"Revenue Law and Practice in Papua New Guinea"
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The Honourable Justice J A Logan RFD [1]

There is actually quite a strong connection, globally, between the ways in which countries raise tax revenue and the ways in which they are governed. When countries are well governed - when disputes are resolved, elections are held regularly, the rule of law prevails, roads are in reasonable prepare, citizens can rely on government for at least basic health, education and welfare services, and government is broadly trusted - then we generally find that government revenue systems are healthy.[2]

In *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*[3] a great jurist, the United States Supreme Court judge, Justice Oliver Wendell Holmes, stated:

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[1] A Judge of the Supreme and National Courts of Papua New Guinea and of the Federal Court of Australia; President, Australian Defence Force Discipline Appeal Tribunal. I gratefully acknowledge the assistance of my Associate, Mr Evan Donaldson, in research tasks associated with the preparation of this paper.

Caveat - The views expressed in this paper are personal and, necessarily, provisional. They not to be regarded as those of either the Australian or Papua New Guinea governments or any court or tribunal of which the author is a member. They do not constitute advice of any description, A different conclusion may be reached by me on any issue covered in this paper in the event that it arises for decision in a judicial proceeding.

A confession

I omitted to refer to the Taxation Administration Act 2017 (TAA) in my Sir Buri Kidu Lecture on the subject of the Rule of Law, delivered in March last year. That omission does not render the observations made about the utility of taxation as a means of combatting corruption. However, the statutory references to, notably, default assessments would now have to take account of the equivalent provisions in the TAA in respect of income years following the commencement of the TAA. The interaction between the TAA, the ITA59 and other Acts mentioned in Schedule 2 to the TAA has yet to be considered by the Supreme Court.

[2] Professor Mick Moore, CEO, the International Centre for Tax and Development, based in the United Kingdom, visiting Papua New Guinea in November 2019 to deliver the keynote address at the Koktok Belong Strongim Nesen discussion series held at the University of Papua New Guinea, as quoted in The Post Courier, 20 November 2019: https://postcourier.com.pg/expert-taxation-key-for-good-governance/ Accessed, 15 February 2023. Professor Moore has written extensively on the inter-relationship between effective and efficient national taxation systems and good public governance generally and nation building, peace, general prosperity and increased overall standards of living. I refer those who would read further on the subject to Deborah Brautigam, American University, Washington DC, Odd-Helge Fjeldstad, Chr. Michelsen Institute, Bergen, Norway, Mick Moore, Institute of Development Studies, University of Sussex (Eds), *Taxation and State-Building in Developing Countries, Capacity and Consent*, Cambridge University Press, 2008.

[3] 275 US 87, at 100 (1927).

> It is true … that every exaction of money for an act is a discouragement to the extent of the payment required, but that which in its immediacy is a discouragement may be part of an encouragement when seen in its organic connection with the whole. Taxes are the price we pay for civilised society …

That statement was made in the context of proceedings for the recovery of tax allegedly illegally imposed and in a dissenting judgement. These features have never been regarded as affecting the accuracy of his Honour's observation that "Taxes are the price we pay for civilised society." Indeed, to this day, with the slight textual alteration of inserting the indefinite article "a" before "civilised society", a rendition of it and its author are inscribed above the main entrance to the Internal Revenue Service Building in Washington DC in the United States of America.

Taxes are also the price paid or to be paid in Papua New Guinea for civilised society. They are the price to be paid for national independence in more than name. It is taxes which will reduce or eliminate dependency on foreign aid. It is taxes that pay for a democratically elected parliament and a supporting public service, public education, public health, public utilities, the conduct of national defence and foreign affairs, the delivery of justice according to the law of Papua New Guinea and related peace and order, together with a myriad of other activities of government, national, provincial and local. In short, it is taxes which pay for the nation established by the people of Papua New Guinea on 16 September 1975 and its governance in accordance with the constitution they adopted.

But taxes are only payable according to law.

The inspiration for this paper has been the experience of never, until this very week by serendipitous coincidence, encountering a taxation case for hearing and determination at appellate level, notwithstanding having for over a decade the privilege of sitting in the Supreme Court. That experience is strange to me. In Australia, I have spent a professional lifetime, either as a barrister or, since 2007, as a judge, appearing, either for or against the Revenue, in or, more latterly, adjudicating, taxation cases. Other judges have encountered appeals in tax cases in the Supreme Court[4] but they are infrequent. Anecdotally, there may be of late an increase in tax case filings in the National Court but they are as yet still uncommon.

My purpose in this paper is not to explore why there is a paucity of tax cases in the court lists, much less whether that is an exemplar of wider governance issues identified in studies on that subject in relation to Papua New Guinea.[5] Rather, it is to highlight some key legal concepts in the principal revenue law statutes and to comment upon features of the assessing, objection, review and appeal procedures for which those relevant statutes provide. I also make some observations about the role of revenue law administration in addressing corruption.

Practising in, or administering, revenue law can appear overwhelmingly difficult. It is easy to lose sight of the wood for the trees. Especially that is so if parliament has tried to micro-manage outcomes by complicated prescription, as opposed to adopting known legal principles and concepts, the application of which is determined by applying those principles and concepts on a case by case basis.

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4 *South Seas Tuna Corporation Ltd v Palaso* [2019] PGSC 3; SC1761 is a rare example.

5 For those who would read further of these, see, for example, Grant Wilson, Governance and Corruption in PNG's public service: insights from four subnational administrations, Discussion Paper 81, Development Policy centre, Australian National University, April 2019; Eugene E Ezebilo, Francis Odhumo and Philip Kavan, The Perceived Impact of Public Sector Corruption on Economic Performance of Micro, Small and Medium Enterprises in a Developing Country, Economics, 2019; Justice Gua, Accountability is the path to better governance in PNG, Lowy Institute, Australia and Papua New Guinea, April 2021.

Human affairs, business and personal, are such that they throw up a myriad of permutations and combinations that rarely lend themselves to successful, detailed statutory prescription of application. My experience is that understanding certain key legal principles and concepts not only solves many revenue law controversies but also, even where it does not, provides the foundation for making a reasonable fist of those situations where parliament in its wisdom has chosen to modify or negate the application of a legal principle or concept.

Also necessary is at least a basic understanding of some related accounting principles so as to understand a balance sheet and profit and loss statement.

Scope of paper

For this purpose, I shall focus upon income tax and goods and service tax (GST). Consideration of other taxes found in Papua New Guinea, which include stamp duty, timber export duty, spice levies, gaming machine tax, bookmaker's tax, departure tax and customs and excise duty lie outside the scope of this paper. Constraints of seminar time also dictate that the focus must be confined to some key concepts and then only at a general level.

Sources for legislation and cases

The current text of legislation in Papua New Guinea can be difficult to locate, especially in digital form.

While the Pacific Islands Legal Information Institute (PACLII)[6] is a useful resource, that is more so for case law than necessarily up to date consolidations of statutes. PACLII is dependent on donor funding and has limited resources. Care needs to be taken with the current accuracy of its PNG legislation databases.

[6] http://www.paclii.org/countries/pg.html Accessed 8 February 2023.

The Internal Revenue Commission (IRC) maintains a comprehensive, publicly accessible list of the principal revenue law statutes under the commission's administration with links to the text.[7] Some of these links direct to PACLII, others to a PDF version of the relevant Act. While one must still check for any later amendments, this database is a valuable resource. I respectfully commend the Commissioner General and his staff for maintaining it.

Many of the key taxation concepts in respect of both income tax and GST are, unsurprisingly given the pre-Independence administration of Papua New Guinea, also found in analogous Australian law. There is presently a dearth of locally decided tax cases in Papua New Guinea. Of course Australian or other foreign cases are of persuasive value only and care needs to be taken to ensure whether there is any difference in local statutory provision. Subject to such considerations, there is much assistance to be gained by reference to Australian and other foreign tax cases. A freely available internet resource of Australian tax legislation and cases is the Australian Legal Information Institute (AUSTLII).[8] Other freely available internet sources for Australian tax cases are to be found in the judgements databases of the High Court of Australia[9] and of the Federal Court of Australia.[10]

Revenue law case law in Australia is dynamic. However, cases concerning hitherto untested or not much tested detailed prescriptive provisions aside, many other recently decided tax cases are but applications of earlier settled principles concerning broad concepts for example, what is income or capital on either the revenue or expenditure sides of the ledger, who is a resident and so on?

[7] PNG IRC Legislation Home: https://irc.gov.pg/pages/know-your-taxes/legislation-home Accessed 8 February 2023.
[8] http://www.austlii.edu.au/ Accessed 8 February 2023.
[9] https://www.hcourt.gov.au/ Accessed 8 February 2023.
[10] https://www.fedcourt.gov.au/ Accessed 8 February 2023.

For this reason, even non-current textbooks which offer good explanations of such broad concepts and foundational cases can still be of great assistance and obtained at reasonable cost. With respect to income tax, my experience is that two of the best are R W Parsons, *Income Taxation in Australia* and O'Grady and O'Rourke *Ryan's Manual of the Law of Income Tax in Australia*. The late Professor Ross Parsons and the late Professor (later Justice) Kevin Ryan were renowned teachers of taxation law at, respectively, the University of Sydney and the University of Queensland Law Schools. I did not know Professor Parsons but I did know Professor Ryan. I had the enduring benefit of being taught taxation law by him and later appearing before him when he went to the bench. He was a wise and kindly man.

Income Tax – Some Key Liability Concepts

As to liability, the relevant legislation is the *Income Tax Act 1959* (ITA59).

Subject to the ITA59, income tax is imposed and levied and must be paid on the taxable income derived during the year of income by any person, whether a resident or a non-resident.[11] A notable qualification is that income derived by a non-resident from sources wholly out of Papua New Guinea is exempt from income tax or salary or wages tax.[12]

Subject to the Act, the term, "taxable income" is defined to mean, "the amount remaining after deducting from assessable income all allowable deductions and includes taxable additional profits from mining operations and taxable additional profits from petroleum operations".[13]

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[11] ITA59. S 11(1).
[12] ITA59, s 36.
[13] ITA59, s 4(1).

Again subject to the Act, the term “assessable income” is defined by the ITA59 to mean “all the amounts that, under the provisions of this Act, are included in the assessable income”. Correspondingly, the ITA59 defines the term “allowable deduction” to mean, “a deduction allowable under this Act”.[14]

Taxable income is thus a net amount entailing the subtraction from assessable income of allowable deductions.

There are special provisions governing the taxation of salary and wages income and related payments and benefits.[15]

“*Income*”

Although there are many exemptions and statutory inclusions and exclusions, the legislative starting point for all of these is what constitutes income under ordinary concepts.

In *Scott v Commissioner of Taxation (NSW)* Jordan CJ (with whom Street J and, on this point, Stephen J agreed) stated[16]:

> The word "income" is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable amount of such receipts: *A-G of British Columbia v*

[14] See, in each case, s 4(1), ITA59.
[15] ITA59, Div2B.
[16] (1935) 35 SR (NSW) 215, at 219.

Ostrum ([1904] AC 144 at 147); *Lambe v Inland Revenue Commissioners* ([1934] 1 KB 178 at 182-3).

But what are "ordinary concepts" of income? Ordinarily, one would identify these as income:

(a) remuneration for the performance of personal services, for example, salary and wages;
(b) income from property, for example, rent or royalties;
(c) income from carrying on a business;
(d) dividends from shares in companies;
(e) receipts of interest on bank deposits, bonds, debentures or loans;
(f) distributions of trust income to a beneficiary.

This is not an exhaustive list. Further, as already mentioned, the ITA59 makes many exemptions and qualifications in respect of items in this list.

The receipt of a wage or salary, although subject to a special taxing regime in the ITA59, is but one form of remuneration for personal services. A commission, for example that paid to a real estate agent for selling a home or a stockbroker for buying or selling shares is another type of remuneration for personal services. If rendered in the course of carrying on a business, the income concerned would be income from the carrying on of that business.

Under ordinary concepts, a receipt of income is to be distinguished from a receipt of capital. The two are mutually exclusive. But they are not exhaustive of types of receipt.

A lawful gift is neither a receipt of income nor capital. On the other hand, tips associated with the performance of a service in the course of employment or carrying on a business are income.

So, too, is a bribe paid to a person to facilitate a service income. And that is so even though the payment and receipt of a bribe is illegal. The ITA59 is indifferent to the legality of derivation of income. In *Partridge v. Mallandaine* decided against the background of a person conducting a systematic illegal betting operation and whether that fell within a taxing provision which taxed the income of a "vocation" or "calling", Denman J stated[17]:

> In my opinion if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of £2000 per year, the Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation.

See also and even more starkly, the advice of the Judicial Committee in *Minister of Finance v Smith*,[18] decided against the background of whether receipts from illegal "bootlegging" operations constituted income for the purposes of a statute which taxed income, in which it was held that they were income for the purpose of the taxing statute.

As in these cases, the ITA59 uses "income" in a general way. There is no occasion for putting a gloss on it by confining its meaning to legally derived income. If anything, there are public policy reasons for not so confining its meaning.

Periodicity of receipt is sometimes said to be a marker for distinguishing between a receipt of income and a receipt of capital. But it is a very imperfect marker. A gain may nonetheless be income if it arises from an isolated business operation or commercial transaction entered into otherwise than in the ordinary course of

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[17] (1886) 2 TC 179. This statement does not appear in the revised version of his Lordship's judgement, as reported in the authorised report of *Partridge v. Mallandaine* (1886) 18 Q.B.D. 276, at 277-278 But the substance of the revised judgements the same namely, that there is no occasion for a gloss on the words "vocation" or "calling" so as to exclude the illegal.

[18] [1927] AC 193.

the carrying on of a person's business but with the intention or purpose of making profit or gain. Whether it does so depends very much on the circumstances of a given case.[19] By the same token, what is truly a capital sum can sometimes be paid by instalments, e.g. the deposit and sale price balance of the sale, otherwise than in the course of a business, of real property.

What assessable income is subject to tax?

In general, the assessable income of a taxpayer includes–

(a) where the taxpayer is a resident–the gross income derived directly or indirectly from all sources whether in or out of Papua New Guinea; and

(b) where the taxpayer is a non-resident–the gross income derived directly or indirectly from all sources in Papua New Guinea,

other than exempt income.[20]

Thus, "source" and "derivation" of income and "residence" are important concepts.

"Source" of income

Where the "source" of income is located, for example in or outside Papua New Guinea, is also not a term of art. The test is a practical one looking at the circumstances of a given case. In *Nathan v Commissioner of Taxation*, Isaacs, Gavan Duffy and Rich JJ stated[21]:

> The Legislature in using the word "source" meant, not a legal concept, but something which a practical man would regard as a real source of

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[19] *Commissioner of Taxation v Myer Emporium Ltd (*1987) 163 CLR 199.

[20] ITA59, s 46(1).

[21] (1918) 25 CLR 183, at 189-190. The Judicial Committee of the Privy Council approved this statement in *Liquidator Rhodesia Metals Ltd (in liq) v Commissioner of Taxation* [1940] AC 774.

> income. Legal concepts must, of course, enter into the question when we have to consider to whom a given source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact.

An example of such a practical evaluation is offered by *Commissioner of Taxation v United Aircraft Corporation*.[22] In that case, the appellant company was incorporated in New York in the United States of America and had its principal place of business there. By an agreement made in New York, it agreed to communicate to an Australian aircraft manufacturing company technical information which would assist that company's production of aircraft and related parts. The Australian company In return, the Australian company agreed to make payments in New York and to receive fob in New York the relevant information (technical drawings etc). The High Court (by majority) held that the payments made to the appellant company did not constitute income derived, directly or indirectly, from a source in Australia. The position may well have been different in terms of a conclusion as to where the "source" was located had the New York company a registered patent in relation to the aircraft and granted to the Australian company a licence for a payment to manufacture the aircraft in Australia. In that circumstance, it might be concluded that it was the Australian licence which was the source of the payment.

More straightforward are, for example, cases where income is derived from a PNG issued licence to conduct an activity in Papua New Guinea or where rent is derived from a property located in PNG. In such cases it may readily be concluded that the "source" of the income is in Papua New Guinea.

When is income "derived"?

[22] (1943) 68 CLR 525.

The ITA59 imposes tax on taxable income "derived" in a given tax year. The statute thus envisages an annual taking of accounts. This makes it necessary to identify when income is "derived". Income is "derived" when it is obtained, got or acquired.[23] As a rule of thumb, if income has been realised or is in realisable form it has been "derived".

Residence

The ITA59 defines "resident" or "resident of Papua New Guinea" to mean:

(a) in relation to a person, other than a company, means a person who resides in Papua New Guinea, and includes a person–

(i) whose domicile is in Papua New Guinea, unless the Commissioner General is satisfied that his permanent place of abode is outside Papua New Guinea; and

(ii) who has actually been in Papua New Guinea, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner General is satisfied that his usual place of abode is outside Papua New Guinea, and that he does not intend to take up residence in Papua New Guinea; or

(iii) who is a contributor to a prescribed superannuation fund or who is the spouse, or a child under 16 years of age, of such a contributor; and

(b) in relation to a company other than a superannuation fund, means a company which is incorporated in Papua New Guinea, or which, not being incorporated in Papua New Guinea, carries on business in Papua New Guinea, and has either its central management and control in Papua New

[23] *Commissioner of Taxation v Clarke* (1927) 40 CLR 246, at 261 per Isaacs ACJ.

Guinea, or its voting power controlled by shareholders who are residents of Papua New Guinea; and

(c) in relation to a superannuation fund, means a superannuation fund which is established or managed in Papua New Guinea.[24]

As far as individuals are concerned, the ITA59 proceeds from a general concept as to who constitutes a "resident" and then includes in any event some particular categories. Some in these particular categories might be a "resident" that concept is generally understood in any event.

The classic statement as to who is a "resident" and where that person "resides" is that of Viscount Cave LC in *Levene v Inland Revenue Commissioners*[25]:

> … the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

As can be seen from this statement, the relevant test is, once again, one of practical, evaluative judgement in the overall circumstances of a given case. Many examples can be given of factors which, in the overall circumstances of a

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24 ITA59, s 4(1).
25 [1928] AC 217.

given case, proved determinative of whether an individual was or was not a "resident". Care needs to be taken in relation to any list of such factors not to apply them uncritically to the different overall circumstances of another case.

The meaning of the Australian analogue of the inclusion found in paragraph (a)(i) of the definition, both in terms of "domicile" and "permanent place of abode", was given recent and detailed consideration by the Full Court of the Federal Court of Australia in ***Harding*** *v Commissioner of Taxation*.[26]

"Domicile" and when it has been relinquished can be difficult subjects. In general, a person born in Papua New Guinea to Papua New Guinea citizen parents has a domicile of origin in PNG. That domicile will be retained and a domicile of choice in a different country gained only of it can be concluded on the facts that there has been a deliberate parting of the ways with Papua New Guinea. As to the meaning of "permanent place of abode", the conclusion reached in *Harding* was that it is not a reference only to an individual's specific house or flat or other dwelling. Instead, the words "permanent place" require the identification of a country in which the taxpayer is living permanently. Where an individual is domiciled is not necessarily to be equated with where he or she resides. In relation to this inclusion, Davies and Steward JJ (with whom on this I agreed) stated[27]:

> The exception in subpara (i) then assumes that the person is not physically present in Australia during the year of income, but is nonetheless still domiciled here. Where it can be shown to the Commissioner's satisfaction that that person has "definitely abandoned" their Australian residence, Parliament's intention is that that person should not be subject to federal income tax. A person who

[26] [2019] FCAFC 29; (2019) 269 FCR 311.
[27] [2019] FCAFC 29; (2019) 269 FCR 311, at [36]. I agreed with these observations.

ceases permanently to live in Australia, but who nonetheless considers themselves still to be an Australian might fall within this category.

This particular inclusion might not be much encountered in Papua New Guinea at present, as it was not until recent years in Australia. However, as those born in Papua New Guinea or who deliberately have moved to PNG a long time ago to take up citizenship come to take up long term employments overseas, it will ever increasingly be encountered in taxation practice. That has been the Australian experience with the like inclusion in Australian income tax law as to who is a "resident".

Allowable deductions

By s 66(1) of the ITA59, it is provided that, "In calculating the taxable income of a taxpayer, the total assessable income derived by him during the year of income shall be taken as a basis and from it there shall be deducted all allowable deductions."

The general provision in relation to what constitutes an "allowable deduction is s 68(1) of the ITA59, which provides:

> (1) Subject to Section 68A and Division III.10, all losses and outgoings, to the extent to which they are incurred in gaining or producing the assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing that income, are allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.

This subsection has great similarity to s 8-1 of Australia's *Income Tax Assessment Act 1997* (ITAA97) and its predecessor, s 51(1) of the *Income Tax Assessment Act 1936* (ITAA36). So cases concerning the meaning and application of these provisions will likely offer much assistance.

The root authority in respect of determining whether an outlay qualifies as a deduction under s 8-1 of the ITAA 97 or is not allowable, because it is an outgoing of capital, is the judgement of Dixon J (as his Honour then was) in *Sun Newspapers Ltd and Associated Newspapers Ltd v Commissioner of Taxation*.[28] Dixon J referred to three indicators.[29] The foremost of these is the character of the advantage sort by the outlay. The following summary of the three indicators identified by Dixon J has the advantage of that of a unanimous Full Court constituted by all seven judges of the High Court in *Mount Isa Mines Ltd v Commissioner of Taxation*:

> *(1) the character of the advantage sought and, in this respect, its lasting qualities and recurrence may play a part; (2) the manner in which the advantage is to be used, relied upon or enjoyed and, in this respect as well, recurrence may play a part; and (3) the means adopted to obtain the advantage, that is, whether a periodical reward or outlay is provided to cover its use or enjoyment for periods commensurate with the payment or whether a final provision or payment is made so as to secure future use or enjoyment.*[30]

The other two indicators mentioned in this passage, "the manner in which the advantage is to be used, relied upon or enjoyed" and "the means adopted to obtain

[28] (1938) 61 CLR 337.
[29] (1938) 61 CLR 337, at 363.
[30] (1992) 176 CLR 141, at 147.

the advantage" could be regarded as subsets of the character of the advantage sought but it assists the determination of deductibility separately to advert to them.

Ordinarily, in deciding whether an amount is allowable as a deduction under s 8-1 of the ITAA97, it "is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent".[31] Where, however, the expenditure concerned is productive of no assessable income or there is a great disproportion between the expenditure and any assessable income which can be seen to be derived, the motive of the taxpayer in the incurring of the expenditure can be relevant if not decisive in a practical, common sense identifying and weighing up of the direct and indirect objects of incurring the expenditure.[32] Even so, if in that weighing up and notwithstanding disproportion what remains is a genuine rather than colourable incurring of the expenditure for the gaining or producing of assessable income then the whole will be deductible under s 8-1. In other cases, that weighing up may disclose but a colourable incurring of the expenditure for gaining or producing assessable income while in yet others the result may be apportionment.

The expenditure claimed need not be productive of assessable income in the year in which it was incurred in order to be deductible under s 8-1 of the ITAA97. The relationship posited by the section is at a greater level of abstraction than this.[33] Further, it is the ultimate object of the incurring of the expenditure which is critical to determining eligibility for its deduction.[34] There is no reason to think that the position is any different in Papua New Guinea.

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[31] *Cecil Bros Pty Ltd v Commissioner of Taxation* (1964) 111 CLR 430, at 434.
[32] *Fletcher v Commissioner of Taxation* (1991) 173 CLR 1, at 18-19.
[33] *Federal Commissioner of Taxation v Finn* (1961) 106 CLR 60 at 68; *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1, at 16-19.
[34] *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459, at [25].

Expenditure which is nothing more than a prerequisite to the gaining or producing of assessable income cannot be characterised as having been incurred in (in the course of) gaining or producing that income.[35]

Expenditure falling within the second limb of s 68(1) of the ITA 59 (the analogue of the second limb of 8-1 of the ITAA97 and, before that, of s 51(1) of the ITAA36) i.e. that incurred in carrying on a business for the purpose of gaining or producing assessable income will often, where it has a voluntary quality, also fall within the first limb of that provision. In *John Fairfax & Sons Pty Ltd v Commissioner of Taxation*,[36] Fullagar J expressed the view that the second limb of the provision, "may be thought to be concerned rather with cases where, in the carrying on of a business, some abnormal event or situation leads to an expenditure which it is not desired to make, but which is made for the purposes of the business generally and is generally regarded as unavoidable."

"Incurred"

For the purposes of s 68(1) of the ITA59, a sum need not only actually be paid in order for it to be "incurred". In referring to the then Australian equivalent of s 68(1) of the ITA59, Dixon J (as his Honour then was) stated in *New Zealand Flax Investments Ltd v Commissioner of Taxation*[37]:

> To come within that provision there must be a loss or outgoing actually incurred. "Incurred" does not mean only defrayed, discharged, or borne, but rather it includes encountered, run into, or fallen upon. It is unsafe to attempt exhaustive definitions of a conception intended to have such a various or multifarious application. But it does not include

[35] *Lunney v Commissioner of Taxation* (1958) 100 CLR 478.
[36] (1959) 101 CLR 30, at 40.
[37] (1938) 61 CLR 179, at 207.

> a loss or expenditure which is no more than impending, threatened, or expected.

Expenditure to which a person is definitively committed could be said to be incurred. An example might be where a person has required his or her bank via internet banking to make an electronic transfer to a third party but the processing of that transfer is pending within the banking system.

Anti-tax avoidance

The ITA59 contains a general provision designed to combat the avoidance of a taxation liability – s 361. As a matter of impression and although some of the text is similar, this section appears to me to be more powerful than the former general anti-avoidance provision in Australian income tax law.[38] It may even be superior to the current Australian general anti-avoidance measures.[39]

One reason why Papua New Guinea's provision looks to me superior to the former Australian provision is that s 361(2) of ITA59, unlike the former Australian provision, permits reconstruction by the Commissioner General -

> … adjusted in such manner as the Commissioner General considers appropriate so as to counteract any tax advantage obtained by that person from or under that arrangement and, without limiting the generality of this subsection, the Commissioner General may have regard to such income as in his opinion–
>
> (a) that person would have, or might be expected to have, or would in all likelihood have, derived if that arrangement had not been made or entered into; or

[38] ITAA36, s 260.
[39] Found in ITAA36, Part IVA.

(b) that person would have derived if he had been entitled to the benefit of all income or taxable gain, or of such part thereof as the Commissioner General considers proper, derived by any other person as a result of that arrangement.

Again impressionistically, because, under s 361(1), what amounts to "tax avoidance" is defined in an inclusory, not exhaustive way, that may leave room for the operation in Papua New Guinea of the English approach to the construction of a revenue law statute, which allows that such a statute will not be excluded from application to a transaction where it can be concluded that the transaction was a "fiscal nullity". In Australia, where the then provision did not have an inclusory quality in relation to what constituted tax avoidance, the presence of a general anti-avoidance provision in a taxing statute was regarded as inconsistent with the adoption of such an approach to the construction of that statute.[40]

The "fiscal nullity" principle was enunciated in *WT Ramsay Ltd v IRC*[41] and approved and applied in the later English case, *Furniss (lnsp of Taxes) v Dawson*.[42] In *Furniss v Dawson*, Lord Brightman, who delivered the principal speech in the House of Lords, stated[43]:

> *First*, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. *Secondly*, there must

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40 *Oakey Abattoir Pty Ltd v Commissioner of Taxation* (1984) 15 ATR 1059.
41 [1982] AC 300.
42 [1984] 2 WLR 226.
43 *Furniss v Dawson*, at 242.

> be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax - not 'no business effect.' If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

While the type of arrangement described in this passage might well be captured in any event by the specific description in s 361(1), the inclusory nature of that description of "tax avoidance" may leave also scope for also treating as "tax avoidance" an arrangement as described by Lord Brightman. Section 361 should sound a cautionary note in respect of those who would engage in artificial or contrived arrangements to avoid tax in Papua New Guinea. Equally, it is important not to treat as tax avoidance ordinary commercial or family arrangements.[44]

Resort to an anti-avoidance provision such as s 361 of the ITA59 is unnecessary where the transaction or arrangement concerned is but a sham.[45]

Audit and Assessment

I consider the subject of audit and assessment by reference to the provisions of the *Taxation Administration Act 2017* (TAA). How the TAA is to be read with the ITA59 and the GST Act is a subject yet to be explored by the Supreme Court.

The Commissioner General is not bound to accept the correctness of an income tax (or GST) return. Subject to the limits set in s 18 of the TAA, he is entitled to amend existing assessments as a sequel, for example, to any such audit and

[44] The advice of the Judicial Committee in *Newton v Commissioner of Taxation* (1958) 98 CLR 1, delivered by Lord Denning, offers a useful illustration of the difference.

[45] *Millar v Commissioner of Taxation* (2016) 243 FCR 302.

investigation. He is also entitled to raise an assessment where there has been default in the lodging of a return.[46]

Although it is by no means the only method by which the Commissioner might assess taxable income in a default assessment, a method which permissibly may be used, and which is frequently used in Australia, is the "asset betterment" method. A good description of this method is to be found in the judgement of Starke J in ***Trautwein*** *v Commissioner of Taxation*.[47] His Honour stated:

> The figures in the amended assessment were arrived at by taking the net increase in the assets for the period 1st July 1920 to 30th June 1927 and adding thereto private and other non-allowable items of expenditure during the period which were not represented by assessments. As far as possible, income was allocated to the years in which it was derived. But an amount of £112,354, which could not be allocated to any particular year, was divided equally between the seven years under review, that is, £16,050 to each year.

Trautwein remains a leading case in Australia about the permissibility of the assets betterment method of default assessing and how a taxpayer discharges the onus of proving such an assessment to be excessive. In effect, a taxpayer must prove by how much the taxable income so assessed was excessive. It is insufficient just to show some flaw in the assessing method.

A taxpayer is not obliged to prove an assessment to be excessive to demonstration, only to reasonable satisfaction (in the context of an objection or review decision) or on the balance of probabilities (in the context of any judicial

[46] TAA, s 16.
[47] [1936] HCA 77; (1936) 56 CLR 63.

proceeding where a tax liability falls for determination on questions of fact as well as law, as to which, see below).

In my view, default assessing or amendment of assessments using the assets betterment method of calculating taxable income, in conjunction with use of the Commissioner General's collection and recovery powers, is a potent method of combatting corruption. If a person has accumulated assets or made expenditures (for example, overseas tuition fees for children or holidays abroad) the value of which cannot be explained by declared income or other lawful benefit (for example, an inheritance), the Commissioner General may assess or amend an assessment using the assets betterment method. In effect, one examines how much income would have been needed to acquire the asset at the time of acquisition or make an expenditure, making allowance for changes in value of money thereafter if need be, and other adjustments appropriate in a given case, and then assesses the resultant income year by year based on such an estimate. Applicable statutory penalties would then be added.

The Commissioner General is not limited in assets betterment based assessing just to looking to assets located in Papua New Guinea. Unexplained assets held abroad may also be taken into account. The existence of such assets may be revealed by searches of public registers of real property and companies. In addition, where, as with Australia and Papua New Guinea,[48] an information exchange is provided for in an International Double Taxation Agreement, use may be made of this right.

Part X of the TAA confers on the Commissioner General extensive information gathering powers within Papua New Guinea. Just as in Australia, the

[48] Agreement between Australia and the Independent State of Papua New Guinea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Australian Treaty series No 37, Article 25: http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1989/37.html Accessed 11 February 2023.

Commissioner is entitled to enter premises to "fish" for information for the purpose of discharging his duties under a taxation law under his administration.[49] The PNG provision conferring this right is arguably superior to its original Australian analogue[50] in that the PNG provision expressly requires the person in possession or control of the premises reasonably to facilitate that access for that purpose.

The Commissioner General also has a broad power to require by "administrative summons" persons to provide him with information via giving evidence and producing documents in hard copy or digital format for the purpose of discharging his duties under a taxation law under his administration.[51] Once again, this broad information gathering power allows the Commissioner General to "fish" for information for that purpose.[52] It is no answer to a summons that the information concerned may be subject to a confidentiality agreement, for example, as between banker and customer.[53]

Unlike in Australia, where the ability is regarded as an incident of the Taxation Commissioner's general administration of taxation laws, in Papua New Guinea an audit power is expressly conferred on the Commissioner General.[54] While there would doubtless have to be an internal record of the decision and reasons to audit, that decision could be preceded and informed by the Commissioner General's use of his information gathering powers. Recalling that the Commissioner General is, necessarily, a stranger to transactions which constitute

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49 See with respect to an analogue of s 59 of the ITA, s 263 of the ITAA36, *O'Reilly v Commissioner of State Bank of Victoria* (1985) 153 CLR 1.

50 ITAA36, s 263.

51 TAA, s 59.

52 *Australia and New Zealand Banking Group Ltd v Konza* [2012] FCAFC 127; (2012) 206 FCR 450. And see *Commissioner of v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499, which is the root authority concerning the then Australian analogue, ITAA36, s 264.

53 *Australia and New Zealand Banking Group Ltd v Konza* [2012] FCAFC 127; (2012) 206 FCR 450.

54 TAA, s 60.

the taxable facts, one might expect that the threshold for a decision to audit on one or more of the statutory bases would be low.

With these great information gathering and audit powers comes a great responsibility on the part of the Commissioner General. Even their use in good faith can impose hardship, economic and emotional, on an individual or corporation in granting access and furnishing information. The Commissioner General's powers must be used reasonably. He and his officers must try and avoid approaching explanations given by taxpayers with undue scepticism and with an understanding of how individuals and businesses conduct themselves in the real world. Tax consequences are taken into account routinely in many if not most large commercial decision but that does not necessarily mean that they are the dominant consideration. I have in Australia seen many a tax case lost by the Revenue, because of uncritical "group think" within the Revenue and a lack of appreciation of commercial realities or family dynamics. In my view, the great challenge for the Revenue is to avoid or at least overcome a natural tendency to view all transactions as dominated by the purpose of obtaining a taxation benefit.

Collection and Recovery of Tax

As with audit and assessment, I consider this topic with reference to the TAA. On this subject also, there may be unresolved questions as to how the TAA is to be read with the ITA59.

Collection and recovery of tax is governed by Part VIII of the TAA.

Although the provisions in Part VIII have many Australian analogues, care must be taken in uncritically adopting Australian case law concerning them. That is because, although analogous, the language of the PNG provisions is not completely symmetrical. At least, however, the language of Papua New Guinea's TAA is more readily comprehensible than the dense thicket which resulted from

the moving by amendment of most Australian collection and recovery provisions into Schedule 1 to the *Taxation Administration Act 1953* and then modifying their language.

Unlike in Australia, Papua New Guinea has retained, albeit in a way limited to withholding tax, GST and amounts owed by third parties to a taxpayer, a form of State priority for such tax and amounts in a company winding up or a bankruptcy.[55] Also unlike in Australia, a person's unpaid tax is a charge on their real and personal property.[56]

As in Australian revenue law,[57] the Commissioner General is able to recover outstanding tax from those who owe money to the taxpayer.[58]

As in Australia, tax is a debt due to the State, recoverable by the Commissioner General in a court of competent jurisdiction, suing in his official name.[59] Unlike in Australia, PNG's TAA explicitly provides that, "If a taxpayer fails to pay tax by the due date, the taxpayer is liable for any costs incurred by the Commissioner General in taking action to recover tax."[60] In Australia, court filing fees and party and party costs associated with a tax recovery proceeding are awarded to the Taxation Commissioner on obtaining judgement in a tax recovery proceeding under the relevant court's general power to award costs. Papua New Guinea's provision certainly goes this far but the meaning of "costs incurred … in taking action to recover tax", even having regard to the definition of "tax recovery costs",[61] may perhaps be wider.

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55 TAA, s 36.

56 TAA, s 41.

57 For example, the former s 218 of the ITAA36 and later equivalents in the Taxation Administration Act 1953, Schedule 1.

58 TAA, s 42.

59 TAA, s 33(1), s 40(1).

60 TAA, s 33(2).

61 Defined by s 2 of the TAA:
"tax recovery costs" means the following -
(a) the costs of recovering unpaid tax referred to in Section 33; and
(b) the costs of seizure proceedings under Section 46; and

As in Australia, the existence of a dispute about a taxation assessment does not mean that the tax concerned is not due and payable.[62]

In any tax recovery proceeding, a certificate signed by the Commissioner General as to the amount owing is "sufficient evidence" upon which the court may give judgement.[63] The language of this provision differs from an Australian analogue[64] in two ways. The Australian provision uses the adjective "conclusive", rather than "sufficient". Further, whereas the Australian provision applies to all proceedings other than appeal and review proceedings, Papua New Guinea's evidentiary provision only applies to actions to recover tax. Whereas in Australia, the tender of an assessment signed by the Taxation Commissioner and its conclusive evidentiary quality has seen the resultant dismissal of proceedings against the Taxation Commissioner for a declaration with respect to a taxation liability,[65] the more limited focus of the PNG tax evidentiary analogue may mean that it would not be possible for the Commissioner General to seek the dismissal of a proceeding in the National Court for a declaration as to a taxation liability. That is because such a declaratory proceeding may not be regarded as a proceeding by the Commissioner General to recover tax.

An ability for a taxpayer to resort in this way to an exercise of judicial power on issues of fact and law in relation to a taxation liability may be important in relation to the validity of the overall taxation regime under the Commissioner General's administration. I make some further observations about challenging taxation assessments under the heading "Appeals and Reviews".

(c) the costs of administrative distress proceedings under Section 47;

[62] TAA, s 30(1).

[63] TAA, s 33(2).

[64] For example, the former s 177 of the ITAA36.

[65] *Platypus Leasing Inc v Commissioner of Taxation* [2005] NSWCA 399; (2005) 61 ATR 239.

As in Australia,[66] formal defects do not in Papua New Guinea invalidate a taxation assessment.[67] It is likely, having regard to case law concerning the Australian analogue, that the effect of the relevant provision is to render pointless a challenge on judicial review to the validity of an assessment unless it is possible to discharge the burden of proving that the assessment was the result of conscious maladministration by the Commissioner General.[68] Such a conclusion is not made out, even on the balance of probabilities, by inexact proofs and indirect references.[69]

In relation to corporate tax liabilities, Paua New Guinea has a novel provision directed to rendering directors and a controlling shareholder personally liable "if an arrangement has been entered into with the purpose, or purposes that include the purpose, or the effect, of rendering a company unable to satisfy a current or future tax liability under a tax law, every person who was a director or controlling member of the company at the time the management is entered into is jointly and severally liable for the tax liability of the company".[70] This may well be superior to the intricate Australian director's penalty notice regime found in the Taxation Administration Act 1953. It certainly looks easier to administer. Given this provision, those who think "phoenix" companies might be an effective way of avoiding PNG corporate tax liabilities should think again.

While the subject of efficiency in tax collection lies outside the scope of this paper, I cannot refrain when considering the subject of collection and recovery of tax from observing that it is important in revenue law administration that the overall amount of public revenue collected exceed by a large margin the cost of

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66 ITAA36, s 175.
67 TAA, s 72.
68 *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146.
69 *Timothy v Timothy* [2022] PGSC 82; SC2282; *Yagama v Uguro* [2018] PGSC 24; SC1682; *Berkefeld v Berkefeld* [1953] PGSC 9; *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
70 TAA, s 45(2).

its collection and recovery (including in that regard audit, assessing and tax review and appeal costs). A taxation regime does not exist just to employ officers of the Internal Revenue Office.

Taxation Objections

On these subjects also, I consider them by reference to the provisions in the TAA. Once again, there may be issues to be resolved as to how the provisions of the TAA are to be read with provisions in the ITA59 providing for challenges to objection decisions. I expressly refrain from making any observations about the meaning and effect of the provisions in the ITA59 in respect of the review of or appeal against a taxation objection decision, because it may be necessary to canvas that subject in a presently reserved judgement of a Supreme Court bench of which I am a member.

Under the TAA, there is not an unrestricted right of objection against any taxation assessment. A significant and, with respect, odd constraint is that an objection is only valid "if the appellant has furnished the tax return for the tax assessment".[71] Read literally, this would preclude the lodging of a notice of objection by a person who, not having lodged a taxation return, is then subject to a default assessment.

Another condition specified in the TAA in respect of the lodging of a valid objection is payment of any tax both in dispute[72] (or at least 50% thereof)[73] or not disputed[74] (or the making of an arrangement which is satisfactory to the Commissioner General in relation to payment of that tax).

Not only must a taxation objection state precisely the grounds of objection but it must also specify the amendments considered necessary and the reasons for the

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[71] TAA, s 24(3)(b)(i).
[72] TAA, s 24(3)(b)(iii)
[73] TAA, s 30.
[74] TAA, s 24(3)(b)(ii).

making of such amendments.[75] The PNG requirements for a valid objection which go beyond specifying the grounds of objection are more onerous than imposed in Australia on a taxpayer who is dissatisfied with an assessment or other taxation decision and wishes to object.[76] However, in Australia, in making submissions on behalf of a taxpayer to the Taxation Commissioner, or on later review or appeal, it would be necessary to deal with these further subjects. So, in practice, the additional PNG objection requirements move these to an earlier stage.

Even so and with respect, the difficulty in these additional requirements in a developing country may be to deny those whose English literacy or education level is, through no fault of their own, not as advanced as others, and who cannot afford to engage a registered tax agent, an ability to lodge an effective tax objection. The existence of such a problem may presently be masked by personal income which is mainly salary or wages, below a tax threshold or just outside the present reach of tax administration for a variety of reasons. But it is difficult to see why an illiterate but perhaps honest person whose taxable income has been increased greatly beyond that returned by an amended assessment made in good faith by the Commissioner General should be held not to have made a valid objection by specifying in writing to the Commissioner General, "I did not earn this extra income you say I did."

Also unlike the present position in Australia but like the former Australian position,[77] in Papua New Guinea the grounds of objection cannot be later amended in any challenge to an objection decision by the Tax Review Tribunal.[78] Under the former Australian position, although a ground of objection was not interpreted technically, the effect of the limitation with respect to specification of

[75] TAA, s 24(3)(a).
[76] Compare s 14ZU, Taxation Administration Act 1953.
[77] ITAA36, s 190(a), as originally enacted.
[78] TAA, s 32(2).

grounds of objection was regarded as precluding a taxpayer on appeal or review from relying upon an entirely new basis for proving an assessment to be excessive.[79] The purpose of that limitation prohibiting later reliance on different grounds of objection was held in Australia to be protection of the revenue.[80] The limitation was removed because the rigidity visited injustices in particular cases and also because, in order to avoid that, a practice developed amongst tax agents of specifying prolix grounds of objection which obscured, rather than identified, the true alleged error in the assessment. Under the present Australian position, amendment of the grounds of objection is permitted with the question as to whether to allow amendment usually resolved by considering whether, at the stage amendment is sought, that would be procedurally fair to the Taxation Commissioner.

In the ordinary course, a taxation objection must be lodged with the Commissioner General in the approved form within 60 days of the service of the notice of assessment (or other taxation decision),[81] although the Commissioner General does have a discretion to extend that time.[82] The National Court would have jurisdiction to review on jurisdictional error grounds a refusal of an extension of time.[83]

In my experience, the objection stage is a very important one in revenue law administration and practice. It is critical that the Revenue approaches the question of whether to uphold in whole or in part an objection with a fresh and open mind, receptive to the possibility that, having regard to the grounds of objection, the assessment in question may be wrong. In effect, it is a "last chance" for the Revenue to avoid the possibility of later being shown to be in error. On the other

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[79] *Archer Brothers Pty Ltd v Commissioner of Taxation* (1953) 90 CLR 140, at 149.
[80] *Archer Brothers Pty Ltd v Commissioner of Taxation* (1953) 90 CLR 140, at 149.
[81] TAA, s 24(1).
[82] TAA, s 24(7).
[83] Constitution, s 155(4).

hand, it is also the last chance for a taxpayer to avoid what may be a costly and diverting endeavour to prove on review that the assessment is excessive. A taxpayer and tax agent does him or herself no favours by not laying all of his or her cards on matters of fact and law on the table in dealings with the Commissioner General in relation to the determination of an objection.

Appeals and Reviews

Unlike the position in Australia,[84] the TAA does not give a person dissatisfied with an objection decision the right of choosing between direct recourse to the judicial branch to challenge that decision on matters of fact and law by proving the assessment concerned to be excessive. Instead, by s 26 of the TAA, the only right offered by that Act is to make an application for review of the objection decision to the Tax Review **Tribunal** in accordance with s 79 of the TAA.

Form the Tribunal, there is a right of appeal to the National Court but that right is confined to an appeal on a question of law.[85] The notice of appeal must be filed within 28 days or within such further time as the court may allow.[86]

A similar restriction to a question of law exists in respect of an appeal to the Federal Court of Australia from the Administrative Appeals Tribunal where a taxpayer has chosen to seek the review of an objection decision by that tribunal, instead of proceeding directly to that court.[87] There is well-developed jurisprudence in Australia in relation to what amounts to a "question of law" for the purpose of that right of appeal.[88] There is also much case law in Papua New Guinea in relation to what constitutes a "question of law" for the purposes of the unrestricted right of appeal to the Supreme Court from the National Court in civil

[84] Currently, Taxation Administration Act 1953, s 14ZZ(1).
[85] TAA, ss 27(1) and 27(3).
[86] TAA, s 27(2).
[87] Administrative Appeals Tribunal Act 1975, s 44.
[88] *Haritos v Commissioner of Taxation* [2015] FCAFC 92; (2015) 233 FCR 315.

proceedings given by s 14(1)(a) of the Supreme Court Act. One might expect that this body of authority would be relevant by analogy in relation to the right of appeal to the National Court from the Tribunal.[89]

An application for review of an objection decision by the Tribunal must be made within 28 days of notification of the objection decision, although the Tribunal does have power to extend that time.[90] Once filed with the Tribunal, the application for review must be served on the Commissioner General within 7 days.[91]

Prior to making an application for review (or filing a later appeal to the National Court on a question of law), any accrued additional tax for late payment[92] and at least 50% of the tax in dispute must be paid by the taxpayer into a trust account administered by the Commissioner General.[93] The Commissioner General may require a higher amount of the tax in dispute to be paid if satisfied that the taxpayer has taken or will take steps to frustrate recovery of the tax in dispute.[94]

The Commissioner General issued a public notice in March 2022 giving details of the trust account into which the required percentage of disputed tax could be paid.[95]

It has long been the case in Australia that the fact that an application for review or taxation appeal is pending does not prevent the recovery of the disputed tax.[96] Equally however in Australia, if satisfied that there is a genuine dispute, the

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89 There is a most helpful discussion of the relevant authorities in L B Mamu, Supreme Court (PNG) Practice and Procedure, Kairos Press, 2016, at pp. 75-76.
90 TAA, s 78(2)(a) and s 79(3).
91 TAA, s 79(4).
92 ITA59, s 262.
93 TAA, s 30(2).
94 TAA, s 30(3).
95 Taxation Appeals - Disputed Tax Deposit: https://irc.gov.pg/news/public-notices/taxation-appeals-disputed-tax-deposit Accessed 16 February 2023.
96 See, for example, the former ITAA36, s 201 and now s 14ZZM and s 14ZZO, Taxation Administration Act 1953. And, as to the effect of these provisions, see *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; (2008) 237 CLR 473.

Taxation Commissioner will usually defer recovery action pending the outcome of an appeal or review if 50% of the tax in dispute is paid. Also however, in Australia, and unlike in Papua New Guinea, the right of appeal or review against an objection decision is not conditioned upon the payment of any of the tax in dispute.

The difference between the two regimes may perhaps mean that, in Papua New Guinea, it is open to argue that the requirement for payment of 50% of the tax in dispute as a condition of a valid application for review creates either generally or in the circumstances of a given case (where payment 50% of the disputed tax would render a taxpayer insolvent) create an incontestable tax and render the requirement constitutionally invalid. That position may be underscored by the absence in the TAA of a right of direct recourse to the judicial branch to contest an objection decision. In Australia, a right of such recourse is regarded as necessary for a valid law with respect to taxation.[97] Acceptance that there is a right for a taxpayer to seek declaratory relief in the National Court in respect of a taxation liability and that the existence of a right of review by the Tribunal is not a basis for discretionary refusal of such relief may be a complete answer to any such invalidity contention. Exploration of that subject in the Papua New Guinea context lies beyond the scope of this paper.

Taxation review proceedings before the Tribunal are to be conducted with as little formality as possible and without the application of the rules of evidence.[98] For the purpose of determining a review, the Tribunal is invested with all of the powers and discretions of the Commissioner General.[99] The purpose and effect of the provisions concerning the nature of a review by the Tribunal is thus

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[97] See *Deputy Commissioner of Taxation v Brown* (1858) 100 CLR 32, at 40-41 per Dixon CJ and *Giris Pty Ltd v Deputy Commissioner of Taxation* (1969) 119 CLR 365, at 378-379 per Kitto J.

[98] TAA, s 79(3).

[99] TAA, s 79(2).

identical to provisions in Australia in relation to review by the Administrative Appeals Tribunal and its predecessor, a Taxation Board of Review. Such provisions have been regarded as conferring administrative or executive rather than judicial power on the review body.[100] Once again, that they have this character may, in the context of the scheme in the TAA, lead to a conclusion in Papua New Guinea not to dismiss as a matter of discretion an application for declaratory relief concerning a taxation liability, at least once an objection decision has been made.

Subject to the giving of due notice and provision of particulars, the Commissioner General is entitled in a review proceeding to defend an assessment on grounds which did not inform its making.[101]

In respect of review proceedings in Australia in the Administrative Appeals Tribunal, it has long been the practice for that tribunal to require the parties to exchange statements of facts, issues and contentions. The aim of this practice is to narrow issues as far as possible and to prevent either party from being taken by surprise at the final hearing (a procedural fairness purpose). A like practice applies in a taxation appeal in the original jurisdiction of the Federal Court of Australia.[102] For like reasons, in my respectful view, there would be much to recommend the adoption of such a practice by the Tribunal in Papua New Guinea and, for that matter, the National Court in any proceeding for a declaration with respect to a taxation liability.

As to appeals to the National Court from the Tribunal, the National Court does have rules of court expressly directed to such appeals, to taxation appeals to the

[100] *Shell Company of Australia Ltd v Commissioner of Taxation* (1930) 44 CLR 530.
[101] *Commissioner of Taxation v Australia and New Zealand Savings Bank Ltd* (1994) 181 CLR 466, at 479; *Commissioner of Taxation v Wade* (1951) 84 CLR 105, at 117.
[102] See Taxation Practice Note (TAX-1): https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/tax-1 Accessed 16 February 2023.

court directly from objection decisions and to references from the Tribunal on questions of law.[103] These rules do not expressly cover the GST Act or the TAA, only the ITA59.; nor do they cover the case stated practice and procedure. They could doubtless be adapted where there were like means of challenge in the GST Act and the TAA to a means found in the ITA59 for a challenge to an objection decision. Were there any doubt as to applicable practice and procedure, an application could be made to the National Court for directions. Any notice of appeal under the TAA must specify the question or questions of law for the court to determine.[104]

The TAA does provide for a test case procedure, initiated by the Commissioner, in respect of notices of objection which raise issues of fact or law which may be of general application. The procedure entails the Commissioner's stating a case for the opinion of the National Court.[105] Subject to a right to request the Commissioner nonetheless to determine an objection or for the Tribunal to finalise a review, the initiation of such a test case brings individual cases raising a like issue to a temporary halt, pending the delivery of judgement by the National Court.[106]

Be it in respect of an appeal to the National Court from the Tribunal on a question of law or in respect of a test case stated to that court or in respect of a declaration with respect to a taxation liability, an appeal would lie to the Supreme Court on questions of law or on questions of mixed law and fact or, by leave, on a question of fact.[107] The Supreme Court could also, by leave and in an appropriate case,

[103] National Court Appeal Rules 2005, Order 18, Division 2, rules 14A and following: http://www.paclii.org/pg/rules/ct_rules/ncar2005265/ Accessed 16 February 2023.
[104] TAA, s 27(3).
[105] See TAA, s 29.
[106] See TAA, s 29.
[107] Supreme Court Act, s 4(1) and s 4(2).

exercise its constitutionally entrenched judicial review jurisdiction in respect of any such National Court judgement.[108]

Goods and Services Tax

The GST for which the *Goods and Services Tax Act 2003* (GST Act) provides is just a Papua New Guinean exemplar of a value added type of regressive, indirect tax that was known to and described by public finance economists well before the Second World War.[109] Such economists regarded a value added tax as an improvement on then existing business turnover taxes. The latter, by falling indifferently on each transaction in a chain of production and distribution to a consumer, had a "cascading" effect, a "tax on a tax" and thereby favoured the vertically integrated business which sold directly to the consumer over specialist production and distribution businesses. [110] Value added taxes have become ever increasingly attractive to governments in the era since the Second World War. One revenue law commentator has offered the following memorable assessment of this phenomenon, opining that a value added tax: "may be thought of as the Mata Hari of the tax world – many are tempted, many succumb, some tremble on the brink, while others leave only to return, eventually the attraction appears irresistible".[111]

At the most general level of abstraction, GST may be described as a tax at the rate of 10% on the supply (but not including an exempt supply) in Papua New Guinea of goods and services, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that

[108] Constitution, s 155(4).
[109] Alan Schenk and Oliver Oldman, Value Added Tax: A Comparative Approach, (Schenk and Oldman) Cambridge University Press, p. 4.
[110] Ibid.
[111] Alan Tait, Value Added Tax: International Practice and Problems 3 (IMF 1988), cited in Schenk and Oldman, p. 1

supply.[112] What constitutes a "supply" is very widely defined.[113] The amount payable to the Commissioner General for a given taxable period is the net amount after deducting from the amount of output tax of a registered person attributable to that taxable period the amounts of input tax in relation to the supply of goods or services by that person for that tax period.[114] GST is largely a self-assessing tax but the Commissioner General has power to make and issue assessments as he considers occasion requires.[115]

A very good general description of Australia's similar in substance GST system was offered by Hill J, an expert in revenue law, in *HP Mercantile Pty Limited v Commissioner of Taxation*, with which description Stone and Allsop JJ agreed.[116]

> 10 The Australian GST is an indirect tax. Indirect taxes may be single stage taxes, for example, a tax on retail sales found in many countries in the world, or a bed tax as imposed in New South Wales in respect of hotel accommodation. They may also, if taxing the consumption of goods, operate at multiple stages in the course of goods being manufactured or imported until such time as they go into consumption, such as the wholesale sales tax in operation in Australia until the commencement of the GST.
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> 11 Where there is a multi-stage tax which operates with a number of taxing points, a problem, generally known as "cascading" will arise. If nothing is done to avoid cascading, the tax levied at each taxing point will be imposed on a value which already will have included tax payable at the previous taxing point or points.

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[112] GST Act, s 8.
[113] GST Act, s 11.
[114] GST Act, s 6 and s 31.
[115] See GST Act Part 10.
[116] [2005] FCAFC 126, (2005) 60 ATR 106; (2005) 219 ALR 59.

Cascading was, at least partly, avoided by the Australian wholesale sales tax by a system of quotation of certificates, so that in its operation, the tax was payable on the last wholesale sale or, if there was no such wholesale sale, on an assumed value calculated as a proxy for the last wholesale sale: *Brayson Motors Pty Ltd (In liq) v Federal Commissioner of Taxation* (1998) 156 CLR 651 at 657.

12 However, even though cascading was generally avoided in the Australian wholesale sales tax system, there was a problem that some inputs at least, attracted tax which was included in the amount upon which the tax was calculated and further, that there was no mechanism which enabled all inputs to be refunded in the event that the goods were exported. Arguably, therefore, Australian exporters might have been disadvantaged in competing with exporters from other countries which had taxing systems, such as value added taxation, which permitted the total tax payable to be identified and refunded to an exporter.

13 The genius of a system of value added taxation, of which the GST is an example, is that while tax is generally payable at each stage of commercial dealings ("supplies") with goods, services or other "things", there is allowed to an entity which acquires those goods, services or other things as a result of a taxable supply made to it, a credit for the tax borne by that entity by reference to the output tax payable as a result of the taxable supply. That credit, known as an input tax credit, will be available, generally speaking, so long as the acquirer and the supply to it (assuming it was a "taxable supply") satisfied certain conditions, the most important

of which, for present purposes, is that the acquirer make the acquisition in the course of carrying on an enterprise and thus, not as a consumer. The system of input tax credits thus ensures that while GST is a multi-stage tax, there will ordinarily be no cascading of tax. It ensures also that the tax will be payable, by each supplier in a chain, only upon the value added by that supplier.

14 In *ACP Publishing Pty Ltd v Commissioner of Taxation* [2005] FCAFC 57 at [2], I described the characteristics of the Australian GST as follows:

> *"The GST is, in essence, the tax known in most countries as value added tax, a name which, perhaps, best describes the essence of the tax. The characteristics of a value added tax were aptly described by the European Court of Justice in* Dansk Denkavit ApS v Skatteministeriet *[1994] 2 CMLR 377 at 394-5 as being that it 'applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; it is charged at each stage of the production and distribution process; and finally it is imposed on the added value of goods and services, since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction.'"*

15 I continued at [3]:

> *"These characteristics are displayed in the Australian legislation by the tax 'output tax' being levied, in effect, upon substantially all supplies (referred to in the GST Act as*

'taxable supplies') being generally, although not exclusively, supplies of goods or services made by a registered person, or person required to be registered, for consideration... and the deduction referred to in Dansk *(popularly known as an 'input tax credit') being given to a registered person, or person required to be registered, who makes a creditable acquisition, as that expression is defined."*

16 In terms of GST theory, it is generally accepted that there are certain kinds of activities where the basic system of output tax on supplies and input tax credits on acquisitions will not lead to taxation on the value added by each supplier in the chain. The most important example is said to be financial transactions of financial institutions such as, but not confined to, banks, because they constantly borrow and lend and turn over money in a way that amounts, such as interest charged, will not represent the real value added by the financial institutions. Indeed, as the explanatory memorandum distributed with the bill which, as amended, later became the GST Act ("the EM") says in Chapter 1 [5.140]: "…there is no readily agreed identifiable value for supplies consumed by customers of financial services". In such a case, it is the margin or imputed margin that is the real economic subject of the supply. There are other examples where this may be the case, one of which is the leasing of, or other dealings with, residential property (not being new residential property).

17 By way of what may be seen as a compromise for the difficulties of applying the normal system of value added taxation to financial supplies and other difficult cases, value added taxation design has

> created a form of supply which is referred to in Australia as an input taxed supply but which, in international value added tax parlance, is referred to as an "exempt supply". An input taxed or exempt supply (and financial supplies made by financial institutions will be the main example) will not, generally speaking, attract output tax, but the entity which makes financial supplies will, likewise, not obtain an input tax credit for the tax payable on acquisitions it makes in the course of its enterprise of making input taxed supplies.

In my respectful view, the PNG GST system is sufficiently similar to the Australian GST system for this general description to be applicable to the PNG GST system.

As a subject, GST warrants not just a separate seminar but series of seminars. Suffice it to say, to the general statements which I have just made the GST Act provides for many exemptions and qualifications.

The observations which I have made above in relation to challenges in the Tribunal under the TAA to an adverse income tax objection decision are just as applicable in relation to an adverse GST objection decision. The GST Act provides for a National Court case stated procedure, as an alternative to review of an objection decision by the Tribunal. How this regime sits with the procedures for challenging an objection decision for which the TAA provides is a subject yet to be explored in judicial authority.

Conclusion

Taxation according to law is but one aspect of a society governed by the rule of law. But it is an important aspect. That is because taxation according to law is the antithesis of arbitrary exaction by the executive government. Both for domestic

peace and order and for investors foreign and local, it is important that there is confidence that taxes will only be imposed and collected according to law. Achieving that requires an Internal Revenue Office, accounting and legal professions and a judiciary with sufficient expertise to install that confidence. That is why it behoves us to develop and maintain a pool of expertise in Papua New Guinea in this branch of law and practice.

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