

IATJ 2017



OBTAINING EVIDENCE AND INFORMATION COMMON LAW JURISDICTIONS

CANADA

KENYA

HONG KONG

UNITED KINGDOM

UNITED STATES

BACKGROUND



CANADA

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BACKGROUND

CANADA

- ❖ Canada has a self-assessment income tax system administered by an agency of the **Ministry of National Revenue (MNR)** called the **Canada Revenue Agency (CRA)**
- ❖ Each taxpayer is responsible for reporting all income in an annual income tax return (similar requirement for Goods & Services Tax but reporting periods vary)
- ❖ Persons who pay taxable amounts to taxpayers (eg, employers) are required to report the payments to the CRA and often must also withhold and remit tax

BACKGROUND

CANADA

- ❖ The CRA has extensive audit and information gathering powers to confirm the information provided by the taxpayer in the tax return
- ❖ The CRA reviews each tax return and issues an assessment of the tax and penalties payable by the taxpayer for the taxation year
- ❖ A taxpayer may object to an assessment issued by the CRA by filing a **Notice of Objection** with the CRA
 - Generally, the deadline is 90 days from the date of the notice of assessment (subject to extension by the MNR or the TCC)
 - The filing of a Notice of Objection to an assessment is a condition precedent to appealing the assessment to the **Tax Court of Canada (TCC)**

BACKGROUND

CANADA

- ❖ A taxpayer that is dissatisfied with the CRA's decision on the Objection has 90 days from the date of the decision to appeal the assessment to the TCC (subject to extension by the TCC)
- ❖ The appeal is initiated by filing a **Notice of Appeal (N of A)**
- ❖ The MNR is required to file a **Reply** to the taxpayer's N of A within 60 days
- ❖ The taxpayer has a further 30 days to file an **Answer** to the Reply but that is rare (collectively called the Pleadings)

BACKGROUND

CANADA

- ❖ The TCC is a superior court of record comprised of 22 full-time judges
- ❖ A single judge of the TCC hears each appeal and renders a judgment
- ❖ The judge may vacate, confirm or send the assessment back to the MNR for reassessment in accordance with the his/her judgment
- ❖ A further appeal lies to the **Federal Court of Appeal** and, with leave, to the **Supreme Court of Canada**
 - New evidence is not allowed except in exceptional circumstances
 - The findings of fact of the TCC are reviewed to determine if there is “palpable and overriding error”
 - The findings of law of the TCC are reviewed for correctness

BACKGROUND

CANADA

- ❖ Canada's tax system is premised on the assumption that the taxpayer knows all of the facts relevant to determining the tax owed by the taxpayer
- ❖ The Supreme Court of Canada has held that the CRA is entitled to assume the facts that support the assessment of tax and the burden to disprove the assumed facts is on the taxpayer
 - The MNR must advise the taxpayer of the assumed facts at a minimum by stating the assumed facts in the Reply
- ❖ The MNR has the burden of proving the facts in support of a penalty or in support of an assessment outside the statutory limitation period

BACKGROUND

HONG KONG

The taxation system is independent from the People's Republic of China

- ❖ Article 106 of the Basic Law of Hong Kong provides that Hong Kong enjoys independent public finances, and shall use its revenue exclusively and not to be handed over to the Central Government in China
- ❖ Article 108 of the Basic Law of Hong Kong expressly provides that the taxation system is independent of, and different from, the taxation system in China
- ❖ Hong Kong maintains a simple, transparent and straightforward tax system. The major legislation governing taxation is mainly the Inland Revenue Ordinance ("IRO")

BACKGROUND

HONG KONG

Requirement to keep Records

- ❖ Every person carrying on a trade, profession or business in Hong Kong (and hence is liable for profits tax) shall keep sufficient records in the English or Chinese language of his income and expenditure to enable the assessable profits of such trade, profession or business to be readily ascertained and shall retain such records for a period of not less than 7 years after the completion of the transactions, acts or operations to which they relate
- ❖ Employers must keep payroll records for its employees for a period of not less than 7 years

BACKGROUND

HONG KONG

- ❖ The **Inland Revenue Department (IRD)** is empowered to review, assess and collect taxes
- ❖ Taxpayers have the duty to file accurate returns with the IRD
- ❖ The IRD adopts a computerised system of **Assess First and Audit Later (AFAL)**
 - Assessments will be issued based on the information reported in tax returns first
 - Assessments will then be selected for audit using customised computer-assisted case selection programme and risk assessment tools

BACKGROUND

HONG KONG

- ❖ Post assessment audits are to identify unassessed or under-assessed cases
- ❖ The IRD has an extensive power to audit and collect information from taxpayers
- ❖ If a taxpayer is dissatisfied with the assessment issued by the IRD, he/she may file written notice of objection to the **Commissioner of the Inland Revenue (CIR)** within 1 month stating the grounds of objection
- ❖ The CIR shall consider the objection and make a Determination

BACKGROUND

HONG KONG

- ❖ A Taxpayer who is dissatisfied with the CIR's Determination may appeal to the **Board of Review** within 1 month after the transmission of the Determination
- ❖ The Board of Review is an independent statutory body constituted since 1947 to hear and determine tax appeals
- ❖ The Board of Review's decision is subject to an appeal to the **High Court** on a question of law

BACKGROUND

UNITED KINGDOM

- ❖ **Self-assessment** tax regime
- ❖ Paper and online filing of tax returns (online filing = c.8.5m = c.85%)
- ❖ Administered by **Her Majesty's Revenue & Customs (HMRC)**
 - Combined tax and customs authority – administers all taxes and duties except vehicle road tax and council tax = residence tax
 - The taxpayer is notified of Tax Decisions by HMRC

BACKGROUND

UNITED KINGDOM

- ❖ A taxpayer may request a 'Departmental/statutory review'
- ❖ **Alternative Dispute Resolution (ADR)** regime also available
 - Not often used and HMRC cannot be compelled to use it
- ❖ 'Appeal' to **First-tier Tribunal (FTT)** lies against original Decision whether or not the Decision was reviewed prior to the appeal
- ❖ Appeal brought by **Notice of Appeal** (sometimes, simply by letter)
 - Same Notice of Appeal for all appeals, irrespective of type of tax, duty, or amount

BACKGROUND

UNITED KINGDOM

- ❖ The FTT has UK wide jurisdiction (tax and duties in general are not devolved to Wales, Scotland, N Ireland - with some very modest exceptions)
- ❖ 50 judges: 10 salaried (full-time), 40 fee-paid (part-time)
- ❖ Jurisdiction adversarial, not inquisitorial

BACKGROUND

UNITED KINGDOM

Primary function of FTT

- ❖ To find relevant facts (FTT is fact-finder: NOT HMRC)
 - Disputed facts found on balance of probabilities
- ❖ To identify relevant law
 - Error of law is the only formal ground of appeal to **Upper Tribunal** (Tax and Chancery Chamber)
- ❖ To apply the law to those facts

BACKGROUND

UNITED STATES OF AMERICA

- ❖ The United States has a self-assessment income tax system administered by the **Internal Revenue Service (IRS)**, an agency of the **Treasury Department**
 - Each taxpayer required to file a return must file an annual Federal income tax return by the filing deadline
 - Failure to do so can expose a taxpayer to civil and/or criminal penalties
 - The annual return filing system is supported by information return filing obligations that are imposed on employers and payors of certain remuneration to report taxable income paid to taxpayers and in some cases, to withhold and remit taxes withheld from those amounts

BACKGROUND

UNITED STATES

- ❖ The IRS will assess the income tax liability shown on a filed return.
- ❖ The IRS also has a certain period of time (period of limitations on assessment) to examine filed returns and determine whether or not to propose an income tax deficiency with respect to the filed return.
- ❖ If a taxpayer does not file a required return when due, the IRS has several options it can choose to deal with the non-compliance including, but not limited to, preparing a substitute-for-return on the basis of information in its possession and then issuing a **notice of deficiency**, initiating a criminal investigation and/or prosecution, and/or imposing monetary penalties

BACKGROUND

UNITED STATES

- ❖ If a taxpayer files a false tax return or takes other actions to evade the imposition or payment of tax, the IRS may initiate a criminal investigation and/or prosecution within the applicable period of limitations
- ❖ The IRS can also pursue fraudulent tax non-compliance in a civil proceeding after examination and may propose substantial civil penalties against a taxpayer who fraudulently fails to file a return or files a fraudulent return

BACKGROUND

UNITED STATES

- ❖ The IRS has extensive audit and information gathering powers that it uses to examine filed returns and to uncover tax non-compliance
- ❖ If the IRS determines that a taxpayer has an income tax deficiency, the IRS must issue the taxpayer a notice of deficiency.
- ❖ The **notice of deficiency (NOD)** informs the taxpayer of the nature of the adjustments that the IRS has determined should be made, the amount of the adjustments, and the amount of the deficiency the taxpayer allegedly owes, along with any civil penalties
- ❖ A taxpayer to whom a NOD is mailed may begin a court proceeding in the UNITED STATES TAX COURT to contest the IRS' determinations in the NOD **without having to pay the income tax deficiency first!**

BACKGROUND

UNITED STATES

- ❖ If the taxpayer files a petition in the Tax Court to contest the NOD, the IRS may not assess the deficiency and any penalties until the litigation is resolved and the decision of the Court is final
- ❖ Alternatively, a taxpayer may pay the deficiency first, file a claim for refund, and if the claim is denied or a certain amount of time passes, the taxpayer may file a proceeding in either a Federal district court or in the United States Court of Federal Claims to contest the IRS' position
- ❖ **The vast majority of all Federal tax litigation in the United States, including income, estate, gift and other tax litigation, is filed in the United States Tax Court**

THE APPEAL PROCEDURE(S)

CANADA

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THE APPEAL PROCEDURE(S)

CANADA

- ❖ The **Informal Procedure** applies to the appeal of an assessment of tax and penalties if the taxpayer elects the procedure in the N of A
 - The maximum relief that can be granted by the TCC is \$25,000 (\$50,000 of loss)
 - If the assessment under appeal is for tax and penalties greater than \$25,000 the taxpayer must agree to limit the amount in issue in the appeal to \$25,000 (\$50,000 for a loss)
 - The Judgment of the TCC in an informal appeal has no precedential value
- ❖ The **General Procedure** applies to the appeal of an assessment of tax in any case where the **Informal Procedure** does not apply

THE APPEAL PROCEDURE(S)

CANADA

- ❖ The **Informal Procedure** has no formal rules for the gathering or exchange of information
 - The practice is to exchange documents on an informal basis prior to the hearing of the appeal
 - In the notice of the hearing, the taxpayer is advised to bring all witnesses and relevant materials to the hearing of the appeal
- ❖ At the hearing, the judge will explain to an unrepresented taxpayer (or to the taxpayer's non-lawyer agent) the procedure and in particular how to introduce evidence at the hearing
- ❖ The judgment in an appeal governed by the informal procedure has no precedential value

THE APPEAL PROCEDURE(S) CANADA

- ❖ The **General Procedure** has extensive rules including those for the gathering and exchange of information:
 - Discovery of Documents
 - Examination for Discovery
 - Requests for Admissions
 - Agreed Statements of Fact
 - Opinion (Expert) Evidence
 - Evidence in Advance of the Hearing

THE APPEAL PROCEDURE(S)

HONG KONG

- ❖ All appeals to the **Board of Review (Board)** are subject to the same rules and procedures
 - A Taxpayer who is dissatisfied with the CIR's Determination may appeal to the Board within 1 month after the transmission of the Determination to the taxpayer (section 66(1))
 - A panel with at least 3 members of the Board of Review (one of whom shall always be either the chairman or a deputy chairman ("Presiding Person")) will be formed to hear and determine the appeal (section 65(4))
 - Decision is made on the basis of a majority of votes, and if there is an equality of votes, the Presiding Person has a casting vote in addition to his original vote

THE APPEAL PROCEDURE(S)

HONG KONG

- ❖ A late appeal will not be entertained unless the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal within the time limit (section 66(1A))
- ❖ The Board hears all appeals *in camera*
- ❖ The Taxpayer has the onus of proving that the assessment appealed against is excessive or incorrect (section 68(4))

THE APPEAL PROCEDURE(S)

UNITED KINGDOM

- ❖ Appeals to the FTT are allocated by the Registrar or staff to one of four 'tracks' / categories:
 - **'Default paper'** (e.g. appeals against late filing penalties)
 - One judge / 'Presiding Member'
 - Dealt with without a hearing
 - **'Basic'** (allocated to this track if it can be)
 - One judge plus one member
 - Dealt with at a hearing
 - Formality of hearing varies

THE APPEAL PROCEDURE(S)

UNITED KINGDOM

- ❖ Appeals to the FTT are allocated by the Registrar or staff to one of four 'tracks' / categories (cont'd):
 - **'Standard'**
 - **'Complex'**
 - If will require lengthy or complex evidence or a lengthy hearing (not defined)
 - If involves a complex or important principle or issue
 - If involves 'a large financial sum' (not defined)

THE APPEAL PROCEDURE(S)

UNITED KINGDOM

- ❖ Wide use of standardised case management directions according to track
 - parties may apply to set aside or vary - but almost never do
- ❖ All appeals governed by FTT's own **2009 Procedure Rules** (quite short - 20 page) - NOT by Civil Procedure Rules (2000 pages)
- ❖ Rules subject to 'overriding objective' - deal with cases in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and parties' resources, and avoiding unnecessary formality

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

- ❖ The NOD is the “ticket to the Tax Court” and is the foundation of the Tax Court’s jurisdiction
- ❖ For the Tax Court to have jurisdiction, there must be a valid notice of deficiency and a timely filed petition (generally, a petition must be filed within 90 days of the date of the NOD)
- ❖ Once the taxpayer has filed a timely petition, the government, acting through the Commissioner of Internal Revenue and represented by the Office of IRS Chief Counsel, will file an answer to the petition
- ❖ In some cases, the taxpayer will file a reply, thereby completing the “pleading” stage of the case

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

- ❖ The pretrial preparation of a case in the Tax Court is conducted pursuant to Rules of Practice and Procedure promulgated by the Court
- ❖ Rule 70(a) authorizes several methods of “discovery” including discovery by written interrogatories, production of documents, electronically stored information (ESI), or things, depositions with the consent of the parties, and depositions without the consent of the parties
- ❖ Rule 70(a), however, also states the expectation of the Court – “The Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.”

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

- ❖ As a general rule, a case in the Tax Court is prepared by some combination of the following:
 - Informal exchange of information and documents
 - If glitches develop in the informal process, the parties will engage in one or more types of “formal” discovery
 - Preparation of stipulations of fact, which operate as the foundation for the evidentiary record in a case [See Rule 91(a) – “The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact.”
 - Requests for Admission – see Rule 90

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

Burden of Proof Rules

- ❖ As in Canada, the burden of proof rules in the Tax Court are premised on the assumption that the taxpayer is in possession of most of the relevant facts regarding the taxpayer's liability for tax
- ❖ The burden of proof rules are set forth in IRC section 7491 and Rule 142
- ❖ Rule 142(a)(1) provides that the burden of proof shall be on the petitioner (taxpayer), except as otherwise provided by statute or determined by the Court, and except that, in respect to any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, the burden of proof is on the respondent (government)
- ❖ The burden of proof as to a disputed factual issue may shift to the government under section 7491

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

Burden of Proof as to Fraud

- ❖ Rule 142(b) and Code section 7454(a) impose the burden of proving fraud with the intent to evade tax on the government
- ❖ The government must prove fraud by clear and convincing evidence

LITIGATION IN THE UNITED STATES TAX COURT

AN OVERVIEW

Rules of Evidence

- ❖ Trials before the Tax Court are conducted in accordance with the Federal Rules of Evidence
- ❖ See Code section 7453 and Rule 143(a)
- ❖ Relaxed rules of evidence and simplified procedures apply to cases in which the taxpayer, pursuant to Rules 170-174 and Code sections 7436 and 7463, elect to have his or her case heard as a “small tax case” (defined as a case in which the amount in dispute is **\$50,000 or less** per taxable period and the Court has concurred in the election)

DISCLOSURE AND EXCHANGE OF INFORMATION

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DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Discovery of Documents

- ❖ The TCC general procedure rules provide for either **partial** discovery of documents or **full** discovery of documents
 - **Partial discovery** requires each party to disclose the documents on which the party intends to rely at the hearing of the appeal
 - **Full discovery** requires each party to disclose all documents currently or formerly in the party's possession, control or power and relevant to the matters in issue in the appeal

DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Discovery of Documents (cont'd)

- ❖ Under the **full discovery** rules, the TCC may direct a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party
- ❖ If a document is not included in a party's list of documents then unless the TCC directs otherwise the document cannot be used by the party as evidence at the hearing of the appeal without the consent of the other party

DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Examination for Discovery

- ❖ The TCC rules provide for either an **oral examination for discovery** or (at the option of the examining party) an **examination by written questions**
- ❖ An **oral examination for discovery** is not permitted unless the amount in issue exceeds \$50,000, the parties consent or a party applies to the TCC and the TCC is of the opinion that the case cannot be properly conducted without oral examination for discovery
- ❖ A party may examine for discovery an opposing party only once except with leave of the TCC

DISCLOSURE AND EXCHANGE OF INFORMATION

CANADA

Examination for Discovery (cont'd)

- ❖ A party that is not an individual shall select a knowledgeable current or former officer, director, member or employee to be examined by the opposing party
- ❖ An examining party that is not satisfied with the nominee of the opposing party may apply to the TCC for a different nominee
- ❖ The party or nominee being examined shall answer to the best of the person's knowledge, information and belief any proper question relevant to any matter in issue in the appeal
- ❖ Prior to the examination, the person to be examined must make all reasonable inquiries about the matters in issue

DISCLOSURE AND EXCHANGE OF INFORMATION

CANADA

Examination for Discovery (cont'd)

- ❖ The person being examined may be required to become better informed and the examination may be adjourned for that purpose
- ❖ The examining party may obtain the names and addresses of persons who might reasonably be expected to have knowledge of the transactions or occurrences in issue in the appeal
- ❖ If the person being examined refuses to answer a proper question or refuses to answer a question on the ground of privilege and the information is not provided to the examining party in writing at least 10 days prior to the hearing then the information may not be introduced at the hearing except with leave of the TCC

DISCLOSURE AND EXCHANGE OF INFORMATION

CANADA

Examination for Discovery (cont'd)

- ❖ If a party discovers that an answer given on the examination for discovery was incorrect or incomplete when given, or is no longer correct or complete, the party shall forthwith provide the information to every other party
- ❖ A party may read-in to evidence at the hearing excerpts from the examination for discovery of the opposing party subject to the rules of evidence
 - Read-ins that address relevant/material facts are generally allowed as admissions by the opposing party

DISCLOSURE AND EXCHANGE OF INFORMATION

CANADA

Examination for Discovery (cont'd)

- ❖ The TCC may grant a party leave to examine a person that is not a party to the appeal if there is reason to believe that this person has information relevant to any matter in issue in the appeal and certain conditions are satisfied
 - Specific conditions must be satisfied and leave is not granted lightly
 - If leave is granted, the evidence of the third party given at the examination for discovery may not be read-in to evidence at the hearing of the appeal

DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Oral Examination for Discovery

- ❖ Unless the parties otherwise agree or the TCC otherwise directs, the person being orally examined must bring to the examination all of the documents disclosed under the discovery of documents rules
- ❖ If the person being examined admits that he or she has possession or control of or power over a document that relates to a matter in issue that is not privileged, the person shall produce the document forthwith
- ❖ A transcript of the examination shall be certified as correct by the person recording the examination

DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Oral Examination for Discovery (cont'd)

- ❖ A person being orally examined for discovery may be re-examined by his or her own counsel
- ❖ If the person being orally examined for discovery does not appear at the examination, refuses to be sworn or affirmed or refuses to answer a proper question or produce a document or thing that the person is required to produce then the TCC may
 - direct that person to reattend the examination at the person's own expense to answer the question and any follow-up question
 - allow or dismiss the appeal
 - strike out that person's evidence in its entirety
 - direct any party or other person to pay costs

DISCLOSURE AND EXCHANGE OF INFORMATION CANADA

Examination for Discovery by Written Questions

- ❖ If the parties elect to conduct the examination for discovery by written questions
 - Each party must submit written questions to the other party and the other party has 30 days to answer the questions
 - A party may ask follow-up questions within 15 days of receiving answers and the other party has 30 days to answer
 - If answers are evasive, unresponsive or otherwise unsatisfactory the TCC may order an oral examination for discovery and may allow or dismiss the appeal or strike out the examined person's evidence

DISCLOSURE AND EXCHANGE OF INFORMATION

HONG KONG

No specific or detailed rules on disclosure of information or documents for the appeal hearing

- ❖ The Presiding Person has the power to give directions on the provision of documents and information for the hearing, and to refuse to admit in evidence any document or information that is not provided in compliance with the Board's directions

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

- ❖ Many of the documents and much of the information relevant to the appeal will be obtained by the IRD during the investigation stage or prior to the issuance of the Determination by the CIR
 - The IRD has an extensive power on investigation and gathering information
 - IRD may conduct desk audit or field audit to ascertain the correctness of the returns. IRD may require the taxpayer to answer questions, and may also visit the taxpayers' business premises and examine the books and records
 - IRD may conduct tax investigation, which is an in-depth examination where tax evasion is suspected.
 - The information obtained during the audit and investigation may be adduced as evidence at the hearing before the Board

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

- ❖ The IRD may conduct desk audit or field audit to ascertain the correctness of the returns. IRD may require the taxpayer to answer questions, and may also visit the taxpayers' business premises and examine the books and records
- ❖ The IRD may conduct tax investigation, which is an in-depth examination where tax evasion is suspected
- ❖ The information obtained during the audit and investigation may be adduced as evidence at the hearing before the Board

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Notice to require taxpayer to furnish statement of assets and liabilities (section 51A)

- ❖ The CIR may make application to the Board for the Board's consent to give a notice in writing to a person requiring him to furnish a statement of all of his and spouse's assets and liability if
 - the CIR or a deputy commissioner is personally of the opinion that a person has made an incorrect return or supplied false information
 - which have the effect of understating his income or profits chargeable to tax
 - he had done so without reasonable excuse and not through innocent oversight or omission
- ❖ The statement may be required to be furnished within a period of not less than 30 days from the date of service of the notice

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Notice to require taxpayer to furnish statement of assets and liabilities (section 51A) cont'd

- ❖ An application for the consent of the Board shall be made in writing by the CIR to the clerk of the Board and shall be accompanied by a statement of the material on the basis of which it is proposed to exercise such power
- ❖ Upon receipt of an application, the Chairman shall appoint 3 members from the panel, one of whom shall be the Chairman or a deputy chairman to consider the application
- ❖ When the Board is considering an application, the CIR or his authorised representative may attend but the person in respect of whom the application is made may not attend

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Notice to require taxpayer to furnish statement of assets and liabilities (section 51A) cont'd

- ❖ The identity of the person in respect of whom the application is made shall not be revealed to the Board in the application nor the consideration of the application
- ❖ If the person on whom a notice had been given so requests, the CIR shall furnish him with a certificate from the Chairman or deputy chairman certifying the Board's consent to the issue of the notice
- ❖ For the purpose of obtaining the certificate, the CIR shall reveal to the Chairman or deputy chairman the identity of that person
- ❖ The decision of the Board to grant or refuse consent shall be final

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Search Warrant (section 51B)

- ❖ The CIR or an authorised senior officer of the IRD may apply to the magistrate for the issuance of a search warrant if:
 - CIR or an authorised senior officer of the IRD satisfies a magistrate by statement on oath that
 - there are reasonable grounds for suspecting that a person has made an incorrect return or supplied false information having the effect of understating his income or profits chargeable to tax and has done without reasonable excuse and not through an innocent oversight; or
 - a person has failed to comply with an order made by the court directing him to comply with the requirements of a notice given to him to furnish a return

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Search Warrant (section 51B)

- ❖ The scope of the warrant may cover the powers:
 - without previous notice at any reasonable time during the day to enter and have access to any place where it is suspected to have books, records, accounts or documents ("Records") of that person, or of any other person, which may afford evidence material in assessing the tax liability of a taxpayer; and to search for and examine any books, records, accounts or documents;
 - in carrying out any such search, to open or cause to be removed and opened any article in which he suspects any Records to be contained;
 - to take possession of any Records of that person or his/her spouse and to make copies
 - to retain such Records for as long as they may be reasonable required for any assessment to be made or for any proceedings under the IRO to be completed

DISCLOSURE AND EXCHANGE OF INFORMATION HONG KONG

Search Warrant (section 51B)

- ❖ If CIR or authorised officer shall retain any Records for a period of more than 14 days, the person aggrieved may apply in writing to the Board for an order directing the return thereof
- ❖ The Board will hear the applicant and the CIR or their respective representatives, and may then order the return either unconditionally or subject to any condition that the Board may consider proper to impose
- ❖ Any person who obstructs or hinders the CIR or an authorised officer acting in the discharge of his duty in exercising the powers given in the warrant commits a criminal offence and is liable on conviction to fine and imprisonment for 6 months

DISCLOSURE AND EXCHANGE OF INFORMATION

HONG KONG

Before the hearing of the appeal:

- ❖ The Appellant would be required to lodge and file the bundle of documents on which the appellant would rely
- ❖ If the appellant intends to call any witness to give evidence at the hearing, usually there will be a direction requiring the filing of witness statement in advance
- ❖ The IRD would be required to lodge and file the bundle of documents on which the IRD would rely
- ❖ Relevant legal authorities would be submitted in advance

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

The level of disclosure of documents depends on the track/category to which the appeal is assigned

Basic

- ❖ Minimal exchange of documents before the hearing
- ❖ In practice, very informal, but generally works

Standard

- ❖ Appellant produces a list of documents upon which Appellant intends to rely
 - no obligation to disclose adverse documents, unlike 'standard' disclosure in civil court

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

Standard (cont'd)

- ❖ HMRC produces a list of documents which were considered by HMRC officer when reaching the Decision, as well as other documents upon which HMRC intends to rely
- ❖ Each party must provide a copy of the documents to the other party
 - In practice, gives rise to huge lists of documents, many of which are irrelevant
- ❖ Flexibility as to introducing evidence at the hearing (especially if it is relevant to the issue(s) which have to be decided)
- ❖ FTT can admit evidence whether or not it would be admissible in a civil trial

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

- ❖ In addition to the forgoing, **the FTT has very wide case management power** 'to permit or require a party or another person to provide documents, information or submissions to the FTT or a party'
- ❖ HMRC also has broad powers to obtain information from taxpayers
- ❖ HMRC can require taxpayer 'to provide information' or 'to produce a document' - using a statutory 'Information Notice' ('Schedule 36 Notice' / 'Taxpayer Notice')
 - 'Information' includes both explanations, and the creation of schedules or documents that do not already exist
 - Information or document must be 'reasonably required by HMRC for the purpose of checking the taxpayer's tax position'

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

- ❖ A **Taxpayer Notice** can be issued if HMRC officer 'has reason to suspect' correct amount of tax not assessed
- ❖ HMRC may seek prior judicial approval for the Taxpayer Notice from FTT, but need not do so
- ❖ Taxpayer can challenge the Taxpayer Notice to FTT
- ❖ Burden of showing reasonably required probably rests on HMRC

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

- ❖ No right of appeal to FTT against request to provide 'statutory records' - must be provided
- ❖ Information or documents which required to keep under or by virtue of the Taxes Acts
- ❖ Includes (minimally) all receipts and expenses, all sales and purchases
- ❖ Value Added Tax has particularly stringent information and document keeping requirements

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED KINGDOM

- ❖ HMRC can also issue **Third Party Notice** requiring information or documents from third party about taxpayer
 - If naming would seriously prejudice assessment or collection and if FTT agrees taxpayer need not be given a copy of the third party notice
- ❖ HMRC can also issue **Identity Unknown** notices
 - Do not name specific taxpayers
 - Used to obtain information from financial institutions re customers with overseas bank accounts

DISCLOSURE AND EXCHANGE OF INFORMATION UNITED STATES

- ❖ In the Tax Court, the parties are expected to cooperate with each other and to exchange relevant documents and information without resorting to “formal” discovery
- ❖ In addition, the parties are expected to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters (facts and documents) that are not privileged and are relevant to the subject matter in the pending case
- ❖ If the informal consultation process and/or the stipulation process breaks down or the parties simply will not or cannot agree, the parties may use formal discovery to complete their pretrial case preparation

DISCLOSURE AND EXCHANGE OF INFORMATION

UNITED STATES

- ❖ Formal discovery techniques include-
 - Requests for production of documents, ESI, etc.
 - Consensual discovery depositions of parties and non-party witnesses
 - Non-consensual discovery depositions, which must be approved by the Court
 - Depositions to preserve testimony
 - Inspection of premises
 - Interrogatories
 - Requests for Admissions

ADMISSIONS AND AGREED STATEMENTS OF FACT

CANADA

HONG KONG

KENYA

UNITED KINGDOM

UNITED STATES

ADMISSIONS AND AGREED STATEMENTS OF FACT CANADA

Requests for Admissions

- ❖ A party to an appeal may serve on the other party a request to admit the truth of a fact or the authenticity of a document
 - A party receiving a request to admit has 15 days to respond to the request. In the response, the party may admit the fact, deny the fact or refuse to admit the truth of the fact
 - If the party fails to respond within 15 days, that party is deemed to have admitted the truth of all the facts and the authenticity of all the documents in the request
 - A party may withdraw an admission only on the consent of the other party or with leave of the TCC

ADMISSIONS AND AGREED STATEMENTS OF FACT

CANADA

Agreed Statements of Fact

- ❖ In some cases, the parties will agree in advance to a statement of facts or to a partial statement of facts
 - In either case, the parties are bound to the agreed facts on the basis that they are admissions of fact
- ❖ The parties may also agree in advance that certain documents are authentic in which case they are admissible as evidence of what they state but not as evidence of the truth of what they state
- ❖ Alternatively, the parties may agree that certain documents are authentic and evidence of the truth of their contents, in which case the documents are admissible as evidence of the truth of what they state

ADMISSIONS AND AGREED STATEMENTS OF FACT

HONG KONG

- ❖ The Board encourages parties to prepare a statement of agreed facts prior to the hearing
- ❖ Most of the Board will give directions to the parties for filing a statement of agreed facts
- ❖ It is common to adopt the statement of facts in the Determination as the agreed facts
- ❖ The parties are bound to the agreed facts on the basis that they are admissions of fact

ADMISSIONS AND AGREED STATEMENTS OF FACT

UNITED KINGDOM

- ❖ No specific rule or power to require admissions
- ❖ HMRC can use procedure (formerly known as 'Hansard' procedure) where taxpayer suspected of serious fraud can enter into a contractual arrangement to disclose, make a full confession, and make good any tax and penalties, in return for immunity from criminal prosecution
- ❖ Parties can agree to statements of fact (and sometimes do)
- ❖ If the parties do agree to facts, they are bound by these facts

REQUESTS FOR ADMISSIONS

UNITED STATES

- ❖ A party in a Tax Court case may serve on another party a request for admissions – see Rule 90
- ❖ The request shall separately set forth each matter of which an admission is requested and shall advise the party to whom the request is directed of the consequences of failing to respond
- ❖ Copies of documents shall be served with the request unless they have already been produced or are made available for inspection and copying
- ❖ Each matter is deemed admitted unless, **within 30 days after service of the request or within such shorter or longer time as the Court may allow**, the party to whom the request is directed serves on the requesting party a written answer meeting certain requirements or a proper objection

REQUESTS FOR ADMISSIONS UNITED STATES



- ❖ The party making the request for admissions may file a motion to determine the sufficiency of the answers or objection – see Rule 90(e)
- ❖ The Court will take action on the motion as appropriate
- ❖ Any matter admitted under Rule 90 is conclusively established unless the Court on motion permits withdrawal or modification of the admission – see Rule 90(f)
- ❖ The Court may impose sanctions for failure to comply with Rule 90 – see Rule 90(g)

STIPULATIONS OF FACT

UNITED STATES

- ❖ Pursuant to Tax Court Rule 90(a), the parties “are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact.”
- ❖ Where the truth or authenticity of facts or evidence claimed by a party to be relevant is not disputed, a relevancy objection may be stated in the stipulation of facts but is not grounds for refusal to stipulate
- ❖ The obligation to stipulate is not affected by the assignment of the burden of proof
- ❖ Stipulations of fact must be as comprehensive as possible and should include admissions and other facts obtained by other means such as discovery

STIPULATIONS OF FACT

UNITED STATES

- ❖ Any objection to all or part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial
- ❖ A motion to compel stipulation may be made pursuant to Rule 91(f)

OPINION (EXPERT) EVIDENCE



CANADA

HONG KONG

KENYA

UNITED KINGDOM

UNITED STATES

OPINION (EXPERT) EVIDENCE

CANADA

- ❖ Unless directed otherwise by the TCC, a party to an appeal that wishes an expert to present expert evidence at the hearing of the appeal must serve the expert report of the expert on the other party at least 90 days before the commencement of the hearing
- ❖ If the other party wishes to present rebuttal expert evidence then the other party must serve the rebuttal expert report of the rebuttal expert on the other party at least 60 days before the commencement of the hearing
- ❖ If the first mentioned party wishes to present a rebuttal of the rebuttal expert evidence then that party must serve a surrebuttal report of its expert on the other party at least 30 days before the hearing

OPINION (EXPERT) EVIDENCE

HONG KONG

No specific rules or procedures for expert evidence

- ❖ It is rare for the CIR or the appellant to call expert evidence at the hearing before the Board
- ❖ If it is necessary to call expert evidence, the Presiding Person may give directions on the same prior to the hearing

OPINION (EXPERT) EVIDENCE

UNITED KINGDOM

- ❖ Generally down to the parties to choose what evidence to advance - an adversarial system
 - But subject to FTT's general case management power to control the evidence - needs to be relevant, and any cost and delay of obtaining it proportionate
- ❖ Expert evidence must be served in advance
- ❖ Parties can each instruct experts
- ❖ Experts can meet and produce joint report, identifying areas of agreement, areas of disagreement, and reasons for the latter

OPINION (EXPERT) EVIDENCE

UNITED KINGDOM

- ❖ FTT can direct expert evidence by a Single Joint Expert (SJE)
 - Expert evidence not confined to facts, but extends to opinion
- ❖ Recent issues: whether accounting practice in accordance with G(enerally) A(ccepted) A(ccounting) Practice)
 - HMRC called expert accountant
 - Appellant called 2 experts (from KPMG)

OPINION EVIDENCE (LAY & EXPERT)

UNITED STATES

- ❖ Under the Federal Rules of Evidence, which govern the admission of evidence in the Federal courts, including the Tax Court, a lay witness (i.e., one who is not testifying as an expert witness) may only testify regarding his opinion if-
 - (a) the opinion is rationally based on the witness's perception;
 - (b) the opinion is helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) the opinion is not based on scientific, technical, or other specialized knowledge within the scope of F.R.Evid. 702.
 - See F.R. Evid. 701

OPINION EVIDENCE (EXPERT WITNESS)

UNITED STATES

- ❖ Rule 702 of the Federal Rules of Evidence permits the use of testimony by expert witnesses if certain requirements are met. It provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if –
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.

DISCOVERY WITH RESPECT TO EXPERT WITNESSES

UNITED STATES

- ❖ Under the Tax Court Rules of Practice and Procedure, a party may require another party to disclose information about expert witnesses that party expects to call
- ❖ Under Rule 71(d), a party by means of written interrogatories may require another party to identify expert witnesses and to state the subject matter and the substance of facts and opinions to which the expert is expected to testify, and give a summary of the grounds for each such opinion, or in lieu thereof, the responding party may furnish a copy of the expert's report
- ❖ A party may also take either a consensual deposition of another party's expert witness (Rule 74(b)), or a nonconsensual deposition (Rule 74(c)(4)), an extraordinary method of discovery that is authorized only where the witness has discoverable information and that information cannot be practicably obtained through other means

EXPERT WITNESS TESTIMONY DURING TRIAL

UNITED STATES

- ❖ The United States Tax Court has a unique rule that governs the testimony of expert witnesses at trial
- ❖ Rule 143 (g) provides that, unless otherwise permitted by the Court upon timely request, any party who calls an expert witness shall cause that witness to prepare a written report for submission to the Court and the opposing party
- ❖ The report must contain the information required by Rule 143(g)(1)
- ❖ Ordinarily at trial, the expert witness's report is marked, identified by the witness, and received in evidence as the direct testimony of the expert witness unless the Court determines that the witness is not qualified as an expert – see Rule 143(g)(2)
- ❖ Additional direct testimony may be permitted and then the expert witness is subject to cross examination and redirect

OTHER MEANS OF OBTAINING EVIDENCE
PRIOR TO THE HEARING

CANADA
HONG KONG
KENYA
UNITED KINGDOM
UNITED STATES

OTHER MEANS OF OBTAINING EVIDENCE PRIOR TO THE HEARING

CANADA

- ❖ A party who intends to introduce the evidence of a person at a hearing may, with leave of the TCC or the consent of the parties, examine the person on oath or affirmation before the hearing for the purpose of having the person's testimony available to be tendered as evidence at the hearing
 - If the witness is an expert witness, then before seeking the consent of the TCC the party must serve the expert's report on all the other parties unless the TCC directs otherwise

OTHER MEANS OF OBTAINING EVIDENCE PRIOR TO THE HEARING

CANADA

- ❖ The procedure for obtaining evidence in advance of the hearing may be used for a witness located in Canada or outside Canada
 - If the witness is outside Canada and the party asking for consent requests it, the direction of the TCC must provide for the issuing of a commission and a letter of request to the relevant foreign authority
 - Typically, the commission is issued to a judge of the TCC who presides over the taking of the evidence in the foreign jurisdiction

OTHER MEANS OF OBTAINING EVIDENCE PRIOR TO THE HEARING

CANADA

- ❖ The Rules allow the TCC to direct that any stage in a proceeding may take place by **teleconference** or **videoconference**, or by a combination of both
 - A witness may testify at a hearing by videoconference
 - A party to an appeal may appear at the hearing of the appeal by videoconference
 - The TCC will allow videoconferencing only if the individual who wishes to appear by videoconference is otherwise unable to attend the hearing in person for reasons acceptable to the TCC

OTHER MEANS OF OBTAINING EVIDENCE PRIOR TO THE HEARING

HONG KONG

Giving of Evidence through Video Link

- ❖ The Board has the power and did give direction allowing a witness to give evidence through video link
- ❖ Directions will be given to ensure the video link equipment facilitates a clear view on both sides; the logistic and the confidentiality of the process

OTHER MEANS OF OBTAINING EVIDENCE PRIOR TO OR AT TRIAL UNITED STATES

Foreign Evidence

- ❖ The parties in a case before the Tax Court should plan well in advance to obtain foreign-based documentation and to arrange to obtain and/or preserve for trial testimony from a witness outside the United States
- ❖ IRC sec. 7456(b) and Rule 72(c) – provides rules for production of records by foreign petitioners
- ❖ Rule 81 provides for depositions to perpetuate evidence and contemplates that a foreign deposition might be taken (see Rule 81(e)(2)), using a person authorized to administer oaths and affirmations in the foreign jurisdiction, or a person commissioned by the Court, or pursuant to a letter rogatory or a letter of request issued in accordance with the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. (Part 3) 2555.

OTHER MEANS OF OBTAINING EVIDENCE

UNITED STATES

Determination of Foreign Law

- ❖ A party who intends to raise an issue concerning the law of a foreign country is required by Rule 146 to give notice in the pleadings or other reasonable written notice
- ❖ The Tax Court, in determining foreign law, may consider “any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible
- ❖ The Tax Court’s determination will be treated as a ruling on a question of law

OTHER MEANS OF OBTAINING EVIDENCE FOR TRIAL UNITED STATES

Trial Subpoena – Rule 147

- ❖ The parties may serve trial subpoena to compel a witness to appear at trial to testify and/or produce documents
- ❖ For nonparty witnesses, the party (excluding the government) must tender appropriate required fees and mileage costs (set by statute – see Rule 148, 28 U.S.C. sec. 1821, and IRC sec. 7457(b)(1))
- ❖ A trial subpoena may be issued to a party, whose testimony is considered important to another party's case

OTHER MEANS OF OBTAINING TESTIMONY FOR TRIAL UNITED STATES

Remote Testimony

- ❖ Judges are experimenting with techniques to accommodate the parties' and witnesses' needs for alternative arrangements
- ❖ Some judges have used video conferencing such as Skype or my formal video conferencing available in other courts
- ❖ The Tax Court will continue to experiment and explore ways to reduce litigation cost while insuring that the parties can build a proper evidentiary record

EVIDENCE AT THE HEARING OF THE APPEAL

CANADA

HONG KONG

KENYA

UNITED KINGDOM

UNITED STATES

EVIDENCE AT THE HEARING OF THE APPEAL

CANADA

- ❖ At the hearing of the appeal, the appellant presents evidence first. Once the appellant has entered all his, her or its evidence, the respondent presents evidence. When the respondent has finished, the appellant has a limited opportunity to present rebuttal evidence
- ❖ Evidence may be given at the hearing by the oral testimony of a witness, by affidavit, by the production of documents or of entries in books, or where a fact is a matter of common knowledge, either generally or in a particular place, by the production of a newspaper which contains a statement of that fact
 - The presentation of evidence through the oral testimony of witnesses is the preferred approach for appeals
 - The use of affidavits is the preferred approach for motions
 - The *Income Tax Act* provides for the use of affidavits to prove certain facts

EVIDENCE AT THE HEARING OF THE APPEAL

CANADA

- ❖ A party may call that party's own witnesses and may also subpoena a witness (including the opposing party or an officer, director or employee of the opposing party) to testify
- ❖ If a party is present in the courtroom during the hearing of the appeal the opposing party may call that party as a witness without issuing a subpoena
- ❖ The witness called by a party is examined first by the counsel for that party (called examination in chief)
- ❖ Once the examination in chief is finished, unless the witness is hostile the counsel for the other party may cross-examine the witness
- ❖ Finally, the witness may be re-examined on points raised in cross-examination

EVIDENCE AT THE HEARING OF THE APPEAL

CANADA

- ❖ Cross-examination is considered crucial because it allows each party to test the evidence of the other party's witness by asking questions that challenge the evidence of the witness and/or the credibility or reliability of the witness (credibility addresses the truthfulness of the witness while reliability addresses the frailties of the witness such as poor memory)
- ❖ Counsel conducting the cross-examination may ask leading questions but cannot unduly harass or embarrass the witness and the judge may disallow any question that is vexatious or irrelevant

EVIDENCE AT THE HEARING OF THE APPEAL

CANADA

- ❖ In hearings governed by the **General Procedure**, the rules of evidence apply
 - It is up to the judge to determine whether the evidence introduced by the parties is admissible under the rules of evidence
- ❖ In hearings governed by the Informal Procedure, the TCC is not bound by any legal or technical rules of evidence and the appeal is to be dealt with by the TCC as informally and expeditiously as the circumstances and considerations of fairness permit

EVIDENCE AT THE HEARING OF THE APPEAL

HONG KONG

- ❖ At the hearing, the appellant will open his case
- ❖ If any witness is called, evidence will be given under oath. There will be examination-in-chief, cross examination and re-examination
- ❖ After the appellant presented his case and evidence, the IRD may open its case
- ❖ IRD may call its own witness, if any
- ❖ There will be closing submission by either side with the appellant having the last words

EVIDENCE AT THE HEARING OF THE APPEAL

HONG KONG

- ❖ The Board's decision is final, subject to an appeal on question of law to the High Court or directly to the Court of Appeal
- ❖ Leave to appeal is required
- ❖ The threshold for granting leave to appeal is the existence of reasonable success
- ❖ No new evidence will be received by the High Court or Court of Appeal except in exceptional circumstance, e.g. where fresh evidence would probably have an important influence on the case and there are good reason for not adducing such evidence at the hearing before the Board (*Ladd v Marshall*)

EVIDENCE AT THE HEARING OF THE APPEAL

UNITED KINGDOM

- ❖ The FTT has the power to give directions on issues on which it requires evidence, the nature of the evidence
- ❖ The FTT has the power to require any person to attend as a witness, and can order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings
 - **Basic cases** - oral - parties turn up and tell
 - **Standard cases** - use of witness statements to stand as evidence in chief

EVIDENCE AT THE HEARING OF THE APPEAL

UNITED KINGDOM

- ❖ Appellant usually goes first and HMRC usually goes second
 - Appellant may provide oral evidence (usually, but not always, on oath or affirmation: depends on the nature of the case, e.g. whether involves dishonesty)
 - Appellant confirms witness statement (if there is one) as evidence in chief
 - Can be supplementary questions in chief
 - Appellant can be cross-examined by HMRC
 - Appellant may be re-examined (questions must arise from cross-exam)

EVIDENCE AT THE HEARING OF THE APPEAL

UNITED KINGDOM

- ❖ The introduction of evidence by HMRC follows the same procedure as for the Appellant
- ❖ The FTT may ask questions at any stage
- ❖ No 'rebuttal' evidence - each side, evidentially, gets one bite of the cherry
- ❖ No power to call other side's witnesses

EVIDENCE AT THE HEARING OF THE APPEAL

UNITED KINGDOM

- ❖ The FTT has flexibility regarding the admission of evidence at the hearing especially if the evidence is relevant to the issue(s) which have to be decided
 - FTT can admit evidence whether or not it would be admissible in a civil trial
 - FTT can exclude evidence not provided in accordance with directions (but power likely to be exercised sparingly if evidence is relevant)
 - Relevant evidence should be admitted unless there are compelling reasons not to admit