

Objections and written tax advocacy

THE OBJECTION PROCESS IS DECEPTIVELY COMPLEX AND THE OBJECTION STRATEGY SHOULD REFLECT THAT IT IS A FUNDAMENTAL PART OF LEGAL PROCEEDINGS.



They're out ta get me
They won't catch me
I'm innocent
They won't break me¹

INTRODUCTION

Overview

A taxpayer may object against an adverse taxation decision by lodging a taxation objection with the Australian Taxation Office (ATO) in the approved form within the required period, stating fully and in detail the grounds on which the taxpayer relies.

The taxpayer may apply for review of an adverse objection decision to the Administrative Appeals Tribunal (AAT) or appeal the objection decision to the Federal Court of Australia (FCA). Alternatively, a taxpayer may seek an ATO internal review or alternative dispute resolution (ADR), or apply to court for judicial review or declaration, stay or injunction orders (if available).

An objection is the first step in the litigation process as it defines and potentially confines any legal proceedings. The quality and style of the objection should reflect that it is a fundamental part of legal proceedings.

The objection process is deceptively complex. The complexities often only emerge during legal proceedings, but they need to be addressed when preparing the objection.

Scope

This article considers the objection process and the potential complexities

that advisers should address, and makes suggestions on writing objections in order to protect the taxpayer in subsequent legal proceedings. The article does not address in detail objections against private rulings, or challenging an assessment or a decision by judicial review or other court order or rights of review to the AAT or appeal to the FCA (which are the subject of subsequent articles).

Legislative references are to the *Income Tax Assessment Act 1936* (ITAA36), the *Income Tax Assessment Act 1997* (ITAA97), the *Taxation Administration Act 1953* (TAA53), the *Fringe Benefits Tax Assessment Act 1986* (FBTAA86), the *Administrative Decisions (Judicial Review) Act 1977* (ADJRA77), the *Judiciary Act 1903* (JA03), and the *Administrative Appeals Tribunal Act 1975* (AATA75).

OBJECTION PROCEDURE REVIEWS

Ralph Review 1999

Recommendations

The Review of Business Taxation (RBT) in *A tax system redesigned* considered the existing arrangements for resolving disputes (which were needlessly tortuous, slow, costly and intrinsically overly adversarial and discouraged direct and open communication and exchange of information).² The RBT recommended the following improvements to the objection system:

- (1) the existing arrangement should shift objection and appeal processes from adversarial structures to arrangements that promote dialogue, ADR and specialist tax litigation court processes; and

- (2) new arrangements should be implemented so that, where all parties agree, an issue will not be resolved without court proceedings, the dispute can bypass administrative processes and can be referred directly to the appropriate independent tribunal or court.

ADR

The AATA75 was amended in 2005 to include greater access to and emphasis on ADR in review proceedings.³ In 2007, the ATO issued a series of practice statements detailing procedures for managing tax disputes and litigation.⁴ PS LA 2009/9 consolidates many of these practice statements.

PS LA 2007/23⁵ expresses the ATO's approach to ADR processes within the current objection and review and appeal processes. Experience suggests that ADR outside tribunal or court conciliation procedures is not widely used. However, within the AAT, conciliation conferences are used with some success.

Objection bypass

The RBT in *A strong foundation* considered that an immediate remedy of appealing to a tribunal or court could be provided in circumstances:⁶

- (1) where the taxpayer is objecting against a lodged tax return rather than an amended assessment because the requirement for ATO officers to follow rulings and other ATO precedential publications serves to delay the appeal and collection process; or
- (2) where the ATO has fully considered the position on audit because the ATO

does not need the objection process as a second chance to consider the matter.

An ATO officer is obliged to follow ATO precedential opinions in rulings, determinations and practice statements.⁷ While this provides consistency, experience suggests that this significantly

narrowing of disputes, and optimising voluntary compliance and independent internal review in the objection process.

- (3) The ATO should continue to develop procedures respecting and promoting a culture of internal review, appropriate settlement and ADR, and review by

“

The taxpayer's review to the AAT or appeal to the FCA is limited to the grounds stated in the taxation objection ...

”

impacts on the benefit of ADR, objection review procedures and negotiating settlements because ATO officers are reluctant to distinguish publications from applying to particular facts or where other authorities clearly express a contrary view.

A bypass mechanism or short-form objection process would be beneficial where the ATO has a clearly articulated or published view that the taxpayer is disputing.

IGOT Review 2009

Recommendations

On 15 April 2009, the Inspector General of Taxation (IGOT) published the *Review into the underlying causes and the management of objections to Tax Office decisions*, which made 12 recommended improvements to the objection system:

- (1) The government should consider improving the objection system by ensuring that the objection process can only be used for genuine disputes rising from amended assessments, default assessments, private rulings or where the ATO has failed or refused to make a decision in relation to a matter in dispute and other matters should be treated as amendment requests.
- (2) The ATO should issue a comprehensive public statement on the management and outcomes of objections which contains a clear commitment to a differentiated risk base approach to management, the earlier resolving and

sufficiently trained, qualified and skilled objection officers with sufficient authority.

- (4) Over a two-year period, the ATO performance standard for finalisation of objections should be reduced from 70% in 56 days to 85% in 28 days in line with other relevant Taxpayers' Charter and ATO standards.
- (5) The ATO should remit general interest charge (GIC) for the time taken by the ATO to finalise an objection beyond the 60-day period available to the ATO where the taxpayer has acted in good faith.
- (6) In the early stages of the objection process, the ATO should encourage contact with the taxpayer by the case officer and by conferencing with technical experts to explore opportunities for early resolution of the dispute.
- (7) The ATO should continue with its integrated quality framework processes to ensure that the quality control system properly evaluates the ATO end-to-end decision-making process in respect of objection processes.
- (8) The ATO should continue to develop information request procedures tailored to the dispute, clearly articulating the information and relevance of the information under request, promoting plain language advice and decisions, and promoting improved understanding of the reasons for the objection.

- (9) The ATO should continue to design, monitor and report against a broad range of indicators and measures to evaluate the quality, efficiently and effectiveness of the objection function.

- (10) The ATO should adopt a more corporate emphasis and analysis of trends and outcomes to objections and litigation to identify and effect improvements to potential systemic issues in the end-to-end dispute resolution process.

- (11) The ATO should review its current audit procedures and training programs to ensure that the original decision-makers are aligned with the ATO end-to-end dispute resolution approach.

- (12) The ATO should continue to develop its integrated quality framework processes to ensure the continuous improvement of overall original decision-making, audit procedures, and evaluation of the effect of internal review in order to minimise the potential negative effects of internal review on the original decision-maker.

The ATO accepted (at least in part) all recommendations except to remit GIC for delays by the ATO to finalise an objection beyond the statutory 60-day review period.

Contentious objections and amendments

The IGOT found that the objection procedure was often used by taxpayers to seek amendments to tax returns and was not limited to genuine disputes with the ATO.⁸

On 11 August 2009, the government referred recommendation 1 to Treasury for further advice.⁹

It is common for a taxpayer to lodge a return on the basis of a published ATO interpretation of a tax law to avoid penalties and to object to the assessment to challenge the interpretation of the tax law.¹⁰ Any legislative amendments should retain these objections within the current disputed objection system. Any legislative amendments should also address the complexities inherent in the objection process, some of which are discussed in this article.

The recommended amendments recognise that the objection process is the first step in a genuine dispute with the ATO which may end in legal proceedings and may

reduce the occasion for tax advisers to prepare and lodge objections.

ATO timeframes

An understanding of the ATO performance standards will assist advisers when managing taxpayer and ATO timeframe expectations. The ATO performance standard requires the ATO to request additional information within 14 days of the objection, to determine the objection within 56 days of receiving all of the information, and to complete an objection within 120 days of the lodgment of the objection.

Experience suggests that, in genuine dispute objections, the ATO has become more diligent in formally extending the 56-day performance standard by agreement with the taxpayer. Recent improvements in the 56-day performance standard may not reflect a reduction in objection review periods, but a willingness by taxpayers to agree to extensions so that the ATO is not pressured into an adverse objection decision.

Experience also suggests that the 56-day and 120-day performance standards are regularly exceeded in genuine dispute objections. If the objection process is limited to genuine disputes, the ATO's performance against these performance standards may worsen unless additional resources are committed to objection services. This is because the averaging effect of a shorter processing time for non-contentious amendment requests will be excluded from the statistics.

Information requests

The IGOT concluded that a major cause for delay in the objection stage was because the ATO had failed to request, or the taxpayer had failed to provide, requested relevant information.¹¹

Experience suggests that the information request processes operate in a number of inappropriate ways. The relevance of requested information or documents is often unclear or is disputed. Further, the ATO's interpretation of the taxpayer's onus of proof and burden of proof (discussed below) makes the extent of the information or documents requested burdensome.

The time and professional fee costs of providing this information and documentation are often prohibitive or

perceived as futile under the current objection process as the ATO officer is bound to follow ATO precedential publications.

Where information or documents are held by third parties, the taxpayer may be unable to effectively access the information and documents. For example, a liquidator, a party to civil litigation or a former spouse may effectively restrict access to information or documents generally or within the period for compliance under the information request.

Experience suggests, and the ATO's response to the IGOT confirms, that the ATO refuses to exercise the ATO's coercive powers to access information and documents held by third parties¹² in order to gather relevant information and assist the taxpayer to prosecute the objection in a cost-effective manner.¹³

Where the taxpayer demonstrates reasonable attempts to obtain the information or documents from the third party without success, the ATO should be predisposed to obtain the information and documents from the third party to facilitate the objection. Where the ATO refuses to do this, the ATO should not be entitled to draw an adverse inference from non-compliance with the request.

Information and document requests often appear to be ad hoc, with multiple subsequent requests which do not always arise out of a review of the additional information provided.

The 56-day and 120-day performance standards may contribute to inadequately considered or incomplete information and document requests by ATO officers who are attempting to comply with the standards. Cynics might suggest that the ATO often makes multiple successive information and document requests because it suspends the performance standards.

Information and document requests are usually returnable within 28 days. However, shorter periods are sometimes issued. Experience suggests that there is asymmetry in ATO and taxpayer response and processing timeframes.

Fast-track objections

The IGOT has also recommended fast-track or modified objection processes to resolve situations where the ATO has a

clearly articulated or a published view that the taxpayer is disputing.

The approved form requirements and the legislative restriction of review or appeal rights to the grounds of the objection (each briefly discussed below) are significant impediments to a fast-track objection process.

IGOT Review 2010

On 7 April 2010, the IGOT announced the terms of reference for the *Review into the ATO's small and medium enterprise audit and risk review policies, procedures and practices*. This review is focused on the audit process. However, better and more efficient audit processes are likely to translate into efficiencies at the objection stage.

OBJECTION CONDITIONS

Objections and amendments

An objection is distinguished from an amendment request for procedural and review purposes. For example, Pt IVC TAA53 procedures and judicial review apply to objections. Part IVC TAA53 procedures and judicial review under the ADJRA77 do not apply to an amendment decision.

TR 96/12 details the ATO's views on objections and PS LA 2008/19 details the ATO's views on amendment requests.

A request will be treated as an objection where:¹⁴

- (1) there is a suggested or clear dispute over facts, issues or interpretation of the law;
- (2) there is an expression of doubt regarding an entitlement to the requested adjustment; or
- (3) there is a suggested or expressed reservation of review rights.

In other circumstances, or where there is no real dispute,¹⁵ the ATO officer has discretion to treat a request as an amendment request or objection to best achieve the most appropriate outcome for the taxpayer.

An amendment request for income tax¹⁶ and an objection¹⁷ each must be in an approved form. Use of the approved form for amendments¹⁸ and objections¹⁹ is not mandatory. The incorrect selection of the approved form or whether the taxpayer

seeks an amendment or an objection should not preclude the ATO from correctly classifying and processing the request under the correct powers.

An amendment request does not become a valid objection even if the ATO treats it as an objection. In *Phelps v FC of T*,²⁰ the ATO treated an extension of time request and an amendment request under the small business concessions as an objection. However, the AAT held that the purported objection decision was ineffective to grant the taxpayer appeal rights under Pt IVC TAA53 because it was correctly characterised as an amendment request. Accordingly, the incorrect selection of the amendment or objection process can impact on the taxpayer's review and appeal rights.

Entitlement to object

A person who is dissatisfied with an assessment, determination, notice or decision, or with a failure to make a private ruling, may lodge a taxation objection under Pt IVC TAA53.²¹ The entity dissatisfied must also be legally affected by the assessment, determination, notice or decision.²²

The entitlement to object is granted by the relevant tax Act. It is necessary to locate in the relevant Act the power to object. For example, s 78A FBTA86 states that "An employer who is dissatisfied with an assessment may object against it in the manner set out in Part IVC of the *Taxation Administration Act 1953*".

Some assessments, determinations, notices or decisions are not susceptible to objection. For example, the refusal to remit GIC is not susceptible to objection.²³ Although the ATO will determine a GIC remission request incorporated in an objection at the same time as the objection, it does not form part of the objection for review purposes under Pt IVC TAA53.

Similarly, an assessment for an employee that disallows a pay-as-you-go withholding credit under s 18-15 TAA53 cannot arguably be effectively challenged because the provisions do not grant an objection right since the set-off for the credit occurs after the assessment process is completed.²⁴

Some decisions are not susceptible to objection and the correct procedure is to

apply for judicial review under the ADJRA77. For example, the decision to extend the time for lodgment of an election under s 139E ITAA36 employee share provisions must be disputed under the ADJRA77.²⁵

A difficult distinction is drawn between a determination²⁶ and a decision.²⁷ In many matters, the distinction is of no consequence and the distinction often distracts from the task of identifying the powers conferred on the ATO.²⁸

Under administrative law, a determination is the process of ascertaining the existence of facts, conditions or rights necessary for the ATO to act, and a decision is the exercise of the discretion to choose how to act and whether or not to act.²⁹ However, the tax Acts and tax cases do not consistently maintain this distinction and often use the terms synonymously.

An objection can dispute the existence of the facts, conditions or rights necessary for the ATO to act or the choices arising from the exercise of the discretion. The determination or decision is vulnerable to attack under Pt IVC TAA53 on the basis of non-satisfaction of the statutory conditions of the ATO's powers to make them and the exercise of the power was not bona fide, did not relate to the subject matter of the legislation or is not reasonably referable to the power.³⁰

In contrast, judicial review under the ADJRA77 and the JA03 is arguably limited to decisions and not determinations.

If the taxpayer is not entitled to object, the taxpayer will need to seek an ATO internal review of the decision or consider applying for judicial review under the ADJRA77 or the JA03 or other court orders (if available).

Tip: objection entitlements

Care is required to ensure that:

- the taxpayer has a power of objection under the relevant tax Act;
- the taxpayer objects under each relevant Act for separate taxes or decisions;
- the correct taxpayer is selected to object; and
- all dissatisfied taxpayers are expressly joined as parties to the objection application.

Approved form

A taxation objection must be lodged with the ATO in the approved form.³¹ An approved form is issued under s 388-50 TAA53.³² The ATO has published objection approved forms for tax professionals and non-tax professionals.³³

A document is in the approved form if, and only if:

- (1) it is in the form approved in writing by the ATO for that kind of document;
- (2) it contains a signed declaration as the form requires;
- (3) it contains the information, statements or documents that the form requires; and
- (4) it is served on the ATO as the ATO requires.

An objection *must* be lodged on the approved form. Arguably, failure to use or complete the approved objection form will invalidate the objection. However, the *Objection guide*³⁴ considers that failure to use the approved form does not invalidate the objection.

Penalties may apply where a taxpayer fails to lodge a document that is in the approved form by the required date.³⁵ The provisions appear to be directed at the lodgment of compulsory documents and appear to be inapplicable to an objection because the lodgment of an objection is not compulsory.

The ATO will accept an objection that is not in the approved form, provided the objection is in writing and clearly indicates that it is an objection, is precise enough to identify the incorrect aspect of the assessment or decision, and gives reasons for considering that the assessment or decision is incorrect.³⁶

The approved forms and the *Objection guide* require the taxpayer to state reasons with facts and arguments that support the reasons, together with a summary of research and analysis of the issues. Part IVC TAA53 does not require this. However, this information is provided where there are real prospects of a favourable objection decision.

The approved form is misleading because it requires the taxpayer to provide reasons rather than grounds of the objection and, if answered literally, could technically

result in an invalid objection (there being no grounds).

The approved forms and the *Objection guide* require the taxpayer to make the following declaration:

"I certify that the information contained in this document, and any attached documents, is true and correct."

The declaration requires all statements to be true and correct, so arguably precludes the taxpayer from excluding admissions of facts in the objection. This declaration is not required by Pt IVC TAA53 for a document to be a valid objection. The *Objection guide* attempts to make the declaration mandatory, so is arguably beyond the ATO's powers and invalid.

A taxpayer that makes a false or misleading statement to the ATO in respect of a material particular may be subject to an administrative penalty³⁷ or a prosecution for a taxation offence.³⁸ A statement is false if it is incorrect or inaccurate.³⁹ A false or misleading statement may also be subject to a criminal offence.⁴⁰

The declaration is unnecessary because the adequate penalties apply for false or misleading statements. A warning rather than a declaration would suffice.

The declaration is expressed in unqualified terms and is not limited to material particulars, so arguably imposes a stricter liability than that provided under the administrative penalties. Further, it is a defence to the tax offence if the taxpayer did not know, and could not reasonably be expected to have known, that the statement was false or misleading or did not have the requisite mental intent so the declaration arguably imposes a stricter liability than that provided under the tax offences regimes.

The approved forms and the *Objection guide*⁴¹ require the adviser lodging the objection to make the following declarations:

"I certify that this document and the attached documents have been prepared in accordance with the information supplied by the individual or entity identified on this request and in the attached documents.

I have received a declaration from the individual or entity identified in this request and in the attached documents stating that the information provided in each document is true and correct.

I am authorised by the individual or entity identified in this request and in the attached documents to submit this objection request to the Commissioner."

Using the approved form, providing reasons (rather than grounds), and making the declarations are objectionable because the taxpayer is required to provide more than is necessary at law.

The above inconsistencies create unnecessary administrative complexities.

Tip: objection approved form

- Advisers should consider not using the approved form or deleting or modifying the declarations so that the additional declarations are not made.
- If the approved form is used, the adviser could prepare the objection on the taxpayer's form so that the adviser does not have to make the additional declarations.
- The objection should expressly state that the information and documents are true and correct to the taxpayer's "knowledge, information or belief" in order to limit the declaration constituting a misrepresentation.
- The objection should expressly state that the "objection does not constitute an admission of facts or liability or waiver of rights".

Objection period

A taxation objection must be lodged within strict time periods depending on the nature of the assessment or decision, type of tax or tax offset. Broadly, a 60-day, two-year or four-year period applies from the date of service of the assessment or decision or occurrence of an event. For example, commonly used objection periods include:

- income tax assessment: two years for an individual or a small business entity, or four years in any other circumstance, from the date of service of the assessment under s 170(1) ITAA36;
- fringe benefits tax assessment: four years from the date of service of the assessment under s 78A FBTA86;
- superannuation excess contribution tax assessment: four years from the date of

service of the assessment under s 292-245 ITAA97;

- deceased's estate delayed administration beneficiary decision or trustee decision: four years from the date the decision is published in the newspapers or grant of probate or letters of administration under s 260-145, Sch 1 TAA53 or s 220 ITAA36;
- other deceased's estate delayed administration beneficiary decision or trustee decision: 60 days from the date the decision is published in the newspapers or grant of probate or letters of administration;
- reviewable indirect tax decision (eg GST): the later of 60 days after the date of service of the notice or four years after the end of the tax period or importation of goods under s 105-40, Sch 1 TAA53;
- reviewable GST decision (eg GST registration decisions): 60 days after the date of service of the decision under s 110-50, Sch 1 TAA53; and
- administrative penalty assessment: 60 days after the date of service of the assessment or, if the penalty relates to an assessment with a longer period, within the longer period of the related assessment under Div 284 TAA53.

The basis of the assessment or decision in similar circumstances may result in different objection periods. For example, where probate or letters of administration of a deceased estate are not granted within six months of death, the ATO will not know who the executors are so the ATO may publish notices in newspapers determining the amount of the deceased tax liability. The executors or beneficiaries can object within four years of obtaining a grant of probate or letters of administration. However, in very small estates,⁴² probate or letters of administration are optional so a 60-day period applies.

A two-year or four-year objection period may be effectively shortened where the challenge to the assessment is dependent on challenging an antecedent decision on which the assessment is based. For example, the ATO may register a taxpayer for GST and then issue a GST assessment

for unpaid GST when the taxpayer asserts that the taxpayer is carrying on an enterprise or does not exceed the registration thresholds. A four-year objection period applies from the date of the GST assessment (being a reviewable indirect tax decision). However, a 60-day objection period applies in respect of the decision to register the taxpayer for GST (being a reviewable GST decision). Practically, the objection must be lodged within the 60-day objection period to effectively challenge the assessment.

Different objection periods apply for an amended assessment or amended determination. Broadly, the objection must be lodged by the later of the objection period of the original assessment or original determination (eg the two or four-year period) or 60 days after service of the amended assessment or amended determination.

Care is required to ensure that the objection is lodged within the objection period so that the taxpayer is not reliant on the ATO extending the objection period for late lodgment.

Tip: objection periods

The complex objection period rules can be simplified by lodging an objection within 60 days of service of the assessment, decision, amended assessment or amended decision.

Extension of objection period

If the objection period has passed, the taxpayer can lodge the objection and request the ATO to deal with the objection as if it had been lodged in time. The request must state fully and in detail the circumstances and reasons for failing to lodge the objection within the objection period.⁴³

If the ATO refuses to extend the objection period, the taxpayer may apply to the AAT to review the decision.⁴⁴

In exercising the discretion to extend time, the ATO (and, on review, the AAT) must balance the duration of the delay, the explanation for and the circumstances that gave rise to the delay, and the relative prejudice that would be caused to the taxpayer and the ATO.⁴⁵

PS LA 2003/7 (formerly IT 2455) requires the ATO to consider the explanation for the delay, the circumstances of the delay, whether the taxpayer has an arguable case for the objection, and other relevant matters.

PS LA 2003/7 considers that an extension of time would be appropriate where the delay is due to illness, overseas travel, change of law or precedential authority, reliance on ATO advice, tax adviser's negligence, or where small business taxpayers lodge outside the two-year, but within the four-year, lodgment period.

The extension of time request should provide any supporting or corroborating documents.

An extension of time is not automatic, so advisers should comply strictly with the lodgment period.

A general request for an extension of time should be included in the objections as a precaution so that, if there are any unanticipated 60-day review periods for underlying determinations or decisions, the ATO can grant an extension of time.

Multiple successive objections

The ATO considers that a taxpayer can make multiple successive objections in respect of the same assessment within the objection period. Accordingly, when the objection period has not expired:

- (1) the taxpayer can lodge another objection to the assessment, rather than lodge a review with the AAT or an appeal to the FCA;
- (2) the taxpayer can lodge another objection to the assessment, rather than lodge an objection to the amended assessment; and
- (3) the objection can dispute the same issue to which the taxpayer has received an adverse objection decision.

Since a review or an appeal is limited to the grounds of the objection (see below), where an adviser is faced with a poorly drafted adverse objection decision, it may be appropriate to lodge another objection to correct the problems and then review or appeal the subsequent objection decision.

The ATO considers that issue estoppel (res judicata) only arises once the AAT or FCA determines the particular issue.⁴⁶

Taxpayer's onus of proof and burden of proof

The taxpayer has the burden of proving at a review to the AAT or an appeal to the FCA that the assessment is excessive or incorrect or that the decision should not have been made or should have been made differently.⁴⁷ The burden of proof effectively remains with the taxpayer on appeal, including where the ATO is the appellant.⁴⁸

The burden of proof does not require the taxpayer to defend the reasons in the objection or disprove the reasons in the objection decision.

The onus of proof is the civil standard of proof on the balance of probabilities.⁴⁹ In 15 CTBR Case 83 (at para 39), the Board of Review stated:

"It is our opinion that if D has given sworn evidence that he incurred expenditure in connexion with any of the properties under consideration, but is unable to support this by reference to book-entries, receipts, or vouchers, and that evidence has not been contradicted by another witness and there has been nothing in his demeanour or otherwise upon which properly to found a belief that it is untrue and unreliable, then the Board should accept his evidence unless it is inherently unreasonable and improbable in respect of the matter of which he has spoken."

Although there are statements to the contrary,⁵⁰ the better view is that it is not a requirement to discharge the onus of proof for the taxpayer to produce evidence to corroborate his own evidence.⁵¹

Experience suggests that the adversarial nature often adopted by the ATO with objections means that the ATO does not actively identify information, authorities or pending cases that will favourably influence the objection decisions. Further, the extent of information requests and the degree of corroboration by contemporaneous documents required by the ATO are greater than the onus of proof requires (having regard to the state of the evidence actually provided and the amount of tax in dispute).

For example, the ATO regularly requests information and documents to corroborate legally binding contracts to test the enforceability of the binding contract where there is no evidence to suggest that the document is untrue or unreliable. Further, the ATO regularly denies objections where there is some evidence to support the tax position, but the taxpayer has failed or

refused to provide requested corroborating evidence.

A more measured and material approach to the onus and burden of proof by the ATO would significantly reduce the costs to taxpayers of the objection process.

Grounds relied on

The taxpayer's review to the AAT or appeal to the FCA is limited to the grounds stated in the taxation objection, unless the AAT or the FCA permits the taxpayer to amend the grounds.⁵²

A taxation objection in respect of an amended assessment or amended determination is limited to the alterations made by the amended assessment or amended determination.⁵³ The objection must state the grounds relied on fully and in detail, and care is required in drafting to ensure that the objection does not inadvertently limit the taxpayer's review or appeal rights.

An objection need not be in legal form,⁵⁴ and the grounds of objection should not be technically, narrowly or rigidly⁵⁵ construed and any ambiguity is to be resolved in favour of the taxpayer.

Vague or general grounds, such as the assessment is excessive,⁵⁴ or the assessed amount is not assessable income,⁵⁶ do not constitute a valid objection.

A distinction exists between the grounds and the facts and reasons supporting the grounds. Although the grounds must be stated fully and in detail in the objection, the facts and reasons need not be stated. In the FCA (if not the AAT), the reasons supporting the grounds, if not articulated in the objection, are articulated in the appeal statement and the statement of facts issues and contentions.⁵⁷ Accordingly, provided the grounds and alternate grounds are sufficiently wide, the facts and reasons can be supplemented at the review or appeal stage.

Care is, however, required to ensure that any statements of facts and documents provided with the objection are accurate and complete to avoid any adverse inferences. Accordingly, only facts and documents verified and corroborated should be stated in the objection.

An objection must expressly attach an asset betterment statement, which may be

difficult to do until details of the calculation are provided to the taxpayer.⁵⁸

The AAT and the FCA will permit amendment to the grounds of objection on review or appeal on the same considerations of justice on which amendments are regularly made in litigation.⁵⁹

A single objection can relate to various taxes and separate objections are not required. For example, a single objection can concern income tax and GST arising from the same set of facts.⁶⁰

A notice that incorporates notice of two or more taxation decisions are taken to be a deemed single taxation decision to the extent that they are not ineligible income tax remission decisions, so separate multiple objections are not required.⁶¹

An ineligible income tax remission decision relates to the remission of additional tax under certain repealed ITAA36 additional tax provisions, including for late lodgment, for failure to lodge and for penalty tax,⁶² so a separate objection is required.

Drafting considerations

A number of administrative matters should be included in the objection. For example, advisers should consider whether it should be expressly stated that:

- (1) each ground, reason or combination of grounds or reasons are separate and do not limit any other grounds, reasons or combination of grounds or reasons;
- (2) no ground, reason or combination of grounds or reasons constitutes an admission or denial of fact;
- (3) the right to request particulars and reasons for decision pursuant to s 38 AATA75 and s 14ZZG TAA53 is reserved; and
- (4) the right to amend, enlarge or raise further or alternate grounds of objection pursuant to s 14ZZK or 14ZZO TAA53 is reserved.

To discharge the burden of proof, the objection should relevantly claim that the assessment is excessive or not in accordance with law or that the decision should not have been made or should have been made differently.⁶³ The objection should identify whether the dispute concerns an assessment, a determination or a decision, as the structure of the

grounds and remedy requested will be different.

A determination objection should identify the fact, condition or right that the ATO has incorrectly found to exist or to not exist.

A decision objection should identify the fact, condition or right that the ATO has incorrectly found to exist or to not exist, or the exercise of the power which was not bona fide, did not relate to the subject matter of the legislation or is not reasonably referable to the power.

A determination objection or decision objection should dispute in the alternative the making of the determination or exercise of the discretion or the failure or refusal to make the determination or exercise the discretion, as it will often be unclear how the determination or decision arose.

An assessment objection should identify the class of assessable income or allowable deduction in dispute. Care is required when disputing the entitlement to a tax credit or offset that is not expressly a deduction, as these amounts may not be susceptible to objection procedures.

Where appropriate, the objection should dispute the antecedent determination or decision which affects the amount of the assessment as alternatives to disputing the assessment.

The typical remedy for a determination objection is to set aside the determination.

The typical remedies for a discretion objection are to set aside the exercise of the discretion or to set aside the exercise of the discretion and re-exercise the discretion in a particular way.

The typical remedies for an assessment objection are to set aside the assessment, to reduce the amount of assessable income to nil or to a greater extent than that allowed by the ATO, or to allow a deduction in whole or to an extent greater than that allowed by the ATO.

While most objections will relate to substantive tax liability, advisers should consider including an objection to the application of Pt IVA ITAA36. Even if the ATO has not made a Pt IVA determination as part of the assessment, the AAT on review can make a Pt IVA determination.⁶⁴

The objection should include an objection to reduce the amount of Medicare levy,

penalty or interest arising from any adjustment of the substantive tax liability.

Although not subject to review under Pt IVC TAA53, the objection should include a GIC remission request, which the ATO will action administratively as part of the objection process.

Tip: example grounds

The [Amount] in respect of [Details] is an allowable deduction under s 8-1 ITAA97 in whole or to an extent greater than that allowed by the Commissioner and the Commissioner should set aside or vary the assessment to allow a deduction for the whole of that amount or an amount greater than that allowed by the Commissioner.

Reasons

- (1) The amount was derived by the taxpayer in the 30 June [Year] income year.
- (2) The taxpayer incurred the amount in gaining or producing assessable income or necessarily incurred the amount in carrying on business for the purposes of gaining or producing assessable income.
- (3) The amount was not in whole or part capital or capital, private or domestic in nature.
- (4) The deduction of the amount was not in whole or part denied by [Details of specific anti-avoidance provisions].

Written advocacy considerations

Effective written advocacy is arguably an art and a subjective preference for style. However, when preparing detailed or extensive objections, advisers should consider the following approaches:⁶⁵

- (1) divide the objection into separate sections with headings such as:

■ facts:

- procedural history;
- statutory history;
- statement of the case;
- chronology;
- supporting facts; and
- distinguished or justified contrary facts;

■ grounds and reasons:

- objection on determinations;
- objection on discretions;
- objection on assessments;
- objection on assessable income;
- objection on deductions;
- objection on Pt IVA;
- objection on Medicare levy; and
- remission request on GIC; and

■ administration:

- default extension of time request;
- exclusion of limitations on grounds and reasons;
- exclusion of admission or denial of facts;
- reservation of right to particulars;
- reservation of right to amend objection grounds; and
- remission of GIC request;

- (2) select and include only the facts and documents that relate directly to the legal reasons;
- (3) include relevant quotations which constitute facts;
- (4) avoid repetition of facts which lessens impact and, if expressed differently, creates ambiguity;
- (5) confine all facts to the facts section so they are not introduced in other sections where the fact may be overlooked;
- (6) exclude legal reasons and conclusions so that other sections are not contaminated;
- (7) provide an explanation to give context and promote comprehension;
- (8) brevity and simplicity of reasons are paramount;
- (9) lead the legal reasoning rather than being reactionary and rebutting and debating the ATO position;
- (10) order the legal reasoning appropriately to emphasise the main or best arguments;
- (11) structure the argument by giving the CRAC method, that is, state the conclusion (C), then a brief statement of the supporting rule (R), then analyse the facts (A), and then cite cases and authorities (C);

- (12) provide technical, administrative and policy reasons;
- (13) paraphrase rather than quote passages from cases, and quotes should be only a few lines;
- (14) only cite key authorities, with no more than three authorities for a proposition;
- (15) every assertion should be supported by some evidence or authority; and
- (16) exclude adjectives, emotive language, ascribed feelings or mental states, legal conclusions and colloquialism.

With all good written advocacy, the above approaches are often modified or ignored to ensure that the reasons are expressed clearly, concisely and persuasively.

Strategy considerations

Advisers may wish to structure their objection consistently with the review application to the AAT or appeal notice in the FCA in order to reduce costs and time in converting the objection to a review or appeal. Also, where a consistent approach is adopted when preparing the objection, any issue of whether the review or appeal varies the objection grounds will be limited.

An objection with grounds and reduced facts and reasons may be appropriate where the objection is effectively a formal step leading inevitably to litigation. Where there are reasonable prospects of negotiation and settlement, or the objection is being used as a means to escalate the issues within the ATO, a more extensive objection should be considered.

Compelling an objection decision

If the Commissioner has not made an objection decision within the original 60-day period after lodgment of the objection, the taxpayer may give written notice to the Commissioner to make the objection decision.

If the Commissioner has not made the objection decision within 60 days of service of the written notice to make the objection decision, the objection is taken to be disallowed so the taxpayer can apply to the AAT or the FCA against the deemed objection decision.⁶⁶

If the Commissioner issues an information request within the original 60-day period, the 60-day period under the written notice

to the Commissioner to make the objection decision runs from the date the information is provided.

Taxpayers are reluctant to apply this provision over concerns that the forced response will be negative. However, this approach may be appropriate where the tax has been paid and the taxpayer wants to force appeal rights, obtain a successful decision, and obtain a refund of the tax as quickly as possible.

CONCLUSION

An objection is the first step in the litigation process and should be prepared with great care and skill. The quality and style of the objection should reflect that it is a fundamental part of legal proceedings.

The objection process is deceptively complex. However, a systematic approach will assist an adviser to prepare a high-quality objection that preserves the taxpayer's rights should the matter not settle and proceed to court proceedings.

Hopefully, the IGOT reports and review of the objection process recommended by the RBT will simplify and streamline the objection process to promote early resolution of the matter and reduce costs. In the interim, this article may encourage advisers to consider the objection process, identify the potential complexities that need to be addressed, and consider the suggestions described above on writing objections to protect the taxpayer in subsequent legal proceedings.

*Ron Jorgensen FTIA, Principal
Harwood Andrews Lawyers
Accredited Specialist in Tax Law*

References

- 1 Guns N' Roses, *Out Ta Get Me*, *Appetite for Destruction*, Geffen Records, 1987.
- 2 RBT, *A tax system redesigned*, July 1999, recommendation 3.8.
- 3 See ss 34 to 34H AATA75, enacted by the *Administrative Appeals Tribunal Amendment Act 2005* (Cth).
- 4 PS LA 2007/1; PS LA 2007/12; PS LA 2007/15-19; and PS LA 2007/23.
- 5 Most recently updated on 26 October 2010.
- 6 RBT, *A strong foundation*, November 1998, at [8.13] to [8.17].
- 7 TR 2006/10; and PS LA 1998/1.
- 8 Case X2 90 ATC 105.
- 9 N Sherry, Assistant Treasurer, "System for taxpayer objections to Tax Office decisions to be improved", press release, 28/2009.
- 10 See Case 5540 ((1990) 21 ATR 3083 at 3090) for an example of this approach.

- 11 Inspector General of Taxation, *Review into the management of objections to Tax Office decisions*, at pp 21-23.
- 12 Ss 263 and 264 ITAA36.
- 13 Inspector General of Taxation, *Review into the management of objections to Tax Office decisions*, at pp 77-78.
- 14 PS LA 2008/19 at [11]-[14].
- 15 TR 96/12 at [46].
- 16 S 170(5) ITAA36.
- 17 S 14ZU TAA53.
- 18 PS LA 2008/19 at [17].
- 19 See the discussion below regarding possible limitations in this respect.
- 20 *Phelps v FC of T* [2009] AATA 780.
- 21 S 14ZL TAA53.
- 22 *CTC Resources NL v FC of T* (1994) 27 ATR 403 at 414, 435.
- 23 *Nyack Investments P/L v FC of T* [2005] AATA 468.
- 24 TR 96/12 at [23]; *ATO Tax Agents' Circular*, June 1986; *Perdikaris v DC of T (No 2)* [2007] FCA 2087; *Perdikaris v DC of T* [2008] FCAFC 186.
- 25 *Isaacs v FC of T* 2005 ATC 4537.
- 26 *WE Carpenter Holdings P/L v FC of T* (2008) 237 CLR 198.
- 27 *Giris Pty Ltd v FC of T* (1969) 119 CLR 365; and *Duggan v FC of T* (1972) 129 CLR 365.
- 28 *WE Carpenter Holdings Pty Ltd v FC of T* (2008) 237 CLR 198 at [31].
- 29 C Enright, *Federal Administrative Law*, Federation Press, 2001, ch 7.
- 30 The Hickman Principle: *R v Hickman* (1945) 70 CLR 598 at 615.
- 31 S 14ZU TAA53.
- 32 PS LA 2005/19.
- 33 Website at www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00237226.htm&page=15&H15. Consolidated list of approved forms, accessed 5 November 2010.
- 34 Website at www.ato.gov.au/businesses/content.asp?doc=/content/55386.htm&page=10&H10. Accessed 5 November 2010.
- 35 Div 286 TAA53.
- 36 TR 96/12 at [10].
- 37 S 284-75(1) TAA53; and MT 2008/1.
- 38 S 8K TAA53.
- 39 Explanatory memorandum to *A New Tax System (Tax Administration) Act (No. 2) 2000*, at [1.42]; PS LA 2006/2; MT 2008/1; and *FC of T v Turner* (1984) 15 ATR 379.
- 40 Ss 137.1 and 137.2 of the *Criminal Code Act 1995* (maximum one year).
- 41 Website at www.ato.gov.au/businesses/content.asp?doc=/content/55386.htm&page=10&H10. Accessed 5 November 2010.
- 42 Such as s 32 of the *Administration and Probate Act 1958* (Vic) for estates worth less than \$25,000 and the only asset is unpaid employee entitlements.
- 43 S 14ZW(2) and (3) TAA53.
- 44 S 14ZX TAA53.
- 45 *Brown v FC of T* 99 ATC 4516.
- 46 TR 96/2 at [41].
- 47 Ss 14ZZK and 14AAO TAA53.
- 48 *McCormack v FC of T* 79 ATC 4111 at 4120, 4123 and 4132; and *FC of T v Mantle Traders Pty Ltd* 80 ATC 4588.
- 49 *Jacob v FC of T* 71 ATC 4192 at 4194; and *Macmine Pty Ltd v FC of T* 79 ATC 4133 at 4146.
- 50 Case L46 79 ATC 292 at 299-300; Case N3 81 ATC 22 at 28.
- 51 *Allied Pastoral Holdings Pty Ltd v FC of T* 83 ATC 4015.
- 52 Ss 14ZZK and 14AAO TAA53.
- 53 S 14ZV TAA53.
- 54 *HR Lancey Shipping Co Pty Ltd v FC of T* (1951) 9 ATD 267 at 268.
- 55 *AL Campbell & Co Pty Ltd v FC of T* (1951) 82 CLR 452 at 461.
- 56 (1952) 3 TBRD Case C26.
- 57 *Cajkusic v FC of T* (2006) FCAFC 164.
- 58 *Szajntop v FC of T* 93 ATC 4307; 92 ATC 4392.
- 59 *Lighthouse Philatelics Pty Ltd v FC of T* 91 ATC 4942; and *Gilder v FC of T* 91 ATC 5062.
- 60 *Russell v FC of T* [2008] FCA 343
- 61 S 14ZR TAA53.
- 62 S 14ZS TAA53
- 63 Ss 14ZZK and 14AAO TAA53.
- 64 AAT Case 4043 (1987) 19 ATR 3047; and *Fletcher v FC of T* (1991) 22 ATR 613.
- 65 Summarised and modified from SD Stark, *Writing to win*, Main Street Books, 1999; KM Hayne AC, "Written advocacy", *CLE Program*, Victorian Bar, 5 and 26 March 2007.
- 66 S 14ZYA TAA53.