

Welcome

Local Tax Club Geelong

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Novotel Geelong



Navigating the matrix of ATO reviews, audits and beyond – A taxpayer's survival guide

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The Matrix – tax audits and disputes

The Matrix is everywhere. It is all around us. Even now, in this room. You can see it when you look out the window or when you turn on your television. You can feel it when you go to work... when you go to church... when you pay your taxes. It is the world that has been pulled over your eyes...

The genesis of a tax dispute

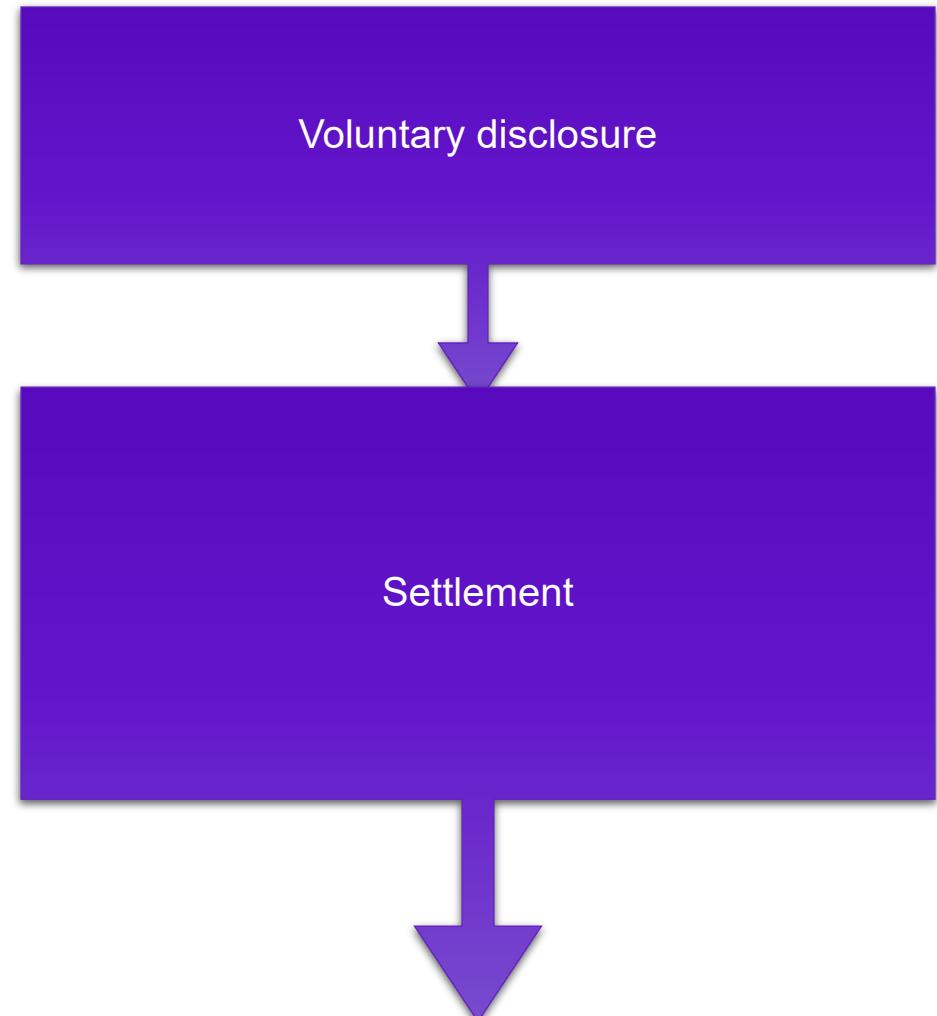
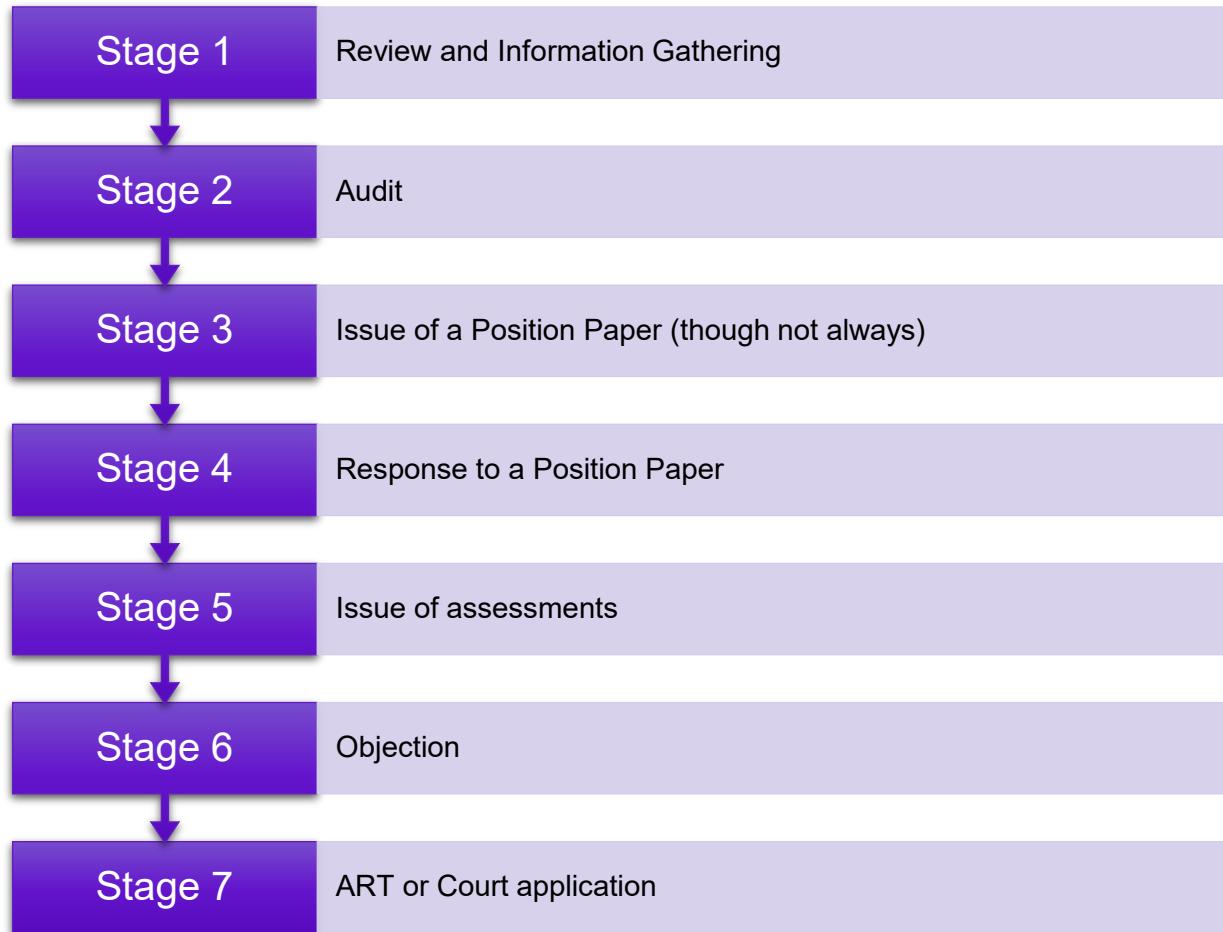
Tax disputes arise in a variety of ways, but practically they arise when:

- A taxpayer applies for a ruling (n.b. on factual matters there are likely better options)
- A voluntary disclosure, including a pre-lodgment process
- A risk review, audit or other “compliance product”, often in connection with an industry issue

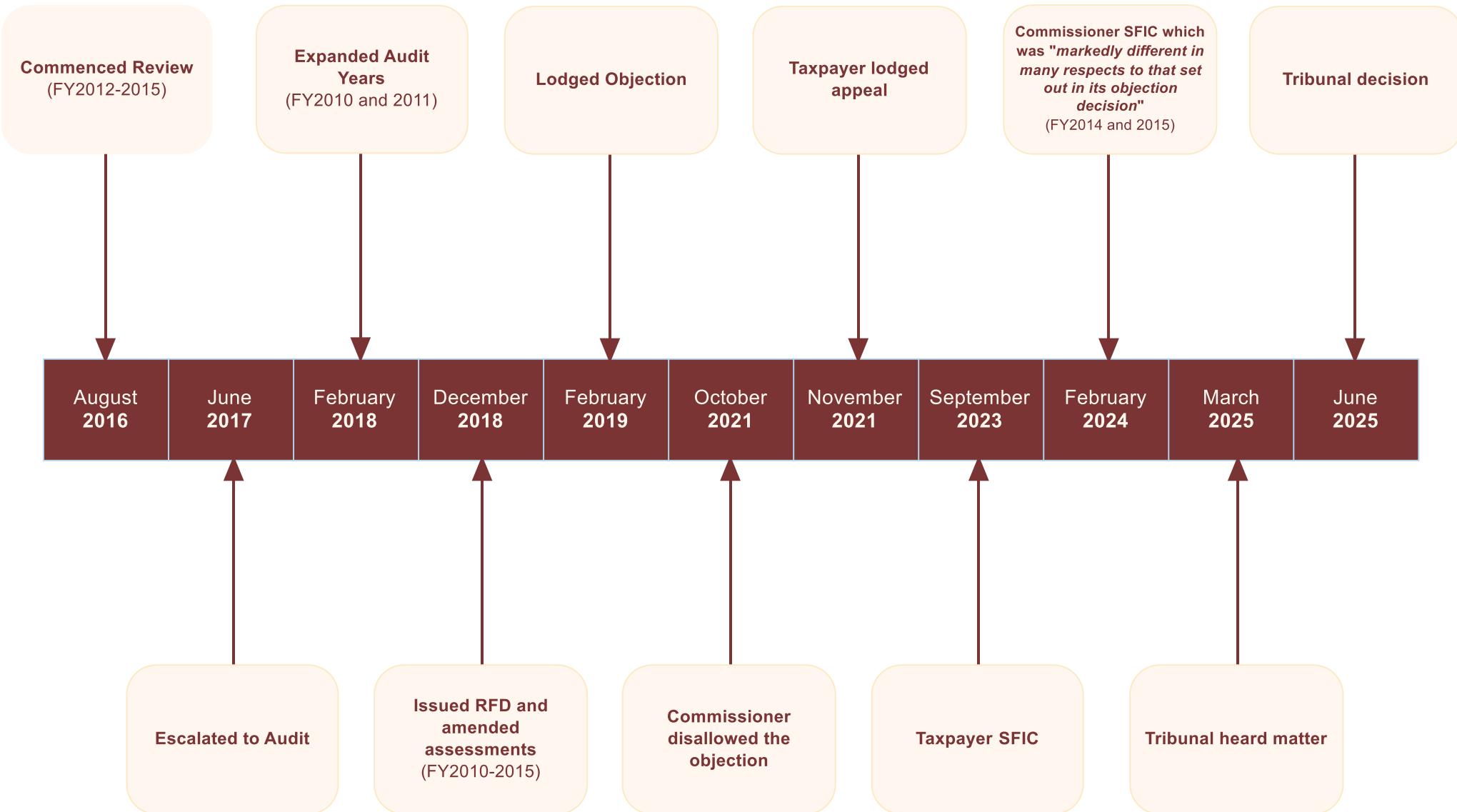
Practically, it is easier for a taxpayer to **try and** set the scope of the dispute in the first two.

Anecdotally, some PBR and pre-lodgment applications may not result in an audit (although litigators don't tend to see them).

Stages of a tax review or audit: Order, Deviation and the illusion of predictability



How deep does the rabbit hole really go? *Abotomey v FCT*



What have you done? What is real?

- Gageler J in *Commissioner of Taxation v Thomas* (2018) 264 CLR 382 at 408 [84]:

Tax lawyers often speak of “taxable facts”. They mean by that expression to refer to more than just facts. They mean by it to refer to **the combination of events that have occurred and legal consequences of events that have occurred on which a taxing statute fixes** to impose a taxation liability or to confer a taxation benefit.

- If you take care of the facts, the law might take care of itself.
- For well resourced taxpayers, the issue is often proving they have acted in accordance with their advice.
- For taxpayers in the SME (but sometimes also high wealth individuals) space, they often don't have clear evidence of what a transaction was or what influenced a transaction or decision.



How do you define what is real?

- **Creating a shared viewpoint between the taxpayer, its advisers and the Commissioner of what needs to be proved for the taxpayer to succeed is key to resolving without litigation.**
- If you know what actually happened, and can convince the ATO of those facts, much of the hard work is done.
- **If you answer the questions the ATO asks, not what you want to answer, much of the hard work may be done.**
- The “burden of proof” is different to the standard of proof – we will discuss what this actually means later on.
- Practically, if there is a technical or industry issue, the Commissioner will want to run the version of the case that has the best chance of winning.

Burdens and Standard of Proof

- Technically there is no burden of proof on a taxpayer at audit – there is only a formal burden to disprove an assessment or amended assessment once it is issued. The Commissioner must make an assessment based on facts in his possession.
- **You don't make friends by pointing that out.**
- Practically, it is the taxpayer's job to convince the ATO of the relevant facts. So, just get on with it.
- The law on burden of proof and standard of proof can help convince the ATO they should be satisfied of particular facts.

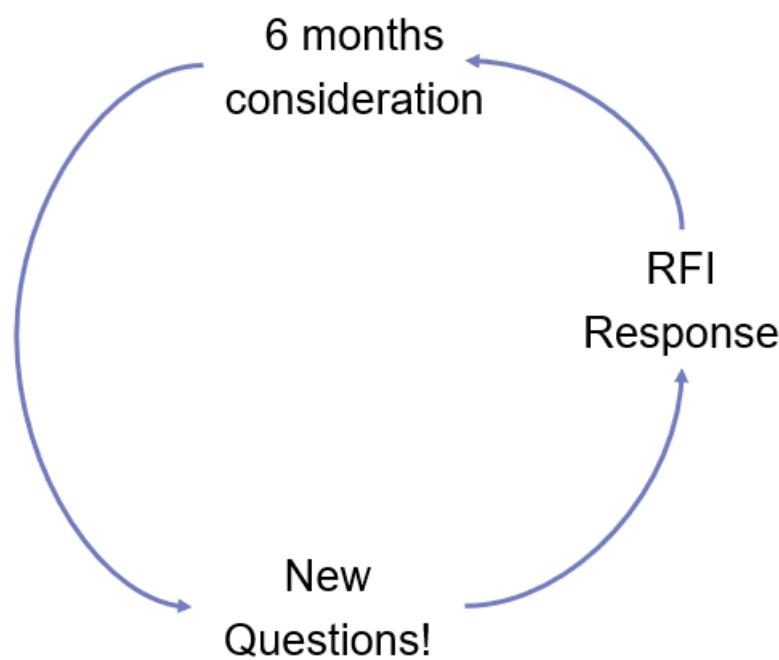
How do you define real? The standard of proof

- Steward J in *Cassaniti v Commissioner of Taxation* (2018) 266 FCR 385 CLR 382 at 409 [88]:
 - The onus of proof is illustrated by considering a pair of scales – if the taxpayer weighs down those scales ever so slightly in his favour then he has discharged the burden he carries
 - It is not obligatory for a taxpayer...to call all material witnesses and produce all material documents which support her or his or its positions
 - There is no requirement that evidence can only be accepted...if it is corroborated
 - The tribunal of fact is free to accept the evidence of the taxpayer alone if it finds the taxpayer to be truthful
 - It would usually be prudent to corroborate the evidence of a taxpayer [and adduce contemporaneous objective evidence]. But prudence should not be confused with the requirements of the law.

The ATO investigative phase

- Where you are in an audit or risk review product, there is a non-negligible chance your ATO officer will be suspicious of your motives.
- This is often the case even in taxpayer-initiated forums.
- Views differ, often “moral context” is a key practical (but not legal) consideration.
- **Creating a shared viewpoint between the taxpayer, its advisers and the Commissioner of what needs to be proved for the taxpayer to succeed is key to resolving without litigation.**

Big Wheel Keeps on Turning



- Relying on moral context is really the only option.
- Other option is to decline to cooperate further.
- For large companies, or complex audits, forensic consideration of questions asked and answered is key.

What have you done?

- **Section 166: Assessment**

From the returns, and from any other information in the Commissioner's possession, or from any one or more of these sources, the Commissioner must make an assessment of:

- (a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and
- (b) the amount of the tax payable thereon (or that no tax is payable); and
- (c) the total of the taxpayer's tax offsets refunds (or that the taxpayer can get no such refunds).

- **Section 167: Default assessment**

If:

- (a) any person makes default in furnishing a return; or
- (b) the Commissioner is not satisfied with the return furnished by any person; or
- (c) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income;

the Commissioner may make an assessment of the amount upon which in his or her judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of section 166.

"[s]ection 166 is to be read with s.167 (the latter is not an independent power but is 'epexegetical to' the former"

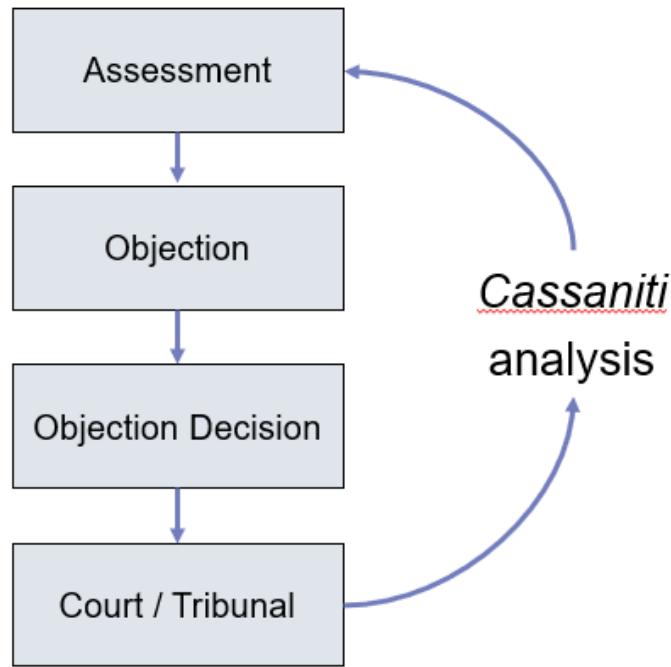
What have you done?

- Section 167
 - Enables genuine estimates that may be imprecise
 - Burden of proof requires proving a taxpayer's actual taxable income (not just an error in formation of the Commissioner's determination of the taxable income) – dual onus?
 - Traditional uses of s 167
 - More recent uses of s 167

Focusing on seeking to disprove the basis of the Commissioner's assessment is an all too common error that taxpayers make in seeking to challenge a section 167 assessment. A more productive course is to ignore the detail of how the Commissioner arrived at the section 167 assessment, and prove their actual taxable income for the year or years in issue:

Dalby v COT [2025] ARTA 1060

Defining real: the ATO investigative phase



- A forensic analysis of what is already proved on the taxpayer's evidence will assist both sides
- Consider what facts can be proved through books and records of a corporation or business records
- Consider what facts can be proved through testimony such as statutory declarations
- **As a general rule, matters can only be agreed or resolved settled when the facts are agreed and only issues such as valuation or purpose remain in dispute**

What evidence will the Commissioner (and eventually a Court) find convincing?

- **Does evidence matter before you reach the Court or Tribunal?**
- Evidence from non-tax sources relevant to transaction structure (e.g. commercial team).
- Documents that were not prepared by a tax advisor (c.f. *Track*).
- Primary documents from the business that are contemporaneous, genuine and not designed to lead to a tax outcome (e.g. emails).
- Documents provided to third parties (e.g. third party funding documents, investor update presentations, etc) particularly if they were transacted on.

What evidence will a Court (and hopefully the Commissioner) find convincing?

The Executors of the Estate of the Late Peter Fowler & Commissioner of Taxation [2016]
AATA 416 (22 June 2016)

- A taxpayer's estate claimed a block of flats was an active asset as there was no evidence anyone else assisted with maintenance, collection of rent, etc.
- No records existed of what the taxpayer actually did so it could not be an active asset!

FLZY & Commissioner of Taxation [2016] AATA 348 (27 May 2016)

- A property developer received capital account treatment when they built and sold an office block.
- Funding documents St George Bank lent on demonstrated long-term intention to lease.

What evidence do you have on purpose?

- Objective documentary evidence of what the purpose of the transaction was.
- What alternatives were considered and their economic outcomes.
- Evidence that is more like *FLZY* and less like *Fowler!*
- Even when purpose based provisions are not in play, relevant to the moral context and penalties.
- What non-tax factors influenced legal form: legal liability, future transaction potential, internal management drivers, regulatory reporting drivers, stakeholder concerns (financiers, state government, etc).

Track & Ors v Federal Commissioner of Taxation [2015]

AATA 45

Deputy President Hack summarised evidence on “asset protection” purpose of pre-sale restructure at [97]:

...none of the principals, nor indeed Mr Accountant, was able to give any detailed explanation of the purpose of the particular steps in the scheme nor the way in which those steps contributed to the asserted motive of “asset protection”. In particular, there was no evidence from Mr Festa, the solicitor from Cleary Hoare who appears to have designed the structure, that explained the relevance of particular steps.

Bywater Investments Limited v Commissioner of Taxation [2016] HCA 45

Taxpayer claimed CM&C was outside Australia but when purported controlling mind was asked why multiple layers of foreign companies and trustees were used:

*Because that company in the Cayman Islands is a company which I owned beneficially...**without wanting to be facetious, it sounded – it seemed like a good idea at the time...***

The alleged controller, who had flown in from Europe, said he didn't have a choice about returning to Court the next day as his travel arrangements were controlled by the Australian who claimed he didn't control the entities!

Are you disputing facts or the law or both?

- If you are not disputing the law, only the facts consider what relief could be sought from bodies other than the ATO.
- For matters involving general law – when was a contract entered into, did a trust exist – declaratory relief on only factual matters may be appropriate: *Warren v Warren* [2002] VSC 461.
- For matters involving trusts (including SMSF), the Supreme Court has the power to advise trustees on factual questions including whether they are justified in disputing or resolving a matter (the latter may be valuable where there are conflicting beneficiaries or claimants or a potential class action).
- Unlikely to obtain declaratory relief on questions of tax law where Part IVC is an alternative remedy: *YTL Power Investment Pty Ltd* [2023] FCA 258

What about changes in context?

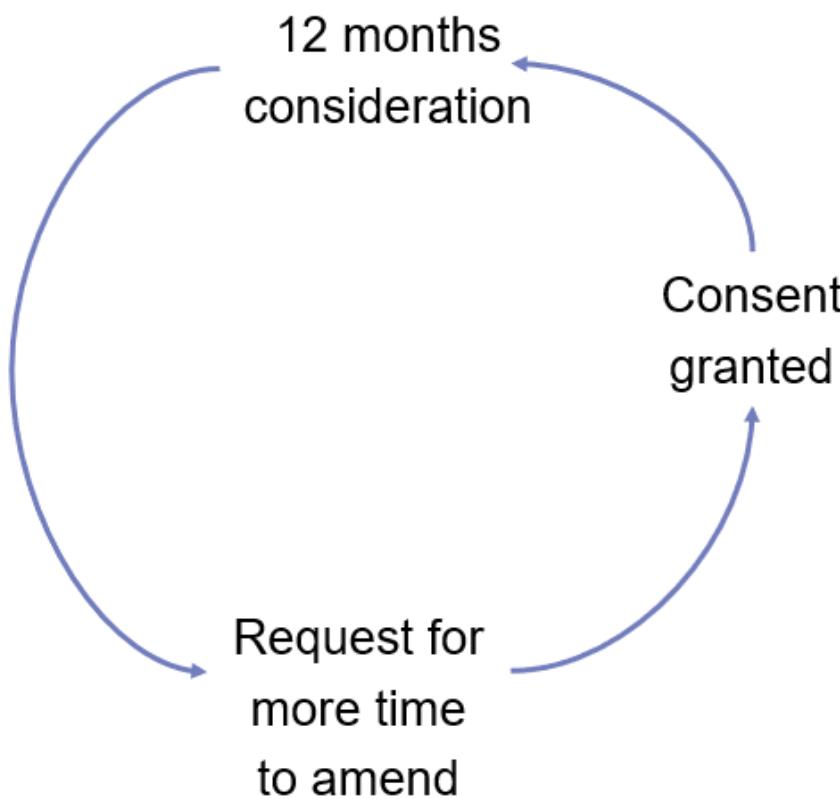
Remember COVID-19? Remember supply chain disruptions? Remember 0.25% RBA rates? Remember when consumers had money to spend?

We are probably now getting to potential disputes concerning that time period. The context that drove decisions included:

- Costs of funds falling but liquidity less available.
- Yields falling in absolute terms while capital values rise.
- Consumer demand radically shifting geographically and in terms of type.

It is worth considering, when resolving an issue, what may have driven the transaction by reference to what was happening in the market in 2020, 2021, 2022, 2023 – all were drastically different.

Rolling around



- It is common for the Commissioner to request an extension of amendment time period as a matter of course.
- It is a matter for a taxpayer on whether to consent.
- Given current ATO audit behaviour, serious questions should arise each time on whether to grant this.
- If the matter is unlikely to resolve with the audit team acceptably, query wisdom of whether to grant this.
- If you are a public company or trustee company, directors should seriously consider obligations to shareholders / beneficiaries where multiple extensions granted.
- If you are not prepared to litigate just yet, do you have any other option?

What if you have to litigate?

- The forum is either the Administrative Review Tribunal or Federal Court of Australia for income tax, and VCAT or Supreme Court for state taxes.
- Courts apply rules of evidence strictly, the Tribunal applies them as a guide.
- If you succeed in Court, you generally receive a costs order in your favour, but if you lose you have to pay the other side's costs.
- In the AAT/ART and VCAT, there are no costs orders either way.
- **Some types of disputes are better ran in the Court or in the Tribunal for technical reasons (e.g. remaking decisions in the Tribunal).**

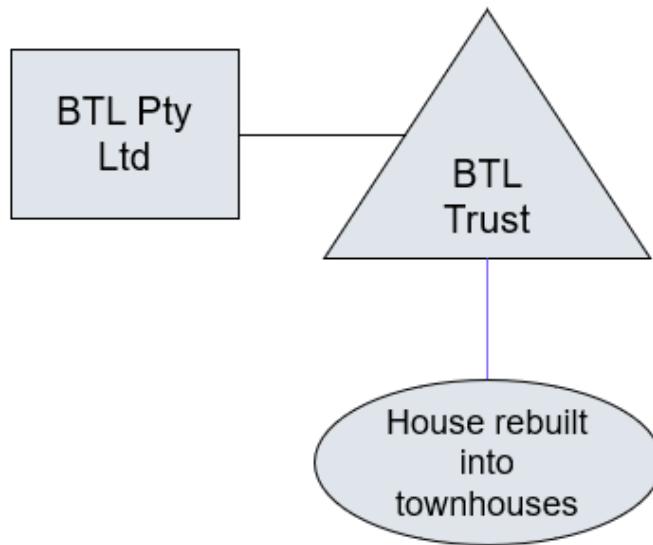
A risk of hitting nothing but air?

- The taxpayer is restricted to *grounds* in their objection unless leave is granted.
- The Commissioner, increasingly frequently, runs new factual arguments and legal arguments throughout the position paper, objection and Court/Tribunal process.
- *RCF IV* made it clear the appeal statement functions as a pleading for both parties in the Federal Court with leave required for the Commissioner to advance new positions afterwards.
- If you empty your resources too early (e.g. at the position paper stage) you risk “hitting nothing but air”?

How do you reduce risk at the time of a transaction?

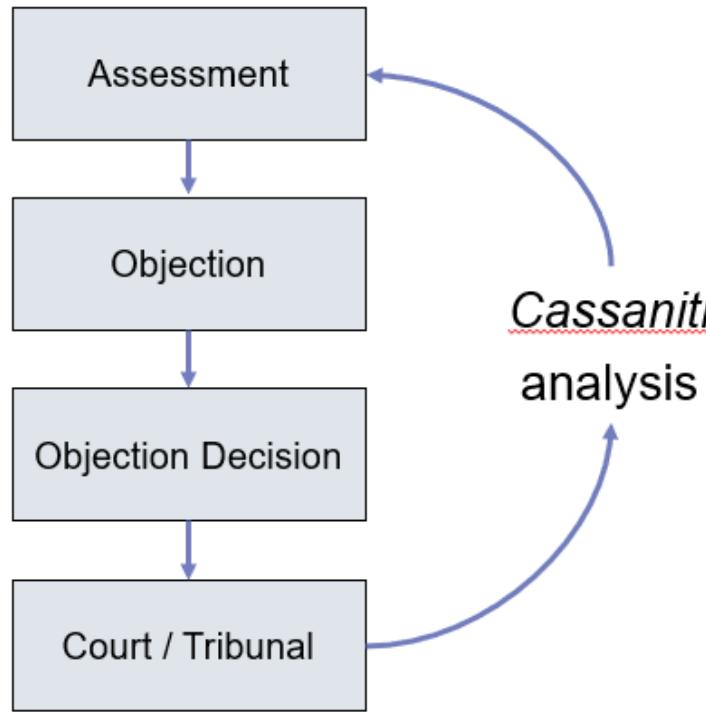
- When writing a steps plan, assign a staff member and document to each step. This helps identify and solve implementation problems contemporaneously rather than during a dispute.
- For large transactions, **take a proof of evidence from key personnel (including operational staff) at the time.**
- Use a proof of evidence to identify the objective documents to preserve as exhibits – cheaper and easier to do contemporaneously than in five years time when people have left and lost email archives!

BTL Trust - how do you manage risk at the time of a dispute?



- Trustee of BTL Trust acquires a tenanted property in 2019.
- Obtains planning approval to build townhouse development at the end of 2019 and ends lease.
- Building completes in 2020.
- Sells townhouses for a profit in 2021.
- Capital or revenue?

BTL Trust - how do you manage risk at the time of a dispute?



- 2018 document shows financial approval obtained on documented build-to-lease financial plan (see *FZLY* – a “business record” or “financial record”).
- Financial approval varied downward as to quantum because of prudential changes (a “business record” or “financial record”).
- Mezzanine debt obtained for completion at 10% (loan documentation).
- Capital value of townhouses has increased due to general property market conditions (real estate agent correspondence via email or letter).

Thank you

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