

Tax Disputes: Sharing the burden of resolution between Taxpayer and Tax Office

NZ and Australian Tax Dispute Regimes: Lessons to be learnt?

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New Zealand regime

- Report of the Organisational Review of IRD 1994
- Way disputes are conducted critical to perceptions of fairness
- Overall aim of regime to promote all cards on the table
- Opportunities for discussion and independent review before an assessment is issued.

Dispute resolution

- Dispute occurs before assessment
- Purpose of disputes procedure: s 89A
- Improve accuracy of disputable decisions by CIR
- Early identification of any basis for dispute
- Reducing likelihood of disputes through open and full communication

Dispute resolution

- Assessment should be the outcome
- Assessment should only be made after all facts and legal issues examined
- Prevents trial by ambush
- Aim to improve accuracy of assessment
- Reduce chances of post-assessment challenge

Dispute resolution

- Rigid time lines
- Includes when a taxpayer can commence a dispute
- Financial incentive to lodge an accurate return
- Financial incentive to resolve any dispute promptly

Procedural process

- Notice of proposed adjustment (NOPA)
- Notice of response (NOR)
- Administrative conference
- Statement of position (SOP) and disclosure notice
- Determination by IRD Adjudication Unit
- Assessment
- Taxpayer can still challenge

Compulsory Code

- Part IVA disputes procedure is a compulsory code
- Sole method for contesting an assessment
- An assessment or disputable decision
- NOPA
- NOR within two months

Issues?

- Pre Assessment requirements too complicated
- SOP unnecessary replication
- Increased compliance costs
- Front loading compliance costs
- Reduction in substantive cases, matched with explosion of procedural cases

Issues?

- Assessment at the back or front?
- Information sharing before or after assessment?
- How many steps should there be in the information sharing process
- How detailed should the documentation be?

Australian Regime

- Part IVC of the Taxation Administration Act 1953
- Triggered by s 175A ITAA 1936
- Taxpayer dissatisfied by an assessment can object to it in the manner set out in Part IVC
- Taxpayer initiated and that the Tax Office not required to do anything after raising of the assessment.

Resolving Disputes

- The formal dispute resolution mechanism of section 175A is the only structured entry point.
- Reinforced by section 175, which provides for the conclusiveness and validity of the assessment
- Responses by the ATO within this regime?

Administrative Responses

- Commissioner Annual Report 2016-2017 (page 65 ff)
- Aim is to utilise different dispute resolution strategies targeted to the taxpayer's circumstances – power to do so see s 8 ITAA 36
- Theme of early engagement and alternative dispute resolution with taxpayers and their advisers

Administrative Responses

- In-house facilitation, with a focus on small business market.
- Every dispute resolved through in-house facilitation saves taxpayers on average \$50,000
- Fast tracking objections- fast intensive triage service
- Dispute assist – support unrepresented individuals

In house facilitation

- In-house facilitation is a mediation process where an impartial ATO facilitator meets with ATO officers and taxpayers
- Can be used at any stage from audit up to an including litigation process- logical time might be after the position paper taken after the audit and before amended assessment
- Voluntary process
- If the facilitation process does not resolve the dispute no impact on the review and appeal rights of Part IVC

In house facilitation (IHF)- reflections

- Voluntary but duty on adviser to advise taxpayer about IHF – Chris Wallis ATLB
- IHF facilitator is an ATO officer not involved in the dispute. Independent?
- IHF or second IHF may bring satisfactory result – not an option in Part IVC proceedings
- IHF anytime between commencement of audit up to determination of Part IVC application – IHF procedures not better than ADR in AAT or Court

Minimising disputes and litigation

- Sometimes disputes are inevitable – aim of the ATO is to reduce the time to resolve disputes and overall costs – Annual Report 2016-2017 p 66
- Large complex disputes – use of external practitioner to conduct ADR – now extended to small business taxpayers
- January 2017 updated independent review guidelines published for suitability of cases for independent review within ATO of large market audits

Minimising disputes and litigation

- Reduction in number of review applications going to the AAT (Annual Report 2016-2017)
- 357 applications in 2016-2017
- 396 applications in 2015-2016
- 533 applications in 2014-2015
- Litigation in both AAT and Court inherently complex – strategic litigation only ?

Settlements

- Settlements prior to litigation
- 650 settlements in 2016-2017 (89% in pre litigation stage)
- 1,350 settlements in 2015-2016 (96% in pre litigation stage)
- Settlement at AAT and Federal Court in 2016-2017 (8% in AAT and 3 % at Federal Court)
- Use of retired Federal Court judges to review settlements

Australian Regime - Analysis

- Dispute resolution strategies rely on s 8 ITTA 36 – general administration provision; there are no statutory mechanisms like NZ
- Raises administrative law issues of legitimate expectation
- Not consistent across taxpayers – large businesses and small businesses
- Issues of independence in in-house facilitator or independent review

Australian regime - Analysis

- Do the various strategies allow for all cards on the table?
- Will the Taxpayer and/or ATO show their cards or keep their aces up their sleeves if the matter goes to external review
- Will the taxpayer and/or ATO utilise the IHF or ADR as only a way to limit the issues that then can be litigated – are other issues able to be resurrected on external review?
- Strategic Litigation still used by ATO – win ratio of 80% in 2016-2017 - Implications?