



THE TAX INSTITUTE

THE MARK OF EXPERTISE

31 January 2014

The President
Administrative Appeals Tribunal
Level 7, City Centre Tower
55 Market Street
Sydney NSW 2000

By email: principal.registry@aat.gov.au

Dear President,

Draft Practice Direction for the Expedited Review of Certain Decisions

The Tax Institute is pleased to have the opportunity to make a submission to the Administrative Appeals Tribunal in relation to the Draft Practice Direction for the Expedited Review of Certain Decisions (**draft practice direction**).

Summary

Our submission below addresses our main concerns in relation to the draft practice direction. In particular:

- The draft practice direction should not apply to most tax decisions, by "tax decision" we mean a decision subject to appeal under Part IVC of the *Taxation Administration Act 1953 (TAA)*. If the draft practice direction is to apply to all tax decisions, amendments to paragraphs 1.3, 2.1 and 2.5 are required to clarify this;
- There should be flexibility as to the timing of an application for expedited review;
- The draft practice direction should clarify whether both the applicant and the respondent can apply for expedited review; and
- The prejudice to the responding party should be a matter the Tribunal considers in determining an application for expedited review.

Discussion

Paragraph 1.3

The phrase "*include but are not limited to*" in the chapeau to paragraph 1.3 of the draft practice direction suggests that any decision within the Tribunal's jurisdiction could be suitable for expedited review under the draft practice direction. However the use of the

word “and” between subparagraph (a) and (b) makes it unclear whether the decisions should satisfy both subparagraphs to be suitable for expedited review. If the decision is required to satisfy both subparagraphs, the bulk of tax decisions under Part IVC of the *Tax Administration Act* 1953 would not be covered, because they would fall outside subparagraph (b). If decisions which fall within either (a) or (b) might be suitable for expedited review under the draft practice direction, then most tax decisions would be covered under subparagraph (a).

We submit that paragraph 1.3 should be redrafted to exclude tax decisions. It is our experience that requests for expedition in tax appeals under Part IVC of the TAA are being dealt with by the Tribunal appropriately without resort to a practice direction.

Paragraph 2.1

Notwithstanding the above, if the draft practice direction is to apply to the bulk of tax decisions before the Tribunal, amendments to paragraphs 2.1 and 2.5(d) are required to take into account statutory modifications under Part IVC of the TAA.

The reference to section 41 of the Act in the chapeau to paragraph 2.1 of the draft practice direction would not apply to tax appeals under Part IVC of the TAA pursuant to the operation of section 14ZZB of the TAA. Accordingly, the paragraph requires that applications for expedited review of those decisions be made only at the time the application for review of the decision is filed. An application for expedited review of a tax appeal under Part IVC of the TAA should be able to be made at any time. Flexibility is required because the timing of any recovery action in other concurrent court proceedings may influence the timing of an application for expedited review in relation to tax decisions before the Tribunal.

Paragraph 2.5

Paragraph 2.5 should also be amended to clarify that the reference to section 41(2) of the Act in subparagraph (d) does not operate in relation to tax appeals due to the operation of section 14ZZB of the TAA. This is to clarify that, although the chapeau to paragraph 2.5 states that the Tribunal “*must be satisfied*” of the matters in subparagraphs (a) to (d), subparagraph (d) is only relevant to tax decisions to the extent that it refers to the general practice direction.

We refer to our comments above in relation to the drafting of paragraph 1.3 and note that the reference to “significant implications” in subparagraph 2.5(a) may be redundant if “significant commercial ramifications” are required for decisions to be suitable for expedited review under subparagraph 1.3(a).

The draft practice direction should clarify whether both the applicant and respondent can apply for expedited review. Paragraph 2.1, as currently drafted, has the effect that an application for expedited review of a tax appeal under Part IVC of the TAA has to be sent with the application for review of the decision. This suggests that only the applicant can request expedited review. If the respondent/Commissioner is also able to request expedited review, this should be clarified in paragraph 2.1.

Paragraph 2.5 is currently drafted such that all of the subparagraphs must be satisfied in order for the Tribunal to deal with an application on an expedited basis. It is our view that one of the essential criteria should be that there is no significant prejudice to the party responding to the application for expedited review so that the responding party is allowed sufficient time to prepare its own case.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely,

A handwritten signature in black ink, appearing to read "M. Flynn", followed by a long, horizontal, slightly wavy line.

Michael Flynn
President