The Tax Institute

The Tax Summit

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Session 6.2: Key considerations in deciding whether to litigate a tax dispute

Presented at Melbourne Convention and Exhibition Centre (MCEC) 3-5 September 2025

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1. Introduction

Litigating tax disputes is, at least for taxpayers, notoriously difficult. The stakes in such disputes may be incredibly high, the timeframe for resolution may appear unclear or non-existent, and the other side frustratingly intransigent. Further, the statutory provisions may not lend themselves to ready comprehension, and the authorities may well raise more questions than they resolve when one seeks to apply them to the present facts. Added to this, it is trite to say that the myriad costs of tax litigation — and in particular extended tax litigation — may render even the strongest of cases practically unfeasible.

All of this is not to promote a pessimistic view of tax litigation. Indeed, in the authors' experience, the successful resolution of tax litigation can be of enormous consequence for the particular taxpayer, the relevant industry, and even Australia's economy and society at large. Clarification as to the operation of tax laws has the potential to profoundly shape how taxpayers structure their transactions, holdings, and commercial (and private!) relationships. As such, the point of this paper is to promote a *thoughtful* and *considered* approach to litigating tax disputes. The decision to litigate a tax dispute — whether in the courtroom or tribunal — is not one that should be made lightly. Nor should the decision to appeal from an unfavourable result in such litigation. And for these decisions to be made properly, they should be made by taxpayers properly informed by their advisers.

This paper seeks to highlight some of the key considerations that should be taken into account when making decisions about tax litigation. Of course, each decision will turn on its own circumstances, and this paper cannot exhaustively detail every matter that could factor into the decisions regarding whether and how to litigate. Yet there are certain considerations that regularly and substantially influence such decision-making. They are the subject of what follows. It is hoped that cognisance of such matters, and the ability to determine what considerations arise in respect of a particular tax dispute and what weight should be given to them when they do arise, will assist taxpayers and their advisers in deciding whether or not to litigate, and how to do so efficiently and with a view to obtaining an optimal outcome.

This paper is primarily directed to a scenario in which a taxpayer is in a position of disagreement with the Australian Taxation Office (**ATO**). Typically, this situation would arise where the ATO has issued an unfavourable original or amended assessment. However, and as is discussed below, an assessment is not a pre-condition to tax litigation — for example, a private ruling from the ATO can be challenged prior to the making of an assessment. Many of the considerations raised with respect to disputes with the ATO can also arise, *mutatis mutandis*, with respect to disputes with State and Territory revenue authorities.

2. Considerations when litigating a tax dispute

2.1 Should you litigate?

Take the hypothetical scenario wherein you, an Australian taxpayer, have reached the position (potentially on advice from your competent advisers) that certain sums you have received in a particular income year should not properly be included in your assessable income for that income year. Having considered the matter carefully, you self-assess on that basis. The ATO later reviews your assessment, forms a contrary view about the status of those received sums, and issues an amended assessment that incorporates those sums into your assessable income (and in turn taxable income) for that income year.

The production of that notice of assessment is generally conclusive evidence of the due making of an assessment, that the assessment is valid, and that its amounts and particulars are correct.[1] The exception is in proceedings under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**), which provides the procedural mechanisms for lodging taxation objections and reviewing objection decisions.

You are therefore left with a choice. One option is to accept the amended assessment, and the tax consequences flowing from that assessment (including the shortfall interest charge and any penalties). Another is to avail yourself of the objection and review processes set out in Part IVC — that is, ultimately, to litigate.

This decision involves more than a mere evaluation of the merits of your position. The following sections address some of the key considerations to which attention should be paid when seeking to make this choice, particularly where an objection has already been lodged, and an unfavourable objection determination made.

2.1.1 Do you have an informed understanding of the case?

As stated, a taxpayer's decision to litigate should not follow solely from their assessment of the strength of their legal position. It does not follow, however, that a taxpayer does not need to have an intimate understanding of the nature of their case so as to be in a position to make such an assessment. Put somewhat inelegantly, a crucial component of the taxpayer's ability to make an *informed* decision is that it has the relevant *information*.

The content of this "relevant information" will turn on the facts of a particular dispute, but one would generally expect it to include an appreciation of:

- the issues that would fall for determination in the event of any litigation;
- the relevant legal principles, including as expressed in the legislation and case law;
- the facts that the taxpayer would need to prove to make out their position, at least in the event that the ATO and taxpayer have not reached an agreed position as to the relevant facts; and
- the evidence that would be required and available to establish the abovementioned facts, at least in the event of disagreement.

In regard to the identification of the relevant issues, it is of fundamental importance that the issues sought to be litigated have the potential *materially* to impact the impugned decision. Often, that will mean that, if the issues are to be resolved as contended for by the taxpayer, then the outcome of the objection determination may actually change.[2] Rare is the taxpayer who or which will knowingly pursue tax litigation merely on point of

[1] TAA Sch 1, s 350-10(1) Item 2.

[2] One is reminded of the High Court's recent judgment in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), where the

principle, with no realistic prospect of altering an assessment or some determination; rarer still the forum which will entertain such proceedings.

In regard to the legal principles, a taxpayer would do well to seek advice as to the lay of the jurisprudential landscape in which it proposes to conduct the tax litigation. If, for example, an issue in dispute concerns the interpretation of a particular statutory provision, does the taxpayer's position align with or challenge the relevant authorities? Are the authorities themselves contradictory or unclear? Is this a matter which has never been the subject of judicial consideration? And if so, are there similar decisions which can be utilised by analogy or distinguished on the basis of difference? These are all matters that will doubtlessly arise in the course of any proceeding that follows, and so it is preferable that they be critically considered at a time when litigation and the consequences thereof can still be avoided.

In regard to the factual considerations, it should first be observed that there are cases where the facts are not the subject of dispute between the taxpayer and the ATO. In such cases, the dispute often turns on the way in which the legislative regime applies to those agreed facts, and questions of evidence quietly fade into the background. That is not to say that the facts in such cases are unimportant — they are simply uncontested. The application of the law will invariably turn on the nature of the facts, and so a taxpayer should familiarise themselves with precisely the circumstances giving rise to the dispute.

If the facts are contested, however, the taxpayer should consider the availability of the evidence that they will need to substantiate their version of events. There may be difficulty in locating the relevant documentary evidence, if indeed such evidence ever existed. That evidence may have been stored electronically, and may have since been inadvertently or routinely deleted; it may take the form of physical documents stored in a long-forgotten warehouse. Further, key witnesses, who may be the only persons able to testify as to crucial matters may be difficult or impossible to contact. And even if they may be located, their present relationship with the taxpayer may be less than cordial. Of course, parties to proceedings before a court or tribunal may be able to issue a subpoena or summons to even friendly witnesses,[3] but one should bear in mind that the subject may not welcome such conduct. These are forensic decisions that will need to be made in the fullness of time in the event litigation is pursued, but they should be given at least preliminary consideration prior to going down a path that may necessitate a particular outcome.

In essence, what is required prior to the making of a decision to litigate is a familiarity with what shape the litigation will take. This is necessarily an imperfect image; litigation has a tendency to take on a life of its own. Yet a taxpayer who or which has an understanding informed by the best information available at the time is in a significantly better position to make sensible decisions than one acting solely on the basis of a disagreement with the ATO. It also follows that a taxpayer should prioritise attaining such an understanding as early as possible in the dispute, prior to the incurring of substantial costs and the potential altering of one's relationship with the tax authority (as discussed below).

2.1.2 Strength of case

Only a taxpayer who or which understands the nature of their tax dispute is capable of appreciating the strengths and weaknesses of their case. That is, they are in a position at least to attempt to evaluate the likelihood that the prosecution of litigation will result in a more favourable outcome than would otherwise be the case. In most tax disputes, this enquiry is quite narrow: taxpayers tend to seek an outcome that ultimately

plurality (with whom Beech-Jones J agreed on this point) said in the context of judicial review that "an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred" (citations omitted).

[3] As to the need to do so, see the recent decision of Rees J in *AMP Ltd v Chubb Insurance Australia Ltd (No 2) (evidence by AVL)* [2025] NSWSC 789.

reduces their tax liability as compared with that assessed, and so the strength of their cases can often be distilled to the likelihood that the result of the litigation will be a reduction in their assessed tax liability.

Yet, whilst taxpayers and their advisers are often easily able to identify the outcome or sort of outcome that they would seek to attain, it is the authors' experience that some taxpayers will *overestimate* their own position and *overlook* the strength of contrary, unfavourable arguments, even when those arguments have already been communicated to the taxpayer at an earlier stage in the dispute. Prior advisers too may be inclined towards such behaviour, particularly where the dispute has arisen in circumstances where the taxpayer has followed their tax advice. Added to this is the compounding difficulty of the taxpayer bearing the burden of proof in Part IVC proceedings.[4] If an assessment is challenged, the taxpayer must prove that it is excessive or otherwise incorrect, and what the assessment should have been; if the impugned decision is not an assessment, the taxpayer must prove that it should not have been made or made differently.

Accordingly, and resource permitting, obtaining independent advice on the strength of the case can prove invaluable. This is all the more so where, on considered and forthright advice, a protracted course of costly, but ultimately doomed, litigation has been avoided. Such advice on prospects is commonly sought from suitably qualified and experienced legal practitioners and counsel, whose subject matter expertise extends not only to the intricacies of tax law but also, crucially, to matters of evidence. After all, a fact, no matter how favourable, insufficiently supported by admissible evidence cannot support one's case.

It should also be noted at this point that it may be prudent to seek independent advice from professionals other than lawyers. For example, in transfer pricing disputes, it is common practice to consult a transfer pricing economist or industry expert. Doing so *during* the litigation may be unavoidable; doing so *before* that litigation has even commenced may save considerable amounts of time, effort and costs, as well as one's relationship with the tax authority.

2.1.3 Financial considerations

As stated above, it is no secret that tax litigation can be expensive. Yet so too can be the incorrect application of the law by a tax authority — and potentially with a result many magnitudes greater. So as to avoid a Pyrrhic victory in tax litigation, with the costs incurred in achieving a successful result approximating or exceeding any reduction in tax liability, a taxpayer would be well-advised to undertake a considered analysis of the potential financial risks of pursuing the litigation, and then to compare those risks with the potential financial rewards.

Primary tax liability, penalties and interest

Undertaking a risk-benefit analysis is a common precursor to litigation generally, but taxpayers contemplating tax litigation have one substantial advantage. Where taxpayers seek to challenge an assessment, they generally already know the precise quantum of the primary tax liability as assessed by the tax authority, as well as any potential penalties and shortfall interest. In turn, this means that taxpayers usually have some clarity as to the counterfactual scenario in which litigation is not pursued: they will be required to pay the entirety of that liability as assessed. There is also a strong probability (although, again, this will depend on the particular dispute) that this assessed liability will be the "worst case" scenario in the event that any litigation is unsuccessful. Conversely, if the quantum of potential tax liability has not been assessed prior to the decision to litigate, it may be necessary to model that liability. Depending on the complexity of the issues in dispute, it may be possible for the taxpayer or their advisers to do this; if not, there are technical specialists who can advise on such matters.

[4] TAA s 14ZZO(b).

Legal costs

Added to this are the costs of litigation. The largest of these costs is often their own legal fees, regarding which a taxpayer's solicitors and counsel should be able to provide details of their rates and estimated fees prior to any engagement (though of course these figures may change as the litigation evolves).

Then there are certain fixed fees, such as those imposed by the court or tribunal. The Federal Court, for example, currently charges corporations a filing fee of $5,050, a fee for setting the proceeding down for hearing of $8,450, and a daily hearing fee which starts at $3,375 per day. For non-corporate litigants before the Federal Court, the amounts are substantially lower, but are certainly not trifling: the filing fee is $1,735, the setting down fee is $3,470 and the hearing fee starts at $1,375 per day.[5] The Administrative Review Tribunal (the **Tribunal**) charges less again, with filing fees being $114 for taxation decisions where the amount in dispute is less than $5,000, or where the Commissioner has refused a request for an extension of time to lodge an objection. Those fees increase to $616 for small business entities (ie entities carrying on a business with an aggregated turnover of less than $10 million), and $1,148 for everyone else.

In complex litigation, a taxpayer may also need to consider, for example, the costs of acquiring hearing transcripts, conduct money for the subjects of any subpoenas, expert witness and/or consultant fees, and the costs of acquiring any accredited translation services.

Costs orders

In the event of an adverse costs order (a risk associated with litigating in the Federal Court rather than the Tribunal — see below), a taxpayer may also be required to pay the costs of their opponent. The inverse of this is also true, however, such that a taxpayer who or which succeeds in the Federal Court would ordinarily be able to recover from their opponent their own costs.

General interest charge

A further financial consideration can be the liability of a taxpayer to pay the general interest charge (**GIC**), which accrues daily by reference to the unpaid tax liability. The GIC rates are relatively high so as to encourage prompt payment of tax liabilities (for example, the GIC annual rate for the period July to September 2025 is 10.78%). For prospective tax litigants, however, this means that, upon the unsuccessful resolution of litigation many years after the incurring of the primary tax liability, their liability to pay the GIC may represent a very substantial (or even predominant) portion of their overall tax liability. In the recent decision of *Alcoa of Australia Ltd v Commissioner of Taxation* [2025] ARTA 482, for example, a transfer pricing case concerning the sale of smelter grade alumina between 1993 and 2009, the total tax shortfall was alleged to have been almost $214 million, with Alcoa having claimed more than $343 million in deductions arising from its associated GIC liability.[6]

Two means of managing a taxpayer's exposure to GIC are:

(i) self-assessment by reference to the ATO's expressed position, with which the taxpayer disagrees. The taxpayer can then pay the tax liability as assessed, but then object *to their own assessment*. In such circumstances, there is no outstanding tax liability, and so no GIC is incurred. The downside, of course, is that the taxpayer is deprived of the benefit of the funds used to pay the disputed tax liability, at least until the resolution of the dispute; or

(ii) entry into a 50/50 agreement with the ATO. Under such an arrangement, the taxpayer agrees to pay at least 50% of the disputed primary tax amount, in exchange for which the

[5] See https://www.fedcourt.gov.au/forms-and-fees/court-fees/fees

[6] See https://news.alcoa.com/press-releases/press-release-details/2025/Alcoa-Welcomes-Australian-Tax-Decision/default.aspx.

Commissioner agrees to defer recovery proceedings and to remit at least 50% of the GIC that accrues on the unpaid balance.[7]

Go-forward considerations

Where the dispute concerns arrangements that the taxpayer intends to continue into the future, their exposure to the tax liability the subject of that dispute may increase over time.

If, for example, the taxpayer chooses to challenge an assessment made for a prior income year and in respect of ongoing behaviour or circumstances, then the taxpayer has to elect whether to self-assess going forward on the basis of either their own position, or that of the ATO. Each option has its own disadvantages. If the taxpayer is ultimately successful in the dispute, but adopted the ATO's position in their assessments, then the taxpayer will need to amend their subsequent assessments and reclaim any amount they have paid that exceeds their actual tax liability. In the meanwhile, they will have been deprived of the benefit of that excess. If the taxpayer is *not* successful in the dispute, but has self-assessed on the incorrect presumption that their position was correct, then the Commissioner will no doubt seek to amend these subsequent assessments and impose a GIC.

Potential benefits

Weighed against the abovementioned risks is the potential benefit of pursuing litigation. The difficulty of quantifying this benefit depends on the nature of the dispute. In some matters, such as where the dispute concerns whether a particular outgoing is or is not a deduction, the quantification analysis may be straightforward. It can be substantially more difficult in other types of cases, such as in Part IVA proceedings wherein a taxpayer may need to compare their actual tax liability with those following from alternative hypotheses or postulates.

Further, and again concerning Part IVA or similar proceedings, a taxpayer should also be mindful as to whether their success on a technical legal point may inadvertently trigger (or cause the Commissioner to trigger) the application of an anti-avoidance rule, which may ultimately leave them in no better tax position. Again, professional advice can be sought on such matters.

2.1.4 Timing

There are two main timing considerations of which taxpayers considering litigation should be aware: the time it takes to litigate, and the time in which one must commence litigation.

Length of dispute

It is well known that litigation is a lengthy process. Matters regularly take years to resolve. A taxpayer should expect as much if they seek to pursue tax litigation, at least if the dispute has any degree of complexity. Naturally, the more complicated the issues requiring resolution, the longer that resolution will take. Reference to recent prominent tax proceedings provides some practical insight:

[7] See Practice Statement Law Administration PS LA 2011/4.

Case and medium neutral citation(s)	Filing date	First instance decision	Appeal decision	High Court decision	Time to final resolution
Chevron Australia Holdings Pty Ltd v Commissioner of Taxation [2015] FCA 1310 [2017] FCAFC 62	20 April 2012	26 November 2015	21 April 2017	N/A	5 years
Glencore Investment Pty Ltd v Commissioner of Taxation [2019] FCA 1432 [2020] FCAFC 187	22 September 2017	3 September 2019	6 November 2020	21 May 2021 (special leave refused)	3.6 years
Singapore Telecom Australia Investments Pty Ltd v Commissioner of Taxation [2021] FCA 1597 [2022] FCA 260 [2024] FCAFC 29	11 November 2019	17 December 2021	8 March 2024	25 October 2024 (special leave refused)	5 years
Merchant v Commissioner of Taxation [2024] FCA 498 [2025] FCAFC 56	3 September 2021	14 May 2024	22 April 2025	N/A (special leave application pending)	3.9+ years
Minerva Financial Group Pty Ltd v Commissioner of Taxation [2022] FCA 1092 [2024] FCAFC 28	3 July 2020	16 September 2022	8 March 2024	N/A (special leave not sought)	3.7 years
PepsiCo, Inc v Commissioner of Taxation [2023] FCA 1490 [2024] FCAFC 86	2 February 2022	30 November 2023	26 July 2024	13 August 2025	3.5 years

It will be observed that this table only references the dates in the litigation phases of the respective disputes. The audit and objections phases that preceded these proceedings would also have played out over several years. *Limitation periods*

Although tax litigation can take a long time to resolve, taxpayers are often afforded only a relatively short window in which to commence those proceedings. Generally, the period in which to commence proceedings

challenging an assessment is 60 days after notice of the objection decision has been served on the applicant.[8] Whilst the Tribunal has the statutory power to extend this time for lodging an appeal,[9] the Federal Court does *not* have an equivalent power.[10] It follows that taxpayers who or which delay in commencing proceedings limit themselves to recourse before the Tribunal. In view of this restricted period in which to commence proceedings, it is strongly recommended that thought be given to this process prior to the resolution of the objection phase.

The applicable limitation periods with respect to other types of tax-related proceedings will depend on the nature of those proceedings.

2.1.5 Alternative dispute resolution

As stated above, the period within which the decision must be made to litigate is generally quite narrow. However, it does not follow from a decision to litigate, and in particular a decision made in a relatively compressed timeframe, that the dispute must for that reason necessarily be resolved by litigation. It is the authors' experience that the ATO remains open to negotiate a resolution at *any* stage in the dispute lifecycle, especially during the objection and litigation phases.

The common avenues of alternative dispute resolution (**ADR**) in tax disputes are direct negotiations with the ATO and mediation. An internal review may also be available upon the ATO's issuing of its final audit position.

In the case of international tax disputes, taxpayers may also request a "mutual agreement procedure" (**MAP**) if they believe that they are not being taxed in accordance with a tax treaty. Under a MAP, the tax authorities in the respective parties to the tax treaty negotiate with one another in an attempt to resolve the dispute. Taxpayers who or which have requested a MAP usually also request that the court proceeding be stayed. Courts are generally, but not invariably,[11] inclined to grant stays in these circumstances.

It is generally advisable for taxpayers to be mindful of the availability of ADR throughout the entirety of the dispute, as a negotiated settlement, particularly at an early stage in the dispute or litigation, may greatly mitigate many of the risks detailed throughout this paper.

2.1.6 Precedential considerations

Taxpayers should also consider whether the proceedings would have implications broader than the mere resolution of the particular dispute. This is so because, whilst a taxpayer may be indifferent to the precedential value of their case, it may influence how the ATO conducts itself throughout the litigation. By way of example, the ATO may be less inclined to settle a dispute if it would provide a suitable vehicle to test a broader legal argument that it considers important to its administration of the Commonwealth tax system.

There are benefits, however, that a taxpayer may enjoy from bringing such litigation. In matters involving issues where there is uncertainty or contention as to the operation of the law, and where it is in the public interest for the matter to be litigated, the ATO may provide funding under its Test Case Litigation Program. Taxpayers seeking such funding should review the conditions attached to it, and submit an application if they wish to proceed.

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8 TAA ss 14ZZC(1), 14ZZN.

9 See *Administrative Review Tribunal Act 2024* (Cth), s 19.

10 *Bayeh v Deputy Commissioner of Taxation* (1999) 100 FCR 138 at [5]-[6] (Beaumont J); *Carter v Commissioner of Taxation* (2001) 109 FCR 215 at [30] (Goldberg J).

11 See, for example, *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application)* [2024] FCA 1262.

2.1.7 Reputational risk

Another easily overlooked consideration is the reputational risk that may attend the pursuit of tax litigation. The ATO, for example, may retain institutional memory of the proceeding in the event that a further tax dispute arises at some point in the future. How taxpayers conduct themselves in respect of the one dispute may therefore affect their ability to resolve disputes in the future.

Moreover, various stakeholders will also obviously be interested in the decision to pursue and conduct of litigation. Creditors of a taxpayer, for example, may pay attention to the status of its tax liabilities; management may use the opportunity of litigation to test the quality of their advisers' advice. Likewise, those advisers will wish to have their previously stated positions vindicated. And one would naturally expect shareholders to be interested in the tax position of the taxpayer company in which they hold shares.

Further, and more generally, the media is increasingly interested in reporting on, and the general public keen to learn about, the tax affairs of large corporations and wealthy individuals, particularly where those taxpayers are perceived, rightly or wrongly, to be "dodging" tax.

In the result, there is general interest in information relating to tax disputes, and a concomitant risk that taxpayers pursuing litigation may harm their reputations in seeking to vindicate their positions. Such information may be readily available where, for example, details about filings are publicly available on the Commonwealth Courts Portal, hearings are held in public, and judgments are published online. Additionally, corporate taxpayers may be subject to reporting requirements.

The making of confidentiality orders may alleviate some of these concerns, but in the authors' experience they are rarely granted outside of Part IVC proceedings in the Tribunal (see below).

2.2 How to litigate

To return to the scenario hypothecated above: you have lodged an objection to your amended assessment, and have received an objection determination in which the ATO (unsurprisingly) maintains its original position. You have therefore weighed your options, giving careful consideration to the relevant of those matters set out above. You have resolved to litigate.

Such a decision is momentous, but it is only a threshold matter. You now need to give thought as to *how* you pursue this litigation. Where should you commence proceedings? On what bases will you bring your claim or claims? Whom should you instruct? And how should you engage with the ATO, with respect to this dispute, and going forward generally?

Of course, these questions are ultimately all to be answered by the taxpayer, properly informed by their advisers, and in view of the particular circumstances giving rise to their particular dispute. Below are some of the considerations that may arise in this process.

At this point, it should be noted that, in reality, the question of whether to litigate is closely, perhaps inextricably, connected with the question of how such litigation would be conducted. A taxpayer would not in reality choose (and as a matter of procedure would not be able to choose) to litigate in the abstract without having at least some idea as to the form that litigation will take.

2.2.1 Jurisdiction and Forum

Where a taxpayer has decided to litigate, the next questions concern the forum in which to commence proceedings and the jurisdiction by which that forum can resolve the dispute. Each is considered briefly below.

Jurisdiction

The nature of the particular proceeding will dictate the court or tribunal's jurisdiction, if any.

Commonly, tax litigation will be commenced under Part IVC of the TAA, which confers jurisdiction on (i) the Federal Court to determine appeals against an "objection decision", and (ii) the Tribunal to review "reviewable objection decisions" (being an "objection decision" that is "not an ineligible income tax remission decision").[12] Such proceedings are preconditioned on the existence of a "taxation objection" — being an objection to an assessment, determination, notice or decision[13] — and a decision made by the Commissioner with respect to that "taxation objection".[14]

Not every tax dispute can be so classified (withholding tax disputes being a common example of this), and so taxpayers may have to look for jurisdiction elsewhere before they can commence proceedings. Judicial review proceedings are the most salient option.

Relief can be sought in the High Court's original jurisdiction under s 75(v) of the *Constitution*, or, more realistically, in the Federal Court under s 39B(1) of the *Judiciary Act 1903* (Cth), each of which confers upon the respective court original jurisdiction with respect to matters in which a writ of mandamus, prohibition or an injunction is sought against an officer or officers of the Commonwealth. It should be noted, however, that relief under these provisions (including the ancillary relief of certiorari and declarations) is (i) predicated upon the establishing of jurisdictional error, and (ii) discretionary. The latter is particularly important as the Court will often withhold its discretion to grant relief under s 39B where Part IVC proceedings are pending.[15]

An alternative source of the Federal Court's jurisdiction to grant declaratory relief is found in the combination of s 39B(1A) of the *Judiciary Act 1903* (Cth) — which extends the Federal Court's original jurisdiction, *inter alia*, to non-criminal matters arising under any laws made by the Commonwealth Parliament (such as federal tax laws) — and s 21 of the *Federal Court of Australia Act 1976* (Cth), which authorises the Federal Court's granting of declaratory relief in civil proceedings in which it has original jurisdiction.[16] Again, however, this remedy remains discretionary and will likely be withheld if Part IVC proceedings are ongoing. Further, as the conclusive evidence rules (referenced above) provide that the production of an assessment is conclusive proof that the assessment was properly made and that its amounts and particulars are correct,[17] declaratory relief will only be granted where either (i) an assessment has not been made, or (ii) the Commissioner agrees not to produce any assessment in the proceeding.[18]

A further alternative source of the Federal Court's jurisdiction is the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), which allows a person "aggrieved" by a "decision to which this Act applies" to apply

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12 TAA ss 14ZQ, 14ZZ(1).

13 TAA s 14ZL.

14 TAA s 14ZY.

15 *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [10] (Gummow, Hayne, Heydon and Crennan JJ).

16 See, for example, RS French, "Declarations – Homer Simpon's remedy – is there anything they cannot do?" [2007] FedJSchol 24 (30 November 2007). See also *Sandini Pty Ltd v Commissioner of Taxation* [2017] FCA 287 at [28] (McKerracher J).

17 Recall TAA Sch 1, s 350-10(1) Item 2.

18 See, for example, *Oil Basins Limited v Commonwealth* (1993) 178 CLR 643 at 651ff (Dawson J). For further discussion about the availability of declaratory relief in tax disputes, see G Redenbach, "Declaratory relief – finally an alternative to Part IVC?", presented at the Tax Institute Masterclass on 16 March 2022.

to the Court for an order of review in respect of the decision on certain grounds, such as breach of natural justice, and that mandatory procedures were not followed.[19] The primary limitation here is that the legislation expressly excludes certain administrative decisions, such as those set out in Schedule 1 to the ADJR Act, from being a "decision to which this Act applies".[20] Among the decisions listed in Schedule 1 are:

> "decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty…"

Forum

As can be seen above, there are certain types of proceedings that can only be commenced in the Federal Court. However, proceedings under Part IVC, for example, can be commenced in either the Federal Court or the Tribunal. Where the choice remains open to taxpayers, they will need to elect the forum in which to commence proceedings. What follows are some of the key differences between proceedings commenced in the Federal Court, and those in the Tribunal.

Timing

As stated above, a taxpayer has only 60 days from the time of being served with notice of an objection decision to commence Part IVC proceedings in either the Federal Court or the Tribunal.[21] However, whereas this is a *strict* deadline in the Federal Court,[22] it may be extended by the Tribunal.[23] Accordingly, a taxpayer wishing to commence Part IVC proceedings outside of the 60-day window will find their choice of forum made for them.

Nature of review

Unlike the Federal Court, the Tribunal can undertake a merits review of the impugned decision. That is, the Tribunal can determine whether that decision was the "correct *or preferable*" decision by reference to the material before it.[24] The practical effect of this is that the Tribunal essentially assumes the role of the Commissioner and can *re-exercise* a discretion.[25]

Importantly, as the exercise of a discretion given to the Commissioner is a fundamentally administrative exercise, it is not something that the Federal Court can do. In the event that the Federal Court were to find that the Commissioner's exercise of his discretion had been infected by the requisite sort of error, it would only be able to quash the decision so that the Commissioner can properly re-exercise that discretion at a later stage.

Confidentiality

A taxpayer before the Tribunal can also request that the hearing of the proceeding be in private.[26] In such matters, pseudonyms are then used in any published reasons. The benefits of this approach to taxpayers seeking anonymity are obvious. That being said, the statutory provision providing for this privacy does not

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19 ADJR Act s 5(1).
20 ADJR Act s 3(1).
21 TAA ss 14ZZC, 14ZZN.
22 Recall *Bayeh v Deputy Commissioner of Taxation* (1999) 100 FCR 138 at [5]-[6] (Beaumont J); *Carter v Commissioner of Taxation* (2001) 109 FCR 215 at [30] (Goldberg J).
23 Recall *Administrative Review Tribunal Act 2024* (Cth) s 19.
24 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 (Bowen CJ and Deane J) (emphasis added).
25 *Administrative Review Tribunal Act 2024* (Cth), s 54.
26 TAA s 14ZZE.

extend to any appeals from the Tribunal, so the taxpayer should not expect that any proceedings commenced in the Tribunal will remain permanently anonymised.

Conversely, the Federal Court, which is able to grant non-publication and suppression orders,[27] is generally reluctant to do so. The granting of such orders is in direct conflict with the Court's commitment to open justice. Taxpayers should not expect that confidentiality orders will be made in tax litigation before the Federal Court unless there is a pressing and clearly articulated need for doing so.

Costs

The Tribunal is a no-costs jurisdiction.[28] It follows that a taxpayer will not be liable to pay the Commissioner's costs in the event that it is unsuccessful in any proceedings before the Tribunal. By extension, however, taxpayers also cannot recover from the Commissioner if the Tribunal finds in their favour.

The position is otherwise in the Federal Court, which has a broad discretionary power to award costs.[29] This discretion is to be exercised "judicially",[30] with the "ordinary rule" being that "costs follow the event".[31] That is, "the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party".[32]

The Federal Court's position is clearly advantageous to the successful litigant, but it compounds the loss experienced by an unsuccessful party, who or which will not only have to bear the consequences of an adverse judgment, but will also be liable to pay both their own costs and those of their opponent. Taxpayers considering litigating in the Federal Court should bear this in mind, because the Commissioner's costs in defending the litigation may be equal to or more substantial than the taxpayer's costs in prosecuting it.

Evidence and procedure

The Federal Court's procedural requirements and adherence to the laws of evidence are well-known topics and beyond the scope of this paper.

What is relevant for present purposes is that the Tribunal has a discretion over its own procedure and is not bound by the rules of evidence.[33] That is not to say that ordinary procedure and the rules of evidence are wholly irrelevant for the purposes of Tribunal proceedings. Rather, the Tribunal will generally adopt a more flexible approach to procedure and evidence. In practice, that may mean that a piece of evidence that would be inadmissible under the *Evidence Act 1995* (Cth) is still admitted in proceedings before the Tribunal, albeit with the Tribunal affording it relatively little weight.

Nature of appeal

Another point of difference between tax litigation commenced in the Federal Court and that commenced in the Tribunal is the nature of the appeals from the decisions made by those fora.

Appeals from a decision of the Federal Court at first instance are made to the Full Court of the Federal Court under s 24 of the *Federal Court of Australia Act 1976* (Cth). This is an appeal by way of rehearing, which is

27 *Federal Court of Australia Act 1976* (Cth) s 37AG.

28 Revised Explanatory Memorandum to the Administrative Review Tribunal Bill 2024 at [771].

29 *Federal Court of Australia Act 1976* (Cth), s 43(1).

30 *Idenix Pharmaceuticals LLC v Gilead Sciences Pty Ltd (No 2)* [2018] FCAFC 7 at [3] (Nicholas, Beach and Burley JJ), citing *Les Laboratoires Servier v Apotex Pty Ltd* (2015) 247 FCR 61 at [305] (Bennett, Besanko and Beach JJ).

31 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [67] (McHugh J, Brennan CJ agreeing).

32 *Northern Territory v Sangare* (2019) 265 CLR 164 at [25] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

33 *Administrative Review Tribunal Act 2024* (Cth), ss 49, 52.

subtly different from an appeal in the "strict sense". This difference was explained by Gageler J in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [31] (footnotes omitted):

> "An appellate court determining an appeal in the strict sense is required to determine the correctness of the judgment under appeal at the time that judgment was given: in an appeal from a final judgment of a judge sitting without a jury, the correctness of the judgment is to be determined on the evidence adduced at the trial and on the law as it then stood. An appellate court determining an appeal by way of rehearing, in contrast, is required to determine the correctness of the judgment under appeal in retrospect: in an appeal from a final judgment of a judge sitting without a jury, the correctness of the judgment is to be determined on the evidence adduced at the trial supplemented by any further evidence that the appellate court may allow to be adduced on the appeal, and on the law as it stands when the appellate court gives judgment on the appeal."

The Full Court can conduct a "real review" of the primary judgment for errors of law *or* errors of fact.[34] There are some limitations upon the Full Court — it will exercise restraint when considering factual findings which are "likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence"[35] — but otherwise it generally considers itself to be in as good a position as the trial judge to decide on the inferences to be drawn from the undisputed facts or findings.

In contrast, a party to proceedings before the Tribunal may only appeal to the Federal Court (or Full Federal Court in the event the Tribunal was constituted by, or by members who include, a Federal Court judge)[36] on a question of law.[37] Taxpayers should keep this in mind, particularly if the relevant facts are complicated, as unlike in the Federal Court they will not be able to challenge factual findings made by the Tribunal on appeal.

Precedent

One final point that may be relevant is the precedential value of the forum's determination. Put simply, a decision by the Federal Court will be given more weight than that of the Tribunal.

For many taxpayers, this consideration will not factor into their decision-making: they simply wish to resolve their present dispute, and each of the Tribunal and Federal Court may be able to achieve that end. But for a taxpayer seeking finality with respect to a particular legal position — so that they can self-assess with confidence going forward — it may be prudent to commence proceedings in the Federal Court.

One common strategy where the taxpayer wishes to challenge assessments made in respect of multiple income years but concerning the same issues is to commence proceedings regarding only one income year in the Federal Court. Upon obtaining a favourable judgment, the taxpayer can then use that as a precedent to challenge the other assessments in the Tribunal.

This may also be an important consideration for the Commissioner in his decision-making in respect of appealing an unfavourable decision. For instance, the Commissioner may be less inclined to appeal an unfavourable decision of the Tribunal as opposed to the Federal Court given that the decision of the Tribunal carries less precedential value and weight by other Courts and taxpayers – incentivising the Commissioner to refrain from appealing the decision and creating the possibility for a Federal Court to also make an unfavourable finding against the Commissioner. This may have been a factor in the Commissioner's decision to not appeal the Tribunal's recent decision in *Alcoa of Australia Ltd v Commissioner of Taxation (Taxation and business)* [2025] ARTA 482.

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34 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [30]-[33] (Gageler J).

35 *Lee v Lee* (2019) 266 CLR 129 at [55] (Bell, Gageler, Nettle and Edelman JJ).

36 *Federal Court of Australia Act 1976* (Cth), s 20(2).

37 *Administrative Review Tribunal Act 2024* (Cth), s 172(1).

2.2.2 Resourcing and legal representatives

Just as attention should be paid to *how* to litigate a tax dispute, it is crucial that taxpayers and their advisers correctly identify *who* is best placed to do so.

By the time a taxpayer needs to decide whether to litigate, they will often have already instructed solicitors, and those solicitors will generally have been involved in the dispute for some time. Accordingly, the most important decision at this time is the selection of counsel, if they have not already been briefed.

Naturally, selection of counsel is a matter of personal judgment to be considered in view of the circumstances of the particular case. Nevertheless, it is generally advisable to brief counsel as soon as reasonably practicable, and preferably prior to receipt of the objection decision. Care should also be taken to ensure that counsel are suitably qualified for that matter: a barrister who specialises in state taxes may not have the requisite experience to conduct large-scale Part IVA proceedings, for example, and *vice versa*.

Further, a taxpayer should ensure that their internal teams will be able to manage the demands of the litigation. Large-scale tax litigation can be of extreme importance to the relevant taxpayer, and can consume considerable amounts of time and staffing resources within a corporate taxpayer. The taxpayer should be aware of this reality, and ensure that their internal finance, tax and/or litigation teams are appropriately staffed so as to ensure that they can both be engaged in the litigation and deal with other, non-related, matters.

2.2.3 Relationship with Tax Authority

After the conclusion of any litigation, and regardless of its outcome, the taxpayer will most likely remain a taxpayer. As such, it will need to maintain a relationship with the ATO throughout and beyond the dispute.

Whilst during litigation it may be difficult to contemplate future considerations, taxpayers should always bear in mind that their relationship with the ATO will continue, perhaps indefinitely, into the future. Thus, and aside from the fact that civility should be promoted for its own sake, it is very much in the taxpayer's interests to be courteous in all its dealings with the ATO, and, if necessary, to impress upon its advisers that they do likewise. The ATO will not respond well to sharp practice, and although it may assist in a particular dispute, it will inevitably attract adverse consequences at some point.

3. Considerations when appealing a tax dispute

Giving thought again to the hypothetical: you have pursued litigation at first instance, and have received an unfavourable judgment or determination. Yet, you remain confident in the correctness of your position.

The question turns to whether you should escalate the matter by means of an appeal. Many of the considerations outlined above apply equally, or at least to some modified degree, with respect to the decision of whether to appeal. Some additional matters that may arise are discussed briefly below.

3.1 Grounds of appeal

As stated above, the choice of forum at first instance will bear upon the nature of any appeal of that forum's decision. Determinations of the Tribunal may only be appealed to the Federal Court on questions of law; judgments from the Federal Court at first instance may be appealed to the Full Court on the basis of either or both of error of law and error of fact.

When considering whether to commence an appeal, it is important the *entirety* of the reasons for the determination or judgment are reviewed. This is because the mere establishing of legal error will not lead to an overturning of a decision. It must also be established that the legal error *materially* contributed to the decision ultimately made.

3.2 Strength of Appeal

It is crucial that the prospects of the appeal be considered before any appeal proceeding is commenced. This requires an honest assessment of the reasons for decision and the likelihood that the decision can be overturned because of errors in that reasoning process.

The process here is largely, but not wholly, reflective of the analysis that should be undertaken when determining the strength of the case prior to commencing litigation (see above). The process here, however, is much more streamlined as it is focused on the reasons for decisions.

Further, and as referenced above, where errors of fact are capable of being considered on appeal, appellate courts will be generally reluctant to overturn factual findings, in particular where those findings have been made by reference to assessments of credit and reliability flowing from the trial judge's observations in the trial. In transfer pricing cases, for example, there may be large volumes of expert evidence, and the trial judge will have enjoyed a very substantial benefit in having seen all of the oral evidence as it was given. An appellate court will be naturally reluctant, but not wholly unwilling, to disturb such findings without clear reason for doing so.

3.3 Timing

Parties to proceedings in the Federal Court have 28 days from the making of the first instance judgment to file a notice of appeal.[38] The Full Court may grant leave to extend this time.[39]

[38] Federal Court Rules 2011 (Cth), r 36.03(a).
[39] Federal Court Rules 2011 (Cth), r 1.39.

The position is the same in respect of proceedings in the Tribunal, albeit the time runs from the time the Tribunal gives the party its statement of reasons.[40]

3.4 Costs

As with litigating at first instance, there are substantial costs that may be associated with an appeal.

First, there are the court fees associated with the appeal process. Filing a notice of appeal from the Federal Court, for example, costs $12,625 for corporations and $5,830 for other litigants.[41] The prices are only nominally different for filing a notice of appeal from a decision of the Tribunal: $12,615 for a corporation, and $5,840 for other litigants.[42] Added to this are, at least, the setting down fees, and the hearing fees as discussed above.

Of course, further legal fees will be incurred in the process of prosecuting or defending an appeal. It should be noted, however, that these costs may be substantially lower than those incurred at first instance, at least if the earlier proceedings involved substantial quantities of work directed to matters of evidence and the fact-finding process, which may be raised but is not wholly repeated on appeal.

40 *Administrative Review Tribunal Act 2024* (Cth), s 174(1)-(2).

41 See https://www.fedcourt.gov.au/forms-and-fees/court-fees/fee.

42 Ibid.

4. Conclusion

The pursuit of litigation, and in particular tax litigation, carries with it substantial risk. Yet, so too does accepting a decision by the Commissioner when there is good reason to doubt its legality.

This paper has sought to outline some of the key considerations to which taxpayers should pay attention when deciding whether to litigate their tax disputes, and whether to appeal any resulting adverse determinations or judgments. Awareness of these matters does not avoid the inherent element of uncertainty that attaches to tax litigation, but it does provide an effective means of managing that risk to the greatest possible degree.