



Tax adviser registration — a new headache for in-house advisers

By John Currie, Consultant, MacDonnells Law

- Tax Agent Services legislation is in effect and many in-house advisers will be affected
- Stringent training and 'fit and proper' requirements to be met before registration
- Government proposes introducing regulations to exempt those advisers not intended to be captured, but further refinement is inevitable

Many company secretaries wear a variety of hats. Some double as chief financial officers or corporate counsel. Many are the public officer of the company or group for tax reporting purposes and routinely sign off the income tax returns (and perhaps BAS returns).

A corollary of this is that the company secretary is often the most knowledgeable person in the boardroom on matters of tax. When tax consequences arise on transactions, many directors habitually turn to the company secretary for an initial opinion.

To date this relatively informal system has worked reasonably well for most companies, with directors generally accepting that there were some issues on which a particular company secretary was comfortable to give an initial opinion and others where the matter should be referred elsewhere.

The new *Tax Agent Services Act 2009* (TASA), which took effect from 1 March 2010, however, may demand a rethink of this informal system.

This legislation was conceived as a form of consumer protection to regulate tax agents who prepared income tax and BAS returns and provided

advice to taxpayers for reward.

Where a member of the public entrusted a registered tax agent with the information needed to prepare and lodge a return, there is a 'safe haven' provision. If the return is misprepared, the newly formed Tax Practitioners' Board (TPB) is vested with disciplinary powers, including suspension and deregistration. The TPB replaces the Tax Agents' Boards that formerly operated in each state.

Further information about the TPB is available at its website, www.tpb.gov.au.

Unintended consequences?

However, there appear to be some unintended consequences in the TASA.

One of those unintended consequences is that the Chairman of the TPB, Dale Boucher, expected in-house tax advisers to secure registration as tax agents on the basis that 'the definition of tax agent services is broad and there is no clear reason why in-house advisors should be excluded'.¹

While this jurisdictional ambit claim may appear to be classic 'empire building', it does have serious implications for some company secretaries, in-house counsel and in-house tax managers.

The dilemma is that many company secretaries, tax managers and group counsel routinely provide at least some tax advice or assistance to board members and other executives during the course of their duties. This could prima facie be seen to be providing a 'tax agent service ... for fee or reward' — the reward being their salaries — and may accordingly need to register in order to continue to do so. Providing these tax agent services without securing registration could contravene the civil penalty provisions (Subdiv 50-A TASA).

The potential ramifications are quite serious. For each breach of s 50–5, the civil penalties are as follows:

- \$27,500 for an individual and
- \$137,500 for a company.

Arguably it was never envisaged that internal corporate tax advisers should be subject to this form of consumer protection legislation.

There is support for this view in the Explanatory Memorandum to the Tax Agent Services Bill 2008 (EM) which introduced the amendment, where it is stated that:

An entity is liable for a civil penalty if it provides a service that it knows or ought reasonably to know is a BAS service ... for a fee or other reward and it is not registered as a tax agent or a BAS agent ...

The requirement that tax agent services or BAS services be provided 'for a fee or other reward' allows employees (who are unregistered) to provide tax agent services or BAS services to their employer/s for a salary wage or other benefit (such as a fringe benefit ...) without contravening the civil penalty provision.²

As a result of industry lobbying, the government has, at the time of writing, publicly backed down on requiring certain in-house advisers to be registered.

A partial solution, at best

The 'fix' announced by Senator Nick Sherry, the Assistant Treasurer, on 18 February 2010 will be made by passing regulations to exclude certain in-house advisers from the TASA registration requirements.³

According to the Assistant Treasurer, in-house tax advisers are those individuals providing tax advice which would be relied upon within their corporate group for a single tax entity. The Assistant Treasurer said that it was not the government's intention to require these advisers to register if they are only providing advice within their corporate group.

However, the Assistant Treasurer's comments appear to contradict those of the Chairman of the TPB, noted earlier.

In addition, there are some serious limitations to the solution announced by the Assistant Treasurer.

First, it would be much better for the fix to be made by a change in the TASA itself rather than by way of regulations, as regulations can be altered without the express approval of the Parliament.

The dilemma is that many company secretaries, tax managers and groups routinely provide at least some tax advice or assistance to board members and other executives during the course of their duties could prima facie be seen to be providing a 'tax agent service ... for fee or reward' — the reward being their salaries — and may accordingly need to register in order to continue to do so. Providing these tax agent services without securing registration could contravene the civil penalty provisions.

Second, the exemption from registration is to apply only to those who are only 'providing advice within their corporate group', that is a single tax entity.

Arguably, this means that where a company secretary, or an in-house adviser, is dealing with (say) a joint venture or corporate partnership, or in the context of a proposed merger or acquisition, and is accordingly dealing with more than a single tax entity, TASA registration would still be required.

Similarly, where a conglomerate has a holding company and partly owned subsidiaries, it appears that tax agent services may be rendered to more than a single tax entity and that registration would arguably also be required.

Third, it is not difficult to conceive of cases where business exigencies require an in-house adviser to drift into contravention of the civil penalties provisions in the ordinary course of their duties.

A merger or takeover will often involve one or more executives looking at the tax affairs of two or more tax entities during the course of which tax advice and assistance may well be rendered to more than the single employing entity. The acquisition of (say) a controlling interest in another company could readily result in an inadvertent supply of tax agent services to more than one entity during the ordinary course of the transaction.

One recent example of how this may happen arose in the recent case of *British American Tobacco Australia Services Ltd v FCT* [2009] FCA 1550.

This case dealt with the international merger of the world's then second and fourth largest tobacco groups. The merger agreement specified that the larger of the BAT or Rothmans groups in each jurisdiction would have the lead role in each country's merger. As you would expect, one issue dealt with by the in-house advisers was the best way to structure the merger for tax purposes.

These limitations indicate that the fix proposed by the Assistant Treasurer is inherently unstable. We are in need of a better thought out solution from the government. While this fix is just a band aid solution, it is, for the foreseeable future, the regime we will have to deal with.

At the time of writing lobbying is on foot to persuade the government to undertake some further 'fine tuning' so that the TASA reverts to its original purpose of consumer protection by widening the carve out for in-house advisers.

There is no telling at the moment whether, or the extent to which, the proposed fix will be expanded to deal with the difficulties referred to above.

TASA registration

Assuming for the moment that you are within the TASA ambit, what does this mean as a practical matter?

Prudent company secretaries may be inclined to:

- ***decline to give any tax advice and assistance in any case unless fully covered by insurance or another indemnity from the company or group***
- ***decline to put advice in writing unless and only to the extent covered by an engagement letter and***
- ***outsource everything tax related to third party tax agents in order to avoid unwanted liability, perhaps at considerable cost and for little tangible benefit to the employer.***

The first point is that registration is not automatic. To be eligible for registration a person must pass both the 'fit and proper person' test and satisfy the TPB that you have met the prescribed qualification and education requirements.

These criteria are perhaps more stringent than many may have expected.

The Q and A sections from the Taxation Institute of Australia website illustrate the registration requirements:

Q Who is fit and proper?

A Two years ago Bob was convicted of a drink driving charge. He received a suspended sentence. This is a matter that would need to be disclosed to the Board for their consideration when determining whether Bob is a fit and proper person.

Q Does an accounting degree qualify you to register?

A Bill has an accounting degree and has been working as an accountant for the last 12 months.

Unless the transitional rules are applicable, Bill will need to complete an approved course in Australian taxation law and commercial law to be eligible to register.

Q Does a diploma qualify you to register?

A Bill has an accounting diploma. He has been working as a tax lawyer for the last two years.

Unless the transitional rules are applicable, Bill will need to complete an approved course in Australian taxation law and commercial law to be eligible to register.

Q Does a law degree qualify you to register?

A Bill has a law degree and is admitted as an Australian legal practitioner. He has been working as a tax lawyer for the last 12 months.

Unless the transitional rules are applicable, Bill will need to complete an approved course in basic accountancy and Australian taxation law to be eligible to register.⁴

Second, registration is not free. An application for registration will cost \$500 for those in business and \$250 for those not carrying on a tax agent's business. Registration will generally be renewable every three years.

Third, registration is likely to be granted on a segmented basis; that is, certain persons will be able to undertake some tasks but not others. For example:

Peter is an Australian legal practitioner and obtained unconditional tax agent registration based on his experience of providing tax agent services (other than the preparation and lodgement of returns) as a legal practitioner. Peter breaches this requirement of the Code if he prepares and lodges returns on behalf of his clients for a fee unless he can satisfy the Board that he is competent to do so, for example he has undertaken private study of material published by the ATO and available on its website and/or has completed certain courses on return preparation.⁵

Fourth, having secured registration, there may be more paper work required, such as engagement letters in some cases, regardless of whether you are carrying on a business.⁶

Fifth, all registered tax agents may have to secure and maintain professional indemnity insurance at a level to be determined by the TPB in due course.⁷ The point is expressed as follows in the EM:

Tax agents and BAS agents are professionals who hold themselves out as having a special skill on which members of the community can rely. As they are agents for the client, they can be liable for any financial loss or damage which their clients suffer through failure or mistake. The requirement to have appropriate professional indemnity insurance cover ensures that those people who are exposed to the risks of financial loss resulting from agents' conduct are adequately protected and compensated.⁸

Taxpayers retain a cause of action at common law to recover damages from their tax agent or BAS agent for the negligence of their agent and a cause of action under s 52 of the *Trade Practices Act 1974* to recover damages from their agent for engaging in conduct that is misleading or deceptive or is likely to mislead or deceive.⁹

This suggests that prudent company secretaries may be more inclined to:

- decline to give any tax advice and assistance in any case unless fully covered by insurance or another indemnity from the company or group
- decline to put advice in writing unless and only to the extent covered by an engagement letter and

- outsource everything tax related to third party tax agents in order to avoid unwanted liability, perhaps at considerable cost and for little tangible benefit to the employer.

Sixth, by securing registration a person will then be subject to a wide range of disciplinary measures by the TPB.

Seventh, by securing registration a person will then be subject to a legislated code of professional and ethical standards. This will include compliance with tax laws in their own affairs and a number of other matters, including independence.

Clearly it will be difficult for a senior officer of a company such as a company secretary to achieve independence as a practical matter from his or her employer. Conflicts are a certainty.

Conclusion

At the date of writing, it is fair to suggest that further changes are likely to the practical operation of the TASA regime in the near future.

Readers will no doubt take solace and comfort from the thought that, according to the Assistant Treasurer:

The tax agents services regime is a major piece of red-tape reducing national reform, encompassing tens of thousands of professionals across the country.¹⁰

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Notes

- 1 See Kehoe J, 2010, 'Inhouse tax guns to slip muster', *Australian Financial Review*, 9 February, p 9
- 2 Explanatory Memorandum to Tax Agent Services Bill 2008, paras 4.28 and 4.29
- 3 Sherry N, 2010, Address to Deloitte Tax Forum Breakfast, Melbourne, 18 February
- 4 See <http://www.taxinstitute.com.au/index.cfm?objectid=EFFBDC4E-5056-BE14-12038DA877F2EC06> [25 March 2010]. Text reproduced with permission
- 5 Explanatory Memorandum, op cit, para 3.41
- 6 See s 30-5 TASA
- 7 See s 30-10 TASA
- 8 Explanatory Memorandum, op cit, para 2.78
- 9 Explanatory Memorandum, op cit, para 3.15
- 10 Sherry, op cit ■