Do trustees no longer have unlimited assessment periods?

by Sam Campbell, Associate, Sladen Legal

A new law administration practice statement will give trustees some comfort that the ATO will not issue an assessment outside the normal two-/four-year periods.

Introduction

On 19 February 2015, the ATO issued PS LA 2015/2. An early candidate in the ATO's ongoing campaign to redesign (and rewrite) law administration practice statements (LAPS),[1] PS LA 2015/2 seeks to explain the ATO's practice of limiting the time in which it will raise an original income tax assessment against a trustee.

The ATO has stated that PS LA 2015/2 has been prepared for the purpose of ensuring that returns lodged by trustees are broadly exposed to similar time limits for review as other taxpayers. It is expected that this in turn will provide trustees with greater certainty in accounting for their taxation affairs.

Timing of original assessments

From a taxpayer's income tax returns (or from any other information in his possession), the Commissioner of Taxation must make an original assessment in relation to the amount of taxable income (or that there is no taxable income) of any taxpayer. The original assessment will include the amount of tax payable (or that there is no tax payable) and the total of the taxpayer's tax offset refunds (or that the taxpayer can get no such refund).[2]

There is no time limit on making an original assessment. However, where an individual taxpayer has not received a notice of assessment within 12 months of filing their return, they may request the Commissioner to make an assessment. Should the taxpayer then fail to receive an assessment notice within three months of the request, the taxpayer is taken to have received on the last day of the three-month period a notional original assessment notice payable on that day.[3] Where a company, superannuation fund, approved deposit fund or pooled superannuation trust lodges an income tax return, the return is deemed to be the notice of assessment.[4]

Once an original assessment has been issued, the Commissioner's powers to amend an assessment or further amend an amended assessment, are (largely) limited and subject to a certain defined timeframe. For most individuals or small business taxpayers, it is a two-year amendment period. This is extended to a four-year amendment period for those taxpayers who do not fall within the two-year period.[5] There are certain categories of taxpayers who are excluded from these standard periods.[6] Further, in certain circumstances, there are no time limits for certain amendments, including where the Commissioner is alleging fraud or evasion.[7]

Nil returns for non-trustee taxpayers

In the past, for taxpayers who returned a nil liability in their tax returns, the ATO had an unlimited period to review their affairs, as any time limitations only started to run from when the tax became due and payable.

In August 2004, the Treasury issued the *Report on aspects of income tax self-assessment* in which it was recommended that, from the 2004-05 income year, the period of review for nil (and loss) liability cases should be equivalent to the period for the ATO to amend assessments creating liabilities.[8] As a result of the government's response to this report, certain changes to the provisions relating to amendment of income tax assessments and objections were passed with application from the 2004-05 and later income years.[9] In light of these changes, an assessment of nil liability is now an "assessment" as defined under taxation law and attracts limited objection rights.

In practice, the ATO issues original assessments for non-trustee taxpayers for nil returns, therefore starting the two-/four-year period for such taxpayers.

Nil returns for trustee taxpayers

From December 2005, the ATO stopped issuing nil liability assessments to trustees. While the ATO accepted that it could issue nil liability assessments to trustees, especially in light of the nil return changes, it argued there were legislative and administrative hurdles in continuing to do so.[10] The legislative difficulties included that, while it may be possible to issue nil assessments from information in a trust return, this would not cover all potential trustee assessments that could arise from a trust return. The administrative difficulties included the significant workload imposed on the ATO if they had to issue notices for the full range of non-taxable circumstances for each trustee.[11]

The consequence of this is that the time does not start running for the period of review for trustees with nil returns and that the Commissioner has an unlimited period to assess the trustee's tax position and issue amended assessments.

Effectively, the ATO will not issue a nil liability assessment to a trustee and start the two-/four-year review period. A trustee therefore has the following three options:

- it could request that the Commissioner issue it an assessment 12 months or more after lodging its return. In that case, if the ATO did not issue the assessment within three months of the request, then, as noted above, a notional original assessment will be deemed to be given;
- the trustee could rely on PS LA 2015/2 as outlined below; or

- the trustee could accumulate a small amount of income, therefore forcing the ATO to issue the trustee with an assessment and starting the two-/four-year period.

Timing of original trustee assessments

In a 2012 policy paper, *Taxing trust income – options for reform*, the Treasury dealt with wider issues of updating and reforming Australian law relating to taxation of trusts. In the paper, it was noted the Commissioner had adopted an administrative practice that any original assessment for a trustee would only be issued within four years of the later of the due date for lodgment of the trust return, or the actual lodgment date of the return. The paper also included an option for reform so that where a trustee has lodged a return indicating they are not liable to tax, it would be deemed a nil assessment and the Commissioner would have the power to issue an amended assessment up to two or four years from this date.[12]

Application of PS LA 2015/2

To avoid the unfairness of the administrative practice of not issuing nil liability assessments to trustees, the ATO has issued PS LA 2015/2. The effect of PS LA 2015/2 is to water down the harshness of the ATO's administrative practice not to issue nil assessments for trustees (and start the two-/four-year period) by creating another administrative practice in which the ATO will generally not exercise its unlimited powers of assessment outside the two-/four-year period.

Time limits for trustees

In PS LA 2015/2, the Commissioner provides that, except in certain situations, the ATO should not issue an original trustee assessment, either:

- more than four years after the relevant trust tax return was lodged; or
- for the income year ended 30 June 2014 and later income years, more than two years after lodgment if the trust is a small business entity for that year and none of the qualifications in item 3 of the table in s 170(1) of the *Income Tax Assessment Act 1936* (Cth) (ITAA36) apply.[13]

Exclusions to time limits

However, the Commissioner notes that these time limits will not apply in the following circumstances:

- if the trustee has not lodged a trust return for the year in question;
- if the Commissioner is of the opinion that there has been fraud or evasion;
- where an extended or unlimited amendment period would apply; or
- where the time limit has been extended (as provided for under PS LA 2015/2, see below).[14]

Extension to time limits

In relation to extending the time limit to raise an original trustee assessment, the Commissioner provides that where an ATO case officer has started to examine the affairs of a trust (or related entity that could affect the trust's tax affairs) and that examination will not be complete within the time frames mentioned above (four years or two years, as applicable), then the officer may seek the trustee's agreement to extend the period. Any such agreement to extend time to issue an original trustee assessment is explicitly excluded under s 170(7) ITAA36 (which relates to a formal extension of the period for amending assessments).[15]

How binding is PS LA 2015/2 on the Commissioner?

Law administration practice statements, such as PS LA 2015/2, are policy documents that provide instructions to ATO staff on the way they should perform certain duties involving the application of laws administered by the Commissioner.[16] Consequently, they do not express a precedential ATO view.[17] A taxpayer who relies on particular LAPS will remain liable for any tax shortfall if those LAPS are incorrect or misleading and the taxpayer makes a mistake as a result.[18] However, they will be protected against any shortfall penalty that would otherwise arise, as well as any interest charges on the shortfall if the particular LAPS are reasonably relied on in good faith.[19]

Conclusion

The PS LA 2015/2 will give some comfort to trustees that assessments will not be raised by the ATO outside of the two-/four-year periods. However, given the non-binding nature of LAPS, including PS LA 2015/2, it is hoped that a legislative fix to this issue will arise out of the coming review of trusts and the government's promised tax white paper.

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References

1 Australian Public Service Commission, *Capability review*, Australian Taxation Office, May 2013, p 12.
2 S 166 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).
3 S 171 ITAA36.
4 S 166A ITAA36.
5 Ss 170 and 170A ITAA36.
6 Reg 20 of the *Income Tax Regulations 1936* (Cth).
7 S 170(1), table, item 5 ITAA36.
8 Treasury, *Report on aspects of income tax self-assessment*, August 2004, p 32, recommendation 3.4.
9 *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*
10 M Dirkis and B Bondfield "Rosa's last gasp: the final steps in self assessments' 21 year journey", (2008) 3(2) *Journal of the Australian Tax Teachers Association* 221.
11 ATO, National Tax Liaison Group draft minutes for the meeting of 5 September 2006, items 23 and 14 quoted in "Rosa's last gasp: the final steps in self assessments' 21 year journey", (2008) 3(2) *Journal of the Australian Tax Teachers Association* 221 at 221-222.
12 Treasury, *Taxing trust income – options for reform*, October 2012, p 13; see also the earlier discussion paper issued by the Treasury, *Review of unlimited amendment periods in the income tax laws*, August 2007, in particular at p 17.
13 Para 2 of PS LA 2015/2.
14 Ibid para 3.
15 Ibid para 4.
16 Para 1 of PS LA 1998/1.
17 Ibid para 2.
18 Ibid; para 236 of PS LA 2008/3.
19 Para 2 of PS LA 1998/1.