

# C. Answers to Questions on Notice

## *Perceptions of fairness in complaints*

### **Extract: Answers to Questions on Notice<sup>1</sup>**

Australian Taxation Office, 30 November 2016

**Topic: Perceptions of fairness and complaints handling**

**Reference: Additional written—14 December 2016**

#### **Question:**

1. The Committee has received submissions which express concerns about the fairness and transparency of ATO determinations on fraud and evasion, with retrospective debt action a consequence.<sup>2</sup>

- a) What are the general principles which support the ATO taking retrospective action beyond the two years specified in section 170 of the Tax Act?
- b) Does the ATO seek external advice in making determinations on such matters?

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<sup>1</sup> ATO, *Submission 1.3*, pp. 8–9

<sup>2</sup> See Submissions 4, and 5.

c) To what extent are litigants advised about the reasons for the ATO's determinations?

2. The Inspector-General's decisions have no binding effect on the ATO in review of such cases. It has been suggested that the Inspector be given wider jurisdiction and resourced to act with binding effect. Have you a comment?

Answer:

1 a) The self-assessment system of taxation relies upon taxpayers self-assessing their own liability through the lodgement of taxation returns and formal assessment. Under section 170 of the Income Tax Assessment Act 1936, a limited period of two years (or four years for taxpayers with more complex affairs) generally applies for the Commissioner to amend assessments; providing certainty and finality. However, by way of exception, the Commissioner has an unlimited amendment period to amend income tax assessments when he is of the opinion there has been fraud or evasion. This power embodies a longstanding principle that people who engage in calculated behaviour to evade tax should remain permanently at risk.

In cases of non-lodgement where no assessment has yet been made, section 170 is not applicable such that the Commissioner may issue an assessment at any time.

b) The ATO does not generally seek external advice in making determinations on such matters. The ATO generally relies on its in-house resources, including internal technical panels. However, in limited instances the ATO does seek advice from external counsel.

c) Taxpayers who end up in litigation with the ATO (either by challenging the ATO's assessment decisions or in defending against ATO recovery action) are advised of the ATO's reasons for determinations at various stages. For instance:

- An opinion on fraud or evasion will usually be formed at the audit stage. Litigants will have been provided with reasons as to why the opinion was formed by the auditor.
- If the Litigant lodges an objection to have the opinion reviewed, the objections officer will consider the objection and make a decision as to whether to allow the objection or disallow it. The Objections officer will issue reasons for his/her decision. Accordingly the Litigant will again be

advised of the reasons if the opinion in respect of fraud or evasion still stands.

- If the Litigant proceeds to file an application in either the Federal Court or in the Administrative Appeals Tribunal to have the Objection Decision reviewed in respect of the opinion, the Commissioner will be required to provide the Court and the Tribunal with either an Appeal Statement or a Reasons for Decision (depending upon the jurisdiction) which will set out the Commissioner's reasons for forming an opinion on fraud or evasion, and which would reflect and reference earlier explanations already provided to the taxpayer. The Litigant is provided with a copy of this document.

The above processes occur in the overwhelming majority of cases involving the formation of an opinion of fraud or evasion. There are a very limited number of cases where the Litigant may not be provided with the reasons as to why the opinion was formed by the auditor before an assessment issues.

For example, where there are concerns the Litigant may be involved in organised crime or the Commissioner considers there to be a high risk of dissipation of assets, the Commissioner may conduct the audit on a covert basis and proceed to issue assessments to the Litigant with limited notice of the reasons for forming the opinion. This type of action is not taken lightly and serious considerations would need to exist before the Commissioner would take this approach.

2. This is a matter for Government.