



## THE TAX INSTITUTE

19 March 2019

Mr Jeremy Geale  
Deputy Commissioner, Review and Dispute Resolution  
Australian Taxation Office  
GPO Box 9990  
Sydney, NSW 2001

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Mr Bernard McCabe, Deputy President  
& Head of the Taxation & Commercial Division  
Administrative Appeals Tribunal

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Dear Mr Geale and Mr McCabe

### **Small Business Taxation Division – Administrative Appeals Tribunal**

The Tax Institute refers to the Administrative Appeals Tribunal's (**AAT's**) Guide to the Small Business Taxation Division (**Guide**). We recognise that our submission is outside the original consultation period. However, we respectfully request that our submission be considered.

The Tax Institute supports the establishment of the Small Business Taxation Division (**Division**). However, some aspects of the Division require further consideration.

The purpose of this submission is to outline the main issues that need to be considered as the Division is developed. In addition, The Tax Institute suggests that further consultation be undertaken by the AAT and ATO around 12 months after the Division has commenced operation to assess its effectiveness.

### **The Guide – content comments**

The Tax Institute considers that the Guide should be amended to deal with the following points:

- As there will be potentially many self-represented small business taxpayers, the procedures at the AAT should be clearly articulated – a flowchart could be produced for this purpose with the various timeframes outlined.

- The Guide should clearly identify the differences between the new Division and the existing Taxation Division.
- If there are taxation issues that will not be heard by the Division, this should be clearly stated. The Tax Institute considers that there is a lack of clarity on this point.
- The concept of a “small business taxation decision” needs to be defined.
- Clarification is needed in relation to which taxpayers are eligible to be heard in the Division. The Tax Institute’s view is that the Division should be available for:
  - any small business entity as defined (ie below \$10m aggregated turnover – no matter what year is at issue - even if the former \$5m threshold was applicable in the relevant year); and
  - any investor in any such entity where the tax issue relates to that investment.
- The comment in the Guide about the engagement of legal representatives and the Commissioner’s payment of costs needs clarification. In this regard, we refer to the comments below in relation to the draft Dispute Resolution Instruction Bulletin DR IB 2019/1.
- While The Tax Institute is supportive of the ASBFEO Concierge Service and other pro bono initiatives, the practical value of these initiatives should be tested with taxpayers. While these are positive measures, The Tax Institute is concerned that these initiatives may not be effective to provide substantial assistance to small business taxpayers in practice.

### **Draft Dispute Resolution Instruction Bulletin DR IB 2019/1**

Draft Dispute Resolution Instruction Bulletin DR IB 2019/1 (**Bulletin**) sets out the ATO’s policy and principles on conducting litigation in the Division.

The Bulletin provides that the taxpayer will be entitled to secure funding from the ATO for the purposes of sourcing equivalent legal representation to an amount equivalent to that expended by the Commissioner where there is a review application for a small business taxation decision in the Division and the ATO engages an external legal service provider and the taxpayer does not have legal representation.

The Tax Institute supports the intention to provide funding for advisory costs for small business entities in circumstances where the Commissioner engages external counsel for matters before the Division.

However, The Tax Institute’s considers that even where the Commissioner does not engage external counsel, some cost support should be provided for small business taxpayers in some circumstances. This would recognise the considerable power imbalance between the ATO and taxpayers in certain circumstances - especially where the tax issue is complex and the taxpayer is self-represented. The ATO should recognise that the involvement of its *internal* lawyers may add to that power imbalance.

The Tax Institute also comments as follows:

- If a taxpayer has existing representation at the time that the Commissioner decides to engage external counsel, funding should be available for that representation. That is, funding should not be limited to circumstances where the taxpayer has no representation at all.
- The Tax Institute considers that it is likely that there will be a *considerable* gap between the discounted costs charged to the ATO for legal services and the costs charged to taxpayers. Any such gap should be taken into account when determining the funding available to taxpayers. The Tax Institute suggests that the funding available should take into account the undiscounted rates of the lawyers involved.
- Guidance should be provided about funding if a matter proceeds to the Federal Court.
- Funding is based on an estimate of costs. Further consideration should be given to whether estimates and funding levels can be revised throughout the process.
- The Tax Institute notes that decisions in relation to funding are to be made in the Test Case Funding team within Review and Dispute Resolution. The Tax Institute considers that the timeliness of the funding decisions will be of significant importance. In The Tax Institute's view, there should be a set administrative timeframe (of no longer than 10 business days) in which decisions about funding should be made.

The Tax Institute also considers that the draft Bulletin should cover small business taxation debt. In particular, if a matter is before the Division, in all but very extraordinary circumstances, the ATO should not be permitted to pursue the taxation debt. Small business taxpayers can be put out of business and it can cause considerable stress if a debt that is genuinely disputed is pursued by the ATO during the dispute phase.

While in principle PS LA 2011/4 allows for discretion to accommodate the needs of all taxpayers, ultimately PS LA 2011/4 is generic in nature. In practice it is understood that there are instances where PS LA 2011/4 is applied in a mechanical manner to small businesses potentially causing serious negative consequences. Accordingly, and given that this is a framework dealing specifically with the small business community, the ATO should issue a PS LA dealing with disputed debts in this particular context.

Finally, The Tax Institute considers that the practices in relation to disputed taxation debts of small business entities need to be reviewed following a period of the Division being in operation to ensure that those practices are effective.

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

Yours sincerely



**Tim Neilson**  
President