

PART 3

NAVIGATING THE TAX TIDE:

Managing penalties and using past decisions to help your case

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QUESTIONS?

Please ask questions through the Q & A pod not on the chat pod.

Not Answered Questions will be emailed to you along with the **webinar recording**

Contents

- Making sense of past decisions, and the difference between tribunals and courts
- Dealing with an unreasonable ATO case officer
- The dreaded default assessment
- The risk of getting it wrong: how the ATO applies penalties and interest

How does precedent actually work

- When to look to cases: to understand the meaning given to the legislation
- Why use precedent: because it has to apply to the ATO and taxpayer, unless a court with jurisdiction says otherwise (principle of Stare Decisis)
- Decisions of courts above are binding on those below – look at how senior the decision is
- Precedent must be followed – it becomes law (legislation is not the only law)
- Tax rulings – binding on the Commissioner (but is not precedent)
- Obiter Dicta – distinction between binding and persuasive precedent
- Depending on your circumstances – you analogise or distinguish your facts to the precedent
- If you like sport, think of the Tribunal!

Court vs Tribunal

- Tribunal – cheaper, less formal, precedent is persuasive only, can be appealed on points of law, in the shoes of the Commissioner (executive power)
- Courts – more formal, binding precedent, more formal rules of evidence, can be appealed on points of law (but can remove one step)
- Main tribunal: AAT (Cth jurisdiction)
- Main courts: Federal Court, Full Federal Court and High Court
- High Court needs to special leave – hard to get
- Question: Why does a section 100A question not just go to the High Court?

Dealing with an unreasonable case officer

- Escalate (within the same team! Keep the relationship)
- ATO complaints line
- TPB
- Ombudsman – Inspector General of Taxation
- More serious: Conscious Maladministration (Section 39B of the Judiciary Act) – never been successful in Aus.

Default assessment and onus of proof

- Onus of proof dominates the essence of cases
- Conclusive evidence principle:
 - This rule states that the NOA is considered conclusive evidence that the assessment was made correctly, and the ATO doesn't need to prove its accuracy in court.
- A taxpayer cannot merely rely on an error made by the Commissioner to discharge their onus of proof
- Only where the appellant proves 'by evidence that the assessment is incorrect, it will prevail'
- Need to show what the assessment should have been
- Default assessment difficulties
 - Skips the explanation steps
 - Straight to assessment, which may be objected to, with the onus of proof resting with the taxpayer
- Very low success rate before the courts

Penalties

- Main one to consider: *False and misleading statement* = at the time that it is made, either outright wrong or give an unclear, uninformative or false *impression* even if it is literally true, regardless of whether the party making the statement knew whether the statement was false (see PSLA 2012/5, para 7)
 - **Intentional disregard** – 75% of the shortfall amount (60 *penalty units* if there is no shortfall).
 - **Recklessness** – 50% of the shortfall amount (40 *penalty units* if there is no shortfall).
 - **Lack of reasonable care** – 25% of the shortfall amount (20 *penalty units* if there is no shortfall).
- 20% uplift
- GIC vs SIC
- Remission – of penalties, and of interest
 - Need to show, not tell – if you want to have a hope of remission

Penalties (continued)

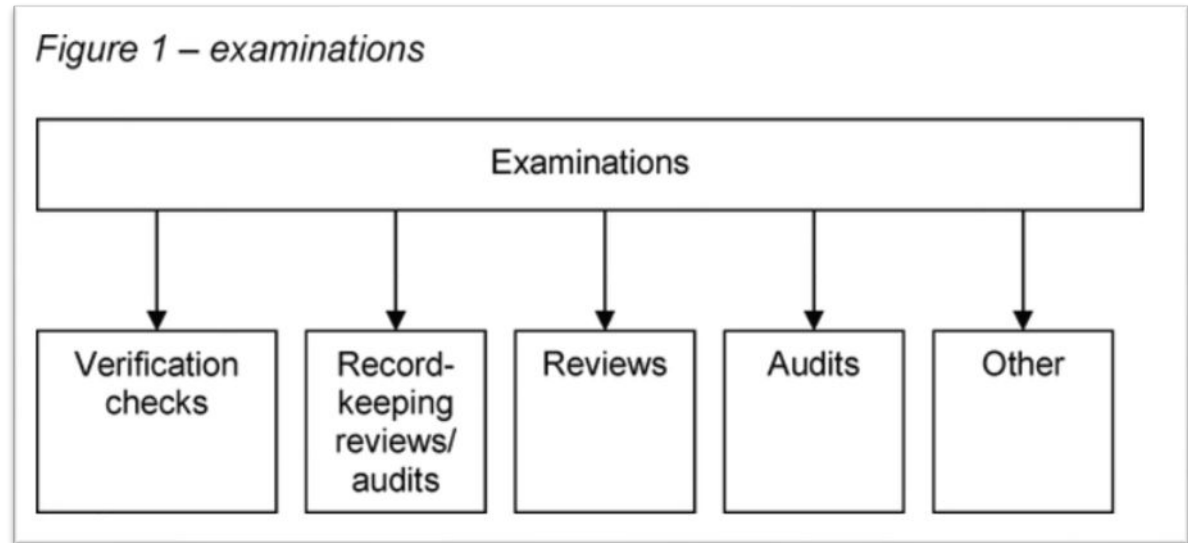
- GLC remission:
 - where the taxpayer had no control over the delay in, but took reasonable steps to make payment;
 - the delay was caused by the taxpayer, but can demonstrate they took reasonable steps to correct the situation and the Commissioner accepts it would be fair and reasonable to remit all or part of the GLC imposed;
 - special circumstances exist that make it fair and reasonable for the Commissioner to remit some or all of the GLC imposed (which may include delays on part of the ATO)

Voluntary disclosures

- **Mistakes happen**, and **historical positions** can inadvertently be **wrong**.
- Voluntary disclosures can be a **great way to resolve a potential tax dispute** and can **reduce administrative penalties** to zero depending upon when the disclosure is made and the size of the tax shortfall.
- **Can still be liable for penalties and interest** – but how to mitigate the exposure? This is discussed in the session.
- **Practical impact** – show of good faith – helps the dispute generally.

Voluntary disclosures (continued)

- Timing is critical – before examination = 80% reduction; after examination commenced = 20% reduction
- ATO guidance – MT 2012/3



- Reason for reduction: saving Commissioner resources
- *Automatic reduction – 80% and 20% VD reductions (100% if less than 1k shortfall)*
- *Discretionary reduction – additional reduction*



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