



This Dispute Resolution Instruction Bulletin provides the ATO policy on conducting litigation in the Small Business Taxation Division of the AAT.

This Instruction Bulletin is an internal ATO document, and is an instruction to ATO staff.

Instruction Bulletins are authorised by SES officers in Review and Dispute Resolution business line. It is important that all litigation staff note that this bulletin constitutes directions issued under the authority of the Commissioner.

1. Purpose

This Bulletin sets out our policy and principles on conducting litigation in the Small Business Taxation Division of the Administrative Appeals Tribunal (AAT).

The ATO is committed to working with all taxpayers to resolve disputes as fairly, quickly, economically and cooperatively as possible.

2. Background

The Small Business Taxation Division was created in 2019 as part of broader government policy to improve access to justice for small businesses appealing the outcome of a dispute with the ATO.

Unrepresented small businesses also benefit from additional support through the Small Business Concierge Service, which provides subsidised legal advice arranged by the [Australian Small Business and Family Enterprise Ombudsman \(ASBFEO\)](#).

Cases in this Division that could satisfy the criteria for the [Test Case Litigation Program](#) should be referred to the Test Case Funding team.

3. Engagement of external legal service providers

As a general rule the ATO will not be represented by external legal counsel in the Small Business Taxation Division of the AAT.

Engagement of external legal service providers in this Division should be the exception and considered by the ATO in circumstances only where a case features:

- significant technical or factual complexity
- issues of significance or high sensitivity, or
- a precedential ATO view is being challenged.

A decision by the ATO to engage external legal service providers must be notified to the taxpayer and the AAT within 2 days of that decision being made.

4. Administration and payment of costs

Where the ATO engages an external legal service provider and the taxpayer does not have legal representation then the ATO will provide to the taxpayer funding for equivalent legal representation.

The amount of funding will be equal to the taxpayer's reasonable costs of its legal practitioners. The reasonable costs will be calculated consistent with the calculation of reasonable costs already paid by the ATO under the ATO's Test Case Litigation Program.

It will include the reasonable costs of the taxpayer's solicitor, even if the ATO only engages counsel. As the funding is intended to be equivalent funding, where the Commissioner only engages junior counsel, funding for counsel will be limited to funding of junior counsel only.

Accessing legal advice through the ASBFEO Concierge Service does not constitute legal representation for the purposes of this Bulletin. Additionally, a tax agent who is not also a practicing lawyer is not considered a legal representative.

The RDR case funding team within Review and Dispute Resolution (RDR) will be responsible for administering the payment of costs relating to legal representation for taxpayers.

Any litigation officer engaging an external legal service provider must promptly inform the RDR case funding team and the officer must:

- email the RDR case funding team to advise of the matter, and
 - provide the latest version of any case management plan
 - provide the details of the type or nature of counsel engaged by the ATO and quoted costs for service
 - ensure that ATO external service provider cost estimates are quoted as accurately as possible.

- ensure that any changes regarding costs and billing are communicated in a timely manner to the RDR case funding area.

The RDR case funding team will then inform the taxpayer and the AAT:

- that the ATO is engaging a legal service provider to represent the ATO in the Small Business Taxation Division matter
- the quoted cost estimate of the ATO's legal service provider
- the amount of costs the ATO will commit to pay for the taxpayer's legal representation, and
- that ASBFEO maintains a list of legal services providers vetted by ASBFEO, but that the taxpayer is not limited to using providers on this list.

On agreement with the taxpayer the ATO will prepare a funding deed that specifies the terms and conditions for payment. The payment amount will be based on the cost estimates of the legal representation for the ATO. If a taxpayer disagrees with the amount of costs that the ATO is willing to commit to pay for the taxpayer's legal representation, the dispute may be referred to the Inspector-General of Taxation (the IGT) for dispute resolution by either of the parties.

Payment of a taxpayer's costs should be made directly to the taxpayer. The payment would be subject to the terms and conditions of payment under the funding deed. The payment process would follow similar procedures as is administered by the [Test Case Litigation Program](#).

Where a decision made by the Small Business Taxation Division is appealed by the ATO to the Federal Court, the ATO will fund the taxpayer's legal representation in the Federal Court on a reasonable costs basis.

There may be tax consequences in relation to payments made to taxpayers as reimbursement of expenditure, or payments made to third parties in respect of services provided to the taxpayer. We recommend that taxpayers obtain advice on this from their legal representative.

5. Test Case Litigation Program

Cases in this Division with the potential to create precedent should be referred to the Test Case Litigation Program. Where the case is eligible for test case funding the taxpayer's reasonable costs of legal

representation will be paid regardless of whether the Commissioner is represented by external legal counsel.

6. Other matters

The ATO will not enforce recovery of the tax debt in dispute before the Small Business Taxation Division other than in exceptional circumstances.

More information

For more information, related Practice Statements and relevant legislative references see:

- [Legal Services Directions 2017](#)
- [Attorney General's Department website](#)
- [Office of Legal Services Coordination \(Attorney General's Department\)](#)
- [AAT Practice directions, guides and guidelines](#)
- [Guide to the Small Business Taxation Division \(AAT\)](#)
- [Administrative Appeals Tribunal Amendment \(Small Business Taxation Division\) Regulations 2019](#)
- [ASBFEO Concierge Service](#)
- [DR IB 2013/1 Role of Dispute Resolution Information Bulletins](#)
- [DR IB 2013/14 Test Case Litigation](#)
- [PS LA 2009/9 Conduct of ATO litigation and engagement of ATO Dispute Resolution](#)

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