



THE TAX INSTITUTE

16 November 2012

Mr Mark Maskell
Secretary
Tax Practitioners Board
PO Box 9825
PENRITH NSW 2740

By email: tpbsubmissions@tpb.gov.au

Dear Mr Maskell,

Exposure Draft TPB Information Sheet TPB (I) D15/2012: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs

The Tax Institute is pleased to have the opportunity to make a submission to the Tax Practitioners Board (**Board**) in relation to the *Exposure Draft TPB Information Sheet TPB (I) D15/2012: Code of Professional Conduct – reasonable care to ascertain a client's state of affairs (Exposure Draft)*.

Summary

The Tax Institute broadly agrees with the commentary and examples included in the Exposure Draft and notes the Exposure Draft will be of great assistance to registered agents (tax and BAS agents) in guiding them as to how they can meet and discharge the obligation to take reasonable care when ascertaining a client's state of affairs. However, The Tax Institute notes that further context around some of the examples would be most useful to alleviate any uncertainty a registered agent may have about particular circumstances they may encounter in their practice.

Discussion

We refer to comments we provided to the Board by email on 16 January 2012 in relation to the Draft Discussion Paper issued by the Board in November 2011 on the issue of registered agents taking reasonable care to ascertain a client's state of affairs.

A copy of these comments are contained in Appendix A attached. In particular, we refer to the comments we provided highlighting areas for which the Board should provide guidance to registered agents in addition to the areas set out in paragraph 7 of the Draft Discussion Paper.

Examples in the Exposure Draft

We note that the Exposure Draft addresses the majority of the issues raised in paragraph 7 of the Draft Discussion Paper and several examples demonstrating these issues have also been given. Examples of other issues have also been given, though we believe these examples require some explanation to give them context.

For example, it would be useful for the Board to provide some guidance around how vigilant a registered agent should be in respect of the documentation provided to it by a client, particularly where the client does not have sophisticated record-keeping practices in place (eg because the client is new to business) and whether the Board would expect a registered agent to take more care in such a circumstance. We acknowledge Example 9 demonstrates this issue. However, we suggest it would be useful for the Board to give some written guidance around what may or may not be an acceptable level of investigation of a registered agent into the records kept by a client in order to discharge the requirement to take reasonable care to ascertain their client's state of affairs.

A second example where some commentary from the Board would be useful to registered agents is in relation to registered tax and BAS agents being able to rely on each other's work. Example 7 is provided to demonstrate the reliance that can, or cannot, be placed on another registered agent's work, however, a statement from the Board to that effect in addition to the example would confirm whether this is the case.

A third example of this is in relation to the circumstances when a registered tax or BAS agent can refuse to engage a particular client. Some commentary confirming that a registered agent is able to do this, in addition to the example provided, would be useful to confirm that a registered agent is able to refuse a client in appropriate circumstances (and should not feel obliged to take on clients they are uncertain about) where they are unable to properly ascertain the client's state of affairs.

We have not listed every single circumstance where commentary should be provided to give context to the examples. Rather, we have highlighted the importance of giving context to the examples provided so that registered agents know when they may have properly discharged their obligation to take reasonable care in particular circumstances.

Suggested Additional Areas for Guidance

Many registered agents have been concerned that they will in effect be required to “audit” their clients before they are able to demonstrate they have discharged their obligation to take reasonable care to ascertain their client’s state of affairs, particularly where they are taking on a client for the first time. They will look to the Board for assistance in striking the balance between meeting their obligations under the Code of Professional Conduct (**Code**) and being able to, for example, limit the terms of their engagement with a particular client. A client may, for example, require the agent to provide services of preparing an income tax return based on information provided by the client and may not be prepared to pay a registered tax agent for time spent to make any enquiries as to the veracity of the information provided. An agent may have doubts about the veracity of the information but will be unable to make further enquiries due to the limitations of their engagement.

Using the facts of Example 9 from the Exposure Draft, Jenny engages Alice on the basis that she requires Alice to accept the small business software records on face value. Alice forms the view she should investigate further the records given to her. However, Jenny will not pay Alice to spend the time to investigate the information further and the terms of Alice’s engagement with Jenny do not enable her to undertake any further investigation. In this regard, would Alice still be regarded as not having taken reasonable care given the terms of her engagement do not allow her to make further enquiries about the information she has been given even though she has formed the view that she should make further enquiries?

The Board will become aware of more circumstances where registered agents are required to find the balance between their obligations under the Code and their obligations owed to their clients. The factual examples the Board will be presented with will increase in complexity as both registered agents and their clients become more aware of this particular Code obligation. The examples included in the Exposure Draft are good, but we believe further and more extensive examples, such as the one noted above, will be necessary in due course.

We believe it would be helpful, as more of these issues come to light and the Board is required to address them, that further examples be included in the Information Sheet that results from this Exposure Draft. However, the process by which Information Sheets are prepared may not allow for easy updating of the Information Sheet. In this regard, the Board should also consider adding examples to its website or provide access through its website or telephone service (or both) to officers at the Board who are able to assist registered agents to determine how to best handle these kinds of situations, though we acknowledge the advice that may be given by the Board’s officers may be non-binding.

In our submission to the Board in relation to the Draft Discussion Paper, we also noted some areas on which the Board should consider giving guidance to tax agents. In particular:

- whether a registered agent is able to approach third parties for information about the client (other than another registered agent or accessing information that is available on a publicly available register such as the Australian Business Register website, both of which are already dealt with in the Exposure Draft) and whether the client's express permission is required in all such instances; and
- where to direct a client who takes issue with what a registered agent may consider in his or her professional judgment to be proper enquiries into the client's affairs in order to properly discharge their requirement to take reasonable care (that is, how will client complaints be handled in the event the complaint relates to a registered agent simply trying to discharge their obligation to take reasonable care in accordance with the standards set by the Board?)

We request the Board give consideration to including commentary around these issues before finalising the Exposure Draft.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Westaway', with a long horizontal stroke above the name.

Steve Westaway
Vice President

Appendix A

From: Deepti Paton
Sent: Monday, 16 January 2012 5:25 PM
To: Pegg, Neil
Cc: Robert Jeremenko; Karen Touma; Deepti Paton
Subject: FW: Discussion paper - Tax Practitioners Board Seeking feedback
[SEC=UNCLASSIFIED]

Neil

The Tax Institute commends the TPB's efforts to compile a work program for the provision of advice, as well as this specific work stream in relation to the Code of Conduct requirement to take reasonable care in ascertaining a client's state of affairs. As noted on earlier occasions, this requirement has proven difficult to apply and worrisome for many of our members.

We broadly agree with the areas in which further guidance would assist in relation to this requirement as set out in the Discussion Paper. Our comments on the issues identified at paragraph 7 of the Discussion Paper are as follows:

- We broadly agree with the interpretation of the requirement set out at c) as it is our view that in order to justify the trust bestowed on tax agents by the ATO, TPB and taxpayers at large, tax agents should be held to a sufficiently high professional standard i.e. tax agents should not simply be conduits for information provided by the client.
- However it should be noted that as this interpretation creates a higher standard of care than most agents perceived was the case before the introduction of the Tax Agents Services Regime (TASR), there is still confusion in the sector as to the practical implications of this requirement. In providing assistance, we encourage the TPB to be cognisant of the additional challenges faced by tax agents in importing this Code of Conduct requirement into their business practices. We note that according to our members, issues in relation to the application of this requirement are most likely to arise in relation to new clients though business practices will need to be amended in relation to all clients of the agent.
- In addition to the factors set out at paragraph 7, in our view areas in relation to which additional guidance would assist are:
 - How a tax agent should appropriately answer queries from clients as to why such additional checks are now required.
 - Whether the tax agent is permitted to approach third parties for information about the client and whether the client's express permission is required in all such instances.

- Where to direct clients that take issue with the tax agents assessment of what constitutes necessary/appropriate queries in order to fulfil the requirement (i.e. will the TPB be open to receiving complaints on this issue from clients?)
- The appropriate action to take when the tax agent is not satisfied by the client's claims as to matters that affect their tax liability i.e. should the tax agent make further enquiries, to what extent must further enquiries be made (especially if the client refuses to co-operate), at what point should the tax agent refuse to lodge on behalf of the client, how should the agent deal with the resulting impact re; their lodgment obligations (especially under any lodgment differentiation framework implemented by the ATO).
- The rights and obligations of the tax agent under existing fee agreements/engagement letters i.e. in what circumstances can the relevant engagement letter/fee arrangement be renegotiated to take into account the additional work required to be undertaken by the tax agent under this Code of Conduct requirement? This will be especially relevant in relation to long-standing engagement letters. To the extent that the TPB is not able to provide such specific guidance (such as where the TPB takes the view that such matters should be dealt with by negotiation between tax agent and client), the TPB should note that engagement letters which relate to scope of services as well as fees and were entered into before TASR may be affected by this requirement.
- The appropriate course of action to take if a client is unable to substantiate claims (such as expenses) due to poor record keeping.
- Whether a tax agent needs to ascertain the veracity of particular claims or merely ascertain the state of a client's record keeping arrangements.

We welcome the opportunity to review the TPB's Exposure Draft of its advice on this subject in due course. In the meantime, should you have any queries or concerns in relation to the above, please do not hesitate to contact me.

Regards

Deepti

(02) 8223 0044

From: Griffin, Lilian [mailto:Lilian.Griffin@ato.gov.au] **On Behalf Of** Boucher, Dale

Sent: Wednesday, 16 November 2011 4:55 PM

To: Deepti Paton

Cc: Luu, Janette; Pegg, Neil

Subject: Discussion paper - Tax Practitioners Board Seeking feedback [SEC=UNCLASSIFIED]

Dear Mr Paton

Seeking feedback on discussion paper: Reasonable care in ascertaining a client's state of affairs

You may recall that your organisation took part in a Tax Practitioners Board (Board) working group in Brisbane on 25 August 2011 to discuss, prioritise and develop guidance on a range of professional practice matters relevant to registered tax and BAS agents.

Following this meeting and your valuable input, the Board have decided to provide additional guidance on the following areas of the Code of Professional Conduct (section 30-10 of the *Tax Agent Services Act 2009*):

1. Code Item 9 - Reasonable care in ascertaining a client's state of affairs;
2. Code Item 3 - Accounting for money or other property held on trust;
3. Code Item 10 - Reasonable care to ensure taxation laws are applied correctly;
4. Code Item 5 - Managing conflicts of interest.

Further to this, the Board have now developed a draft discussion paper on Code item 9 for your consideration and comment. Please refer to the attachment.

We also encourage you to circulate the attached discussion paper to your members for their feedback, inviting them to provide practical examples of situations that they encounter in their work as a tax practitioner, in the context of applying Code Item 9.

In addition to this, we will be contacting a selection of tax and BAS agents to seek their consideration and feedback on the application of Code Item 9.

Once we have received stakeholder comments, we will prepare and publish an exposure draft information sheet which will be subject to a separate consultation period. We hope to incorporate relevant comments and examples from our stakeholders into the exposure draft information sheet.

We would be grateful if you could email your comments and examples to Neil Pegg at neil.pegg@tpb.gov.au by 15 December 2011

Thank you for your consideration in this matter.

<<FINAL Issues paper Code 9 - FNL - Nov 2011.doc>>

Yours sincerely



Dale Boucher

Chair

Tax Practitioners Board