Taxation Ombudsman

Activities 2001-2002

ISSN 0814-7124

Enquiries about this Report, or any of the information or references contained within, should be directed to:

Chief Information Officer
Office of the Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Ph: (02) 6276 0111
Fax: (02) 6249 7028
Email: info@ombudsman.gov.au
Website: www.ombudsman.gov.au

Contacting the Ombudsman

For the cost of a local call, you can contact your nearest Commonwealth Ombudsman's office by calling the national complaints line 1300 362 072.

Cover designed by Grafis, Canberra
Produced by the Commonwealth Ombudsman's office, Canberra
Formatting by Lava Design, Canberra
Printed by Goanna Print, Canberra

INTRODUCTION

This report is about my activities as Taxation Ombudsman during the 12-month period ending 30 June 2002, and is an extract from my annual report to Parliament. The great majority of adult Australians are taxpayers. Because of this there is a particular interest in the Ombudsman's responsibilities concerning the Australian Taxation Office (ATO).

Section 4(3) of the *Ombudsman Act 1976* gives the Commonwealth Ombudsman the power to investigate complaints about Commonwealth Government agencies, including the ATO.

While the Ombudsman's office has always had jurisdiction over the ATO, a 1993 Joint Committee on Public Accounts Report (JCPA Report No. 326, "An Assessment of Tax. A Report of an Inquiry into the Australian Taxation Office") recommended, among other things, the establishment of a specialist position within the Ombudsman's office with sufficient resources to more adequately investigate tax complaints.

The Committee's recommendation stemmed from its perception that a fundamental imbalance existed between the powers of the ATO and the rights of taxpayers. It regarded the establishment of a Taxation Ombudsman function as a key mechanism in balancing those rights and responsibilities.

As Taxation Ombudsman, my tax team is led by a Senior Assistant Ombudsman, Philip Moss, who is also designated as the Special Tax Adviser. The tax team consists of six investigation officers and a part-time technical adviser located in Canberra, and one officer in the Sydney office. The tax team is assisted by other investigation staff who are located in the remainder of my capital city offices. These staff members only deal with tax matters on a part-time basis. They handle straightforward inquiries and act as a referral point to the specialist tax team.

During the year, the tax team remained in close touch with the developments concerning mass-marketed tax schemes. Following the Commissioner of Taxation's offer of settlement, my office continued to receive representations about the ATO's handling of this matter. Many taxpayers who invested in these schemes were frustrated and unhappy about the position in which they found themselves. My staff was able to assist some of these complainants to understand better their circumstances and the options available to them.

During 2001-02, we maintained our focus on identifying the underlying causes of the complaints we investigated. Broadly, this means that where our investigation into a particular complaint reveals an administrative deficiency on the ATO's part that has an impact beyond the immediate case we pursue the matter with the ATO to obtain a change that will benefit other taxpayers in a similar situation. Dealing with systemic issues in this fashion continues to be a significant part of our investigation of complaints.

I am grateful to my tax staff for their support during the year.

The full text of the Annual Report is available from the Commonwealth Ombudsman's internet site at www.ombudsman.gov.au.

R N McLeod

Taxation Ombudsman

TAXATION OMBUDSMAN

In 2001–02, my office received 2,618 complaints about the Australian Taxation Office (ATO). This is 22% less than last year, but 26% higher than 1999–2000. Tax complaints represented 14% of complaints in all jurisdictions received by my office this year, consistent with last year, a figure surpassed only by complaints about Centrelink.

Complaints about A New Tax System (ANTS) eased significantly during the year. This decrease suggests that we have moved beyond the teething problems that occurred when it was introduced. However, there is an important ongoing role for my office as the ATO and taxpayers come to terms with the changed environment of tax administration.

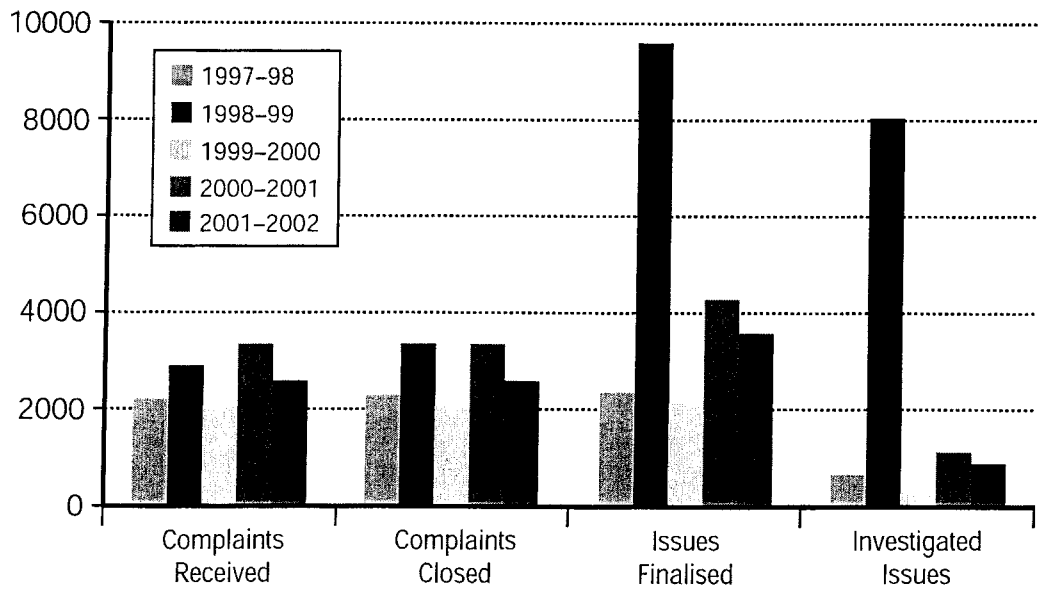
Overall, 2,628 complaints involving 3,646 issues were closed during the year. Twenty-eight per cent of closed issues were investigated, maintaining the same rate of investigation for last year. Overall, in 33% of individual investigations we formed the view that there had been defective administration. However, in the area of ANTS complaints, we found defective administration in some 47% of cases, similar to the overall rate of 49% last year.

Complaint-handling processes

It is the normal practice of my office to refer a complainant back to the agency concerned where the complainant has not previously raised the complaint with the agency. This is consistent with the Ombudsman being an office of last resort.

This year I have moved to develop further the existing complaint referral processes between my office and the ATO. First, we established a set of protocols to facilitate referral of general complaints to ATO Complaints, the ATO's internal complaint-handling body. In essence,

AUSTRALIAN TAXATION OFFICE



ATO Complaints has become the key contact for my office when dealing with the ATO. Towards this end, my Special Tax Adviser and the Assistant Commissioner responsible for ATO Complaints have established regular contact to discuss particular cases and systemic issues arising from our investigations. We are also able to provide a fax-referral service for written complaints where a complainant has not previously contacted the ATO and is willing for us to facilitate the process. This approach has proven particularly effective and alleviates in part the need for complainants to tell their story again. In most cases, ATO Complaints is able to ensure that the complaint is passed on to the area of the ATO that can best resolve the taxpayer's concerns.

In part, these measures were aimed at reinforcing the complaint handling function of ATO Complaints while strengthening the relationship between my office and the ATO. Regular meetings between the Deputy Ombudsman, the Special Tax Adviser, a Second Commissioner of Taxation, the ATO's Integrity Adviser and the Assistant Commissioner (ATO Complaints) have further enhanced this communication.

Second, we established a protocol to facilitate the referral of complaints about ATO fraud or serious misconduct to the Assistant Commissioner responsible for the ATO's internal fraud investigation unit. This protocol also encourages the ATO to consider the independent review role of my office in relation to any such complaints received by the ATO that might more appropriately be handled by investigators outside of the ATO. I am pleased with the way these arrangements have worked to date.

Third, we welcomed the Commissioner of Taxation's decision to appoint a dedicated contact officer at the Assistant Commissioner level for complaints about mass-marketed schemes. This appointment has ensured that complaints are directed to the relevant part of the ATO to resolve the problem, and has kept my office informed of developments concerning this aspect of tax administration.

CASE STUDY

Complaint

Ms B contacted us after receiving a summons to appear in court for not lodging tax returns for years ending 1998 and 1999. She agreed that she had not lodged the returns, but thought it was unreasonable for the ATO to proceed with prosecution. Ms B had longstanding medical conditions that contributed to her failure to lodge the returns. Ms B had telephoned the ATO in an attempt to have the ATO hold off on prosecution, without success.

Referral to the ATO

As it was clear that Ms B was not in a position to deal with the ATO without some assistance, my investigation officer summarised Ms B's complaint in writing and ensured Ms B was satisfied that it reflected her views and intent to lodge her outstanding tax returns. With her consent, her complaint was faxed to ATO Complaints and a response sought.

Outcome

The ATO contacted my investigation officer after receipt of the fax and confirmation that Ms B's tax agent was preparing the returns for lodgement by a specified date. After discussion, it was agreed that continuation of legal action was not appropriate given the circumstances for the delayed returns, as well as the confirmation that the returns were being prepared.

In May 2001, I launched an own motion investigation into ATO complaint handling as part of my ongoing review of internal complaint handling units of departments and agencies. It is essential that these internal complaint units operate effectively if my office is to be confident in referring complainants to these services. Internal systems must be effective for aggrieved clients – otherwise they have the potential to damage this office's credibility if we make referrals to them.

The first phase of that investigation is now complete, and a draft report has been provided to the Commissioner of Taxation for his comments. I hope soon to finalise the investigation by way of a public report.

I believe my current investigation has improved the complementary role my office and the ATO Complaints unit play in dealing with tax-related complaints. A useful development has been regular attendance by members of my specialist tax team at the ATO Complaints Forum – a meeting of members of the ATO complaints network used for raising and working-through complaint-handling issues.

A NEW TAX SYSTEM (ANTS)

As indicated in my previous annual report, it would be unrealistic to expect that a large and still relatively new system like the GST could be implemented without errors. While many of the initial problems appear to have been resolved, as indicated by the fewer number of individual complaints received, it has been our experience that many of the individual complaints raised systemic issues. Where one individual might complain about a new tax system problem, it was highly likely that more people were affected by the same problem. We have performed an important role in referring complaints to the ATO for action and in monitoring the resolution of such complaints where the taxpayer believes that the ATO's efforts have not produced a satisfactory resolution.

Overall, I consider our decision to monitor the ANTS system has been valuable, as our investigations reveal that taxpayers are still experiencing significant problems with ANTS. As mentioned previously, there was defective administration in 47% of complaints that we investigated. Accordingly, I propose to continue this approach to ANTS complaints next year.

Of the ANTS complaints received, 43% were about Business or Instalment Activity Statements (BAS and IAS), 30% were about the Goods and Services Tax (GST), 13% were about Pay As You Go (PAYG) and the remaining 14% were about Australian Business Numbers (ABN) and the Savings Bonus. For the purposes of this report I have focussed on BAS or IAS, GST and PAYG complaints.

BAS and IAS

Business and Instalment Activity Statements (BAS and IAS) complaints received indicate that the issues raised range from straight-forward issues, such as phone problems through to systems errors.

By contrast, other complainants such as Ms L (see case study) had complex problems because they were inadvertently taken out of the PAYG cycle, which had an impact upon their liability in the activity statement system.

CASE STUDY

Complaint

Ms O had been ringing the BAS dedicated help line but was unable to get through.

Investigation

Our investigation revealed that there had been technical difficulties with the phones and the phone company was in the process of fixing the problem.

Outcome

The ATO undertook to phone Ms O direct and arranged a field visit to discuss her problems.

Internal systems problems with BAS and IAS processing have caused problems for a number of complainants throughout the year. While many are resolved by the ATO, there are occasions where our intervention is necessary.

CASE STUDY

Complaint

Mr G had submitted his final tax return for his company in June 2000. Despite the closure of his company for 12 months, he continued to receive BAS statements notifying him of a tax debt that he believed he did not owe.

Investigation

The investigation found that the statements were being sent in error as a result of a system error and that Mr G did not have a tax debt.

Outcome

The ATO advised that it would resolve the error and contact Mr G to confirm that he did not have a tax debt and to request him to ignore any BAS statements he might receive prior to the system error being fixed.

CASE STUDY

Complaint

Ms L complained that the BAS forms she received contained incomplete information, such as the instalment rate. She had contacted the ATO and been advised that the next BAS would contain all the information, but the problem occurred with the next two BAS issued. She contacted this office.

Investigation

Upon receipt of a late tax return, Ms L had been exited from the PAYG system in error. Consequently, her instalment rates had not been calculated automatically. While eventually the instalment rate had been manually calculated, it was not included in the BAS and nor had Ms L been notified of her liability.

Outcome

The ATO agreed to contact Ms L to discuss payment arrangements for her debt and to provide a written explanation of why the BAS error had occurred.

Goods and Services Tax (GST)

As New Tax System (ANTS) has become an ordinary part of the ATO's business, the relationship between ANTS and other ATO systems has also come to our attention, such as difficulties arising from the complex interrelationship between ANTS and the ATO's obligations in relation to Child Support Agency (CSA) debts.

CASE STUDY

Complaint

Mr R complained that he was expecting a considerable GST refund, which he had not received. He had approached the ATO and had been told that the refund was not issued because he had a debt with another Commonwealth department. However, he was not aware of any debt that he had with a Commonwealth agency.

Investigation

The ATO advised us that Mr R's records had a CSA indicator, which suggested that he owed money to the CSA. However, when queried with the CSA, it was determined that the debt no longer existed and the GST refund should be processed.

Outcome

The ATO undertook the refund processing immediately and later paid interest on the delayed refund.

Pay As You Go

PAYG complaints received this year raised issues about entering the system, annual payment elections versus quarterly elections, and having payments processed through to exiting the system. Examples of such complaints included quarterly payments not processed and subsequent PAYG notices overstating the tax owed, while some taxpayers experienced delays in receiving their tax returns as a result of PAYG processing problems.

CASE STUDY

Complaint

Ms A complained that the ATO's quality assurance procedures in relation to PAYG-related correspondence were inadequate.

Investigation

Applications for annual PAYG election were due before October 2001. Ms A lodged a PAYG annual election form via the internet well before this time, but received a letter from the ATO in August 2001 indicating that her application was invalid as it was not lodged by the due date.

Outcome

ATO acknowledged that there was a problem with PAYG election lodgements. However, once the problem had been identified, all affected taxpayers (approximately 3,500 out of 30,000) were contacted by the ATO and advised of the corrections.

MASS-MARKETED SCHEMES

In 2000–01, I reported on the completion of two own motion investigations into the ATO's treatment of mass-marketed schemes – a series of mass marketed film schemes and an agricultural scheme called Main Camp. In both cases, I formed the view that it was reasonably open for the Commissioner to interpret and act on the law as he had. However, I did criticise the ATO for some administrative deficiencies – most particularly the apparent delays in reviewing its position, its failure to provide adequate explanations of its decision to participants, and, more generally, its failure to adequately explain the operations of the self-assessment system to all taxpayers.

In June 2000, I also noted that the Senate Economics References Committee had begun its inquiry into mass-marketed schemes and investor protection. In June 2001, the Committee handed down its interim report, closely followed in September 2001 by its second report. These reports accepted that the lawfulness or otherwise of the ATO's actions was a matter best left to the courts. However, the Senate Committee also recommended a conciliatory settlement package in recognition that most investors had unwittingly been caught up in the schemes and in the interests of bringing the dispute to an end.

In February 2002, the Commissioner of Taxation announced a settlement offer that incorporated most of the terms recommended by the Senate Committee. Since then, the ATO received judicial confirmation in the Budplan and Vincent cases that these two mass-marketed schemes were primarily for the purpose of tax avoidance. An appeal was pending in the second matter.

Many of the mass-marketed schemes complaints received by my office this year raised the same substantive issues as those addressed in my earlier investigations and reports – namely the allegation that the Commissioner's actions in relation to mass-marketed schemes were unlawful, retrospective, and unfair. In response to these complaints I reaffirmed my view that the certainty that investors were seeking in relation to the substantive legal issues would most reasonably and appropriately be addressed through the legal process of objection and appeal. I was also able to refer to the conclusions and recommendations of the Senate Committee's Inquiry and, since February 2002, to the favourable settlement terms offered by the ATO.

Although we decided not to investigate complaints that related to the substantive legal basis of the Commissioner's actions, I made it clear that we would investigate issues relating to the ATO's administration of schemes-related issues. Some examples of these follow.

Superannuation surcharge

Many investors found that, as a result of amendments to their income tax assessments, they were automatically sent new superannuation surcharge assessments. Some investors were concerned that this action was contrary to the ATO's undertaking that no recovery action would occur pending the progression of test cases. Further, there were concerns about the possibility of having to lodge separate objections to these surcharge assessments when taxpayers had already objected to their amended income tax assessments.

We raised these concerns with the ATO, which assured us that its treatment of superannuation surcharge assessment debts would reflect that of the related income tax debts and that investors would not have to lodge separate objections to the surcharge assessments. The ATO also indicated that taxpayers were now being alerted that amendment of their income tax assessments might affect their superannuation surcharge liabilities. We suggested that these were matters that the ATO might consider advertising in its regular 'Facts about tax effective investment' newsletter, which it duly did.

Tax credits

My office was involved in similar activity concerning the treatment of tax credits. In November 2000, the Commissioner was given the discretion to allow from July 2000 a tax credit to be paid to a taxpayer rather than apply it against an existing tax debt. In the first half of this year, my office was involved in assisting a considerable number of investors who were concerned about the ATO's actions in offsetting their tax refunds against their schemes-related tax debts. My officers were able to explain the recent changes to the law and to direct these complainants to the appropriate ATO officers, enabling them to apply for the discretion to be exercised in their favour. We also encouraged the ATO to inform investors of this in its newsletter.

CASE STUDY

Complaint

Mr K had invested in a mass-marketed scheme and had contacted the ATO to discuss settlement options. At the same time he was undergoing treatment for a terminal illness. While raising his concerns regarding the ATO's attitude, he also complained that the ATO did not answer his question "what happens to my tax debt when I die?" He had also requested that tax refunds used to offset his tax debt be paid to him. He had been waiting some months for an answer, but had not received one.

Investigation

With agreement from Mr K to advise the ATO that he was seriously ill, the Investigation Officer contacted the ATO to ascertain what consideration the ATO might give to Mr K, in the light of his circumstances.

Outcome

The ATO arranged for an experienced ATO officer who could deal with his questions and concerns sensitively, to contact Mr K direct. The ATO also undertook to contact Mr K immediately. As a result of Mr K and the ATO's discussions, discretion was exercised in Mr K's favour and his tax refund issued.

Opportunity to settle

More recently, my office received complaints from investors about the settlement opportunity announced by the Commissioner of Taxation in February 2002. As with complaints about schemes generally, I indicated that I would not look to the substantive issues of the settlement. In my view, the essence of a settlement is that it brings the dispute to an end. In settling, each side makes compromises, and it is a matter for each party to determine if the terms are acceptable.

However, I was, and remain willing to examine taxpayer complaints about any administrative issues surrounding the ATO's treatment of the settlement opportunity, including debt repayment arrangements and requests for an extension of time in which to decide to accept.

CASE STUDY

Complaint

Mr D was a finance professional who had invested in a film scheme. He complained that the ATO had combined his existing tax debt and his schemes-related tax debt and was not offering settlement terms consistent with the Commissioner's announced settlement opportunity of February 2002. As a member of a finance profession, Mr D was not automatically eligible for the full settlement terms.

Investigation

We asked the ATO to clarify the situation in relation to Mr D's two debts and explain whether he would be treated as an eligible investor for the purposes of settlement.

We suggested that a taxpayer's eligibility was an important consideration in whether or not the taxpayer would settle, and that, accordingly, such taxpayers should be given an indication of their eligibility prior to settlement.

Outcome

The ATO agreed to consider Mr D's eligibility and to hold the settlement opportunity open to him until 28 days after a decision on his eligibility.

OTHER ISSUES

Cooperation with my office

In late 2001, the ATO approached my office with information about an error that had been identified in the calculation of Pay As You Go assessments for 2000–01. The error had meant that approximately four hundred thousand taxpayers, who paid PAYG quarterly and relied upon the ATO's calculations, had overpaid tax. Most overpaid tax of approximately $13.00.

The ATO briefed the Special Tax Adviser and me regarding the cause of the problem, the strategy for resolving the problem by contacting the taxpayers affected, the decision to pay interest on overpaid tax as well as the provision of a dedicated phone line to deal with any complaints arising from the error. Further, I was provided with an opportunity to comment on the draft letters to taxpayers. In February 2002, the Commissioner of Taxation issued a media release informing taxpayers of the error, how it came about and how it would be resolved. Taxpayers, or their agents, then received a letter explaining how their overpaid tax would be handled.

Unintended consequences of legislation - the Wine Equalisation Tax

My office has the power to investigate matters that arise when legislation causes an unreasonable or oppressive outcome. One such matter that has arisen this year involved the Wine Equalisation Tax (WET). The WET was introduced from 1 July 2000 to replace the existing wholesale sales tax. It was introduced to ensure that following the introduction of the GST the price of wine remains stable.

The WET system results in a higher amount of tax on premium wines relative to low value wines. The intention of the legislation is to maintain concessional treatment of cask wine, in order to assist Australian wine grape producers. Approximately 50% of Australian wine consumption is cask wine. The WET rate is 29% and applied to wine whether it is imported or produced in Australia.

My office received a complaint that 'Australian' cask wine – which may, in practice, now contain up to 95% imported wine – was also qualifying for the tax concession. It was claimed that this wider concession produced a result contrary to the intention of the legislation – namely the encouragement of the importation of low value bulk wine, which has exacerbated the grape oversupply problem in the Australian industry.

I decided not to investigate the matter but referred it to the Board of Taxation, as the complaint clearly related to the structure of the WET, rather than its administration. The function of the Board is to advise the Government on improvements to the general integrity and functioning of the taxation system, including possible changes to legislation.

Superannuation guarantee

As with the previous year, I have continued to receive a small but steady flow of complaints from employees. The issues arising from their complaints are constant: the alleged failure of the ATO to pursue employers who have not paid contributions combined with a lack of feedback from the ATO regarding the pursuit of owed superannuation contributions. The provisions of taxation law regarding

confidentiality prohibit the ATO from releasing information about the tax affairs of a person to others. This requirement prevents the ATO from reporting back in any detail to the employee who initially complained to the ATO.

The Special Tax Adviser met with officers from ATO's Superannuation Business Line known as SPR to discuss in the light of the complaints that we had received how compliance generally might be improved. It is pleasing to note that the ATO had already been considering improvements to the Superannuation Guarantee (SG), using data matching to enable the ATO to take a more proactive approach that is less reliant upon employee notification. Further, a more stringent procedure using formal notices to obtain information during desk audits was trialled in a few States. This approach resulted in employers providing better information in a timelier manner and improved compliance. In conjunction, SPR has worked with the ATO's Client Account Management (CAM) to better identify and raise superannuation debts for pursuit.

In order to consider the individual circumstances of taxpayers and the reality of recovering monies owed, risk management governs debt recovery. However, in some cases the opportunities for recovering the debt are ineligible, as evidenced by a subgroup of complaints received. That is, there are circumstances where the superannuation guarantee monies owed will not be recovered. The ATO has recognised that there is a need to educate employees to act more quickly if they believe that superannuation contributions are not being paid. The ATO has proposed legislative changes so that employees' payslips are required to identify employer contributions.

From 1 July 2003, employers will be required to make Superannuation Guarantee payments to a complying fund on behalf of their eligible employees on at least a quarterly basis.

More frequent superannuation contributions benefit employees in a number of ways, including increased retirement savings (contributions will be paid earlier enabling employees' accounts to benefit from compounding returns) and more timely superannuation guarantee debt recovery action in respect of business insolvencies.

From that date, employers will need to advise their employees of the amount of contributions made and the name of the fund to which the contributions have been made. These changes are expected to minimise the cash flow problems that employers experience with annual contributions and to provide the employee with an avenue to check whether the contributions have, in fact, been made to the fund.

My office receives a small number of complaints from employers regarding the ATO's approach. The ATO's approach to superannuation guarantee compliance must be balanced, as not all errors on the part of employers reveal an intention not to comply.

I am satisfied that generally the ATO is taking a balanced approach to the Superannuation Guarantee. Nevertheless, my office will continue to monitor the ATO's implementation and success of its early detection system. Our handling of individual complaints will continue in the same role as for Community Information (see relevant section later in this chapter).

CASE STUDY

Complaint

Company Q complained that the ATO was taking legal action against it for an outstanding SG penalty. The company considered the legal action to be unreasonable given that they had paid SG contributions but had mistakenly paid it into the wrong account. The employee SG contributions had been withdrawn and paid into the correct account.

Investigation

This complaint was referred to the ATO for it to handle in the first instance. Feedback from the ATO was sought with the consent of the complainant.

Outcome

Based upon the company's good SG compliance history as well as its speedy correction of the error and self-notification to the ATO, the penalty was revoked and legal action ceased.

Fraud investigator behaviour

Very occasionally this office receives complaints regarding the behaviour of fraud investigation officers towards potential witnesses. In the course of investigating a complaint, I examined the ATO's procedures relating to evidence collection and the rights of witnesses. From our discussions with ATO senior fraud investigation staff, we satisfied ourselves that the ATO provides suitable guidelines for its staff concerning the collection of witness statements. While these guidelines are somewhat general, officers are given training about the best approach to take when seeking statements. This training includes approaching potential witnesses with the appropriate respect and professionalism.

My office is continuing to maintain an interest in this area and the Special Tax Adviser now addresses courses and staff meetings. This input augments existing training and procedural guidelines and helps to ensure that the required standards are met in fraud investigations.

The role of tax agents and lawyers

The ATO's recognition of tax agents' role in handling their clients' affairs has come under notice. Where tax agents had lodged objections on behalf of some clients who had participated in mass-marketed schemes, the ATO did not consider the objections duly lodged because the objections were signed by the agent and not the taxpayer.

After discussion between my office and the ATO, the ATO agreed to vary its policy to ensure that objections lodged by tax agents on behalf of their clients would be treated as duly lodged. I note that there has been some delay in the ATO completing its undertaking and I look forward to seeing the revised draft policy early in the new financial year.

Recognition of agents (whether a tax agent or a lawyer) has also caused concern for the legal profession under instruction, where information regarding legal action against a client has been refused because of the secrecy provisions found in taxation law.

CASE STUDY

Complaint

Mr C, a lawyer, wrote to the ATO in relation to a summons his client had received, asking that the ATO give notice to Mr C seven days prior to any action being taken against his client. He received no response, so complained to the ATO again. He was advised that he had to provide written authority from his client before the ATO would respond to his request. He then contacted the Ombudsman to complain that written authority was unnecessary.

Investigation

The ATO's *Proof of Identity Procedures* state that written authority is required where a solicitor is dealing with a client's taxation matters in general. However, the ATO indicated that the procedures could be clearer in relation to solicitors acting in relation to court matters.

Outcome

The procedures were clarified to advise that where a solicitor is acting on particular instructions, such as those relating to a court matter, a letter on the solicitor's letterhead identifying the taxpayer and the individual legal practitioner, including a statement of retainment as well as the particular matter under instruction is sufficient evidence of the solicitor's authority. The ATO acknowledged that Mr C had provided this and no further request for authority was necessary on this occasion.

The amended guidelines were drawn to the staff's attention and the ATO wrote to the solicitor apologising for the inconvenience caused.

Freedom of Information

The other schemes-related issue in which I have taken a close interest concerns Freedom of Information (FOI). I have a legislative responsibility for monitoring FOI administration and a personal commitment to seeing agencies adopt the full spirit of FOI as vital for good public administration.

In my last annual report, I announced that my own motion investigation into the ATO's practices and procedures around FOI had been postponed in response to the ATO's apparent difficulty in managing the greatly increased number of FOI applications it had received in relation to mass-marketed schemes.

In response to a number of complaints, I wrote to the Commissioner of Taxation in August

2001 expressing concern at the apparent delays in the processing of schemes-related FOI requests. There was also at this time some controversy surrounding the FOI charge estimates – in some cases over $100,000 – which applicants were receiving. My understanding was that this, combined with difficulties in determining the acceptable limits of the requests, was the primary cause for the delay.

The ATO stated that it in fact sought to contact many of the scheme-related applicants in an informal manner when their applications were first received to offer them the opportunity to reduce the scope of their requests, having regard to the obvious issues they faced with respect to seeking information which they would not receive due to privacy and secrecy issues. The ATO also stated that much time was spent early on trying to contact these FOI applicants but the majority were not prepared to speak to the ATO.

On 26 September 2001, the Commissioner announced that all valid schemes-related applications – irrespective of their size – would be processed for a maximum charge of $200. I considered this a satisfactory response and no further action was taken on complaints current at that time.

More recently, we received complaints which indicated that some applicants had not yet received any outcome to their requests. Our recent inquiries have indicated that the ATO did not begin to inform applicants of the Commissioner's September 2001 decision to cap FOI charges until 29 January 2002. The ATO's explanation for this was that it was necessary to develop policy and procedures to guide officers in the implementation of the Commissioner's decision.

However, it is not clear why the development of internal procedures for processing applications should have delayed the process by which applicants were formally notified of the Commissioner's decision to reduce charges to a maximum of $200. The apparent delay in the issuing of these notifications to valid applicants meant that those applicants were seemingly not kept informed of the ATO's action on their requests (contrary to both the spirit of the FOI Act and the Taxpayers' Charter) and were not always aware of their review rights until well after they should have had the right to exercise them.

In essence, the ATO's processing of these applications appears to have gone well beyond the statutory time limits and otherwise would appear to indicate a number of instances of defective administration. These problems were compounded by the tight deadline in which investors had to decide whether to settle, when one of the results of such settlement was that they agreed that the ATO need take no further action on any outstanding FOI requests.

My concerns were put to the ATO, who undertook to address the 16 requests outstanding. I now understand that the ATO has provided outcomes acceptable to most of these 16 applicants, and will shortly provide decisions under the FOI legislation to the others.

It is only fair to note that the volume of scheme-related requests was far higher than the ATO would usually receive in total in a year, as well as that the requests were extremely broad, potentially extending to tens of thousands of

pages of documentation, which also created difficulties in dealing with the large number of applicants. The ATO stated that it sought to identify all relevant documentation and respond to the requests.

I have indicated to the Commissioner that I will most likely resume my own motion investigation in the next financial year as part of a broader review of FOI management throughout the Commonwealth.

My office also focussed on the ATO's use of settlement waiver clauses in relation to FOI. Last year, I indicated my concern about the propriety of the ATO's practice against the purpose for which the FOI Act was enacted. I have recently again had cause to write to the Commissioner in the strongest possible terms that a citizen should not have to forgo his or her FOI rights when settling a tax dispute.

FOI furthers the objective of open government. It is a citizen's right under FOI to seek information from government about any matter without having to justify the purpose of the request. In my view, the exemption provisions of the FOI Act should be the only basis on which an agency can seek to prevent citizens from obtaining access to government records.

For these reasons I believe it is unreasonable for an agency to seek to exclude the application of FOI by making it a **condition** of settlement. I do not object to an agency indicating that, if a settlement is reached, it does not intend to take any further action in relation to any outstanding FOI applications lodged in connection with the dispute. However, I would be critical of the ATO if it refused to settle a taxation matter with a taxpayer, solely on the basis that they were reluctant to forgo their rights under FOI legislation.

Similarly, I believe it would be unreasonable for the ATO to seek to rely on an earlier or existing settlement with a taxpayer to avoid responding to any future FOI applications by that taxpayer. In my view, access to information under the FOI legislation is an important right of our citizenship. Accordingly, I do not believe it is appropriate for Commonwealth agencies to treat it as a negotiable right in relation to an unrelated dispute.

The Commissioner has indicated that within the settlement context the clause used by the ATO expects a taxpayer to waive their FOI rights in that particular dispute, not an unrelated dispute or any other issue. This is a matter that I shall continue to pursue in the coming year.

Test case litigation

In July 2000, I decided to conduct an own motion investigation into the alleged ATO delays in the Budplan Test Case. When I commenced my investigation, my main concern about the delay was about the mounting interest charges for investors. Last year, the investigation was put on hold pending the outcome of the Federal Court case.

The Budplan decision was handed down in late February 2002, in favour of the Commissioner. However, by that time, the situation was much changed. The Senate Economics References Committee had recommended a settlement package to bring the matter to finality, and the Commissioner had adopted most aspects of that package. Most importantly, it would seem that the likely detriment of any delay in the test case has been largely overcome by the Commissioner's announced settlement terms in relation to the waiver of penalties and interest.

The ATO has acknowledged that there have been lessons learned from its handling of the Budplan litigation. Accordingly, I believe the only outstanding matters relate to any systemic issues and improvements to the test case program, and I am currently making enquiries as to what actions the ATO is taking in this regard.

Objections

Generally the first step in formally challenging the ATO's actions or interpretations is via the objections process. Where a taxpayer disagrees with the ATO's interpretation of tax law, he or she can seek to challenge the Commissioner's interpretation and so obtain certainty at law. However, some recent complaints to my office have raised questions about the value of the objection process, particularly when the Commissioner has already publicly expressed his position on a matter. Following an investigation of such a complaint in the context of mass-marketed schemes, my officers concluded that the current objection process is fair and reasonable.

Although we did not form the view that the current objection process was defective, I do believe there is scope for further improvement of the objection process. The Ralph Review in 1999 made a number of recommendations in relation to administrative approaches, such as a streamlined 'whole of transaction' approach to assessment, objection and dispute resolution; improved dispute resolution mechanisms; and extended scope for small claims before the Administrative Appeals Tribunal. Our experience confirms that these administrative issues are important and I have signalled our interest in being involved in development of these proposals.

Providing certainty - rulings and ATO publications

Under the self-assessment regime, taxpayers are obliged to self assess in a complex tax system often surrounded by uncertainty. They often have little real practical alternative other than to rely on advice from the ATO, sometimes conflicting, or that of professional advisers. Even taxpayers who have a strongly compliant attitude to meeting their taxation obligations often have an uneasy feeling that, although they have done their best, they carry all the risk that they might have got it wrong and may be called upon at some later date to reimburse the Revenue. Rulings are designed to alleviate that burden.

However, recent reviews by my office, the Australian National Audit Office and the ATO's own internal review have exposed deficiencies in the administration of the Private Rulings system. Questions have been raised about whether the ATO has done enough to maintain and develop its legal and technical expertise to perform the rule-making role, detect emerging patterns and trends and adopt a wider systemic perspective. The ATO has responded by implementing a range of initiatives directed at improving the private ruling system.

Taxpayers also seek certainty in order that they might avoid penalties. They want to know that their actions will be endorsed by the ATO. Here Private Rulings have had an important role to play in some early controlling interest superannuation cases, as demonstrated in the following case.

CASE STUDY

Complaint

Following applications by taxpayers, the ATO said in a number of private binding rulings, opinions or other general advice letters that controlling interest superannuation arrangements were acceptable. The number of taxpayers participating in the arrangements escalated rapidly, affecting revenue to the extent of over $100M. The ATO responded by altering its stand and published its revised view by way of a media release. Prior to lodging relevant returns some (approximately 220) of the participants provided the Commissioner with details of their arrangements and sought private rulings. This would ordinarily have afforded them protection from penalties.

However, the ATO declined to rule, issued assessments disallowing the tax benefits claimed, and imposed penalties. Some taxpayers then sought judicial review of the decision not to rule.

Investigation

During our investigation we expressed the view that it is undesirable to penalise taxpayers who adopt a position and disclose it to the Commissioner in a request for a private ruling. It was argued that it is in the interest of good administration of the tax system that taxpayers be encouraged to inform the Commissioner about a position they have taken that may be controversial, so that the Commissioner has a chance to rule.

Later complaints centred on the predicament of taxpayers who committed to the arrangements in the belief that the ATO considered them acceptable, only to later find themselves liable for tax and penalised.

Outcome

After discussion and consideration the Commissioner accepted our argument that penalties were inappropriate in cases where taxpayers had sought private rulings. It was agreed the penalties would be remitted. In consequence, judicial review litigation was settled or discontinued, saving both public and private resources.

We are still investigating issues arising from the revision and clarification of the ATO's position and the circumstances surrounding the decision to impose penalties in the first place.

Taxpayers also look to TaxPack and other ATO publications for certainty in the preparation of their tax returns. For this reason, ATO publications providing taxation advice need to be as clear and unambiguous as possible, acknowledging the general nature of the advice provided.

CASE STUDY

Complaint

We received a complaint from an investor in residential property that she had experienced great difficulty in convincing an ATO auditor that certain costs were tax deductible. The ATO auditor was based outside the Australian Capital Territory and was apparently unaware that stamp duty paid on the transfer of an ACT property is a deductible expense where the property is to be used for rental investment.

Investigation

Our investigation disclosed that tax treatment of rental properties in the ACT was different from those of the States, because of the nature of property title in the ACT. The auditor had not taken this into account. On examining the TaxPack referred publication "Rental Properties 2000–2001", we suggested that the section dealing with deductible rental expenses could be clarified to specifically cover the rules in relation to ACT properties. We also suggested that all auditors be made aware of the special issues concerning crown leases.

Outcome

The ATO agreed to make changes to its publication on rental properties, to update the audit guidelines, and to clarify the situation in relation to the deductibility of stamp duty paid on the grant or transfer of crown leases. The updated ATO publication *Rental Properties 2001–2002* was recently released and the amended *Rental Audit Guidelines* should be available to staff shortly.

Compensation issues

In my previous report, I referred to my ongoing concerns regarding the ATO's handling of applications made for Compensation for Detriment Caused by Defective Administration (CDDA scheme). In particular, I highlighted the quality and transparency of decision-making as well as delays. While I acknowledge that I receive a few complaints in comparison to the total number of claims received by the ATO (for example, in the financial year 2000-01 the ATO made 1395 payments under the CDDA scheme while my office received 15 complaints about compensation decisions) my concerns remain the same for this reporting period.

In one matter drawn to my office's attention, the initial decision-maker and the reviewer referred to the applicant being given many opportunities to support her claim for non-financial losses. However, our investigation revealed that the ATO had not asked the applicant to provide supporting information of a specific kind required to consider the loss claimed. The ATO decided not to pay further compensation under the CDDA scheme. This decision may have been appropriate, but the process was compromised.

On occasions, problems have also arisen in the ATO's consideration of the "tests", as set down by the Department of Finance and Administration's guidelines (see http://www.finance.gov.au/finframework/discretionary_payments.html). In determining whether there has been defective administration, a decision-maker needs to consider both the correctness of the advice given to the complainant as well as the adequacy of guidelines relating to the advice given.

I have also raised my concern that CDDA decisions have been at times unduly delayed. Delays can result in decisions based on information collected some many months after the administrative action and can be further compounded if the ATO has no record or an inadequate record of the oral advice it originally gave to the taxpayer. On those occasions, I have asked the ATO to reconsider its decision not to pay compensation. The ATO considered its earlier decisions, which were set aside, and the taxpayers compensated for their financial loss.

However, many compensation decisions have been further delayed by the lapse of delegations from the Minister. In February 2002, my office first became aware that the ATO did not have the necessary delegations to make decisions under the CDDA scheme, as they had expired with a change of Assistant Treasurer. My office initially monitored the situation because the ATO was confident that it would be resolved. In May, I wrote to the Commissioner of Taxation to clarify whether or not newly drafted delegations had gone to the Assistant Treasurer, and to seek reassurance regarding any payments made without the necessary authority.

I was advised that a new authorisation had been sent to the Minister for Revenue and Assistant Treasurer along with the request that she ratify decisions made while delegations were not in place. The ATO also noted that decisions under the CDDA scheme had been delayed and, where appropriate, the ATO will consider whether a further payment should be made to compensate the taxpayer for the delay.

CASE STUDY

Complaint

A small business sought advice from the ATO regarding the application of GST to health courses it ran. The ATO initially advised that the courses would be GST exempt, and the business set its course fees to not include GST. The business was later told that the initial advice was incorrect, and GST did apply to the courses.

The business made a claim under the CDDA scheme, given it had incurred additional to normal business expenses. The ATO acknowledged that expenses would not have been incurred if the initial advice were correct. However, the company complained because it considered that the ATO's compensation was not reasonable in the circumstances.

Investigation

Having considered the ATO's decision-making, it was proposed to the ATO that it might reconsider the quantum paid on the basis that it had not recompensed the company for some of its expenses reasonably incurred as a result of the ATO error. Consistent with the office's practice, a recommendation regarding the actual amount of compensation to be paid was not given, as it is more appropriate that the applicant and agency directly negotiate.

Outcome

The ATO indicated a willingness to increase its offer and entered into negotiations with the business and an increased amount of compensation was agreed upon.

COMMUNITY INFORMATION

Each year I receive a small, but increasing, number of complaints about how the ATO deals with information about alleged tax avoiders. Many complainants felt that if they provided information to the ATO about tax avoidance and where they had a personal interest in the matter because of child support arrangements or unpaid superannuation for example, they believed that the ATO should tell them how the ATO was using the information and whether or not the ATO was pursuing the person alleged to have avoided paying tax.

The secrecy provisions of taxation law prohibit the ATO from releasing information about the tax affairs of a person to others without the taxpayer's consent. This prohibits the ATO from reporting its case management and decision-making back to the individual who initially provided the information to the ATO. This has been a source of frustration for complainants as they remain "in the dark" as to whether the ATO has dealt with the information in a timely, appropriate and consistent manner.

In response to these complaints, the ATO was approached to brief my staff on its policy, procedure and assessment system as well as its

strategies for pursuing tax debts as a result of community information. While I am satisfied that the system generally provides a sound basis for determining which matters should be pursued, I will continue to review the ATO's consideration of individual cases where a complainant remains uncertain as to whether the ATO has pursued a matter appropriately or effectively. This means that the investigation officer will satisfy himself or herself that the ATO has appropriately prioritised the matter and taken appropriate action. The investigation officer can advise the complainant whether he or she is satisfied with the action taken by the ATO, without revealing information about another's tax affairs. In many cases complainants are satisfied with this approach, as they can appreciate the need for protecting another person's tax affairs while having an independent body review the ATO's actions.

FUTURE DIRECTIONS

Inspector-General of Taxation

In an election statement the Prime Minister announced in October 2001 the Government's intention to establish a new advisory body of Inspector-General of Taxation. In May 2002, the Minister for Revenue and Assistant Treasurer released a discussion paper - *The Inspector-General of Taxation in the Taxation System* – for public consultation. At the time of writing (30 June 2002), the Board of Taxation was gathering the views of business, taxpayers, the tax advising professions, and the community on the various Inspector-General proposals set out in the consultation paper. The Board intended to advise the Government on 19 July 2002 on the views presented to it.

The government's intention is that the Inspector-General will not replace existing review and accountability processes, but will work to improve the existing framework by analysing and reporting on systemic issues arising from tax administration. I have had the opportunity to provide my views about the proposed new agency. I support the strengthening of independent scrutiny of the ATO's administration of the tax system and will work closely with this proposed new agency.

The task ahead

During the year, the ATO initiated a review of the Taxpayers' Charter. My office has been consulted in the course of the review. In my continuing work with the ATO in helping to improve its administrative practices I intend to give the revised Taxpayers' Charter a more central place in the complaint handling process. One measure that my investigation officers use to assess the appropriateness and reasonableness of ATO actions is the performance standards of the various ATO Business Lines. I also intend to place greater emphasis on the principles set out in the Taxpayer's Charter to ensure that the level of service and the kind of relationship that the ATO seeks to have with taxpayers is achieved. I will continue to monitor the extent to which Tax Officers apply the principles outlined in the Charter through the complaints made to my office.

My own motion investigation into ATO complaint handling will provide an opportunity for the ATO to improve its complaint handling systems. I am firmly of the view that the ATO should ensure that ATO Complaints, in its internal complaints coordination role, is able to perform a more strategic role in identifying

complaint trends and improving the responsiveness of the ATO to taxpayer concerns and difficulties. As the effectiveness of the ATO Complaints increases my office can give more attention to those matters that require external independent review.

As the new tax system becomes more settled and the ATO moves from an educative focus on compliance to an enforcement focus, I would expect this transition to be reflected in complaints to my office. I envisage that this would be an important aspect of my office's operations in the coming year.

GLOSSARY OF ACRONYMS

ABN	Australian Business Number
ANTS	A New Tax System
ATO	Australian Taxation Office
BAS	Business Activity Statement
CAM	Client Account Management
CDDA	Compensation for Detriment caused by Defective Administration
CSA	Child Support Agency
FOI	Freedom of Information
GST	Goods and Services Tax
IAS	Instalment Activity Statement
PAYG	Pay As You Go
SG	Superannuation Guarantee
SPR	Superannuation Business Line
WET	Wine Equalisation Tax