

TAX TALKS

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

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10 | Objections & Appeals

A tax audit ending badly doesn't have to be the end. You got options. From objections and appeals to much more.

Objections & Appeals

Once the audit is over and you got the new assessment, the ball is in your court. What do you do next? Let things be or continue the fight? You can:

- 1 – Let things be – Accept the assessment – Seek a payment arrangement
- 2 – Negotiate – Talk outside of court – Seek to settle
- 3 – Object and appeal – Fight the assessment – Settle through an ADR
- 4 – Quash the assessment – Seek declaratory relief of conscious maladministration

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1 – Let Things Be

If you decide to accept the acceptance, there is nothing else to do but manage your tax debt – working out a way to pay – often through a payment arrangement.

2 – Negotiate

You can always try to negotiate with the ATO and settle outside of court.

- a) Consider your credit rating at the ATO. If it is good, the ATO will talk.
- b) Propose different payment options
- c) Show how the ATO will be better off under these
- d) Show that you will be able to pay
- e) Promise to pay and keep that promise
- f) Stress the technical strength of a possible objection and appeal
- g) Apply for debt relief or hardship review in exceptional circumstances
- h) Avoid statements that you do insolvent trading

3 – Objections and Appeals

So you decide to fight the assessment. How much time do you got? This is crucial. Every assessment gives you an objection deadline. This time limit is usually tight and just a matter of weeks. If you miss the deadline, the Commissioner might still allow your objection to go through but you are at their mercy. They might let you through or they might not. So make sure you object in time.

Respond to the specific issue at hand. Outline the facts, state the reason for certain actions and provide evidence. Don't miss anything vital.

Remember that a new officer is looking at your case with little prior knowledge of the facts. And that is a good thing. You want a fresh pair of eyes. No preconceived ideas. So make it easy to get across the issues.

Control the information flow. This applies to the entire life cycle of the dispute. Only disclose information that is relevant. Don't open up a can of worms prompting more questions.

Seek further tax and legal advice if you need it. The stakes are getting higher.

Keep your objection wide and broad. In any subsequent appeal you are limited to the grounds stated in your objection. So keep it as wide as possible. Make sure you include penalties. You can only bring up later what you mention now.

Consider whether there are any tax administration issues. Was the assessment out of time? Is information protected by legal professional privilege?

Always work on tax debt management. Unless you already paid the full debt, this will be an ongoing issue from assessment to final payment.

And most of all never take your eyes off the ball. The ATO has 60 days to respond to your objection. Use this time to gather further information and evidence.

You might receive a favourable decision. The ATO issues a new assessment with no shortfall and you receive a refund of the additional tax paid. Happy End.

Or the objection officer doesn't get your point of view and rejects your objection. Now that you got a decision – even though it isn't the one you wanted – you can appeal. Not a minute before. No decision, no appeal.

If the ATO seems to be fishing or delaying the objection review, consider gaining a default rejection so you can bring the dispute quickly to the next stage, ie appeal (s14 ZYA TAA 1953). This is also called serving a s14 ZYA notice.

AAT

Who do you appeal to? Appealing to the Australian Administrative Tribunal (AAT) rather than the Federal Court has many advantages.

The AAT can protect your privacy. Upon request the case ruling will not include your name but will include a non-identifying description like "The Engineering Manager", "Taxpayer 123" or similar. The Federal Court can't do this. Their ruling would be "Your name v FCT [the relevant year]".

The rules of evidence don't apply at the AAT. So it is less costly to provide evidence. You don't have to get everything witnessed, certified or translated – you do for some evidence but a lot less.

The AAT can decide on questions of fact and law. The Federal Court can only decide on questions of law. So if a question of fact is in dispute – for example whether board meetings were held in Australia or when you actually signed a document – then you can only appeal to the AAT.

The AAT allows self representation so you can represent yourself or your client at the AAT. At the Federal Court you need a lawyer and that is expensive.

The AAT can exercise the Commissioner's discretion. So they can remit penalties or allow a late appeal. The Federal Court can't. They are limited to confirming or rejecting the Commissioner's previous decisions.

And last but not least you can still appeal to the Federal Court later on questions of law. So you don't lose this option by first going to the AAT.

Federal Court

Appealing to the Federal Court rather than the AAT makes sense for narrow technical issues. And the Federal Court can make a declaratory relief under s39B of the *Judiciary Act 1903* which the AAT can't.

But that is about all there is. Appealing to the Federal Court is usually more costly since the rules of evidence apply, you need legal representation and are hit with a higher fee structure.

The fact that the Federal Court can award costs and the AAT can't, is not necessarily an advantage. It is great when you win. But not great at all when you lose and have to cover your own legal costs as well as the ATO's.

Full Federal Court

After the Federal Court you can appeal to the Full Federal Court. The Full Federal Court usually has three judges rather than just one.

High Court

You could even appeal to the High Court if you received special leave. But this is rarely granted for a tax dispute. Appealing to the High Court is an expensive exercise.

Alternative Dispute Resolution

You always have the option to settle with the ATO before the actual hearing. This is called Alternative Dispute Resolution – ADR. Most tax disputes at the AAT and Federal Court settle in an ADR.

Quash the Assessment

And then there is one more way to get around an adverse assessment – quashing the assessment due to conscious maladministration. This is an option when you encounter corruption, fraud, bribery, dishonesty or some sort of bad faith while dealing with the ATO.

In *FCT v Futuris Corp Ltd* [2008] the assessment was quashed due to bad faith. And in *Denloy v FCT* [2008] the assessment was quashed as the assessments had been based on stolen information.

Quashing an assessment means that the Federal Court or High Court void the assessment on the grounds of conscious maladministration. The official term is seeking declaratory relief to declare that the assessment process constituted conscious maladministration. This is an option per s398 of the *Judiciary Act 1903 (Cth)* for the Federal Court and per s75(v) of the *Constitution of Australia* for the High Court.

However, quashing an assessment is extremely difficult to pull off. You can try, but really hard to get through.

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