Submission

CLA Civil Liberties Australia

To: House of Representatives Standing Committee on Tax and Revenue

INQUIRY INTO TAX DISPUTES

Civil Liberties Australia is a not-for-profit association which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies, forces and the corporate sector to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

We work to help keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority' Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all.

No sane person likes disputes. The object of any legal system should be to make the law so clear that room for debate or dispute is minimized.

Some fundamental principles must be kept in mind, though usually forgotten.

All taxation is a gift or aid or subsidy to the Crown and its government from the people. Fundamentally, the English legal theory of taxation, which is our birthright, declares that taxation is a voluntary gift from the people, authorized by their representatives in Parliament assembled. Taxation is a taking of money by the Crown's officers with the taxpayer's deemed consent, given on his behalf by his elected representatives. As the judges have often declared, there is no common law of taxation: taxation is as alien to the common law as slavery.

Legal principles

From this basic constitutional background flow several consequences.

First, tax legislation should be interpreted strictly against the Crown and its government. No rational person should be taken to have given away more than the law his representatives has sanctioned says that he actually must give. Taxpayers support the government, not the other way round. Any ambiguity in legislation should be construed against the Commissioner and the revenue officers of the Crown. Insofar as the Parliament and the Courts do otherwise, they open up abuses of power and leave the taxpayer subject to extortion, as less and less care is taken to draft clear statutes.

Second, it follows that taxation should be primarily a civil rather than criminal matter. As a matter of principle, it is wrong to confound a reluctant contributor with an outright thief. Tax disputes should be fundamentally civil disputes and no taxpayer should be in fear that a tax dispute may lead to criminal charges. It is understandable that the Commissioner should have full and free access to papers etc for purposes of ascertaining a civil liability. It is quite unacceptable that information or statements thus obtained by coercive powers should be able to used, directly or indirectly, to prosecute taxpayers for criminal offences. Thus it is unfair to force someone to make statement under penalty and then treat him as a criminal if he gets it wrong. Strictly speaking, it is probably the case that most tax returns in Australia are not perfectly technically correct and therefore most taxpayers could face prosecution. For example, how many Australians who have donated a few coins to a collector – ultimately representing a foreign charitable trust – while they were on holidays realize they may have a tax liability to disclose as a transferor to a foreign trust? Civil tax disputes should be strictly separated from any criminal investigations, so that taxpayers are not treated worse than murderers or paedophiles in terms of traditional procedural protections designed to ensure the prosecution bears the burden of proving its case beyond all reasonable doubt.[1]

Third, while it is reasonable that taxpayers involved in civil disputes should be made to bear the burden of proof as to facts *within their peculiar knowledge*, it is not reasonable that they should be made to bear the whole burden of proving their cases. The burden of proof is not fairly distributed. In many tax disputes the Commissioner wins by default. The proper approach would be that the Crown should bear the burden of proof in claiming any money from a taxpayer, save that, *in respect of any facts within the peculiar knowledge of the taxpayer*, the taxpayer should bear the burden of proof as to those facts for which he contends.

Fourth, it follows that the principle laid down in the *Judiciary Act* should be followed, namely, that in all disputes between the Commonwealth and subjects, each should be on the same footing as any other litigants with no procedural advantages. Thus averments, conclusive certificates etc should be avoided.

Fourth, the Commissioner should obey the law. This is trivial but, regrettably, needs to be stated. Recently, the Full Federal Court had occasion to chide the Commissioner for ignoring precedents laid down by the Courts. It is simply not acceptable in a legal system built on precedent for the Commissioner to "cherry pick" lines out of judgments out of context and then claim the precedent does not apply or the matter is in doubt. Such behaviour undermines voluntary compliance since taxpayers will inevitably ask why they should obey the law if the Tax Office does not. For practising lawyers, trying to ensure that taxpayers comply carefully with their obligations can sometimes be difficult. Few people want to pay more tax than they have to and those few have little need to consult lawyers. It is therefore imperative that the resolution of tax disputes proceed on a careful and, indeed, scrupulous adherence to the rule of law, if society is not to degenerate into anarchy.

[1] The current 'Freedoms' inquiry, referred by the Attorney-General to the Australian Law Reform Commission, might well consider this aspect at least of Australian taxation law.

The object of tax litigation is not for the Commissioner to do a "smash and grab" operation against the taxpayer or for the taxpayer to "put one over" the Commissioner. The proper object of any system for resolving tax disputes can only be to ensure that the legally correct amount of tax is paid, no more, no less – and regardless of whether it is zero or $1 billion.

Fifth, if tax is not payable, it should be promptly refunded. There has been recent GST litigation where the Commissioner has not only failed to refund moneys never legally due as GST but has claimed the right to claw back GST refunds already paid of tax never due, on the basis that he had a discretion to have refused to refund it. How tax never due can be claimed by the Commissioner is something which is hard to understand for what is supposed to be a tax system resting upon law.

Sixth, all discretions should be removed from the Commissioner and placed with the Inspector-General of Taxation or some other body. Where the Commissioner has a discretion e.g. as to excess superannuation contributions, it is inevitable and understandable that he will take the narrowest possible view in order to "protect the Revenue", no matter how extreme that view. This may actually defeat the object of Parliament's granting of such a discretion. There is less likelihood of a dispute over the exercise of a discretion if it is seen not to have been exercised by the Commissioner in the first instance.

Seventh, penalties and enforcement in the tax system should not be implemented on the basis that the Taxation Commissioner is to be judge, jury and executioner. Unlike other administrative penalties, e.g. speeding tickets, tax penalties are enforceable without being able to be delayed or halted as of right during a tribunal or judicial process.

This can wreak great injustice. For example, in the *Brayson Motors Case* [1985] HCA 20; 156 CLR 651; 59 ALR 265, the Commissioner alleged there was an ineffective sales tax scheme, seized the company's cash flow, and drove it into liquidation, notwithstanding undertakings proffered by the directors. Yet the liquidator succeeded in the High Court. This demonstrates that, while it is understandable that the Commissioner may need to have security for any assessment, to allow him to enforce penalties and assessments before having proved his case may lead to great injustice – for which the taxpayer has no remedy.

The law should subject the Commissioner to the same rules of procedural fairness as any other man seeking to enforce a debt or to protect the fruits of litigation. There is no reason why freezing orders should not be sufficient to protect the Commissioner's interests where there are disputed assessments or penalties.

Eighth, tax debts should be subject to the Statutes of Limitations. This was intended by a Senate amendment in the 1920s successfully moved by Senator Keating when he struck out the ouster of limitation periods in the 1915 *Income Tax Assessment Act*. The Senate's policy intent, accepted by the House of Representatives, was that there should be reasonable finality in tax dealings. Unfortunately, the High Court did not refer to the history of the legislation or legislative intent when it decided that limitation periods did not apply to the Commissioner, in *Deputy Commissioner of Taxation v. Moorebank Proprietary Limited* (1988) 165 CLR 55.

Administrative procedures

It is fair to say that most tax officers perform their duties with a commendable degree of common sense and a proper spirit of detachment.

However, it is inevitable that those closest to an audit or the raising of an assessment may feel an undue attachment to the raising of revenue, rather than a calm acceptance of what is the legally correct tax outcome, whether one likes it or not.

It is therefore important that the resolution of tax disputes be at arm's length from those involved in raising assessments or performing audits. While this principle is followed to some extent by the separation of the ATO's legal officers from its operational lines, the separation is not adequate. "In house" legal advisers are subject to considerable and potentially unreasonable direction from their clients. When it comes to dispute resolution, it is best that independent lawyers represent each party. It would make sense for the ATO's legal officers involved in tax disputes to be removed to the Australian Government Solicitor's office so that they are completely comfortable and unconflicted as independent legal professionals rather that as Tax Office employees when it came to examining and settling tax disputes.

Conclusion

It is fair to say that the Tax Office is suffering from the weight of complex legislation it has to administer and that this inevitably creates disputes. It is therefore imperative that those disputes are resolved with complete procedural fairness if confidence and public trust in Parliament, the tax system and the rule of law are to be sustained.

In that regard, the Commissioner's Project DO IT is to be commended as a sensible approach to ensuring that tax obligations or penalties are not so onerous as to lead people to believe that, once wrong, they can never hope to settle tax liabilities or disputes and that they may as well stay forever out of the tax system. It is notable that Project DO IT implicitly concedes a major theme of this submission by ensuring that taxpayers will be dealt with in a civil settling of their debts, not by criminal sanctions. That should be the general approach of taxation law.

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4 July 2014

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