

Overstated deductions - one day you are a registered Tax Agent and the next day you are not

Overview

You may not be aware that recent ATO and media releases indicate that tax agents are increasingly in the firing line. The ATO is currently cracking down on individual taxpayers who are returning false or overstated allowable deductions in order to maximise their tax refund. The ATO is paying particular attention to self-education expenses (item D4) and work-related car expenses (item D1). The media has reported that this is costing government **approximately \$8.7 billion a year** and that a significant component of the shortfall can be traced to registered tax agents preparing tax returns in a competitive price environment using commoditised practice administration techniques.

Tax agents and their clients are being targeted by the ATO using data matching, metric analyses and predetermined benchmarks that the ATO already adopts to identify taxpayers who claim an unusually high amount in deductions compared to others in the same industry with similar income.

If you or your clients are being targeted by the ATO then we suggest that you become very pro-active (on an informed basis) immediately in dealing with such enquiries. The worst thing that you can do is not to respond or to respond in a minimalist manner in the hope that “it all blows over” – because it won’t.

If the ATO believes that a tax agent is failing to properly substantiate large deductions, has inappropriate administrative procedures for the preparation and filing of returns or is being blamed by numerous taxpayers for their incorrect returns, then the ATO will refer a tax agent's conduct to the Tax Practitioner's Board (**TPB**). The TPB will conduct an investigation and has the power to direct you to provide written answers and submissions in respect of any issues of concern that the TPB may have. Once the

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TPB has your response then the TPB will make a determination concerning any alleged misconduct or complaint. There is no formal hearing by the TPB. A decision is made by the TPB “on the papers” (namely on the basis of their investigations and your written responses and submissions).

The TPB’s decision making powers are very wide and the TPB’s decision can include a determination that your licence to practice as a tax agent be suspended (for a period of time) or forfeited (for a period of time and the requirement that you then reapply for a new licence). It may also require you to undertake further training or to participate in future review audits of your practice. A deregistration or suspension decision invariably includes an order prohibiting you from providing income tax services after a certain date i.e. if you are a sole practitioner, this would result in you closing your business.

If you wish to contest the TPB’s decision (this is technically called a review of the TPB decision), **then the general rule is that you must make an application within 28 days to the Administrative Appeals Tribunal (AAT)**. This application may also include an application for a stay of any TPB order requiring you to cease providing tax agent services (thus allowing you to continue trading if you want to appeal the TPB decision). The AAT does not always allow a stay of the TPB order for you to cease providing tax agent services and as such you can suffer serious financial consequences without first having your day in court.

If you receive a notification from the ATO that they are conducting an audit of your clients (or a risk segment of your client base), or a notification from the TPB that they are investigating your clients’ affairs generally because of an ATO audit or they want to investigate your internal control procedures, then you need to act immediately and we would be very pleased to assist in assisting you in dealing with the ATO.

When is your client your worst enemy

Many individual taxpayers want to maximise their tax refunds and the more adventurous taxpayers often over claim deductions by using a tax agent. If they are caught by the ATO, many individual taxpayers invariably blame their tax agent for their misfortune at being caught on the basis that their tax agent did not fully or properly advise them, or indeed, their tax agent told them how much they could claim without any substantiation and without being audited.

This is a simple case of the taxpayer using the tax agent as a shield to obtain a higher refund. This is a real risk that tax agents take if they do not satisfy themselves that the claims being made by the taxpayer are accurate and not exaggerated. It also places the tax agent in the crosshairs of the TPB.

At CharterLaw, we have assisted many tax agents and also taxpayers. Invariably, when we meet with a taxpayer who is being pursued by the ATO they instantly and automatically lay the blame squarely at the feet of the tax agent. Taxpayers will often sing in chorus about the failings of their tax agent and claim to have no knowledge of the alleged breaches of the tax act. This is when your client becomes your worst enemy and will do everything in their power to shift the blame to escape punishment. The standard claims of innocence typically begin with statements such as:

- My tax agent had all the relevant information
- I told my tax agent my exact circumstances
- My tax agent said it was OK to do it this way
- I wasn't told that it was risky
- I'm not a tax expert how could I have known, that's what I pay them for

Of course, this is complete nonsense and designed to put you in harms way, which means you will be at risk of an investigation by the TPB.

The powers of the Tax Practitioners Board

We all know that the TPB is the governing body for tax agents in Australia, but what you may not know is that it regularly deregisters tax agents who engage in the kind of conduct described above. They are not the toothless tiger we once thought they were and, presuming the reports are true, they are going to receive large quantities of referrals for investigation.

Each registered tax agent must adhere to the Code of Professional Conduct (the Code). This is required by Division 30 of the Tax Agents Services Act 2009 (TASA). The Code regulates the professional behaviour of tax agents and lists 14 separate principles which must be followed.

For current discussion purposes the most important of those 14 are:

- (1) *You must act honestly and with integrity; and*
- (9) *You must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to the statement you are making or a thing you are doing on behalf of the client; and*
- (12) *You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.*

Therefore, a failure to adequately test a taxpayer as to their bona fides of a claimed deduction could lead to an investigation based on a breach of TASA. This is serious territory to find yourself in for a taxpayer client who you might only see once a year or possibly never again.

A breach of any of the TASA codes can also lead to a finding that you are not a fit and proper person to be a registered tax agent.

Fit and proper person requirement

To maintain registration, tax agents must remain a fit and proper person as defined by TASA. To fail this test would mean that you will not be able to renew your registration, if it hasn't already been terminated by an investigation. This is another way the TPB can attack your livelihood if there is insufficient evidence to terminate your registration. The criteria for a fit and proper person is set out in Section 20.15 of TASA. Briefly, it compels a tax agent to be of good fame and character. This is a broad and subjective test which considers the balance of all the facts and circumstances of a tax agent's alleged degree of culpability. It will always include consideration of the public interest.

The TPB process of investigation

Subdivision 60-E of TASA empowers the TPB to investigate tax agents. These powers are broad and forceful. The TPB need only give written notice 2 weeks after it has decided that it will investigate a tax agent for conduct that may result in any breach of the TASA. It also has complete discretion as to how it investigates and it is not bound by the rules of evidence (See 60-95 (4)). It has an incredible amount of power and discretion to, quite frankly, do as it pleases. It is clear that tax agents should not act for themselves in such circumstances.

The TPB can compel a tax agent to produce documents or other evidence provided it is made in writing and specifies the material it wants. It can require people to attend interviews, which are recorded, and the TPB even has the power to take evidence on oath or affirmation, and no, the interviewee is not protected from self-incrimination!

The Evidence Act 1995 provides certain protection against witnesses giving evidence that might lead to self-incrimination. Because the Evidence Act 1995 doesn't apply to the TPB, you or anyone who might be compelled to give evidence to the TPB are completely exposed. These outrageously strong powers should not be taken The TPB lightly by tax agents and should strike fear in those who are not making sure that they are protected.

The TPB is not a toothless tiger – It has the power to deregister or suspend

Investigations are not limited to the tax agent as the TPB has the power to compel your colleagues, your clients or any other third party to give evidence.

The investigating officer compiles all the evidence available, including transcripts of recorded interviews, in what is called a "final submission to a board conduct committee". The final submission contains background history about the tax agent, a list of the alleged breaches of TASA and a comprehensive list of all attached material evidence to be relied upon including any evidence given by third parties.

Whilst the final submission to the TPB does not include any recommendation by the investigating officer, that officer presents the final submissions to the TPB. It has been said that the investigating officer has no standing or influence when presenting the final submission

but one might wonder whether human nature results in at least a small amount of influence based on the manner in which he or she presents the final submissions.

The conduct committee will then determine the matter based on the paperwork before them. They will discuss it amongst themselves and make a determination as to whether or not a breach has occurred and, if so, what action will be taken.

Before any sanctions can be imposed, the TPB must have conducted an investigation, as described above, to enliven its powers under 30.15(2).

The TPB undertakes to resolve any investigation within 6 months at which time they may apply any of the following sanctions listed in 30.15(2) -

30.15(2) The Board may do one or more of the following:

- (a) give you a written caution;*
- (b) make an order against you under section 30-20;*
- (c) suspend your registration under section 30- 25; or*
- (d) terminate your registration under section 30-30.*

An order under section 30-20 is an order that might –

- require a tax agent to complete a course for retraining in the area of the TASA which the TPB determined the tax agent breached,
- require the tax agent to be supervised for a period of time, or
- restrict the type of work that a tax agent can perform.

Any decision made in accordance with the above must be in writing specifying the full details of the orders and any time limits that may apply. Such decisions under 30.15(2) are reviewable by the Administrative Appeals Tribunal.

Appealing a TPB decision in the Administrative Appeals Tribunal (AAT)

Tax agents who have been sanctioned by the TPB don't have to agree with the decision to impede on their livelihood. It is possible to appeal any decision made by the TPB. This is particularly important if the TPB has decided to suspend or terminate a tax agent's registration. The tax agent can appeal the TPB decision in the Administrative Appeals Tribunal (AAT).

Often, decisions by the TPB to suspend or terminate a tax agent's registration are decided by matters of factual circumstances whereby the TPB has preferred the evidence of others to the evidence given by the tax agent. In many cases, the tax agent does not feel that their evidence has been given sufficient weight or that the TPB has ignored relevant information that the tax agent has offered, leaving the tax agent feeling a sense of injustice in the absence of a level playing field. The saying "guilty until proven innocent" comes to mind.

Fortunately, an appeal to the AAT is a hearing “de novo” or a new trial. This means that the AAT will look at the evidence with fresh eyes without being influenced by the TPB or any decision made by the TPB previously. However, the TPB will only give tax agents 28 days’ notice for any termination of registration. This means that the first step for the appeal is to urgently apply to the AAT to have the TPB decision stayed to allow the tax agent to continue practising until the AAT appeal is heard.

Avoiding an appeal in the Administrative Appeals Tribunal

The preferred method of resolution is to engage with the TPB on a firm and methodical basis, before a decision is made, to avoid the need to appeal any termination of registration. You must be pro-active. You must take advice from lawyers who are competent in both tax law and administrative law.

Being charged with a criminal offence during an investigation by the TPB

We are all aware of the criminal provisions in the TAA 1953 that apply to dealing with the Commissioner of Taxation. Some of those offences are:

- failing to comply with the requirements of a taxation law
- failing to answer questions when attending before the Commissioner
- making a false or misleading statement
- recklessly incorrectly keeping records
- incorrectly keeping records with the intention of deceiving or misleading
- falsifying or concealing identity with the intention of deceiving or misleading

It is important to note that any reference to the Commissioner also applies to the TPB (see section 8AC). This means that if during an investigation you commit any one of the above offences, you could also find yourself criminally charged by the TPB.

Being charged with any of these offences will require you to attend the Local Court to explain yourself to the Magistrate. If found guilty, you will have a criminal conviction recorded against you personally. Even if it is your company that is guilty, the TPB can still seek to charge you personally (see section 8Y).

Generally speaking, the above offences carry maximum fines of \$10,500 per offence and/or 12 months imprisonment. It is usual for multiple offences to occur simultaneously and rare that only one or two offences is charged. This increases the seriousness of the sentencing of the Court.

If charged with an offence of this nature, you should seek professional advice on how to keep your criminal record clean and minimise any Court imposed fines.

CharterLaw services and expertise

CharterLaw Legal regularly deals with disputes against government bodies such as the ATO and the TPB and has the required knowledge and skill set amongst a team of senior lawyers to fight on behalf of tax agents at the AAT. We are numerate tax lawyers who understand the traps and pitfalls of tax agents who try to engage with the TPB on their own without fully understanding the process and what is at risk.

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The information provided here is general and based on the law and administrative practice as at the date of this document. The law and its application and administration may change at any time. The information provided is general in nature and you must seek advice before adopting any of the advice or strategies that may be outlined in this paper.

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