

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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ATO disputes do not count as the most pleasant life experience for most.

ATO Disputes

So how can we avoid them and if we can't, how should we manage them? Andrew Henshaw of [Velocity Legal](#) in Sydney will give you an answer in this episode.

Here is what we learned from talking to Andrew. But please listen to the audio file above since Andrew explains this much better than we ever could.

To listen while you drive, walk or work, just access the episode through a podcast app on your mobile phone.

Process

An ATO dispute can start in two ways. It either starts with the taxpayer taking the initiative and requesting a private ruling or contacting the ATO's Early Engagement Team. And tax payer and ATO then disagree on the finer details and start battling it out.

Or it starts with a spark. Something flag's the ATO attention. and they commence a risk review that might progress to an audit.

Either way there might be an in-house facilitation (alternative dispute resolution = ADR) to bring both parties to the table. At some stage the ATO might issue a tax assessment or amended tax assessment, which the taxpayer might challenge or accept.

If the parties can't agree, the dispute makes its way through the tribunal and possibly the courts. And it might feel like an eternity, but every dispute has an end – one day.

Private Ruling

If you apply for a private ruling, request an extension of time to lodge the income tax return in question while the ATO reviews the issue. A deferral of tax payments means money saved.

When you receive an unfavourable private ruling, lodge on time and in accordance with the ATO's view. You then pay 'under protest' and subsequently object to the assessment. You object to the assessment, not the private ruling. This way you avoid a default assessment being issued and the imposition of further penalties and interest.

It Starts With A Spark

Sometimes a tax dispute with the ATO does seem to suddenly fall out of the sky. The tax payer might think all is well, but then something flags the ATOs attention and invites them to look closer.

The most common spark to ignite the fire are AUSTRAC, data matching with other government bodies like the State Revenue Office, lifestyle and income mismatch, publicly reported transactions, benchmarking and rogue advisors.

Risk Review

A risk review doesn't always start long after year end. The ATO's early engagement team may approach taxpayers several months before the end of income year and potentially commence a risk review.

Treat a risk review as a serious matter. The most common mistake is to take these lightly. Assess the scale and magnitude and involve the experts you need. Seek tax advice on the strength of your position as soon as possible. Early identification of issues is key. Consider a voluntary disclosure as well as time limits. And try hard to avoid an audit.

If upon seeking advice, it is apparent that your position is relatively weak, the best approach is to lodge a voluntary disclosure with the ATO as soon as possible and seek a reduction in penalties and interest.

Audit

The outcome of an audit is usually a position paper – either in draft form or final. This paper will list the assessed tax shortfall and penalties.

In-House Facilitation

This is an ATO mediation process that allows both parties to talk and hopefully avoid the courts. There is a facilitator who is impartial and tries to bring both parties to an agreement.

Consider facilitation as an option before the final objection decision is issued. It is a window of opportunity to speak to the key decision makers in the ATO.

Communication

The ATO does not always engage with taxpayers in the same way that it expects taxpayers to engage (delays, extension of time and timeframes).

There can be numerous information requests. Don't be afraid to challenge the information requests if they are unnecessary, or essentially overlapping previous requests.

Assessment

The ATO might issue an amended or original assessment and will probably start enforcement action some time after the assessment. You can dispute the assessment but will incur interest while the debt is outstanding. Pay now – Fight Later.

Objection

The process to challenge an assessment is governed by Part IVC of the Tax Administration Tax 1953 (Cth).

To challenge an objection you must 'object', i.e. lodge an objection. But there are time limits, so you can only object within a certain time period.

If your objection is unsuccessful, you can take it to the AAT and after that to the Federal Court.

Penalties

Penalties are calculated as a percentage of the tax shortfall. The extent of penalties depend on the perceived culpability of taxpayer as well as the tax agent.

Penalties start at 25% of the tax shortfall for failure to take reasonable care or adopting a position that is not reasonably arguable. Go up to 50% for 'recklessness'. And might go to 75% for an intentional disregard of a tax law. In certain circumstances there is a further possible uplift of 20%.

You can ask the Commissioner for a remission of penalties as well as interest. Whether you will be successful is a different matter, but there is the chance that you will.

Interest

There is Shortfall Interest Charge (SIC) as well as the more common General Interest Charge (GIC). GIC is the most expensive credit you can go for. So don't use the ATO as a bank.

Outcomes

You have three options. You either accept the ATO's position (i.e. cop it) or you get the ATO to agree with your position or you battle it out in court or at the AAT.

Map out possible outcomes, tax consequences and their likelihood when considering settlement.

Prevention

To avoid a dispute seek upfront advice, especially before entering into large transactions. Maintain good records – documentation of your position is key to a successful outcome.

The onus of proof is on you as the taxpayer, not the ATO. If not sure how to handle a case, seek a private ruling or contact the ATO's Early Engagement team.

Support

The Government has created a small business concierge services within the Australian Small Business and Family Enterprise Ombudsman's office (ASBFEO). Features include:

- prior to applying to the AAT, unrepresented small business can receive one hour of legal advice on payment of a \$100 co-payment;
- after lodging the application for review with the AAT, the small business taxpayer can benefit from a second hour of advice from an experienced small business tax lawyer for free (paid by ASBFEO);
- a case manager to provide support;
- a standard application fee of \$500;
- fast-tracked decisions to be made within 28 days of a hearing;
- and if the ATO appeals the AAT decision to the Federal Court it will pay the reasonable costs of the small business.

Recovery

In the past the ATO has been fairly forthcoming with their recovery action.

On 29 April 2019, the ASBFEO released its review of the ATO's debt recovery action for small businesses in dispute at the AAT. In particular, it has recommended for the ATO to immediately cease debt recovery action against any small business with a dispute before the AAT. The Commissioner responded on the same day that

he will give consideration to these suggestions.

MORE

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