

## **COURTROOM ISSUES FROM THE TAXPAYER'S PERSPECTIVE**

### **AUSTRALIA'S RESPONSE**

#### **THE HON G.T. PAGONE QC AND JUSTICE JENNIFER DAVIES**

In Australia, there are two forums in which tax disputes are heard at first instance: the Administrative Appeals Tribunal (**Tribunal**) and the Federal Court of Australia (**Court**). The taxpayer has the choice of forum, not the Commissioner of Taxation but, in both forums, the taxpayer has the onus of proving that the tax assessment is “excessive”. That requires the taxpayer to prove the taxpayer’s true liability.

The Tribunal is an independent statutory body that reviews administrative decisions on their merits and can re-exercise any statutory discretion on which the liability depends. As it is an administrative body, the Tribunal makes its own decision about the amount of tax payable, if any. The Tribunal is not bound by the rules of evidence and may inform itself as it thinks fit about the relevant facts and material, whilst observing rules of natural justice and fairness. Taxpayers have the right to appear and may represent themselves or can engage an appropriate professional, such as a tax agent or lawyer, to represent them. A taxpayer can also request that the proceedings in the Tribunal be held in private and the taxpayer’s identity kept confidential.

The Court exercises judicial power, which means that the Court must determine the correct decision in law without exercising any discretion. The Court, in that task, applies the rules of evidence which the parties must present in admissible form. The proceedings are open to the public as open justice is a fundamental tenet of the common law system. As cases in the Court are conducted in open, a taxpayer does not have the right to have their case heard in private or to have the evidence given in the proceedings about their taxation affairs kept confidential. A taxpayer can apply for an order that their identity or taxation affairs be kept confidential, but an order will only be made if a taxpayer satisfies the Court that it is necessary for the administration of justice. The fact that the publicity may be embarrassing for a taxpayer or that a taxpayer wants to keep their affairs private is not a reason to make an order.

Taxpayer are not required to be legally represented before the Court and can appear themselves but the Court may refer a party to a lawyer for free legal assistance where a taxpayer does not have the means to pay for legal representation and the nature and complexity of the tax dispute is such that the Court considers it desirable for the taxpayer to have legal representation. The

Australian Taxation Office also has a test case litigation program which provides financial assistance to taxpayers to help them meet some, or all, of the reasonable litigation costs for tax disputes that involve significant questions of tax principle for resolution.

Where a taxpayer is self-represented –either in the Tribunal or the Court - the Tribunal/Court has the duty to ensure that there is a fair hearing and that the taxpayer has a proper opportunity to present their case without causing prejudice to the party with legal representation. The Australian Taxation Office, as a “model litigant”, also has a duty to assist the Tribunal/Court in that task.

Both forums have flexible and wide case management powers to streamline the preparation of the case and take an active role in managing a case from commencement of issue through to the hearing of the dispute, though in the Court it is for the parties to determine the issues to be raised and the evidence to adduce. In both forums taxpayers have a right of appearance and a right to be heard, including on any procedure to be adopted in relation to the conduct of the hearing. The Court also has broad powers to give directions about practice and procedure which are intended to facilitate the effective, efficient and fair resolution of disputes and to discourage the prosecution of unmeritorious cases. The key objectives of case management are to reduce costs and delay, to ensure that there are fewer issues in contest, to ensure that the investigation of facts is no greater than justice requires in relation to the issues raised and to ensure that as few interlocutory applications as necessary be conducted for the just efficient and inexpensive disposition of matters. Both forums also encourage the parties to resolve their tax disputes by alternative dispute resolution and it is common to refer a tax dispute to mediation.

From a financial cost perspective, there may be advantages to taxpayers choosing the Tribunal over the Court as:

- the filing fees in the Tribunal are significantly lower than the filing fees in the Court;
- procedures in the Tribunal are relatively informal and designed to provide a cost effective review process;
- it can be easier for a self-represented taxpayer to present their case because the taxpayer does not have to comply with the rules of evidence; and

- costs cannot be awarded against the taxpayer, if the taxpayer is unsuccessful in setting aside the assessment.

Proceedings in the Court are usually more costly and generally tax disputes dealt with by the Court involve large corporate taxpayers with complex tax matters where the parties are legally represented.

A key aspect of Australia's tax collection system is that the tax is payable even though the taxpayer may dispute and be contesting the tax assessed. The fact that the taxpayer has sought to contest the tax imposed by application to the Tribunal or to the Court does not stop the tax being recoverable. However the taxpayer may enter into an administrative arrangement with the Commissioner to defer the payment of the tax or some part, pending the resolution of the tax dispute.

The taxpayer does not have a right in either forum to require the tax dispute to be heard or determined within a particular time. In both forums, it is the Tribunal/Court that controls the timing of the processes, not the parties. Nor does the taxpayer have the right to have a decision handed down within a particular time after completion of the hearing. The Tribunal and the Court strive to hand down their decisions within as soon as possible but there is no statutory time frame. The taxpayer, and the Commissioner, in both forums have the right to written reasons for decision. That is an important right to enliven the appeal rights from both forums.

An appeal lies to the Court from a decision of the Tribunal but only on a question of law. This limitation can be a reason why taxpayers may prefer to contest the assessment by appeal directly to the Court, as the jurisdiction of the Court, on appeal from the Tribunal, is confined to determining the question of law raised by the appeal and the Court is bound by the findings of fact made by the Tribunal. The Court can only set aside the decision of the Tribunal if legal error is shown. Alternatively, however, the taxpayer can choose to go straight to the Court to challenge the tax assessment. A decision by a single judge of the Court (either on appeal from the Tribunal or exercising original jurisdiction) can be appealed to the Full Court of the Federal Court, usually comprising a bench of three judges but sometimes a bench of five judges, depending upon the issues raised by the appeal.

An appeal is conducted as a re-hearing of the case on the evidence which was before the court below, though the Full Court on appeal does have a limited discretion to permit further evidence to be adduced. The issue on an appeal is whether the order of the court below was the result

of some legal, factual or discretionary error having regard to the evidence before the appellate court. An appeal from the Full Court to the High Court (Australia's final court) is only by way of the High Court granting special leave to appeal. The criteria for the grant of special leave to appeal require the applicant to show that the proposed appeal involves a question of law that is of public importance. The High Court often grants special leave in tax cases because of public importance and general application of the tax laws.

Taxpayers also have the right to challenge administrative decisions and actions of the Taxation Office for legal error, independently of contesting an assessment. The Court will intervene where there has not been compliance with the law in the performance of duties and can restrain taxation officers from acting unlawfully in excess of their powers or authorities.