This Document contains a Submission and 5 supplementary submissions lodged by Australians for Tax Justice Inc.

Submission

Subject: Submission re tax shortfall interest and "reasonably arguable"

We respond in relation to your invitation to Mr Lawrence Henderson to comment on the tax shortfall interest charge bill. Unfortunately the website you give to consult contains no explanation of the bill.

1.If it is the one which also adds ”about” to “as likely as not” then we criticised it at its introduction for being virtually unintelligible in its ”insert here insert there delete this add that” form. As a vehicle for communication (which is what it should be when it comes to the rights and duties of citizens and the Commonwealth, duties which have the potential to markedly alter a taxpayer’s whole life) it was sadly lacking.
2. As a response to the problems of self-assessment raised in submissions to the Treasury and partly but not wholly reflected in the ROS report, it is wholly inadequate. In particular the Treasurer’s policy on safe harbour for taxpayers who use a tax agent announced 1998 has yet to eventuate, held up by tax agent representations.
3. If it is a response to the IGT GIC report, does it address the issue of distinguishing when including the premium over the time cost of money in the TSI charge is justified and when it is not, eg. for the eight years it has taken to have the ATO Commissioner decide that a certain FFC case (Sleight) is now a test case for investments entered up to eight years before, even though he didn’t fund the taxpayer’s case contrary to his undertakings to the Senate Economics References Committee. In the case of Cooke and Jamieson the period to decide the law was 16 years from investment; this is ludicrous.
Just what is the law for them and other taxpayers while they wait to find out?
These investments include Central Highlands, Bopple Macadamia, Chalice Bridge, Main Camp 4, and Lemon Myrtle.
4. We also note that in the Pearce case in the Supreme Court of WA in 2005 the Commonwealth DPP in a case passed to him by the ATO Commissioner said that the group investment project taxpayers were innocent of any wrongdoing, yet the Commissioner initially imposed penalties on all those 41000 taxpayers, and is still doing so whether they settle or not. The penalties are contrary to Commonwealth prosecution policy on averments, under which it is considered wrong to penalise a person for something they didn’t intend.
5. We attach a copy of our paper tabled in Parliament on March 17, but with minor amendments. This contains among other things a discussion of some of the issues this bill raises, but also indicates that a lot of information was withheld from the Senate Economics References Committee by the ATO in the 2000-2002 group investment project Inquiry.
6. We come now to TRs 94/4 and 94/7. These say that penalties will not apply where the taxpayers case is reasonably arguable or the tax return is as likely as not correct. We also note that the TaxPack Guarantee (at least in 1996 when many group investments were made) and the Taxpayers Charter which provides a Commissioner’s guarantee. It is clear that from the day the first Notices of Intention to Reassess were issued to group investment taxpayers, these Commonwealth undertakings to the taxpayer were flouted by the Commissioner’s staff. And they are still being flouted in

the settlement offers going out right now based on the Commissioner's view that Sleight and not Cooke applies to certain other project taxpayers.
This is in breach of the ethics provisions of the Public Service Act. So far the Assistant Commissioner handling the current settlements has over a period of six or more weeks failed to respond to an invitation to meet, even though he was in Perth, and we have repeatedly has to invoke the ATO complaints process over this, so far to no effect. This has been made more difficult by the fact that the ATO has interfered with email communications from our organisation. The previous Public Service Commissioner Andrew Podger considered the matter was not in his remit.

We note TR 92/1:
"If the Commissioner makes an assessment involving that matter, the law compels the Commissioner to act in accordance with the favourable public ruling."
Apparently the law does no such thing.

The group project taxpayers' case certainly fell within the four guides in 6. above. Deputy Commissioner JM Wheeler had approved Northern Rivers (the project Kevin Sleight was in) and Main Camp 1 in another taxpayers objection after an audit in 1995-6. A total of at least eight deputy commissioners had approved such investments in written form, either private ruling or something else. It has been admitted in the Federal Court by counsel for the ATO that the ATO did use private rulings up until 1999 as models to decide other cases involving similar investments. Indeed it could hardly do otherwise in terms of logic, consistency and efficient use of staff. However it still refuses to divulge the 18 projects which were used as models for 260 at the 27-28 May 1999 PtIVA seminar at Casselden place in Melbourne.
So it is important with this bill that it provides a route to challenge the Commissioner which is easy and affordable for the ordinary taxpayer. By way of contrast, an application for an injunction in relation to the guarantees in para 6. we are told would run the risk that the a whole lot of costs incurred by the Commonwealth can be lumped on the applicant. The ATO has shown itself not to be a model litigant and a complaint to Karl Alderson in the AG's office over this is still in progress, awaiting an ATO response, after seven months.

Geoff Taylor

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Supplementary Submission 1

We have now had time to painstakingly match the details of the two bills purportedly partly implementing the recommendations of the Review of Self Assessment and the Inspector General of Taxation's review of the general interest charge. Firstly will there be an opportunity for oral consultation with the committee? We can come to the ACT.

We make the following further comments:

1. The IGT report of August 2004 notes that it is not fair to apply an interest charge to someone who is not aware, until the Commissioner so decides, that his tax return may be incorrect. The proposed 280-100(2)(a) fails to address paras 1.56 and 1.57 of the IGT report.
2. Re 280-170. The former Tax Ombudsman's view stated in writing to one of the undersigned was that intention of the tax legislation , ie. PtIVC is to deny objections, even though there is well established administrative law rule against bias. PtIVC breaches the administrative law rule that "no one shall be judge in their own cause". The amendments do not amend 298-30(2) and not to do so is wrong for all bases of objections. There is abundant evidence in relation to group projects that the Commissioner decided as a policy to deny all objections and force taxpayers into the AAT or federal court. Consequently we have no faith in the proposed 280-170 or in ATO staff who perform the Commissioner's exercise of a discretion.
3. The other primary procedural fairness rule in administrative law, "hear the other side", must apply before a reassessment is made, or SIC or penalty applied. Aronson the Australian administrative law author, questions whether successful appeal downstream of the decision/charge/penalty can fully offset the consequences for the citizen of an initial decision against them, as compared with an upfront hearing. The bill does nothing to answer the criticism that the taxpayer is investigated (often without their knowledge), accused, and penalty applied all before any day in court, and all by the one government authority. The application of a penalty in some cases goes against the Commonwealth Attorney General's policy of not punishing people for something they didn't intend, given that group project taxpayers were found guilty of tax avoidance by the Commissioner based on the actions of others of which they were unaware. There are sections of the tax law which let the Commissioner not remit where is tax avoidance, even though that can occur as a result of actions outside the knowledge of the affected taxpayer. This is unfairly discriminatory.
4. 280-160(1): We require a body independent of the Commissioner to consider remission. As we have already stated in our earlier submission he has been shown to ignore a clear legal requirement to observe his own tax rulings TR 94/4 and 94/7 as well as the TaxPack Guarantee and Commissioner's Guarantee in the Taxpayer's Charter. We note that independent review of a tax debt was abolished by recently dismantling the Tax Relief Board, and the Finance Minister tax waiver process has been altered.
5. These amendments for income tax are to apply from the 2004-5 tax year.Yet the IGT report said that there is no detailed policy framework for the

remission of the interest charge for the pre-amendment assessment period for years 1992-3 to 1999-2000. These bills fail to address this. These bills fail to take on board the findings of the ROSA report by failing to address pre-existing wrongs done to taxpayers. Their application should be retrospective.

6. 298-10 in Schedule 1: For transparency, reasons should always be given.
7. 280-70: The 20% rule is not acceptable for reasons of fairness. If the ATO claims additional tax of $100k, then remits all but $19.9k of other charges, no objection is allowed. The taxpayer should always have the right to appeal.
8. 298-30(3): It is unacceptable that a notice from the ATO is unchallengeable. This was reportedly rammed through in the dying hours of the 2001 Parliament. Taxpayers should be allowed to test evidence that proper delegations are in place and that in accordance with the Taxpayers Charter the officer concerned has turned his or her mind to the circumstances of the individual taxpayer.
9. Big picture points: (a) These bills and a raft of other tax bills with them do nothing to reduce the complexity of tax law, despite recognition from all quarters that the system is complex, contradictory and ramshackle.(b) The bills fail to right the wrongs done in the past by not being retrospective (c) The bills are clear evidence that ROSA section 7.2 has been ignored in that there has been no Board of Taxation consultation with the community in the drafting of the bills.(d) As noted in our earlier submission the bills fail to address ROSA section 4.2.4 on the seven year old announcement by the Treasurer of the safe harbour policy for those using a government licensed tax agent.
10. We are understandably critical of ATO administration when we find that there never was a PtIVA Panel as such convened to consider the group project cases, but rather a workshop or seminar, which only considered 18 projects out of 260, that this workshop was more concerned with the tactics to be used to attack the taxpayers, and that one of the independent experts at that meeting, Prof. Y Grbich, has recently told one of the undersigned there was a clear line of authority back to Lau's case, a case which was decided in favour of the taxpayer.

Yours sincerely

Henry Sheil and Geoff Taylor
for Australians for Tax Justice Inc.

22nd May 2005

Supplementary Submission 2

We include a part of three relevant tax rulings below. Sorry where we previously mentioned TR 94/7 we meant TR 94/5 and 94/7. We believe the bills should eliminate the two sentences in 94/5 below starting "the shortfall". We believe that the first sentence is meaningless, as guidance to a taxpayer, and the second should not relate applying a penalty to the size of any shortfall, large or small.

It is clear from both rulings, but particularly 94/4, and given TR 92/1:
"If the Commissioner makes an assessment involving that matter, the law compels the Commissioner to act in accordance with the favourable public ruling.",

that the threat of a penalty, high or low, contained in the latest round of settlement offers from the Commissioner is illegal. As we said eight Deputy Commissioners, in the time period taxpayers in which submitted their returns, are on record as being in favour of the way group project tax returns treated the investments. Court decisions after that period could of course not have been known to those taxpayers and the one case the ATO relied on, Spotless, has now been distinguished by the federal court as not applying because of its very different factual context.

Geoff Taylor
Australians for Tax Justice Inc, Perth

TR 94/4.

6. The reasonable care test requires a taxpayer to take the care that a reasonable, ordinary person would take in all the circumstances of the taxpayer to fulfil the taxpayer's tax obligations. Provided that a taxpayer may be judged to have tried his or her best to lodge a correct return, having regard to the taxpayer's experience, education, skill and other relevant circumstances, the taxpayer will not be liable to pay penalty.

TR 94/5

4. Where a taxpayer has a tax shortfall for a year of income the taxpayer will be liable to pay additional tax if:

* the shortfall or a part of it was caused by the taxpayer, in a taxation statement, treating an income tax law as applying in relation to a matter or identical matters in a particular way;
* the shortfall or part so caused exceeded the greater of $10,000 or 1% of the taxpayer's return tax for the year; and
* when the statement was made, it was not reasonably arguable that the way in which the application of the law was treated was correct.

……

(a) the reasonably arguable test does not require that the treatment given a particular matter by a taxpayer must be the better view, or be more likely than not the correct

treatment. The test is "about as likely as not". This requires that the prospects that the taxpayer's treatment will be upheld by a court or Tribunal as being the correct treatment must be substantial, whether or not those prospects are less than or greater than 50 per cent;

TR 94/7

4. The explanatory memorandum to the *Taxation Laws Amendment (Self Assessment) Act 1992* , which introduced the shortfall sections into the ITAA, lists three examples where it may be appropriate to remit the statutory penalties otherwise attracted (see pages 98 - 99 of the Explanatory Memorandum).

5. These are:

(a)

where an authority that is material to whether a taxpayer's treatment of a matter is reasonably arguably correct is published immediately before the taxpayer lodges its return of income, in circumstances where the taxpayer could not reasonably be expected to have been aware of the authority's existence;

Supplementary Submission 3

The Secretary
Economics References Committee

1.There is a parallel between the Corby decision yesterday and the group investment project decisions here in the Federal Court.

If indeed Ms Corby did not put the drugs in the surfboard bag, then just as in our case she was convicted and penalised on the basis of the actions of others of which she was unaware. In our case the conviction and penalty all took place inside the ATO without the need for a court.

The law in Indonesia, and the PtIVA law introduced by John Howard apparently advised by Graham Hill and Murray Gleason (now Federal and High Courrt judges) makes that possible.

2. In relation to the accumulation of interest on tax owed issue, it should be noted that it took sixteen years for the deductions of Messrs Cooke and Jamieson to be validated by the Federal Court. If they had lost, the accumulated interest would have been very high. Although they were in a group project which never produced flowers and where they borrowed all of the funds they invested, the ATO did not regard their case as a precedent for group project investors, where the gearing was lower and in many cases there was a product sold.

As another example, if the charter boat tax ruling had been made retrospective as the Commissioner originally intended back in 2003, there would have been nine years accumulation of interest.

AFT J Inc

Supplementary Submission 4

From an AAT press release:

"From 1990 to 1998, Mr Lindsay was National Taxation Technical Director with KPMG in Sydney".

This is the period when KPMG were issuing favourable opinions inter alia for the Interest Recount and Freedom Express projects, since attacked by the ATO.

So once again re the bills on penalties/interest, I think it can be said that taxpayers had a **reasonably arguable case** and were **about as likely as not correct.**

Geoff Taylor for AFTJ Inc

Supplementary Submission 5

1. If this legislation operates from the 2005 tax year, it will only really operate for non PtIVA reassessment (ATO reach back four years) from 2009 and for PtIVA from 2011 (ATO reachback six years - because it doesn't introduce the reduced four year limit for PtIVA coming out of the ROSA report).
2. The 3% on top of bank rate if applied to preassessment interest means that the IGT's criticisms of the old TSPI in his August 2004 report have been ignored because the interest still includes a penalty component.
3. We understand Mr Lindsay is now in Mr Brough's office, and reputedly taking a hard line to a project for which KPMG gave a favourable opinion.

AFTJ Inc