

CLAIRELEIGH HOLDINGS PTY LIMITED AND CLAIRELEIGH (GOSFORD) PTY LIMITED

SUBMISSION TO THE PARLIAMENTARY COMMITTEE INTO TAX DISPUTES

This Submission concerns the ATO's audit of 2 of my wholly owned companies Claireleigh Holdings Pty Limited ('**Claireleigh Holdings**') and Claireleigh (Gosford) Pty Limited ('**Claireleigh Gosford**') over the period April 2011 to May 2014.

EXECUTIVE SUMMARY

Claireleigh Holdings

- The ATO Objection report of 6/8/2008 (**Objection** report) refunded GST (plus interest and penalties) paid by Claireleigh Holdings in 2003/2004. E-mails from the ATO's preceding the Objection report referred to internal advice on the operation of the 4 year rule.
- In 2012 a new ATO auditor seems to have misread the 2008 Objection report and concluded that the refund of GST was an improper 'windfall gain' by Claireleigh Holdings. To get around the 4 year time bar the auditor (apparently without informing himself of the reasons for the 2008 Objection report) constructed a case of 'tax evasion' based on a presumption of culpable knowledge concerning a 'Partnership' dating back to 2003/2004 (though the ATO did not decide the issue till 2008) and certain 'BankWest' evidence (which does not exist).
- The Tax Commissioner's 'Independent Delegate' endorsed the auditor's reasoning and evidence and his opinion of 12/10/2012 established 'tax evasion' as a fact.
- New assessments were raised and Claireleigh Holding's bank account Garnisheed for \$1.75 million.
- Had my lender(s) known of the Garnishee orders I would likely have been financially ruined.
- At Mediation on 24/5/2013 the ATO's 2008 e-mails and internal advice (obtained under FOI) were addressed and the ATO withdrew its claims.
- While the ATO apparently does not now deny the substance of the foregoing its recent 'Internal Review' seeks to blame its actions on me and my adviser's for lack of co-operation – which is simply incorrect. The 'Internal Review' seems to be affected by the same procedural shortcomings that led the auditor to mislead himself. No opportunity has been given to me or my advisers to address the findings of the 'Internal Review'.
- The auditor's inability to understand the 2008 Objection report and check the ATO's records forced me to incur costs in excess of \$200,000 (and mental stress) to deal with a lengthy process that was essentially the result of the auditor's ineptitude.
- But for my educational and other resources I would most likely now be bankrupt. The ATO's indifference to its demonstrated egregious maladministration is alarming.

Claireleigh Gosford

- The ATO characterised a Joint Venture agreement as a 'project management' and denied use of the margin scheme resulting in a claimed underpayment of GST.

- Absent this reference to the margin scheme and there has been no suggestion that the primary GST paid is wrong (: the ATO called for and was provided valuations).
- The argument was somewhat 'technical' so that even if the auditor was correct then a simple rearrangement of the transaction would see the same tax result (maybe the ATO would pick up relatively small amount in penalties – but no additional primary tax).
- The end result would be a 'wash': – if party 'A' paid GST and was denied the use of the margin scheme, then it would seek a refund of excess GST paid and party 'B' who would undoubtedly be able to use the margin scheme would pay the same amount of GST.
- In targeting Claireleigh Gosford for additional tax and penalties the auditor showed a lack of basic commerciality.
- As in the Claireleigh Holdings audit the ATO refused attempts to discuss the matter and in due course issued Garnishee orders for \$188,000.
- Nearly a year after the matter had been listed with the Administrative Appeals Tribunal the ATO (with no further input from Claireleigh) asked for an order allowing Claireleigh Gosford's appeal in full with the decision in favour of Claireleigh Gosford.

My tax advisers BDO have described the auditor's conduct as 'inept and malicious'. There was never the slightest possibility that the ATO would win either matter yet it dragged proceedings out for years forcing me to waste huge amounts of time and incur huge fees in order to avoid financial ruin in response to what was no more than caprice.

For both these matters to have run their full course required the action of not just a single over-zealous individual but system-wide support all the way up to the Tax Commissioner's 'Independent Delegate' and a win-at-all-costs culture that even now (as shown by the 'Internal Review' letter of 20/12/2013) appears to be incapable of understanding that its behavior here was simply an excess of power.

I have attached a copy of my Submission to the Inspector General of Taxation which goes through the issues in detail and attaches a supporting documentation referred to in this Submission including copies of the ATO's own records and internal advice obtained under FOI.

I would like the opportunity to discuss these 2 audits with the Parliamentary Committee.

CLAIRELEIGH HOLDINGS – *ATO Allegations of Tax Evasion*

The ATO auditor's allegations appear to have been based on a fundamental misreading of the ATO's earlier audit Objection report of 6/8/2008 which concerned GST paid by Claireleigh Holdings.

1. Claireleigh Holdings was audited in 2006-2008 in respect of a development in Cammeray NSW which was completed and GST paid in 2003/2004. A new assessment and \$50,000 in interest and penalties was raised in 2006.
2. On appeal PKF (now known as BDO) submitted that while the correct amount of GST had been paid, the ATO had wrongly assessed Claireleigh Holdings when the correct entity was either a 'Joint Venture' or alternatively a 'Partnership' of which Claireleigh was a member.

The ATO allowed the appeal and in its Objection report (**Objection** report) dated 6/8/2008 declared that the correct entity to be assessed was a Partnership.

In considering Claireleigh Holding's appeal the ATO's internal legal advice in a memo. dated 5/5/2008 states was that as the 4 year time limit had expired (a) Claireleigh was entitled to refunds of GST (and interest and penalties) and (b) the ATO could not include the refunded GST amount in the Partnerships (2003/2004) BAS. Most importantly the advice states: '*...there is no evidence of Fraud or Evasion.*'

Had the auditor read the Objection report properly or raised his concerns at the outset the matter would have ended in May 2012.

3. The ATO sent BDO e-mails prior to issuing the 2008 Objection report referring to its internal advice which made it clear that it would deal with the BAS and BDO were to amend Claireleigh Holding's Income tax returns (which BDO duly did).
4. In June 2009 the ATO (without prior notice) paid the full amount of GST, interest and penalties into Claireleigh Holdings bank account.
5. At some time in early 2011 the auditor:
 - a. Appears to have misread the ATO's 2008 audit report as saying (contrary to the ATO's internal advice including the memo dated 5/5/2008) that Claireleigh Holdings had been instructed to amend its BAS and pay back to the ATO the GST it had earlier been refunded. In fact the Objection report says no such thing.

So the basic premise of the 2012 audit was the auditor's understanding of the 2008 Objection Report as stated in his note of a meeting dated 10/8/2012:

'... discussed the objection report and as the four year rule has expired is the fact that the partnership of Claireleigh Holdings Pty Ltd and IJ Hashman not reported the income in the partnership as instructed in the objections report in 2007 (sic) enough to constitute evasion.'

So in a single jump we go from the ATO saying on 5/5/2008: '*...there is no evidence of Fraud or Evasion*' (and that we could not amend the 2003/2004 BAS) to the auditor in 2012 trying to get around the 4 year rule, and having miss-stated the Objection report proceeds with a Submission of 'tax evasion'.

- b. On 29/4/2011 registered a Partnership for purposes of the audit using BDO's address. As the auditor admitted in an e-mail dated 30/10/2012 neither BDO nor I were notified of this. (So much for being a Model Litigant.). No doubt to have done so may have tipped us off as to the audit strategy- but it could also have seen the matter disposed of at the outset.

- c. Began collecting information but apparently without checking the ATO's archives on matters leading to the 2008 Objection report. The ATO's files would have provided the auditor with all the information provided to me under FOI in March/April 2013.
- d. Having identified the 'four year rule' roadblock (referred to in (a) above) the auditor seems to have looked about for an explanation based on 'Fraud or Evasion' to allow an audit review unlimited as to time – i.e. back to 2003/2004.
- e. On 12 October 2012 the Tax Commissioner's 'Independent Delegate' issued a 'tax evasion' opinion based on, it seems, a wholesale endorsement of the auditors reasoning premised on my alleged culpable knowledge of the 'Partnership' being the correct entity for GST all the way back to 2003/2004 (even though the ATO had not decided the matter till 2008) and the auditor's supporting 'BankWest' loan application 'evidence'.

(The ATO's FOI information does not indicate if the 'Independent Delegate' queried the auditor on his reasoning and the supporting evidence presented to him, or asked why the auditor's Submission made no reference to the matters leading to the Objection report.)

The auditor's argument that I had culpable knowledge of the relevance of the 'Partnership' in 2003/2004 based on the issue of Certificates of Titles in the names of Claireleigh Holdings and me is just farfetched.

The ATO has since been unable to produce the 'BankWest' evidence cited by the auditor and the 'Independent Delegate' for the simple reason that it does not exist. The BankWest Director Development Finance cannot recall and BankWest's records do not show any reference to any loan application for a new development made by me after June 2009.

- f. Neither BDO or I had no prior warning that the auditor was looking at 'tax evasion' nor were we given any opportunity to address the allegations prior to the 'Independent Delegate's' opinion issued on 12/10/2012.
- g. With 'Independent Delegate's' opinion of tax evasion in hand the auditor went about raising assessments of \$1.75 million followed up by Garnishee Orders in February 2013 while the appeal against the Final audit report was still on foot.

One should be under no doubt that if news of the Garnishee orders had got to my lenders the financial consequences for me would have been ruinous.

2011-2012 Tax Audit

In about May 2012 the auditor made a wide ranging and onerous request for information (requiring a response of hundreds of pages of documents) on 'Claireleigh Holdings and I J Hashman' (no mention of any partnership) that was expanded within weeks to the past 10 years.

Most of the important information requested in was in the ATO's records having been provided as part of the 2006-2008 audit.

(At about the same time the auditor served information requests on Claireleigh (Gosford) Pty Limited which was audited in parallel with Claireleigh Holdings.)

No reason was given as to the ATO's ability to seek documents going back 10 years.

It is now established from the ATO's internal correspondence obtained under FOI that the auditor failed to check the ATO's archives for the earlier audit records. Had the auditor gone through this simple step - that I think would be obvious to any competent investigator - he would have seen the reasoning behind the 2008 Objection report and the ATO's reasons for refunding the GST paid by Claireleigh Holdings in 2003/2004.

The ATO's attempts to obfuscate on the reasons for this fundamental failure of investigative practice (see the ATO's 'Internal Review' letter of 20/12/2013) are simply not acceptable. Taxpayers should be able to rely on the assumption that information provided to the ATO is stored safely and can be accounted for and accessed. I was able to get the information from the ATO's archives under FOI and so would the auditor.

The auditor was at all times aware that the BDO partner handling my matters was ill and needed time off (the diagnosis of an aggressive cancer was made in early-mid May 2012 from which he passed away in February 2013). When faced with a relatively short delay in receiving a response to the onerous request for information from BDO the auditor followed up with a notice for my examination on oath.

I understand that when the BDO partner handling my matters was not able to get to the office he was in contact with BDO staff who dealt with the ATO. (The ATO's account of contact between the ATO and BDO is considered to be inadequate.)

I think it would be understandable that in dealing with complex tax matters (particularly faced with what was clearly a most unusual and aggressive approach from the ATO) I would always want to have my tax advisers available. I think the auditor understood this, and I have the suspicion that most likely he saw some benefit in getting me on tape away from BDO.

The ATO claims that the examination on oath is a last resort, which clearly was not the case here. About a month or so after the initial requested interview (which I was not made aware of - the auditor followed the ATO practice of serving important documents and instructions for examinations on oath by ordinary mail - which of course is not the norm in other jurisdictions) the auditor who must have thought he was on a sure-win became impatient and procedural propriety came second.

The ATO FOI files show the auditor and his superiors proceeding on a basis that continued to miss-state the Objection report and in doing so did not provide BDO or me with the opportunity to understand the matters under investigation, or address the allegations of tax evasion.

In reading the ATO's internal correspondence there is an apparent lack of any real scrutiny from the auditor's supervisors (including the auditor's Manager who had been the team leader for the 2006-2008 audit, and who must have been aware of the reasons for the 2008 Objection decision) or even the 'Independent Delegate' whose core function must be to include having some sort of

healthy skepticism about submissions put before him – after all Fraud and Evasion are not matters to be inferred lightly.

The auditor's reasoning as to my 'blameworthy conduct' is that I must have known that the 'Partnership' was the party that should have paid the GST all the way back to 2003/2004 because the names of Claireleigh Holdings and Ian Hashman were shown on the Certificates of Titles issued by the NSW Land Titles Office for the Cammeray units. This is naïve at best (: what if the ATO had decided in 2008 that a Joint Venture was the appropriate party to pay GST and I had instead registered a partnership in 2003?).

In response to my query the NSW Land Titles Office provided me with an e-mail in 2013 (tabled at the Mediation) that they infer no legal relationship (e.g. as to any partnership, joint venture, tenants-in-common or joint tenants, etc) from the issue of a Certificate of Title in more than one name. This is just commonsense.

The 'BankWest' evidence cited by the auditor and the 'Independent Delegate' is apparently a finance application I made in 2007 for the Claireleigh Gosford development – which cannot possibly support the auditor's assertions.

After the interim audit report was issued on 15/10/2012 BDO asked the ATO whether 'tax evasion' was being suggested and the ATO's reasons for doing so. This was brushed aside on the basis that 'tax evasion' had been found as a matter of fact by the 'Independent Delegate'.

At would appear that the 'Independent Delegate':

- Failed to query why the auditor did not make any mention of the long history in this matter.
- Failed to think about the logical absurdity of the theory that I 'must have known it was a partnership way back in 2003' put forward by the auditor.
- Failed to check whether the 'BankWest' evidence in fact existed before citing it.

BDO tried to use an informal liaison channel which operates between the ATO and the profession to have the ATO discuss the decision on 'tax evasion' in the light of the ATO's 2008 correspondence. This went nowhere as we were told there had been an 'admission' as to the partnership during the relevant 4 year period. (In fact there were no such 'admission' but rather there had been 'submissions' which included as an alternative a 'partnership'.)

This meant that the way forward involved more costly appeals with the likelihood of appeals to the AAT and possibly the Federal Court.

The auditor proceeded to raise assessment followed up in February 2013 with Garnishee orders for about \$1.75 million. Garnishee orders are a 'review event' under most loan arrangements and their very existence would most likely have triggered off a ripple effect that would have left me financially ruined.

On 24 May 2014 the Mediation provided the first real opportunity to present a response to the ATO's allegations of 'tax evasion' together with the overwhelming weight of evidence – mainly from the ATO's own FOI files. The strong impression received was that the ATO officers present were unable or unwilling to accept what was being put to them – even as it was read out from their own files. They seemed unprepared for anything other than the material in their brief. They did not have authority to negotiate and the matter almost foundered when it was referred 'up the line' to a person who was not at the mediation (again not Model Litigant practice).

The ATO's Defence

In discussions with the ATO officer who conducted the 'Independent Review' of the audit he accepted most if not all of the foregoing, but said the auditor had met with a lack of co-operation. If this is true then it is a serious charge against the professional conduct of my tax advisers.

(Though I cannot see that we were responsible for the auditor's misreading of the Objection report and also that somehow I arranged for him to make representations as to having non-existent 'evidence'.)

The fundamental flaw in the ATO's defence is this question:

'Given that BDO and I had in our hands from some time in 2008 all the information required to defeat the auditors claims of 'tax evasion' and bogus evidence, then why would BDO an apparently competent and experience firm of tax advisers not deal with the auditor at the outset and put a stop to the matter rather than running up hundreds of thousands of dollars of advisory fees and potentially place me in bankruptcy?'

BDO does not agree with the auditor's account of events and consider that their efforts to deal with the auditor were not accurately described in the auditor's file notes.

The ATO has been invited to address the matter properly and to date has chosen not to do so. The ATO's attempts to excuse its actions undermine the taxpayer's trust and confidence.

COMMITTEES TERMS OF REFERENCE

Fair and honest treatment and respect of payers

- The ATO thought it had a very high likelihood of success with 'tax evasion' and fairness and process seemed to become secondary considerations. So we see:
 - The deliberate failure to inform me or my tax advisers that that it had registered the Partnership as far back as 29/4/2011 and did not do so till about October 2012.
 - The ATO knowing BDO acted for me all the way back to 2006 avoiding dealing with BDO in 2012 apparently because (what a surprise) had no evidence it acted for the 'Partnership'.
 - The auditor's attempts at ambush in requesting onerous amounts of information and resorting to formal examinations knowing that arrangements were in hand to meet the ATO's requirements.
 - I spoke with the auditor on the phone and asked him what he was looking for and his response was patently evasive.
- There is a question of whether an examinee faced with an aggressive investigation and then faced with the added prospect of a formal examination by the same investigator, would have any confidence that the safe guards provided (for example in the case of public examinations under the Corporations Act) would operate.

- There is evidence in the ATO's files of a meeting with me that BDO sought to arrange in late July or mid-August (subject to the availability of the BDO tax partner advising me) that the auditor decided not to proceed with. There is evidence of the auditor failing to provide the benefit of an 'exit interview' after the Final audit report even though it was agreed with BDO that this would be done.
- The ability of an auditor who is subsequently found to have been inept or acted improperly to issue Garnishee orders is concerning.

Transparency from the Taxpayer's point of view

- The process followed by the auditor was intentionally opaque. BDO have been told by senior ATO staff that its approach in serious 'Fraud or Evasion' matters is not to inform the subject of the nature of their investigations till they are ready to close in.
- In 2012 the auditor sought a huge amount of information without even (contrary to its recent protestations) identifying the entity for which it was being sought. BDO and I had no knowledge that the Partnership had been registered by the ATO or that there were any matters outstanding from the 2008 Objection report given the ATO's e-mails.
- We were given no opportunity to address the 'tax evasion' allegations either before or after they were rubber-stamped by the 'Independent Delegate'. This breach is unacceptable.
- It was fortuitous that I asked for a copy of the 'Independent Delegate's' opinion which once dissected unravelled the ATO's case. There is no reason why this opinion was not made available with the final audit report which was premised on 'tax evasion' having been established as a matter of fact by the 'Independent Delegate'.
- It took several FOI requests to finally pin down that the 'BankWest' evidence cited by the auditor and the 'Independent Delegate' cannot be produced by the ATO. (I did make a loan application to BankWest in 2007 for the Gosford development though it would be totally improper to use this to suggest that there was any application to BankWest for a development loan after June 2009 as per the auditor's version of events.)

This in itself raises questions as to why the ATO has not withdrawn the 'Independent Delegate's' opinion given that it is based on evidence that cannot be produced.

- It was obvious from reading the ATO's internal correspondence obtained under FOI that there is a close relationship between the auditors and the appeals officers. In the 2006-2008 audit the appeals officer realising that the auditor had assessed the wrong entity suggested alternative arguments to try and save the original assessments (– which also failed).

Taxpayers expect that appeals will be treated properly fairly and independently. Simply separating the administrative from the compliance functions of the ATO will not achieve this.

Model Litigant Rules –

The requirement for ATO officers to behave professionally and competently is fundamental. BDO (in a letter dated 11/4/2013 to the ATO) described the auditor's as acting '...capriciously, if not maliciously...' with '... an unacceptable level of ineptitude...' in dealing with this matter. I think that there would appear to have been failures not just by the auditor but extending up the chain of command.

That this matter went the full distance to the issue of Garnishee orders without any of the auditor's support team, his supervisors or the 'Independent Delegate' raising any obstacles raises questions as to the culture that permits such conduct.

My recent attempts at seeking a meeting with the ATO to discuss its handling of the matter have been rebuffed with the ATO seeking to vindicate its behavior by blame shifting. It comes as no surprise following on from the failings of the audit to see the ATO's 'Internal Review' being conducted totally in-house based on the auditor's version of events without any reference to BDO or me.

The outcome of the Mediation of 24/4/2013 was as inevitable as it should have been embarrassing for the ATO. Yet its response again was to try and use its position to force unfair and unconscionable agreements to hide its failures. In my circumstances I had no alternative but to enter into an agreement with the ATO that I would not willingly accept.

At the Mediation I understood that the ATO would have no hesitation in using its very advantageous cost arrangements with barristers to pursue the matter in Court if it was not resolved on the ATO's terms. The threat of 'Deep Pockets' litigation is an unacceptable instrument of ensuring compliance.

CLAIRELEIGH GOSFORD - ATO allegations the arrangement was improperly reported as a Joint Venture

BDO consider that the Claireleigh Gosford auditor's views were affected by the views he formed in the Claireleigh Holdings audit and that he had not considered this case on its merits.

I doubt that most other auditors on finding that the correct amount of GST had been paid would then spend large amounts of time and effort in trying to find some technical basis on which to extract additional tax and penalties.

Properly understood, on a 'best case' outcome the auditor stood to pick up about a maximum of say \$30,000 in penalties (with no additional GST) for the ATO - but this is only on the unlikely assumption that his somewhat technical arguments prevailed. On a risk weighted basis the ATO's outcome was always likely to be negative.

The matter concerns a Joint Venture agreement drafted by the lead indirect tax partner at Hunt & Hunt, and signed off by the head of indirect tax at BDO. In effect the auditor argued that neither of these eminently qualified practitioners knew what a Joint Venture for GST purposes was.

1. The St Vincent de Paul Society (the ‘Society’) and parties related to Claireleigh Gosford (the ‘developer’) entered into a formal Joint Venture agreement whereby the Society would contribute land on which Claireleigh Gosford would build:
 - a. commercial units for the Society, and
 - b. residential units which the developer would sell to pay for the development costs.
2. On sale of the residential units in 2009/2010 Claireleigh Gosford as manger of the Joint Venture paid the appropriate GST.
3. In 2012 the auditor argued that as Claireleigh Gosford hadn’t registered the Joint Venture agreement with the ATO it was open to the ATO to determine the true nature of the arrangement.
4. The auditor said the arrangement was not in fact a Joint Venture but rather some sort of fee-for-services arrangement which meant that as Claireleigh Gosford did not own the land it was wrong in claiming the benefit of the margin scheme in calculating GST. Taking the margin scheme out of the calculation resulted in a significant GST underpayment.
5. In May 2012 the ATO asked for information from Claireleigh Gosford and there is nothing to suggest that its requests for information were not met. Shortly after requesting the information the ATO issued me with a requirement to be examined on oath in respect to Claireleigh Holdings Pty Limited and Claireleigh Gosford Pty Limited. While the 2 matters were not necessarily interrelated, this does suggest that in the auditors mind they were part of some overall pattern of culpable conduct.

I think that the auditor’s imaginings about ‘tax evasion’ in the Claireleigh Holdings matter coloured his judgment and ruled out the possibility of a fair assessment in this case.

6. The auditor ignored BDO’s arguments on the interim (26/11/2012) and final (30/1/2013) audit reports and raised assessments and Garnishee orders for \$188,000.

While these Garnishee orders were nowhere near as life threatening as the \$1.75 million Garnishee order on Claireleigh Holdings their effect on my livelihood would have been just as incendiary.

7. After lodging an appeal against the audit report BDO attempted on several occasions to make contact with the ATO appeals officer. BDO’s calls were not answered and the appeal was substantially rejected.
8. In parallel with the appeal BDO used its ATO liaison contact (who no doubt having learnt from the Claireleigh Holdings debacle) arranged to have the matter referred for an informal review. In order to protect my position BDO also lodged an appeal with the AAT at which point the informal review was abandoned.

9. In December 2013 during the course of seeking information on the Claireleigh Holdings 'Internal Review' I began hearing from the ATO that the Claireleigh Gosford matter had been 'resolved'. However it took nearly 6 months more for the ATO to contact BDO and suggest that the AAT be asked for an order allowing Claireleigh Gosford's appeal in full with judgment for the appellant. And in the meantime I had no option but to continue paying adviser's fees and putting in the effort to deal with the Garnishee orders.

While the above account is very simplified, the auditor's argument was technical and required equally lengthy (and expensive) responses to the interim and final audit reports. Apart from the cost to the tax payer for the 2 years of ATO time, my adviser's costs are over \$60,000. And it is clear that all of this could have been avoided if the auditor had followed normal procedure and put forward his concerns in writing as per usual ATO practice.

In very simple terms the flaw in the auditors approach was as follows:

1. Claireleigh Gosford had already paid GST on the sale of the 29 residential units and the ATO could not 'double-dip' GST on the sale from both the Society and Claireleigh Gosford.
2. If in fact the arrangement was a 'project management' as the ATO contended then Claireleigh Gosford would have paid far too much GST on any reasonable management fee (say an open market fee of \$200,000) and it would seek a refund of most of the GST (which it had paid on the sale of 29 units).
3. The Society would pay then pay the GST on the sale of the 29 apartments and claim the benefit of the margin scheme. The net result would always be a 'wash' with the same total amount of GST being paid.
4. Even with the 'wash' in place the ATO could have argued that Claireleigh Gosford had initially wrongly attempted to use the margin scheme and seek a penalty of \$30,000 – But there would be no more primary tax payable by Claireleigh Gosford or the Society.

Even if the auditor's technical arguments were right the amount the ATO stood to gain could hardly be justified as being 'commercial' on any risk weighted cost benefit analysis.

The ATO's decision to withdraw the matter from the AAT was sensible if not inevitable. I have had 2 years of disruption to my life and a huge amount of advisers fees based on an auditor's whim.

COMMITTEES TERMS OF REFERENCE

Fair Treatment of Tax Payers

Having been through audits before and since the 2 Claireleigh audits referred to in this Submission I see no reason why the Claireleigh Gosford matter - essentially based on a technical argument – saw the need for any departure from normal ATO audit procedure.

I see no reason why the auditor did not send through a written account of his concerns and beliefs and have them responded to. This is usual ATO audit practice and I see no reason why the ATO did not act fairly and consistently in this matter. I suspect that this amounts to some form of prejudicial behavior based on the auditor's incorrect beliefs in the Claireleigh Holdings matter.

Emboldened by the apparent strength of the ATO's position on Claireleigh Holdings matter the auditor took a heavy handed approach in resorting to formal examinations while there was no indication that it was receiving anything other than full co-operation. In doing so the auditor shut off the opportunity for a rational discussion that would have resolved the matter.

Transparency from the Taxpayer's point of view

It is clear that the auditor adopted an approach designed to conceal the nature of his enquiries. Whatever the mistaken justification in the alleged Claireleigh Holdings 'tax evasion' matter, the same reasoning did not apply here. The auditor simply did not feel the need to show any respect for the taxpayer. And presumably this also applies to his superiors who facilitated the Garnishee orders.

Model Litigant Rules

The ATO constructed a complex and technical argument designed to extract the maximum amount of revenue. The cost to me was greater than any risk-weighted likelihood of additional revenue to the ATO.

The auditor's arguments were never likely to succeed before any competent independent tribunal. It was incumbent on the ATO to make an early assessment of the prospects of success in legal proceedings and yet it took the better part of a year while the matter to be withdrawn from the AAT.

I see the ATO's failure to respond in the interim and final audit report stages of the process and the willingness to take the matter to the brink before the AAT as indicating a willingness by ATO to use its superior ability to fund litigation as a legitimate negotiating and compliance tool.

Ian Hashman

Claireleigh Holdings Pty Limited
Claireleigh (Gosford) Pty Limited

July 2014