Tax Litigation in the AAT – What, Why & How?
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CCH Learning:

Hello, everybody and welcome to today's webinar. Tax litigation in the AAT - What, Why and How? My name is Susannah Gynther from Wolters Kluwer CCH Learning and I will be your moderator for today. A few quick pointers before we get started. In the handout section, you'll find the PowerPoint slide for today's presentation. If you're having any sound problems, please check your audio settings, try to toggle between audio and phone and just a reminder that within 24 to 48 hours, an notification for the e-learning recording will be emailed to you. You can ask questions at any point during the presentation by sending them through the questions box. I will collate those questions and ask some of the Q and A towards the end of today's presentation.

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Your presenter today is Bruce Collins, Founder and Principal Solicitor, Tax Controversy Partners. Bruce is the founder and principal solicitor... Sorry. Bruce is currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of his time as a senior executive in what is now Client Engagement Group covering most ATO functions. Bruce was the leader of the Technical and Case Leadership area in Private Wealth for several years prior to leaving the ATO, as well as having previously been strategic, technical and compliance leader for many of the ATO's litigation and law clarification programs, as well as at times being a member of the ATO Test Case Litigation Panel. I will now hand you over to Bruce to commence today's presentation

Bruce Collins:

So hopefully people can see my screen. So we're going to talk today about the AAT. At least while it lasts. We'll talk about an introduction of what the AAT's function is and how it's positioned in statutory framework. We'll talk about how ATO objections work because decisions that go to the AAT on a tax front normally have an objection in front of them. We'll look at the cases that can actually be heard at the AAT as opposed to ones that actually have to go elsewhere like through the Federal Court. We'll talk about small business tax decisions, which have a special division in the current ATT. And as I mentioned, we'll talk about other tax decisions that can't go to the AAT. We'll talk about ATO test case funding briefly and then we'll look at case management issues and directions that occur through the AAT process.

We'll look at the very important section 37 statement or T-document framework and how that works. And then we'll look at the statement of facts, issues and contentions, which is like the backbone if you wish of the case for each of the parties, the applicant taxpayer and the respondent commissioner. We'll then look at the applicant's evidence and the ATO's evidence in response. And we'll talk about the conciliation and conferencing forms of alternative dispute resolution at the AAT practices. We'll then talk about how hearings work in the AAT and obviously they're very much a matter of how the particular member wants to do things, but there's a general standard. And we'll look at the powers that the Tribunal has and what sorts of decisions that the Tribunal can make. And then we'll talk about next steps if one party or the other or both conceivably don't like the answer that they get from the AAT. Effectively appealing to the Federal Court or cross appealing if somebody else is already appealing.

Now before we kick off, it's always good to find out who's in the audience. So we might just firstly run a poll and I'll turn back to Susannah, to ask whether you're an accountant or tax agent, a lawyer, a financial planner, a student or an other. So back to you Susannah.

CCH Learning:

Thank you very much, Bruce. So I'm just going to quickly launch that poll. So please put a click in the radio button next to which best describes you. I'll just give you a few moments to put that in. And just a reminder that if you do have any questions, please put them into the questions pane and we will get to those questions and in the Q and A session at the end of the presentation. Okay. I can see that many people have put in their options. I'll just give you a few more seconds to get in any more of our audience. Okay, I'm going to close the poll and let's have a little look at who we have. We have 82% are accountants or tax agents with 18% being lawyers. Thank you, Bruce.

Bruce Collins:

Thank you for that, Susannah, and everybody. Now the next thing I just wanted to do was talk about whether people are in private practice, and have had experience with tax cases in the AAT. Are in private practice and haven't had any experience in the AAT. Are in public practice like at the ATO and have had experience with tax cases in the AAT. Or are in public practice and had no experience. And of course if for those who don't fit in either category, there's another at the end. So again, back to Susannah to run that poll quickly.

CCH Learning:

Thank you, Bruce. So here we go. So A, if you are in private practice and have had experience. B, private practice and no experience. C, public practice and have had experience. D, public practice and no experience. And E, of course, is other. Just click in the radio button next to the option that best describes you. That would be great. And again, once again a reminder that if you do have any questions please put them into the questions pane and we will get to those questions. All right, I'll just give you a few more seconds, so please get your choices in. Okay, I'm going to be closing the poll now. Thank you. And let's have a look. Well, we have 42% who say A, so private practice with experience. 42% again, in private practice with no experience. Then we have 8% in public practice with experience. And 8% in public practice with no experience. Thank you very much, Bruce.

Bruce Collins:

Okay, well thanks for that, everyone. That gives me a bit of an idea about the spread. Pretty much equal across the categories in both private and public. So I'll bear that in mind as we're talking through the content. Now the AAT was established back in '75 as part of the, what was that time called the New Administrative Law System, which is no longer quite so new or shiny and at the moment as we'll talk about, that's likely to change further in the future. Now the AAT conducts what's called a merit-based review. So it takes a fresh look at everything and it actually looks at the relevant facts and the evidence pointing towards those facts and it then applies the law and policy framework that relates to the issues in the case and arrives at its own independent decision. Now therefore the AAT can affirm a decision, it can vary it, it can set it aside and substitute a new decision, and it can also remit some decisions to the original decision maker for reconsideration.

Now this is very important because unlike the Federal Court, the AAT member or members on a panel are standing in the shoes of the commissioner. They actually have the powers that the commissioner has, so they can do things that haven't been previously considered by the commissioner, such as power to remit or something like that, a relevant matter before them. Now, the review process is intended to be accessible, fair, just, economical, informal and quick. Now, how well that those criteria are actually delivered by the current AAT is of course the

matter of the current review. But it has to be an investment of time and effort that's proportionate to the importance and complexity of the matter. And it's supposed to promote trust and confidence in the public in the decision making process of the Tribunal and the broader area of law and administration that the Tribunal is dealing with, in this case the tax and superannuation systems.

Now, of course in December the current government announced that it plans to legislate this year to abolish the AAT and replace it with a new body. My money is calling it an Administrative Review Tribunal, but who knows? But the idea is that it's supposed to improve the process to make it more user-focused, efficient, accessible, independent and fair. Now there were perceptions as per media coverage of this and I actually for my pain and suffering I suppose I watched the senate estimates discussions where the previous government were asked questions about their appointment of some people to the AAT, who weren't lawyers and had no relevant experience but were government connected in some way. So there's a question about how people are selected and whether they have the right skills and abilities and experience to be able to make sensible administrative decisions in that review capacity.

It's also looking at getting additional capacity, So it's quite likely there'll be increased investment into the AAT, and replacement and that'll be interesting to see how they do that. And also looking at, because the AAT like all other government agencies has been subject to spiral funding, the decreasing efficiency dividend means that you get less money each year. So that means that the AAT has been cut in its resources over time when its workload has been increasing, and so they want to work out better ways of doing some of that stuff. And I'll ultimately want to make sure that people can get better access to effective administrative review processes that work more effectively and efficiently through the process. Now the AAT as it exists will continue to operate until a new body's established and there'll be machinery of government processes to deal with any transfer of existing applications before the Tribunal.

And so we'll see how that works. But the new body won't be looking at reviewing decisions that have already been made by the previous Tribunal or anything like that. That's a matter for the appeal bodies in the Federal Court. There's a link there to the media release for that. But the big thing will be that the existing work will continue and the new framework will be based upon the existing framework. It'll just be hopefully improved as our government thinks it is. It's a bit of a new broom thing, I think. Now, objection decisions under the Tax Act. Well, mostly we'll talking about objection decisions, although we'll also touch on the fact that there are some other types of decisions that can also go to the AAT. The AAT is given the power to review objection decisions. So just the idea of what is an objection decision is important and a person who doesn't like the decision on an objection can go to the AAT or the Federal Court and this will talk about there are reasons why you would go to either, but my preference is usually to go to the AAT.

Now objections can be lodged against income tax, GST and fuel tax, fringe benefits tax and superannuation guarantee, admin act decisions. Now there are also similar rights to seek review of objections to private rulings and we'll touch on that a little bit and you'll see what the differences are. Now the objection rights that person has is effectively somebody who doesn't like an objection or a private ruling can actually... Sorry, a person doesn't like an assessment or a private ruling can object. Now objections have to be in writing and they have to provide grounds to articulate why they think the decision's wrong and have to provide supporting evidence. But an assessment normally has for this purpose it must have for income tax, taxable income and tax payable. It includes original deemed, default and amended assessments and the same sorts of issues apply for the relevant other taxes I mentioned.

Now for private rulings, you can object to a private ruling but only where the relevant assessment hasn't been made for the relevant year or period. So if you've got a BAS already lodged for the first quarter in a year and your objection relates to what happened in the first quarter, and you can no longer object to the private ruling, same thing applies for income tax. So once the relevant assessments been issued, you have to then go that way and

that's a disincentive sometimes to proceeded a private ruling path but instead to go to objections to the relevant assessments. Now also if it's a withholding tax related matter, if the withholding taxes actually become due and payable as the machinery provision for a page withholding does indicate, then you can't go for the private ruling. You have to go for the machinery induced assessment of that due and payable amount.

And also you can't get objections for rulings involving excise duty decisions. Now there has to be a taxpayer who is deriving income or gains for a company or a... Sorry, try that again. Income or gains for capital nature and it includes a company and a liquidator but not a partnership, because partnerships don't normally have assessments issued against them at the partnership level. And the person has to be dissatisfied in the sense that they don't like the decision, it has to be adverse to them in a way which results in a particular negative consequence. Now, importantly Part IVC proceedings in general objections and the subsequent litigation phases, the prescribed channel of review, so everything is moved into this channel and generally speaking, the taxing acts provide an oust or privative clause which prevents people otherwise challenging the efficacy or legality of the assessment. There's very small exceptions to that under say 39B of the Judiciary Act.

But the case law on that after futurists is that basically you've got Buckley's chance of doing that in most circumstances unless you can prove that there was conscious maladministration, in other words, utter bad faith. And so I don't think too many people are pursuing that now, although, you still get to run every so often. Now, why choose the AAT over the Federal Court? I'll concentrate on the AAT column here. The AAT is going to do a merit-based decision and the Federal Court will really do a judicial review. It cannot make a new decision, has to remit back to the commissioner to make a substitute decision. The AAT will not review the process by which the ATO made the decision, it can only review the decision, whereas sometimes there'll be aspects of a Federal Court review that will actually look at the process under which the assessment was made to which the objection relates.

The AAT can exercise discretions, the Federal Court can't has to remit them back. The AAT is a lower cost option. It'll either be about a thousand dollars or 543 if you're in a Small Business Tax Division. There are no ongoing legal fees in the... Sorry, no ongoing fees to the AAT for its time in contrast to what happens with filing fees in the Federal Court and the filing fees are much higher as a starting point. But most importantly the AAT is a non-cost jurisdiction, whereas the Federal Court is definitely a cost jurisdiction, which means that anybody applying to seek review of a decision is going to be at risk of having to pay the other party's cost. In this case, the commissioners. Of course if a taxpayer wins in the AAT and then the ATO goes for costs in the Federal Court after appealing, it can go the other way. But the commissioner is generally not going to do that as often.

If the taxpayer goes to Federal Court though to appeal against an unfavourable AAT decision, then the ATO is going to chase costs. Now the theory is that the AAT is not bound by the strict rules of evidence and the process is less formal. But over time the AAT looks a bit more like a Court than it was originally intended to do. And that's one of the things I think that the current review's going to focus on. In contrast, the Federal Court is bound by the strict rules of evidence and of course the Court rules even impose greater strictures on that than would otherwise be a case. And in the AAT, the taxpayer can request a gag order basically to suppress their identity so that things are heard anonymously and in private.

Whereas the Federal Court will normally have things heard openly in the interest of justice can get a gag order for some things where public matters might affect other proceedings and things like that, such as in a controversial trial, it might also be connected to a criminal trial, but it's more unusual and frankly doesn't happen quite as often as a result. Now, the Small Business Tax Division is important. If somebody's a small business operator and they get assessed on money they were supposedly taking out of the small business, they're still a small business taxpayer. So lots of times when the ATO does something like a division seven, a new audit or a trust related audit and the company or the trust concerned is actually involved in business, then the best thing to do is to go to the Small Business Tax Division.

It has a few advantages. Firstly, the fees are lower for filing and they may be remitted entirely if the person wins, but also if the ATO decides that they'll go to external legal service providers before the taxpayer does, and that includes whether they get a panel, solicited firm or council and it could be junior council or senior council. If they decide to do that, then they will then offer to match their funding by funding the other side. Conversely, if the taxpayer gets legal representation in the ATO legislature, the taxpayer doesn't get Buckley's of anything, so there's nothing in there for them. Now, now, this year from December, the AAT got the power to grant stays in collection proceedings as a result of particular statutory amendments to both the AAT Act and related provisions. So as a result, that happened pretty much the same day as the announcement of the abolition of the AAT after it being mooted for a long time that the actual legislation passed the same week. So the idea there is you're going to stay in the collection process.

It can also be a tactical advantage while you are attempting to pursue your dispute. The alternative is that the ATO goes to bankruptcy on an individual or a liquidation of a company, including a company that's operating as a corporate trustee and then the taxpayer can't pursue the dispute anymore, and that happens not infrequently, and as consequence, there's a real advantage to that stay order. It hasn't been used a lot yet. So I'm really watching out for that case that comes up where it's a good option for that. And lastly, the Australian Small Business and Family Enterprise Ombudsman, I can't work out how to say ASBFEO or whatever it is, can provide and does provide a certain amount of support for people to get an initial consultation with a legal practitioner or a tax agent to talk about their prospect success and can also provide some additional funding along the way. But it's not a lot of money and it doesn't cover anything like the pool ride for the fees, but it's useful to certainly work out whether you should and if so, to determine what your chances are.

Other types of tax decisions that can be appealed to the AAT include applications for relief for serious hardship, impositions or remission of penalties for failure to comply with the taxation law, and as I mentioned, private rulings. And interestingly a refusal to extend the time for lodging an objection and in fact that's probably something which happens very rarely, but it can happen. And normally that will ride with a presumptive conclusion that the objection was disallowed and sometimes the ATO will even issue a notice of disallowance along with the refusal to extend time, just to protect that. Now the other forms of ATO decisions under an enactment have to go through the ADJR process and there is specific exclusions in schedule one of the ADJR Act that prohibit the review of assessment or private ruling decisions. So they have to go through, it's part of that process. The only way to challenge an assessment private ruling decision is really through Part IVC proceedings.

So the downside of contesting a tax assessment through the Part IVC proceedings is that the assessment or private ruling decision has to be proven to be incorrect. And in assessment context, it's actually proving that the assessment is excessive. That's a high standard for the taxpayer to meet. And if they don't present probative evidence to prove it, then are they going to fail? It's not enough to go in, as I keep emphasizing, and complain that you don't like the process the ATO followed, you don't like their asset better methodology or anything. You need to actually attack the outcome from the assessment process. The amount is wrong and explain why it's wrong to get your arguments up and then you have to show by how much it's wrong.

So Gauci is, he's probably the best authority on that point. And as the quote says, the commission doesn't have to prove anything. The assessment is protected by the statutory framework. The taxpayer has to prove and the commission doesn't even need to have any evidence to base their assessment on. They can just say, we think this is the assessment. The idea though is that unless the taxpayer meets that standard under 14ZZK, they're going to fail. So that's very important. Now the taxpayer therefore has to show the facts that they rely upon by providing that probative evidence and they have to show how that evidence points towards the existence of a particular amount of tax, which may be zero, which is less than the amount that the commissioner has argued in their assessment. And they need to do that by filing evidence, witness statements from people which attach to them relevant documentary evidence where available.

And you can still get very different outcomes in similar circumstances depending upon how well people pursue those particular lines of argument. And you'll see that difference in Ross and Le, the two cases that are quoted there. And then probably my favourite quote in this area is actually from just Burchett in Ma. The thing is that if a taxpayer denies any undisclosed income, provides acceptable evidence, how they spend their time and demonstrates a reasonable explanation for any appearance of the possession of assets, he will generally discharge his burden of proof unless some positive reason is shown why he's to be disbelieved. And we'll talk about witness credibility in a little while as well. If a lot turns on how credible a taxpayer is going to be in the box, if they're the primary source of evidence about their own affairs, which they usually will be.

The other issues we'll talk about is as how to corroborate and what corroboration looks like. But the process in the AAT starts off with, that the taxpayer generally lodging an application to seek AAT review of the relevant decision. Now it has to be in writing, it has to state the reasons for seeking the review, but generally the grounds of review are going to be limited to the grounds of the objection decision to which they're appealing. So the idea is that if the objection was to disallow a deduction for work-related expenses but there was no dealing in the objection with interest deductions, then you can't then raise that additional issue in the AAT without lodging a separate objection to the interest deductions. And there's a whole body of case law and principle that says you can only have one bite at the objection cherry on a given particular.

Now, whether you can then get a second bite at the cherry for that second interest deduction issue that wasn't dealt with in the first objection is something that ATO probably have a negative view on. I might have a positive view on it, so you might end up arguing about that too. Now there's, again, an extension of time power which can be sought and the ATO will be asked if they oppose. So the taxpayer should have a good reason for why they've taken longer, such as they're continuing to agitate with the ATO to seek an informal review of the objection decision. I've done that on some cases. And sometimes the ATO actually decides that they do need to amend their objection decision. Other times they say, "Well no, I have to go to the Tribunal." In either case, the taxpayer will have to explain to the AAT who are exercising that discretion why they took longer and it has to be reasonable for them to be granted that extension time.

Now, the next step, this is from the AAT's general practice directions. The AAT will generally appoint a managing member to manage the application process. That's going to be one of the other people who do tax cases. The AAT will then advise the ATO that the relevant application for review has been received and the commissioner then has to provide a section 37 statement or T-documents, are within a certain period of time, 28 days, usually. Since they take longer in some cases with the really big cases, and so that's important. And there'll normally be some sort of scheduling conference held to arrange the filing process. And what happens after that can be done by registrar, quite often is, particularly in a Small Business Tax Division. There'll be a directions hearing to discuss the steps in the case management process, usually using a standard model that sometimes varied in during the circumstances between the parties and the nature of the case usually held before the section 37 statements lodged, but not always.

And it looks of whether there should be orders made in relation to the section 37 statement, for instance, 37 1A basically provides what the commissioner thinks is relevant. 37 1B allows the power to ask for extra things to be included. And it'll then schedule the other steps and it'll also consider whether there's any concurrent proceedings, such step proceedings that need to be considered. And it'll schedule some form of ADR, usually a conciliation to be considered at some point. And it will look at the process to presenting evidence, usually witness statements and then if there's a hearing, it'll be oral evidence and expert witnesses may be heard or not. And then it'll make directions about lodging and filing issues and including for evidence and the statements of fact issues and contentions, we'll talk about. Now, section 37, as I said, is the backbone of what the commissioner thinks is the basis of the decision and it needs to contain a statement giving the reasons, the notice objection, the taxation decision concerned, or it could be the objection decision, the actual taxation objection lodged by the applicant.

Every other document that is in the commissioner's possession or under the commissioner's control and is considered by the commissioner to be necessary to the review of the objection decision concerned. This is important because some documents the commissioner may not consider is relevant, but the taxpayer may, the applicant may seek to have a 37 1B matter, which is the third of the large dot points. But there's also questions about confidential information or privileged communications. So legal advice. If the commissioner gets legal advice, they're not going to want to provide that in their section 37 statement because they want to protect their privilege. There may be other confidentiality issues or even intergovernmental matters that occasionally pop up and the commissioner will argue they shouldn't be provided. The applicant will normally want them to be provided and there'll be some sort of decision on that made in the course of these processes.

Now, there's also a question about stuff that is generated afterwards. Section 38 capital A actually requires the commissioner or can require the commissioner to provide information that's relevant to the decision under review that is created after the date of the decision. And so it could be obtained by the commissioner after the decision or it can be created by the commissioner after the decision. So those things can, I mean, war will be provided in the basic section 37 statement that the commissioner proposes.

Now, the other thing about this process is what's called the SFIC or Statement of Issues, Facts and Contentions. I don't know why it's called a SFIC if it's actually the statement of issues, facts and contentions. It should be if SIFC or something, bur SFIC flows off the tongue more easily. It has to include the final number of the review process, the name of the applicant, name of the respondent, which would be commissioner of Taxation. You'll have to explain the issues. Now the issues that are in there is, what is the problem with the decision and what questions does the applicant want the Tribunal to answer? In response, the commissioner's SFIC will have the converse why they think that there are no problems with the decision and the opposite answer to the questions raised.

It needs to provide facts and evidence to support those facts. Now the SFIC itself is not an evidentiary document. You don't put evidence in it, you refer to evidence that's otherwise been adduced or is to be adduced. You shouldn't include opinions or assertions, therefore you should rely upon the other evidence that's there. But I'm referring to either the T-documents, the section 37 statement and other evidence that's been filed by the applicant. Now, the idea here is for the taxpayer to provide a contrary narrative to the commissioner's narrative. The aim of the commissioner's narrative is basically to defend the original assessment or private ruling decision, whereas the applicant's trying to provide an alternative one that supports their finding that they shouldn't be treated in the way that the commissioner's decision does. The contentions are therefore around what the conclusions of fact and law that the applicant wants their Tribunal to draw and why these conclusions should be drawn rather than the ones that the commissioner relied upon.

And ultimately it should outline the decision being sought and that you are seeking that that decision be made in substitution for the ATO's objection decision. Now, in the process of progressing an AAT review, evidence is crucial. The commissioner needs to present that evidence in support of the facts that they argue exist and the contentions that they actually think should be supported through that process. Now the material can be given in a written statement form, which is usually the stuff that's filed in initial stages, but it can actually also occur in oral statements made at hearing. And so the aim of the game there is to get your material in through one of those two channels. Now, documents including digital files need to be adduced as attachments to a written statement. Somebody needs to own them and attest to their provenance, the source of those documents and then provide some context for how they came to be created.

Now, again, the whole reason for the evidence is to provide the taxpayer's contrary narrative or for the commissioner in their evidence to support the original narrative or a substitute narrative if they're going to now argue alternatively basis in favour of the same conclusion via a different path. And this can be a bit of a battle of narratives. So the initial narrative comes up, the taxpayer raises some new ideas, and then the commissioner's then considering that and raises new arguments or counter-arguments and provides a counter-narrative. And

particularly when you're talking about tax outcomes and penalty outcomes, this can be much about the objective circumstances of the taxpayer but also increasingly subjective circumstances. So evidence of intention, for instance, can be important and contemporaneous evidence of intention can be crucial in some forms of decision. Or knowledge in terms of did somebody know something or not know something in a particular point in time that can relate to both intention and knowledge can relate to penalty and position in particular.

And while taxpayers can initially try to rely upon evidentiary presumptions like section 1305 and section 251A of the Corporations Act, the company documents and accounting documents in first case and minutes of meetings and records of meetings in the second. They're rebuttable presumptions. So as soon as the commissioner raises reasonable concerns based upon contrary evidence or something, it can mean that the presumption is defeated and then you have to go back to the re-establishing the circumstances that you would otherwise have had covered in those records. But the commissioner then has a positive burden to rebut that presumption. So then unlike the rest of the process in a rebuttable presumption, the commissioner does have a burden showing what's going on and why the presumption shouldn't just be accepted. Now, preparing the evidence is complicated in a sense, but family transactions and small business ventures in particular, you actually have a lot of informality.

If I'm dealing with my wife's entity, I'm not going to necessarily prepare all the documentation I would do if I was getting a mortgage from a bank. I'm not going to expect that there'll be, I mean, the degree of argumentation around any dispute that might occur. So there's a lack of documentation and it's an understandable one. In the Melbourne Corporation case here, what we've got is a quote from Justice Logan, which effectively comments about the generally accepted level of informality of small businesses, private groups and family dealings. And the idea that the commissioner shouldn't be placing an artificially high requirement on taxpayers in those circumstances to have third party arms length dealing documentation. And it would be a great disservice to the economy for anyone to suggest that. However, even though there can be informality, there still needs to be credibility and you need to consider what supporting evidence there may be available.

Now, keeping things in your documents are for the business. If you start accounting for things according to a particular way, that's corroboration for the existence of the transaction. And the parties, if both parties have the same accounting treatment between the entities, section 1305, the Corps Act starts to apply and then the commissioner's got that burden I talked about at trying to rebut that presumption. And the business records therefore are important. This is probably my favourite quote out of the last year, so you probably want to have a look at that case. It's quite an interesting one in a longstanding, long running, litigation chain. But there's a question about fraud or evasion which applies in AAT litigation and indeed in Federal Court litigation on tax matters. The problem is, if you've got a blameworthy act or admission to act, which is the definition of evasion from the case law in the chemicals case, the problem that the taxpayer is they have to prove that they didn't do the wrong thing.

So in other words, to get an unlimited period for the commissioner to make an amended assessment, they have to show that they believe that there was a blameworthy act. And once they do, the evidentiary burden then goes to the taxpayer to prove that it wasn't. And the only real way to do that is not to attack the processor of determining that they were maybe blameworthy, they have to prove that the relevant issue wasn't negative to them. So they basically have to meet their burden of proof, and cases like Nguyen and Bai and Binetter really show this in sharp contrast, because these are people who were accused of serious misconduct and they were found by the Court in the Federal Court in each case to have the burden of them proving that they didn't.

So unlike the presumption of innocence, you've got a presumption of guilt in this context and then the tax payers to prove that they did the right thing in their circumstances by showing that they didn't actually have an understatement of tax, which is effectively very difficult if it's like 10 or 20 years after the fact and the business records are no longer available. Banking records are available, commissioner just makes an assessment and then

suddenly the person has this burden. And I think that there is an argument for a statutory review of the burden of proof in this context for those sorts of cases.

Now, preparing evidence requires that the taxpayer prove the relevant objection decision was in incorrect and excessive and by how much. Now, taxpayer information is often regarded as being self-serving. The commissioner will almost always argue that in a case that the taxpayer's version of events can't be believed because their own evidence is only to protect them from the assessment liability.

Now, that's the norm, but sometimes people can turn up in the box and be incredibly believable. I don't know how many people have actually witnessed people giving evidence in things. It's not always like TV. It's not like Perry Mason ask a question and the witness cracks and suddenly reveals that they're secretly the other murderer. That's not how it really works in most cases. A lot of people can turn up and give evidence quite credibly even if they're true. And conversely, people who are completely truthful can actually be really crap witnesses. That's a technical term for it by the way. They can actually turn up and not be very believable. They can have trouble expressing themselves, particularly if they have non-English speaking backgrounds. And a lot of cases do involve people like that. And conversely, some people can just be completely believable because they're telling the truth.

My high watermark for this is probably the Krew case back from '71 I think it was. And in that case, the taxpayer convincingly argued before the Tribunal in... Sorry, the Court in question that they earned all of their money from gambling and they had irregularity to that gambling and they were very effective at it and then thus the amounts weren't accessible to them. I don't think this apply today given subsequent case law, but it's still a possible to have evidence believed in those sorts of circumstances. Now, if there's conflict between what's in evidence from other perspectives and what a witness says. So if there's a document that says otherwise or there's a previous statement from a witness that says otherwise, then they have to be able to explain that divergence of evidence. If they don't, their credibility will be shot.

Now, even when there's some inconsistency, sometimes those inconsistencies can be well explained. And in the VTBL case just a couple of weeks ago, that's pretty clearly what happened. There was questions raised by the commissioner about the credibility of the witness, in that case the taxpayer, and the credibility of other witnesses. And the applicant was able to explain why some of those inconsistencies existed and explain away what were perceived as inconsistencies by showing there weren't truly inconsistent. Now, that happened during submissions because the commissioner started to argue, I think in the case from the report at least, some issues after the first time in the hearing. And so the taxpayer couldn't provide contrary evidence to that in the normal flow of filings. Instead they did it in their after hearing submissions. But it's very important to recognize the need in making an effective case to consider what the other side's going to say and to rebut that in advance where you can but otherwise to cover it in your submissions.

Now, expert evidence is a complicated thing and there's a practice guideline from the Tribunal about what the expert evidence has to entail. Now, it has to specify what the area of expertise is and show the person has that expertise and it has to be an opinion, an independent opinion. Can't be from a person who is an advocate or has worked for the taxpayer in other context. And their independence can be questioned. The actual witness statement from the expert has to include their instructions and any other details of any other communications they've had with the party who's engaged them, so that you can show that they're not being nobbled by the party by being told what to say. Now, importantly, expert evidence is different to the evidence from say, an advisor who might have expertise that they gave the taxpayer during the course of the process that led to the relevant tax of all transaction.

So sometimes you'll get instances where the commissioner understandably challenges whether somebody's evidence is being provided as an expert, because they were engaged by the taxpayer at the time to give advice and therefore they're part of the transactions. But the answer to that should be that the information's being provided by that advisor not as expert evidence, but as evidence of what the client taxpayer was told at the time about the relevant transactions and their characterization and potentially information about the chain of transactions, the description of the events as the relevant advisor understood it. And so the problem with that is, and the last sentence in the slide really talks about it, is that they will be giving an expert opinion about what they told the taxpayer at the time because they shared their expert opinion with the taxpayer, but they're not giving expert witness evidence. They're giving evidence of what they told the taxpayer at the time. That's a narrow difference, but it's an important one.

Now, the commissioner gets a tactical advantage in this process because the applicant goes first, the ATO's evidence in response is therefore going to be anything else they want to adduce as evidence afterwards. Now, they'll often focus on material that might contradict or conflict with evidence provided by the taxpayer or their witnesses. And those contrary materials are therefore part of the commissioner's attack on the credibility or potential credibility of their witness. But sometimes it's not actually about that, maybe it's, and more importantly, it's about the rebuttal evidence that the applicant provides in response. So you get original evidence, you get a response evidence, then you get rebuttal evidence. And so you'll have this battle and sometimes you'll get a second round of filings in that context to do that. And that actually can even lead to the commissioner trying to provide further evidence in response. And even the taxpayer trying to provide further rebuttal evidence in response to that. So it can actually end up with a bit of a cycle. And the Tribunal can get, let's say, unhappy with that running on too long and sometimes try to bring things to a close.

Now the commissioner's SFIC is again, second in time. So it really does mean at that point that the commission gets a bit of a tactical advantage. Now, the commission SFIC will therefore contain a rebuttal response to the taxpayers arguments, generally defending the basis of the original decision, but sometimes making additional arguments in alternative terms to put before the Tribunal to try and reach the same conclusion. And they'll almost always refer to any evidence they believe is being contrary and will try to counter the narrative from the applicant taxpayer. And the commissioner will tend to try and defend the original story or provide, as I mentioned earlier, an alternative supporting narrative. So you can end up with several different narratives being explored concurrently, which makes it fun.

Now, there's always a scope for conciliation and other forms of alternative dispute resolution, mostly conferencing discussions to see whether the parties can agree. That's particularly prevalent in the Small Business Tax Division, but there's usually a formal conciliation. Now, the purpose of the conferences and the conciliation process is to identify and narrow the issues in dispute and see whether there can be agreement on any of them. Identify further evidence that may be needed and discuss when it has been received and to consider what the impact of that is on the merits of the case. Now, there's a tendency for both parties to not truly consider independently what the evidence is that the other party's provided. So it's a very important possibility here for the parties for the first time really consider what the other party's saying, and what their prospects of success are versus what they thought they were originally.

And there's usually a schedule of those conferences and conciliation arrived at very early in the piece. Now, the conciliation process, the form process requires a confidential issue statement to be generated and it has to be no more than three pages and in readable font. Don't go to one point font, they won't accept that. And it really has to lay out what each party's position is. Now those are confidential, they're shared with the AAT conciliation member or rather the registrar. And they are actually really there to allow each party to articulate things and to then try and make arguments then about those issues subsequently. So the actual contents of that are laid out here, I figure everyone can read, but it's really like a mini run of your case, plus indicating how long you think that the hearing's going to take and what witnesses you're going to call. And that then highlights the costs incurred to

date and the likely further costs. Now that stuff can get really, it's like a precursor to the hearing certificate that you subsequently have to file.

Now, if the parties reach agreement, that can actually be put in writing and then the other parties take that to the member and get it signed off. And if the Tribunal agrees, which they don't always agree, they'll consider it appropriate to make the decision and they can record a consent decision. But the converse is that if parties have a discussion and make some sort of potential concession without prejudice sort of sense in the conciliation mediation process, they're protected communications and can't be produced later on. The exception of that is if there's enforcement of an order, consent order, you can then produce evidence of what was discussed in the relevant conciliation or mediation conference at that time. That doesn't happen a lot. I've only seen it once recently.

Now, the submissions are very important as well. I've talked about that a bit, but it's effectively providing a coherent argument as to why you believe the Tribunal should make a conclusion of fact, which supports your party's contentions and whether and why the Tribunal should make a conclusion of law based on the authorities which supports your party's position. And also you need to argue against the other party's arguments in your submissions. So you've got to put your positive case and then you've got to argue against the other party's case. So it's good to workshop what the other party's case is and work through that accordingly. If you don't, there's a sunsuit quote which I can't remember exact wording for, but essentially it says that if you know yourself, your own position and you know may have a good shot at something, if your opponent's case you'll have a good shot at doing or dealing with their position. If neither, you'll lose. So the thing is you've got to know your own position well, but you've also got to workshop what you think the other party's position is too.

Now, as I talked about, the existence or non-existence of a material fact is often crucial so that whether are two potential narratives and submissions have to focus on why your narratives should be preferred and also why the other parties should be discounted. If credibility is an issue for either party's witnesses and the commissioner's witnesses can have their credibility challenged as well, it's not solely a taxpayer issue, then you need to actually argue that in your submissions on questions of fact as to why the relevant credibility questions should be decided in your party's favour. And you can't get by with just asserting things. You have to refer to evidence that supports your proposition. And even if the other party doesn't focus on any perceived inconsistencies, the Tribunal raises those issues themselves. So you can't just rely upon that. And submissions on issues of law need to analyze the relevant authorities and form conclusions about it. If you don't, then you're really on a hiding to nothing. So you have to actually explain why, if there are two potential possibilities, the one that's favorable to your party is the one that should be preferred.

And of course, if you've got something complicated where there's different ways in which something might be treated, whether it's a capital revenue issued for a property developer where you might have an isolated profit making schemer undertaking argument as well, you need to look at which of those three would be considered and you need to rebut the other alternatives. If you've got something like penalties, you need to then run through the alternatives in order. So first is there wasn't a shortfall. Second is there wasn't a lack of reasonable care.Third is if there was a lack of reasonable care, it was safe harbored. And if there is any remaining penalty, then the 298-20 discretion should be exercised for whatever penalty may remain. But if you don't do it in a logical order, then your submissions will be jumbled and the Tribunal member may either be confused by them or choose not to follow them because they're not convincing.

Now, the actual hearing is going to be before a member, maybe a panel occasionally, and if it involves a question of law, it's likely to be heard by a presidential member. So you then get the process where the applicant will present their case. The commissioner will then as respondent present theirs, so there'll be a representative of the applicant, whether if there's a tax agent or a lawyer present or maybe a barrister as well. And again, the respondent will have somebody there and they can have representation as well. And there'll be people present

for their bit to give their evidence. And that can include witnesses who appear voluntarily and those who are under summons to actually give evidence.

Now the conduct of hearings, this is a lovely quote here from Spoodler. The idea here is that the procedure is variable and the idea is, Tony Pagone's book is excellent by the way. The idea is that it's important to recognize that the process can be varied and the idea is that that needs to be decided on the basis of the facts and circumstances of the case. And the Tribunals might. And just because they did things in a particular way doesn't generally mean that the whole process can then be open to criticism because again, it has to result in the outcome being challengeable, the outcome in the sense of the objection decision to which the Tribunal proceeding relates. So it's got to be a pretty significant defect law in the process for it to actually fall over.

Now the hearing itself, there's a bit of a spiel here about what happens, but effectively I've gone through that and then after the hearing and there'll actually be a reservation of the decision in some cases, other times the Tribunal member will give a decision on the spot. The length of the actual hearing process can vary substantially. It can be short or long, it can be days, sometimes even weeks. And people will be asked questions as witnesses and there'll be cross-ex examination of witnesses and things. And then at the end, each party will be given a summing up opportunity before the matters then are reserved or decided. As we talked about earlier, the AAT can affirm, vary or set aside and they can set aside and remit sometimes. They can usually give an oral decision at the end of the hearing, but they'll usually send out a notice of the decision usually within two months. But I saw, VTBL seem to be 12 months after the actual hearing and they're normally published unless the disclosure is prohibited and adverse decisions can then be appealed within 28 days after receiving the decision to the Federal Court.

Powers of the AAT are that they sit in the shoes of the commissioners, I talked about. Now the Tribunal isn't bound by tax rulings, but they often give them weight. And again, as I mentioned earlier, the AAT now has the ability to stay recovery proceedings where there's a reviewable objection decision in the Small Business Tax Division. And the idea of standing the shoes, the commissioner and all of those things is not to go over what the commissioner did, but to actually work out what the correct answer is rather than to revisit all the steps the commissioner took.

Now, party who's dissatisfied needs to consider whether they go to the Federal Court and it's limited to a question of law. Some questions of fact can be so bad that they constitute a mixed question of fact and law, but it's a high water mark to reach. The Federal Court can make new findings of fact if necessary to complete dispose of something, but that's unusual. And it has to be in the new issues can only be raised where it's in the interest of justice and it's about the construction of the law. And the AAT can make... Sorry, the Federal Court not AAT review can actually make any order and they can remit it back to the AAT to be heard again or determine again. And of course can appeal from Federal Court decision or full Federal Court and from full Federal Court with special leave to the high Court, noting an increased tendency for that special need to be refused.

Lots of reading here for people. So there's the directions, et cetera. And those two books by Tony Pagone I think are excellent. Now, we might open for questions and sorry, I ran a few minutes longer because there was a bit to cover. So back to you, Susannah.

CCH Learning:

Thank you very much for that, Bruce. Lots of information there, but that's okay. Always good to get more information. So yes, we will be spending the next few minutes taking some questions. So just a reminder to please type them into the questions pane. While that's happening, I'm just going to mention some of our upcoming webinars. So coming up, we do have our webinar on the 28th, well today. So this afternoon we're looking at FBT 2023, Return Preparation. Next, and then on Thursday we'll be looking at FBT 2023 Motor Vehicles

(including Electric Vehicles). Next week we will be looking at Car Parking in relation to FBT and we're also looking at Tax Risk Management and Tax Governance. We're also looking at SMSF's and Death Benefits and Tax issues for Property Developers. If you are interested in any of those webinars, please, head to our website and check them out.

So let's have a little look at our questions. Okay, so I do have a question from Nishaf. Now, Nishaf has asked two sort of quite related questions. The first question was, can an accountant and a tax agent lodge an objection with the AAT on behalf of a client or can only a lawyer lodge it?

Bruce Collins:

Yeah, look, that's a good question. One I should have mentioned. Anybody can appear on a client's behalf in the AAT and it's a tax agent service, so you'd have to be a tax agent. So effectively the Tax Agent Services Act would make that the case. But lawyers can obviously appear for people. Literally though a person who wasn't charging anybody can appear. And I've seen people appear on a pro bono basis in the Tribunal who weren't either lawyers or accountants or tax agents. It's just a question about who wants to appear. And because the Tribunal's the master of its own procedure, or mistress perhaps, the idea is that they can do that. So they can allow whoever wants to appear on behalf of the person do so.

CCH Learning:

Okay, so does that include even lodging the objection? Yes.

Bruce Collins:

Lodging the application is, anybody can do that on behalf of the person, but the person has to sign it and then file it and pay the fee.

CCH Learning:

Okay. Well, I think that actually answered both of Nishaf's questions because he did then ask who can appear and you answered that question. So there you go, Nishaf, both your questions have been answered there. So I also have a question from Michael. Michael's asking, "What do I do if the other side doesn't come to the conciliation with an open mind to negotiate or even consider our position and evidence?"

Bruce Collins:

Look, that's probably the most difficult part of the whole process of alternative dispute resolution. Everyone has confirmatory bias about their own position. Taxpayers think they've got a hundred percent chance of winning. The commissioner thinks they've got a hundred percent chance of winning. They can't both be right. The parties will often come down by 20% so they each think they've got an 80% chance of winning and get a litigation risk discounted maybe 20% for their position. But I've seen cases where the ATO said they had a hundred percent chance of winning, offered a 20% litigation risk discount to the taxpayer. So effectively the taxpayer was going to pay 80% of the disputed tax and penalties. And then the commissioner is lost in the Tribunal and entirely on every ground, other cases where they've lost on most of the grounds. But the commissioners' initial assessment of their position was that they were entirely going to win.

I've also seen taxpayers who weren't willing to offer any concession in a settlement negotiation where they don't think that they're going to lose and they think that they're entirely justified and then subsequently they've lost. So it can happen to be both ways. I think that the articulation of your understanding of their case and why there are weaknesses in their case is probably the best convincing argument in favour of them moving further.

So if you look at VTBL, a case that I talked about earlier, in that circumstance, there was apparently additional filings information that hadn't been considered an objection in support of the taxpayer's contentions. Now I would've thought that the commissioner in a case like that would've seriously considered the additional evidence filed and maybe gone through it. But maybe they didn't really understand its impact where, so that the conciliation or a mediation process is an opportunity to put forward those arguments for the taxpayer's perspective and to try to, I get that, I don't know if there was a conciliation or mediation in VTBL or not. But it's that opportunity to highlight what you think of the weaknesses in the other party's case to get them to give ground. But they have to be working past their own cognitive bias to do so. So it's tricky, but works both ways, not just the commissioner that has [inaudible 01:05:03] biases, clearly taxpayers as well.

CCH Learning:

Thank you for that, Bruce. So I hope that that helps you there, Michael, I have a question from Amir. Amir is asking, "Taxpayer had a K2 event and transferred a property to partnership in 2020. Partnership developed in the property and sold them in 2022 and 2023. In individuals 2022 pre-fill indicates six sales for the subdivided property as capital sales. How do we let the ATO know the situation to preempt the audit?"

Bruce Collins:

Well, that's a very specific case, but I would suggest writing to them through the portal if you're a tax agent or writing to them via whatever other channel you might have as a legal practitioner, through the legal practitioner gateway. Because it is something that the ATO's, if there's a discrepancy like that, the ATO is quite likely to come knocking on the door.

CCH Learning:

Okay, thank you for that. So I hope that helps you there, Amir. I also just had another question from Nishaf. Nishaf was asking, "What is the force of the AAT's decision? Can it be relied upon by the ATO and the taxpayer on related matter?"

Bruce Collins:

Yes and no. So the ATO will quite frequently agree to apply the position taken in a related AAT case and it doesn't have direct force because it's not binding except on the applicants. So sometimes you're actually better off lodging several references to the AAT applying for several taxpayers and then having one be the lead case, and the others will be joined to it or be seen to follow it. That actually means that the decision on the AAT is likely to apply to all of them. But if you don't do that and you have other people in the same circumstance who are connected, then you'd want to make that clear to the commissioner early in the piece and hopefully get agreement from them that this will be like your test case for that group. If you don't do that, the commissioner is likely to be reasonable in a lot of circumstances, but not always.

So in that sort of situation, there's no direct presidential authority of the AAT, but there's a general rule that if the commissioner doesn't like an answer for a taxpayer other than they should appeal, and that's particularly if it was a Federal Court decision precedent starts applying then. But in the AAT it really doesn't have direct authority. It's persuasive but not determinative of the issue. So try and work it out with the commissioner in advance. If you are

aware of the litigation happening by somebody else in a group. If it's a beneficiary of a trust and there are three other beneficiaries, I would join them by lodging applications for them. But sometimes one person won't like it and go ahead and just storm through bulldozing and everybody else is just following along in the trench that they've dug. So that's the bit we need to contact with the other taxpayer to talk with them about it in advance.

CCH Learning:

Thank you for that, Bruce. I hope you that helps you, Nishaf. And Nishaf says, "That's great. Thanks." So there you go, Bruce. Let's have a look. Do we have another question? Yes, we have one more question from Sarah. Sarah is asking, "If the ATO is represented by external legal representation, can I still talk to the ATO on other tax matters? What happens if we are told we cannot communicate with the ATO on any matter?"

Bruce Collins:

Look, that's a complicated issue. Essentially if like the legal practice guidelines that the code of conduct that applies to us in the legislative framework that applies to lawyers, prohibits me from talking to a client who's represented by another lawyer. I have to go through the lawyer. I need the permission of the other law firm to actually communicate directly with the taxpayer about the subject matter of the litigation or the legal matter, which might be pre-litigation. Now, that doesn't mean, because the commissioner has a range of statutory duties and obligations. That doesn't mean that if I want to apply under freedom of information on an unrelated matter that I can't go to the commissioner directly. Or if I want to lodge an objection on an unrelated matter that I can't go to the commissioner directly. Tax agents don't have this problem. I think tax agents are advantaged in that circumstance, because they can continue to communicate with the commissioner.

They may refer everything back to the lawyers anyway and then right back by the lawyer, but they can't be prohibited from communicating. I can be because I am. The complicating factor is really though that it depends on what it's about. So if you've got a litigation matter that involves debt litigation, but I'm dealing with an objection on the same matter, is that something I need to go through the lawyers on? And the answer may be yes, but I still need to lodge the objection with the commissioner. And if the established channel is to lodge the objection through the lawyer, then I go that way. But it is actually quite a messy issue. And something I have taken up with the ATO at times and mentioned the inspector general is that lawyers, tax lawyers in particular are disadvantaged in dealing with the commissioner in these circumstances because of those practice requirements. So it is actually not an easy question to answer. So I usually say if it's completely unrelated, go to the commissioner. If it's partly related, if you're a lawyer, you need to go through the lawyer that's representing the commissioner.

CCH Learning:

Thank you for that, Bruce. So there you go, Sarah. Somewhat complicated, but we do have a way forward. Well, that does seem to be all the questions we have today. So in terms of next steps, I would like to remind you all to please take a moment to provide your feedback when exiting. We've asked you a couple of questions about today's webinar, so it's really important for us to hear your opinions. It's also a reminder that within 24 to 48 hours you will be enrolled into the e-learning recording, which can be watched multiple times and have access to the PowerPoint transcript and any other supporting documentation and of course a CPD certificate. I would very much like to thank Bruce for today's session and to you, the audience for joining us. We hope to see you back online for another CCH Learning webinar very soon. Enjoy the rest of your day. Thank you very much.

Bruce Collins:

Thanks a lot everyone.