

ATO Submission – Tax and Revenue Committee

Inquiry into Tax Disputes

26 November 2014

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Executive summary

1. We welcome the Committee's focus on the management of tax disputes. Disputes, while not desirable, are a feature of a complex system and must be managed well to maintain trust and confidence in the Australian Taxation Office (ATO) and the broader tax and superannuation systems.
2. While the number of disputes with the ATO is relatively low, their significance is high. They impact people's lives and businesses and the effects can be long lasting. When disputes take too long and are not managed well, the costs are too high for everyone involved – not only in terms of time, effort, and money, but also stress.
3. We have read the submissions and heard the statements of witnesses and acknowledge that the experience for some people has been less than desirable. We have identified a number of key themes coming out of this material:
 - the importance of early engagement to prevent and resolve disputes
 - issues relating to our timeliness and reasonableness in setting timelines for taxpayers
 - the need for greater transparency in decision making, and
 - further separation of audit and disputes handling.
4. The ATO's stance, strategy and capability is now focussed on resolving disputes as early as possible, in a way that is efficient, respectful and fair. Resolving disputes early not only saves time and money for the taxpayer and the ATO, it also provides certainty for taxpayers and promotes productive relationships.
5. We are pleased with the feedback and results we are getting from the improvements the ATO has made to dispute prevention and resolution management in the last 18 months. We have a number of strategies in place that are having a positive impact:
 - early conversations with taxpayers at both audit and objection stage, rather than protracted paper wars
 - greater technical decision making support for our auditors and increased training and feedback about dispute prevention and resolution

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- increased use of alternative dispute resolution – using facilitators and private practitioners (including former judges)
 - an independent review service for publicly listed companies and taxpayers with an annual turnover of more than \$250 million
 - movement of our objections for taxpayers with an annual turnover of more than \$100 million to a separate organisational unit (Review and Dispute Resolution)
 - a facilitation service available to all taxpayers for less complex disputes, and
 - a revised Code of Settlement – supportive of settlement as a feasible option for resolving disputes and providing certainty for the future.
6. The feedback is very positive and results show we are resolving disputes much earlier. For example, in 2013-14 77% of all settlements were at audit or objection, up from 52% in 2010-11. We intend to continue with these strategies and are exploring the following:
- expanding the scope of existing strategies to more taxpayers
 - options for further separation such as moving all objections (except for administrative reversals) out of the Compliance Group
 - reviewing our performance measures to ensure a focus on outcomes and the experience people have with us, and
 - introducing a Dispute Resolution Charter.
7. We are committed to improving the experience people have when they deal with the ATO and in particular the experience of those in dispute with us. The ATO does not support the idea of creating a separate agency or a new second commissioner. The risks and costs associated with either of these options include increased costs, isolation, lack of feedback loops, reduced confidence in primary decision making and lack of focus on the system as a whole. We welcome the Committee's observations and recommendations for the way forward.

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What we have heard

8. We have reviewed all submissions and listened to the statements presented to this inquiry.
9. The material highlighted that even though the number of disputes is low, their impact on people's lives and businesses can be high. While the matters themselves need to be resolved, it is important that we resolve them in a fair and transparent way that promotes willing participation.
10. We recognise that community confidence and trust in the ATO is influenced (in part) by the way we manage tax disputes.
11. We are pleased with feedback to the committee that confirms the positive impact of our improvement strategies.

The ATO's approach to improving the management of disputes

Early engagement to prevent and resolve disputes

12. Over the last eighteen months we have invested heavily in improving our management of disputes. Our approach is two pronged – investing in strategies that prevent disputes and, when a genuine dispute arises, working to resolve the dispute as quickly as possible.
13. At the core of these efforts is a focus on engaging earlier with taxpayers, preferably in person. This allows us to listen to the taxpayer's reasons for undertaking transactions, clarify our concerns and theirs, and quickly identify the issues and work together to resolve them.
14. We are taking a fresh look at our compliance approaches. Given that the vast majority of taxpayers willingly comply with their obligations, our focus will be more on encouragement and support rather than on enforcement. In a dispute context, this means working with people to ensure they get clarity and certainty with minimal cost, effort and time.

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15. We are asking our people to engage with taxpayers early through conversations and not to continue practices that lead to drawn out paper wars that only increase the likelihood of a protracted dispute. The more direct and open engagement and greater use of alternative dispute resolution or settlements is resolving matters earlier in their lifecycle, increasingly before they reach objection or litigation.
16. From February this year, we piloted a new approach for small business that supports the prevention of disputes at audit stage using early engagement and conversations. This included direct phone contact with taxpayers before audit letters are issued, followed by a face to face meeting to discuss the issues and scope of the audit and the information required. Initial feedback has been positive.
17. Our GST audit letters, now include information about a taxpayer's right to seek facilitation before the audit is concluded. We are in the process of expanding this to income tax, small business and individual taxpayer letters.
18. From 1 July 2014, we asked our teams that audit individual taxpayers to adopt early dispute resolution principles. In a recent case a large accounting firm partner stated *'our overarching comment is the Commissioner's proposal to move forward on the basis of dispute resolution and the settlement discussions conducted by his officers so far have been positive and demonstrate his willingness to compromise and resolve this issue – which the taxpayer welcomes'*.

Timeliness

19. We have achieved significant reductions in the time it takes to resolve disputes. Our approach includes a strong focus on finalising new objections in a timely manner and identifying and removing blockers that result in some cases becoming aged.
20. For new objections, we have reduced the median time taken to finalise the objection by 25% over the past 2 years - a reduction from 52 days in 2011-12 to 39 days in 2013-14.
21. We will be reviewing the performance measures we use for disputes to ensure that they measure not only timeliness but also ensure a focus on outcomes and the experience people have with us.

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22. To assist with this we have commissioned an independent survey on taxpayer perceptions of fairness and reasonableness and expect to have the first results by February 2015.

Transparency

23. Some evidence has stated that the ATO has commenced audit activity without fully explaining the reasons why the taxpayer was selected, that we take a long time to explain the scope of the audit and the issues under review. We agree that it is important we clearly explain these things up front.
24. We also note the expectation that transparency extends to dealings with the ATO especially when dispute management officers are dealing with other areas. In our Independent Review service there are new communication protocols to manage such contact, including notice to taxpayers of the intention to make contact.

Separation of Audit and Disputes Handling

25. We have made some changes to separate our audit and disputes handling work. Independent Review, facilitation, alternative dispute resolution, large market objections and litigation work is now managed outside Compliance, within the separate area - Review and Dispute Resolution.
26. In July 2013 we introduced the independent review service to encourage earlier resolution of disputes for taxpayers with turnover of more than \$250 million. This service brings a fresh set of eyes, someone who has had no prior involvement in the audit, to look at the merits of the audit position.
27. Of the 20 independent reviews we have completed so far, 12 supported the initial ATO view and eight concluded that the taxpayer had the preferred view. Only one case has gone on to objection.
28. Following feedback from taxpayers and professional associations during a post-implementation review in January 2014, we expanded Independent Review from 1 July 2014 to be available in all large market audits (with public and private entities) in respect of all taxes that are the subject of the audits. All objections of more than \$100 million were also moved to our Review and Dispute Resolution area.

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29. Review and Dispute Resolution is independent from our auditors and has authority to make decisions about the way forward, whether that is arriving at the same decision as the original decision maker or if overturning the original decision, whether to settle or whether to litigate.
30. As highlighted by the Commissioner in our last submission, the lessons learned from Independent Review are informing our approach more broadly.
31. The ATO notes the feedback that there should be separation between audit and disputes handling. We do not support the idea of creating a separate agency or a new second commissioner to achieve this. The risks and costs associated with either of these options include increased costs, isolation, lack of feedback loops, reduced confidence in primary decision making and lack of focus on the system as a whole. Also, an additional second commissioner would involve the Commissioner spending time “umpiring” disputes and opinions between different areas of the ATO when this could be done at the second commissioner level, at less cost and in a more timely way. It is important that the Commissioner is focussed on strategic issues and working with the community. We think it would be preferable to provide this separation by moving all objections to our Review and Dispute Resolution area within the Law Design and Practice Group.

Improving access to tax technical knowledge for frontline staff

32. We understand the tax technical knowledge of our front line auditors is essential for taxpayers to have confidence in our service. We have made it easier internally for our staff to access technical support. Some officers who were previously with our technical centres of expertise (based in the law group) have been redeployed to our audit teams, to improve capability and to promote earlier engagement and resolution of disputes. Our senior Review and Dispute Resolution people provide continuous professional development sessions and clinics on legal processes like ‘facts and evidence gathering’. We will continue to provide formal training, on the job support and feedback to audit teams so that we are constantly learning about what creates disputes and how best to resolve them.

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Increased use of Alternative Dispute Resolution

33. We are promoting the use of alternative dispute resolution as a cost effective and convenient option for taxpayers and the ATO to resolve disputes.
34. In April 2014, we established a facilitation service using trained ATO facilitators. This service is available to individual and small business taxpayers at audit or objection. It can easily be requested by taxpayers and their agents, and ATO officers to help resolve less complex disputes. Although the service is new, 23 referrals were made from April 2014 to October 2014.
35. From 1 July 2013 to 30 June 2014 the Australian Centre for Justice and Innovation at Monash University conducted a feedback survey involving all participants in alternative dispute resolution processes with the ATO. Most of the people surveyed were small businesses or individuals. The report found:
 - there were very positive perceptions of the alternative dispute resolution process being fair and impartial
 - two-thirds of all cases were resolved either during the actual alternative dispute resolution process or sometime after the process
 - taxpayers and the ATO indicate that the alternative dispute resolution process resulted in significant cost savings, and
 - there are opportunities to improve timeliness and consider alternative dispute resolution earlier in the dispute.

Refreshed Code of Settlement

36. Our Code of Settlement has been streamlined and it is written in a clear and concise way that supports settlement as a sensible option for resolving disputes and providing certainty for taxpayers in the future. It replaces the Code that had been in place since 1999 and sets out the factors to be considered when deciding whether or not to settle.
37. We will only settle where it is reasonable and practical to do so. We are settling more cases earlier. In 2013-14, 77% of settlements occurred before litigation being lodged, an increase from 52% in 2010-11.

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Working with the Community

38. We have been conducting focus groups and one-on-one interviews with various segments and stakeholders of the community, including business and intermediaries, to understand their current experience and how they would like it to change.
39. We have begun conversations with members of our Dispute Resolution Working Group (with the professional associations, Administrative Appeals Tribunal, and Attorney General's Department) to explore the concept of a Dispute Resolution Charter.
40. Such a Charter could provide guidance on:
 - the ATO's commitment to service while in dispute
 - principles like being helpful and accurate; keep you informed; timely; easy to deal with and professional
 - options and choices available to taxpayers
 - communication protocols, and
 - expectations of all parties; ATO, taxpayers and tax professionals.
41. We will continue to have conversations about this concept over the next few weeks to develop a prototype for further co-design and consultation with the community.
42. We will also be consulting with the community to ensure that the arrangements that we have in place demonstrate and provide independence in our management of objections and litigation is appropriate.

Litigation improvements

43. While we are committed to early resolution of disputes, litigation remains an important component of our dispute management strategy. In keeping with the principles of being a model litigant, litigation is appropriate where:
 - there is a contentious or uncertain point of law which requires clarification, and it is in the public interest to seek law clarification through litigation
 - the behaviour involved is such that we need to send a strong message to the community
 - there is a longstanding unresolvable debt, and

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- the dispute is intractable and an alternative means of resolving the dispute have been attempted but has not produced an acceptable outcome.
44. We do not litigate every dispute between the ATO and taxpayers. In 2013-14, around 800 applications were made to the Courts and Tribunals but only 100 cases went on to decision with the remainder being resolved prior to hearing.
 45. As part of our litigation strategy we are reviewing our Test Case Litigation Funding Program (which has been in place for almost 20 years) to make sure that access is easier and that we identify potential cases earlier. Funding under the program is determined by a panel which comprises two ATO representatives and three external representatives.
 46. We are also working with the judiciary and the legal profession to explore the use of declaratory proceedings to resolve disputes earlier and at less cost. Examples where it may be useful to include questions dealing with elections and withholding issues.