefinite notwithstanding arguments of ill health and bankruptcy.
- *Deputy Commissioner of Taxation v Woods* [2010] TASSC 67 Associate Judge Holt in refusing the taxpayer's stay, applied French J in *Snow v Deputy Commissioner of Taxation (1987) 14 FCR 119 at 139* and declined an order for a stay on grounds that unlike D*enlay* the taxpayer here had failed to provide evidence as "to how the stigma of bankruptcy might impact on her".

- *Deputy Commissioner of Taxation v Selvadurai Raveendran* [2010] VCC 1493, Kennedy J of the County Court of Victoria in refusing the taxpayer's stay, distinguished *Denlay* on the basis that the defendant had not lodged any objections against his tax debts and had not demonstrated that bankruptcy was "highly likely."
- 15 March 2011 - *Groves v COT* [2011] FCA 22 Logan J. Dr Groves sought a stay of Part IVC appeals pending resolution in the Supreme Court of litigation concerning the alleged misappropriation of dividends. Logan J commented that although *Denlay* was of persuasive weight it was not binding on the Federal Court, and that in the present case it was not necessary to explore whether the Denlay judgment could be reconciled with *Broadbeach* or *Hoare Bros*, both of which bound him.
- *Deputy Commissioner of Taxation v Tilley Property Management Services Pty Ltd* [2011] FCA 678, Logan J, refusing the taxpayer's application for an adjournment of winding up, and commenting on the High Court decision in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 said:

> *For completeness, reference should also be made to a judgment of the Queensland Court of Appeal. Deputy Commission of Taxation v Denlay & Anor [2010] QCA 217 (Denlay), in which the court dismissed an appeal by the Commissioner against a refusal by a trial judge to grant summary judgment in respect of liabilities grounded in assessments which were the subject of challenge. Denlay is not binding upon me. Further, though there is reference in the judgments in that case to Broadbeach Properties, this does not in my respectful opinion, sit happily with that case. Be that as it may, Denlay is, again with respect, explicable on the basis that the challenge made by Mr and Mrs Denlay was not just by way of the invoking of the statutory rights of objection, appeal and review, but also by way of a judicial review proceeding, the effect of which was to allege that the assessments concerned were not in truth and in law assessments at all, but rather the product of conscious maladministration. It is possible to explain the outcome both in the Trial Division and the Queensland Court of Appeal in that proceeding on the basis that reliance upon section 177 of the Income Tax Assessment Act 1936 could not rise higher than its source and if the source itself, namely the assessment, said to be conclusive evidence of a liability was the subject of a challenge which went to the very existence of an assessment at all, then the effect of section 177 was moot.*