



## HIGH COURT OF AUSTRALIA

**Public Information Officer**

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### COMMISSIONER OF TAXATION v SHANE DAY

A Customs officer charged with misconduct offences could claim a tax deduction for his legal expenses as the offences were connected with his work, the High Court of Australia held today.

Shane Day was charged with failure of duty in 1998 and in 1999 and obtained legal advice and representation. The 1998 charge was of improper conduct by presenting his Customs identification to a clerk at the Downing Centre Local Court in Sydney to try to obtain information about a search warrant which had been executed on the Australian Customs Service. Mr Day was unsuccessful. The warrant had authorised the Australian Federal Police to search his workstation. An authorised Customs officer found that it was improper for Mr Day to have conveyed that his purpose was official. He was demoted and his salary reduced. The Disciplinary Appeal Committee found the charge proved but upgraded the position and salary from that directed by the inquiry officer. In judicial review proceedings in the Federal Court, Justice Roger Gyles held that the conduct was not improper and remitted the case to the Committee which set aside the direction of the inquiry officer and ordered the Commonwealth to pay Mr Day's costs. A Full Court of the Federal Court dismissed the Commonwealth's appeal from Justice Gyles's decision.

Mr Day was charged with a set of seven charges in 1999 and suspended without pay. Three charges related to his conduct in connection with a claim for a diesel fuel rebate by the partner of another Customs officer, including helping to create a false diary. The fourth charge was that he had acquired a work vehicle for a fellow officer to transport Mr Day's daughter. Two charges involved his actions to conceal absences from work, by asking a colleague to cover for him and to switch his computer on, and by submitting a false attendance record. The seventh charge was that he failed to communicate information concerning an investigation into an individual. Mr Day commenced proceedings in the Federal Court to have the charges set aside, alleging that information obtained by the AFP through telephone intercepts as part of a criminal investigation was wrongly made available to Customs officials. That application, an appeal to a Full Court, and an application for special leave to appeal to the High Court were refused with costs.

For the financial year 2001-02, Mr Day claimed that \$37,077 of outstanding legal expenses should have been allowed as a tax deduction. The deduction was refused and the Tax Commissioner disallowed his objection to his income tax assessment. Mr Day appealed to the Federal Court. Justice Arthur Emmett held that the legal expenses were not deductible as they were not incurred in gaining or producing taxable income in accordance with section 8-1(1)(a) of the *Income Tax Assessment Act*, but also held that the Commissioner be estopped from contending that expenses from the 1999 charges were not deductible as it had earlier consented to a deduction for fees paid to one counsel for legal advice. The Full Court of the Federal Court, by majority, allowed the Commissioner's appeal on the issue of estoppel, but allowed Mr Day's cross-appeal, holding the expenses to have been properly deductible under section 8-1(1)(a). The Commissioner appealed to the High Court.

The Court dismissed the appeal by a 4-1 majority. It held that Mr Day's legal expenses were properly allowable as deductions. What was productive of his income was to be found in all the incidents of his position in Customs, including his obligation to observe standards of conduct which if breached might entail disciplinary charges. Mr Day's outgoings by way of legal expenses followed upon the bringing of the charges with respect to his conduct, or misconduct. He was exposed to those charges and consequential expenses by reason of his office. The charges could not be viewed as remote from his office or of a private nature. Whether the charges were well-founded was not relevant to the question of deductibility. The Court held that the incurring of expenses by an employee to defend a charge that may result in their dismissal may not always establish a necessary connection to the employment which was productive of income. Much depended on what was entailed in the employment and duties it imposed upon an employee. In Mr Day's case, the requisite connection was present.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*