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“ALL CARDS ON THE TABLE” OR “TAXPAYER BURN OUT”

Professor Julie Cassidy

Introduction

- Disputes resolution regime for all taxes administered by CIR contained in Pt IVA TAA
- Current regime came into effect 1 October 1996
- Previous regime contained in Pt IVA TAA
- Reforms dramatically turned the tax disputes process “On its head”

Introduction

- Previous regime allowed CIR to reassess taxpayer without explanation
- Only once an assessment raised could taxpayer object
- Dispute occurs after assessment
- No prior information sharing process
- Perverse incentive to withhold information
- “Trial by ambush”

Introduction

- New regime proposed in Report of the Organisational Review of IRD 1994
- The way disputes are conducted critical to perceptions of fairness
- Aim of current regime is to promote “all cards on the table” approach to disputes: SPS 11/05 at [6]
- Dictates a series of document exchanges with strict time limits, opportunities for discussion and independent review before an assessment is issued
- Dispute occurs before assessment

Introduction

- Critically evaluates the previous and current regime
- While identified flaws of previous regime were very real
- New regime does provides some benefits
- But equally flawed

Previous objection regime

- Disputes start with the assessment
- Amended assessment was the first step in the disputes procedure
- Low threshold for a valid assessment: CIR v New Zealand Wool Board (1999)
- Could be uncertain and/or arbitrary
- Ability to revisit
- No incentive to co-operate at audit stage to ensure accuracy of reassessment

Previous objection regime

- No requirement for parties to exchange information
- Disputes caused and resolution delayed by IRD withholding information
- Perverse incentive to withhold information
- Trial by ambush
- Many disputes that go to court should have been resolved by full disclosure and discussion

Previous objection regime

- No statutory time limits
- Lengthy delays in resolving disputes
- Including timeframes for taxpayer disputing earlier returns, “late objections”
- See *Peterson v CIR* (2005) and *Dunphy v CIR* (2010)
- CIR required to adjudge late objections on their substantive merits: *CIR v Wilson* (1996); *FB Dunvall Ltd v CIR* (2011)
- Administrative chaos and uncertainty?

Previous objection regime

- Note, no statutory requirement to pay tax on a disputed assessment (s 398 ITA 1976)
- No interest accruing on any additional amount
- With inflation a perverse incentive to prolong disputes

Previous objection regime

- Both investigation and assessment carried out by the same IRD officer
- Same IRD officer considered the objection
- Investigation and adjudicator
- Impartiality?

Current regime

- Purpose of disputes procedure: s 89A
- Improve accuracy of disputable decisions by CIR
- Reducing likelihood of disputes through open and full communication
- Early identification of any basis for dispute
- Prompt and efficient resolution of any dispute before proceedings are commenced

Current regime

- Now assessment should be the outcome
- Assessment should only be made after all facts and legal issues examined
- Allows for a shifting of position: CIR v Delphi Fishing Co Ltd (2004)
- Note s 138G re new legal issues
- Prevents trial by ambush
- Aim is to improve accuracy of assessment
- Reduce chances of post-assessment challenge

Current regime

- Now rigid time lines
- Includes when a taxpayer can commence a dispute
- Coincided with compliance and penalties regime
Pt X TAA and UOMI regime in Pt VII TAA
- S 120A compensate for loss of use of money
- UOMI “no fault” concept
- Financial incentive to lodge an accurate return
- Financial incentive to resolve any dispute promptly

Current regime

- Now investigation and assessment are separate functions
- Adjudication Unit now determines if the proposed assessment should be issued
- IRD officers, but act independently
- Fresh look at the merits of the case
- A measure of independence

Current regime: Procedural steps

- SPS 11/05 “Disputes resolution process commenced by CIR” and SPS 11/06 “Disputes resolution process commenced by a taxpayer”
- Notice of proposed adjustment (NOPA)
- Notice of response (NOR)
- Administrative conference
- Statement of position (SOP) and disclosure notice
- Determination by IRD Adjudication Unit
- Assessment
- Taxpayer can still challenge

Current regime: Procedural steps



Current regime: Procedural steps

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- NOPA
- NOR
- Administrative conference
- SOP
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Current regime

- Pre-assessment requirements
- CIR's NOPA
- Taxpayer's NOR within 2 months
- Conference stage
- CIR's disclosure notice and SOP
- Taxpayer's SOP within 2 months
- Adjudication mandated
- Assessment

Current regime: Compulsory code

- Pt IVA disputes procedure is a compulsory code
- Sole method for contesting an assessment: s 109
- CIR v Disputes Tribunal (1997)
- An assessment or disputable decision
- NOPA
- NOR within two months
- Allen v CIR (2005)

Current regime

- Pre-assessment requirements too complicated
- SOP unnecessary replication?
- Increased compliance costs
- Front-loading compliance costs
- Taxpayers “burned off”
- No more efficient or timely in resolving disputes?
- Reduction in substantive cases, matched with explosion of procedural cases

Current regime

- UOMI too heavy a burden (suspend during dispute or at least when IRD does not meet a deadline?)
- CIR is still investigator and adjudicator (McIlraith v CIR (2007))
- Criticism of Adjudication Unit

Conclusion

- Assessment at the back or front?
- Information sharing before or after assessment?
- How many steps should there be in the information sharing process?
- How detailed should the documentation be?