TAX FORUM OCTOBER 2011

GROUP OF 100 POSITION

The G100 believes that the following issues should be addressed at the Tax Forum:

- tax administration including the operation of the self-assessment system, relationships with the ATO, the ATO‟s approach to reportable tax positions and the use of administrative discretions; and
- the need for certainty, timeliness and consistency in tax positions and rulings issued by the ATO.

Tax Administration

Tax administration should be driven by the following:

- enhancing international competitiveness;
- developing a framework that minimises uncertainty and specific risk arising from tax system;
- tax arrangements that are transparent, simple to administer and minimise the compliance burden.

Our focus on tax administration issues relate principally to the operation of the self assessment regime and the relationship between the ATO and the taxpayer.

Self-Assessment

Prior to self-assessment, certainty was obtained by taxpayers by way of an assessment system which worked on the basis that the ATO, upon lodgement of a taxpayer‟s tax return and making an assessment thereof, was precluded from amending the taxpayer‟s return in respect of any matters that related to a question of the application of the tax law. Consequently, tax returns under the former full assessment system contained significantly more information than that required at the outset of the self-assessment regime. If a mistake of fact was detected by the ATO, it could amend the return retrospectively but not in respect of a matter that related to an interpretation of the tax law. As a result, this system provided a great deal of certainty for taxpayers when it came to matters involving the interpretation of the law.

The G100 believes that the practical realities are that the ATO has, in many instances, moved away from the self-assessment system contemplated by the current legislative provisions of the Income Tax Assessment Act. In fact, for those taxpayers that the ATO determines are „higher

consequence‟ to the Revenue, a system of full and, in many cases, „real time‟ assessment is in operation. That shift and the resultant fact that there are now effectively two assessing systems in place, needs to be recognised in a legislative context.

The self-assessment legislative framework intended by Parliament albeit subject to administration by the ATO included the need to carry out compliance activities. The question becomes: what has changed since its introduction to make the self-assessment system out-dated? At a high level the G100 considers that:

- the level of income tax return disclosure required by the ATO has and continues to increase, but with no obligation upon the ATO to reach any view about that information;

- legislation post self-assessment (and in some instances prior) in many instances gives the Commissioner the power to exercise his discretion making it impossible for taxpayers to self-assess with any certainty. This includes Part IVA of the Act, the development of which was in its infancy at the time self-assessment was introduced. Additionally, Part IVA provides a further discretion to the Commissioner and is a further source of uncertainty;

- the Rulings system which was introduced to supplement self-assessment to enable taxpayers to get an answer in respect of difficult or uncertain matters has not worked effectively or efficiently, because it takes an inordinate amount of time to get Rulings and there is a perception that the Rulings are biased towards the Revenue. Other than the Rulings system, there is no formal mechanism for engagement with the ATO;

- the Commissioner is administering the law so that many taxpayers are subject to "full assessment"; and

- meanwhile, the self-assessment regimes in respect of interest, penalty and amendment periods, which were understandably harsh under a self-assessment regime, are still relied upon is unreasonably harsh in an environment where taxpayers are subject to the ATO‟s audit program.

These factors indicate that a review of the self-assessment system is warranted. If it is ultimately determined that the existing self-assessment framework requires modification, the new regime should be installed by way of legislative reform and not by reliance upon the administrative practices of the ATO. The current enforcement and administration regime is based on a legislative regime different from and ill-suited to what is in fact being applied in practice.

Certainty

The G100 believes that changes are required to ensure certainty of tax outcomes for businesses.

With the globalisation and growing complexity of business arrangements, transactions and tax law, Australia needs a commercially minded tax administration to provide certainty of outcomes for business in a timely manner. The presence of uncertainty and delays in responding, say,

through the issue of tax rulings and position statements creates problems for businesses in decision making because, for many transactions, their viability is significantly influenced by, or is dependent on, the impact of taxation. The presence of uncertainties also impacts on the international competitiveness of Australian businesses.

The reasons why the current full assessment methods currently being applied do not result in providing taxpayers with certainty is because:

- the ATO only reviews the issues it believes will increase revenue. The assessment process is not complete in that not all positions are reviewed;

- where the ATO reviews an issue and does not proceed to amendment, there is no sign-off provided to the taxpayer that their position is correct, but almost invariably it is left as "no further action at this stage";

- where the taxpayer seeks to actively engage the ATO to determine the correct treatment of a position, then outside the Rulings system or a compliance product (designed to remediate risks to the Revenue only) the ATO has no means (or „ATO Product") by which certainty can be provided – the ATO only has compliance products directed at raising revenue – some taxpayers have of course assumed that their filing position over many years was correct because of, for example, the Commissioner"s passive acceptance of the position, only to find that this is not the case – as identified in the IGOT review into ATO „U turns";

- if after this full assessment process the ATO amends the taxpayer"s position, the taxpayer is subject to the interest and penalty regime designed for self-assessment and remains in the hands of the ATO"s administrative practices as to how those deliberately harsh regimes are applied; and

- notwithstanding this full assessment process, it is only the passage of the statutory amendment periods, designed for a self-assessment regime, which bring the requisite certainty to a taxpayers" affairs. However, the protective assessments are threatened by ATO practice which elongates the statutory deadlines so that in substance issues can remain open for several years.

ATO Advice Framework

There are broad concerns about the ATO Advice Framework, the ATO"s recent stance on Reportable Tax Positions in a self-assessment system and the commercial focus of the ATO. For example

- The ATO advice framework is not sufficiently timely or responsive to the complexities of our tax system and the needs of taxpayers. Under the current system, taxpayers are faced with the choice of a Private Binding Ruling, which is an expensive and time consuming (60-90 days) exercise, or nothing. In practice, taxpayers often do not have the luxury of the time required to get a Ruling. A current topical example is the current uncertainty regarding the ability to frank a dividend declared from accumulated losses. ASX lodgement deadlines do

not provide sufficient time to get a Tax Ruling. Ideally there should be a better alternative to the Private Binding Ruling System to give taxpayers a level of certainty where time (and cost) is of the essence.

- The requirement for some taxpayers to lodge a schedule of Reportable Tax Positions is a significant change to the self-assessment landscape. It should not be introduced without consideration of fairness and equity. At a very minimum it should be accompanied by reductions in interest and penalties (as is the case with voluntary disclosures) and some form of early closure of any review by the ATO of reported uncertain positions. The ATO practices in respect of reportable tax positions also violate the general principles of fairness and equity in that the ATO is requiring taxpayers to make disclosures such as the amounts that have been provided for a potential litigation matter to a potential litigant, being the ATO.

- The relationship between big business and the ATO would be enhanced if the ATO recruited more people with business experience to its senior ranks; eg Assistant Commissioners. This would hopefully engender a culture that is sympathetic to the needs and motivations of the business community, while not diluting the effectiveness of the ATO‟s core functions to protect the revenue and uphold the law.

Conclusion

In conclusion, the self-assessment system has not provided taxpayer certainty, partly because of the vagaries of the law and partly because of the way the ATO administers the law. We believe that it is now important to examine whether the existing self-assessment system is appropriate for the administration of Australia‟s tax law and, if not, for it to be replaced with a modified regime which has legislative support and adequate taxpayer protections that have had the benefit of community debate and Parliamentary consideration.

As a result, the G100 recommends that there be a consultative and detailed review of the enforcement and administrative regime of Australia‟s tax system performed by an independent body involving both ATO and broad taxpayer community consultation.