



## THE TAX INSTITUTE

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**By email:** [garnishee@igt.gov.au](mailto:garnishee@igt.gov.au)

Dear Ali

### **Review into the ATO's use of Garnishee Notices**

The Tax Institute welcomes the invitation to make a submission in relation to the Inspector General of Taxation's (IGT) review to examine the allegations made during a recent Four Corners program as well as to explore the themes arising from related complaints on the use of garnishee notices made in recent years.

The terms of reference include a focus on the ATO's:

1. strategies to manage tax debts by way of garnishee notices;
2. policies and procedures for issuing garnishee notices, including how the ATO considers circumstances of taxpayers such as vulnerable small businesses and individuals;
3. mechanisms to ensure staff adherence to its garnishee notice policies and procedures;
4. Key Performance Indicators (KPI) with respect to both tax debt collection and staff performance;
5. specific communications to staff regarding the use of garnishee notices and associated KPIs at each location of its debt recovery units; and
6. other relevant concerns or potential improvements identified during the course of the review.

### **Four Corners Program**

The Tax Institute's Senior Tax Counsel, Profession Robert Deutsch has previously made comments in relation to the Four Corners Program on the ATO's use of garnishee notices. His comments are summarised below.

Mistakes made involving the ATO can have serious impacts on taxpayers. The examples shown in the Four Corners program undoubtedly demonstrate that when material mistakes occur, they have material consequences for taxpayers.

The playing field is not level when you take into account the powers and resources the ATO has at its disposal. The ATO does offer some processes, such as facilitation, to try to resolve disputes it may have with small business taxpayers.

However, these taxpayers may struggle to correct ATO mistakes using the available processes in a cost-effective and timely manner.

We have suggested that consideration should be given to the possibility of having ATO decisions being referred to an independent body or a separate unit within the ATO for further examination in cases where there are allegations of ATO mistakes and there is financial urgency due to actions taken by the ATO. Though costly to implement and maintain, this may present a more accessible option for smaller taxpayers to challenge aspects of ATO behaviour involving allegations of mistakes.

Subsequent to the above comments being made, the ATO has publicly announced that it is expanding their independent review process to eligible small businesses. The small business pilot commenced in July 2018. This is a positive initiative that may assist in solving this issue.

### **Assessing the use of Garnishee Notices**

When considering whether any specific examples of the ATO issuing garnishee notices involves an inappropriate or unfair use of the power it is important to bear in mind the nature and purpose of the power.

The power authorises the Commissioner to divert a payment which would otherwise be made to the taxpayer in order to discharge a tax debt. The exercise of the power can cause inconvenience and commercial disruption to the taxpayer. However, the power is based on the premise that some inconvenience and disruption is justified given the desirability of discharging the tax debt and protecting the revenue.

When assessing the use of the power, consideration should be given to the competing interests at stake.

Given the purpose of the garnishee power, we recognise that it may not be sufficient to justify a conclusion that the power has been inappropriately or unfairly exercised to merely point to:

- unfortunate or undesirable commercial consequences for the taxpayer arising from its exercise; or
- the disclosure of the fact that a taxpayer may be insolvent.

Whether the power to issue a garnishee notice has been used appropriately and fairly will ultimately depend on the facts and circumstances of the case.

### **The Tax Institute – General Committee Experiences**

The Tax Institute's Dispute Resolution Committee is generally of the opinion that the ATO is working hard to achieve consistent practice in its approach to taxpayers and to work to resolve matters where taxpayers are in dispute with the ATO. The ATO has made significant inroads and has developed a range of processes which have broadly been very helpful to taxpayers.

The Tax Institute acknowledges that the ATO is increasingly focused on debt collection and has a broad range of powers, including garnishee notices to assist it in that process. The Tax Institute considers that the ATO's debt collection powers are appropriate if used as intended.

The Committee have discussed examples of cases where the garnishee powers have been used appropriately by the ATO. However, our Committee members have also noted specific examples where the powers do not seem to have been used appropriately. These examples are described below under the heading "Specific Committee Experiences".

As a general comment, The Tax institute considers that the ATO needs to improve its lines of communication between the various areas within the ATO. For example, when a matter is being discussed as part of an alternative dispute resolution process with the ATO review and dispute resolution area, or there are settlement negotiations progressing with the ATO audit team, the sudden issue of a garnishee notice by the ATO debt team can completely derail those processes. This is counterproductive.

For fairness, it is desirable that the Commissioner should consult with the taxpayer prior to issuing a garnishee notice. However, we recognise that the power may be used in circumstances where the taxpayer is in default of its tax debts and has adopted an adversarial or evasive posture with the Commissioner and the Commissioner reasonably consider that the taxpayer is taking steps to frustrate the recovery of the tax debts it owes. In such circumstances, an effective use of the power, consistent with its statutory purpose, will often demand that it be done without notice.

We realise that in such circumstances the ATO may be justified in issuing a garnishee notice with no notice (ie when there is a high probability that if notice is given the tax debt may be avoided). However, as a general rule, we consider that the relevant taxpayer and their tax agent should be given notice of the ATO's intention to issue a garnishee notice. Further, the parties should discuss whether there is an alternative solution to issuing a garnishee notice.

The Tax Institute considers that the ATO should encourage taxpayers to seek advice, and/or should involve the new Dispute Assist process to educate taxpayers prior to the issue of a garnishee notice, especially for individuals or small business. The impact of a

garnishee notice can be severe, and taxpayers need to understand they need to work with the ATO and how to do that.

In our opinion, the ATO should ensure that on all occasions garnishee notices are used as a measure of last resort, as they can be very damaging to a taxpayer's financial status, business branding and reputation if issued to third parties.

### **The Tax Institute – Specific Committee Experiences**

Members of The Tax Institute's Dispute Resolution Committee discussed specific examples where their clients had a positive experience when the ATO had used its power to issue a garnishee notice.

Some Committee members noted that in their clients' cases, the ATO had used its powers appropriately and worked effectively with the adviser to assist the taxpayers concerned. Further, some Committee members noted that their clients' matters were generally resolved by entering sensible payment arrangements and that garnishee notices were generally only used as a last resort in their experience.

However, our Committee members also discussed examples where it appears that the ATO may not have used their garnishee powers appropriately.

For example, one Committee member noted that:

*The taxpayer was under investigation for major fuel tax fraud and was asked to attend a meeting with the ATO to discuss the findings of the investigation. At the meeting, in addition to handing over its findings, the ATO unexpectedly served multiple assessments on the taxpayer, which included the maximum penalty amount for fraud and evasion. Also, unknown to the taxpayer, the ATO was simultaneously issuing garnishee notices to the taxpayer's major clients, all of whom were blue chip ASX listed companies. Upon receipt of the garnishee notices, the taxpayer's clients immediately called the taxpayer to find out what was going on, to which the taxpayer responded that it was being accused of major fuel tax fraud by the ATO, which the taxpayer vigorously denied. Unfortunately, all of the taxpayer's clients took the position that they should not be dealing with a company the subject of such accusations and all terminated their longstanding supply contracts with the taxpayer within 48 hours of receiving the garnishee notices. The result was that the taxpayer's reputation was destroyed and a highly successful business that had taken 20 years to build up was destroyed overnight. The ATO also seized several million dollars from the taxpayer's bank account, which deprived the taxpayer of its working capital. Within a matter of days, the taxpayer had no choice but to go into administration.*

Another example provided by a Committee member involved the following facts:

*Our client runs a business that employs over 130 people Australia wide. The ATO initially conducted an audit and during that process the taxpayer's former legal representatives attempted to settle the matter based on a number of facts and a comprehensive review of the accounting treatment of the relevant transactions. The ATO alleged that the tax debt was almost three times what the taxpayer thought it was. Unfortunately, it did not settle during the audit, and objections were lodged. While waiting for the objections to be allocated to a case officer, and completely **without notice**, the ATO issued a number of garnishee notices to key supply partners – including their bank, based on their view of the tax debt from the audit.*

*While the ATO is legally able to take recovery action, such as issuing a garnishee notice, without prior notice and without allowing the taxpayer to go through the objection process, it can and, in this case did, put the business in a compromised trading position.*

*The taxpayer had to explain their attempts to resolve the matter to their bank and their clients. We can imagine that on receipt of a notice their bank would have questioned why they had such a high debt, why the debt had not been paid and what other financial issues the business was facing.*

*It should be noted that the garnishee notice stated that the taxpayer owed a particular amount, and that amount was what was correct in the ATO's view and not the taxpayer, and was determined without having gone through the objection process.*

*In the end it was good news for our client, as we were able to make immediate contact with senior debt officers at the ATO to discuss and negotiate a fair and appropriate outcome for our client. As a result, the garnishee notices were withdrawn (even though a full disclosure of the issues and steps being taken was required to the bank).*

Another example provided by a Committee member involved the following facts:

*This case involved a covert audit - the taxpayer had no idea that they were being audited, until a week or so before the sale of their family home was due to settle. The ATO without notice issued audit reasons for decision, amended assessments with substantial penalties and a garnishee notice to the purchaser of their house.*

*In this case, the client was selling his house to pay down business debts and loans to make a fresh start. The ATO's argument that they were concerned about the dissipation of funds did not make sense - the taxpayer was not selling their house to avoid paying tax, as they did not even know they had a tax debt until a just before settlement.*

*We stepped in and negotiated with the ATO on the amount of the disputed ATO debt (which was solely based on the figures the ATO had determined from their covert audit) and to allow their sale to go through, with some funds (but not the amount of the disputed debt) being set aside to potentially pay the tax debt.*

Another example provided by a Committee member involved the following facts:

*In this example, the ATO carried out reviews (including a comprehensive risk review) in respect of the taxpayer in 2009, 2010 and 2014. No adverse findings were made by the ATO in any of these reviews.*

*The ATO subsequently commenced an audit into the taxpayer's affairs in or around June 2015, and, as part of the audit process, made a request in late 2016 that the taxpayer attend an interview. The taxpayer prepared for the interview but had no contact from the ATO for approximately six months. Then, without notice, the ATO issued audit reasons for decision and amended assessments (a substantial component of which was interest and penalties). The ATO also issued a large number of garnishee notices on bank accounts and various entities associated with the taxpayer which garnisheered significant funds.*

Our Committee members also provided other specific examples, that may represent an inappropriate (and counterproductive) use of the ATO's powers to issue garnishee notices based on the limited facts disclosed to us. Extrapolating from the specific examples that were discussed by the Committee, we consider that circumstances may mean that it is inappropriate to issue a garnishee notice:

- when settlement discussions are in progress;
- when the taxpayer is selling its business to fund a tax debt; or
- when the garnishee notice is in respect of a certain percentage of income a business is receiving via EFTPOS when no justification is given for the particular percentage used.

However, in all cases, all the facts and circumstances (including the relevant competing concerns) should be considered when assessing whether the use of a garnishee notice is appropriate.

### **Garnishee Notices and KPIs**

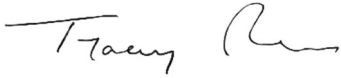
In our opinion, it would be inappropriate to link the KPIs of ATO debt collection staff to the issue of garnishee notices.

In our opinion, it would be more beneficial for the tax system to link the KPIs of the ATO's debt collection staff to resolution rates (including entering into payment arrangements) and future compliance by taxpayers who have previously failed to pay their tax debts.

\* \* \* \* \*

If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read "Tracey Rens". The signature is fluid and cursive, with the first name "Tracey" written in a larger, more prominent script than the last name "Rens".

**Tracey Rens**  
President