

Economics References Committee
ANSWERS TO QUESTIONS ON NOTICE
Australian Taxation Office
Inquiry into Corporate tax avoidance
21 April 2016

Department/Agency: ATO

Question: 1

Topic: Interim Report (18 August 2015)

Reference: Hansard page 32

Senator: Whish-Wilson, Peter

Question:

Senator WHISH-WILSON: Okay. Lastly, in relation to the interim report that this committee put out on this exact inquiry we are on now—that was released last year, I think in August—has the government come to you for consultation in terms of a response to the number of recommendations that were made in that report? I presume the minister's office has come to you guys for advice on that.

Mr Konza: We would have to take that on notice. I am afraid we do not know today. We cannot answer that question directly.

Mr Jordan: If it has happened, it would have been through our Integrated Tax Design Unit that does the interface on matters like that. I am not aware of specific approaches on those interim reports, but we could get back to you if it is at a different level, at an officer's level.

Answer:

Government agencies do not disclose advice provided to government. This question should be referred to the Minister.

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Question: 2

Topic: Legal professional privilege

Reference: Hansard page 34

Senator: Xenophon, Nick

Question:

Senator XENOPHON: Okay, we will leave it at that from a policy point of view. You made reference to claims of legal professional privilege, which sometimes takes a year to work through, and you made reference to being stooged and gamed and getting big grins from some of the people who you are dealing with. Without in any way suggesting that legal professional privilege should be abrogated, is there an argument for dealing with these disputes in a more expeditious way so that you can get to the truth of whether the privilege has been abused or not?

Mr Jordan: It would be very useful for us to have a mechanism through a tribunal or wherever to have someone look more quickly at the material and make an independent judgement of what is validly subject to legal professional privilege and what is not. That would be very useful.

Mr Hirschhorn: Can I just quickly add one point from the coalface. It is very frustrating when what I would describe as reckless claims for legal professional privilege are made, and there seems to be very few consequences for reckless claims for privilege.

Senator XENOPHON: Can you please provide some details on notice, because legal professional privilege is that. It is a privilege and it ought not be abused, so if you could provide some details in respect to that, that would be useful.

Answer:

The ATO understands and acknowledges that legal professional privilege is a common law right of every taxpayer.

The ATO has encountered cases where legal professional privilege has been used as a collateral tactic to defer, delay and defeat the assessment process. In some instances taxpayers and their legal advisers have made 'blanket claims' for legal professional privilege over all the documents obtained under the ATO's access and information gathering powers and are either unresponsive or very slow in engaging in a process to resolve the legal professional privilege claims by agreement, arbitration or court determination.

At present, the consequences for making reckless legal professional privilege claims are insignificant compared to the consequences for the effective administration of the taxation system. The delays caused by reckless privilege claims, coupled with the changes that have been made to the tax law to progressively reduce the 'period of review' for assessments, significantly impair the Commissioner's ability to amend assessments in the allowed time.

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Examples of the more egregious claims for legal professional privilege encountered by the ATO include:

- A private group that has had over 40 litigated cases with the ATO (including on legal professional privilege) focusing on preventing the ATO from gathering evidence, with no cases proceeding on substantive tax issues.
- A major accounting firm claiming legal professional privilege and the accounting concession (an administrative concession similar to legal professional privilege for accountants) over virtually all documents associated with a particular takeover transaction of interest to the ATO. A lengthy negotiation process was required to resolve the claims.
- Many cases involving large number of claims for legal professional privilege over documents, including blanket claims, and the documents are gradually released to the ATO on a drip feed basis over an extended period of time. On perusal of the released documents most of them had no legitimate basis for the legal professional privilege claim, and the claim has only served to delay the evidence gathering process. Such delays potentially take the case outside the set time frame (period of review) for the ATO to make amended assessments.
- A case where blanket claims of legal professional privilege were made by lawyers over certain communications, including an email chain between a manager and an administrative staff member about cocktails. This shows a failure to exercise the required professional responsibilities in making legal professional privilege claims, and there is no effective sanction for this.
- A corporate lawyer advising a Chief Executive Officer to ensure that all documents were sent through the corporate lawyer so that legal professional privilege could purportedly be claimed.
- A person who used the title 'Corporate Solicitor' but was not legally qualified was asked by the chairman to claim privilege to keep documents away from the regulator.
- A company that made a partner from a law firm a director and then claimed privilege over everything said at board meetings. The company was prepared to cooperate only when the ATO signalled its intention to commence legal proceedings.