

The Secretary
ROSA

Please find response to March 2004 Discussion Paper below

Best wishes

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1. The poor record of the Parliament in making things easier for the taxpayer, which in turn relates to the work of the parliamentary draughtsman, has been understated. Cross referencing legislation, ATOIDs, PBRs, TRs, CR's, PS's, Product Rulings etc to check consistency can be facilitated by current IT. The Parliament has refused to pass a bill requiring all tax rulings to be tabled.
2. In a number of places eg. 1.1.2, the text should say "what the ATO contends to be" matters of fact or mistakes of law.
3. The litany that self-assessment is not well understood is repeated a lot. In fact it is understood in many cases but it depends on a ludicrous assumption which is that a taxpayer can work their way through the large and conflicting corpus of tax legislation together with the other documents in Para 1. In particular S177 is so obscure as to consistently require long discussion by federal and high court judges, and the relationship between S177D and S177A(5) is poorly understood by the ATO. The latest court decisions in Cooke and Sleight have given weight to the view that the evidence tendered by a taxpayer must be given due weight, a principle consistently abused in the case of MMTEI taxpayers, despite written invitations from the ATO to provide such evidence, which was then ignored. The Cooke and Vincent cases have also highlighted the "guilt by association" section of S177D(b), in which the inferred purpose of a project manager becomes the inferred purpose (but according to S177A(5) not necessarily the dominant purpose) of the taxpayer. This must go.
4. The paper appears not to consider the issue of 221D variations which caught many MMTEI taxpayers.
5. The paper ignores the departure for MMTEI taxpayers from the consistent line in the sand policy of the ATO as enunciated by senior ATO officials to the Senate inquiry.
6. The paper ignores the fact that a PBR is only good as long as any succeeding PR doesn't contradict it.
7. The "exercise of reasonable care by the taxpayer" principle has been abused by the ATO which ignored its own TRs 94/4 and 94/7.
8. The paper tries to pretend that most taxpayers have simple returns but 50% of Australians have shares which means use of the supplementary pack at best but once "CGT uplift factor" is mentioned eyes glaze over and a tax agent is required. In addition the bodgie formula used for applying GDP as the index to some tax matters is a disgrace.
9. It was startling to discover that Rod Kemp's 1998 proposal on tax agents was still languishing. The other ludicrous aspect of self-assessment is that after having to use professional advice it is the taxpayer who is penalised (up to 50% penalty, interest at GIC) if the professional is wrong.
10. The paper assumes that the ATO consults widely. It does not consult with the ordinary taxpayer and it and the government have refused to include ordinary taxpayers in its ongoing forums - eg. NTLG, BoT, Advisory Board to BoT, TCLP.
11. The p 78 reference to ANTS subsuming the issues in the TLIP is misleading - ANTS did not deal with continued duplication of two main bodies of tax legislation.
12. The paper makes out that ATO internal review is good. How can it be when we know the ATO adopted a policy of denying all MMTEI objections across the board and that certain personnel at the top (according to impeccable authority) would "rather die than give in"? How can it be when complaints about senior staff are passed to less senior staff to deal with? The ATO has little concept of "no one shall be judge in his own cause, and "hear the other side". Hence the Taxpayers Charter must be enforceable. Mention of the Ombudsman as a reliable bulwark (or for that matter the Public Service Commissioner in relation to the APS Code of Conduct) just doesn't cut the mustard in our experience.

13. The concept that there is a debt to the state immediately upon issue of a re-assessment including GIC accumulated up to six years and penalty is quite unfair, and has led to reports of at least seven suicides of MMTEI taxpayers. It is wrong of the paper to compare this to other administrative matters where a decision may not have this instantaneous impact
14. The TCLP has been shown to be biased and to fail to give reasons for its decisions.
15. Considering the devastating impact of the recommendations of the PtIVA Panel its modus operandi has been shown to be highly questionable. Despite claims about the Commissioner's discretion it has operated as a Court of Star Chamber, and even that apparently kept minutes unlike the PtIVA Panel. The Commissioner's Crowne Plaza speech of 15th April implicitly admitted these defects and granted the right of appearance at the the Panel to the taxpayer.
16. Public rulings have been abused. eg. TR 97D/17 and its successor 2000/8 were issued after tens of thousands of people had been attacked by the ATO. In addition they contravened the no retrospectivity promise in TR 92/20. They also tried to leave open the gate for PtIVA on matters which the High Court had already decided in Lau were acceptable, whereas the correct honest and open and transparent approach after Lau was to ask the government for new legislation.
17. Estoppel of the Commissioner must be adopted.
18. The paper's faith in the AAT is marred by the exceptions to its use (despite changes recommended by the ARC in 1989), and the ATO's flagrant abuse of FOI provisions in 2000 - 2002 and orders to discover.
19. The Duke of Westminster dilemma must be resolved, and not by the courts on a piecemeal basis. "Partly or wholly for a purpose other than gaining of assessable income" is far too vague.
20. The business test is confused and as the Budplan Personal Services case shows deals unfairly with investment in R and D which may create a value -adding business. It has been confused even more by the issue of TD 96/16, which did anything but contribute to certainty. It has also not been helped by the ATO risk test which can sit at odds with prudent methods of improving a business investment, and by Product Rulings which allow the investor to buy reduced risk which the ATO has said it won't accept. (The Cooke decision says it's OK).
21. The ATO can fail to check its facts on very important matters as the Facts Sheet issued by the Commissioner to MMTEI taxpayers in June 2001 has been shown to have done. It is also confused about the practical versus the legal impact of PBRs with one Commissioner saying in writing that the Sherman -inspired PBR database was there as a source of advice for the community.
22. The US filing status deserves attention. It might do a lot to deal with the split income issue.
23. The ATO insistence on each person in an identical investment in a cooperative project requiring a separate PBR application is silly and its practical result on ATO staff time was pointed out by Senator Andrew Murray three years ago. Product rulings have overcome this to a degree. However it has taken five months so far with a six and half month end date (after applying pressure) to get a PBR on a retirement issue, one that affects tens of thousands of people and which the ATO has been aware of for at least two and probably five years. So default PBR's sound good. We fail to see why the taxpayer should be charged for clarity, when the problem may arise from lack of diligence by a Minister, Parliament or Parliamentary counsel.
24. There has been an attitude abroad by the main parties that they will leave electorally sensitive tax matters to the ATO to sort out - current evidence - dealing with the house price spiral issue in an election year by a nod and wink to the ATO to revise depreciation schedules.
25. The use of "inadvertent " on page 64 is misleading. In the MMTEI issue failure to implement the Charter by incorporating accepted principles of administrative law into its operations contrary to the Charter and the APS Values and Code of Conduct, and refusal when challenged three years ago to acknowledge this, led the ATO into error. Equally this hubris led to a situation where senior ATO officers refused to accept that incontrovertible evidence of the existence of a viable agricultural operation ran counter to their statement that little if any funds were spent on the project, even when challenged face to face in the Constitution Ave offices.

26. Tax law cannot operate as if it was based on different principles to the law generally. Taxpayers should not be able to be found guilty on the say-so of the ATO and penalised before they have had their day in court or the AAT.
27. The tax law does not meet the Universal Declaration of Human Rights Art 11 in relation to penal provisions, although the Australian HRC has got out of this because it follows the International Covenant on Civil and Political Rights Art 14 which uses the word 'criminal' not 'penal'.
28. The tax law also does not meet the Commonwealth A-G's policy on averment of intent. And *Kioa v West* should set the standard for procedural fairness by the ATO.
29. Computer generated letters to taxpayers containing threats should not be generated unless the information in them has first been double checked by a responsible officer. Threats based on incorrect information generated by inadequate search routines are occurring eg. in the bank data matching area.
30. Although the GIC contained a punitive element when it was TSPI up until 2000, the percentage as punishment has not been removed now that it is no longer punitive.