

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Question: SBT 59-62

Topic: Litigation trends (ATO)

Hansard Page: written

Senator BUSHBY asked:

59. Are you able to provide an annual breakdown from the years 2007-08 to 2011-12 of disputes the ATO has been involved in during that time, whether they went to appeal, and if the ATO was successful or not?
60. Is any assessment undertaken by the ATO, prior to a prosecution or appeal?
61. ATO senior executives are on the public record ('ATO's poor dispute record 'acceptable,' Australian, 7/9/2012, Pg 21) as saying that litigation is more about clarifying the law than winning or losing. Can the ATO please provide examples of where the ATO has 'lost' but a problem with the law was clarified and amended?
62. Can you please provide a breakdown of the ATO's litigation costs for the past four years?

Answers:

59. The following tables provide a breakdown of outcomes of tax litigation cases in the courts and tribunals for the five financial years from 2007-08 to 2011-12.

Table 1 sets out the breakdown of cases lodged between Court and Tribunal cases and the breakdown of cases resolved between resolution prior to hearing (e.g. through settlement, concession by the ATO or withdrawal by the taxpayer) and resolution at hearing (i.e. resolution by decision of the Court or Tribunal).

Table 2 provides a further breakdown of the outcome of cases resolved prior to hearing.

Table 3 provides a further breakdown of the outcome of cases resolved at hearing.

The ATO is not able to provide reliable historical data on the numbers and outcomes of appeal cases across all venues, but can provide data for cases in progress.

Table 4 sets out cases in progress as at 30 June 2012, including a breakdown to indicate the number of cases on appeal and in which venue.

Further information is available in the ATO's [Your Case Matters](#) booklet, which is available on the ATO website (www.ato.gov.au).

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Table 1: Tax litigation disputes – venue and point of finalisation

All tax litigation disputes									
Decision FY	Cases lodged			Finalised prior to hearing			Finalised at hearing		
	Tribunals	Courts	Total	Tribunals	Courts	Total	Tribunals	Courts	Total
2007-08	639	222	861	761	137	898	223	71	294
2008-09	558	123	681	667	57	724	125	69	194
2009-10	502	146	648	678	165	843	96	75	171
2010-11	607	152	759	429	35	464	79	45	124
2011-12	717	121	838	464	81	545	110	69	179
TOTAL	3,023	764	3,787	2,999	475	3,474	633	329	962

NB: All tax litigation disputes include first instance and appeals, and include Tribunals (Administrative Appeals Tribunal,, Small Taxation Claims Tribunal) and Courts (Federal Court, Full Federal Court, High Court)

Table 2: Tax litigation disputes – outcomes prior to hearing

Decision FY	Tribunal				Court			
	Conceded / abandoned by ATO	Conceded / abandoned by taxpayer	Settled	Total	Conceded / abandoned by ATO	Conceded / abandoned by taxpayer	Settled	Total
2007-08	109	215	437	761	51	21	65	137
2008-09	83	195	389	667	6	16	35	57
2009-10	108	148	422	678	8	14	143	165
2010-11	79	124	226	429	3	18	14	35
2011-12	119	171	174	464	16	26	39	81
Total	498	853	1,648	2,999	84	95	296	475

Table 3: Tax litigation disputes – Court and Tribunal outcomes

Decision FY	Tribunal				Court			
	All favourable to ATO	All favourable to taxpayer	Part favourable to each party	Total	All favourable to ATO	All favourable to taxpayer	Part favourable to each party	Total
2007-08	100	57	66	223	42	19	10	71
2008-09	83	15	27	125	44	23	2	69
2009-10	60	9	27	96	42	26	7	75
2010-11	60	7	12	79	21	17	7	45
2011-12	82	9	19	110	35	26	8	69
Total	385	97	151	633	184	111	34	329

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Table 4: Tax litigation disputes – first instance and appeals (as at 30 June 2012)

	First Instance	Appeal	Total
Tribunals	763		763
Federal Court	134	19	153
Full Federal Court		18	18
High Court		5	5
Total	897	42	939

60. Yes, all matters are assessed prior to prosecution or appeal. The ATO is committed to resolution of disputes in a way which facilitates access to justice for taxpayers and minimises their and our costs. Although ADR will not always be appropriate, the ATO wants to resolve disputes as efficiently and cheaply as possible and encourages its staff to instigate direct negotiations on disputes whenever appropriate.

The ATO's Law Administration Practice Statement, *PS LA 2009/9 Conduct of Tax Office litigation* (available at www.ato.gov.au) sets out what actions the ATO must take upon receiving an adverse or partly adverse decision. The Practice Statement describes in detail *who* is responsible for making a decision to appeal, *what* factors need to be considered in reaching a decision, and *when* the decision making process should start and end.

All prosecutions are undertaken by or under the authority of the Commonwealth Director of Public Prosecutions (CDPP). The CDPP has the responsibility for prosecuting both summary and indictable criminal offences against all the laws of the Commonwealth. Due to the number and regulatory nature of some taxation offences against the Acts administered by the Commissioner of Taxation, the CDPP has agreed that the ATO in-house prosecution area may prosecute certain types of offences. These offences are straightforward summary breaches to be heard before a Magistrate that are undefended.

The ATO's Corporate Management Practice Statement PS CM 2007/02 (available at www.ato.gov.au) interprets and applies the Commonwealth fraud control and prosecution policies from the perspective of the ATO as a revenue agency and as an employer. This CMPS addresses a number of different purposes that include that the ATO:

- states the reasons for using prosecution as a compliance strategy and the factors to consider when making decisions and the process to be undertaken
- follows processes for determining when a prosecution referral is a more appropriate response than other decisions and the process to be undertaken
- describes the referral processes for fraud and other offences.

61. Litigation that clarifies the law benefits the tax system regardless of whether or not the decision is favourable to the Commissioner. The ATO runs a test case litigation program in which its published purpose "... is to clarify the operation of the laws administered by the Commissioner of Taxation where there is uncertainty or contention."

In 2011-12, 14 test case decisions were handed down, of these 12 led to law clarification and two resulted in Government announcing law changes.

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

The following table lists the 14 test case decisions together with the outcome for the ATO, and whether the judicial decision led to law clarification or law change.

	HIGH COURT		
1	<i>Commissioner of Taxation v Bargwanna</i> [2012] HCA 11	Favourable decision to ATO	Law clarification
	APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO THE HIGH COURT		
2	<i>Commissioner of Taxation v Byrne Hotels Qld Pty Ltd</i> [2012] HCATrans 141	Commissioner's application refused	Law clarification
3	<i>Commissioner of Taxation v Multiflex Pty Ltd</i> [2011] HCATrans 320	Commissioner's application refused	Government announced law change
4	<i>Commissioner of Taxation v Graham Bargwanna & Melinda Bargwanna as trustees of the Kalos Metron Charitable Trust</i> [2011] HCATrans 211	Commissioner application granted	Law clarification
5	<i>Deputy Commissioner of Taxation v Soong</i> [2011] HCATrans 212	Commissioner's application refused	Government announced law change
6	<i>Commissioner of Taxation v Clark</i> [2011] HCATrans 236	Commissioners application refused	Law clarification

	FULL FEDERAL COURT		
7	<i>Commissioner of Taxation v Byrne Hotels Qld Pty Ltd</i> [2011] FCAFC 127	Adverse decision to ATO	Law clarification
8	<i>Commissioner of Taxation v Greenhatch</i> [2012] FCAFC 84	Favourable decision to ATO	Law clarification
9	<i>Commissioner of Taxation v Multiflex Pty Ltd</i> [2011] FCAFC 142	Adverse decision to ATO	Government announced law change
	FEDERAL COURT		
10	<i>Commissioner of Taxation v Traviati</i> [2012] FCA 546	Favourable decision to ATO	Law clarification
11	<i>Aurora Developments Pty Ltd v Commissioner of Taxation (No. 2)</i> [2011] FCA 1090	Favourable decision to ATO	Law clarification
12	<i>Sent v Commissioner of Taxation</i> [2012] FCA 382	Favourable decision to ATO	Law clarification
	ADMINISTRATIVE APPEALS TRIBUNAL		
13	<i>Lake Fox Limited v Federal Commissioner of Taxation</i> [2012] AATA 265	Favourable decision to ATO	Law clarification
14	<i>Greenhatch v Commissioner of Taxation</i> [2011] AATA 479	Adverse decision to ATO	Law clarification

NB: Cases are repeated for each of the stages of an appeal or application for special leave

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Below is a snapshot of two test cases where the Commissioner received an adverse decision and the Government announced law changes.

1) *Commissioner of Taxation v Multiflex Pty Ltd [2011] HCATrans 320* (High Court Special Leave: GST refunds: Commissioner's application: Adverse to ATO)

The ATO's special leave application was rejected. The issue concerned whether the ATO was required to refund GST amounts where suspicion on reasonable grounds is held that the taxpayer is not entitled to the amounts and no assessments have yet issued. The Full Federal Court had found that the ATO has no proper or lawful basis to withhold GST refunds [2011] FCAFC 142. The High Court refused to grant special leave to appeal on 9 December 2011. This matter was test case funded. The Government announced on 15 February 2012 it would amend the law to ensure the ATO's discretion to delay refunding certain amounts to taxpayers pending necessary verification of their claims. *Tax and Superannuation Laws Amendment (2012 Measures No. 1) Act 2012* received Royal Assent on 28 June 2012.

2) *Deputy Commissioner of Taxation v Soong [2011] HCATrans 212* (High Court Special Leave: GST refunds: Commissioner's application: Adverse to ATO)

The ATO's special leave application was rejected. The issue concerned the application of Director Penalty Notices (DPN) given pursuant to section 222AOE of *Income Tax Assessment Act 1936 (Cth)*. The NSW Court of Appeal found in overturning its decision in *Deputy Commissioner of Taxation v Meredith (Meredith) [2007] NSWCA 354*, that a DPN is taken to be given when delivered in the ordinary course of post, rather than when posted [2011] NSWCA 26. The High Court refused to grant special leave to appeal on 12 August 2011. This matter was test case funded. The law was amended to ensure that the notice is taken as being given at the time the Commissioner sent it by pre-paid post restoring the precedential view of the law under *Meredith*. *Tax Laws Amendment (2011 Measures No. 7) Act 2011* received Royal Assent on 29 November 2011.

In addition, there were 18 High Court decisions from 1 July 2008 to October 2012, with eight of those matters test case funded. Of these 18 cases, 12 (67%) clarified the law and five (28%) resulted in Government announced policy or law change to provide certainty, and one (5%) was mainly factual.

62. The ATO does not have data that relates specifically and only to the cost of litigation. The ATO can provide a breakdown since 2008-09 of ATO expenditure on external legal services that primarily relate to litigation work: counsel and professional fees, disbursements (including expert witness fees and court and tribunal filing fees), costs awarded against the ATO, and test case litigation funding.

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates 2012

18 October 2012

Table 6: ATO external legal services expenditure most closely related to litigation

EXTERNAL LEGAL SERVICES	Total expenditure (\$million)			
	2008-09	2009-10	2010-11	2011-12
Counsel	12.73	12.56	17.50	18.24
Professional fees	21.78	19.69	25.75	29.62
Disbursements	11.28	9.94	15.46	17.11
Costs awards	8.47	3.14	12.95	4.98
Test case funding	1.80	2.90	1.33	0.50
Total	56.06	48.23	72.99	70.45

Further information on costs associated with litigation is available in [Your Case Matters](#), an ATO publication providing key data and analysis about Australia's tax and superannuation litigation since 2007-08, which is available on the ATO website (www.ato.gov.au).