

SUBMISSION TO JOINT PARLIAMENTARY STANDING COMMITTEE ON TAX AND REVENUE: INQUIRY INTO TAX DISPUTES

INQUIRY'S RELEVANT TERMS OF REFERENCE

We wish to submit our experience as taxpayers regarding a dispute with the Australian Taxation Office where we believe our treatment has been **unfair** and where **the review process has been less than transparent**. We are small business owners and taxpayers with a long tax compliance history trying to provide for our own self-funded retirement.

OUR EXPERIENCE WITH THE ATO: WHAT IS IN DISPUTE?

An excess contributions tax assessment where the Australian Taxation Office refused to exercise discretionary powers to allow contributions to be reallocated between years in accordance with our intention. The refusal to reallocate our contributions in accordance with our intentions meant that we made two contributions in one year and none in the following year, and led to a sizeable excess contribution assessment being issued against us. The ATO also denied us the opportunity to offset one of the assessments against our superannuation balance and insisted the amount in dispute be paid out of business cash flow (during the period of the GFC).

The delays in being issued with the assessments meant we had no opportunity to access information relevant to our case (bank recordings of phone conversations had already been destroyed by the time our assessments were received).

A number of internal reviews by the Australian Taxation Office of our case have been unproductive from our perspective and achieved no resolution whatsoever. These reviews have been time consuming and inefficient, making the review requirements an unreasonable impost on small business owners. Further, we believe the review processes have failed to address the central issue in our dispute.

FAIRNESS AND TRANSPARENCY OF THE TAX REVIEW PROCESS

Our tax dispute arose because of the **discrepancy** between how the discretionary powers to reallocate distributions are being applied by the Taxation Office and the manner in which taxpayers are led to believe these powers will be applied according to the principles expressed in the **Tax Office Charter**.

The tax environment is increasingly complex and in order to maintain public confidence in the tax system and preserve the Tax Office's reputation for fairness and equity, a Tax Office Charter was introduced in Australia following on from a recommendation of a Joint Parliamentary Committee in the late 1990s. The

Taxpayers' Charter is a key mechanism to redress the imbalance of power between the ATO and individual taxpayers.

The Australian National Audit Office conducted a performance audit of the Taxpayers' Charter (ANAO Audit Report 19 of 2004/5) with the objective of establishing how the ATO manages its responsibilities under the Charter as an important element of its performance. In that review, the ATO commented on the significance of the Charter: *"It is fundamental to the system of self-assessment that taxpayers must have sufficient confidence in the collecting authority—confidence that we will provide them with the information they need and that we will act fairly and treat taxpayers according to their individual circumstances. We believe we need to position ourselves in such a way that demonstrates to Australians that we are fair and reasonable and that we treat people according to their individual compliance behavior". P13*

The treatment of individual circumstances is the heart of our dispute with the ATO. The Charter (as it was written at the time of our dispute – since revised) committed the Tax Office in **all circumstances** to take into account the following in being fair and responsive:

- A taxpayer's **history of compliance**;
- The particular **circumstances of the case**;
- The **clear intent of the taxpayer**.

The Charter also committed the Tax Office to supporting those who properly participate in the tax system. When taxpayers try to participate properly in the taxation system and if they make a genuine mistake, it is the Tax Office's obligation under its Charter to ensure that these people are not subjected to undue use of the Tax Office's powers. They should not be subjected to excessive, unexpected and unreasonable assessments.

The Tax Office position is that the Charter commits the Tax Office to making fair and equitable decisions **in accordance with the law**. Extending this defence, the Tax office only listens to you and takes your circumstances into account **"if they are relevant and the law allow us to"**.

The Tax Office Charter makes a commitment about how taxpayers can be expected to be treated **in all circumstances** and yet, without any specific exceptions being mentioned, the Tax Office refuses to apply that set of specific factors it guarantees to taxpayers will be considered in their case (ie intent, history of compliance). The Charter **misrepresents** to taxpayers how they can expect to be treated and in our view, is a **deceptive** document. It could only be regarded as an honest document if it alerted taxpayers to the reality that, in the event that a genuine mistake is made, no account will be taken of the intention of the taxpayer or the taxpayer's history of compliance.

Not only are taxpayers misled about how they can expect to be treated, the deception carries through the review processes carried out by the Tax Office. Taxpayers are lured into a time-consuming review process under the misapprehension that the ATO will abide by its Charter commitments, only to

discover that the Tax Office reviews cast these inconvenient commitments aside: “The Charter is not a legal document...The Charter is policy, not legislation. Being policy, it cannot override the legislation” *Quote: Senior Case Manager, ATO Complaints April 2013*. It appears the **ATO does not see the necessity to ensure that its Charter promises are consistent with the legislative framework**. Where there is a discrepancy, the Charter is effectively cast aside because it has no legislative basis. The Tax Office adopts an overly aggressive interpretation of tax laws. Their uncompromising position sits in stark contrast with the approach that they’d prefer to have everyone believe: that you can expect the ATO to treat you fairly and reasonably and be accountable for what they promise.

The ATO doesn’t see the need to alert taxpayers to the significant discrepancies between the Charter and the legislative framework, and neither does it point out to taxpayers the real risk that an inadvertent, honest mistake could expose them to a significant, unexpected tax bill. Further, the Charter gives taxpayers no indication that in the event that a large assessment is issued against you because of an honest, inadvertent mistake, you will be required to pay that bill immediately (or legal action will be taken against you) and you must pay in full before you can have your objection heard. There is also no timeframe in which the objection process must be resolved. To quote Joe Hockey, “In relation to legislated powers, it all works in favour of the Tax Office”: *Joe Hockey, Address to the National Press Club 22 May 2013*.

The Tax Office points out to taxpayers their right to an independent review by the **Administrative Appeals Tribunal or the Federal Court**. The Administrative Appeals Tribunal looks at a case afresh and considers the legislative questions and the rules of the original decision maker. It has no jurisdiction to consider a Tax Charter or the inconsistencies between the Charter and the legislation. It is an expensive review process where the scope of the review doesn’t extend to the issue in dispute in our case ie the discrepancy between how the discretionary powers are being applied under the legislation and how taxpayers are promised they can expect to be treated according to the Charter. The Federal Court is hardly a viable review alternative for most taxpayers.

The Taxation Ombudsman won’t intervene in cases where taxpayers have rights of appeal to the AAT, but the AAT don’t examine the question of whether the ATO is acting in accordance with its Charter. The Inspector-General of Taxation will consider submissions in relation to whether the discretionary powers are being applied fairly by the ATO, but will not deal with individual reviews. Taxpayers are left with a void of accountability – no-one is effectively regulating the regulator to make sure that where the Tax Office misleads the public about how they can expect to be treated, there is an appropriate remedy.

DOUBLE STANDARDS

The Excess Contributions Tax assessments issued to us by the Australian Taxation Office contained serious errors that were conveniently ignored and

excused by the Tax Office. The double standard applies: it is acceptable for the Tax Office to make mistakes that breach its own service principles, but taxpayers making one small and inadvertent error (while attempting to comply with their tax obligations) can be held to account and find themselves liable for massive and unreasonably harsh tax bills.

TRENDS OVERSEAS

Australia lags behind other countries in a bill of rights for taxpayers. The Tax Charter as it stands enshrines no legal rights for taxpayers and is effectively not worth the paper it is written on because there is no-one, apart from the agency itself, to conduct a proper review of compliance with the Charter principles in individual tax office disputes.

The United Nations has reviewed the development of citizens' charters and established model guidelines for their design. To be successful, the charter should contain a statement of the services offered, and for each service, there should be a statement of entitlement of the user, service standards and the remedies available when these standards are not met.

Governments and agencies should be subject to the law in the same way as for individuals and companies. The substantial power imbalance between the Tax Office and individuals requires the ATO to act fairly and in accordance with the highest professional standards. Having a Charter that creates misleading impressions of how people can expect to be treated by the Tax Office is not consistent with those high standards. This is particularly the case where the Tax Office is silent about significant discrepancies between the law and the Charter, and where the Tax Office hides behind caveats such as "where the law allows us to do so" to deceive taxpayers that their approach is fair when it is not.

REMEDIES

Consumers who are misled about products have a right to take action against companies for providing false and misleading information. Taxpayers currently have no effective power to challenge the ATO about false and misleading information included in the Tax Charter and no specific review mechanism in relation to this aspect outside of the ATO. This allows the Tax Office to use its excessive powers in ways that can be extremely detrimental to individual taxpayers and unfair, but may allow them conveniently to meet their revenue targets.

Against a backdrop of an exceptionally harsh and no-holds barred approach for cases such as our dispute, the Tax Office regularly writes off large sums in tax evasion and other cases. In 2007/8, the Tax Office wrote off more than 240,000 debt cases. The Government is also seen to be going soft on elaborate tax avoidance tricks by large companies: "Glencore tax bill on \$15 billion income: zip, zilch, zero", *The Age* 27.6.2014. It is hard to reconcile this approach and its laissez-faire approach to tracking down large-scale tax evasion (eg. transfer arrangements with tax havens) with our personal tax office experience.

Joe Hockey also said in his speech to the National Press Club (22 May 2013) that “confidence in tax policy making is at an all-time low” and “I have deep reservations about the ATO being administrator and prosecutor”. The ATO review processes need to be made fairer and need to be seen to be fair, or there is potential to substantially reduce compliance in the future. This is particularly the case where taxpayers are issued very large and unexpected assessments after taking every reasonable step to comply with their tax obligations and provide for their future.

The review processes also need to be simpler and more transparent. The system should be more fail-safe and compliance should be easier. Taxpayers with a long history of compliance shouldn't be taken to the cleaners over inadvertent breaches. Information requested by Tax Officers as part of a review is sometimes unnecessary and expensive for taxpayers to compile (eg. being asked to provide a statutory declaration when there is no necessity or reason for it). It can appear to taxpayers that the review processes available to them against an ATO decision are designed to be exhausting (and often unproductive) so as to discourage anyone from pursuing that course.

RECOMMENDATIONS

Changes need to be introduced to make the relationship between taxpayers and the ATO less adversarial and the ATO must become less insular in its approach and more accountable to its community it serves. Compliant taxpayers should be granted more respect and should be given a better range of effective remedies against the ATO, particularly where the ATO breaches the standards of performance set down in its Charter.

1. Consideration should be given to enshrining the Tax Charter in legislation to make it binding on the Tax Office.
2. The Tax Charter should contain a statement of the services offered and for each service, there should be a statement of entitlement of the user and service standards. There should be a formal requirement for any discrepancies between the Charter and the tax legislation to be spelt out to taxpayers so there is no potential for misleading information and deception.
3. An independent review outside of the ATO should be available to individual taxpayers who are in dispute in relation to the ATO acting outside of its Charter obligations.
4. Timely remedies should be available for individual taxpayers when these Charter obligations and standards are not met. Affordable review processes independent of the ATO should be available for taxpayers, particularly in relation to whether the Taxation Office is meeting its Charter Obligations. The Tax Office cannot effectively review itself.

5. Taxpayers should be given rights of review prior to an assessment being enforced in cases of genuine mistake and where large, unexpected assessments are issued against taxpayers.
6. There should be clearer rules about what type of information can reasonably be expected as part of Tax Office reviews.
7. Taxpayers should have the right to recover costs against the ATO for reasonable expenses associated with multiple reviews where the Tax Office is seen to be acting outside of its Charter Obligations.

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