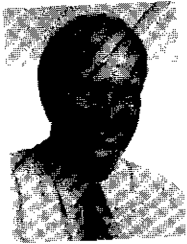

TONY WINDSOR B.Ec. MP
INDEPENDENT
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1 July 2004

Review of Self Assessment
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

I enclose herewith a letter of 31 May, 2004 from Mr Lawrence Henderson, Chairman, Australians for Tax Justice Inc (AFTJ) , PO Box 7123, Cloisters Square, Perth, WA, 6850, with attached copy of a submission to the Review of Self Assessment relating to the issue of retrospectively applied, disallowed tax deductions for mass marketed managed investments.

I would be grateful if consideration could be given to the concern raised in the AFTJ submission and for your advices in due course.

Yours sincerely

Tony Windsor

Tony Windsor MP
Member for New England

tw.lt

31 May 2004

Dear Member of Parliament

SUBJECT YOU AND MASS MARKETTED PROJECTS, AGAIN

I am writing to you with an issue which the parliament can no longer ignore.

The self assessment taxation system has a fundamental weakness that ensures that a taxpayer can not receive a fair go if he makes a claim with which the ATO disagrees. That weakness is that the law expects the taxpayer to get it right when lodging his return.

You will be aware that the high court handed down a decision in the Harts case which overturned a decision of the full bench of the federal court on split loans for purchasing an investment property. If four federal court judges can't get it right what chance has the man in the street who takes his advice from a financial advisor or his accountant?

The responsibility for getting it right has to revert to the ATO. As you will see from our submission to the review panel (attached overleaf), the ATO has ensured that investors who are challenging the ATO position on their disallowed deductions have to run their own individual federal court case. This is exactly the opposite position that the ATO took when it funded a test case before a single judge and pronounced that this judgement applied to all investors regardless of the project they invested in.

The cost of doing this is prohibitive for any working Australian. This means that the ATO can issue an amended assessment and because the taxpayer has to prove the ATO wrong and bear the cost of doing it, the ATO wins because it knows that the taxpayer can't afford to take his case to court. We then have a situation where tax can be collected not according to the laws passed by the parliament, but by what the ATO says.

The ATO should never get away with the stripping away of individual rights, as it has done in implementing a one size fits all approach - again.

If you agree with our submission we would like you to write to the review panel* (contact details below) and tell them so. This is in addition to the requests we made to you in our letter of 15 April 2004, to which a response from you is awaited.

The unfairness of this ATO campaign may not affect you personally but if nothing is done then aggressive tax collecting will surely ruin many more lives.

As an elected MP it is up to you to ensure that this does not happen again.

Yours sincerely

Lawrence Henderson
Chairman,
AUSTRALIANS FOR TAX JUSTICE Inc.

* (Contact Paul McCullough, General Manager, Review of Self Assessment - Tel : 02 6233 3820 / Fax : 02 6263 4312 / Email Pmccullough@treasury.gov.au & Roger Brake, Principal Advisor Revenue Group (same contact numbers and Email : rbrake@treasury.gov.au)

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18th May 2004

The Review of Self Assessment
The Treasury
Langton Cresent
ACT 2600

E: selfassessment@treasury.gov.au

AFTJ SUBMISSION TO TREASURY ON "REVIEW OF SELF ASSESSMENT"

Dear Mr Peter Costello MP,

Australians For Tax Justice Inc (AFTJ) aims to represent over 45,000 families across Australia who for the last 5 years have been battling the ATO and the government's line over retrospectively applied, disallowed tax deductions.

Our fight together with others has led taxpayers, on four occasions, so far, to the Full Federal Court of Australia *(Vincent, Puzey, Sleight and Cooke).* On each occasion the blanket approach of the ATO to issue retrospective assessments irrespective of the facts and circumstances of each investor and each project has been shown to be flawed. On each occasion the ATO assessments have been shown to be invalid or excessive. We also note that in two cases *Puzey and Sleight,* the judgments are going to be the subject of special leave applications to the High Court.

This clearly vindicates our belief that the existing self assessment taxation system, in combination with the application of inappropriate ATO administrative procedures and government checks and controls requires remedial intervention.

Given this, and with some excitement, we welcomed the announcement of your review, which with The Inspector General of Taxation parallel review, acknowledges that something major is wrong. In fact these reviews seem to have been written exclusively for us, and those we represent.

We herein attach our comments for your review, comment and incorporation and would be grateful if you would confirm receipt, by return.

Yours sincerely

Lawrence H.

Lawrence Henderson
Chairman, AUSTRALIANS FOR TAX JUSTICE Inc.

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SELF ASSESSMENT REVIEW.

Introduction.

This submission from the Australians For Tax Justice (AFTJ) will focus on the way in which the ATO has conducted itself in its retrospective attack on about 45,000 working Australians.

We maintain that this is the worst example of tax administration under self assessment (or before it) and because of this gives us a clear view of how the ATO sees the responsibilities of itself and taxpayers under the self assessment system.

Because of the campaign waged by the ATO we maintain that there has to be fundamental change to self assessment flowing from this attack.

We want your committee to bring down a report which embraces our recommendations.
If it does this it will be a landmark report in tax administration.

On the other hand if we get a report that basically exonerates the appalling behaviour of the ATO and makes a few cosmetic recommendations the report will sink without trace like so many others.

Background.

The move to a self assessment system was premised on some basic assumptions by the parliament. The legislators would have believed these things.

- Most Australians are honest in their financial dealings including telling the truth when filing their tax returns.
- The ATO would conduct its activities competently and fairly. If the ATO were to have a concern over areas such as claims by taxpayers with which the ATO had a disagreement that they would act expeditiously.
- That the ATO would educate Australian taxpayers on their rights and responsibilities under self assessment.
- That as long as taxpayers took all reasonable care when filing their tax returns and told the truth they would not be at risk of the severe penalties and interest reserved for a taxpayer committing fraud.
- That the ATO would act as a model litigant as it is required to do under instruction from the Attorney Generals office.

We maintain that taxpayers who were attacked by the ATO did fulfill their responsibilities under self assessment and the ATO did not.

Features of the ATO campaign.

As background to our recommendations we believe these facts to be true.

The Managed Investments Industry.

Managed investments have been around for over 20 years. Evidence tendered to the Senate Committee showed projects as far back as 1980.
The vast majority of projects were genuine businesses which were designed to reward investors and promoters. The federal courts have overwhelmingly accepted this to be true in the judgements they have handed down.
Project managers and promoters advertised their projects widely in the print media and in some cases the electronic media.
Because of inaction by the ATO the number of projects on the market expanded rapidly and the quality of many of them from an investor point of view fell dramatically.
In 1999 the ATO changed its procedures to a product ruling system. It should have drawn a line in the sand at this time.

The Taxpayer.

Was, in the main, approached to invest by an ASIC registered financial planner or an Accountant to purchase an interest in an investment.
The prospectus was registered with ASIC and had a tax opinion from a tax lawyer or one of the first tier accounting firms and in some cases a second opinion was sought by promoters.
Told the truth when filling out their tax returns once again with their accountant.

The ATO.

Admitted to the Senate inquiry that they had concerns in 1990 but did nothing.
Gave at least seven private rulings saying that the arrangement which would form the basis of their subsequent attack were within the law.
Processed tens of thousands of 221D pay variation forms where the reason for variation was clearly stated.
Many witnesses to the Senate inquiry and written submissions to the committee stated that officers of the ATO gave verbal approval for people to invest when they rang them for advice.
Conducted audits on taxpayers approving their deductions in a managed investment only to disallow the deductions in its retrospective campaign.
Stated to the Senate committee that where ATO actions would lead taxpayers to believe that the ATO approved of a certain practice and the ATO changed its mind that the ATO would draw a line in the sand.
Has still not properly educated Australians about their responsibilities under the self assessment system. Its biggest education campaign has been the attack on 45,000 Australians who took professional advice and told the truth.
Has not acted as a model litigant. The ATO under its test case funding budget is required to clarify the law where doubt exists. To date the ATO has funded one case which it chose before a single judge on a non representative research and development project and then used this single decision as the justification for its non negotiable settlement offer to tens of thousands of investors. When taxpayer funded cases have gone against the ATO they have always stated that the decision only applies to the person who took the matter to court or it has little relevance. The ATO far from

seeking to clarify the law has done exactly the opposite. It has consistently refused to fund test cases leaving investors to fund cases which have shown that the reasons given by the ATO to deny deductions for investors are not universally accepted by the courts. Indeed a summation of the judgements comes down on the side of the taxpayer. By taking the position that judgements favourable to the taxpayer have limited application the ATO are making rules which are totally unfair on taxpayers as they have to mount individual federal court cases. This is clearly cost prohibitive. We refer you to an article in the Financial Review on the 7th May 2004 which confirms our views on the selective manner in which the ATO applies judicial precedent.

The ATO has not treated taxpayers on their individual circumstances as required by the Taxpayers Charter of Rights. Even an internal ATO document, which was produced prior to the ATO attack, recommended against the action they subsequently took because of this fact. The document also said that there were good commercial reasons for the use of limited recourse round robin loans. The ATO did not heed its own advice.

The ATO do not have the resources to administer the mess they have created. After nearly two years many investors who were bullied into settling have not received any correspondence from the ATO.

Comment.

It is obvious to anyone who has an interest in tax administration that the ATO should never have mounted this campaign. There can be no doubt that it is revenue driven, has little legal support for its position and is being sustained only to save the reputations of the officers within the ATO who made the decision to implement it.

If you believe, as we do, that these facts are correct then your recommendations must ensure that this disastrous campaign can never be repeated.

Our recommendations.

1. Where the ATO seek to disallow deductions en masse to groups of taxpayers it is the ATO who must fund any case before the courts to clarify the law before it issues amended assessments. The ATO has to accept the responsibility of getting it right and to make them prove their allegations rather than the taxpayer having to disprove them would do this.
2. That a committee of at least ten people competent in tax law and administration be set up completely independent of the ATO to adjudicate on test case funding and part 4a matters. The ATO would have to prove its case and the taxpayer would be allowed to be represented before the committee. The committees decision would be binding with both parties reserving their rights to have their day in court.
3. That the ATO be required to act as a model litigant by having an independent audit from a competent external legal body every year.
4. That the ATO be required to treat each taxpayer according to their individual circumstances and not be subject to a one size fits all approach which has been dismissed by the courts and even the ATO as it loses cases in the federal court. We maintain that the ATO be required to go back and allow each of the 45,000 people it has attacked to have their cases treated individually. NOTE If you accepted this common sense and completely justifiable recommendation you would end this sorry episode in tax maladministration tomorrow. As the ATO internal document recommended this was the minimum standard the ATO should have applied at the start. The only reason they stripped individuals of their rights was administrative efficiency. It was administration by mail merge where all the documents were the same and only the name changed regardless of the project or the individual motives of the taxpayer.
5. That the ATO be required to educate Australians on how the self assessment system works.

Conclusion.

It is clear from the facts behind the campaign waged by the ATO that they have exceeded the spirit and the intentions of the legislators in passing the self assessment in to law.

We maintain that the investor, in the main, did all that was required of him in fulfilling his duties under self assessment. He took advice from a professionally registered person, acted on tax advice prepared by a professional and told the truth.

The ATO by contrast disregarded its own advice not to retrospectively take the action it did.

There was never any communication with investors about the 1990 concerns. The ATO had a duty of care on this matter and completely failed it.
The ATO has not tried to clarify the law as it is required to do. It has used the Senate committee recommendations, selectively, to justify its offer to investors to settle where the amount is dispute was never included in the take it or leave it document.

We would like to conclude with two observations.

Firstly the ATO have branded their attack under the umbrella of aggressive tax planning. The last time we checked the law this was not illegal. We believe that the ATO have embarked on aggressive tax collection because they didn't have to justify their actions. This aggressive tax collecting has cost lives, caused marital breakdowns, bankruptcies and significant economic damage to rural Australia.

Secondly it is hard to disagree with the Inspector General of Taxation David Vos as reported in the West Australian (12/5/04 p29) where he said ….." called on the tax office to shoulder more responsibility under Australia's self assessment regime - a responsibility he believed the organisation was trying to abdicate.

They have taken the view that it is not their responsibility… that it's up to the taxpayer to get it right and if they don't then it's up to the tax office to clobber them." He said. "They can't hide behind the mantle of belief that it's the taxpayers responsibility and they don't have to enter into it at all."

We couldn't have put it better ourselves.

If you accept the thrust of our recommendations you will go a long way to improving the operation of our tax system.

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