

Karen Payne
Inspector-General of Taxation and Taxation
Ombudsman

GPO Box 551
Sydney NSW 2001

Email: objections@igt.gov.au

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CPA Australia Ltd

ABN 64 008 392 452

Level 20, 28 Freshwater Place
Southbank VIC 3006 Australia

GPO Box 2820 Melbourne
VIC 3001 Australia

P 1300 737 373
Outside Aust +613 9606 9677

cpaaustralia.com.au

Dear Karen

The ATO's administration and management of objections

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 170,000 members in over 100 countries and regions. We make this submission on behalf of our members and in the broader public interest.

Our submission in response to the Inspector-General of Taxation and Taxation Ombudsman's (IGTO) investigation into the **ATO's administration and management of objections** focuses on the experiences of advisers, particularly tax agents, and their small business and individual clients.

Awareness of rights and familiarity with processes

Given the size and diversity of the Australian taxpaying population, the likelihood of a taxpayer being subject to ATO audit is relatively small¹. This means that the awareness of and familiarity with ATO compliance and dispute processes is limited, even amongst advisers, many of whom will rarely be contacted by the ATO about their clients' affairs.

Positively, our members report that many ATO queries are resolved satisfactorily in the first instance, particularly when related to matters of fact (e.g., providing substantiation or explaining specific transactions). It is the cases where there are interpretive issues or where the ATO does not accept the explanation or documentation provided by the taxpayer that tend to progress through to audit phase.

At this point, the taxpayer and their adviser can be confronted by a lack of experience and resources, meaning that audits may be finalised without the taxpayer providing all relevant information and legal reasoning.

We are aware of cases where taxpayers and their advisers have accepted ATO decisions when the taxpayer's position was likely correct, due to cost and knowledge barriers. Extended and detailed cases are costly, and the tax in dispute may ultimately be less than the cost of objecting to the ATO's decision, leading the taxpayer to accept an amended amount even when an objection had a high likelihood of success. Often, the taxpayer and their adviser believe they have put forward all relevant arguments and evidence but it has led to no change in the ATO position. Therefore, they do not have confidence that lodging an objection will change the outcome.

In other situations, the finalisation of the audit triggers the engagement of a specialist adviser who can better formulate the necessary arguments and gather supporting evidence for an objection. These specialist advisers are experienced with the various avenues available to resolve disputes, making it easier for both the ATO and the taxpayer to come to a resolution.

¹ On average, the ATO adjusts around 1.2 per cent of returns through audit (between 441,300 and 531,00 per year). Around 26,100 disputed cases are resolved at the objections stage, equivalent to around 5 per cent of adjusted returns. ATO, Dispute management, **Commissioner of Taxation annual report 2020-21**, p. 186

However, access to proper review should not be restricted to those who can afford it. We therefore support the IGTO's recommendations from the [Investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal](#) (Investigation into the ATO's communication of taxpayers' rights) to improve the explanation of decisions at the audit stage and help taxpayers and their advisers access and navigate the objections process. If effectively addressed by the ATO, we would expect to see an increase in the number of complaints and objections as taxpayers and their advisers become more confident in asserting their rights and are better supported by the ATO to access review processes.

In addition to the IGTO's areas of examination outlined in the [Terms of Reference](#), it may also be beneficial to consider the ability for small business and individuals to access the objections process in a cost-effective manner in the first place. For example, a service to help taxpayers and their advisers decide whether to proceed with an objection and what might be involved, or a streamlined handover process that minimises the cost to and effort required of the taxpayer and their adviser. Greater awareness and use of ATO in-house facilitation may also be of benefit, although the effectiveness of this process in resolving disputes is unclear.

The objections process

Small business and individuals often have limited funds to expend on tax services, let alone legal representation, and they are often intimidated and overwhelmed by the presence of the ATO. Advisers, particularly tax agents, will often represent or support their client in a review, dependent on the terms of engagement and funds available.

Prior to the objection stage, taxpayer and adviser experiences can include:

- A lack of communication about the issue and the progress of the case
- Statements from ATO Client Engagement staff such as 'I don't have any choice', 'I can't do anything about it' or 'well, you can object if you don't like it'
- A sense of not being heard. That is, an inability to hold open discussion about the issue, what the issues are, how the query could be satisfied and the technical reasoning behind the decision when made
- A perception that a checklist or pro forma approach is being used by ATO Client Engagement staff, meaning that alternative positions or different forms of evidence may not be properly considered
- High, and possibly unreasonable, expectations from the ATO in relation to information and documentation that goes beyond what is likely required to establish a reasonably arguable position
- Unreasonable timeframes to respond to information requests, with ATO Client Engagement staff then taking weeks or months to respond.

Therefore, when the objection is lodged, the taxpayer and their adviser are often seeking a "fresh set of eyes" over the case. It is also, in many cases, the final opportunity for review as the cost of progressing further to the Administrative Appeals Tribunal or Federal Court can be prohibitive.

The ATO's [information](#) on objections is clear on its approach, particularly efforts to ensure independence of the reviewer from the original decision-maker. However, concerns have been raised that in practice:

- Case records may not be complete, with certain communications or documents not attached
- Case records and decisions may include conclusions that are not supported by evidence
- Discussions between the reviewer and original decision-maker have the potential to introduce bias into the review process
- Where senior ATO staff are involved in the original decision, reviewers may be reluctant to question or change the decision
- It is natural that there is an inherent institutional bias towards the revenue, however, it's unclear as to how much this is openly acknowledged and mitigated.

Greater insight into the ATO's governance of the independence of the objections process would provide assurance that taxpayers will receive independent review, and potentially identify areas where independence could be at risk.

The ATO should also commit to contacting the taxpayer or their adviser when an objection is lodged², including providing direct contact details and explaining the process. This may also include a discussion about the technical issues and ascertaining if further information would assist.

"Strategic considerations" and "broader strategic issues" are listed as being of relevance to the reviewer's decision, without being clear as to what is meant by the ATO. Taxpayers will generally expect to have their case assessed on its individual merits and to be treated accordingly. Where a decision on the case is dependent on factors that go beyond the taxpayer's case, it is essential that this is clearly explained and documented by the ATO at the earliest possible stage. A concern is that most cases fall under one ATO strategy or another across a varying spectrum of behaviours and risks, so taxpayers and their advisers cannot be certain about how an objection might be treated. Where strategic considerations are found to be of importance, these cases should be progressed to test case funding or litigation in a timely manner, and other similar cases – both in Client Engagement and Objections and Review – should not be stockpiled or delayed as a result. There should also be assurance that sufficient evidence and argument are available to support the decision that the case is of strategic relevance, given that it is likely to significantly affect the taxpayer's costs and negotiating position.

Our members have also observed that going to objection often involves significant additional work. Developing and evidencing the basis of the objection can require extensive research into tax legislation, case law and rulings that is not usually done during the audit phase as well as the need to provide further details and explanations. Preparing an effective objection may also require the engagement of specialist tax advisers with experience in audits and disputes, often at a cost which is not affordable for many small businesses and individuals.

As a result, we would expect the quality of objection submissions received by the ATO to be highly variable and for reviewers to be able to identify those with limited experience or knowledge of objections. Consideration should be given to how this group can be best supported.

Possible solutions could include:

- Consider establishing a new role or broadening the IGTO's role to encompass an advocacy function like that of the United States Internal Revenue Service (IRS) [Taxpayer Advocate Service](#) (TAS). This would enable taxpayers and their agents to access support during both the audit and objection stages
- Establishment of an external panel focused on small business and individuals' objections and which can provide independent advice
- A commitment to providing additional information and guidance on both the process and the issues in dispute to ensure taxpayers and their advisers are able to consider all relevant aspects of the case.

Ultimately, the goal is that taxpayers and their advisers are able to have their issue reviewed with proper consideration of the relevant laws, cases and rulings and without bias, and that the ATO position is one that withstands scrutiny and would be successful at a tribunal or court.

Penalties objections

In some cases, the primary tax is not in dispute but rather the level of penalties. In 2020-21, the ATO imposed penalties for intentional disregard of a taxation law more than 26,600 times (\approx 5.5 per cent of all audit amendments) followed by recklessness (\approx 4,900 times) and then failure to take reasonable care (\approx 1500 times)³.

² ATO information currently states, "We **may** contact you or your representative to discuss your objection, or request further information. We will also discuss how long your objection may take to resolve." (**emphasis added**) ATO, [How we deal with your objection](#), viewed 23 March 2022

³ ATO, [Overview of behavioural penalties in 2020-21](#), viewed 23 March 2022

Comment has been made by members that, while in many cases the ATO does not apply or fully remits penalties, when the decision to apply penalties has been made, these tend to be applied at one level higher than what the taxpayer and their adviser would expect (i.e., 75 per cent penalties for intentional disregard are applied instead of 50 per cent for recklessness). There is also a concern that penalties for recklessness are being imposed to circumvent the penalty safe harbour⁴ available to taxpayers who engage a registered tax or BAS agent. An objection is not always lodged due to the previously challenges in constructing an effective objection. For those that are lodged with the ATO, it would be helpful to review this data to identify whether penalties are an issue.

A positive example of responsiveness by the ATO was in relation to the remission of Part 7 penalties under the *Superannuation Guarantee (Administration Act) 1992*. It was found that PSLA 2020/4 was overly punitive and limited the ability for ATO Client Engagement officers to remit penalties. We observed that taxpayers were objecting due to the unreasonable results. The ATO addressed this by replacing PSLA 2020/4 with a new approach in PSLA 2021/3, enabling more reasonable decisions and reducing objections. A remediation process was also undertaken to ensure the updated approach was also applied to closed cases.

Closing comments

The right to review is fundamental to the Australian tax system and an independent and effective objections function is important to resolve disputes, reduce taxpayer costs, improve processes and maintain fairness. The importance of enabling reviewers to operate objectively, independently and without bias cannot be understated, as well as the need to appropriately manage power, experience and knowledge differentials between the ATO, and taxpayers and their advisers.

The IGTO's earlier Investigation into the ATO's communication of taxpayers' rights found a large awareness gap, including amongst advisers, of the various avenues available. This current investigation will provide further transparency with respect to the objections processes and outcomes, which can inform strategies to build taxpayer and adviser capability in this area and can improve interactions with the ATO.

If you have any queries about this submission, contact Elinor Kasapidis, Senior Manager Tax Policy on 0466 675 194 or elinor.kasapidis@cpaaustralia.com.au.

Yours sincerely,

Dr Gary Pflugrath FCPA
Executive General Manager
Policy and Advocacy

⁴ Subsection 284-75(6), *Taxation Administration Act 1953*