

SMALL TAX DISPUTE RESOLUTION IN NEW ZEALAND – MAKING TAXPAYERS ‘WINNERS’ NOT ‘LOSERS’

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Abstract

In his 2011 comparative study, Maples³ observes that, despite the then recent positive administrative changes implemented by Inland Revenue (including facilitated conferences and the ability to opt-out of the dispute process after the conference phase), “these changes do not alter the fact that the [New Zealand] dispute process essentially provides ‘a one size fits all’ procedure for tax disputes, irrespective of their complexity and the amount in dispute.” Moreover, as noted by various commentators both prior to and following Maples’ study, taxpayers with small tax disputes are either ‘burnt off’ through the dispute process or may not even challenge Inland Revenue’s position. Maples’ study was undertaken against the backdrop of the abolition of the small claims jurisdiction of the Taxation Review Authority.

Fast forward six years – what has changed for small tax dispute resolution? While no substantive changes have occurred in the New Zealand (NZ) dispute resolution process since the 2011 study; the three other countries considered by Maples have all subsequently implemented changes focussed on, or potentially benefitting, small tax disputes. Similar to NZ, Australia abolished the Small Taxation Claims Tribunal of the Taxation Appeals Division of the Administrative Appeals Tribunal (AAT) in 2015. However, with effect from 1 April 2014 the Australian Taxation Office instituted in-house facilitation for small businesses and individuals with less complex disputes at the audit and objection stages. In addition, while not specifically aimed at small tax disputes, the early assessment and resolution process for all cases lodged with the AAT (effective July 2013) and more recently, the fast intensive triage process (effective from March 2017), have the potential to lead to more efficient dispute resolution generally.

In the United Kingdom, in addition to the First-tier Tribunal, which since 2009 has divided cases into four categories including ‘Basic’ cases (encompassing small tax disputes subject to an informal hearing), Her Majesty’s Revenue and Customs (HMRC) implemented alternative dispute resolution (ADR) in 2013. This is available at any stage of the process for taxpayers across all HMRC business lines (including non-large business taxpayers).

Turning to Canada, two developments are noted by the authors. First, in 2013, the monetary limits for access to the informal appeal procedure in the Tax Court of Canada were increased from the C\$12,000 and C\$24,000 thresholds for federal tax (and penalties) in dispute and dispute loss amounts, respectively, to C\$25,000 and C\$50,000, respectively. Second, a triage-type process for objections to the Canada Revenue Agency, based on level of complexity, was introduced.

This present study has been extended to consider current small tax dispute processes in the United States. The authors find that a range of options exist for taxpayers in this category, including the Small Tax Case procedure in the Tax Court and Small Business/Self-Employed Fast Track Settlement offered by the Internal Revenue Service’s Appeals Office. The authors

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³ Andrew Maples ‘Resolving Small Tax Disputes in New Zealand – Is there a better way’ (2011) 6(1) Journal of the Australasian Tax Teachers Association 96, 132.

conclude by considering what lessons NZ can learn from the practices of the four jurisdictions analysed.

1.0 INTRODUCTION

In his 2011 comparative study, Maples¹ observes that, despite the then recent positive (and largely administrative) changes implemented by Inland Revenue (including facilitated conferences and the ability to opt-out of the dispute process after the conference phase), “these changes do not alter the fact that the [New Zealand] dispute process essentially provides ‘a one size fits all’ procedure for tax disputes, irrespective of their complexity and the amount in dispute.”

In the context of small tax disputes, in 2008 the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA)² in their co-authored submission³ (the Joint Submission) to the Minister of Revenue and the Commissioner of Inland Revenue (CIR), expressed serious concerns about the impact of the process on the resolution of such disputes. Among its observations, the Joint Submission commented that existing mechanisms for dealing with small claims were inadequate; resulting in abandonment of such disputes by taxpayers. “Effectively taxpayers are ‘burned off’ by the high costs imposed by the disputes resolution procedures.”⁴ As a result taxpayers with small tax disputes “have no forum for their disputes to be considered”.⁵ Maples’ 2011 article was written against the abolition of the only aspect of the dispute process targeted at small tax disputes - the small claims jurisdiction of the Taxation Review Authority (TRA) - with effect from 29 August 2011.⁶

Some seven years later and concerns over the process, and its deficiencies, have largely remained unchanged,⁷ as summed up by Keating, who observes there is a need “to free

¹ Andrew Maples ‘Resolving Small Tax Disputes in New Zealand – Is there a better way’ (2011) 6(1) Journal of the Australasian Tax Teachers Association 96, 132.

² From 1 July 2014, Chartered Accountants Australia and New Zealand (CA-ANZ) was launched as the new trading name merging the former NZICA and the Institute of Chartered Accountants Australia.

³ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *The Disputes Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994* (Wellington, August 2008).

⁴ *Ibid*, [2.1(d)], 6.

⁵ *Ibid*, [2.1(d)], 7.

⁶ The small claims process within the TRA was an option available for taxpayers who did not wish to proceed down the path of a full court hearing and where inter alia the amount of tax in dispute was NZ\$30,000 or less. The small claims jurisdiction was abolished for a number of reasons, not least that since its establishment in 1996 fewer than ten cases had been heard by the TRA acting in this capacity. Inland Revenue, *Taxation (Tax Administration and Remedial Matters) Bill: Commentary on the Bill* (Wellington, November 2010) 20.

⁷ See, for example Mark Keating and Michael Lennard ‘Developments in tax disputes – Another step backwards?’ (paper presented to the New Zealand Institute of Chartered Accountants Annual Tax Conference, Auckland, 11-12 November 2011); Shelley Griffiths ‘Resolving New Zealand Tax Disputes: Finding the Balance Between Judicial Determination and Administrative Process’ (paper presented to the Australasian Tax Teachers Association Conference, Sydney, 17 January 2012); Susan Glazebrook ‘Taxation Disputes in New Zealand’ (paper presented to the Australasian Tax Teachers Association Conference, Auckland, 22 January 2013); Lindsey Ng and Chris Cunniff ‘Inland Revenue service – are you satisfied?’ (2013) 92(1) Chartered Accountants Journal 78; Denham Martin ‘Honest Taxpayers Need Advocates and Real Rights’ (2013) 212 NZLawyer 22; Fred Ward ‘Changes to the Disputes Resolution Process – A Practitioner’s Perspective’ (paper presented to the New Zealand Law Society Tax Conference, Auckland, September 2013) 165; Sarah Miles ‘The Price we Pay for a Specialised Society: Do Tax Disputes Require Greater Judicial Specialisation?’ (2015) 46 VUWLR 361; Colmar Brunton *Satisfaction with Inland Revenue: November 2015* (4 November 2015); Alison Pavlovich ‘The Tax Disputes Process and Taxpayer Rights: Are the Inconsistencies Proportional?’ (2016) 22 NZJTL 70; Geoff Clews and Ele Duncan ‘Audits and Disputes: The Myths, The Realities and The Lessons to be Learnt’ (paper presented to the New Zealand Law Society Tax Conference, Auckland, 13 October 2016) 85.

taxpayers from a lengthy and expensive system which appears to be almost entirely controlled by the IRD.”⁸

A disputes procedure that is accessible to all taxpayers (including small tax disputants) is vital to the proper functioning of the tax system. Tax compliance research⁹ shows that a number of factors may influence taxpayers’ level of compliance, including their perceptions of the fairness of the tax system.¹⁰ One aspect of fairness¹¹ is procedural justice, which “concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from a decision maker.”¹² In the New Zealand (NZ) context, if small tax disputes are not being heard due to the costly and cumbersome nature of the resolution process, the affected taxpayers may perceive that they have not been treated fairly by Inland Revenue (and tax system) which ultimately may impact on the level of the taxpayer’s on-going compliance.¹³

A number of studies¹⁴ also indicate that revenue authority contact may have an impact on taxpayer compliance. The disputes resolution process, with its numerous interactions with Inland Revenue, can be stressful and potentially intimidating for taxpayers and may contribute

⁸ Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH, Auckland, 2012) 20.

⁹ See, for example, Betty Jackson and Valerie Milliron ‘Tax compliance research, findings, problems and prospects’ (1986) 5 *Journal of Accounting Literature* 125 and Maryann Richardson and Adrian Sawyer ‘A Taxonomy of the Tax Compliance Literature: Further Findings, Problems and Prospects’ (2001) 16 *Australian Tax Forum* 137.

¹⁰ See, for example Joachim Vogel ‘Taxation and Public Opinion in Sweden: An Interpretation of recent survey data’ (1974) 27 *National Tax Journal* 499; Michael Spicer and Sven Lundstedt ‘Understanding tax evasion’ (1976) 31 *Public Finance* 295; Michael Spicer and Lee Becker ‘Fiscal Inequity and tax evasion: An experimental approach’ (1980) 33 *National Tax Journal* 171; Thomas Porcano ‘Correlates of tax evasion’ (1988) 9 *Journal of Economic Psychology* 47; Wilbur Scott and Harold Grasmick ‘Deterrence and income tax cheating: Testing interaction hypotheses in utilitarian theories’ (1981) 17 *Journal of Applied Behavioral Science* 395; Amitai Etzioni ‘Tax Evasion and Perceptions of Tax Fairness: A Research Note’ (1986) 22(2) *The Journal of Applied Behavioural Science* 177; Peggy Hite, ‘An examination of the impact of subject selection on hypothetical and self reported taxpayer noncompliance’ (1988) 9 *Journal of Economic Psychology* 445; Lin Mei Tan ‘Taxpayers’ Perceptions of Fairness of the Tax System – A Preliminary Study’ (1998) 4(2) *New Zealand Journal of Taxation Law and Policy* 59; Michael Roberts ‘An Experimental Approach to Changing Taxpayers’ Attitudes Towards Fairness and Compliance via Television’ (1994) 16(1) *The Journal of the American Taxation Association* 67; George Gilligan and Grant Richardson ‘Perceptions of Tax Fairness and Tax Compliance in Australia and Hong Kong: A Preliminary Study’ (2005) 12(4) *Journal of Financial Crime* 331 and Peggy Jimenez and Govind S Iyer ‘Tax compliance in a social setting: The influence of social norms, trust in government, and perceived fairness on taxpayer compliance’ (2016) 34 *Advances in Accounting, incorporating Advances in International Accounting* 17.

¹¹ Saad identifies a number of dimension including vertical fairness, horizontal fairness, policy fairness, exchange fairness, a preference for either progressive or proportional taxation, personal fairness, tax rate fairness, procedural fairness, special provisions and general fairness: Natrah Saad ‘Fairness Perceptions and Compliance Behaviour: The Case of Salaried Taxpayers Malaysia after Implementation of the Self-Assessment System’ (2010) 8(1) *eJournal of Tax Research* 32, 35.

¹² Kristina Murphy ‘Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance’ (2005) 32(4) *Journal of Law and Society* 562, 566.

¹³ The issues paper, *Disputes: a review*, issued by Inland Revenue and the Treasury in 2010, recognised that the costs of the current system were “likely to have repercussions for the integrity of the tax system, because the affected taxpayers may come to have less faith in its overall fairness.”: Inland Revenue and the Treasury, *Disputes: a review – an officials’ issues paper* (Wellington, July 2010) 43.

¹⁴ Jackson and Milliron, above n 9, 139-140; Richardson and Sawyer, above n 9, 188-192; Ronald Worsham ‘The effect of tax authority behaviour on taxpayer compliance: a procedural justice approach’ (1996) 18 *Journal of American Taxation Association* 19-39; Karyl Kinsey ‘Deterrence and alienation effects of IRS enforcement: an analysis of survey data’ in Joel Slemrod (ed.), *Why people pay taxes: tax compliance and enforcement* (Ann Arbor, MI: University of Michigan Press, 1992) 259, as cited in Richardson and Sawyer, above n 12, 191; James Alm, Todd Cherry, Michael Jones and Michael McKee ‘Taxpayer information assistance services and tax compliance behavior’ (2010) 31 *Journal of Economic Psychology* 577.

to negative perceptions of the tax system and revenue authority. Further, the current procedural requirements of the disputes resolution process make no concession for the size of the dispute or its complexity.¹⁵ In 2010, NZLS and NZICA¹⁶ noting that taxpayers are priced out of a disputes process which also delays their access to justice, pertinently observed that these issues are “cementing the view of taxpayers that the system is weighted against them and that there is no point in pursuing disputes. This is undermining the integrity of the tax system.”¹⁷

To set the context for the discussion of possible reform options for small tax dispute resolution in NZ, section 2 of this paper briefly outlines the current process including those aspects that impact on small tax disputes. The purpose of this paper is not to comprehensively evaluate the recent administrative developments in NZ nor to develop a definitive proposal for reform targeted at small tax dispute resolution.¹⁸ While no substantive changes have occurred in the NZ dispute resolution process since the 2011 study; there have been developments focussed on, or potentially benefitting, small tax disputes in the three other countries considered by Maples. The small tax dispute focussed approaches (also referred to as “processes” in this paper)¹⁹ of Australia, Canada and the United Kingdom (UK) are accordingly discussed in sections 3 to 5, respectively. In particular, this paper reviews both the current operation of processes existing at the time of the 2011 study and also subsequent developments in these jurisdictions which impact on the resolution of small tax disputes. As an extension to the 2011 study, section 6 additionally considers approaches in the United States (US) to resolving small tax disputes. Key features drawn from the review of the processes considered in section 3 to 6 are outlined in section 7 and concluding observations and limitations are noted in section 8.

Due to the nature of this research, a multiple unit case study approach has been adopted²⁰ to compare the processes in these jurisdictions targeted at, or impacting on, small tax disputes. In addition, the paper does not define what is a small tax dispute; preferring to rely on measures adopted in the respective jurisdictions be they monetary or otherwise described.

2.0 NEW ZEALAND

2.1 New Zealand Tax Dispute Resolution Procedure

Tax disputes in NZ typically arise when a taxpayer and Inland Revenue have not reached agreement on an issue following an Inland Revenue investigation or audit. The disputes procedure involves a number of statutorily prescribed and administrative steps.²¹ Part IVA

¹⁵ Taxation Committee of the New Zealand Law Society and National Tax Committee of the New Zealand Institute of Chartered Accountants *Disputes: A Review, July 2010* (Wellington, September 2010) [3.49], 20.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, [2.3], 2.

¹⁸ For consideration of a possible solution for dealing with small tax disputes in New Zealand see James Peck and Andrew Maples ‘The Disputes Resolution Process in New Zealand: What about the little fellas?’ (2010) 16(4) *New Zealand Journal of Taxation Law and Policy* 348 and Melinda Jone and Andrew J Maples ‘Mediation as an Alternative Option in New Zealand’s Tax Disputes Resolution Procedures: Refining a Proposed Regime’ (2013) 19(4) *New Zealand Journal of Taxation Law and Policy* 301.

¹⁹ The term “processes” is used broadly to encompass other mechanisms or avenues available for small tax dispute resolution that are not necessarily processes per se.

²⁰ See further John W Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd ed, Sage, Thousand Oaks, 2003); Margaret McKerchar *Design and Conduct of Research in Tax, Law and Accounting* (Thomson Reuters, Pyrmont, 2010) and Robert K Yin *Case Study Research: Design and Methods* (5th ed, Sage, Thousand Oaks, 2014).

²¹ A description of the statutory provisions and the administrative steps in the current tax dispute resolution procedures are set out in Inland Revenue ‘SPS 16/05: Disputes resolution process commenced by the

(disputes procedures) of the Tax Administration Act 1994 (TAA 1994) prescribes the procedure to be followed in the event of a tax dispute concerning an assessment or other disputable decision.²² The main elements of the dispute resolution procedure are:²³

- A Notice of Proposed Adjustment (NOPA) is issued by either the CIR or the taxpayer, notifying the other that an adjustment is sought in relation to the taxpayer's assessment, the CIR's assessment or other disputable decision;
- A Notice of Response (NOR) rejecting the adjustment in the NOPA is issued by the other party;
- The parties voluntarily participate in an Inland Revenue conference to discuss the issues with a view to resolving the dispute;
- A Disclosure Notice is issued by the CIR;
- A Statement of Position (SOP) is issued by each party which restates or clarifies the facts, issues and legal arguments relied upon by each party;
- The dispute is referred to Inland Revenue's Disputes Review Unit (DRU) for adjudication; and
- If the dispute is decided by the DRU in the taxpayer's favour, Inland Revenue have no right of appeal against the decision and the dispute comes to an end. If the dispute is decided in favour of the CIR, the taxpayer may challenge the decision in the TRA or the High Court.

2.2 Processes for Small Tax Dispute Resolution

2.2.1 Shortened Notices of Proposed Adjustments

Where the tax dispute is initiated by Inland Revenue, the length of the CIR's NOPA will vary from case to case.²⁴ The maximum length of a CIR's NOPA is administratively capped at 30 pages (excluding any discussion on shortfall penalties and schedules that show complicated calculations and diagrams). Of importance to small disputes, the 30-page limit is subject to the following further restrictions:²⁵

- (a) For disputes involving less than \$5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should not exceed five pages.
- (b) Where the dispute concerns one issue only (for example, the imposition of shortfall penalties), the Commissioner's NOPA should not exceed 10 pages.

The restriction for small and sole issue disputes is a positive feature for such disputes. However, these limits are guidelines only. In addition, to respond to even a shortened NOPA (and to be well-prepared for the conference), most taxpayers will need the assistance of a practitioner. Further, where the dispute exceeds NZ\$5,000 and involves multiple issues, a not uncommon scenario, limit (b) will not apply.

Commissioner of Inland Revenue' (2016) 28(11) Tax Information Bulletin 14 ['SPS 16/05'] and Inland Revenue 'SPS 16/06: Disputes resolution process commenced by a taxpayer' (2016) 28(11) Tax Information Bulletin 50 ['SPS 16/06'].

²² A "disputable decision" covers "an assessment; or a decision of the Commissioner under a tax law", except for decisions specifically excluded by the definition in s 3(1) TAA 1994.

²³ Keating, above n 8, 11-12.

²⁴ Inland Revenue, 'SPS 16/05', above n 21, [79], 23.

²⁵ Inland Revenue, 'SPS 16/05', above n 21, [79], 23-24.

2.2.2 Alternative Dispute Resolution

Inland Revenue conferences and adjudication by Inland Revenue's DRU constitute the two administrative dispute resolution processes in the NZ tax dispute resolution procedures. Alternative dispute resolution (ADR)²⁶ features in the NZ dispute resolution system through the availability of conference facilitation as an option for all taxpayers in the conference phase.²⁷ The facilitator who is an independent senior Inland Revenue officer with "sufficient technical knowledge to understand and lead the conference meeting."²⁸ Their role is to "assist in focussing the parties on the relevant facts and technical issues, explore options and ensure that all information that should have been disclosed is exchanged at the earliest possible opportunity."²⁹ In addition, the facilitator has the ability to determine when the conference phase has come to an end.

Facilitated conferences, to date, have been relatively successful - approximately 30 per cent reach a negotiated settlement; 20 per cent conceded by the taxpayer; 10 per cent conceded by the CIR; and 40 per cent proceed to SOPs.³⁰ Clews and Duncan similarly state that "around 55 percent of all facilitated conferences achieved resolution of the dispute."³¹ However, these figures should be interpreted with some caution as they do not specify the type of dispute (e.g., small or large) nor do they reveal taxpayer satisfaction (or otherwise) with the facilitated conference process and outcome. In addition, the 55 per cent resolution rate appears lower than the broadly equivalent rates for the similar facilitation processes in Australia (81 per cent, see section 3.2.2), the UK (79 per cent, see section 5.3) and the US (74 per cent, see section 6.2.3); an issue considered in section 7 of this paper.

2.2.3 Option to opt-out

With effect from 1 April 2010, taxpayers can elect to opt-out of the disputes process (and proceed to court) after the conference phase if, inter alia, the core tax in dispute (i.e., excluding shortfall penalties, use of money interest and late payment penalties, if applicable), is NZ\$75,000 or less, the dispute turns purely on the facts or it is considered the dispute can be resolved more efficiently at a hearing authority.³² The opt-out is subject to the taxpayer having meaningfully participated in the conference phase and signed a declaration that they have supplied all material information to Inland Revenue officers directly involved in the dispute.³³

The opt-out option is only available after the conference phase. As a consequence, taxpayers are still required to prepare a NOPA or NOR and also prepare for a conference; thus, requiring the commitment of (potentially significant) time and resources. Further, the narrow criteria to

²⁶ For the purposes of this paper, ADR can be defined as "an umbrella term for processes other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them." See National Alternative Dispute Resolution Advisory Council *Dispute Resolution Terms* (September 2003) 4.

²⁷ Rules 7.2 and 7.3 of the District Court Rules 2014 and Rule 7.79 of the High Court Rules 2016 provide for the potential availability of ADR processes (including judicial settlement conferences, mediation or other forms of ADR agreed to by the parties) in the TRA and the High Court during the litigation stage of the NZ tax dispute resolution procedures. However, in practice, ADR (particularly in the form of mediation or "other forms of ADR agreed to by the parties") is generally not utilised, if in fact at all, at the litigation stage.

²⁸ Inland Revenue, 'SPS 16/05', above n 21, [135], 29; Inland Revenue, 'SPS 16/06', above n 21, [164], 67.

²⁹ Inland Revenue and the Treasury, above n 13, [2.14], 7.

³⁰ Email from Eddie Oosterwijk (Case Director, Office of the Chief Counsel, Inland Revenue) to Melinda Jone (4 May 2016).

³¹ Clews and Duncan, above n 7, 109.

³² Inland Revenue, 'SPS 16/05', above n 21, [167]-[168], 32-33; Inland Revenue, 'SPS 16/06', above n 21, [196]-[197], 71.

³³ Inland Revenue, 'SPS 16/05', above n 21, [164], 32; Inland Revenue, 'SPS 16/06', above n 21, [193], 70.

opt-out, for example the dispute turns purely on the facts, limits its availability for taxpayers. Given these factors, the authors are of the view that the opt-out option may not be ideally suited to many small tax disputes.

3.0 AUSTRALIA

3.1 Australian Tax Dispute Resolution Procedure

A taxpayer dissatisfied with an assessment or other taxation decision may challenge that decision in accordance with the objection, review and appeal procedures outlined in Part IVC of the Taxation Administration Act 1953 (Cth) (TAA 1953 (Cth)). The steps in the procedures where a taxpayer wishes to challenge an assessment (or other taxation decision) are generally as follows:

- An objection is lodged by the taxpayer.³⁴ All objections are now subject to the Australian Taxation Office's (ATO's) Fast Intensive Triage (FIT) service (discussed in section 3.2.3 of this paper);
- The ATO issue an internal objection decision either allowing or disallowing the taxpayer's objection;³⁵ and
- If the objection is disallowed the taxpayer may file an application for review or appeal in the Administrative Appeals Tribunal (AAT) or the Federal Court of Australia.³⁶ The Early Assessment and Resolution (EAR) process (discussed in section 3.2.4 of this paper) is applied to all cases lodged in the AAT.
- The Australian Commissioner of Taxation or the taxpayer may appeal to the Federal Court from a decision of the AAT on a question of law only.³⁷
- If dissatisfied with the Federal Court's decision, the taxpayer or the Australian Commissioner can appeal against the decision to the full Federal Court, and ultimately, with leave, to the High Court of Australia.

In addition, ADR may be utilised by parties as a means of resolving disputes generally at any stage of the dispute process.³⁸ Of relevance to small disputes is ATO in-house facilitation – a specifically developed ATO ADR program for smaller and less complex disputes generally available at the audit and objection stages of the dispute procedures (discussed in section 3.2.2).

³⁴ An objection must be lodged within two years of service of the notice of assessment or decision for most individuals and very small business taxpayers, or within four years of service of the notice of assessment or decision for taxpayers with more complex affairs: s 14ZW TAA 1953 (Cth).

³⁵ If an objection decision is not made within 60 days, the taxpayer may require the Australian Commissioner to make a decision within a further 60-day period: s 14ZYA TAA 1953 (Cth).

³⁶ An application for review or appeal must be made within 60 days of being served the objection decision: ss 14ZZC and 14ZZN TAA 1953 (Cth).

³⁷ An appeal to the Federal Court is heard by a single judge (unless a judge of the Federal Court presided in the AAT in which case the appeal must be heard by a full bench of the Federal Court).

³⁸ For further information, see Australian Taxation Office 'Practice Statement Law Administration 2013/3: Alternative Dispute Resolution (ADR) in ATO Disputes' (2013) <<http://law.ato.gov.au/atolaw/view.htm?locid='PSR/PS20133/NAT/ATO'>>.

3.2 Processes for Small Tax Dispute Resolution

3.2.1 Small Taxation Claims Tribunal abolition

Up until 1 July 2015, if the amount of tax in dispute was under A\$5,000 (equivalent to NZ\$5,548.93),³⁹ an application for review by the AAT could be made to be heard by the Small Taxation Claims Tribunal (STCT) rather than the Taxation Appeals Division (TAD)⁴⁰ of the AAT. The STCT was intended to provide a cheaper and less formal means of resolving tax disputes, in particular by encouraging mediation.⁴¹ The Tribunals Amalgamation Act 2015 (Cth) abolished the STCT as part of an amalgamation of the AAT. Applications that were dealt with in the STCT are now heard by the Taxation and Commercial Division of the AAT. However, the lower application fee (of A\$87, equivalent to NZ\$96.55)⁴² that was previously payable in relation to applications of that kind has been maintained.⁴³

Prior to its abolition, Tran-Nam and Walpole considered the (declining) role of the STCT within the AAT over time.⁴⁴ In 2010-11 only about six per cent of all tax dispute applications lodged at the AAT went to the STCT,⁴⁵ a significant reduction compared with more than a decade earlier. For example, in 1997–98 and 1998–99, almost 25 per cent and more than 31 per cent of tax dispute cases of the AAT went to the STCT, respectively.⁴⁶ Tran-Nam and Walpole attributed the declining role of the STCT, both in absolute and relative terms, to various factors, including:⁴⁷

- the cumulative effect of inflation and economic growth, the result of which had been that the upper eligibility limit of A\$5000 had become proportionally smaller and smaller over the years;
- the high costs of small tax disputes;⁴⁸ and
- the fact that some taxpayers may have been aware that they have a low chance of success in the STCT.⁴⁹

³⁹ Using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁴⁰ Now referred to as the Taxation and Commercial Division, pursuant to the Tribunals Amalgamation Act 2015 (Cth), s 17A.

⁴¹ CCH *Australian Master Tax Guide 2015* (56th ed, CCH, Sydney, 2015) [¶28-090]. For further details on the differences between the former STCT and TAD divisions of the AAT, see Binh Tran-Nam and Michael Walpole 'Independent tax dispute resolution and social justice in Australia (2012) 35(2) UNSWLJ 470, 483-484.

⁴² Using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁴³ A lower application fee applies, only if paid on or after 1 July 2016, for the review of certain taxation decisions including where the amount of tax in dispute is less than A\$5,000. The standard application fee, for most other disputes is A\$884 (NZ\$980.94): Administrative Appeals Tribunal "Fees" (24 January 2017) <<http://www.aat.gov.au/applying-for-a-review/fees>>. Foreign currency conversion using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁴⁴ Tran-Nam and Walpole, above n 41, 493.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid, 494.

⁴⁸ Tran-Nam and Walpole estimated the average costs of tax dispute resolution, at that time, in the STCT without professional assistance was A\$2,000 (NZ\$2,219.23) and \$A4,800 (NZ\$5,325.90) with professional assistance: Ibid, 492. Foreign exchange currency conversion using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁴⁹ Tran-Nam and Walpole further observe that if the taxpayer chooses to represent himself or herself, then while their personal costs will be more affordable, their chance of being successful will be negatively impacted: ibid, 492.

The Australian House of Representatives Standing Committee on Tax and Revenue's *Inquiry into Tax Disputes*⁵⁰ in 2015 also noted, inter alia, that the STCT "gave taxpayers false hope [as the] time and effort is usually required to properly adjudicate a dispute, even if the amount involved is small."⁵¹ A tax dispute for a small amount can still be a complex matter. Consequently, the Standing Committee made the recommendation that the Government review the STCT and determine whether it should continue and if so, there should be a one-off increase to the A\$5,000 limit to take account of inflation.⁵² As noted, in fact the decision was instead made to abolish the STCT.

3.2.2 In-house Facilitation

Following a successful ADR facilitation pilot, with effect from 1 April 2014, ATO in-house facilitation is available for individuals and small businesses. The facilitation service is targeted at the audit and objection stages of the disputes process (although it can be used up to and including the litigation stage).

ATO facilitation is a process where "an impartial ATO facilitator meets with the taxpayer/their agent and the ATO case officers to identify issues in dispute, develop options, consider alternatives, [and] attempt to reach a resolution."⁵³ The facilitator is an ATO officer trained in facilitative mediation who has had no involvement in the dispute, and who is impartial and independent. The facilitator "will not establish facts, take sides, give advice, make a decision or decide who is 'right or wrong.'"⁵⁴ Their role is to guide and assist the parties through the process "to ensure that there are open lines of clear communication, and messages are correctly received."⁵⁵

ATO facilitation is a voluntary process which is usually held face-to-face at the request of the taxpayer, their advisor or the ATO case officer.⁵⁶ After a request for in-house facilitation is made, the facilitation is scheduled at the earliest date convenient for the parties and usually lasts less than a day. ATO facilitation is a free service. However, taxpayers may choose to have representation at the facilitation at their own cost.

Any information disclosed during the facilitation process is only to be used for the facilitation process, unless authority is provided by the disclosing party, disclosure is required by law, or the information represents an actual or potential threat to human life or safety. If participants have agreed on an outcome at the end of a facilitation, the facilitator will help the participants

⁵⁰ House of Representatives Standing Committee on Tax and Revenue *Tax Disputes* (Canberra, March 2015).

⁵¹ Ibid, [3.131], 51.

⁵² Ibid, [3.136], 52. It was suggested that the threshold should be increased to A\$10,000 (NZ\$11,097.87) or A\$15,000 (NZ\$16,646.80) and a system introduced so that the threshold increases incrementally in the future to keep pace with inflation: ibid, [3.129], 51. Foreign currency conversion using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dc=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁵³ Australian Taxation Office 'In-House facilitation' (31 September 2017) <https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Alternative-Dispute-Resolution/In-House-Facilitation/?anchor=Resolve_tax_disputes_more_quickly_using_in_house_facilitation#Resolve_tax_disputes_more_quickly_using_in_house_facilitation>.

⁵⁴ Australian Taxation Office 'ATO plain English guide to alternative dispute resolution' (1 June 2015) <<https://www.ato.gov.au/About-ATO/About-us/In-detail/Key-documents/ATO-plain-English-guide-to-alternative-dispute-resolution/>>.

⁵⁵ Ibid.

⁵⁶ Participants can withdraw from the process at any time by advising the facilitator and the other participants: Australian Taxation Office, above n 53.

to record the agreement, settlement or recommendation. If the dispute remains unresolved, in whole or in part, taxpayers' review and appeal rights are not affected in any way.

In the 2015-2016 year the ATO facilitation service achieved:⁵⁷

- 128 referrals for facilitation. This was a 30% increase in the number of referrals for the service compared to the 2014-2015 year.
- 81% resolution or partial resolution of the dispute. This was an increase of 6% on the 2014-2015 year.
- 88% of referrals were made by taxpayers or their advisors.
- 55% of facilitations conducted took place at the audit or advice stage, with 29% at objection, and 16% at litigation.

For each facilitation that resolves a dispute, it is estimated to save taxpayers at least A\$50,000 (equivalent to NZ\$55,489.37)⁵⁸ that would otherwise be incurred if the dispute proceeded to litigation.⁵⁹ In-house facilitation is viewed by the ATO as an important strategy for reducing the number of small business and individual appeals to the AAT.⁶⁰

3.2.3 Fast Intensive Triage

Fast Intensive Triage (FIT) was implemented with effect from 16 March 2017 in the ATO's Review and Dispute Resolution (RDR) business line.⁶¹ Experienced ATO staff will work on the new triage service for all incoming objections with the aim of being "able to make early, meaningful contact with taxpayers and their agents."⁶² They will:⁶³

- assess all cases at the earliest opportunity to determine if the matter looks quite straightforward, can be resolved relatively quickly and make that happen, or
- if the matter is more involved or complex, they will allocate it directly to the right person in RDR for resolution. Sometimes other experts (like ATO Tax Counsel Network members or economists' practice or even external counsel) may be involved in providing guidance to the RDR decision maker.

In addition, the triage team will be able to provide guidance to the objections case officer about how the case should be managed, and also provide an estimation of the likely timeframe to finalise the dispute. The categorisation of objections is based on the complexity of the objection, and similar to the approach adopted in Canada by the Canada Revenue Authority (CRA) (see section 4.2.2 below), FIT apparently makes a distinction between 'straightforward' and 'complex' disputes. Although, at the time of writing no guidance has been provided by the ATO on distinguishing between the two categories of cases. Further, similar to the CRA's process, FIT is not in itself a dispute resolution forum or mechanism. However, FIT does direct

⁵⁷ Debbie Hastings 'The Effective and Timely Resolution of Tax Disputes: The ATO In-house facilitation service and beyond' (speech to the National Mediator Conference, Gold Coast, 11-14 September 2016) 6.

⁵⁸ Using a cross rate of A\$1 = NZ\$1.11, <https://www.google.co.nz/search?q=australia+nz+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=AlgKWtyWCqvM8geWooHwAg> at 16 November 2017.

⁵⁹ The average timeframe in the facilitation pilot, from first contact about the facilitation pilot to resolution was 41 days: Australian Taxation Office, *GST administration annual performance report 2012-13* (Canberra, November 2013) 52.

⁶⁰ Debbie Hastings 'Alternative Dispute Resolution in Tax Disputes' (Tax Bar Association Seminar - In dispute with the ATO: What to expect, 2 October 2014).

⁶¹ Chris Jordan, Keynote address to the Tax Institute 32nd National Convention (Adelaide, 16 March 2017).

⁶² Ibid.

⁶³ Ibid.

cases as to the appropriate path of dispute resolution based on the level of complexity of the case (and accordingly, may potentially result in more efficient dispute resolution).⁶⁴

In December 2016, the ATO commenced a pilot called Dispute Assist to support unrepresented individual taxpayers through the disputes process. Dispute Assist's focus is on supporting vulnerable unrepresented taxpayers, such as elderly taxpayers and those dealing with family illness, domestic violence or mental health issues.⁶⁵ Accordingly, Dispute Assist may be of relevance to small disputes particularly involving unrepresented taxpayers. Furthermore, Dispute Assist will be expanded in 2017–18 to include small business taxpayers.⁶⁶ Like FIT, Dispute Assist is not a dispute resolution forum. However, it may potentially lead to the more efficient resolution of disputes for certain taxpayers by helping them to navigate the disputes process more effectively than if unassisted.

3.2.4 Early Assessment and Resolution

Effective from July 2013, an early assessment and resolution (EAR) process is applied to all cases that are lodged with the AAT.⁶⁷ Specialist senior ATO officers examine each new application to look for opportunities to resolve the matter without a lengthy or costly tribunal process, saving resources for all parties. EAR focuses on early engagement with the taxpayer (preferably in person), to listen, discuss and accept evidence of events where appropriate. The officer will also engage with other stakeholders in the ATO in attempt to resolve the dispute.

The EAR approach is particularly suited to cases:⁶⁸

- of low monetary value
- involving taxpayers with good compliance history
- where the law is quite settled
- where evidentiary issues are of primary concern
- where the dispute relates solely to a penalty imposed.

In the event that complete resolution is not achieved, “the process aims to identify and narrow the issues in dispute, and ensure that only the right matters proceed to hearing without delay.”⁶⁹ The use of ADR processes may also be considered where attempts at direct negotiation have not resolved the matter. In recent times, up to 85 per cent of all taxation matters at the AAT have been finalised prior to a hearing.⁷⁰ Conferencing is the most important tool the AAT uses to facilitate settlement of disputes.⁷¹ The AAT also utilises formal ADR processes, including conciliation and mediation to assist parties to filter and narrow the issues in dispute and, where possible, arrive at consensual outcomes.⁷² As indicated above, the EAR process is of particular

⁶⁴ In the first three months of the operation of FIT, seven out of ten cases were ultimately resolved and finalised, generally within two weeks, through this new service. Australian Taxation Office *Commissioner of Taxation Annual Report 2016-17* (2017) 65.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Australian Taxation Office ‘Early assessment and resolution’ (30 March 2017) <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Avoiding-and-resolving-disputes/Litigation/Early-assessment-and-resolution/>>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Australian Taxation Office ‘Submission on the Productivity Commission Inquiry: Access to Justice Arrangements’ (12 February 2014) [30], 8.

⁷¹ Administrative Appeals Tribunal ‘Tax Dispute Resolution: The AAT Perspective’ (4 June 2013) 8 <<http://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/TaxDisputeResolution04June2013.pdf>>.

⁷² *Ibid.*, 9.

relevance in providing an early opportunity to resolve disputes for small business and individual taxpayers given that this taxpayer segment comprises the bulk of taxpayer appeals to the AAT.

4.0 CANADA

4.1 Canadian Tax Dispute Resolution Procedure

Tax disputes in Canada generally arise during an audit or review by the CRA or upon the subsequent issuance of an assessment or reassessment. While there is no formal procedure for resolving disputes with CRA auditors or reviewers, the practice is for them to provide taxpayers with an opportunity to preview initial audit or review findings and to provide additional information for consideration in the event that there are disagreements with initial findings.⁷³ Upon assessment or reassessment, taxpayers who dispute the tax assessed can seek redress by:

- Lodging an administrative appeal with the CRA in the form of a notice of objection within 90 days of the disputed assessment.⁷⁴ When the CRA receive a notice of objection, it is categorised based on the complexity of the objection (see section 4.2.2 of this paper).
- Once an objection is lodged, the Minister “shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess.”⁷⁵
- Where a taxpayer disagrees with the CRA’s decision resulting from an objection, they may appeal their assessment or determination to the Tax Court of Canada (TCC),⁷⁶ either under the Informal Procedure (see section 4.2.1 of this paper) or the General Procedure. The time limit for filing an appeal is 90 days from the date on the decision notice.⁷⁷
- Both taxpayers and the CRA can appeal the TCC’s decision to the Federal Court of Appeal. A judgment of the Federal Court of Appeal can be further challenged before the Supreme Court of Canada, with the Court’s permission.

4.2 Processes for Small Tax Dispute Resolution

4.2.1 The Tax Court of Canada – the Informal Procedure

The Informal Procedure in operation

The TCC is a federal court established by the *Tax Court of Canada Act, S.C. 1980-81-82-83 (Can)*, c. 158, effective 18 July 1983. Its jurisdiction includes hearing appeals from assessments under, inter alia, the Income Tax Act 1985 (Can) and the Excise Tax Act 1985 (Can).

⁷³ Karen Stilwell ‘Mediation of Canadian Tax Disputes’ (Master of Laws Thesis, University of Toronto, 2014) 5.

⁷⁴ Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)), s 165(1).

⁷⁵ Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)), s 165(3).

⁷⁶ About 92 per cent of objections to the CRA are resolved administratively, with the remaining 8 per cent of taxpayers choosing to take the matter further by appealing to the TCC. Of these appeals, approximately one-third are settled before the actual trial date, one-third are withdrawn by the taxpayer and one-third are litigated: Jamie Golombek ‘Tax court aims for speedier resolutions’ (3 December 2011) <http://www.jamiegolombek.com/article/detail.php?article_id=1168>.

⁷⁷ Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)), s 169(1). If 90 days have elapsed after service of the notice of objection by the taxpayer, and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed, the taxpayer may appeal directly to the TCC.

As outlined in section 4.1 above, if a taxpayer disagrees with the CRA's objection decision there are two procedures for appealing to the TCC: (1) the Informal Procedure,⁷⁸ and (2) the General Procedure.⁷⁹ No filing fee is payable by taxpayers electing the Informal Procedure.

Taxpayers can elect to use the Informal Procedure for disputes where:

- the total amount of federal tax and penalties in dispute per assessment (i.e., for each taxation year), excluding interest, is not more than C\$25,000 (equivalent to NZ\$28,553.23);⁸⁰
- the total amount of goods and services tax (GST) and harmonized sales tax (HST) in dispute per assessment, is not more than C\$50,000 (equivalent to NZ\$57,106.46);⁸¹
- the disputed loss amount is not more than C\$50,000 per determination;
- interest on federal tax and penalties is the only matter in dispute.

When the amount in dispute in an income tax case is greater than C\$25,000, the taxpayer may choose to restrict the amount under appeal to C\$25,000; otherwise the General Procedure will apply. A taxpayer disputing a loss amount can likewise restrict the claim to C\$50,000 and thus come under the Informal Procedure threshold.

There are strict time restrictions placed on the CRA and TCC to ensure the dispute is settled quickly.⁸² Accordingly, upon receipt of the taxpayer's notice of appeal the TCC Registry will forward a copy to the CRA, which must reply within 60 days.⁸³ Failure to do so will result in the taxpayer's allegations of fact contained in the notice of appeal being presumed as true. No later than 180 days after the filing of the CRA's reply to the taxpayer's notice of appeal,⁸⁴ the TCC will schedule a hearing, advice of which will be sent to the taxpayer (or their representative) at least 30 days before the hearing.⁸⁵

Taxpayers may represent themselves or be represented by a lawyer or an agent and hearings are in public. The *Tax Court of Canada Act, R.S.C. 1985 (Can)* makes it clear that "the Court is not bound by any legal or technical rules of evidence in conducting a hearing".⁸⁶ In addition, hearings and appeals utilising the Informal Procedure "shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit."⁸⁷ This process "is intended to minimize the legal steps involved in the appeal process."⁸⁸

⁷⁸ The Informal Procedure was instituted in *The Act To Amend the Tax Court of Canada Act and Other Acts in Consequence Thereof SC 1988*, effective 1 January 1991. It is governed by provisions contained in section 18 of the *Tax Court of Canada Act, R.S.C. 1985 (Can)*, c. T-2, as amplified in *Tax Court of Canada Rules (Informal Procedure)*, *SOR/90-688b*, promulgated effective 1 January 1991.

⁷⁹ The General Procedure is the default system of the TCC and follows formal court rules, which cover filing of an appeal, rules of evidence, examinations for discovery and production of documents: Canada Revenue Agency 'Resolving your dispute: Objection and appeal rights under the Income Tax Act' (June 2014) 16.

⁸⁰ Using a cross rate C\$1 = NZ\$1.14, <https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=AlgKWvX6EIi0QTU3ralBg&q=canada+to+nz+dollar+conversion&oq=canada+nz+conversion&gs_l=psy-ab.1.0.0i8i30k1.885895.886921.0.888645.6.6.0.0.0.0.393.393.3-1.1.0....0...1.1.64.psy-ab..5.1.392....0.LJ7WnR-2Gt4> at 16 November 2017.

⁸¹ *Ibid.*

⁸² Canada Revenue Agency, above n 79, 14.

⁸³ *Tax Court of Canada Act, R.S.C. 1985 (Can)*, s 18.16(1).

⁸⁴ *Ibid.*, s 18.17(1).

⁸⁵ *Ibid.*, s 18.19(1).

⁸⁶ *Ibid.*, s 18.15(3).

⁸⁷ *Ibid.*, s 18.15(3).

⁸⁸ Dominique Lamoureux 'Just a Beginning – A Caseflow Management Review of The Tax Court of Canada Income Tax Cases' (2006) *Institute for Court Management, Court Executive Development Program, Phase III*

The judge may either deliver a decision on the taxpayer's appeal at the conclusion of the hearing or (in the absence of exceptional circumstances) within 90 days after the hearing concluded.⁸⁹ The reasons for the judgment do not need to be in writing "except where the Court deems it advisable in a particular case to give reasons in writing."⁹⁰

Costs may be awarded only in favour of the taxpayer (if successful). The entire process, from the date the taxpayer files the notice of appeal to the decision of the judge in a TCC Informal Procedure appeal is usually completed within 11 months (330 days).⁹¹

Decisions in appeals involving the Informal Procedure have no precedential value.⁹² Despite this "informal procedure decisions, while not technically legally precedential, often do have an influential value on other judges."⁹³ Taxpayers cannot appeal a decision of the TCC under the Informal Procedure but decisions can be judicially reviewed on restrictive grounds.⁹⁴

Increase in the monetary limits for accessing the Informal Procedure

In 2013 the *Tax Court of Canada Act* (R.S.C., 1985, c. T-2) was amended to increase the monetary limits for access to the informal appeal procedure in the TCC. Specifically, the C\$12,000 (equivalent to NZ\$13,705.55)⁹⁵ and C\$24,000 (equivalent to NZ\$27,411)⁹⁶ thresholds for federal tax (and penalties) in dispute and dispute loss amounts, respectively were increased to C\$25,000 and C\$50,000, respectively). A new monetary limit for GST/HST appeals was also introduced - previously there was no such monetary limit. Thus, in order to achieve a better balance between General Procedure and Informal Procedure caseloads, the C\$50,000 limit for Informal Procedure appeals to the TCC in respect of GST/HST appeals was introduced.

The changes in the monetary limits for access to the informal appeal procedure were the result of proposals made in 2011 by the Canadian Government to improve the caseload management of the TCC.⁹⁷ They were aimed at providing taxpayers with greater access to a simplified and cost-effective judicial process and enabling a better balance in the TCC's caseload.

Project 16. One of the priorities of the TCC in both procedures is that the court be accessible to all Canadians – as such, the court sits in 68 Canadian cities and “has even sat in a taxpayer’s kitchen when the taxpayer could not otherwise attend the meeting.”: ‘Tax Court of Canada 20th Anniversary Symposium’ (2005) 53(1) Canadian Tax Journal 135, 138.

⁸⁹ Tax Court of Canada Act, R.S.C. 1985 (Can), s 18.22(1).

⁹⁰ Ibid, s 18.23.

⁹¹ Lamoureux, above n 88, 17.

⁹² Tax Court of Canada Act, R.S.C. 1985 (Can), s 18.28.

⁹³ Jamie Golombek ‘Going to Court’ *Forum Magazine* (1 June 2005) <http://jamiGolombek.com/printfriendly.php?article_id=832>. See, for example, *Mourtzis v The Queen*, 94 DTC 1362, at 1364 (TCC).

⁹⁴ See Federal Courts Act, R.S 1985 (Can), c. F-7, s 27(1.2), (1.3).

⁹⁵ Using a cross rate C\$1 = NZ\$1.14, <https://www.google.co.nz/search?q=cnada+new+zealand+conversion&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&dcr=0&ei=vmwKWsD1L63M8geG54GoDA> at 16 November 2017.

⁹⁶ Ibid.

⁹⁷ Government of Canada ‘Archived - Backgrounder: Proposals to Improve the Caseload Management of the Tax Court of Canada’ (10 November 2011) <https://www.fin.gc.ca/n11/data/11-116_1-eng.asp>; Government of Canada ‘Archived - Government Invites Comments on Proposals to Improve the Caseload Management of the Tax Court of Canada’ (10 November 2011) <<https://www.fin.gc.ca/n11/11-116-eng.asp>>.

Table 1: Proceedings instituted or filed in the Tax Court of Canada⁹⁸

	2015-16	2014-15	2013-14	2012-13	2011-12
Proceedings instituted or filed	5,892	5,455	5,316	5,381	4,750

Table 2: Tax Court of Canada Statistics as of 1 October 2011⁹⁹

	Appeals filed	Appeals disposed of	Appeals settled	Appeals withdrawn	Self-represented litigants
Informal procedure	1,272	2,207	627	1,035	658
General procedure	1,120	1,117	585	522	198

One main factor contributing towards the increase in caseload (as shown in Table 1) in the TCC over time is the increase in self-represented litigants.¹⁰⁰ As indicated in Table 2, self-representation is more common in the informal procedure of the TCC. This aligns with the aim of the informal procedure to provide “easier, speedier, and less expensive access than the general procedure.”¹⁰¹ In 2011, the proportion of informal procedure cases filed represented 53 per cent of the total appeals filed in the TCC. Given the abovementioned increase in self-represented litigants over time, and the increase in the monetary limits for access to the informal procedure, one could arguably deduce that the proportion of proceedings instituted or filed in the informal procedure out of the total filings in the TCC has also increased during this period.

Observations of the Informal Procedure

MacGregor et al. believe that over time the TCC “has garnered respect from both the general public and the tax community.”¹⁰² As far as the general public are concerned “the accessible and flexible procedures available under the informal procedure allow for relatively straightforward appeals to be heard regardless of location or the amount at issue.”¹⁰³ More complex tax appeals can be determined in accordance with the more formal processes operating in the general procedure. Nevertheless, MacGregor et al. observe that despite the informal procedure being an efficient and relatively inexpensive process, “it is not always perfectly comprehensible to those without legal training.”¹⁰⁴ As a consequence “a practice has developed in which it is accepted that both the judge and the Crown owe a special duty to taxpayers who are not represented by legal counsel.”¹⁰⁵ Goldschmidt also cites the following statement made by the court in *Wagg v. Canada*, [2003] 1 F.C.A. 303, ¶ 32 (Can): “A trial judge who is dealing with an unrepresented litigant has the right and the obligation to ensure that the litigant

⁹⁸ Courts Administration Service, *2015-16 Annual Report* (2016) 12.

⁹⁹ John R Sorensen ‘Tax Court of Canada 2011 Canadian Tax Foundation Update’ (2012) 22(2) Ontario Bar Association Taxation Law Section 1, 1.

¹⁰⁰ See, for example, Courts Administration Service, *2014-15 Departmental Performance Report* (2015) 20; Courts Administration Service, *2012-13 Annual Report* (2013) 16.

¹⁰¹ André Gallant ‘The Tax Court’s Informal Procedure and Self-Represented Litigants: Problems and Solutions’ (2005) 53(2) Canadian Tax Journal 333, 333.

¹⁰² Ian MacGregor, Thomas Akin, Jeff Oldewening and Kimberly Brown ‘The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature’ (2010) 58(supp) Canadian Tax Journal 87, 98.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, 96.

¹⁰⁵ *Ibid.*

understands the nature of the proceedings. This may well require the judge to intervene in the proceedings.¹⁰⁶

4.2.2 Categorisation of objections based on complexity in the CRA

In 2016 the Office of the Auditor General (OAG) of Canada conducted a performance audit which focused on whether the CRA was efficiently managing income tax objections.¹⁰⁷ As part of this performance audit, the OAG looked at the time the CRA took to provide taxpayers with decisions on their objections. The findings of the OAG's performance audit are important given that the longer it takes to process objections and for the CRA to make a decision, the higher the cost to taxpayers (including interest payable to the CRA if the taxpayer loses the dispute).¹⁰⁸

Upon receiving a notice of objection, the CRA aims, within 30 calendar days from the date the taxpayer filed the notice, inter alia, to communicate how long the taxpayer can expect to wait to be contacted by an appeals officer.¹⁰⁹ However, the OAG found that this communication to the taxpayer did not provide an estimate of the waiting period to actually resolve the objection – information that was also not available publicly. Taxpayer's therefore remained unaware at the time of filing the objection how long, on average, it could take the CRA to resolve it.¹¹⁰

The OAG recommended that the CRA provide taxpayers with the time frames in which it expects to resolve their objections based on the complexity of the objection.¹¹¹ The CRA agreed with the OAG's recommendation, stating that expected and actual time frames related to complexity would begin to be shared with the general public on the CRA's website by the end of the fiscal year (FY) 2016–17.¹¹² In addition, the CRA also undertook to implement and publicly report a standard for the resolution of low-complexity objections, which represent approximately 60 per cent of the yearly objection intake.¹¹³

¹⁰⁶ Jona Goldschmidt 'Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience' (2008) 17 Michigan State Journal of International Law 601, 634, fn 81. See also, Gallant, above n 101, 359-363, who also suggests, among other things, that greater judicial intervention is necessary in the case of self-represented litigants in order to reduce delays, permit the presentation of all the relevant evidence, and generally allows for a fair trial.

¹⁰⁷ See Office of the Auditor General of Canada *Income Tax Objections – Canada Revenue Agency* (2016).

¹⁰⁸ The CRA charges interest (and penalties) on taxes assessed. To avoid such interest, taxpayers can pay the amount in dispute when they first file their objections or at any time when there is a balance outstanding. Otherwise, they must pay interest later if their objections are not allowed.

¹⁰⁹ In the FY 2015–16, this waiting period ranged from three months to a year for low- and medium-complexity files. Office of the Auditor General of Canada, above n 107, [2.29], 6. 'Complexity' is the basis which is used by the CRA for categorising an objection according to the extent of research it requires for processing. Low-complexity objections require application of basic provisions of the law. Medium-complexity objections involve more intricate transactions and require application of more complex provisions of the law. High-complexity objections involve large files (for example, those related to international transactions or multinational corporations) and tax avoidance files: *ibid*, 6.

¹¹⁰ *Ibid*, [2.30], 6.

¹¹¹ *Ibid*, [2.31], 7.

¹¹² As at the time of writing of this paper, the CRA website displays actual income tax objection assignment timeframes for low and medium complexity cases, and actual objection resolution times for low complexity disputes. The timeframes for high complexity disputes were not able to be provide due to the complex nature of the issues involved. See Canada Revenue Agency 'Income tax objections' (26 October 2017) <<https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/income-tax.html#2>>.

¹¹³ The standard adopted was to respond to taxpayers on low-complexity objections within 180 days, 80 per cent of the time. The intention was to improve on this standard as resources allowed. Office of the Auditor General of Canada, above n 107, [2.50], 11.

While the above actions do not provide a dispute resolution forum or procedure for resolving low-complexity tax objections per se, they do illustrate that the CRA has processes in place which distinguish small or low-complexity tax disputes (from medium- and high-complexity tax disputes). Moreover, there is recognition that the time frames for the resolution of objections and also the steps to resolving disputes differ according to the objections' level of complexity.

5.0 UNITED KINGDOM

5.1 United Kingdom Tax Dispute Resolution Procedure

From 1 April 2009, to coincide with the new tribunal system (see section 5.2.1), Her Majesty's Revenue and Customs (HMRC) introduced a new optional statutory review process for appealable tax decisions, with the aim of resolving disputes more quickly and cost-effectively. The statutory review process is as follows:¹¹⁴

- Taxpayers who disagree with a direct tax decision¹¹⁵ made by HMRC have 30 days from the date of the decision to appeal in writing (with supporting reasons) to HMRC against it.¹¹⁶ This may lead to further discussions between the taxpayer and HMRC officials - usually the HMRC officer who is responsible for the decision - with the aim of resolving the dispute. According to HMRC most disputes are resolved in this way.¹¹⁷
- If the matter remains unresolved or if discussions are not appropriate or possible, HMRC may offer a review. The taxpayer has 30 days to accept the review offer or to send the appeal to the tribunal. If the taxpayer takes no action the dispute is treated as settled by agreement.
- The review is carried out by an HMRC officer who has not previously been involved in the original decision. The review conclusion letter must set out HMRC's reasoning and conclusions on the review.
- In addition, at any time after the taxpayer has sent their appeal to HMRC, they may either request a review by HMRC or notify the appeal to the First-tier Tribunal (FTT) (by a notice of appeal).¹¹⁸ However, once the taxpayer has accepted a review offer (or asked for a review), they may only notify the appeal to the tribunal after either they have been advised by way of a review letter of the outcome by HMRC or the mandated 45 day (or other agreed) review period has expired.
- The processes for disputing an indirect tax decision¹¹⁹ made by HMRC are similar to those for direct tax decisions. However, for indirect tax decisions, the taxpayer does not need to send an appeal to HMRC – they can either accept HMRC's offer of a review or appeal to the tribunal within 30 days of the HMRC decision letter.¹²⁰

¹¹⁴ The review existed previously for some indirect taxes and, informally, for VAT purposes.

¹¹⁵ Direct taxes include those listed in HM Revenue and Customs *ARTG1060 - Introduction: Guidance - direct taxes* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg1060>>.

¹¹⁶ See HM Revenue and Customs *ARTG2010 - Reviews and appeals overview: Process for direct taxes* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg2010>>.

¹¹⁷ Ibid.

¹¹⁸ A nine-page Notice of Appeal form can be downloaded from the Tribunals Service website for this purpose, see HM Courts and Tribunals Service 'Court and tribunal form finder' <http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?original_id=3015>.

¹¹⁹ Indirect taxes include those listed in HM Revenue and Customs *ARTG1070 - Introduction: Guidance - indirect taxes* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg1070>>.

¹²⁰ See HM Revenue and Customs *ARTG2020 - Reviews and appeals overview: Process for indirect taxes* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg2020>>.

5.2 Processes for Small Tax Dispute Resolution

5.2.1 The First-tier Tribunal

Introduction

As part of a programme of tribunal reform the *Tribunals, Courts and Enforcement Act 2007* (UK) introduced the framework for a new two-tier tribunal system - the FTT and the Upper Tribunal - with specialist Chambers handling similar types of appeal. From 1 April 2009, the vast majority of tax appeals are heard by the FTT (also known as the Tax Chamber) in the first instance. The tribunal system brings together matters previously heard by inter alia the General Commissioners and Special Commissioners.

The four categories of cases

In most cases the taxpayer's appeal will be considered by the FTT.¹²¹ There is no fee charged for filing an appeal with the FTT and to ensure accessibility there is a network of hearing centres across the UK. The FTT has a wide power under *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK) ('the Tribunal Procedure rules') to "regulate its own procedure".¹²² It also has the authority to suggest to the parties to the dispute that they consider ADR and arbitration.¹²³

All FTT cases are heard by legally-qualified Tribunal judges and suitably qualified Tribunal members. Taxpayers can choose to be represented by an advisor at the hearing. In most cases HMRC's case will be presented by a member of HMRC staff.¹²⁴ Decisions of the FTT do not generally create a binding legal precedent, however, they can be influential in other decisions of the courts and tribunals. Decisions of the FTT may be appealed to the Upper Tribunal on a point of law if the FTT or Upper Tribunal gives permission (or leave, in Northern Ireland).¹²⁵

When the tribunal receives a notice of appeal¹²⁶ it will, in line with the Tribunal Procedure rules allocate the case to one of the following four categories detailed below.¹²⁷ While small disputes will typically fall within either the default paper or basic case categories (hence the focus of this discussion), depending on the circumstances of the case, a small value dispute could be allocated to any of the four case categories outlined following.

All hearings will be held in public unless the tribunal gives a direction otherwise. The tribunal may publish a decision or the reasons for a decision (subject to ensuring any published report does not disclose information that was referred to only in the part of the hearing held in private).

¹²¹ In certain circumstances, the decision of the FTT can be appealed to the Upper Tribunal. The Upper Tribunal may also, in cases falling within the Complex category and with the agreement of the parties and the consent of the FTT and Upper Tribunal hear cases in the first instance, without the case being heard by the FTT, The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), rr 23(5)(b) and 28(1).

¹²² Ibid, r 5(1).

¹²³ Ibid, r 3(1).

¹²⁴ In more complicated direct tax cases, and in the majority of indirect tax cases, HMRC's case will be presented by counsel.

¹²⁵ The Upper Tribunal is a superior court of record and therefore has the same status as the High Court.

¹²⁶ The standard notice of appeal form for the FTT does not provide for the appellant to indicate to which category the appeal should be allocated. However, HMRC or the taxpayer can apply to the tribunal for the case to be allocated to a different category. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 23(3).

¹²⁷ Ibid, r 23(1).

Costs (in Scotland, expenses) may be awarded by the tribunal in Complex cases - except where the customer has written to the tribunal opting out of the costs regime.¹²⁸ While the tribunal has no general power to award costs or expenses (as appropriate) to either party in Default Paper, Basic or Standard category cases, it can make a wasted costs order,¹²⁹ or an order for costs against a party who has “acted unreasonably in bringing, defending or conducting the proceedings.”¹³⁰

(i) Default Paper cases

This category is essentially concerned with penalties imposed on taxpayers rather than substantive legal issues.¹³¹ Default Paper cases are normally decided on the basis of paper submissions alone (notice of appeal, HMRC statement of case and other relevant documents), although either the taxpayer or HMRC (on rare occasions) may request the case be decided at a hearing with the parties present.¹³² Certain (comparatively short) timeframes must be adhered to the taxpayer and HMRC.¹³³ Taxpayers have welcomed the Default Paper category as it offers a chance to have a dispute decided by the tribunal without a hearing.¹³⁴

(ii) Basic cases

Basic cases will usually be disposed of after an informal hearing and with minimal exchange of documents before the hearing. The types of appeal or application that may be heard in the Basic category (provided the case does not fall within the Default Paper category) include: penalties for late filing and late payment and penalties for incorrect returns, and cases where an appeal is also brought against the assessment of the tax to which the return relates, and indirect tax cases.

In most cases after the notice of appeal has been filed by the taxpayer with the tribunal (and HMRC is duly notified) the case will proceed directly to a hearing. There is no requirement for HMRC to provide a statement of case,¹³⁵ but the tribunal can decide to request further information from either party. However, if HMRC intends to raise any new grounds at the hearing they must advise the taxpayer “as soon as is reasonably practicable”¹³⁶ after becoming aware of the grounds and in enough detail for the customer to respond to those grounds at the hearing.

The parties are expected to attend the hearing and to present their cases (including presentation of documents and calling witnesses). The case could be heard by up to three members, each of whom is either a judge or a member (who may be legally qualified). The hearing is conducted

¹²⁸ Ibid, r 23(5)(a).

¹²⁹ Wasted costs are those costs incurred by a party either: as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative; or before such conduct but, in the light of which, the Tribunal considers it unreasonable to expect that party to pay: Tribunals, Courts and Enforcement Act 2007 (UK), s 29(4)-(6).

¹³⁰ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 10(1)(a),(b).

¹³¹ The category therefore includes appeals against, inter alia, self-assessment (SA) and corporation tax self-assessment (CTSA) fixed filing penalties and employer end of year late return penalties: HM Revenue and Customs ARTG8350 - *First-tier and Upper Tribunals: Preparing for tribunal: Categories of tribunal case* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8350#IDA2WHCH>>.

¹³² HM Revenue and Customs ARTG8370 - *First-tier and Upper Tribunals: Preparing for tribunal: Default Paper cases* <<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8370>>.

¹³³ See further The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), for example, r 25(2), r 26.

¹³⁴ Penny Hamilton ‘Basically the same?’ (14 July 2010) Taxation.co.uk <<https://www.taxation.co.uk/Articles/2010/07/14/262661/basically-same>>.

¹³⁵ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 24(2).

¹³⁶ Ibid, r 24(4)(a).

in an informal manner. “[T]he ‘turn up and talk’ approach of the [former] General Commissioners [is] encouraged”¹³⁷ in Basic cases. The tribunal usually gives its decision at the end of the hearing. The decision will be confirmed in writing, with brief reasons, within 28 days.

(iii) Standard and (iv) Complex cases

The FTT categorise cases as Complex:

- that require lengthy or complex evidence or a lengthy hearing; or
- involving a complex or important principle or issue; or
- involving a large financial sum.¹³⁸

Cases not categorised as Default Paper, Basic or Complex will be categorised as Standard cases by the tribunal. Standard cases will usually be subject to more detailed case management and be disposed of after a hearing and are heard by a judge sitting alone or with one or other judges or members (who may be legally qualified).

Standard and Complex cases follow more detailed case management processes and there is a formal hearing. The same procedural deadlines are prescribed for Standard and Complex cases. While Basic, Standard and Complex cases are normally decided at a hearing, both parties may consent to the matter being decided on the basis of the papers alone.¹³⁹

Tax Tribunal Statistics

In 2016-17 the tax tribunal notified HMRC of 6,559 tax appeals that it received (5,161 in 2015-16).¹⁴⁰ During the year 4,462 appeals were settled either by a formal hearing, or by agreement before the hearing (3,917 in 2015-16).¹⁴¹ Of those appeals which were heard by the tribunal in 2016-17, HMRC won 77 per cent (75 per cent in 2015-16).¹⁴² However, there is a growing stock of tribunal cases on hand.¹⁴³ This may possibly, partly be attributable to the UK government’s adoption of an “aggressive stance against tax avoidance and tax evasion”,¹⁴⁴ as well as HMRC’s “aggressive litigation strategy”¹⁴⁵

Appeals against penalties and other tax assessments of £10,000 (equivalent to NZ\$19,383.99)¹⁴⁶ or less are reported to constitute a “substantial proportion” of the FTT's

¹³⁷ Hamilton, above n 134.

¹³⁸ The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK), r 23(4).

¹³⁹ Ibid, r 29(1).

¹⁴⁰ HM Revenue and Customs *Annual Report and Accounts 2016-17* (2017) 109.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ 29,566 appeals were outstanding at the end of 2014-15, a figure almost triple the 10,061 cases awaiting hearing five years earlier. Pinsent Masons ‘Outstanding UK tax tribunal cases reach record levels’ (19 August 2015) Out-Law.com <<https://www.out-law.com/en/articles/2015/august/outstanding-uk-tax-tribunal-cases-reach-record-levels/>>.

¹⁴⁴ Melissa Fenty ‘UK Tax Disputes Surge’ (6 June 2016) BIBA <<http://biba.bb/uk-tax-disputes-surge/>>.

¹⁴⁵ Pinsent Masons, above n 143.

¹⁴⁶ Using a cross rate £1 = NZ\$1.94, <https://www.google.co.nz/search?source=hp&ei=17AQWs7kLYXK0ASe-o6gBg&q=foreign+exchange+pound+to+dollar+nz&oq=foreign+exchange+pound+to+dollar+nz&gs_l=psy-ab.3..0i22i30k1l6.1535.12306.0.12715.17.17.0.0.0.646.3517.2-2j5j1j1.9.0...0...1.1.64.psy-ab..8.9.3513...0j0i131k1.0.yppdGI_PuN8> at 19 November 2017.

annual caseload.¹⁴⁷ However, up to two-thirds of tax tribunal users are reported to be self-represented.¹⁴⁸

5.3 HM Revenue and Customs Alternative Dispute Resolution

HMRC offer an ADR service, which is available for large business customers,¹⁴⁹ and all other HMRC customers outside of large business,¹⁵⁰ respectively. The service is generally available for all tax types. It uses independent facilitators from HMRC to resolve disputes between HMRC and taxpayers whether or not an appealable decision or assessment has been made by HMRC. The ADR service is available alongside taxpayers' rights for a review by HMRC or to appeal to an independent tax tribunal. Entering into the ADR process does not affect the taxpayer's review or appeal rights if the dispute remains unresolved following ADR.

The facilitator is an HMRC member of staff who has received in-house training by HMRC in ADR techniques and who has had no prior involvement in the dispute. The role of the facilitator is to "work with both the customer and the HMRC case-owner to try to broker an agreement between them" through meetings and telephone conversations.¹⁵¹ The facilitator will "help all parties to obtain a shared and full understanding of the disputed facts and arguments."¹⁵² In addition, the facilitator will ensure that there is proper communication between the parties and may help to explain what one or other side is trying to say to the other. However, the facilitator will not impose their views on either party.

HMRC ADR is a voluntary process for both parties.¹⁵³ For cases to be considered for the HMRC ADR service taxpayers must complete an online application form and HMRC will notify the taxpayer if their request for ADR has been accepted within 30 days. The ADR process proceeds entirely on a "without prejudice basis".¹⁵⁴ Taxpayers are not charged a fee for using the ADR service. However, taxpayers may choose to have representation at their own cost.

The aims of ADR include reducing costs for both HMRC and the taxpayer in dispute and reducing the number of disputes that reach statutory review internal review and/or the Tribunal.¹⁵⁵ While ADR can be used at any stage of the dispute resolution process, it is most commonly utilised when taxpayers have stopped making progress in their dealings with HMRC during a compliance check or tax enquiry (i.e., audit) conducted by HMRC. Furthermore, ADR

¹⁴⁷ Hui Ling McCarthy 'Tribunal fees – a tax on justice' Issue 1 Tax Adviser (January 2016) 1. No breakdown of the allocation of cases to each of the four categories is able to be obtained.

¹⁴⁸ Nick Skerrett 'Q&A: How would the proposed tax tribunal fees impact taxpayers?' (12 August 2015) Tax Journal <<https://www.taxjournal.com/articles/qa-how-would-proposed-tax-tribunal-fees-impact-taxpayers-12082015>>.

¹⁴⁹ Large business includes the top 2,000 UK businesses defined by complexity of factors of turnover, number of employees and Business Reading Ratings.

¹⁵⁰ Taxpayers outside of large business are under the remit of HMRC's Enforcement and Compliance (E&C) team and include small and medium enterprises (SMEs) and individual taxpayers.

¹⁵¹ HM Revenue and Customs 'Tax disputes: Alternative Dispute Resolution (ADR)' (8 December 2014) <<https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr>>.

¹⁵² Ibid.

¹⁵³ Either party can choose to withdraw from the process at any time: HM Revenue and Customs, *Resolving Tax Disputes: Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases* (April 2012) 6.

¹⁵⁴ Ibid, 39.

¹⁵⁵ HM Revenue and Customs *Alternative Dispute Resolution for SMEs and Individuals: Project Evaluation Summary* (April 2013) 3. In 2016-17, 86 per cent of all HMRC ADR facilitations were closed within 120 days of acceptance: Email from Beckie Pocock, (Business Manager, Professionalism and Case Governance – Alternative Dispute Resolution, HM Revenue and Customs) to Melinda Jone (4 May 2017).

is not intended to replace statutory internal review which is an already established process aimed at resolving disputes without a tribunal hearing. HMRC statutory review looks at legal challenges to decisions whereas ADR is more suitable for disputes where there might be more than one tenable (legal) outcome.¹⁵⁶ Thus, ADR provides an additional mechanism for taxpayers (including SMEs and individual taxpayers) to resolve disputes with HMRC.

The following statistics shown in Table 3 relate to the total ADR referrals¹⁵⁷ made in the 2016-17 and 2015-16 years.¹⁵⁸

Table 3: HMRC ADR Statistics

	2016-17	2015-16
Cases that applied for ADR	1,265	581
Cases resolved successfully (fully or partially)¹⁵⁹	370	262
Cases proceeding to litigation beyond ADR¹⁶⁰	96	15
Success rate (%)¹⁶¹	79	95

As noted above, as a result of an increased focus in recent times by HMRC on non-compliance, there has been an increase in tax enquiries generally, and in the number of cases submitted to the tax tribunal. Increasingly ADR has been utilised to help resolve disputes where it has not been possible to settle on issues which otherwise are likely to end up before the tax tribunal. HMRC accepted 413 applications from small and medium-sized enterprises and individuals in 2014-15.¹⁶² This represented an increase of over 70 per cent from the previous year.

6.0 UNITED STATES

6.1 United States Tax Dispute Resolution Procedure

6.1.1 The Internal Revenue Service

The principal national revenue authority in the US is the Internal Revenue Service (IRS).¹⁶³ Tax disputes in the US generally arise through the IRS's examination (audit) process.¹⁶⁴ In instances where the taxpayer does not agree with any or all of the IRS findings in an examination procedure, they may request a meeting or a telephone conference with the IRS

¹⁵⁶ HM Revenue and Customs, above n 155, 3.

¹⁵⁷ Includes the total ADR referrals for all HMRC business lines, including large business.

¹⁵⁸ HM Revenue and Customs, *Annual Report and Accounts 2016-17* (July 2017) 101.

¹⁵⁹ Dispute resolved satisfactorily (without recourse to litigation or significantly clarified prior to litigation).

¹⁶⁰ Cases that were closed without being resolved or significantly affected through ADR.

¹⁶¹ The number of cases resolved successfully (fully or partially) as a percentage of the number of cases accepted for ADR which were closed during the year.

¹⁶² RSM 'An alternative way forward?' (25 January 2016) <<https://www.rsmuk.com/ideas-and-insights/offshore-messenger-january-2016/an-alternative-way-forward>>.

¹⁶³ The IRS is organised into four operating divisions serving groups of taxpayers with similar needs. These operating divisions are: (1) Wage and Investment (W&I); (2) Small Business/ Self-Employed (SB/SE); (3) Large Business and International (LB&I); and (4) Tax-Exempt and Government Entities (TE/GE): CCH *US Master Tax Guide 2015* (98th ed, CCH, Chicago, 2014) [¶2701].

¹⁶⁴ Tax disputes can also arise when a taxpayer disagrees with a proposed or taken IRS collection action. The tax dispute resolution procedures for disputes arising from IRS examination and IRS collection differ. As this paper focuses on tax disputes concerning disagreements over taxpayers' tax liabilities or entitlements rather than disputes over the collection efforts of the revenue authority, tax disputes initiated through the IRS collection process are beyond the scope of this paper.

examiner and/or the examiner's supervisor. If no agreement is reached, the US tax dispute resolution procedures generally involve the following steps:

- A 30-day letter is issued by the IRS notifying the taxpayer of their rights to appeal to the IRS Appeals Office within 30 days.
- In order to make an appeal to the Appeals Office, the taxpayer must file either a formal written protest or a small case request (this is discussed further in section 6.2.1).
- If the taxpayer makes an appeal, the Appeals Office will review the issues of the case and schedule a conference (the Appeals conference) between the parties so that they can attempt to settle the differences between them.
- If the taxpayer and the IRS do not agree on some or all of the issues after the Appeals conference, or if the taxpayer does not respond to the 30-day letter (i.e., chooses to bypass the Appeals system), a 90-day letter is issued by the IRS.
- The taxpayer has 90 days (150 days if it is addressed to a taxpayer outside the US) from the date of the 90-day letter to file a petition with the US Tax Court, the US District Court or the US Court of Federal Claims.¹⁶⁵ If the amount in the taxpayer's case is US\$50,000 (equivalent to NZ\$72,769.63)¹⁶⁶ or less for any one tax year or period, the taxpayer can request that the case be handled under the small tax case (S case) procedure in the US Tax Court (this is discussed further in section 6.2.2).
- A case¹⁶⁷ may be further appealed to the US Court of Appeals (or the US Court of Appeals for the Federal Circuit for decisions of the US Court of Federal Claims) and ultimately to the US Supreme Court, if these courts accept the case.

Established in 1927, the IRS Appeals Office is organisationally located in the Office of the Commissioner of the IRS. It is independent of any other IRS office (including the IRS Examination division and the Office of the Chief Counsel) and serves as an administrative forum for any taxpayer who disagrees with an IRS determination.¹⁶⁸ When the Appeals Office receives the taxpayer's appeal, an Appeals officer will review the issues of the taxpayer's case with "a fresh, objective perspective" and schedule a conference with the taxpayer so that the IRS Appeals officer and the taxpayer can attempt to negotiate a mutually acceptable settlement.¹⁶⁹ IRS Appeals conferences are informal and are conducted by correspondence, telephone or in-person. The IRS state that most differences are settled at this level.¹⁷⁰

In addition, to the standard Appeals process, the Appeals Office offers a number of ADR programs for certain types of taxpayers to resolve tax disputes at certain stages of the dispute resolution process. This paper is limited to discussing the IRS ADR program relevant to small tax disputes – Small Business/ Self-Employed Fast Track Settlement (SB/SE FTS) (see section 6.2.3).¹⁷¹

¹⁶⁵ The US Tax Court is the main court for trying disputes between taxpayers and the IRS. It generally hears cases before any tax has been assessed and paid. The US District Court and the US Court of Federal Claims generally hear tax cases only after the taxpayer has paid the tax and filed a claim for a credit or refund.

¹⁶⁶ Using a cross rate US\$1 = NZ\$1.46 <https://www.google.co.nz/search?client=firefox-b&dcrl=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i10i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.0.259.479.2-2.2.0....0...1.1.64.psy-ab..0.2.477....0.81wWvX4h7g0> at 16 November 2017.

¹⁶⁷ With the exception of decisions of the US Tax Court in S cases which are final and not appealable.

¹⁶⁸ Internal Revenue Service *Appeals* (IRS Pub. No. 4227, October 2013) 2.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ For further information on the range of IRS ADR programs available, see Internal Revenue Service 'Appeals Mediation Programs' (14 April 2017) <<https://www.irs.gov/individuals/appeals-mediation-programs>>.

6.1.2 The Taxpayer Advocate Service

The Taxpayer Advocate Service (TAS) provides an additional avenue for taxpayers to resolve problems with the IRS which they have been unable to resolve themselves¹⁷² and is available alongside the traditional dispute resolution process. It is an independent organisation within the IRS, headed by the National Taxpayer Advocate (NTA).¹⁷³ The mission of the TAS is to help taxpayers resolve problems with the IRS and to recommend changes to prevent the problems.¹⁷⁴ The organization fulfils its mission through two types of advocacy: case advocacy¹⁷⁵ and systemic advocacy.¹⁷⁶ Of relevance to this paper, the TAS is also responsible for administering Low Income Taxpayer Clinics (LITC) which assist low income individuals who have a tax dispute with the IRS. LITC are discussed further in section 6.2.4 of this paper.

6.2 Processes for Small Tax Dispute Resolution

6.2.1 Small case request to the Internal Revenue Service Appeals Office

Where a taxpayer disagrees with an IRS determination, they may request an Appeals conference by filing a formal written protest, unless they qualify for the small case request procedure. A small case request is appropriate if the total amount of tax, penalties, and interest for each tax period involved is US\$25,000 (equivalent to NZ\$72,769.63)¹⁷⁷ or less. If more than one tax period is involved and any tax period exceeds the US\$25,000 threshold, a formal written protest for all periods involved must be filed. The total amount includes the proposed increase or decrease in tax and penalties or claimed refund.

Thus, the small case request procedure therefore provides a simplified process (in terms of the information to be provided in the application compared with a formal written protest) for requesting an Appeals conference for taxpayers with disputes that qualify.¹⁷⁸

6.2.2 Small tax case procedure in the United States Tax Court

The United States Tax Court (US Tax Court) is established as a court of record under Article I of the Constitution by I.R.C. § 7441. The Small Tax Case (S case) procedures instituted by the

¹⁷² See Taxpayer Advocate Service ‘The Taxpayer Advocate Service is your voice at the IRS’ <<https://taxpayeradvocate.irs.gov/>>.

¹⁷³ Each state has at least one Local Taxpayer Advocate (LTA) who is independent of the local IRS office and reports directly to the NTA.

¹⁷⁴ I.R.M. 13.1.1.12.

¹⁷⁵ This involves assisting taxpayers in resolving problems with the IRS. For example, the TAS may be able to assist a taxpayer if: the taxpayer’s problem is causing financial difficulties for the taxpayer, their family, or their business; the taxpayer faces (or their business is facing) an immediate threat of adverse action; or the taxpayer has tried repeatedly to contact the IRS but no one has responded, or the IRS has not responded by the date promised. Internal Revenue Service *Taxpayer Advocate Service: We are Here to Help You* (IRS Pub. No. 1546, June 2016).

¹⁷⁶ Systemic advocacy involves identifying areas in which groups of taxpayers are experiencing problems with the IRS and, to the extent possible, proposing administrative or legislative changes to resolve or mitigate those problems). I.R.M. 13.1.1.2.

¹⁷⁷ Using a cross rate US\$1 = NZ\$1.46 <https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.0.259.479.2-2.2.0...0...1.1.64.psy-ab..0.2.477....0.81wWvX4h7g0> at 16 November 2017.

¹⁷⁸ The response times from IRS Appeals can vary depending on the type of case and the time needed to review the file. The timeframe taken to resolve a case also depends on the facts and circumstances and can take anywhere from 90 days to a year: Internal Revenue Service ‘What can you expect from Appeals?’ (14 April 2017) <<https://www.irs.gov/individuals/what-can-you-expect-from-appeals>>.

US Tax Court implement the Tax Reform Act of 1969 which established a procedure to handle disputes over small amounts quickly, efficiently, and as informally as possible in a judicial determination of tax liabilities. Although taxpayers electing the S case procedure may represent themselves or obtain representation by any individual admitted to practice before the US Tax Court,¹⁷⁹ approximately 90 per cent of all small tax cases are litigated on a pro se basis.¹⁸⁰ The amount in dispute eligible for S case treatment increased from US\$10,000 (equivalent to NZ\$14,553.93)¹⁸¹ to US\$50,000 effective for proceedings commenced after 22 July 1998.¹⁸² Cases eligible for S case procedures include:¹⁸³

- Deficiency cases where the amount of the deficiency and any additions to tax or penalties, but not including interest, disputed for each year are US\$50,000 or less;¹⁸⁴
- Collection actions where the total unpaid tax (including interest and penalties) for all years do not exceed US\$50,000.

Small tax cases traditionally are decided under relaxed evidentiary and trial preparation procedures. To have a case tried as an S case, a petitioner must qualify and elect to have S case procedures applied to their case and the US Tax Court must also agree with their election. Generally, the US Tax Court will agree with the election if the case qualifies for S case procedures.¹⁸⁵ A petitioner who wishes to have a case handled under the S case procedures may elect at the time of filing the petition or at any time prior to trial.¹⁸⁶ Certain timeframes must be met upon the filing of a petition. A taxpayer may designate the location of the trial.¹⁸⁷ The court will make every effort to conduct the trial at the location most convenient to that designated, when suitable facilities are available. A non-refundable filing fee of US\$60 (equivalent to NZ\$87.32)¹⁸⁸ is payable at the time of filing. The payment of the filing fee may be waived if the petitioner establishes to the satisfaction of the Court their inability to make such payment.¹⁸⁹

The US Tax Court is comprised of 19 presidentially appointed judges, alongside several senior judges and special trial judges. Trials are conducted before one judge (S cases are usually heard

¹⁷⁹ US Tax Court Rule 172.

¹⁸⁰ H Dubroff and BJ Hellwig *The United States Tax Court: An Historical Analysis* (2nd ed., Government Publishing Office, 2014) 896.

¹⁸¹ Using a cross rate US\$1 = NZ\$1.46 <https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.259.479.2-2.2.0....0...1.1.64.psy-ab..0.2.477....0.81wWvX4h7g0> at 16 November 2017.

¹⁸² Section 3103 of the IRS Restructuring and Reform Act of 1998 (RRA 98) amended I.R.C. § 7463.

¹⁸³ United States Tax Court ‘Taxpayer Information: Starting a Case’ (7 May 2015) <https://www.ustaxcourt.gov/taxpayer_info_start.htm>.

¹⁸⁴ The US\$50,000 limit applies only to the amount that is contested by the taxpayer.

¹⁸⁵ Three categories of cases have been identified as presenting situations in which the US Tax Court may decline to concur in the taxpayer’s election to have the S case procedure apply: (1) cases involving an important issue; (2) cases involving an issue common to other cases before the court; and (3) cases involving an issue that will establish a principle of law important to other cases: Dubroff and Hellwig, above n 180, 892.

¹⁸⁶ Petitioners must file Form 2, Petition (Simplified Form), and indicate that they want their case conducted under S case procedures.

¹⁸⁷ Small tax case trials are held in about 15 more cities than are regular cases.

¹⁸⁸ Using a cross rate US\$1 = NZ\$1.46 <https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.259.479.2-2.2.0....0...1.1.64.psy-ab..0.2.477....0.81wWvX4h7g0> at 16 November 2017.

¹⁸⁹ US Tax Court Rule 173(a)(2).

by special trial judges), and without a jury. US Tax Court trials are held in public. Trials of small tax cases are conducted as informally as possible consistent with orderly procedure and any evidence deemed by the court to have probative value is admissible. The hearing is recorded but a transcript is not normally ordered. A brief is not required but may be permitted or requested by the court. The purpose of the S case procedure is to reduce the time involved in preparation, execution, and filing of settlement documents in small cases. All S cases may be settled on the basis of a specific dollar amount agreed upon by both parties to approximate the amount that would have been reached if formal computations had been made. It is intended that this approach be utilised in simple cases where the finalisation of decision documents would clearly be better facilitated because of the presence of the taxpayer. Most S cases are decided within one year, compared with regular US Tax Court cases which can be much longer.¹⁹⁰

Normally decisions (or opinions) issued in S cases are called Summary Opinions,¹⁹¹ and since 2001 they have been available in a searchable format on the US Tax Court's website. Decisions in S cases cannot be appealed and are non-precedential.¹⁹² There are some limited circumstances where a petitioner, as a prevailing party, can recover fees and costs from the IRS.

For the past decade, the US Tax Court has handled about 30,000 cases per year.¹⁹³ Over 90 per cent of cases filed in the US Tax Court are settled before trial. Generally, S cases constitute approximately half the US Tax Court's total docket.¹⁹⁴ In 2005, the US Tax Court published 189 S case opinions for the calendar year. Of these cases 82 per cent were decided against the taxpayer on one or more primary issues.¹⁹⁵

The cost of representation likely constitutes the primary reason for the substantial degree of self-representation in the small tax case arena of the US Tax Court. The fact that small tax cases are conducted under informal procedures, designed not to penalise taxpayers lacking litigation skills, may also encourage self-representation.¹⁹⁶ The presiding judge or special trial judge usually will assist the taxpayer in eliciting relevant testimony from witnesses.¹⁹⁷ Moreover, any evidence having probative value typically is admitted.¹⁹⁸ The court has made every effort to assure that taxpayers electing the small case procedure are not intimidated by the formal rules of evidence and procedure applicable to regular tax cases.¹⁹⁹

¹⁹⁰ Frederick W Daily, *Stand Up to the IRS* (12th ed., Nolo, California, 2015) 154.

¹⁹¹ The US Tax Court, in both regular cases and S cases, can also issue a Bench Opinion, which is described as an Oral Finding of Fact or Opinion. The judge, after trial and before the close of the Court session, might render an oral opinion from the bench. The judge will orally state findings of fact and conclusions, which will be recorded in the transcript of the proceedings and served upon the parties. Bench Opinions may not be relied upon as precedent. See I.R.C. 7459(b) and US Tax Court Rule 152.

¹⁹² I.R.C. § 7463(b). To be considered a prevailing party, the taxpayer must substantially prevail with respect to the amount in controversy or must substantially prevail with respect to the most significant issue or set of issues presented: I.R.C. § 7430(c)(4)(A)(i).

¹⁹³ Keith Fogg 'The United States Tax Court: A Court for All Parties' 2016 70(1/2) Bulletin for International Taxation 75, 76.

¹⁹⁴ Dubroff and Hellwig, above n 180, 886.

¹⁹⁵ Brian P Trauman and Jeffrey R Malo 'A Practical Guide to Small Tax Cases in The United States Tax Court' *The Practical Tax Lawyer* (Fall 2006) 43, 46.

¹⁹⁶ Dubroff and Hellwig, above n 180, 896.

¹⁹⁷ *Ibid*, 896-897.

¹⁹⁸ *Ibid*, 897.

¹⁹⁹ Section 7475(b), as amended by the sec. 860A of the Pension Protection Act of 2006, Pub. L. No. 109-280, provides that the US Tax Court's periodic registration fee is available to the court to provide services to pro se taxpayers. In accordance with this authority, the court assists low income taxpayers by paying (1) transcript fees

6.2.3 Internal Revenue Service Alternative Dispute Resolution - SB/SE Fast Track Settlement

The IRS Restructuring and Reform Act of 1998 (RRA 1998) enacted I.R.C. § 7123 which, inter alia, directed the IRS to establish procedures that allow for ADR processes such as mediation and arbitration. Pursuant to this mandate, in addition to the traditional Appeals process, the Appeals Office established various ADR programs designed to serve different types of taxpayers at certain stages of the dispute procedures. Of specific relevance to disputes involving small businesses and individual taxpayers is the SB/SE²⁰⁰ Fast Track Settlement (FTS) program.²⁰¹ SB/SE FTS offers SB/SE taxpayers an opportunity to resolve tax disputes at the earliest possible stage while in the examination process. In SB/SE FTS, a trained mediator from the IRS Office of Appeals is assigned to help the SB/SE taxpayer and the IRS reach an agreement on the disputed issue(s).²⁰² In addition to using mediation techniques to facilitate settlement discussions, the Appeals mediator may offer settlement proposals and use Appeals' settlement authority, if needed, to resolve the dispute. Either the SB/SE taxpayer or the IRS may agree to or deny the Appeals mediator's settlement proposal. Communications made during FTS sessions are confidential except as provided by statute.²⁰³

SB/SE FTS is applicable for legal and factual disputes where the issues are fully developed.²⁰⁴ For a case to be considered for SB/SE FTS, the taxpayer must first try to resolve all issues with the IRS. This means working cooperatively with the IRS examiner, followed by a conference with the examiner's manager before applying for the services of an Appeals mediator.²⁰⁵ If the application for SB/SE FTS is accepted, the goal is resolution within 60 days. Either party may withdraw from the process at any time before reaching a settlement of any issue under consideration by notifying the other party and the Appeals mediator.

SB/SE FTS does not eliminate or replace existing dispute resolution options, including the taxpayer's opportunity to request a hearing before Appeals. There is no charge to the taxpayer for the services of an Appeals mediator. However, taxpayers may choose to have representation at their own cost.

in appropriate circumstances, and (2) the fees necessary to hire a translator to provide assistance at trial to a taxpayer who does not speak English as a primary language.

²⁰⁰ The IRS's SB/SE group serves individuals filing Form 1040 (US Individual Income Tax Return), Schedules C, E, F or Form 2106 (Employee Business Expenses), and businesses with assets under US\$10 million (equivalent to NZ\$14,553,924): using a cross rate US\$1 = NZ\$1.46 <[²⁰¹ Internal Revenue Service Rev. Proc. 2017-25, 2017-14 I.R.B. 1039 \['Rev. Proc. 2017-25'\]. The Appeals Office has established a range of other ADR programs, including Fast Track Mediation - Collection \(FTMC\) and Post Appeals Mediation \(PAM\) which are available to SB/SE taxpayers as well as taxpayers from other operating divisions in the IRS. However, SB/SE FTS is the only program which is solely available to SB/SE taxpayers.](https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.0.259.479.2-2.2.0....0...1.1.64.psy-ab..0.2.477....0.81wWvX4h7g0> at 16 November 2017.</p></div><div data-bbox=)

²⁰² Internal Revenue Service, Rev. Proc. 2017-25, above n 201, [6.01].

²⁰³ Internal Revenue Service, Rev. Proc. 2017-25, above n 201, [8.02].

²⁰⁴ Issues excluded from SB/SE FTS include: issues designated for litigation; issues docketed in any court; issues precluded from settlement by previous closing agreements, res judicata, or controlling Supreme Court precedent; issues for which SB/SE FTS would not be in the interest of sound tax administration. For further exclusions, see Internal Revenue Service, Rev. Proc. 2017-25, above n 201, [4.02].

²⁰⁵ The taxpayer and the Examiner must jointly complete and sign Form 14017, *Application for Fast Track Settlement* and prepare an Application Package (which must include the Form 14017, properly documented work papers supporting the Examiner's position, and the taxpayer's written response): Internal Revenue Service, Rev. Proc. 2017-25, above n 201, [5.03].

Table 4 shows that for FY 2016, 74 per cent of disputes (receipts) in the SB/SE FTS program were settled. Unfortunately, IRS ADR programs²⁰⁶ accounted for only 306 case receipts during FY 2016 – less than one half of one per cent of the total Appeals case receipts for that same year.²⁰⁷ Moreover, as shown in Table 5, aggregate case receipts and the number of settlements achieved in the IRS’s ADR programs have been steadily declining over the past three years. The settlement percentage in the cases pursued has also fallen overall in FY 2014-16.

Table 4: SB/SE FTS Receipts, Settlements and Settlement Percentage for FY 2016

	Receipts	Settlements	Settlement Percentage
SB/SE FTS	142	105	74%

Table 5: IRS ADR Receipts, Settlements and Settlement Percentages for FY 2014-16²⁰⁸

Fiscal Year	Receipts	Settlements	Settlement Percentage ²⁰⁹
2014	413	310	75%
2015	383	232	61%
2016	306	197	64%

In addition, Olson notes that low income taxpayers without representation are less likely to initiate ADR proceedings than other taxpayers.²¹⁰ Low income taxpayers can obtain assistance from LITC (see section 6.2.4 of this paper) in ADR hearings. However, Olson further suggests that in order for taxpayers to embrace a voluntary ADR program, they must be persuaded that it will produce beneficial, cost-effective outcomes.

6.2.4 Low Income Taxpayer Clinics

Low Income Taxpayer Clinics (LITC) assist low income taxpayers²¹¹ who have a tax dispute with the IRS, and provide education and outreach to individuals who speak English as a second language (ESL).²¹² LITC can represent qualifying taxpayers before the IRS or in court on audits, appeals, tax collection matters, and other tax disputes. LITC services are provided for free or for a small fee. In order to qualify for assistance from LITC, in addition to the taxpayer’s income being below a certain threshold the amount in dispute with the IRS is usually less than US\$50,000. The LITC program is administered by the TAS. Although LITC receive partial

²⁰⁶ These ADR programs include SB/SE FTS, FTMC and PAM.

²⁰⁷ Nina E Olson, *Taxpayer Advocate Service – 2016 Annual Report to Congress* (2016), 215.

²⁰⁸ *Ibid*, 216.

²⁰⁹ Calculated by dividing the number of settlements by the number of receipts. This comparison is illustrative rather than exact, as occasionally, cases received in one year are settled in a subsequent year.

²¹⁰ Olson, above n 207, 218.

²¹¹ Low income taxpayer means an individual whose income does not exceed 250 per cent of the Federal Poverty Guidelines, as determined in accordance with official guidance published by the federal government. A business entity is not a low income taxpayer eligible for LITC representation, even if an owner, partner, shareholder, beneficiary, or member of the business entity is an individual whose income does not exceed 250 per cent of the Federal Poverty Guidelines. Internal Revenue Service, *Low Income Taxpayer Clinics 2017 Grant Application Package and Guidelines* (IRS Pub. No. 3319, April 2016) 7. For the income ceilings for low income representation for the 2017 calendar year see Internal Revenue Service ‘Information for Taxpayers Seeking LITC Services’ (20 January 2017) <<https://www.irs.gov/advocate/low-income-taxpayer-clinics/low-income-taxpayer-clinic-income-eligibility-guidelines>>.

²¹² Internal Revenue Service ‘Low Income Taxpayer Clinics’ (10 March 2017) <<https://www.irs.gov/advocate/low-income-taxpayer-clinics>>.

funding from the IRS (via the LITC grant program),²¹³ LITC, their employees, and their volunteers are completely independent of the IRS. LITC grantees are generally legal aid or legal service organisations; clinics at law, business or accounting schools; and other not-for-profit organisations that provide services to the poor.

The LITC program is designed, inter alia, to provide access to representation for low income taxpayers so that achieving a correct outcome in an IRS dispute does not depend on the taxpayer's ability to pay for representation. Studies assessing the effect of representation in disputes involving the IRS, both in administrative proceedings²¹⁴ and in the US Tax Court,²¹⁵ found that a represented taxpayer is nearly twice as likely to receive a positive outcome as an unrepresented taxpayer. Among those who received a favourable outcome, represented taxpayers received a greater reduction of the disputed taxes than taxpayers appearing without a representative.²¹⁶

LITC represented 18,571 low income taxpayers in disputes with the IRS in 2015 and provided consultation or advice to an additional 18,810 taxpayers.²¹⁷ If a taxpayer delays before responding to an IRS notice, the taxpayer may be subject to automated enforcement mechanisms and it may limit the taxpayer's options for resolving the issue.²¹⁸ A 2012 TAS survey found only 46 per cent of taxpayers believe they have rights before the IRS, and only 11 per cent knew what they were.²¹⁹ Those survey findings may shed light on why more than half of the cases where LITC provided representation in 2015 involved a taxpayer who had already reached IRS collection proceedings.²²⁰

Given that, as stated above, LITC generally represent taxpayers who have amounts in dispute of less than US\$50,000, LITC are of relevance to small tax dispute resolution. While LITC are not a dispute resolution mechanism per se, they can provide representation and assistance to small taxpayers in resolving their tax disputes, which they might otherwise be unable to obtain.

7.0 THE COUNTRIES COMPARED – A REVIEW

In sections 3 to 6 of this paper the authors have considered the processes that impact on small tax disputes in Australia, Canada, the UK and the US. The review of these four countries in this section highlights the following points (which are also summarised in Table 6).

²¹³ The LITC grant program requires a dollar-for-dollar match in funding from the grant recipient. In 2016, the IRS awarded over US\$11.4 million (NZ\$16,009,317.61) in grants to 138 grantees located in 49 states and the District of Columbia. Internal Revenue Service *Low Income Taxpayer Clinics Program Report 2017* (IRS Pub. No. 5066, January 2017) 3. Foreign currency conversion using a cross rate US\$1 = NZ\$1.46 <https://www.google.co.nz/search?client=firefox-b&dcr=0&ei=v2wKWpXCFYyY0gTA54_oDw&q=us+dollar+to+new+zealand+conversion&oq=US+new+zealand+conversion&gs_l=psy-ab.1.0.0i7i30k1j0i8i7i30k1j0i8i7i10i30k1j0i8i7i30k1j0i30k1j0i8i30k1.384632.385459.0.387084.2.2.0.0.0.0.259.479.2-2.2.0...0...1.1.6 4.psy-ab..0.2.477...0.81wWvX4h7g0> at 16 November 2017.

²¹⁴ Nina E Olson, *National Taxpayer Advocate Annual Report to Congress 2007 – Volume Two* (Internal Revenue Service, December 2007) 93-116.

²¹⁵ Janene R Finley and Allan Karnes 'An Empirical Study of the Effectiveness of Counsel in United States Tax Court Cases' (2010) 16(1) *Journal of American Academy of Business* 1.

²¹⁶ Olson, above n 214; Finley and Karnes, above n 215.

²¹⁷ Internal Revenue Service, above n 213, 6.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

7.1 A Specific Forum for Hearing Small Tax Disputes

The UK, Canada and the US each have a specific forum for hearing small tax disputes. Australia, with the abolition of the STCT in 2015, has effectively followed the approach adopted in NZ hearing all tax disputes in the same general forum.

Canada and the US define their small claims procedures by monetary limit – the latter arguably having a more generous threshold. The category approach adopted in the UK has the advantage that disputes are not excluded from streamlined processes simply because of a somewhat arbitrary monetary threshold which also requires periodic updating to reflect the impact of inflation. In Canada and the US, the ability for taxpayers to restrict the amount under appeal to some degree ameliorates concerns over the sufficiency of the monetary levels, particularly where the amount of tax in dispute exceeds the monetary threshold by only a small amount.

The UK approach further recognises that disputes vary based on issue and level of complexity, not simply on the amount in dispute. However, the boundaries between the four categories of tax dispute are arguably somewhat vague and moreover, taxpayers are not given the option to elect to use one category or another as the decision is made by the FTT.

The specific procedures in the UK, Canada and the US exhibit the following characteristics:

- (a) Filing fees are kept to a minimum (US), or are not charged at all (in the case of the UK and Canada). While non-refundable, the US\$60 filing fee charged in S case procedures can be waived on evidence of the taxpayer's inability to pay.
- (b) The processes to request the specific forum are simplified. The hearings²²¹ themselves are also simplified and conducted in a less formal manner. For example, in Canada under the Informal Procedure, the hearing does not have to follow legal or technical rules of evidence.
- (c) Related to (b), the decision may be delivered either at the hearing or within a short period after the hearing (i.e., 90 days in the case of the TCC Informal Procedure; within 28 days for FTT cases; and as soon "as shall be practicable"²²² after trial for S Cases in the US Tax Court).
- (d) While the time from lodging the appeal application to the judicial decision differs between the three jurisdictions, the consistent theme is the total timeframe is much shorter than for larger disputes. In Canada the aim is resolution within 11 months from the date the taxpayer files the notice of appeal to the decision of the judge. Most S cases are decided within one year. The average time from filing an appeal (unadjusted for stays) to the decision in the UK is 84 weeks (21 months) and 28 weeks (7 months) for Default Paper and Basic cases, respectively.
- (e) Decisions are non-precedential, but at least in the UK and Canada may be influential in other cases.
- (f) Rights of appeal are limited in the UK (to a point of law) and Canada (judicial review on restrictive grounds) and non-existent in the US.
- (g) Costs may be awarded in very limited circumstances. In the UK, except for Complex cases, the FTT has no general power to award costs. It can only make a wasted orders costs order or an order against a party who acts unreasonably. The approach in Canada is more taxpayer-favourable where costs may be awarded only in favour of the taxpayer (if successful).

²²¹ As noted with the UK Default Paper cases the decisions are generally made by the tribunal without a hearing.

²²² US Tax Court Rule 182.

In the US, in limited circumstances a petitioner, as a prevailing party, can recover costs from the IRS. Thus, in these forums or procedures, no costs can be awarded to the revenue authority in the event that it is successful.

(h) While none of the jurisdictions surveyed specifically differentiate between small and very small disputes, their approaches do accommodate a range of small disputes.

Assessing the use and effectiveness of these hearing procedures is difficult. In 2011, the proportion of Informal Procedure cases filed represented 53 per cent of the total appeals filed in the TCC. It is expected this figure will have subsequently increased with the raising of the monetary limits for accessing the Informal Procedure in 2013. Of the appeals disposed of in 2011, 28 per cent were settled and 47 per cent were withdrawn. No information is available on the percentage of cases decided in favour of the taxpayer and CRA.

In the US, S cases comprise approximately half of the cases handled by the US Tax Court. Overall 90 per cent of cases filed in the US Tax Court are settled before trial. Based on 2005 data (and effectively a small sample) 82 per cent of S case opinions in that year were decided against the taxpayer on one or more primary issues. Similarly, of the appeals that were heard by the FTT, 77 per cent went in HMRC's favour. However, no breakdown of this percentage per category is available. In 2016-17, 68 per cent of tax appeals were settled either by formal hearing or by agreement before the hearing.

7.2 The Use of ADR Processes

Another theme evident through this research is a trend in the use of ADR processes in the form of in-house facilitation (mediation in the US) processes, as seen in Australia, the UK and US. In-house facilitation/mediation is aimed at achieving a resolution of the dispute early; hence while facilitation/mediation is available at any stage of the process in Australia and the UK, it is targeted largely at the audit stage (and objection stage in Australia); and in the US it is only available at the examinations (audit) stage.

The in-house facilitation/mediation processes exhibit the following similar characteristics:

- (a) A specific facilitation service is provided for individuals and small businesses in Australia and the US; and all non-large business customers in the UK;
- (b) In each jurisdiction the process is provided at no charge to the taxpayer (unless they choose to be represented);
- (c) The facilitator/mediator is an employee of the revenue authority who has received in-house training and has had no prior involvement in the dispute;
- (d) The role of the facilitator/mediator is broadly similar (to identify issues in dispute, explore options and attempt to reach a resolution). In the US, the mediator also has the additional power to offer settlement proposals and use Appeals' settlement authority to resolve the dispute;
- (e) Information disclosed during the process is generally confidential;
- (f) Appeal rights remain if the dispute is unresolved at the end of the process.

Relatively high resolution rate rates are achieved for in-house facilitation/mediation in these three jurisdictions (Australia, 81 per cent, the UK 79 per cent and the US 74 per cent). As discussed in section 2.2.2, the resolution rate for in-house facilitation in NZ, at 55 per cent, is much lower despite the facilitation process itself in NZ being very similar. One key difference is that the facilitation in Australia, the UK and the US can occur much earlier in the process, and arguably before the parties to the tax dispute become entrenched. Recent statistics indicate that more disputes in the current NZ process are resolved either at the conference stage or after

the SOPs (i.e., later in the disputes process), rather than at the earlier NOPA or NOR stages.²²³ In addition, unlike NZ where Inland Revenue conferences (and facilitation) are administratively mandated for all taxpayers who have a dispute with Inland Revenue, in the three other jurisdictions it is voluntary option available for a specific group of taxpayers, meaning the motivation to resolve the dispute is likely to be greater compared with NZ where taxpayers may simply “go through the motions” rather than seeking a resolution.²²⁴

7.3 Other Developments

7.3.1 Categorisation of objections based on complexity

While not specifically targeted at small tax disputes, the triage process of categorising objections based on complexity, adopted by Canada and Australia, appears to be relatively effective in both countries. In Australia, the ATO estimate around one-third of all cases can be resolved and finalised “fairly quickly” through the FIT process.²²⁵ In Canada, 60 per cent of objections are classified as “low-complexity”,²²⁶ the average time to resolve these objections is 143 days compared with 431 days and 896 days for medium- and high-complexity objections, respectively.²²⁷

7.3.2 Early Assessment and Resolution

In Australia, the EAR process for cases lodged with the AAT is particularly beneficial for less complex, low monetary value disputes in achieving the resolution of cases without need for an AAT hearing, thereby avoiding additional time and costs of litigation.

7.3.3 Small case request

In the US, a simplified process for requesting an Appeals conference exists for tax disputes (essentially under US\$25,000). While it is not a dispute forum, small tax disputants can benefit from utilising this streamlined process in terms of savings in both time and cost (psychic and monetary).

7.3.4 Assistance for unrepresented taxpayers

Two initiatives targeted at unrepresented taxpayers were noted in this paper; the US-based LITC program (where tax in dispute is less than US\$50,000) and, since December 2016, the ATO Dispute Assist pilot scheme. Representation (or lack thereof) is a significant issue for small taxpayers and thus small tax disputes. Studies noted in section 6.2.4²²⁸ show that represented taxpayers are nearly twice as likely to receive a positive outcome as an unrepresented taxpayer in disputes involving the revenue authority whether in administrative proceedings or court.

²²³ See Colmar Brunton *Satisfaction with Inland Revenue: November 2017* (2017) slide 52.

²²⁴ Ward, above n 7, 173.

²²⁵ Jordan, above n 61.

²²⁶ Office of the Auditor General of Canada, above n 107, [2.50], 11.

²²⁷ Ibid, [2.53], 12.

²²⁸ Olson, above n 214; Finley and Karnes, above n 215.

Table 6: The Countries Compared

	Australia	United Kingdom	Canada	United States
Litigation				
Tribunal/Procedure		<p>First-tier Tribunal (FTT) (Tax Chamber).</p> <p>‘Complex’ cases may be heard by Upper Chamber (Tax and Chancery Chamber).</p>	<p>Informal Procedure of the Tax Court of Canada (TCC).</p>	<p>Small Tax Case (S case) procedure in the US Tax Court.</p>
Jurisdiction		<p>Four categories depending on importance of the case, complexity of issues, costs and resources of the parties.</p> <p>Categories of case are: ‘Default Paper’, ‘Basic’, ‘Standard’ and ‘Complex’.</p>	<p>Total amount of disputed federal tax and penalties (per assessment), excluding interest, is not more than C\$25,000. Taxpayer can limit claim to C\$25,000.</p> <p>Disputed loss amount not more than C\$50,000. Taxpayer can limit loss claim to C\$50,000.</p> <p>Interest on federal tax and penalties is the only disputed matter.</p> <p>Goods and services tax, harmonised sales tax, total amount disputed is not more than C\$50,000.</p>	<p>In a deficiency case, the amount of the deficiency and any additions to tax or penalties, but not including interest, that the taxpayer disputes for each year must be US\$50,000 or less.</p> <p>In a collection action, the total unpaid tax (including interest and penalties) for all years cannot exceed US\$50,000.</p> <p>In addition, amounts in certain other specified jurisdictions cannot exceed US\$50,000.</p>
Initiation of Process		<p>Taxpayer files 9-page notice of appeal form to FTT after receiving HMRC’s review decision (or if the taxpayer rejects HMRC’s offer of a review).</p>	<p>If internal review of earlier notice of objection unsuccessful, taxpayers can appeal to the TCC. Under the informal</p>	<p>Taxpayer files 2-page Form 2, Petition (Simplified Form) after receiving a Notice of Deficiency from the IRS.</p>

	Australia	United Kingdom	Canada	United States
		Taxpayers also have the option of lodging an appeal online.	procedure, taxpayers do not need a form (although, a 2-page notice of appeal form is available) to file an appeal. However, they must appeal in writing and state the reasons for the appeal and the relevant facts.	The petition is submitted with other required documentation, forms and the filing fee.
Filing Fee		No filing fee.	No filing fee.	US\$60 non-refundable fee. The filing fee may be waived if the petitioner establishes to the satisfaction of the Court by an affidavit or a declaration containing specific financial information the inability to make such payment.
Dispute Resolution Process		Depends on category of case: <ul style="list-style-type: none"> • ‘Default Paper’ – decided on paper submissions alone, normally no hearing; • ‘Basic’ informal hearing with all parties present, minimal exchange of documents, ‘turn up and 	Appeal dealt with by the TCC as informally and expeditiously as the circumstances and considerations of fairness permit.	Pre-trial and trial procedures are less formal than in regular cases. Neither briefs nor oral arguments are required in S cases unless the Court directs otherwise.

	Australia	United Kingdom	Canada	United States
		<p>talk’ approach;</p> <ul style="list-style-type: none"> • ‘Standard’ and ‘Complex’ cases – more detailed case management, formal hearing. <p>FTT has wide powers to regulate its procedures.</p>		
Nature of Hearing		<p>All hearings in public unless the Tribunal directs otherwise.</p> <p>Hearings, and rules of evidence giving, are informal for ‘Basic’ cases. For ‘Standard’ and ‘Complex’ cases, these are conducted more formally. Normally no hearings for ‘Default Paper’ cases.</p>	<p>Hearings in public. TCC not bound by any legal or technical rules of evidence in conducting a hearing.</p>	<p>All trials are in public. Trials of S cases are conducted as informally as possible consistent with orderly procedure, and any evidence deemed by the Court to have probative value is admissible.</p>
Decision – Written or Oral?		<p>‘Basic’ cases – the Tribunal will normally give an oral decision on the day of the hearing and will usually provide a written decision within 1 month.</p> <p>‘Standard’ and ‘Complex’ cases – the Tribunal may give an oral decision on the day, but will usually deliver (or confirm) a decision in writing within 2 months of the hearing.</p> <p>‘Default Paper’ cases – decision in writing is posted as soon as</p>	<p>Oral decision at end of hearing or within 90 days.</p> <p>No requirement for written decision.</p>	<p>Written Summary Opinion is issued and made available on the US Tax Court’s website.</p> <p>A Bench Opinion (oral opinion) may be issued during the trial session in some cases when appropriate. The oral opinion is recorded in the transcript of the proceedings and served</p>

	Australia	United Kingdom	Canada	United States
		possible after the appeal has been considered on the papers.		upon the parties.
Timeframe		Average timeframe from filing of appeal (unadjusted for stays): 84 weeks (default paper), 28 weeks (basic), 164 weeks (standard), 120 weeks (complex).	Aim: decision within 11 months from taxpayer filing notice of appeal.	At least one year from the filing of a petition.
Rights of Appeal		For all categories of case, appeal on a point of law if permission (leave in Northern Ireland) is granted.	No right of appeal but decisions can be judicially reviewed on restrictive grounds.	No right of appeal.
Award of Costs		No award of costs (except for 'Complex' cases) – unless wasted costs order or party acting unreasonably.	Yes – only in favour of taxpayer (if successful). No costs award if taxpayer unsuccessful.	There are some limited circumstances where a taxpayer, as a prevailing party, can recover costs from the IRS.
Decisions Precedential?		Non-precedential.	Non-precedential.	Non-precedential.
Alternative Dispute Resolution (ADR)				
ADR Process Name	Australian Taxation Office (ATO) In-house Facilitation.	HM Revenue and Customs (HMRC) ADR.		Small Business Self-Employed (SB/SE) Fast Track Settlement (FTS).
Jurisdiction	Small businesses and individuals with less complex tax disputes, including indirect tax disputes.	Cases across all tax types and HMRC lines of business outside large business.		All cases under the jurisdiction of SB/SE – certain case exclusions apply.
Stage Available	At any stage – targeted at audit and objection.	Any stage.		Audit.

	Australia	United Kingdom	Canada	United States
Initiation of Process	Taxpayer completes an online request for in-house facilitation form.	Taxpayer completes an online application form.		Taxpayer and SB/SE examiner jointly prepare and submit an application package (containing FTS application form, properly documented work papers supporting the examiner's position, and the taxpayer's written response).
Cost of Process to Taxpayer	Costs of representation (if any).	Cost of representation (if any).		Cost of representation (if any).
Dispute Resolution Process	ATO facilitator meets with the taxpayer and the ATO case officer(s) to help them to identify disputed issues, develop options, consider alternatives and attempt to reach a resolution.	HMRC facilitator works with the taxpayer and the HMRC case-owner to explore ways of resolving the dispute, focus on the areas that need to be resolved and tries to broker an agreement between them.		IRS Appeals mediator uses mediation techniques to facilitate an agreement between IRS and the taxpayer. In addition, the Appeals mediator may offer settlement proposals and use Appeals' settlement authority, if needed, to resolve the dispute.
Confidential?	Yes – unless required by law.	Yes – unless required by law.		Yes – unless required by law.
Timeframe	Average of 41 days from first contact about facilitation (based on pilot program).	Approximately 120 days from acceptance of application.		60 days from acceptance of application.

	Australia	United Kingdom	Canada	United States
Usual Appeal Rights Retained if Dispute Unresolved through ADR?	Yes.	Yes.		Yes.
Triage				
Triage Process Name	Fast Intensive Triage (FIT)		Objections Complexity Categorisation	
Stage Available	Objection		Objection	
Possible to Achieve Resolution in the Process?	No		No	
Other				
Process Name	Early Assessment and Resolution (EAR) in the Administrative Appeals Tribunal (AAT)			Small Case Protest for Appeals
Stage Available	Litigation			Objection
Possible to Achieve Resolution in the Process?	Yes			No
Process Name	Dispute Assist			Low Income Taxpayer Clinics (LITC)
Stage Available	Objection			Any stage
Possible to achieve Resolution in the Process?	No			No

8.0 CONCLUSION

The administrative changes implemented in the NZ tax dispute process by Inland Revenue in 2010, including the ability to opt-out of the process after the conference and limiting the length of NOPAs, are positive steps. However, these changes do not alter the fact that the dispute process essentially provides ‘a one size fits all’ procedure for tax disputes, irrespective of their complexity and the amount in dispute. As Clews opined in 2016, “It is simply bad tax administration to have a system which involves such a degree of cost and complexity as leads to taxpayers being financially and emotionally burnt off and so unable to pursue genuine disputes.”²²⁹ These issues are particularly prevalent with small tax disputes.

Against the back drop of these continuing concerns this paper has reviewed processes utilised in four overseas jurisdictions which are targeted at, or at least impact on, small tax dispute resolution. As mentioned in section 1, the purpose of this paper is not to develop a definitive

²²⁹ Clews and Duncan, above n 7, 22.

proposal for reform of the (small) tax dispute resolution system in NZ but rather identify practice(s) which are worthy of further consideration in NZ. This approach recognises that the NZ dispute resolution process is unique among those studied in this paper with its lengthy pre-assessment phase which means comparisons with, and principles to be adopted from, other jurisdictions need to be made with some caution. The potential design and implementation of any such processes in NZ, while beyond the scope of this paper, therefore provides future research opportunities.

Turning to the processes considered in this paper, three jurisdictions provide a specific forum for hearing small tax cases. Such a forum, which provides flexible and informal procedures aimed at ensuring tax disputes are resolved in a timely and inexpensive manner, prima facie appears as beneficial for NZ. However, the addition of a small tax forum as an alternative to a TRA or High Court hearing would do little to address issues of cost and timeliness for small tax disputants. To be effective, the small tax forum would need to be available at the early stages of the dispute process, as is the case in the jurisdictions considered. This would entail a significant change to the existing NZ dispute resolution process and could have downstream impacts on other aspects of the existing process; hence the authors suggest it would need to be accompanied by a wholesale change to the NZ dispute resolution process (which, as stated above, is not the purpose of this paper).

The authors do not believe that the EAR process adopted in Australia would be effective in the current NZ procedures on the basis that EAR occurs late in the dispute process (i.e., the litigation phase), at which stage either taxpayers will already have spent considerable time and money or would have been burnt off.

In-house facilitation (mediation in the US) has been met with success both in NZ and the other jurisdictions considered in this paper. The authors believe that its use much earlier in the NZ dispute process, for example the audit stage (as occurs in Australia, the US and UK) could be an option to pursue without the need for wholesale reform to the dispute resolution system itself. The significantly higher success rates for in-house facilitation/mediation in these three jurisdictions supports this view, as among other things, taxpayers are less entrenched at this stage. Successful facilitation at this stage would correspondingly reduce the time and cost of disputes for both taxpayer and Inland Revenue; and therefore more than offset any additional Inland Revenue costs consequent on requiring more staff to be trained as facilitators. This ADR option also fits in with the current service paradigm of tax administration. It enhances taxpayers' perceptions of fairness of the tax system as well as Inland Revenue as an institution, both of which may have a positive impact on taxpayer compliance.²³⁰ In line with the ATO's view of in-house facilitation as noted in section 3.2.2, Hastings (ATO) observes that: "[r]esolution at the in-house facilitation also provides certainty to taxpayers and improves the relationship between the ATO and the taxpayer".²³¹

The authors do not believe the triage process operating in Australia and Canada could be incorporated easily into the NZ dispute process due to the current NOPA and NOR steps; rather, it could be considered in any future reform of the current process. The triage process is also an inherently subjective process which reduces its utility.

²³⁰ Melinda Jone and Andrew J Maples 'Mediation as an Alternative Option in New Zealand's Tax Disputes Resolution Procedures' (2012) 18(4) *New Zealand Journal of Taxation Law and Policy* 412, 442. See also Olson, above n 217, 214; Amy S Wei 'Can Mediation be the Answer to Taxpayers' Woes? An Examination of the Internal Revenue Service's Mediation Program' (2000) 15(2) *Ohio State Journal on Dispute Resolution* 549, 549-550.

²³¹ Debbie Hastings, above n 57, 6.

Streamlined processes, such as the simplified CIR issued NOPA in NZ and the small case request filed by taxpayers in the US, have the potential to reduce compliance costs for taxpayers as well as administrative costs for the revenue authority and should be further pursued where possible in the NZ process.

Assistance for unrepresented taxpayers, whether a modified version of the LITC or in some other form has merit. However, funding for such an initiative would be an issue, especially at a time when the Inland Revenue is currently undertaking a \$1.9 billion Business Transformation programme and has additionally signalled significant future job cuts.²³² This issue, along with aspects, such as assistance eligibility criteria, could be considered as part of future research into the overall feasibility of such an assistance programme.

This paper contains a number of limitations. The statistical data published by the revenue authorities is limited and spans across different timeframes. Thus, the data is not necessarily comparable between jurisdictions. This, among other things, makes determining the ‘success’ of a particular process difficult. The paper considers small tax dispute processes in only five jurisdictions, and in addition, these jurisdictions are all western common law countries. Future research considering reform options for NZ could therefore consider the tax dispute processes of a larger number and range of countries.

²³² Tom Pullar-Strecker ‘Inland Revenue outlines job changes to staff’ *Stuff* (19 July 2017) <<https://www.stuff.co.nz/business/industries/94881890/inland-revenue-pulls-down-the-shutters-for-staff-briefings>>.