

Committee Secretary
Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
Canberra ACT 2600
AUSTRALIA

Annual Public Hearing with the Commissioner of Taxation

Submission to Joint Committee of Public Accounts and Audit hearing

Friday 14 September 2012

Commissioner's Obligation to Follow Single Judge Decisions

I submit that the Committee seek the following information or answers from the Commissioner:

1. Whether the Commissioner accepts the finding of the Full Federal Court of Australia in [Indooroopilly FC of T v Indooroopilly Children Services \(Qld\) Pty Ltd, \[2007\] FCAFC 16 \(22 February 2007\), per Allsop J \(Stone J and Edmonds J concurring\)](#), that the Australian Taxation Office had been **'ignoring the views of the judicial branch of government in the administration of a law of the Parliament'**. (para 3)
2. Whether the Commissioner nonetheless holds to the view he expressed in a [speech on September 1 2007](#) that the Solicitor-General and legal counsel jointly advised him that:

"the ATO is not required to follow a single judge decision if, on the basis of legal advice, there are good arguments that, as a matter of law, the decision is incorrect and prompt action is being taken to clarify the position."

Note that Edmonds J, [speaking extracurially](#), said that not only does the Commissioner's statement not fully reflect the tenor of the views expressed in the joint advice but the advice itself does not meet with universal acceptance, certainly not the acceptance of the Honourable Justice McHugh AC, as he then was (see paras. 41 and 42).
3. If the Commissioner holds to the view he expressed, as quoted above, does he also hold to the view that taxpayers themselves are not required to follow a single judge decision that they contend is incorrect?

Commissioner's Continuing Incumbency

I submit the if Mr D'Ascenzo insists that the ATO is not required to follow single judge decisions, then such insistence is in defiance of the Full Federal Court, in defiance of Justice Edmonds speaking extracurially and in defiance of other judicial authorities.¹ I further submit that if Mr D'Ascenzo

[1] Note paragraph 40 of Justice Edmonds' speech, referred above, where his Honour tells of his 'exasperation in the face of the Commissioner's refusal to follow the single judge decisions'.

insists on his view then his ongoing incumbency as Commissioner is untenable and the Committee should refer the matter to the Governor General for her to consider her powers under [section 6C of the Taxation Administration Act 1953](#).

Tax Compliance of Large Business

I submit that the Committee seek the following information or answers from the Commissioner:

1. In relation to Second Commissioner Quigley's [speech to the Corporate Tax Association Conference on 18 June 2012](#) where he stated that 'a small proportion of taxpayers are deliberately non-compliant and require a stronger approach that brings to bear the full force of the law':
 - the basis upon which Mr Quigley believes the proportion to be 'small';
 - the size of the 'small' proportion;
 - the nature of the evidence upon which Mr Quigley relies for his assessment ;
 - the number of Large businesses (turnover of \$250M or more per annum), or their public officers or directors, against whom in the last 5 years the ATO has '[brought] to bear the full force of the law' by way of prosecution proceedings and, in particular, for having made false statements in tax returns or other forms filed with the ATO.
2. How confident is the Commissioner in the reliability and accuracy of the financial and other information disclosed in Large businesses tax returns? What is the basis for his level of confidence? How does he measure that reliability and accuracy?

These questions are important given that the ATO now relies on [Large market income tax risk filters](#), having moved away from random audits of Large businesses ([Commissioner's current submission to the Joint Committee](#)—click on the Australian Taxation Office PDF 282KB) toward the [Large business - risk differentiation framework](#).

3. How does the Commissioner reconcile the following two apparently contradictory statements? [Statement by Jim Killaly, Deputy Commissioner, Large Business and International \(Case Leadership\)](#):

"The large business population currently comprises around 1,100 economic groups with a turnover greater than \$250 million and special categories of financial institutions increasing the population by around 200 to a total of around 1300.

...

Note, too, paragraph 29, where Justice Edmonds quotes High Court Chief Justice Gleeson referring to *Indooroopilly* and saying that, "*It is surprising that a circumstance could arise in which Justice Allsop should feel it necessary to say what he said in his reasons in paragraphs 4 and 7, for example.*"

Note, too, where Federal Court Justice Gordon, in her Speech to the Department of Treasury, *Simplifying Tax Law*, 10 March 2011, p.17, said in relation to the problems generally of interpreting tax statute, "The person charged with interpreting the provision often finds himself or herself in precisely the same position as the taxpayer but with the added complication of the "tax office" view. This view may find little reflection in the statute or in what the Court has said about the statute".

Over the 2005 to 2008 financial years more than 40% of the company income tax returns lodged by large business taxpayers had a tax payable of zero and around half those were showing losses.

Over that same period of 2005 to 2008, depending on the particular financial year, between 540 to 580 economic groups had an entity that filed a company income tax return with a tax payable of zero; and there were between 130 to 160 that returned a tax payable of zero for the entire economic group.”

[Statement by Bruce Quigley, Second Commissioner:](#)

“Our experience is that large businesses are generally trying to do the right thing and that most have got sound processes in place so that does occur. Yes, there is still a small minority who want to play the system. The majority do not. It is our aim to work with them to make it as easy as possible for them to comply with the law, while making it fairer for all by taking a firm stance with those who choose not to comply.” [underlining added]

Greater Accountability, Openness and Transparency

I further submit that in the public interest, in the interests of good governance and in the interests of accountability, openness and transparency, the Committee recommend the following:

1. That the Commissioner inform the Committee whether the position of Special Tax Advisor was publicly advertised before it was presently filled. If so, when and in what publication? If not, why not?
2. That the Commissioner publish either on the ATO website, in his Annual Report to Parliament or in a report to the Committee, within 3 months of the information becoming available:
 - the full results of Staff Engagement Surveys, including all staff comments otherwise obtainable under Freedom of Information legislation;
 - the full results of the ATO's staff diversity census (see 2010-11 Annual Report p.141), distinguishing the results for the Senior Executive Service (SES) level from those of the Executive Level. The separation of the SES results will assist the Committee to ascertain how well the merit principle of staff selection is applied at the senior levels of the ATO;
 - the number of SES officers who manage 100 or more staff and the proportion of those SES who hold a graduate or postgraduate qualification in organisational or business management from a tertiary institution;
 - the annual amount paid by the ATO to taxpayers as compensation for maladministration; and
 - a schedule showing the annual amount paid to any existing or former ATO employees in settlement of legal claims brought against the ATO for alleged breaches of employment, and the nature of the alleged breaches. Amounts paid in settlement of claims of alleged harassment, bullying, intimidation, discrimination or victimisation by SES officers against past or present employees should be separately specified.
3. That the Commissioner publish on the ATO website:

- the full written terms of settlement of tax disputes, edited only to the extent required if the information were sought under the Commonwealth Freedom of Information legislation.
This recommendation is consistent with the ATO's existing practice of publishing edited versions of private binding rulings.
 - the full written Minutes of Meeting of the General Anti-Avoidance Rules (GAAR) Panel, edited only to the extent required if the information were sought under the Commonwealth Freedom of Information legislation.
Publication will improve tax law certainty and assist taxpayers to understand the ATO's rationale in applying the anti-avoidance rules. Publication of this information is also consistent with the ATO's existing practice of publishing the Minutes of Meeting of the National Taxpayer Liaison Group.
 - the full written Minutes of Meeting of the Public Rulings Panel.
Publication will assist taxpayers to understand the ATO's rationale in arriving at the 'ATO View' of the law.
4. That the Commissioner inform the Committee of the size of the Tax gap and the basis upon which he measures the gap. The gap estimate should be dissected according to population groups such as Large business, small and medium business, and individuals, and sub-groups such as the 'cash economy'.

Disclosure of Legislative Problems to Parliament

I submit that the Commissioner's response to **Recommendation 2 of the JCPAA Report 426** is misconceived and unsatisfactory. The response, contained in Section 3 at page 33 of the Commissioner's current submission, states:

Recommendation 2

The Committee recommends that Australian Taxation Office notifications to the Government, either directly or through Treasury, on tax policy and legislative problems be made public within 12 months of submission, along with the Government's response.

ATO Response: Whilst the Committee originally advised they considered the ATO should respond to this recommendation, we have advised the Committee that we consider this a policy recommendation and a matter for Government.

I submit that legislative problems not aired within at least 12 months of the Commissioner notifying Government become a matter not solely for Government but also Parliament.

I submit that Parliament has a vested interest in knowing the problems of legislation it has enacted.

I submit that undue delays in bringing legislative problems to the attention of Parliament perpetuate tax uncertainty to the detriment both of taxpayers and of tax administration. As Edmonds J observed in relation to the central legal issue in [Virgin Holdings SA v. Federal Commissioner of Taxation – \[2008\] FCA 1503 \(10 October 2008\)](#):

“3. The issue has been around for some time. It was the subject of a ruling issued by the Australian Taxation Office ("the ATO") on 19 December 2001 - Taxation Ruling TR 2001/12 ...

4. It is surprising that it has not come to the surface as a justiciable issue before now, however, as I have previously observed in *Hastie Group Limited v Commissioner of Taxation* 2008 ATC 20-019 at [2], for some unknown reason, so many of the more controversial or topical issues which have arisen in practice in recent times seem to carry the baggage of a significant time-lag before they are agitated in this Court. The more so in this case, because the Ruling was preceded by a number of writings by commentators with undoubted qualifications taking different views on the issue: see those referred to in footnotes 2 - 9 inclusive in *Treaty Application to a Capital Gains Tax after Conclusion of the Treaty*, by the Honourable Justice Gzell, (2002) 76 ALJ 309.”

More recently, as the Full High Court observed in a joint judgement of French CJ, Gummow, Hayne, Heydon and Crennan JJ in [Federal Commissioner of Taxation v. Bamford \[2010\] HCA 10 on 30 March 2010](#):

“16. Before turning to consider further the relevant provisions of the 1936 Act, the following points of a general nature should be made respecting the intersection between the statute and the law of trusts.

17. First, both sides in argument on the present appeals accepted that whichever of the competing constructions of Div 6 were accepted examples could readily be given of apparent unfairness in the resulting administration of the legislation; it is more than 20 years since Hill J observed that "the scheme of Div 6 calls out for legislative clarification, especially since the insertion into [the 1936 Act] of provisions taxing capital gains as assessable income".

September 2 2012

Name Withheld