Australian Government

Australian Small Business and Family Enterprise Ombudsman

AUSTRALIAN TAXATION OFFICE PRACTICES REGARDING SMALL BUSINESS

The Australian Small Business and Family Enterprises Ombudsman (ASBFEO) welcomes the opportunity to provide input into the investigation of the Australian Taxation Office (ATO), announced by Minister for Revenue and Financial Services, Kelly O'Dwyer on 11 April 2018, following allegations of unfair treatment resulting from the joint *Fairfax/ABC Four Corners* reporting on 9 April 2018 of heavy handed tactics by the ATO in respect of small business.[1]

The ASBFEO is initially providing input to the investigation by supplying data from small business and insights into the operation of the system to the Secretary to the Treasury. The Secretary will investigate the administration of the taxation laws by the ATO as they are applied to small businesses and make recommendations for improvements to the administration of those laws by the ATO.

In the two weeks since the *Fairfax/ABC* report, the ASBFEO has received in excess of 100 requests for assistance from small businesses and advisors in relation to their own experiences with the ATO. The level and nature of these requests for assistance point to the presence of serious system-wide issues impacting small business. The ASBFEO is working with the small businesses to understand the various issues in each matter and provide tailored assistance/referral for each of the small businesses.

Executive Summary

In the tax system, there is a fundamental denial of access to justice for small business due to the following factors:

1. The ATO has unparalleled authority in terms of its resources, administrative powers and access to legal expertise;
2. The ATO operates its systems to target revenue collection (whether by tax officer KPIs or otherwise) to ensure revenue collection without dealing in a tailored way with individual small business taxpayers. This means that broad approaches are necessarily applied without consideration of their appropriateness and impact in individual cases;
3. The ATO has power to amend taxpayer assessments without notice and move to recover amounts without providing small business with sufficient opportunity to object;
4. The ATO can even (and does) take away the ability of a business to operate through denying it an ABN or cancelling its ABN;
5. The ATO can access taxpayer bank accounts through garnishment before a taxpayer has any knowledge that there is even an issue;
6. Internal review processes of the ATO lack true independence as they work within the same legal approaches as the original decision-maker. By using ATO officers the review rests upon the same interpretative statements and cultural norms underlying the original decision and therefore unlikely to produce a different result.

[1] Ombudsman media release – 16 April 2018

7. It is not financially viable for small business to fight the ATO beyond internal review processes given the cost in terms of money, time and stress, whilst small business taxpayers are fearful that should they object then they will be targeted;

8. Even where the ATO admits that it has been wrong, compensation through the CDDA or otherwise is not of an appropriate level to compensate for the damages incurred by small business.

The following are overarching issues raised by small business:

- ***Abuse of ATO power*** – ATO using heavy-handed practices and unsignaled changes in approach, targeting small business. Where a taxpayer objects to an ATO audit decision (assessment), the taxpayer must lodge an objection 'amended assessment'. However, even if a taxpayer objects to and disputes a debt, the debt is at law immediately payable. This is then regularly enforced by the ATO through garnishee orders and a writ for judgment imposed on the small business, whatever its size and/or financial capacity might be. This has a stressful impact on small business and will regularly make the small business insolvent since it will be unable to pay its debts as and when they come due.
- ***Timeframes/delays on decisions*** – When an alleged debt is calculated and raised by an ATO 'audit' officer and the taxpayer objects, the ATO allocates an 'objection' officer to the case. This often takes in excess of two months. This is a serious concern since the ATO obviously has a vested interest in being slow to allocate an objections' officer since it can move in the meantime to collect the debt. We understand that this is an issue in practice despite ATO policies and procedures that seek to limit this sort of behaviour by its officers.
- ***Lack of independence of objection officer*** – Clearly, the objection officer should be entirely independent of the audit officer. However, the objection officer is an ATO officer (albeit from a separate legal area) who is subject to applying the same practices and approaches that the original area applied. Further, the reviewer will normally lack small business expertise and is inculcated with the same culture as the area that conducted the original audit. Applying the same procedure and interpretation with the same culture (and lack of understanding of small business) necessarily means that the review lacks the independence that should appropriately apply to the objection.
- ***ATO processes of post-assessment –*** When a taxpayer's objection is disallowed by the ATO, the taxpayer is forced to appeal to the Administrative Appeals Tribunal and/or the Federal Court. Given the expense and time required to undertake an appeal of this nature, this presents a huge hurdle for small businesses. Should a small business choose to appeal the matter it will need to defend itself by whatever means it has available (including self-representation) against the senior legal counsel used by the ATO.

Ongoing issues with ATO processes and practices have been the subject of a number of reviews with specific recommendations being made by the Inspector General of Taxation (IGT), Australian National Audit Office (ANAO), ATO's Small Business Stewardship Group and the House of Representatives. We recognise that the ATO has placed considerable resources behind its small business unit that has championed educational and administrative (i.e. non-legislative) ways of improving governmental

dealings with small business, but this activity is limited to income taxation only and is divorced from mainstream ATO areas that deal with ABNs, debt and collection (and lacks small business expertise). Further, the small business unit will not always be aware of what various areas of the ATO are doing, and even when they do, the small business unit has no role to authorise or countermand approaches when it recognises that small businesses will be significantly impacted.

ASBFEO Recommendations

The reforms we are calling for do not reduce tax collection powers but apply to principles to ensure ATO powers are used responsibly:

Increase review independence and certainty

1. Ensure that the ATO small business unit is given appropriate oversight powers of areas of the ATO that impact small business to ensure that the ATO's focus on debt collection and revenue raising does not override its responsibilities and duty of care to small business.
2. Create a fully independent ATO internal review team with small business expertise to deliver timely and low cost dispute resolution. This could be based on the New Zealand approach and should be set up in a way that is not bound by the Commissioner's views. The internal review team must engage with small business to ensure that any appropriate evidence in support of their case is able to be presented and encourage small business to come forward without fear of retribution.
3. An independent review to be conducted of the ATO internal review team after 2 years to verify effectiveness and independence.
4. Create a fully independent low cost external review mechanism that is binding on the ATO in addition to allowing taxpayer (not ATO) appeal to existing Tribunal and Court review. This mechanism must be designed so that it facilitates a small business prosecuting its case. This independent review could be a joint operation of the IGT and ASBFEO.

More teeth and an enhanced small business focus for the Inspector General of Taxation (IGT)

5. The IGT to have the capacity to make decisions binding on the ATO;
6. The IGT to work with ASBFEO input to:
    6.1. Raise small business awareness that the IGT exists and its role in assisting small businesses with ATO issues; and
    6.2. Review the IGT website content to specifically address small business needs.
7. The IGT to monitor the effectiveness and independence of the ATO Internal Review team from its inception.

Improve ATO processes and transparency

8. In consultation with the IGT, the ASBFEO to conduct a review of:

8.1. Debt collection policy and practices with regard to small business, and in particular garnishee notices to ensure appropriate notice and appeal and transparency of process;

8.2. ABN processes to ensure that:

8.2.1. ATO actions are proportionate;

8.2.2. Processes are timely, clear and transparent;

8.2.3. There is an efficient appeal mechanism; and

8.2.4. ABNs are cancelled only with sufficient notice (subject to appeal) and are not routinely cancelled while an audit is progressing; and

8.3. ATO conduct of appeals and settlements to ensure that processes are fair and proportionate, including whether and how an independent body may determine appropriate levels of taxpayer compensation in respect of the Compensation for Detriment Caused by Defective Administration Scheme (CDDA).