

RESOLVING SMALL TAX DISPUTES IN NEW ZEALAND – IS THERE A BETTER WAY?

ANDREW J MAPLES*

ABSTRACT

The current tax disputes resolution procedure, introduced in New Zealand (NZ) with effect from 1 October 1996, includes an extensive pre-assessment phase – the aim of which is to resolve tax disputes without the need for litigation. While this objective of the regime arguably has been achieved it has come at a price for taxpayers; in particular the costs of the new process are such that some tax disputes are not worth pursuing with taxpayers preferring to concede their dispute with Inland Revenue.

In response to concerns raised by commentators and professional organisations about the operation of the disputes resolution process, in 2010 Inland Revenue released an Issues Paper for consultation. This included a cursory and, in the author's view, dismissive review of the approaches in Australia, Canada and the United Kingdom to dealing with small tax disputes. This article reviews the small tax dispute resolution processes adopted in these countries and concludes a separate forum or procedure for such disputes is worthy of further consideration in NZ.

* Associate Professor of Taxation Law, University of Canterbury. The author would like to acknowledge the financial support provided by the College of Business and Economics in preparing and presenting an earlier version of this paper at the 2011 ATTA Conference and for participants' comments and suggestions. Correspondence to andrew.maples@canterbury.ac.nz.

I INTRODUCTION

In 1994 the Organisational Review of the Inland Revenue Department (the Richardson Committee),¹ headed by Sir Ivor Richardson, conducted a general review of the operations of the Inland Revenue Department (Inland Revenue). Its review included consideration of the way tax issues between taxpayers and Inland Revenue were managed. The Richardson Committee found a number of shortcomings with the existing process including the time and high cost required to resolve a dispute. The process did not support the early identification and prompt resolution of issues.² A new disputes resolution process aimed at resolving disputes fairly and quickly was recommended.³ The Richardson Committee believed that the disputes resolution process should be more accessible to a greater number of taxpayers, and include a simple fast-track, non-precedential procedure for dealing with small claims to be administered by the Taxation Review Authority (TRA).⁴ The new disputes resolution process, based on the Richardson Committee's proposals, came into effect from 1 October 1996.

A review of the disputes resolution process was conducted in 2003 by Inland Revenue.⁵ Based on both the declining number of audited cases that were disputed and the cases being litigated this review concluded that the process appeared 'to a significant extent to be meeting its objectives'.⁶ Submissions on the Discussion Document were less positive, with concerns relating to the cost and time required to complete the disputes resolution process.⁷ The changes made⁸ - effective generally from 1 April 2005 - overall did not address the problems with the process.⁹

¹ Organisational Review Committee, *Organisational Review of the Inland Revenue Department*, (Wellington, New Zealand Government, 1994), ch 10. For an outline of the process pre-October 1986 see Inland Revenue, *Resolving Tax Disputes: Proposed Procedures* (Wellington, New Zealand Government, 1994), ch 2.

² Inland Revenue, above n 1, 4.

³ Organisational Review Committee, above n 1, [10.5].

⁴ Ibid, [10.7]. A Taxation Review Authority (TRA) is a one-member authority that sits as a judicial authority for hearing and determining objections and challenges to assessments of tax and to other decisions or determinations of the Commissioner of Inland Revenue as authorised by the Inland Revenue Acts. The TRA system is designed to provide a fair, efficient and cost effective mechanism for the independent adjudication of tax disputes.

⁵ Inland Revenue, *Resolving tax disputes: a legislative review - A government discussion document*, (Wellington, New Zealand Government, 2003), 2 (the Discussion Document).

⁶ Ibid, 2. The Inland Revenue observed: 'In 1997, the proportion of audited cases giving rise to a dispute was two percent of total cases. This dropped to 0.91 percent in 2002.': *ibid* 2.

⁷ PricewaterhouseCoopers, *Submission on the 2003 legislative review* (2003); Ernst & Young, *Submission on the 2003 legislative review* (2003); Brookfields Lawyers, *Submission on the 2003 legislative review* (2003).

⁸ The amendments, which were aimed at ensuring that the disputes resolution process is more accessible to taxpayers and that the costs incurred in preparing the various documents are no greater than is necessary for each particular case, included (i) simplifying the documentation required by both parties to progress a dispute; (ii) extending the time for taxpayers to initiate a dispute to their self-assessment from two months to four months; (iii) introducing a more accessible small claims process which included raising the threshold for such cases from NZ\$15,000 to NZ\$30,000, and (iv) allowing the disputes process to be stayed pending the outcome of a test case if both parties agree. For a discussion of the amendments to the disputes resolution process see also Inland Revenue, 'Disputes Resolution Process' (2005) 17:1 *Tax Information Bulletin* 53.

⁹ The Taxation Committee of New Zealand Law Society and The National Tax Committee of New Zealand Institute of Chartered Accountants, *Joint Submission: The Disputes Resolution Procedures in Part IVA of the*

In 2008, due to continuing concerns over the operation of the process,¹⁰ the Taxation Committee of the New Zealand Law Society (NZLS) and the National Tax Committee of the New Zealand Institute of Chartered Accountants (NZICA) co-authored a submission¹¹ (the Joint Submission) to the Minister of Revenue and the Commissioner of Inland Revenue (CIR), expressing serious concerns about the current process and calling for urgent change. 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:

Our experience is that in effect Inland Revenue may issue questionable matters below the [sic] \$25,000 with impunity, as Inland Revenue knows that it will cost the taxpayer more than that [to] proceed through the disputes resolution procedures and to challenge the Inland Revenue's position in Court. Effectively taxpayer's are 'burned off' by the high costs imposed by the disputes resolution procedures.¹²

As a result taxpayers with small tax disputes 'have no forum for their disputes to be considered'.¹³

In response to the Joint Submission, and in close collaboration with NZLS and NZICA, Inland Revenue began an internal review of the disputes process. This resulted in the implementation of administrative changes effective 1 April 2010¹⁴ - and the subsequent release of two revised Standard Practice Statements (SPS) in November 2010¹⁵ - as well as the publication by Inland Revenue and the New Zealand Treasury of an issues paper

Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act 1994 (Wellington, August 2008) 4,
<[http://www.lawsociety.org.nz/_data/assets/pdf_file/0017/4418/Taxation Administration Act Dispute Resolution Procedures.pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0017/4418/Taxation_Administration_Act_Dispute_Resolution_Procedures.pdf)>NZICA>.

¹⁰ Joanne Dunne, 'Tax Disputes Procedure: Legislative change is needed' (April 2009) 17 *Taxation Today* 1; Hon. Justice William Young, 'Tax Disputes in New Zealand' (Paper presented at the Annual Australian Tax Teachers Association Conference, Christchurch, 19-21 January 2009); Greg Blanchard, 'The Case for a Simplified Tax Disputes Process' (2005) 11(4) *New Zealand Journal of Taxation Law and Policy* 417; Mark Keating, 'New Zealand's Tax Dispute Procedure - Time for a change' (2008) 14(4) *New Zealand Journal of Taxation Law and Policy* 425; Aylton Jamieson, 'Brave New World Mark III ... are we there yet?' (November 2007) *Chartered Accountants Journal* 56; James Coleman, 'Tax Update: Disputes Procedure' (December 2007) *New Zealand Law Journal* 407.

¹¹ NZLS and NZICA, above n 9. See also NZICA and NZLS, *Dispute Resolution Procedures and Challenge Procedures* (Wellington, 4 August 2008) 1,
<http://www.nzica.com/AM/Template.cfm?Section=Other_Issues_Files&Template=/CM/ContentDisplay.cfm&ContentID=13180>.

¹² NZLS and NZICA, above n 9, 6. The Joint Submission also notes that: 'The effect of the increased costs under the new system is reflected in the statistics - in the year ended 30 June 1996 there were 64 cases taken to the Taxation Review Authority. By 2006 this had dwindled to 13.': *ibid* 6.

¹³ *Ibid* 7.

¹⁴ Inland Revenue, *Changes to the disputes resolution process*, (Wellington, June 2010)
<<http://www.ird.govt.nz/technical-tax/general-articles/changes-to-disputes-res-proc.html>>.

¹⁵ Inland Revenue, 'SPS 10/04: Disputes resolution process commenced by the Commissioner of Inland Revenue' (2010) 22(11) *Tax Information Bulletin* (SPS 10/04) <<http://www.ird.govt.nz/technical-tax/standard-practice/disputes/sps-10-04-disputes-commenced.html>>; Inland Revenue, 'SPS 10/05 Disputes resolution process commenced by a taxpayer' (2010) 22(11) *Tax Information Bulletin* (SPS 10/05) <<http://www.ird.govt.nz/technical-tax/standard-practice/disputes/sps-10-05-disputes-bytaxpayer.html>>. Standard Practice Statements are issued by the Inland Revenue and describe how it will exercise its statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

*Disputes: a review – an officials’ issues paper*¹⁶ (the Issues Paper) in July 2010. The Issues Paper outlined a number of options to address concerns with the current process including conference facilitation, limiting CIR-initiated Notices of Proposed Adjustment (NOPA)¹⁷ to 30 pages and an opt-out option for taxpayers. NZLS and NZICA jointly formulated a response to the Issues Paper in September 2010 (the September Submission),¹⁸ which provided mixed support for the proposals outlined. In November 2010, the Taxation (Tax Administration and Remedial Matters) Bill 2010 (NZ)¹⁹ was introduced into Parliament incorporating proposals from the Issues Paper, including the abolition of the small claims jurisdiction of the TRA. This Bill was subsequently enacted in August 2011 as the *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ). The purpose of this article is not to consider the changes proposed in the Issues Paper and ultimately enacted in the *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ) except where they may impact on the resolution of small tax disputes discussed in this article.

A disputes procedure that is accessible to all taxpayers is vital to the proper functioning of the tax system. Tax compliance research²⁰ shows that a number of factors may influence taxpayers’ level of compliance, including taxpayers’ perceptions of the fairness of the tax system.²¹ One aspect of fairness²² is procedural justice, which ‘concerns the

¹⁶ Inland Revenue and the Treasury, *Disputes: a review – an officials’ issues paper* (Wellington, July 2010).

¹⁷ The NOPA is the first formal step in the disputes process and is issued by either the CIR or taxpayer to the other advising that an adjustment is sought to the taxpayer’s assessment, the CIR’s assessment or a disputable decision.

¹⁸ NZLS and NZICA, *Disputes: A Review, July 2010* (Wellington, 3 September 2010) <<http://www.nzica.com/Technical%20and%20business/Tax/Tax%20submissions/~media/NZICA/Docs/Tech%20and%20Bus/Tax/submissions/DisputesReviewAnOfficialsIssuesPaperJuly2010.ashx>>.

¹⁹ The NZLS and NZICA’s joint submission on the Taxation (Tax Administration and Remedial Matters) Bill 2010 (NZ), dated 11 February 2011, can be viewed at

<<http://www.nzica.co.nz/Technical%20and%20business/Tax/Tax%20submissions/~media/NZICA/Docs/Tech%20and%20Bus/Tax/other/Joint%20Final%20%20Submission%20re%20Taxation%20Tax%20Administration%20and%20Remedial%20Matters%20Bill%202010211.ashx>>.

²⁰ 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.

²¹ 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 and 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.

²² 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

perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from a decision maker.²³ In the New Zealand 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 the tax system) which ultimately may impact on the level of the taxpayer's on-going compliance.²⁴ This is especially important given the potentially large number of small tax disputes. According to the Richardson Committee two-thirds of tax disputes (at that time) were concerned with amounts of less than NZ\$10,000²⁵ - adjusted for inflation, this figure would be equivalent to NZ\$15,050 in 2011.²⁶ The September Submission observes that it would be uneconomic to take a dispute for this amount and that these small 'disputes do not disappear, they are left to fester'.²⁷

A number of studies²⁸ 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 to negative perceptions of the tax system and revenue authority. In addition, the current procedural requirements of the disputes resolution process make no concession for the size of the dispute or its complexity.²⁹ The September Submission, noting 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.'³⁰

The next section contains a brief overview of the disputes resolution process including the small claims process. Section 3 outlines concerns with the (former) small claims jurisdiction of the TRA. The purpose of this article is not to develop a definitive proposal for the resolution of small (or very small) tax disputes in New Zealand³¹ but to consider

and Compliance Behaviour: The Case of Salaried Taxpayers in Malaysia after Implementation of the Self-Assessment System' (2010) 8(1) *eJournal of Tax Research* 32, 35 <http://www.asb.unsw.edu.au/research/publications/ejournaloftaxresearch/Documents/paper3_v8n1.pdf>.

²³ 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.

²⁴ The Issues Paper 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, above n 16, 43.

²⁵ Organisational Review Committee, above n 1, [10.8].

²⁶ Based on the Reserve Bank of New Zealand *New Zealand Inflation Calculator* <<http://www.rbnz.govt.nz/statistics/0135595.html>> at 26 April 2011.

²⁷ NZLS and NZICA, above n 18, [3.28].

²⁸ Jackson and Milliron, above n 20, 139-140, Richardson and Sawyer, above n 20, 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 and 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* (University of Michigan Press, 1992) 259, as cited in Richardson and Sawyer, above n 20, 191.

²⁹ NZLS and NZICA, above n 18, [3.49].

³⁰ *Ibid* [2.3].

³¹ 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.

the approaches of Australia, Canada and the United Kingdom (UK) to resolving small disputes (Section 4), and highlight key principles from the survey of these three jurisdictions (Section 5). Concluding comments are made in Section 6.

II THE DISPUTES RESOLUTION PROCESS

While the disputes resolution process can be initiated by either the CIR or taxpayer issuing a NOPA, it is usually the CIR who will initiate the process. Accordingly this section is primarily written on the basis of that assumption, but with references to taxpayer initiated disputes as appropriate.

The disputes resolution process, which is essentially prescribed in Part IVA of the *Tax Administration Act 1994* (NZ)³² contains an extensive pre-assessment phase, comprising the exchange of the following documents by the taxpayer and Inland Revenue: NOPA,³³ Notice of Response (NOR),³⁴ Disclosure Notice³⁵ and Statements of Position (SOP).³⁶ These documents are designed to ensure that taxpayers and Inland Revenue operate on an 'all cards on the table' basis and to give the parties every possible opportunity to resolve their differences before heading down the path of judicial determination.³⁷ The procedures include set time frames, deemed acceptance of the other party's position if time frames are not met and the 'evidence exclusion rule', which essentially limits both parties in any subsequent litigation to the issues and propositions of law disclosed in their respective SOPs.³⁸

The process also includes administrative (non-legislated) procedures - the conference and adjudication phases. If the dispute has not been resolved after the NOR phase, a conference may be held to clarify and if possible, resolve the issues. From 1 April 2010³⁹ 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,

³²For more information on the current disputes resolution process refer SPS 10/04 and SPS 10/05: Inland Revenue, above n 15.

³³ New SPS 10/04 states that for disputes involving less than NZ\$5,000 of tax (excluding evasion and tax avoidance issues) CIR NOPA's should not exceed 5 pages: Inland Revenue, above n 15, 73. Where the dispute concerns one issue only (for example the imposition of penalties), CIR's NOPA should not exceed ten pages: *ibid*.

³⁴ A NOR is issued by the recipient of a NOPA if they disagree with the NOPA.

³⁵ The Disclosure Notice is issued by the CIR and triggers the application of the 'evidence exclusion rule'.

³⁶ The SOP is issued by both parties, providing an outline of the issues, facts, evidence and propositions of law with sufficient detail to support the position taken.

³⁷ Organisational Review Committee, above n 1, [10.11].

³⁸ Up until 28 August 2011 the evidence exclusion rule limited parties to the facts, evidence, issues and propositions of law disclosed in their respective SOPs. The *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ), with effect from 29 August 2011, amended the evidence exclusion rule so that it now limits parties to only the issues and propositions of law disclosed in their respective SOPs: *Tax Administration Act 1994* (NZ), s 138G.

³⁹ Inland Revenue, above n 14, 1. 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, according to SPS 10/4: Inland Revenue, above n 15, [263].

the dispute turns purely on the facts or it is considered the dispute can be resolved more efficiently at a hearing authority.⁴⁰

The revised SPSs⁴¹ provide that conferences can, at the option of the taxpayer, be attended by a facilitator who is an independent senior Inland Revenue officer with 'sufficient technical knowledge to understand and lead the conference meeting.'⁴² 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.'⁴³ In addition, the facilitator has the ability to determine when the conference phase has come to an end.

Disputes that remain unresolved following the issuing of SOPs are referred to Inland Revenue's Adjudication Unit in Wellington.⁴⁴ The unit's function is to consider the dispute impartially and independently of the audit function. If the adjudicator finds in the taxpayer's favour, the dispute will conclude. If the adjudicator agrees with all or any of the adjustments proposed by the CIR, an assessment consistent with these findings will be issued. At this stage the disputes resolution process has been completed. If the taxpayer still wishes to challenge the resulting assessment they may do so by commencing court proceedings within the two-month response period. The dispute could be heard in the TRA – either the general or (formerly) small claims jurisdiction – or the High Court.

Up until (and including) 28 August 2011, a small claims process is an available option for taxpayers who do not wish to proceed down the path of a full court hearing and comes within the jurisdiction of the TRA.⁴⁵ This option is available to taxpayers if the amount of tax in dispute is NZ\$30,000 or less, the facts are clear and not in dispute and no significant legal issues of precedent are involved.⁴⁶ A non-refundable NZ\$400 fee is payable to file a claim with the TRA small claims jurisdiction. The fee can be waived if the taxpayer is unable to pay or the issue is a matter of public interest.

Decisions of the TRA acting in its small claims jurisdiction are of no precedential value, are not published, and cannot be appealed. This forum may be elected in the taxpayer's NOPA or NOR (for a CIR-initiated dispute). If the taxpayer makes this election it is irrevocable. The CIR can challenge the taxpayer's election and apply to the TRA to have the proceedings transferred to either the general jurisdiction of the TRA or the High Court,⁴⁷ or the TRA may require the proceedings to be transferred to its general jurisdiction.⁴⁸ Effectively the election circumvents the remainder of the dispute resolution process and allows the dispute to proceed straight to the TRA acting in its small claims jurisdiction.

⁴⁰ Ibid [267] (SPS 10/04).

⁴¹ Ibid [234-238], [247-251] (SPS 10/04) and [165-169], [178] (SPS 10/05).

⁴² Ibid [234] (SPS 10/04) and [165] (SPS 10/05).

⁴³ Inland Revenue and the Treasury, above n 16, 7.

⁴⁴ The Adjudication Unit is part of Inland Revenue's Office of the Chief Tax Counsel.

⁴⁵ *Tax Administration Act 1994* (NZ), s 89E.

⁴⁶ Ibid s 89E(1).

⁴⁷ Ibid s 1380(1).

⁴⁸ Ibid s 1380(2).

The TRA, in its small claims capacity, cannot award costs for or against the taxpayer or CIR, with the limited exception in respect of costs of the TRA itself, where a challenge is dismissed as being frivolous, vexatious or made solely for delay.⁴⁹

The *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ) abolished the small claims jurisdiction of the TRA with effect from 29 August 2011.

III A 'LAME DUCK'? - THE OPERATION OF THE TRA SMALL CLAIMS JURISDICTION

There have been concerns expressed over the small claims process⁵⁰ - most significantly - that since its establishment in 1996 fewer than ten cases have been heard by the TRA acting in this capacity.⁵¹ The *Taxation (Tax Administration and Remedial Matters) Bill: Commentary on the Bill*⁵² (the Commentary on the Bill) states this is due to the fact that 'a dispute has to exhibit certain characteristics before a taxpayer can elect to use the small claims jurisdiction, and there is no right of appeal from the TRA acting in that capacity'.⁵³

Three 'characteristics' have clearly limited the use of the small claims process. First, there 'are very few tax cases involving no disputed facts. Often cases will turn on fact patterns, or the parties' interpretation of factual matters.'⁵⁴ Second, disputes with matters of legal significance that may have precedential value are not permitted to use the small claims process. Anecdotal evidence suggests that Inland Revenue considers most cases to be of precedential value and therefore ultimately cases involving small disputes are elevated to the TRA or the High Court.⁵⁵ The Issues Paper acknowledges even in cases where the facts are clear 'it is often at least arguable that there is a 'significant' legal issue at stake'.⁵⁶ Of these two 'characteristics', the September Submission somewhat cynically but aptly observes: 'If the facts are clear and undisputed and there is no significant legal issue, one could well ask what there is to dispute.'⁵⁷ Third, the threshold of NZ\$30,000 is too low and therefore excludes many disputes.

The second reason cited by the Commentary on the Bill for the paucity of cases heard in the TRA's small claims jurisdiction is the lack of appeal rights. How important appeal rights are to taxpayers with small tax disputes, especially very small disputes, is a moot

⁴⁹ *Taxation Review Authorities Act 1994* (NZ), s 22.

⁵⁰ See for example Keating, above n 10, 428; NZLS and NZICA, above n 9, 6-7; Jamieson, above n 10, 57.

⁵¹ Inland Revenue, *Taxation (Tax Administration and Remedial Matters) Bill: Commentary on the Bill* (Wellington, November 2010) 20, <<http://taxpolicy.ird.govt.nz/publications/2010-commentary-term/overview>>. The Tribunals Unit, Ministry of Justice, has advised the author that only four decisions were decided under the small claims jurisdiction between 2006 and 2009, all of which were decided on the papers.

⁵² *Ibid.*

⁵³ *Ibid* 20.

⁵⁴ Inland Revenue and the Treasury, above n 16, 44.

⁵⁵ Somewhat ironically, when recommending a fast-track process for small claims the Richardson Committee believed most small disputes (i.e. amounts of less than NZ\$10,000) were non-precedential: Organisational Review Committee, above n 1, [10.7].

⁵⁶ Inland Revenue and the Treasury, above n 16, 44.

⁵⁷ NZLS and NZICA, above n 18, [3.30].

point. In the author's view, arguably what this group wants is for their dispute to be heard by an independent party without delay and at minimal cost. It is unlikely, except perhaps for more 'sizeable' small disputes, that these taxpayers would rate the ability to appeal as important and indeed would also be unlikely to appeal a determination if they had the option – to do so would simply delay resolution of the dispute and lead to additional, potentially unwarranted costs (on the basis of the small amount in dispute). The Australian experience (which is outlined in Section 4.B of this article) - where only one appeal was lodged from a decision of its Small Taxation Claims Tribunal in the 2009-2010 year - supports this contention.⁵⁸ However, it is acknowledged that there are taxpayers who are litigious in nature and for whom appeal rights, irrespective of the amount of tax in dispute, would be important.

Proposals for reforming the process for resolving small tax disputes have been outlined in the Joint Submission⁵⁹ and, for small and very small tax disputes, the September Submission.⁶⁰ For small tax disputes, the Joint Submission recommends that taxpayers should be able to file a Notice of Claim and proceed directly to the small claims jurisdiction of the TRA without completing the disputes resolution process.⁶¹ This would reduce the potentially significant costs currently incurred both by the taxpayer and Inland Revenue in preparing the NOPA and NOR.

The September Submission, while supportive of the right for small disputes to opt-out, recommended the right to opt-out should be a legislated right (and also suggested a reduction in the level of formal documentation required).⁶² In the case of very small or 'micro' tax disputes – defined as tax in dispute of up to NZ\$50,000 - the September Submission recommends such disputes be heard by way of mediated hearing with unresolved matters either decided by an experienced tax arbitrator or the TRA (which could also run the mediation).⁶³ A consideration of the Joint Submission and September Submission proposals is beyond the scope of this paper.

The Issues Paper also addressed the resolution of small (and very small) tax disputes. It proposed the repeal of the small claims jurisdiction of the TRA on the basis that the (new) ability for taxpayers to truncate the disputes process – by opting-out of the process after the conference phase⁶⁴ - would eliminate the need for a specific taxpayer election to the small claims jurisdiction, because taxpayers will be able to begin a dispute at the earlier stage in the general jurisdiction of the TRA.⁶⁵ It 'will result in small claim disputants effectively having a 'fast track' to the TRA.'⁶⁶ Further, the Issues Paper suggested this route may be preferable for taxpayers as they will retain their appeal rights and receive the benefits of the facilitated conference.⁶⁷ The Issues Paper also

⁵⁸ AAT, *Annual Report 2009-10* (2010) 137 (Table A3.9) (AAT Annual Report).

⁵⁹ NZLS and NZICA, above n 9, 17-18.

⁶⁰ NZLS and NZICA, above n 18, [3.34], [3.40-3.41] and [3.54-3.57].

⁶¹ NZLS and NZICA, above n 9, 17-18.

⁶² NZLS and NZICA, above n 18, [3.33], [3.41].

⁶³ *Ibid* [3.54-3.57]. In addition, decisions would be non-precedential and taxpayers could elect for this form of dispute resolution without having to proceed through the NOPA/NOR or conference phase.

⁶⁴ For example, where the tax in dispute is less than NZ\$75,000.

⁶⁵ Inland Revenue and the Treasury, above n 16, 46.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

stated the ability for taxpayers to opt-out of the process after the conference (and new Inland Revenue care and management principles) would effectively deal with 'very small' claims, which are defined as disputes where the tax at issue is NZ\$5,000 or less.⁶⁸ Accordingly, in the view of the Issues Paper, there is no need for a specialist tribunal for very small tax disputes.⁶⁹ As already noted the small claims jurisdiction of the TRA was abolished by the *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ).

This opt-out process will be 'fast track' in comparison with the current disputes resolution process (through to adjudication). However, it will require taxpayers to take part in a (facilitated) conference, which will add time and cost for taxpayers and will still require taxpayers to file a NOPA or NOR – the same documents as used to commence complex tax disputes.

The Commentary on the Bill observes that the "TRA acting in its general jurisdiction is able to deal with small claims. Disputants can represent themselves and the TRA, as a commission of enquiry, has a large degree of flexibility in the formality or otherwise of hearings."⁷⁰ In the author's view, even with small disputes, taxpayers in the TRA will be facing an experienced Inland Revenue litigation team. Further, irrespective of the amount of tax in dispute, as TRA decisions (in the general jurisdiction) are precedential, Inland Revenue will ensure, utilising its vast pool of experienced staff, that their case is well prepared and presented. It will be rare for a taxpayer to have the confidence or ability to represent themselves and argue their case – if they did there would be 'an imbalance of power and knowledge'.⁷¹ In the event that they fail to meet the prescribed procedural requirements Inland Revenue may issue a default assessment and challenge the taxpayer's documentation in court.⁷² Further, simply because a dispute may only involve a small amount of money does not mean that the issues are not still complex – a point noted in the 2009-2010 Annual Report of the Australian Administrative Appeals Tribunals (AAT) (see Section 4.B).⁷³

Accordingly, it is likely that taxpayers with small tax disputes will still require the services of a legal advocate – in addition to their existing tax advisor, if they have one – to prepare and present their case. This significantly increases the costs of disputing the issue(s) potentially making small and very small tax disputes uneconomic.⁷⁴ As a result these taxpayers may still prefer to concede or settle with the CIR at an early stage.

⁶⁸ The NZLS and NZICA do not agree that a small tax sum dispute is one limited to no more than NZ\$5,000: NZLS and NZICA, *Disputes Resolution and Challenge Procedures: National Tax Disputes Process Subcommittee Report – NZLS and NZICA Response* (15 September 2009) 9, <[http://www.lawsociety.org.nz/_data/assets/pdf_file/0014/12830/Disputes_Resolution_and_Challenge_s_final_version\[D\].pdf](http://www.lawsociety.org.nz/_data/assets/pdf_file/0014/12830/Disputes_Resolution_and_Challenge_s_final_version[D].pdf)>.

⁶⁹ Inland Revenue and the Treasury, above n 16, 43.

⁷⁰ Inland Revenue, above n 51, 20.

⁷¹ NZLS and NZICA, above n 18, [3.51].

⁷² *Ibid* [3.50].

⁷³ AAT, above n 58, 26.

⁷⁴ In Appendix A of the Joint Submission NZLS and NZICA also observe with respect to the decline in tax cases proceeding to court: "This does not mean that people no longer have disputes with Inland Revenue for small amounts of tax – it just means that there is no forum for those cases to be heard, where the tax dispute cannot be heard for less than the cost of the disputes process.": NZLS and NZICA, above n 9, 28.

The Issues Paper considered the approaches of Australia, Canada and the UK to very small claims and rejected some form of tribunal or hearing authority to deal with such disputes for several reasons including adding extra costs to the system and the current inherent flexibility that exists in the TRA in setting its own processes.⁷⁵ In addition, the Issues Paper noted that the New Zealand approach to dispute resolution also differs from these countries as the bulk of the process is designed to take place before the assessment is issued.⁷⁶ Walker comments that these 'reasons given for dismissing the development in New Zealand of a very small claims forum for tax disputes do not appear insurmountable. Taxpayers may well see this as a missed opportunity for positive reform.'⁷⁷

The Issues Paper briefly canvassed the idea of increasing the existing threshold for hearing small claims in the TRA (to tax in dispute of less than NZ\$75,000) and permitting factual disputes to be heard in the small claims jurisdiction. This proposal is dismissed with little analysis in the Issues Paper, essentially on the grounds that the 'lack of appeal rights would make the election to the small claims jurisdiction more of a 'gamble' for taxpayers.'⁷⁸ However, the Issues Paper continues that to allow appeals from the small claims jurisdiction would mean the jurisdiction would differ little from the general TRA jurisdiction.⁷⁹ Again, the author questions the assertion that appeal rights are a significant consideration to taxpayers in this category – if they are an issue then taxpayers could simply elect to use the full dispute resolution process rather than the small claims process. It is acknowledged that the finality of decisions in the TRA small claims jurisdiction may be more an issue for Inland Revenue.

In October 2010, the Minister of Revenue announced that the recent operational changes made to the disputes resolution process will be reviewed in two years and should significant taxpayer concerns remain he may consider further legislative change at that time.⁸⁰

IV RESOLUTION OF SMALL TAX DISPUTES – A CONSIDERATION OF OTHER COMMON LAW COUNTRIES

A Introduction

The Richardson Committee identified the need for a specific fast-track non-precedential process to deal with small tax disputes - defined as those claims where the tax in

⁷⁵ Inland Revenue and the Treasury, above n 16, [8.38-8.39].

⁷⁶ Ibid [8.35-8.36].

⁷⁷ Jarrod Walker, *The Reform of the Tax Disputes Process: The Story Continues* (8 October 2010) <<http://www.bellgully.com/resources/resource.02654.asp>>.

⁷⁸ Inland Revenue and the Treasury, above n 16, 46.

⁷⁹ Ibid. The Issues Paper also considers but rejects making the small claims jurisdiction compulsory: ibid 47. For very small claims (i.e., where the tax at issue is NZ\$5,000 or less) the Issues Paper canvasses using the Disputes Tribunal (ibid 47-48) or establishing a specialist tribunal (ibid 48-50) to resolve these disputes. Both these options are rejected.

⁸⁰ Honourable Peter Dunne, 'Keynote address to the 2010 NZICA Tax Conference' (Speech delivered at the New Zealand Institute of Chartered Accountants Tax Conference, Auckland, October 2009) <<http://taxpolicy.ird.govt.nz/news/2010-10-29-nzica-conference>>.

dispute was less than NZ\$10,000⁸¹ (equivalent to NZ\$15,050 in 2011 adjusted for inflation).⁸² It noted simpler, 'fast track' procedures for small claims were available in the tax courts in the United States and Canada and a recommendation had been made for the establishment of a small taxation claims tribunal to deal with small tax disputes in Australia. According to the Richardson Committee, two-thirds of all tax disputes at that time concerned amounts less than this threshold and most would be non-precedential.⁸³ The Richardson Committee accordingly saw the resolution of small tax disputes as very important, and clearly envisaged a significant number of disputes being heard through a streamlined, focused process. The September Submission also favourably refers to examples used in Australia, Canada and the UK to resolve very small tax cases.⁸⁴ This section of the article outlines the approaches to resolving small tax disputes in these three jurisdictions. Key findings from the survey of the three jurisdictions are summarised in 'Table A: Small Tax Disputes - A Comparison' at the conclusion of this section.

In this part of the article the author uses the terms 'taxpayer', 'applicant' and 'appellant' interchangeably and the relevant revenue authority title and 'respondent' interchangeably as invariably (but not always), the appeal proceedings will be commenced by the taxpayer.

B Australia and the Small Taxation Claims Tribunal

The Small Taxation Claims Tribunal (STCT), which is part of the Taxation Appeals Division of the AAT,⁸⁵ commenced operation on 1 July 1997. The STCT, which was established under Part IIIAA of the *Administrative Appeals Tribunal Act 1976* (Cth)⁸⁶ is **independent** of the Australian Taxation Office (ATO). It was created 'to provide a cheaper and more informal means for taxpayers to obtain merits review of taxation decisions'.⁸⁷

The STCT can review decisions of the ATO:

- if the amount of tax in dispute is less than A\$5,000⁸⁸ (equivalent to NZ\$6,560),⁸⁹ or
- for refusing an individual's request to be released from paying a tax debt (irrespective of the amount involved).⁹⁰

⁸¹ Organisational Review Committee, above n 1, [10.7], [10.11].

⁸² Based on the Reserve Bank of New Zealand *New Zealand Inflation Calculator*, <<http://www.rbnz.govt.nz/statistics/0135595.html>> at 26 April 2011.

⁸³ Organisational Review Committee, above n 1, [10.7].

⁸⁴ NZLS and NZICA, above n 18, [3.44-3.46].

⁸⁵ The AAT was established by the *Administrative Appeals Tribunal Act 1976* (Cth) and commenced operations on 1 July 1976.

⁸⁶ *Administrative Appeals Tribunal Act 1976* (Cth), ss 24AA to 24AD.

⁸⁷ AAT, *Small Taxation Claims Tribunal Practice Direction*

<<http://www.aat.gov.au/PracticeDirectionsAndGuides/SmallTaxationClaimsTribunalPracticeDirection.html>>.

⁸⁸ In cases where the tax in dispute exceeds this threshold, the matter is heard by the AAT's Taxation Appeals Division.

⁸⁹ Using a cross rate A\$1 = NZ\$1.312,

<http://money.msn.co.nz/currencyconverter.aspx?cmp=gl_nz1_CurrencyCalculator&mch=sem> at 5 January 2011.

Before the STCT can review these decisions, the taxpayer must have requested the ATO reconsider the decision again by lodging an objection. The STCT can review the decision made by the ATO on the objection.

Applications for the dispute to be heard by the STCT can be made by the taxpayer to the STCT, in either an application form⁹¹ or a letter,⁹² along with a copy of the ATO decision they are disputing and can be lodged electronically.⁹³ If the amount of tax in dispute is not stated in the application the review will be conducted by the AAT's Taxation Appeals Division. Applications to the STCT must be made within 60 days of receiving the ATO's objection decision and must be accompanied by a non-refundable fee of A\$77 (equivalent to NZ\$100.99).⁹⁴ In the event that the time limit for making an application has expired the taxpayer may apply for an extension of time.

Within 14 days of receiving notice of a STCT application, the ATO will lodge with the Tribunal the documents required under section 37 of the *Administrative Appeals Tribunal Act 1976* (Cth) (Section 37 Documents) and send copies of these documents to the applicant.⁹⁵ These documents comprise those papers which are relevant to the ATO's decision. The applicant must ensure that any relevant information, such as financial records or other documents not included in the Section 37 Documents, is available to bring to the first conference, or make arrangements to allow the ATO to inspect the documents before the first conference if it is impractical to bring the information to the first conference.

In most cases, the first step in a review is a pre-trial [conference](#) which is an informal meeting conducted by the AAT (before a Tribunal member or Conference Registrar) with the taxpayer (with representation if necessary) and an ATO officer. It will be held between four and six weeks after the taxpayer's application is lodged.⁹⁶ The conference is an opportunity for discussion of the issues in dispute, the facts surrounding those issues, any relevant information that the applicant has brought and the need to obtain any further evidence. The STCT will, where possible, attempt to help the parties reach an agreement about the resolution of the case. If the dispute is not resolved at the first conference, a hearing date will be set (even if a second conference is to take place). The hearing date will be within 6 weeks of the first conference.

⁹⁰ The STCT can also review decisions made by the ATO refusing a request for an extension of time within which to make an objection if the taxpayer is late in filing the objection.

⁹¹ AAT, *Application for Review of Decision* <http://www.aat.gov.au/docs/form1_Nov10.pdf>. The September Submission observes that the form fits on two sheets of A4 paper: NZLS and NZICA, above n 18, [3.44].

⁹² The letter must include the taxpayer's personal details (name, address, telephone number and date of birth), the decision reference, the date of the decision and the date it was received by the taxpayer and brief reasons why the taxpayer believes the decision is wrong, and the amount of tax in dispute (if the taxpayer want the STCT to review a decision about how much tax must be paid).

⁹³ In the 2009-2010 income tax year, 27 (46 percent) of the 59 applications lodged were concerned with income tax (other than tax schemes) followed by FBT (14 applications, 24 percent): AAT, above n 58, 127-128 (Table A3.1).

⁹⁴ Using a cross rate A\$1 = NZ\$1.312, MSN, above n 89. From 1 November 2010, the fee cannot be waived in the case of financial hardship: AAT, *Changes to AAT fees* <www.aat.gov.au>.

⁹⁵ See further AAT, *Practice Direction relating to Section 37 of the Administrative Appeals Tribunal Act 1976* <<http://www.aat.gov.au/PracticeDirectionsAndGuides/Section37PracticeDirection30April2007.htm>>.

⁹⁶ AAT, *The Small Taxation Claims Tribunal 3*, <<http://www.aat.gov.au/ApplyingToTheAAT/SmallTaxationClaims.htm>>.

Normally only one conference is held. However, a second conference may take place if the Tribunal member or Conference Registrar conducting the first conference believes there is a real prospect of resolution if a second conference occurs and/or special circumstances exist. Any second conference will take place within 4 weeks of the first conference. Alternatively, another type of dispute resolution process may be held, such as mediation,⁹⁷ conciliation case appraisal or neutral evaluation.⁹⁸ A consideration of alternative dispute resolution (ADR) for small tax disputes, such as mediation and arbitration, is beyond the scope of this paper.

The AAT Annual Report observes that in the 2009-2010 year 95 percent of applications were finalised at the conference stage without a hearing.⁹⁹ This compares favourably with 84 percent and 72 percent in the 2008-2009 and 2007-2008 years, respectively.

If the conference is unsuccessful in resolving the dispute, the matter will be heard by the STCT by way of a public, but informal, hearing (unless the taxpayer satisfies the SCTC that the hearing should be in private). In certain circumstances, some of the information might also be made public. The AAT can order that information be kept confidential if there is good reason to do so.

Certain procedures may be adopted by the STCT at the hearing to simplify proceedings and reduce the need to call witnesses at a hearing.¹⁰⁰ At the discretion of the presiding member (and the other party's consent), part of any hearing may be conducted either by telephone or video link. Decisions of the STCT are delivered orally at the end of the hearing. Written reasons will be provided if either party so requests.¹⁰¹ The taxpayer only bears their own costs – not those of the ATO - if their appeal is unsuccessful.

In the 2009-2010 year the AAT Annual Report indicates that 59 applications were lodged with the STCT (compared with 97 and 94 applications in the 2007-2008 and

⁹⁷ With respect to mediation, the Small Taxation Claims Tribunal Practice Direction states: 'If the application does not resolve at, or shortly after the first conference, a party may [within 2 weeks of the first conference] request that mediation take place. The Tribunal may also recommend to the parties that mediation take place.': AAT, above n 87, 2. The consent of both parties is required before mediation can occur.

⁹⁸ AAT, above n 96, 3. For information concerning alternative dispute resolution see AAT, *Alternative Dispute Resolution* <<http://www.aat.gov.au/ApplyingToTheAAT/AlternativeDisputeResolution.htm>>.

⁹⁹ AAT, above n 58, 133 (Table A3.4).

¹⁰⁰ The Practice Direction advises one of the following procedures may be adopted at the hearing if it is appropriate in the circumstances of the particular application: (i) 'Statement of Agreed Facts - Where the application involves a question of law and/or statutory interpretation and the applicant is represented, the Tribunal may require the parties to lodge a statement of agreed facts signed by both parties 7 days prior to the hearing. At the hearing, any oral evidence or cross-examination will only be about the facts in dispute'; **or** (ii) 'Statement of Facts Not in Dispute - Where the applicant is not represented and there is no substantial dispute as to the facts, the Tribunal may require the ATO to prepare a document which sets out all the facts which the ATO does not dispute. The ATO would be required to lodge the document with the Tribunal and give it to the applicant 7 days prior to any hearing'; **or** (iii) 'Witness Statements - Where there is no substantial agreement as to the facts, the Tribunal may require the parties to prepare written witness statements. The parties would be required to lodge the statements with the Tribunal and give them to the other party 7 days prior to any hearing. The statement will be treated as the evidence of the witness and cross-examination will only be about the facts in dispute.': AAT, above n 87, 2.

¹⁰¹ *Administrative Appeals Tribunal Act 1976* (Cth), s 43(2A).

2007-2008 years, respectively).¹⁰² The STCT finalised 98 applications in 2009-2010 (83 and 115 in the two preceding periods) with 31 applications shown as 'current' at the end of the reporting period (compared with 68 and 55 in the 2008-2009 and 2007-2008 periods, respectively).¹⁰³

The taxpayer or Commissioner of Taxation may appeal to the Federal Court against a STCT decision on a point of law. According to the AAT Annual Report one appeal was lodged with the Federal Court from a decision of the STCT. This compared with two in the prior year and no appeals in the 2007-2008 year.¹⁰⁴ These statistics may add weight to the author's contention that appeal rights are not an important issue for taxpayers with small tax disputes. With respect to outcomes of appeals heard, in 2009-2010 the only appeal reported was discontinued.¹⁰⁵ In the preceding year the only appeal heard was dismissed. No outcomes of appeals were reported for 2007-2008.

The AAT states that the STCT aims to finalise applications within 12 weeks of lodgment.¹⁰⁶ In the 2009-2010 reporting year the Annual Report notes that 22 percent of applications met this standard.¹⁰⁷ This was an increase from 18 percent (2008-2009) and 17 percent (2007-2008), although well short of the desired standard.¹⁰⁸ The Annual Report tellingly observes that:

It is the Tribunal's experience that applications dealt with in the Small Taxation Claims Tribunal cannot necessarily be completed faster than other types of taxation reviews. Although the amount of tax in dispute may not be large, the issues in dispute can be complex and the parties may require additional time to gather relevant material.¹⁰⁹

C The United Kingdom and the First-tier Tribunal

1 Introduction

As part of a programme of tribunal reform the *Tribunals, Courts and Enforcement Act 2007* (UK) created a new tribunal system to replace some 70 tribunals dealing with a wide range of matters.¹¹⁰ The tribunals are independent, judicial bodies. Cases may be heard by either legally qualified members, non-legally qualified members or a combination of the two. The overriding objective of the tribunals is to deal with cases

¹⁰² AAT, above n 58, 23 (Chart 3.6). The Annual Report acknowledges that lodgements were significantly lower in the 2009-2010 year with a marked decline in applications concerning release from taxation liabilities: at 22. The number of applications lodged in the STCT compares with 994 lodgements in the Taxation Appeals Division, or 6 percent of such lodgements: at 21 (Chart 3.2).

¹⁰³ Ibid 23 (Chart 3.6).

¹⁰⁴ Ibid 137 (Table A3.9).

¹⁰⁵ Ibid 139 (Table A3.11).

¹⁰⁶ AAT, above n 96, 3.

¹⁰⁷ AAT, above n 58, 26 (Table 3.10).

¹⁰⁸ Ibid 26 (Table 3.10).

¹⁰⁹ Ibid.

¹¹⁰ HMRC, *ARTG1010 - Introduction: Background*

<<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG1010.htm>>. For an overview of the changes see Robert Carnwath, *The Senior President of Tribunals' Annual Report: Tribunals Transformed* (2010) <www.tribunals.gov.uk>.

fairly and justly.¹¹¹ The administration of tribunals, including making arrangements for hearings, is carried out by the Tribunals Service which is part of the UK Ministry of Justice.

The *Tribunals, Courts and Enforcement Act 2007* (UK) introduced the framework for a new two-tier tribunal system - the First-tier Tribunal 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 First-tier Tribunal (also known as the Tax Chamber) in the first instance.¹¹² A small number of appeals (i.e. cases coming within the Complex category) may be transferred to the Upper Tribunal (also known as the Tax and Chancery Chamber).¹¹³ The tribunal system brings together matters previously heard by the General Commissioners¹¹⁴ and Special Commissioners,¹¹⁵ the VAT & Duties Tribunal¹¹⁶ and the Tribunal constituted under s 706 of the *Income and Corporation Taxes Act 1988* (UK).¹¹⁷

Decisions of the First-tier Tribunal may be appealed to the Upper Tribunal¹¹⁸ on a point of law if the First-tier Tribunal or Upper Tribunal gives permission (or leave, in Northern Ireland).¹¹⁹

2 *The review process*¹²⁰

From 1 April 2009, to coincide with the new tribunal system, Her Majesty's Revenue and Customs (HMRC) introduced a new optional statutory review process for

¹¹¹ HMRC, *ARTG8020 - First-tier and Upper Tribunals: Introduction: Tribunals*, <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8020.htm>>.

¹¹² Tax credit appeals are dealt with in the Social Entitlement Chamber.

¹¹³ For such cases to be transferred both the parties must agree and the consent of the President of the Tax Chamber and of the President of the Finance and Tax Chamber (in the Upper Tribunal) is also required: *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009*, r 28.

¹¹⁴ The General Commissioners heard the most straightforward appeals against HMRC decisions in relation to direct taxation.

¹¹⁵ The Special Commissioners were all legally qualified and heard more complex direct taxation cases. There were 25 such Commissioners. Decisions of the Special Commissioners are not binding on the First-tier Tribunal: see for example *Frossell* [2010] TC 00382.

¹¹⁶ This Tribunal dealt with appeals against decisions of HMRC in relation to indirect taxation, largely VAT, excise and customs duties.

¹¹⁷ This Tribunal heard matters concerning the anti-avoidance provisions of s 706.

¹¹⁸ In early 2010 there were 50 tax appeals to be heard by the Upper Tribunal with a small number of judicial reviews pending: Carnwath, above n 110, 45.

¹¹⁹ The Upper Tribunal is a superior court of record and therefore has the same status as the High Court. It replaced the High Court in England and Wales for tax appeals and will also consider appeals in Scotland and Northern Ireland. Its decisions are binding on lower tribunals and authoritative on the interpretation of the law. Appeals against the decisions of the Upper Tribunal are made to the relevant appellate court on a point of law and with permission (or leave, in Northern Ireland) from the Upper Tribunal or relevant appellate court. Either the taxpayer or HMRC may appeal decisions of the Upper Tribunal to the relevant appellate court (Court of Appeal, or Court of Appeal in Northern Ireland, or the Court of Session in Scotland) in certain circumstances.

¹²⁰ See HMRC, *ARTG2010 - Reviews and appeals overview: Process for direct taxes* <<http://www.hmrc.gov.uk/manuals/artgmanual/artg2010.htm>>. Direct taxes include those listed in HMRC, *ARTG1060 - Introduction: Guidance - direct taxes* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG1060.htm>>. For indirect taxes see HMRC, *ARTG2020 - Reviews and appeals overview: Process for indirect taxes* <<http://www.hmrc.gov.uk/manuals/artgmanual/artg2020.htm>>.

appealable tax decisions, with the aim of resolving disputes more quickly and cost-effectively.¹²¹ Taxpayers who disagree with a direct tax decision of the HMRC have 30 days from the date of the decision to appeal in writing to HMRC against it (and include an explanation of what they disagree with and their reasons). 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.¹²²

If discussions between the taxpayer and HMRC do not resolve the matter or if discussions are not appropriate or possible, HMRC may offer a review. The taxpayer has 30 days from the date of the review offer to accept it or to send the appeal to the tribunal. If the taxpayer takes no action the dispute is treated as settled by agreement.

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 (by a notice of appeal).¹²³ 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 45 day (or other agreed) review period has expired.

The processes for disputing an indirect tax decision of the HMRC are similar to direct tax decisions.¹²⁴ If the taxpayer wishes to dispute an indirect tax decision, they can either accept HMRC's offer of a review or appeal to the tribunal within 30 days of the HMRC decision letter.¹²⁵

If a taxpayer wants their case heard by the tribunal and it is a direct tax case they must first have appealed to HMRC, but in a crucial change from the previous process, can then appeal immediately to the tribunal. "This puts the taxpayer in control of his own appeal and he can decide whether (and when) he wants to take his appeal to the tribunal so that the judicial process can commence."¹²⁶ Similarly, HMRC cannot request a direct tax appeal to be considered by the tribunal; rather, to progress the case HMRC must offer the taxpayer a review. Appeals against indirect decisions must (as under the previous system) still be made directly to the tribunal.

¹²¹ The review existed previously for some indirect taxes and, informally, for VAT purposes.

¹²² HMRC, above n 120 (*ARTG2010*). According to HMRC, in the 12 months from 1 April 2009, 30,530 customers asked for a review by HMRC: HMRC, *HMRC's review process - the first twelve months* <<http://www.hmrc.gov.uk/complaints-appeals/review-process.htm>>. The majority (81 percent) were unrepresented taxpayers. Approximately 75 percent of the reviews concerned penalties such as for filing their tax return late.

¹²³ A seven-page Notice of Appeal form can be downloaded from the Tribunals Service website for this purpose, see <http://www.tribunals.gov.uk/tax/Documents/NoticeofAppeal_Jun10.pdf>.

¹²⁴ HMRC, *How to appeal against an HMRC decision - indirect tax* <<http://www.hmrc.gov.uk/complaints-appeals/how-to-appeal/indirect-tax.htm>>.

¹²⁵ *Taxes Management Act 1970 (UK)*, s 49F. The HMRC notes that even close to the tribunal hearing it may be appropriate to settle the case by agreement, for example if new information is provided by the taxpayer: HMRC, *ARTG8440 - First-tier and Upper Tribunals: Preparing for tribunal: Communication with the customer* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8440.htm>>.

¹²⁶ Penny Hamilton, *Basically the same?* 1, <<http://www.taxation.co.uk/taxation/articles/2010/07/14/20702/basically-same>>.

The review is carried out by an HMRC officer who has not previously been involved in the original decision. Taxpayers can provide additional information about their case during the review. The review conclusion letter must set out HMRC's reasoning and conclusions on the matters subject to the review.¹²⁷

3 *The First-tier Tribunal*

(a) *Introduction*

In most cases the taxpayer's appeal will be considered by the First-tier Tribunal. In certain circumstances, the decision of the First-tier Tribunal 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 First-tier Tribunal and Upper Tribunal,¹²⁸ hear cases in the first instance, without the case being heard by the First-tier Tribunal.¹²⁹

There is no fee charged for filing an appeal with the First-tier Tribunal. It is intended that the tribunal system is accessible¹³⁰ (hence there is a network of hearing centres across the UK).

In order to manage the cases before them the tribunals have published procedural rules. The relevant rules for the Tax Chamber are contained in *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK).¹³¹ The overriding objective of *The*

¹²⁷ Statistics show for the period 1 April to 31 December 2009, in approximately 53 percent of cases, HMRC's original decision was cancelled, indicating that internal reviews may be a useful tool for taxpayers wanting to avoid litigation: Maryanna Sharrock and Catherine Robinson, 'Comment: Property & Tax – how to get the best from Tax Tribunals' (August 2010) *Hedgeweek* <<http://www.hedgeweek.com>>. Bullock observes that the HMRC review works well where one of the parties 'clearly "got it wrong" or where the dispute is a question of judgment (eg, the appropriate level of a penalty) where a slightly moderated position by HMRC can result in a taxpayer accepting the revised position and consequently withdrawing the appeal': James Bullock: 'Tax disputes: the way forward' (2 August 2010) *Tax Journal 2*, <<http://www.taxjournal.com/tj/articles/tax-disputes-way-forward>>. However, he comments, 'where positions are more entrenched – or quite simply the substance of the appeal is more of a "grey area", it is difficult to see how such a Review is likely to overturn a position which has already been the subject of substantive enquiries, correspondence or even negotiations.': *ibid*, 3. The CCH (UK) Tax Reporter records similar concerns of certain commentators: 'the reviews will not allow the reviewers to step outside established HMRC policy, even if it is widely thought that that policy would be overturned by a Tribunal.': CCH Online, '[190-390] Scope of statutory reviews' *Tax Reporter*, <[http://www.cchinformation.com/CCH/Gateway.dll?f=templates\\$fn=default.htm\\$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2Fenu](http://www.cchinformation.com/CCH/Gateway.dll?f=templates$fn=default.htm$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2Fenu)>.

¹²⁸ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), rr 23(5)(b) and 28(1).

¹²⁹ This route may be chosen where a case is likely to be litigated to the (UK) Court of Appeal (and beyond).

¹³⁰ *Tribunals, Courts and Enforcement Act 2007* (UK), s 22(4). At the beginning of 2009, and before the start of the new tax tribunals and HMRC processes, there were a number of outstanding tax cases many of which went back ten years: Carnwath, above n 110, 52.

¹³¹ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK) are divided into four parts. Part 1 provides some introductory rules, including the concept of the 'overriding objective'. Part 2 provides the general rules concerning the handling of cases before the Tribunal. Part 3 contains the rules that deal with the actual handling of cases by the Tribunal. Part 4 deals with the procedures that follow the issue of a decision by the Tribunal.

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (UK) is to enable the First-tier Tribunal to deal with cases 'fairly and justly'.¹³² This includes:

- a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- b) avoiding unnecessary formality and seeking flexibility in the proceedings ...
- c) avoiding delay, so far as compatible with proper consideration of the issues.¹³³

This tribunal has a wide power under *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK) to 'regulate its own procedure',¹³⁴ bearing in mind the injunction for 'avoiding unnecessary formality and seeking flexibility in the proceedings.'¹³⁵ The First-tier Tribunal has extensive case management powers, including deciding the form of any hearing and the category of a case.¹³⁶ It may admit evidence whether or not it would be admissible in a civil trial in the UK.¹³⁷ The First-tier Tribunal also has the authority to suggest to the parties to the dispute that they consider ADR and arbitration.¹³⁸

All First-tier Tribunal cases are heard by legally-qualified Tribunal judges and suitably qualified Tribunal members. Taxpayers can be represented by an advisor at the hearing or, if they are unrepresented, may take along a friend for support. In most cases HMRC's case will be presented by a member of HMRC staff. In more complicated direct tax cases, and in the majority of indirect tax cases, HMRC's case will be presented by counsel.

(b) The four categories of cases

When the tribunal receives a notice of appeal¹³⁹ it will, in line with *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), allocate the case to one of the following categories:

- Default Paper cases, which are usually disposed of without a hearing;
- Basic cases, which will usually be disposed of after an informal hearing and with minimal exchange of documents before the hearing;

¹³² *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 2(1).

¹³³ Ibid r 2(2).

¹³⁴ Ibid r 5(1).

¹³⁵ Ibid r 2(2)(b).

¹³⁶ Ibid r 5(1)-(3). See HMRC, *ARTG8500 - First-tier and Upper Tribunals: Preparing for tribunal: Case management powers* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8500.htm>>.

¹³⁷ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 15(2)(2). CCH observes: 'This means, for example, that witnesses of fact will be able to give opinion evidence (i.e. evidence that should ordinarily come from expert witnesses). It is suggested, however, that the Tribunal would not necessarily give evidence admissible under this rule its full weight.': CCH Online, '[190-540] Rule 15 - evidence and submissions' *Tax Reporter* <[http://www.cchinformation.com/CCH/Gateway.dll?f=templates\\$fn=default.htm\\$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclint=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu](http://www.cchinformation.com/CCH/Gateway.dll?f=templates$fn=default.htm$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclint=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu)>.

¹³⁸ Ibid r 3(1).

¹³⁹ The notice of appeal must include: details of the decision appealed against, a copy of the decision appealed against, a copy of any reasons given for the decision, grounds of appeal, the result the taxpayer is seeking; the taxpayer's name and address (and that of their agent if relevant): *ibid*, r 20(2), (3).

- Standard cases, which will usually be subject to more detailed case management and be disposed of after a hearing (and have not been classified under one of the other three case categories); and
- Complex cases. Cases are categorised as complex if the tribunal considers the case will:¹⁴⁰ (a) require lengthy or complex evidence or a lengthy hearing; (b) involve a complex or important principle or issue; or (c) involve a large financial sum.¹⁴¹

The tribunal may, at any time, decide to allocate the case to a different category.¹⁴² In addition, while – somewhat surprisingly – the standard notice of appeal form does not provide for the appellant to indicate to which category the appeal should be allocated, HMRC or the taxpayer can apply to the tribunal for the case to be allocated to a different category.

While, as noted, 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.¹⁴³

(i) Default Paper cases

Under this category the tribunal hears appeals against:

- SA (self-assessment) and CTSA (corporation tax self-assessment) fixed filing penalties;
- Employer end of year late return penalties;
- Construction industry late return penalties;
- Class 2 NIC (National Insurance Contributions) late notification penalties
- Income tax surcharges; and
- Applications for penalties for failure to make a return (*Taxes Management Act 1970* (UK), s 93(3)).¹⁴⁴

Default Paper cases are 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)¹⁴⁵ may request the case be decided at a hearing with the parties present. If such a request is made the tribunal must hold a hearing to decide the issue - in which case, the appropriate rules and procedures for the Basic category will apply. The tribunal may also, on its own initiative, direct that a hearing takes place.¹⁴⁶

The HMRC is normally required to send a statement of case to the tribunal and a copy to the taxpayer within 42 days after the Tribunals Service sent it the taxpayer's notice of appeal. The statement of case must outline the legislative provision under which the

¹⁴⁰ Ibid r 23(4).

¹⁴¹ Ibid r 23.

¹⁴² Ibid r 23(3).

¹⁴³ Ibid r 29(1).

¹⁴⁴ HMRC, ARTG8350 - *First-tier and Upper Tribunals: Preparing for tribunal: Categories of tribunal case* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8350.htm#IDA2WHCH>>.

¹⁴⁵ HMRC, ARTG8370 - *First-tier and Upper Tribunals: Preparing for tribunal: Default Paper cases* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8370.htm>>.

¹⁴⁶ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 26.

original decision was made, and HMRC's position on the issues in dispute (including copies of documents where appropriate).¹⁴⁷

The taxpayer may send to the tribunal a response to HMRC's statement of case - with arguments outlining the taxpayer's response to it and any other relevant information and documents) - within 30 days (unless an extension is granted) of the date HMRC sent a copy of its statement of case to the taxpayer. The response may also include a request for the case to be dealt with at a hearing. The 30-day timeframe has been subject to criticism as 'HMRC communications regularly arrive a week or so after the day which appears on their covering letter. It would have been better if the rule operated by reference to the date that the appellant received the respondent's statement of case.'¹⁴⁸

Neither HMRC nor the taxpayer can send any further evidence or arguments after this point (unless the tribunal gives permission for them to do so). In most cases, the taxpayer will receive a decision in writing as soon as possible - within 28 days - unless the appeal is going to a hearing.

This category is essentially concerned with penalties imposed on taxpayers rather than substantive legal issues. Taxpayers have welcomed the Default Paper category as it offers a chance to have a dispute decided by the tribunal without a hearing.¹⁴⁹

(ii) Basic cases

The following types of appeal or application may be heard in the Basic category provided the case does not fall within the Default Paper category:

- Penalties for late filing and late payment, including daily penalties;
- Penalties for incorrect returns, except appeals against penalties for deliberate action whether concealed or not;
- Cases where an appeal is also brought against the assessment of the tax to which the return relates, and indirect tax cases;
- Penalties in indirect taxes where the customer is appealing on the basis of reasonable excuse;
- Decisions on construction industry scheme gross payment status Regulations 2005; and
- Information notices.¹⁵⁰

In addition, the following applications also come within the Basic case category, applications for:

- Permission to make a late appeal;
- Postponement of the payment of tax pending resolution of an appeal; and

¹⁴⁷ Ibid r 25(2).

¹⁴⁸ CCC Online, '[190-610] Rule 26 - Default paper cases' *Tax Reporter*
<[http://www.cchinformation.com/CCH/Gateway.dll?f=templates\\$fn=default.htm\\$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu](http://www.cchinformation.com/CCH/Gateway.dll?f=templates$fn=default.htm$3.0&s=6&GLOBAL=G&G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3F%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu)>.

¹⁴⁹ Hamilton, above n 126, 5.

¹⁵⁰ HMRC, above n 144.

- A direction that HMRC close an enquiry (e.g. applications under s 28A(4) and para 7(5) Schedule 1A *Taxes Management Act 1970* (UK) and para 33 Schedule 18 *Finance Act 1998* (UK)).¹⁵¹

In most cases after the notice of appeal¹⁵² 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,¹⁵³ however, 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'¹⁵⁴ after becoming aware of the grounds and in enough detail for the customer to respond to those grounds at the hearing. Hamilton observes:

The words 'reasonably practicable' are hardly precise and an appellant faced with additional grounds at the last minute will have to rely on the wide discretion of the tribunal to ensure that the appeal is dealt with 'fairly and justly' in accordance with the overriding objective [of *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 2)].¹⁵⁵

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 in an informal manner. The president of the First-tier Tribunal, Sir Stephen Oliver has stressed that 'the "turn up and talk" approach of the General Commissioners [is] encouraged'¹⁵⁶ 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.

The tribunal may make any directions it thinks are appropriate to fairly dispose of a case, for example in some complex cases such as construction industry scheme gross status appeals which may require more intensive procedures than provided for in the Basic category.¹⁵⁷ The brief discussion of the UK dispute processes in the Issues Paper focuses on the Default Paper and Basic categories of cases.

*(iii) Standard cases*¹⁵⁸

Cases not categorised as Default Paper, Basic or Complex will be categorised as Standard cases by the tribunal. Standard cases are heard by a judge sitting alone or with one or other judges or members (who may be legally qualified).

¹⁵¹ Ibid.

¹⁵² Overall, compared with notices of appeal for Standard and Complex cases, notices of appeal for Basic cases may be brief and undetailed.

¹⁵³ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 24(2).

¹⁵⁴ Ibid r 24(4)(a).

¹⁵⁵ Hamilton, above n 126, 4.

¹⁵⁶ Ibid 5.

¹⁵⁷ HMRC, above n 144.

¹⁵⁸ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 23(2)(c).

(iv) Complex cases

As outlined, cases are categorised 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.¹⁵⁹

Commentators have expressed concern that there is no official guidance on the application of these criteria, some of which are vague.¹⁶⁰ The Upper Tribunal in *Capital Air Services Ltd v HMRC*¹⁶¹ made it clear that these criteria are to be determined by the First-tier Tribunal.¹⁶²

For Standard and Complex cases, within 60 days of the tribunal sending the taxpayer's notice of appeal to HMRC, the revenue authority must send a statement of case to the tribunal (and a copy to the taxpayer). The statement of case will contain similar information to that described above for the Default Paper category, though the facts and issues will obviously be more complex.

The parties have 42 days from the date the statement of case is sent to provide the tribunal and other party a list of documents they intend to rely upon.¹⁶³ The tribunal may make any direction at this time as to what is required from the parties. The hearing will be more formal than for Basic cases. The taxpayer will receive a decision in writing within 28 days of the hearing.

(c) Hearings, decisions and costs

The tribunal may give its decision orally at a hearing.¹⁶⁴ Whether there has been a hearing or not the tribunal must provide a decision notice to the parties within 28 days of making the decision (or as soon as practicable thereafter).¹⁶⁵ The decision notice must state the Tribunal's decision and, unless the parties agree it is unnecessary, include a summary of the findings of fact and the reasons for the decision, or be accompanied by full written findings of fact and reasons for the decision.¹⁶⁶ A party

¹⁵⁹ Ibid r 23(4).

¹⁶⁰ Matthew Hodkin and David Ward, 'Capital Air Services and 'Complex' cases' (8 November 2010) *Tax Journal* 2, <<http://www.taxjournal.com/tj/print/23874>>.

¹⁶¹ *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (CTC).

¹⁶² In this case the Upper Tribunal was asked to consider these criteria after the First-tier Tribunal held the appellant's case did not fall within the criteria and could not be allocated as a Complex case. The Upper Tribunal stated it was for the First-tier Tribunal to assess whether any of the criteria were satisfied – a judgment that would differ between judges – and accordingly there was not a single 'right' answer that could be ascertained objectively as a matter of law: *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (CTC) [23]. However there were limits outside of which the tribunal could not stray. 'It would be perverse to say that a hearing of 1/2 day could ever be lengthy or that a 3 month case was not lengthy. It would be perverse to say a case involving tax of £1,000 involved a large financial sum or that a case involving tax of £100 million did not do so.': *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (CTC) [24].

¹⁶³ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 27.

¹⁶⁴ Ibid r 35(1).

¹⁶⁵ Ibid r 35(2).

¹⁶⁶ Ibid r 35(3).

cannot appeal a decision of the First-tier Tribunal without a full statement of reasons for the decision.

All hearings will be held in public except where the tribunal gives a direction that the hearing, or part of it, is to be held in private. The tribunal can restrict access to the hearing if it thinks it is justified.¹⁶⁷ 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).

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.¹⁶⁸ The tribunal may make an order on an application or on its own initiative.¹⁶⁹ 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,¹⁷⁰ or an order for costs against a party who has 'acted unreasonably in bringing, defending or conducting the proceedings.'¹⁷¹ The tribunal cannot make an order relating to costs against either the taxpayer or HMRC without taking into account their financial means (if an individual), and giving them an opportunity to make representations.¹⁷²

At this stage, due to the comparative short period the First-tier Tribunal has been hearing tax appeals, it is premature to assess how successful the process is. Due to a concerted effort to clear outstanding disputes before the commencement of the new

¹⁶⁷ For example, where it is in the interests of public order or national security or to maintain the confidentiality of sensitive information.

¹⁶⁸ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 23(5)(a).

¹⁶⁹ The matter of costs attracted significant comment from stakeholders during the initial consultation on proposal for a new Tax Chamber: Gemma Young, 'Tax Appeals Modernisation' (6 October 2008) *Tax Journal* 2, <<http://www.taxjournal.com/tj/print/20663>>. There were concerns that the prospect of paying HMRC's costs should not deter taxpayers from pursuing an appeal. Similarly, Young comments that there was also concern that taxpayers may be discouraged by the inability to recover their own costs from HMRC, especially in terms of seeking legal representation: *ibid*, 2.

¹⁷⁰ 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).

¹⁷¹ *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 10(1)(a),(b). 'This is a relaxation of the rule that applied in cases before the special commissioners. There, the conduct had to be "wholly unreasonable" before a costs award could be made (the *Special Commissioners (Jurisdiction and procedure) Regulations 1994* (SI 1994/1811), reg. 21)... Furthermore, the rules have diverged from the wording of the former regulations in another, slightly more subtle, way. Previously, costs were potentially available only if the unreasonable conduct was "in connection" with the hearing. Under the new rules, the conduct can relate to the actual decision to bring (or defend) the proceedings as well as in relation to the actual conduct of the proceedings.' : CCH Online, '[190-515] Rule 10 - costs awards', *Tax Reporter*, <[http://www.cchinformation.com/CCH/Gateway.dll?f=templates\\$fn=default.htm\\$3.0&s=6&GLOBAL=G & G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3Ff%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu](http://www.cchinformation.com/CCH/Gateway.dll?f=templates$fn=default.htm$3.0&s=6&GLOBAL=G & G_ZZFILE1=&G_NXTSITE=CCH&G_VID=livecch:10.1048/enu&isclient=&G_TOC_TEMPLATE=/CCH/Gateway.dll%3Ff%3Dtemplates%24fn%3Dcontents-frame-js.htm%243.0&G_universalId=UniCanterbury&G_oVid=LiveCCH%3A10.1048%2FEnu)>.

¹⁷² *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* (UK), r 10(5). See also HMRC, ARTG8660 - *First-tier and Upper Tribunals: The tribunal hearing: Tribunals right to award costs* <<http://www.hmrc.gov.uk/manuals/artgmanual/ARTG8660.htm>>. The amount of costs to be paid can be arrived at by decision of the First-tier Tribunal; by agreement between the paying and receiving persons; or by consideration of all or part of the costs incurred by the receiving person, if not agreed: *ibid* r 10(6).

HMRC processes (or cases being in the new HMRC review stage), as at early 2010 there had been less 'of the old [smaller] General Commissioner-type work' heard by the First-tier Tribunal.¹⁷³ However, there had been a surge of high value appeals, where the tax in dispute ranged from £1m to £1,000 million.¹⁷⁴ Bullock observes that anecdotally the First-tier Tribunal is understood to have registered approximately 10,000 appeals in its first year of operation, which represents a 50 percent reduction from appeals listed under the former regime indicating the success of the HMRC review process.¹⁷⁵ He comments that this is about 2.5 percent of all tax disputes between HMRC and taxpayers.

Sharrock and Robinson¹⁷⁶ observe that there is a potential weakness in the new system:

which, in an effort to minimise costs, encourages taxpayers to conduct their own appeals, or to use advisors who are not experienced litigators, and there may be a correlation between this and the number of cases where the Tribunal's decision is that the evidence provided does not support the taxpayer's claims.

Sharrock and Robinson¹⁷⁷ therefore recommend that taxpayers 'should consider instructing tax litigation experts at an early stage to ensure that the best case is put forward for' them. Alternatively, more guidance may be required from the First-tier Tribunal on the importance of evidence.

D Canada and the Informal Procedure in the Tax Court of Canada

The Tax Court of Canada (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, R.S.C. 1985* (Can), c. 1, the *Excise Act, R.S.C. 1985* (Can), c. E-15, the *Employment Insurance Act, S.C. 1996* (Can), c. 23 and Canada Pension Plan.¹⁷⁸

Before appealing to the TCC to have it resolve an income tax or Goods and Services Tax (GST) dispute, the taxpayer must first send a notice of objection to the Canada Revenue Agency (CRA). The CRA review of the objection will result in a reassessment, a confirmation or a determination. If the taxpayer is an individual or a testamentary trust the time limit for filing an objection is within:

- (i) One year of the date of the return's filing deadline; or
- (ii) 90 days of the date the CRA mailed the notice of assessment.

In every other case, the objection must be filed within 90 days of the date the notice of assessment is mailed.

¹⁷³ Carnwath, above n 110, 52.

¹⁷⁴ Ibid.

¹⁷⁵ Bullock, above n 127, 2.

¹⁷⁶ Sharrock and Robinson, above n 127.

¹⁷⁷ Ibid.

¹⁷⁸ For a discussion of the TCC and its history see Wilfrid Lefebvre, 'Income Tax Litigation' (1995) 43(5) *Canadian Tax Journal* 1861 and 'Tax Court of Canada 20th Anniversary Symposium' (2005) 53(1) *Canadian Tax Journal* 135.

The CRA advises that they will review the objection and if necessary contact the taxpayer (or their advisor) to discuss the matter:

and to provide an open exchange of information, we [the CRA] can provide you with the documents relating to the issues in dispute. In addition, we inform you of any discussions we have had with assessing area representatives about your disputed assessment.¹⁷⁹

After the facts have been considered, the Chief of Appeals, or another authorised officer in the CRA Appeals Branch, will make the final decision concerning the assessment.¹⁸⁰ The Appeals Branch is 'independent' of the auditing and assessing sections of the CRA and will take a fresh and independent view of the facts and law involved in the dispute. This function is similar in part to that undertaken by the Inland Revenue Adjudication Unit in New Zealand (see section 2 of this article).

If the CRA rejects the taxpayer's objection the taxpayer has 90 days to appeal to the TCC.¹⁸¹ There are two procedures for appealing to the TCC: (1) the [Informal Procedure](#),¹⁸² and (2) the [General Procedure](#).¹⁸³ The Informal Procedure 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*,¹⁸⁴ promulgated effective 1 January 1991. A filing fee of C\$100 (equivalent to NZ\$130.63)¹⁸⁵ is payable by taxpayers electing the Informal Procedure.¹⁸⁶ The fee is refunded if the appeal is allowed in whole, or in part. The court may also choose to waive the fee in cases of severe financial hardship.

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

¹⁷⁹ CRA, *Resolving Your Dispute: Objections and Appeal Rights under the Income Tax Act* (December 2009) <www.cra.gc.ca>. Information made available by the CRA to the taxpayer includes: working papers and reports prepared by the auditor supporting the assessment (as well as relevant copies of legislation and cases); records of discussions between an appeals officer and an auditor concerning the assessment and information from third parties that the taxpayer has been dealing with (eg sales invoices and purchase orders): *ibid* 8-9. Certain information cannot be provided due to its sensitive nature and to maintain the integrity of the tax system including information subject to legal professional privilege and documentation related to an on-going investigation: *ibid* 9.

¹⁸⁰ The Appeals Branch of the CRA receives 45,000 – 65,000 objections relating to the various Canadian taxes: Paul Hickey, 'Appeals and Tax in Dispute' (2007) 15(1) *Canadian Tax Highlights* 2. About 92 percent are resolved administratively, with the remaining 8 percent appealed to the courts. Of the 8 percent, approximately one-third each are withdrawn by the taxpayer, settled or heard: *ibid*.

¹⁸¹ Taxpayers can also appeal to the TCC if the CRA does not respond to their objection notice within 90 days in an income tax case or 180 days in a GST case.

¹⁸² 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.

¹⁸³ 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: CRA, *ibid* n 179, 16.

¹⁸⁴ See <<http://www.canlii.org/en/ca/laws/regu/sor-90-688b/latest/sor-90-688b.html>>.

¹⁸⁵ Using a cross rate C\$1 = NZ\$1.30,

<http://money.msn.co.nz/currencyconverter.aspx?cmp=gl_nz1_CurrencyCalculator&mch=sem> at 5 January 2011.

¹⁸⁶ If the taxpayer misses the deadline for initiating an appeal due to exceptional circumstances beyond their control, they may apply to the TCC to extend the time limit.

- 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\$12,000 (equivalent to NZ\$15,682.80);¹⁸⁷
- the disputed loss amount is not more than C\$24,000 per determination (equivalent to NZ\$31,348.80);¹⁸⁸
- 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\$12,000, the taxpayer may choose to restrict the amount under appeal to C\$12,000; otherwise the [General Procedure](#) will apply. A taxpayer disputing a loss amount can likewise restrict the claim to C\$24,000 and thus come under the Informal Procedure threshold. In the absence of an election to use the Informal Procedure the taxpayer's appeal will automatically be governed by the General Procedure.

Taxpayers can also appeal an assessment or determination concerning GST and the harmonized sales tax (HST) to the TCC under the Informal Procedure. There is no limit to the amount in dispute for GST and HST that can be heard using the Informal Procedure.

The appeal is instituted either by completing the two-page '[Notice of Appeal - Informal Procedure](#)' form,¹⁸⁹ the CRA online document-filing facility accessible through the CRA web site or by a letter (without any requirements for any special form of pleading) filed at any TCC office. In addition to being signed and dated, the notice of appeal should include: the taxpayer's personal details (name, mailing address, telephone number etc) and those of their lawyer or agent (if applicable); the taxation year(s) under appeal or the assessment number; the date of the reassessment or confirmation; the grounds for the appeal and relevant facts; a statement that they are appealing under the Informal Procedure; and, if applicable (in an income tax appeal), a statement that the taxpayer is limiting the amount of their appeal to C\$12,000 for each year under appeal.

There are strict time restrictions placed on the CRA and TCC to ensure the dispute is settled quickly.¹⁹⁰ 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.¹⁹¹ The 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,¹⁹² the TCC will schedule a hearing, advice of which will be sent to the taxpayer (or their representative) by registered mail at least 30 days before the hearing.¹⁹³ While an adjournment may be requested prior to the hearing date, the Court is reluctant to grant adjournments unless the parties are faced with circumstances which would not permit the hearing to proceed.

¹⁸⁷ Using a cross rate C\$1 = NZ\$1.30, MSN, above n 185.

¹⁸⁸ Ibid.

¹⁸⁹ See Tax Court of Canada, *Notice of Appeal (Informal Procedure)* <http://cas-ncr-nter03.cas-sati.gc.ca/portal/page/portal/tcc-cci_Eng/Process/Forms>.

¹⁹⁰ CRA, above n 179, 15.

¹⁹¹ *Tax Court of Canada Act, R.S.C. 1985 (Can)*, s 18.16(1).

¹⁹² Ibid s 18.17(1).

¹⁹³ Ibid s 18.19(1).

On the hearing day, all the parties will appear in court to present their evidence (including witnesses) and arguments before the judge. Taxpayers may represent themselves or be represented by a lawyer or an agent. 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'.¹⁹⁴ The parties are encouraged, throughout the process, to contact each other and discuss their positions and any tentative settlement.

The *Tax Court of Canada Act, R.S.C. 1985* (Can) provides that 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'.¹⁹⁵ This process 'is intended to minimize the legal steps involved in the appeal process'.¹⁹⁶

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 day on which the hearing concluded.¹⁹⁷ 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'.¹⁹⁸ The TCC will send a copy of the judge's decision to both parties.

In line with the Canadian Parliament's intention of encouraging easy access to the courts, the *Tax Court of Canada Act, R.S.C. 1985* (Can), s 18.26 provides that costs may be awarded only in favour of the taxpayer; i.e, where the judgment reduces the aggregate of all amounts in issue or the amount of interest in issue, or increases the amount of loss in issue, by more than one-half. Costs cannot be awarded in favour of the Crown. This means that the taxpayer is not exposed to paying the costs of the hearing if they are unsuccessful.

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).¹⁹⁹ In a study undertaken in 2006 Lamoureux concluded that 36 of the income tax cases studied (i.e. 72 percent) were processed very effectively (i.e. they were disposed of within the same year) while 14 cases (28 percent) fell short of the required standard.²⁰⁰ Of the 14 cases, 10 had not been heard - either because they had been adjourned and rescheduled (four cases) or had yet to be scheduled (six cases) - while three cases were scheduled to be heard in the near future and one case had been heard

¹⁹⁴ Ibid s 18.15(3).

¹⁹⁵ Ibid s 18.15(3). The case *Paynter v The Queen*, 96 DTC 6578 (FCA) is an example of the operation of these principles. In *Paynter*, the taxpayer's counsel had been replaced one month before the appeal hearing and the CRA had consented to an adjournment. However, the request for an adjournment was refused on the basis that appeals under the Informal Procedure are to be heard in a quick and orderly fashion.

¹⁹⁶ 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 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.': above n 178, 138.

¹⁹⁷ *Tax Court of Canada Act, R.S.C. 1985* (Can), s 18.22(1).

¹⁹⁸ Ibid s 18.23.

¹⁹⁹ Lamoureux, above n 196, 17.

²⁰⁰ Ibid, 19.

with the judgment reserved.²⁰¹ The median age for the 14 'unprocessed' cases was 19 months.²⁰²

The Auditor General of Canada observed,²⁰³ with respect to the 1996-1997 reporting period, that in the Informal Procedure 31 percent of cases were withdrawn by the taxpayer or dismissed, 20 percent resulted in consent judgments, and 49 percent proceeded to trial. At the trial in the Informal Procedure, taxpayers were successful, in whole or in part, about 30 percent of the time (and 33 percent in the General Procedure).²⁰⁴ About 40 percent (2,669) of cases heard by the TCC in the reporting period to November 2006 were heard under the Informal Procedure and involved approximately 1.4 percent of the tax in dispute.²⁰⁵ The remaining 60 percent (3,421) of cases were heard under the General Procedure and involved around 84 percent of the tax in dispute.²⁰⁶ This compares with earlier statistics of 70 percent of cases heard under the Informal Procedure (in the mid-1990s) and 59.5 percent (for 2003).²⁰⁷ This (percentage) decline may be due to the fact that the C\$12,000 threshold is too low or taxpayers are preferring to have even small disputes heard under the General Procedure – for example if they are complex in nature. There has clearly been a greater growth in larger disputes, perhaps due to more targeted auditing by the CRA of tax schemes etc. The total number of cases heard under the Informal Procedure has increased from 2003 to 2006 from 1,906 (2003) to 2,669 (2006) – an increase of 40 percent.²⁰⁸ However, in this same period, the number of cases under the General Procedure has increased 164 percent (from 1,295 to 3,421). The original target was for 70 percent of disputes to be heard under the Informal Procedure.²⁰⁹

Section 18.28, *Tax Court of Canada Act, R.S.C. 1985 (Can)* states that decisions in appeals involving the Informal Procedure have no precedential value.²¹⁰ Despite this, 'informal procedure decisions, while not technically legally precedential, often do have an influential value on other judges'.²¹¹ Lefebvre observes that while the Informal

²⁰¹ Ibid.

²⁰² Ibid. Lamoureux comments: 'It is well known and it has been an ongoing project in the [Tax] Court, to monitor and to improve case processing practices in order to move cases along more expeditiously through the system.': *ibid* 33.

²⁰³ Office of the Auditor-General, (1998) *1998 April Report of the Auditor General of Canada* [5.47] <http://www.oag-bvg.gc.ca/internet/English/parl_oag_199804_05_e_9311.html>.

²⁰⁴ Ibid [5.47].

²⁰⁵ Hickey, above n 180, 2.

²⁰⁶ Ibid.

²⁰⁷ André Gallant, 'The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions' (2005) 53(2) *Canadian Tax Journal* 333, 335.

²⁰⁸ Hickey, above n 180, 2.

²⁰⁹ Lefebvre, above n 178, 1877.

²¹⁰ Golombek cites a very practical example where this aspect of the informal procedure can work against taxpayers in general: Jamie Golombek, 'Going to Court', *Forum Magazine* (June 2005) 1, <http://jamielogolombek.com/printfriendly.php?article_id=832>. In September 2005, the TCC, under the informal procedure, heard the case *Krause v The Queen* [2004] TCC 594 and concluded that full-time attendance at a foreign university included full-time attendance through the internet or online, therefore meaning a student could claim tuition fees for a university outside Canada. 'Originally, this case was seen to be a positive development for many online students, who could now seek some tax relief for their tuition fees, until it was pointed out by the CRA that the case was heard under the informal procedure.': *ibid*. As such the CRA has advised the case does not affect its longstanding view: *ibid*.

²¹¹ *Ibid* 2.

Procedure incorporates a non-judicial dispute mechanism, it is still a judicial procedure as shown by the TCC's reluctance to apply a liberal interpretation to the statutory direction in the *Tax Court of Canada Act, R.S.C. 1985 (Can)*, s 18.28, citing Bowman J in *Mourtzis v The Queen*²¹² as an example:

I regard this section as being of very limited application. I am prepared to accept it insofar as it means nothing more than this: If I do not choose to follow the decision of one of my brethren in an informal procedure, I am not bound by the strict rules of *stare decisis*. If that section is interpreted to mean that counsel is not permitted to refer to informal procedure cases or that I am not permitted to cite them or follow them if I choose to do so, then I regard that as a most unreasonable interpretation of the Act and, indeed, I would regard it as an unwarranted attempt by Parliament to interfere with my judicial independence and with the independence of the bar in this country to refer to such authorities if they see fit to refer to them. After all, the decisions of the House of Lords are not binding on me. Does that mean they should not be referred to?

Taxpayers cannot as such appeal a decision of the TCC under the Informal Procedure but decisions can be judicially reviewed on restrictive grounds.²¹³

The Federal Court will not engage in an examination of the evidence as such, nor substitute its appraisal of the evidence for that of the TCC.

The taxpayer must apply within 30 days of the decision to the Federal Court of Appeal to have it review the decision. The taxpayer does not need a form to file an appeal. However, the review application must be in writing and state the reasons for it and relevant facts. There are prescribed timelines for the review process.²¹⁴

E The jurisdictions compared

The following table summarises key points from the survey undertaken of the small tax dispute processes in Australia, the United Kingdom and Canada.

²¹² *Mourtzis v The Queen* 94 DTC 1,362, 1,364 (TCC).

²¹³ Decisions of the Tax Court of Canada (Informal Procedure) can be appealed if it '(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record; (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; (e) acted, or failed to act, by reason of fraud or perjured evidence; or (f) acted in any other way that was contrary to law.': *Federal Courts Act, R.S. 1985 (Can)*, c. F-7, s 27(1.2), (1.3).

²¹⁴ CRA, above n 179.

| Table A: Small Tax Disputes - A Comparison | | | |
|---|--|---|---|
| | Australia | United Kingdom | Canada |
| Tribunal/ Procedure | Small Tax Claims Tribunal (STCT), part of the Taxation Appeals division of the Administrative Appeals Tribunal (AAT). | First-tier Tribunal (FTT) (Tax Chamber) 'Complex' cases may be heard by Upper Chamber (Tax and Chancery Chamber). | Informal Procedure of the Tax Court of Canada (TCC). |
| Jurisdiction | Tax in dispute of less than A\$5,000. Australian Tax Office (ATO) refusal to release taxpayer from paying tax debt. | Four categories depending on importance of the case, complexity of issues, costs and resources of the parties. Categories of case are: 'Default Paper', 'Basic', 'Standard' and 'Complex'. | Total amount of disputed federal tax and penalties (per assessment), excluding interest, is not more than C\$12,000. Taxpayer can limit claim to C\$12,000. Disputed loss amount not more than C\$24,000. Taxpayer can limit loss claim to C\$24,000. Interest on federal tax and penalties is the only disputed matter. Goods and services tax, harmonised sales tax - no monetary threshold. |
| Initiation Process | Taxpayer files 2-page application form to AAT seeking review of ATO decision. | Taxpayer files 7-page notice of appeal form to FTT before or after HMRC review. | Taxpayer files 2-page notice of appeal form to TCC if internal review of earlier notice of objection unsuccessful. |

| | | | |
|--|--|--|---|
| <p>Filing Fee</p> | <p>A\$77 non-refundable fee.</p> | <p>No filing fee.</p> | <p>C\$100 fee, refundable if taxpayer successful (in whole or in part). Waived on hardship grounds.</p> |
| <p>Tax Dispute Resolution Process</p> | <p>Pre-trial conference before member of AAT to discuss issues, facts etc, aimed at resolving case. May be second conference or alternate dispute procedures (eg mediation) prior to STCT hearing. Proceed to STCT hearing.</p> | <p>Depends on category of case:</p> <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 talk' approach; • 'Standard' and 'Complex' cases – more detailed case management, formal hearing. <p>FTT has wide powers to regulate its procedures.</p> | <p>Appeal dealt with by the TCC as informally and expeditiously as the circumstances and considerations of fairness permit.</p> |
| <p>Nature of hearing</p> | <p>Informal hearings held in public unless STCT directs otherwise.</p> | <p>All hearings in public unless tribunal directs otherwise. Formality depends on category of case. 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> |

| | | | |
|----------------------------------|---|--|--|
| Decision Written or Oral? | Oral decision at conclusion of hearing. Written reasons available on request. | Oral decision may be delivered at end of hearing. Decision delivered (or confirmed) in writing within 28 days of the hearing. | Oral decision at end of hearing or within 90 days. No requirement for written decision. |
| Timeframe | Aim: decision within 12 weeks of taxpayer lodging application for review of decision. | Various deadlines depending on category of case. | Aim: decision within 11 months from taxpayer filing notice of appeal. |
| Rights of Appeal | Appeal on a point of law to Federal Court. | 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. |
| Award of Costs | No award of costs. | No award of costs (with the exception of 'complex' cases) – unless wasted costs order or party acting unreasonably. | Yes – only in favour of taxpayer (if successful). No costs award if taxpayer unsuccessful. |
| Decisions precedential? | Non precedential. | Non precedential. | Non precedential. |

V SMALL TAX DISPUTE RESOLUTION RECONSIDERED

The survey of the three countries in this article highlights the following points of interest:

- a) Each jurisdiction has a specific forum or procedure to deal with small disputes. The abolition of the small claims jurisdiction of the TRA in New Zealand accordingly is out of step with the approach in these common law jurisdictions. Indeed, in very unequivocal terms, the September Submission states: 'An appropriate forum for micro disputes is necessary as a *basic right to justice*.'²¹⁵ (emphasis added)

²¹⁵ NZLS and NZICA, above n 18, [3.53].

- b) Filing fees are kept to a minimum, or are not charged at all (in the case of the UK). In Canada the fee is refundable if the taxpayer is successful or can be waived on hardship grounds. While the NZ\$400 non-refundable TRA filing fee was clearly the highest fee, it could be waived if the taxpayer was unable to pay or the issue was a matter of public interest. The Issues Paper, while acknowledging the size of the fee, did not consider it to be prohibitive.²¹⁶
- c) Australia and Canada have preferred to define their small claims procedures by monetary limit (except for GST and HST in Canada where there is no such limit). The category approach adopted in the UK has the advantage that disputes are not excluded from streamlined processes simply because of an arbitrary monetary threshold – thresholds in both Australia and Canada, which have existed at these levels for a number of years, look decidedly on the low side. The ability for appellants in Canada to restrict the amount under appeal to C\$12,000 (or C\$24,000 for loss claims) ameliorates this issue to a degree, providing taxpayers the option of using the Informal Procedure for disputes which exceed this threshold. The UK approach recognises disputes vary based on issue and level of complexity – not simply on amount in dispute. However, in the UK, as has already occurred, disputes on the boundaries between the categories are likely to arise, for example where is the line between a more complex Basic case and a Complex case?
- d) None of the jurisdictions surveyed differentiate between small and very small disputes. The UK approach does provide some differentiation, dependent on the issue, level of complexity etc. The Australian approach clearly applies to what would be described as very small tax disputes - all other disputes (including small tax disputes) are heard by the AAT's Taxation Appeals Division. In Canada, the threshold is somewhat higher and would apply to a wider range of tax disputes. In fact, the C\$12,000 (NZ\$15,682.80)²¹⁷ threshold is broadly equivalent to the NZ\$15,050 (inflation-adjusted) threshold suggested by the Richardson Committee which would cover two-thirds of tax disputes in New Zealand. However, the September Submission observes that it would be uneconomic to take a dispute for this amount²¹⁸ and suggests an alternate process, including mediation, for tax in dispute up to NZ\$50,000.²¹⁹ For disputes above that level, the opt-out option (after the conference) would be available for taxpayers seeking quick dispute resolution.

Support for a higher threshold comes from Canada where the percentage of cases being heard in the Informal Procedure has dropped from 70 percent (the original target) in the mid-1990s²²⁰ to 40 percent in 2006.²²¹ There could be a range of explanations for this fall, including the C\$12,000 threshold is too low.

²¹⁶ Inland Revenue and the Treasury, above n 16, [8.40].

²¹⁷ Using a cross rate C\$1 = NZ\$1.30, MSN, above n 185.

²¹⁸ NZLS and NZICA, above n 18, [3.28].

²¹⁹ Ibid [3.56].

²²⁰ Gallant, above n 207, 335.

²²¹ Hickey, above n 180, 2. However, the total number of cases heard under the Informal Procedure has increased 40 percent from 2003 to 2006, but at a slower rate of increase than the General Procedure: *ibid* 2.

Leading New Zealand tax practitioners interviewed in 2009 had mixed views concerning the threshold for a small tax dispute process in New Zealand, ranging from NZ\$20,000 (based on the level of dispute the Disputes Tribunal, a non-tax body, can consider with the parties consent) to a much higher threshold than the NZ\$60,000 suggested by the researchers.²²²

- e) Unlike the (former) small claims jurisdiction of the TRA, the small tax disputes processes in the three countries surveyed are not restricted to those disputes where the facts are clear and there are no significant legal issues of precedent involved.
- f) Prior to the small tax process formally commencing the revenue authority usually will have reviewed the case again – in the UK many disputes are resolved prior to or at the HMRC review stage.²²³ The use of pre-conference hearings in Australia has also proven effective.²²⁴ In Australia, applications for a review by the STCT can be made by letter or two-page application form (which includes reasons why the taxpayer believes the decision is wrong). The Canadian notice of appeal (for the Informal Procedure) is similarly short (two-pages) including a page for the taxpayer to state reasons why they disagree with the CRA's decision. Alternatively the taxpayer can institute an appeal by way of letter filed at any TCC office. The HMRC notice of appeal form, which is designed for any appeal to the First-tier Tribunal, at seven-pages (with provision for extra pages to be inserted if necessary) is more complex and less user friendly due to catering for all categories of appeal. It similarly requests applicants to explain why, with reasons, the taxpayer believes HMRC is wrong.

The requirements for either a taxpayer-initiated NOPA or NOR (where the dispute is initiated by the CIR) in New Zealand are more onerous than the examples referred to above - requiring *inter alia* a concise statement of the law (legislation and cases), the relevant facts and how the law applies to the facts. The procedural standards operating in New Zealand make no distinction between small, simple disputes and large, complex ones. 'The taxpayer that wants to challenge a minor tax matter is automatically put at a disadvantage because most (if not all) taxpayers would find it difficult to comply with [the] requirements'.²²⁵

- g) Not unexpectedly, the importance of flexible procedures, informality (of hearings),²²⁶ timeliness and accessibility are emphasised in each jurisdiction, typically through statute and administrative directives. For example, in Canada

²²² Peck and Maples, above n 31, [5.2.2].

²²³ HMRC, above n 120 (*ARTG2010*).

²²⁴ AAT, above n 58, 133 (Table A3.4).

²²⁵ NZLS and NZICA, above n 18, [3.49]. The recommended restriction of CIR NOPAs to five pages where the dispute involves less than NZ\$5,000 (Inland Revenue, above n 15, [144] (SPS 10/04)) is welcome but does not level the playing field for inexperienced taxpayers. In addition, this length can increase, where for example the issue is complex or there are multiple issues: *ibid*.

²²⁶ Judge Barber, the only remaining TRA judge, has indicated he sees the TRA as a Court of Inquiry and as such 'he is free to adopt whatever process is necessary to achieve a just outcome.': NZLS and NZICA, above n 18, [3.54].

under the Informal Procedure, the hearing does not have to follow legal or technical rules of evidence and the TCC's decision has no precedential value. Decisions may be given at the end of the hearing or within a short period after. Time limits for the small tax dispute processes (and various stages) differ. In Australia the aim is resolution within 12 weeks from the lodgement of the taxpayer's application with the STCT. This contrasts with 11 months from the date the taxpayer files the notice of appeal in Canada. Achieving these targets has proven more difficult – 22 percent of applications in the 2009-2020 reporting year in Australia met the required standard – an increase on prior years.²²⁷ Somewhat more favourably, in Canada, Lamoureux concluded 72 percent of cases studied were concluded within 12 months.²²⁸

- h) Rights of appeal are limited in Australia and the UK (with leave) to points of law. In Canada, appeals (in the form of judicial review) from Informal Procedure cases are restricted to errors of law and matters akin to breaches of natural justice. The Issues Paper cites lack of appeal rights as a reason for so few cases being heard by the small claims jurisdiction of the TRA. The author does not believe this is a significant concern for taxpayers with small tax disputes – a view tentatively supported by the approaches in the three countries reviewed in this paper.
- i) During the consultation on the proposal for a new tax chamber in the UK, concerns were expressed that an award of costs against a taxpayer may deter them from pursuing an appeal.²²⁹ This may explain the approach ultimately adopted in the UK – with the exception of Complex cases, the First-tier Tribunal 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. In making any costs order, where an individual is concerned, the person's means are also taken into account. The approach in Canada is even more taxpayer-favourable – costs may be awarded only in favour of the taxpayer where the judgment reduces the aggregate of all amounts in issue, or increases the amount of loss in issue, by more than one-half. Costs cannot be awarded in favour of the Crown. In a similar move not to discourage taxpayers, in New Zealand the TRA can only award costs if it dismisses a challenge as being vexatious, frivolous or for the purpose of delay.

VI CONCLUSION

A number of the objectives of the Richardson Committee – including resolving disputes without recourse to the courts - have been achieved in varying degrees. However, this has come at a greater dispute cost – a cost which is too great for many taxpayers where the amount of tax in dispute is small and has deterred them from proceeding with their dispute. The lack of access to resolution for such disputes negatively impacts taxpayers' perceptions of fairness and potentially the levels of taxpayer voluntary compliance.

²²⁷ AAT, above n 58, 26 (Table 3.10).

²²⁸ Lamoureux, above n 196, 19.

²²⁹ Young, above n 169, 2.

Recent administrative changes implemented by Inland Revenue, 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. It is unfortunate that, due to the restrictive criteria for cases to be heard in the small claims jurisdiction of the TRA (and its corresponding limited utilisation), the *Taxation (Tax Administration and Remedial Matters) Act 2011* (NZ) has abolished this capacity of the TRA and has not replaced it with an alternative forum. This is out of step with other common law jurisdictions which have a forum or process for hearing such disputes, a fact acknowledged in the Issues Paper.

The review undertaken in this article highlights some key themes with the small tax dispute procedures adopted in the surveyed countries. Flexible and informal procedures aim to ensure tax disputes are resolved in a timely and inexpensive manner. Timeliness, however, is a difficult aim to achieve. Application to the forum is (in Australia and Canada, at least) by way of a simple, two-page form which does not require the taxpayer to detail the law related to their dispute. Filing fees are low or non-existent. Access to the small claims procedure is either determined solely by monetary threshold or category of case. The restrictions imposed in New Zealand for access to the TRA in its (former) small claims jurisdiction (clear, undisputed facts and no significant legal issues of precedent) do not exist. Rights of appeal may be limited as are awards of costs. There is no separate treatment between 'small' and 'very small' disputes. These jurisdictions, except for the UK approach, simply differentiate between (very) small and all other tax disputes. Further research could consider whether in fact disputes procedures should distinguish between 'small' and 'very small' tax disputes. A consideration of alternative dispute resolution (ADR) for small (and very small) tax disputes, such as mediation and arbitration, is another area for future research.

To ensure that the tax system is perceived to be fair and that justice is available for the smallest of dispute, the author concludes that – in line with the Richardson Committee in 1994 – New Zealand should reconsider the need for a separate forum or procedure that allows the 'fast-tracking' of small tax disputes.