The revolt of the quiet Australians – losers in the COVID assistance battle

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Tax practitioners are being placed under enormous pressure to assist clients to be eligible for the Cash Flow Boost and JobKeeper payments.

Dodgy Doug was one of the churchgoing quiet Australians whose business had been trashed by the government COVID 19 response.

Dodgy Doug asked his “anal” bookkeeper to make sure that his trust received the guaranteed minimum cash payment of $10,000 the government promised every business.

The “anal” bookkeeper patiently explained that:

- the “Cash Flow Boost” was not a cash payment;
- that the $10,000 was a credit to reduce his tax liability;
- that his trust:
  - had no employees;
  - the trust has never shown any PAYG withholding amounts on its BAS lodgments;
  - would not get the $10,000 credit.
- Dodgy Doug, his wife and son and daughter in law had always relied on trust distributions at year end to pay out their drawings.

Dodgy Doug was furious, after all he and his family paid well over $100,000 in personal tax on their trust distributions and did so by instalments and ahead of time.

On 23 March 2020 Dodgy Doug met with his accountant, Sally Schema.

On 23 March 2020 Sally Schema advised Dodgy Doug that after the announcement the previous day the Cash Flow Boost amounts could be as much as as $100,000, not just $10,000, and that the trust should be registered for PAYG from 1 January 2020.

Sally Schema explained to Dodgy Doug that the size of the Cash Flow Boost payment depended on the amount of PAYG withheld – the more PAYG withheld the bigger the boost.

Dodgy Doug asked about the backdating and she assured Dodgy Doug there was nothing wrong - “we do it all the time when people forget to do it” and while Doug watched on she registered the trust for PAYG entering the registration date of 1 January 2020.

Finally Sally Schema told Dodgy Doug:

- he needed to lodge a TFN for himself; and
- the trust needed to show wages for the period until Easter;
- the trust needed to set up a Super Fund and to deal with the Super Choice documents; and
- to pay the superannuation by 28 April 2020;
- the trust would need to be on STP by 1 July.

On returning home a fired up Dodgy Doug started googling. He found the TFN Declaration which he printed, completed and mailed to the ATO. Remembering Sally Schema's words he wasn't concerned about the warning immediately under where he signed the form twice "**There are penalties for deliberately making a false or misleading statement**."

Next Dodgy Doug set about understanding the Cash Flow Boost Payment – he grasped that if the trust reported $100,000 of PAYG withheld in a year it could get $100,000.

For Dodgy Doug that was a no brainer – why should a quiet Australian miss out just because he took drawings from his trust and paid instalments of tax rather than by the trust withholding PAYG?

Next Dodgy Doug went through the loan account in Xero and changed all the memos on his drawings of $3,150 per week since 1 January to "Wages".

A day later a nagging feeling go the better of him. Dodgy Doug went back to Zero and changed the "drawings" memo on the loan accounts for his wife, his son and his daughter in law too.

He called the bookkeeper to come back on 1 April 2020 to complete the BAS for the March quarter and told her of Sally Schema's advice that the family be moved to wages from 1 January 2020. Proudly he added that he had moved all the family to wages from 1 January 2020.

The bookkeeper saw the changed loan account memos which she took to be instructions and paid the drawings by applying wages to loan accounts as at 31 March, then prepared the BAS and calculated the PAYG withholding liability.

However the bookkeeper was uncomfortable, and keen to avoid more fights with Dodgy Doug, told him that because the PAYG amount was so large the trust would become a monthly PAYG remitter and she did not want to lodge the BAS just now and that he should get Sally Schema to check that the BAS matched her advice and if it was right to get her to lodge the BAS through her portal.

The same day Dodgy Doug tried to meet with Sally Schema but could only have a Zoom meeting. She asked him to email his Xero file which he did.

A little while later she called and told Dodgy Doug she would sort it but she would need him to sign the BAS and send it back after she had prepared it. The next day Dodgy Doug signed and returned the BAS.

Over Easter, talking to fellow traders, Dodgy Doug found out about JobKeeper. Slowly he understood that he would be able to get JobKeeper but not his wife or his son or daughter in law.

He called Sally Schema after Easter who confirmed his conclusion and asked if he wanted any help to claim JobKeeper.

In mid May Sally Schema called Dodgy Doug to tell him that the ATO had credited a $47,500 Cash Flow Boost payment to the Trust account and that she was emailing her invoice and asked him to make sure he paid it promptly.

A few days later Dodgy Doug received a letter from the Commissioner advising of an Overpayment. Sally Schema was not available for his calls. Dodgy Doug spent the afternoon in a verbal phone war with ATO officers.

Later Dodgy Doug left a message for Sally Schema that he was really angry about the letter and he had called channel 9 and the ABC to complain about being victimised by the ATO and that Channel 9 had set up an interview the following day.

On 10 June 2020 Sally Schema received a Zoom meeting appointment email from the firm's Managing Partner. When she logged on she saw him very red in the face and waving a letter – he explained it was a section 353-10 notice from the Commissioner addressed to the firm requiring Sally Schema ***"to attend and give evidence … for the purpose of the administration or operation of a taxation law"*** and ***"to produce documents including time sheets and invoices in relation to trust's Dodgy Doug's 1 January registration as an employer and any other clients to whom the firm had provided similar advice in the period after 12 March".***

The Managing Partner told her he had the accounting firm's legal advisor on standby and joined him into the Zoom meeting. After establishing what had gone on the legal advisor apologised for not having had time to prepare more fully but suggested the road ahead could include any or all of the following:

- ♦ Administrative Penalties for Dodgy Doug:
  - ~ making a false or misleading statement (by the trust's agent) to the Commissioner when the PAYG registration was backdated;
  - ~ fail to lodge TFN within time;
  - ~ fail to withhold are remit PAYG on time;
  - ~ making a false or misleading statement in lodging the TFN declaration;
  - ~ the trust's non compliance with Super Choice obligation for the entire first quarter's SG contribution notwithstanding the contribution was made by 28 April 2020;
- ♦ Administrative Penalties for Sally Schema making a false or misleading statement to the Commissioner when she backdated the trust PAYG registration;

- The Commissioner would likely pursue potential "cash" wages questions given the unexplained disparity between sales and non cash purchases on older BAS's and the firm's specialist expertise in that industry sector;
- Potential for the firm to attract attention under the Promoter Penalty regime;
- Potential TPB issues for her and the firm.

He also advised that criminal charges could be laid for one or both of Dodgy Doug and Sally Scheme:

- obtaining financial advantage by deception (Section 134.2(1));
- obtaining financial advantage (Section 135.2 (1)
- conspiracy to defraud the Commonwealth (Section 135.4(3).

Finally he mentioned having seen somewhere, in some weeks ago at the height of COVID 19, a statement by the Commissioner that the Commissioner might need to consider and perhaps re-characterise previous "drawings" where wages suddenly appeared on a BAS.

Later that afternoon Dodgy Doug called Sally Schema and told her he had received another letter from the Commissioner telling him he had to attend for an interview and that he wanted to have Sally Schema at the interview with him.

Dodgy Doug's day took a turn for the worse when Sally Schema said her firm would not allow her to attend the meeting with the Commissioner.

So Dodgy Doug called the family solicitor whose response fired Dodgy Doug up even more.

The solicitor said they didn't know much about tax but they understood enough to know that not only all the partners in their legal firm had been receiving JobKeeper for weeks now but also all their domestic partners had also been receiving JobKeeper so Sally Schema must have structured Dodgy Doug wrongly and perhaps Sally Schema's firm should be sued for bad structuring advice.

While the ATO may not have moved as rapidly on compliance issues too often in the past the Commissioner's enormous store of data, the power of data analytics and the ability it provides to flag suspicious or inconsistent behaviour on a mass basis means "sugar hit" practitioners cannot rule out the Commissioner responding rapidly to promote general deterrence.

There are too many quiet Australians who have routinely paid personal instalments over long periods and whose view is that their business was "confiscated" by government decision.

A number of those will be questioning their self worth, their future and a host of other things.

Those quiet Australians have missed out simply because they used a capital conserving trust structure following sound structuring advice from their accountants.

Now those people feel done over not only because they missed out on the absurd and misleadingly named “Cash Flow Boost” and “Cash Flow Boost Payment” but also because in the main, they will miss out JobKeeper payments.   They see other special groups being looked after and wonder “why”.

Tax practitioners are being placed under enormous pressure to “assist” clients to become eligible for the Cash Flow Boost and JobKeeper payments. Some will find that pressure difficult to resist.

There are many “sole practitioners” who changed jobs in the last year or who alternate between contractor and employee status who have similarly missed out. They too are becoming angry. In substance rather than form their income from any source is psi – the Commissioner could treat all of those as a class of entities under the Rules and issue a legislative instrument establishing an alternative decline in turnover test for them.

To date the Commissioner and Treasury have acted with agility and undeniable speed when obvious weaknesses are identified by interested parties– there is no reason to conclude that they won’t continue to do so.

Practitioners might everyone’s interests best by flagging the “misses” with their professional bodies as quickly as possible for they have the resources to make “class of entity submissions” that are beyond an individual

What might the ATO have flagged to cause the section 353-10 notice?

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