

19 January 2022

Director  
Tax Administration Unit  
Individuals and Indirect Tax  
Treasury  
Langton Cres, Parkes ACT 2600

By email: [taxdebtconsultation@treasury.gov.au](mailto:taxdebtconsultation@treasury.gov.au)

Dear Sir/Madam,

## **Extend the power of the AAT to pause or modify ATO debt recovery action**

CPA Australia represents the diverse interests of more than 168,000 members, working in over 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

We make this submission in response to Treasury's **exposure draft legislation** to extend the power of the Administrative Appeals Tribunal (AAT) to pause or modify ATO debt recovery action in relation to proceedings before the Small Business Taxation Division of the AAT. We support efforts to provide small businesses with affordable, sensible and accessible options when dealing with the ATO, given the significant differential in power and resources, especially in dispute situations.

In 2019, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) found that, "ATO debt recovery action happens in a sizable number of cases which are before the AAT (at least 12 per cent) and that such action can severely impact a business' ability to prosecute its case and carry on its business". It recommended that small business taxpayers be able to seek a stay order of ATO debt recovery action before the AAT<sup>1</sup>.

In response to the ASBFEO, the ATO submitted that, "For the vast majority of small businesses who have a disputed debt, we will not enforce recovery of a tax debt, including even parts of the debt which are not in dispute. The only time we will recover debts in dispute is in exceptional circumstances where we see evidence of phoenixing, fraud, criminality, serious tax evasion, dissipation of assets or transfer of funds to defeat the collection of tax. These are very rare cases"<sup>2</sup>.

The **exposure explanatory memorandum (EEM)** confirms that, "in practice, there are very few cases in which the Commissioner pursues recovery action in relation to a disputed debt", suggesting that ATO staff are operating in line with the relevant policies and practice statements. However, given the prohibitive costs of applying for judicial review of debt recovery actions, enabling the AAT to hear such applications – even when they may be rare – improves access to the justice system and connects the tax dispute with the debt recovery actions at the Tribunal, as opposed to having issues related to the same case heard before different courts and tribunals.

The EEM explains that the proposed section 14ZZH(3A) is intended to mitigate the risk that the AAT process is used by certain taxpayers to frustrate debt recovery actions. This requires, amongst other things, for taxpayer to satisfy the Tribunal that the application is unlikely to prejudice or unduly restrict the administration of a taxation law, unlikely to undermine the objective or purpose of a taxation law or the integrity of the taxation system and is not otherwise intended to impede the proper administration of a taxation law. Section 14ZZH(3A) places the burden on the applicant to demonstrate to the AAT that these specific requirements are satisfied. This is an incredibly high threshold for the applicant. As a result, the proceedings may ultimately be no more certain or less costly than an application to the Federal Court, which is counter to the policy intent.

As a more general observation, the speed at which tax disputes are processed by the AAT has an impact on the urgency of debt recovery action. The greater the time that elapses, the greater the opportunity for restructuring or asset dissipation to occur, leaving creditors and insolvency practitioners with little to pursue. It is therefore important to ensure the AAT, and more specifically the Small Business Taxation Division, is properly resourced to ensure that tax disputes are heard expeditiously so

<sup>1</sup> Australian Small Business and Family Enterprise Ombudsman, 2019. p.4, Executive summary, **Australian Taxation Office – enforcement of debt recovery**

<sup>2</sup> Ibid, p.18.

that the final tax liability can be determined as soon as practicable This would reduce the need for the use of orders to restrict the Commissioner of Taxation in his debt recovery actions.

We recommend:

- that section 14ZZH(3A) be reviewed to ensure that an unreasonable burden is not placed on the taxpayer. For example, where subsection (iii) is satisfied by the taxpayer, this might include shifting the burden to the Commissioner of Taxation<sup>3</sup> for subsections (i) and (ii)<sup>4</sup>
- a review of these provisions at some point (e.g., five years after commencement) to ensure that they operate effectively, are not being abused and are not unreasonably delaying other necessary parts of the process (e.g., winding up proceedings)
- that the AAT is appropriately resourced to ensure the timely resolution of tax disputes to enable efficient debt recovery actions when necessary.

The submission made by the Business Law Section of the Law Council of Australia draws attention to the existing power of the AAT to stay and submits that current powers would be sufficient to give effect to the policy intent, rendering the proposed paragraph 14ZZH(3A)(b) unnecessary. CPA Australia is supportive of the Law Council of Australia's proposed preferred approach as well as the comments made in relation to the EEM's reference to the principles underlying the Law Administration Practice Statements fettering the independence of the AAT.

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](mailto:elinor.kasapidis@cpaaustralia.com.au).

Yours sincerely,

Dr Gary Pflugrath  
Executive General Manager,  
Policy and Advocacy

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<sup>3</sup> Given that the ATO approach is to only take recovery action in exceptional circumstances, we expect that the ATO will hold the required evidence to demonstrate that an order would prejudice or unduly restrict the Commissioner, or that it would undermine tax laws or integrity of the tax system.

<sup>4</sup> E.g.,

The Tribunal must not make an order unless the party requesting the order (who is not the Commissioner) satisfies the Tribunal of:

- the application for review and the request for making the order is not frivolous, vexatious, misconceived, lacking in substance or otherwise intended to impede the proper administration of a taxation law.

The Tribunal must not make an order if the Commissioner satisfies the Tribunal of:

- the order is likely to prejudice or unduly restrict the Commissioner's administration of a taxation law;
- the order is likely to undermine the objective or purpose of a taxation law or a provision of a taxation law, or the integrity of the taxation system as administered by the Commissioner.